ISSN: 2212-5914

EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

European Gender Equality Law Review

No. 1 / 2012

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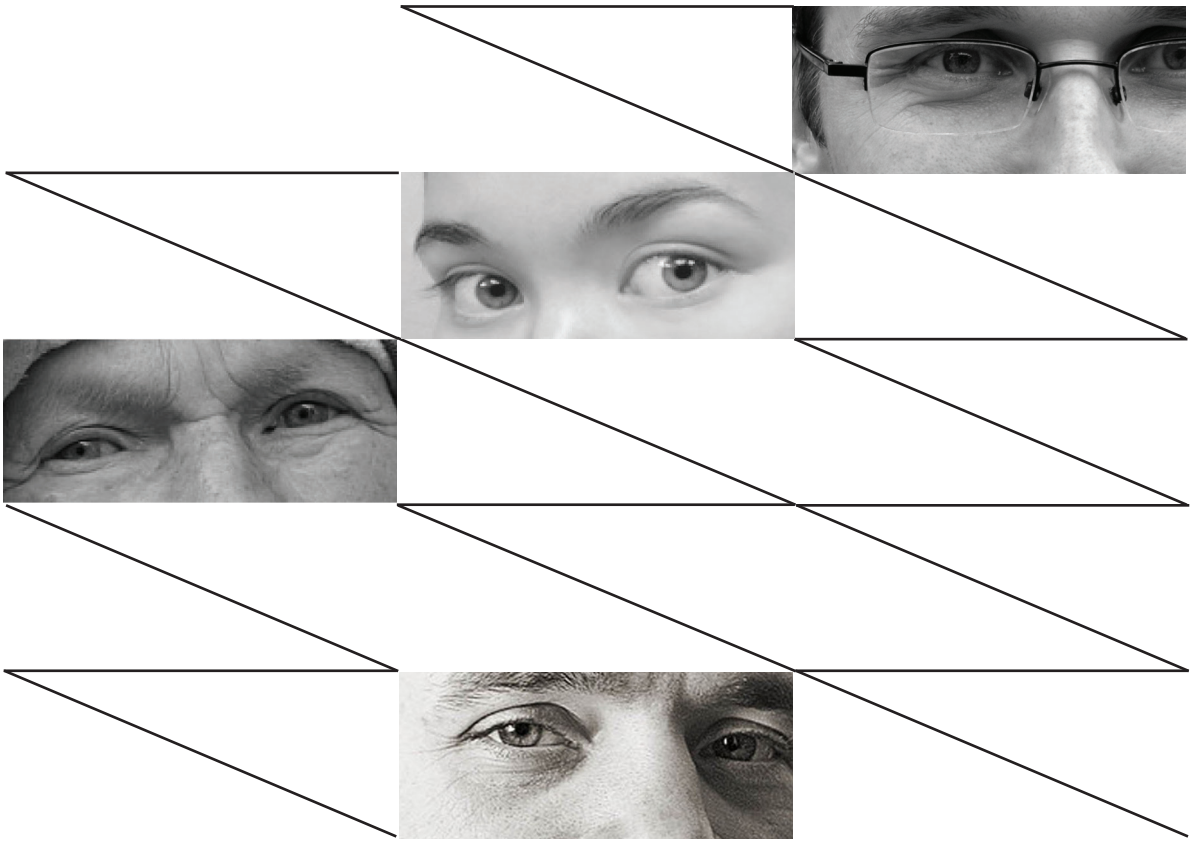

EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

European Gender Equality Law Review

2012 - 1

This report was financed by and prepared for the use of the European Commission. It does not necessarily represent the Commission's official position.

This publication was commissioned by the European Commission under the framework programme PROGRESS (Decision 1672/2006/EC of the European Parliament and the Council, OJ L 315/1 of 15.11.2006). For more information on PROGRESS see: http://ec.europa.eu/social/main.jsp?catId=327&langId=en

Manuscript completed in June 2012.
The information contained in this report reflects, as far as possible, the state of affairs on 2 April 2012.

Production

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Editorial

Gender-Related Assumptions or: How Old Habits Die Hard…

Linda Senden[*]

Despite the numerous sex equality rules that have been put into place in the European Union over the past decades and the substantiation of these by the European Court of Justice, the realization of gender equality in every day life still remains highly problematic these days. The continuous accounts in this Review and in the European Gender Network's reports on the state of affairs in the EU Member States and in other European states testify to this. Obviously, there are many different reasons that explain the gap between the law on the books and gender equality in practice. Here I want to highlight just one of these; the impact of gender-related assumptions.

As case law shows, stereotypical thinking about women's professional and family roles continues to be a very relevant cause of sex discrimination and gender inequality and, as such, a matter of huge concern that needs to be appropriately addressed. This issue comes clearly to the fore in the article by Ivana Radačić in this Review. Her discussion of sex equality cases that have been brought before the European Court of Human Rights shows that national governments as defendants may still rely on outdated perceptions of women's roles to justify their discriminatory behaviour. One category of cases she describes concerns the discriminatory denial of social benefits. A Dutch case (2002) concerned a challenge to a reduction in a woman's pension on account of her husband's insurance status, which the government sought to justify by arguing that, at the time in question, men were predominantly the breadwinners. A British case from the same year concerned the non-availability of a widow's allowance to a man, whereas a woman in similar circumstances would have been granted such an allowance. The government sought to justify this difference by arguing that women were more likely to be financially dependent on men. What may be most worrisome about such cases is that arguments like these are often positioned as facts without providing much evidence for them, while they may be nothing more than rather subjective perceptions.

Other cases that Radačić discusses reveal the reliance by defendant governments on a stereotypical division of roles in the past with a view to justifying differences in present-day life. In a British case (*Runkee and White v. the UK*, 2007), the government thus sought to justify the denial of a widow(er)'s pension to men by invoking financial hardship and the inequality that older widows had historically faced because of the married woman's traditional role of caring for the husband and family in the home rather than earning money in the workplace. In a more recent case (*Andrle v Czech Republic,* 2011), a challenge to a pension scheme was at stake that provided for the lowering of the pensionable age in relation to the number of children raised, but only for women and not for men. It was argued that this difference originally served as a protective measure compensating for the factual inequality in which women in their capacity as mothers found themselves in comparison with men.

A crucial question is of course to what extent the highest European Courts – not only the ECtHR but also the CJEU – allow defendants to get away with such arguments, which will also determine the way in which national courts deal with these. In relation to social security issues as described, it is very regrettable that one has to note, as Radačić does and Koldinska did in a previous article in this Review (No. 2/2011), that the approach of the ECtHR does not align very well with that of the CJEU and that in the *Andrle* case it was clearly not inclined to follow the approach that the CJEU set out in its earlier case law. In particular, the ECtHR

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appears rather more receptive to the adduced historical justification grounds, whereas the CJEU can be said to have already developed a more contemporary approach more than a decade ago. In *Griesmar* its line of reasoning was the actual, similar situation of those concerned, and so where men have assumed a child-rearing task, their retirement pension should be calculated in the same way as that of women in their role as mothers. The CJEU thus appears less permissive of differential treatment in relation to advantages connected to parenting and caring responsibilities that should be equally shared by women and men. Its approach seemingly offering better prospects for combating gender stereotyping than the ECtHR's approach, at least in the specific area of social security. Clearly, the fact that different approaches are adopted by the two highest European courts is also to be deplored from the point of view of legal certainty, and the need for the uniform application and coherency of the EU gender equality rules and the European Convention on Human Rights that require simultaneous application in the Member States. Such problems are not to be ignored and will not disappear by simply refraining from referring to the relevant case law of the ECJ, as the ECtHR did in the *Andrle* case.

Quite remarkably, the contribution by Radačić also reveals that the evolution in the line of thinking in the ECtHR's case law in relation to cases that specifically concerned the role of the father and the mother in family life and in raising children is in fairly stark contrast with the above approach. This shows that the ECtHR is not in principle unresponsive to societal developments or to the CJEU's approach in the *Griesmar* case. In its older case law concerning challenges to the non-availability of the parental leave allowance for fathers, the ECtHR still considered this to be justified, noting the woman's primary role in the upbringing of children and the lack of a common approach among the Member States on these issues. In a very recent case (*Markin v. Russia*, 2012), however, concerning the non-availability of parental leave for male military personnel, the ECtHR held, referring to the *Griesmar* case, that the evolution of society points towards a more equal sharing between women and men of the responsibility for raising children, concluding that the traditional distribution of gender roles could not justify the exclusion of men from entitlement to parental leave. This judgment at least holds some promise of a more convergent approach between the two courts on this point in the future.

The article by Irene Asscher-Vonk focuses on sex discrimination resulting from an instruction to discriminate. This may occur not only within the framework of an employment relationship, but also beyond it, for instance where an employer instructs a recruitment bureau to advertise a certain position for only men (e.g. a security officer), whereas gender is not in fact a determining requirement for the position. Clearly, at the heart of such instructions may be deep-rooted ideas of the professional and family roles of women. It is therefore highly important that the EU's prohibition of sex discrimination also covers the instruction to discriminate. Interestingly, as the Austrian contribution to this Review demonstrates, stereotypical thinking may also in certain cases lead the national court to the conclusion that there is question of sexual harassment.

Shifting our attention from the European highest courts to the other European institutions, most importantly the legislator, there are also some relevant developments to note with regard to the question of how to deal effectively with gender-related assumptions and how to eradicate gender stereotypical thinking. The first development concerns the possibility of reinforcing female representation in positions of power through the imposition of quotas for company boards, which is now being considered by Commissioner Reding and which has also been the subject of a recent report by the European Gender Network, comparing the existing legal situations in the Member States in this respect. Stereotypical thinking based on subjective ideas on, and outdated perceptions of, women's and men's professional and family roles and responsibilities is one of the reasons why women still experience difficulties in

gaining access to 'old-boys' networks.[1] At the same time, and quite paradoxically, gender-related assumptions that reflect more objective differences between women and men, such as differences in management and communication styles, are not acknowledged in such networks to the extent that they should. Such differences in fact provide a strong economic argument for ensuring a more gender – also culturally – diversified and equally balanced company board, as there is evidence that this leads to better financial results.[2] There are thus not only strong societal and ethical grounds that advocate equal representation on such boards, but also economic reasons. What appears necessary, therefore, is a change of culture within companies that not only puts less emphasis on male dominance in power positions from a social justice perspective, but also enhances awareness about the economic benefits that ensue from a more balanced representation. While the imposition of gender quotas is clearly a very top-down and far-reaching device for bringing about gender equality, one may also argue that it is a necessary device for bringing about the necessary changes since all other (bottom-up) approaches have so far failed, given the still deplorable figures.[3] As such, it could function as a temporary, chisel-type of measure that is being applied until there are signs of a true cultural change. National developments, as charted in the previously mentioned Network report, show that the basis of support for – soft and hard – quota-type measures is growing.

A second development relates to the Union's gender mainstreaming approach under Articles 8 and 10 TFEU, as a tool to ensure that the gender dimension is taken on board in all the regulatory activities of the European Union regardless of the policy area or sector. An important device for putting this approach into practice lies in the Union's financial policy, in particular in stipulating the conditions for the allocation of the structural funds. To this end, the Commission proposed an ethics clause in its regulation for the structural funds and cohesion policy for 2014-2020. This policy is designed to invest in projects ranging from job creation to improving infrastructure and represents more than a third – about EUR 347 billion – of the current EU seven-year budget. As a condition for accessing the EU structural funds, the Commission required the Member States to guarantee the needs of groups commonly discriminated against, including women, gay people, disabled people and religious minorities. Regarding specifically gender equality, the Commission wanted Member States to create national bodies with the authority to analyze gender-related issues.[4] Yet, the Foreign Ministers at the general affairs council in Brussels on 24 April excised the anti-discrimination clause from the Commission's proposal. The Ministers only decided to keep the gender condition for anyone wishing to access the European Social Fund (ESF), worth some EUR 75 billion. This shows a clear reluctance on the part of the Member States to use an important mainstreaming device for the promotion of gender equality to its full potential. Hopefully, the European Parliament will succeed in getting this on the agenda once again when dealing with the proposal.

1 See for example the report Women on Boards, February 2011, UK Department for Business, Innovation and Skills, available on: http://www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf, accessed 31 May 2012.

2 See as regards Europe, for instance the McKinsey report 'Women Matter', 2010, available on: http://www.mckinsey.com/locations/swiss/news_publications/pdf/women_matter_2010_4.pdf, accessed 31 May 2012.

3 See the Network's report, mentioned in footnote 2.

4 See N. Nielsen, EU countries scrap ethics clause in EU funds, EUobserver, 25 April 2012, http://euobserver.com/851/116041, accessed 31 May 2012.

Instruction to Discriminate

Irene Asscher-Vonk [*]

Introduction

Article 2, paragraph 2 of Directive 2006/54/EC[1] on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), includes 'instruction' in the definition of discrimination:

> 'For the purposes of this Directive, discrimination includes: (….) (b) instruction to discriminate against persons on grounds of sex;(…)'

A similar extension of the definition of discrimination is already to be found in Directive 2000/43/EC,[2] implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The instruction to discriminate is defined as discrimination in Article 2(4):

> '1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.
> (…)
> 4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.'

Directive 2000/78/ EC[3] establishing a general framework for equal treatment in employment and occupation contains a similar provision.

Directive 2010/41/EU[4] on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC inserts the instruction to discriminate in the definition of discrimination (Article 4(3)).

In Article 4, paragraph 4 of Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, also an instruction to discriminate has been defined as discrimination.

Indeed, the provision seems to be inspired by the practice of everyday life. Examples of an instruction to discriminate are not difficult to find: the Temporary work agency or Employment service bureau that accepts the condition of the principal that the temporary worker should be available for a period of six months, in which period maternity leave would not be acceptable; a cleaning company that follows the instruction that in certain homes no cleaners wearing headscarves are to be used; a hospital that knows that certain patients do not want to be treated by men and respects that wish; an employer who instructs a nightclub's security staff to keep a critical eye on dark-skinned visitors and to ask them for their membership card; an employer who knows that his employee intimidates customers of a certain ethnic origin and tolerates that behaviour; a political party that commissions a graphic artist to design a poster with texts that amount to xenophobia.

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1 Directive 2006/54/EC of the European Parliament and the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

2 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
Official Journal L 303, 02/12/2000 P. 0016 – 0022.

4 Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010.

It is clear that an instruction to discriminate may appear in different forms. Legally, a diversity of forms may also be discerned. The authority to issue instructions may be the intrinsic part of a contractual relation. For instance, the authority to issue instructions and the obligation to follow them is one of the defining elements of the employment contract (the others are work and wages). The authority to issue instructions, and the limits to be observed there, are explicitly regulated in the law.

The authority to issue instructions may be explicitly or implicitly bargained for in (other) contractual relations, or may have the form of a specification in a commission. For instance, when giving the commission to design and sew a dress, even if the subordination is not a defining element of the relation, specific instructions as to the model, size, and material may be given and will then be part of the contract. Nobody will dispute the authority to add instructions such as these to the commission. Nor will instructions such as these change the overall legal character of the commission: the instructions will not in themselves make the relation an employment contract. For that, the duty to adhere to instructions and directions in the *execution* of the work would be essential.

The above discusses the instruction as part of another contractual relation. A Commission Contract to perform a certain task can itself be considered as an instruction. Lastly, the Contracting of a Job may be under specifications that are instructions as to how the job has to be performed.

Instructions, in each of the situations described above, may be explicit or implicit. An implicit instruction may be discerned in situations where an explicit instruction is not necessary, in situations where the wish of the instructor as to the way the task is performed or as to the task or the work itself is clear.

Moreover, instructions may either explicitly point at some desired behaviour or may be implicitly given in the omission to correct certain behaviour: allowing or leaving certain behaviour to continue.

A number of questions arise, since instructions are apparently possible in a number of ways and in a number of (legal) situations. What ways of instruction – implicit or explicit, actively given or implied by omission (allowing or leaving certain behaviour to continue) – can amount to an instruction as meant in the definition of the Directives? Moreover, since, as the examples show, instructions can be given in a number of contractual or non-contractual relations, the question is whether an 'instruction' in the Directive definitions is limited to instructions in certain contractual relations or has a broader scope.

The problem is relevant for the question whether the Directives have been properly transposed in national law, and for the way national courts have to interpret the provisions in the implementation legislation, so as to attain conformity with the Directive(s). Since specific rules concerning the burden of proof are applicable to discrimination, the question whether an instruction is deemed to be discrimination has important consequences. Do the situations described – instructions in different contractual contexts and instructions in different forms – (all) fall under 'instruction' in the definition of discrimination, as first amended in 2000?

In this Review I will discuss this problem on the basis of the way the Directives on this point are implemented in the Netherlands.

First, in section 1, the question of what is the meaning of this extension of the definition of discrimination, by inserting the instruction to discriminate in the definition of discrimination, is discussed. Was a specific purpose to be served? Or is the amendment of the definition meant to serve the general purpose of the Directives? Then, in section 2, the way the provision is implemented and interpreted in Dutch law will be discussed. A look at the practice – what the problems seem to be in practice – is taken in section 3. A conclusion will be formulated as to the conformity of the implementation in Dutch national law with the Directives in section 4.

1. What is the meaning of the broadening of the definition in the Directives?

In none of the Recitals of the Directives mentioned has any explicit or specific attention been given to this amendment of the definition of discrimination. By contrast, the insertion of harassment and sexual harassment in the definition of discrimination has been elaborately elucidated upon in the Recitals. For instance, in Consideration 11 of the Recital before Directive 2000/78/EC, the inclusion of harassment and sexual harassment in the definition of discrimination is put in the context of the prevention of discrimination based on sex. No such explanation is to be found for an instruction to discriminate being equated with discrimination.

There is no case law from the ECJ to enlighten us in this respect.

There is, therefore, only the general purpose of the Directives to guide us in the problem of the meaning and purpose of this amendment of the definition of discrimination.

The Directives are placed in the context of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. The Recital of Directive 2000/43/EC, for instance, underlines the place of the non-discrimination rule within universal rights: (Consideration 3) 'The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognized by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.'

The Recital of Directive 2000/78/EC (Consideration 4) also proclaims that 'The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognized by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms (…).'

The overall purpose of Directives 2000/43/EC and 2000/78/EC is the attainment of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and the quality of life, economic and social cohesion and solidarity (Considerations 9 and 11, respectively). Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons, states Consideration 11 of the Recital of Directive 2000/78/EC. To this end, Consideration 12 states, 'Any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community.'

The Recital of Directive 2004/113/EC also stresses the importance of equality before the law and protection against discrimination as a universal right. The general purpose of this Directive is no different from the purpose of Directive 2000/43/EC, Directive 2000/78/ EC or Directive 2006/54/EC which is that the right to equality before the law and protection against discrimination for all persons constitutes a universal right recognized by the Universal Declaration of Human Rights (UDHR), the United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the International Convention on the Elimination of all forms of Racial Discrimination (CERD) and the United Nations Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR) and by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), to which all Member States are signatories (Consideration 2). The Recital

states, moreover, that 'discrimination based on sex also takes place outside the labour market. Such discrimination can be equally damaging (as discrimination within the labour market, IA), acting as a barrier to successful integration of men and women into economic and social life.' The Recital of Directive 2006/54/EC stresses equality between men and women as a fundamental principle of Community Law and mentions the positive obligation of the Community to promote equality (between men and women) in all its activities and formulates as its purpose 'to safeguard the rights (of self-employed people) related to fatherhood and motherhood' (Consideration 3) and to 'take action on the gender gap (in entrepreneurship) as well as improve the reconciliation of private and public life' (Consideration 6).

Common to all these Directives is the aim of furthering equality in the light of fundamental rights, and removing barriers to attaining the integration of men and women, persons of all ages, ethnic origin and handicapped persons, in economic and social rights, especially employment rights and rights connected with employment, be it in an employment relation or self-employed. One might object that the scope of Directive 2000/43/EC is wider than employment relations and also pertains to housing and access to and the supply of goods and services which are available to the public, including housing. The ECJ, however, has not narrowly interpreted the scope of this Directive in Vardyn,[5] which is a sign that one should not go too far from the core of the scope. Directive 2004/113/EC forbids discrimination in the offering of goods and services. As Consideration 9 of the Recital of Directive 2004/113/EC states, discrimination outside the labour market can be equally damaging acting as a barrier to full and successful integration into economic and social life.

I conclude that the question whether the Directive is correctly implemented in national law, or the question of how the definition, as implemented in national law, has to be understood must be answered in the light of the general purpose of the Directives where the extension has been made.

The extension of the definition of discrimination with an instruction to discriminate should be read in the sense that it should contribute to the protection of the fundamental right to equality and that it should contribute to the attainment of the objectives of a high level of employment and of social protection, the raising of the standard of living and the quality of life and equality between men and women, thereby removing barriers to full and successful integration into economic and social life.

I add two remarks: Firstly, it should be noted that the text of the Directive leaves open the possibility that the instruction to discriminate amounts to either direct or indirect discrimination.

Secondly, the rule, by inserting this extension in the definition of discrimination, seems to lay down a *general* prohibition on instructions to discriminate, also outside labour relations, but within the scope of the Directive. The counterparty of the instruction is surely not per definition the counterparty in the labour relationship. In the Dutch Parliament, as shall be shown below, the Minister even defended that the counterparty of the instruction is by definition *not* the counterparty in the labour relationship.

2. How is this provision transposed in the national law of the Netherlands?

The extension of the definition of discrimination as laid down in Directive 2000/78/EC (the Framework Directive) has been transposed in the *Wet gelijke behandeling op grond van leeftijd bij de arbeid* 2003 (WGBL, Equal Treatment in Employment (Age Discrimination) Act).[6]

Article 1 of this Act reads:

'(….) The instruction to discriminate is also deemed discrimination.'

5 Judgment of 12 May 2011, Case C-391/09.

6 *Staatsblad* 2004, 30.

An amendment to the definition had already been discussed in Parliament upon the introduction of the Equal Treatment (Handicapped and Chronically Ill People) Act.[7] Although the extension of the definition of discrimination with an instruction to discriminate was already, as mentioned, laid down in Directive 2000/78/EC (Framework Directive), this provision has not transposed that Bill.[8] On a related point, namely the question of why harassment was not included in the definition of discrimination, a question was asked in Parliament on which the Minister answered: 'The Framework Directive describes in Article 2, paragraph 3, harassment and sexual harassment as a form of discrimination. The Members (…) ask why in the Bill proposing the WGBL a similar provision is incorporated, but not in this Bill. In this Bill, the Minister stated, only provisions that are relevant for this Bill are transposed. The so-called General Provisions will be transposed later. At the moment the general provisions are transposed, and the provisions on harassment and an instruction to discriminate will be inserted.'[9]

At the time of the transposition of the Directives into the WGBL the Minister had explained the amendment to the definition in the Explanatory Memorandum in the following way: 'In the fourth paragraph of Article 2 of the Directive it is laid down that an instruction to discriminate against persons is to be considered discrimination as meant in the first paragraph. This provision is elaborated in Article 1, paragraph 2 of the Bill. The instruction to discriminate is interpreted as a form of discrimination.' Members of Parliament asked whether the Government could give examples of situations where tolerating or allowing a discriminatory situation comes within the definition of the prohibition of discrimination. The Minister answered that tolerating or allowing does not fall within the scope of instruction. The Minister argued that the Bill serves to implement the Framework Directive. 'The Directive uses the term *instruction* to discriminate. Allowing or tolerating is not understood as falling within this term.' The Minister did give an example of allowing or tolerating: a CEO allows the situation where a manager discriminates, although he is aware of the situation. In the opinion of the Minister, here there is not a case of an instruction. However, the fact that the employer allows or omits to correct the discrimination may be considered as discrimination *in labour conditions*, for which the employer is responsible under Article *5* paragraph 1 sub h of the AWGB.

In the Act of 21 February 2004[10] which implemented the general provisions of Directive 2000/78/EC, the insertion of an instruction to discriminate was implemented in the AWGB.

Article 1, sub a of the AWGB reads:

'a. discrimination: direct and indirect discrimination, and instruction to that end.'

At that time, the same was laid down in the Equal Treatment (Handicapped and Chronically Ill People) Act.

Upon the introduction of this amendment, the Minister stated: 'On a number of issues the AWGB needs amendment in order to implement Directives 2000/78/EC and 2000/43/EC. One of the amendments concerns the amendment of the definition so as to understand the instruction to discriminate as discrimination. These amendments mean an improvement in the legal protection against discrimination.'[11]

The problem whether only an active instruction is to be considered as an instruction in the sense of the definition, or that also an omission to act can be an instruction to discriminate, was also discussed. The Minister stated: 'Instruction to discriminate is the same as in Article 1, paragraph 2 of the Bill on the Equal Treatment in Employment (Age Discrimination) Act. In the Explanatory Memorandum and the Note following the Report from Parliament on this Bill, it is explained that an instruction to discriminate does not

7 *Staatsblad* 2003, 329.
8 Parliamentary papers 28169.
9 28169, 5, p. 10.
10 *Staatsblad* 2004, 119.
11 28770, 3, p. 3.

amount to allowing or leaving a discriminatory situation to continue. Actively giving an instruction is to be distinguished from passively allowing or leaving a discriminatory situation or act to continue. This does not mean that the allowing of such a situation may not fall under the prohibition of discrimination. As an example of this last situation the following may be mentioned: an employer neglects to take adequate action against an employee who intimidates his fellow employee on the ground of race. In this situation the employer contravenes Article 5, paragraph 1, sub h of the AWGB. This provision forbids discrimination in labour conditions. Just as in the Bill introducing the WGBL, in this Bill only the implementation of the Directives is to be attained. The Directives speak of an *instruction* to discriminate. Allowing or leaving or an implicit instruction to discriminate cannot be understood as a specific instruction. The members' proposal to also insert an implicit instruction in the definition was not followed, the Minister stated. On the question of in what contractual context an instruction can occur, the Minister stated: 'It is considered that with "instruction" a Commission Contract as regulated in Article 7:400 Civil Code is meant',[12] 'A temporary work Agency that establishes the condition that temporary workers may not be pregnant or are not allowed to wear a headscarf gives a discriminatory instruction. That employer thus contravenes Article 1 AWGB.'[13]

The Minister also stated: 'The Members (….) raised questions about the fact that an instruction to discriminate is added to the definition of discrimination. They were not certain about the exact meaning of an instruction to discriminate. Does allowing or leaving discrimination to continue fall under the definition of an instruction, and can there be a tacit or implicit instruction?' The Minister continued: 'Instruction to discriminate has the same meaning as in the WGBL. In the Explanatory Memorandum of that Bill and other papers it is explained that allowing or tolerating discrimination is not to be understood as instruction. The active issuing of an instruction is to be distinguished from passively allowing or tolerating a discriminatory situation or treatment.'

Probably to fend off any possible suggestion that the implementation of the Directive had been done rather poorly, the Minister added that 'the Government chose to implement the general provisions of Directive 2000/78/EC in the AWGB that not only forbids discrimination on the grounds of Article 19 TFEU (former Article 13 TEC) but also on the grounds of political persuasion, nationality and civil status. That means that the elements that the Framework Directive adds to the legal system against discrimination are also introduced for, among others, the grounds of political persuasion, nationality and civil status. Moreover, it is proposed not to limit the new elements (especially an instruction to discriminate, intimidation, victimization and shifting the burden of proof) to the fields that are within the scope of the Framework Directive, but to apply them to all fields where the AWGB is now applicable. In that way, the Bill contains additional national policy.'[14] The Minister seemed to forget here that already Directive 2000/78/EC, forbidding discrimination on the grounds of disability, age or sexual orientation and Directive 2000/43/EC, forbidding discrimination on the grounds of race or ethnic origin, contained the extended definition of discrimination also in cases of discrimination on grounds other than sex.

The Minister firmly held that (only) a Commission Contract in the sense of Article 7:400 Civil Code is an instruction that, if discriminatory, amounts to discrimination. The Minister argued that instructions in the course of an employment contract are not instructions in the sense of the definition. Those instructions may be forbidden, following the rules of responsibility for discrimination in working conditions, when the rules of responsibility are applied to the discrimination carried out by an employee on the instructions of his employer.

My conclusion is that the transposition of the provisions of the Directive in the Netherlands has been very limited, namely confined to the Commission Contract as regulated in Article 7:400 Civil Code only. An implicit instruction or an instruction by omission does not fall

12 28170, 3, p. 18.
13 Parliamentary papers 2002–2003, 28 770, no. 5 p. 17.
14 28770, 9, p 1.

under the definition. The Minister used semantic arguments only for his limited approach and did not try to find arguments in the Directives or European Law for the interpretation of this provision, which is, after all, implementation legislation. Parliament, whose questions pointed to a broader interpretation of the definition of discrimination, accepted the Minister's standpoint.

This narrow interpretation is not without consequences. If 'instruction' would not be interpreted in such a limited way, but, for instance, also as instruction within the contract of employment, also a not followed instruction would fall under the definition. This would mean a better position for the employee who refuses to follow the instruction. His refusal would concern the refusal to follow an illegal instruction. Moreover, if the instruction to discriminate in itself amounts to discrimination, the specific rules of proof are applicable, that is when persons who consider themselves wronged, because the principle of equal treatment has not been applied to them, establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. That circumstance would also ameliorate the position of the employee who refuses to obey an instruction to discriminate.

A question to be put, but which has not been asked in Parliament, might be whether the instruction to discriminate is either direct or indirect discrimination, or that the qualification depends on the kind of discrimination that has been instructed. In the Dutch AWGB both direct and indirect discrimination by instruction seems possible. The importance of this question of course lies in the possibility for justifying the instruction. This problem has not been discussed in Parliament. Nor do the Directives give an answer to this question. It seems logical that the characterisation of the instruction as direct or indirect discrimination should depend on the kind of discrimination that is instructed. For instance, the instruction to recruit only persons who do not have care tasks at home will be seen as indirect discrimination, given the fact that more women than men perform care tasks at home. The instruction not to hire a pregnant woman would be direct discrimination. In the one decision which the CGB (Commission on equal treatment) has given on an instruction to discriminate, to be discussed under section 4, the CGB also follows this line.

3. What is the practice so far?

No cases decided by the Court of Justice of the European Union on this point have so far been published. Nor do I know of any decision by a Dutch Court of Law on this point.

There is only one decision by the CGB under the heading of an 'instruction to discriminate' which has been published on the Commission's website.[15] In that case,[16] the CGB was asked to investigate whether a Foundation, offering Nursing Home care, home care etc., had discriminated by instructing a cleaning company to turn down the application of a female cleaner because of the fact that she wore a headscarf. The Cleaning Company, which followed the instruction, was not called upon to justify itself.

The Commission ruled that the fact that the claimant had not requested an investigation into the conduct of the cleaning company, which followed the instruction and turned the claimant down, did not mean that the Commission could not investigate the Foundation which issued the instruction. The Commission considered that everybody who has a role in the labour relation have their own responsibility to observe equal treatment law (consideration 3.3 of the CGB's decision). This consideration seems to miss the point that, following the definition of Article 1, the instruction in itself amounts to (direct) discrimination, even if the instruction would not have been followed. The CGB considered that the fact that the instruction and the dress code explicitly referred to headscarves meant that here there was a case of direct discrimination by instruction.

15 www.cgb.nl, accessed 31 May 2012.
16 CGB (Commission on Equal Treatment), June 28, 2010, opinion number 2009-0439.

In this case, the claimant was the person who was turned down because the instruction was followed. I wonder whether also the person who receives the instruction to discriminate could be considered as a claimant. This problem occurs in the temporary work sector. Especially temporary work agencies seem to tend to conform to the wishes of their principal, even if they are discriminatory, as is apparent from two recent studies by Anne Backer and Evelien Loeters.[17] In the paper by Loeters, attention is given to the dilemma faced by employees of Temporary Works Agencies who are – or feel – instructed to meet the wishes of their clients.

The CGB generally pays attention to the problem of discrimination by Temporary Work Agencies. The CGB took part in a Conference on January 25, 2012 on this very subject. In its contribution to the conference (published on the CGB's website)[18] the CGB recommends further research. The CGB does not mention the legal measures that are possible both against the Principal of the Agency that has a discriminatory request and, if 'instruction' is read in a broader sense, against the Agency as the employer of the employee who is instructed – explicitly or implicitly – to comply with the wishes of the clients.

4. Conclusion.

As discussed under 1, the Recitals of the respective Directives do not give explicit explanations of the meaning of an instruction to discriminate and of the objective to be attained with the insertion of an instruction to discriminate in the definition. For that reason, the provision has to be explained in the context of the general aims of the Directives. Those are to further equal treatment in employment and occupation, in order to dispense with barriers to full and successful integration – without discrimination – in social and economic life.

The Dutch Minister stated, upon the occasion of the amendment of the AWGB, that already, without the amendment of the definition, the person who instructs somebody to discriminate is responsible for the discrimination. Does the broadening of the definition add to the already existing rule?

In my opinion, the insertion of instruction in the definition of discrimination does add significantly to the existing body of rights, and for that reason has to be interpreted not only as confirming the rule that the employer is responsible for discriminatory labour conditions, as the Minister suggests. The extension of the definition with an instruction to discriminate forbids the instruction, even if it has not been followed. No contravention by the agent is necessary for taking action against the principal. The rules of proof, specific to discrimination law, are also applicable in the case where the instruction is not followed. The insertion of an instruction to discriminate in the definition of discrimination has a broader meaning than being a mere clarification: it means that the instruction in itself, regardless of whether it is followed, is, just as discrimination, forbidden. For discrimination consisting of an instruction, the specific rules of proof are equally applicable. By this broader interpretation of the concept of instruction, the non-discrimination rule becomes more effective.

Neither do I concur with the Minister's opinion that an instruction in the definition of discrimination is limited to Commission Contracts regulated in Article 7:400 CC. In my opinion, also an instruction in the course of other contracts, be it Employment, Commission (with another primary object than discrimination) or Contracting work out is to be considered as being covered by the amended definition. The same reasoning – the broader the

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17 Anne Backer, *Discriminatie bij uitzendbureaus: Uitzedbureaus, gekleurde doorgeefluiken?* (Discrimination by temporary work agencies: Temporary work agencies, biased hatches?), 2011 (quoted by the CGB), available at http://www.vu.nl/nl/Images/Scriptie%20Anne%20Backer_tcm9-241356.pdf (in Dutch), accessed 11 June 2012; Evelien Loeters, *De klant is koning. Een onderzoek naar het honoreren van discriminerende verzoeken van werkgevers door intercedenten van uitzendbureaus in Nederland* (The Customer is King: Research into employees of temporary work agencies honouring discriminating requests by employers), 2011, available at http://www.vu.nl/nl/Images/Scriptie%20Evelien%20Loeters_tcm9-241575.pdf (in Dutch), accessed 11 June 2012.

18 www.cgb.nl accessed 31 May 2012.

applicability, the more effective the rule – applies here and leads me to provide a positive answer to this question.

My conclusion is that there is no reason to presume that the Directives limit an instruction to discriminate to explicit, formal instructions by a Contract as stated by the Minister. The 'alternative' ways of allowing a situation to continue and tacit instructions are also forbidden by the insertion of 'instruction' in the definition of discrimination.

European Union Law forces the Netherlands to interpret the definition in the Directives not along the lines of the explanation given in the Dutch Parliament, but in the sense of the Directives which is broader.

To sum up:

1. The meaning of this amendment to the definition has to be found in the Directives.
2. The Directives and the Recitals are not explicit as to the meaning and purpose of this broadening of the definition. To date, there has been no case law from the Court of Justice of the EU on this point to guide us. Therefore, it is still to be decided what meaning of the term instruction best serves the general purpose of the Directives.
3. Whether instruction means only an active instruction, and not an omission to correct, leave or allow, depends on the purpose of the provision. Since no explicit purpose for the amendment of the definition is given, the general purpose as explained in the Recitals should lead us. That general purpose being the furthering of the effectiveness of the equal treatment rule, the question to be answered is whether that purpose is helped by a broader definition of an instruction, also including a tacit or implicit instruction, and allowing a situation to continue. The answer is in the positive.
4. An instruction should also be an instruction within the labour relationship. It may be true, as the Minister stated, that there are other ways to bring an action against the employer whose employee discriminates. However, that is the case (only) if the instruction is obeyed: the *obeying* is discrimination. The purpose of the Directives demands that an 'instruction to discriminate' be read in a broader sense.
5. The insertion of instruction in the definition of discrimination has to be explained not only as confirming the rules of responsibility for discriminatory working conditions, as the Minister suggested. The extension of the definition with an instruction to discriminate forbids the instruction, even if it has not been followed. In that way it facilitates the position of the agent who has been instructed. No contravention by the agent is necessary for taking sanctions against the principal. The rules of proof, specific to discrimination law, are also applicable. This contributes to the effectiveness of the rules on equality and therefore has to be considered as an adequate implementation of the Directives.

The European Court of Human Rights' Approach to Sex Discrimination

Ivana Radačić[*]

1. Introduction

The principle of sex/gender equality[1] is one of the key underlying principles of the European Convention on Human Rights (the Convention).[2] However, the European Court of Human Rights (the Court) does not have a consistent approach to sex discrimination. The dominant approach is that of 'sameness' – the prohibition of different treatment on the basis of sex/gender, based on the presumption of the irrelevance of the sex/gender difference.[3] However, in certain cases there is a recognition of women's disadvantage without formal abandonment of the 'sameness approach', while in domestic violence cases a more radical approach to equality can be discerned.

This article examines the Court's sex discrimination jurisprudence, referring, where appropriate, to its divergence from the jurisprudence of the Court of Justice of the European Union (CJEU).[4] It points to inconsistencies in the Court's jurisprudence and calls for a greater recognition of women's disadvantage in the adjudication of sex discrimination claims.

The article starts with a brief introduction to the non-discrimination provisions. It proceeds with an analysis of different categories of cases, classified according to the Government's justifications and the subject-matter at issue, followed by the assessment of the Court's approach. The article ends with a proposal for a new approach for the Court in which the focus would be the question of disadvantage.

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1 The term gender has traditionally been used to describe the socially constructed identity of women and men, while the term sex has traditionally been used to refer to their biological characteristics, though these are not easily separable categories. In this paper I shall use the term 'sex' as a term used in the Convention.

2 This was first stated in *Leyla Sahin v. Turkey* [GC], no. 44774/98, 10 November 2005.

3 This approach is connected with liberal (feminist) theories of equality, which presume fundamental similarities between women and men and argue for equal treatment. See, e.g. W. Williams, Crisis of Equality: Some Thoughts on Culture, Courts and Feminism, *Women Rights Law Reporter* 7 (1982).

4 I will only discuss Article 14 cases where sex was a specifically mentioned ground in the judgment. Hence, I will exclude some important cases which were declared inadmissible as being manifestly ill-founded: *Dahlab v. Switzerland* (no. 42393/98, 15 February 2001), challenging the prohibitions on wearing the 'Islamic headscarf' imposed on teachers, and *Hoogendijk v. the Netherlands* (no. 58641/00, 6 January 2005), challenging the introduction of the income requirement to the scheme of incapacity benefits as indirect discrimination, and *Mendez Perez and others v. Spain* (no. 35473/08, 4 October 2011) challenging the rule of gender equality legislation according to which electoral lists had to have at least 40 % of each sex represented. Further, I will not include those cases challenging time limits for challenging paternity applicable to putative fathers but not to mothers, the child and other interested parties, as the Court did not state the ground of discrimination (*Rassmussen v. Denmark,* no. 8777/79, 28 November 1985: *Mizzi v. Malta*, no. 26111/02, 12 January 2006). Finally, I will also not discuss cases challenging the rule according to which mothers were awarded custody of a child born out of wedlock unless the parents had agreed on joint custody and whereby there was no possibility for a judicial review of whether joint custody would be in the interest of the child (*Zaunegger v Germany,* no. 22028/04, 3 December 2009; *Sporer v Austria*, no. 35637/03, 3 February 2011) as the primary issue here was different treatment in comparison to married fathers (on the basis of marital status). For an earlier paper on sex discrimination jurisprudence see I. Radačić, 'Gender Equality Jurisprudence of the European Court of Human Rights', *European Journal of International Law* 19:4 (2008).

2. Sex discrimination jurisprudence

There are two non-discrimination norms under the Convention and its protocols: Article 14 of the Convention, which is a subsidiary provision prohibiting discrimination in the enjoyment of Convention rights,[5] and Article 1 of Protocol No. 12, which is a general non-discrimination norm prohibiting discrimination in the enjoyment of any right set forth by law or discrimination by any public authority.

Neither of these provisions prescribes a test of discrimination and the grounds of discrimination are open-ended.[6] The Court's jurisprudence has clarified that the provision prohibits the different treatment of individuals in analogous situations, and equal treatment of individuals in *significantly* different situations, unless there is a reasonable and objective justification. However, it has only once applied a second prong of the test.[7] Indirect discrimination is also prohibited but the Court has yet to develop a consistent approach to indirect discrimination.[8]

The test of objective and reasonable justification is applicable to both direct and indirect discrimination claims, unlike under EU sex equality law.[9] It requires that there is a legitimate aim and a 'reasonable relationship of proportionality' between the means employed and the aims sought to be realised. While, so far, there has been no case challenging affirmative action, it seems that it could be justified under the test of reasonable and objective justification.[10]

The Court applies a different level of scrutiny to different grounds of discrimination. Sex, together with race, religion, nationality, illegitimacy and sexual orientation, is a suspect ground, which means that 'very weighty reasons' would have to be advanced before the difference in treatment on the ground of sex could be regarded as compatible with the Convention. In this respect, the Court's case law could be compared to that of the US Supreme Court,[11] whereas there are no grounds that are deemed more suspect than others in the EU anti-discrimination law.[12]

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5 While Article 14 cannot be argued independently, but only in conjunction with other substantive rights, its application does not presuppose a breach of one of the substantive provisions. It requires only that the facts at issue fall 'within the ambit' of one or more of the provisions. For the application of the test see R. Wintemute, '"Within the Ambit": How Big is the "Gap" in Article 14 European Convention on Human Rights? Part 1' *European Human Rights Law Review* 4 (2004) 366.

6 They include: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

7 *Thilmmenos v. Greece* [GC], no. 34369/97, 6 April 2000.

8 Although the Court has never specifically provided a definition of indirect discrimination, in many of its judgments it has included phrases which seem to describe the concept of indirect discrimination. However, it has very frequently, and until 2005 as a rule, dismissed indirect discrimination claims because of the lack of discriminatory intent or because it held that statistics did not constitute sufficient evidence of prima facie discrimination.

9 Under EU gender equality law direct discrimination is generally prohibited, unless a specific written exception applies. S. Burri and S. Prechal, *EU Gender Equality Law – Update* (Luxembourg: Office for Official Publications of the European Communities, 2010).

10 There have been a number of cases where the Court alluded that affirmative measures could be justified where 'factual inequalities are at issue'. In addition, *Mendez Perez and others v. Spain* (supra note 4) concerns a challenge to quotas applicable to political parties due to which the all-women list for local elections had not been accepted. The Court held that the application of the electoral law could not amount to a difference in treatment on the basis of sex, to the extent that a list of candidates consisting of men, not respecting the legal quota of 40 % of candidates belonging to the other sex, was also disqualified. It thus held the complaint to be manifestly ill-founded and declared it inadmissible.

11 However, in the jurisprudence of the US Supreme Court gender is subject to an intermediate, rather than a strict level of scrutiny (unlike race).

12 However, the hierarchy has also developed in the case law of the ECJ. See S. Besson 'Gender Discrimination Under EU and ECHR Law: *Never Shall the Twain Meet*' *Human Rights Law Review* 8:4 (2008). See also E. Howard, 'EU Equality Law: Three Recent Developments', *European Law Journal* 17:6 (2011).

The following factors are also relevant in determining the strictness of scrutiny and the width of the State's margin of appreciation:[13] the circumstances, the subject-matter, the background, and the existence of consensus.[14] The subject-matter at issue and (the lack of) consensus have been the most prominent factors influencing the level of scrutiny, as will be seen below.

2.1. Different roles of women and men in the upbringing of children: Cases concerning parental leave

The non-availability of parental leave for fathers was first challenged in *Petrovic v. Austria.* The government justified this different treatment by the 'fact' that at the time in question mothers had the primary role in looking after children.[15] Although the Court was not convinced of the comparability of the situations of women and men, it eventually proceeded with a presumption of similarity, but gave the States a wide margin of appreciation in assessing whether 'difference in otherwise analogous situations' constitutes an objective and reasonable justification for different treatment.[16] Noting the woman's primary role in the upbringing of children and the lack of a common approach among the Member States on the issues at the time in question, the Court held that the States did not exceed their margin of appreciation.

However, the Court changed its approach in the later case *Markin v. Russia*, which concerned the non-availability of parental leave for male military personnel.[17] On this occasion the Court stressed that women and men were in analogous situations as far as parental leave and allowances were concerned and it then analysed the state's justifications. With respect to the alleged special connection between a mother and a child which the government sought to protect, the Court held that the comparative and international jurisprudence it examined (including the CJEU's cases *Joseph Griesmar v. Ministre de l'Economie, des Finances et de l'Industrie, Ministre de la Fonction publique, de la Réforme de l'Etat et de la Démocratisation*[18] and *Roca Álvarez v. Sesa Start España ETT*)[19] pointed to the evolution of society towards a more equal sharing between women and men of the responsibility for the upbringing of children, and concluded that the traditional distribution of gender roles could not justify the exclusion of men from an entitlement to parental leave. As regards the argument that granting parental leave to servicemen would have a negative effect on the army, the Court, although noting the special nature of the army, emphasised that particularly serious reasons would have to be advanced for restrictions imposed in the most intimate sphere of private life, and held that the restrictions in questions did not satisfy the requirement of proportionality.

2.2. Different socio-economic position: Cases concerning pension rights and social rights related to the pensionable age

The first group of cases consists of cases brought against the UK concerning different age requirements for women and men in respect of an entitlement to statutory pensions and social benefits linked to pensions. These cases are: *Stec and Others*, in which two men and two

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13 The doctrine of the margin of appreciation limits the Court's power of review, based on the idea that state organs have greater legitimacy or are better placed than an international body to decide on human rights issues 'due to their direct and continuous contact with the vital forces of their society'. See, e.g. E. Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' *New York University Journal of International Law and Politics* 31 (1998-1999).

14 The Court mostly looks at the (non-)existence of the common approach among Member States to determine whether there is a consensus on the issue, but sometimes it examines the developments in international law, and sometimes it looks at the evolution in social developments. Sometimes it does not discuss consensus at all. See, e.g. L.R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights' *Cornell International Law Journal* 26 (1993).

15 *Petrovic v Austria,* no 20458/92, 27 March 1998.

16 The Court very often postpones the decision on comparability to an examination of justification. For criticism see Besson, supra note 12.

17 *Markin v Russia* [GC], no. 30078/06, 22 March 2012.

18 Case C-366/99, [2001] ECR I- 9413.

19 Case C-104/09, [2010] ECR I-08661.

women challenged the legislation imposing a cut-off or limiting conditions in respect of a reduced-earning allowance (industrial injury earning replacement) by reference to the ages used by the statutory old-age pension scheme (60 for women and 65 for men);[20] *Walker,* in which a man challenged different age conditions regarding the payment of national insurance contributions;[21] *Barrow*, in which a woman challenged different age conditions in respect of receiving incapacity benefits;[22] and *Pearson*, in which a man challenged different pension ages.[23]

The government argued that setting the pension age fell within the State's margin of appreciation, as it concerned complex social and economic judgments, which States are better placed to make. It also emphasised that the original aim of having different pensionable ages was to compensate for women's economic disadvantage. With respect to different age requirements for entitlements to social benefits, the government argued that these were linked to working life and that using the pensionable age as a cut-off point made the scheme easier to understand and administer.

The Court first noted that different treatment may not only be justified but may, in certain circumstances, be required when 'factual inequalities' are at issue. However, it then restated the 'very weighty reasons' formula, and also referred to the State's wide margin of appreciation when it comes to 'general measures of economic and social strategy.' However, the Court did not clearly state how these conflicting principles are to be applied in the case at issue: whether the applicants are to be considered in equal or different situations, and how is the doctrine of the margin of appreciation to be reconciled with the principle of strict scrutiny in sex discrimination cases.

The Court eventually proceeded from the presumption of analogous situations and then assessed the justification somewhat leniently in the light of the wide margin of appreciation in the area concerning 'general measures of economic and social strategy'. With respect to the different pensionable age, the Court found the difference to be justified in light of the original justification for the measure, the slowly evolving nature of the change in working women's lives, the absence of common standards amongst the Member States, and the fact that the pensionable age fell within one of the exceptions of Article 7(1)(a) of Directive 79/7/EEC. It held that the respondent State's decisions as to the precise timing and the means of rectifying the inequality were not so manifestly unreasonable as to exceed the wide margin of appreciation allowed to it in such a field. There was, therefore, no discrimination contrary to the Convention.

With regard to linking entitlements to benefits and obligations, and the paying of contributions to the pensionable age, the Court also deferred to the State's wide margin of appreciation in questions of the administrative economy and coherence, and accepted the State's justification. In this respect, the Court found it to be of central importance, while not determinative, that the ECJ had held in the case of *Hepple v Chief Administration Officer* that the difference in treatment was 'objectively and necessarily linked to difference between retirement age for men and women.'[24]

The case of *Runkee and White v the UK* falls into a second group. In this case two men challenged a denial of a widow's pension to men, which the government sought to justify by referring to the financial hardship and inequality historically faced by older widows because of the married woman's traditional role of caring for her husband and family in the home

[20] *Stec and Others v. the United Kingdom* [GC], no 65731/01, 6 July 2005.
[21] *Walker v. the United Kingdom*, no. 37212/02, 22 August 2006.
[22] *Barrow v. the United Kingdom*, no. 42735/02, 22 August 2006.
[23] *Pearson v. the United Kingdom*, no. 8374/03, 22 August 2006.
[24] Case C-196/98, [2000] ECR I–3701, paragraph 45.

rather than earning money in the workplace.[25] Without formally abandoning the 'sameness approach', the Court recognised that historically there were differences between women's and men's economic positions which the measure aimed to address, and emphasised that States have a wide margin of appreciation when it comes to general measures of social and economic policy, and thus in deciding when the measure was no longer justified. Hence, it found no discrimination contrary to the Convention.

The third group consists of *Andrle v. Czech Republic,* which concerned a challenge to a pension scheme which provided for the lowering of the pensionable age for women in relation to the number of children raised but not for men who had raised their children.[26] The Government claimed that the original aim of the measure was to compensate 'for the factual inequality in which women in their capacity as mothers found themselves in comparison with men' and was justified 'until social conditions changed enough for women to cease to be disadvantaged as a consequence of the existing family model', which in its opinion has still not been the case.[27] The Court accepted that the original aim of the measure was to compensate for the factual inequality between men and women and noted a gradual change in women's and men's working lives, referring to the difficulty in pinpointing 'any particular moment when the unfairness to men begins to outweigh the need to correct the disadvantaged position of women by means of affirmative action'.[28] It held that the measures which the Czech Republic was undertaking to rectify the inequality in question, in light of the gradual changes in the perceptions of the roles of the sexes, were not so manifestly unreasonable as to exceed the wide margin of appreciation allowed in this field.

The Court, differentiating this case from *Markin*, emphasised that, unlike a pension scheme, parental leave was a short-term measure which did not affect the entire lives of members of society and did not have such serious financial ramifications; in addition, the pensionable age reflected and compensated for past inequalities. The *Griesmar* case, referred to in *Markin*, in which the CJEU found a violation of the principle of sex equality in similar circumstances, was not mentioned in *Andrle*, which would have required the Court to provide reasons for departing therefrom,[29] given its previous approach of keeping the interpretation of EU and ECHR case law in line with each other.

2.3. Different position within the family: Cases concerning family names

Several cases fall into this category: *Burghartz v. Switzerland*, which challenged the lack of an option for husbands to add his surname to the wife's surname, which they had chosen as the family name, when this option was available for women;[30] *Losonci Rose and Rose v. Switzerland*, which challenged a prohibition on foreign men married to Swiss women keeping their surname if this option was provided in their national law, an option available to women;[31] and *Unal Tekeli v. Turkey*, which challenged prohibitions on women using their surname as the family name, an option only available to men.[32] The governments tried to justify their positions on the basis that there was a need to reflect family unity. In all of these cases the Court referred to the 'living instrument' nature of the Convention, it noted the international and comparative consensus in respect of the prohibition of discriminatory provisions regarding family names, and it found a violation of the Convention.

25 *Runkee and White v. the United Kingdom*, nos 42949/98 and 53134/99, 10 May 2007.
26 *Andrle v. the Czech Republic*, no. 6268/08, 17 February 2011.
27 *Ibid,* paragraphs 36-37.
28 Ibid, paragraph 56.
29 For a critique of the Court's approach see K. Koldinska, 'Should Fathers Not Raise Their Children? Two Cases of ECHR and ECJ on Gender Equality in Pensions Rights' *European Gender Equality Law Review* No. 2 (2011).
30 *Burghartz v. Switzerland,* no. 16213/90, 22 February 1994.
31 *Losonci Rose and Rose v. Switzerland*, no. 664/06, 9 November 2010.
32 *Ünal Tekeli v Turkey*, no. 29865/96, 16 November 2004.

2.4. Different working patterns for women and men: Cases concerning immigration rights, social benefits and jury service

The first group of cases under this heading consists of *Abdulaziz, Cabales and Balkandali v. the UK*, challenging the harsher restrictions applied to female immigrants settled in the UK (than for male immigrants) in obtaining permission for their non-national husbands and fiancées to enter or remain in the country.[33] The government sought to justify this different treatment by pointing to the different impact of immigrant husbands on the domestic labour market, which it sought to protect, in light of 'the fact' that men of working age are more likely to seek employment than women. The Court refused to grant the State a wide margin of appreciation, however, holding that even if there were such differences, this was not sufficiently important to justify the difference in treatment on the basis of sex.

The second group consists of cases concerning the discriminatory denial of social benefits. *Wessels-Bergervoet v. the Netherlands* involved a challenge to a reduction in a woman's pension on account of her husband's insurance status, which the government sought to justify by the 'fact' that, at the time in question, men were predominantly the family breadwinners.[34] *Willis v. the UK* challenged the non-availability of a widow's payment or a widowed mother's allowance to a man, where a woman in similar circumstances would be granted these payments, which the Government sought to justify by the 'fact' that women were more likely to be financially dependent on men.[35] *Schuler-Zgraggen v. Switzerland* concerned the denial of an invalidity pension to a woman on the basis that women with young children did not work.[36] The Court applied a strict scrutiny standard of review and found that the reasons adduced were not 'weighty enough', even if the assumptions on which they were based were true.

Zarb Adami v. Malta falls within the third group. The applicant argued that women who satisfied the legal requirements for jury service were called upon to fulfil jury service less frequently than men when compared to men, and that this was caused by the way in which the lists of jurors were compiled.[37] The government argued that the difference in treatment depended on a number of cultural, social and economic factors, including the fact that jurors were chosen from those who were active in the economy and professions, that an exemption from jury service could be requested for family reasons, and that defence lawyers might have had a tendency to challenge female jurors.

The Court first restated its indirect discrimination test: recalling that a policy or a measure which has disproportionate effects on a group of people could be considered discriminatory even if it is not specifically aimed at that group, and that very weighty reasons would need to be put forward for a difference in treatment on the basis of sex to be compatible with the Convention. Accepting that there was a *prima faciae* indication of discrimination, as evidenced by statistics concerning the number of women on the lists, it proceeded to analyse the justifications. It held that the reasons adduced by the government were not weighty enough: the second and the third factor did not explain the very low number of women included on the list of jurors and, in any event, the submitted facts were not a valid justification.

2.5. Biological differences: Cases concerning the imposition of contributions

The following cases fall under this heading: *Van Raalte v. the Netherlands*, which challenged the imposition of the duty to pay childcare contributions on childless men older than 45 where women in the same category were exempted, which the Government sought to justify on

33 *Abdulaziz, Cabales and Balkandali v. the United Kingdom,* nos 9214/80, 9473/81 and 9474/81, 28 May 1985.
34 *Wessels-Bergervoet v. the Netherlands*, no. 34462/97, 4 June 2002.
35 *Willis v. the United Kingdom*, no. 36042/97, 11 June 202. These also fall within the exception set out in Directive 79/7/EEC. The same complaint was submitted in *Runkee and White v. UK*.
36 *Schuler-Zgraggen v. Switzerland*, no. 14518/89, 24 June 1993.
37 *Zarb Adami v. Malta*, no. 17209/02, 20 June 2006.

account of the different reproductive capabilities of women and men;[38] and *Karlheinz Schmidt v. Germany*, which challenged the imposition of the duty to pay a fire service levy (a contribution in lieu of service in the fire brigade) only on men, which the Government sought to justify on the basis of the need to protect women in view of their 'physical and mental characteristics.'[39] The Court held that the differences were over-generalised and were anyhow irrelevant for the cases at hand: the imposition of the duty in *Van Raalte* was not linked to benefit entitlements, and the obligation was held to be of a financial nature (as the levy has lost its compensatory character and has become only an effective duty) in *Karlheinz Smidt.* It hence found a violation of the Convention.

2.6. Domestic violence cases

In *Opuz v. Turkey* the indirect discrimination test was for the first time applied in the context of domestic violence.[40] The case concerned a State's duty of due diligence to undertake measures to prevent violence to which the applicant and her mother had been subjected by the applicant's husband. In addition to claims under Article 2 (the right to life) and Article 3 (freedom from torture) of the Convention, the applicant also argued under Article 14 that the domestic law of the respondent State was discriminatory and insufficient to protect women, that domestic violence was tolerated by judicial and administrative bodies, and that the applicant and her mother were victims of a violation of the Convention rights simply because they were women.

The Court first repeated the principles it used in indirect discrimination cases, as set out in detail in *D.H. v. Czech Republic*.[41] In applying these principles to the case at hand, the Court first noted the relevance of the specialised instruments and jurisprudence on violence against women, which define gender-based violence as a form of sex discrimination (e.g. by the Committee on the Elimination of All Forms of Discrimination against Women and the Inter-American Commission on Human Rights). It then discussed the approach to domestic violence in Turkey, holding that the reports of the interveners on the attitudes of the police and the passivity of the judiciary pointed to the existence of a prima facie indication of tolerance towards domestic violence. Finally, the Court assessed whether such attitudes were discernable in the case at hand and whether the applicant and her mother had been discriminated against on account of the State's failure to provide equal protection under the law. It referred to its findings on the ineffectiveness of the criminal law system (under Articles 2 and 3) and the passivity of the authorities, and considered that the violence which the applicant and her mother had suffered constituted gender-based violence and hence sex discrimination. It concluded that the overall unresponsiveness of the judicial system and the impunity enjoyed by the aggressors, as found in the case at hand, indicated that there was an insufficient commitment to take appropriate action to address domestic violence and hence a violation of Article 14, in conjunction with Articles 2 and 3 of the Convention.

However, in the later domestic violence case of *A. v Croatia*, the Court, without applying the three-prong test of *Opuz*, simply held that there was no *prima facie* indication of discrimination and found the claim to be ill-founded.[42] The applicant argued that legislation on domestic violence was discriminatory in that it provided for minor offences proceedings in respect of all acts of domestic violence, including instances of serious physical abuse, while such violence occurring outside a domestic context was dealt with through ordinary criminal-law mechanisms She further submitted that insufficient training in domestic violence was provided to law enforcement and judicial bodies. Finally, she argued that responses by the judiciary to domestic violence were inadequate, in so far as requests for protection orders were refused or ignored and relatively lengthy proceedings were common. The Court noted that the applicant had not produced detailed reports such as those in *Opuz,* holding that the statistical data on judicial cases were insufficient and had been submitted without any

38 *Van Raalte v. Netherlands,* no. 20060/92, ECHR 1997-I.
39 *Karlheinz Schmidt v. Germany*, no. 13580/88, 18 July 1994.
40 *Opuz v. Turkey,* no. 33401/02, 9 June 2009.
41 *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, 13 November 2007.
42 *A v. Croatia*, no. 55164/08, 14 October 2010.

analysis. Hence, it might be argued that that the Court would have applied the *Opuz* approach if NGOs had submitted detailed evidence supporting the applicant's allegations. However, the Court also found it relevant that the authorities did not explicitly exhibit any discriminatory attitudes (despite the fact that no sanctions were ever executed) which points to the Court's retreat to its more conservative individualist approach where intentions play an important role.

2.7 An assessment of the cases

In sex discrimination cases, the Court has formally adopted a 'sameness' approach to discrimination, starting from the presumption of the irrelevance of the sex/gender difference and requiring very weighty reasons for treating men and women differently in order to be justified, regardless of the area of life or the form of discrimination. In most of the cases, the Court has applied this approach and undertaken a strict scrutiny of the measures in question. This approach is apparent in the cases concerning family names, the cases concerning different working patterns and the cases concerning a biological difference. Further, strict scrutiny was applied even in the indirect discrimination case concerning jury service.

In the domestic violence case of *Opuz*, discrimination was found even without a discussion of the comparability of situations and justifications. This moved the Court's approach from a formalistic formula of equal treatment to an approach which is more similar to radical feminists' understanding of equality according to which the relevant question is not that of sameness/difference but rather the question of the distribution of power,[43] which has been adopted by the Committee on the Elimination of All Forms of Discrimination against Women.[44] However, this approach has yet to be consistently applied in domestic violence cases.

In only two categories of cases did the Court apply a lenient scrutiny referring to the State's wide margin of appreciation: those concerning parental leave, and those concerning pension rights. In an early case concerning parental leave, the Court accepted that differences in otherwise similar situations between women and men in respect of their family roles as mothers and fathers ('women's primary role in taking care of children') justified a difference in treatment, due to the lack of a common approach among member states on the issue in question. However, this approach changed in a later case, in which the Court noted the emerging consensus on the more equal sharing of the responsibility for raising children and held that the traditional distribution of gender roles in society could not constitute a justification for different treatment with respect to the issues in question.

Thus, the only category where the Court still applies a lenient scrutiny and gives States a wide margin of appreciation are cases concerning pension rights, on account of the 'complexity of the subject matter at issue', including the financial and social implication of the abrupt

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43 The radical feminist approach to equality (the dominance approach) rejects the difference as a relevant subject of inquiry, conceptualising equality not as an issue of sameness and difference but rather as an issue of dominance and hierarchy: 'male supremacy and female subordination'. Under this approach laws, polices and practices that facilitate and reinforce the subordination of women to men are seen as morally illegitimate and as being required to be prohibited by law. See C.A. MacKinnon, 'Difference and Dominance: On Gender Discrimination' in *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987).

44 The radical character of CEDAW can already be seen in the title of the Convention – starting from the presumption of 'extensive discrimination against women' (furthered by tradition and culture rather than any biological difference), and not from the similarity of the positions of men and women in that it specifically addresses discrimination against women, rather than sex discrimination. It provides for a substantive definition of discrimination, which has been interpreted by the Committee to include gender-specific forms of human rights abuses, such as violations of reproductive rights and gender-based violence, calls on States to adopt temporary special measures, and extends into the 'private' sphere of relationships between individuals. See I. Radačić, '*Konceptualizacija rodne ravnopravnosti u međunarodnom pravu*' (Conceptualisation of Gender Equality in International Law), in Radačić (ed.), *Žene i pravo* (*Women and Law*) (Zagreb: *Centar za ženske studije*, 2009).

changes in the pension system. In these cases concerning 'economic and social policy', the Court accepts the justifications submitted by the Government and respects their decision as to what kind of treatment is required unless it is 'manifestly unreasonable'. Such an approach is different from that of the CJEU, which only accepts very limited, expressly stated justifications for direct sex discrimination in occupational pension schemes. A divergence between the two courts is thus possible in these types of cases.

While the Court's approach of lenient scrutiny in pension rights cases, whereby any justification – including administrative coherence – is accepted unless it is manifestly unreasonable, can be criticised as being overly deferential, the acknowledgement of the 'factual inequality' of women – their disadvantage – is to be applauded. Indeed, it might be that the two courts are not proceeding from the same set of assumptions: with the CJEU starting from the presumption of sameness (in relation to the upbringing of children), whilst the Strasbourg Court starts from a presumption of a difference (in relation to the socio-economic position attached to women's position as primary carers).

While both approaches are limited in challenging the disadvantage – the 'sameness' approach neglects it,[45] while the 'difference approach,'[46] with its requirement of 'special treatment' potentially exacerbating it by furthering gender stereotypes of women as weak,[47] it might be easier for the second approach to take this disadvantage into account. Acknowledging the historical disadvantage attached to women's position as primary carers of children does not necessarily presuppose an endorsement of the view that women's position is or should be normatively different from than of men in respect of the upbringing the children, in that it is more 'natural' for women to take care of children, as the Court has indeed made clear in the *Markin* case. Indeed, the disadvantage/dominance approach is not concerned with the difference per se, but rather with the 'difference the difference makes'.[48] It requires a shift from sameness/difference to an approach that emphasises the question of power and disadvantage.[49] This approach has recently started to be applied in domestic violence cases; however, it is still to be settled.

As the disadvantage approach has a greater potential to achieve substantive equality than a formal approach, it is proposed that it should be applied to all sex discrimination cases. The disadvantage approach would start from the acknowledgement of gender inequality, discrimination against women, rather than a presumption of the irrelevance of the sex/gender difference; the Court would be required to pay attention to the political context of power relations between the sexes, taking account of multiple systems of oppression and the intersectionality of discrimination.[50] It would have to assess in all claims, whether made by men or women, how the challenged measure has historically affected unequal gender relations, paying attention to the discursive effects of its judgements. Hence, the question

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45 Under this approach, a legitimate solution would be to lower the protection for women to the same level as men. Indeed, as a response to the judgment in the case *Abdulaziz, Cabales and Balkandali v. the UK* (note 33), the UK Government strengthened immigration rules in respect of brining wives, thereby lowering the protection for both women and men. Hence, even though the applicants won the case, they did not get the substantive right they were seeking.

46 This 'difference approach' is associated with cultural feminists. It stresses the relevance of the sex/gender difference and demands its accommodation, arguing against accepting the male norms. This strand of feminism can be traced to Carol Gilligan's research on the moral development of young girls and boys described in *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982).

47 For criticism of both approaches as endorsing a male standard of comparison, see C. MacKinnon, supra note 44, at 39.

48 Ibid.

49 This approach is based on a radical feminist understanding of equality (see note 43).

50 The concept of the intersectionality of discrimination refers to the interrelatedness of the different systems of oppression. It was first developed by coloured feminists. See for example Crenshaw, 'Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anti-Racist Politics' *University of Chicago Legal Forum* 139 (1989).

should not be whether women and men are equally placed to raise children, have equal working patterns and are biologically different, but what the consequences of these differences (whether biological or social, real or imagined) are and how to address them. The answer should not depend on the consensus or subject-matter at issue.

3. Conclusion

Since the Court's first case of sex discrimination in 1985, its jurisprudence has been developed extensively and now covers different areas of social life, including parental leave, pension rights, immigration rules, jury service, social benefits and contributions, as well as family names. Protection has been extended even to cases concerning domestic violence, where at issue were the positive obligations on the state to secure equality of women in the 'private sphere'.

As the Court starts from the presumption of similar situations, the predominant test is that of the prohibition of different treatment. While the Court formally applies strict scrutiny to cases of sex discrimination, it leaves the States with a wide margin of appreciation in respect of pension rights formally on account of the complexity of the subject-matter, but possibly because of the difficulty in applying the sameness approach to areas concerning the historical economic disadvantage of women. However, the Court should explicitly state its normative position, rather than simply deferring to the State's margin of appreciation on account of the 'complexity of the issue'. Its normative position should be that of challenging disadvantage, as proposed under a 'disadvantage approach'. This approach has already been applied in domestic violence cases, although it has yet to be confirmed in the Court's jurisprudence.

EU Policy and Legislative Process Update

October 2011 – May 2012

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1. On 24 May 2012 the European Parliament adopted a resolution on equal pay for men and women. The Parliament urged the European Commission and the Member States to reinforce existing legislation with appropriate types of effective, proportionate and dissuasive sanctions for employers in breach thereof.

   European Parliament resolution of 24 May 2012 with recommendations to the Commission on the application of the principle of equal pay for male and female workers for equal work or work of equal value:
   http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0225+0+DOC+XML+V0//EN&language=EN#BKMD-6
   See also:
   http://www.europarl.europa.eu/news/en/pressroom/content/20120523IPR45701/html/Gender-pay-gap-Parliament-calls-for-stiffer-sanctions

2. On 22 May the European Parliament adopted a resolution on a 2020 Perspective for Women in Turkey. Amongst other things, it called upon the Turkish Government to uphold and strengthen the principles of equality and women's rights by adopting and amending its legislative framework, including the planned process for a new constitution. The resolution also addresses gender violence as an issue on which effective action should be taken. Other subjects are participation on the labour market, education and the political participation of women.
   The resolution can be found on:
   http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0212+0+DOC+XML+V0//EN&language=EN

3. In May the Update of the Network's report 'The Transposition of Recast Directive 2006/54/EC' was published on the website of the European Commission. Also the update of the report Gender Equality in 33 European Countries was published.

   The reports can be found on:
   http://ec.europa.eu/justice/gender-equality/files/recast_update2011_final_en.pdf
   http://ec.europa.eu/justice/gender-equality/files/gender_equality_law_in_33_european_countries_update2011_en.pdf

4. On 16 April 2012 the European Commission published a Report on the application of the EU Charter of fundamental rights. In paragraph 2 of the report the European Commission stresses the importance of the promotion of equality between men and women in the EU.
   The report can be found on:
   http://ec.europa.eu/justice/fundamental-rights/files/2011-report-fundamental-rights_en.pdf

5. In March the European Institute for Gender Equality (EIGE) presented its work on 'gender-based violence' to a network of stakeholders working on statistics.
   http://www.womenlobby.org/spip.php?article3365&lang=en

6. On 13 March 2012 the European Parliament adopted a resolution on equality between women and men in the European Union. The resolution stresses, amongst other things, the need for the economic independence of women, the need for action against gender-based violence and the need to take appropriate measures to reduce the gender pay gap and the gender pension gap.

The resolution can be found on:
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0069+0+DOC+XML+V0//EN&language=EN
Statement by European Commissioner Reding on the resolution:
http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/173&format=PDF&aged=0&language=EN&guiLanguage=en

7. On 5 March the European Commission published a report on the gender balance on company boards. The report shows that limited progress towards increasing the number of women on company boards has been achieved one year after EU Justice Commissioner Viviane Reding called for credible self-regulatory measures. Just one in seven board members at Europe's top firms is a woman (13.7 %). This is a slight improvement from 11.8 % in 2010. However, it would still take more than 40 years to reach a significant gender balance (at least 40 % of both sexes) at this rate.
See the report 'Women in economic decision-making in the EU'
http://ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf

8. The second European Equal Pay Day (EEPD) took place on 2 March 2012. This EU-wide day aims to raise awareness of the pay gap that exists between women and men in the different EU Member States and to encourage action to close this gap.
http://ec.europa.eu/justice/newsroom/gender-equality/news/120307_en.htm

9. On 17 February 2012 European Commissioner Reding delivered a speech entitled 'Increasing gender balance on company boards: Good for businesses and the economy'.
http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/110&format=PDF&aged=1&language=EN&guiLanguage=en

10. On 22 December 2011 the European Commission adopted guidelines to help the insurance industry implement unisex pricing, after the Court of Justice of the European Union ruled that different premiums for men and women constitute sex discrimination (the *Test-Achats* case). Vice-President Viviane Reding, the EU's Justice Commissioner, met with leading EU insurers in September 2011 to discuss how the industry should adapt to the Court's ruling.

    The Guidelines on the application of Council Directive 2004/113/EC to the insurance industry, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (*Test-Achats*), can be found on:
    http://eur-ex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:011:0001:0011:EN:PDF

Court of Justice of the European Union Case Law Update

October 2011 – May 2012

- **Case C-415/10 of 19 April 2012**
  Galina Meister v Speech Design Carrier Systems GmbH
  Council Directive 2000/43/EC

Facts

Ms Meister, a Russian national, holds a Russian degree in systems engineering, which has been recognised in Germany as being equivalent to a German degree awarded by a *Fachhochschule* (university of applied science).

Speech Design published a newspaper advertisement for the purposes of recruiting an 'experienced software developer', to which Ms Meister responded by applying for the post on 5 October 2006. By a letter dated 11 October 2006, Speech Design rejected her application without inviting her to a job interview. Not long afterwards, a second advertisement, with the same content as the first, was published by that company on the internet. Ms Meister reapplied, but Speech Design once again rejected her application, without inviting her to an interview and without informing her on what ground her application had been unsuccessful.

She claimed that she was treated less favourably than another person in a comparable situation, on the grounds of her sex, age and ethnic origin. She first claimed compensation and, secondly, she requested the production of the file for the person who had been engaged, which would enable her to prove that she is more qualified than that person. The national court asked the Court of Justice whether EU law would establish the right to information under these circumstances and whether the refusal to provide such information would constitute a presumption of discrimination.

Judgment of the Court of Justice

1. Article 8(1) of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 10(1) of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation and Article 19(1) of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation must be interpreted as not entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process.
2. Nevertheless, it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it.

Opinion of Advocate General Mengozzi delivered on 12 January 2012
The Advocate General advises the Court of Justice:

1. Article 8(1) of Council Directive 2000/43/EC, Article 10(1) of Council Directive 2000/78/EC, and Article 19(1) of Directive 2006/54/EC are not to be interpreted as meaning that a job applicant must, if his application was unsuccessful, be able to force the employer to tell him whether, and on the basis of what criteria, that employer has engaged another applicant, and, if so, for what reasons, even if it transpires that the unsuccessful applicant shows that he fits the required profile set out in the advertisement published by the employer.

2. Under Article 8(1) of Directive 2000/43/EC, Article 10(1) of Directive 2000/78/EC and Article 19(1) of Directive 2006/54/EC, the referring court must assess the attitude of an employer, consisting in a refusal to disclose the information requested by the unsuccessful job applicant as to the outcome of the recruitment process and as to the criteria on the basis of which one of the applicants has been engaged, not only by considering the failure of the employer to respond but, on the contrary, also by taking account of the wider factual context in which that occurred. In that regard, the referring court may also take into account such evidence as the fact that the applicant's qualifications clearly match the post to be filled, the failure to call her for a job interview and the fact that the employer persisted in refusing to call her for an interview where he ought to have conducted a second selection process for that same job vacancy.

▪ Court order Case C-572/10, Clément Amédée v Garde des sceaux, Ministre de la justice et des libertés, Ministre du budget, des comptes publics, de la fonction publique et de la réforme de l'État, 28 March 2012

Article 157 TFEU

Facts

Amédée, who worked as a civil servant, took early retirement. According to French legislation civil servants who have taken care of a child for at least two months continuously, had maternity or parental leave, or have taken leave for the adoption of a child may add an extra year of service to their years of service.

The question was whether this neutral condition of taking care of a child for at least two months continuously would constitute indirect discrimination, since in general mostly women will fulfil that condition. According to Amédée women do comply with the period of two months care automatically, in contrast to men, because they are granted maternity leave.

Judgement of the Court of Justice

Case C-572/10 is removed from the register of the Court at the request of the referring court. The Opinion of Advocate General has been published on 15 December 2011.

Opinion of Advocate General N. Jääskinen of 15 December 2011
The Advocate General advises the Court of Justice:

1. National provisions as those in the main proceeding cannot as such be considered to be indirectly discriminatory in the sense of Article 141 EC, because more women than men benefit from this calculation because the paid maternity leave applies only to mothers, biologically. The Advocate General is of the opinion that the fact that more women benefit from this measure does not constitute indirect discrimination as such, since also men can apply for this additional service year when they choose to take care of their child for at least two months continuously.
2. Given the negative answer to the first question, the question with regard to possible justifications does not need to be answered, according to the Advocate General. The fourth question, with regard to the effect of the judgment in time, does not need to be answered either, since the conditions of the French legislation do not constitute indirect discrimination in his opinion.
3. The third question, whether the French rules would violate Council Directive 79/7/EEC, is not answered, since the Directive is not applicable on the facts of the case.

PENDING CASES BEFORE THE COURT OF JUSTICE

- **Case C-44/12: Reference for a preliminary ruling from the Court of Session (Scotland), Edinburgh (United Kingdom) made on 30 January 2012**
  Andrius Kulikauskas v Macduff Shellfish Limited, Duncan Watt
  Directive 2006/54/EC

Referred questions

1. With reference to the Recast Directive (2006/54/EC), is it unlawful discrimination to treat a person ('A') less favourably on the grounds of a woman's ('B's') pregnancy?
2. With reference to the Recast Directive (2006/54/EC), is it unlawful discrimination to treat a person ('A') less favourably on the grounds of the pregnancy of a woman ('B') who is (i) his partner, or (ii) otherwise associated with him?

- **Case C-7/12: Reference for a preliminary ruling from the Augstākās tiesas Senāta (Republic of Latvia) lodged on 4 January 2012**
  Nadežda Riežniece v Zemkopības ministrija (Republic of Latvia), Lauku atbalsta dienests
  Directive 2002/73/EC

Referred questions

1. Must the provisions of Directive 2002/73/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, and of the Framework Agreement on Parental Leave be interpreted as meaning that an employer is precluded from undertaking any action (in particular, the assessment of an employee while absent) which might result in a female employee on parental leave losing her post after returning to work?
2. Does the answer to the previous question differ if the reason for such action is the fact that, due to the economic recession in a Member State, in all the administrations of the State the number of civil servants has been optimised and posts abolished?
3. Must the assessment of an applicant's work and merits which takes into account his latest annual performance appraisal as a civil servant and his results before parental leave be regarded as indirect discrimination when compared to the fact that the work and merits of other civil servants who have continued in active employment (taking the opportunity, moreover, to achieve further merit) are assessed according to fresh criteria?

- **Case C-5/12: Reference for a preliminary ruling from the Juzgado de lo Social de Lleida (Spain) lodged on 3 January 2012**
  Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)

Referred questions

1. Does a national law, specifically Article 48(4) of the *Estatuto de los Trabajadores*, which, in the case of childbirth, recognises employed mothers as holders of a primary and separate right to maternity leave once the six-week period following the birth has elapsed, except in cases where the mother's health is at risk, and employed fathers as holders of a secondary right, which can be enjoyed only where the mother also has the status of an employed person and elects for the father to take a designated part of that leave, contravene Council Directive 76/207/EEC and Council Directive 96/34/EC?
2. Does a national law, specifically Article 48(4) of the *Estatuto de los Trabajadores*, which, in the case of childbirth, recognises the primary right of mothers, but not of fathers, to suspend their contract of employment and to return to the same job, paid for by the social security system, even once the six-week period following the birth has elapsed, except in cases where the mother's health is at risk, so that the taking of leave by a male

employee is dependent on the child's mother also having the status of an employed person, contravene the principle of equal treatment, which prohibits discrimination on grounds of sex?

3. Does a national law, specifically Article 48(4) of the *Estatuto de los Trabajadores*, which recognises employed fathers as holders of a primary right to suspend their contract of employment and to return to the same job, paid for by the social security system, when they adopt a child but, by contrast, when they have a child by birth, does not give employed fathers their own separate right, independent of that of the mother, to suspend the contract, recognising only a right deriving from that of the mother, contravene the principle of equal treatment, which prohibits discrimination?

▪ Case C-680/11: Reference for a preliminary ruling from Upper Tribunal (United Kingdom) made on 22 December 2011

Anita Chieza v Secretary of State for Work and Pensions

Referred questions

1. Is the differential treatment on the basis of gender under the incapacity benefit scheme necessarily and objectively linked to the difference in pensionable age so that it falls within the scope of the derogation under Article 7(l)(a) of Directive 79/7/EEC in circumstances where a claimant:

   (a) is a woman;
   (b) falls ill before reaching pensionable age (for a woman, 60);
   (c) receives statutory sick pay (SSP) from her employer for 28 weeks, taking her past pensionable age;
   (d) after reaching pensionable age, makes a claim for short-term incapacity benefit;
   (e) meets the contributions requirements for entitlement to short-term incapacity benefit;
   (f) is denied short-term incapacity benefit because as a matter of law her 'period of incapacity for work' began after she reached pensionable age (because legislation provides that a period of entitlement to SSP does not count as a period of incapacity for work),

   but where a male claimant who falls ill shortly before the age of 60, receives SSP from his employer for 28 weeks, and makes a claim for short-term incapacity benefit at the age of 60, will in principle qualify for short-term incapacity benefit, as his period of incapacity for work began before he attained pensionable age, albeit after reaching 60?

▪ Case C-614/11: Reference for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 30 November 2011

Niederösterreichische Landes-Landwirtschaftskammer v Anneliese Kuso

Directive 76/207/EEC

Referred questions

Does Article 3(1)(a) and (c) of Directive 76/207/EEC, as amended by Directive 2002/73/EC, preclude national legislation under which discrimination on grounds of sex in connection with the termination of an employment relationship which is effected solely by lapse of time pursuant to a fixed-term individual employment contract entered into before the entry into force of the above directive (in this case before Austria's accession to the European Union) is to be examined not on the basis of a contractual provision stipulating the fixed term to be a 'condition governing dismissal' but only in connection with the rejection of the request for a contract extension as a 'condition governing recruitment'?

European Court of Human Rights Case Law Update

October 2011 –May 2012

▪ Case of Susan v. Richardson against the United Kingdom (Application no. 26252/08) of 10 April 2012

Facts

In 2006 and 2008 the applicant requested a pension forecast from the Department for Work and Pensions ('DWP'). These forecasts were calculated on the basis that the applicant would become entitled to receive her State Pension from the age of 65 onwards.

Both State Pension forecasts expressly stated that the pension the applicant might receive could be different from the forecast, either because of changes in the applicant's circumstances or to the law. Both also stated that they were not formal decisions about her pension. The applicant complained that the deferral of the payment of her State Pension until she reached the age of 65 would cause her financial hardship, since she had budgeted to retire at 60. She argued that she was the victim of sex and age discrimination, because women born before 6 April 1950 would receive the State Pension at the age of 60. According to the Spanish government the measure would not constitute discrimination. A man with the same date of birth as the applicant would become eligible for a State Pension at the same age as the applicant.

The Court

As regards sex discrimination the Court did not find that the applicant would be treated any differently under the Pensions Act 1995 from a man with the same date of birth: they will both become entitled to a State Pension at the age of 65. It follows that the applicant's complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 was manifestly ill-founded and therefore inadmissible, pursuant to Article 35 paragraphs 3 and 4 of the Convention.

Judgment

http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=93154110&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=98043&highlight=

▪ Case of Konstantin Markin v. Russia (Application no. 30078/06) of 22 March 2012

Facts

The applicant served in the army as a radio intelligence operator. Upon the birth of his third child the couple divorced. The children would live with the applicant, as was agreed by an agreement. He asked the head of his military unit for three years' parental leave. His request was refused because three years' parental leave could only be granted to female military personnel. The applicant was allowed to take three months' leave. However, during that period he was recalled to duty. The representatives submitted the argument that the applicant did not have sole care of the children.

The applicant appealed, alleging that the refusal to grant him three years' parental leave had violated the principle of equality between men and women as guaranteed by the Constitution. He appealed to the Constitutional Court that found the provision to be in accordance with the Constitution since 'By granting, on an exceptional basis, the right to parental leave to servicewomen only, the legislature took into account, firstly, the limited participation of women in military service and, secondly, the special social role of women associated with motherhood'.

The Court
The Court considered that the exclusion of servicemen from entitlement to parental leave, while servicewomen are entitled to such leave, is not reasonably or objectively justified. The Court concluded that this difference in treatment, of which the applicant was a victim, amounted to discrimination on grounds of sex.

There was therefore a violation of Article 14 taken in conjunction with Article 8.

Judgment
http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=30078/06&sessionid=97832509&skin=hudoc-en
Press release
http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=97313&sessionId=97835845&skin=hudoc-pr-en&attachment=true

▪ Case of Gas and Dubois v. France (Application no. 25951/07) of 15 March 2012

Facts
The couple Gas and Dubois (both female) have been cohabiting since 1989. Dubois gave birth to a daughter conceived in Belgium by means of medically-assisted procreation with an anonymous donor. The couple entered into a civil partnership agreement two years after the birth of the child. Ms. Gas requested the adoption of the child, supported by Ms. Dubois. This request was refused because Gas and Dubois could not have shared parental responsibility as permitted by the Civil Code in the case of adoption by the spouse of the child's biological mother or father; the adoption would deprive Ms Dubois of all rights in relation to her child.

The applicants complained to the ECHR against the refusal. They maintained that this decision had infringed their right to private and family life in a discriminatory manner, in breach of Article 14 (the prohibition of discrimination) taken in conjunction with Article 8 (the right to respect for private and family life).

The Court
The Court pointed out that, according to its determined case law, a difference in treatment between persons in relevantly similar situations is discriminatory if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court further reiterated that differences based on sexual orientation required particularly serious reasons by way of a justification. However, the Court considered that, in view of the social, personal and legal consequences of marriage, the applicants' legal situation could not be said to be comparable to that of married couples when it comes to adoption by the second parent. The Court reiterated that the European Convention on Human Rights did not require member States' Governments to grant same-sex couples access to marriage. If a State chooses to provide same-sex couples with an alternative means of recognition, it enjoys a certain margin of appreciation regarding the exact status conferred.

The Court therefore held that there had been no violation of Article 14 taken in conjunction with Article 8.

Judgment (in French only)
http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=904041&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649
Press release
http://cmiskp.echr.coe.int////tkp197/portalhbkm.asp?sessionId=97881745&skin=hudoc-pr-en&action=request&poll=3#

▪ Case of Raviv v. Austria (Application no. 26266/05) of 13 March 2012

Facts

In March 2002, an amendment to the Austrian General Social Security Act (*Allgemeines Sozialversicherungsgesetz*) entered into force, providing for the possibility of obtaining pension entitlements, by paying contributions on a voluntary basis and at preferential rates, for persons who had been victims of Nazi persecution and had been prevented from accumulating any insurance periods before their emigration.

Ms Raviv requested the Austrian Pension Insurance Office to apply those provisions to her case, since she lived in Israel, as an Austrian and an Israeli national. In October 2002, the office decided that she was entitled to pay contributions for a total of 180 insurance months. In addition, certain periods of secondary and university education were accepted as substitute periods for the purpose of the pension insurance. Ms Raviv appealed against the decision, arguing in particular that periods during which she had raised her children should be counted for the purpose of calculating her pension.

According to her, the fact that the calculation did not include the years during which she had raised her children would discriminate against her in relation to women who had not been forced to emigrate and had thus raised their children in Austria.

The Court

The Court did not find that there was a difference in treatment – based on an aspect of personal status, as required by Article 14 – between those under the special regime who could not have child-raising periods abroad credited and those under the regime who could have periods of higher education abroad credited.

Indeed, Ms Raviv herself, while she could not obtain credited periods for child-raising abroad, had obtained credited periods for higher education spent abroad as substitute periods.

Judgement

http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=903611&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

Press release

http://cmiskp.echr.coe.int////tkp197/portalhbkm.asp?sessionId=97890665&skin=hudoc-pr-en&action=request&poll=3#

▪ Case of B. v. Romania (Application n° 42390/07) of 10 January 2012

Facts

The applicant, Ms B., is a Romanian national who was born in 1958 and lives in Buhuşi.

She suffered from a mental health disorder and was admitted, on a compulsory basis, to the psychiatric wing of various hospitals on a number of occasions between 2000 and 2008. In 2006, she lodged an oral complaint with the police against D, alleging rape. She refused to be examined by a gynaecologist, claiming that she had been the victim of attempted rape rather than the full act. A decision was taken not to prosecute. Relying on Article 3, Ms B. alleged, in particular, that the investigation by the national authorities into her allegations of attempted rape was ineffective.

The Court

Given the psychiatric illness suffered by the applicant and which necessitated special diligence on the part of the prosecutor, and adequate social protection, the Court considered that the investigation into her accusations of rape had not adhered to the requirements of Article 3 of the Convention.

The Court therefore concluded that there had been, in this case, a violation of the positive obligations on the respondent State under the procedural aspect of Article 3 of the Convention.

Judgement (in French only)
http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=42390/07%20%7C%2042390/07&sessionid=98663870&skin=hudoc-en
Press release
http://cmiskp.echr.coe.int/tkp197/view.asp?action=open&documentId=898154&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

News from the Member States, EEA Countries, Croatia, FYR of Macedonia and Turkey

October 2011 – April 2012

AUSTRIA – *Neda Bei*

Policy developments

The necessity to cope with the financial crisis and, moreover, with austerity criteria within a European institutional framework is still the main issue of political debate. However, the media and citizens are preoccupied with the findings of a parliamentary committee, which took up its work in October 2011 and has since then investigated cases of corruption which occurred in the context of privatisation dating back to 2000. Polls taken in March 2012 point to a widespread and deep mistrust in politicians and established institutions. Also in March 2012, three new political parties were launched: the 'Pirates'; a split-off from the *ÖVP*, stressing free market policies and supported by the retired Austro-Canadian entrepreneur Frank Stronach; and the 'Online Party', which promotes political decisions mainly by internet votes. The possible impact of these newly founded parties on the political landscape is, of course, difficult to tell. The Federal Minister for Women and Civil Service has kept the gender pay gap and wage transparency in the private as well as in the public sector a focus of her activities. A second focus is the representation of women on company boards. By the end of 2011, the Minister had provided a first assessment of the self-binding measure taken for company boards of essentially state-owned companies in March 2011; on the one hand, she stated that the measures had had a certain impact, but on the other, she was far from satisfied and informed the press that she was considering mandatory measures. Furthermore, the Minister launched a campaign to raise awareness of the multiple disadvantages of part-time employment, and a further campaign concerning domestic violence against women. The Minister continued her focus on the promotion of women in sports.

Legislative developments

On 1 January 2012 amendments to the Child Care Allowance Act entered into force, providing for a total of five models in the case of a person having an additional income while receiving the allowance.[1]

Furthermore, on 1 January 2012, the obligation to establish income reports entered into force for enterprises employing between 500 and 1000 persons on a permanent basis.[2] The negotiations on introducing a mandatory month of fathers' leave have come to a standstill. Other negotiations on legislative plans are moving on reluctantly, as are the negotiations on amending the Equal Treatment Act, which had been launched in October 2011.[3] A new topic introduced by the Minister for Women and Civil Service is mandatory Affirmative Action Plans for women in private enterprises. The Ministry of Labour, Social Affairs and Consumer Protection stands by its plan to broaden horizontal protection against discrimination in access to and the supply of goods and services. The budget for 2012 passed through Parliament in

1 OJ Nos. I 116/2009, I 11/2011 and I 139/2011. One of the objectives of the amendment was to simplify the hitherto rather complicated calculation of admissible additional income, another one was the harmonisation of eligibility criteria for employees, on the one hand, and for self-employed persons, on the other. That the new periods for receiving the benefit were not harmonised with the periods of parental leave currently provided for by labour law might be seen as a problem, however, cf. H. Hess-Knapp '*Die Novelle zum Kinderbetreuungsgeldgesetz*', *infas* 2/2012 (February) pp. 53-57.

2 OJ. No. I 7/2011, gradual entry into force depending on the size of the company; cf. EGELR 2011/2, 43.

3 See EGELR 2011/2, 44.

December.[4] An extensive accompanying legislation passed through Parliament on 28 March 2012; this legislation, not yet formally in force, comprises measures which will also have an impact on employment in the public sector and, furthermore, on social security and labour law, as well as on the pension system.[5]

Administrative Law

The Minister for Science and Research issued an Affirmative Action Plan according to the Federal Equal Treatment Act.[6] On 15 March 2012, the Federal Minister for women's affairs issued a circular, in the form of a directive *(Erlass)*, on public procurement by the Federal Chancellery under the threshold of EUR 100 000, requiring positive action as a prerequisite to tendering enterprises; above this threshold, the EU directives on public procurement apply.[7]

Case law of national courts

Supreme Court

If an employer refuses to renew a fixed-term employment contract for an indefinite period, so that the (male) employee could take parental leave, such a refusal is, as opposed to the Equal Treatment Commission's opinion (in the given case), not to be considered as discrimination as regards working conditions. The employer's refusal would have to be assessed in the light of European Court's ruling in the *Jiménez Melgar* case, according to the prohibition of discrimination as regards access to employment.[8] The Court decided, according to the preliminary ruling in Case C-123/10, *Waltraud Brachner* v *Pensionsversicherungsanstalt*, that the extraordinary pension adjustment in 2008 not only treated pensioners with higher pensions in an unjustifiable way to the disadvantage of the group of pensioners receiving minimum benefits and entitled to a compensatory supplement, but that within the latter group women were indirectly discriminated against within the meaning of Article 4(1) of Directive 79/7/EEC. Furthermore, the principle of equal treatment could only be upheld by extending the more favourable standard to the disadvantaged group. As a result, the group of minimum pensioners was entitled to an increase of 2.81 % of their pension instead of 1.017 %, regardless of their sex.[9] The Supreme Court's decision will be effective in analogous cases for more than 140 plaintiffs besides Ms Brachner. Albeit the Court pointed out that national courts were obliged to disregard the relevant legal provision before any formal legislative abrogation, the implications in analogous cases, which had *not* been brought before the court, are not clear and should probably be best resolved by legislation.[10] In a case concerning the obvious sexual harassment of a software technician with protected status under the Disabled Persons Act, the Supreme Court clarified the shared responsibility of the employer and 'third persons' to provide sufficient redress according to the Equal Treatment Act. This responsibility, the Court stated, could not be understood in a formal way and was thus narrowed down to the fully liable partners of a limited partnership (*Kommanditgesellschaft*); on the contrary it had to be taken into account that the alleged harasser had de facto acted as the defendant's general manager and the plaintiff's superior.[11]

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4 *Bundesfinanzgesetz 2012*, OJ I 110/2011.

5 First Stability Act 2012 (taxes), planned entry into force: 1 April 2012, http://www.parlinkom.gv.at/PAKT/VHG/XXIV/I/I_01680/index.shtml; Second Stability Act 2012, http://www.parlinkom.gv.at/PAKT/VHG/XXIV/I/I_01685/index.shtml (not yet in force, planned entry into force 1 May 2012); cf. for an overview the minority report of the Green Party http://www.parlinkom.gv.at/PAKT/VHG/XXIV/I/I_01707/fnameorig_246911.html, all accessed 2 April 2012.

6 Administrative regulation *(Verordnung)* 27 February 2012 OJ No. II 49/2012 complete with two annexes A and B, Federal Legal Information System RIS, http://www.ris.bka.gv.at/, accessed 4 April 2012.

7 GZ BKA-180.310/0041-I/8/2012, not (yet) published.

8 Supreme Court 25 October 2011, 9 ObA 78/11b; case C-438/99 *Maria Luisa Jiménez Melgar* v *Ayuntamiento de Los Barrios* [2001] ECR I-06915.

9 Supreme Court 6 December 2011, 10ObS129/11k.

10 Cf. M. Thomasberger '*Österreichisches Pensionsrecht und Gleichbehandlung der Geschlechter – Verfahren anlässlich der Pensionserhöhung* 2008 (Rs Brachner)' *DRdA* 2/2012 (April 2012) pp. 271-275.

11 Supreme Court 21 December 2011, 9 ObA 118/11k.

Constitutional Court

The competent Austrian authorities had denied citizenship for two children born by a surrogate mother in the USA; their genetical parents, an Austrian woman and an Italian man, had been acknowledged as both the genetical and legal parents by the competent US authorities. The Austrian Federal Ministry of the Interior insisted that only a woman having given birth can be considered a mother in the context of creating citizenship. The Court rejected this notion as being arbitrary, that it was not in conformity with the constitutional principle of equality, and it duly repealed the decision.[12]

High Administrative Court

Neither the child-care allowance *(Kinderbetreuungsgeld)* nor, a fortiori, the family allowance *(Familienbeihilfe)*, the latter not depending on the entitled person's income, is to be considered a subsidiary social welfare benefit within the meaning of Article 28 paragraph 2 Directive 2004/83/EC, OJ L 304, of 30 September 2004, p.12.[13] The working group for equal treatment at the University of Salzburg complained to the Court about the chancellor's decision not to continue negotiations with all the applicants for the vacant chair of stochastics, especially not with the candidate whom the selection committee had listed as being in third place. However, the Court did not agree with the complainant that the legal precept of promoting women should have rightfully applied to this case.[14] Finally, the Court decided according to the preliminary ruling in Case C-256/11, *Dereci and Others* v *Bundesministerium für Inneres*, that, inter alia, an Austrian citizen could not be forced to leave the country in order to join her Turkish husband whose right to residence the Austrian authorities had rejected.[15]

Equality body decisions/opinions

In three cases brought before Senate I of the Federal Equal Treatment Commission (public sector) since October 2011, the Equal Treatment Commission found that the provisions of the Federal Equal Treatment Act on the preferential treatment of women in career advancement to higher functions or positions as well as the relevant Affirmative Action Plans had been infringed. In a further case, a university's internal tender exclusively addressed to women was considered not to be discriminatory, but an admissible measure to promote women.[16]

Senate I of the Equal Treatment Commission (private sector, world of work – ETC-I, *GBK-I*) has published around 15 opinions on individual cases since the summer of 2011. In several cases the complaints were answered in the negative (I/263/10 – termination of employment; I/249/09 – man applying for a job as a packager; I/254/09 – job application, ambulance-woman in private emergency medical services; I/267/10 – male manager applying for parental leave as regards access to employment and other working conditions; I/227/09 – equal pay, male complainant; I/294/10 – notice given to a female export clerk, legitimate economic reasons). In two cases that concerned women employed in qualified positions, Senate I, in extensive opinions, found that there had been discrimination in more than one situation (I/248/09 – pay, career advancement, working conditions, the termination of employment; I/247/09 – working conditions, the termination of employment).

In the rather complex case of a father who had been denied parental part-time leave, Senate I found that he had been discriminated against by this denial of working conditions, but not upon the termination of the employment. Furthermore, Senate I stated that he had

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12 Constitutional Court 14 December 2011, B 13/11.

13 High Administrative Court 29 September 2011, 2011/16/0065, referring to Case C-543/03 *Christine Dodl and Petra Oberhollenzer* v *Tiroler Gebietskrankenkasse* [2005] ECR I-05049, and further to OGH 26 June 2008, 10 Ob S 53/08.

14 High Administrative Court 29 November 2011, 2010/10/0052.

15 ECJ 15 November 2011, not yet published in the ECR: High Administrative Court 19 January 2012, 2011/22/0313 et al.

16 Federal Equal Treatment Commission (Senate I), opinions 103 - 106, as published on http://www.frauen.bka.gv.at/site/5538/default.aspx, accessed 30 March 2012.

been subject to sex-related harassment by a (male) colleague, namely not by being called inter alia a backstabber *(Kameradenschwein)* because of his plans to take parental part-time leave, but because he was mocked that he only wanted to do so merely because his wife had demanded this; the sex-related element in this, the Senate stated, was the connection to sex-role stereotypes (I/271/10).

Two further opinions by Senate I concerned sexual harassment (I/261/10 – male employee of a technical call-centre with multinational staff verbally abused by a woman; I/274/10 – a female clerk by a male colleague, although one incident was classified as criminal assault which was outside the material scope of the Equal Treatment Act).

Furthermore, two cases of multiple discrimination brought before the Equal Treatment Commission/Senate I concerned sex/age (I/259/10-M – no discrimination when applying for a job, complainant refused a hearing by the Senate) and sex/ethnicity. The latter case concerned the termination of the employment of a Turkish temporary agency worker and divorcee who had asked for leave to care for his sick child (no discrimination on grounds of ethnic origin; discrimination on grounds of gender; I/264/10-M).[17]

Senate III of the Equal Treatment Commission (private sector, access to and supply of goods and services) found that free bus travel, offered to women by public transport on Women's Day, was to be considered a legitimate and proportionate positive action within the meaning of the Equal Treatment Act and did not discriminate directly against the male complainant.[18]

Miscellaneous

Case law of other bodies

The Upper Disciplinary Commission (federal civil servants) stated that the supervisors concerned, when confronted with cases of alleged mobbing and sexual harassment, should not, of their own volition, check and assess evidence in detail before a formal disciplinary procedure had been instigated. Subject to a proper hearing by the disciplinary commission, the inquiry into facts and the assessment of evidence in detail could take place in the form of a dialogue, especially in the presence of the elected staff members' representatives *(Dienststellenausschuss)* whose right to participate in disciplinary hearings was not to be infringed. In the given case, the decision based on the premature assessment described was overruled, having been to the detriment of the woman who had been harassed.[19]

Reports and studies

The report by the national audit institution *(Rechnungshof)* on income was launched in December 2011, referring to the years 2009 and 2010. The report especially mentions women's presence on company boards.[20]

In October 2011, the Minister for Women and Civil Service presented the 'Gender Index', a compilation of gendered statistics in various areas.[21] In November 2011, she launched, in a consolidated version, the regular biannual report on the government's measures

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17 Opinions of the Equal Treatment Commission (private sector), Senate I – discrimination on grounds of sex, multiple discrimination: http://www.frauen.bka.gv.at/site/6611/default.aspx, accessed 20 October 2011. If not explicitly mentioned otherwise, the persons concerned were women.

18 GBK III/73/11, September 2011, http://www.frauen.bka.gv.at/DocView.axd?CobId=45917, accessed 30 March 2012.

19 Upper Disciplinary Commission (*Disziplinaroberkommission*, second instance) 7 November 2011, 96/12-BK/11, http://www.ris.bka.gv.at/Dokumente/Dok/BEKRS_20111107_96_12_BK_11_01/BEKRS_20111107_96_12_BK_11_01.pdf, accessed 30 March 2012.

20 http://www.rechnungshof.gv.at/aktuelles/ansicht/detail/rechnungshof-veroeffentlicht-einkommensbericht-20111.html, accessed 2 April 2012.

21 http://www.frauen.bka.gv.at/DocView.axd?CobId=46227, accessed 30 March 2012.

to reduce disadvantages for women.[22] Furthermore, she presented a case study on lethal violence against women.[23]

BELGIUM – *Jean Jacqmain*

Policy developments

At the end of the longest political crisis in world history, a federal government based on a broad coalition was finally pieced together with a programme of severe budgetary austerity which it immediately undertook to apply. Meanwhile, members of the federal Parliament seem to be left free to pass legislation provided it does not entail any extra public expenditure.

Legislative developments

Career break made less attractive

Under the career break scheme, a staff member is entitled to take full-time or part-time leave; no remuneration is paid during the period of absence, but a modest benefit (e.g. EUR 347.75 net per month as from 1 May 2011 in case of full-time leave) is provided by the statutory unemployment insurance scheme. The maximum duration of a career break used to be 6 years full-time and 6 years part-time. As from 1 of January 2012, a Royal Decree of 28 December 2011[24] reduced the maximum to 5 years full-time and 5 years part-time.

For tenured staff members, who are entitled to a retirement pension in the civil servants' scheme, a maximum of 5 years in the full-time career break scheme and 5 years in the part-time scheme could be taken into account for the calculation of one's career which gives access to the pension. As from 1 January 2012 (but only for new applications), Article 101 of the Multi-Purpose Act of 28 December 2011[25] has imposed a single maximum of one year (part-time career breaks being computed in months).

Under Article 122 of the same Act, ancillary Royal Decrees may introduce a similar reduction in the time credit scheme, which substituted the career break scheme in the private sector as from 2002.

According to the most recent data available (for November 2011), in the whole country there were 4 568 women and 1 534 men taking a full-time career break, and 50 183 women and 17 918 men were taking a part-time break. Theoretically, a staff member may use the leave for any purpose at all (except engaging in another paid activity), but it is undisputed that, given the unequal distribution of family tasks and responsibilities, a vast majority of women will use the career break for conciliation purposes, while men rather tend to regard the scheme as a gliding slope towards retirement.

Prima facie, no attention at all was paid to such considerations when the two measures mentioned above were adopted, although under the Gender Mainstreaming Act of 12 January 2007,[26] the federal government is supposed to evaluate the gender impact of any proposed decision.

Bill aimed at combating the pay gap between men and women

No less than five bills have recently been tabled in the House of Representatives (the first House of the federal Parliament) by various members in order to reduce the gender pay gap.

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22 http://www.frauen.bka.gv.at/DocView.axd?CobId=44177, accessed 17 March 2012.

23 'High-Risk Victims. Tötungsdelikte in Beziehungen. Verurteilungen 2008 bis 2010' Federal Chancellery Vienna, 2012, http://www.frauen.bka.gv.at/DocView.axd?CobId=46530, accessed 31 March 2012.

24 *Moniteur belge/Belgisch Staatsblad*, 30 December 2011, 5th ed., available (in French and Dutch) on http://www.juridat.be, accessed 26 March 2012.

25 *Moniteur belge/Belgisch Staatsblad*, 30 December 2011, 4th ed., available (in French and Dutch) on http://www.juridat.be, accessed 26 March 2012.

26 *Moniteur belge/Belgisch Staatsblad*, 13 February 2007, available (in French and Dutch) on http://www.juridat.be, accessed 26 March 2012.

Given the very broad government majority and the support of the two green parties, it was possible to make those texts coalesce into a single one[27] which was adopted by the House on 8 March (not a coincidence). The Senate (the second House) then decided not to amend the bill, so that it will be promulgated very quickly.

Essentially, the bill 'aimed at fighting the pay gap between men and women' inserts a number of new provisions into various pieces of legislation, mainly:

- the biennial 'intersectoral agreement' (a framework for negotiations on working conditions, including pay, in the private sector) will have to include measures aimed at combating the pay gap, especially the promotion of gender-neutral job classification systems; collective agreements for the same purpose will have to be concluded at the sector level;
- with the support and under the supervision of the Department of Employment, joint sector committees will have to revise their job classification systems in order to ensure that they are gender neutral;
- any enterprise of at least 50 employees will have to provide representatives of the workforce with a biennial detailed analysis of its pay structure;
- relying on the analysis mentioned above, the works council will consider whether it is necessary to draft and implement a plan aimed at developing a gender-neutral pay structure;
- on the works council's proposal, an enterprise of at least 50 employees will be free to appoint a member of its workforce as a mediator, who will advise on drafting and implementing the plan mentioned above, as well as on possible remedies to claims of gender discrimination in pay within the enterprise in question.

In the private sector, pay is essentially a contractual matter, regulated by collective agreements at intersectoral, sectoral and individual enterprise levels, and finally in individual employment contracts. Consequently, the legislator's intervention in this field can hardly extend much further than strong incitement.

The effectiveness of the future Act will depend upon the social partners' willingness to make its provisions work. While the two main trade union confederations expressed enthusiastic support for the bill, the main employers' confederation voiced its reluctance, e.g. through stressing that the social partners might find that some issues require attention more urgently than gender neutrality in job classifications. Moreover, the exclusion of enterprises of less than 50 employees is an obvious weakness of the bill.

Case law of national courts

Labour Court of Appeal in Brussels, 7 September 2011

After the Labour Court of Appeal in Brussels had referred a preliminary ruling to the ECJ in Joint Cases C-231/06 and C-233/06, *Jonkman*, *Vercheval and Permesaen* [2007-I-5149], the latter defined in what measure Directive 79/7/EEC could admit the provisions which had been adopted in Belgium in order to remedy the consequences of past discrimination in the retirement pension of air hostesses. Indeed, until 1980 women had been excluded from the special statutory pension scheme for the cabin personnel of airlines, which entailed higher benefits conditional upon the payment of higher contributions than under the general scheme for paid workers.

Resuming its examination of Ms Permesaen's case, the Labour Court of Appeal in Brussels was confronted with the evident intransigence and the dilatory manoeuvres of the National Office of Pensions (and the federal government). However, by means of three successive judgments,[28] the Court found that the adjustment contributions (increased by interest payments aimed at compensating monetary depreciation) owed by Ms Permasaen had

[27] House of Representatives, *Document*/*Stuk* n°53 1675/009, available (in French and Dutch) on http://www.lachambre.be or www.dekamer.be, accessed 26 March 2012.

[28] Judgments of 9 June 2010, 2 March 2011 and 7 September 2011, *Rôle général* n°2004/AB/45031, unreported.

to be deducted from the pension arrears owed by the Office, and that the balance plus interest was due to the former hostess. The only unsolved question concerns the fiscal impact which the higher contributions would have entailed if Ms Permesaen had not been excluded from the special scheme; the Court appointed an expert to evaluate that impact.

It is now hoped that the National Office of Pensions (and the federal government) will adhere to the Labour Court of Appeal's decision and apply the same solution to the various similar cases (some 40 in all) which are still pending.

The epic tale of the Sabena air hostesses (which started more than 40 years ago with the case of Gabrielle Defrenne) is in Belgium a unique example of litigation strategy that was made possible by the solidarity of discrimination victims (organised under their own labour association, the *Belgian Corporation of Flying Hostesses*) and the help of some pugnacious female lawyers such as Eliane Vogel-Polsky and the late Marie-Thérèse Cuvelliez.

Constitutional Court judgment of 5 October 2011

As reported previously,[29] the Act of 1 June 2011 inserted a new Article 563*bis* into the Penal Code, under which wearing any attire which conceals one's face completely or for the most part in any space open to the public is liable to a penal fine. As soon as the Act was published, two women filed claims for annulment with the Constitutional Court; they also applied for a suspension of the enforcement of the Act until the Court decided on the merits of the case.

In its judgment n°148/2011 of 5 October 2011,[30] the Constitutional Court found that the latter applications were admissible, but rejected them. Indeed, under the Special Act of 6 January 1989 concerning the Constitutional Court, any application for the suspension of an Act of Parliament must include evidence that the enforcement of the said Act would entail 'serious and hardly reparable damage' for the applicant in question which could not be removed by the subsequent annulment of the Act. According to the Court, such evidence was not convincingly demonstrated by the application for suspension. Among various elements, the Court noted that the applicants had declared that, under certain circumstances, they would be prepared to remove their *niqabs* in order to be identified when security rules made it necessary. The Constitutional Court also explained that should the applicants be indicted for breaching Article 563*bis* of the Penal Code, they would be free to request the Magistrates' Court to refer to the Constitutional Court for a preliminary ruling on the compatibility of the said Article with the Constitutional provisions on freedom of thought and religion.

Having decided that the requirement concerning the damage had not been met, the Constitutional Court did not have to embark upon a summary examination of the merits.

No conclusion can be drawn from this judgment as to the possibilities for the success of the claims to annul the Act of 1 June 2011, on which no decision can be expected for at least a year.

Meanwhile, the press occasionally reports on the helplessness of local police forces which find the prohibition of the *burka/niqab* rather difficult to enforce effectively.

BULGARIA – *Genoveva Tisheva*

Policy developments

During the period since October 2011, gender equality trends and policy in Bulgaria have been marked by the economic crisis. The official review of the database of the Employment Agency at the Ministry of Labour and Social Policy for 2010 and 2011 confirms that the possibilities for the realization of equality between women and men on the labour market are preconditioned by a series of interconnected factors, like gender, age, professional

[29] See *EGELR* n°2/2011, p 47.

[30] *Journal des tribunaux*, 2011, p. 709 with a critical comment by X. Delgrange; the judgment is available (in French, Dutch and German) on http://www.constitutional-court.be , accessed 26 March 2012.

qualifications and education.[31] According to data from the Employment Agency, the ratio of registered unemployed women (54.7 %) continues to prevail over that of unemployed men. The highest percentage of unemployed women is in the over 55 age group (21.2 %) and for women aged 50 - 54 years it is 13.8 %. Young women aged up to 19 have the lowest unemployment rate (1.4%), as well as those aged 20 – 24 (7.1 %). Women without qualifications and with only primary education amount to 50.7 % of unemployed women. It has been revealed that another trend – the ratio of long-term unemployed women (for over a year) – increased in 2011 from 34.6 % up to 37.4 % of unemployed women. For a comparison, the ratio of long-term unemployed men soared from 28 % in 2010 up to 33.3 % in 2011 but is still lower than the respective ratio of women.

In response to the above-mentioned trends, the Bulgarian government, through its Employment Agency, undertook a number of initiatives for an active policy in the labour market, funded from the State budget and the European Social Fund (ESF). Over 73 000 women were reached by these initiatives, programmes and projects.[32]

The latter are aimed at increasing women's competitiveness in the labour market through vocational and key competence training, providing employment to unemployed persons, providing care facilities for small children, and encouraging employers to hire unemployed persons, single parents and mothers with children up to 3 years of age, as well as unemployed mothers with children between 3 and 5 years of age. The transition from unemployment to employment, from one job to another, is also supported by applying the approach of better reconciling professional and family life and the inclusion of different lifelong learning.

There has not yet been any assessment and evaluation of these programmes.

Another alarming trend which has been identified is the slight increase in the Gender Pay Gap in the period 2008 - 2010. The latest EUROSTAT data for this indicator show a 12.3 % difference for 2008, 13.9 % for 2009 and 14.1 % for 2010. The sectors with the widest gaps for 2010 were: Financing and insurance (32.3 %), Health and social work (31.7 %) and Culture, sports and entertainment (30.3 %). The preliminary data from the National Statistics for 2011 reveal that women's average annual salary for all sectors was 81 % of that for men.

Indicative are the stated commitments of the government in relation to the topical issue of promoting the participation of women on company boards. The Secretariat of the National Council on Gender Equality at the Council of Ministers supported the dissemination of the initiative to promote the appointment of qualified women in cases of vacancies on company boards. The target is to reach 30 % of women's participation by 2015 and 40 % by 2020. The Ministry of Labour and Social Policy and the Ministry of Economy, Energy and Tourism circulated a declaration on the commitment to the higher participation of women on company boards in Europe by reaching their partners – 130 public private companies and 51 companies with over 50 % State ownership. Thirteen companies joined the declaration in 2011. In the Report on the implementation of the National Plan for 2011 it is noted that by November 1, 2011, women made up 43 % of board members in the companies with prevailing State shares, which is a fair balance.

Although related to the gender balance in political participation, the results from the local elections and the presidential elections from the end of October 2011 have to be mentioned for the period under review. For the local elections, only 4 out of the 27 biggest towns have women mayors, and the female candidate for President did not manage to reach the ballot, despite her surprising result of 17 % of the votes during the first round.

All the fields mentioned – gender equality in the economic sphere and in the labour market, equal participation in decision-making, as well as areas like combating gender-based violence, and gender stereotyping – form part of the National Plan on Gender Equality for 2011. A similar ambitious Plan was also adopted for 2012. The elaboration and implementation of the gender equality policy through the annual plans is an essential and complex task, which can no longer be implemented by the current institutional structure. The

[31] Report on the implementation of the 2011 National Plan on Gender Equality- Ministry of Labour and Social Policy, March, 2012.

[32] Ibid.

Ministry of Labour and Social Policy has been mandated with this task which is implemented solely by its unit called 'Equal opportunities, anti- discrimination and social assistance'. In the Report on the implementation of the 2011 National Plan, the Ministry itself states that its unit is in compliance with the requirements of the Recast Directive for a governmental body on gender equality. Despite that, this unit, which is also in charge of the administrative and technical working of the National Council on Gender Equality, does not have enough human and other resources to oversee and coordinate all the activities on gender equality in Bulgaria. It is far from fulfilling the requirements of the Recast Directive in this field.

Legislative developments

One of the major changes in the period under review is the amendment of the Code on Social Insurance (COSI) with an increase in the pensionable age for both men and women. According to Article 68 of the COSI, the pensionable age which is 60 years for women and 65 for men will gradually increase each year from 31 December 2011 by 4 months for both women and men, until the age of 63 for women and 65 for men is reached. The insurance periods required for men and women will also increase, respectively from 34 to 37 years for women and from 37 up to 40 years for men.[33]

These changes were agreed after discussions and consultations with the trade unions during the last two years. Despite the commitment of the government not to increase the pensionable age at this stage, suddenly after the national and presidential elections won by the ruling party last autumn, the decision was taken and the Code was amended accordingly. And this was done without any public debate, with no attention being paid to the protests by and the discontent emerging among the trade unions in the country and with no additional consultations. Obviously, the trend we are witnessing in the European Union was also being followed. This cannot be justified by an EU standard as Member States have retained their relative independence concerning their policies in this field, based on their demographic trends, life expectancy and the structure of their respective economies. The fact remains that the recent changes were implemented without any public discussion, including the increase in the pensionable age for women. Instead, there are comments and analyses after the amendments to the COSI to the effect that the difference in the pensionable age of women and men is a form of discrimination which is prohibited by EU law.[34]

Case law of national courts

Two examples of court decisions in the field of gender equality can be mentioned for this period. One of them is the final judgement of the Supreme Administrative Court on sexist advertisements by a well-known alcohol brand. Although the case is formally outside the scope of the EU law on equal treatment, the area of the media and advertising being excluded from the scope of Directive 2004/113/EC, it is nevertheless interesting as it is a new type of discrimination case. After three and a half years of litigation before the Commission for Protection against Discrimination and the Supreme Administrative Court (SAC), the final judgement was issued on 13 March 2012.[35] In the absence of any relevant case law in the field, the SAC held that there is no data on *prima facie sex* discrimination. As to gender stereotypes, the Court refused to deal with them as a source of such discrimination and confirmed that they are sufficiently stable in Bulgaria:

> '*...It has been a just and lawful assumption by the Commission that these are issues from the area of aesthetics, ethics, psychology and social science, and namely of a type of sub- culture, issues which have a philosophical dimension, which are*

[33] Amendment with State Gazette No. 100 from 2011, in force since 1 January, 2012.
[34] http://www.segabg.com/article.php?id=593668, accessed 5 April 2012.
[35] Judgement 36161 on Adm. Case 12183/ 2011 of the Supreme Administrative Court.

characteristics of the state of society at the given historical moment and cannot and could not be solved within the limited factual frame of a concrete legal case.'

The second decision by the Supreme Administrative Court is not final but has all the prospects of becoming so. With the Court Order of 16 March 2012,[36] the SAC refused to consider a private complaint from a group of women against a general administrative act by the Vice-president of the Commission for Financial Supervision (CFS). The women, all born after 1960, complained of the non-conformity of the act with EU law, as it approves yearly biometrical tables for the supplementary obligatory social security pillar, valid for persons born after 1960. The latter is part of the statutory social security system in Bulgaria and applying differential criteria in insurance in this pillar is prohibited by EU equal treatment law. The SAC had initially declared the case to be admissible and it had adjourned a court hearing until September 2012 but following an internal procedure, the admissibility of the case was re-examined and the complainants were refused access to the SAC based on their lack of legal interest as they were not directly affected by the act. Following the reasoning of the court, there is no way for the women affected by the approved biometrical tables to have access to justice and to challenge their conformity with EU law. As the case is still pending, further information will follow.

These two important gender equality issues from completely different spheres of life, proposed for consideration by the court, are examples of how difficult it is for high instance courts to deal with sex discrimination issues, and also how the court declines any possibility to discuss and apply the equal treatment law of the EU. The practice so far reveals that there should be mechanisms for enhancing the access of Bulgarian women to justice in cases of sex discrimination.

CROATIA – *Ivana Radačić*

Policy developments

On 4 December 2011 a general election was held in Croatia. According to the research carried out by the Office of the Ombudsperson for Gender Equality, out of 313 electoral lists, 37.70 % had more than 40 % of female candidates on them, while 62.30 % had less than 40 % of female candidates. Further, out of 4 359 candidates 65.04 % were men, and 34.96 % women, while 82.40 % of the lists had men currently holding the seat. The new Parliament, constituted on 22 December 2011, includes 35 women out of 151 members, which amounts to 23 % women and 77 % men. Originally, the number was even lower but as some male MPs were appointed to the Cabinet, the number of women rose.

The new Coalition government was formed by the Social Democratic Party, the Croatian People's Party – Liberal Democrats, the Croatian Party of Pensioners and the Istrian Democratic Assembly. There are 4 women in a 22-member Cabinet: the Minister of Social Policy and Youth, who is also one of the four vice presidents, the Minister of Culture, the Minister of Foreign and European Affairs, the Minister for the Protection of the Environment and Nature, the last three being prominent feminists.

Prior to the national elections, on 28 October 2011 the then Parliament appointed a new Ombudsperson for Gender Equality: Visnja Ljubicic, a former employee of the Government's Office for Human Rights. The appointment procedure demonstrated a number of problems. The criteria for appointment were not sufficiently clear and comprehensive, only two conditions being required: a higher education and being known to the public for the promotion of human rights, while the deadline for the application was only 8 days. Further, the Government nominated only one candidate to Parliament (the Gender Equality Act and the call for proposals not being clear in this respect) who had been selected in closed session, without any prior interviewing of the other candidates who were not even notified of the

[36] Court Order No. 3840 on Adm Case 356/ 2012 of the Supreme Administrative Court.

results of the procedure. Finally, the preference for candidates with a background in public administration for the positions of ombudspersons (three out of four) might be questioned with respect to the requirement of their independence and visibility to the public as a defender of human rights. However, the current Ombudsperson for Gender Equality was, in addition to working as a civil servant, volunteering for a few NGOs.

For the new Deputy Ombudsperson for Gender Equality, Parliament appointed Goran Selanec, a former higher legal advisor at the Office, to this post, on the proposal of the Ombudsperson for Gender Equality. In the call for proposals it was specifically stated that only male candidates were sought in accordance with the provision of the Gender Equality Act which states that the Ombudsperson and her/his deputy have to be of different sexes. Even though in this particular appointment procedure a well qualified candidate was appointed, the exclusion of one half of the population from the competition on the basis of sex without the assessment of their qualifications for the position seems to be problematic from the perspective of EU gender equality law.

The Office of the Ombudsperson for Gender Equality has been very active since the appointment of the new Ombudsperson and his Deputy, hosting many important conferences and public events, meeting with relevant public administration bodies, issuing public statements, intervening in court proceedings, examining complaints and proposing changes to the legislation. In March 2012 the Ombudsperson issued his annual report which is to be examined by Parliament. The Report notes the systematic and widespread nature of domestic violence; women's disadvantaged position at work, including their under-representation in executive positions; the under-representation of women in politics; insufficient gender sensitivity in education; the stereotypical presentation of women in the media; and it has issued recommendations for addressing these problems.

Legislative developments

In the reporting period the only legislative development which is relevant to gender equality was the adoption of the new Criminal Code on 7 November 2012, which will come into force on 1 January 2013. The Code has changed the name of the heading concerning sexual violence, omitting any reference to morals, as well as definitions of these crimes, whereby the central element of the basic crime against sexual autonomy – sexual intercourse without consent – is no longer force but a lack of consent (which is not to be defined by mere submission but rather has to be given voluntarily and in certain circumstances is presumed not to exist). In addition, the Code has for the first time criminalised sexual harassment (when committed against a person in a subordinate, dependent or vulnerable position), as well as using the services of a prostitute/sex worker in certain circumstances (where a person has been forced or induced by fraud, abuse of power or by dependency to engage in sex work or where the person in question is underage). Furthermore the Code includes certain new offences regarding the sexual abuse of children and has raised the age of consent to 15. These are all welcome developments.

However, certain problems remain in the definition of acts against sexual autonomy, as the 'consent-based' understanding of sexual violence has not completely replaced the 'force-based' approach and the difference between the proscribed sexual offences is not sufficiently clear. In addition to the offence of sexual intercourse without consent, the Code criminalises rape, which is still defined by force or a threat of force. Further, there is also a new offence of serious crimes against sexual autonomy, defined by certain circumstances which are also mentioned as examples of non-consent in the definition of the crime of sexual intercourse without consent which leaves room for an inconsistent interpretation of the crimes by the courts. Finally, with respect to sexual crimes against children certain offences (such as the showing of pornographic material) raise the issue of achieving the appropriate balance between the protection of children from abuse and respect for their sexual autonomy.

On 2 February 2012 the Government adopted the Programme for the Adoption and Implementation of the *Acquis* for 2012. The programme envisages the following legislative measures which are relevant to gender equality: amendments to the Elimination of

Discrimination Act (with respect to the allowed exceptions to discrimination) in the second quarter of the parliamentary season (April–June); the adoption of the new Occupational Health and Safety Act (which also regulates the work of pregnant and breastfeeding women); and the adoption of the new Act on Maternity and Parental Benefits (October–December).

Further, acting upon the proposal to examine the constitutionality of the Act on the General Ombudsperson, on 15 February 2012 the Constitutional Court found that the Act had not been adopted by the appropriate majority and could not enter into force before it is adopted by the majority of all MPs. Upon this decision, the Government decided to draft a new Act. It seems that the new Government's position is not to merge the special ombudspersons with the General Ombudsperson, as they advocated when they were in opposition.

Finally, in March 2012 the Ministry of Heath sent the Draft Act on Medically Assisted Reproduction to the Government. In many respects the Draft constitutes an improvement in comparison to the highly restrictive 2008 Act on Medical Reproduction: unlike the former Act, it allows for the freezing of embryos and there is no requirement of legal and psychological counselling before the procedure can begin. However, it some respects the Act is still restrictive and raises the question of non-discrimination on different grounds. For example, medically-assisted reproduction is only allowed for couples, donors have to have the consent of their partners/spouses, only 12 embryos can be frozen regardless of the problems involved, women older than 42 do not have a right to state-funded procedures and the number of procedures funded by the state is limited to 6 (which the former Act did not prescribe).

Case law of the national courts

Unfortunately, due to the non-availability of the judgments of the Croatian courts on the internet, it is difficult to report on gender equality case law but it is safe to assume that it is still scarce which points to the reluctance of victims to report discrimination, which may be due to a fear of reprisals, disappointment with a judicial system and a culture in which litigation is not seen as a legitimate way of solving problems.

In February 2012 the newspapers reported a case concerning the mobbing and harassment on the basis of sex and ethnicity (argued, as it seems under the Labour Act, rather than anti-discrimination law) of a female employee of the Croatia Electric Power Industry by the director of the Rijeka branch. In de final judgement of the Rijeka County Court the firm was ordered to pay HRK 30 000 (EUR 3 973). Another important (first-instance) judgment was issued in February by a Municipal Court in Varazdin in the case concerning a refusal by a shop owner to accept two female Roma pupils for practical training on the basis of their ethnicity. The judgement is of great importance to the Roma community, and especially for multiple disadvantaged Roma girls who face particular problems with respect to access to education (both from their own community as well as the wider community). In addition, four high profile cases followed by the media concerning discrimination on the basis of sexual orientation are being litigated, in which the Ombudsperson for Gender Equality is acting as a mediating party.

The Report of the Ombudsperson for Gender Equality for 2011 mentions 1 391 cases in which the office had acted (out of which 1 359 were opened in 2011): 63.9 % of the cases concern discrimination against women, while men were discriminated against in 23.1 % of the cases. Most of the complaints concerned sex discrimination (76.6 % of the cases), followed by discrimination based on sexual orientation (5.2 %), discrimination based on marital and family status (3.6 %), gender identity and expression (0.3 %), while in 14.3 % of the cases the Ombudsperson did not find a basis for examining the complaint. Most of the complaints concern the area of labour and social rights – 65 % of all complaints. In addition, the Ombudsperson is acting as a mediator in 6 cases concerning discrimination on the basis of sexual orientation.

CYPRUS – *Lia Efstratiou-Georgiades*

Policy developments

On 20 March 2012 the President of the Republic of Cyprus, Mr. Demetris Christofias, appointed a new Minister of the Interior, Mrs Eleni Mavrou. Mrs Mavrou had served as a Member of Parliament and as a Mayor of Nicosia.

Legislative developments

On 22 March 2012 the Government submitted to the House of Representatives a bill entitled 'Parental Leave and Leave for reasons of Force Majeure Law of 2012'. The purpose of the bill is to harmonise national law with Directive 2010/18/EU. Among other provisions, the bill regulates the right of working women and men to parental leave because of the birth or adoption of a child. It also provides for the abolition of the Law on Parental Leave and Leave for reasons of Force Majeure No. 69(I)/2002.

The main provisions of the bill are the following:

(a) The duration of parental leave is increased from three to four months, one of which is strictly not transferable and covers all forms of employment, including part-time, fixed-term contracts or a temporary employment relationship.
(b) In case of successive fixed-term contracts with the same employer the sum of these contracts shall be taken into account for the purpose of calculating the qualifying period.
(c) There is an obligation for employers to take into consideration any needs of parents who return to work after parental leave for changes to their working hours for a set period of time.
(d) The social partners are recommended to assess the need to adjust the conditions of the application of parental leave to the needs of parents of children with a disability or a long-term illness.

Further to the above provisions, the bill includes some other changes which were found necessary, taking into account the experiences and suggestions of users and beneficiaries of parental leave. More specifically, there is a provision to increase the duration of parental leave for parents who are widows/widowers to 23 weeks and the possibility for transfer two weeks from one parent to the other (and not only from the father to the mother).

Equality body decisions/opinions

File No. A.K.I 88/2009 dated 14 November 2011[37]

The Ombudsman, as the Equality Authority, examined a complaint submitted on 30 November 2009 by Mrs M.X., a secondary school teacher, against the decision of the Educational Service Commission (ESC) to reject her request to be posted for service within the area of her place of residence because she had, at the relevant time, a baby under twelve months old. Mrs M.X. argued that the ESC's refusal to post her to another town was contrary to Article 5 of the Protection of Maternity Laws from 1997 to 2008 relating to the granting of facilities for breastfeeding babies and for the increased care of the child.

Mrs M.X. gave birth on 7 September 2009. Her appointment by the ESC was on a casual basis from 23 September 2009 to 26 February 2010 and was renewed from 1 March 2010 to 31 August 2010 with the same terms and conditions as her initial contract of employment. The ESC granted the complainant maternity leave from 23 September 2009 to 14 November 2009.

The Ombudsman studied all the facts of the case including the provisions of a circular issued by the Ministry of Education and Culture dated 14 September 2007, which was sent to all school directors and contained the provisions of Article 5 of the Protection of Maternity

[37] www.ombudsman.gov.cy, accessed 2 April 2012.

Laws about the granting of facilities to female teachers for breastfeeding or the increased care of the child. Article 5 provides that for the purpose of breastfeeding and/or increased care of the child a woman has the right, for a period of nine months from the day of confinement, or from the day maternity leave begins in the case of adoption, either to have a work break for one hour, or to come to work one hour later, or to leave work one hour earlier, every day. The Ombudsman also examined the complaint in relation to the implementation of the principle of non-discrimination on the ground of sex, including the family situation, which is safeguarded by the Equal Treatment of Men and Women in Employment and Occupational Training Laws from 2002 to 2009.[38] The Ombudsman stated that any measures for the protection of pregnancy and maternity are targeted not only at the protection of the health and safety of the mother and child, but also at the implementation of equality for all working women.

On the basis of all the above, the Ombudsman concluded that the ESC did not handle the case of Mrs M.X. in the right way and, as a result of this, she could not take advantage of the provisions of the Maternity Laws. The needs of the service on which the ESC based its decision to reject the applicant's claim cannot justify the non-application of the relevant provisions of the Law. The ESC has a duty to properly examine claims of this nature, taking into consideration the facts of each case along with the satisfaction of the needs of the service. As the period of nine months had already elapsed by the time the claim was examined and so there was no way to satisfy it, the Ombudsman called upon the ESC to include the dimension of the reconciliation of professional and family lives of women in its policies relating to postings, in a manner that would safeguard compliance with the protective provisions of the Protection of Maternity Laws from 1997 to 2011.

Miscellaneous

Female teachers in primary and secondary education protested to the Government that there was unequal treatment between male and female teachers.

The appointment of teachers in public secondary education is made on the basis of the order in which their name appears on the list of candidates and in accordance with the Public Educational Service Law of 1969 (Law No. 10/1969) as amended by Law Nos. 180/87, 245/87 and 24(I)/2011.39 The order of priority is first determined by the year in which candidates obtained their first university degree. Between candidates who obtained their first university degree in the same year the order of priority is determined on the basis of criteria which give candidates specific points.

In Cyprus male citizens who have completed the age of 18 have an obligation to serve in the National Guard (the Army) and carry out military service of 24 months' duration. Women do not have this obligation.

The above-mentioned Laws provide that those who serve in the National Guard obtain one point, which is considered as an additional criterion, at the time of registration on the list of male candidates, in order to compensate them against female candidates, who can be registered on the list of candidate teachers two years earlier than them.

The purpose of the last amendment of the Law by Law No. 24(I)/2011 was to give male teachers who served in the National Guard the possibility to obtain additional points (up to three) at the time of drawing up the lists of teachers eligible for promotion, again as a counterbalance to female teachers who do not serve in the army. These lists are prepared in February of each year.

As a result of the above amendment, the order in which teachers eligible for promotion appear on the lists of teachers eligible for promotion, which were prepared in February 2012, changed radically. Female teachers in primary and secondary education protested to the Government against this situation and questioned the correctness of the Law. They argue that the controversial provision of the Law leads to more favourable treatment for men compared to women teachers who are candidates for promotion at the same period of time. More

38 Harmonization of Directive 76/2007/EEC as amended by Directive 2002/73/EC.
39 www.cygazette.com, accessed 2 April 2012.

specifically, they say that although the granting of points for the purpose of promotion is done only once, nevertheless it is a new criterion and it gives advantages of seniority to men against women, which have consequences in the future. They have also pointed out that the Law covers service in the Cyprus Army only and not military service generally, thus creating a discriminatory situation for teachers who are EU citizens and carry out their military service in their country (mainly Greece) and would be interested in registering for the list of candidate teachers in Cyprus. Female teachers argue that an appropriate measure to avoid discrimination between the sexes in the educational service in Cyprus would be to grant to male teachers, only at the time of their registration on the lists of candidate teachers, the number of points they need so that their names appear in the same order in which the names of female candidate teachers, who are of the same age, appear on these lists.

Female teachers are ready to resort to the Supreme Court, claiming that the Amendment Law is unconstitutional and contrary to the principle of equality.

In January 2012 the Gender Equality Committee in Employment and Vocational Training, which has been established under the Equal Treatment of Men and Women in Employment and Vocational Training Law No. 205(I)/2002 as amended, published an Annual Report for the year 2011. The Annual Report sets out the actions which were undertaken for promoting equality between men and women in employment, such as lectures and seminars to Women's Organisations, Public Authorities and Semi-Government Organisations, lessons and lectures to police officers on sexual harassment, the preparation and broadcasting of a short film on equality at work and a competition for artistic posters on gender equality. The posters were presented at an exhibition at the European University in Nicosia on 24 February 2012, where prizes were awarded to the two best posters.

The Committee drew up a code of practice on sexual harassment at the workplace, which was given to public authorities and semi-government organizations. Also, in January 2012, it published a book entitled 'Good Practices for promoting gender equality in employment'.

Finally, in November 2011, the University of Cyprus circulated the magazine '*Endictis*',[40] volume 22, which contained articles on the subject of 'gender and politics' written by academics and politicians, with a rich bibliography, with the aim of raising awareness and promoting gender equality.

CZECH REPUBLIC – *Kristina Koldinská*

Legislative developments

Recent changes in family benefits – the possibility to harmonize better family and professional life

As from 1 January 2012, an important sample of several social act amendments entered into force. Some of the changes to the current legislation could have some influence on gender equality. In particular, there were some changes to the parental allowance, an allowance provided on the basis of Act No. 117/1995 Coll. on state social support (Sections 30-32). One of the parents is entitled to this allowance if he or she cares for a child of up to four years of age.

As of January 2012 parents are entitled to the parental allowance also if they place their child in a kindergarten for 46 hours a month, if the child is less than two years old. From two years of age there is no time limit on how long the child may spend in a kindergarten. Previously, there were much stricter conditions: it was only possible to place one's child in a kindergarten for a maximum of four hours per day. Many parents complained, but this did not solve their situation, as employers do not generally wish to employ people on a part-time basis and there is even less availability of jobs which employ a person for less than four hours a day.

[40] www.ucy.ac.cy, accessed 2 April 2012.

The last amendment to the state social support therefore contributes to the further possibility of the parents to combine family and working life without losing their entitlement to the parental allowance. This has a particular positive impact on women, who mostly claim this allowance (some 95 % of recipients of this allowance are women).

Case law of national courts

Giving birth at home – judgement of the Constitutional Court

On 28 February 2012 the Czech Constitutional Court decided case No. Pl.ÚS 26/11 from 28 February 2012 in which a woman, who wanted to give birth at home but did not feel free to do so, claimed that she was not provided with the necessary assistance as the public authorities, and also the national legislation, discouraged women from giving birth at home.

She argued her case, among other things, by relying on the ECHR case of Ternovszky vs. Hungary, where the ECHR gave this right to a woman in a similar situation. Moreover, she argued, there are also several CEDAW reports which note that women in the Czech Republic experience many obstacles when they decide to give birth at home.

The Constitutional Court did not find itself competent to decide the case in the material part (due to the principle of subsidiarity, the applicant did not appeal to the regional court and went directly to the Constitutional Court), but strongly recommended all public authorities, including Parliament and the Government, to reflect seriously about the problem and to also start a serious debate on possible amendments to the Czech legislation. As the wording of the recommendation of the Constitutional Court is quite strong, it is possible that the debate and concrete reflection will start after all.

The applicant has in the meantime appealed to the ECHR.

This case also enhanced a debate within society and some articles on the case and the Constitutional Court's judgement were published.[41]

DENMARK – *Ruth Nielsen*

Policy developments

On 15 September 2011, there was a general election in Denmark. On 3 October 2011, a new government was formed by the Social-Democrats, the Socialist People's party and the Radical party (a centre party). In matters of equality very little has happened so far since the formation of the new government. It has expressed its willingness to do something in respect of gender quotas on company boards and it is expected to put forward proposals for reform on paternal leave and equal pay for men and women.

Legislative developments

On 28 March 2012 the Employment Minister presented a proposal for an amendment to the Act on the Equality Board to the Danish Parliament.[42] The new act will clarify that the Board has competence to decide on harassment cases and will change the rule on who can be the Chair of the Board. According to the proposed new provision the Chair must be a high court judge. Under the present rule the Chair can be a city court judge.

Also on 28 March 2012 the Employment Minister presented a proposal for an amendment to the Act on the Equalization of maternity costs (*barseludligningsloven*) to the Danish Parliament.[43] The amendments concern some technical adjustments on how to collect

41 See e.g. http://zpravy.idnes.cz/diskutujme-o-domacich-porodech-vyzvala-wagnerova-a-popudila-kolegy-1p5-/domaci.aspx?c=A120313_162410_domaci_hv, accessed 30 March 2012.

42 Bill no. 119, see (in Danish) http://www.ft.dk/samling/20111/lovforslag/L119/som_fremsat.htm#dok, accessed 4 April 2012.

43 Bill no. 118, see (in Danish) http://www.ft.dk/samling/20111/lovforslag/L118/som_fremsat.htm#dok, accessed 4 April 2012.

contributions from employers. It also contains provisions on complaints. In section 6(3) it is proposed to insert the following provision:

> 'Complaints over decisions by ATP [which administers the Act on the Equalization of maternity costs (*barseludligningsloven*)] under this Act or provisions laid down with a legal basis in this Act can within a time limit of 4 weeks be brought before the ATP appeals board.'

ESTONIA – *Anu Laas*

Policy developments

Positive discrimination and quotas rejected

The key objectives of the government are a competitive economy, a family-friendly country, a sense of social security and a highly educated population. The Prime Minister has explained that 'The greatest goal of the government is to improve people's quality of life – to create an Estonia, a living environment, where our culture prospers, where more children are born, where life expectancy is longer and where people want to live their lives'.[44] In spite of this declaration, government action plans are gender blind.

The 'Action Programme of the Government of the Republic 2011-2015'[45] has three fields of policies as a minimum, where gender and power relations should be targeted; however, the action plan does not mention the term 'gender':

1) a family-friendly state is a target for a positive natural increase in the population and an increase in the total birth rate to 1.71 (parental benefits, the introduction of parent pensions as of 1 January 2013; family counselling etc.);
2) combating intimate partner violence and school violence;
3) increasing life expectancy and years of good health (an increase in life expectancy to 72.5 years for men and to 82.2 years for women; an increase in the number of years of healthy (unrestricted) life to 57.1 years for men and 62 years for women, calculated from the moment of birth).

The government has priority indicators and increasing the birth rate is one of them. The aim of the family-friendly policy is expressed in the national Action Programme in a very pragmatic way – to increase the birth rate and to attract investment. Simply having happy women and men is not a target. Action should be taken in accordance with the commitments and actions set out in the chapters 'Family-Friendly State' and 'Safe Estonia' and it is hoped that the development of a social environment attracts investment and international business.

Resistance to quotas for the improvement of women's position in society is clearly stated in several position papers by the State. The Archimedes Foundation (AF) has formulated a national opinion on the Common Strategic Framework for EU Research and Innovation Funding.[46] This opinion does not yet have legal authority; this is a communication in the form of a Green Paper. The AF response states that 'the special treatment of women or the imposition of quotas should not be a separate objective for the creation of attractive working conditions in science'. The AF accepts a need for positive actions and measures and even

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44 http://valitsus.ee/en/government/Programme, accessed 29 March 2012.

45 The Action Programme of the Government 2011-2015 can be found at http://www.valitsus.ee/en/government/Programme, accessed 29 March 2012.

46 Response to the European Commission Green Paper 'From Challenges to Opportunities: Towards a Common Strategic Framework for EU Research and Innovation Funding', http://ec.europa.eu/research/horizon2020/pdf/contributions/post/estonia/archimedes_foundation.pdf#view=fit&pagemode=none, accessed 25 March 2012; the Archimedes Foundation is an independent body established by the Estonian government in 1997 with the objective of coordinating and implementing EU programmes (FPs, LLL, Youth and RSF) and projects in the field of training, education, research, technological development and innovation.

points to a wider group of stakeholders, but does not mention who that group comprises. The AF states that 'It is the position of Estonian stakeholders that systematic measures should be taken for increasing the participation of women in research and innovation, including support for combining their family life with work. The requirement of equal treatment for men and women should be observed in the election of persons to positions and equal treatment in remuneration should be valued. The career model and remuneration system based on qualifications and competence is of primary importance.'

An initiative on gender quotas for company boards cannot find support from the Estonian Government. The European Commissioner Viviane Reding launched a public consultation on how to redress the gender balance in the EU's boardrooms in March 2012. Estonia's opinion was presented by the Ministry of Justice.[47] Estonia opposes any extension of the European Union framework of corporate governance for listed companies to all companies and states that the widening and adjustment of the rules of the EU framework of corporate governance to other companies must be a decision made by each Member State. Estonia does not support the determination of recruitment policy and the regulation of the diversity policy of supervisory boards' composition on the level of the European Union. The Estonian Government has expressed the idea that 'the listed company itself must be able to determine which specific skills the member of the supervisory board should have and how diverse a composition its supervisory board needs.' Estonia uses a myth argument against quotas, which is actually widely used: 'We are also firmly against the establishing of any quotas for the composition of supervisory boards. The enforcement of any quotas would lower the priority of the most important selection criterion, i.e. the competence and capabilities of the members of the supervisory board to perform their duties.'[48]

Gender budgeting has been studied

PROGRESS (2007-2013) is the EU programme for Employment and Social Solidarity, set up to provide financial support for contributing to the implementation of the Europe 2020 Strategy. Within the framework of the PROGRESS programme, in 2010-2012 a project entitled 'Mainstreaming the gender perspective into the state budget' was carried out at the Office of the Gender Equality and Equal Treatment Commissioner. Gender budgeting was studied by more than 30 civil servants from different ministries and a handbook on gender budgeting was published. The project started with a survey (questionnaires for civil servants at government agencies), and continued with training and practice sessions, and a trip to Austria (the State Chancellery, the Ministry of Finance etc. were visited). A gender-sensitive calendar and a handbook were issued.[49] At the closing conference also the experiences of Iceland and Finland were studied. This project has trained a number of gender-aware specialists who can carry out a gender-impact assessment and analyse budgets from a gender perspective at different ministries and other government agencies.

Legislative developments

Legislative impact assessment is poor

The National Audit Office (NAO) has presented a report to the *Riigikogu* on the legislative impact assessment in October 2011.[50] The NAO has assessed whether ministries have

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47 Public consultation 'The EU corporate governance framework'. Opinions of Estonia, page 6. http://ec.europa.eu/internal_market/consultations/2011/corporate-governance-framework/public-authorities/ministry-of-justice-estonia_et-en.pdf, accessed 19 March 2012.

48 Ibid., p. 7.

49 Quinn, Sheila (2011*). Riigieelarve naistele ja meestele. Vajaduspõhine eelarvestamine avalikus sektoris. Toim. Mari-Liis Sepper ja Liivi Pehk. Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik; Eesti Vabariigi Sotsiaalministeerium. Vahi: Ecoprint*. http://www.sm.ee/fileadmin/meedia/Dokumendid/Sooline_vordoiguslikkus/RNJM_VEAS_2012_final_bookmargid25012012.pdf , accessed 26 March 2012.

50 National Audit Office (2011). The state of affairs with the legislative impact assessment. Summary of audit results. Report by the National Audit Office to the *Riigikogu.* Tallinn, 31 October 2011. http://www.riigikontroll.ee/Suhtedavalikkusega/Pressiteated/tabid/168/ItemId/618/View/Docs/amid/557/language/en-US/Default.aspx, accessed 30 March 2012.

performed their obligation to analyze the impact of legislation upon drafting legislation. The activities of the Ministry of Justice in developing and improving the analysis of the impact of legislation were also audited. A new way to institutionalize the impact analysis has failed and the impact analysis has not improved since 2007, the time of the most recent audit.

The report states that 'According to the opinion of the NAO, the impact of legislation is assessed insufficiently and therefore the institutions adopting legislation or the public may not have sufficient and reliable information about the possible consequences of the legislation'.

The Government's Regulation of technical rules for the drafts of legislative acts was issued in 1999.[51] Using ESF support, the Ministry of Justice amended the existing regulation and established a new conception and guidelines in 2009.[52] This new conception also points to the legal requirement in Article 9(2) of the GEA which determines that upon the planning, implementation and assessment of national, regional and institutional strategies, policies and action plans, the agencies should take into account the different needs and social status of men and women and consider how the measures applied and to be applied will affect the situation of men and women in society.[53] The handbook does not mention the terms 'gender', 'women' and 'men'.

Article 34(1) of the Technical Rules for the Drafts of Legislation of General Application from 1999 required that the part of an explanatory memorandum entitled '*Seaduse mõjud*' [Effects of the Act] should explain the presumed social consequences, the effects on national security, on international relations, the economy, the environment, regional development and the organisation of the work of state agencies and local government agencies and other direct or indirect consequences brought about by the enactment of the Act.[54] In 2011 the Government Regulation was amended and adopted in December 2011; it entered into force on 1 January 2012.[55] The Minister of Justice has said that the requirements of this Government Regulation should be applied at least by every fourth draft law in 2012, every second draft law in 2013 and all draft laws should be handled according to the requirements in 2014.[56] According to Article 5(2) of the Rules and Regulation No. 10, special rules should be adopted by the Government of the Republic for impact assessment methods.[57] This regulation of impact assessment methods has not yet been adopted. However, several projects have been targeted to achieve good governance and increased capacity for impact assessment.[58]

To conclude, this is a requirement for capacity building for legal impact assessment purposes and special attention should also be given to gender impact assessment. The legislative impact assessment must give explicit consideration to questions of gender equality. A list of areas which are subject to attention (social consequences, the effects on national security, on international relations, the economy, the environment, regional development and organising the work of state agencies and local government agencies and other direct or indirect consequences) today are too broad and more precise categories for analysis should be mentioned in a new Government Regulation.

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51 Government of the Republic Regulation No. 279 of 28 September 1999 'Technical Rules for the Drafts of Legislation of General Application', State Gazette, RT I 1999, 73, 695.

52 Justiitsministeerium 2009, '*Õigusakti mõjude analüüsi kontseptsioon*', http://www.just.ee/orb.aw/class=file/action=preview/id=41328/%D5MA+kontseptsioon_apr09.pdf, accessed 30 March 2012*; Justiitsministeerium* 2009, '*Õigusaktide mõjude analüüs: juhend õigusloomega tegelevatele ametnikel*'. http://www.just.ee/orb.aw/class=file/action=preview/id=41329/%D5MA+k%E4siraamat_12+2.pdf, accessed 30 March 2012.

53 Gender Equality Act (GEA). State Gazette, RTI, 21.04.2004, 27, 181.

54 Government of the Republic Regulation No. 279 of 28 September 1999 'Technical Rules for the Drafts of Legislation of General Application', State Gazette, RT I 1999, 73, 695.

55 Government of the Republic Regulation No. 180 of 22 December 2011 'Good Legislation and Technical Rules for the Drafts of Legislation of General Application' (*Hea õigusloome ja normitehnika eeskiri*), State Gazette, RT I, 29.12.2011, 228.

56 Session of the Government of the Republic 22 December 2011, http://valitsus.ee/et/uudised/istungid/51162, accessed 1 March 2012.

57 Government of the Republic Rules and Regulation No. 10 of 13 January 2011. State Gazette, RT I, 19.01.2011, 4.

58 A draft proposal to the Ministry of Justice, 'Project on long-term planning, development and the improvement of the organization of work in public administration' ('*Valitsuse töö pikaajalise planeerimise süsteemi arendamine ja korrastamine*', 2012-2013). https://valitsus.ee/UserFiles/valitsus/02-03-2012_Valitsuse%20t%C3%B6%C3%B6korralduse%20parandamise%20programm.pdf, accessed 1 April 2012.

Case law of national courts

The leading gambling provider Olympic Casino had an employment dispute concerning alleged discrimination based on gender in 2009-2011. On 4 January 2012, the Supreme Court of Estonia announced its final judgment in this court case, resolving the case in favour of Olympic Casino.[59] The judgement in civil case 3-2-1-135-11 is one of the very few Supreme Court judgments in discrimination cases in Estonia and is thus highly significant.

An application by a person was made to the Gender Equality and Equal Treatment Commissioner for an opinion in 2009. Facts were presented on the basis of which it was possible to presume that discrimination based on sex had occurred. The Commissioner was of the opinion that there was discrimination and unequal treatment on grounds of gender. Discrimination disputes can be resolved by a court or a labour dispute committee (LDC) or by the Legal Chancellor by way of conciliation proceedings. In this case the person in question resorted to the court.

In this case the claimant alleged direct discrimination on the basis of gender and was treated less favourably than another employee in a comparable situation. The claimant's job title was 'an assistant manager' and a colleague was 'a cashier'. They had a glass of champagne during their shift on New Year's Eve. The employer discovered a violation of the rules two weeks later in the course of checking security cameras. The employer asked the employees for a written explanation and decided to dismiss the male assistant manager while the female cashier was subjected to a disciplinary punishment. The employer received an apology from the cashier, but not from the assistant manager. The dismissed employee was unable to find a job, he had lost his income and his studies were interrupted; in addition, he developed health problems.

The claimant accused the employer of discrimination and requested compensation for non-proprietary damage caused by the dismissal. The county and district courts found that there had been discrimination against the employee on grounds of gender and also that he was entitled to compensation. The county court also referred to the Opinion of the Gender Equality and Equal Treatment Commissioner. The Commissioner had found that the two employees were in a comparable situation, while one was dismissed and the other was not. The Commissioner found that there had been a case of discrimination. The court did not take into account the fact that the casino had fallen on hard times and from February the employees were forced to work on a part-time basis. The dismissal of one employee without the need to pay dismissal compensation was beneficial for the employer.

The Supreme Court explained that when two different types of legal measures applied to two employees, this cannot be deemed to be discrimination if these two employees cannot be considered to be comparable persons. Further, there is no discrimination if two employees are indeed treated differently from each other, but that this is due to objective reasons that are not related to the gender of the employees. The Supreme Court also set aside the required compensation for non-proprietary damage caused by the dismissal because the claimant was referring to economic harm (the lack of a job, the lack of income) and was unable to prove non-proprietary damage. This decision by the Supreme Court will make it extremely complicated in the future, if not even impossible, to apply for non-proprietary damage as is stipulated in Article 13 of the GEA.60 The major arguments by the Supreme Court were that the claimant was in higher position, had damaged the reputation of the employer and showed no remorse for what had happened. The decisive factor was the fact that, unlike his colleague, the assistant manager had greater responsibility and his violation of the rules was more serious. Consequently, the difference in the employees' treatment was justified by the employer.

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[59] Decision of the Supreme Court, No. 3-2-1-135-11. Available at (in Estonian): www.nc.ee, accessed 29 March 2012.

[60] Gender Equality Act (GEA), RT I 2004, 27, 181.

FINLAND – *Kevät Nousiainen*

Policy developments

Report on the position of sexual minorities

Finnish equality law regulates gender equality under the Act on Equality between Women and Men (609/1986), and other prohibited grounds of discrimination under the Non-Discrimination Act (21/2004). The latter Act contains an open-ended list of grounds, and does not explicitly mention belonging to sexual minorities[61] as a ground of discrimination. Nor does the Act on Equality mention this group. The case law of the European Court of Justice has considered the discrimination of 'trans-people' as a form of gender discrimination. In 2005, the Parliamentary Standing Committee on Employment and Equality outlined that the proper solution is to include the protection of sexual minorities against discrimination under the Act on Equality. The Finnish Equality Ombudsman, the equality body entrusted with the mandate to supervise gender equality law in Finland, has since then considered that the prohibition of gender discrimination and positive duties to promote gender equality in the Act on Equality between Women and Men also cover sexual minorities. The first court case in which compensation has been awarded to a person belonging to 'trans-people' was decided by the Helsinki District court in 2011.[62]

The Ministry of Social Welfare and Health started the preparatory works for an amendment to the Act on Equality in 2010, with the aim of including both an explicit prohibition and a positive duty to promote the equality of sexual minorities. Even after such an amendment, several problems concerning discrimination against sexual minorities would need to be solved by legislative amendments. A report on the position of sexual minorities in Finland was made at the behest of the Equality Ombudsman and published in March 2012.[63] The aim of the report was to gather information on how these minorities are treated, by interviewing their NGO representatives, relevant authorities and experts. The NGO representative unanimously stated that people belonging to sexual minorities are often discriminated against in working life, and the amendment of the Act on Equality should offer better protection against that type of discrimination.

The term 'sexual minorities' is used in various ways. By this term the report refers to 'trans-people' (transsexual, transgender and transvestite persons) and intersexual persons, but not to sexual orientation. Some but not all of these persons wish to undergo a sex reassignment. The report describes relevant legislation, including sexual reassignment, regulated by the Act on Sex Reassignment (563/2002), and the procedures followed concerning a change of forename, public register information and the impact of reassignment on family law. The report relates the Finnish constitutional and EU law on the discrimination of the sexual minorities.

Sexual minorities are not explicitly mentioned in Finnish legislation, political programmes or equality plans, and their invisibility is noted to be a problem in itself. While there is no question about sexual minorities being protected under the Finnish Constitution and non-discrimination law, the legal provisions are difficult to interpret. For example, when the Finnish Criminal Code mentions 'sexual orientation' as a ground to be protected under the provision on discrimination, it may remain unclear that trans-people are also protected, although the preparatory works of the provision show that this was meant with the wording.

The Act on Sex Reassignment requires that a person undergoing reassignment has to undergo sterilisation. The requirement seems to be motivated by traditional family values rather than any medical reasons. Finnish family law is based on separate provisions concerning marriage, which is limited to heterosexual couples, and a registered partnership which is available for

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61 The ambiguous term 'sexual minorities' is here used in the specific way, explained later in the text.

62 Helsinki District Court, Decision 21.12.2011 Nr 5301.

63 *Selvitys sukupuolivähemmistöjen asemasta. Tasa-arvovaltuutetun toimisto Tasa-arvojulkaisuja* 2012:1, at http://www.tasa-arvo.fi/julkaisut/valtuutetunjulkaisut, accessed 27 March 2012.

homosexual couples. A person undergoing a sex reassignment is required to change his or her family form accordingly, provided that his or her partner has consented to the change. The Supreme Administrative Court decided in 2009[64] that the requirement does not violate the Finnish Constitution, and that Finnish law in this respect draws a balance between the protection of the private life of trans-sexual persons and the dominant values in family life in a manner that falls within the margin of discretion allowed by the European Convention on Human Rights. The case has now been brought to the European Human Rights Court. The Finnish Act on Sex Reassignment was passed in the ordinary legislative procedure, although it concerns the fundamental rights of the persons concerned.[65]

In Finland, people are registered either as men or women by the official population register, and the individual social security number shows the sex of the person in question. While the Finnish language does not recognise linguistic gender, Finnish first names are gendered, and persons undergoing a sex reassignment change their first names accordingly. There are no official guidelines on the procedure to be followed by the local register offices, but a statement by a psychiatrist is required for a change of name. There are no official guidelines concerning medical care for trans-persons, and they encounter problems in health care especially in youth and old age. Part of the problem lies in the outdated medical classification, under which 'sexual minorities' are classified as pathological conditions. The Finnish authorities have removed transvestism from the national classification of disorders, but are waiting for changes to the relevant WHO classification before proceeding any further. The medical care related to sex reassignment is legally regulated, and the care concentrates on two medical units. Trans-gender persons also feel a need to use the care given by these units, but in practice only some of them benefit from these services. In order to obtain better access to treatment and care, these persons may seek to be medically diagnosed. There are two contending schools of thought concerning care practices for inter-sexual children. Sexual minorities' access to health services is thus in need of guidelines.[66]

Military service is also a problem for sexual minorities, as it is mandatory for all male citizens. The defence forces stress that discrimination is prohibited on the grounds of sex and sexual orientation, as well as other similar grounds. If a person has undergone a sex reassignment, it is taken into account *ex officio*. The first contact with the military service takes place at an age when people belonging to sexual minorities are in a state of transition concerning their sexual identity, however, and thus this first contact may cause problems. Guidelines are needed.[67]

Case law of national courts

Harassment of service producer as an issue of criminal law

A recent decision by the Supreme Court[68] illustrates the difficulties connected with the fact that harassment as such is not punishable under the Finnish Criminal Code, and that the crime of discrimination does not cover harassment by clients. A client who physically harassed a taxi driver was convicted of assault and the taxi driver received damages for the personal injury she had experienced. The Supreme Court referred to a provision from the Tort Liability Act on immaterial damages. According to the Court, the taxi driver had been harassed in a manner which, while not causing physical pain or injury, was humiliating and caused the victim anguish, aggravated by the fact that she could not properly defend herself against the aggressor while driving. The Court referred to the provision on an offence against liberty, honour and domestic peace or a comparable offence, and the intentional violation of personal integrity. Interestingly, the Court did not refer to another provision of the Tort Liability Act, which explicitly concerns the crime of discrimination. The reason for the choice of provision lies in the fact that harassment as such is not punishable under the Finnish Criminal Code.

64 Case KHO: 2009: 15. The case was presented in EGELR 1/2009, p. 53-54.
65 *Selvitys sukupuolivähemmistöjen asemasta*, p. 18-19.
66 Op. cit., 24-29.
67 Op.cit., 24.
68 Finnish Supreme Court Decision KKO:2012:14.

The crime of discrimination is prohibited under the Criminal Code, but only covers discriminatory acts by a service provider, but not discriminatory acts perpetrated by a client. The sum of damages demanded by the victim was merely EUR 100. The rather nominal damages reflect the fact that under the Finnish law of torts, damages for suffering or mental injury have traditionally been quite modest. The fact that the case was brought all the way to the Supreme Court by the defendant, despite the fact that the sum to be paid as damages was quite modest, shows the general interest involved in the case.

Terms of fixed-term employment by a hired employee

The Supreme Court recently decided[69] that an employer may not justify the use of a fixed-term employment contract merely by the fact that the employee is hired from an agency. In the case in question, an enterprise used several agency workers, and terminated the employment of an employee when the assignment ended. The employee brought the issue to court, claiming that the employment contract was to be considered as being indefinite, as both the agency and the user enterprise had a continuous need for labour. The agency justified the use of fixed-term contracts by claiming that such contracts are commonly used when an agency hires out employees to user enterprises. The Supreme Court found, however, that the Finnish Employment Contract Act does not contain a specific provision on the duration of agency work, and thus the general rule on fixed-term work is to be followed. Under the Act, an employment contract is valid indefinitely, unless it has, for justified reasons, been concluded for a fixed term. The customary practice followed by employers in agency work was not a justified reason. The justification of the use of a fixed-term contract is to be evaluated by the circumstances of the case, such as whether the work in question is truly for a fixed term. If the termination of the work is not specified at the outset, and the employee performs continuous tasks as in the case in question, there was no valid reason for the use of a fixed-term contract. The decision of the Court was taken by a vote (a majority of three judges against two dissenting).

As fixed-term work is common in Finland especially among women, and agency work has increased especially for young and foreign persons, a clarification of the rules to be followed as to the duration of the employment contract of hired employees is in many ways important for equality.

FRANCE – *Sylvaine Laulom*

Policy developments

A new socialist President has been elected on 6 May 2012. During the presidential campaign, women's rights were a marginal issue and the candidates did not propose any innovative solutions. François Hollande, the socialist candidate, proposed the creation of a Ministry of women's rights, the reimbursement of all abortion costs and also some measures to combat part-time work. Part-time work in France is highly feminized, poorly paid, and is very often not at a chosen time. François Hollande also stated that, if he is elected, his government will ensure parity between men and women. During his mandate, Nicolas Sarkozy did not do a great deal for women's rights. The government funds for family planning decreased and some abortion clinics closed. The political party to which he belongs, the UMP, only had 28 % of female candidates at the last parliamentary elections. Only the laws on parity on company boards and on administrative boards are positively evaluated by women's organisations. During the campaign, Nicolas Sarkozy only proposed to increase child-care facilities. We now have to wait and see if the newly elected President will propose a new policy and new rights for women.

[69] Finnish Supreme Court Decision KKO:2012:10.

Legislative developments

New quotas in the civil service

A new law has been adopted regarding public servants in the three main public services: the civil service of the State, the civil service of public hospitals and the civil service of local governments.[70] The aims of the law are to improve the working conditions of contractual workers in the public services and to combat discrimination based on sex. The idea is that the civil service should be an example for equality between men and women. The main provision of the law is certainly the adoption of quotas in the same way as in the private sector. The law requires that women make up 40 % of the various boards of public enterprises (Article 52 of the law). This percentage must be attained at the second renewal of the boards since the adoption of the law. All the consultative bodies representing public servants must also attain this percentage upon their next renewal (the 'common council of the civil service', and each council of each category of the civil service: State, territorial, hospitals). However, this percentage does not apply to the members of the bodies representing trade unions. The law also requires that women make up 40 % of high-level public service workers (20 % for the nomination in 2013 and 2014 and 30 % between 2015 and 2017). This means that in 2018 at least 40 % of high-level public service workers should be women.

Other measures have been adopted regarding parental leave which will now count as one year of work for the first year, and six months for additional years.

A national collective agreement is actually being discussed and should be signed on equality in the civil service. The aims of the agreement are to improve knowledge concerning the statistical situation of men and women in the civil service and women's careers in general as well as improving the balance between working and private life.

The law contains very important provisions and an important extension of the scope of quotas. However, the law has hardly been commented upon until now and its adoption has been very confidential. It is now necessary to wait for a few years before analysing whether these provisions can really improve the situation of women in the civil service.

Case law of national courts

Harassment

In the last few months, the *Cour de cassation* has issued few rulings on harassment and these decisions demonstrate the importance which is attached by the Court to the prohibition of harassment and its willingness to interpret the relevant legislation in a strict way. In an interesting case,[71] the *Cour de cassation* held that sexual harassment could be found even if the facts occurred outside the enterprise. In this case, the supervisor of two telephonists sent them e-mails by MSN containing sexual references. During parties organized after working hours, he also included sexual comments when talking to them. However, for the Court of Appeal sexual harassment could not be found here because the actions in question had taken place outside the workplace and not during working hours. The *Cour de cassation* overturned this decision and held that the employer can dismiss a worker who commits sexual harassment when the facts are committed in the professional sphere. Here, what was important for the *Cour de cassation* was the fact that the supervisor was in contact with the two female workers because of his work, thus the case did not concern his private life. In another decision on the same day regarding 'mobbing' (bullying in the workplace),[72] the *Cour de cassation* also held that the employer is responsible for a harassing situation even if the harasser does not belong to the enterprise. The case concerned a concierge who was harassed by an inhabitant of the building. This position of the *Cour de cassation* is motivated by the general obligation to prevent harm to workers' mental health and risks linked to moral

[70] L. n° 2012-347, 12 ars 2012 *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*, www.legifrance.gouv.fr, last accessed 25 March 2012.

[71] Cass. Soc. 19 October 2011, n° 09-72672.

[72] Cass. Soc. 19 October 2011, n° 09-68272.

harassment. Even if the case concerns mobbing, the same principle applies to sexual harassment or harassment on the grounds of sex. In another case,[73] the *Cour de cassation* confirmed that mobbing can occur even if the one who commits the harassment is in an inferior hierarchical position to the one who is being harassed.[74]

Right to maternity leave for teachers

The right to maternity leave for female teachers who are employed by the State is defined by the general Statute establishing statutory provisions relating to State civil servants (*Loi n°84-16 du 11 janvier 1984 modifiée, art. 34*). When maternity leave coincides with the general period of annual leave, civil servants can take their annual leave. However, the situation is different for teachers when maternity leave overlaps with the summer vacation, even if there is no specific rule which applies to this situation. The administration considers that the annual leave for teachers does not coincide with the summer vacation. Taking annual leave is not accepted and teachers do not have the right to take annual leave during school term if part of their summer vacation is taken up by maternity leave. The administration considers that they already take this annual leave during the other holiday periods (Christmas, February, Easter). A decision by an administrative tribunal has explicitly rejected this (TA Caen, 19 May 2006, n°0501566). In the relevant case, a teacher had taken maternity leave during the summer vacation and asked to take her annual leave after her maternity leave, thus during school term. The tribunal rejected her claim. For the tribunal, the school holidays are outside the scope of the general Statute of 1984. The particular necessities of this public service (education) determine that teachers cannot take their annual leave outside school holidays. However, in a recent decision by the administrative tribunal of Besançon,[75] another position was adopted. Here, again, the case concerned a teacher who had taken maternity leave during the summer vacation and asked to take her annual leave after her maternity leave, in other words during the school term. The administration rejected her request. However, referring to European Directive 2003/88/EC and its Article 7, the administrative tribunal accepted her claim and decided that she had a right to postpone her annual leave until after her maternity leave. For teachers who are employed by the State, prior to this decision, French legislation was not in conformity with the case law of the ECJ in Case C-342/01 *María Paz Merino Gómez v. Continental Industrias del Caucho SA*. [2004] ECR-I2605, which states that a worker must be able to take her annual leave outside her maternity leave. This decision, directly applying European Directive 2003/88/EC, definitely improves the situation of female teachers but I am not sure whether public administrations have ceased to apply the previous rule and a claim may need to be made for teachers to be able to take their annual leave outside their maternity leave.

Sex discrimination concerning the wearing of an earring

The *Cour de Cassation* has decided that the dismissal of a man,[76] who was a waiter at a restaurant, because he was wearing an earring constituted discrimination based on physical appearance and sex. The employer could not justify his decision to dismiss the worker and thus discrimination was proved. The decision is interesting because the employer tried to justify his decision by invoking the image of the restaurant and the fact that the waiter had contact with customers. For the *Cour de cassation*, these elements cannot justify the decision of the employer to forbid the waiter from wearing an earring because he is a man.

[73] Cass. Soc. 20 October 2011, n° 10-15623.
[74] Cass. Crim. 6 December 2011, n° 10-82266.
[75] Administrative Tribunal of Besançon, 24 March 2011, n°101222, AJDA juillet 2011, p. 1389.
[76] Cour de cassation, 11 January 2012, n°10-28213.

GERMANY – *Ulrike Lembke*

Policy developments

Gender quotas on company boards

The issue of gender quotas for supervisory and executive boards is continuously debated in Germany. In December 2011, a political alliance of women from all parliamentary groups and parties presented the Berlin Declaration demanding legally binding regulations providing a 30 % female quota on supervisory boards of listed private companies and of public companies – to start with.[77] The Berlin Declaration points out the failure of voluntary commitments, and therefore calls for effective equality legislation, including, but not limited to, binding quota regulations. This initiative is supported by women and men from business, organisations, politics and academia.

The strongest opponents of statutory women's quotas are the Minister for the Family, Senior Citizens, Women and Youth (who favours the concept of a 'flexiquota' which seems to remain a political idea because a concrete draft law has not yet been presented) and the political leaders of the Liberal Party (*Freie Demokratische Partei, FDP*) which is one of the governing parties in a coalition with the Christian Democratic Party (*Christlich Demokratische Union, CDU*). But according to recent reports,[78] the Chancellor is considering making statutory women's quotas a main issue in the next election campaign, (female and male) members of the Christian Democratic Party support and have signed the Berlin Declaration and a fresh discussion has started on the possibility of competitive disadvantages for German companies with respect to the procurement regulations of European countries with effective gender quotas.

Child-care benefits

It is expected that the coalition agreement between the parties in power providing for child-care benefits (*Betreuungsgeld*) for parents who want to care for their children personally as long as they are less than three years old instead of sending them to a kindergarten will not become law. In the summer of 2011, politicians, lawyers and other experts questioned the compliance of child-care benefits with the Constitution, gender equality and the welfare of the child.[79] According to calculations published by the Financial Times Deutschland,[80] the costs child-care benefits will amount to EUR 2 billion a year. (The government expected this to be EUR 400 million to EUR 1.2 billion.) The main reason for this increase is the insufficient infrastructure of public day-care facilities in Germany because parents who have to care for their children personally at home on an involuntary basis will claim the benefits as well as parents who have decided to stay at home with their toddlers. Besides these financial problems, the Institute for the Study of Labour published an alarming study on the effects of child-care benefits[81] suggesting that such benefits lead to a decline in female labour force participation, negative short-term effects on cognitive and non-cognitive skills of girls and negative spill-over effects on older siblings. On 3 April 2012, twenty-four MPs from the ruling Christian Democratic Party (*Christlich Demokratische Union, CDU*) announced that they will vote against the child-care benefits in the Bundestag.[82] On 4 April 2012, the parliamentary group of the Liberal Party (*Freie Demokratische Partei, FDP*), which is one of

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77 For further details see: http://www.berlinererklaerung.de/, last accessed 2 April 2012.

78 See: http://www.spiegel.de/politik/deutschland/0,1518,820647,00.html, http://www.spiegel.de/wirtschaft/unternehmen/0,1518,823574,00.html, accessed 2 April 2012.

79 Most of the arguments were presented in the hearing before the Federal Parliament on 4 July 2011, http://www.bundestag.de/dokumente/textarchiv/2011/34850518_kw26_pa_familie/index.html, accessed 2 April 2012.

80 See: http://www.ftd.de/politik/deutschland/:streit-um-kinderbetreuung-regierung-rechnet-sich-betreuungsgeld-billig/70017855.html, accessed 4 April 2012.

81 The study is available at http://ftp.iza.org/dp6440.pdf, accessed 4 April 2012. See also Professor Margarete Schuler-Harms, http://www.fes.de/forumpug/documents/BroschuereVerfassungsrechtlicherRahmeneines Betreuungsgeldes09_000.pdf, accessed 4 April 2012.

82 See: http://www.manager-magazin.de/politik/deutschland/0,2828,825376,00.html, accessed 4 April 2012.

the governing parties in a coalition with the Christian Democratic Party, raised doubts as to the compatibility of child-care benefits with the Constitution with regard to the system of legislative powers under the German Basic Law.[83]

Child custody between unmarried parents

With the objective to put an end to certain forms of discrimination against unmarried fathers, a comprehensive revision of the German law of child custody between unmarried parents was required by the European Court of Human Rights and the Federal Constitutional Court (*Bundesverfassungsgericht*) in 2009 and 2010. Since then, different regulatory models have been discussed but no bill has been ratified by the Bundestag. The latest legislative proposal was presented by the parliamentary group of the Social Democratic Party (*Sozialdemokratische Partei, SPD*).[84] The proposal provides for the competence of the youth welfare office to bring the question of child custody before the family court without a parental application. The proposal was criticised by the German Women Lawyers' Association (*Deutscher Juristinnenbund, djb*) due to its suspected ineffectiveness.[85]

Reconciliation of work and family life

The Minister for the Family, Senior Citizens, Women and Youth has set up a programme in cooperation with leading industry associations to promote family-friendly working environments in German companies.[86] The programme includes a company network, a competition for the most family-friendly company, concepts for family-friendly working hours and a support programme for company-supported day-care facilities for children.

Gender pay gap

In Germany, the gender pay gap is not closing but remains at 23 %.[87] Therefore a broad alliance of the German Women's Council, parliamentary groups, some state governments, the German Federation of Trade Unions, the association of equal opportunity commissioners, social organisations, male interest representations and others demand equal pay legislation.[88]

Male kindergarten teachers

The Minister for the Family, Senior Citizens, Women and Youth has established a coordination centre to promote the increase in the number of male kindergarten teachers.[89] A very positive side-effect is that the accompanying publicity campaign[90] offers new ideas and images of the profession of kindergarten teachers as well as of gender roles.

Legislative Developments

There are no legislative developments in the field of gender equality. Especially the Minister for the Family, Senior Citizens, Women and Youth prefers concepts which are not legally binding. Moreover, 2013 is an election year.

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83 See: http://www.spiegel.de/politik/deutschland/0,1518,825628,00.html, accessed 4 April 2012. Professor Margarete Schuler-Harms comes to the conclusion that a federal regulation of child-care benefits violates the system of legislative powers under the Basic Law, http://www.fes.de/forumpug/documents/BroschuereVerfassungsrechtlicherRahmeneinesBetreuungsgeldes09_000.pdf, p. 18-19, accessed 4 April 2012.

84 See: http://dipbt.bundestag.de/dip21/btd/17/086/1708601.pdf, accessed 2 April 2012.

85 See: http://www.djb.de/Kom/K2/pm12-05/, accessed 2 April 2012.

86 See: http://www.erfolgsfaktor-familie.de/default.asp?id=70, accessed 2 April 2012.

87 See: http://www.bmfsfj.de/BMFSFJ/Service/themen-lotse,did=88096.html, accessed 2 April 2012.

88 See: http://www.frauenrat.de/deutsch/infopool/informationen/informationdetail/back/11/article/equal-pay-day-recht-auf-mehr-nur-mit-einem-gesetz.html, accessed 2 April 2012.

89 See: http://www.koordination-maennerinkitas.de/, accessed 2 April 2012.

90 For example http://www.vielfalt-mann.de/, accessed 2 April 2012.

Case law of the national courts

Federal Administrative Court (*Bundesverwaltungsgericht*), decision 2 B 93.11 of 9 November 2011

The Federal Administrative Court had to decide on the unlawful denial of promotion for a female part-time worker in the civil service.[91] The applicant claimed compensation because her promotion had been denied due to her part-time work and thus she faced gender discrimination. The claim for compensation was rejected under German law because of the absence of fault on the part of the employer. Moreover, the applicant was not awarded compensation resulting from the breach of Directive 76/207/EC (non-fault liability) because the court was unable to verify a sufficiently serious breach of a superior (European) rule of law for the protection of the individual.

Federal Administrative Court (*Bundesverwaltungsgericht*), judgement 2 C 19.10 of 30 June 2011

This judgement concerned criteria for the promotion of civil servants.[92] The applicant's employer formed groups of civil servants on the basis of their concluding assessments. Within groups with similar assessments, the employer created a ranking list starting with disabled women, followed by women and disabled men right up to able-bodied men. The court decided that this promotion practice was unconstitutional because the employer had to make distinctions between the civil servants within the same group based on details in their concluding assessments before not performance-related criteria such as gender or (dis)ability might have been taken into consideration.

Federal Social Court (*Bundessozialgericht*), judgment B 10 EG 1/11 R of 15 December 2011

The judgment concerned regulations for calculating the amount of parental allowance when both entitled parents take parental leave and work part time simultaneously instead of taking parental leave one after the other and ceasing work during the leave while the other parent works full time.[93] The law on parental leave provides for a parental allowance to parents for up to 14 months, provided that at least two months are taken by the other parent. The amount depends on the average salary of that parent during the past twelve months and the income earned by part-time work during the leave is taken into account. The parental allowance cannot be claimed by both parents for 14 months – not even when both work part time and earn accountable incomes – but can only be claimed by these parents one after the other for up to 14 months. Thus, the applicants were awarded a parental allowance amounting to only half the amount which parents would have been awarded if they had taken parental leave one after the other and ceased work during the leave while the other parent worked full time.

The applicants argued that the law on parental leave and parental allowance is discriminatory because, due to the concept of simultaneous and equal parental care, they were placed in a less favourable position than parents who take parental leave one after the other. The court decided that the law on parental leave and parental allowance neither violates the constitutional protection of the family, especially the free decision on the optimal division of labour between the parents, nor the principle of equality, especially gender equality.

Federal Social Court (*Bundessozialgericht*), judgment B 11 AL 19/10 R of 25 August 2011

The Federal Social Court had to decide on the proper calculation of the amount of unemployment benefits after long-term parental leave.[94] The applicable law provides for

[91] http://www.bverwg.de/pdf/2711.pdf, accessed 30 March 2012.
[92] http://www.bverwg.de/pdf/2379.pdf, accessed 30 March 2012.
[93] http://juris.bundessozialgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bsg&Art=en&sid=788c2c2061fdd5b3aa2896736c9f1058&nr=12332&pos=0&anz=34, accessed 30 March 2012.
[94] http://juris.bundessozialgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bsg&Art=en&sid=546947a26249d76b252100da819a8c7d&nr=12273&pos=4&anz=34, accessed 30 March 2012.

unemployment benefits for 12 months. The amount is calculated on the basis of the average salary during the past twelve months before the unemployment. When the applicant has worked less than 150 days during the past twelve months before the unemployment – e.g. because of parental leave – the amount is calculated on the basis of the average salary during the past three years before the unemployment. When the applicant has worked less than 150 days during the past three years before the unemployment – e.g. because of parental leave – the amount is calculated on the basis of a fictitious salary which the applicant could have earned at the time when the application is lodged.

The applicant demanded a calculation of her unemployment benefits on the basis of the salary that she had earned before she took long-term parental leave. The court rejected her claim and found no indirect discrimination on the ground of sex, basing its argument on the fact that the applicable law was objectively justified and that, moreover, the applicant's general entitlement to unemployment benefits (and not the significantly lower unemployment assistance) was only established with regard to the times of her parental leave.

Federal Court of Finance (*Bundesfinanzhof*), judgment XI R 40/09 of 19 October 2011

This judgement concerned advantageous tax conditions for male foreign artists presenting strip shows.[95] The finance court rejected the artists' claim for advantageous tax conditions with the argument that their strip show would only attract a female audience and thus the performances were not directed towards the public at large. According to the Federal Court of Finance, the strip shows were presented to an unspecified number of visitors and were therefore directed towards the public, irrespective of the actual sex or gender of the audience.

GREECE – *Sophia Koukoulis-Spiliotopoulos*

Policy developments

The growing socio-economic crisis in Greece has led to an intensification of the activity of independent bodies dealing with human rights, including gender equality, such as the Greek Ombudsman, who is also monitoring the implementation of gender equality and non-discrimination legislation, and the Greek National Commission for Human Rights (GNCHR).[96] Expressing their deep concern for the dramatic socio-economic situation in Greece, which seriously affects women, young people, parents and children,[97] they are striving for and demanding the implementation of fundamental EU principles, rights and objectives, as a means to overcome the crisis. In the same vein, international NGOs (INGOs) are mobilising and formulating similar demands.

The common conclusion of the GNCHR and the INGOs is that there is no way out of the socio-economic crisis, which is plaguing Europe as a whole; no way for the EU to regain the trust of its citizens – indeed no future for the EU – without safeguarding and strengthening fundamental rights, including social rights.

These concerns are shared by EU institutions. Thus, the President of the European Commission, the President of the European Parliament and the Prime Minister of Denmark, currently the President of the Council of the EU, have responded to the invitation of the

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95 http://juris.bundesfinanzhof.de/cgi-bin/rechtsprechung/druckvorschau.py?Gericht=bfh&Art=en&nr=25602, accessed 30 March 2012.

96 The GNCHR was established and is operating under the UN Paris Principles (UN General Assembly, 85th Plenary, 20.12.1993, A/ RES/48/134) as an independent advisory body to the Greek State for the protection of Human Rights.

97 In December 2011, the general unemployment rate was 21 %. Women and young people were the worst hit: the male rate was 18 %, the female rate was 25 % and the youth rate was 50.4 %. There was a dramatic rise in ten months: in February 2011, the general unemployment rate was 14.9 % (12.2 % for men and 18.6 % for women), while youth unemployment was 39.5 %: Eurostat *Newsrelease Euroindicators*, 52/2012 – 2 April 2012: http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-02042012-AP/EN/3-02042012-AP-EN.PDF, accessed 2 April 2012. It is obvious that real unemployment was even higher in December 2011 and that all rates have gone up since then.

European Ombudsman to discuss, on 24 April 2012, at a high-level public seminar, the subject of 'Europe in crisis: the challenge of winning citizens' trust'. In his invitation, the European Ombudsman is stressing that 'the most important current issue at both the EU and the Member States levels is undoubtedly the economic and financial crisis and its implications for the future of the EU. Citizens in many Member States are not only losing trust in their national governments, but are also increasingly sceptical of the EU's ability to find solutions to the worst crisis in its history'. The aim of the seminar is 'to explore what concrete measures European and national institutions can take to (re)gain EU citizens' trust'.[98]

Miscellaneous

The Greek Ombudsman

Introducing her Annual Report for 2011, the Greek Ombudsman stresses that 'we are going through a period of tectonic restructuring. The crisis wipes out the certainties which accompanied us at least in the post-war period. Not only the conditions, but moreover the rules regarding rights and obligations are radically changing, and along with them the plans at individual and collective levels are thwarted. Continuous legislative interventions are repealing rights and expectations based on them. The adjustment to which the Greek economy and society are forcibly led is dramatically affecting citizens, while vulnerable groups are expanding and multiplying. Social rights are restricted and financial obligations become often unbearable.'

The Ombudsman deplores the fact that, while the intervention of her institution is increasingly being requested, the general situation and the sharp budget cuts make its task increasingly difficult. She moreover warns that 'the difficult conjuncture must not constitute an alibi for regression regarding precious, but fragile achievements in the field of the protection of the rule of law and democracy. Their respect is now even more important, as what is at stake for citizens is more crucial than ever.'[99]

In the same Report, the Deputy Ombudsman for gender equality deplores that 'the austerity measures have contributed to a massive loss of employment in the private and public sector, unprecedented deregulation of labour legislation and an increase in atypical employment. Women's complaints of employment discrimination are increasing, as they are more exposed to adverse working conditions, in particular during pregnancy and upon their return from maternity leave. They are moreover under greater pressure to accept flexible forms of employment which do not ensure an adequate standard of living and do not allow them to meet their family obligations. At a time when employment rights are being abolished and protection by collective agreements is diminishing in favour of individual agreements, it is EU law which provides important tools for the promotion of gender equality, enabling the Ombudsman to offer out of court protection'.[100] Let us note that, in spite of growing discrimination, women are increasingly reluctant to have recourse to the courts, mainly for fear of victimisation, lack of evidence and fear of being labelled as trouble makers.

The Greek National Commission for Human Rights

In December 2011, the GNCHR issued a Recommendation 'On the imperative need to reverse the sharp decline in civil liberties and social rights', which it updated in February 2012.[101] It thereby expressed its deep concern for the dramatic deterioration of living standards in Greece and the adoption of measures which are incompatible with social justice and which are coupled with the dismantling of the Welfare State, with unprecedented adverse effects on the enjoyment of a wide spectrum of human rights and sounded the alarm. More in particular:

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98 www.ombudsman.europa.eu accessed on 2 April 2012.

99 Greek Ombudsman *Annual Report 2011*, *Introduction* by the Ombudsman, Professor Calliope Spanou, January 2012 (in Greek): www.synigoros.gr accessed 2 April 2012.

100 Greek Ombudsman *Gender and Employment Relationships*, Special Report 2011.

101 See both texts in Greek and English on www.nchr.gr accessed 1 April 2012.

Concerns about the situation

The GNCHR deplored inter alia the drastic reductions in even lower salaries and pensions; the reversal of the hierarchy and the weakening of collective agreements; the facilitation of dismissals and the restrictions on hiring; the rapid increase in unemployment and the overall job insecurity; the disorganization, reduction or elimination of social infrastructures; the drastic reduction or withdrawal of vital social benefits; the lack of support for maternity, paternity, children and the family in general, while the number of unemployed parents with young children is continuously increasing; the lack of prospects for the young, who are either unemployed or employed under detrimental and precarious conditions; the increase in taxes, often with retroactive effect, which are unrelated to the taxpayers' ability to pay; the avalanche of unpredictable, complicated, conflicting, and constantly modified 'austerity measures', which exacerbate the general sense of insecurity; and the inadequacy of legal aid.

The GNCHR also deplored that such measures 'are rendering a significant part of the population destitute, widening the social divide, disrupting the social fabric, strengthening extremist and intolerant elements and undermining democratic institutions. However, such phenomena are not unique in Europe. They are part of an all too slippery ground on which many EU countries are currently situated, which is leading to a radical change of heart among Europeans vis-à-vis the process of European integration and is undermining the Union's cultural and democratic foundations'.

The GNCHR is sounding the alarm: there is no way out of the crisis if fundamental rights are not effectively guaranteed

The GNCHR recalled that, by virtue of the Treaties, the Fundamental Rights Charter and the Court's case law, civil liberties and social rights are fundamental values and objectives of the EU, indeed its cornerstone. Moreover, the fulfilment of EU social objectives conditions the effectiveness of its economic objectives. The Court, interpreting Article 119 TEC (now 157 TFEU) (equal pay for men and women), stressed that the EC/EU '*is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek constant improvement of the living and working conditions of the peoples of Europe, as is emphasized in the Preamble to the Treaty*',[102] while the Charter proclaims that the EU *'places the individual at the heart of its activities'* (Preamble).

The GNCHR also recalled that, in response to a complaint by the Greek General Confederation of Labour, the ILO Committee on the Application of Standards underlined that 'restrictions on collective bargaining should be imposed only as an exceptional measure and only to the extent that it is necessary, without exceeding a reasonable period and should be accompanied by adequate safeguards to protect workers' living standards'.[103] However, the situation is not in compliance with these standards, and it is constantly worsened.

The GNCHR concluded that 'there is no way out of the socio-economic and political crisis, which plagues Europe as a whole – in fact no future for the Union – if civil liberties and social rights are not effectively guaranteed'. Deploring the growing tendency to adopt measures of EU 'economic governance' of a monetarist character, it sounded the alarm and called upon the Greek Government and Parliament to undertake common action with the governments and parliaments of other Member States, so that every EU and national measure of 'economic governance' can be adopted and implemented with due respect for and in a manner that safeguards fundamental rights.

The INGOs enjoying participative status with the Council of Europe also sound the alarm

The Conference of INGOs enjoying participative status with the Council of Europe (366 INGOs) support the Declaration 'Reinforcing social rights in order to exit the economic crisis', drafted by the Association of Women of Southern Europe (AFEM) and the

[102] ECJ Cases C-50/96 *Schröder* [2000] ECR-774 and C-270/97 *Sievers* [2000] ECR I-933.

[103] International Labour Conference, 100th Session, Geneva, June 2011, *Report of the Committee on the Application of Standards, Part two: Observations and information concerning particular countries,* 18 Part II/68-II/72, *Conclusions*: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_157818.pdf, accessed 1 April 2012.

Marangopoulos Foundation for Human Rights.[104] This declaration, adopted in May 2011 and updated in March 2012, voices concerns similar to those of the GNCHR.

The declaration recalls that fundamental rights, including gender equality, are the cornerstone of the EU and that the social character – indeed the human face – of the EU is constantly stressed by the European Parliament, the Council and the Commission and reinforced by the Court's case law. However, 'the real situation all over Europe is flagrantly diverging from the text of the Treaties. The social protection structures are disintegrating and the gap between the economically weak and the powerful is dangerously widening and deepening. Consequently, any policy aimed at achieving an exit from the crisis must be designed and implemented in light of EU fundamental values, rights and objectives explicitly proclaimed in EU fundamental texts. Otherwise, the substantial decrease of salaries and pensions, unemployment, the intensification of poverty and social exclusion, and the ensuing social tensions will further hamper economic growth and accelerate recession and misery, thus reinforcing the current crisis and putting at risk democratic structures in Europe.'

Regretting that EU measures of economic governance ignore the EU social dimension, the INGOs are sounding the alarm and demanding that 'all economic governance measures be accompanied by binding social clauses based on fundamental values and rights guaranteed by the EU Treaties and the Charter; that the European Parliament avail itself of the reinforcement of its powers by the Lisbon Treaty in order to demand such social clauses; that the Commission members dealing with social affairs and human rights be actively involved in the elaboration and implementation of the economic governance. Otherwise, all economic governance measures are doomed to failure. They will only lead to misery and will shake the democratic institutions.'

HUNGARY – *Beáta Nacsa*

Policy developments

In the reviewed period (between November 2011 and April 2012) the Conservative Government of the middle-right Fidesz Party (Hungarian Civic Union) and its alliance, the small KNDP (Christian-Democratic Party), continued its strained political and legislative activity without any genuine debate with the opposition, purely relying on its two-thirds parliamentary majority. In the reviewed period the new Basic Law (which replaced the Constitution), which had been created by the Fidesz-KNDP alliance, came into force, and numerous Acts were enacted in the fields of the most important societal setting, such as parliamentary elections, the judiciary, education, the media, employment, etc., that fundamentally changed the regulations in the given fields.[105]

This legislative activism in these fields that are directly related to exercising political power in the country has met little resistance from the weakened national institutions such as the Constitutional Court, the Ombudsman[106] and the judiciary, but has provoked intensive international criticism from the side of the EU, the IMF, and the Council of Europe.

The gender balance of the government has improved slightly by the appointment of the very first female minister to the position of Minister of National Development on 23 December 2012. Mrs Lászlóné Németh's appointment as head of one of the biggest ministries has been rather controversial, however, because of her lack of a college/university degree.

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[104] www.afem-europa.org, in English (http://afem.itane.com/DOCUMENTS/Francais/Nos%20Activites/Prises%20de%20position/DECLARATION_EN%2019%20NOV.pdf) and French, accessed 10 April 2012.

[105] In 2011 Parliament enacted more than 200 Acts.

[106] The Commissioner for Fundamental Rights filed a petition with the Constitutional Court claiming the annulment of certain sections of the Transitional Provisions of the Basic Law passed by Parliament in December 2011 because that harms the principle of the rule of law. 14 March, 2012. www.obh.hu/allam/eng/index.htm, accessed 5 April 2012.

As a response to the constantly high inactivity rate and the recently slowly increasing unemployment rate among women,[107] the Minister of National Economy has appointed a special commissioner responsible for female employment on 1 April 2012 for six months. The 51 % activity rate of women is far below the EU average (58 %); nonetheless, the distribution of female employment in Hungary is more favourable because of the much higher proportion of those in full-time employment (47 % full-time and 4 % part-time, compared to 40 % full-time and 18 % part-time employment in EU). The aim of the Government is to maintain the high proportion of full-time employment and as well as generating additional part-time employment. The breaking point here could be the recent increase in places in day nurseries, the low number of which prevents mothers of children below three years of age from re-entering the labour market.

The Central Statistical Office published its volume on 'Women and Men in Hungary 2009-2010' on 7 March 2012, containing numerous tables on gender-sensitive features of the economy and society. According to the data published on wage differentials, since 1995 the pay gap between men and women has considerably decreased in unskilled jobs (from 80 % to 96 % in the ratio of the wages of women to the wages of men), while it has seriously increased in all categories of employees with a higher education. The pay gap is the widest among managerial employees where the proportion of women's wages to that of men decreased from 85 % in 1995 to 76 % in 2010.

Legislative development

New Basic Law came into effect

Hungary's (the name of the state is no longer the Hungarian Republic) new Basic Law came into effect on 1 January 2012. The Basic Law has been criticised for several important reasons, relating both to the procedure for creating the new Basic Law and its content. Those reasons point out that the Basic Law has not been based on consensus among political forces and within society; that constitution-making has been treated as a matter of ordinary politics; and that the competences of the Constitutional Court have been reduced both with regard to preliminary and *actio popularis* in *ex post* constitutional review.[108] It was also pointed out that the text often relegates (on over 50 occasions) cardinal laws which are supposed to regulate, in detail, society's most important aspects, including – among the gender-related issues – family policies (Article L.), on which a new law was passed in the reviewed period as well. (See below.)

As for the content of the Basic Law, Article II is one of the most worrisome rules from a gender-related aspect, which provides protection for the life of the foetus from its conception. From this Article, it appears as if there is a hierarchical relationship between the life and the interests of the mother and that of the foetus, to the detriment of that of the mother. An ultraconservative regulation of abortion and homebirths could be reinforced by a reference to this Article in the new Basic Law.

New Act on the protection of families

Parliament enacted Act CCXI of 2011 on the protection of families by a supermajority according to the new Basic Law.[109] The new Act provides a legislative framework for further regulating the legal standing of families and family members. The framework character of the legislation is emphasized by the numerous references to further pieces of legislation which will concretize particular regulations in the future. The Act – similar to the Basic Law – starts

[107] Between December 2011 and February 2012 the unemployment rate among women slightly increased while during the same period the male employment and unemployment rate has shown improvement. Central Statistical Office, http://www.ksh.hu/docs/eng/xftp/gyor/jel/ejel21201.pdf, accessed 5 April 2012.

[108] Opinion on the New Constitution of Hungary. European Commission for Democracy through Law. (Venice Commission). Cdl-Ad(2011)016 Or. Engl.

[109] The Venice Commission took the view that the regulation of families should/could be left to ordinary legislation and that majoritarian policies, such as family issues, fall outside of that which is fundamentally politically important, and that also in this regard a flexibly adaptable regulation is needed, p. 6.

with a lengthy preamble containing a philosophical explanation on the role of families in society. The first part sets the aims and principles of the regulation; the second part determines the rights and obligations of family members, including that of minors. According to Article 9 (1), on the basis of parental responsibility the rights and obligations of the mother and father are equal; nonetheless, the paragraph points to further legislation which might regulate this issue otherwise. This part also establishes the financial obligations of family members towards each other: parents are obliged to support their minor children even to the detriment of themselves, and adult children must support their parents if they are not able to support themselves through no fault of their own. The third part of the Act sets the rules on protecting the employment position of parents. These regulations do not go beyond the protection provided by the Labour Code, and frequently refer to further pieces of legislation which set out in detail the actual content of the rights and obligations. The final part relates to the principles under which families enjoy state support and protection, also broadly determining the different forms of financial protection and protection in kind.

Lessening the protection of parents from dismissal – the New Labour Code

The Hungarian Parliament has enacted a new Labour Code (Act No. I of 2012) that will come into force on 1 July 2012. The new Code has considerably lessened the legal protection of workers against unjust dismissal by the employer; nonetheless, the level of legal protection afforded to pregnant women and mothers/parents of small children has not been reduced as much as that of other groups of employees.

Pregnant women are still protected against dismissal. Previously the protection started at the moment of conception which has been reduced to the time when the woman notifies her employer about her pregnancy. If the woman is undergoing human reproduction (IVF) treatment, she is also entitled to protection from dismissal for the duration of the treatment up to a maximum period of six months, also from the notification of the employer about the treatment. The protection in this case also starts from the notification of the employer.

Both parents are entitled to unpaid leave as long as the child reaches the age of three for which period both are protected from dismissal regardless of their qualification for social security payments. If the mother or the single father who raises the child alone returns to work before the child reaches the age of three, the level of legal protection is reduced but is not totally eliminated. The form of protection from dismissal varies according to the actual reason for dismissal. If the reason for the dismissal is related to the employee's behaviour, it must be so serious that it could serve as the basis for a summary dismissal. If the reason for the dismissal is related to either the capabilities of the employee or the operations of the employer, the employee can only be dismissed if there is no available equivalent work at the employer's given premises which corresponds to the capabilities, practice and qualifications of the employee in his/her actual work.

If the employee is temporarily away from work in order to care for a child who is ill, the period of notice for a dismissal will not commence until (s)he returns to work. Under the previous Labour Code, this situation also constituted a ground for prohibiting such a dismissal.

If the employer illegally dismisses a pregnant or IVF-treated woman, or the mother/father of a child below the age of three, the employee is entitled to reinstatement in her/his previous work, while (s)he is also entitled to lost wages. The right to reinstatement is an exception to the general rule that seriously reduces the legal consequences of unjust dismissal. Under the general rule, the employee will be entitled to any compensation if (s)he proves that (s)he has suffered damage in relation to the unjust dismissal. Without being able to show the actual damage, the employee – instead of compensation – will only be entitled to absence fee[110] for the notice period.[111]

[110] The absence fee (*távolléti díj*) replaces the previously applied average salary. The absence fee, according to its method of calculation, is always lower than the average salary and is equal to the basic salary of the worker in most cases.

[111] The length of the notice period is 30 days which increases with the length of service up to 90 days that is reached after 20 years of service.

This seemingly provides for stronger protection for all three above-mentioned groups of employees. In recent court practice, under which any person who has been unjustly dismissed could claim reinstatement, such claims are extremely rare because court procedures frequently last for many years. If the length of court procedures does not decrease considerably, the opportunity for pregnant women and the parents of small children to be reinstated will only be a theoretical and not a valid option. On the other hand, the huge difference in the available legal consequences could be counter-productive, because employers could develop a strategy to avoid taking on female employees due to their legal privileges.

Case law of national courts

Conviction of midwife for assisting in a home birth

The midwife Ágnes Geréb, who is the pioneer of homebirths with a record of more than 3 000 non-complicated homebirths, was sentenced in a final and binding judgment of the criminal court of second instance to two years' imprisonment and a ten-year prohibition on practising as a midwife, and was also ordered to pay the considerable costs of the criminal procedure because of negligent malpractice on 10 February 2012.[112] Since then, Ms. Geréb and other midwives have been prosecuted on further charges.

In theory, an expectant mother's right to freely determine the place where her baby will be born has been accepted as an integral part of the right to self-determination and the right to dignity, and as such was recognised by the previous Constitution and by the recent Basic Law (in force since 1 January 2012) as well. In practice, however, any medical personnel who assisted women who decided to give birth at home risked being subjected to criminal charges (negligent malpractice) because homebirth as a medical process and independent midwifery as a medical profession were not regulated until 2011.

The issue of the legal regulation of homebirths became pressing when a baby died due to shoulder dystocia during a homebirth. In the criminal procedure, due to the lack of regulations on independent midwifery, the activity of the midwife was judged on the basis of medical protocols to be followed in hospitals. The experts taking part in the criminal procedure took the view that a homebirth is extremely dangerous to both the mother and the newborn baby *per se*, and therefore anyone who assists in this process commits negligent malpractice.

The conviction of Ágnes Geréb and other midwives only occurred due to the improper regulation of homebirths and independent midwifery. The State formulated the first regulation on this issue only in 2011,[113] when homebirths had already existed in practice for more than two decades.

Not only the merits of the decision, but also the procedure were seriously criticised by lawyers and Ms. Geréb's family: the frequent strip searches while in jail, the use of handcuffs and leg shackles causing serious wounds, and the ignoring of evidence and testimonies in the accused's favour, including evidence provided by internationally recognised experts in homebirth. The criminal case against Ágnes Geréb reinforces fears about the possible malfunctioning of certain Hungarian courts.

[112] Decision by the Fővárosi Itélőtábla in the criminal case against Ágnes Geréb and other defendants on 10 February 2012.

[113] 35/2011. (III. 21.) *Korm. rendelet az intézeten kívüli szülés szakmai szabályairól, feltételeiről és kizáró okairól* (Government Decree 35/2011. (III.21.) on the rules, conditions and exclusionary factors regarding giving birth outside (health-care) institutions) has been criticized by independent midwives as being extremely strict, rigid and restrictive. The Government Decree is considered to be discriminatory on the basis of age because whole groups of women are excluded from homebirths (women below 18 and above 40, the latter in the case of a first birth) and also discriminatory on the basis of wealth as only women who can pay for the extremely expensive private insurance may enjoy the right to freely determine the conditions of her confinement and may opt for out-of-hospital birth.

Importance of notification by the employer concerning protected issues during employment and dismissal

In the course of restructuring a company, a female cashier was dismissed. She was a single mother of three. The employee stated inter alia that she had been dismissed because of her motherhood during the restructuring, despite her excellent work record. The employee also referred to a breach of Article 65 (3) of the Labour Code, which obliges the employer to consult with the works council and the trade union about any dismissal, by way of which the employment of single mothers with good working records could be safeguarded. In dismissal cases the burden of proof falls on the employer who must prove that the work of the claimant has been affected by any restructuring. The employer pointed out that the decision of the employer on the method of restructuring falls outside the competence of the courts, and also that during the dismissal the employee did not claim that she fell under Act No. CXXV of 2003 on equal treatment because of some protected attribute. The claim was rejected by the court because the employer proved the validity and causality of the reason for the dismissal. With regard to the arguments based of discrimination, the court reasoned that the employee did not establish that it was probable that the dismissal was based on her motherhood; therefore, there was no need to apply the rules on reversing the burden of proof with regard to discrimination.[114]

Decisions of the Equal Treatment Agency (ETA)

Trivializing sexual harassment in company investigations

A male co-worker habitually made remarks about the attractive appearance of a female co-worker. During conversations he used a very intimate tone (calling her 'puppy' or 'piglet'), and repeatedly offered himself as her sexual partner both in the open office space and in the kitchen. The female worker initiated an ethical procedure within the company against the co-worker asking the employer to sanction the harasser and to prevent further sexual harassment. Evidence collected in the course of the procedure supported the allegations by the female worker; nonetheless, the company played down the sexually offending character of his behaviour, and only issued a written warning due to his improper behaviour.

The female worker in her claim instigated at the Equal Treatment Agency (ETA) insisted that the employer had trivialized the sexual harassment and did not take appropriate steps for its prevention.

The ETA upheld the claim and concluded that the employer had not taken proper steps in order to change this degrading and humiliating working environment. Issuing a written warning, especially if it is based on more general terms, e.g. improper behaviour instead of actual sexual harassment, does not have a sufficient preventive effect without further measures, like sensitivity training, company newsletters, etc. Despite the fact that the employer started to establish rules and regulations on harassment at the workplace during the procedure, the ETA imposed a fine of EUR 4 000 and ordered the publication of the decision on both the homepage of the ETA and of the employer for three months.[115]

Sexual harassment during public work programmes

Two claims, one by an individual female employee and another by a women's association, were filed against a company providing public services. These stated that the manager of the company had sexually harassed female employees employed through public work programmes. According to the claims, the manager of the company sexually harassed female workers during the cleaning of bungalows. As this habitual harassment became well known among employees, they were afraid of being alone with the manager in the bungalows. As far as the claim filed by the employee is concerned, no evidence could be gathered to support the facts stated in the claim: witnesses gave evidence only to the effect that the claimant had complained about the harassment shortly after the alleged events had occurred, but no direct

[114] Mfv. I.10.077/2011/4. 2-H-MJ-2010-12.
[115] 365/2011 EBH http://www.egyenlobanasmod.hu/jogesetek/hu/365-2011.pdf, accessed 5 April 2012.

evidence could be found to support the harassment itself. On the other hand, the claim filed by the women's association against the same employer on the basis of the same facts was successful. The *actio popularis* was supported by a witness who gave evidence that she had been sexually harassed by the manager, and it was also proved that a humiliating and intimidating working environment had developed at the workplace because of the behaviour of the manager. The Agency took into account, as an aggravating circumstance, the managerial position of the harasser, which excluded the possibility of legal redress within the organisation of the employer. The ETA granted the *actio popularis* by the women's organization and ordered the publication of the decision on the homepage of the ETA for 90 days.[116]

ICELAND – *Herdís Thorgeirsdóttir*

Policy developments

The Gender Equality Studies and Training Programme (GEST Programme) is a joint project between the University of Iceland and the Ministry for Foreign Affairs and forms part of the Icelandic government's development cooperation efforts. The objective of the GEST Programme is to promote gender equality and women's empowerment in developing countries and post-conflict societies through education and training. Part of this programme is to promote the important role of gender in the international climate negotiations, both in mitigation action as in adaption to climate change. The Icelandic government, along with the governments of Denmark, Norway and Uganda, have jointly entered into a project on gender and climate change, focusing on the importance of gender when addressing climate change issues and aim to mainstream gender in climate change actions. The GEST at the University of Iceland is responsible for developing short training courses on how to mainstream gender into climate change actions in Uganda, offering training and capacity building for a selected number of experts and policy makers.[117]

Case law of the national courts

No recent case law on gender equality issues.

Equality body decisions/opinions and miscellaneous

The Gender Equality Complaints Committee (hereinafter the GECC) examines cases and delivers rulings on whether the provisions of the Gender Equality Act No. 10/2008 (hereinafter GEA) have been violated. The GECC´s rulings may not be referred to a higher authority. In a recent ruling on 8 February 2012 the GECC dealt with a case where the complaining party held that his rights under the GEA had been violated. The facts of the case concern the Women's Association Leave Committee which did not permit a man to participate in a trip to Slovenia which had been organized by the Committee for housewives. The man who complained to the GECC maintained that he was entitled to participate according to law no. 53/1972 on housewives' leave. He claimed that his rights under the GEA had been violated. The GECC did not rule in his favour. The GECC held that the programme provided for in the law on housewives' leave only permitting women to participate in special trips was in accordance with the GEA's Article 24 (2) providing that although all forms of discrimination, direct or indirect, on grounds of gender, are prohibited, affirmative action shall not be contrary to the GEA.[118]

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[116] 126/2012 EBH http://www.egyenlobanasmod.hu/jogesetek/hu/126-2012.pdf accessed 5 April 2012.
[117] https://gest.hi.is/?p=717, accessed 10 April 2012.
[118] The Gender Complaints Committee ruling No. 8/2011 (2 February 2012) on Housewives' leave. http://www.rettarheimild.is/Felagsmala/KaerunefndJafnrettismala/, accessed 12 April 2012.

IRELAND – *Frances Meenan*

Policy developments

The Minister for Justice and Equality on October 6, 2011, announced the appointment of a Working Group to advise him on the establishment of a new and enhanced Human Rights and Equality Commission (HREC). On March 28, 2012, the Minister announced in Parliament that he hopes to have the legislation in place amalgamating the Equality Authority and the Human Rights Commission by July 2012.[119]

It is reported[120] that the Government is to consider making an *ex gratia* payment to Ms. Lydia Foy who fought a 14-year legal battle to secure official recognition as a woman despite being born with male physical characteristics and having lived her early years as a man.[121] Over a long number of years, she sought to have her identity changed on her birth certificate to her new identity; she suffers from Gender Identity Disorder.[122] The High Court determined that Ireland was in breach of the European Convention on Human Rights which was transposed into Irish law by the European Convention on Human Rights Act 2003 and that the relevant sections of the Civil Registration Act 2004 were incompatible with the Convention. In its Programme for Government, the Irish Government in March 2011 stated that it would bring in the necessary legislation to recognise transgender persons.

Legislative developments

The Electoral (Amendment) (Political Funding) Bill 2011[123] was published in December 2011 and is presently being debated in the Houses of the *Oireachtas* (Parliament). This Bill concerns political funding and the net effect is to lower the limit on corporate and personal contributions. Political parties are funded on the basis of State funding and private donations (which are published over a certain financial level).

The Bill was introduced in the *Seanad* (upper house – Senate) on 2 February 2012. When passed by the upper house, it will then go to the *Dáil* (lower house) for debate. More usually, draft legislation (a Bill) is introduced in the lower house and then goes to the upper house before being passed by Parliament; however, a Bill is sometimes introduced into the upper house if the lower house is too busy, or if the legislation is urgent, or perhaps for reasons of political expediency. In this case, it may be for the last reason as the funding of political parties is always a difficult issue, and has been in Ireland.

As recently as 31 March 2012, the *Taoiseach* (Prime Minister) in his speech at his party's[124] annual *Ardfheis* (annual conference) reiterated the government's commitment to have more women in politics.[125] The proportion of men to women in the population is approximately 50:50 but this has never been reflected in *Dáil Eireann* (lower house) representation. Just over 15 % of the members in the *Dáil* are women. The Minister for the Environment, Community and Local Government in introducing the Bill said that action needs to be taken. Part 5 of the Bill is designed to hasten the journey towards greater gender equality. Parties who do not select at least 30 % women candidates at the next general election will face losing half of their State funding for the lifetime of the next Parliament (up to five years). A total of EUR 538 million was paid to the five qualified political parties in 2010.

The 30 % women/men will apply at the next general election and for seven years thereafter when the 40 % provision will then come into effect at the next election following

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119 http://debates.oireachtas.ie/dail/2012/03/28/00151.asp. accessed 4 April 2012.
120 http://www.irishtimes.com/newspaper/ireland/2012/0404/1224314347315.html. accessed 4 April 2012.
121 *Foy v An t – Ard Chlaraitheoir* (No. 2) [2007] IEHC 470.
122 http://www.flac.ie/download/pdf/2010_06_17_foy_case_briefing_document.pdf. accessed 4 April 2012.
123 http://www.oireachtas.ie/viewdoc.asp?DocID=19912&&CatID=59&StartDate=01. accessed 4 April 2012.
124 *Fine Gael* (European People's Party).
125 http://www.finegael.ie/latest-news/2012/speech-by-an-taoiseach-en/index.xml. accessed 4 April 2012.

this. There will then be a minimum of seven years applying between the 30 % rule and the 40 % rule. One can be by no means certain with politics but the next general election should be in 2016 and the next following in 2021 – all at the very latest; however, the provisions could come into effect much sooner if there were early elections.

This percentage is significant given that only 86 of the 566 candidates at the last general election in February 2011 were women, i.e. 15.19 %. Hence the 30 % requirement is a significant step. Interestingly, these provisions will not apply to local elections, i.e. city/county councils; power is centralised in Ireland. Nonetheless, political parties will prepare their candidates for local elections with this quota in mind for the next local elections in 2014. The timeline is based on the electoral cycle because that is how political funding operates in Ireland as parties are given funding in accordance with their numbers in Parliament.

However, in relation to women in politics, there is serious criticism of sitting hours in Parliament, etc. Ireland is a small country with a personalised electoral system, i.e. many people know their local member of parliament. The multi-seat constituency means that members of parliament are actually competing within their own parties for their seats. Hence, members live in their constituency and thus only travel to Dublin for three/four days per week; their families usually live in the constituency. Therefore, the real issue is: do rural members want to live away from their family for half the week? This is more likely to be the real issue as to why there are fewer women candidates. If they have families, women are more likely to come to politics later or, alternatively, come relatively young and may or may not stay. There is also the practical issue that there are no safe seats in Parliament so a political career may be short.

Case law of the national courts

In *O'Brien v Persian Properties trading as O'Callaghan Hotels*[126] the claimant, a former director of sales and marketing in the hotel group with overall responsibility for multi-Euro revenue targets had her contract of employment unilaterally terminated while she was on maternity leave. This was a discriminatory dismissal on grounds of gender and, furthermore, she was harassed on the ground of gender and family status; she was also victimised. However, what was key to this case was the reference to Article 25 of the Recast Directive 2006/54/EC. The claimant was in receipt of a salary of EUR 126 000 per annum, which had been reduced by 10 % due to the economic downturn; she also had the benefit of a petrol card and mobile phone and, in the years between 2003 and 2007, she was in receipt of a bonus worth 25 % of her salary. There was also an annual pension contribution of ten percent of her salary.

The claimant was awarded EUR 220 500, that is, 21 months' salary in compensation for the harassment and discriminatory dismissal on the gender and family status grounds; and EUR 94 500 (nine months' salary) for distress caused by victimisation. In addition, she is to receive interest on half of these amounts from 23 December 2009 to the date of payment, that is, interest on the gender ground only. There is only provision in the legislation in respect of interest on gender discrimination and not on family status discrimination. The total award of EUR 315 000 plus interest is not subject to income tax.

Whilst on the facts, this is a significant case in relation to discrimination on the gender ground. However, it is the scale of the award which is clearly effective, proportionate and dissuasive. In total, the claimant will be in receipt of 30 months' compensation based on her salary plus interest on half the compensation. It also highlights that whilst the maximum award under the Employment Equality Acts 1998-2011 is two years' remuneration as compensation, if a person succeeds in a victimisation case that is seen as a separate case and therefore the award can be significantly higher. The award of interest which is 8 % is also

[126] http://www.equalitytribunal.ie/Database-of Decisions/2012/Employment-Equality-Decisions/DEC-E2012-010-Full-Case-Report.html. accessed 4 April 2012.

significant. Whilst this case is on appeal to the Labour Court, nonetheless such a high award would be dissuasive in relation to gender discrimination.

ITALY – *Simonetta Renga*

Policy developments

The Monti Reform of the labour market in a perspective of growth

The Government bill on labour market reform contains some provisions for the improvement of women's inclusion in economic life. These few rules are far from providing a special plan to increase women's occupation; they represent, however, the first timid signal for a long time in favour of the implementation of gender equality in the labour market.

The first provision plans to tackle the problem of blank resignations. In particular, women's resignations or the mutual termination of their employment contracts have to be validated either by the Inspectorate at the Ministry of Labour or by a signed communication to the Employment Centres. If these procedures show that the women in question did not leave voluntarily, the employer will be subject to an administrative or, in certain conditions, a penal sanction. If the resignation or the mutual termination agreement takes place within the first three years after a child's birth, there will be a special procedure to validate them through the Labour Inspectorate, which will be applied to both men and women. In any case, if the resignation is not genuine, it will be regarded as a discriminatory dismissal.

Moreover, the bill provides three consecutive days' compulsory paternity leave within the first five months after a child's birth.

Finally, the bill introduces vouchers for baby-sitting services. These will be made available to mothers from the end of the compulsory maternity leave and will continue for the next eleven months as an alternative to voluntary maternity leave. The voucher is paid by Inps (the National Social Welfare Institute) and its amount will depend on the family income.

The Monti Bill now has to be approved by Parliament. Its progress in Parliament, however, will not be smooth and will take some time due to several other provisions contained in it, such as those on workers' dismissals (better known as the Article 18 regulation) and provisions on redundancies and unemployment benefits.

Legislative developments

The Monti government's 'Save Italy' Act and women's pensions

Following the Court of Justice Case C-46/07, *Commission v Italy*, Act no. 122/2010 equalized the pensionable age for male and female civil servants at 65 years of age by 2012; by 2026, however, the same legislation provided that the pensionable age of men and women would be fixed in the civil service sector at 67 years of age. The situation was different in the private sector: here, the pensionable age for women was set 5 years lower than that for men, but women could carry on working until the age provided for men and be covered by unfair dismissal protection; the age, therefore, was flexible between 60 and 65 for women and not for men. Through Acts no. 111/2011 and no. 148/2011, however, the legislator has equalized the pensionable age of men and women in the private sector, bringing it to 65 years by 2026.

In this context, Act no. 214/2011 was enacted, which is generally known as the Monti government's *Save Italy* Act, which determined the pensionable age in the public sector to be 66 for men and women already by 2012. In the private sector, the same provision determined the pensionable age to be 66 for men by 2012; women's pensionable age will be gradually equalized up to 66 by 2018. All employees, however, both in the private and public sectors, will have a pensionable age of 67 by 2021. Thus all the transitory periods for both the equalization of and the increase in the pensionable age were consistently shortened. As regards the pensionable age, Act no. 214/2011 is part of the general trend which exists all over Europe to increase and to equalize the pensionable age of women and men. This is mainly due to demographic and structural problems, such as the ageing of the population,

changing family patterns, and low fertility rates, which endanger the system's financial sustainability.

Act no. 214/2011 also provides for an increase in the minimum contribution condition from 5 to 20 years: if the claimant has less than 20 years of contributions, the pension will be paid at 70 years of age. Moreover, it introduced a new minimum benefit amount according to which pensions will be paid at 70 rather than at 66 (67 by 2021) when their amount is less than EUR 643 a month. The same Act finally provides for the establishment of a fund for the financing of interventions to increase the quality and quantity of women's and young people's employment. The financial problems of the pension funds lie at the heart of these provisions. However, atypical workers (that is intermittent, temporary, occasional and part-time workers, which are positions often taken up by women) will find the increase in the contribution conditions and the new minimum amount particularly difficult. This means that many women may risk only receiving their pension when they are 70 years old. It is worth stressing that when exclusions from coverage in relation to non-standard working patterns considerably affect more women than men and are not justified by social policy aims (C-317/93 *Inge Nolte v Landesversicherungsanstalt Hannover* [1995] ECR I-4625 and C-444/93 *Ursula Megner and Others v Innungskrankenkasse Rheinhessen-Pfalz* [1995] ECR I-4741), this might be considered to be indirect discrimination. Certainly the significant worsening of the qualifying conditions for women is not counterbalanced by the fund to promote women's occupation, the effect of which will basically depend on both the amount of resources assigned to the fund and the type of interventions envisaged. The Act, therefore, has definitely saved Italy but certainly not women's pensions.

Women's representation on Company Boards of Directors and Auditors

Act No. 120 of 12 July 2011 recently introduced a quota system for the appointment of managing directors and auditors of listed companies and state subsidiary companies. Act No. 120/2011 modifies an article of the Merchant Banking Code, and provides that statutory legislation shall assure the balanced participation of the two sexes on company boards. To achieve this, for three periods of tenure, the less represented gender shall obtain at least one third of the posts compared to the other sex. Moreover, in the case of an infringement of this rule, a sanction procedure is to be applied by the *Consob* (National Securities and Exchange Commission).

The *Consob* is authorised to monitor the enforcement of the principles laid down in Act No. 120/2011 under a regulation regarding procedural rules, to be issued by the *Consob* itself within six months from the enactment of the law. A recent decision by the *Consob* modified the Framework Regulation on listed companies of 14 May 1999 no. 11971, thereby enforcing principles laid down in Act No. 120/2011. Actually, this regulation does not add much to the content of the law. It essentially repeats the provisions of Act No. 120/2011 and refers to general rules on the application of the authority to sanction to be applied in the case of any infringement of the law. Nevertheless, a part of the ruling as regards procedures may contribute to the effectiveness of the quota system: it provides that in cases where the application of the quota rule would result in a fraction of the number of the less represented gender who must be appointed is to be rounded up. As regards State subsidiary companies not quoted in the regulated market, the same principles are enforceable under Act No. 120/2011, but a regulation should have been issued within two months after the law came into force so as to ensure compliance with the rule on gender balance by laying down terms and conditions for implementation. A draft regulation has just been prepared by the Ministry of the Economy but it has not yet been issued, notwithstanding the delay in the implementation of the law.

Thus, the first steps in the implementation of the law draw a distinction between the private and public sector. As regards listed companies, the ruling has been issued exactly on time. It could be expected to have been more detailed, but it probably reflects the choice not to interfere too much in the procedures to be followed by the companies in question. In any case it still contains an interesting provision, that is the rounding-up provision mentioned above, which entitles the less represented gender to have one more member compared to the application of the mathematical rule that is normally applied. A problem could eventually

arise from the long period (up to six months) of the *Consob* procedure to apply sanctions, which could hamper their effectiveness. As regards State subsidiary companies there is a serious delay in the issuing of the ruling provided by Act No. 120/2011. Actually, this gap in the implementation of the law shall be filled as quickly as possible as these principles will have to be applied from the first renewal of company boards following 12 August 2012 and their concrete application largely depends on the issuing of this regulation, in particular as regards the surveillance of its enforcement and the criteria for the possible substitution of members. In fact, on this point one of the deputies who promoted Act No. 120/2011 recently presented a question asking for information with regard to its timing. The Minister of the Economy assured that it will be issued soon but no news has been forthcoming as to its content.

Case law of national courts

Part-time workers in the Public Administration: conciliation between working life and private life

Several judgments can be officially noted as regards recent amendments to the rules governing part-time work in public administration, where a large majority of women are employed. Actually, access to this type of contract has been extensively modified: before 2008, workers had the right to convert from full-time to part-time work within 60 days following their request and the public employer could only reject this request in the case of incompatibility with the possible further activity to be performed by the worker or postpone it for six months following the request in case of serious organizational needs. To date, Article 73 of Decree no. 112/2008 allows public employers to reject the request if the conversion gives rise to a conflict of interest or merely (no longer 'seriously') interferes with the organizational needs of the employer. More recently, Article 16 of Act no. 183/2010 provided that the conversions from full-time to part-time work authorized by public employers before Article 73 of Decree no. 112/2008 could be subject to a new evaluation within 180 days after the Act came into force (to confirm or reject the conversion), following the principles of *fairness and bona fides,* which must govern all decisions by Public Administration. Under the latter provision, public employers have reconverted many part-time contracts into full-time contracts, and the application of Article 16 has given rise to a certain number of cases which mainly addressed two issues: the necessity of the consent of the worker to convert a contract from part-time into full-time and the justification for such a conversion.

On the first issue, the order of the *Tribunal of Trento* (judgment of 4 May 2011), issued under an urgent procedure, ruled that the worker's consent is necessary to reconvert a part-time contract which was allowed under the previous legislation, as Article 16 is inconsistent with the principle of voluntariness stated by Directive 97/81/EC on part-time work. In particular, according to the Tribunal, Article 16 gives rise to the detrimental treatment of part-time workers compared to full-time workers, as for the first group the employer can unilaterally modify the number of working hours. The subsequent judgment by the same *Tribunal of Trento* (judgment of 16 June 2011) reached the opposite conclusion and ruled that Article 16 is completely legitimate as it does not entitle the public employer to an arbitrary choice, but allows the rejection of the worker's request only in case of specific organizational needs. According to the court this interpretation is also consistent with EU law which does not exclude the importance of the 'reasons' of the employer in the conversion.

On the second issue, a contrast in the case law is also to be noted. According to the *Tribunal of Firenze* (order of 31 January 2011), the reference to the principles of *fairness and bona fides* provided by Article 16 means that a possible reconversion into full-time employment is illegitimate if it is not justified in writing by the public employer as regards the specific worker who has requested part-time work and the organization of the office where he/she works; the justification must not be generic, e.g. merely mentioning a 'serious personnel shortage'. The *Tribunal of Milan* of 26 May 2011 went even further and ruled that respect for the principles mentioned above in the decision of the public employer involves that the evaluation must take into consideration a fair and justified balance between the

interest of the public employer and the interest of the worker, as well as of the needs of the latter and the needs of the other workers whose part-time contract could also be converted in order to avoid non-transparent decisions. In contrast, according to the same *Tribunal of Firenze* (judgment of 7 March 2011), the return to full-time work after the evaluation provided by Article 16 cannot be deemed to be illegitimate on the mere consideration that it has not been specifically and formally justified by the public employer, and the worker will have to file a claim challenging the real existence of the organizational needs, which are to be ascertained by the court.

LATVIA – *Kristine Dupate*

Legislative developments

The Ministry of Welfare has elaborated amendments to the Law on the prohibition of discrimination against natural persons – performers of economic activities. Amendments are intended to implement Directive 2010/41/EU. In addition, amendments envisage the inclusion of other non-discrimination grounds provided for by Directive 2000/78/EC.

There is no single law regulating the activities of self-employed persons, thus a separate law was adopted for the purposes of implementing the principle of non-discrimination regarding this field. This is the Law on the prohibition of discrimination against natural persons – performers of economic activities, and it was adopted in 2009. This law currently prohibits discrimination on two grounds (sex and race/ethnic origin), and covers two aspects of self-employed persons: access to self-employment (Directives 2000/43/EC and 2006/54/EC), and access to and the supply of those goods and services necessary for the performance of self-employed activities (Directives 2000/43/EC and 2004/113/EC).

Amendments envisage widening the material scope of the law. Protection against discrimination will also cover '*the launching or extension of any other form of self-employed activity*' as required by Article 4(1) of Directive 2010/41/EU. As mentioned above, since there is no single law regulating the activities of the self-employed, the Ministry of Welfare has concluded that there is a need to implement the principle of non-discrimination with regard to access to self-employment on the grounds of age, disability, religion or belief and sexual orientation as required by Directive 2000/78/EC. Consequently the amendments envisage widening also the personal scope of the law.

Overall, the amendments will ensure the complete implementation of the provisions of Directives 2010/41/EU and 2000/78/EC with regard to self-employed activities. Most probably, after these amendments the law will provide wider protection against discrimination than is required by EU law regarding such grounds as race/ethnic origin, age, disability, religion or belief and sexual orientation, because Directives 2000/43/EC and 2000/78/EC require only non-discriminatory access to self-employment and a profession, but after these amendments the Law on the prohibition of discrimination against natural persons – performers of economic activities will provide protection against discrimination also in a course of the performance of activities by the self-employed.

The Ministry of Welfare has also elaborated amendments to the Consumer Rights Protection Law envisaging the extension of non-discrimination grounds. Currently the Consumer Rights Protection Law prohibits discrimination on two grounds – sex and race/ethnic origin. The amendments propose the inclusion of non-discrimination grounds provided by Directive 2000/78/EC: disability, age, religious and or other belief and sexual orientation. In the context of gender equality, the amendments will also tackle multiple discrimination with regard to access to, and the supply of, goods and services.

The amendments are planned to be discussed at an intra-ministerial coordination meeting on 5 April 2012 before submission to the Cabinet of Ministers which will then decide if particular legislative proposals have to be submitted to Parliament (*Saeima*). Draft proposals have not yet been published.

Case law of national courts

Reference for preliminary ruling to the CJEU

The Supreme Court of Latvia, by its decision of 27 December 2011 in case No.SKA-398/2011,[127] decided to refer preliminary questions to the CJEU in relation to the right to return to one's previous or equivalent work after child-care leave, the right not to be dismissed after returning to work, and the periods taken into account for the evaluation of performance (case C-7/12).[128]

The dispute arose between Nadežda Riežniece and her previous employer, the Ministry of Agriculture. Nadežda Riežniece was employed as a civil servant in the post of senior officer in the Legal Department. She was on child-care leave from 14 November 2007 until 6 May 2009, a total of 18 months as provided by Article 156 of the Labour Law. After her return to work on 6 May 2009, she was notified by an order adopted on the 5 May 2006 concerning her transfer to another post as an officer in the Information Department. On 26 May 2009 she was again notified of her dismissal from the post of an officer at the Information Department on account of the abolition of that post.

Nadežda Riežniece brought an action before the Administrative court concerning the failure to provide her with the rights stipulated by the Labour Law in connection with child-care leave. In particular, she claimed that rights requiring the provision of the same or equivalent work after child-care leave, and rights to equal treatment on the basis of sex had been denied to her. Besides the fact that there was an opportunity to provide her with the same post at the Legal Department, her performance was evaluated on the basis of her performance before child-care leave in comparison to other colleagues (competitors for the same post – a male and two females) whose performance were evaluated on the basis of performance during the actual period in question. The periods of performance taken into account for the purpose of evaluation did not, therefore, coincide. She also claimed gender discrimination on the basis of the fact that the decision to transfer her had been taken one day before her return from the child-care leave – on 5 May 2009.

The Supreme Court decided to refer the following questions to the CJEU:

1. Must the provisions of Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, and of the Framework Agreement on Parental Leave included in the annex to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC be interpreted as meaning that an employer is precluded from undertaking any action (in particular, the assessment of an employee while absent) which might result in a female employee on parental leave losing her post after returning to work?
2. Does the answer to the previous question differ if the reason for such action is the fact that, due to the economic recession in a Member State, in all the administrations of the State the number of civil servants has been optimised and posts abolished?
3. Must the assessment of an applicant's work and merits which takes into account his latest annual performance appraisal as a civil servant and his results before parental leave be regarded as indirect discrimination when compared to the fact that the work and merits of other civil servants who have continued in active employment (taking the opportunity, moreover, to achieve further merit) are assessed according to fresh criteria?

The decision of the CJEU may provide useful answers regarding gender discrimination with regard to child-care leave. To the knowledge of the author there have been several cases decided by Latvian national courts on whether less favourable treatment on the grounds of the

[127] Not published.

[128] Reference for preliminary ruling C-7/12, OJ C65/9, 3 March 2012, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:065:0009:0009:EN:PDF, 22 March 2012.

exercise of the right to child-care leave results in indirect discrimination on the grounds of sex. National case law is unclear regarding this aspect. Now the CJEU has an opportunity to clarify this matter. It is also important for an understanding of the interpretation of EU gender equality law, in particular, whether an obligation to provide the same or equivalent work after child-care leave allows the immediate issuing of a notice of dismissal after returning to work which was and is (especially on account of the economic crisis and the liquidation of posts in the public service and workplaces in the private sector) quite common practice in Latvia.

Scope of Directive 2004/113/EC and its relation to the protection of family life under national law

The Supreme Court of Latvia, by its decision of 1 February 2012 in case No.SKC-4/2012, decided that the surviving unmarried partner of a deceased person has no right to continue a tenancy agreement for a municipal apartment, because the tenant was not married to the deceased partner and Latvian family law does not provide any rights to unmarried couples.[129]

Although in the current case the survivor was male, in principle it may give rise to the question of the applicability of Directive 2004/113/EC. This is due to the fact that the majority of families in Latvia live outside marriage and on account of the significant gap in life expectancy between male and female persons (11 years). This results in a situation where females more frequently suffer from the absence of rights for non-married couples. In other words, the situation leads to indirect discrimination on the grounds of sex against women with regard to access to housing services (both public and private). In such a case the national courts must take into account not only restrictive family law but also the right to non-discriminatory access to services.

LIECHTENSTEIN – *Nicole Mathé*

Policy Developments

Training course in politics (*Politiklehrgang*) 2012

On 2 March 2012, the ninth interregional training course in politics for women[130] will begin and will end on 1 December 2012 with the awarding of certificates of successful completion. Applications were possible until 6 February 2012. There are 10 places for women from Liechtenstein and 10 places for women from Vorarlberg (Austria). Since 2004, more than 150 participating women have successfully completed the training course. The course deals with the following topics in six modules: political engagement – a challenge for me?; the political systems of Liechtenstein and Vorarlberg; rhetoric and reasoning; political structures; conflict management; public relations and media training. Since 2008 three modules have taken place in Liechtenstein and three in Feldkirch (Austria).

Legislative developments

Abortion

On 28 February 2012 the government issued a statement[131] to be approved by Parliament concerning the amendment of the Criminal Code with regard to abortion. On 18 September 2011 the population of Liechtenstein had rejected the initiative to introduce a law permitting an abortion within the first three months of pregnancy.[132] So abortion remains illegal in Liechtenstein; it is punishable by up to one year imprisonment (Article 96 Criminal Code),[133]

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[129] Decision of 1 February 2012 by the Senate of the Supreme Court of Latvia in case No.SKC-4/2012, *Jurista Vārds*, No. 11, 13 March 2012.

[130] http://www.frauenwahl.li/aktuelle-projekte/politiklehrgang, accessed 12 April 2012.

[131] BuA No. 15/2012 http://bua.gmg.biz/BuA/index.jsp, accessed 12 April 2012.

[132] http://www.hilfestattstrafe.li, accessed 12 April 2012.

[133] LGBl. 1988/37, http://www.gesetze.li/Seite1.jsp?LGBl=1988037.xml&Searchstring=stgb&showLGBl=true, accessed 12 April 2012.

even if the abortion has been undertaken abroad (Article 64 Criminal Code). However, sentences with respect to this crime have not been handed down for many years.

The government examined in its statement of 28 February 2012 the proposals of the initiative. The next step will be up to Parliament to decide on this issue.

Parental leave

On 3 April 2012 the report by the government[134] with regard to the amendment of the Civil Code concerning the implementation of Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by Businesseurope, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, was published for consultation by the whole public, which will continue until 30 June 2012. On 23 August 2011 the government of Liechtenstein presented the report and proposed amendments to several relevant acts with regard to the implementation of Directive 2010/18/EC by Liechtenstein legislation.[135] The government intends an economy-friendly minimum implementation of the innovations in the directive.

Miscellaneous

Equal Opportunities Prize

An annual Equal Opportunities Prize[136] has been awarded by the government for 11 years. The prize of CHF 20 000 (approximately EUR 16 000) and the art object '*Chancengleichheit*' ('Equal opportunities') as well as two recognition prizes, each of CHF 5000 (approximately EUR 4 000) honour and help to finance projects in the fields of gender equality, handicaps, migration and integration, social disadvantages, age and sexual orientation. Candidates which are eligible are those enterprises, organisations, private initiatives or individuals that have a project ready to begin that will have a lasting effect.

The competition for the Equal Opportunities Prize 2012 was open until February 2012. The prizes were awarded on 8 March 2012 to the three best projects which this year focussed especially on children and young people.

Business Day for women 2012

The Business Day[137] will take place for the fifth time in Vaduz on 22 May 2012 and will focus on the topic of 'Leadership – Quality – Sustainability'. The Business Day brings together a large number of women occupying key positions. The economic forum analyses the specific needs of female managers and entrepreneurs and how they think and act. The Government of Liechtenstein is the supporting institution of this economic forum. It is meant for female managers, entrepreneurs and students, as well as for women and men from the world of economics. The Business Day offers the opportunity to network and the more people attend the more creative and innovative the exchange will be. The Business Day for women in 2012 offers a special programme for its five-year anniversary. It has been well established as it has had maximum attendance during the last four years when 500 people from Liechtenstein, Switzerland and Austria participated. Its focus is also on the integration of societies, knowledge and cultures.

Succession in marriage and partnership

The Commission for Gender Equality and the Office for Equal Opportunities held their eleventh discussion round with female deputies from the Parliament of Liechtenstein on 15 March 2012.[138] The discussion and information round was open to the public and its topic was 'Succession in marriage and partnership'. The two above-mentioned organisations have

[134] Press release by the Liechtenstein Information Office, dated 3 April 2012, http://www.llv.li/llv-rk-amtsgeschaefte-vernehmlassungen-laufende, accessed 12 April 2012.
[135] BuA No. 79/2011.
[136] Press release by the Liechtenstein Information Office, dated 8 March 2012.
[137] Detailed information on the internet www.businesstag.li, accessed on 12 April 2012.
[138] Press release by the Liechtenstein Information Office, dated 7 March 2012.

organized a twice-yearly discussion round with female deputies from Parliament since 2007. As regards the revision of succession law, female deputies from Parliament had, in 2007, already transmitted a motion regarding a fair construction of succession law, which should have led to a stronger position of the surviving spouse. But these concerns were not integrated into the proposal of the government to amend the succession law in the framework of the project '200 years of the Civil Code'. The aim of the 2012 discussion was now to exchange information and concerns about this specific topic.

LITHUANIA – *Tomas Davulis*

Legislative developments

Transposition of Directive 2010/41/EU and the elaboration of the notion of the violation of equal rights

On 13 March 2011 the Lithuanian Parliament adopted Law no. XI-1926[139] on amendments to the Law on Equal Opportunities of Men and Women (EOAWM)[140] in order to transpose Directive 2010/41/EU into Lithuanian law. The amendments were rather minimal – the existing obligations of the state and municipal authorities and institutions to prevent sex discrimination were supplemented with a new obligation not to violate the equal rights of women and men while providing administrative or public services. The transposition of the Directive seems technical if we accept that the Directive imposes obligations on the state and municipal authorities only. However, the Directive is intended to govern all relations between self-employed persons and their spouses with third persons. Therefore, we can argue that in Lithuanian law relationships with state companies (e.g. the State Enterprise 'Centre of Registries' in Lithuania), public institutions having no tasks of public administration (the public body 'Export Lithuania'), or private persons (notaries, etc.)[141] should be, but are not covered.

In addition, the Lithuanian legislator used the opportunity to elaborate the notion of the violation of equal rights of women and men in EOAWM. The notion has been newly formulated (in Section 6) to mean any behaviour or actions that discriminate against persons on the grounds of sex, unless they fall within a list of specified exceptions. The elaboration of the notion of the violation of equal rights of women and men was needed less for the clarification of the definition of discrimination, and more for the purpose of explicitly prohibiting sexual harassment, harassment, and instructions to discriminate. The amendment covers these because those actions are now defined as discrimination based on sex and, in addition, the discrimination is expressly prohibited. Previously, those actions were classified as discrimination but, legally speaking, were not expressly prohibited. It is interesting to note that, by doing so, the Lithuanian legislator leaves in force separate sections dealing with prohibited actions of employers, of state institutions, of service providers and others. Therefore it remains unclear what the relationship will now be between the general prohibition of discrimination formulated in the new Section 6 and these existing Sections prohibiting discriminatory actions by different actors.

The new Law also established the general period of 10 days to submit information sought by the Equal Opportunities Ombudsperson to it.

[139] State Gazette, 2012, no. 36-1769.
[140] State Gazette, 1998, no. 112-3100.
[141] Of course, some of them will fall under the transposition provisions of Directive 2004/113/EC.

Case law of national courts

The protection of the female head of a company

The Supreme Court of Lithuania confirmed[142] the application of the provisions of Articles 131 and 180 of the Labour Code,[143] which prohibit the dismissal from work of an employee while on parental leave, to heads of companies. The legal status of the heads of companies is dualistic, as recognised in the jurisprudence of the Supreme Court. The Law on Companies requires that a contract of employment shall be concluded with the head of the company. However, given the specific nature of his or her relationship with the company, corporate law demands the flexible termination of the contract. Moreover, in 2001 the Supreme Court had already confirmed the absolute power of the supervisory board, the board of the company, or the meeting of shareholders to terminate this contract. After doing so, it faced many problems in explaining which guarantees awarded to employees by the Labour Code should apply to the heads of companies. In the present case, the Supreme Court applied the provision protecting the female head of the company until the end of her parental leave mainly on the basis of an argument that a termination would deprive her of maternity (or, in the case of fathers, paternity) allowance paid by the State Social Insurance fund. And indeed, Article 19 of the Law on Sickness and Maternity State Social Insurance requires that the payment of the allowance stops in cases where the contract of the employee on parental leave has terminated. There are a few exceptions provided by the law but the decision to terminate the contract of the head of the company is not among those exceptions. In its obiter dictum, the court has also made reference to the European Social Charter (Article 29 (3)), the EU Charter on Fundamental Rights (Article 33) and the ECHR. In applying this provision, the Court did not proclaim the dismissal to be illegal but only postponed the date of the dismissal until the very end of the parental leave.

LUXEMBOURG – *Anik Raskin*

Policy developments

Parental leave

After having announced a possible reduction of the duration of parental leave from six to four months, the Government decided to perform a detailed analysis of the results of the measure before any reform takes place. The analysis will be carried out in 2012, which is the year that Directive 2010/18/EU,[144] implementing the revised Framework Agreement on parental leave, has to be transposed into national law. A reduction of the duration of parental leave by the implementing law could risk resulting in a reduction of the protection afforded to workers in the field of parental leave.

The *Comité du Travail Féminin* (Women's Labour Committee) adopted an opinion on Directive 2010/18/EU in March 2011. This advisory body consists of representatives of the National Council of Women, employers' and workers' organisations and ministries. It is responsible for studying, either on its own initiative or at the Government's request, all matters connected with the work, training and professional advancement of women. In its opinion, the Committee does not oppose the reduction of parental leave from six to four months, on condition that the Government considers adapting the allowance for parental leave and introducing more flexibility into the procedures. Regarding the allowance, the Committee suggests making it a percentage of the salary, rather than the current fixed amount. It also suggests allowing workers to take parental leave by dividing the total duration into various shorter periods.

[142] The Ruling of the Supreme Court of 11 October 2011 in case no. 3K-3-384/2011.
[143] State Gazette, 2002, no. 64-2569.
[144] OJ L 68/13 of 18 March 2010.

Gender quotas in the private sector

On 22 January 2011, the Minister of Equal Opportunities announced that she has not ruled out introducing a legal obligation for quotas in the private sector. At first, she wants employers to put efforts into establishing gender-mixed teams until 2014. At present, no precise percentage has been discussed.

In February 2012 an update on figures on the participation of women in decision-making in the private sector was presented by the Ministry of Equal Opportunities. The percentage of women on boards has increased from 16 % in 2003 to 20 % in 2011. This includes all societies run by a board. In Luxembourg, only 8 societies are listed which probably explains why the discussions on gender quotas are not concentrated on listed societies.

Legislative developments

Goods and services

On 21 April 2010, the Government introduced Bill No. 6127,[145] which aims to include the content of media and advertising as well as education within the scope of the law that implemented Directive 2004/113/EC.[146]

The purpose of the Bill is to eliminate the current hierarchy of protection between different grounds of discrimination. In point of fact, currently the protection against discrimination regarding gender in the field of access to and the supply of goods and services does not include the media, advertising and education. However, protection against discrimination on the other five grounds does include these areas.

At the request of one Member of Parliament who considers that extending the protection to include media and advertising could be contrary to the freedom of the press, the Council of the Press was asked for its opinion on the Bill. The Council's opinion was published in January 2012. It strongly opposes the Bill. The Bill is still subject to the legislative procedure (April 2012).

Domestic violence

Since August 2010[147] a bill, which aims to modify the current law on domestic violence, is pending. The aim of the bill is to increase protection for victims and children in cases of domestic violence. In November 2011, the Government introduced amendments to the bill which have been strongly criticised by civil society because of a reinforcement of the rights of the aggressor. According to the amendments, the specific service that was created years ago in order to provide therapy for aggressors should be able to represent the accused in court and it is also proposed that some new powers given to the police by the initial reform project should not be introduced.

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145 http://www.chd.lu/wps/portal/public/RoleEtendu?action=doDocpaDetails&backto=/wps/portal/public&id=6127, accessed 2 April 2012.

146 OJ L 373/37 of 21 December 2004.

147 http://www.chd.lu/wps/portal/public/!ut/p/c1/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gXI5ewIE8TIwN380ATAyMvVy_z0GA_Ywt3Y6B8pFm8kYVFcJC7o6-rpWWok4GngbNhsGugk5GBpxEB3X4e-bmp-pH6UeZIqsJ8DQ2MnDyNA70CLI0tXA31I3NS0xOTK_ULciPK8x0VFQGcGq-6/dl2/d1/L0lJSklna21BL0lKakFBRXlBQkVSQ0pBISEvWUZOQTFOSTUwLTVGd0EhIS83X0QyRFZSSTQyMEdWTTEwMkJJM1FKUDkzOEUxL21tWUE4MjEyODAwMTU!/?PC_7_D2DVRI420GVM102BI3QJP938E1_action=doDocpaDetails&id=6181&filter_action=doDocpaDetails&PC_7_D2DVRI420GVM102BI3QJP938E1_displayLink=true&PC_7_D2DVRI420GVM102BI3QJP938E1_numPage=1&PC_7_D2DVRI420GVM102BI3QJP938E1_positionInHistory=&PC_7_D2DVRI420GVM102BI3QJP938E1_display=1&PC_7_D2DVRI420GVM102BI3QJP938E1_EtatDossier=En+cours&PC_7_D2DVRI420GVM102BI3QJP938E1_AuteurCommission=Commission+de+la+Famille%2C+de+la+Jeunesse+et+de+l%27Egalit%C3%A9+des+chances&PC_7_D2DVRI420GVM102BI3QJP938E1_TypesDeTri=Commission&PC_7_D2DVRI420GVM102BI3QJP938E1_SortOrder=ASC&PC_7_D2DVRI420GVM102BI3QJP938E1_numPageTop=1&PC_7_D2DVRI420GVM102BI3QJP938E1_numPageBottom=1, accessed 2 April 2012.

Miscellaneous

Equality body

The *Centre pour l'Egalité de Traitement* or *CET* (Centre for Equal Treatment) is concerned with discrimination based on race and ethnic origin, disability, age, religion or belief, sexual orientation and sex. The CET published its annual report covering the period from 1 January to 31 December 2011. During that period it registered 118 new claims. 14 claims concerned gender discrimination.

Since April 2011, the CET has carried out a systematic analysis of employment advertisements in newspapers in order to identify discrimination. It identified 94 advertisements which contained illegal references, 89 mentioning gender, and 4 providing for an age limit, and one mentioning both grounds.

FYR of MACEDONIA – *Mirjana Najcevska*

Policy developments

In November 2011, Ministry of Labour and Social Politics released the 'Information regarding the conclusion of the Government of the Republic of Macedonia on the findings of the analysis of qualitative participation of women in public and political life in local government'.[148] The recommendations are related to the budget that should be set by the central and local government, the training of representatives of local self-government in gender equality, and awareness-raising activities in the municipalities.

At the beginning of 2012, the Minister of Economy launched the project 'Female entrepreneurship'.[149] The aim of the project is to support the establishment of female-led enterprises. The financial implications of the project are very low (the maximum cost of the support per applicant should be around EUR 3 000); however, it should be noted that this is the first concrete political measure focusing on businesswomen.

The Strategy for Gender Equality of the Capital City of Skopje was announced on 8 March, 2012.[150] This document, although it is called a strategy, is in fact more of a declaration, even a wish-list. It consists of general ideas without a mechanism for their implementation or any clear and elaborated allocation of tasks and duties. However, the existence of a political will to develop and adopt such a strategy should be noted.

In February 2012, Ministry of Labour and Social Politics (Sector for gender equality) adopted an Operational plan for the implementation of the National plan of action for gender equality in 2012.[151] The plan is mainly oriented towards awareness-raising and the distribution of information rather than the development of specific proactive measures to ensure gender equality.

One of the coalition parties at the present government (the Party for the Democratic Renewal of Macedonia) came up with a proposal for changes in electoral legislation. They propose quotas in the election of mayors (arguing that without such measures it is possible that during next local elections in 2013 there will be no women mayors as occurred during the last elections). So far, other political parties have not agreed to begin discussions on this subject.[152]

148 http://www.mtsp.gov.mk/?ItemID=463B79E2DAE454468BBCDFEC8D2D7845, accessed 30 March 2012.
149 http://economy.gov.mk/EN/news/3134.html, accessed 30 March 2012.
150 http://www.skopje.gov.mk/DesktopDefault.aspx?tabindex=0&tabid=584, accessed 30 March 2012.
151 http://www.mtsp.gov.mk/WBStorage/Files/NPARR-finalen%20dokument.pdf, accessed 30 March 2012.
152 http://www.dom.org.mk/index.php?option=com_content&view=article&id=292:2012-02-26-11-24-52&catid=30:2011-04-09-12-25-04&Itemid=191, accessed 30 March 2012.

Legislative developments

In January 2012 Macedonia adopted a new Law on Equal Opportunities for Women and Men (subsequently referred to in the report as the Gender Equality Law, GEL).[153] According to the Ministry of Social Policy and Labour introducing the draft law, unlike the previous Law on Equal Opportunities for Women and Men, the new law includes obligatory provisions. Furthermore, the Draft law transposes into Macedonian law three EU directives: 2002/73/EC, 2000/78/EC and 2004/113/EC.

During the period of drafting the Law on Equal Opportunities for Women and Men (the Law), the OSCE/ODIHR issued an Opinion which offered certain suggestions and recommendations to the drafters.[154] Some of the recommendations were implemented in the final version. However, some practical recommendations that should have made the Law more effective were not implemented at all or were implemented in a different way. This was the case, for example, regarding the following suggestions: 'To include in Article 1 paragraph 2 references to other legislation governing equal opportunities and specify in which circumstances other laws shall exceptionally take precedence over the Law'; 'to ensure harmonization of the Law with all other legislation dealing with gender equality'; 'to provide employers' associations, unions and citizens' associations with a more specific and formal role in shaping public policy in the field of equal opportunities under the Law'; and 'to clarify possible legal remedies and the circumstances in which they may be made use of, in particular in situations involving complaints of sexual harassment'.

During the public debate, several important comments were submitted to the Government from experts and NGOs, for example regarding the establishment of an independent body, methods for achieving effective protection, and the position of the private sector.[155] These did not however influence the final text of the Law.

Concentrating only on the issue of the transposition of the three mentioned directives into the new Law, generally speaking it could be said that both the spirit of these Directives as well as the majority of the obligations contained therein are properly transposed. However, there are a few issues that might be of concern:

- The Macedonian GEL does not state ensuring full equality as its objective. It speaks only of '*establishing equal opportunities and equal treatment*'. Yet, the definition of full equality (Article 4/8) encompasses rights, opportunities, conditions and treatment.
- The Macedonian GEL envisages the application of different treatment that will not constitute discrimination (Article 3/7). However, it does not provide details of the grounds, reasons and limitations to this rule.
- While the Directives speak of the need to abolish provisions which are contrary to the principle of equal treatment, the Macedonian GEL does not address any abolishment. It only repeals the previous law, the Law on Equal Opportunities for Women and Men of 2006, including its amendments in 2008 (Article 46). On the other hand, the Macedonian GEL generally allows possibility that certain issues could be regulated by other law dealing with the issues related to equal opportunities for women and men (Article 1/2).
- Completely lacking are provisions on victimization and on the possibility of legal entities engaging in an administrative or judicial procedure on behalf or in support of complainants (so-called 'proxy engagement' or *amicus curiae* proceedings).
- The Macedonian GEL envisages various bodies charged with dealing with the issues of gender equality, including in Parliament, the government's Cabinet, all the ministries, and in all the units of local self-government, as well as the Legal Representative (Article 21) for legal protection in the unequal treatment of women and men – a civil servant seated at the Ministry of Social policy and Labour.[156] Yet, there is no provision

[153] http://www.mtsp.gov.mk/WBStorage/Files/zem_2012.pdf, accessed 30 March 2012.
[154] Warsaw, 9 June 2011, Opinion No. GEND– FYROM/184/2011 (AT).
[155] http://www.soros.org.mk/dokumenti/baranje-za-povlekuvanje-na-zakonot-za-ednakvi-moznosti-FOOM.pdf, accessed 30 March 2012.
[156] http://www.mtsp.gov.mk/?ItemID=463B79E2DAE454468BBCDFEC8D2D7845, accessed 30 March 2012.

for any independent body or a body[157] within an agency charged at the national level with the defence of human rights or safeguarding individual rights.
– The Macedonian GEL envisages (Articles 10 & 12) dialogue with representatives of the civic sector (without an explanation as to what is meant under this term) selected to be members of the governmental '*Intersected Consultative and Advisory Group on Equal Opportunities for Women and Men*'. However, there are no provisions on contacts or possibility for cooperation with other NGO, i.e. social dialogue with the wider public.

According to the proposed changes of the Law on labour and social policy, sickness benefits covered by the employer are increased from 21 to 30 days.[158] This could affect the employment of women as they are more frequently the recipients of sickness benefit (especially for child care).

On 20 March, 2012 the Republic of Macedonia ratified the Maternity Protection Convention.[159]

Case law of national courts

There is still no case law on discrimination on the ground of gender or sex.

Equality body decisions/opinions

In the annual report of the Ombudsperson,[160] gender equality or discrimination based on sex is not mentioned at all.

There is no public record of any gender equality report having been submitted by the Sector of equal opportunities in the Ministry of labour and social politics to anyone.

Miscellaneous

The 'Reactor' research centre has launched a discussion paper under the title: 'Finding the key to the glass door: Demystifying the reasons for women's low participation in the labour market'.[161] This is a comprehensive analysis of the high economic inactivity rates among women in Macedonia, which reveals that women are placed at a serious disadvantage on the labour market compared to men. Based on this analysis, concrete recommendations are made, under one, rather long heading: 'Collect more data on inactive women; Reconcile Labour and Family Policies; Fight gender discrimination in the labour market and in the workplace'.

MALTA – *Peter G. Xuereb*

Policy Developments

It remains current government policy to provide incentives to women to enter or re-enter the labour market, and the last national budget, as did previous budgets, has continued to provide tax and other incentives, as well as to make further provision for child-care facilities for working parents. The number of state child-care centres now numbers some 55.

At the same time, it remains government policy to encourage female participation in decision-making at all levels and in all sectors, but not – until recently – to make provision for

[157] 2002/73/EC (Article 8a) and 2004/113/EC (Article 12).
[158] http://www.sobranie.mk/ext/materialdetails.aspx?Id=96b81a99-4df0-497a-aa1d-130bff12fcac, accessed 30 March 2012.
[159] Official Gazette No. 40/2012.
[160] http://www.ombudsman.mk/ombudsman/upload/documents/2012/Izvestaj%202011-MK.pdf, accessed 30 March 2012.
[161] Reactor (research in action) Finding the Key to the Glass Door: Demystifying the Reasons for Women's Low Participation in the Labor Market, European fund for the Balkans, February 2012.

such thorough measures of mandatory positive action such as a mandatory quota for women on company boards. Things may be changing, however. The Nationalist Party (currently in government) produced a Policy Paper with the title of 'Our Roots' in November 2011 that appears to hint strongly at future proposals for legislation embodying gender equality 'positive measures' covering both the political and economic spheres. There is no explicit reference to quotas in the document, but in the light of building pressure on Member States from the Commission in this regard, it is thought that this new policy orientation may well result in a proposal as to quotas regarding the election of women to company boards.

However, it is possible to report another, more general, major shift in Government policy, following on from last summer's defeat of the government's stand against the introduction of divorce at the polls in a referendum on the subject. A popular vote for the introduction of divorce led to the introduction of the Divorce Law. This event resulted in a general policy shift within the governing Nationalist Party that appears to have cleared the way for other measures related to family rights, such as same-sex civil partnerships (as part of the proposed Cohabitation Law) and the possible adoption of a Gender Identity law that will give rights to transgender persons, including the right to marry. At the same time a number of attacks on gays have led to calls for stricter hate crime laws to include homophobia.[162] The Government is expected to introduce Bills on these issues in the near future. As to the proposed law on cohabitation, while it will regulate non-married cohabiting couples, it appears that it will fall short of introducing 'gay marriage'. Nevertheless, the new element being proposed is the inclusion of the new legal institution of the 'civil partnership' for homosexual couples. It means that same-sex couples will be covered by rules that place them (at least) closer to the situation of a heterosexual married couple than the paradigm of other cohabitees, such as brothers/sisters or other family members living in the same home, as previously envisaged. However, details have not yet been released. It is not yet clear what rights and obligations it is proposed will flow from the status of civil partnership. Gay Rights lobbyists are pushing for parity of treatment with heterosexual marriage. However, it remains unclear whether the Government's plans go this far, especially in relation to issues such as adoption, inheritance and pension entitlements. The influential Catholic Church in Malta continues to voice dismay at all measures, including those proposed, which can be perceived as diminishing the traditional values of marriage and the family.

The government has also announced its intention to widen the brief of the main national equality body, the National Commission for the Promotion of Equality (NCPE). The brief of the NCPE will be broadened to cover other forms of discrimination beyond its current brief of sex equality, and discrimination on grounds of race (excluding employment issues). Coming within the NCPE's brief in the future will also be the grounds of gender identity and sexual orientation, religion or belief, and age. These grounds have not been covered by any specific equality body thus far. Disability will remain within the remit of the National Commission for Persons with Disability. The NCPE will also be given a brief to protect the self-employed and the spouse of a self-employed person in accordance with Directive 2010/41/EU, which requires implementation by the Member States by 5 August 2012. Directive 2000/43/EC, in article 13, required that an independent equality body be given the brief of ensuring equality of treatment for persons of different ethnic or racial origin. However, it appears that the brief over employment issues as related to race will also remain where it is at the moment, namely with the Department of Industrial and Employment Relations within the Ministry for Education, Employment and the Family. In the author's view, proper compliance with the Directive calls for the transfer of this brief to the NCPE, which is the statutorily independent equality body of relevance. This is important also from the perspective of the identification and treatment of possible multiple discrimination.

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[162] See The Times, Monday, January 23, 2012, Sarah Carabott *NGOs call for 'hate crime' to also cover anti-gay acts,* The Times, Monday 23 January 2012, http://www.timesofmalta.com/articles/view/20120123/local/NGOs-call-for-hate-crime-to-also-cover-anti-gay-acts.403447, accessed 28 March 2012. See also http://www.timesofmalta.com/articles/view/20120213/local/Victims-urged-to-come-forward.406474, accessed 28 March 2012.

Legislative Developments

Maternity Leave
Maternity leave has been extended. Parliament has increased the period of statutory maternity leave from 14 weeks to 16 weeks for the year 2012, and to 18 weeks as from 1 January 2013. In Malta full wages are paid for the first 14 weeks of maternity leave and the burden falls on the employer. This new financial burden was considered too great a new burden to be borne by the employer/enterprise. The new Legal Notice expressly excludes any obligation for an employer to pay an employee full wages during the additional new periods of maternity leave. The relevant Legal Notice also protects an employee from having to work overtime during pregnancy or for a period of twelve months from either the birth of his or her child or form the effective date of the adoption of a child.

Parental/Adoption/Fostering Leave
Recent amendments to the law have brought parental leave into line with the latest EU law. Parental/adoption/fostering leave are regulated by the Parental Leave (Entitlement) Regulations, 2003 [Legal Notice 225 of 2003], as amended recently by the Parental Leave Entitlement (Amendment) Regulations, 2011 [Legal Notice 204 of 2011]. These Regulations are made under the Employment and Industrial Relations Act, 2001, Act No. XXII of 2002. They were made applicable also to Government service by the Extension of Applicability to Service with Government (Parental Leave Entitlement Regulations and Urgent Family Leave Regulations) Regulations, 2007 [Legal Notice 433 of 2007]. The purpose of the Regulations is to lay down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities of working parents and foster carers (Regulation 1(2)). They apply to full and part-time employees, in the latter case *pro rata* (Regulation 2(1)), provided that the employee has been in the employment of the same employer for a continuous period of twelve months (Regulation 3(1)), unless a shorter period of entitlement has been established in the contract of service of the employee or in the collective agreement applicable to the employee (Regulation 3(2)). It is the individual right of both male and female workers to be granted unpaid parental leave on the grounds – according to the recent amendments – of birth, adoption or legal custody of a child to enable them to take care of that child for a period of (now) four months until the child has attained the age of eight years. The right is non-transferable. Also, the right must be availed of in established periods of one month each (Regulation 4(1)).

Retirement Pensions
Now in force is the Retirement Pensions Act, Act XVI of 2011,[163] which in part implements the Occupational Pensions Directive, Directive 2003/41/EC and related measures. It is to be construed accordingly. It regulates occupational retirement schemes and funds. Licensing is conditional upon the satisfaction of stipulated conditions including those set out in relevant Union law, including the Occupational Pensions Directive.

Equality body decisions/opinions

The relevant Maltese equality body is the National Commission for the Promotion of Equality (NCPE).[164] The NCPE is not empowered to make decisions. However, it is empowered to investigate complaints, to mediate, and to support claimants in their claims before any Court or Tribunal. The date of the NCPE's eighth annual conference has not yet been announced at the time of writing but is due shortly. It will be published in due course on the NCPE website.[165] If the usual format is followed the Annual Report for 2011 will provide – without

[163] http://www.doi.gov.mt/EN/parliamentacts/2011/ACT%20XVI%20for%20DOI.pdf.
[164] Website at www.equality.gov.mt.
[165] Annual report 2010, available at https://secure2.gov.mt/socialpolicy/SocProt/equal_opp/equality/resources/annual_reports.aspx, accessed 29 September 2011.

supplying a full breakdown of cases by subject-matter, or providing details – the number, range and a broad breakdown into general headings of complaints received during 2011. A summary of some selected case examples used to be provided in the past, but this practice appears to have been discontinued.

Case law of national courts

There are no major cases to report.

Miscellaneous

NCPE Report 'Unlocking the Female Potential'
The NCPE has published a Research Report[166] following the completion of its project on Unlocking the Female Potential. This EU co-funded project *ESF 3.47 – Unlocking the Female Potential* aims at improving access to employment and enhancing the participation and progress of women in the labour market. In-depth research was carried out on various facets related to female participation in the labour market. It is hoped that the findings and recommendations will be a valuable tool for policy makers in related policy formulation. The research components include: 'research on identifying, understanding and validating the reasons underlying the inactivity of the female segment in the Maltese population; research analysing what produces the "glass ceiling" and the "glass cliff" in Maltese society; a comparative study on male and female entrepreneurs, seeking to provide further knowledge on the impact of gender on entrepreneurship; and research that seeks to identify whether economic independence is relevant to Maltese females.'

Hate crime
Hate crime appears to be on the increase, with recent attacks on a lesbian couple and another on a Sudanese immigrant, the latter attack proving fatal. Racial hatred is not the subject of this report. The former attack involved a gang attack on a lesbian couple.[167] The Minister for Justice last year declared that homophobia would be declared a hate crime but legislation is still to be advanced.[168] Meanwhile, the perpetrators can only be charged with harassment and bodily harm.

Equality Mark
Fifteen new organisations have been awarded the NCPE's Equality Mark in recognition of best practice in gender equality.[169]

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166 https://secure2.gov.mt/socialpolicy/SocProt/equal_opp/equality/projects/unlocking.aspx, accessed 29 March 2012. The Report is available at https://secure2.gov.mt/socialpolicy/SocProt/equal_opp/equality/resources/research_outcomes.aspx, accessed 27 March 2012.

167 Claudia Calleja, *Updated: Thugs attack girl on a bench, The Sunday times, 22 January 2012,* http://www.timesofmalta.com/articles/view/20120122/local/Thugs-attack-lesbian-16-on-a-bench.403284, accessed 28 March 2012.

168 Article 82A of the Criminal Code (Chapter 9 of the Laws of Malta) reads as follows: '82A. (1) Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up violence or racial hatred or whereby violence or racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months. (2) For the purposes of the foregoing sub-article "violence or racial hatred" means violence or hatred against a group of persons in Malta defined by reference to colour, race, religion, descent, nationality (including citizenship) or ethnic or national origins or against a member of such a group.' The Criminal Code is available at http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574&l=1, accessed 29 March 2012.

169 https://secure2.gov.mt/socialpolicy/SocProt/equal_opp/equality/news_events/latest_news.aspx, accessed 27 March 2012.

THE NETHERLANDS – *Rikki Holtmaat*

Legislation

Balanced representation of m/f on company boards

In the Netherlands, Parliament took the initiative to propose quotas in the context of company boards.[170] Soft quota measures were adopted in June 2011 by means of a law amending the Civil Code, which will enter into force in the summer of 2012.[171] The amended Civil Code now obliges both publicly and privately owned public limited companies and private limited companies[172] to strive for a balanced representation of members of each sex on the company's executive board of directors and on the supervisory board.

The law defines a 'balanced representation' as having at least 30 % women and 30 % men on the board. This norm only applies to larger (publicly and privately owned) private and public limited companies. These companies need to take into account a balanced representation of both sexes *as far as possible* in their procedures to select new members of the board of executive directors or the board of supervisors, and in the drafting of the specification of any vacancy.[173] Small and medium-sized companies, i.e. companies that do meet at least two of the following three criteria, do not fall under this legal obligation. The three criteria are: the value of their assets amount to no more than EUR 17 500 000, their net annual turnover amounts to no more than EUR 35 000 000, and their annual average number of employees amount to less than 250.

If a larger company does not reach a representation of at least 30 % of each sex, it must explain in the annual report to the shareholders why the balanced representation has not been achieved, which measures have been taken to achieve it, and what measures the company plans to introduce to achieve it in the future (a 'comply or explain' mechanism). There are no sanctions for not meeting the 30 % norm.[174] The measure has a temporary character and will expire on 1 January 2016.[175]

Prohibition on wearing a* burka *or* niqab*: bill submitted to Parliament but withdrawn after the Government fell and new elections were announced

On 3 February 2012, the government of the Liberal and Christian Democrat parties, which at that time was still supported by the Freedom Party (PVV), submitted a bill to Parliament in which it was proposed to prohibit face-covering garments in public places as a criminal offence.[176] The punishment for wearing such garments would be a fine of EUR 380. In fact, the idea for this bill came from the side of the PVV. However, after the government was no longer supported by the PVV at the end of April and new elections were announced, the Christian Democrat Minister of the Interior and Kingdom Relations announced, on 2 May 2012, that she no longer supports this bill and that she will withdraw it. It appears that this bill is the third 'stillborn proposal' to criminalise the wearing of the *burka* or *niqab* in the past 6 years.[177]

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[170] This legislation was proposed by Labour Party Members of Parliament in a motion asking the government for an amendment to the Civil Code; Motie Kalma c.s., see *Kamerstukken II,* 2009-2010, 31 763, no. 14.

[171] Law of 6 June 2011, published in the *Staatsblad* 2011, 275. *(Wet van 6 juni 2011 tot wijziging van boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen)*. The Law will enter into force after a special Decree is published in the Official Journal (Staatsblad), which is foreseen on 1 June 2012.

[172] See Article 2:166 and Article 2:276 Civil Code respectively. Only public limited companies (*Naamloze Vennootschappen*, *NV*) can be listed on the stock exchange.

[173] See Articles 2:166 Paragraph 2 and 2:276, Paragraph 2 of the Civil Code read in conjunction with Article 2:379 Civil Code. There are no specific additional requirements for public limited companies that are listed on the stock exchange.

[174] See Article 2:391 Paragraph 7 Civil Code.

[175] See Article VII of the Law amending the Civil Code.

[176] Tweede Kamer 2011-2012, 33 165 nos. 1-4.

[177] See Tweede Kamer 2005-2006, 29 754 no. 41 (Motion by Geert Wilders, MP); Tweede Kamer 2006-2007, 31 108, nos. 1-2 (bill by Wilders and Frisma, MPs for the Freedom Party); Tweede Kamer 2007-2008, 31 331, nos. 1-2 (bill by Kamp, MP for the Liberal Party).

The new bill had met with a great deal of criticism, among others from the side of the Council of State. Briefly stated, the Council doubted whether there were any compelling reasons to introduce such a prohibition. In as far there is a safety risk, as the government argued, legislation in the area of public order may already be called upon in order to oblige someone to remove face-covering garments. Especially the government's argument that women should be protected against pressure from relatives or religious communities and should be able to participate on an equal footing with men is not valid, according to the Council, since a prohibition in that case would make these women even more confined to the home than they were before.

Implementation of Directive 2010/18/EU on parental leave

On 1 March 2012, the First Chamber of Parliament adopted a bill with which the Netherlands has implemented Directive 2010/18/EU in two respects.[178] First, the provision in the Civil Code which prohibits dismissal because of making use of the right to parental leave (Article 7:670(7) CC) was complemented with a provision in the Work and Care Act (*Wet Arbeid en Zorg*, new: Article 6:1a) which offers protection against suffering any kind of disadvantage because someone has used his/her right to take parental leave or has assisted someone else in obtaining such leave (See Clause 5, paragraph 4 of the Framework Agreement.) Second, in the Working Hours Act (*Arbeidstijdenwet*) a new provision has been included (Article 4:1b) in which the person who has used his/her right to take parental leave is given a right to request adapted working hours during a period of one year after the parental leave period has expired. (See Clause. 6, paragraph 1, sub. b of the Framework Agreement.) The request needs to be submitted 3 months before the end of the parental leave. The employer has to decide within a period of 4 weeks after the request has been made. These requirements will probably become more flexible in the near future. In August 2011, the government proposed a bill to Parliament in which several of the procedural regulations concerning parental leave and adoption leave will be changed in order for workers to make it easier to take leave and to arrange this leave in such a (flexible) way that it will meet their specific needs.[179]

Case law

Equal Treatment Commission declares a university's positive action scheme to be discriminatory

In an Opinion of 15 December 2011, the Equal Treatment Commission (ETC) declared that a positive action programme by the University of Groningen was discriminatory.[180] In the Netherlands, one of the areas where women have great difficulty in being appointed to the highest positions is academic research and teaching.[181] In 2008 the University of Groningen had 52 female and 352 male professors (i.e. 13 % female – 87 % male). The university adopted a plan in order to increase the number of female professors between 2011 and 2012 from 13 % to 17 %. The plan was to use the possibility of granting someone a 'personal chair' to give excellent female academics more opportunities to become a professor. A 'personal chair' is sometimes given to persons with an excellent academic status when there is no vacancy for a regular professorship in a particular discipline. It is used, for example, when a university wants to retain someone who is threatening to go elsewhere to increase his/her career opportunities. In that case there is not an open selection procedure. Candidates are

[178] Tweede Kamer 2010-2011, 33 197, nos. 1-3. Staatsblad 2012, 152.

[179] Wet Modernisering regelingen voor verlof en arbeidstijden; Tweede Kamer 2010-2011 32 855, nos 1-3.

[180] ETC Opinion 2011-198. http://www.cgb.nl/oordelen/oordeel/224489/het_voorkeursbeleid_van_rijksuniversiteit_groningen_om_meer_vrouwen_te_bevorderen_tot_hoogleraar_is_niet_in_overeenstemming_met_de_eisen_die_aan_een_dergelijk_beleid_worden___ (accessed 5 February 2012).

[181] See e.g. Marieke van den Brink: (2011) Scouting for talent: Appointment practices of women professors in academic medicine, Social Science & Medicine, Vol. 72,12, p. 2033-2040 and Brink, M. van den (2011). Hoogleraarbenoemingen in Nederland (m/v). Mythen, feiten en aanbevelingen. RU/Sofokles/LnvH: The Hague.

assessed against general objective criteria as to whether they are eligible to become a university professor.

The university board (in accordance with the Works Council and the University Council) created a fund from which 17 female senior lecturers could be 'upgraded' to the level of professor. The University established a special Committee that would test the quality of the candidates. No concessions were made as regards the level of excellence, the number of publications, et cetera that are normally applied in all professorship appointment procedures. In the end, 12 proposals were accepted. In the same period, 15 men and 6 women were appointed as a 'regular' professor, either as a result of a vacancy for a normal chair or for a personal chair. As a result of all this, the percentage of female professors was raised to 16.8 % in 2011.

A foundation that has combating discrimination as its main goal submitted a complaint to the ETC, stating that this positive action plan amounted to direct discrimination against men. The ETC agreed with this view and declared the policy to be unlawful. In its reasoning, the ETC first established that the plan amounted to direct discrimination. The exception as regards positive action plans (Article 2(3) General Equal Treatment Act and Article 5(1) of the Equal Treatment Act) needs to be interpreted in accordance with the 'guidelines' in the CJEU case law. According to the ETC, the criteria are (a) that it must be shown that women are underrepresented; (b) there needs to be transparency: when a position is offered, it must be clear that a positive action plan is applicable; (c) procedural correctness, meaning that there needs to be an objective assessment of the qualities of the candidates. Only when a candidate who belongs to the 'preferred group' (in this case women) has equal qualifications, may he/she be appointed; (d) the proportionality principle must be applied, meaning that the measure/plan must be in proportion to the level of underrepresentation. In the case at hand, the ETC concluded that criteria (a) and (b) had been met, but that criteria (c) and (d) had not. As regards the correctness of the procedure (c), the ETC stated that male senior lecturers were not invited to participate in this programme, meaning that there was not an assessment of the qualities of the women concerned as compared to male candidates. As regards proportionality, the ETC stated that – considering the fact that at that point in time of all senior lecturers 22 % were women – the measure was disproportionate. The gap between the 13 % female professors and 22 % female senior lecturers was not sufficiently large to justify such a strong measure.

This Opinion of the ETC is very regrettable and incorrect, in the present author's view. First, the ETC is here using a 4-point test which, although seemingly applying the CJEU case law at this point, is not directly related to the language of the relevant provisions in Dutch law concerning the positive action exception.[182] Second, the ETC uses the wrong yardstick when applying the third criterion (c). In accordance with the case law of the European Court, it applies the standard that individual men always must have an opportunity to compete for a particular job and that only after a comparison between the male and female candidates has shown that a particular female candidate indeed has equal qualifications, may she be appointed under a positive action scheme. However, the ETC here overlooks the fact that in case of a 'personal professorship' (which is a *promotion*; i.e. being awarded such a professorship is not linked to a vacancy for an already existing chair), there are never any other candidates to which a specific comparison can be made. A comparison is being made with the general and objective standard whether a candidate for such a promotion has the level of excellence that may be expected of a university professor. In this part of the Opinion, the ETC does not consider the fact that, when a model of competition is followed, there are still more possibilities for men to become a professor than for women, as is shown by the fact that in the same period of time 15 men were appointed in 'normal' procedures (as against only 6 women). As far as the last criterion is concerned (d; proportionality) it is remarkable that here the ETC suddenly compares the percentages of female senior lecturers and female professors. This comparison would have been rational under the first criterion (a), whether

[182] The ETC has also published these criteria in a brochure; see http://www.cgb.nl/publicaties/publicatie/221064/folder_voorkeursbeleid, accessed 5 February 2012.

there is indeed a case of underrepresentation of female professors. The 'pool' from which they may be selected indeed consists of senior lecturers. In other words, there is a discrepancy between first accepting (under a) that there is indeed a case of serious underrepresentation of women (13 % – 87 %) and the conclusion (under d) that the measure is not proportionate. Suddenly, the underrepresentation is measured against the number of possible female candidates. The ETC does not consider that this percentage (22 %) is also low because to become a senior lecturer is almost as difficult as to become a professor. As regards the issue of proportionality, the ETC does not follow the usual steps of assessing whether (1) there is a clearly described legitimate aim of the plan; and (2) the plan is appropriate and necessary to attain this aim. In other words: is it possibly effective and/or could the aim be attained with less damaging/discriminatory means? None of these steps were explicitly followed in this Opinion.

To conclude: the ETC here seems to be 'more Catholic than the Pope', as the saying goes. Since 2008, most Dutch Universities have signed the so-called '*Talent naar de Top*' ('Talent to the Top') 'Charter'.[183] In that context, they have committed themselves to increasing the number of female professors. It may be feared that they will now pull out from that commitment.

Court protects care workers in case of sick leave against loss of pay

In the Netherlands, the legal position of persons who work part time (i.e. less than on 4 different working days per week) in private households is very weak, both in terms of labour law regulations not being fully applicable to them and in terms of not falling under the scope of social security laws.[184] Most of this work concerns care work (cleaning, cooking, housekeeping, child minding, *et cetera*.). The main justification that is advanced by the government for this specific position of this category of workers is that their employers (mostly considered to be housewives who hire a cleaning woman or a nanny for a couple of hours per week) may not be expected to do all the administrative work that is involved in signing up personnel for the statutory social security funds and to pay premiums on their behalf. These 'private employers' are also not requested to pay income taxes on behalf of their personnel (while all other employers are). These employees are supposed to inform the tax revenue office of their income themselves.[185] In fact, most of the persons who do paid work in private households offer this work on the so-called 'black labour market' (i.e. they do not pay taxes at all). Most of these workers are women and increasingly often they have no resident permits to remain in the country.

A specific issue is that the government, indirectly, uses this particular weak position of privately employed care workers in order to cut down on welfare costs. Carers who used to be employed by (subsidized) home-care institutions are now very often dismissed from their jobs and are re-employed by those private persons who need their care work. In this construction, the care worker does not get any social security protection (unless she chooses to insure herself on a voluntary basis; which rarely happens because this is very expensive) and has less labour law protection than she used to have while being employed by the care institution,[186] although in fact doing exactly the same work. Also, in most cases she no longer receives education and training. In many instances, the care institution is still the intermediary between the care workers and the clients/private employers and organises the work (instructions as to the tasks to be done, the schedules, planning et cetera). The institution also adopts the role of

[183] See for the text of the Principles on which the Charter rests: http://www.talentnaardetop.nl/uploaded_files/mediaitem/Charter_Talent_naar_de_Top.pdf, accessed 2 May 2012. A list of signatories may be found at: http://www.talentnaardetop.nl/charter-en/Signatories.htm, accessed 6 February 2012.

[184] An elaborate description of their position, including an assessment as to whether this situation is in compliance with EU law (quod non), may be found in Leontine Bijleveld & Eva Cremers: *Een baan als alle andere? De rechtspositie van deeltijd huishoudelijk personeel.* Leiden, Vereniging Vrouwen en Recht, 2010.

[185] This is regulated in the so-called '*regeling dienstverlening aan huis'*. For more information see also http://www.alphamatch.nl/regeling-dienstverl.html, accessed 23 March 2012.

[186] Most importantly, the private employer can more easily dismiss her than the institution can.

sending the bills to the clients/private employers and paying the salary to the care worker on behalf of her clients.

This form of 'privatization' of care work is strongly criticized by Trade Unions and by several women's organizations. Some of them started a test case in the courts. A care worker, who worked for several private employers, broke her wrist, as a consequence of which she could not work for approximately 6 weeks, and after that she could (initially) only work part time. This person claimed that the care institution that had sent her to her clients/private employers was in fact her employer. This claim was not upheld by the sub-district division of the District Court. However, the Court did rule that the care institution was liable to pay the (statutory)[187] 6-week sick leave payment to the carer.

In fact this judgment is partly a loss and partly a victory for the claimant. Although the Court refused to acknowledge that there was indeed an employment relationship between the care institution and the employee/care provide, it did acknowledge the right of the latter to claim the statutory 6-week sick leave payment from the care institution, instead of having to go to each of her clients/private employers herself to claim this money. The institution had already collected the money that the private employers owed the care worker and paid this salary to her on their behalf. It therefore seems only logical that the institution also had to collect the sick leave payment and to forward this to the care worker.

Several NGOs that were involved in this test case have (again) brought this situation to the attention of Parliament and have requested that an end be put to this situation.

It can be argued that the (weak) position of this particular category of workers, especially in the area of social security, amounts to indirect discrimination on the ground of sex under Directive 79/7/EEC. Also, the lesser protection against dismissal compared to 'regular' workers is a form of indirect discrimination under the Recast Directive 2006/54/EC. It remains to be seen whether, when tested by the CJEU, these instances of discrimination will be objectively justified. Especially when large care institutions use this legal construction in order to save money (and thus to meet the budget cuts that have been imposed by the government). The original purpose of making this particular category of employees (i.e. that private employers cannot be expected to deal with complicated social security and fiscal administration) certainly does not apply to these big institutions, which in fact do all the necessary administrative work on behalf of their clients/private employers. One could say that the care institutions abuse this legal construction for a completely different purpose (meeting budget cuts).

Miscellaneous

Pregnant women and mothers of young children discriminated against on large scale

The ETC has often reported that it had the impression that in the Netherlands there is a widespread practice of discrimination against pregnant women and women with young children on the labour market. They concluded this from the great number of requests for information and actual complaints in the area.[188] In March 2012, the ETC published a report on an in-depth study that it has conducted into the experiences of pregnant women and mothers with young children on the labour market.[189] More than 1000 women and employers answered questionnaires and were interviewed. The following text on the conclusions of the survey is derived from the English summary of the report:

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[187] Under the Civil Code, Article 7: 629(2), employers are obliged to pay the salary during the first 6 weeks of a period of illness or other disability precluding work. This obligation applies to labour contracts for work in private households on less than 4 days a week. However, under Article 7:629(1) CC in conjunction with Article 29a Sickness Act for all 'regular employees' the period that the employer has to continue to pay 70 % of the salary is 2 years.

[188] E.g. in its annual reports and in its 5-year evaluation reports. All reports are published (in Dutch) on the website of the ETC: www.cgb.nl; see under publicity; accessed 25 March 2012.

[189] For the summary of the report in English, see the PDF file published on the following web page: http://www.cgb.nl/publicaties/publicatie/225042/hoe_is_het_bevallen_onderzoek_naar_discriminatie_van_zwangere_vrouwen_en_moeders_met_jonge_kinderen_op_het_werk.

> 'The study reveals that 45 % of the women who became mothers and worked and/or applied for a job in the period 2007 to 2011 experienced a situation that involved possible discrimination. The study uses the term 'possible discrimination' because the survey cannot precisely determine the circumstances and context in which a specific situation may have occurred. However, certain forms of possible discrimination occur more frequently than others. For example, 38 % of the women indicate that their employment relationship failed to go ahead at the last minute or was subject to conditions different from those originally agreed. In 44 % of cases, women with a temporary contract say that their contract was not renewed partly or wholly as a result of their pregnancy. This compares to 3 % of women with a permanent contract who say they were dismissed wholly or partly because of pregnancy.'

The researchers also made an inventory of the problems that pregnant women and women who have recently given birth experience when combining paid work and care. These concern *inter alia* the lack of possibilities or quiet places to breastfeed the child. Some other remarkable points are that most employers who were interviewed said that they generally do not have any major organizational problems relating to pregnancies at work and that many women who had experienced 'difficulties' did not describe these with the term 'discrimination'.

As regards the differences between various categories of women in the labour market, the ETC observes that '(…) certain groups of women are at greater risk of encountering situations that suggest discrimination than others. For example, women in lower-level professions are more likely to face possible discrimination when entering into a contract. Women with a managerial position are more likely to face possible discrimination when returning after leave. In general, the following groups of women run the greatest risk of possible discrimination: employees in a managerial position, employees with a temporary contract, employees in the profit sector, women who have suffered frequent illness as a result of pregnancy, women with complications during childbirth and women with a child that suffers from health problems.'

The report ends with a long list of practical suggestions on how to improve the situation, both for the employers and for female employees. The report was launched on a prime-time daily news show and attracted a lot of media attention.

NORWAY – *Helga Aune*

Policy developments

Appointment of a new Minister for the Ministry of Children, Equality and Social Inclusion
Ms Inga Marte Thorkildsen was appointed Minister for Children, Equality and Social Inclusion on 23 March 2012.[190]

***Official Norwegian Report NOU 2011: 18* Structure of Equality**[191]
A commission to report on Norway's gender equality policy based on people's lifecycle, ethnicity and social class was established pursuant to a Royal Decree of 12 February 2010. In addition to the report which is to be submitted in the autumn of 2012, the Commission is to deliver, pursuant to a specific mandate dated 21 October 2010, a review and assessment of the policy implementation system linked to the field of equality and anti-discrimination. The

[190] NOU is short for '*Norsk Offentlig Utredning*' which is an Official Norwegian Report that is the product of a working Group of experts analysis and recommendations often used as pre-legislative work, See for more information http://www.regjeringen.no/nb/dep/bld/aktuelt/nyheter/2012/ny-statsrad-i-bld.html?id=676244, accessed 1 April 2012.

[191] The summary of the report is available in English at the following site: http://www.regjeringen.no/pages/36950733/PDFS/NOU201120110018000EN_PDFS.pdf, accessed 1 April 2012.

report was delivered on 15 November 2011 and with a deadline for comments in the public round of consultations on 9 March 2012. The recommendations point at clear weaknesses in the current legislation and calls for a strengthening of the structure to fulfil the ambition of gender equality in practice. The most controversial recommendation is the establishment of a new directorate under the Ministry of Children, Equality and Social Inclusion to have professional responsibility for implementing an equality policy.[192] This is necessary as under the current rule the ambitions regarding achieving gender equality are high, but 'no one' is responsible for seeing it through. The area of responsibility for the Ombud and the Tribunal covers only a limited area in the greater picture. The conclusions are unanimous. The following are the recommendations and proposals by the Commission:

- Incorporating a prohibition against compound (intersectional) discrimination in the Gender Equality Act and other anti-discrimination legislation.
- That the duty to make active efforts which relates to employers and the duty to make active efforts which relates to public authorities as bodies exercising authority and providers of services are to be specified in the Gender Equality Act.
- That the Ministry of Children, Equality and Social Inclusion is to be authorized to supervise the duty of public authorities to make active efforts, and that the Ministry is to be able to delegate this task to an underlying agency (directorate).
- Establishing a new directorate under the Ministry of Children, Equality and Social Inclusion to have professional responsibility for implementing an equality policy. An equality directorate should be regionally anchored through regional offices. The Commission also proposes initiating greater efforts in the form of a 10-year programme to develop local work to promote equality. The core tasks of an equality directorate will be:
  - To supervise the public authorities' duty to make active efforts.
  - To provide training and guidance on the duty to make active efforts and report on working life.
  - To administer financial tools in the efforts to promote equality, including regional development funds.
  - To take care of documentation and to disseminate knowledge.
  - Establishing a contact committee between the national authorities and organisations in the field of gender equality.
  - Establishing a forum to discuss equality in working life that consists of the Minister of Children, Equality and Social Inclusion and employers' and employees' organisations. One of the forum's main goals will be to help follow-up the duty to make active efforts and report as stipulated in the anti-discrimination legislation.
  - Assigning the Ombud, as part of its mandate, a duty to map and analyze its own complaints and guidance cases. The Commission also proposes assigning the Ombud with a duty to obtain information from the parties on whether and how the case has been resolved. The Commission proposes to stipulate in the Equality and Anti-Discrimination Ombud Act that the parties are obliged to provide such information.
  - Making the Equality and Anti-Discrimination Ombud and Equality and Anti-Discrimination Tribunal responsible for enforcing the prohibition against sexual harassment which is laid down in the Gender Equality Act. Currently protection against sexual harassment may only be enforced by the courts.
  - Simplifying the regulations governing the Ombud's mandate so that the core tasks in the function of promoting equality and developing expertise are clearly stated.
  - Stipulating in regulations that the Ombud is to report to the Ministry any conflict between Norwegian law and administrative practice and the UN Convention on the Elimination of Discrimination against Women (CEDAW) and the UN Convention on the Elimination of Racial Discrimination (ICERD). The duty to report must also apply

[192] The establishing of a new Directorate regarding Gender Equality Issues is seen as a radical suggestion by many as gender equality is not an overwhelmingly popular topic. In addition, establishing a Directorate will cost money which politicians may fear is an unpopular subject before the elections in a year's time.

to cases where the state has in some other way not complied with its obligations pursuant to these conventions. The Commission proposes additional funds to strengthen the Ombud´s function of monitoring compliance with the conventions.
- Giving the Equality and Anti-Discrimination Tribunal authority to award damages for non-economic loss in cases concerning a breach of the prohibition against discrimination;
- that the fault requirement for obtaining damages for non-economic loss due to gender discrimination outside working life should be changed from gross negligence to ordinary negligence.
- Authorising the Equality and Anti-Discrimination Tribunal to review other authorities' individual decisions when the decision has been made in the authority's capacity as an employer. Decisions made by the King or ministries are exempt from this; and
- granting legal aid without any requirement of means testing in cases where the Tribunal has agreed with the complainant that discrimination has taken place and has recommended that legal aid be granted.

The CEDAW Committee's observations on Norway's 8th report

The CEDAW Committee touched upon a number of issues during its evaluation of Norway's 8th report whereupon two issues relate to the area of gender and employment.[193]

– The Committee encourages the State party to consider expanding the rules concerning gender balance on boards of public limited companies to other types of enterprises and other areas of the private sector, (see Paragraph 18).
– Attention is specifically called for gender stereotypes and the education system (see Paragraphs 22 and 27). This is important as an end result of the stereotypes is the gender segregated employment market and the great amount of part-time work amongst employed women which in turn affects the pension level of women (see Paragraph 29).

CEDAW is the convention which most specifically addresses the underlying hindrances to gender equality, such as traditional gender stereotypes. These stereotypes need to be specifically targeted in the way legislation is designed in order to promote changes.

Legislative developments

On 17 February 2012 the Government presented its proposal for legislative amendments to the provisions on parental leave through amendments to sections 14-9, 14-10 and 14-12 in the National Insurance Act (*Folketrygdloven* of 28 February 1997 no. 19).[194] The proposed parental leave is divided into three parts, one third reserved for each of the parents and the last third may be divided between them as they see fit. In the bulk of the amendments the mothers' quota/right to leave is raised from previously 3 weeks before birth and six weeks after birth to a proposed 3 weeks before birth and 12 weeks after birth, while 12 weeks are reserved for the father. 20 weeks (with 100 % salary) or 30 weeks (with 80 % salary) remain as the third period which the parents may divide between them (or one parent will take all) as they see fit.

The proposal is one of the measures proposed by the Equal Pay Commission (2010) as one of the means to change the traditional gender patterns in families. A result of the analysis regarding pay is that women are increasingly lagging behind in pay after each period of parental leave. In addition, parental leave (maternity and paternity leave plus a parental leave period) divided into three will be a profound statement to the parents that the parental leave

[193] See http://foreninger.uio.no/jurk/CEDAW-C-NOR-CO-8%5B1%5D.pdf, accessed 1 April 2012.
[194] See for additional information: http://www.regjeringen.no/en/dep/bld/pressesenter/pressemeldinger/2012/ny-modrekvote-likestiller-foreldrepermis.html?id=672684, and Prop. 64 L (2011–2012) http://www.regjeringen.no/nb/dep/bld/dok/regpubl/prop/2011-2012/prop-64-l-20112012.html?id=672457, both accessed 1 April 2012.

period 'belongs' to the parents together and this compels parents to take an active decision as to how it is to be shared between them as the Minister phrased it.

Case law of the national courts

There are no cases to report during the first three months of 2012, not from the national courts nor from the Gender Equality and Anti-Discrimination Tribunal.

The Gender Equality and Anti-Discrimination Ombud
The Ombud has heard several cases during this period. One case concerns the question of bonus payments while on maternity and parental leave.

Parental leave / bonus payments / direct discrimination:[195]
Two women employed at an insurance company were denied bonuses for 2009. The bonuses were given to all employees as long as they had worked during the year. The bonus payment was not linked to the results of the individual employee, but was meant to inspire and motivate all employees. The two women had not been working during 2009 since they had been on pregnancy-related sick leave, maternity leave and parental leave. The Ombud concluded that the employees who were denied their bonus were victims of direct discrimination because of gender in violation of the Gender Equality Act of 9 June 1978 no. 45, section 3. The employer was asked to pay the bonus and to inform the Ombud when the payment had been made.

POLAND – *Eleonora Zielińska*

Policy Developments

After the appointment of the Prime Minister Donald Tusk (PO), the winner of the 2001 parliamentary elections, finally the long-awaited change in the position of the Government Plenipotentiary for Equal Treatment took place. The new Plenipotentiary, Ms Agnieszka Kozłowska-Rajewicz, took up her position in December 2011. Already her first interventions have resulted in appreciation from women's rights circles; among others, these decisions concerned: the protest against the humiliating conduct of Top Model jurors towards female participants on a popular TV programme; the prohibition of breastfeeding while in public office, and the gender pay gap.

Recent months have been dominated by the debate on pension reform, which by definition influence the situation of women to a greater extent than men. The government has proposed to gradually increase the retirement age to 67 years, both for women (in 2040) and men (in 2020). In view of the fact that women can now retire at the age of 60 and men at 65, this would result in an extension of the working period for two years in the case of men and seven years in the case of women. This proposal has met with violent social protests.

The opponents of the change argue that it is difficult to talk about pension reform when the only proposal is to extend and equalise the retirement age, without any major system changes. The reform should enable a choice to be made between membership of the ZUS (National Insurance Office) and the OFE (privately owned Public Pension Funds), taking into account the fact that investments made by the OFEs, membership of which is currently mandatory, raises fears about the amount of retirement benefits which are to be paid in the future (in 2011, out of PLN 16 billion (circa EUR 3.8 billion) received, the OFEs had lost as much as PLN 12 billion (circa EUR 2.9 billion) on the stock market). A true, comprehensive reform of the pension system should eliminate unfair pension benefits agreed for, among others, miners, the uniformed services and farmers. It should also take into account the high

[195] http://www.ldo.no/no/Klagesaker/Arkiv/2011/To-kvinner-fikk-ikke-utbetalt-bonus-pa-grunn-av-foreldrepermisjon/, accessed 1 April 2012.

unemployment rate as well as the situation on the labour market by providing incentives for job creation and the maintenance of existing jobs, and reducing so-called 'junk contracts', for which only the minimum pension contributions are being paid. Those activities should also be accompanied by actions aimed at eliminating the gender pay gap, since higher earnings received for a longer period of employment naturally have to translate into higher retirement benefits. The reform should also be connected with an active policy of encouraging families to have more children who in the future will work for their parents' pensions paid from ZUS and which will lead, among other things, to the creation of an appropriate number of financially available nurseries and kindergartens, in order to enable the parents of small children to combine family responsibilities with a professional career. The raising of the retirement age should also correspond with improvements in health care, in particular for senior citizens. Despite the positive development in the average life expectancy in Poland, in relation to other European countries, the national life expectancy is still about 4-5 years less for women and about 8 years less for men. It should be noted that in arguing in favour of the need to raise the retirement age, the government cited demographic forecasts, which assume that by 2027 the population of Poland will have shrunk from the current 38.2 million to 37.2 million. Demographers contend, however, that the reform is based on outdated forecasts. The general population survey conducted in 2011 shows that the current population is estimated to be too high, because the number of residents, that is people who actually live in Poland, is about one million higher than in reality. This number includes Poles working abroad and it is quite likely that those people will remain there permanently. This means that there will be fewer children because most of those who have gone abroad are relatively young people.

Increasing the retirement age also divided the governmental coalition of the PO and PSL. Eventually, a compromise could be achieved, by which women over 62 years of age with 35 years of working time could retire early and receive 50 % of the benefits until they reach 67 years. It would be similar for men over 65 years of age with 40 years of working time. While receiving the reduced pension, one can continue with one's professional career. This compromise, however, which has recently resulted in presenting Parliament with the governmental draft law amending the law on the social pensions system,[196] will probably, as might be expected, not put an end to the social unrests related to this reform. It seems that the main reason for this is the fact that increasing the retirement age will not necessarily result in higher pensions. The forecasts are that pensions will be significantly lower than today (currently they amount to an average of 55 % of one's salary, and in the future they will be less than 30 %). Members of the government do not dispel those fears. One can even say that to a certain extent they have been confirmed, among others, by the statement by the Deputy Prime Minister Pawlak (PSL) that he cannot rely on a state pension and that, instead, he has arranged for his own retirement benefits, in particular by maintaining good relationships with his children.[197] This opinion is also confirmed by the Prime Minister, who noted that it is also possible to pay contributions to an individual retirement account, the IRA (III pillar). However, the possibility of saving for one's retirement in this system are limited (the annual tax-free payment made to the IRA in any calendar year may not exceed an amount equal to one and a half the average monthly salary (in 2011 – PLN 5 352, circa EUR 1 250).

It is worth noting that in its judgment of 15 July 2010, the Constitutional Tribunal found that provisions introducing a lower retirement age for women constitutes a constitutionally admissible equalization privilege for women, aimed at diminishing factual gender inequality.[198] The planned pension reform does not take this fact into account, however.

[196] Draft law of 24 April 2012, Sejm Print N 329, http://www.sejm.gov.pl/Sejm7.nsf/druki.xsp#2, accessed 2 May 2012.

[197] http://www.wprost.pl/ar/307008/Pawlak-o-emeryturach-licze-na-dzieci-bo-niepokoje-sie-o-OFE/, accessed 28 March 2012.

[198] No. K 63/07 published http://www.trybunal.gov.pl/OTK/otk.htm, accessed 2 April 2012.

Legislative Developments

Increasing the involvement of budgetary funds in pro-family measures

From 1 January 2012 the new provision in the Law on the social pension system[199] entered into force, providing for a new basis for estimating pensions and other benefits for those on parental leave. It will equal 60 % of the average monthly wage, but not more than the average monthly salary paid to the particular employee for the 12 months preceding the taking of parental leave. Those contributions will be paid from the state budget. The new regulations will benefit those whose earnings exceed the minimum wage, but do not amount to more than 60 % of the average monthly salary. Unfortunately, those who earn the lowest amounts cannot rely on higher deposit contributions. These restrictions were imposed in order to avoid a situation in which the contributions to social security funds for the period of parental leave would surpass the amount of deposits paid by the particular employee, if he had not taken the parental leave and continued to work instead.[200] Parental leave, in accordance with the contents of Article 186 of the Labour Code, is available to any employee employed for at least 6 months during 3 years before the child reaches 4 years of age. The budget also pays pension contributions for nannies employed by families. Soon the budget will also start paying pension contributions for self-employed parents taking parental leave and persons working on employment contracts. In view of the criticism with regard to shifting the burden of maintaining local nurseries and kindergartens from the State to local self-government bodies, the consequence of which was an increase in the fees collected from parents, it was announced that in 2013 budget subsidies for kindergartens will be introduced which will amount to PLN 0.5 billion (circa EUR 120 million).[201] Most of those changes were notified within the framework of a broad reform of leave possibilities associated with having children, introduced in 2008 and 2011, for which, however, full implementation is planned in 2014. It is worth noting that in addition to parental leave, parents are also entitled to maternity leave (or leave on the same conditions as maternity leave) and paternity leave. Maternity leave is currently made up of two parts: one obligatory and one optional. As regards the obligatory maternity leave, the three time limits that existed in the past (18 weeks in the case of giving birth to the first child, 20 weeks for every subsequent birth and 28 weeks for multiple births) have been substituted by 20 weeks for the first and every other single birth, and 31 weeks for twins, 32 weeks for triplets, 35 weeks for quadruplets and 37 weeks for quintuplets or more children during a single delivery (Article 180 of the Labour Code). In a similar way the length of the leave will be extended in the case of the adoption of one or more than one child simultaneously (Article 183 of the Labour Code).

In addition, the law has given parents the possibility to take an optional maternity leave after the expiry of the obligatory maternity leave. The length of this optional leave shall increase gradually from 2 weeks (in 2010) to 6 weeks in 2014 (Article 182^1 of the Labour Code). Currently the leave which an employed father is entitled to (paternal leave) consists of three types of benefits: (1) leave on the same conditions maternity leave, associated with the acquisition by a male employee of the remainder of the maternity leave waived by the mother after completion of at least 14 weeks (Article 180 § 5 of the Labour Code); (2) additional leave under the terms of the maternity leave (Article 182^2 of the Labour Code); and (3) a separate paternity leave for up to 2 weeks (to be used until the child reaches 12 months of age (Article 182^3 of Labour Code)).

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[199] Article 18 (5b) of the law of 13 October 1998 on the social pensions system (unified text: *Dziennik Ustaw* (Journal of Laws, hereafter:Dz.U.) 2009, No. 205, pos.1585, with further changes, as amended by Articles 4 and 16 of the Law of 6 of December 2008, (Dz.U. 2008, No. 237, pos.1654); accessed 28 March 2012.

[200] A. Abramowska Od 2012 *wyższe składki na* ZUS (from 2012 increased payments to the National Insurance Office), *Rzeczpospolita Prawo* 11. November 2911, http://www.rp.pl/artykul/750450.html, accessed 29 March 2012.

[201] A. Nowakowska, D. Wielowieyska, *Dobry kompromis emerytalny. Gazeta Wyborcza*, weekend edition, 31 March – 1 April 2012. www.wyborcza.pl, accessed 1 April 2012.

Balanced representation of women and men on companies boards

The text of the Good Practices of Companies Noted on the Warsaw Stock Exchange[202] was modified by the Board of Stock Exchange in November 2011. This soft law, governing the functioning of public companies, recommends that public companies should ensure the balanced participation of women and men in performing the functions of management and supervision over companies, thereby strengthening the creativeness and innovativeness of companies' economic activities (Part I 9). According to the Amendments, beginning from 2012, all companies which are subject to the regulations will be obliged to publish information on the number of women and men on their management and advisory boards for the past two years. This information should be presented on the company's website in the fourth quarter of every calendar year (Part II 2a). This requirement, added in November 2011, applies the '*comply or explain*' mechanism to the equal gender representation rule, which has not been provided for until now.

Case law of national courts

Possible indirect sex discrimination against maintenance beneficiaries

In judgment of 29 March 2012 the Constitutional Tribunal[203] decided that article 21 (1) point 127 (b) of the Law of 26 July of 1991 on income tax from natural persons[204] is contrary to Article 2 (the Rule of Law) and Article 32 paragraph 1 (the Equality Clause) of the Constitution to the extent that this provision excludes the application of the exemption from income tax for payments set out in court agreements.

The national tax policy in relation to maintenance payments in the last decade has undergone frequent changes. Until 2007 only maintenance payments for children did not constitute an income, therefore tax provisions did not apply to them. With effect from 1 January 2007, as a result of amendments made by the Law of 16 November 2006[205] changing the Law on income tax from natural persons and some other laws, the general rule was adopted that all maintenance payments constitute part of one's income which is subject to taxation (Article 20 paragraph 1 of the Act, in the version applicable as of 1 January 2007). However, under Article 21 paragraph 1, pt. 127 of this Act, exempted from taxation are not only maintenance payments for children under 25 years of age, but also such payments adjudged by the court to other persons, up to the amount of PLN 700 (circa EUR 170).

The Human Rights Ombudsman who lodged this case with the Constitutional Tribunal,[206] noted that making a tax exception for maintenance beneficiaries other than children, dependent on the fact that this maintenance has been agreed by a court in a judgment, constitutes a violation of the constitutional principle of equality and, eventually, amounts to an unjustified unequal treatment of persons who have been granted maintenance payments in a court settlement.

Neither the Ombudsman nor the Tribunal raised the argument that the challenged provision can also be seen as indirect discrimination based on sex. Still, it is a fact that most beneficiaries of the provision on maintenance payments are divorced wives who have not been found to be responsible for the divorce, but as a result thereof they suffer from a financially worse situation. One might argue for the existence of such discrimination. It is worth noting that court settlements, recommended by the state as a practical alternative means of dispute resolution, are always the result of a compromise between the parties, and therefore tend to be financially less attractive than maintenance awarded by a court ruling. The lack of a tax exemption in this case increases the inequality even more.

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202 Annex to Resolution No. 17/1249/2010 of the Warsaw Stock Exchange, published under http://www.corp-gov.gpw.pl/assets/library/polish/publikacje/dpsn2010.pdf, as amended, accessed 26 March 2012.

203 No. K12/11 published on http://www.trybunal.gov.pl/index2.htm, accessed 1 April 2012.

204 Law of 26 July 1991, Dz.U. 2000 No. 14 item 176 with amendments.

205 Dz.U. 2006 No. 217 item. 1588.

206 http://www.rpo.gov.pl/index.php?=980&strona=17970=1, accessed 1 April 2012.

Equality body decisions/opinions

The discrimination of police officers in relation to child-care leave

The Human Rights Ombudsman has asked the Minister of the Interior and Administration[207] to repeal his regulation from 2 September 2002 on specific rights, obligations and service by police officers which – in her opinion – discriminate against male police officers with regard to the possibility to take leave to care for a child. Pursuant to article 188 of the Labour Code, an employee raising at least one child aged less than 14 years has the right, once a year, to paid leave from work for two days (without any medical certificate). This right applies, on an equal footing, to male and female employees. However, if both parents are employed, only one of them is entitled to this leave (article 189[1] of the Labour Code). The Law on the Police 1990 (after amendments introduced by the Law of 1 April 2011) states that police officers are entitled to all benefits with regard to parenthood, as guaranteed by the Labour Code, unless this law provides otherwise. In addition, it states that if both parents are police officers, only one of them may benefit from those rights (Article 79). These rules are contradicted by the above-mentioned Regulation of the Minister of the Interior and Administration, which in paragraph 8 states that female police officers, raising at least one child aged less than 14 years, are entitled, once a year, to two days of paid leave. If both parents serve in the police force, only one of them is entitled to the leave. Male police officers are entitled to such leave if they are the sole carers of a child. At the time when this provision of the Regulation was enacted, it remained in conformity with the Labour Code, entitling only female employees to take such leave. After the Labour Code was amended in this respect, the provision of this Regulation contradicted the Labour Code, as well as Article 79 of the Law on the Police, as amended in 2011. It discriminates against male police officers who are only entitled to two days leave for child care when they are married to female police officers. If this is not the case, then this entitlement does not apply unless they are the sole carers of the child. The Regulation does not provide for such restrictions in the case of female police officers. This Regulation should be repealed; however, despite two such requests which have already been made by the Defender of Human Rights, the provision discriminating against male police officers continues to exist.

PORTUGAL – *Maria do Rosário Palma Ramalho*

Legislative developments

Labour law reform

In the context of the Financial Assistance Programme for Portugal, that is now in place, some structural reforms in the area of employment and labour contracts are being implemented. Although they are of a general nature, they will have a direct or indirect impact on equality issues.

These reforms relate especially to the following areas: unemployment benefits; damage compensation at the end of a labour contract; fixed-term labour contracts; working time arrangements, vacation and national holidays, lay-offs, grounds of dismissal for economic reasons, collective bargaining and collective agreements.

The first three Acts of this reform are already in force:

– Law No. 53/2011, of 14 October, on damage compensation at the end of the labour contract: this Act has reduced the value of employees' damage compensation rights at the end of their labour contract, from an average compensation on the basis of 30 days of salary per year of the duration of the labour contract (with a minimum limit of 3 months and no upper limit) to a basic 20 days of salary per year of the contract with no minimum limit and an upper limit of 12 salaries.

[207] Information received from the Office of the Defender of Human Rights.

– Law No. 3/2012, of 10 January, on fixed-term labour contracts, that has extended the possible duration of fixed-term labour contracts from the actual limit of 3 years by an additional 18 months.
– Decree-Law No. 64/2012, of 16 March 2012, on unemployment benefits: this Act reduces the amount and duration of unemployment benefits, but eases the conditions to have access to those benefits (the minimum period of contributions required to have access to this benefit is reduced and independent workers can also have access to this benefit, under certain conditions); the Act also allows the accumulation of this benefit with employment under certain conditions and increases the value of the benefit for families with children or other dependents when both parents are unemployed.

The impact of the first Act on equality issues is not yet significant since this Act only applies, during this first stage, to new contracts. But the future extension of its provisions to older contracts, in a second stage of the reform, will be severe since this new system facilitates dismissals and may therefore contribute to unemployment that already affects some categories of workers more than others.

The second Act has been explicitly justified by the growing unemployment rate in Portugal and has an immediate and direct impact on equality issues, since the number of fixed-term contracts is higher amongst women and disadvantaged professional groups (such as young people, the handicapped and elderly persons) than among other groups. Therefore this extension of fixed-term contracts can reduce the risk of unemployment in these sectors.

As to the third Act, it is supposed to promote unemployed persons in their search for a new position, but the present unemployment rate makes searching for employment rather difficult. From the perspective of equality law, the most important measure to underline in this Act is the one which increases the amount of benefit for family reasons.

At the present stage of the Labour Law Reform, another Act is now being discussed in the National Parliament, following a large-scale commitment between the Government and the Social Partners – the 'Commitment for Growth, Competition and Employment',[208] signed on 18 January 2012.

This Act will consider the above-mentioned issues in the following sense: working time arrangements, aiming to achieve more flexible schemes; vacation and national holiday rules, aiming to reduce some rights; lay-offs, aiming to make the legal system more flexible; grounds of dismissal for economic reasons that will be extended; the dismissal compensation system, thereby extending the reduction of the value of damage compensation to older contracts; collective bargaining and collective agreements, in the sense of facilitating collective bargaining at the plant level to the exclusion of unions.

Case law of national courts

Gender equality and maternity and paternity rights in collective agreements

In view of the enforcement of the provisions regarding gender equality, the Portuguese Labour Code[209] (LC) has established, since 2009, a new competence for the Commission for Equality in Employment (CITE):[210] in the first 30 days after the official publication of collective agreements, they must be checked by the CITE for possible discriminatory clauses (Article 479 of the LC); if that is the case, the CITE has the power to endorse a claim with the public prosecutor ('*Ministério Público*'), in order to a promote judicial procedure to declare such clauses null and void and to eradicate them from the collective agreement.

Making use of this legal power, the CITE has already instigated several claims regarding collective agreements and some actions have been brought before the Courts by the public

[208] '*Compromisso para o Crescimento, Competitividade e Emprego*'.
[209] Approved by Law No. 7/2009, of 12 February 2012.
[210] '*Comissão para a Igualdade no Trabalho e no Emprego*'. This Commission is a public agency, dependent on the Labour Minister, but with the social partners being represented, that is competent in the area of gender equality and non-discrimination in general in the field of employment.

prosecutor in that respect. Recently, two judgments by the Labour Court of Lisbon have declared several clauses in two collective agreements to be null and void on the ground of discrimination.

In the first judgment (from 4 October 2011),[211] the Court declared the following clauses of the Collective Agreement between the ANESM and the FETESE (an employers' association in the area of merchandising services and an union federation in the area of services) to be null and void:[212] a clause taking into consideration maternity leave, but not other forms of leave related to maternity and paternity, for the purpose of the right to postpone employees' annual rest, when the birth has taken place during holiday periods; and a clause taking into consideration maternity leave, but not other forms of leave related to maternity and paternity, as effective working time, for the purposes of the worker's career (e.g., for the purpose of access to promotion). The fact that the clause only takes maternity leave into consideration and not other forms of leave on the ground of maternity and paternity rights was considered discriminatory by the Court.

Another judgment, also from the Labour Court of Lisbon (from 11 November 2011),[213] has determined exactly the same in relation to a collective agreement signed by the APHP and the FETESE (an employers' association in the area of private hospitals and a union federation in the area of services).[214] The Court declared a clause in this collective agreement taking into consideration maternity leave but not other forms of leave related to maternity and paternity rights, for the purposes of the right to postpone employees' annual rest, when the birth has taken place during holiday periods, to be null and void.

These judgments are very important as they demonstrate the practical implementation of equality law in collective agreements.[215]

ROMANIA – *Roxana Teşiu*

Policy developments

National Research on Discrimination in Romania

On 23 March 2012 the National Council for Combating Discrimination (NCCD) has released the results of a research carried out at the national level on perceptions and attitudes towards discrimination in Romania.[216] The research had four objectives:

1. Evaluating the degree of knowledge among the population concerning discrimination (the concept thereof, the applicable legal framework, its impact);
2. The impact of EU membership on perceptions and attitudes concerning discrimination;
3. Determining the population's opinions on persons belonging to vulnerable population groups;
4. Determining the degree of notoriety of NCCD's actions in terms of prevention.

In terms of the population's knowledge of the concept of discrimination, 49 % of the population believe that discrimination is either frequent or very frequent in Romania, while 11 % indicated that discrimination is very rare. In the group of respondents that indicated discrimination to be frequent or very frequent practice – the population group aged 18 to 30 – university graduates represented the majority (62 %).

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211 Judgment No. 1925/11-3TTLSB.

212 ANESM – *Associação Nacional de Empresas de Serviço de Merchandising*; FETESE – *Federação dos Sindicatos dos Trabalhadores dos Serviços*.

213 Judgment No. 2306/114TTLSB.

214 APHP – *Associação Patronal da Hospitalização Privada*; FETESE – *Federação dos Sindicatos dos Trabalhadores dos Serviços*.

215 Sources**:** Official journal (www.dre.pt), last accessed on 2 April 2012 and information provided by the CITE.

216 http://www.cncd.org.ro/noutati/Comunicate-de-presa/Lansarea-sondajului-de-opinie-Perceptii-si-atitudini-privind-discriminarea-in-Romania-136/ , accessed on 2 April 2012.

The most discriminated social groups identified by the respondents are the Roma population, persons with disabilities, AIDS-infected persons, homeless persons and drug addicts. With regard to the connection between Romania being given EU membership and changes in the level of perception over discrimination, 31 % of the respondents indicated that after Romania became a member of the EU, discrimination towards the Roma population and older people has intensified. In addition, 53 % of the population indicated that the economic crisis has intensified discrimination as a practice.

With reference to gender-based discrimination, 34 % of the respondents are of opinion that discrimination exists between men and women in Romania. Within the group of respondents who consider that there is discrimination between women and men, the areas where women are discriminated against are in the workplace (58 %), in decision making (58 %), in political activities (54 %) and in the household (50 %). Men are discriminated against with regard to the age required to obtain a pension and as parents.

In relation to the opinions on persons belonging to vulnerable groups, 31 % of the population stated that they would not be comfortable being around a homosexual, 22 % felt the same way concerning an AIDS-infected person and 15 % did not want to be around a person belonging to the Roma population. With regard to the image of the Roma population, 43 % of the respondents had a negative and very negative impression of Roma persons.

Some 49 % of the respondents were aware of the NCCD and 65 % of this group are of opinion that the NCCD is currently fulfilling its mandate of preventing discrimination. Within the same group of respondents who are aware of the existence of NCCD, 20 % stated that they have great and very great trust in its activities, while the same percentage stated that they have no trust at all in its activities. The vast majority of the respondents in this group (43.5 %) are neutral *vis-à-vis* the trust level in the NCCD as an institution.

The three main activities that need to be carried out by the NCCD are in the respondents' opinion:

– Preventing acts of discrimination (36 % of respondents);
– Investigating and sanctioning discriminatory behaviour (23 %);
– Information campaigns concerning discrimination (17 %).

Legislative developments

New regulations on child-raising leave. Incentives for the sharing of child-raising leave between parents.

Under the legal provisions of the Governmental Emergency Ordinance No. 111/2010 on child-raising leave and indemnity (the **Child Raising Ordinance**)[217] any natural, adoptive or otherwise assimilated parent may benefit, on grounds of the birth or adoption of a child, from child-raising leave and the corresponding indemnity. The length of the child-raising leave may be for a period up until the respective child reaches 1 or 2 years of age, or 3 years of age in the case of disabled children. The employee who applies for this leave must indicate which one of the two durations of the child-raising leave is being applied for.

Under the Child Raising Ordinance, such leave and the corresponding indemnity could only be granted to one parent during the whole of the chosen period. The parent had to exercise such a right after informing his or her employer, thus resulting in the voluntary suspension of the individual employment contract, as well as the local public authorities which are charged with the payment of the child-raising indemnity.

Following the applicability of the **Social Benefits Ordinance,**[218] in line with the provisions of the Parental Leave Directive, at least one month of the child-raising leave must be allotted to the other parent, namely the one not having exercised his or her right to apply for child-raising leave.

[217] Governmental Emergency Ordinance No. 111 of 8 December 2010 on child-raising leave and the corresponding indemnity published in Official Gazette No. 830 of 10 December 2010.

[218] Governmental Emergency Ordinance No. 124 of 27 December 2011 on the modification and completion of certain legal norms regulating the granting of social assistance benefits, published in Official Gazette No. 938 of 30 December 2011.

The impact of the legislative changes
The changes brought about by the Social Benefits Ordinance are the following:

– *With regard to the parent having decided not to apply for the child-raising leave*, this parent is provided with an incentive to take child-raising leave (with the corresponding payment of the indemnity) for at least 1 month, thus voluntarily suspending his or her own employment relationship.

  The parent must file a written request (accompanied by relevant supporting documentation) with the competent public authority charged with paying the corresponding indemnity at least 30 days prior to the start of this leave. If the respective parent continues to choose not to apply for child-raising leave (not even for the minimum of one month) this decision must be notified to the competent public authority at least 60 days prior to the child reaching 1, 2 or 3 years of age, as the case may be.

– *With regard to the parent having exercised his or her option to take child-raising leave*, this parent will have the duration of the child-raising leave and the corresponding indemnity decreased by and suspended for at least one month. In accordance with the provision of the new Social Benefits Ordinance, this parent is prohibited from benefiting from the minimum one-month child-raising leave, instead of the parent mentioned in the paragraph above. This is a basic regulation and the minimum one-month period is granted on a non-transferable basis. During the period of the suspension of the labour contract this parent may opt to take unpaid leave or to return to work in order to obtain a new taxable income.

  The above-mentioned changes are designed to create an incentive scheme for parents, aimed to encourage them to share child-raising leave. Furthermore, it could be stated that the Social Benefits Ordinance prescribes the mandatory sharing of child-raising leave[219] as both parents lose the respective minimum one-month child-raising leave and the corresponding indemnity.

Scope of application:
The above-mentioned changes do not apply:
(a) to single parents;
(b) in the event that the other parent, namely the one not having originally opted to apply for child-raising leave, is not eligible to benefit from child-raising leave and the corresponding indemnity (for example, he or she does not have any taxable (or assimilated) income during the 12 months prior to the birth of the child); and
(c) in the event where the parent who has applied for child-raising leave decides to return to work prior to the child reaching the age of 1 or 3 years (in the case of disabled children). In such a situation, if the respective parent notifies his or her decision at least 3 or 6 months in advance, that parent will benefit from the so-called *insertion benefit*, regulated by the Child Raising Leave Ordinance.

Time frame:
The above-mentioned changes are applicable to parents whose children are born from 1 March 2012 onwards. The Child Raising Ordinance as originally enacted on 1 January 2011 provided for the above-mentioned changes. However, their applicability was delayed in practice and only achieved through the new Social Benefits Ordinance.

Other notes on changes:
The new Social Benefits Ordinance also prescribes new eligibility criteria for both the child-raising leave and the corresponding indemnity. Hence, from 2012 onwards these rights may be maintained subject to the beneficiary duly complying with his or her tax-related obligations towards the local budget.

[219] Subject to the condition that the right to the (minimum) one-month child-raising leave is not exercised.

Case law of national courts

There is no public information available on developments related to the case law on gender equality. The Romanian courts do not publish their decisions, hence it is very difficult to assess to what extent the gender equality law is being enforced.

Equality body decisions

No decision by the National Council for Combating Discrimination relating to gender-based cases has been published during the past three months.

SLOVAKIA – *Zuzana Magurová*

Policy developments

Parliamentary elections

Parliamentary elections took place on 10 March 2012, somewhat less than two years after the last election in 2010. The early election followed the downfall of the coalition government of the first woman Prime Minister, Iveta Radičova, in October 2011. Her government had lost a no confidence vote because of its support for the European Stability Fund. The former Prime Minister Robert Fico's Direction –Social Democracy party won an absolute majority of the seats available.

Although more women than men live in Slovakia, they will only be represented by 26 Members of Parliament from a total number of 150 deputies, which is 5 less than after the previous election. Non-governmental organisations have criticized the fact that none of the political parties had the ambition to enforce gender equality, which was reflected in the small number of women on their candidate lists. The election results once again stirred up public discussions on quotas. In the view of experts and women's non-governmental organisations the introduction of mandatory quotas would help to increase female participation.

The new Cabinet will contain just woman – the head of the ministry of health and the unfilled post of Vice-Prime Minister for Human Rights, National Minorities and Gender Equality. An amendment to the Competence Act is planned, followed by the repealing of this post, and the creation of the new post of the Vice-Prime Minister for the Economy who will be in charge of large investment projects. Non-governmental organisations and experts from the Government Council for Human Rights, National Minorities and Gender Equality set up at the office of the outgoing Vice-Prime Minister reacted to this and requested the incoming Prime Minister to retain the post of Vice-Prime Minister for Human Rights and National Minorities and Gender Equality. In their view the issue of human rights and gender equality requires a single institution to coordinate different themes with ministries, because it has a cross-cutting character.

The first woman to be appointed as the Public Defender of Rights (the Ombudsperson) in Slovakia's history

The former MP for the Slovak Democratic and Christian Union (SDKÚ) party, Jana Dubovcova, took up the post of the Public Defender of Rights on March 28 when she took the oath of office before the Speaker of Parliament, Pavol Hrusovsky. She was elected to the post in December of last year and had been nominated by the previous governing coalition parties.

Case law of the ECHR

The European Court of Human Rights delivered a judgment in the case of the forced sterilization of a young Roma woman by doctors at Prešov hospital (Case *V.C. vs. Slovakia*, 18968/2007 of 8 November 2011). The complainant who lived in one of the poorest settlements in Eastern Slovakia had been sterilized against her will at the age of 20 after

giving birth to her second child in August 2000. During labour doctors asked her whether she wanted to have more children. When she said yes, they informed her that another pregnancy might end with the baby's death. Ms. V then became upset and said to the doctors: 'Do what you want to do'. With a shaking hand she signed a form stating 'the patient requires sterilization'. One hour later doctors delivered her child by means of a caesarean section and then sterilized her. On her medical card it was stated that she was of Roma origin. After the birth Ms. V shared a hospital ward with other Roma women that had a separate bathroom and toilet. The impossibility of having further children had scarred her so much that she suffered hysterical pregnancies with false pregnancy symptoms for seven years after the sterilization. Her marriage broke up in 2009 due to her sterility. In her complaint to the ECHR she also stated that she had felt inferior in the Roma community. Her action for the infringement of her rights had failed before the Slovak courts. The doctor who had carried out the surgery claimed in his statement that the sterilization had taken place at the patient's request and due to a medical necessity. The patient's third pregnancy might have been dangerous without regular monitoring. However, he admitted that the sterilization did not amount to life-saving surgery. The head physician at the maternity ward could not remember the case in his statement. He thought it was a 'case like the others'. The Slovak courts dismissed the action arguing that the surgery had been justified by medical reasons. The ECHR disagreed with the decision of the Slovak courts. In its judgment the ECHR stated that the sterilization was not a life-saving operation. Such a medical procedure is conditional upon the patient's free and informed consent, after having been fully and comprehensively informed about the consequences of such an operation. To request a patient's consent while she was in labour and without her understanding the meaning of the term 'sterilization' was contrary to respect for human dignity and human rights as guaranteed by the Convention. The doctors had not respected her right to physical integrity and had not given her any other alternative than to agree to enforced surgery. In the view of the Court, the Slovak Republic was responsible for a violation of the prohibition of torture and other inhuman and degrading treatment and for a violation of the protection of private and family life. The most discussed part of the judgment was the violation of the prohibition of discrimination. In Ms. V.C.'s view the reason why she had been exposed to such inhuman treatment was her Roma origin. In her opinion the practices applied by the doctors were a remnant of the Communist policy that financially motivated Roma women to undergo such operations. But a majority of the judges at the ECHR refused to deal with this part of Ms. V.C.'s complaint to the effect that her Roma origin was the true reason for such treatment. Most of the judges agreed that in this specific case the plaintiff had not submitted sufficient evidence that the reason for the degrading treatment had been her ethnic origin. The female judge Mijovic disagreed with the majority of the judges in her dissenting opinion. She argued that the doctors´ conduct had been the worst form of discrimination possible. In her view sterilizations 'were not done to Roman women at random, but were a hangover of deep-rooted negative attitudes towards the Roman minority in Slovakia'. As there were no medical reasons for the sterilization, it was evident that the reference to her origin was the actual reason for this forced surgery. As non-governmental organisations have highlighted, the judges´ decision might have been influenced by statistics referring to high numbers of such operations among the specific category of Roma women. But such statistics do not officially exist because the public authorities argue that the collection of data based on ethnicity is not allowed. This is despite many recommendations made by human rights organisations and the European Commission that the collection of such data with the necessary anonymisation is not only possible, but also necessary for the exposure of discrimination, in particular structural discrimination. The former Minister of Justice, Lucia Žitňanská, stressed that this case was an isolated one. She referred to amendments to the legislation implemented in 2004 with the aim of preventing such surgery without the informed consent of the patient. Her attitude concerning the case of Ms. V.C is considered to be a failure to respect fundamental human rights. In view of the severity of the stated infringement of fundamental human rights and taking into account the repeated calls by international and national human rights organisations, including the Final Findings of CEDAW Committee from the year 2008, the Minister, together with other state officials,

should have condemned such practice and initiated a proper investigation and awarded compensation. Even the outgoing Prime Minister (who decided not to pursue her political career and to return to academic life) did not use this opportunity to apologise to Roma women for forced sterilizations.

Equality body decisions/opinions

The Slovak National Centre for Human Rights

The Slovak National Centre for Human Rights (hereafter, the Centre) will submit its annual Report on the Observance of Human Rights including the Observance of the Principle of Equal Treatment by the end of April.

In June 2011 the former Government approved the analytical report on the activities of the Centre, wherein the authors noted, among other deficiencies, that the Centre did not have sufficient capacity in the area of equal treatment and only very few cases of discrimination have been brought to the courts by the Centre and not one has been successfully resolved. In their conclusion they suggested transforming the Centre into an Equality Body and transferring its competences in the area of human rights to the Public Defender of Rights (the Ombudsman). Due to the fall of the former Government, the transformation of the Centre could not be implemented. Several employees, including lawyers representing clients, have recently left the Centre.

Miscellaneous

In March 2012 the Institute for Public Issues presented the results of a research project on issues of active ageing, the participation and discrimination of old people and public views concerning these issues. The research was conducted during a period of six months and it focused on people aged between 45 and 64 years, who represent 1.4 million inhabitants of Slovakia. It proves that the population is rapidly ageing. In 2010 the number of persons aged between 45 and 64 was 1 447 757 (of which 699 221 were men and 748 536 were women). The aim of the project was to acquire knowledge about the lives of older people and their experiences with discrimination, as well as the rate of their participation in different areas of society; to obtain views on the position and rights of older people; to refer to age stereotypes; to analyze the preparedness of the public and older people to accept the active ageing model; and to contribute to the cultivation of a public discussion on the rights of older people and to offer knowledge so as to choose the most appropriate public policy.

Although the research did not focus exclusively on women, it also comprised data classified by gender showing that the situation of women is much worse than that of men. The average pension for men was EUR 400 per month, while that for women was slightly more than EUR 300. Older women are more exposed to poverty: in the 65+ age group the risk of poverty among women was nearly 2.5 times higher in comparison with men.

Approximately one fifth of persons aged 45-64 have had personal experience of discrimination based on age. Women, people with lower qualifications and the unemployed experience discrimination more frequently. From the point of view of age, people aged 55-59 feel the most discriminated.

Based on this survey, the low number of complaints and resolved cases of discrimination based on age that is caused by low awareness among older people concerning their rights and society's low sensitivity concerning different forms of discrimination based on age still persists.

SLOVENIA – *Tanja Koderman Sever*

Policy developments

Governmental activities

The Council for the Implementation of the Principle of Equal Treatment met for the eighth time at the beginning of January 2012. It has concluded that despite progress, discrimination against certain social groups in different areas of social life still exists and that an institutional system of protection against discrimination is still lacking. In its opinion, there is a need to ensure a more effective non-discrimination policy. Besides, all policy makers should strive to tackle discrimination actively and to integrate non-discrimination policies systematically in their strategies.

Activities of the National Assembly

In October 2011, the National Assembly adopted the Annual Report of the Human Rights Ombudsman for 2010. In the Annual Report, the Ombudsman highlights the problems related to the lack of control as far as the implementation of the legislation is concerned. According to the Annual Report, this control is either inefficient or does not exist, whereas inspection services do not fulfil their tasks. Besides, the Ombudsman expressed a need to establish an independent specialized body for protection against discrimination.

Elections to the National Assembly

In comparison with the elections held in 2008, the share of female representatives in the National Assembly increased from 14 % to 31 % in December 2011 when the preliminary elections were held. This is the highest share of women in the National Assembly since 1991 when Slovenia became an independent state.

Activities of the Commission for Petitions, Human Rights and Equal Opportunities

Members of the Parliamentary Commission for Petitions, Human Rights and Equal Opportunities have been informed about the reorganization of the Office for Equal Opportunities in accordance with the amended Law on Public Administration. They asked the Ministry of Labour, Family and Social Affairs to present these plans and to inform them as to how they will carry out the functions of their office and all the international commitments assumed by Slovenia in the area of equal treatment. Although the Minister gave assurances that all the tasks will be carried out as they were before, the Equality Advocate, *Boštjan Vernik Šetinc,* is convinced that a guardian working under the minister cannot be independent. In addition, they discussed the Annual Report by the Equality Advocate.

Activities of the Equality Advocate and the Office for Equal Opportunities

In December 2011, the Office for Equal Opportunities organized a roundtable discussion, together with the Slovene Publisher Sophia, in order to promote the publication of the book 'Women at the edges of politics'. The book offers an insight into the functioning of women in Slovene politics from the beginning of the struggle for the right to vote up until today.

Besides, the Office for Equal Opportunities urged, in December 2011, 800 of the largest companies in Slovenia to take measures which will ensure a balanced representation of women and men in decision-making positions in the area of the economy. At the same time, it conducted a survey on the participation of both genders in decision-making positions in the area of the economy. The conclusions of the survey were presented and discussed at the press conference at the World Women's Day, on 8 March. According to the survey, only two large Slovene companies have a solid female representation on the supervisory board. In the majority of the other supervisory boards, women are underrepresented or nor presented at all. In addition, they discussed the reasons why women are underrepresented in decision-making positions in the area of the economy and the profit that can be gained from a balanced representation of women and men.

Legislative developments

Within the scope of saving measures adopted by the Slovene Government, the amendments to the Public Administration Act were adopted by the National Assembly at the beginning of March 2012. According to the amended legislation, the Office for Equal Opportunities was abolished. The field of equal opportunities has been transferred to the Ministry of Labour, Family and Social Affairs from the 1st of April 2012 onwards.

Case law of national courts

There is an interesting case[220] from October 2011 which concerns the sexual harassment of a female complainant by her superior. Following an extensive assessment of the evidence, the High Labour and Social Court decided that an employer had failed to provide the complainants with a working environment where none of the workers could be subjected to undesirable conduct of a sexual nature by allowing improper conduct by its employees and was therefore liable for the damage caused by verbal and non-verbal sexual harassment by those employees. A complainant was awarded compensation to the amount of EUR 2 500.

Miscellaneous

Before the elections to the National Assembly, the Women's Lobby of Slovenia organized, in October 2011, a conference entitled 'How to achieve a more balanced representation of women and men in the National Assembly'. At the conference, it presented an analysis of the impact of voting districts on the election of women. According to this analysis, the success of a female candidate depends on the voting district in which she stands. Despite female quotas, which are respected, female candidates are not elected because political parties generally do not include them on the candidate lists in districts where they have the best prospects of being elected. The electoral legislation should therefore be amended in order to achieve a more balanced representation of women and men in politics. Two main proposed changes were the abolition of compulsory voting districts and the introduction of the absolute preferential vote. All the above-mentioned findings are also supported by the Office for Equal Opportunities.

SPAIN – *Berta Valdés de la Vega*

Policy developments

The creation of the Collaborating Organizations' Census by Decree 346/2011 (BOJA 12 of December 2011)

Law 12/2007 for the promotion of gender equality in Andalusia lays down the principle of cooperation between the Public Administration and the social initiative and the associations for the promotion of gender equality. Also the I Strategic Plan for the Equality of Women and Men in Andalusia 2012-2013 includes within its lines of action the promotion of women's participation and one clear objective is to increase this participation through the promotion of women's associations. In Andalusia there are more than 1800 women's organizations acting as agents of change for a more egalitarian society. The creation of the Collaborating Organizations' Census has the purpose to know of and to give publicity to women's associations as well as to promote the collaboration among them. Also the creation of the Census has the aim of: a) promoting cooperation between the Public Administration and the social initiative and the women's associations working on the promotion of the gender equality; b) promoting the creation of networks of women's associations.

[220] Judgement of the High Labour and Social Court, No. Pdp 712/2011 from 12 October 2011.

Legislative developments

Law 27/2011 on the updating, adjustment and modernization of the Social Security System (BOE 2nd August 2011)

This Law introduces some new benefits for taking care of children or minors. These benefits regulate the situation in which a person who is taking care of children or minors stops contributing to the Social Security System. In that case and under certain other conditions the period during which there is a lack of contributions will be considered as a real, complete contribution period for the carer. These conditions are:

– The interruption of the contribution is due either to the ending of an employment contract or to the termination of unemployment benefits; and
– The interruption of the contribution has taken place in the period between the nine months prior to the birth or the three months prior to the adoption and the end of the sixth year after the birth or adoption.

The complete application of this benefit will take place gradually. The number of days considered as a real contribution will be increased from 112 days for each natural child or minor adopted in 2012 to 270 days in 2019. The period considered as a contributed period can be five years at most and it will only be recognized for one of the parents. There is also a modification concerning the social security effects of the leave of absence for taking care of natural or adopted children under Article 46(3) of the Workers' Statute. The new regulation adds one year to the period considered as an effective contribution for the purposes of social security benefits. Now, with this additional year, the total period considered as an effective contribution is the same as the number of years of leave of absence. The aim of both regulations is to decrease the effects that taking care of children have on the social security careers of the parents. The majority of the persons taking care of children or minors are women, so the new regulation will help to reduce the gap in social protection between women and men.

Royal Decree 1620/2011 regulates the special labour relation of domestic employees (BOE 17 November), and Royal Decree 1596/2011 extending protection in the event of professional contingencies to the employees included in the Special Regime of the Social Security of Domestic Employees (BOE 2 December)

The legislation for domestic employees has been amended, regarding both working conditions and social security. In the sector of domestic employees, 94 % are women and only 6 % are men. Working conditions and social protection have always been regulated taking into account the special place where the work is carried out (family homes) and its characteristics (within the private lives of families and in confidence). Although taking into account these specific circumstances is probably necessary, the previous regulation resulted in the weaker protection of working conditions and social protection for domestic employees. Now, the regulation of employment contract conditions has been changed by Royal Decree 1620/2011 in order to improve them, e.g. by including the guarantee of a minimum wage or the regulation of working time and rest time. Royal Decree 1620/2011 also states that a group of experts will be created with the purpose of analysing the possibility of establishing unemployment protection adapted to this kind of work. The report should be completed before December 2012. The changes in social security are relevant as the Special Regime of Social Security for Domestic Employees is going to be integrated into the General Regime of Social Security. This entails, among other things, an extension of the protection to these workers in the event of professional contingencies. Now they will also have Social Security protection in the event of an accident at work and work-related illnesses subject to the same conditions as those established in the General Regime.

Royal Decree Law 3/2012 on urgent measures for the modification of the labour market (BOE 11th February 2012)

Different Labour Laws have been widely modified by RDL 3/2012 and in general the main idea has been to empower the position of enterprises in a labour relationship. The modification of Article 37(6) of the Workers' Statute (WS) regulating some rights to reconcile personal, family and working life is one expression thereof. Article 37(4) ET regulated breastfeeding rights and provided for a daily leave period or a reduced working day in order to facilitate the breastfeeding of infants under nine months old. The rights themselves have not been modified (the right to be absent from work for one hour per day or, alternatively, the reduction of the working day by half an hour which can also be accumulated into complete days) but now they are also recognised for the parents of adopted infants under nine months old. This leave was recognised for the mother or, in the case of both parents working, it could be taken by either the mother or the father. The article has been modified to become more neutral from a gender point of view, as an individual right either for men or women but it can only be used by one of the parents in case both are working. The right of employed fathers, now being an individual right, is clearly independent from the employment situation of the mother, following Case C-104/09 *Roca-Alvarez v. Sesa Start España ETT SA* [2010], not yet reported. In the same Article 37 but in paragraph (6) there is also an important modification of the regulation concerning the moment (during the working day) and the period during which these rights can be exercised. The employee was entitled to decide on the moment and period during which these rights were to be exercised, but Article 37(6) ET has now been changed. Collective agreements may now introduce some criteria to be aplied when deciding on this moment and period for exercising these rights. And these criteria can take into account not only the rights to reconcile personal, family and working life, but also the productive and organizational needs of the enterprise. Article 37(6) WS will also be applied to the right to reduce working hours, with a proportional loss of pay, recognised for the care of children under the age of eight or relatives with a disability.

Law 14/2011, of 16th of December, modifying Law 5/1998 on Cooperatives of Galicia (DOG 3rd January 2012)

One of the objectives of the modification of Galicia's Law on Cooperatives is its adaptation to the 3rd additional disposition of Galicia's Law 2/2007 on women's employment on the basis of equality. According to this disposition, cooperatives must respect the principle of equality between men and women and one of the modifications affects the governing organs of cooperatives. The composition of the Governing Council (*Consejo Rector*) of the Committee of Resources (*Comité de Recursos*) and the Galician Council of Cooperatives (*Consejo Gallego de Cooperativas*) should reach a balanced composition between women and men. To make this balanced composition possible there should be appropriate measures for the members of these organs in order to facilitate their conciliation of working time with the situations of maternity leave, paternity leave and other forms of leave for taking care of dependants.

Case law of national courts

Judgement of the* Audiencia Nacional *of 23rd of November 2011

This decision analyses the payment plan by objectives of an enterprise which is based on the concept of a 'productive working day' in annual calculations. This plan establishes the right of: a) 100 % of the variable wage complement if the number of productive working days is more than 180; b) 50 % if the productive working days are between 135 and 180 days; c) if the number of productive working days is lower than 135 the employee does not receive the complement. The 'productive working day' includes several concepts such as the representative's function or commercial training activity. For the calculation of the productive working day, criteria which are applicable to all employees are used. Nevertheless, the six weeks of maternity leave which are taken immediately after childbirth by the mother are not taken into account in order to calculate the 'productive working day'. This judgement

considers that this amounts to direct discrimination because of sex in the application of Article 14 of the Spanish Constitution and Article 8 of Law 3/2007 for effective equality between women and men. This last article describes as direct discrimination because of sex all unfavourable treatment of women related to pregnancy and maternity. Although the criterion used to compute the productive working day are applied equally to men and women, only women have the option to enjoy maternity leave for six weeks immediately after childbirth.

Miscellaneous

Report on the situation of Women in the labour market during the year 2011 (Publish on 8th March 2012)
This report by the Minister of Employment and Social Security has as its objective to analyse the most relevant aspects of women's employment situation using, for this purpose, the main statistics obtained on different issues related to working live. Despite the depth of the economic crisis the report emphasizes that the process of women being incorporated to labour market has continued during this year, although at a lower speed. Women represent 45 % of all workers, although the majority of women's new contracts are part-time contracts. Women continue to be in the majority in social services, while they are very much in the minority in industry and in the building sector. The fall in family incomes has motivated a process of incorporating older women into the labour market. There is a tendency to reduce the pay gap in all sectors and in all the different types of contracts but also very slowly.

SWEDEN – *Ann Numhauser-Henning*

Legislative developments

Governmental proposal concerning insurance and sex discrimination
A recent Government Bill, Government Bill 2011/12:122, on Discrimination related to sex in insurance services, presents the Swedish Parliament with a proposal to eliminate the current exception in Chapter 2 Section 12 of the (2008:567) Discrimination Act for insurance services as a response to the CJEU's judgment in case C-236/09, *Test-Achats*.

The hitherto rule on explicit exceptions to the ban on sex discrimination regarding access to and the supply of goods and services in Chapter 2 Section 12 Paragraph 2 the 2008 Discrimination Act will be amended and transferred to a new Paragraph 12 a. An exception is still made concerning differential treatment of men and women with regard to services and housing, when this is for a legitimate aim and the means of achieving this aim are appropriate and necessary. There is, however, now an explicit exception regarding insurance: 'As far as insurance services are concerned there must not be a difference between women and men in insurance premiums or insurance compensation for the individual on the ground of gender-related factors.'

It has been suggested that the reform should enter into force on 21 December 2012 and the requirement of gender-neutral calculations only applies to insurance contracts entered into after that date. (The new rules do not apply to an inherent prolongation of an insurance contract entered into before 12 December 2012.)

The proposed amendment to the 2008 Discrimination Act will put an end to existing and hitherto accepted sex discrimination as regards insurance services, especially frequent in private pension schemes and car insurance.

Case law of national courts

There has really not been any significant case law in the area of sex discrimination during the last six months. There was, however, the Swedish Supreme Court's decision not to allow an

appeal concerning alleged sex discrimination in the social security area, in principle leaving the earlier Appeal Court's judgment standing. This case is referred to below.[221]

Alleged discrimination on the grounds of sex during pregnancy in the area of social security (parental benefits)[222]

In four cases from the Stockholm District Court (judgments T 10670-07, 10671-07, 10702-07 and 15410-07 of 3 November 2009) four pregnant women with pregnancy-related physical problems were denied sickness benefits with reference to pregnancy being 'a natural state' and not an illness. Four different women, all pregnant, were thus denied sickness benefits by *Försäkringskassan* despite them being prevented from working during parts of their pregnancy due to (mainly) pregnancy-related back problems. Ms A (a pre-school teacher) had, according to her doctor, a total loss of ability to work from week 33 of her pregnancy. The medical expert of *Försäkringskassan* regarded her problems as 'a natural' consequence of her pregnancy and *Försäkringskassan* denied her sickness benefits arguing that 'a right to sickness benefits requires the pregnancy to deviate from what could be regarded as 'the normal process of pregnancy' in that there were complications amounting to an 'illness'. 'Illness' was defined as 'any abnormal physical or psychological condition not related to the normal process of life'. Only certain quite specific complications during pregnancy were regarded as such 'abnormal' conditions amounting to illness. Ms B (a nurse) suffered from back problems which prevented her from performing her work from week 26 of her pregnancy; Ms C (a bus driver) lost her capacity for work for 50 % by pregnancy-related problems as of week 21 of her pregnancy and later on for 100 %; and Ms D (a work-environment inspector) was unfit for work due to diverse problems for 50 % as of week 31 of her pregnancy. All three (B, C and D) were also denied sickness benefits by *Försäkringskassan* based on the same line of argument. The Equality Ombudsman brought the four situations of alleged discrimination to the Court arguing that a non-pregnant person suffering from symptoms of the same kind and severity would have been provided with sickness benefits. The Stockholm District Court found for the claimants. These cases were later appealed to the *Appeal Court Svea Hovrätt* which delivered its judgment in 2011 (reported in EGELR 01/2011). The Appeal Court also found direct discrimination on the grounds of sex. The Appeal Court began by stating that the underlying cause of the symptoms amounting to an illness is of no relevance for the application of sickness-benefit insurance. The mere fact that *Försäkringskassan* took into account that, in these cases, the symptoms were pregnancy-related implied that it had applied a special and more severe reference norm than the one used for the relevant comparator – a 'non-pregnant' man. It is 'obvious that the four women due to their pregnancies were treated worse than a man with similar symptoms', said the Appeal Court and this amounts to *a prima facie case of direct discrimination*. *Försäkringskassan* has not been able to show that the denial of sickness benefits was not related to pregnancy, nor that a man with equivalent symptoms would also have been denied benefits. Indemnification was, however, restricted to EUR 1 500 (SEK 15 000) each, taking into account that the discrimination was 'unintentional' and that the consequences were limited (sickness benefits were later approved). An appeal was not allowed by the Supreme Court. The Equality Ombudsman stated that a settlement had been made in this case giving the 12 women, victims of discrimination, an indemnity amounting to SEK 15 000 each (approximately EUR 1 500) or the same amount approved earlier by the Appeal Court.[223]

The fact that this judgment now stands proves very important for pregnant women in Sweden in that pregnancy-related symptoms will qualify for sickness benefits to the same extent as other, non-pregnancy-related symptoms. Until now, women had to use their limited days of parental leave benefits in this situation. Interesting is also that the decision by *Försäkringskassan* was considered to amount to detrimental treatment despite the fact that it

[221] The case concerned, as regards domestic law, Chapter 2 Section 1 and Chapter 6 Section 3 of the (2008:567) Discrimination Act and Sections 16 and 24 of the (1995:584) Parental Leave Act whereas at the EU level it concerns Article 14 of the 2006/54/EC Recast Directive.

[222] Compare and the Swedish contribution to EGELR 01/2011.

[223] http://www.do.se/ accessed 02 April 2012.

was changed later on by the County Court and thus never took legal effect. This was thus also taken into consideration when deciding upon the amount of the indemnity whereas the argument of the discrimination being 'unintentional' is more difficult to understand.

TURKEY – *Nurhan Süral*

Policy developments

State to provide financial aid for widows in poverty

The General Directorate of Social Assistance and Solidarity (SYDGM), a department of the Ministry of Family and Social Policy, has been working on a new project on developing a financial assistance programme for needy widows since 2009 in cooperation with Bogazici University.[224] Starting from April 2012, these women will be paid TL 500 (approximately EUR 208) once every two months. As estimated, around 150 000 women will benefit from this financial assistance.[225] Financial aid will be severed if the widow enters into a formal or informal marriage (a common law marriage or a domestic partnership).

Legislative developments

Women in managerial positions

So far, there has been no quota system in Turkey to support women's access to managerial positions in companies. Turkey has now chosen to implement quotas for the number of women on boards. On 11 February 2012, Communiqué no. 57 issued by the Capital Markets Board (SPK) was published in the Official Gazette. According to the Communiqué which amended a former one (Communiqué no. 56) on the Principles Regarding the Determination and Application of Corporate Governance Principles, having at least one female member in the five-member executive committees has become a general principle for companies listed on the Istanbul Stock Exchange. The application of this principle is based on a 'comply or explain' approach: If a company does not comply with this principle, its reasons for not complying will be made public in its 'Report of compliance with the corporate governance principles.'

According to the Grant Thornton International Business Report 2012 (IBR)[226] based on a survey conducted between November 2011 and February 2012, in Turkey, 31 % of senior management roles are held by women, up from 25 % in 2011. Turkey ranks eighth out of 40 economies. The rise in the rate of women holding senior management positions puts Turkey ahead of the BRIC countries (Brazil, Russia, India and China) where the average rate is 26 %. The world average is 21 % and has risen by only 1 % in the last year. Turkey (at 24 %)[227] had one of the lowest female participation rates among the economies included in the survey; however, it has shown significant progress over the past 12 months. Whilst economies such as India, Japan and Mexico have both low female economic activity rates and low proportions of women in senior management, in Italy and Turkey low female participation rates are turned into a higher proportion of women in senior roles. The percentage of businesses with a female CEO is 9 %. A recent report by Mercer, a business consultancy firm, showed Turkey boasts the lowest gender pay gap in Europe, with a 1 % difference between senior male and female executives.[228] The greatest pay disparity in Western Europe occurs in Germany where women executives are paid 22 % less than the total

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224 *Eşi Vefat Etmiş Kadınlar İçin Bir Nakit Sosyal Yardım Programı Geliştirilmesine Yönelik Araştırma Projesi.*

225 Star, a daily newspaper, 09.03.2012.

226 http://www.grantthornton.co.nz/Assets/documents/pubSeminars/IBR-2012-women-in-senior-management.pdf, accessed 10 March 2012.

227 According to the results of the Household Labour Force Survey 2011, labour force participation rate (LFPR) realized as 28.8 % with a 1.2 % increase for females. The target set in the Ninth Development Plan (2007-2013) is the attainment of a 29.6 % labour force participation rate for women by the end of 2013.

228 http://www.employeebenefits.co.uk/item/14573/23/5/3, accessed 10 March 2012.

compensation of their male counterparts, according to research by Mercer. This is compared to a gap of 9 % in the UK. The research, which analysed the pay of 264 000 senior managers and executives in 5 321 organisations across 41 European countries, found that Germany was followed by Austria, which has a gender pay gap of 20 %, Sweden (9 %), Spain and Greece (both 18 %), France and the Netherlands (both 14 %), Denmark (12 %), Ireland (10 %), Italy, Finland, UK and Portugal (9 %), Norway (8 %), Switzerland (7 %) and Belgium (6 %).

Sabanci Holding provides a typical example of big business conglomerations with a high sensitivity for gender issues. 'Gender equality is an innate right, not an imposed obligation. ... Women constitute half of the talent pool, and research shows that women have crucial leadership capabilities. Providing equal opportunities based on talent and success, the companies benefit from the larger potential this talent pool presents' said the Sabanci Holding Chairperson and managing director Güler Sabanci in her opening address at the 'Gender Equality for Sustainable Business' conference organized by the United Nations in New York in March 2012. The holding has signed the U.N. Women's Empowerment Principles, demonstrating its commitment to efforts to maintain gender equality at the workplace. Güler Sabanci was placed at number two on the Financial Times' annual list of top 50 women in world business in November 2011. She was placed third on the 2010 list. The percentage of women in managerial positions increased from 23 % to 28 % in the years 2006-2011. Women make up 34 % of the workforce. The ratio is 55 % in financial services, 66 % of white-collar women have university or postgraduate degrees. The ratio of women is higher in Akbank, a bank (51 %), and AvivaSa, an insurance company (64 %).[229]

New law to curb violence against women

Turkey played an important role in drafting a Convention as the current Chair of the Committee of Ministers. The 'Convention on Preventing and Combating Violence against Women and Domestic Violence' was signed at the 121st Meeting of the Committee of Ministers of the Council of Europe on 11 May 2011 in Istanbul. The Turkish Parliament *(TBMM)* adopted the 'Law on the Approval of the Ratification of the Council of Europe Declaration on Preventing and Combating Violence against Women and Domestic Violence.' Hence, it passed into law on 24 November 2011, one day prior to the International Day for the Elimination of Violence against Women. Thus Turkey became the first country to pass the Council of Europe Convention through Parliament. The Law on the Protection of the Family and the Prevention of Violence against Women[230] makes a special reference to the Treaty: the relevant international treaties ratified by Turkey and especially the Council of Europe Treaty will be taken as a basis in the implementation of the Law and the provision of necessary services to victims (Art. 1/2a).

At his party's group meeting on 6 March 2012, the Prime Minister, Recep Tayyip Erdoğan, stated that they will show zero tolerance towards violence against women, just as they showed zero tolerance towards torture. The Law on the Protection of the Family and the Prevention of Violence against Women abrogated the former law, the Law on the Protection of the Family.[231] This new law to curb violence against women by introducing tough measures and providing improved protection for victims was accepted unanimously in Parliament on the International Women's Day.

The Law on the Protection of the Family and the Prevention of Violence against Women increases people's protection against violence, improves the systems to provide protection against physical and non-physical forms of abuse and offers enhanced support for victims. All women, be they married, divorced, engaged or in a relationship (e.g. a dating relationship), who are subjected to violence, or for whom there is a threat of violence, are covered. Also protected are children, family members and those being stalked. In the Law, there are a number of deterrent and punitive measures for the prevention of violence. The law tries to

[229] http://www.sabanci.com/, accessed 20 March 2012.

[230] *Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanun,* Law no. 6284, Official Gazette 20.04.2012, no. 28239.

[231] *Ailenin Korunmasına Dair Kanun,* Law no. 4320, Official Gazette 17.01.1998, no. 23233. For a comparison of these laws see: Turkey, European Gender Equality Law Review, No. 2/2011, pp. 106-17.

effectively tackle the problem of endemic violence against women and treats it as a serious human rights abuse. Among a non-exhaustive list of preventive sanctions to be ordered by the administrative authorities and judges are mandatory imprisonment, detention orders, no contact orders, mandatory treatment and/or counselling (anger management classes), surveillance by electronic tags, the seizure of weapons, and being denied access to a personal residence. If the abuser is required to pay maintenance and if he is covered by the Social Security Institution (SGK), the money will be withdrawn by the authorities to be paid to the victim.

Victims of violence will be provided with accommodation in shelters with their dependants and receive financial, psychological, legal and social assistance. They will be provided with panic buttons. If victims of violence face threats to their lives, they will be placed under temporary protection and their identity will be changed.

Sensitivity and awareness raising among the public has also been envisaged by the law (Article 16): All public and private tv channels and radio stations, be they national, regional or local, are required to air acknowledgement materials prepared by the Ministry of Family and Social Policies for at least 90 minutes per month. Broadcasts have to be between 08:00 a.m.-10:00 p.m. provided that at least the half an hour part is broadcast between 05:00 p.m.-10:00 p.m. Courses on gender equality and women's human rights are to be included in the curricula of primary and secondary education.

In early March 2012, the International Strategic Research Centre *(USAK)*[232] released a report entitled 'Violence Against Women in Turkey'[233] discussing the socio-economic, cultural and global aspects of the issue together with the problems stemming from the lack of effective implementation measures. The report sheds light on the strong bond between violence against women and the perceptions toward and applications of the idea of gender equality. According to the report, a very high proportion of women (42 %) in Turkey have been subjected to physical or sexual violence or both throughout their lives.

Recent research conducted by Bahcesehir University's Centre for Economic and Social Research (BETAM) ('Working saves life'), based on data collected by Hacettepe University's Institute of Population Studies for Turkish Health and Demographic Surveys in 1993, 1998, 2003 and 2008, revealed interesting and useful insights regarding the question of violence towards women.[234] In urban areas at the beginning of the 1990s only 15 % of women were participating in the labour force, whereas in 2008 this had risen to 24 %. BETAM's econometric analysis shows that the legitimization of violence is closely related to the level of education as well as whether the woman is working or not. Of the women who accept violence as if it were justified, 90 % attended school for less than five years, while this is limited to 60 % among other women. Working also matters: For any two married women at the same educational level and whose husbands are also equally educated, the woman who works is less likely to justify violence. On the demand side, headscarf wearing is still not allowed in the public sector; there are numerous private enterprises that do not wish to hire headscarf-wearing women for ideological or 'image' reasons. Now the educational level of headscarf-wearing women is rapidly increasing.[235] On the other hand, a woman with a higher level of education is more likely to work. In another BETAM research paper, 'Women face institutional and cultural barriers to participation in the labour market,'[236] a comparison with southern European countries showed that even if female Turkish citizens were as educated as their southern European counterparts, the participation gap would be fulfilled by only one-third, more or less. The female participation rate is actually about 28 % in Turkey, while it is over 50 % in Greece and Italy and over 60 % in Spain.

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[232] *Uluslararasi Stratejik Arastirmalar Merkezi.*

[233] http://www.usak.org.tr/, accessed 8 March 2012.

[234] C*alismak hayat kurtarir,* RN 12/129 07.03. 2011, http://betam.bahcesehir.edu.tr/tr/ accessed 15 March 2012.

[235] Seyfettin Gursel, Women: Too few are working, too much violence against them, Zaman daily newspaper, 11.03.2012.

[236] Seyfettin Gursel, Gokce Uysal and Aysenur Acar, Women face institutional and cultural barriers to participation in the labor market (RN 11/115, 20.12.2011), http://betam.bahcesehir.edu.tr/en/ accessed 15 March 2012.

A total of 121 women have been killed in the last three years in Istanbul alone. Istanbul witnessed 2 754 incidents of 'domestic assault' in the same time period.[237] For the last two months Istanbul has had a special force trained in the proper handling of cases of violence. Each one of the 39 districts in Istanbul has been assigned at least two of these specially trained officers. Female officers make up half of the 100-member force, which completed a 15-day training course on gender issues, inequality and the proper, sensitive and timely handling of cases of violence. Some 250 instructors had trained about 40 000 police officers in another project that was initiated by the Istanbul Police Headquarters in 2007 to combat domestic violence. The aim of the Istanbul Police Department is to have all police officers, not just a special team, trained in awareness and sensitivity on gender issues. A branch directorate was recently established in Ankara Police Headquarters to combat domestic violence.

Case law of national courts

Constitutional Court decision on married women's surname

In Turkey, married women can make a written declaration to the Registrar of Births, Marriages and Deaths on signing the marriage deed, or at the Registry of Births, Marriages and Deaths after the marriage, if they wish to retain their maiden name before their surname (Article 187, Civil Code). Therefore, married women cannot *only* be known by their maiden name after they marry, whereas married men keep the surname they had before they married. This was challenged before the European Court of Human Rights (ECtHR) by Ayten Unal Tekeli who wanted to continue using her maiden name following her marriage.[238] The Court in its judgment of 16 November 2004 ruled that '... the Court considers that the obligation on married women, in the name of family unity, to bear their husband's surname – even if they can put their maiden name before it – has no objective and reasonable justification ...'

Article 187 of the Civil Code was challenged before the Constitutional Court. The ECtHR decision was cited in the application. Despite the decision of the ECtHR, the request for its annulment was rejected by the Court in March 2011 with a majority decision (8/17).[239] The Court stated that by entitling women to use their maiden name before the husband's surname, a justifiable balance was established between a personal right and the public benefit.

Constitutional Court decision on a child's surname upon divorce or the annulment of marriage

According to Article 4 of the Law on Surnames,[240] a child had to bear his father's surname even if the parental authority over the child was granted to the mother upon divorce or the annulment of the marriage. A lower court in Siirt challenged the constitutionality of this provision requesting its annulment. The Constitutional Court annulled the contested rule by making references to international rules and standards such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR).[241]

Constitutional Court decision on the right to survivors' benefits

In Turkey, a female child obtains survivors' benefits as long as she is unmarried and not working. Unlike male children, there is no age limit. For this reason, there are women who prefer an informal marriage and also women who choose to become divorced from their husbands but continue living with their ex-husbands (domestic partnership) in the conjugal home.

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237 Speech by the Istanbul Homicide Bureau Chief, Fahrettin Gönbe, daily papers 06.03.2012.
238 *Unaltekeli v. Turkey* judgment, 16 November 2004, application no. 29865/96.
239 Constitutional Court decision, E. 2009/85, K. 2011/49, 10 March 2011, Official Gazette 21.10.2011, no. 28091.
240 *Soyadı Kanunu*, Law no. 2525, Official Gazette 02.07.1934, no. 2741.
241 Constitutional Court decision no. 2011/165, Official Gazette 14.02.2012, no. 28204.

Article 56 of the Social Insurances and General Health Insurance Law[242] stipulates the severance of survivors' benefits in the case of such a sham divorce. This provision was challenged before the Constitutional Court. The Court rejected the claim of unconstitutionality by stating that rights cannot be misused and that such a divorce constitutes fraud against the law.[243]

Constitutional Court decision on the ratio of survivors' benefits for the remaining spouse
Article 34 of the Social Insurances and General Health Insurance Law states that a surviving spouse will be entitled to 50 % of the deceased spouse's earnings as calculated under relevant rules. If the remaining spouse is not working and without a child benefiting from the survivors' benefits, then the percentage is increased to 75 %. This rule was contested before the Constitutional Court and the deletion of the term 'non-working' was requested. It was argued that there was discrimination between a working and non-working spouse resulting in 'punishment for employment.' The Court rejected the claim of unconstitutionality by stating that a working and non-working spouse do not have an equal status and a higher percentage for the non-working spouse is justifiable and does not violate the principle of equality.[244]

Miscellaneous

Women's representation in the judiciary
According to figures by the Supreme Board of Judges and Prosecutors (*HSYK*),[245] women are underrepresented in Turkey's judiciary: toughly 75 % of the country's judges and prosecutors are men. Women constitute 24.3 % out of a total of 7 600 judges in Turkey, but only 8.3 % of about 4 400 prosecutors in the country are women. The ratio of women in bar associations, however, stands as high as 40 %.

4 530 women behind bars in Turkey on women's day
A total of 4 530 women in Turkey remain behind bars, according to a report released on International Women's Day by the International Centre for Prison Studies (ICPS).[246]

ICPS, an academic partner of the University of Essex, reported in the second edition of its World Female Imprisonment List that there are more than 625 000 women and girls in prisons worldwide as either pre-trial detainees or convicted criminals. The report, prepared by the researcher Roy Walmsley, was conducted in 212 prison systems in independent countries and dependent territories. In about 80 % of prison systems, female prisoners make up between 2 and 9 % of the total prison population, according to the report. The median rate is 4.45 %. The ICPS report found that 3.6 % of the total prison population in Turkey are female.

UNITED KINGOM – *Aileen McColgan*

Legislative developments

Implementation of Equality Act 2010
There have been no significant legislative developments in this area since April 2011, when the second tranche of implementation of the Equality Act 2010 occurred.

[242] *Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu,* Law no. 5510, Official Gazette 16.06.2006, no. 26200.
[243] Constitutional Court decision no. 2011/75, Official Gazette 15.12.2011, no. 28143.
[244] Constitutional Court decision no. 2011/58, Official Gazette 28.12.2011, no. 28156.
[245] Today's Zaman, daily newspaper, 17.11.2011.
[246] Today's Zaman, daily newspaper, 08.03.2012.

Case law of national courts

Birmingham CC v Abdulla & Ors[247]
In this case, the decision of the High Court in which was reported in the last EGELR, the Court of Appeal has ruled that equal pay claims may be brought in the ordinary courts and are not confined to Employment Tribunals. Such claims may be brought as breach of contract claims because the Equality Act 2010, like the Equal Pay Act 2010, operates by implying an 'equality clause' into the successful claimant's contract of employment which entitles her to be treated the same as her comparator in respect of the particular element or elements of pay to which the claim relates. Employment Tribunals are generally more attractive venues for claimants than the ordinary courts because costs are rarely awarded against the unsuccessful party by Tribunals but are awarded as a matter of course in the ordinary courts. But equal pay cases in Tribunals are subject to strict time limits (generally three months) whereas the time limit applicable in the ordinary courts is generally six years.

Dunn v The Institute of Cemetery and Crematorium Management[248]
In this case the Employment Appeal Tribunal (EAT) ruled that the prohibition on discrimination against married persons (then in the Sex Discrimination Act 1975, now in the Equality Act 2010) was wide enough to capture discrimination which was because of the *identity* of the claimant's husband rather than merely the fact that she was married. Ms Dunn was subject to discriminatory treatment by reason of her marriage to Mr Dunn, who was also employed by the Respondent. A Tribunal found that this did not amount to discrimination on grounds of married status for the purposes of the 1975 Act. The EAT allowed her appeal and returned the case to the Tribunal to determine as a matter of fact whether Ms Dunn had been treated as she was because of her relationship.

Royal Bank of Scotland v Donaghay[249]
Here the EAT overturned a finding by the Employment Tribunal below that Mr Donaghay had been subjected to direct sex discrimination. Both Mr Donaghay and his then girlfriend worked for the bank. He was dismissed for gross misconduct after being charged in respect of an alleged assault on his girlfriend, charges of which he was eventually acquitted. He had in the meanwhile attended his former girlfriend's place of work in possible breach of his bail conditions. He claimed throughout that he had acted in self-defence, and alleged that the decision to dismiss him and not his (now former) girlfriend was the result of sex discrimination.

The Employment Tribunal upheld Mr Donaghay's claim, finding that he had been less favourably treated than his former girlfriend who was accepted as a suitable comparator. The Tribunal took the view that Mr Donaghay and his former girlfriend were similarly situated in that each accused the other of assault. The Tribunal took the view that the employer had acted in reliance on an 'automatic sexist assumption' that the man was to blame.

The EAT overturned the decision of the Tribunal, ruling that Mr Donaghay's former girlfriend was not an appropriate comparator in view of the fact that only he had been subject to a complaint of assault to the police, only he had been charged, and only he had been in possible breach of his bail conditions. In any event, even had Mr Donaghay's former girlfriend been an appropriate comparator, the EAT did not accept that there had been sufficient evidence on which to pass the burden of proof to the employer. A mere difference in treatment and difference of sex (such as here) was insufficient and the Tribunal was not entitled to act simply on the basis of its own hypothesis regarding the employer's alleged sexist assumptions, as distinct from on the evidence.

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247 www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2011/1412.html, accessed 30 march 2012.
248 www.bailii.org/uk/cases/UKEAT/2011/0531_10_0212.html, accessed 30 March 2012.
249 UKEATS/0049/10 http://www.bailii.org/uk/cases/UKEAT/2011/0049_10_1111.html, accessed 30 March 2012.

Michalak v The Mid Yorkshire Hospitals NHS Trust & Ors[250]

In this case an employment tribunal made an award of GBP 4.4 million (approximately EUR 5.3 million) to a consultant physician who, having been the first consultant physician at her hospital to take maternity leave, was subject to six years of discriminatory treatment before being dismissed. The Tribunal found that her colleagues had been disgruntled by the fact that Dr Michalak, who was Polish, took maternity leave, and had embarked on a campaign to get rid of her which was tainted not only by sex but also by the fact that she was Polish. Dr Michalak was discriminated against in terms of pay, her colleagues having received pay increases during her leave which were attributed to additional responsibilities falling to them during her absence, whereas in fact a locum had been employed to cover her duties and her colleagues had not been required to undertake any additional work. When she complained of pay discrimination on her return, Dr Michalak was victimised by a secret campaign on the part of senior management and doctors to try to identify potential misconduct on her part with a view to having her dismissed.

The size of the award which was made to Dr Michalak was attributable to the loss the Tribunal accepted that she had suffered as a result of the discriminatory conduct of her employers and colleagues. She had become psychiatrically unwell during the course of events and the evidence was that she was unlikely to be able to return to a job at consultant level, or even as a doctor. She had been unable to look after her child and her husband had had to give up work for a period in order to care for her and their child. In addition to 'pecuniary damages', Dr Michalak was awarded the maximum available award for injury to feelings of GBP 30 000 (approximately EUR 36 000) and GBP 56 000 for psychiatric injury (approximately EUR 67 000) and GBP 4 000 (approximately EUR 4 800) in 'exemplary' damages designed to punish 'oppressive, arbitrary or unconstitutional action' by the employer. This award was limited because it related only to the employer's abuse of its powers to suspend Dr Michalak, but it is highly unusual for exemplary damages to be awarded and the award is indicative of how bad the employer's actions were regarded by the Tribunal as having been. As above, the vast majority of the award made to Dr Michalak was to compensate her for the actual loss which the Tribunal was satisfied flowed from the discrimination to which she was subject. The Tribunal made explicit reference to the EU principle that an effective and proportionate remedy had to be awarded to Dr Michalak in declining to follow the normal rules regarding the extent to which an award made in respect of future loss had to be reduced to take account of the fact that the beneficiary was advantaged by receiving the money prior to when she would have expected to receive it in the normal course of events.

Miscellaneous

Proposal to increase Tribunal fees

On 14 December 2011 the Ministry of Justice published a consultation paper, *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal*, in which it seeks views on the level of fees which ought to be introduced in the Employment Tribunals and Employment Appeal Tribunal.[251] Importantly, the Consultation Paper does not seek views on the principled question whether such fees ought to be introduced, such being a foregone conclusion. Insofar as they touch on discrimination cases, the choices are between (1) a scheme under which a charge of GBP 250 (approximately EUR 300) would be levied on claims with a further GBP 1250 (approximately EUR 1500) having to be paid prior to the hearing and GBP 250 (approximately EUR 300) if a written decision is requested), and (2) a scheme under which a single fee is set according to the value of the claim of GBP 600 (in respect of claims for less than GBP 30 000 (approximately EUR 30 000)) or GBP 1750 (approximately EUR 2100) (in respect of claims for GBP 30 000 (approximately EUR 30 000) or more). Further, there is a

[250] www.judiciary.gov.uk/media/judgments/2011/dr-michalak-v-mid-yorkshire-hospitals-nhs-trust-others-tribunal-decision, accessed 30 March 2012.

[251] http://www.justice.gov.uk/consultations/et-fee-charging-regime-cp22-2011.htm, accessed 30 March 2012.

proposal that, where a claim is made in respect of GBP 30 000 or less, a Tribunal will not be empowered to award more than GBP 30 000 even if it would otherwise do so. Fees of GBP 16 000 or GBP 16 500 are proposed for the Employment Appeal Tribunal (approximately EUR 1 800 – 1 900).

If they become law, these fees are likely not to be chargeable in the case of those on very low incomes (probably at the level of about GBP 13 000 p.a. (approximately EUR 15 500) or GBP 23 860 (approximately EUR 29 000) in the case of a couple with two children.

The introduction of these fees is likely to have a significant deterrent effect on discrimination claims. It is said that they are necessary in order to transfer some of the costs of running the Tribunal system from the taxpayer to Tribunal users. The foreword to the Consultation Paper, however, contains the statement by the Minister of Justice that 'Employers complain that ... the operation of the current system can be a one-way bet against them.' The impact assessment then states that 'Fear of tribunal costs and awards is an issue that has been frequently raised by business stakeholders, particularly in relation to the uncapped nature of discrimination awards. This concern may have been influenced by some of the extremely high figures quoted in the press, which in reality are likely to be exceptions. However, we understand that this fear creates uncertainty for businesses and can therefore discourage them from growing and taking on staff.' As a recent edition of the *Equal Opportunities Review* (February 2012) points out 'There is simply no credible evidence that a significant number of businesses have been discouraged from growing by fear of tribunal awards'.

The *EOR* article goes on to suggest that the Government 'is already positioning itself to defend a challenge that fees will contravene the EU principles of effectiveness and/or equivalence', the first with the availability of refunds and the non-applicability of the charges to those on the lowest incomes and the second on the basis that the users of other courts have been charged for many years. The *EOR* goes on to point out that the impact assessment of the proposals does not include any estimate of how many fewer cases are likely to be brought as a result, suggesting that 'the calculation has been done but is being kept secret'.

Gender pay gap update[252]

The gender pay gap between full-time women and full-time men workers in the UK continues to narrow overall. The latest figures (April 2011) show that the gap in the median hourly rates for men and women full-timers stood at 9.1 %, down from 17 % in 1997 and a full 1 % lower than it was in April 2010. The figures on which this gap is calculated exclude overtime earnings (which men are more likely to earn and which tend to be higher), and when the annual earnings of full-time men and women workers are compared the gap is 21.8 %, a figure explained partly by men's greater tendency to work overtime hours and their generally longer working hours.

The median hourly rate for full-time women workers in their 20s is actually 3.6 % higher than that for men in the same age group (again this excluding overtime) while in their thirties they earn 1.1 % less (down from 6.2 % in 2009). By the time women are in their fifties, however, their hourly earnings are 16 % lower than those of their male colleagues of equivalent age. The pay gap is also larger for women at the top end of the earnings bracket than it is for those whose earnings are in the lower decile (5.6 % in the bottom decile in 2011 but 19.6 % in the top decile, an increase of 0.3 % from 2010).

The picture for part-time women workers is bleak and has changed little since the 1970s. Such women, who constitute over 40 % of the female workforce (but just over 10 % of the male workforce), suffer an hourly earnings gap of 38.3 % as against full-time men workers, although they earn 5.6 % more per hour than part-time men workers.

[252] www.ons.gov.uk/ons/rel/ashe/annual-survey-of-hours-and-earnings/ashe-results-2011/ashe-statistical-bulletin-2011.html, accessed 30 March 2012.

Delayed extension of parental leave

The government recently announced the decision to delay by a year the proposed extension of parental leave required by the Parental Leave Directive. The Directive came into force on 8 March 2012 and requires an extension of unpaid parental leave by 5 weeks to 18 weeks. It permits Member States an additional year for implementation 'to take account of particular difficulties'. In January 2012 the Government announced its intention to take advantage of this period of grace.

Women to serve on submarines

In December 2011 it was announced, following an 18-month review by the Royal Navy, that women are to be permitted to serve on submarines for the first time. They had previously not been permitted to serve by reason of concerns about the impact of high levels of carbon dioxide. These concerns have been proven to be unfounded but pregnant women will not be permitted to serve on submarines due to concerns about foetal health.[253]

[253] http://www.bbc.co.uk/news/uk-16088431, accessed 30 March 2012.

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