



EUROPEAN NETWORK OF LEGAL EXPERTS  
IN THE FIELD OF GENDER EQUALITY

# European Gender Equality Law Review

No. 2 / 2014



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Maternity Rights for Intended Mothers? Surrogacy  
Puts the EU Legal Framework to the Test

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A False Start: Discrimination in Job Advertisements

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# Members of the European Network of Legal Experts in the Field of Gender Equality

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## Editorial

Alice Welland\*

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2014 has been significant for the European Gender Equality Network. Earlier this year we celebrated 30 years of the Network, an occasion marked by two of our longest standing Members in an article published in the previous issue of the *European Gender Equality Law Review*.<sup>1</sup> As this anniversary draws to a close, so too does this Gender Network as a separate and distinct organisation. The contract for the Gender Network between Utrecht University and the European Commission expired at the end of 2014, and a new single European network of legal experts in gender equality and non-discrimination has been formed. The expertise of the gender equality experts is maintained in the new network, which shall be composed of two separate streams of gender equality and non-discrimination. Human European Consultancy will be responsible for the general co-ordination of this new network. There are two specialised co-ordination teams; one on gender equality and one on non-discrimination. Dr. Susanne Burri (co-ordinator), Dr. Alexandra Timmer (assistant co-ordinator), and myself (assistant co-ordinator) of Utrecht University are responsible for the specialised co-ordination of the gender stream. Migration Policy Group is responsible for the specialised co-ordination of the non-discrimination stream. The existence of the two separate streams accurately reflects the chronological development of the EU equality directives, and acknowledges the necessity to maintain gender as a distinct ground of discrimination in its own right. The new European network of legal experts in gender equality and non-discrimination will produce an *Equality Law Review*, and for each of the 35 countries included in the new network one expert on gender equality and one expert on non-discrimination will report on national legislative and policy developments in their respective field.<sup>2</sup> This is therefore the final issue of the *European Gender Equality Law Review* and the end of an era as we know it.

2014 has also witnessed the conclusion of José Manuel Barroso's Commission, and the coming into office of the new European Commission, presided over by Jean-Claude Juncker.<sup>3</sup> Despite this being the last issue of the *Gender Equality Law Review*, it provides the chance to reflect over what continuing challenges may confront the Juncker Commission. Issues such as unemployment, the on-going impact of the financial and economic crises, immigration, and escalating tensions in Ukraine dominate national and European headlines and agendas. However, between these issues (and more) lies gender inequality. Persistent and ubiquitous, blatant and nuanced, and damaging in both its consistency and variation; the consequences of gender inequality serve as a reminder to governments and organisations alike of the constant need to find intuitive and effective means to fight it.

On 1 October 2014, the new Commissioner for Justice, Consumers and Gender Equality, Ms. Věra Jourová, made a number of commitments at her hearing before *inter alia* the Committee on Women's Rights and Gender Equality. Amongst these commitments she identified as priorities the adoption by the end of 2015 of the Directive on ensuring a gender

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<sup>1</sup> See: S. Koukoulis-Spiliotopoulos & H. Masse-Dessen 'Thirty Years of the Gender Equality Network: Who We Are, What We Do, and Why We Do It' in: European Network of Legal Experts in the Field of Gender Equality, *European Gender Equality Law Review 1/2014*, European Commission 2014, pp. 4-11, available at: [http://ec.europa.eu/justice/gender-equality/files/law\\_reviews/egelr\\_2014\\_1\\_final\\_web\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2014_1_final_web_en.pdf), accessed 8 November 2014.

<sup>2</sup> Contract No. JUST/2014/RDIS/PR/EQUA/0039. The two additional participating countries will be Serbia and Montenegro.

<sup>3</sup> Date of entry into office: 1 November 2014. See the press release of the European Commission at: [http://europa.eu/rapid/press-release\\_IP-14-1237\\_en.htm](http://europa.eu/rapid/press-release_IP-14-1237_en.htm), accessed 8 November 2014.

balance on company boards; gender mainstreaming; the Maternity Leave Directive; violence against women and girls; and a comprehensive gender equality strategy.<sup>4</sup> I would like to draw particular attention to these last two priorities; and specifically within the latter, the issue of gender stereotypes.

### ***Gender-based violence***

The sheer breadth and pervasiveness of gender-based violence constitutes nothing short of a worldwide phenomenon, and the national experts of the participating countries in the Gender Network have repeatedly alerted this issue to the attention of the Commission and to the readership. For example, within this issue the expert for Bulgaria notes how national political instability has blocked crucial legal reform that is necessary to protect women from violence, and to more effectively and severely prosecute crimes within the context of domestic violence.<sup>5</sup> Similarly, the expert for the former Yugoslav Republic of Macedonia highlights the failure of the Macedonian Government to consult with NGOs prior to the preparation of a Law on the prevention, combating and protection from domestic violence. This failure to cooperate has resulted in the final version of the Law being heavily criticised as ineffective and non-transformative.<sup>6</sup> These developments are particularly concerning when considered against the backdrop of the recently published Fundamental Rights Agency EU-wide survey on violence against women; the results of which showed that one in three women had experienced physical and/or sexual violence since the age of 15.<sup>7</sup>

Progress has been made in 2014. On 1 August 2014 the Council of Europe Convention on preventing and combating violence against women and domestic violence (the ‘Istanbul’ Convention) entered into effect.<sup>8</sup> However, at the time of writing only 15 Council of Europe Member States have ratified the Convention, compared with 36 signatures; the distance between these two figures perhaps indicative of a reluctance to fully commit to the legal obligations that follow.<sup>9</sup> This is reflected in the report for Germany in this issue. Here the expert describes the reluctance of the Federal Ministry of Justice to implement the Convention by amending the Criminal Code to remove the requirements of force, serious threat, or the especially vulnerable situation of the victim to prosecute sexual assault cases.<sup>10</sup>

Legislative debate at the European Union has also intensified over the extent to which EU protection in the area of gender-based violence is desirable and feasible. On 24 February 2014 the European Parliament adopted the *Resolution on Combating violence against women*, which urges the European Commission to submit by the end of 2014 a proposal for an act establishing measures to promote and support Member States in the field of prevention of violence against women and girls.<sup>11</sup> However, so far the Commission has not taken such an action. Both the development of this legislative debate, and the possibility of the EU to accede to the Istanbul Convention, are issues to watch in the coming years with the new Commission.

<sup>4</sup> For an overview of these Commitments, see: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/509995/IPOL\\_BRI\(2014\)509995\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/509995/IPOL_BRI(2014)509995_EN.pdf), accessed 9 November 2014.

<sup>5</sup> See in this issue: G. Tisheva ‘Bulgaria’ at p. 42.

<sup>6</sup> See in this issue: M. Najcevska ‘The former Yugoslav Republic of Macedonia’ at p. 82.

<sup>7</sup> By either an intimate partner, non-partner, or both. See the main findings at: [http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results-apr14\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results-apr14_en.pdf), accessed 9 November 2014.

<sup>8</sup> See the text at: <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/210.htm>, accessed 9 November 2014.

<sup>9</sup> See the status of signature and ratifications at: <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=210&CM=&DF=&CL=ENG>, accessed 9 November 2014.

<sup>10</sup> Article 36 of the Istanbul Convention requires the prosecution of non-consensual sexual acts without further requirements. See also in this issue: U. Lembke ‘Germany’ at pp 58-59.

<sup>11</sup> See the Resolution and the detailed recommendations of the European Parliament set out in the Annex at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0126+0+DOC+XML+V0//EN#BKMMD-30>, accessed 9 November 2014.

### **Gender stereotypes**

Many forms of discrimination are inter-sectional, meaning that discrimination is not based on only one protected characteristic, but on several characteristics, which are often inherently linked and not mutually exclusive.<sup>12</sup> This is especially true for stereotyping. As preconceptions about groups of people, stereotypes cut across identities such as age, ethnicity, sexual orientation, religion, sex, and disability. In terms of sex and gender, Article 5(a) of the Convention on the Elimination of All Forms of Discrimination Against Women obliges States to combat harmful gender stereotypes; the only international legal provision of its kind in the area of gender equality. In addition, the European Commission's *Strategy for Equality between Women and Men 2010-2015* emphasises the need to promote non-discriminatory gender roles.

The Gender Network has addressed gender stereotypes both directly and indirectly, and especially over the last few years in its publications. A number of national contributions to the report on *Harassment related to Sex and Sexual Harassment* identified the existence of gender stereotypes as a factor that maintains and reinforces sexual harassment in the workplace, and also prevents access to and the efficacy of effective remedies.<sup>13</sup> In addition, the Gender Network has extensively reported on the alarming prevalence of gender stereotypes in the context of family roles and responsibilities. In *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood* all 33 national experts recognised that harmful gender stereotypes vastly perpetuate discrimination against pregnant women and mothers.<sup>14</sup> The presence of strong cultural perceptions and social stereotypes regarding caring responsibilities not only limits women in areas such as job opportunities, career development, and the reconciliation of work and family life; but it also creates significant disadvantages for men. For instance, the rights of fathers during paternity leave are generally not as developed as the rights afforded to women during pregnancy and maternity leave, and it is generally considered less socially acceptable in the workplace for men to request time-off for caring for a child.<sup>15</sup> These stereotypes regarding the roles of women and men in the family also permeate issues surrounding the division and take-up of parental leave.<sup>16</sup>

In this issue of the *European Gender Equality Law Review*, several national experts highlight the issue of stereotyping. For instance, the expert for France notes the positive legislative development of a Bill that explicitly tackles gender stereotypes, especially in the media.<sup>17</sup> Additionally, the expert for the Netherlands reports on a recent equality body

<sup>12</sup> See further: European Network of Legal Experts in the Field of Gender Equality, S. Burri & D. Schiek *Multiple Discrimination in EU Law: Opportunities for legal responses to intersectional gender discrimination?* European Commission 2009, available at: [http://ec.europa.eu/justice/gender-equality/files/multiplediscriminationfinal7september2009\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/multiplediscriminationfinal7september2009_en.pdf), accessed 9 November 2014.

<sup>13</sup> In particular, see: G. Tisheva 'Bulgaria' at pp. 51-59, and especially at p. 57; S. Koukoulis-Spiliotopoulos 'Greece' at pp. 116-127; and T. Davulis 'Lithuania' at pp. 174-182, in: European Network of Legal Experts in the Field of Gender Equality, A. Numhauser-Henning & S. Laulom *Harassment related to Sex and Sexual Harassment Law in 33 European Countries: Discrimination versus Dignity* European Commission 2011, available at: [http://ec.europa.eu/justice/gender-equality/files/your\\_rights/final\\_harassment\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/your_rights/final_harassment_en.pdf), accessed 9 November 2014.

<sup>14</sup> See generally: European Network of Legal Experts in the Field of Gender Equality, A. Masselot, E. Caracciolo di Torella & S. Burri *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood The application of EU and national law in practice in 33 European countries* European Commission 2012, available at: [http://ec.europa.eu/justice/gender-equality/files/your\\_rights/discrimination\\_pregnancy\\_maternity\\_parenthood\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final_en.pdf), accessed 9 November 2014.

<sup>15</sup> For a comprehensive overview, see: A. Masselot & E. Caracciolo Di Torella 'Executive Summary' in: *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood The application of EU and national law in practice in 33 European countries* at pp. 1-33. See further: E. Caracciolo di Torella & A. Masselot 'Work and Family Life Balance in EU Law and Policy 40 Years on: Still Balancing, Still Struggling' in: European Network of Legal Experts in the Field of Gender Equality, *European Gender Equality Law Review 2/2013* at pp. 6-15, European Commission 2013, available at: [http://ec.europa.eu/justice/gender-equality/files/law\\_reviews/egelr\\_2013\\_2\\_final\\_web\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2013_2_final_web_en.pdf), accessed 9 November 2014.

<sup>16</sup> See further: M. do Rosário Palma Ramalho, P. Foubert & S. Burri, European Network of Legal Experts in the Field of Gender Equality, *The Implementation of Parental Leave Directive 2010/18 in 33 European Countries*, European Commission 2014 (forthcoming).

<sup>17</sup> See in this issue: S. Laulom 'France' at p 56.

decision, which recognised how in a particular case the use of gender-statistics actually resulted in the reinforcement of harmful stereotypes.<sup>18</sup> Furthermore, the authors of the article ‘A False Start: Discrimination in Job Advertisements’ in this issue provide examples of the role played by stereotypical representations of women and men in job vacancy advertisements.<sup>19</sup>

It is clear that a more consolidated effort is required in Europe to effectively tackle the harmful consequences of gender and inter-sectional stereotyping. It is therefore hoped that the preliminary reference to stereotypes made by Ms. Věra Jourová in the context of a new comprehensive gender equality strategy delivers as much promise as it implies.<sup>20</sup>

### ***In this European Gender Equality Law Review***

The European policy and legislative developments are presented along with the case-law updates from the Court of Justice of the European Union, the European Court of Human Rights, and the Court of Justice of the European Free Trade Association States. Two articles are also contained in this issue: in the first article, ‘Maternity rights for intended mothers? Surrogacy puts the EU legal framework to the test’, Eugenia Caracciolo di Torella and Petra Foubert discuss the two recent cases of the CJEU concerning surrogacy.<sup>21</sup> In the second article ‘A False Start: Discrimination in Job Advertisements’, Rikki Holtmaat and Paul Post address the issue of sex discrimination in job advertisements. Last, and certainly not least, the experts from the countries participating in the Gender Network present their respective policy, legislative, and national case-law updates; alongside decisions and opinions of equality bodies, and any further issues relevant to national and EU gender equality law.

The members of the editorial board hope that the content will be of interest to the reader.

The publications of the European Network of Legal Experts in the Field of Gender Equality will continue to be available at:

[http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/document/index_en.htm).

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<sup>18</sup> See in this issue: R. Holtmaat ‘The Netherlands’ at pp 88-89.

<sup>19</sup> See in this issue: R. Holtmaat & P. Post ‘A False Start: Discrimination in Job Advertisements’ at pp 12-23.

<sup>20</sup> See: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/509995/IPOL\\_BRI\(2014\)509995\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/509995/IPOL_BRI(2014)509995_EN.pdf), accessed 9 November 2014.

<sup>21</sup> Cases C-167/12 *CD v ST* [2014] ECR I-000, and C-363/12 *Z v Government Department and the Board of Management of a Community School* [2014] ECR I-000. See the full article at pp. 5-12 of this issue.

# Maternity Rights for Intended Mothers? Surrogacy Puts the EU Legal Framework to the Test

E. Caracciolo di Torella and Petra Foubert\*

## 1. Introduction

The current EU framework on the protection of maternity at work is based on a traditional understanding of what is meant by ‘being a mother’. In the legislation of most of the EU Member States, maternity is constructed according to a gestational<sup>1</sup> criterion: the woman who is pregnant and gives birth to the child is the mother: *mater semper certa est*.<sup>2</sup> The relevant EU provisions in this area are firmly based on this assumption. Accordingly, the Pregnant Workers Directive<sup>3</sup> is based on the gestational link between a mother and her child where the relevant legal concepts are a *pregnant worker*, a worker who has recently *given birth* and a worker who is *breastfeeding*.<sup>4</sup> The Recast Directive<sup>5</sup> builds upon and further confirms the choices that were made in the Pregnant Workers Directive. Over the years, using these instruments, the EU has been successful in creating a framework where pregnancy and maternity in the workplace are acknowledged and protected. Such a framework, however, fails to regulate non-traditional situations where the gestational criterion is not present, like same sex parents, foster parents and adoptive parents. This article looks at the situation of surrogacy,<sup>6</sup> where a woman, namely the surrogate mother, gestates (carries) a child for the person who intends/ the persons who intend to raise the child, namely the intended (commissioning) parent(s).<sup>7</sup> At the same time, the practice of surrogacy is increasing across Europe,<sup>8</sup> and this creates a gap between social reality and legislation.

Such a gap was recently highlighted by two cases decided by the Court of Justice of the European Union (CJEU), originating respectively from Great Britain and Ireland.

In both cases, the Court found that the intended mother could not rely on the provisions of either the Recast or the Pregnant Workers Directives. Equally, the Court found that the

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\* E. Caracciolo di Torella, School of Law, University of Leicester (United Kingdom); P. Foubert, School of Law, Hasselt University (Belgium). A related but longer paper on ‘Surrogacy, Pregnancy and Maternity Rights: a Missed Opportunity for a More Coherent Regime of Parental Rights in the EU?’ is forthcoming in the *European Law Review* (2015).

<sup>1</sup> ‘Gestational’ derives from the Latin verb ‘*gestare*’, i.e. ‘carry in the womb’. It refers to ‘the process or period of developing inside the womb between conception and birth’, <http://www.oxforddictionaries.com>, accessed 29 August 2014. In the context of this article the term ‘gestational mother’ refers to a woman who carries a fertilised ovum that will develop into an embryo and who eventually will give birth to a child.

<sup>2</sup> ‘The mother is always certain’. See V. Todorova, ‘Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood, ie mutual recognition of Surrogacy Agreements: What is the Current situation in the MS? Need for EU Action?’, EU Parliament, DG for Internal Policies, Legal and Parliamentary Affairs, Note.

<sup>3</sup> Council Directive 92/85/EEC of 19 October 1992 concerning the implementation of measures to encourage improvements in the safety and health of pregnant workers, workers who have recently given birth and women who are breastfeeding, OJ L 348, of 28 November 1992, pp. 1-7.

<sup>4</sup> Article 2 of the Pregnant Workers Directive. Authors’ emphasis.

<sup>5</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 20, of 26 July 2006, pp. 23-36.

<sup>6</sup> See generally, K. Trimmings & P. Beaumont ‘General Report on Surrogacy’ in: Trimmings & Beaumont (eds.) *International Surrogacy Arrangements* p. 439 Oxford, Hart Publishing 2013. See further R. d’Alton-Harrison ‘Mater Semper Incertus Est: Who’s your Mummy?’, *Medical Law Review* 22 No. 3 (summer 2014) pp. 1-27.

<sup>7</sup> D. Morgan, ‘Surrogacy: an Introductory Essay’ in: R. Lee & D. Morgan (eds.) *Birthrights: Law and Ethics at the Beginning of Life* p. 56 London, Routledge 1989.

<sup>8</sup> See L. Brunet, J. Carruthers, K. Davaki, D. King, C. Marzo & J. McCandless, *A Comparative Study on the Regime of Surrogacy in EU Member States*, Parliament, DG for Internal Policies, 2013.

Framework Directive,<sup>9</sup> which prohibits discrimination on grounds of disability, could not be invoked.

## 2. The CJEU's views on surrogacy in the workplace

### 2.1. The facts of the surrogacy cases

In the first case, *CD v ST*,<sup>10</sup> which was referred to the Court by the Employment Tribunal in Newcastle upon Tyne (UK), Ms CD fulfilled her desire to have a child with the assistance of a surrogate mother. The child was genetically linked to CD's partner. Furthermore, CD began breastfeeding the child within an hour of the birth and continued to do so for three months.<sup>11</sup> Almost four months after the birth, she and her partner were granted a parental order by the Family Proceedings Court in respect of the child. Before the birth of the child, CD had unsuccessfully applied to her employer for paid time off 'for surrogacy' under the employer's adoption leave policy. Following a second application, the employer reconsidered his position, applied the adoption leave policy accordingly, and granted CD paid leave.

CD brought claims of unlawful discrimination on the grounds of sex (based on the Recast Directive) and/or pregnancy and maternity (Pregnant Workers Directive) with regard to the refusal of her original request.

In the second case, *Z v Government Department and the Board of Management of a Community School*,<sup>12</sup> referred to the Court by the Irish Equality Tribunal, Ms Z suffered from a rare condition where, although she had healthy ovaries and was otherwise fertile, she had no uterus and, thus, could not support a pregnancy. In Ireland, surrogacy is at present unregulated, so in order to have a child, Z and her husband arranged for a surrogate mother to give birth to their genetic child in California, where surrogacy is permitted. According to Californian law the child is considered the genetic child of the intended parents: in fact no mention of the surrogate mother is made on the child's (American) birth certificate. During the surrogate's pregnancy, Z made an application for adoption leave and paid leave of absence. Her request was initially rejected. As in the previous case, however, her employer reconsidered his position and, at a later stage, Z was offered unpaid parental leave by her employer.

Z brought a complaint arguing that she had been subject to discrimination on grounds of sex, family status and disability. Accordingly, the domestic court asked the CJEU questions regarding the interpretation of the Pregnant Workers, Recast and Framework Directives.

### 2.2. Equal treatment for intended mothers?

In both of these cases, the CJEU made it clear from the outset that the Recast Directive was not applicable. The refusal to grant maternity leave to an intended mother was deemed not to constitute direct or indirect discrimination on the grounds of sex. In fact an intended father would be treated in the same way as an intended mother. Accordingly, the refusal was not based on a reason that applied exclusively to workers of one sex,<sup>13</sup> rather it was based on the employees' desire to have a child with the assistance of a surrogate mother. In this respect the facts of the two cases under scrutiny could be distinguished from the *Mayr* case<sup>14</sup> where the CJEU was asked to determine the starting point of the pregnancy in the specific instance of *in vitro* fertilisation (IVF).<sup>15</sup> Mrs Mayr had been dismissed whilst undergoing IVF treatment: at

<sup>9</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, of 2 December 2000, pp. 16–22.

<sup>10</sup> Case C-167/12 *CD v ST* [2014] ECR I-000.

<sup>11</sup> It is possible for a woman to breastfeed a baby without having given birth to it (induced lactation). See, e.g., F.P. Biervliet et al. 'Case report. Induction of lactation in the intended mother of a surrogate pregnancy' *Human Reproduction* 16 No. 3 (2001) pp. 581–583.

<sup>12</sup> Case C-363/12 *Z v Government Department and the Board of Management of a Community School* [2014] ECR I-000.

<sup>13</sup> Case C-167/12 *CD v ST*, para. 47; Case C-363/12 *Z v Government Department and the Board of Management of a Community School*, para. 52.

<sup>14</sup> Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR I-1017.

<sup>15</sup> *Ibid.*

the time of the dismissal her ova had been fertilised but had not been transferred to her uterus, thus she was not technically pregnant. Although this made it impossible to rely on the protection afforded by the Pregnant Workers Directive, the CJEU nevertheless decided to rely on the Equal Treatment Directive<sup>16</sup> and argued that Mrs Mayr had been discriminated against because such a situation can ‘directly affect only women’<sup>17</sup> as opposed to men. Thus, it concluded that: ‘Articles 2(1) and 5(1) of Directive 76/207 preclude the dismissal of a female worker who (...) is at an advanced stage of *in vitro* fertilisation treatment, that is, between the follicular puncture and the immediate transfer of the *in vitro* fertilised ova into the uterus, inasmuch as it is established that the dismissal is essentially based on the fact that the woman has undergone such treatment.’<sup>18</sup>

In other words, regardless of how Mrs Mayr would eventually become pregnant, she was the one who would have carried the baby and given birth; this was enough to trigger the application of the Equal Treatment Directive. Therefore, in this case, it was straightforward to consider her to be the mother.

Whilst the CJEU quickly dismissed the equality aspect, the Advocates General appointed in each of the cases did explore in detail the different angles and approaches relevant to the issue at stake.<sup>19</sup>

In the case of *Z v Government Department and the Board of Management of a Community School*, AG Wahl was prepared to expand his reasoning and to look at ‘the issue of identifying the correct comparator’. If surrogacy cannot be assimilated to the situation where a woman is pregnant and gives birth, it might be assimilated to a situation where a woman adopts a child. Indeed, he held that ‘an appropriate point of comparison seems to be found (...) in an adoptive mother (or, as the case may be, a parent, male or female) who has not given birth to a child’.<sup>20</sup>

Adoption is acknowledged at EU level to the extent that Article 16 of the Recast Directive protects from discrimination both men and women who make use of adoption or paternity leave *in those Member States which recognise the right to such leave*.<sup>21</sup> As a consequence, Member States are not obliged on the basis of the Recast Directive to adopt and/or protect such types of leave. The right, thus, is constructed as an ‘option’ for Member States to consider rather than an enforceable individual right. Furthermore, even if Member States were to be obliged to provide for adoption leave, or if it were to be taken into account that almost all Member States already grant leave to adoptive parents,<sup>22</sup> it would still be a matter for the national courts ‘to assess, in light of that national law, whether the application of differing rules to adoptive parents and to parents who have had a child through a surrogacy arrangement (and who are recognised as the legal parents of the child) constitutes discrimination’.<sup>23</sup>

However, although Article 16 of the Recast Directive might not, in practice, be relevant, by comparing surrogacy to other – traditional and less traditional – possible ways of

<sup>16</sup> See K. Koldinska, ‘Case Law of the European Court of Justice on Sex Discrimination 2006-2011’ 48 *Common Market Law Review* (2011) pp. 1620-1622.

<sup>17</sup> Case C-506/06, *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG*, para. 50.

<sup>18</sup> *Ibid.*, para. 52.

<sup>19</sup> The fact that two different Advocates General (AG) were appointed to write the opinions on the two surrogacy cases may indicate the complexity of the legal issues involved.

<sup>20</sup> Opinion of AG Wahl, at paras. 54 and 64.

<sup>21</sup> Article 16 of the Recast Directive states that: ‘This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.’

<sup>22</sup> E. Caracciolo di Torella, S. Burri & A. Masselot (eds.), *European Network of Legal Experts in the Field of Gender Equality, Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood. The application of EU and national law in practice in 33 European countries* European Commission 2012, available at: [http://ec.europa.eu/justice/gender-equality/files/your\\_rights/discrimination\\_pregnancy\\_maternity\\_parenthood\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final_en.pdf), accessed 29 August 2014.

<sup>23</sup> Opinion of AG Wahl, para. 67.

becoming a mother, AG Wahl showed that there was a further applicable model apart from the gestational perspective. He introduced a new perspective into the debate on maternity-related rights in the workplace that focus on the needs of the person who looks after the child, namely the social parent (*in casu* the mother). Ultimately, such perspective is in the interests of the child's well-being.

By contrast, in the case of *CD v ST*, AG Kokott explained that surrogacy cannot be compared to adoption because in this case 'as a rule, there is no bond between the intended mother and the child prior to the birth of the latter, created on the basis of an agreement concluded between two women concerning the child's specific future'.<sup>24</sup> She suggested, however, that the issue could be solved on the basis of the Pregnant Workers Directive.

### 2.3. Maternity leave for intended mothers?

Like the Recast Directive, the Pregnant Workers Directive was also not originally intended to address surrogacy. By definition, the application of the Pregnant Workers Directive is triggered by pregnancy. As a consequence, it might be difficult to apply it to the case in question. However, the Directive also specifically intends to protect the health and safety of pregnant workers and workers who have recently given birth, and also of workers who are *breastfeeding*.<sup>25</sup> Although, in at least one of the cases under analysis the intended mother was breastfeeding, the CJEU chose to give a restrictive (or perhaps cautious?) interpretation of the Directive and held that the entitlement to maternity leave pursuant to the Pregnant Workers Directive presupposes that the worker has been pregnant and has given birth to a child.<sup>26</sup> The fact that the intended mother was breastfeeding the child did not alter the situation.<sup>27</sup>

With this decision the CJEU further entrenches the protection of the special relationship between a woman and her child – which the CJEU has always<sup>28</sup> seen as a natural addendum of the Directive's health and safety protection – and limits it only to women and babies who have a gestational link. Disappointingly, the CJEU did not use a broader approach that considered the actual caring for the child, as it had done in the decision in *Roca Álvarez*.<sup>29</sup>

Prima facie, AG Kokott has been bolder. She took a rights-based approach and concluded that, in view of medical advances, the class of persons targeted by the Pregnant Workers Directive 'must be understood in functional rather than monistic biological terms. An intended mother who begins to care like a biological mother for an infant in place of its biological mother directly after it is born, as planned pursuant to an agreement concluded in advance with the surrogate mother, takes the place of its biological mother after the child is born, and from that point onwards she must have the same rights as would otherwise be conferred on the surrogate mother'.<sup>30</sup> AG Kokott referred to a specific right of a child to maintain on a regular basis a personal relationship and direct contact with both of his or her parents, unless that is contrary to his or her interests. In this respect she mentioned Article 24(3) of the Charter of Fundamental Rights of the European Union as well as the more general provision contained in Article 7, namely 'the right to respect for his or her private and family life' to further substantiate her argument.<sup>31</sup>

<sup>24</sup> Opinion of AG Kokott, para. 49.

<sup>25</sup> According to Article 1(1) of the Pregnant Workers Directive '[t]he purpose of this Directive (...) is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding'.

<sup>26</sup> Case C-167/12 *CD v ST*, paras. 36 and 37.

<sup>27</sup> Case C-167/12 *CD v ST*, para. 40.

<sup>28</sup> Even before the entry into force of the Pregnant Workers Directive, see Case 184/83 *Hofman* [1984] ECR 3047.

<sup>29</sup> Case C-104/09 *Roca Álvarez* [2010] ECR I-8661, para. 24. In this case the CJEU pronounced on breastfeeding leave that had, in practice, become some sort of parental leave as it was also awarded to mothers who did not breastfeed their babies. The CJEU recognised that 'the positions of a male and a female worker, father and mother of a young child, are comparable with regard to their possible need to reduce their daily working time in order to look after their child' and awarded breastfeeding leave to the father of the child. See also E. Caracciolo di Torella 'Brave New Fathers for a Brave New World' *European Law Journal* 20 No. 1 (January 2014) pp. 102-103.

<sup>30</sup> Opinion of AG Kokott, para. 48.

<sup>31</sup> Opinion of AG Kokott, para. 45.



Notwithstanding the fact that AG Kokott suggested a decision which provides a desirable practical outcome to the specific facts under scrutiny, AG Wahl took a position that offers better perspectives for the future. He suggested the Court should acknowledge the inadequacy of the current legal framework. Guided by the equality principle, he highlighted that the special-relationship<sup>32</sup> objective between the mother and the child should be given independent significance and, accordingly, should not be related to giving birth: ‘the scope of protection afforded by Article 8 of Directive 92/85 could not (...) be meaningfully limited only to women who have given birth, but would necessarily also cover adoptive mothers or indeed, any other parent who takes full care of his or her new-born child’.<sup>33</sup> It follows that, although he did not go as far as to advise the CJEU to extend a right to paid leave of absence to a person wishing to bond with a new-born baby, other than the person who had given birth to that baby,<sup>34</sup> he called upon the legislature to regulate the matter.

#### 2.4. Disability protection for intended mothers?

As illustrated by the case of *Z v Government Department and the Board of Management of a Community School*, women can opt for surrogacy because of disability: Z suffered from a condition which prevented her from supporting a pregnancy and this opened up the possibility of using the Framework Directive, which intends to combat discrimination on the grounds of, among other things, disability as regards employment and occupation (Article 1), within the limits of the areas of competence conferred on the EU (Article 3).

However, the CJEU dismissed the possibility of such a link on the basis of its previous case law on disability. In the *Ring and Skouboe Werge* case, disability was defined as ‘a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned *in professional life* on an equal basis with other workers’.<sup>35</sup> Therefore, the CJEU concluded that ‘the inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment’.<sup>36</sup> In other words, Z’s condition was not found to prevent her from exercising her professional activity and, therefore, there could be no discrimination on the basis of disability in this respect.

Furthermore, as the CJEU highlighted in *Ring and Skouboe Werge*, disability should be interpreted in a manner that is consistent with the 2006 UN Convention on the Rights of Persons with Disabilities,<sup>37</sup> which has been ratified by the European Union.<sup>38</sup> This UN Convention states that ‘disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder the full and effective participation *in society* on an equal basis with others’.<sup>39</sup> In light of this, it appears that the interpretation given by the CJEU in this case is too narrow. The CJEU simply stated that the

<sup>32</sup> See Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, para. 21.

<sup>33</sup> Opinion of AG Wahl, para 47.

<sup>34</sup> Broadening the scope of the Pregnant Workers Directive, AG Wahl argued, would result in a contradictory situation whereby this Directive ‘would extend a right of paid leave of absence to a female worker undertaking surrogacy, but would not extend such a right, by the same token, to a working adoptive mother – or indeed to a father, whether through surrogacy or otherwise’. Opinion of AG Wahl, para. 51.

<sup>35</sup> Authors’ emphasis. Joined Cases C-335/11 and C-337/11 *Ring and Skouboe Werge* [2013] ECR I-0000, paras. 38 and 39, as quoted in the opinion of AG Wahl, para 89. This definition of disability represents a ‘paradigm shift’ from the previous interpretation offered in Case C-13/05 *Chacón Navas* [2006] ECR I-64567. See N. Betsch ‘The *Ring and Skouboe Werge* case: a reluctant acceptance of the social approach of disability’ *European Labour Law Journal* 4 No. 2 (2013) pp. 135-142. See also Case C-312/11 *Commission v Italy* [2013] ECR I-000, para. 56 and joined Cases C-335/11 and C-337/11, *HK Danmark* [2013] paras. 38 and 39, both cases more recently reaffirmed by AG Jääskinen in Case C-354/13, *Karsten Kaltoft* [2014] ECR I-000, para. 30.

<sup>36</sup> Case C-363/12 *Z v Government Department and the Board of Management of a Community School*, para. 81.

<sup>37</sup> Joined Cases C-335/11 and C-337/11 *Ring and Skouboe Werge*, paras. 29-32.

<sup>38</sup> Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ L 23, of 27 January 2010, pp. 35-61.

<sup>39</sup> Recital (e) of the Preamble to the UN Convention on the Rights of Persons with Disabilities (authors’ emphasis).

Framework Directive cannot be tested against the UN Convention, as the provisions of that Convention are ‘programmatic’ and do not have direct effect.<sup>40</sup> Arguably, this case is a missed opportunity to develop a notion of disability in cases related to pregnancy and maternity.<sup>41</sup>

### 3. Conclusion

Recent developments in medicine and the evolution of society’s perceptions have questioned the traditional concept of ‘who is the mother’. The surrogacy cases are a clear reminder that the EU framework on maternity rights in the workplace is in urgent need of revision in order to address less ‘traditional’ situations. Specifically, these cases challenge the concept of the protection of the mother’s health and the special mother/child relationship as exclusively triggered by birth.<sup>42</sup>

Furthermore, to deny maternity rights to a mother, simply because the child is born through a surrogacy arrangement, has the effect of depriving the mother and child of their right to bond and develop a relationship. If one of the main aims behind maternity leave is to protect the special relationship between the mother and the child,<sup>43</sup> surely how the child is born should be irrelevant.<sup>44</sup>

When it comes to recognising the rights of children growing up in new forms of families and with parents dividing tasks in less traditional ways, the European Court of Human Rights in Strasbourg has used a more creative approach than the Court of Justice of the European Union.<sup>45</sup> It has already taken progressive positions in cases regarding parental leave for fathers and adoption leave for mothers.<sup>46</sup> This perspective is supported by international conventions<sup>47</sup> and by Article 24(2) of the EU Charter of Fundamental Rights that expressly refers to the best interests of the child.<sup>48</sup>

The surrogacy cases indicate that the time has come for the EU to seriously reconsider maternity rights for working mothers and paternity rights for working fathers.<sup>49</sup> Furthermore, the opportunity should be seized to consider also the establishment of a broader legal framework that accommodates parenthood-related rights in the workplace in general: i.e. rights of both women and men who are parenting, even without there being a biological link between themselves and the child.

<sup>40</sup> Case C-363/12 *Z v Government Department and the Board of Management of a Community School*, paras. 88-90.

<sup>41</sup> For a critical note regarding the CJEU’s decision in Case C-363/12 *Z v Government Department and the Board of Management of a Community School*, see A. Boujeka ‘La gestation pour autrui et le handicap confrontés au principe de non-discrimination en droit de l’Union’ *Recueil Dalloz* No. 31 (18 September 2014) pp. 1811-1815.

<sup>42</sup> See, e.g., Case 184/83 *Hofmann* [1984] ECR 3047, para. 25; Case C-136/95 *Thibault* [1998] ECR I-2011, para. 25; Case C-411/96 *Boyle* [1998] ECR I-6401, para. 41; and Case C-116/06 *Kiiski* [2007] ECR I-7665, para. 46. For reasons of length, fathers are intentionally not referred to here. However, the rights of fathers in relation to surrogacy arrangements is a topic worthy of its own paper.

<sup>43</sup> See Case 184/83 *Hofmann*, para. 25.

<sup>44</sup> From this perspective, AG Kokott’s view that surrogacy cannot be compared to adoption also bypasses the equal rights of all children.

<sup>45</sup> See the recent decision in *Mennesson and Lebassee v France* (Appl. No. 65941/11) Judgment of 14 June 2014.

<sup>46</sup> Case 30078/06 *Konstantin Markin v Russia* ECtHR (Grand Chamber) 22 March 2012 and Case 19391/11 *Topčić-Rosenberg v Croatia* ECtHR 14 November 2013. A number of other cases related to the problems which the intended parents faced in having children born through a surrogate recognised as their (legal) children, but did not deal with the employment rights of the intended parents, e.g.: Case 65941/11 *Labassee v France* ECtHR 26 June 2014 and Case 65192/11 *Mennesson v France* ECtHR 26 June 2014. Two similar surrogacy cases are still pending before the European Court of Human Rights: Case 25358/12 *Paradiso and Campanelli v Italy* and Case 29176/13 *D and R v Belgium*.

<sup>47</sup> Article 8 (right to family life) of the ECHR and Article 3 (best interest of the child) of the Convention on the Rights of the Child.

<sup>48</sup> Article 24(2) of the Charter of Fundamental Rights of the European Union provides: ‘In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.’

<sup>49</sup> This argument is further developed in: E. Caracciolo di Torella & P. Foubert ‘Surrogacy, Pregnancy and Maternity Rights: A Missed Opportunity for a More Coherent Regime of Parental Rights in the EU’ 40 *European Law Review* (2015) 52-69.

The authors call upon the EU legislature to be proactive, take genuine account of equal chances for men and women workers, and pay full attention to the difference between, on the one hand, the protection of health and safety of the gestating mother and unborn baby and, on the other hand, the equal chances of all children to build up relationships with the people who take care of them. It is disappointing that the European Commission recently proposed to withdraw the amendment to the Pregnant Workers Directive.<sup>50</sup> However, such a withdrawal would open up the opportunities to start from scratch and build a totally new framework that takes into account recent developments in medicine and society, and accordingly there are different ways to become a parent.

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<sup>50</sup> Communication from the Commission to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions. Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook, COM(2014) 368 final, p. 10., <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0368&rid=1>, accessed 8 September 2014. The withdrawal concerns the Proposal for a Directive of the European Parliament and the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, COM/2008/0637 final.

# A False Start: Discrimination in Job Advertisements

*Paul Post and Rikki Holtmaat\**

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## 1. Introduction

Anybody who has ever watched a swimming competition, sprinting event or motor race, has undoubtedly realised that fair competition can only exist by virtue of an equal start. In sports, therefore, referees will monitor the start of the game with special attention, thus guaranteeing a level playing field, i.e. a situation in which all play by the same rules and no-one has an unfair advantage over others. Equal treatment legislation in the field of employment, too, aims at creating a level playing field, a job market in which all have a fair and equal chance to participate in paid labour. Discrimination in the labour market, however, despite all ongoing efforts, remains a widespread phenomenon – a practice that in many cases commences with job advertisements that are either directly or indirectly discriminatory. Discriminatory job ads are the labour market equivalent of a false start.

Many women experience discrimination in the labour market, which often begins with a discriminatory job advertisement. If women are already discouraged from applying for a job because an advertisement, explicitly or implicitly, makes it clear that the company is seeking a male worker, their chances of finding a job are seriously diminished. For the excluded job seekers, the advertisement can plant a seed of a lack of confidence in the enforcement of equal treatment law. Discriminatory advertisements, moreover, signal to the wider public that discrimination is an accepted practice that the authorities are unable or unwilling to tackle. They send out a message that distinctions based on the prohibited non-discrimination grounds may still be made and will not be punished, regardless of the legislation in place. The importance of putting an end to this form of discrimination is therefore obvious.

In order to get an impression of the situation in this regard, a questionnaire was sent to all 33 country experts of the European Network of Legal Experts in the Field of Gender Equality, with the purpose of assembling information on the prevalence of this phenomenon, the respective country's legal framework and relevant case-law, as well as good practices. This article is based on this information and, furthermore, builds on previous comparative research into discriminatory job advertisements conducted by the authors of this article in 2013 and commissioned by the CEE-office of the International Labour Organization in Budapest.<sup>1</sup>

This article will, in Section 2, sketch out the legal framework of the European Union (EU). In Section 3, an overview of the situation in the various countries will be given. In the Section 4, the legal obstacles that were reported by the experts will be identified. Section 5 of this article aims to contribute towards the development of tools to improve the effectiveness of the legal norms for prevention and elimination of discrimination in job advertisements by identifying examples of effective legislation and of good practices.

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<sup>1</sup> Working title: "Wanted": Effective Legal Measures to Eliminate Discrimination in Job Advertisements', not yet published. Countries participating in this study were Portugal, the UK, the Netherlands, Moldova, Romania and Ukraine.

## 2. Legal Framework of the European Union

The history of the EU shows an ever-expanding involvement of the Union with the issue of sex discrimination in the field of employment relations and in other spheres of economic activity.<sup>2</sup> The prohibition of discrimination on the ground of sex in the area of employment can currently be found in the so-called ‘Recast Gender Equality Directive’ of 2006,<sup>3</sup> which prohibits discriminatory selection criteria and recruitment conditions.<sup>4</sup> Job advertising is part of the recruitment process and is thus included within the scope of this Directive.

### 2.1. Direct discrimination

Both direct and indirect sex discrimination are prohibited under the Recast Directive. Direct discrimination occurs ‘where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation’.<sup>5</sup> This means that the prohibited discrimination ground is explicitly mentioned as a job requirement in the advertisement. This often happens by naming a job in the feminine or masculine form (see Section 3 of this report). Any form of direct discrimination in job advertisements is prohibited, unless one of the Directive’s justification grounds (or exceptions) is applicable. In the context of job advertisements, the most important possible justification ground is the genuine occupational requirement, which arises ‘by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out’.<sup>6</sup>

With respect to some jobs it may be necessary to advertise for a person from a particular sex, for example if an employer needs to hire female models for a fashion show of the latest women’s fashion. In that case, one of the essential job requirements explicitly refers to the prohibited non-discrimination ground of sex, which makes such a requirement suspect on the ground of direct discrimination.<sup>7</sup> From the text of the Recast Directive and the Court of Justice of the European Union’s (CJEU) case-law, four requirements can be derived which must all be fulfilled to establish a genuine need to set these occupational requirements, and these are always closely and strictly scrutinised by the CJEU, because this concerns an exception to the general principle of equal treatment. It must be shown (by the employer) that:

1. the objective pursued is legitimate;
2. the characteristic required constitutes a *genuine* and *determining* occupational requirement for carrying out the function in question;
3. the characteristic is *related to* the particular discrimination ground, in this case: sex (so it does not need to be directly referring to that ground as such); and
4. the characteristic is appropriate and necessary for effectively carrying out the particular function.

A further possibility to justify direct discrimination in a job advertisement could be that the company or organisation has a positive action programme in place and aims to hire more persons belonging to an underrepresented category of workers, as is provided for in Article 157(4) of the Treaty on the Functioning of the European Union (TFEU). Article 3 Recast Directive provides that ‘Member States may maintain or adopt measures (...) with a view to

<sup>2</sup> A comprehensive and detailed overview can be found in: E. Ellis & P. Watson, *EU Anti-Discrimination Law*, Oxford: Oxford University Press 2012. An on-line recently updated overview can be found in: S. Burri & S. Prechal, European Network of Legal Experts in the Field of Gender Equality, *EU Gender Equality Law. Update 2013*, Luxembourg: European Commission 2014, available at: [http://ec.europa.eu/justice/gender-equality/files/your\\_rights/eu\\_gender\\_equality\\_law\\_update2013\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/your_rights/eu_gender_equality_law_update2013_en.pdf), accessed 4 November 2014.

<sup>3</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast) OJ L 204 of 26 July 2006, pp. 23-36.

<sup>4</sup> Article 14(1)(a) Recast Directive.

<sup>5</sup> Article 2(1)(a) Recast Directive.

<sup>6</sup> Article 14(2) Recast Directive.

<sup>7</sup> A ‘genuine occupational requirement exception’ applies where a direct reference to a discrimination ground is made, while other essential characteristics of a particular function may be formulated in neutral terms and may be suspected of constituting indirect discrimination. See below where indirect discrimination is discussed.

ensuring full equality in practice between men and women'. This means that, if such a programme exists and fits into the very narrow criteria set by the CJEU, a job advertisement can state that the employer wants to hire more women in order to have a more balanced workforce.<sup>8</sup>

## 2.2. Indirect discrimination

Indirect discrimination is defined as the situation 'where an apparently neutral provision, criterion or practice would put persons of a certain sex at a particular disadvantage'.<sup>9</sup> In other words: the rule, practice or condition does not openly refer to sex, and in that regard appears to be neutral. But nevertheless, the impact may be that particular groups of people are excluded or otherwise disadvantaged. Most of the time, the essential requirements of functions (or job descriptions and prerequisites for performing the job) are formulated in a neutral way, but such neutral requirements may in fact put women in a disadvantaged position. An example could be an advertisement that requires experience in the military, when men are overrepresented in the military service.

Indirect discrimination can be objectively justified, which means that an employer who puts requirements in an advertisement that have a disproportionate impact on a particular category of job seekers, has to demonstrate that he/she is pursuing a legitimate aim and that the means of achieving that aim are appropriate and necessary (see above).

## 2.3. Some other aspects of EU non-discrimination law

A few other aspects of EU non-discrimination law are particularly relevant in the context of combating discrimination in job advertisements. A first one concerns the personal scope of the Directive: who is bound by the equal treatment norms and liable for a violation of these norms? This is not made explicit in EU law, but the Recast Directive applies to employment relations in both the public and the private sphere, thereby indicating that all employers have to respect the relevant equal treatment norms, including temporary agencies. Apart from employers, various other parties are involved in job advertising, most notably the companies or organisations that publish the advertisement in their newspaper or on their website. EU legislation as such does not apply to these latter parties,<sup>10</sup> but – as we shall see in the remainder of this article – in many countries the scope of the equal treatment legislation has in fact been expanded in such a way that the prohibition does also apply to them.

A second issue is the question as to standing (*locus standi*): who may rely on the norms that are included in the Directive? It is presumed that the Directive primarily protects employees from discrimination in their employment relationship. However, someone who is seeking a job does not yet have an employment relationship with the employer who has issued the discriminatory job advertisement. Nevertheless, EU legislation does not exclude this job seeker from pursuing a claim in legal proceedings because the scope of this legislation also covers the pre-contractual recruitment phase.<sup>11</sup> It is, furthermore, important to note that Article 17 Recast Directive explicitly includes the possibility that Member States allow for non-governmental organisations (NGOs) or other organisations to file a complaint about discrimination on behalf of victims or possible victims. However, it is up to the Member States to regulate the extent and conditions of such legal actions. In the contributions of the country experts, we see several examples of national equal treatment laws that make it

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<sup>8</sup> See e.g. Cases C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051; C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363; and C-158/97 *Badeck v Landesanwalt Beim Staatsgerichtshof des Landes Hessen* [1999] ECR I-1875.

<sup>9</sup> Article 2(1)(b) Recast Directive.

<sup>10</sup> It could be argued that publishing a job advertisement in a newspaper is a service, provided to job seekers who buy the paper to read the advertisements. In as far as this argument would be accepted by the CJEU, this could be brought under the prohibition to discriminate in the area of publicly offered goods and services, as prohibited in Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

<sup>11</sup> Article 14 Recast Directive.

possible for interest groups or NGOs to hold an employer liable for a discriminatory job advertisement.

A third issue that will be examined more closely in the remainder of this article concerns the obligation of all Member States, which is enshrined in Article 25 Recast Directive, to ensure ‘effective, proportionate and dissuasive’ penalties. Article 288 TFEU stipulates that Directives are binding on each Member State ‘as to the result to be achieved’, but the choice ‘of form and methods’ is left to the national authorities. Article 17(1) of the Directive lays down the right of persons who have experienced discrimination to pursue their claims in legal proceedings before a court, after possible recourse to other competent authorities. This means that they not only have the right to actual access to judicial procedures, but also the right to have the case examined.

In the case of a discriminatory advertisement, it is difficult to determine which sanction or remedy would meet these criteria, as the damage suffered is unclear since it is not certain that the claimant would have been hired if the advertisement had been non-discriminatory. When it is accepted that it is not only aspiring applicants who in principle could apply (the targeted group of the advertisement), but also members of the general public who take offence or NGOs, the damage becomes even more abstract. An administrative or criminal law fine would, in that case, perhaps be a more appropriate sanction. One possibility could be to oblige employers to re-issue the advertisement. If the state opts for fines or damages, these need to be dissuasive and proportionate to the damage suffered by the applicant (Article 18 Recast Directive). A famous case before the CJEU concerned a woman who was discriminated against during an application procedure, but who only got reimbursed for the actual costs that she had incurred (a stamp for the application letter and some travel expenditure). In that case, the CJEU ruled that such a minimal level of compensation was not a dissuasive form of sanction for discrimination.<sup>12</sup> The Court has taken a firm stance on fixed upper limits for the amount of compensation, ruling that they cannot constitute proper implementation of EU law,<sup>13</sup> although it has adopted a somewhat looser approach in cases in which it was found that the applicant would not have got the job even if there had been no discrimination.<sup>14</sup>

Discrimination is particularly hard to substantiate, which means that the claimant in a discrimination case faces considerable difficulty in proving the alleged discrimination. Article 19(1) of the Recast Directive therefore provides for a reversal of the burden of proof once the claimant has provided the tribunal with *prima facie* evidence. There must be *prima facie* evidence of a particular disadvantage for women as a result of that neutral criterion. To prove this, it is enough that it is shown by the applicant (on the basis of statistical or other evidence<sup>15</sup>) that one sex is in fact excluded. This means that it is not necessary to prove that the employer *intended* to exclude women or men. When this has been established, the burden of proof will shift to the employer.

In *Kelly and Meister*, the CJEU ruled that that an unsuccessful job applicant is not entitled to see the file of a successful applicant with the purpose of proving that he or she was more qualified than that person. However, account may be taken of the refusal of any access to information in deciding if there are facts that give rise to a presumption of discrimination, and thus shift the burden of proof.<sup>16</sup> In *Firma Feryn*, the CJEU held that publicly made statements by which an employer makes clear he or she will not recruit employees of a certain group, may also constitute facts that lead to a presumption of discrimination.<sup>17</sup>

<sup>12</sup> Case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR I-1891.

<sup>13</sup> Case C-271/91 *Marshall v Southampton and South West Area Health Authority (No 2)* [1993] ECR I-4367.

<sup>14</sup> Case C-180/95, *Draehmpaehl v Urania Immobilienservice OHG* [1997] ECR I-2195.

<sup>15</sup> The authors cannot go into the details of the means of proving *prima facie* evidence of indirect discrimination. See E. Ellis & P. Watson 2012, at p. 160.

<sup>16</sup> Case C-104/10 *Kelly* [2011] ECR I-6813, Case C-415/10 *Meister v Speech Desing Carrier Systems GmbH* [2012] ECR I-0000.

<sup>17</sup> Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-5187.

### 3. The situation in the national states: prevalence and case-law

Although the prevalence of discriminatory advertisements differs considerably from country to country, a few Europe-wide trends may be discerned. Firstly, several experts emphasise that the number of discriminatory advertisements has decreased considerably over the last decade (e.g. **Bulgaria, Estonia, Finland, Hungary, Lithuania**), and point to a high level of general awareness of gender equality requirements and a correspondingly rare occurrence of discriminatory advertisements (**Austria, France, Hungary, Iceland, Ireland, Latvia, the Netherlands, Norway, Portugal, Slovenia, Sweden**). In some countries, however, this practice is still widespread (**Czech Republic, former Yugoslav Republic of Macedonia, Greece, Poland, Spain, Turkey**), with the **Greek** expert mentioning recent research from which it turned out that, out of 150 reviewed advertisements, 36 (24 %) were directly discriminatory on the ground of sex and the expert from the **former Yugoslav Republic of Macedonia** remarking that in her country, advertisements ‘usually discriminate on the ground of sex’.

The use of the M/F device and/or adding endings to the title of a profession in declensions of both sexes is now widespread (**Austria, Belgium, Germany, Latvia, Liechtenstein, Luxembourg, the Netherlands, Portugal**). In the **United Kingdom**, it is common to refer to the fact that the employer is, or is attempting to be, an ‘equal opportunities employer’. However, some experts think that the effectiveness of such clauses is diminishing. The **Belgian** expert, for example, finds that the long-term usage of the M/F tool means that one hardly pays any attention to its eventual absence from an advertisement. In **Portugal**, if the advertisement fails to use neutral language and instead uses the gender-specific form to designate the profession, it is to be considered indirectly discriminatory if the profession is dominated by one of the sexes, despite the ‘magic formula’ ‘M/F’ being included in the advertisements.

Advertisements containing discriminatory requirements or drafted in gender-specific language seem to be published by smaller companies more often (**Hungary, Latvia, the Netherlands, Romania**). Also, there seems to be a big difference between low- and high-end jobs: most examples given by the experts concern advertisements for low-skilled and low-paid jobs, for example cleaners (**Cyprus, Greece, Hungary**). In this context it is interesting that the expert from the **Czech Republic** notes that job advertisements for low-paid jobs are very often published using the female word, whereas advertisements for highly-qualified and well-paid jobs more often use the male word.

In addition, there seems to be a difference between advertisements that are published on websites and advertisements in newspapers, with the former category more often being found to contain discriminatory requirements (**Latvia, the Netherlands**). This might be overlapping with the finding that high-skilled jobs, which are more frequently published in (national) newspapers, less often contain discriminatory requirements, but we suggest that this may also partly be due to the fact that newspapers in general will have more experience in applying the non-discrimination rules.

Directly discriminatory advertisements seem to occur less frequently than indirectly discriminatory ones. An example was provided by the **German** expert, concerning a job advertisement on behalf of a transport and logistics company seeking a managing director, which did not contain a female designation. The court explored the grammatical possibilities of gender-neutral and gender-sensitive job advertisements and emphasised that advertisements should fulfil higher requirements than are usual in everyday language or even in law texts. The female applicant was awarded damages amounting to one month’s salary.<sup>18</sup>

An example of an indirectly discriminatory advertisement was mentioned by the **Swedish** expert. The advertisement in question showed a man surrounded by objects that reflected stereotypically male interests, such as a guitar, footballs and a snowboard, accompanied by the text: ‘We are looking for people like me! And not just one, but hundreds!’ The Swedish ombudsperson considered that the advertisement gave the impression that the company was

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<sup>18</sup> Higher Regional Court of Karlsruhe, judgment of 13 September 2011, 17 U 99/10.



looking for male engineers of 25-30 years old. It did not matter that the advertisement was part of an advertising campaign in which some advertisements also addressed women, since these were published separately.

The general impression outlined by the country experts as regards case-law is rather disappointing. Often there seems to be a complete lack of recent case-law from the courts (for example **Austria, Bulgaria, Estonia, Iceland, Latvia, Liechtenstein, Luxembourg, Malta, Norway, Portugal, the Netherlands, Norway, Poland, Spain, United Kingdom**). This indicates that effective enforcement mechanisms are lacking. In some countries, there is some case-law from the equality bodies or the ombudsperson, but these judgments are in general non-binding recommendations and less authoritative than judgments of regular courts. The **Turkish** expert notes that case-law in her country has more impact on public bodies than on the private sector, and mentions that in the private sector there have been no legal procedures before the courts on the basis of gender discrimination in job advertisements, whereas she cites a few cases pertaining to the public sector. Most attention, as the **German** expert rightly points out, seems to be paid to advertisements that are discriminatory on the grounds of ethnicity or age, with discrimination on the ground of sex receiving little attention.

#### 4. Legal issues

Discriminatory advertisements are prohibited in all states that were included in the survey. Most legal systems provide for an explicit prohibition of this form of discrimination (for example **Austria, Belgium, Bulgaria, Cyprus, Finland, Germany, Greece, Hungary, Iceland, Lithuania, Malta, the Netherlands, Norway, Romania, Spain**), sometimes to be found in labour law (**Czech Republic, Estonia, France, former Yugoslav Republic of Macedonia, Latvia, Luxembourg, Portugal, Slovenia**). In a few countries, the prohibition is implicit and should be read into more general provisions guaranteeing equal access to employment (e.g. **Italy, Liechtenstein, Poland, Sweden**) or into the criminal code provision on discrimination (**Turkey**). In the **United Kingdom**, the Equality Act 2010, by contrast with the previous legislation, does not contain an express prohibition on discriminatory advertising. The expert from the **United Kingdom** notes in this context that, instead of the current implicit prohibition, it would be preferable to have greater clarity in the form of explicit provisions concerning discrimination in advertisements.

##### *4.1. Personal scope: who can be held liable?*

The personal scope of the equal treatment legislation, i.e. who can be held liable, differs considerably between the countries involved in the survey. It is clear from the experts' reports that the employer is in the first place liable for the content of the job advertisement, but the legal situation regarding the liability of recruitment agencies and publishers varies widely from country to country. In **Bulgaria, the Czech Republic, Germany, Greece, Portugal and Slovenia**, only (potential) employers can be held accountable. In the majority of the remaining states recruitment agencies can also be held liable.

By contrast, publishers can only be held liable in a minority of the countries included in this report, such as **Cyprus, France, former Yugoslav Republic of Macedonia, Iceland, Italy, Luxembourg, Malta, the Netherlands, Norway, Romania, Spain, the United Kingdom**. Almost no examples, however, were given of media that had actually been held liable for a discriminatory advertisement, although the **Romanian** expert mentions that seven newspapers had been sanctioned for publishing discriminatory job advertisements. This virtual absence of case-law concerning the liability of publishers seems to indicate that applicants, when confronted with a choice as to who to hold liable for an advertisement, opt for the employer, probably because the employer is more easily found liable, or because the law makes it clear that the employer is liable, but is unclear about the liability of the publisher. It remains unclear, because of a lack of case-law on this matter, as to what the publisher's legal situation is in this regard (which is explicitly mentioned in the country reports of **Hungary and Liechtenstein**).

In the **Netherlands**, newspapers and other media that publish job advertisements usually include an exoneration clause that excludes any responsibility for the content of the advertisement, in order not to be exposed to any such claims. The **Italian** expert mentions that newspapers, in order to avoid being held liable for complicity with a discriminatory job advertisement, normally include a general statement that all job advertisements are open to both male and female candidates. Again, because of a lack of case-law, it is unclear whether such general statements would indeed be deemed sufficient in order for a newspaper not to be held liable in a case where it had published a discriminatory ad.

#### **4.2. Legal standing: who can bring a claim?**

In many countries, for example **Belgium and Latvia**, an individual who claims to be a victim of discrimination must, in order to have standing before the courts, demonstrate that he or she has suffered damage; or must prove that he or she is a victim who is 'affected' by the discrimination (**Czech Republic**). This requirement is highly problematic, as it is very complicated to prove damage as a result of a discriminatory advertisement. A claimant can hardly ever prove that, but for the discriminatory requirement, he or she would have got the job. In **Latvia**, the legislation even implies that the person who brings such a claim needs to have been refused a position on a ground of discrimination. Obviously, this is a very high threshold that can deter wronged individuals from bringing rightful claims.

In **Germany and Poland** (amongst others), potential applicants can bring a claim for damages and/or compensation. In these countries, other members of the discriminated group have no standing to bring a case, let alone the general public. This kind of requirements poses questions, as rightly remarked by the expert of the **United Kingdom** (where the legal situation in this regard is as yet unclear), as to the standing of an individual who is deterred from applying for a post on the basis of a discriminatory advertisement, as that individual might be held not to have been subject to any tangible form of less favourable treatment and might therefore need to prove to be an potential applicant. By contrast with the countries where such a threshold exists, in **Cyprus and Norway**, anybody (i.e. potential applicants, members of the discriminated group, the general public) who finds an advertisement in violation of the equal treatment legislation may bring a case before the court.

The expert from **Poland** provided a possible explanation for the reluctance to grant standing to persons who are not directly affected by a discriminatory advertisement. Often, it is held that the possibility of obtaining compensation by a potential employee is intended for expenses made with respect to the search for employment that were incurred in vain due to a discriminatory policy of the employer; such damages are not to be seen as a source of income for people searching for 'imprecise' job ads placed by employers. It is exactly this attitude that renders the prohibition of discriminatory advertisements practically unenforceable by individuals in many countries. The opposite position, i.e. allowing anybody to take legal action against discriminatory job ads, would enhance the situation where individual citizens could play an important role in the enforcement of equal treatment law, and would thus be preferable.

The legal situation regarding the standing of organisations, such as labour unions and NGOs, is equally divergent. Most often, trade unions and associations/foundations have standing (**Bulgaria, Cyprus, Czech Republic, Hungary, Iceland, Liechtenstein, Lithuania, Norway, Portugal**), which in some countries is subject to the requirement that they aim at the defence of gender equality/human rights protection (**Belgium, France, former Yugoslav Republic of Macedonia, Greece, Italy, Romania, Spain, the Netherlands**); in other countries, standing is subject to the consent of the person who is discriminated against, which *de facto* extends strict rules on standing of individuals to legal entities (**Malta, Poland**). Such previous approval of a victim is certainly problematic when it concerns a discriminatory advertisement, because it requires potential applicants to step forward and claim their rights, which is exactly the reason why the problem of discriminatory ads is so persistent. In some countries, e.g. **Hungary, Italy**, *ex officio* powers are granted to the equal treatment body or labour inspectorates to bring a case before the courts. In a few countries, however, associations have no standing at all (**Germany, Latvia, Slovenia**).

The conclusion is that the legal situation in many countries does not comply with the CJEU's jurisprudence in the cases of *Firma Feryn*<sup>19</sup> and *ACCEPT*,<sup>20</sup> where the Court ruled that an actual individual who suffered a disadvantage is not necessarily required to establish discrimination. Limited standing seriously hinders the enforcement of equal treatment norms regarding access to employment, such as the prohibition of discriminatory advertisements, and is as such objectionable. This is especially so because discriminatory advertisements by their very nature do not disadvantage one particular individual, but rather cause damage to society as a whole by preventing the establishment of an inclusive job market and by signalling that discrimination goes unpunished.

#### 4.3. Effectiveness of sanctions

Discriminatory advertisements are often punished with (administrative) fines, such as in **former Yugoslav Republic of Macedonia**, where a fine amounting to EUR 2 000 to EUR 3 000 may be imposed by the courts (similarly in **Slovenia**, with administrative fines ranging from EUR 3 000 to EUR 20 000), and in **Spain**, where the offender can be condemned to pay a fine of at least EUR 6 251. The **Romanian** expert mentions a case in which discrimination against women was found and sanctioned with a fine of EUR 465 for a job advertisement that was solely directed at men. This decision was upheld on appeal, on the ground that the employer had failed to prove the existence of a genuine occupational requirement.

In some countries, furthermore, fines may be imposed *ex officio* by labour inspectorates. In the **Czech Republic, Greece, Italy, and Poland**, for example, this is the case, but the **Greek** expert mentions that the Greek labour inspectorate prefers to deal with concrete complaints regarding a refusal to hire on the ground of sex, whereas the imposition of fines for discriminatory advertisements would be impracticable.

The **Latvian** expert remarks that in her country, individuals and NGOs usually submit a complaint to the office of the ombudsperson, which can only issue a non-binding opinion. The **Norwegian** expert mentions two cases before the ombudsperson in which discrimination was found, but no fines were imposed. In other countries too, it seems to be the case that the threshold for bringing a case before a court is very high, while equal treatment bodies may be more accessible, but do not have compulsory jurisdiction and cannot impose sanctions that meet the EU criteria as set out above in Section 2.

Generally speaking, awarding compensation in the form of damages for discriminatory advertisements encounters legal problems, because the damage suffered is very difficult to estimate. This issue, however, plays a role in many other forms of general damages, and could be addressed by using standardised compensation, for example the statutory minimum wage or a fixed fine. In **Poland**, for example, the claimant is entitled to damages equalling at least the amount of the monthly statutory minimum wage, if the employer fails to prove before the court that there was no discrimination. In **Belgium**, the equal treatment legislation provides for a fixed amount of damages of EUR 650, but the expert observes that amount seems to be too low, as it has not recently encouraged anybody to take legal action. In **Germany**, the damages may not exceed the amount of three months' salaries (see above under section 3, where a case was discussed in which damages amounting to one month's salary were awarded). The **Spanish** expert mentions a case in which a company was condemned to pay damages amounting to EUR 1 202.<sup>21</sup>

The main problem as regards the effectiveness of the prohibition of discrimination in job advertisements is that too few cases are brought before a court or an equality body, either because of lack of awareness or/and because standing is too limited. Nonetheless, effective sanctions are indispensable for the protection of equal treatment. If countries choose to limit

<sup>19</sup> Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-5187.

<sup>20</sup> Case C-81/12 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, Judgment of 23 April 2013.

<sup>21</sup> High Court of Justice Cantabria, Third or Social Hall, judgment of 14 November 2005, appeal no. 905/2005, <http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=1089678&links=&optimize=20051215&publicinterface=true>, accessed 7 November 2014

access to court, they should at least provide the equality body or ombudsperson with the possibility of imposing sanctions. Also, the possibility of awarding damages may incentivise potential applicants and other members of the discriminated group to bring a claim, which obviously improves the effectiveness of the system as a whole.

## 5. Good practices

Most country experts were unable to mention any good practices in their country. Still, the survey resulted in some interesting good practices being put forward. For example, various experts mentioned the effectiveness of media campaigns (**Cyprus, Estonia, Hungary, Italy**). A practice that might be of interest to countries with gender-specific nouns is found in **Belgium**, where the Ministry of the French-speaking community regularly updates a handbook on how to introduce feminine forms for denominating jobs and functions.

In **the Netherlands**, an independent Advertising Commission (*Reclamecodecommissie*) has been established by advertising and media companies. Anyone feeling that an advertisement is discriminatory can lodge an appeal with the Commission, resulting in a low-cost arbitration. A decision of this Commission can be appealed before a regular court, where a binding judgment can be obtained. Many discriminatory job advertisements in newspapers and journals were brought to the attention of the Commission by active individuals and NGOs, which drew a lot of attention from the media and greatly contributed to raising awareness on this topic.

In **Malta**, the National Commission for the Promotion of Equality (NCPE) introduced the practice of contacting the main local websites that advertise job vacancies and informing them about the usage of gender-inclusive language in adverts. The owners of these websites were also informed about the set of Guidelines that the NCPE had issued in order to raise awareness about the island's equality legislation concerning advertising job vacancies. In other countries, such as **France, the Netherlands and Sweden**, guidelines for the editing and drafting of job advertisements are also made available to employers and media.

A good practice that has broader implications than solely discriminatory advertising is put forward by the **German** expert: a pilot project on 'anonymised job applications' started in 2010 by the Federal Anti-Discrimination Body. Under this project, employers agreed to receive only data about the professional qualifications of an applicant before deciding about the invitation to an interview. The applications lack photographs as well as any personal data which could provide information about the sex/gender, age, family situation, ethnic origin, migrant background etc. of the potential applicant. The **German** expert mentions that the project caused a broad public debate about stereotypes and discrimination in recruitment processes. Similarly, in **Liechtenstein**, a method called 'Job-Speed-Dating' was introduced by the national labour market service institute, which enabled potential job applicants and potential employers to meet directly and personally without any prior written contact. This procedure might be advantageous from the perspective of combating gender discrimination. Still, both practices would seem to be most useful in the phase after a job advertisement has been published, because they would prevent discrimination while reading application letters and/or during the interview.

## 6. Conclusion

The questionnaire that was sent to all 33 country experts of the European Network of Legal Experts in the Field of Gender Equality with the purpose of assembling information on discriminatory advertisements has, as set out above, resulted in several important findings. It is interesting to note that major differences exist between the various countries. The prevalence of discrimination in job advertisements differs from country to country, with no clear regional dimension being discernible. Also, the legal situation is highly divergent, regardless of the fact that all EU Member States are bound by the Recast Directive. Despite this varied picture, five core recommendations can be made on the basis of the experts' reports as regards improving the effectiveness of the prohibition of discrimination in job

advertisements. Firstly, all countries covered in this report already prohibit discriminatory advertisements, but some only do so implicitly. Given the symbolic value of anti-discrimination legislation, we think that all countries should include an explicit prohibition on discriminatory advertising in their national anti-discrimination law, covering all grounds that fall under the national equal treatment legislation. Publishers of advertisements could also refer to this explicit provision.

A second point of interest is that, in most of the 33 countries, only the employer can be held liable (sometimes because the prohibition of discriminatory advertisements is to be found in labour law). This prohibition is not very adequate, as many employers only incidentally publish a job advertisement and lack knowledge of the exact requirements of equal treatment legislation. We therefore recommend shifting the focus to those who are professionally and/or regularly involved in publishing job advertisements: temporary agencies, recruitment agencies and the media, including internet fora where job ads are placed. Expressly extending the liability for discriminatory advertisements to these parties would be a step in the right direction, as it would increase the effectiveness of the prohibition and remove the uncertainty as regards the position of recruitment agencies and the media in this context.

Thirdly, it is clear from the complete lack of recent court case-law reported by virtually all experts that legal standing should not be limited to people who have a direct interest in bringing a case. On the contrary, as advertisements do not specifically address one individual, but are communicated to the broader public, it should be possible for anyone belonging to a group that is discriminated against, or for associations/foundations representing the interests of this group, to bring a claim before the national equality body or, preferably, before the courts. This increases the chance that the prohibition of discrimination in job advertisements is not just a dead letter, but is actually enforced.

Fourthly, effectiveness would be increased if the labour inspectorate, national equality body or ombudsperson were to take responsibility for ensuring that equal treatment law is respected everywhere, especially if civil society activism is lacking. Clear, comprehensive and accessible information should be provided on how to comply with the requirements of anti-discrimination law, as this could prevent many well-meaning employers and media from unknowingly publishing discriminatory advertisements. The public body's role would ideally also extend to actively checking and monitoring all job ads and, ultimately, bringing cases before the national equality body or court. It is clear from the country experts' contributions that, if these bodies do not take this responsibility, nobody else does, with predictable consequences.

A fifth point concerns the dissuasiveness of remedies and sanctions. Currently, the problem seems to be twofold: only very few cases are brought before a national equality body or court; and when they reach this stage and a violation of the equal treatment law is found, although we have seen that in some cases fines have been imposed and that in other cases damages were awarded, normally only a non-binding opinion is issued. More often awarding sufficient fines or damages might work as a two-edged sword, on the one hand deterring employers and other parties from publishing discriminatory ads, on the other hand incentivising wronged individuals (either potential applicants or others) to bring a claim, and thus enforcing equal treatment norms.

It is true that eradicating discrimination in job advertisements does not eradicate discrimination from society. Advertisements are the start of the recruitment process, and discrimination takes place during later phases of recruiting as well, often with severe material and general damages for individual victims. Still, one should not underestimate the important symbolic value of job advertisements. Every discriminatory job advertisement that is tolerated by the authorities sends out two signals: to the discriminator, that his or her illegal actions are permitted; and to those who are discriminated against, that their rights are not enforced and protected. Combating the phenomenon is therefore essential in ensuring equal opportunities for all who are willing to participate in the labour market.

Hence it is crucial to combat discriminatory advertisements effectively, for which – as set out above – a multi-layered approach is required. Explicit legal standards, the inclusion of recruitment agencies and traditional publishers and web fora as norm-addressees, the

expansion of standing to all individuals belonging to the group that is discriminated against and all organisations representing their interests, a stronger role for public authorities in providing guidelines for employers, checking compliance and bringing cases before an equality body or court, and dissuasive remedies and sanctions are all necessary to reach the goal of ensuring the elimination of discriminatory advertisements – and to ensure that nobody loses the opportunity to find a job due to a false start.

# EU Policy and Legislative Process Update

April 2014 – November 2014

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1. On 14 April 2014 the European Commission published online ‘Questions & Answers: Report on the EU Charter of Fundamental Rights and Progress Report on Gender Equality’. These questions and answers relate to core issues, such as explaining the notion of fundamental rights; the situations when the Charter applies, including the occasions in 2013 in which it was applied; and the implementation of the Charter in Member States.

The questions and answers are available to view and download at:

[http://europa.eu/rapid/press-release\\_MEMO-14-284\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-284_en.htm).

2. On 14 April 2014, the Vice-President of the European Commission and EU Justice Commissioner Viviane Reding presented the Fundamental Rights report and the Report on Progress on equality between women and men in 2013. This marked almost exactly four years to the day since all of the Commissioners took an oath on the EU Charter of Fundamental Rights before the Court of Justice. Ms. Reding noted that one of the report’s main findings is that the EU Charter is becoming increasingly popular and important to citizens. The following three examples demonstrate how the EU Charter is becoming a concrete reality: (i) data protection reform through giving effect to Article 8 of the Charter; (ii) legislative developments at EU-level concerning women on company boards, encouraged by ensuring equal opportunities for all; and (iii) the increasing references made by national and European courts in their jurisprudence to the EU Charter.

The presentation of the Fundamental Rights report can be viewed at:  
[http://europa.eu/rapid/press-release\\_SPEECH-14-327\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-327_en.htm).

The Report on Progress on equality between women and men in 2013 can be viewed at:  
[http://ec.europa.eu/justice/gender-equality/files/swd\\_2014\\_142\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/swd_2014_142_en.pdf).

The 2013 Report on the Application of the EU Charter of Fundamental Rights can be viewed and downloaded at:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1399031014350&uri=CELEX:52014DC0224>.

3. On 2 May 2014 the European Commission Directorate General for Justice published a new statistical report entitled *Gender equality in the workforce: Reconciling work, private and family life in Europe*. This report summarises the findings of a research project focused on gender equality in the workforce, undertaken by the research organisation ‘RAND Europe’ and researchers at the Department of Sociology at the University of Groningen, the Netherlands. It provides a detailed analysis of the following topics:
  - (i) the Barcelona childcare targets;
  - (ii) labour force participation rates of men, women, and parents;
  - (iii) balancing work and family for single parents;
  - (iv) gender inequalities in the transition from school to work;
  - (v) share of earnings and domestic work amongst couples; and
  - (vi) access to family-friendly working schedules.

The report is available to view and download at:

[http://ec.europa.eu/justice/gender-equality/files/documents/140502\\_gender\\_equality\\_workforce\\_ssr\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/140502_gender_equality_workforce_ssr_en.pdf).

4. On 20 May 2014, the European Commission Directorate General for Justice organised a meeting for promoters of projects on violence against women, funded through the Progress and Daphne programmes. 43 participants from national governments and NGOs attended the meeting, which aimed to improve collective knowledge about the programmes, and to make the projects contribute more effectively to the implementation of policies. Issues tackled included female genital mutilation, sexual violence and domestic violence.

The presentations made during the meeting can be downloaded via:

[http://ec.europa.eu/justice/newsroom/gender-equality/events/meeting\\_vaw\\_20140320.htm](http://ec.europa.eu/justice/newsroom/gender-equality/events/meeting_vaw_20140320.htm).

5. On 21 May 2014 the Council of the European Union adopted Conclusions *on Gender Equality in Sport* (2014/C 183/09). The Council Conclusions invite Member States to consider developing policies and programmes to eliminate gender stereotypes and promote gender equality in education curricula and practices from an early age. The Council Conclusions also invite Member States, in cooperation with sports organisations, to promote the prevention of gender based violence in sport, and the protection of victims and potential victims of sexual abuse and harassment in sport.

The Council Conclusions are available to view and download at:

[http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1412674897125&uri=CELEX:52014XG0614\(09\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1412674897125&uri=CELEX:52014XG0614(09)).

6. On 3 and 4 June 2014, a seminar on gender impact assessment was held in Vienna. It served as an exchange of good practices, and focused on the tools needed to increase the recognition of the gender dimension in budgets, legislation, and policy assessment. Participants in particular praised the sound legal bases of both the Austrian approach and the practical procedure of the Finnish approach.

The discussion and comments papers from the seminar are available to download via:

[http://ec.europa.eu/justice/gender-equality/other-institutions/good-practices/review-seminars/seminars\\_2014/gender\\_impact\\_assessment\\_en.htm](http://ec.europa.eu/justice/gender-equality/other-institutions/good-practices/review-seminars/seminars_2014/gender_impact_assessment_en.htm).

7. On 5 and 6 June 2014 the Council of the European Union adopted Conclusions on *Preventing and combating all forms of violence against women and girls, including female genital mutilation*. Member States and the European Commission are called upon to develop, implement, and further improve comprehensive, multidisciplinary and multi-agency coordinated action plans, programmes or strategies; to prevent and combat all forms of violence against women and girls. Member States and the European Commission were called, where appropriate, to take into account the results of the FRA survey on violence against women.

The Council Conclusions are available to view and download at:

[http://ec.europa.eu/justice/gender-equality/files/jha\\_violence\\_girls\\_council\\_conclusions\\_2014\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/jha_violence_girls_council_conclusions_2014_en.pdf).

8. On 19 June 2014 the Council of the European Union adopted Conclusions on *Women and the economy: Economic independence from the perspective of part-time work and self-employment*. The Council Conclusions outline a new set of indicators to measure progress towards equal economic participation, including indicators on part-time and self-employment.

Member States are called upon to *inter alia* support a work-life balance for women and men; reduce gender segregation at all levels of education and employment; and address gender



stereotypes that adversely affect women and men, with a particular emphasis on promoting the greater involvement of men in caring for children.

The Conclusions are available to view and download at:

[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/lisa/143269.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lisa/143269.pdf).

9. On 27 June 2014 the European Commission Directorate General for Justice released a factsheet on the proposed Directive on improving the gender balance in listed company boardrooms. It sets out clearly the aims of proposal, the companies that will be affected, the requirements of the proposal, the position of the European Parliament and negotiations in the Council, and relevant statistics on the current share of women on boards and the national measures in place in the 28 Member States.

The factsheet is available to view and download at:

[http://ec.europa.eu/justice/gender-equality/files/gender\\_balance\\_decision\\_making/boardroom\\_factsheet\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/boardroom_factsheet_en.pdf).

10. On 10 July 2014 the Council of Europe Commissioner for Human Rights published a comment *on women's rights during the crisis*. The comment emphasises the unequal footing of men and women in the economic crisis, and the way in which austerity measures disproportionately negatively impact women. The Commissioner also draws attention to the increasing feminisation of poverty across Europe, and calls for the increased participation of States in targeted and gender-sensitive recovery policies.

The full text of the comment is available to view at:

<http://www.coe.int/en/web/commissioner/-/protect-women-s-rights-during-the-crisis#more-475>.

11. On 18 July 2014 Eurostat presented new gender statistics for the EU alongside indicators such as education, labour market, earnings, and health. The statistics show that the three major sources of differences between the average earnings women versus men are: (i) the gender pay gap; (ii) the gap in the number of hours in paid work; and (iii) the gender employment gap.

The statistics are available to view and download at:

[http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Gender\\_statistics](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Gender_statistics).

12. On 1 August 2014 the Council of Europe Convention on preventing and combating violence against women and domestic violence (the 'Istanbul Convention') came into effect. At the time of writing of this European Gender Equality Law Review, 15 Council of Europe States have ratified the Convention.

The Convention is available to view and download at:

<http://www.coe.int/t/dghl/standardsetting/convention-violence/convention/Convention%20210%20English.pdf>.

A list of countries that have ratified the Convention is available at:

<http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=210&CM=&DF=&CL=ENG>.

13. On 3 September 2014, the European Parliament published *A new strategy for gender equality post 2015: Compilation of in-depth analyses, workshop 3 September 2014*. The publication presents findings and issues recommendations in the following areas: gender mainstreaming;

gender budgeting and monitoring; economic independence and the position of women on the labour market; maternity leave, paternity leave, and parental leave and unpaid care work; women in political and economic decision-making; dignity, integrity, and violence against women; and gender aspects of foreign affairs and development cooperation. The recommendations include: improve and increase policy coherence in the promotion of gender equality in all areas of EU external action; sustain and strengthen political leadership and senior management support for gender equality in EU external relations at headquarters and delegation level; and invest further in institution-wide expertise and capacity-building in EU delegations and headquarters.

The document is available to view and download at:

[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509984/IPOL\\_STU%282014%29509984\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509984/IPOL_STU%282014%29509984_EN.pdf);

and also at EU book shop, at:

<http://bookshop.europa.eu/en/a-new-strategy-for-gender-equality-post-2015-pbQA0414743/?CatalogCategoryID=m3UKABstAj4AAAEjh4cY4e5K>.

14. On 24 September 2014, the European Commission released new statistics that show the average share of women on boards of the largest publicly listed companies in the EU has risen to 18.6 % (figures as of April 2014). This rise is unprecedented, and represents a shift of one percentage point since the previous data collection six months ago (October 2013). The figures show that accelerated progress correlates to increased political and regulatory pressure to increase the share of women on company boards. Significant progress is concentrated in only a few Member States; in ascending order Germany, the United Kingdom, the Netherlands, Slovenia, Italy, and France. However, this progress in the boardrooms has not been translated to the top executive positions, where only 3.3 % of the largest listed companies in Europe have a woman CEO (Chief Executive Officer).

The factsheet is available to view and download at:

[http://ec.europa.eu/justice/gender-equality/files/womenonboards/wob-factsheet\\_2014\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/womenonboards/wob-factsheet_2014_en.pdf).

15. In October 2014, the European Union Agency for Fundamental Rights published the report *Discrimination against and living conditions of Roma women in 11 EU Member States*. The report is based on studies undertaken in Bulgaria, the Czech Republic, Greece, Spain, France, Hungary, Italy, Poland, Portugal, Romania, and Slovakia. The findings of the report reveal that while the ethnic gap between Roma and non-Roma is already wide in key areas of life (such as education, employment, health, and experiences of discrimination), the situation is considerably worse for Roma women. For example, 23 % of the Roma women surveyed say they cannot read or write. Severe housing deprivation, early marriage, and access to healthcare are identified as key areas for concern.

The report is available to view and download at:

[http://fra.europa.eu/sites/default/files/fra-2014-roma-survey-gender\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-roma-survey-gender_en.pdf).

16. On 10 October 2014, the European Commission published the summary report of a seminar held in London, entitled *Exchange of good practices on gender equality: Encouraging female entrepreneurship*. The seminar discussed how gender-focused business support can be effectively delivered through women-focused initiatives, as well as how this support provided by stakeholders and politicians can be secured. Important issues that were raised during the discussions included the need to reconsider policies supporting self-employed women and men in crisis-periods; the desire to redefine the meaning of ‘successful business’; and the recommendation to collect more detailed and accurate quantitative and qualitative data.

Representatives of both the United Kingdom and Germany presented discussion papers, and representatives from a further 11 States involved in the seminar offered comments papers.

The summary report, discussion papers, and comments papers can all be downloaded via: [http://ec.europa.eu/justice/gender-equality/other-institutions/good-practices/review-seminars/seminars\\_2014/female\\_entrepreneurship\\_en.htm](http://ec.europa.eu/justice/gender-equality/other-institutions/good-practices/review-seminars/seminars_2014/female_entrepreneurship_en.htm).

17. On 23 and 24 October 2014 the Italian Presidency of the Council of the European Union hosted a high-level conference, titled *Gender Equality in Europe: Unfinished Business? – Taking stock 20 years after the Beijing Platform for Action*. The conference was organised by the Department for Equal Opportunities of the Presidency of the Italian Council of Ministers in collaboration with the European Commission. It was an opportunity for different stakeholders to discuss issues related to the Beijing Platform for Action and the agenda for women's empowerment, which were approved in 1995 during the Fourth World Conference on Women.
18. On 1 November 2014, the new European Commission presided over by Jean-Claude Juncker started its term of office, which will run until 31 October 2019. The European Parliament elected Mr. Juncker on 15 July 2014 by a strong majority of 422 votes. Despite Mr. Juncker previously urging governments to submit more female candidates, only 9 of the 28 new Commissioners are women.

The new Commissioner for Justice, Consumers and Gender Equality is Ms. Věra Jourová, from the Czech Republic. Ms. Jourová has explicitly expressed her intent to ensure the adoption of the Directive on ensuring a gender balance on company boards by the end of 2015, and has emphasised the importance of adopting a strong and effective strategy on gender equality. Concerning the latter, Ms. Jourová has identified closing the gender gaps in pay, labour market participation, pensions, and power; fighting violence against women; and the need for improved and high quality childcare infrastructures as priorities. In addition, Ms. Jourová has expressed her commitment to the objectives of the proposed Maternity Leave Directive, and has stated her willingness to find a compromise between the positions of the European Parliament and the Council.

See the home-page of the Juncker Commission at:

[http://ec.europa.eu/index\\_en.htm](http://ec.europa.eu/index_en.htm).

View Mr Juncker's Political Guidelines for the European Commission at:

[http://ec.europa.eu/about/juncker-commission/docs/pg\\_en.pdf](http://ec.europa.eu/about/juncker-commission/docs/pg_en.pdf).

See the Commitments made by Ms. Jourová before the Committee on Women's Rights and Gender Equality at:

[http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/509995/IPOL\\_BRI\(2014\)509995\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/509995/IPOL_BRI(2014)509995_EN.pdf)

# Court of Justice of the European Union Case Law Update

April 2014 – November 2014

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- **Case C-173/13 of 17 July 2014, Reference for a preliminary ruling – Administrative Appeal Court, Lyons, France (*Cour administrative d'appel de Lyon*) in the case of Maurice Leone & Blandine Leone v Garde des Sceaux, ministre de la Justice & Caisse nationale de retraite des agents des collectivités locales**

*Article 141 EC, Equality of pay for female and male workers*

## **Facts**

The applicant Maurice Leone, a civil servant in the hospital sector, worked as a nurse in civilian care homes in Lyon. In 2005 he applied for early retirement with immediate payment of his pension in his capacity as the father of three children. His application was rejected on the ground that he had not taken a break from work for each of his children. Mr Leone then started legal proceedings, claiming that he was the victim of indirect discrimination. Mr Leone claimed that female civil servants automatically satisfy the condition under French law relating to a career break by reason of the automatic, compulsory nature of maternity leave, while male civil servants are for the most part excluded from those benefits because there is no legal provision enabling them to take paid leave equivalent to maternity leave. The Administrative Court of Appeal in Lyon referred this issue to the CJEU, and asked the following questions:

1. do the relevant national legal provisions indirectly discriminate between men and women within the meaning Article 157 TFEU?
2. if the answer to the first question is in the affirmative, can this indirect discrimination be justified?

## **Judgment of the CJEU (Fourth Chamber)**

- The Court, going directly against the Opinion of Attorney-General Jääskinen of 27 February 2014, found that the rules at stake did indirectly discriminate between men and women, because they ‘in reality, are liable to be met by a much lower proportion of male civil servants than female civil servants, with the result that it places a much higher number of workers of one sex at a disadvantage as compared to worker of the other sex’.
  - The Court also found that the measure cannot be justified because it does not genuinely concern the stated objective to compensate for career-related disadvantages resulting from taking a career break for reasons of birth, arrival in the home, or raising of children. In addition, the Court found that in its content, application, and exceptions; the measure was neither consistent nor systematic in relation to the objective pursued.
- It is interesting to note that the Court applied a very strict approach towards indirect discrimination, enabled by the strict interpretation and application of ‘consistent and systematic’ criterion, which originated in the case of *Gambelli*.<sup>1</sup>
  - In addition, the ‘consistent and systematic’ criterion seems to have been applied separately from the criterion that the measure is ‘genuinely concerned with attaining the stated objective’.
  - This approach is completely contrary to the Opinion of A-G Jääskinen, who emphasised instead that male and female workers are in different situations that cannot be compared,

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<sup>1</sup> Case C-243/01 *Reference for a preliminary ruling: Tribunale di Ascoli Piceno – Italy, Gambelli and Others* [2003] ECR I-13031, and Paragraph 67.

and the existence of comparable situations of different groups is crucial to make a finding of indirect discrimination.<sup>2</sup>

▪ **Case C-318/13 of 3 September 2014, Reference for a preliminary ruling – Supreme Administrative Court of Finland (*Korkein hallinto-oikeus*) in the case of X v the Ministry of Social Affairs and Health**

*Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security*

**Facts**

X, born in 1953, was injured in an accident at work, which occurred on 27 August 1991. The Insurance Court held that he was entitled to a lump-sum payment of compensation for long-term disability, which the competent insurance authority paid to him in the amount of EUR 4 198.98. However, Finnish legislation applies the different life expectancies of women and men as an actuarial calculation criterion for statutory social benefits payable due to an accident. X brought an action against the decisions, arguing that the amount of compensation ought to be calculated on the basis of the same criteria as those stipulated for women, which would result in an additional EUR 278.98. When the complaint reached the Supreme Administrative Court, the Court decided to stay proceedings and asked the CJEU:

1. If Article 4(1) of Directive 79/7 is to be interpreted to preclude national legislation, when that national legislation applies the different life expectancies of women and men as an actuarial calculation criterion and results in a smaller benefit for a man than for a woman in the same age and situation; and
2. If the answer to the previous question is in the affirmative, whether or not the case involves a sufficiently serious breach of EU law.

**Judgment of the CJEU (Second Chamber)**

- The Court found that the unequal treatment could not be justified, as life expectancy is not included in the (exhaustive) grounds of derogation as provided for by Article 7(1) of the Directive; and further that a calculation of compensation cannot be made on the basis of such a generalisation. It therefore concluded that Article 4(1) of the Directive should be interpreted to preclude the national legislation as described by the Supreme Administrative Court in its first referral question.
- As to the second question, the Court decided that it was for the national court to decide whether the infringement of EU law must be considered ‘sufficiently serious’, but provided guidance on how to do so.

▪ **Case C-221/13 of 15 October 2014, Reference for a preliminary ruling – District Court, Trento, Italy (*Tribunale ordinario di Trento*) in the case of Teresa Mascellani v Ministero della Giustizia**

*Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC*

**Facts**

The applicant in the main proceedings is an employee at the Ministry of Justice (*Ministero della Giustizia*), and since October 2000 has been working part-time. Her contract was unilaterally terminated and a new full-time working arrangement imposed, in accordance with

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<sup>2</sup> See: Case C-173/13 Opinion of Advocate General Jääskinen of 27 February 2014.

national law. The applicant opposed these changes, and stated that working part-time has enabled her to care for her family and undertake vocational training.

The District Court (referring court) has asked the CJEU:

1. Should Clause 5.2 of the Framework Agreement implemented by Directive 97/81 be interpreted to mean that provision may not be made in national legislation, which allows for employers to convert a part-time employment relationship into a full-time employment relationship even when the employee does not consent?
2. Does Directive 97/81 preclude a provision of national law under which employers may convert a part-time employment relationship into a full-time employment relationship, even where the employee does not consent?

#### ***Judgment of the CJEU (Third Chamber)***

- Within the context of the Directive, a part-time employment relationship increased to a full-time employment relationship is not comparable to a full-time employment relationship reduced to a part-time employment relationship; because the consequences of these actions differ, particularly in remuneration of the worker.
  - The Directive should thus not be interpreted to preclude national legislation that allows for such a conversion without the employee's consent.
- It is interesting to note that even though the applicant cited family-care reasons, a claim of indirect discrimination on the ground of sex or gender was not made.

#### **▪ Case C-252/13 of 22 October 2014 – Failure of a Member State to fulfil obligations – The European Commission v The Netherlands**

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

#### ***Facts***

On 30 September 2011 the Commission, acting under Article 258 of the EU Treaty, sent the Kingdom of the Netherlands a reasoned opinion stating its view that by maintaining in force provisions of Netherlands legislation contrary to Article 1(2) (a) and (b), Article 15, and Article 28(2) of Directive 2006/54, the Kingdom of the Netherlands has failed to fulfil its obligations under that Directive. The Commission argued that the Netherlands allegedly did not sufficiently establish that if female workers returning after the conclusion of maternity leave are faced with less favourable employment conditions, this is contrary to the prohibition on discrimination on the grounds of pregnancy, childbirth, and motherhood. The Commission rejected as insufficient both the argument that when a legal right to leave is recognised, that right automatically implies that any less favourable treatment is unlawful; and the possibility to bring an action on the basis of the general prohibition of discrimination. The Commission claims the Court should declare that the Kingdom of the Netherlands has failed to fulfil its obligations under the Directive, and order the Kingdom of the Netherlands to pay the costs of proceedings.

#### ***Judgment of the CJEU (Sixth Chamber)***

- Although the Commission sets out in detail the Netherlands legislation in force, this is only for the purposes of its contention that those measures are insufficient to ensure the full transposition into national law of the provisions of Directive 2006/54 – the Commission failed to identify a specific rule of Netherlands law which is contrary to the Directive.

- Without the crucial information relating to a specific rule of Netherlands law, the Court cannot rule on the order sought, and therefore considers the application fails to meet the requirements of clarity, precision, and coherence.
- The action is dismissed as inadmissible.

## **OPINION OF ADVOCATE-GENERAL**

- **Case C-527/13 Opinion of Advocate-General Yves Bot of 9 October 2014**  
**Request for a preliminary ruling from the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia, Spain) lodged on 7 October 2013 – Lourdes Cachaldora Fernández v Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS)**

*Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security*

### ***Facts***

Under Spanish law, permanent invalidity pensions are calculated by considering the contributions paid in the eight years prior to the occurrence of the event giving rise to the invalidity. The law provides a corrective mechanism if, during some months of that reference period, the person concerned has not paid contributions to the social security scheme. If the person concerned ceased her/his professional activity immediately after a period of full-time employment, the protective mechanism allows for the contribution applicable to periods of full-time employment to be taken into account. However, if that person was working part-time immediately prior to interrupting contribution payments, the integration of the periods when the person did not pay contributions is to be calculated using a reduced contribution. This was the case for the applicant Ms. Lourdes Cachaldora Fernández, who worked part-time only for four years prior to ceasing contributions, and before that period worked for almost 27 years full-time.

When the case reached the High Court of Justice, the Court asked the CJEU if the method of calculation was incompatible with EU rules that preclude:

1. discrimination between men and women in social security; and
2. discrimination between full-time and part-time workers.

The Court considered the disproportionately high number of female part-time workers in Spain as giving rise to potential indirect sex discrimination.

### ***Opinion of Advocate-General Yves Bot***

1. AG Bot did not consider the provision in question of the Spanish legislation to fall within the scope of the Directive on part-time work.
  2. AG Bot did consider that the legislation introduces indirect discrimination on the ground of sex, contrary to Directive 79/7.
- The AG reasoned that the calculation method is likely to penalise far more women than men, considering the percentage of female part-time workers in Spain.
  - He also reasoned that the method in question reduces the pension in a way that is disproportionate in view of the contributions paid by the applicant over the entirety of her career, and that the calculation method could therefore not be justified.

# European Court of Human Rights Case Law Update

April 2014 – November 2014

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## ▪ Case of *S.A.S. v. France* (Application no. 43835/11) of 1 July 2014 – Grand Chamber Judgment

### *Facts*

The applicant is a French national who was born in 1990 and lives in France. She is a devout Muslim and in her submissions she said that she wore the *burqa* and *niqab* in accordance with her religious faith, culture and personal convictions. As she explained, the *burqa* is a full-body covering including a mesh over the face, and the *niqab* is a full-face veil leaving an opening only for the eyes. The applicant also emphasised that neither her husband nor any other member of her family put pressure on her to dress in this manner. She added that she wore the *niqab* in public and in private, but not systematically. She was thus content not to wear the *niqab* in certain circumstances but wished to be able to wear it when she chose to do so. Lastly, her aim was not to annoy others but to feel at inner peace with herself. Following the entry into force on 11 April 2011 of a law prohibiting the concealment of one's face in public places, the applicant has been deprived of her possibility to wear the *burqa* and *niqab* in public.

Relying in particular on Articles 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion) and 10 (freedom of expression), the applicant complained that she was unable to wear the full-face veil in public. Lastly, under Article 14 (prohibition of discrimination) she complained that the ban led to discrimination on grounds of sex, religion and ethnic origin, to the detriment of women who, like herself, wore the full-face veil. The Court especially noted that although the ban in national legislation mainly affected certain Muslim women, the ban was based on the fact that some clothing concealed the face, and not its religious connotations. The Court also noted that as the law concerned the concealment of faces in public, it constituted a choice of society, and France had a wide margin of appreciation.

### *The Court:*

1. *Declares*, unanimously, the complaints concerning Articles 8, 9 and 10 of the Convention, taken separately and together with Article 14 of the Convention, admissible, and the remainder of the application inadmissible;
2. *Holds*, by fifteen votes to two, that there has been no violation of Article 8 of the Convention;
3. *Holds*, by fifteen votes to two, that there has been no violation of Article 9 of the Convention;
4. *Holds*, unanimously, that there has been no violation of Article 14 of the Convention taken together with Article 8 or with Article 9 of the Convention;
5. *Holds*, unanimously, that no separate issue arises under Article 10 of the Convention, taken separately or together with Article 14 of the Convention.

## ▪ Case of *Hämäläinen v Finland* (Application no. 37359/09), of 16 July 2014 – Grand Chamber Judgment

### *Facts*

The applicant, Heli Hämäläinen, is a Finnish national who was born male and married in 1996. She and her wife had a child in 2002 and in 2009 Ms Hämäläinen underwent male-to-



female gender reassignment surgery. Although she had changed her first names in June 2006 she could not have her identity number changed to indicate her female gender in her official documents unless her wife consented to the marriage being turned into a civil partnership (which she refused to do) or unless the couple divorced. The couple, who are Evangelical Lutherans, preferred to remain married because divorce would be against their religious convictions and they felt that a civil partnership did not provide them and their child the same degree of security as marriage. Ms Hämäläinen's request to be registered as female at the local registry office was therefore refused.

Her appeal to the domestic courts against the refusal to register her as a female was rejected on the grounds that the law relating to confirmation of the gender of transsexuals was not intended to change the fact that only a man and a woman could marry under Finnish law. In 2010 the Supreme Administrative Court refused her further appeal and in November 2012 Fourth Section ECtHR held unanimously that there had been no violation of Article 8 ECHR (private and family life) in her case.

The applicant complained that by making recognition of her new gender conditional on transforming her marriage into a civil partnership, and the refusal to give her a female identity number which corresponded to her actual gender, violates her rights under Articles 8 and 14 respectively.

***The Court:***

1. *Holds*, by fourteen votes to three, that there has been no violation of Article 8 of the Convention;
2. *Holds*, by fourteen votes to three, that there is no need to examine the case under Article 12 of the Convention;
3. *Holds*, by fourteen votes to three, that there has been no violation of Article 14 taken in conjunction with Articles 8 and 12 of the Convention.

**▪ Case of J.L. v. the United Kingdom (Application no. 66387/10), of 30 September 2014**

***Facts***

The applicant, J.L., is a British national, who used to be married to an army officer who violently abused the applicant and one of her daughters. He resigned from the army following a court martial which found him guilty of 'ungentlemanly conduct'. The army therefore no longer had a duty to house the applicant, but in 1989 and on compassionate grounds the army moved her to Ministry of Defence (MoD) accommodation in Leeds, close to her daughters' boarding school, until she was able to obtain housing through the local council. Her licence to occupy was terminated in 1990, the MoD was granted a possession order in July 1993, and attempts were made to find the applicant alternative accommodation for her and her daughters. However, when an offer was made by the MoD, the applicant had to deny it because she is registered as disabled and requires a wheelchair, and the proposed housing did not accommodate this. Several further possession attempts were made, but the applicant remained in occupation. In 1996 the MoD sold its Leeds property to a company called Annington Homes and leased it back, and in 1999 it was stated that the applicant's dwelling was surplus to MoD requirements and should be handed back to Annington Homes. A possession order based on the 1993 order failed, but several notices to quit were still made. Possession proceedings started, and the MoD was granted a possession order. Bearing in mind the applicant's disability, her daughter's mental health problems, and her other daughter's young son with Crohn's disease, the applicant claims that the granting of the possession order violates her rights under Article 8 of the ECHR. However, and after an assessment of proportionality at two levels of jurisdiction, the High Court upheld the order on the grounds that the MoD had a legitimate and proportionate aim in seeking possession. Appeal was denied.

The applicant complained under Article 8 of the Convention that the possession proceedings brought against her had violated her right to respect for her home. The applicant further complained that in view of her 'different situation' the decision to grant the Ministry of Defence the right to evict her before alternative accommodation was available had violated her rights under Article 14 read together with Article 8 of the Convention. The Fourth Section of the ECtHR considered the assessment of proportionality sufficient to ensure the protection afforded by Article 8, and the Court also noted the applicant's failure to explain how she had been treated differently within the context of Article 14.

***The Court unanimously:***

*Declares* the application inadmissible.

▪ **Case of Konovalova v Russia (Application no. 37873/04) of 9 October 2014**

***Facts***

The applicant, a pregnant woman, was taken to hospital after her contractions started, and was handed at an unknown time, a written warning that all patients are involved in the study process of medical students. The applicant quickly started to show signs of fatigue, and the examining doctor after establishing she was 40 weeks pregnant, noted that the contractions seemed premature and put into a drug-induced sleep for two hours. Several hours after she awoke, she was given medication to suppress her irregular contractions, and was informed that her delivery was scheduled for the next day and that it would be attended by medical students. After the applicant awoke from another drug-induced sleep the next morning, her contractions intensified and soon after the doctors took her to the delivery room, where she gave birth. According to the applicant, in the delivery room she objected to the presence of medical students at the birth.

After civil proceedings against the hospital failed, the applicant then complained under Article 8 of the European Convention on Human Rights about the unauthorised presence of medical students during the birth of her child. The Government submitted that the applicant had implied her consent and that as spectators the students' presence did not amount to an 'interference'. The applicant argued that it amounted to an unlawful interference because she had not given written consent, and according to her she only learned of the students' presence too late, in an unfit condition to make alternative arrangements. The applicant also alleged under Article 3 of the Convention, that that management of the birth was deficient and that her delivery had been intentionally delayed so that medical students could be present.

***The Court unanimously:***

1. *Declares* the complaint concerning the alleged violation of the applicant's right to respect for her private life admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 8 of the Convention; and
3. *Holds* that the respondent State is to pay the applicant EUR 3 000 in respect of non-pecuniary damages and EUR 200 in respect of costs and expenses.

# Court of Justice of the European Free Trade Association States Case Law Update

April 2014 – November 2014

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- **Case E-13/14 of the EFTA Surveillance Authority v Iceland, brought on 17 July 2014 – Status: pending**

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

## **Facts**

An action against Iceland was brought before the EFTA Court on 17 July 2014 by the EFTA Surveillance Authority. The EFTA Surveillance Authority requests the EFTA Court to:

1. Declare that by failing to adopt and/or notify the EFTA Surveillance Authority of all the measures necessary to implement Council Directive 2004/113/EC, as adapted to the EEA Agreement by way of Protocol 1 and by Joint Committee Decision No 147/2009, within the time prescribed (no later than 26 August 2013), Iceland has failed to fulfil its obligations under the Act and under Article 7 of the EEA Agreement.
2. Order Iceland to bear the costs of these proceedings.

Deadline for written observations from Governments and relevant institutions: 9 December 2014.



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

April 2014 – November 2014

**AUSTRIA** – Martina Thomasberger

## Policy developments

After a public debate on adequate female representation in federal and provincial legislative bodies, a renewal of initiatives to implement legislation concerning quota systems for elections and parliamentary representation of women began in the summer. Representatives of the two major parties have agreed to start talks if quota systems should be integrated into the federal election legislation. Of the five parties currently holding federal parliamentary seats, the Green Party (*Die Grünen*) and the Social-Democratic Party (*SPÖ*) have committed themselves to an internal quota system in their party statutes. A current conflict over the succession to a parliamentary seat vacated by the death of social-democratic President of Parliament, Barbara Prammer, in August 2014, showed a legal conflict between party statutes and election legislation. Experts on election legislation have affirmed the priority of legal rules over internal party statutes, underlining at the same time that there would be no constitutional obstacles for a legal election quota system.<sup>1</sup>

Parental leave regulations do not apply to foster parents who take care of small children without the intention of adoption under the supervision of child welfare authorities. This has been pointed out by a parliamentary initiative.<sup>2</sup> Additionally, this matter will be included in a prospective round of negotiations between the two governmental parties and representatives of the social partners that has been scheduled for autumn 2014, on amendments to parental leave and child-care benefits which are expected to lead to legislative changes in 2015.

## Legislative developments

The general family benefit (*Familienbeihilfe*) is a family benefit in cash that is payable to parents raising their children in Austria.<sup>3</sup> It had not been increased for several years. As of 1 July 2014 every benefit has been increased by 4 % and will be increased by another 1.9 % in 2016 and in 2018 respectively. Benefits for children with disabilities are increased by 8.4 %.

Competent federal and provincial authorities have laid the groundwork for policy changes in childcare by a binding constitutional agreement. Pre-school is set to include not only elementary care but also elementary education. The capacity of childcare is going to be extended in order to meet the Barcelona goals, and operators of child-care institutions are being encouraged to extend their services. Closing days for pre-school care institutions are to be limited to an amount that is compatible with the requirements of parents' working life, and opening hours should be organised with improved considerations of working time and business hours. The federal authorities have agreed to co-finance the extension of child-care

<sup>1</sup> <http://diestandard.at/2000005300663/Unterschiedliche-Ansaetze-im-Europa-Vergleich>, accessed 12 September 2014.

<sup>2</sup> Legislative initiative No. 347/A XXV legislative period (*Initiativantrag 347a XXV. Gesetzgebungsperiode*), [http://www.parlament.gv.at/PAKT/VHG/XXV/A/A\\_00347/imfname\\_344040.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/A/A_00347/imfname_344040.pdf), accessed 12 September 2014.

<sup>3</sup> 80 % of recipients are female, because the Act on Balancing Family Burdens (*Familienlastenausgleichsgesetz, FLAG*) requires payment to the mother of the children unless a request for payment to the father or another person or institution acting in place of parents is submitted to the authorities.

in cooperation with the competent authorities of the nine provinces (*Länder*).<sup>4</sup> Between 2014 and 2017 EUR 305 million will be allocated by the Ministry of Finance towards these goals providing the requirements are met and the measures are co-financed by the Provinces.

## Case law of national courts

### *Civil courts*

Two separate cases concerning the entitlement to small children's benefit (*Kinderbetreuungsgeld* – maximum age of child three and a half years) for parents in same-sex partnerships have been brought before the Civil Courts for Labour and Social Law (*Landesgerichte als Arbeits- und Sozialgerichte*) in two different regionally competent jurisdictions. In both cases the civil courts decided that the benefit could not be split between the female life partners and was payable only to the birth mother. Both cases were appealed to the two regionally competent superior courts (*Oberlandesgerichte*). While *Oberlandesgericht Linz* ruled in favour of the applicant and conceded the right to split the benefit between same-sex partners, *Oberlandesgericht Innsbruck* denied entitlement to the benefit for the parent who did not bear the child. The case is now pending with the Supreme Court (*Oberster Gerichtshof*).<sup>5</sup>

## BELGIUM – Jean Jacqmain

### Policy developments

Following the General Elections of 25 May 2014, a government was pieced together in every federate component of the state but, at the time of reporting, negotiations were still under way to build a federal coalition.

### Legislative developments

#### *Prohibition of transgender discrimination*

Under Article 4 (2) of the Act of 10 May 2007 'aimed at combating discrimination between women and men' (the 'Gender Act'),<sup>6</sup> discrimination grounded on gender reassignment is to be regarded as gender discrimination.

An Act of 22 May 2014<sup>7</sup> inserted a new subsection (3) in Article 4, to provide that discrimination grounded on 'gender identity or gender expression' is also to be regarded as gender discrimination.

Although the *Conseil d'État/Raad van State*, in its capacity of legal adviser to the federal government, had recommended that the proposed provision should define those new concepts, such definitions are only to be found in the statement of purpose of the Act,<sup>8</sup> which refers rather verbosely to non-binding instruments.<sup>9</sup> Consequently, there must be a fear that the new Article 4(3) will raise endless legal disputes, especially now that gender discrimination in work relationships has become a criminal offence (see below).

<sup>4</sup> Agreement according to Article 15a Federal Constitutional Act (Bund-Länder-Vereinbarung gemäß Art 15(a) B-VG), [http://www.parlament.gv.at/PAKT/VHG/XXV/I/I\\_00187/fname\\_355218.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/I/I_00187/fname_355218.pdf), accessed 12 September 2014.

<sup>5</sup> See <http://derstandard.at/2000003174513/Streit-um-Kinderbetreuungsgeld-fuer-Lesben-geht-viele-etwas-an>, accessed 2 October 2014. The decisions of the lower courts have not been published.

<sup>6</sup> Available, like all legal instruments quoted, in French and Dutch at <http://www.juridat.be>, accessed 14 August 2014.

<sup>7</sup> *Moniteur belge/Belgisch Staatsblad*, 24 July 2014.

<sup>8</sup> *Documents parlementaires/Parlementaire stukken*, 2013-2014, no. 3483/001, available in French and Dutch at <http://www.lachambre.be> or [www.dekamer.be](http://www.dekamer.be), accessed 14 August 2014.

<sup>9</sup> Mainly the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, available at <http://www.yogyakartaprinciples.org>, accessed 14 August 2014.

***Prohibition of sexism in public places***

A second Act of 22 May 2014<sup>10</sup> made ‘sexism in public places’ a criminal offence, punishable by imprisonment (of one month up to one year) and/or a fine (of EUR 300 up to 6 000). The offence is defined as ‘any gesture or behaviour obviously aimed at expressing contempt towards a person on the grounds of her/his belonging to one sex, or at considering that person, on the same grounds, as an inferior or as reduced essentially to her/his sexual dimension, and which entails a serious infringement on that person’s dignity’. The offence can have been perpetrated in any public place, or in any place in the presence of witnesses, or in writings which have been made accessible to other persons, and the victim must be an identified person.

***Gender discrimination liable to penal sanctions***

As compared with the first two pieces of legislation on gender equality (namely, the Acts of 4 August 1978 and 7 May 1999), the present Gender Act has so far made a very limited use of penal sanctions (mainly in cases of instigation to discrimination or to hatred and violence). However, the same ‘second’ Act of 22 May 2014 (see above) inserted two new provisions (Article 28/1 and Article 28/2) into the Gender Act, to make gender discrimination in access to and provision of goods and services, and in work relationships, punishable by imprisonment (of one month up to one year) and/or a fine (of EUR 300 up to 6,000). The civil and labour law remedies already provided by the Gender Act remain available to victims of discrimination.

***Gender quota in Constitutional Court***

Up to now, Article 34.5 of the Special Act of 6 January 1989 concerning the Constitutional Court has only provided that the judges must belong to different sexes. Consequently, the bench of the Court is presently composed of 10 men and 2 women.

A special Act of 4 April 2014 amended the Special Act of 6 January 1989.<sup>11</sup> Most of the amendments were aimed at improving procedural aspects, but one of them introduced a gender quota in the composition of the bench, along the following lines.

There are 12 lifetime appointed judges at the Constitutional Court; 6 of them must have been either members of the Court of Cassation or the *Conseil d’État/Raad van State* (the highest administrative court), or professors of law in a university; the other 6 must have been members of a Parliament (federal or federate). The amendment (to Article 34.5 of the Special Act of 6 January 1989) provides that both sexes must be represented in each category, and that at least one-third of the 12 judges must belong to each sex. That provision will come into force when the quota is achieved; meanwhile, a judge belonging to the less represented sex must be appointed whenever the previous two appointments did not enhance the representation of that sex.

***Maternity support allowance***

Following the judgment rendered on March 2013 by the Labour Court of Appeal in Brussels,<sup>12</sup> the Equal Opportunities Council had recommended to the competent federal minister that ‘maternity support allowance’ should be made available on the same terms as maternity benefit to self-employed workers who had given birth. The Royal Decree of 17 January 2006 was consequently amended to that effect by the Royal Decree of 10 April 2014,<sup>13</sup> so that previous periods of contribution to the social security scheme for paid workers are now taken into account for the calculation of the required six-month period of contribution to the scheme for self-employed persons.

<sup>10</sup> *Moniteur belge/Belgisch Staatsblad*, 24 July 2014.

<sup>11</sup> *Moniteur belge/Belgisch Staatsblad*, 15 April 2014.

<sup>12</sup> See J. Jacquain ‘Belgium’ in: European Network of Legal Experts in the Field of Gender Equality, *European Gender Equality Law Review 2/2013*, European Commission 2013, p. 39, available at: [http://ec.europa.eu/justice/gender-equality/files/law\\_reviews/egelr\\_2013\\_2\\_final\\_web\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2013_2_final_web_en.pdf), accessed 13 October 2014.

<sup>13</sup> *Moniteur belge/Belgisch Staatsblad*, 5 May 2014.

### ***Gender testing federal policies***

Under Article 3 (2) of the Gender Mainstreaming Act of 12 January 2007, whenever a member of the federal government submitted any draft of legislation or regulation for the cabinet's approval, he/she had to assess the impact of that draft on the respective situations of women and men. The form of the assessment, or 'gender test', was to be defined by an ancillary Royal Decree, which was never adopted.

An Act of 15 December 2013 aimed at simplifying various administrative processes amended Article 3 (2) of the Gender Mainstreaming Act, so that the gender test will now be integrated, along with several other existing tests (e.g. on sustainable development, on reduction of red tape, etc.), into a single assessment instrument or 'Regulatory Impact Analysis' ('RIA'). The methodology of that new RIA and of the gender test in particular was described in an ancillary Royal Decree of 21 December 2013.<sup>14</sup>

The final four months preceding the General Elections were hardly a propitious period to evaluate the effectiveness of the RIA, but it is a potentially useful tool to improve the quality of public policies, gender mainstreaming included, all the more so as the Administrative Simplification Agency, the public body which coordinates the drafting of the RIA, makes it accessible for all groups and organisations concerned.

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

#### ***Labour Court of Appeal in Liège (Namur division), judgment of 17 February 2014***

A case of alleged gender discrimination related to pregnancy had been reported previously.<sup>15</sup> The local council of the city of Namur had engaged a female architect on a one-year employment contract, which was to serve as a probation period for a further contract of indefinite duration. Shortly after starting her job, she informed her employer that she was pregnant, thus causing great indignation in her supervisor. When the contract expired, the local council decided not to re-employ her.

In its judgment of 12 March 2013, the Labour Court of Appeal in Liège (Namur division) had concurred with the Namur Labour Court's finding that the claimant and the *l'institut pour l'égalité des femmes et des hommes* (Institute for the equality of women and men) had established prima facie evidence of direct discrimination, in accordance with Article 33 of the Gender Act which implemented Article 19 of Directive 2006/54/EC. However, the Labour Court had not examined the grounds for dismissal presented by the employer as unrelated to pregnancy with sufficient care, so that the local council had to be given opportunity to produce more evidence, including witnesses' testimonies, to establish those grounds. This was done conclusively as, in its final judgment of 17 February 2014,<sup>16</sup> the Labour Court of Appeal accepted that the local council's decision not to re-employ the architect was motivated exclusively by two professional blunders of such a serious nature as to demonstrate that the employee was unfit for the vacant position (of head of department). The case was dismissed.

## **BULGARIA – Genoveva Tisheva**

### **Policy developments**

The political crisis in Bulgaria which started at the beginning of 2013 remains a major problem even after the national elections held on 5 October 2014. This crisis affects the economic indicators but also weakens the efforts of whichever Government is in place to tackle serious social issues, including in the spheres of non-discrimination and gender equality.

<sup>14</sup> Both the Act and the Royal Decree were published in *Moniteur belge/Belgisch Staatsblad*, 31 December 2013.

<sup>15</sup> See J. Jacquain 'Belgium' in: European Network of Legal Experts in the Field of Gender Equality, *European Gender Equality Law Review 2/2013*, European Commission 2013, p. 39, available at: [http://ec.europa.eu/justice/gender-equality/files/law\\_reviews/egelr\\_2013\\_2\\_final\\_web\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2013_2_final_web_en.pdf), accessed 13 October 2014.

<sup>16</sup> *Rôle général* no. 2012/AN/41, not reported.



Some of the trends identified in the Report of the Expert Group on Gender and Employment, entitled 'The impact of the economic crisis on the situation of women and men and on gender equality policies'<sup>17</sup> are still valid for Bulgaria, as the country was placed in the group of countries heading for a double dip in terms of the length of the crisis. In fact, the political instability in the last two years coincided with a second cycle of the crisis, where trends like risk of poverty and social exclusion, including in-work poverty, job cuts and unemployment, increasing responsibility of women for maintaining the household, impact of fiscal consolidation on gender mainstreaming policies, were exacerbated.

Data from both trade unions and the Ministry of Labour and Social Policy reveal that the percentage of the working poor in Bulgaria has amounted to 7-8 % of the total number of employed over the past few years. The minimum wage and the average salary remain the lowest in the EU, although Bulgaria accepted the challenges of the Europe 2020 Strategy and the goal of reducing the number of people exposed to the risk of poverty by a total of 20 million people on an EU scale and by 260 000 in Bulgaria.<sup>18</sup>

The latest trends, identified by the National Statistical Institute, show that there is a considerable increase in the long-term unemployment rate (people who have been looking for employment for more than one year). This rate has reached 58.8 % of the total number of unemployed persons and women continue to predominate among the numbers of the long-term unemployed.<sup>19</sup>

The situation is being further exacerbated by the increase in the cost of certain basic necessities, namely heating and electricity, which was decided by the National Regulator, respectively from 1 July and 1 October 2014. The allegedly deliberately caused financial crisis created by closing down one of the biggest and most popular banks, the Corporate Commercial Bank, and depriving depositors of their deposit accounts added to the severity of the political and economic hardship of the country.

Another warning indicator is the worsening of the business climate, registered in June 2014, despite the positive trends identified at the beginning of the year. This is clearly due to the governmental crisis which generates insecurity, stagnation of reforms, and delays in administrative procedures. This will hold back economic development and also the development of social reforms and policies for some time.

In this context, the previous Government (May 2013- July 2014) undertook some positive steps aimed mainly at the alleviation of the impact of the crisis, and the risk of poverty. These measures, such as the increase of the minimum wage, the amount of benefits for raising a child, and benefits for disability, are also measures that directly affect women. In addition, during the mandate of the previous Government, for one year Bulgaria stopped the implementation of the pension reforms approved in 2012. The Government plans to carry out another broad discussion on the parameters of the pension system so that the measures undertaken should not burden disproportionately the generation born between 1950 and 1960. Political instability and a change of Government might delay the discussions which were expected in the autumn.

Other positive examples of policies on gender equality in the period of crisis are the National Plan for the implementation of the Recommendations of the CEDAW Committee which was adopted in 2013, and the draft legislation on gender equality and on the improvement of the national gender equality mechanism. Although some of them were discontinued due to the political crisis, the intention is there and the issues will be considered, hopefully by the next Government.

These initiatives will be considered in the section on legislative developments.

<sup>17</sup> See: [http://ec.europa.eu/justice/gender-equality/files/130522\\_crisis\\_report\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/130522_crisis_report_en.pdf), accessed 7 November 2014.

<sup>18</sup> See more at: <http://www.novinite.com/articles/159516/Labor+Minister%3A+Share+of+Working+Poor+in+Bulgaria+at+7-8#sthash.iyrrRlwX.dpuf>, last accessed 30 September 2014.

<sup>19</sup> Source: [www.nsi.bg](http://www.nsi.bg), accessed 22 October 2014.

## Legislative developments

Due to the political instability, the previous Government and Parliament also abdicated from their obligations in the fundamental penal law sphere and much needed legal reform, namely by failing to adopt a new Penal Code, based on the results from consultations and on the constructive criticism of experts from the judiciary and civil society. Thus the claims of organisations dealing with gender equality and women's rights for amendments in the Draft Penal Code directed at strengthening the protection of women and children against violence remained unaddressed. Among the suggestions are making all forms of violence against women a criminal offence and envisaging crimes related to such violence being prosecuted consistently as general crimes, including more severe punishment of crimes committed within the context of domestic violence.<sup>20</sup>

Related to the blocked legislative reform mentioned above is the reluctance to act, deferring responsibility and postponing to the next Government the signature and ratification of Convention No. 210 of the Council of Europe on preventing and combating violence against women and domestic violence, the so-called Istanbul Convention of the Council of Europe,<sup>21</sup> and taking effective measures as a follow-up to the EU Agency for Fundamental Rights (FRA) survey on violence against women.<sup>22</sup>

Another piece of legislation pending before the 42nd National Assembly, and abandoned half way, is the Draft Law on the amendment of the Law on Protection from Discrimination,<sup>23</sup> containing provisions aimed at harmonisation with the Recast Directive<sup>24</sup> amendment of the definition of the notion of burden of proof and expanding the definition of 'gender' so as to include in this notion also gender reassignment, in order to make the prohibition of gender discrimination more encompassing.

It is worth noting that in the period under review the Bulgarian Government, on the initiative of the Ministry of Labour and Social Policy, started to implement the National Plan on the implementation of the Recommendations of the CEDAW Committee<sup>25</sup> in the priority areas indicated by the Committee, i.e. the adoption of legislation on gender equality and the strengthening of the institutional mechanism on gender equality, up until the end of July 2014.<sup>26</sup>

Since 2010 the Bulgarian Government has also undertaken commitments in the same area in the process of the Universal Periodic Review (UPR), a mechanism within the UN Human Rights Council. Among the list of recommendations accepted explicitly by the Government is the adoption of a separate gender equality law in Bulgaria in the period until the next UPR, scheduled for spring 2015. The adoption of a special law on gender equality and the strengthening of the institutional mechanism will bring Bulgaria closer to the requirements of the EU Recast Directive 2006/54 and other directives in the field of equal treatment.

Driven by these international processes and the pressure of civil society, in spring 2014 an attempt to draft a gender equality law and to strengthen the implementation of gender equality through institutional mechanisms was made on the initiative of the Ministry of Labour and Social Policy. A working group was established and the National Council on

<sup>20</sup> For example, not all acts of domestic violence which result in bodily injury are publicly prosecuted. Those representing *average* bodily injuries between spouses are still treated by the prosecution as a private complaint – the result of the act is measured but not the act itself. The act of violence itself (the act of aggression against the person) remains unpunished, especially in close relationships.

<sup>21</sup> View the Convention at: <http://www.coe.int/t/dghl/standardsetting/convention-violence/convention/Convention%20210%20English.pdf>, accessed 10 November 2014.

<sup>22</sup> See: <http://fra.europa.eu/en/theme/gender>, accessed 7 November 2014.

<sup>23</sup> Promulgated in S.G. No. 86/2003 and last amended in S.G. 68/2013.

<sup>24</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

<sup>25</sup> See the National Plan in Bulgarian at: [www.mlsp.government.bg/equal/normativ.asp](http://www.mlsp.government.bg/equal/normativ.asp), accessed 7 November 2014.

<sup>26</sup> See the Recommendations of the CEDAW Committee at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fBGR%2fCO%2f4-7&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fBGR%2fCO%2f4-7&Lang=en), accessed 7 November 2014.

Gender Equality endorsed both steps in the direction of compliance with international and European standards. With the resignation of the Government, the work on the draft law on gender equality was discontinued.

All these initiatives for legal reform are worthwhile and needed, the time for change is ripe and, hopefully, the arguments and energy invested will not be lost and will be maintained in the near future.

The only finalised change in the field of gender equality was the adoption in May 2014 by the Bulgarian Government of amendments to the regulation of the National Council on Gender Equality. The changes were adopted in governmental Decree No. 108/10 May 2014.<sup>27</sup>

The Regulation on the structure and organisation of work of the National Council on Gender Equality provides for new rules for strengthening this mechanism, as a part of the equality bodies in Bulgaria. The body is located within the Council of Ministers, is chaired by the Minister of Labour and Social Policy and its Secretariat is placed within the unit in this Ministry dealing with equal opportunities, which is also a part of the equality bodies.

The National Council on Gender Equality is a body for regulation, coordination and consultation, which will support the Council of Ministers in the process of elaboration and implementation of the governmental policy in this field. The National Council will coordinate the activities of the different ministries and agencies which make up a part of the National Council, and also the cooperation with non-governmental organisations working on gender equality issues. The latter have the opportunity to apply in order to become associated members of the National Council and have the right to a consultative vote. Among the competences of the National Council will also be discussing and giving opinions on draft laws and other normative documents, support of research activities in the different ministries, and support of other projects on gender equality. The National Council is also provided with a monitoring and control function, which is not very clearly defined in terms of mechanisms, impact or outcomes. The National Council on Gender Equality will hold sessions once every three months.

### Case law of national courts

There are no important final decisions on landmark cases of discrimination based on sex for the reported period.

The cases brought by women for breach of the equal treatment principle in social security (EU Directive 79/7/EEC<sup>28</sup>) against the use of gender as an actuarial factor in the tables for calculation of pensions paid under the supplementary mandatory pension scheme in Bulgaria, are still pending and have again been postponed by the Supreme Administrative Court. A complaint before the European Commission is pending on this issue as well.<sup>29</sup>

And finally, despite the fact that the Bulgarian Government has due diligence obligations to guarantee effective access to justice, reparation and protection for women victims of gender-based violence, it has not yet provided compensation and reparation to the women and girls who are victims of such forms of violence in the cases decided by the CEDAW Committee under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>30</sup> Thus the Government does not comply with the international human rights standards and nor does it respect its general international law obligations.

<sup>27</sup> State Gazette No. 42/2014.

<sup>28</sup> Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

<sup>29</sup> See: EU Pilot 6013/JUST.

<sup>30</sup> Since 2011, *V.K. v Bulgaria*; and since 2012, *Jallow v Bulgaria* and *V.P.P. v Bulgaria*. See: [http://www.ohchr.org/Documents/HRBodies/CEDAW/Jurisprudence/CEDAW-C-49-D-20-2008\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/CEDAW/Jurisprudence/CEDAW-C-49-D-20-2008_en.pdf), [http://www.ohchr.org/Documents/HRBodies/CEDAW/Jurisprudence/CEDAW-C-53-D-31-2011\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/CEDAW/Jurisprudence/CEDAW-C-53-D-31-2011_en.pdf), and <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/JurisprudenceSession52.aspx>, all accessed 7 November 2014.

**CROATIA – Nada Bodiroga-Vukobrat****Policy developments**

The working group for the preparation of the new National Anti-Discrimination Plan for the period 2014-2018 was established and a first preparatory meeting was held in September 2014. Three workshops are planned for this purpose in the coming months. This activity is part of the project 'Development of national strategy for the fight against discrimination', financed through the Programme of the European Union for Employment and Social Inclusion (PROGRESS). In partnership with the Ombudsperson for gender equality, the Government of the Republic of Croatia Office for Human Rights and Rights of Minorities implements this project. From the available information,<sup>31</sup> it remains unclear why the preparations for the adoption of the new Plan have started relatively late, since the new Plan is supposed to replace the previous National Anti-Discrimination Plan 2008-2013.<sup>32</sup> The goals of the new Plan will probably remain in line with the previous Plan. The main aims of the previous Plan were to supplement the existing national documents in the field of anti-discrimination and to fight against racism, xenophobia and other forms of intolerance; to raise public awareness about the right to non-discrimination; to achieve adequate representation of disadvantaged social groups at all levels of government; to strengthen their participation in public life; and to educate state and civil servants about the relevance of suppression of all forms of discrimination.

**Legislative developments**

The new Labour Act entered into force on 8 August 2014.<sup>33</sup> Among other things, provisions on the protection of pregnant women, women who have recently given birth and adoptive parents have been amended with a view to making horizontal adjustments with other legislation in force. The Act contains an express prohibition of unequal treatment of pregnant workers, and an express protection of the health of pregnant workers, workers who have recently given birth and workers who are breastfeeding. Dismissal during pregnancy and during maternity and parental leave is still prohibited. However, the Act now contains an explicit provision that the employment contract is terminated on the death of the employer (natural person), and on the closure of the business by force of law or by deletion of an individual tradesman from the register of individual tradesmen. Another innovation is that an employment contract with the protected category of workers may be terminated in the procedure of the winding-up of a company due to business reasons. Several aspects of the new Act, primarily regulation of fixed-term work and temporary work, work time and breaks, as well as dismissal, could potentially have an adverse impact on the position of women in the labour market and overall gender equality in labour relations. Based on previous studies and reports by the Ombudsperson for gender equality,<sup>34</sup> women in general, mothers, pregnant women and single parents are shown to be the most vulnerable persons in employment relations, who are often reluctant to instigate formal court proceedings for the protection of their rights, mostly due to fear of victimisation and the length of the procedure.

<sup>31</sup> See: <http://www.prs.hr>, accessed 3 October 2014.

<sup>32</sup> *Nacionalni plan za borbu protiv diskriminacije 2008-2013*, available at: [http://www.uljppnm.vlada.hr/index.php?option=com\\_content&view=article&id=113&Itemid=83](http://www.uljppnm.vlada.hr/index.php?option=com_content&view=article&id=113&Itemid=83), accessed 3 October 2014.

<sup>33</sup> *Zakon o radu*, Official Gazette of the Republic of Croatia *Narodne novine* no. 93/2014.

<sup>34</sup> See, for example, Annual Report 2013 of the Ombudsperson for gender equality, <http://www.prs.hr/index.php/izvjesca/izvjesce-o-radu-za-2013>, accessed 20 August 2014.

### Case law of national courts

In a case decided by the County Court in Bjelovar in 2012,<sup>35</sup> but reported in 2014, the claimant was awarded compensation for damages suffered as a result of violation of her dignity. The claimant was forced by her employer to provide telephone services of a pornographic character ('hotline'), even though she was employed to provide telephone services of other kinds (horoscope, etc.). The employer refused to protect her from having to provide vulgar and explicit sexual telephone services, even after she had filed written complaints, and he continued to advertise such services, even though he had no such arrangement with the telephone operator. The Court found that the claimant's rights arising from the employment relationship were violated by sexual harassment in the workplace. When deciding on the amount of damages, the Court had taken into account the nature of the violation of dignity and the fact that the claimant was repeatedly exposed to such harassment several times a day during a period of more than six months.

### Equality body decisions/opinions

Three cases before the Ombudsperson for gender equality are presented here as examples of the growing number of cases handled by this institution.

The first case<sup>36</sup> concerns the right to maternity benefits granted to persons outside the labour market (unemployed persons). The Croatian Institute for Health Insurance (CIHI) demands that the persons eligible for this benefit do not conclude service contracts during the time that they stand to receive this benefit, under the threat of losing the benefit. The Ombudsperson for gender equality concluded that CIHI thus directly discriminates against pregnant women and issued a recommendation to stop this practice which puts this category of beneficiaries at a considerable disadvantage in comparison with other employed or self-employed beneficiaries. Furthermore, the Act on Maternity and Parental Benefits<sup>37</sup> does not in any way preclude pregnant women who receive maternity benefits from concluding service contracts during the time they receive this benefit.

The second case<sup>38</sup> concerns the discriminatory tax treatment of a monetary donation made by a person to the Centre for female studies. The tax administration officer refused to grant tax relief on this donation, explaining that the Centre (the beneficiary of the donation) is actively promoting the right to abortion, which is, according to the reasoning of the officer, 'against the Constitution of the Republic of Croatia'. This case received a lot of media attention, and the officer was subsequently suspended. The Ombudsperson for gender equality has issued a warning to the Tax Administration that it has acted *ultra vires* and has discriminated against the applicant. The contested decision violates Article 10 (h) and Article 16(1)(e) of the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), as well as Article 6(2) of the Gender Equality Act, which prohibits all discrimination on grounds of pregnancy and motherhood. Prohibition of discrimination is interpreted to include all issues of free will regarding family planning and access to information in connection with it.

The third case<sup>39</sup> was based on a complaint by a female client of a bank, who claims that her loan application was rejected solely because the bank gained knowledge of her pregnancy, even though she fulfilled all formal requirements for a loan. The Ombudsperson has established that the bank has unjustifiably categorised the client as an excessive risk, by

<sup>35</sup> County Court in Bjelovar, Gž-2000/12, Judgment of 11 October 2012.

<sup>36</sup> Ombudsperson for gender equality, available at: <http://www.prs.hr/index.php/odluke-prs/prema-osnovi-diskriminacije/bracni-ili-obiteljski-staus/1375-preporuka-hzzo-u-vezano-za-ostvarivanje-prava-na-rodiljnu-naknadu>, accessed 3 October 2014.

<sup>37</sup> *Zakon o rodiljnim i roditeljskim potporama*, Official Gazette of the Republic of Croatia *Narodne novine* nos. 85/08, 110/08, 34/11 and 54/13.

<sup>38</sup> Ombudsperson for gender equality, available at: <http://www.prs.hr/index.php/priopcenja-prs/1388-rjesenje-porezne-ispostave-samobor-je-diskriminatorno>, accessed 3 October 2014.

<sup>39</sup> Ombudsperson for gender equality, available at: <http://www.prs.hr/index.php/priopcenja-prs/1268-priopcenje-vezano-za-diskriminaciju-trudnica-kod-odobranja-kredita>, accessed 3 October 2014.

taking into account the benefit she received while on pregnancy-related sick leave, and not her actual salary. The situation of pregnant women asking for loans was elaborated in a study conducted by the Ombudsperson for gender equality in 2013.<sup>40</sup>

## CYPRUS – Lia Efstratiou-Georgiades

### Policy developments

The economic crisis caused the National Machinery for Women's Rights to reduce the grant to both women's organisations and women's sections of trade unions for the year 2014, which is given in order to organise seminars on equality matters. Up to 2012 the maximum amount of the grant to each organisation was EUR 17 086, and it has now been reduced to EUR 12 000.

### Legislative developments

Law No. 60(I)/2014 on Preventing and Combating Trafficking in Human Beings and Exploitation and Protecting Victims was published in the Official Gazette of the Republic on 15 April 2014. To an extent this was initiated by the reaction of Cyprus to the trafficking case of *Rantsev v Cyprus and Russia*.<sup>41</sup> Following this case the Government appointed a special committee to study the matter of trafficking, and suggest reforms of relevant legislation.

The Law was enacted in order to reform the existing legal framework on the above matters and to harmonise it with the following EU framework decisions and directives:

- (a) Council framework Decision 2001/220/JHA of 15 March 2001, relating to the status of victims in criminal procedures;
- (b) Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities;
- (c) Council Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.

Law No. 60(I)/2014 repealed the previous Law No. 3(I)/2000 and prevails over Laws No. 87(I)/2007 and No. 13(I)/2012. The Law was also enacted to better ensure the application of the UN Convention against Transnational Organised Crime and especially of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.

The purpose of the Law is the taking of measures for preventing, suppressing and combating the offences of trafficking in human beings and of exploitation and ill-treatment of persons, for the protection and support of victims of these offences, for the creation of machineries for control and for the development of international cooperation for the application of these measures (Article 3).

The application of the Law by any responsible authority and NGO and in particular the application of the measures for the protection of the rights of the victims, is safeguarded without any discrimination on any ground, including sex, race, colour, language, religion, political or other belief, ethnic or social descent, being a member of an ethnic minority, property or birth (Article 4(1)).

In applying the Law, every responsible authority and NGO must safeguard the interests of children (Article 4(2)).

The Law establishes the following criminal offences and their punishments:

<sup>40</sup> Annual Report 2013 of the Ombudsperson for gender equality, available at: <http://www.prs.hr/index.php/izvjesca/izvjesce-o-radu-za-2013>, accessed 20 August 2014.

<sup>41</sup> European Court of Human Rights, Application no. 25965/04.

- (a) Trafficking in adult persons by means of threats or use of force, of abduction, of fraud, of the abuse of power or of a position of vulnerability, is punishable by imprisonment of up to 10 years (Article 6).
- (b) Trafficking in human organs and exploitation by using the means mentioned at (a) above, is punishable by imprisonment of up to 25 years. In a case where a person is found guilty of serious negligence which endangers the life of the victim, the imprisonment can be up to 30 years and in a case where the victim dies, the sentence can be life imprisonment (Article 7).
- (c) Exploitation of persons at work is punishable by imprisonment of up to 6 years and in a case where the victim is a child, the imprisonment can be up to 10 years (Article 8).
- (d) Trafficking in adult persons for the purpose of sexual exploitation or prostitution. The person found guilty can be sentenced to imprisonment of up to 10 years (Article 9).
- (e) Trafficking in children and sexual exploitation of children. The person found guilty can be sentenced to imprisonment of up to 20 years (Articles 10 and 11). The consent of a child victim cannot be a defence. The consent of an adult victim cannot be a defence when there is threat or use of force, of abduction, of fraud, of deception, of abuse of power or exploitation of the vulnerable position of the victim, or receiving of payments or benefits to achieve the consent of the victim (Article 12).
- (f) Incitement, aiding and abetting and attempt to commit the criminal offences set out at (a) to (e) above. The person found guilty can be sentenced to the same length of imprisonment as the person who commits the crime (Article 15).
- (g) Retention or destruction of a passport or other personal (identification) document of a person. The person found guilty can be sentenced to imprisonment of up to 5 years or to a fine of not more than EUR 17 000 or to both (Article 16).

Victims of trafficking in human beings are not prosecuted and no penalties are imposed on them for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the above-mentioned acts (Article 29). Victims have a right to compensation. General damages must be just and reasonable. A Court may impose on the perpetrator punitive damages. These damages take into account the degree of the exploitation or the degree of the abuse by the perpetrator of his relationship with the victim, or of the abuse of the authority the perpetrator may have over the victim (Article 35). The Law provides for measures of assistance and support to victims, irrespective of their nationality, provided that they do not have sufficient resources, and also sets out measures for protection of their private life (Article 47).

The Social Insurance Services establish and operate shelters for victims (Article 48). There are special provisions for assistance, support and protection of unaccompanied children who are victims of trafficking (Article 50). Articles 52-57 provide for protection of victims who are EU citizens or third-country nationals and also stipulate that no measure of deportation can be taken against them.

The Minister of Interior, on the basis of an individual assessment of the case by the prosecuting authorities and the medical services, can certify that it is safe and in the interests of the victims, for the victim to be returned to his/her country of origin as a permanent solution and can decide that the victim is to be repatriated. It is preferable that such repatriation is done voluntarily and (a) under conditions of respect, safety and protection, (b) in cooperation with the country of origin, and (c) does not entail any danger (Article 60).

The Ministry of Interior must, in cooperation with other services involved:

- (a) take measures to discourage and reduce the demand that fosters all forms of exploitation which are connected with trafficking in human beings;
- (b) take measures aimed at raising public awareness and reducing the risk of people becoming victims of trafficking in human beings, especially children; and
- (c) promote the regular training of officials who are likely to come into contact with victims and potential victims of trafficking in human beings (Article 61).

The Law establishes a Fund for the Support of Victims which is under the supervision of the Ministry of Interior (Article 62). The Law also establishes a coordination group of Government department representatives as well as of NGO representatives, for the purpose of combating the offences under the Law, under the chairmanship of the National Coordinator (who is the Minister of Interior) (Article 64-66).

Every three years and for a three-year period, the National Coordinator must call upon an independent assessor to carry out assessments of trends in trafficking in human beings, to measure the results of anti-trafficking actions, and to gather statistics and submit reports. The independent assessor is a mechanism equivalent to the national rapporteur mentioned in Article 19 of Directive 2001/36/EU. The independent assessor is an institution or person that has experience in matters relating to trafficking in human beings (Article 67).

The National Coordinator, in cooperation with the Ministry of Foreign Affairs and the consular authorities of Cyprus abroad, gives to third-country nationals who are interested to enter Cyprus, information material to the conditions of lawful immigration and the dangers of illegal immigration and especially about exploitation and trafficking in human beings (Article 69).

It is believed that this Law will be effective in the struggle to prevent, suppress and punish trafficking in human beings, especially of women and children, because it has embodied all the provisions of Directive 2011/36/EU,<sup>42</sup> especially those providing protection to victims who can complain without risk of being prosecuted.

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

Case No. 23076/13 before the Nicosia Assize Court. Judgment dated 3 July 2014 against D.N. from Bulgaria.

The accused was charged with the following offences:

- (a) trafficking of an adult person in violation of the Preventing Trafficking in and Exploitation of Human Beings and Protecting of Victims Law No. 87(I)/2007, punishable with imprisonment of up to 15 years;
- (b) sexual exploitation of an adult person in violation of Law No. 87(I)/2007, punishable with imprisonment of up to 10 years;
- (c) forcing an adult person into prostitution, punishable with imprisonment of up to 10 years; and
- (d) exploitation of a prostitute in violation of Article 164 of the Penal Code, punishable with imprisonment of up to 5 years.

The offences were committed between 27 and 29 November 2013. The victim was a girl named S. from Bulgaria. S. was fully dependent on the accused and had very low self-esteem. She believed that she had no other choice than prostitution and worked as a prostitute for the benefit of the accused.

The Court, after hearing the witnesses for the prosecution and the witnesses for the defence and evaluating all the testimony presented before it, accepted the testimony of the prosecution and found the accused guilty of all the offences. The Court sentenced the accused to imprisonment of 8 years for the first offence, to 6 years for the second offence, to 6 years for the third offence and to 4 years for the fourth offence. The penalties will run concurrently.

The judgment was published in the press but has not yet been published on the internet.

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<sup>42</sup> Directive [2011/36/EU](#) of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101 of 15 April 2011.



**CZECH REPUBLIC – Kristina Koldinská****Case law of national courts*****Czech Supreme Court rules on part-time work of parents***

The Supreme Court ruled in a case concerning an employee of one Czech city hall (public authority).<sup>43</sup> The employee, who was the mother of a small child, worked as an officer for the city and because she could not leave her child for more than a certain number of hours at the kindergarten, she agreed with her employer to work part-time for a total of 35 hours a week. After one of her colleagues (who usually took over her job for a few hours) retired, management authorities wanted her to switch to the full-time job of 40 hours a week. The woman refused and the employer reacted by abolishing the agreement on the reduction in her working hours, alleging serious operational reasons. The employee continued to leave her office about an hour earlier each day. For this behaviour, she was given notice.

The District Court agreed with the employer; the Regional Court, on the other hand, ruled in favour of the employee. The municipality therefore turned to the Supreme Court, arguing that, because the woman left her office early, the workplace had to be prematurely closed or her work had to be taken over by another colleague, which constituted serious operational reasons for the employer.

The Supreme Court, in its decision, applied the Labour Code, which provides that if an employee caring for a child younger than 15 years requests shorter working hours or other suitable adjustment of the weekly working time, the employer is obliged to accommodate such a request. The only exception where the employer can revoke its decision, which had allowed employees with children shorter working hours, is where there are serious operational reasons. The Supreme Court, however, did not see in the above situation sufficiently serious operational reasons to enable the employer to refuse to reduce the working hours and to give notice to the mother of a young child.

This judgment could have some influence on the future behaviour of Czech employers, who are still not very willing to meet the requests of employees, who care for small children, to reduce their working hours. According to statistics, in the Czech Republic only 8.5 % of women are working part-time, while the EU average is nearly 32 %. In the Czech Republic, only 1.8 % of men work part-time, whereas the average in the EU is 8 %.

This case, however, also reveals that Czech lawyers are still hesitant to use discrimination as a legal argument in a case if there are other possibilities to be used to argue and win the case. In the above case, discrimination was not even mentioned and the only argument was about the legal interpretation of 'serious operational reasons'.

**Equality body decisions/opinions*****The Czech Ombudsman's opinion on headscarves in schools***

The Public Defender of Rights has issued an opinion on headscarves in schools, after a public debate started as a reaction to a prohibition of any religious symbol in one Czech secondary school. The Public Defender's office issued its opinion in a case of two Muslim girls, who wanted to study at secondary school to become nurses and arrived at school wearing a hijab. The Director of the school applied an internal rule of the school, which prohibited any headgear in the school deeming it an expression of misbehaviour. The school wanted to target students who were wearing e.g. baseball caps or hoods during classes. The Public Defender's office reacted to a debate in the Czech media and also issued a preliminary announcement, stating that the school was indirectly discriminating against those girls when it hindered their

<sup>43</sup> Case No. 21 Cdo 1821/2013, judgment, from 9 July 2014, available at: [www.nsoud.cz](http://www.nsoud.cz), accessed 5 September 2014.

free access to education because of their religion.<sup>44</sup> According to the Public Defender, limits to expressions of religion can only be made by law if there is a legitimate aim.

## DENMARK – Ruth Nielsen

### Legislative developments

Section 5(a) of the Danish Equal Pay Act (consolidation Act no 899 of 5 May 2008) on gender-specific wage statistics was amended by Act no. 513 of 26 May 2014. Under the current Section 5(a) of the Danish Equal Pay Act an employer with a minimum of 35 employees must each year prepare gender-segregated wage statistics for groups of a minimum of 10 persons of each sex.

The new Section 5(a), which will enter into force on 1 January 2015, provides that, each year before 1 September, Statistics Denmark must, at no cost to the company, send gender-based wage statistics to the company for all or part of the company when the company's reporting of payroll information so allows and shows that the company employs workers equal to at least ten full-time employees, including at least three men and three women. If a company reports payroll information to an employers' organisation, the employers' organisation must send, also before 1 September, gender-based wage statistics to the company when the report from the company makes it possible. Gender-segregated wage statistics should cover all employees of the company who are paid according to the work time. The statistics cover a period of 12 months and show the pay gap between men and women in the groups of employees determined in accordance with the classification DISCO-08 or a similar classification system, when there are at least three men and three women at a given ISCO group level or equivalent group level.<sup>45</sup>

Compared to the current provision, the scope of application of the provision has been expanded to cover employers with a staff of 10 employees and at least 3 of either sex.

## ESTONIA – Anu Laas

### Policy developments

The Reform Party and Social Democrat coalition formed a new Government of Estonia in March 2014. The Cabinet's mandate will last until a new Government is formed after the next parliamentary elections on 1 March 2015. The new Cabinet has six women and eight men, the percentage of women has increased from 15 % to 43 %.

The new Prime Minister, Taavi Rõivas, has stated that the Government will continue with the current foreign and security policy and will contribute 2 % of Estonia's gross domestic product to defence costs. Additionally, one of the most important objectives of the Government is to reduce the tax wedge<sup>46</sup> on labour (social tax, fringe benefits, etc.) and increase child benefits.

<sup>44</sup> See: <http://www.ochrance.cz/tiskove-zpravy/tiskove-zpravy-2014/skola-nemuze-zcela-zakazat-noseni-krizku-ani-muslimskeho-satku-nezahalujiciho-tvar-a/>, accessed 5 September 2014.

<sup>45</sup> All Danish businesses must report wage statistics to Statistics Denmark. For the wage statistics to be reported a 6-digit code called DISCO-08 that describes the employee's job function is required. The entire guidance material can be consulted at the website of Statistics Denmark at: [www.dst.dk/hent](http://www.dst.dk/hent), accessed 4 November 2014.

<sup>46</sup> The deviation from equilibrium price/quantity as a result of a taxation, which results in consumers paying more, and suppliers receiving less.

## Equality body decisions/opinions

The Annual Report 2013 of the Gender Equality and Equal Treatment Commissioner has a positive message about the increased capacity of the Office. The number of employees at the Office of the Commissioner increased from two to seven in 2013.

In 2013, the Gender Equality and Equal Treatment Commissioner received 403 communications. Out of these communications, 53 were discrimination complaints, and a further 53 were explanation requests about unequal treatment, and ten other requests.<sup>47</sup> The Commissioner identified 15 discrimination cases from all 116 claims.

The Gender Equality Act (GEA) has been in force for ten years, i.e. since 1 May 2004. The Commissioner has pointed out that implementation of equality legislation has been slow due to a lack of political will. Gender stereotypes and prejudices are still issues to be tackled. The Gender Equality and Equal Treatment Commissioner has made efforts to increase the awareness of civil servants and employers on gender equality and equal treatment. Job applicants and employees have knowledge gaps about their rights, legal protection measures and procedures.

## Miscellaneous

The *National Review of the Implementation of the Beijing Declaration and Platform for Action* was issued in 2014.<sup>48</sup> The national review reflects mainly the period from 2009-2014 and the available statistics for 1995-2014. The national review gives an overview of achievements and challenges of gender equality work since 1995. The authors of the review state that the main challenge has been the implementation of equality legislation. The main obstacles were seen as a low awareness of gender equality issues and a lack of interest among different stakeholders (e.g. employers, employees, legal professionals, civil servants).

The review covers the establishment of institutions promoting gender equality and the adoption of specific gender equality legislation. This review has valuable Annexes presenting statistical information, a list of English translations of legal acts, policies, strategies, action plans and publications.

The Estonian national review was prepared by the Ministry of Social Affairs and largely based on the draft Fifth and Sixth periodic report of the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>49</sup> The Ministries of Social Affairs, Justice, Education and Research, Internal Affairs, Culture, Finance, Economic Affairs and Communications, Agriculture and Foreign Affairs were involved in the preparation of the CEDAW Report. Input was also made by the Office of the Chancellor of Justice and the Gender Equality and Equal Treatment Commissioner.

*Gender Equality Monitoring* (GEM) 2013 was published in September 2014.<sup>50</sup> This is the fourth GEM since 2003 and the focus was on analysing the world of values, more specifically attitudes towards gender inequality. Less emphasis was put on behavioural aspects and personal experiences. The survey was conducted in the summer of 2013 and the analysis was performed in the spring of 2014, before a new Government assumed office. For the first time

<sup>47</sup> There were 116 discrimination claims and requests in 2013. In 2012 there were 394 communications and of these 69 were discrimination complaints. In 2011 there were 358 communications and of these 90 were discrimination complaints. The number of communications has increased every year.

<sup>48</sup> Accessible at [http://www.unece.org/fileadmin/DAM/Gender/publication/Estonian\\_National\\_Review\\_of\\_the\\_Implementation\\_of\\_the\\_Beijing\\_Declaration\\_and\\_Platform\\_for\\_Action.pdf](http://www.unece.org/fileadmin/DAM/Gender/publication/Estonian_National_Review_of_the_Implementation_of_the_Beijing_Declaration_and_Platform_for_Action.pdf), accessed 8 September 2014.

<sup>49</sup> CEDAW Report to be submitted in 2014, not publicly available on 8 September 2014. However, the draft report has been accessible to gender equality experts since 2013. The draft report is under revision by gender equality specialists and needs to be updated before being sent to the CEDAW Committee.

<sup>50</sup> T. Roosalu (ed.) (2014), 'Soolise võrdõiguslikkuse monitooring 2013. Artiklite kogumik' ('Gender Equality Monitoring 2013. Collection of Articles'), Sotsiaalministeeriumi Toimetised, 3 (Working Papers of the Ministry of Social Affairs No. 3), Tallinn. Available in Estonian, summary in English: [http://sm.ee/sites/default/files/content-editors/Ministeerium\\_kontaktid/Uuringu\\_ja\\_analuusid/Sotsiaalvaldkond/sooline\\_vo\\_monitooring\\_2013\\_veeb.pdf](http://sm.ee/sites/default/files/content-editors/Ministeerium_kontaktid/Uuringu_ja_analuusid/Sotsiaalvaldkond/sooline_vo_monitooring_2013_veeb.pdf), accessed 16 September 2014.

ever, five women ministers were appointed in Estonia.<sup>51</sup> The report points out that ‘this little step sends an important signal to the whole society’. Study findings show that women and men are in favour of equality in the public sphere, but keep more traditional values in the private sphere. It could be assumed that national gender equality policies have some positive impact, because the public arena is easier to regulate than private life. The report also recalls that civil partnership is undergoing a discussion more serious than ever before.<sup>52</sup>

The report provides an overview of the results of the factor and cluster analyses conducted based on the GEM 2013 questions measuring values and attitudes. There emerged the following groups of people:

1. 22 % of the respondents support gender equality in all aspects;
2. 9 % point out gender differences while supporting equality and valuing women’s role in both the private and the public sphere;
3. 21 % have an unequal (sometimes intolerant) attitude towards different genders in private life, and the percentage is the same in the public sphere ;
4. 29 % support equality in private life, but not in the public sphere;
5. 10 % stress gender differences and wish to expand hegemonic masculinity in private life and in raising children;
6. 9 % stress gender differences, but fundamentally do not wish for equality in either the private or the public sphere.

## FINLAND – *Kevät Nousiainen*

### Policy developments

The Government Bill on the reform of Finnish non-discrimination and equality legislation was brought before the Parliament in April 2014.<sup>53</sup> The reform has been under way since 2006. At first, the aim was to unify two pieces of legislation, the Act on Equality between Women and Men (609/1986) which prohibits discrimination on the ground of sex, and the Non-Discrimination Act (21/2004), which prohibits discrimination on other grounds and which was introduced in order to implement Directives 2000/43/EC<sup>54</sup> and 2000/78/EC.<sup>55</sup> Later, the aim was redefined to involve a reform only of the Non-Discrimination Act, and to keep the Act on Equality as a separate piece of legislation. To some extent the reform will also involve gender equality law, as the Bill proposes that two existing equality bodies (Equality Board and Discrimination Tribunal) be unified into a new body which would deal with both gender discrimination and other discrimination cases. The Bill also contains some amendments to the Act on Equality but, in the main, the gender equality provisions are to remain intact.

The Act on Equality between Women and Men and the Non-Discrimination Act are thus to remain separate, and so gender discrimination and other forms of discrimination remain as two areas with different legal rules and separate equality bodies. At present, there are two ombudsmen, one for gender equality (Equality Ombudsman), and another for ethnic discrimination (Minority Ombudsman), and two special bodies (Equality Board for gender equality and National Discrimination Tribunal for ethnic discrimination), with varying competences. The provisions that involve working life under the Non-Discrimination Act are

<sup>51</sup> On 3 November 2014, in Estonia the first female Minister of Finance was appointed.

<sup>52</sup> Bill on Cohabitation (650 SE) passed the first reading in Parliament in June 2014.

<sup>53</sup> Government Bill HE 19/2014 vp Hallituksen esitys eduskunnalle yhdenvertaisuuslaiksi ja eräiksi siihen liittyviksi laeiksi (Government Bill to the Parliament for a Non-Discrimination Act and certain other related Acts).

<sup>54</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ L 180, 19 July 2000 pp. 22-26.

<sup>55</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303, 2 December 2000 pp.16-22.

further supervised by occupational safety authorities, which have no competence under the Act on Equality. The basic structure of monitoring will be preserved in the reform.

The proposed new Board, which is to replace the Equality Board and the Discrimination Tribunal, consists of a chairperson and a minimum of 13 members, seven of whom, together with the chairperson, are to be lawyers. The Board, assisted by a secretary general and other staff, is to act in divisions. The provisions on bringing matters to the new Board would, however, be different for sex and other discrimination grounds. This is because the provisions under the Act on Equality between Women and Men are to remain materially unchanged and, according to that Act, only the Gender Equality Ombudsman and the Social Partners may bring cases to the Equality Board. A victim of alleged discrimination on grounds other than sex may take his or her case to the new Board which may prohibit continuation of discrimination, but a victim of alleged sex discrimination cannot do so, as the amendment of the Act on Equality between Women and Men would only allow the Equality Ombudsman or a central labour market organisation to take matters to the Tribunal. A victim of gender discrimination thus has the option of getting his or her matter before the new Board through the Ombudsman or the Social Partners, or by taking his or her claim on compensation to a court. The proposed arrangement does not give better access to victims of alleged multiple discrimination than the present one, due to different rules of access for gender and other discrimination grounds. As such, a new and stronger equality body with a mandate to conciliate cases would be a welcome addition to remedies under Finnish non-discrimination law.

The Government Bill also contains some amendments to the Act on Equality between Women and Men. The aim of the Act is widened to include prevention of discrimination on the ground of sex identity (*sukupuoli-identiteetti*) and expression of gender identity (*sukupuoli-identiteetin ilmaiseminen*). Sex identity refers to the experience that a person has of his or her sex (gender) identity, and expression of gender identity refers to expressing one's belonging to a gender by choice of dress code, behaviour or other similar ways. Prohibition of discrimination on the grounds of sex identity and expression of gender identity also covers discrimination on the basis that a person's gender-defining characteristics are not explicitly either those of a woman or a man.

The Government Bill further contains an amended duty for employers to promote equality in working life. Employers of 30 or more employees are to make a biannual equality plan in cooperation with the representatives of the employees. The amended duty to make a 'pay chart' (*palkkakartoitus*) includes an exercise to monitor groundless pay differentials among women and men who do the same work or work of the same value. While employers even under the law in force have a duty to carry out 'pay charting', the proposed provision (Section 6(b) of the Act on Equality) gives more detailed guidelines for the procedure. If a comparison between men and women doing similar or equally demanding tasks shows a pay differential, the employer must clarify the reason for it, and if the pay system consists of different pay components, the relevant components must also be considered. If there is no justifiable ground for pay differentials, the employer must correct the situation adequately.

### Case law of national courts

The CJEU (Second Chamber) has ruled<sup>56</sup> in a case referred by the Finnish Supreme Administrative Court in 2013.<sup>57</sup> At issue was whether the use of sex as an actuarial factor in statutory social insurance benefits infringes EU law (Directive 79/7/EEC).<sup>58</sup> In 1991, the male applicant in the national proceedings suffered an accident at work, which resulted in a long-term disability. He was paid a lump sum compensation, calculated using a criterion based on

<sup>56</sup> Case C-318/13 Judgment of the Court (Second Chamber) 3 September 2014, Request for a preliminary ruling under Article 267 TFEU from the *Korkein hallinto-oikeus* (Finland).

<sup>57</sup> Supreme Administrative Court decision KHO:2013:105.

<sup>58</sup> Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

the different life expectancies for men and women. As a consequence of using this criterion, the compensation for the complainant was lower than it would have been for a woman.

The applicant first demanded from the Ministry of Social Affairs and Health that his compensation be increased, as the determining of the amount violates EU law. In 2009, the Ministry refused the request. The applicant then brought an action against the decision before the Helsinki Administrative Court, and demanded that compensation for his loss be paid from State funds. The Helsinki Administrative Court decided it had no jurisdiction in the matter, and in 2012 the Supreme Administrative Court took the case. The Supreme Administrative Court found that at the time when the complainant suffered the accident, the Finnish Act on accident insurance contained a provision under which compensation for a long-term disability may be paid as a lump sum, and that the administrative criteria stipulated for calculating this sum were based on the different life expectancies of men and women. Even after the legislation was amended in 2009, the lump sum compensation continued to be calculated by using sex-segregated life expectancy statistics.

Interestingly, the issue at stake in the case was discussed during the legislative preparation. The Draft Bill for the 2009 amendment refers to Directives 2006/54/EC<sup>59</sup> and 2004/113/EC<sup>60</sup>, which according to the preparatory works allows the use of sex-segregated statistics in the assessment of insurance risks. Even though these directives did not regulate mandatory social security, the preparatory works assume that the principle adopted in Directive 2004/113 is acceptable in social security insurance. The Social Affairs and Health Committee of the Finnish Parliament disagreed with the interpretation presented in the Draft Bill in its opinion, and stated that Directive 79/7/EEC could not be interpreted in this manner. The Committee also stated that even if it was, in the long run the use of sex as an actuarial factor should be dropped. The amendment to the law was adopted in the form proposed in the Draft Bill.

The Supreme Administrative Court held that the CJEU case law gave no direct answer to the question whether sex can be used as an actuarial factor in mandatory social security legislation, and decided to ask a preliminary ruling from the CJEU. The Supreme Administrative Court asked whether Article 4(1) of Directive 79/7/EEC precludes national legislation that applies different life expectancies of women and men as an actuarial calculation criterion, and results in a smaller benefit for a man than for a woman in the same age and situation. In addition, it asked whether, in the case of an affirmative answer, the case involves a sufficiently serious breach of EU law.

The CJEU found that the unequal treatment cannot not be justified under Directive 79/7/EEC, as life expectancy is not mentioned among the exhaustive list of derogations from the principle of equality in the Directive, and also because a calculation on a compensation cannot be made on the basis of such a generalisation. Therefore, Article 4(1) of the Directive precludes the use of sex as an actuarial factor in social security legislation. However, the CJEU left it to the national court to decide whether the infringement of EU law should be considered 'sufficiently serious'; but on that point provided some guidance to the Finnish Supreme Administrative Court. The Finnish court is to take into consideration the fact that the question of sex as an actuarial factor under the statutory social system under Directive 97/7/EEC has not yet been decided by CJEU case law, and that the case of *Test-Achats*<sup>61</sup> held the provision on actuarial factors under Directive 2004/113/EC invalid, because the provision infringes the principle of equal treatment between men and women.

The Finnish Supreme Administrative Court is expected to deliver its judgment on the case in the beginning of 2015.

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<sup>59</sup> Directive of the European Parliament and the Council 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

<sup>60</sup> Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

<sup>61</sup> Case C-236/09 *Association Belge des Cosommateurs Test-Achats and Others v Conseil des Ministres* [2011] ECR I-00773.

The Finnish Labour Court in a recent decision<sup>62</sup> refers to a preliminary ruling by the Court of Justice of the EU.<sup>63</sup> The case confirmed that the right interpretation of the collective agreement is that an employee is entitled to pay during maternity leave even when the new maternity leave begins during child-care leave. It also applies when a female worker wishes to return to paid maternity leave from unpaid family-related leave, even though the collective agreement which entitles an employee to pay during maternity leave expressly limits the right to paid maternity leave in such cases.<sup>64</sup> Pay during maternity, parental or so-called home-care leave is not mandatory under Finnish law, but many collective agreements contain a condition under which the employee is entitled to pay during maternity leave. A person on parental leave is entitled to an income-related benefit, while a much longer child-care leave (or home-care leave) only entitles a person to a flat-rate benefit. The collective agreement in this case contained a condition that limited the right to pay during maternity leave for persons whose maternity leave starts during child-care leave.

The CJEU decided that such a condition in a collective agreement violates the effective impact of the Parental Leave Directive,<sup>65</sup> and the Finnish Labour Court formulated its decision so as to follow the preliminary ruling.

There has long been disagreement on the interpretation of collective agreements which provide pay during maternity leave in cases when a new maternity leave begins straight after family-related leave. The employers tend to see situations where a woman on family-related leave wishes to interrupt such leave in order to return to maternity leave during a new pregnancy as unfair to the employer, especially when a collective agreement provides pay during maternity leave. Finnish case law tended to agree with the employers.

A previous request for a preliminary ruling in the *Kiiski* case tested the then standard interpretation in Finnish collective agreements according to which a pregnancy did not constitute an unforeseeable and justifiable ground for interrupting child-care leave.<sup>66</sup> The interpretation was backed up by a widely shared opinion among employers that, as pay during maternity leave is not mandatory but based on a collective agreement, it is unfair to return to paid maternity leave directly from child-care leave. The CJEU held that a pregnancy is an unforeseeable event comparable to the loss of a child or the other parent. The employee had a right to interrupt child-care leave in those circumstances. Pregnancy prevented Ms. Kiiski from looking after her first child. Refusal to allow an interruption of child-care leave in order to begin maternity leave constituted direct discrimination on grounds of sex. After *Kiiski*, collective agreements were reformulated so as to expressly limit access to paid maternity leave for persons on unpaid leave. The new ruling of the CJEU and the Labour Court decision prevent the use of this type of limiting condition.

## FRANCE – Sylvaine Laulom

### Legislative developments

#### *A new Bill on ‘Real Equality between women and men’*<sup>67</sup>

After months of discussion, the law about ‘real equality between women and men’ was promulgated in August 2014 after approval by the Constitutional Council.<sup>68</sup> No MP voted

<sup>62</sup> The Labour Court decided to refer the case to the CJEU in 2011. Decision of the Labour Court TT:2011-108.

<sup>63</sup> Joined Cases C-512/11 and C-513/11 (*Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Terveyspalvelualan Liitto ry (C-512/11) and Ylemmät Toimihenkilöt (YTN) ry v Teknologiateollisuus ry and Nokia Siemens Networks Oy (C-513/11)*), [2014] ECR n.y.r. The decisions concern two different collective agreements which both required that an employee who exercises her right to unpaid parental leave renounces her right to paid maternity leave in advance.

<sup>64</sup> Labour Court Decision TT:2014:115, 22 August 2014.

<sup>65</sup> Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC OJ L 145 of 19 June 1996, pp. 4-9.

<sup>66</sup> Case C-116/06 *Sari Kiiski v Tampereen kaupunki* [2007] ECR I-07643.

<sup>67</sup> Loi no. 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes, <http://www.legifrance.gouv.fr/>, accessed 27 August 2014.

against the law. The left-wing MPs and most centrists voted in favour of it and most of the right-wing MPs abstained, even though after the adoption of the law some senators referred the Bill, without success, to the Constitutional Council. The aim of the Bill is wide as it intends, as its title shows, to pursue a ‘real’ and concrete equality between men and women in all aspects of life. In that respect, it is certainly one of the most comprehensive laws on women’s rights adopted in France. According to the French Minister of Women’s Rights, Najat Vallaud-Belkacem, the Bill will attain three main objectives: to ensure the full effectiveness of women’s rights which have already been recognised, for example in professional life or in terms of parity in elections; to recognise rights in new areas with the goal of dealing with the sources of inequality, and to experiment with new tools for a specific period before deciding to definitely adopt them.

Article 1 defines the duty for the state to adopt a gender mainstreaming policy in every action taken. The Bill is then divided into five Titles which cover all aspects of societal life:

- equality in working life;
- fight against precarity;<sup>69</sup>
- protection of women against domestic violence and action against gender stereotypes;
- relationships with administration; and
- political representation of women.

Thus, the law plans to set up measures to reinforce equality at work, to protect women who suffer from domestic violence, to fight against sexist stereotypes in the media, and to help women in poverty.

The most important measures of the Bill are the following. Regarding women’s rights at work, the most important provisions concern the reform of parental leave to encourage more fathers to take it. The right to parental leave remains the same, but the conditions concerning social benefit for the parent who takes this leave are amended. Until now, the ‘supplement for free choice of working time’ was paid for six months after the first child and for three years for later children. With the new Bill, this allowance will be paid for six months and then for a further six months, for a family’s first child, if the other parent is taking this extension of parental leave. So, a period of one year paid parental leave will be recognised for the first child if both parents share parental leave. For later children, the allowance will be reduced to two and a half years and it will only be paid for three years if parental leave is shared. The new rules do not apply to single families. Other rights are also recognised for fathers. Hitherto, the employer could not dismiss a woman during her maternity leave. With the new Bill, the father is also protected against dismissal during the four weeks following the birth of his child. According to Article L.1225-4-1 of the Labour Code, the employer cannot dismiss a female worker in the four weeks following the birth of a child, except in a case of gross misconduct or if the reason for dismissal has nothing to do with the birth. The father will also have the right of leave to go with the mother to a maximum of three prenatal medical examinations. The Bill also modifies Article L.1225-57 of the Labour Code to redefine the content of the meeting that the employer has to organise at the end of parental leave. During this interview, the employer and the worker may organise how the worker will come back to work: for example, is there a need for some measures of vocational training, what are the consequences on wages of the parental leave? If the worker so requests, this interview will be scheduled before the end of the parental leave.

The Bill also simplifies the obligation to negotiate. Hitherto, there were two different obligations for the employer: to negotiate annually on the gender pay gap and to negotiate on professional equality. The Bill merges these two obligations together.

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<sup>68</sup> Décision du Conseil constitutionnel no. 2014-700 DC du 31 juillet 2014, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2014/2014-700-dc/decision-n-2014-700-dc-du-31-juillet-2014.142036.html>, accessed 27 August 2014.

<sup>69</sup> Definition: a condition of existence without predictability or security, affecting material or psychological welfare. Specifically, it is applied to the condition of intermittent or underemployment and the resultant precarious existence.



The measure on abortion – which has been legal in France since 1975 – was the most controversial. The Bill scraps the requirement that women must prove that they are in ‘distress’ in order to have an abortion. With this new law, they just have to show that they do not want to continue with the pregnancy.

The Bill also works on language and symbols as patriarchal references. For instance, it removed some gender-loaded language, such as ‘the good family man’, from the Civil Code. It also works on societal symbols and it gives the same rights to married couples and to couples engaged in a civil partnership (known as a ‘PACS’), which is available for both same sex couples and heterosexual couples.

To fight against the poverty of women, a specific protection for single mothers will be introduced on an experimental basis for 18 months. For single mothers who do not receive regular child support from the father of their children, a public trust will grant funds to women to protect them from financial loss while measures to recover child support from the father will be taken.

Various provisions of the Bill also intend to offer better protection to women who suffer from domestic violence. It also provides better protection for immigrants. The prohibition of sexual harassment now applies explicitly to the military.

So far as the media are concerned, the French media regulator, the CSA, will now have the authority to ensure that women are fairly portrayed and that they are not diminished by sexist statements or depictions.

Beauty contests for children under the age of 13 are banned, and authorisation is needed for them between the age of 13 and 16.

Regarding political representation, the Bill increases fines for political parties that do not meet equal representation objectives and it aims to improve a balanced gender representation at local and regional levels. Some provisions also apply to sport federations.

The Bill is ambitious as its aim is to act on the reasons behind the persisting inequalities. It is of course too early to analyse its impact on the law. However, even if the Bill intends to adopt an all-encompassing approach to equality, the result is not so convincing and as the Bill appears to add very different types of unconnected measures.

## Case law of national courts

### *Dismissal of a woman wearing an Islamic veil*

The *Cour de cassation*, in its plenary session, its most solemn form, has finally concluded one of the most controversial cases of recent years. In its decision of 26 June 2014,<sup>70</sup> the *Cour de cassation* has closed the debate opened six years previously. The case is about whether the dismissal of an employee from her job at a private nursery school (Baby Loup Association) for refusing to remove her Islamic veil at work amounted to religious discrimination. The decision is about discrimination on the ground of religion. However, it is also about the refusal not to wear an Islamic veil, a matter that only concerns women. The internal rules of the nursery contained a general clause on secularism and neutrality applicable to all jobs in the company. In a first decision on 19 March 2013,<sup>71</sup> the Social Chamber of the *Cour de cassation* ruled that the dismissal amounted to religious discrimination. For the *Cour de cassation*, in its first decision, such a clause was invalid and the dismissal of an employee for serious misconduct on the grounds that she violated the provisions of this clause constitutes discrimination on grounds of religious conviction and must be declared void. The Court explained that because the *Baby Loup* nursery was a private institution whose staff did not provide a public service, the principle of secularism (*laïcité*) did not apply. The *Cour de cassation* does not rule on the merits of a case; its function is to decide whether the rules of law have been correctly applied by the lower courts. This is why when the decision of the Court of Appeal is quashed, the case has consequently to be heard again. Usually, the lower courts follow the interpretation of the *Cour de cassation*. However, in this very controversial

<sup>70</sup> Cass. Ass. Plén. 24 June 2014, no. 13-28369.

<sup>71</sup> Cass. Soc. 19 March 2013, no. 11-228845 and 12-11690.

case, the Court of Appeal of Paris came to a different conclusion from the one reached by the *Cour de cassation*.<sup>72</sup> The Court of Appeal ruled that the private nursery school was justified in firing a woman who refused to remove her Islamic veil. For the Court of Appeal, the nursery, because of its specific mission, was justified in enforcing religious neutrality. In its final decision of June 2014, the *Cour de cassation*, using a different legal argument from the Court of Appeal, decided that the dismissal was legal. For the *Cour de cassation*, a private entity can place limits on its employees' freedom to express their religious beliefs in the workplace if these limits are justified and proportionate. In this second decision, the *Cour de cassation* considers that this was the case here. The nursery is a small business; it employs only 18 workers who come into continual contact with young children and their parents. Therefore the prohibition was not general and was precise enough and justified by the nature of the work. The *Cour de cassation* could have made a reference to EU Directive 2000/78/EC.<sup>73</sup> However the Court preferred not to make any reference to the EU Directive and it also preferred not to make any preliminary reference to the CJEU. Indeed in France, the decision was much more discussed in the light of the case-law of the European Court of Human Rights than of the EU Directive.

It is expected that the claimant will now make an appeal to the European Court of Human Rights.

### Miscellaneous

In June, the Ministry of Employment published an annual report on collective bargaining, which presents the general figures on collective agreements concluded in the year before. The report published in 2014 indicates that, for the first time for a few years, in 2013 there was a decrease in the number of collective agreements concluded, both at sectoral level and at company level. This seems to be a consequence of existing legal incentives: many companies and sectors concluded agreements before 2013 to apply the legal obligation to negotiate on gender equality. The content of the agreements is also slowly improving and some good practices are presented. However, the report also notices that some of the agreements are lacking concrete measures to improve the situation of women, particularly in terms of company wages.<sup>74</sup>

## GERMANY – Ulrike Lembke

### Policy developments

#### *Gender income gap*

A recent study by the German Institute for Economic Research shows a gender income gap of 51 % in Germany.<sup>75</sup> The study takes into account all forms of income such as pay, investments, and profits and it refers not to monthly but to annual income. Women do not reach the best paid positions, they work mainly part-time and in the low income sector, and they are still responsible for childcare and other unpaid care work.<sup>76</sup> The author of the study does not expect a rapid change.

<sup>72</sup> CA Paris, 27 November 2013, no. 13/02981.

<sup>73</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 2 December 2000, pp. 0016- 0022.

<sup>74</sup> Ministère du travail, *La négociation collective en 2013*, Bilan et Rapport, La documentation française 2014, [http://travail-emploi.gouv.fr/IMG/pdf/BNC2013\\_interactif.pdf](http://travail-emploi.gouv.fr/IMG/pdf/BNC2013_interactif.pdf), accessed 27 August 2014.

<sup>75</sup> S. Bach 'Frauen erzielen im Durchschnitt nur halb so hohe Einkommen wie Männer' *DIW Wochenbericht* Nr. 35/2014 pp. 803-814.

<sup>76</sup> See the interview with the author of the study, S. Bach, available at: <http://www.spiegel.de/karriere/berufsleben/diw-studie-frauen-verdienen-nur-halb-so-viel-wie-maenner-a-988316.html>, accessed 30 September 2014.

***Prosecution of non-consensual sexual acts***

The Council of Europe Convention on preventing and combating violence against women and domestic violence, which entered into force on 1 August 2014, obliges state parties to make engaging in non-consensual sexual acts a criminal offence without further requirements.<sup>77</sup> In Germany, only 5-10 % of all sexual assaults are reported, attrition rates continue to rise and only 8 % of all investigation procedures lead to a conviction. The criminal law requires not only the lack of consent but additionally force, serious threat, or an especially vulnerable situation of the victim. And in the majority of cases when the perpetrator is a person close to the victim and/or the victim does not fight back, state prosecutors and judges do not identify the sexual assault as covered by the criminal law or they do not believe the victim.

The Federal Association of Women's Advice Centres and the Women's Emergency Hotline demand an amendment of the Criminal Code to implement the Council of Europe Convention and to combat and prosecute sexual violence effectively.<sup>78</sup> The Federal Ministry of Justice has shown reluctance to fully implement the Convention. In the media, a chairman of judges at the Federal Court of Justice, Thomas Fischer, actively campaigns against the prosecution of non-consensual sexual acts without further requirements. The National Human Rights Institution identified the need for some amendments from a human rights perspective.<sup>79</sup> Further discussions of this topic with representatives of the Ministry of Justice and of human and women's rights organisations took place in October, and continue through November 2014.

**Legislative developments*****Draft law to amend the Statute on Parental Leave and Parental Allowances***

On 26 September 2014, the first reading of a draft law to amend the Federal Law on Parental Leave and Parental Allowances took place in the Federal Parliament.<sup>80</sup> Until now, the law has provided for parental leave for up to three years and for a parental allowance to parents for up to 14 months after the birth, provided that at least two months are taken by the other parent. The draft law extends the duration of the entitlement to parental allowances of parents working part-time. They can receive their parental allowances in payments of halved amounts while the number of months paid is doubled. Parents working simultaneously part-time between 25 and 30 hours per week while taking simultaneous parental leave for four months are entitled to additional parental allowances for these months (partnership bonus). And to increase the flexibility of parental leave, the draft law grants every parent the right to take up to 24 months of parental leave between the third and eighth birthday of the child without needing the consent of the employer, instead of up to 12 months with consent as under the current law. The amendments are intended to encourage both parents to work part-time during parental leave and to share family responsibilities and childcare duties more equally.<sup>81</sup>

The German Women Lawyers Association welcomes the improvements for parents working part-time and sharing care responsibilities.<sup>82</sup> But it criticises the complications and restrictions of the 'partnership bonus'. It suggests accepting part-time work between 20 and 30 hours per week and securing the entitlements of single parents. It further suggests the introduction of the possibility to take part of parental leave between the third and fourteenth birthday of the child and deals with questions of the distribution of working time as well as

<sup>77</sup> See: <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/210.htm>, accessed 30 September 2014.

<sup>78</sup> See: <https://www.frauen-gegen-gewalt.de/vergewaltigung-verurteilen.html>, accessed 30 September 2014.

<sup>79</sup> See: <http://www.institut-fuer-menschenrechte.de/aktuell/news/meldung/article/menschenrechtswidrige-schutzluecken-schliessen-policy-paper-zu-menschenrechtlichem-aenderungsbedar.html>, accessed 30 September 2014.

<sup>80</sup> Draft law on the Implementation of Parental Allowances Plus with a Partnership Bonus and of More Flexible Parental Leave within the Law on Parental Leave and Parental Allowances of 22 September 2014, Parliamentary Documents 18/2583, available at: <http://dip21.bundestag.de/dip21/btd/18/025/1802583.pdf>, accessed 3 October 2014.

<sup>81</sup> See the Federal Ministry for Family, Senior Citizens, Women and Youth, available at: <http://www.bmfsfj.de/BMFSFJ/familie.did=209870.html>, accessed 3 October 2014.

<sup>82</sup> See: <http://www.djb.de/Kom/K4/st14-10/>, accessed 3 October 2014.

protection against dismissal after parental leave. The Association points out that the lack of a right to return to work after parental leave violates Directive 2010/18.

### ***Draft Law on the Protection of Prostitutes***

On 14 August 2014, the Federal Ministry for Family, Senior Citizens, Women and Youth presented the framework for a draft law on the commercial law requirements for prostitution.<sup>83</sup> The aim of the law is to improve the conditions for sex workers, to reduce exploitation and to combat discrimination, violence and crime such as trafficking in women. But the achievement of these objectives is hampered by a lack of differentiation in a very heterogeneous working field and a lack of effort to tackle authorities' arbitrariness as well as widespread unlawful official practices.

### ***Amendments of statutory pension schemes***

The amendments to the Social Code No. 6 and the Act on Old-Age Protection for Farmers cover the recognition of childcare periods by statutory pension schemes and by professional insurance funds and introduce the option of an early start to retirement at the age of 63 without deductions.<sup>84</sup>

The German Women Lawyers Association<sup>85</sup> welcomes the extension of recognised childcare periods, but raises legal concerns as to the financing by statutory pension schemes of childcare periods of parents insured under professional pension funds. Moreover, the Association rejects the idea of an early retirement at 63 due to its gender impact: the requirements of early retirement are disproportionately met by well-paid male employees who did not interrupt their working life for childcare periods. The requirements cannot be met by employees in marginal or minor employment or employees who have taken childcare leave for longer periods – the overwhelming number of them being female. Thus, the intended early retirement option constitutes indirect discrimination against women and is incompatible with CEDAW and the German constitution.

### ***Statutory gender quota on company boards***

A draft law on a statutory gender quota on company boards presented by the Ministry for Family, Senior Citizens, Women and Youth is being discussed by the respective federal ministries.<sup>86</sup> The draft provides for a statutory 30 % gender quota for supervisory boards of all private companies which are listed *and* subject to full co-determination,<sup>87</sup> and binding published target quotas for executive and supervisory boards as well as for the highest management level of listed *or* fully co-determined private companies. Moreover, the Statute on Bodies within Federal Control and the Federal Equality Statute are to be amended to increase the number of female leaders in public and state-owned companies. The law enters into force in 2016.

## **Case law of national courts**

### ***Equal opportunity commissioners***

German courts continue to decide that the preference for appointing female equal opportunity commissioners or even the exclusion of male equal opportunity commissioners can be

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<sup>83</sup> See: <https://researchprojectgermany.files.wordpress.com/2014/08/eckpunkte-prostituiertenschutzgesetz.pdf>, accessed 3 October 2014.

<sup>84</sup> Law on the Improvement of Services of the Statutory Pension Insurance Schemes of 23 June 2014, Official Journal (*Bundesgesetzblatt BGBl*), part I p. 787, available at: [https://www.lwl.org/spur-download/bag/24\\_2014an.pdf](https://www.lwl.org/spur-download/bag/24_2014an.pdf), accessed 22 October 2014.

<sup>85</sup> German Women Lawyers Association, Expert opinion of 2 April 2014, available at: <http://www.djb.de/Kom/K4/st14-05/>, accessed 30 September 2014.

<sup>86</sup> See: <http://www.bmfsfj.de/BMFSFJ/gleichstellung.did=210072.html>, accessed 3 October 2014.

<sup>87</sup> For an explanation of the concept of co-determination in German labour law see R. Page *Co-determination in Germany—A beginner's guide* 5<sup>th</sup> ed. 2011, available at: [http://www.boeckler.de/pdf/p\\_arbp\\_033.pdf](http://www.boeckler.de/pdf/p_arbp_033.pdf), accessed 6 November 2014.

justified. Furthermore, the courts strengthen the position of equal opportunity commissioners by enforcing the exercise of their statutory participation rights.

On 8 May 2014, the Administrative Court of Berlin decided that the statutory exclusion of men from the right to vote and to stand as a candidate in the elections of equal opportunity commissioners for the civil services in Berlin is compatible with constitutional and EU law.<sup>88</sup> The court recognised the electoral regulations as positive action measures to compensate for factual disadvantages of women. Although 58 % of the employees within the Berlin civil services are female, there are only 27 % to 33 % in the higher salary grades.

On the same day, the court decided on the inadequate participation of the equal opportunity commissioner in appointment procedures of the Federal Ministry for Family, Senior Citizens, Women and Youth.<sup>89</sup> The court emphasised that the statutory participation rights such as timely information and adequate consultation do not permit any exceptions for the appointment of leading government officials. In February 2014, the court had already held that equal opportunity commissioners must be consulted in any warning procedure by the employer, irrespective of the sex of the respective employee or the nature of his or her misconduct, due to their statutory rights.<sup>90</sup>

### ***Discriminatory job advertisements***

Job advertisements that refer to women only are usually contested by male potential applicants. The courts accept a limited scope of genuine and determining occupational requirements to justify such gendered advertisements. However, job advertisements that refer to women only are not accepted as a means of positive action.

The Labour Court of Berlin decided that an advertisement for an internship, with an ‘only female applicants’ headline, published by the left-wing daily newspaper *die tageszeitung* and aimed at the employment of a woman with a migrant background as a means of positive action, indicated discrimination and entitled the male applicant to damages in the amount of three months’ salary.<sup>91</sup> The daily newspaper argued that women were significantly underrepresented in leading positions in the media and migrants were significantly underrepresented within the media as a whole, but it could not offer gender segregated statistics on the second claim.<sup>92</sup> The court did not accept positive action as a justification, emphasising that the exclusion of men was not appropriate and that the post in question was not a leading position.<sup>93</sup>

## **Miscellaneous**

### ***Gender discrimination within legal education***

An interdisciplinary study on the grading of final examinations in law at three German universities shows significant gender-related differences that cannot yet be explained.<sup>94</sup> The authors gathered data on the final school examination grades, the grading of exercise tests before the final university exams, the grading of the final university exams differentiated between written and oral examinations, the university attended, and the sex of the candidates.

<sup>88</sup> Administrative Court of Berlin, judgment of 8 May 2014, press release available at: <http://www.berlin.de/sen/justiz/gerichte/vg/presse/archiv/20140508.1445.397046.html>, accessed 30 September 2014.

<sup>89</sup> Administrative Court of Berlin, judgment of 8 May 2014, press release available at: <http://www.berlin.de/sen/justiz/gerichte/vg/presse/archiv/20140508.1440.397045.html>, accessed 30 September 2014.

<sup>90</sup> Administrative Court of Berlin, judgment of 27 February 2014, press release available at: <http://www.berlin.de/sen/justiz/gerichte/vg/presse/archiv/20140321.0925.395594.html>, accessed 30 September 2014.

<sup>91</sup> Labour Court of Berlin, judgment of 5 June 2014, 42 Ca 1530/14.

<sup>92</sup> See: <http://blogs.taz.de/hausblog/2014/03/11/darf-die-taz-maenner-diskriminieren/>, accessed 30 September 2014.

<sup>93</sup> See: <http://blogs.taz.de/hausblog/2014/06/10/die-taz-darf-maenner-nicht-mehrdiskriminieren/>, accessed 30 September 2014.

<sup>94</sup> E. Towfigh et al. ‘Zur Benotung in der Examensvorbereitung und im ersten Examen’ *Zeitschrift für die Didaktik der Rechtswissenschaft* 1/2014 pp. 8-27 (20), available at: [http://www.zdrw.nomos.de/fileadmin/zdrw/doc/2014/Aufsatz\\_ZDRW\\_14\\_01\\_Towfigh\\_u.a.pdf](http://www.zdrw.nomos.de/fileadmin/zdrw/doc/2014/Aufsatz_ZDRW_14_01_Towfigh_u.a.pdf), accessed 30 September 2014.

They found out that the Abitur grades as well as the grading of exercise tests have significant effects on the grading of the final state examination. But although female law students start their studies with significantly better Abitur grades, they pass the final legal state examination with significantly lower grading than male students. This effect is intensified in oral examinations compared with written examinations. And between ‘statistical twins’, the gender grade gap reaches 10 %.

After her legal education, a female lawyer published a summary of the sexist stereotypes she was confronted with by her instructors during her practical traineeship in Bavaria.<sup>95</sup> Her publication was vigorously discussed among jurists and lawyers. The Bavarian Minister of Justice asserted that he pays great attention to this problem and tries to evaluate the trainee material.<sup>96</sup>

#### ***Federal Anti-Discrimination Authority: discriminatory job advertisement***

The Federal Anti-Discrimination Authority (*Antidiskriminierungsstelle des Bundes*) supported several out-of-court settlements between potential employers and male potential applicants who claimed discrimination by job advertisements referring to women only.<sup>97</sup> Moreover, the Authority pointed out to a university that it must not advertise a position exclusively for female scientists as a means of positive action even if this position was financed by a specific fund for the increase of the number of female junior researchers.<sup>98</sup>

It remains a mystery how the gender discriminatory structures in academia can ever be changed without effective support for female young researchers. More troubling is the fact that the Federal Anti-Discrimination Authority obviously ignored the duties imposed on any German authority by Article 4 of the UN Convention on the Elimination of All Forms of Discrimination Against Women. Temporary special measures will not be considered to be discrimination but appropriate means to eliminate discrimination against women which must be taken without delay.

#### ***Federal Anti-Discrimination Authority: sexual harassment***

In 2015, the thematic focus of the Federal Anti-Discrimination Authority will be on sex/gender discrimination. As part of this focus, the authority has commissioned a report on the legal framework of sexual harassment. There are several gaps in the legal protection against sexual harassment, e.g. in the field of education, including universities, or in public spaces.

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

#### **Policy developments**

As previously mentioned in the *European Gender Equality Law Review 1/2014*,<sup>99</sup> the parental leave issue has been quite topical in Greece for some time, in particular after the CJEU judgment in the *Chatzi* case<sup>100</sup> which responded to a preliminary reference by the

<sup>95</sup> D. Schweigler ‘Das Frauenbild in der bayerischen Justizausbildung’ *Deutsche Richterzeitung* 2014 p. 52-55.

<sup>96</sup> See: <http://www.sueddeutsche.de/politik/juristenausbildung-in-bayern-lernen-mit-lola-lotter-1.1907531>, accessed 30 September 2014.

<sup>97</sup> See: [http://www.antidiskriminierungsstelle.de/SharedDocs/Kurzmeldungen/DE/2013/nl\\_04\\_2013/nl\\_04\\_aus\\_der\\_beratungspraxis\\_01.html](http://www.antidiskriminierungsstelle.de/SharedDocs/Kurzmeldungen/DE/2013/nl_04_2013/nl_04_aus_der_beratungspraxis_01.html) (commercial staff, EUR 100), and [http://www.antidiskriminierungsstelle.de/SharedDocs/Kurzmeldungen/DE/2011/nl\\_06\\_2011/nl\\_06\\_aus\\_der\\_beratungspraxis\\_02.html](http://www.antidiskriminierungsstelle.de/SharedDocs/Kurzmeldungen/DE/2011/nl_06_2011/nl_06_aus_der_beratungspraxis_02.html) (secretary, EUR 300), both accessed 30 September 2014.

<sup>98</sup> See: [http://www.antidiskriminierungsstelle.de/SharedDocs/Kurzmeldungen/DE/2012/nl\\_03\\_2012/nl\\_03\\_aus\\_der\\_beratungspraxis\\_01.html](http://www.antidiskriminierungsstelle.de/SharedDocs/Kurzmeldungen/DE/2012/nl_03_2012/nl_03_aus_der_beratungspraxis_01.html), accessed 30 September 2014.

<sup>99</sup> S. Koukoulis-Spiliotopoulos ‘Greece’ in: *European Network of Legal Experts in the Field of Gender Equality, European Gender Equality Law Review 1/2014*, pp. 66-69, European Commission 2014, available at: [http://ec.europa.eu/justice/gender-equality/files/law\\_reviews/egelr\\_2014\\_1\\_final\\_web\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2014_1_final_web_en.pdf) accessed 30 August 2014.

<sup>100</sup> Case C-149/10 *Zoi Chatzi v Ipourgos Ikonomikon* (Minister of Finance) [2010] ECR I-8489.

Thessaloniki Administrative Court of Appeal (ACA) on the meaning of Clause 2.1 of the Framework Agreement (FA) on parental leave annexed to Directive 96/34/EC.<sup>101</sup> This case concerned the entitlement to parental leave of civil servants who are parents of twins. However, it was of more general interest, as the CJEU interpreted the Directive in the light of Articles 33(2) and 24(1) of the EU Charter of Fundamental Rights (the Charter).<sup>102</sup> Following this judgment, a paid leave of six months for each child in the case of multiple births was granted to civil servants of both sexes, through an amendment to the Civil Servants Code (CSC),<sup>103</sup> in addition to the nine-month paid parental leave which all civil servants received on a transferable basis by virtue of the CSC, until the child reached the age of four.

The Greek report of the *European Gender Equality Law Review 1/2014* presented judgments Nos 3590 and 3591/2013 (Plen) of the Council of the State (Supreme Administrative Court; CS) regarding the parental leave of judges. This nine-month paid leave was initially granted to mothers only by the Code of Regulation for the Courts and the Status of Judges<sup>104</sup> (Judges' Code), until the child reached the age of four; it was also granted to fathers, on a transferable basis, but was reduced to five months for both parents, by Article 89 of Act 4055/2012.<sup>105</sup>

By the above judgments, which were inspired by the application of the Parental Leave Directive in the light of the Charter as made by the CJEU in the *Chatzi* case, the CS ruled that the curtailing of the leave conflicted with the Constitution and EU law and that both parents were entitled to the nine-month paid leave. Following these CS judgments, Article 8 of Act 4239/2014<sup>106</sup> granted the nine-month paid leave again, plus a six-month paid leave for each child in case of multiple births, thereby aligning the Judges' Code with the CSC.

The Act which had curtailed the leave also added to the Judges' Code a provision which deprived certain judges of parental leave and which can be considered to affect the individual character of the leave. This provision, which constitutes a modified version of a CSC provision, was not repealed by Act 4239/2014 which reintroduced the nine-month leave. However, the CSC version of this provision was dealt with by CS judgment No. 1113/2014, which made a preliminary reference to the CJEU, as explained below.

## Legislative developments

### *The Civil Servants Code*

Article 53 of the CSC initially granted a nine-month paid, transferable, parental leave to female civil servants only. It subsequently granted it to both female and male civil servants, on a transferable basis. According to the CS, this was done in compliance with Directive 96/34/EC.<sup>107</sup> Furthermore, Paragraph 3(c) of this article provided that 'if the wife of a civil servant does not work or exercise any profession, the husband may not make use of the parental leave, except if his wife, due to a serious illness or handicap, is unable to look after the child'. This provision was abolished by Article 6(2) of Act 5210/2013.<sup>108</sup>

### *Legislation and case law regarding judges*

As previously mentioned in the *European Gender Equality Law Review 1/2014*, by virtue of Article 1 of Act 3258/2004, a provision was added to Article 44 of the Judges' Code, by which, in compliance with landmark CS judgment No. 3216/2003 (Plen.), female judges were

<sup>101</sup> Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE, CEEP and ETUC, OJ L145 of 19 June 1996, p. 4.

<sup>102</sup> On this case and the subsequent judgment of the Thessaloniki ACA, see S. Koukoulis-Spiiotopoulos 'Greece' in: European Network of Legal Experts in the Field of Gender Equality, *European Gender Law Review 1/2014*, pp. 66-69, European Commission 2014, available at: [http://ec.europa.eu/justice/gender-equality/files/law\\_reviews/egelr\\_2014\\_1\\_final\\_web\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2014_1_final_web_en.pdf), accessed 30 August 2014.

<sup>103</sup> Act 3528/2007, OJ 26 of 09 February 2007.

<sup>104</sup> Act 1756/1998, OJ A 35 of 26 February 1998.

<sup>105</sup> OJ A 51 of 12 March 2012.

<sup>106</sup> OJ A 43 of 20 February 2014.

<sup>107</sup> CS No. 4875/2012.

<sup>108</sup> OJ A 254 of 21 November 2013.

granted the nine-month paid parental leave provided for civil servants. This CS judgment did not have to address the entitlement of male judges to the same leave, as the claimant was a female judge. However, as it relied on the Constitution (Article 21(1) and 21(5) requiring the protection of the family, marriage, motherhood and childhood, and the taking of measures for coping with the demographic problem, respectively) and EU law (the principle regarding the reconciliation of family and professional life and Directive 96/34/EC as an expression thereof), it opened the way to further case-law developments. It was notably followed by CS judgments 1 and 2/2006, which upheld claims of male judges to the nine-month paid parental leave on the basis of the same constitutional and EU rules, plus the constitutional gender equality principle (Article 4(2)) and Directive 76/207/EEC and recalled that the harmonisation of family and professional obligations is, according to CJEU case law, a ‘natural corollary to gender equality’. This case law has been reaffirmed by many CS judgments.

Therefore, judges of both sexes have been entitled since 2006, by virtue of well-established CS case law relying on the Constitution and EU law, to the nine-month paid parental leave provided for civil servants, and they have been regularly receiving it in practice. However, this leave was not formally extended to male judges until 2012, when Article 89 of Act 4055/2012 also granted it to them, on a transferable basis, but curtailed it for both parents.

In addition to curtailing the leave, Article 89 of Act 4055/2012 added to Article 44 of the Judges’ Code a provision (Paragraph 24) which reads: ‘If the spouse of a judge does not work or exercise any profession, then the judge may not make use of the parental leave, except if the judge’s spouse, due to a serious illness or handicap, is unable to look after the child’. This provision was inspired by the abovementioned Paragraph 3(c) of Article 53 of the CSC, but the condition that it sets for the deprivation of parental leave concerns both male and female judges. Article 8 of Act 4239/2014, which reintroduced the nine-month parental leave, also granting it to male judges, did not repeal this provision.

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

#### ***CS judgment No. 1113/2014 and the preliminary question it addressed to the CJEU***

In December 2010, a male judge requested the nine-month parental leave which, at the time, was granted by the Judges’ Code to mothers only, for his child who was born in October 2010. This leave was refused to him on the ground that the Judges’ Code provided it (at the time) for mothers only. The CS, by judgment No. 2060/2011, relying on Directive 96/34/EC, annulled this refusal and referred the case to the author of the refusal, the Ministry of Justice, for a new, lawful decision. However, the Ministry of Justice again refused the leave, in September 2011, this time relying on CSC Article 53(3)(c) (see above).

The applicant sought the annulment of this second refusal before the CS. The CS, in judgment No. 1113/2014, referred to Article 4(1) and (2) of the Constitution (gender equality and equality before the law, respectively) and Article 21(1) of the Constitution (protection of the family, marriage, motherhood and childhood); to gender equality which, ‘according to Articles 2 and 3(2) TEU and CJEU case law constitutes a fundamental principle of EU law’, recalling that ‘these provisions proclaim gender equality as an “obligation” and an “objective” of the EU and impose the positive obligation to promote it in the framework of all EU actions’. The judgment also invoked Articles 21, 23 and 33 of the Charter and the EC Charter of Fundamental Social Rights of Workers. It then invoked Directive 96/34/EC on parental leave, which it considered applicable in the instant case, as Directive 2010/18/EU repealed it with effect from 8 March 2012, i.e. subsequent to the impugned refusal, as well as Directive 2006/54/EC (recast), quoting several provisions of both Directives.

The CS then recalled its well-established case law on the parental leave of judges, in particular the aforementioned judgments Nos. 3216/2003 (Plen.) and 1 and 2/2006. It noted that, in view of this case law, whenever there is no provision in the Judges’ Code on a matter of parental leave, those provisions of the CSC which are suitable for judges are applicable, with a view to complementing this Code. The CS then considered that the provision on the



basis of which parental leave was refused to the applicant is among the CSC provisions applicable to judges.

The CS noted that the *res judicata* from its aforementioned previous (No. 2060/2011) judgment, by which it had annulled the refusal to grant parental leave to the applicant, did not cover the matter under consideration. It then referred to the above mentioned CJEU judgment in *Chatzi*, according to which parental leave aims at facilitating the combination of professional and family obligations of working parents and pointed out the following: ‘It is in view of this aim that the right to parental leave was included among the fundamental social rights of Title IV “Solidarity” of the Charter (Article 33(2)). The aim of parental leave does not coincide with the aim of maternity leave (Directive 92/85/EEC, in conjunction with Directive 76/207/EEC and now Directive 2006/54/EC), to which the working mother is entitled, which is intended, first, to protect a woman’s biological condition during and after pregnancy and, second, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment’ (a reference to paragraph 9 of the General Considerations of the Framework Agreement attached to Directive 96/34/EC and paragraph 50 of the CJEU judgment in the case of *Montull*<sup>109</sup>).

The CS further mentioned that parental leave ‘also aims at promoting equality of opportunities and treatment between men and women in matters of employment and occupation, which is guaranteed by Directive 2006/54/EC. Further, with a view to achieving the above aims of parental leave, an “individual right” to this leave is recognised for “working parents”, who at the same time bear the obligation to raise their children, so that, firstly, the combination of their professional obligations with their family obligations is enabled in practice (CJEU, *Chatzi*, paragraphs 36 and 39) and, secondly, “the participation of women in active life” is promoted and men are encouraged “to assume an equal part of family obligations” (see Paragraphs 7 and 8 of the General Considerations of the Framework Agreement). However, it is not fully clear, nor has it been clarified by the CJEU case law, whether the aforementioned provisions of Directives 96/34/EC, 2006/54/EC and 2006/54/EC, as they apply to the instant case, have the meaning that national provisions like the impugned provision of Article 53(3)(c) of the CSC (...) are incompatible with them.’

Consequently, the CS considered it necessary to postpone the issuance of a final judgment in the instant case and to submit to the CJEU the following preliminary question:

‘Do the provisions of Directives 96/34/EC and 2006/54/EC, as they apply to the instant case, have the meaning that they prohibit national provisions which, like the impugned provision of Article 53(3)(c) of Act 3528/2007 [the CSC], provide that, if the wife of the civil servant does not work or exercise any profession, the husband is not entitled to parental leave, except if, due to a serious illness or handicap, she has been found to be unable to cope with child-raising needs?’

***Can the CJEU response to the preliminary question have an effet utile in the instant case?***

Due to the importance of the above case and of the response of the CJEU to the preliminary question, it is opportune to explain more precisely the facts of the case and to place it in the Greek legal context, which will necessarily condition the final outcome at national level. In particular, the following matters should be pointed out.

The provision of Article 53(3)(c) of the CSC, the validity of which in relation to EU law is at stake, was repealed by Article 6(2) of Act 4210/2013,<sup>110</sup> with effect from 21 November 2013, the date upon which this Act came into effect, following a letter of warning by the Commission. The refusal of the parental leave challenged before the CS took place on 26 September 2011, i.e. before the repeal of this provision.

Moreover, Act 4055/2012, which curtailed the judges’ parental leave, also introduced into the Judges’ Code a provision inspired by the impugned provision of Article 53(3)(c) of

<sup>109</sup> Case C-5/12 *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)* [2013] ECR n.y.r.

<sup>110</sup> OJ A 254 of 21 November 2013.

the CSC, albeit in a ‘neutral’ wording making it applicable to both fathers and mothers. This is Paragraph 24 of Article 44 of the Judges’ Code, the text of which is quoted under ‘Legislation and case law regarding judges’, above. The refusal of parental leave which was challenged before the CS was prior to the introduction of this provision as well.

Therefore, it was indeed Article 53(3)(c) of the CSC – the legal basis of the refusal of the leave – that was applicable to the case. However, as the ‘neutral’ provision of Paragraph 24 of Article 44 of the Judges’ Code is still in effect, whatever the response of the CJEU to the preliminary question and whatever the CS judgment in compliance with this response may be, parental leave will be refused to the applicant for a third time, on the basis of this provision of the Judges’ Code. Therefore, the applicant will have to have recourse to the CS for a third time and the CS may make a second preliminary reference to the CJEU.

Meanwhile, the child concerned, who is already four years old (the child was born in October 2010, as mentioned above), will have exceeded the age up to which parental leave is granted both by the Judges’ Code and by the CSC (four years), and even the age of six provided by Article 50(1) of Act 4075/2012 which transposed the new parental leave directive (Directive 2010/18/EU).<sup>111</sup> Consequently, the father, although having requested parental leave well in time, i.e. three and a half months after the child’s birth, and not bearing the slightest responsibility for all this ‘*aller-retour*’ of his case, will very likely not be able to enjoy the leave at all.

## HUNGARY – Beáta Nacsa

### Policy developments

The Prime Minister, Viktor Orbán, called the three election victories (in the parliamentary, municipal and European Parliamentary elections) of the FIDESZ-KDNP permanent party alliance (*Fiatal Demokraták Szövetsége–Kereszténydemokrata Néppárt*: Alliance of Young Democrats–Christian Democratic People’s Party) to be ‘unprecedented, disarming, almost falling into the world of political science fiction’.<sup>112</sup> This massive victory of the right-wing parties re-established the extremely low percentage of women represented in politics. The new parliamentary elections held in 2014 resulted in women representing just 9.5 %. The ruling FIDESZ-KDNP permanent party alliance has the lowest number of female MPs among the parliamentary parties: out of 133 MPs only 9 are women, which equals 6.7 %.<sup>113</sup> The European Parliamentary Elections resulted in 4 seats for women out of 21 in the European Parliament (i.e. 19 %).<sup>114</sup> The new Government has only male members.<sup>115</sup>

Shortly following his re-election, the Prime Minister discussed the possible paths of success for Hungary in the future. He pointed out that the world is trying to understand systems that are not western, not liberal, perhaps not even democracies, but are nevertheless successful, like Singapore, China, India, Russia and Turkey. ‘While breaking with the dogmas and ideologies that have been adopted by the West, we are trying to find the form of community organisation, the new Hungarian state, which is capable of making our community competitive in the great global race for decades to come.’ In reply to a question,

<sup>111</sup> This Directive was transposed by Articles 48-54 of Act 4075/2012, OJ A 89 of 11 April 2012.

<sup>112</sup> The campaign assessment speech of Prime Minister, Viktor Orbán, on 19 October 2014. See: [http://www.miniszterelnok.hu/beszed/a\\_peldatlan\\_gyozelem\\_utan\\_a\\_munkahelyteremtes\\_es\\_a\\_kozneveles\\_megujitasa\\_a\\_cel](http://www.miniszterelnok.hu/beszed/a_peldatlan_gyozelem_utan_a_munkahelyteremtes_es_a_kozneveles_megujitasa_a_cel), accessed 7 November 2014.

<sup>113</sup> The author’s calculations on the basis of data published on the website of the Parliament. Available at: <http://www.parlament.hu/aktiv-kepviseloi-nevsor>, accessed 7 November 2014.

<sup>114</sup> The author’s calculations on the basis of data published by the National Election Office. Available at: [http://valasztas.hu/hu/ep2014/877/877\\_0\\_index.html](http://valasztas.hu/hu/ep2014/877/877_0_index.html), accessed 7 November 2014. Three female MEPs belong to FIDESZ-KDNP ([www.fidesz.hu](http://www.fidesz.hu)), and one to Jobbik (The Movement for a Better Hungary) (<http://www.jobbik.com/>), both accessed 7 November 2014.

<sup>115</sup> Members of the Government. See: <http://www.kormany.hu/hu/a-kormany-tagjai>, accessed 7 November 2014

the Prime Minister explained that the Hungarian solution will be the ‘work-based state’.<sup>116</sup> On 21 October Viktor Orbán further elaborated this idea: Government policy aims to achieve full employment by 2018, through ‘the restoration of the prestige of vocational training’. Consequently, no one should need income supplement support as everyone should have a job.<sup>117</sup> Antal Rogán, the leader of the FIDESZ-KDNP group in the Parliament, announced on 5 November that the members of the group had asked the Government to abolish income support by 2018 and to invest the resources thus freed into public work programmes. They also recommended looking for a way to link family allowance to work activity.

Due to the synergistic effect of education about equal treatment in schools, programmes in the electronic media, acceleration of progressive content on the Internet, the different activities of the Equal Treatment Authority (ETA),<sup>118</sup> women’s rights organisations and human rights groups, the directly discriminatory job advertisements that were so frequent 10 to 15 years ago have almost disappeared from Hungary. Directly discriminatory job advertisements are now almost only ever published by small employers looking for workers for low ranking jobs (e.g. for cleaning).

According to the report published by the ETA, the number of its procedures in 2013 exceeded the number of procedures it had undertaken in previous years. The majority of the submissions (total 1 496) fell outside the scope of activity of the ETA, therefore the ETA launched proceedings in only 598 cases. In these proceedings the most frequently cited protected characteristics were disability (119 cases); belonging to an ethnic or national minority (113), health conditions (77 cases). Pregnancy, motherhood (fatherhood) was cited in only 53 cases, and sex/gender in 22 cases. Out of 598 cases, only in 21 cases did the ETA hold that the rules of equal treatment had been violated by the respondent and applied sanctions, and in 30 cases the ETA endorsed the settlement concluded by the parties. The majority of the cases were terminated for a procedural reason.<sup>119</sup>

### Legislative developments

Act I of 2012 on the Labour Code was modified in order to make further steps towards the transposition of Directive 2010/18/EU.<sup>120</sup> The law on executive employees was modified by Article 175 (21) of Act CCLII of 2013 on the modification of certain Acts due to the entry into force of the new Civil Code. Article 175 (21) (which modified Article 209 of the Labour Code) entered into force on 15 March 2014.

According to the modified Article 209 of the Labour Code, the employment contract of executive employees is no longer allowed to deviate from Article 127, which provides mothers with 24 weeks maternity leave. Consequently, female executives became entitled to four months maternity leave by this modification, as required by Directive 2010/18, since 15 March of this year.

<sup>116</sup> See: [http://www.miniszterelnok.hu/in\\_english\\_article/the\\_era\\_of\\_the\\_work-based\\_state\\_is\\_approaching](http://www.miniszterelnok.hu/in_english_article/the_era_of_the_work-based_state_is_approaching), accessed 10 November 2014.

<sup>117</sup> See: [http://www.miniszterelnok.hu/in\\_english\\_article/government\\_wishes\\_to\\_achieve\\_full\\_employment\\_in\\_cooperation\\_with\\_world\\_of\\_business](http://www.miniszterelnok.hu/in_english_article/government_wishes_to_achieve_full_employment_in_cooperation_with_world_of_business), accessed 10 November 2014.

<sup>118</sup> Virtual library of the ETA, available at: [http://www.egyenlobanasmod.hu/cikkek/virtual\\_library#videok](http://www.egyenlobanasmod.hu/cikkek/virtual_library#videok); publications of the ETA, available at: [http://www.egyenlobanasmod.hu/cikkek/virtual\\_library#dokumentumok](http://www.egyenlobanasmod.hu/cikkek/virtual_library#dokumentumok); short film contest of the ETA for youngsters, available at: <http://www.egyenlobanasmod.hu/tamop/palyazatok#rovidfilmalyazat>; and audiobook contest of the ETA for youngsters, available at: <http://www.egyenlobanasmod.hu/tamop/hangoskonyvek>. All webpages accessed 13 October 2014.

<sup>119</sup> See: [http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/8745bda54b1ed94d06475af17cb3a40f/EBH2013\\_EN\\_20141021.pdf](http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/8745bda54b1ed94d06475af17cb3a40f/EBH2013_EN_20141021.pdf), accessed 10 November 2014.

<sup>120</sup> Council 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 OJ L 68 of 18 March 2010, p. 13-20.

## Case law of national courts

The new Labour Code introduced the rule that only pregnant women who notified an employer of their pregnancy were entitled to legal protection against dismissal. The Constitutional Court nullified this legal provision of the Labour Code. This nullification re-established the previously existing rule that the status itself and not its notification activates the legal protection.<sup>121</sup> The procedure at the Constitutional Court was initiated by the Commissioner for Fundamental Rights, claiming that the obligation of notification about early pregnancy generally (without any particular legal reason) violates pregnant women's human dignity and their right to privacy.<sup>122</sup>

## Equality body decisions/opinions

On the website of the Equal Treatment Agency, until October 2014 only four cases were published regarding discrimination based on pregnancy, motherhood, and fatherhood; and none concerning sex discrimination. Out of four cases, only in one case did the ETA hold that the rules of equal treatment had been violated by the respondent, and applied sanctions. In three cases the ETA endorsed the settlement concluded by the parties.

In case no. EBH/379/2014 the ETA established that the employer could not prove a legitimate reason for terminating a pregnant employee's employment relationship during the probationary period; therefore this amounted to direct sex discrimination. Consequently ETA applied sanctions against the employer (a fine, and a prohibition on any further infringement of equal opportunities laws, issued under the Act on Administrative Procedure).<sup>123</sup>

Settlements were endorsed in the following cases: a public transportation company did not accommodate the specific needs of a mother travelling with a pram;<sup>124</sup> a predefined benefit was not provided to an employee who was on maternity leave;<sup>125</sup> and a foundation informed an applicant for a research grant that it would be considered a disadvantage in the evaluation process if she intends to also bring her child.<sup>126</sup>

## ICELAND – *Herdís Thorgeirsdóttir*

### Policy developments

#### *The certified wage standard system*

The certified wage standard system, which was launched in Iceland six years ago, has not yet been implemented. The launch of the project plan in 2008 would put into practice in Iceland the world's first certified wage standard. It is being tested right now and will be ready for implementation soon. Both private and public companies will then be able to use the standard. They will be given a certificate if they can prove that they are following the standard and are paying equal wages for equal work. The objective is to achieve wage equality.

Work on the production of the wage equality standard began in 2008 in accordance with an Interim Provision of the Gender Equality Act and the Protocol of the Collective

<sup>121</sup> Decisions of the Constitutional Court and the Official Journal of the Constitutional Court; available online at: [http://www.mkab.hu/letoltesek/abk\\_2014\\_17\\_alairt.pdf](http://www.mkab.hu/letoltesek/abk_2014_17_alairt.pdf), accessed 5 June 2014.

<sup>122</sup> 17/2014. (V. 30.) Constitutional Court Decision on the nullification of the phrase of 'prior to dismissal' in Article 65.(5) of Act I of 2012 on the Labour Code (17/2014. (V. 30.) AB határozat a munka törvénykönyvéről szóló 2012. évi I.törvény 65. § (5) bekezdése „a felmondás közlését megelőzően” szövegrésze alaptörvényellenességének megállapításáról és megsemmisítéséről).

<sup>123</sup> See: <http://www.egyenlobanasmod.hu/article/view/379-2014-megallapito-terhesseg>, accessed 10 November 2014.

<sup>124</sup> See: <http://www.egyenlobanasmod.hu/jogesetek/hu/161-2014.pdf>, accessed 10 November 2014.

<sup>125</sup> See: <http://www.egyenlobanasmod.hu/jogesetek/hu/231-2014.pdf>, accessed 10 November 2014.

<sup>126</sup> See: [http://www.egyenlobanasmod.hu/article/view/157\\_2014\\_egvezseg\\_anyasag](http://www.egyenlobanasmod.hu/article/view/157_2014_egvezseg_anyasag), accessed 10 November 2014.

Agreement.<sup>127</sup> The Icelandic Confederation of Labour and the Confederation of Icelandic Employers in the Private Sector, both of which were involved in the procedure, stressed the importance of collaboration between the parties on equality issues. Negotiations between representatives of the Ministry of Social Affairs and Social Insurance, the Icelandic Confederation of Labour and the Confederation of Icelandic Employers began in 2008 on the implementation of this task and work on the production of the standard began immediately. Work on the production of the standard was subject to the European standardisation policy by which the Icelandic Standards Council is bound.<sup>128</sup> One aspect of the work was that all those who might be interested were invited to participate in the production of the standard. A technical committee was set up to oversee the work of producing the standard.

There is a constant gender pay gap in Iceland and the project of a certified wage standard, with the participation of enterprises and institutions interested in adopting the standard, is seen as potentially an effective tool to bridge the gender pay gap. The wage equality standard is a tool which can consequently be certified. It requires that those using it, both public and private companies, prove that they are following the standard and are paying equal wages for equal work. The aim of the wage equality standard is to ensure that enterprises and institutions establish procedures that will guarantee that decisions regarding wages will not involve gender-based discrimination, for example ad hoc decisions based on close ties of an employee with the employer or prejudiced or biased grounds.

In September 2014, the certified wage standard system had still not been implemented. At present the establishment of qualified independent reviewers of the implementation of the wage equality standard is being checked before the standard is put into practice. Both private and public parties will be able to seek certification from the competent authorities stating that they meet the requirements of the standard.

#### ***A working group to formulate proposals to better achieve objectives of the Act on Maternity, Paternity, and Parental Leave***

The Minister of Welfare announced on 9 September 2014 that she would appoint a working group to come up with proposals regarding the future schemes of maternity, paternity, and parental leave, and to decide whether it is more important to prolong parental leave or raise the payments to parents to achieve the objective of the Act on Maternity, Paternity, and Parental Leave No. 95/2000. Reduced payments in the wake of the financial crisis have resulted in many fathers not making use of their entitlement to take paternity leave.<sup>129</sup>

#### ***Highlights of Icelandic gender policy achievements***

Recently the Women in Parliaments Global Forum (WIP)<sup>130</sup> held a conference in Iceland where the gender equality policy achievements making Iceland the world's global leader in gender equality were listed. Iceland ranks number one according to the World Economic Forum's Global Gender Gap Report. The highlights mentioned through history are:

1. Iceland approved equal inheritance rights for men and women in 1850;
2. female suffrage was introduced in Iceland in 1915 (women over 40 and all women in 1920);
3. the first woman was elected to the national Parliament in 1922;
4. in 1958 women were only 1 % of all municipal council members in Iceland. In 1959 the first woman became mayor in Reykjavík;
5. the first female cabinet minister was appointed in 1970;

<sup>127</sup> Gender Equality Act no. 10/2008. See here: [http://eng.velferdarraduneyti.is/media/Rit\\_2013/Plan-of-Action-on-Gender-Equality\\_02052013.pdf](http://eng.velferdarraduneyti.is/media/Rit_2013/Plan-of-Action-on-Gender-Equality_02052013.pdf), accessed 31 October 2014.

<sup>128</sup> [http://ec.europa.eu/enterprise/policies/european-standards/standardisation-policy/index\\_en.htm](http://ec.europa.eu/enterprise/policies/european-standards/standardisation-policy/index_en.htm), accessed 31 October 2014.

<sup>129</sup> See: <http://www.velferdarraduneyti.is/frettir-vel/nr/34803>, accessed 15 October 2014.

<sup>130</sup> The Women in Parliaments Global Forum (WIP) is an independent, international and non-partisan foundation established with the purpose of advancing society by building a network between Women in Parliaments, based in Zurich, Switzerland. See: <http://www.womens-forum.com/stories/report-women-in-parliaments-study-trip-to-iceland/142>, accessed 18 September 2014.

6. in the same year, 1970, the Red Stockings movement was founded, inspired by women's rights and feminist movements all over the world and it became a key radical force in raising awareness on various gender equality issues;
7. on 24 October 1975 Icelandic women went on strike nationwide to emphasise the importance of women's contribution to the economy and paralysed the labour market for one day;
8. in 1975 a three-month maternal leave was approved and a new law on abortion, reproductive and maternal health was adopted;
9. in 1980 the first woman to be elected in democratic elections as head of state became President of the Republic of Iceland;
10. in the wake of the last parliamentary elections in 2013, women occupy 25 out of 63 seats in the Parliament (*Althing*) (39 %). Iceland's electoral system is based on proportional representation;<sup>131</sup>
11. Iceland has one of the highest rates in the OECD countries of women participating in the labour market, namely 77 %. 90 % of children aged 1-5 years are in day care;
12. in 2009 the purchase of sexual services was made illegal in Iceland and in 2010 all strip clubs were banned by law;
13. since 2003, Icelandic fathers have had an independent (not transferable; i.e. if they cannot or will not use it the mother cannot make use of it) right to a three-month paid paternal leave, where they receive 80 % of their salary up to a certain ceiling;
14. in 2013 a new law took effect, which obliges companies to have a minimum 40 % of both gender represented on their boards;
15. in 2011 Icelandic authorities approved a three-year plan on implementing gender budgeting to make the (different) impact of fiscal policy on the genders more visible, so it is possible to re-evaluate policies, expenditure and sources of revenues in accordance with objectives of equality.<sup>132</sup>

### Legislative developments

The Minister of Welfare has introduced a draft law proposing to unite seven complaints committees that fall under the auspices of the ministry, among them the Maternity/Paternity/Parental Complaints Board, with the aim of rendering the operation of these complaints boards more practical and efficient. Complaints in the spheres of housing, social security, employment and in other spheres related to welfare issues have increased in recent years.<sup>133</sup>

## IRELAND – Frances Meenan

### Policy developments

#### *Gender reassignment*

The Government published a revised General Scheme for the proposed Gender Recognition Bill in June 2014.<sup>134</sup> This is the second draft of a consultative document. The legislation proposes to provide for legal recognition of the acquired gender of transgender persons and intersex persons. This formal legal recognition is for all purposes, including official dealings

<sup>131</sup> See for further reading: [http://en.wikipedia.org/wiki/Proportional\\_representation](http://en.wikipedia.org/wiki/Proportional_representation); <http://www.landskjor.is/english>; <http://www.government.is/how-iceland-is-governed/>, accessed on 30 October 2014.

<sup>132</sup> See in this context a fact sheet of the Ministry of Finance on gender budgeting: [http://eng.fjarmalarduneyti.is/media/utgafa/GB\\_in\\_Iceland\\_Fact\\_Sheet2012.pdf](http://eng.fjarmalarduneyti.is/media/utgafa/GB_in_Iceland_Fact_Sheet2012.pdf), accessed 27 October 2014.

<sup>133</sup> See: <http://www.velferdarraduneyti.is/frettir-vel/nr/34818>, accessed 24 September 2014.

<sup>134</sup> Available at: [www.welfare.ie](http://www.welfare.ie), accessed 3 September 2014. It should be reiterated that this is a second draft of a consultative document and should not be confused with a 'Bill' which is draft legislation. It is envisaged that the Gender Recognition Bill 2014 will be introduced in Parliament by the end of the year.

with the state and all official bodies and civil and commercial society. It includes the right to marry or enter a civil partnership in the acquired gender and the right to a new birth certificate. The effect of legal recognition will not be retrospective but will be only from the date on which legal recognition is provided by means of the issuing of a gender recognition certificate. All rights and obligations of actions by the person in his or her original gender prior to the date of recognition are to remain unaffected.

## Legislative developments

### *Irish Human Rights and Equality Commission Act 2014*

The Irish Human Rights and Equality Commission Act 2014 was signed by the President on 17 July 2014.<sup>135</sup> A Chief Commissioner designate, commissioners designate, and staff have been appointed. An Order for the commencement of the Act is awaited. This Act dissolved the Irish Human Rights Commission and the Equality Authority, and transferred their respective functions to the Irish Human Rights and Equality Commission ('the Commission'). The Commission has enhanced powers. The Act introduces a positive duty on public bodies to have due regard to human rights and equality. The Commission will assist public bodies to comply with this positive duty by producing guidelines and codes of practice. The new Commission is being established with the intention of being recognised as Ireland's human rights institution. There are a number of definitions of importance, namely the definition of 'dignity' which in relation to a person means 'the inviolable intrinsic value, equal to other persons, that the person has and includes the recognition by other persons of such value with respect of that person'. The term 'to discriminate' is as set out in the Employment Equality Act 1998 and the Equal Status Act 2000 (the provision of goods and services) and includes the issuing of an instruction to discriminate and other prohibited conduct (to include harassment and sexual harassment). The discriminatory grounds are as provided in the Acts of 1998 and 2000, namely gender, civil status, family status, age, race, religion, sexual orientation, disability and being a member of the traveller community. 'Human rights' means 'the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution [of Ireland]', 'the rights liberties or freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which [Ireland] is a party' and 'the rights liberties and freedoms that may reasonably be inferred as being- (i) inherent in persons as human beings, and (ii) necessary to enable each person to live with dignity and participate in the economic, social or cultural life in ... [Ireland]'.

The Act provides for equality reviews and various enforcement actions as previously provided under the equality legislation. There is a statutory provision whereby the Commission may apply to the High or Supreme Courts as an *amicus curiae*. The background to the amalgamation of these two bodies was the economic recession and the reduction in the number of state bodies. However, provided that there will be sufficient funds, the amalgamation may prove to have a positive outcome. The most important feature in this legislation is the provision of a positive duty for public bodies in respect of equality and human rights. Such bodies include all state bodies as well as commercial semi-state bodies, e.g. state transport, electricity and so forth. Whilst all state bodies as employers or providers of services would come within the scope of the equality legislation, nonetheless this is providing a positive duty in respect of equality and human rights. Such positive duty will place an added burden on these state bodies in the defence of any claim under the equality legislation. Such bodies will appear also to have a positive duty in respect of any other form of claim e.g. a judicial review application in respect of the non-application of fair procedures. It should be noted, however, that Ireland has significant rules in respect of the application of fair procedures deriving from a constitutional right. There is also effectively the merger of

<sup>135</sup> Irish Human Rights and Equality Commission Act 2014, <http://www.oireachtas.ie/viewdoc.asp?DocID=26857&&CatID=59>, accessed 28 August 2014. Irish Human Rights and Equality Commission, <http://www.ihrc.ie/>, accessed 28 August 2014.

equality and human rights in respect of equality reviews and various enforcement procedures under the Act.

There is also provision for the legal assistance of claimants; however, such provisions appear to be a restatement of the provision in the employment equality legislation and there is no enhancement of such entitlement. Assistance is only provided if there is a point of principle involved, where it would be unreasonable to expect the applicant to deal with the matter to which the proceedings concerned relate without assistance, due to the complexity of the issue or at the discretion of the Commission.

### ***Transposition of Directive 2010/41/EU in respect of assisting spouses and civil partners of self-employed persons***

The Social Welfare and Pensions Act 2014<sup>136</sup> provides that the spouse or civil partner of a self-employed person who carries out the same or ancillary tasks and earns over EUR 5 000 will be entitled to pay 'Pay Related Social Insurance' (more usually called 'PRSI') and thus be entitled to various entitlements (maternity and adoptive leave benefit and state pension) in due course.<sup>137</sup> This provision applies where there is no formal partnership in place (e.g. a family business).

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

An interesting case arose under the Equal Status Acts 2000-2012 on the family status grounds where a pregnant woman and her husband were denied the lease of an apartment on the grounds that it was not suitable for children.<sup>138</sup> Having viewed the apartment, the complainant contacted the letting agency whose representative asked who would be living in the apartment. The complainant said that it would be herself, her husband and that she was expecting a baby in three months' time. The agency staff member stated that the landlords had left strict instructions that there were to be no children in the apartment. There were no specific reasons for this instruction. The equality officer noted that this issue did not arise when the complainants were looking around the apartment with the agency representative. The equality officer noted that the apartment was advertised as being on a 12-month lease and there was no reference to it being unsuitable for children nor did this matter arise when the complainants were being shown around the apartment. The landlords in their submission referred to the facts, inter alia, that the premises were a protected structure and that there were sash windows and that they were concerned about safety. The equality officer noted that, at the end of a twelve-month lease, the baby would then only be eight months old and would not be in a position to climb up and fall out of the windows. The landlords had submitted extensive submissions as to why the property was not suitable, but the equality officer noted that it was a spacious apartment with ample storage space. The equality officer decided that the respondent had discriminated against the complainants on the grounds of family status. The equality officer considered that the letting agents, the respondent in this action, had discriminated against the complainant. The sum of EUR 1 500 was awarded to each of the complainants. It was also ordered that the respondent should review its policies and procedures to formulate guidelines for its staff and customers setting out how it complies with its statutory obligation not to discriminate. These should also set out any objective reasons that may be taken into account when considering the suitability of properties for letting purposes. In addition, the respondent is to provide training for all its staff on the provisions of the Equal Status Acts.

<sup>136</sup> <http://www.oireachtas.ie/viewdoc.asp?DocID=26812&CatID=87>, accessed 3 September 2014.

<sup>137</sup> The Department of Social Protection has just published the details in respect of the payment of Pay Related Social Insurance ('PRSI') by the spouse or civil partner of the self-employed who are doing the same or ancillary tasks as their spouse or partner. See: <http://www.welfare.ie/en/Pages/Change-to-Self-Employed-Social-Insurance.aspx>, accessed 3 September 2014.

<sup>138</sup> *Markusson v Vincent Finnegan Ltd.* DEC-S2014-005, <http://www.workplacerelations.ie/en/Cases/2014/June/DEC-S2014-005.html>, accessed 4 September 2014.



The issue of discrimination on the gender and age ground in national broadcasting was considered in *Shanahan v RTE*.<sup>139</sup> The equality officer decided that the complainant failed to establish a prima facie case of discrimination in relation to conditions of employment, promotion and victimisation on the basis of the grounds of gender and age. The complainant was employed in full-time permanent employment by *RTE* (the state broadcasting authority). From 1989 to 1999, she was designated a reporter/presenter but actually worked as a producer on the radio programmes *Farm Week* and *Farm News*. In 2004, she maintains that she was not consulted about changes in the Agriculture Department in *RTE*. Between 2006 and 2011 the complainant occupied various roles on different radio programmes. She contended that over those years there was ongoing discrimination, as she was not the main presenter on these agricultural programmes and younger male presenters acted as main presenters instead. Over these years the complainant performed only stand-in or research roles. She considered that none of these roles befitted her experience. The respondent denied the claims that she was discriminated against on grounds of gender and age.

The complainant's representative cited a UK employment tribunal judgment<sup>140</sup> which he contended was similar to this case, particularly in the treatment of an older woman. The possibility of a combination of age and gender was considered in the present *RTE* case but the equality officer noted that, in the *BBC* case, it was found that discrimination occurred on the grounds of age only. The equality officer accepted the evidence of the respondent, *RTE*, as to why the complainant was not appointed as presenter in 2004 or 2009 or latterly as stand-in presenter. The evidence, given by a number of witnesses who were in senior positions involved in programming in *RTE Radio 1* during the period in question, considered that the complainant was an experienced, knowledgeable and respected reporter/presenter but she was not considered suitable by the editorial board to present an hour-long live radio programme. The respondent contended that the complainant was told at the time of the 'comparator's' appointment in 2009 that she was neither considered suitable to present a live hour-long programme nor to act as a stand-in presenter. The evidence that the complainant was not accepted for a stand-in role in 2011 was accepted by the equality officer. The equality officer also accepted the respondent's evidence concerning her suitability or lack thereof in presenting the radio programme in 2004 and 2009. It was considered that there was no other act of discrimination in 2011. The equality officer could not find discrimination on the gender or age ground or more interestingly on the 'combined'<sup>141</sup> ground of age and gender discrimination. It was decided that the claimant could not establish a *prima facie* claim of discrimination in relation to victimisation and conditions of employment.

## ITALY – Simonetta Renga

### Legislative developments

#### *Quotas in politics*

Act No. 65 of 22 April 2014 recently modified Articles 12 and 13 of Act No. 18 of 24 January 1979 on the election of members of the European Parliament for Italy,<sup>142</sup> to ensure a more equal gender balance amongst Italian members of the European Parliament. This is based on a proportional system (that is the electoral system where the seats are assigned in proportion

<sup>139</sup> An equal pay claim was also brought but subsequently withdrawn. DEC-E2014-021, see: <http://www.workplacerelements.ie/en/Cases/2014/April/DEC-E2014-021.html>, accessed 4 September 2014.

<sup>140</sup> Case Number: 2200423/2010 *O'Reilly v BBC*. It was also noted that in the *BBC* case the employment tribunal found there were inconsistencies in the evidence given to explain certain decisions made by the respondent about the appointment of presenters. It was accepted that the respondent had a legitimate aim but the means to achieve that aim were not proportionate.

<sup>141</sup> Author's emphasis.

<sup>142</sup> Act No. 18 of 24 January 1979, published on 30 January 1979, [http://www.normattiva.it/atto/caricaDettaglioAtto?atto\\_dataPubblicazioneGazzetta=1979-01-30&atto.codiceRedazionale=079U0018&currentPage=1](http://www.normattiva.it/atto/caricaDettaglioAtto?atto_dataPubblicazioneGazzetta=1979-01-30&atto.codiceRedazionale=079U0018&currentPage=1), accessed 7 November 2014.

with the votes, which normally implies that the number of valid votes is divided by the number of posts and the result is the electoral rate, that is the number of votes necessary to obtain a post), with a minimum barrier of 4 %, and the possibility to give up to three preferential votes.

Under these amendments, which will fully come into force for the 2019 elections, each list cannot be made up of more than 50 % candidates of the same sex and the first and the second candidates in the list cannot be of the same sex. If these rules are infringed, the candidates of the overrepresented sex are cancelled, starting from the last one in the list, until the balance is restored. The list will not be accepted in the electoral competition in a case where the number of the remaining candidates is below the minimum required. If the first and the second candidates on the list are of the same sex, the order of the candidates is changed by placing, after the first one, the following candidate of the different sex. In the case of two or three preferential votes, they must be given to candidates of a different sex. The amendment can be considered a step forward in the improvement of female participation in politics. This is particularly necessary in Italy, as only 21 % of European Parliament representatives from Italy are women.

### ***Further deregulation of fixed-term contracts***

Act No. 78/2014, which is the first intervention of the new Government in the labour market, includes a further deregulation of fixed-term contracts.

The main change concerns the justification (for organisational, technical, production, or replacement reasons), which was an essential requirement for contracts longer than 12 months, and is not needed anymore. The new ruling only provides for a quantity requirement as fixed-term contracts cannot apply to more than 20 % of the personnel of the enterprise. Extensions are permitted if they concern the same job. Contracts can be extended up to five times within the maximum time limit of 36 months, a condition which was already in force. This reform of fixed-term contracts has been presented as a necessary and urgent measure aimed at counteracting the rising levels of unemployment. However, the reforms received some negative comments.

Employers' representatives appreciated the simplification coming from the repeal of the justification clause (which often gave rise to legal actions) and the ruling on extensions which can be particularly helpful to the specific and contingent needs of a business. On the other hand, one major union (CGIL) underlined the high risk of decreasing stability caused by further deregulation, and particularly criticised the extensions, which allow several periods of fixed-term contracts without any interruption within the maximum length of 36 months.

The risk of decreasing stability is more than a remote possibility: statistics show that only 23 % of fixed-term contracts lead to a permanent job, while the permanency percentage of this kind of contract tends to be increasing. This could affect women more than men, as women are more likely to be employed on such a contract (14 % for women and 11 % for men, of all women and men employed). Although there is no evidence of the reasons for this, it should be underlined that, in 93.5 % of cases, this kind of contract is not a worker's voluntary choice and that the risk of increasing precariousness is particularly high for low-qualified jobs, which are often performed by women.

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

#### ***The principle of equal treatment in the case of redundancy and the principle of equal pay in maternity allowance***

The Tribunal of Taranto on 5 December 2013 deemed the dismissal of a female worker in a redundancy procedure to be discriminatory and as a consequence null and void, with the worker's right to reintegration, due to the infringement of Article 5 Paragraph 2 of Act No. 223/1991 which states that 'The enterprise cannot dismiss a percentage of female workers higher than the percentage employed in the same job'. In that case three women and one man had been dismissed, whereas five women and three men were employed as television reporters.

The Tribunal of Taranto stated that the percentage limit is rigid and unbreakable and fully justified in the light of the principle of equal treatment both at EU and national level. The Tribunal recalled that the provision itself states the infringement of the percentage is discriminatory and it does not assure any privilege to female workers as it specifically refers to the percentage of people already working in the enterprise. This judgment can be recorded as a strict interpretation of the ban on gender discrimination. In fact, the judge firmly rejected the ‘soft’ interpretation of Article 5 of Act No. 223/91 proposed by the employer who claimed that it just involved a form of presumption of discrimination, which could be overcome by the correct application of other criteria (such as burdensome family responsibilities, seniority, and technical and organisational needs of the enterprise) provided by the same law in the redundancy procedure.

The Tribunal of Florence on 6 February 2014 detected a case of gender discrimination where the Health and Insurance Institute (*istituto nazionale per l'assicurazione contro gli infortuni sul lavoro*), which had to pay maternity allowance to a flight attendant of an airline company, took into consideration only 50 % of the ‘flight allowance’ in the notion of remuneration, making reference to the same notion of remuneration used to reckon sickness allowance.<sup>143</sup>

The judge declared that the interpretation followed by the Institute was not correct and the Health and Insurance Institute had accepted an allowance lower than the measure provided by law to assure the woman an unchanged standard of living during compulsory maternity leave. As a consequence the behaviour of the Institute gave rise to gender discrimination as the detrimental effect on the female worker was grounded on her state of pregnancy and maternity.

This judgment is particularly interesting where it deals with the problem of the comparator in the gender pay gap. In particular, the Tribunal underlines that discrimination does not necessarily involve a comparison (between some people who suffer detrimental treatment compared with other people in the same condition), as maternity is biologically connected to gender. As a consequence the detrimental treatment is discriminatory in the case where it affects the working woman on the ground of her condition, without any need to find an actual or a hypothetical comparator.

#### ***A case of reverse discrimination regarding leave for child care***

The tribunal of Milan on 5 July 2013 ruled Article 4 of the national collective agreement of public transport workers to be discriminatory, as it entitles female employees to 10 days remunerated leave for the illness of a child up to the age of three, while male employees can only use this leave in a case where the mother gives it up or renounces her right to it. This rule provides for much better conditions for female employees as they benefit from the leave simply by virtue of working under such a contract irrespective of the ‘job status’ of the father (employed, self-employed, or unemployed), while male employees can use the leave only in a case where the mother is entitled to the same right (that is, she works for an employer who enforces the collective agreement mentioned above) and gives it up or renounces her right to use it.<sup>144</sup>

The judge deemed the exception to the principle of equal treatment provided by Article 4 of the collective agreement to be discriminatory as it did not have an objective and necessary justification and was grounded on gender. Moreover, it did not favour parents in sharing care duties and could not be classified as a positive action as it lacked the requirement of proportionality between the exception and its effects.

For these reasons the judge ordered the removal of such discrimination from the national collective agreement in question, by ensuring that male employees have the same rights and the same conditions as those to which women were already entitled.

<sup>143</sup> A similar case was addressed by the CJEU in Case C-194/08 *Susanne Gassmayr v Bundesminister für Wissenschaft und Forschung* [2010] ECR I-06281.

<sup>144</sup> Similar cases were addressed by the CJEU in Cases C-104/09 *Pedro Manuel Roca Álvarez v Sesia Start España ETT SA* [2010] ECR I-08661 and C-05/12 *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)* [2013] ECR n.y.r.

The full reasoning refers in detail to CJEU case law,<sup>145</sup> regarding both the possible justification of differential treatment and the notion of positive action. The same reasoning was also used by the judge to sustain the extension of the benefit to male employees in order to remove discrimination. This accurate reconstruction of the development of equality concepts at EU level is becoming more and more common in the few published judgments which deal with gender discrimination, which can be considered a reassuring sign that these matters, as well as the influence of the CJEU's jurisprudence, have finally gained their proper place among judges.

## LATVIA – Kristine Dupate

### Legislative developments

Previously the amount of parental allowance was 70 % of the gross salary,<sup>146</sup> which corresponds to the real salary, because persons in active employment after the deduction of taxes are entitled to approximately 69 % of the gross salary.<sup>147</sup> One of the parents has the right to parental allowance until a child reaches 12 months of age. Currently, a parent who wishes to receive parental allowance may not remain in active employment (or self-employment).

Since 1 October 2014, there have been some changes.<sup>148</sup> First, the amount of parental allowance was reduced. It now amounts to 60 % of the gross salary (social insurance contribution salary) for parents who choose to stop working until a child reaches 12 months of age. Or if a parent (who has stopped working) would like to receive parental allowance until a child reaches 18 months of age, then the amount of that allowance is 43.75 % of the gross salary, i.e., the same amount of money will be paid out over an extended period of time.

Second, the system will become more work–life balance ‘friendly’, because when a parent decides to stay in full-time or part-time employment, he or she will also be entitled to parental allowance. The amount for working parents will be rather small; they will be entitled to 30 % of the full allowance (the full allowance being that they would be entitled to if they would discontinue working).<sup>149</sup> However, they will be entitled at least to some support.

### Miscellaneous

The Court of Justice of the European Union (CJEU) in the case *Zoi Chatzi* held that ‘the parents of twins are in a special situation’ and that the Member States must ensure that ‘the

<sup>145</sup> Among the cases mentioned by the Tribunal were C-345/89 *Ministère Public v Stoeckel* [1991] ECR I-4047; C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR I-00069; C-184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984] ECR I-03047; C-158/97 *Georg Badeck and Others* [2000] ECR I-01875; C-476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-02891; C-187/00 *Helga-Kutz-Bauer v Freie und Hansestadt Hamburg* [2003] ECR I-2771; and joined Cases C-128/07 to C-131/07 (*Angelo Molinari (C-128/07), Giovanni Galeota (C-129/07), Salvatore Barbagallo (C-130/07) and Michele Ciampi (C-131/07) v Agenzia delle Entrate – Ufficio di Latina*) [2008] ECR I-00004.

<sup>146</sup> The Law on Maternity and Sickness Insurance (*Likums Par maternitātes un slimības apdrošināšanu*), OG No. 182, 23 November 1995.

<sup>147</sup> The income tax for employee salaries is 24 % (the Law on Residents' Income Tax; *likums 'Par iedzīvotāju ienākuma nodokli'*, Official Gazette No. 32, 1 June 1993); statutory social security contributions constitute 34.09 %, but employees only have to pay 10.5 % and 23.59 % must be contributed by the employer (the Law on Statutory Social Security; *likums 'Par valsts sociālo apdrošināšanu'*, Official Gazette No. 274/276, 21 October 1997). After taxes and social security contributions have been deducted, employees are therefore entitled to approximately 69 %.

<sup>148</sup> The Law on Maternity and Sickness Insurance (*Likums Par maternitātes un slimības apdrošināšanu*), OG No. 182, 23 November 1995, respective amendments OG No. 228, 22 November 2013.

<sup>149</sup> Example, if a parent's gross salary were EUR 1 000, then the amount of parental allowance for parents who stop working would be EUR 600, which amounts to 60 % of the social insurance contribution salary. If, however, a parent would decide to stay in active employment he/she would be entitled to 30 % of the parental allowance, i.e. 30 % of EUR 600 (or the normal parental allowance), which would amount to EUR 180).

body of national rules offers sufficient possibilities to meet, in a specific case, the particular needs of the parents of twins in their work and family life'.<sup>150</sup>

Although such findings of the CJEU concern the interpretation of Directive 96/34/EC, which does not provide any obligations for Member States regarding financial support during parental leave, nevertheless in the Member States with low income the entitlement to the statutory allowance is of great importance for the effective use of the right to parental leave.

In Latvia during parental leave an allowance for employed persons is provided under the statutory social insurance system. The amount of such allowance is almost equal to the net salary of a parent. In addition, in the context of equal treatment of parents having two or more children born at the same time (a multiple birth), a flat-rate state social allowance of EUR 171 is granted for each additional child.

According to data provided by the Ministry of Welfare in February 2014, the average amount of parental allowance was EUR 376. Consequently, it seems that parents of two or more children born at the same time, by being entitled to an extra EUR 171 for each 'additional' child, are granted the financial support which takes into account their specific situation and needs.<sup>151</sup>

## LIECHTENSTEIN – Nicole Mathé

### Policy developments

#### *Online survey role models*

Liechtenstein, Vorarlberg (Austria) and Graubünden (Switzerland) jointly conducted the interregional project called 'concern: role models'.<sup>152</sup> Since September 2013 young people aged between 14 and 25 years have participated in the online survey entitled 'What do you think about role models in employment and the family?'. The questionnaire treated topics such as attitudes, role models, role behaviour and 'wishful thinking' (as it was called in the questionnaire) about the future.

The result of the survey shows that traditional role behaviour is very common among the group of young people aged between 14 and 25 years. The main findings of the online survey are that in general young people have become sensitised to matters of gender equality. This can be observed in their attitudes towards family tasks which both young women and men want to share in the future. But when it comes to concrete behaviour women still choose professions in social and medical fields, whereas men prefer technical professions. In addition, the percentage of young women willing to work part-time is much higher than that of men. Consequently it can be stated that gender stereotypes are still present and followed by young people in spite of their up-to-date attitudes. Therefore a public awareness-raising campaign and a touring exhibition are planned where young people can be motivated to choose a profession which really corresponds to their potential.

<sup>150</sup> Decision in Case C-149/10 *Zoi Chatzi v Ipourgos Ikonomikon* [2010] ECR I-08489.

<sup>151</sup> The Cabinet of Ministers Regulation No. 1609 'Regulations on amount of child-care allowance and supplement to child-care allowance and parental allowance for twins or more children born in the same birth and procedure on its review and award and pay-out' (*Noteikumi par bērna kopšanas pabalsta un piemaksas pie bērna kopšanas pabalsta un vecāku pabalsta par dvīņiem vai vairākiem vienās dzemdībās dzimušiem bērniem apmēru, tā pārskatīšanas kārtību un pabalsta un piemaksas piešķiršanas un izmaksas kārtību*), OG No.204, 29 December 2009.

<sup>152</sup> Press release by the Liechtenstein Information Office, dated 28 March 2014, <http://www.llv.li/>, accessed 12 April 2014, available at: [www.rollenbilder.org](http://www.rollenbilder.org), accessed 28 August 2014.

## Legislative developments

### *Law of names*

On 25 February 2014 the report<sup>153</sup> of the Government regarding the law of names was brought before the Parliament. By this reform a modern law of names is to be created in Liechtenstein. As before, a common family name for both spouses is possible but they will also have the possibility to keep their own names after marriage if they want to. The possibility of creating a double name will still exist. The child will get the common family name of the spouses or one of the names of the parents if they keep their own names after marriage; in the second case they can freely choose the family name of the child. In order to keep the union of names between mother and child, the child of unmarried parents will get the family name of the mother (if she was married before and took the name of her former husband) and no longer the mother's maiden name.

### *Abortion*

On 8 July 2014 the Government presented the report concerning the amendment of the Criminal Code with regard to abortion. It is open to the public for written comments until 2 September 2014. The very restrictive current criminal legislation prohibits abortion in Liechtenstein and abroad for people residing in Liechtenstein.<sup>154</sup>

In 2012 a member of the Parliament presented a petition in order to ameliorate the situation of women considering an abortion. The Government set up in 2013 a working group to examine the possibilities to ameliorate the situation of such women and to clarify potential amendments in the criminal law. The Government presented a report in answer to the petition in June 2014.<sup>155</sup> The Government has now issued a report proposing several amendments to the criminal law in order to improve the situation of women considering an abortion.<sup>156</sup> The measures proposed aim at the decriminalisation of abortion under certain circumstances, abolition of the criminalisation of abortion abroad, creation of additional justification grounds (e.g. in rape cases) for abortion, and establishing criminal liability for coercion to undertake an abortion. In addition, counselling without a predetermined conclusion, is proposed as a legal requirement in cases where a woman is unsure of whether to continue with her pregnancy, which means without the intention to envisage the decision for or against the abortion in advance. Moreover it was stated that, in addition to amendments to the criminal law, accompanying measures will be developed by the Government and integrated into the future report and proposal to the Parliament.

## Miscellaneous

### *Business Day 2014*

The Business Day took place for the seventh time in Vaduz on 12 May 2014 and focused on the topic 'Ways to success: role models inspire – networks support'.<sup>157</sup> 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 is. The Business Day has

<sup>153</sup> Reports of the Government BuA 2014/16, available at: <http://bua.gmg.biz/BuA/default.aspx>, accessed 27 August 2014.

<sup>154</sup> Article 96-98(a) Criminal Code, Official Gazette 1988 No. 37.

<sup>155</sup> Report 52/2014 BuA, available at:

<http://bua.gmg.biz/BuA/default.aspx?nr=52&year=2014&content=193160979>, accessed 27 August 2014.

<sup>156</sup> Press release by the Liechtenstein information office, dated 10 July 2014, available at: [www.rk.llv.li](http://www.rk.llv.li), [http://www.llv.li/files/srk/Vernehmlassungsbericht%20Abänderung%20SPO\\_Schwangerschaftskonflikt.docx.pdf](http://www.llv.li/files/srk/Vernehmlassungsbericht%20Abänderung%20SPO_Schwangerschaftskonflikt.docx.pdf), accessed 28 August 2014.

<sup>157</sup> Press release by the Liechtenstein Information Office, dated 12 May 2014, available at: <http://www.llv.li>, [www.businesstag.li](http://www.businesstag.li), accessed 28 August 2014.

become well established as it was a sell-out event for the last six years when 500 people from Liechtenstein, Switzerland and Austria have participated. Its focus is also the integration of communities, societies (e.g. charity, business, immigration societies, etc.), knowledge, and cultures.

### *30 years of women's suffrage*

Liechtenstein introduced women's suffrage by a referendum of 29 June and 1 July 1984.<sup>158</sup> Before that date some communities already had women's suffrage, e.g. Vaduz in 1976 being the first and Gamprin in 1980. The anniversary of 30 years was celebrated in Vaduz with a conference on 30 June 2014. Women's suffrage is highly valued as a cornerstone of gender equality, but constant efforts will be continued to bring gender equality into all spheres. During the last 30 years the percentage of women in politics and economy has constantly increased. Today women participate in community parliaments and in the national Parliament, their representation being between 20 and 25 % of the total membership. Nevertheless it was unanimously stated that with regard to the participation of women in politics and the economy, as well as on the topic of equal pay for men and women, much work will still have to be done in the future.

## LITHUANIA – *Tomas Davulis*

### **Legislative developments**

On 15 July 2014 the Lithuanian legislature introduced several amendments to the Equal Opportunities Act for Women and Men (EOAWM) with the aim of ameliorating the existing legislation.<sup>159</sup> Firstly, the addressee of the obligation to ensure the equal opportunities has been defined more specifically. The law had always addressed the employer as a person who is responsible for the implementation of non-discrimination provisions. The law was amended so as to include the 'representative of employer' alongside the 'employer'. The distinction between those two is not so important from the legal point of view because there is no evidence that it had created problems in imposing administrative liability so far. With the amendment the language of equality legislation on the responsibility of natural persons will be brought in line with the analogous language used in administrative law legislation. The second amendment concerns the broadening of the scope of EOAWM. One of the features of Lithuanian equality legislation is the inclusion of the education sector under non-discrimination legislation. The law was amended so as to include the obligations of universities and other institutions of education and higher education to protect employees and students from harassment and sexual harassment and to protect them from adverse treatment in response to a complaint against discriminatory actions of the institution. Such actions were already prohibited in the field of labour law and the obligation to protect will now be imposed, in express terms, on institutions of education. The third amendment concerns the time limitation of the investigations by the Office of Equal Opportunities Ombudsperson. The procedural term of an investigation was increased from two months to three months to address the problem of increased numbers of more sophisticated investigations. The prolongation of the period will increase the chances of successful investigation but is clearly not sufficient, given the scope of competence and limited human resources within the Office.

<sup>158</sup> Press release by the Liechtenstein Information Office, dated 30 June 2014, available at: <http://www.llv.li/>, accessed 27 August 2014.

<sup>159</sup> Law No. XII-1023; Register of Legal Acts, No. 2014-10423.

## Case law of national courts

On 4 September 2014 the Lithuanian Court of Appeal delivered its judgment in a case on the dismissal of a pregnant woman from the position of translator in the embassy.<sup>160</sup> The woman was dismissed during her period of probation after several months of employment on the ground that she was not suitable for the work. The decision on dismissal was taken on the day after she had informed her employer about her pregnancy. The prohibition of dismissal of pregnant women during a probationary period was not clearly stipulated in the Labour Code – the unsuitability of an employee could be perceived as a separate ground for dismissal (stipulated in the Code’s subsection ‘Conclusion of the Contract’) and not covered by the general ban on the dismissal of pregnant woman (stipulated in the subsection ‘Termination of the Contract’).

After three years of litigation at various levels, the Court of Appeal confirmed the unjustified discriminatory nature of the dismissal and awarded pecuniary and non-pecuniary damages to the victim. Since there is no such practice in other cases, it was not surprising that the Court refused to award the future salary which the victim would have received until pensionable age. Instead it awarded compensation of approximately EUR 14 500 to cover the salary from the day of dismissal in 2008 until the day of the judgment (more than five years). The Court stressed that the award would be dissuasive, proportionate and just. In addition, the court awarded compensation of approximately EUR 2 900 to cover non-pecuniary damages.

The ruling allows several conclusions to be drawn which are of significant importance for future practice:

1. a prohibition on terminating the employment relationship with a pregnant woman (Section 132 (1) of the Labour Code) will also be effective in cases where the termination is based on the negative results of the probationary period.
2. Embassies and diplomatic institutions are also covered by Lithuanian labour legislation and may be respondents in Lithuanian courts if the employee is engaged in the activity under a contract of employment and not public service.<sup>161</sup>

The ruling of the court is in line with the interpretation of Directives 2006/54/EC<sup>162</sup> and 92/85/EC.<sup>163</sup> The strong protection of pregnant women is characteristic of the Lithuanian legal system and the victim has received satisfaction that is even higher than that which is usually awarded in cases of unlawful dismissal on other grounds.

## LUXEMBOURG – Anik Raskin

### Policy developments

#### *Implementation of gender quotas in politics and the economy*

On 16 September 2014 the Minister of Equal Opportunities presented her strategy regarding gender balance in politics and in the economy.

A law introducing financial cuts for political parties has been announced. Political parties receive public financial support for their campaigns at national and European elections. The new law will cut this support for political parties which present unbalanced lists of candidates.

<sup>160</sup> Ruling of 4 September 2014 of the Lithuanian Court of Appeal in case No. 2A-1219/2014.

<sup>161</sup> The doctrine of restricted state immunity from foreign jurisdiction is applied, following the European Court of Human Rights judgment of 23 March 2010 in Case No. 15869/02 (*Cudak v Lithuania*).

<sup>162</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

<sup>163</sup> Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) OJ L 348 of 28 November 1992, pp. 1-8.



The cuts will be progressive. The quota which has to be reached will be 40 % of the underrepresented sex. Political parties will receive 100 % of the public financial support if they reach the quota; 75 % if the percentage reached is between 35 and 39 % of candidates of the underrepresented sex; 50 % if the percentage reached is between 30 and 34 %; and 25 % of the financial support if the percentage of the underrepresented sex reached is less than 30 %.

There will be no legal quotas concerning gender balance for the private economic sector. But, the Government will run a campaign in order to motivate companies to take non-mandatory measures. The only measure announced so far has been the intention to implement the 40 % quota, as mentioned above. Regarding the nominations of board members which are made by the Government in public companies, the Government will guarantee a quota of 40 % of the underrepresented sex.

The coalition programme does not present any details on the other projects. So far, it has been impossible to analyse how these different legislative changes will be implemented.

## Legislative developments

### *Abortion*

The Minister for Justice has introduced a Bill intended to decriminalise abortion and remove the second obligatory consultation introduced in 2012.<sup>164</sup>

According to this Bill,<sup>165</sup> abortion will no longer be part of the criminal code but will be regulated by a special law. Abortion will be lawful until the twelfth week of pregnancy. The second obligatory consultation, which had been largely contested by NGOs, will be removed.

## FORMER YUGOSLAV REPUBLIC OF MACEDONIA – *Mirjana Najcevska*

### Policy developments

On 27 April 2014, early parliamentary elections were conducted in the former Yugoslav Republic of Macedonia.<sup>166</sup> Women were well represented on election lists;<sup>167</sup> however, they did not have visibility in reality during the elections as gender related discrimination was not treated as a significant issue in the political parties' campaign activities<sup>168</sup> despite the fact that most of the political parties did include gender related activities in their programmes (except DPA which is one of the main ethnic Albanian parties).<sup>169</sup>

Before the start of the electoral campaign, the NGOs promoted several initiatives related to gender equality.<sup>170</sup>

The legal obligation for one-third of candidates to be women was respected in most of the lists of proposed candidates. However, there were candidates' lists where women were placed in the lower parts of the lists, thus minimising the possibility for them to be elected as members of the Parliament.

<sup>164</sup> Available at: <http://www.legilux.public.lu/leg/a/archives/2012/0268/a268.pdf#page=2>, accessed 15 October 2014.

<sup>165</sup> Available at: <http://www.chd.lu/>, accessed 16 October 2014.

<sup>166</sup> Results of the parliamentary elections: <http://rezultati.sec.mk/Parliamentary/Results?cs=en-US&r=2&rd=r&eu=All&m=All>, accessed 8 September 2014.

<sup>167</sup> Candidate lists: VMRO-DPMNE candidate lists at: <http://vmro-dpmne.org.mk/?p=22804>; SDSM candidate lists at: <http://sds.org.mk/default.aspx?mId=55&agId=5&articleId=10243>; DUI candidate lists at: <http://novatv.mk/index.php?navig=8&cat=2&vest=12620>, all accessed 23 October 2014.

<sup>168</sup> Findings of the International Election Observation Mission (IEOM) available at: <http://www.osce.org/odihr/elections/fyrom/118078?download=true>, accessed 23 October 2014.

<sup>169</sup> Electoral programme of VMRO-DPMNE political party at: <http://vmro-dpmne.org.mk/wp-content/uploads/documents/VMRO%20programa%202014-2018%20v2a.pdf>, accessed 23 October 2014.

<sup>170</sup> NGO proposal for Declaration on hate speech at: <http://www.esem.org.mk/index.php/shto-rabotime-sega/477-po-povod-pretstojnite-pretседателски-parlamentarni-izbori-promocija-na-deklaracijata-za-osuda-na-govor-na-omraza-i-diskriminatoriski-govor-kon-zenite,-lezbejkite,-gej-mazite,-biseksualcite,-transrodnite-lica-i-marginaliziranite-zaednici.html>, accessed 23 October 2014.

Macedonia is divided into nine electoral units (six in Macedonia and three abroad). Men are holders of the lists (i.e., the first candidate on the list) in the majority of cases (for all the participating political parties) for the six territorial electoral units. Furthermore, there was no female holder or female candidate on any of the lists of candidates for the three electoral units abroad.

The elections themselves were marred by various and serious deficiencies, including in particular proxy voting (substituting women's votes), group and family voting.<sup>171</sup> Hence, for the first time in the last two decades, the elections were not defined as fair and free.<sup>172</sup>

The early elections resulted in women making up 34 % of the newly elected members of the Parliament (not including the opposition that boycotts the parliamentary results – the opposition does not participate in the Parliament). Despite this, the newly elected Governmental Cabinet is composed of 25 ministers of whom only two (or 8 %) are women. However, these issues (in particular: absence of women in the Government; placement of women in the lower parts of the lists; absence of women as holders of lists) did not attract the attention of the Commission on Equal Opportunities of Women and Men, which continued to deal with domestic violence as its main interest. This is surprising, considering the fact that the function of this Commission is to address gender equality issues in legislation, state structure, and global state strategies.

On 18 March 2014, a Declaration condemning hate speech and discriminatory language against women, lesbians, gay men, bisexuals, transsexual people and marginalised communities was signed by several political parties (among which was the main opposition party SDSM, but not the main governing party VMRO-DPMNE).

The main problem in the former Yugoslav Republic of Macedonia is still the enormous gap between legislation and its implementation. Some practical steps are the opposite of the general legislative intention; for example, among basic measures in the Law on Equal Opportunities for Women and Men is education on equal opportunities. Yet, in the new (2014-2015) academic year, instead of the programme on gender studies, which is temporarily closed, a new programme has been introduced at the Saint Cyril and Methodius University, entitled family studies. The new programme promotes traditional family values and traditional gender roles. Several NGOs reacted to the closing of the gender studies programme and expressed their concern that the closure of gender studies means less interest in gender equality issues, whilst the opening of the family studies programme means high interest in traditional roles of women and men.<sup>173</sup>

## Legislative developments

On 24 July 2014, without any wider and/or public debates, Parliament adopted amendments to the Law on Labour Relations concerning the age of retirement. The changed Article 104 of the Law on Labour Relations,<sup>174</sup> states that an employee by means of a written statement to an employer may seek to extend the contract of employment up to the age of 67 years (men) or 65 years (women).<sup>175</sup> These changes were to be followed by changes in several other laws (Law on civil servants, Law on public servants etc.).

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<sup>171</sup> Citizens Association MOST – press conference on the preliminary statement for the second round of the presidential elections, as well as the early parliamentary elections 2014, available at: [http://www.most.org.mk/images/MOST/Preliminarna%20izjava\\_vtor%20krug\\_28.04.2014\\_ENG.pdf](http://www.most.org.mk/images/MOST/Preliminarna%20izjava_vtor%20krug_28.04.2014_ENG.pdf), accessed 23 October 2014.

<sup>172</sup> Council of Europe Observation of the presidential election (13 and 27 April 2014) and of the early parliamentary elections (27 April 2014) in the former Yugoslav Republic of Macedonia, available at: <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=20908&Language=EN>; OSCE/ODIHR Election Observation Mission Final Report at: <http://www.osce.org/odihr/elections/fyrom/121306?download=true>, both accessed 23 October 2014.

<sup>173</sup> Reaction of NGOs related to the opening of the family studies programme at the state university, available at: <http://www.time.mk/c/18f247150a/na-semejnite-studii-ke-se-uci-deka-razvodot-vodi-kon-devijantno-odnesuvanje.html>, accessed 8 September 2014.

<sup>174</sup> Official Gazette of the Republic of Macedonia No. 113/2014.

<sup>175</sup> Proposed Law, available at: <http://www.sobranie.mk/materialdetails.nsp?materialId=96b43c77-727c-4142-a102-46037d2c4c21>, accessed 8 September 2014.

A comparison of the amended Article 104 of the Law on Labour Relations with the original version of the Article shows that the previous formulation ('Employer terminates the employment contract of an employee when the employee turns 64 years of age and 15 years of service') was gender neutral.

At the first meeting of the newly created Parliamentary Commission on Equal Opportunities between Women and Men (established after the elections in April 2014), a discussion about the proposal for a new Law on the prevention of, combating and protection from domestic violence was conducted.<sup>176</sup> The Law was prepared and passed through all other Parliamentary commissions and was submitted for the Parliamentary plenary session on 1 September 2014.<sup>177</sup> The NGOs claim that they were not involved at all in the preparation of the proposed Law on the prevention of, combating and protection from domestic violence; that their amendments (developed in meetings without the presence of government) were not considered in the final version; and that the Law would not make any change in either the fight against domestic violence or in the protection of women.<sup>178</sup>

In the six months prior to the procedures on this Law, more than 120 laws on all kinds of issues were changed (mostly in short procedures). None of the numerous amendments, in some cases directly affecting women, were subject to debate in the Parliamentary Commission on Equal Opportunities between Women and Men. Neither were they discussed in the Club of Women Parliamentarians, nor were they the subject of any wider public debate.

### Case law of national courts

The initiative submitted to the Constitutional Court by several NGOs<sup>179</sup> on the Law on Termination of Pregnancy was put on the agenda of the court in July 2014.<sup>180</sup> The final decision of the Constitutional Court, adopted in October,<sup>181</sup> was to reject the initiative. One of the constitutional judges explained during the discussion that the 'dream of every woman is to be married and to become a mother'. According to this judge liberal abortion should not be allowed because it will lead to a higher number of infidelities and other immoral activities.

An initiative related to the last changes to the Law on Labour Relations which introduce different ages for pensions for women and men has also been submitted to the Constitutional Court by several professors from the Ss. Cyril and Methodius University in Skopje.<sup>182</sup>

### Equality body decisions/opinions

The annual report for 2013 of the Ombudsperson was presented before the Parliament in June 2014.<sup>183</sup> In the Report, the Ombudsperson 'highlighted the need to respect the principle of equality between men and women on appropriate distribution of jobs on the basis of gender

<sup>176</sup> Meeting of the Parliamentary Commission on Equal Opportunities, available at: <http://www.sobranie.mk/sessiondetailsrabortni.nsp?sessionDetailsId=e8fcac34-4e27-4038-a872-301237601368>, accessed 8 September 2014.

<sup>177</sup> Proposed Law: <http://www.sobranie.mk/materialdetails.nsp?materialId=3447572f-67f9-42e1-9b93-4903ae77d6e5>, accessed 8 September 2014.

<sup>178</sup> Press conference of the National network against violence against women and domestic violence available at: <http://www.glasprotivnasilstvo.org.mk/04-09-2014-pres-konferentsija-predlog-zakon-za-preventsija-sprechuvan-e-i-zashita-od-semejno-nasilstvo/#>, and media coverage available at: <http://www.plusinfo.mk/vest/149683/Liljana-Popovska-gi-ignorira-naporite-na-nevladinite-za-podobar-zakon-za-semejno-nasilstvo>, both accessed 8 September 2014.

<sup>179</sup> The initiative was submitted by NGOs: HERA, Reactor, Coalition for sexual rights, and Helsinki committee for human rights.

<sup>180</sup> Media coverage of the initiative before the Constitutional Court, available at: <http://www.time.mk/c/a03ddd5a2c/zakonot-za-abortus-pred-ustaven-sud.html>, accessed 8 September 2014.

<sup>181</sup> Media reports on the decision of the Constitutional Court, available at: <http://www.time.mk/c/030e0c322e/ustaven-sud-zakonot-za-abortus-ne-e-protivustaven.html>, accessed 10 October 2014.

<sup>182</sup> See: <http://www.akademik.mk/elena-gradishki>, accessed 8 September 2014.

<sup>183</sup> See: <http://www.sobranie.mk/materialdetails.nsp?materialId=e1297e5b-14f9-4591-88ec-b0c07a39e3ba>, accessed 8 September 2014.

and level of education, especially managerial jobs'. There are no other opinions of the Ombudsperson related to gender equality to report.

According to the report of the Commission for protection of human rights, during 2013<sup>184</sup> only nine claims were received for protection from discrimination based on sex. The Commission on protection from discrimination submitted research on the issue of discrimination in job advertisements. The research specifies that the most common basis for discrimination is gender (55 %), while 93 % of discrimination on the basis of gender was identified in advertisements for work in the private sector and 5.5 % in advertisements for work in the public sector. In the research, according to the Commission, there should be equal/shared responsibility between the advertiser and the medium where the job is advertised.<sup>185</sup>

## MALTA – Peter G. Xuereb

### Policy developments

The Government published its new National Employment Policy document in May 2014.<sup>186</sup> It details all the measures intended to reduce female unemployment and address the many challenges that women face in the labour market. In particular, the Government introduced a national scheme for free childcare for all as from 1 April 2014,<sup>187</sup> and several new childcare centres have been built. Chapter 8 of the National Employment Policy document is devoted to incentives for female employment. The document states that maternity leave costs the employer 27 % of the wage bill for every mother-to-be. In reaction to this, it is being proposed to raise the yearly social security contributions payable by the employer for each employee – male and female. The additional inflow of social security contributions is to be allocated to the financing of maternity leave. The end result of this initiative, says the document, would be the spreading of the cost to employers of employees having children, across all sectors of the economy between both genders. In turn this would curb gender discrimination related to having children, allow for equal opportunities for career progression and further reduce the gender gap in employment. The policy document reaffirms the intention to reduce the gender gap and the gender pay gap in employment.

### Legislative developments

The Istanbul Convention came into force on 1 August 2014. The forms of violence covered by the Istanbul Convention include psychological violence, stalking, sexual harassment, physical violence, sexual violence including rape, forced marriage, female genital mutilation, forced abortion and forced sterilisation. In line with the ratification of the Istanbul Convention, provisions to address female genital mutilation, forced marriage and forced sterilisation were recently included in the Maltese Criminal Code.<sup>188</sup>

<sup>184</sup> See: <http://www.kzd.mk/mk/dokumenti/2013>, accessed 8 September 2014.

<sup>185</sup> See: <http://www.kzd.mk/mk/dokumenti/2014>, accessed 8 September 2014.

<sup>186</sup> National Employment Policy, May 2014. Available at: [http://www.google.com/mt?url?sa=t&rcrt=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Feducation.gov.mt%2Femployment&ei=qJ39U7\\_XLIWtO6D\\_gJgK&usq=AFQjCNGHJdu8NwfXOf3CBOTY18Mtwrru0w&bvm=bv.74035653,d.ZWU](http://www.google.com/mt?url?sa=t&rcrt=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Feducation.gov.mt%2Femployment&ei=qJ39U7_XLIWtO6D_gJgK&usq=AFQjCNGHJdu8NwfXOf3CBOTY18Mtwrru0w&bvm=bv.74035653,d.ZWU), accessed 27 August 2014.

<sup>187</sup> Ibid. page 65.

<sup>188</sup> See for example, Act No. 1 of 2014 Criminal Code (Amendment) Act, Government Gazette No. 19, 204 of 31 January 2014, available at: <http://www.justiceservices.gov.mt/LegalPublications.aspx?pageid=30&type=1> amending Chapter 9 of the Laws of Malta (accessed 27 August 2014). The new provisions are Articles 251E to 251I of the Criminal Code. The Criminal Code is available at: <http://www.justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chronoboth>, accessed 28 August 2014.

On 14 April 2014 the Parliament enacted the Civil Unions Act, Act no. IX of 2014, Chapter 530 of the Laws of Malta.<sup>189</sup> This provides in Article 4 that a registered civil union between persons, whether of the same or the opposite sex, is to have the effect at law of a marriage contracted under the Marriage Act (that is, between persons of the opposite sex) and as determined by the Civil Code.

### Case law

The Industrial Tribunal has now delivered its ruling in the *Psaila Savona* case.<sup>190</sup> The case has been pending for four years, only to end with the Tribunal deciding in March of this year that it had no competence to hear the case on the merits since there was no employment relationship between the parties but rather a consultancy agreement. In effect, the Tribunal held that there was no contract of service and therefore no employer-employee relationship, so that the relationship was not governed by the law relating to employment relationships. Nor did the Industrial Tribunal have competence to decide disputes other than those arising from a contract of employment. Dr Anika Psaila Savona, a lawyer, had alleged unfair dismissal on grounds of pregnancy. Her employer, a leading hotel group, argued that she was not an employee but a 'legal consultant' operating as a self-employed person, and that she was therefore not covered by employment legislation, as well as arguing that she was not dismissed on grounds of pregnancy. The case was set to test the limits of the anti-discrimination provisions of the Employment and Industrial Relations Act of 2002 (Chapter 452 of the Laws of Malta, henceforth EIRA) and the Protection of Employment (Maternity) Regulations by reference to the definitions of 'employer', 'employee', 'contract of service' and 'contract of employment'. The claimant argued that irrespective of profession and designation, and even the signing by her of a 'consultancy agreement', she was in fact and in law an employee at the time of the occurrence of her dismissal, albeit as a highly qualified professional. Dr Psaila Savona argued that she only signed the agreement presented to her – which inter alia provided that the agreement was not to be construed as creating an employment relationship – pending a re-ordering of her employment relationship and on the assurance of her employer that this would occur. The proviso added by the Employment Status National Order (Legal Notice 44 of 2012) to the definitions in the EIRA of 'contract of service' and 'contract of employment', appeared possibly to indicate an outcome in favour of the claimant if the facts showed that in the course of carrying out her duties she acted under instruction to a high degree. Legal Notice 44 had the object of 'clarifying' certain provisions of the EIRA. The case might also have led to the sort of preliminary reference to the Court of Justice of the European Union that may bring before this Court the issue of the personal (and/or relational) scope of EU anti-discrimination employment law. In the event no reference was made, since the Tribunal dismissed the case for lack of jurisdiction. The claimant has filed a case before the civil court and the possibility of a reference may arise there.

### Equality body decisions/opinions

The main equality body in Malta, the National Commission for the Promotion of Equality (NCPE), does not take decisions. It deals with complaints by seeking an amicable solution. It can investigate and mediate. The NCPE's Annual Report for 2013 was presented at a conference launching the report in May of this year.<sup>191</sup> The number of complaints relating to

<sup>189</sup> See: [http://www.google.com/mt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=OCDMQFjAD&url=http%3A%2F%2Fjusticeservices.gov.mt%2FDownloadDocument.aspx%3Fapp%3Dlp%26itemid%3D26024%261%3D1&ei=NrT9U\\_CCDYjJPNfDgeAJ&usq=AFOjCNHzZC8naTYcY407R8kgrum2BIbvHw&bvm=bv.74035653.d.ZWU](http://www.google.com/mt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=OCDMQFjAD&url=http%3A%2F%2Fjusticeservices.gov.mt%2FDownloadDocument.aspx%3Fapp%3Dlp%26itemid%3D26024%261%3D1&ei=NrT9U_CCDYjJPNfDgeAJ&usq=AFOjCNHzZC8naTYcY407R8kgrum2BIbvHw&bvm=bv.74035653.d.ZWU), accessed 28 August 2014.

<sup>190</sup> *Av. Dr. Anika Psaila Savona v CHI Ltd.* Case Number 2757 /MF, Decision Number 2275, Industrial Tribunal, 3 March 2014 available at <http://www.google.com/mt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=UCD4QFjAC&url=http%3A%2F%2FIndustrialrelations.gov.mt%2Fdownload.aspx%3Fid%3D2262&ei=ba5gU-noEKOR4AT04YHoDg&usq=AFOjCNEUnT-xFLCMYMEf4NmJdg9MtxWqqA> accessed 28 August 2014.

<sup>191</sup> The NCPE Annual Report 2013 is available at [http://msdc.gov.mt/en/NCPE/Pages/Our\\_Publications\\_and\\_Resources/NCPE\\_Annual\\_Reports.aspx](http://msdc.gov.mt/en/NCPE/Pages/Our_Publications_and_Resources/NCPE_Annual_Reports.aspx) accessed 28 August 2014.

gender discrimination totalled 12 in 2013, the same as the previous year. This is considered by many to be a small number of complaints for the NCPE to be receiving and reporting. The annual report also states that the NCPE carried out a number of investigations of the complaints of individuals.<sup>192</sup> It also continued to monitor job advertisements in the national press and on Malta-based job vacancy websites and took action in some 55 cases of discriminatory advertisements.<sup>193</sup> It was also reported that the Commissioner and members were finalising the draft of a proposal for a Bill on Cohabitation.<sup>194</sup> A law on cohabitation would set the legal basis for the regulation of relations between a man and a woman who have been cohabiting as husband and wife, and two persons of the same sex who have been cohabiting as in a civil union, when such relations break up either by separation or death.

## Miscellaneous

### *Flexibility measures – private sector*

The National Employment Policy document of May 2014 reported that the private sector increasingly recognises that the adoption of flexible working measures is helpful in the current socio-economic context.<sup>195</sup> To this effect, the Malta Business Bureau (MBB) has created the SHIFT (Supporting Human Resources in Family-Friendly Training) project, which was an initiative aimed at supporting its members and local businesses to achieve a healthy workplace through the implementation of family-friendly measures. The findings (MBB, 2012) indicate that, when asked about the concept of flexible work and family-friendly measures, the majority of respondents associated positive attributes linked with flexible work and family-friendly measures, with the majority choosing the phrases ‘an opportunity to shift towards better work–life balance’ and ‘a possibility to retain trained staff’.<sup>196</sup>

The findings also reveal that amongst Small Enterprises (10 to 49 employees) and 82 Large Enterprises (250+ employees) the main focus was on the notion that flexible work and family-friendly measures allow a shift to a better work–life balance (33.3 % Small Enterprises and 36.8 % Large Enterprises). In Medium Enterprises, 45.5 % associated more with the possibility to retain trained staff. The study also indicated that the majority of respondents did not agree that family-friendly measures need to be implemented mostly in companies having a majority of female workers. More than half of the respondents (60.3 %) claimed that flexible work and family-friendly measures should be made available to all members of staff. The most common family-friendly measure offered amongst respondents was reduced hours, followed by flexible hours and teleworking/working from home. Most respondents reported benefits relating to higher levels of employee motivation and engagement and improved employee loyalty/retention. On the other hand, one challenge includes the inability to implement a uniform measure across the board and thus having to act on a case-by-case basis. On a positive note, 17.6 % of respondents claimed there were no major difficulties in implementing flexible work and family-friendly measures. Moreover, 26.5 % claimed that they experienced no other difficulty in the implementation phase. The policy document concludes by stating that, in the coming years, the Government will be involving social partners to highlight successful cases of work flexibility amongst employers. The aim of this initiative is to promote the benefits of introducing flexible measures amongst employers.

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<sup>192</sup> See NCPE Annual Report 2013 at page 22.

<sup>193</sup> See *ibid.* at page 23.

<sup>194</sup> *Ibid.* at page 18.

<sup>195</sup> National Employment Policy document, May 2014, at page 81, available at [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Feducation.gov.mt%2Femployment&ei=qJ39U7\\_XLIWrO6D\\_gJgK&usg=AFQjCNGHJdu8NwfxOf3CBOTY18Mtwrru0w&bv=bv.74035653.d.ZWU](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Feducation.gov.mt%2Femployment&ei=qJ39U7_XLIWrO6D_gJgK&usg=AFQjCNGHJdu8NwfxOf3CBOTY18Mtwrru0w&bv=bv.74035653.d.ZWU) accessed 27 August 2014.

<sup>196</sup> See: <http://www.di-ve.com/business-technology/flexible-work-arrangements-private-sector>, accessed 15 October 2014.

**THE NETHERLANDS – Rikki Holtmaat****Legislative developments*****CEDAW Committee invites Dutch state to compensate self-employed women who did not receive a maternity allowance***

In the Netherlands, self-employed women used to receive a pregnancy and maternity benefit under a national social insurance scheme. In 2004 however, this allowance ceased to exist without any transitory measures being introduced. In 2008, a new Act became effective.<sup>197</sup> Since then, self-employed women – again – have a right to a pregnancy and maternity allowance for a period of at least 16 weeks. However, women who gave birth before 4 June 2008 could not retroactively claim an allowance under this new legislation. In the meantime, various women had sought a declaratory decision by the District Court of The Hague, claiming that the state had violated Article 11(2)(b) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) through its failure to provide a statutory arrangement entitling self-employed women to maternity allowance. The court rejected the claim, stating that Article 11(2)(b) of the Convention was not directly applicable. This ruling was upheld by the Court of Appeal of The Hague, and ultimately by the Supreme Court.<sup>198</sup>

The claimants then decided to take their case to the CEDAW Committee using the framework of the individual complaints procedure that is available through the Optional Protocol to this Convention. The Committee has now judged that the Dutch state, by abolishing the existing maternity leave scheme applicable to self-employed women up to 2004, has violated the Convention. The Committee notes that the law has been amended since, but condemns the fact that no compensation is available for self-employed women who gave birth between 1 August 2004 and 4 June 2008. The Committee therefore advises the Dutch state to address and redress the situation of such women.<sup>199</sup>

The Dutch Government has not yet published a reaction to the Committee's views, but is now expected to compensate this group of women, which will cost approximately EUR 60 million.

***Extended paternity leave when mother dies in childbirth***

In the Netherlands, fathers have a right to paid paternity leave to attend the birth of their child and an additional two days leave which can be taken at any time within the following four weeks. They are also allowed paid time off to register the birth of the baby. The current Government has, in addition, proposed a Bill to the effect that the right to paternity leave will be extended with three additional days of (unpaid) leave to a total of five days. Employers cannot refuse a request for paternity leave if it is made at least two months in advance.<sup>200</sup>

More recently, it has been proposed to extend the right to paternity leave in a case where the mother dies in childbirth, which happens on average 25 times a year. Under the proposal, fathers would receive leave equivalent to the maternity leave that the mother would have received. In the Netherlands, maternity leave is granted for a period of 16 weeks. Prior to confinement, leave between four and six weeks is compulsory, which means that 10 to 12 weeks remain for leave after confinement.

Both measures are part of a larger policy change to make the combination of work and care easier. This line of policy has been launched with an eye to the transition from a classic

<sup>197</sup> Act on pregnancy and maternity allowance for the self-employed (*Wet zwangerschaps- en bevallingsuitkering zelfstandigen*), Law Gazette 2008/192.

<sup>198</sup> Dutch Supreme Court, 1 April 2011, ECLI:NL:HR:2011:BP3044 (*Elisabeth de Blok et al v the Netherlands*). The case is available at: <http://uitspraken.rechtspraak.nl/>, and may be found using its ECLI number.

<sup>199</sup> CEDAW/C/57/D/36/2012, see:

<http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Jurisprudence.aspx>, accessed 1 September 2014.

<sup>200</sup> Tweede Kamer 2013-2014, Kamerstukken 32 855, no. 15. The Government's press release is available at: <http://www.rijksoverheid.nl/nieuws/2014/04/17/ook-verlof-voor-vader-als-moeder-overlijdt.html>, accessed 28 August 2014.

welfare state to a so-called ‘participation society’, in which citizens must take responsibility for their own future and environment, including care tasks on behalf of friends and family members. Other measures include making it easier to exercise the right to care leave with the purpose of looking after a non-relative, such as a friend or neighbour.

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

#### ***Ground-breaking judgment on the legal status of domestic workers confirmed***

In the Netherlands, only a part of labour law applies to domestic workers when they work for private households. Their social security rights, as defined in the ministerial regulation Services at Home 2007, differ considerably from other employees’ rights, one example being that they have a right to be paid during six weeks of illness while other employees have this right for 104 weeks. The legal status of this group of (generally female) workers is thus precarious.

‘Alpha-workers’ are a particular group of domestic workers. They perform domestic work in private households, for example for the elderly and/or sick persons, through the services of a professional homecare organisation. Nevertheless, they were considered not to be working under a normal labour contract, because they formally worked for the private households, not for the homecare organisation. The legal status of this group has, however, been improved thanks to two judicial decisions.

In November 2013 a ground-breaking judgment had already shed new light on this group’s legal status. The Arnhem Court of Appeal found that the domestic worker did have an employment relationship with the homecare organisation, *inter alia* because the organisation had recruited her, paid her salary, and bore responsibility for her work. Based on these criteria, the Court decided that she was working under a normal employment contract and that she was therefore eligible for all social security schemes, including the prolonged period of sick pay.<sup>201</sup>

In December 2013, a similar judgment was reached by the Dutch Administrative High Court (*Centrale Raad van Beroep*) in a different case. Again, it was judged that an alpha-worker was working under a normal labour contract and thus eligible for all social security schemes, including the prolonged period of sick pay.<sup>202</sup> More specifically, this case concerned an unemployment benefit payable under the statutory social security schemes, after the alpha-worker’s labour contract had been terminated. All in all, it seems that some progress has been made where the alpha-workers are concerned, but considerable problems continue to exist for other domestic workers (see below under Miscellaneous).

#### ***Muslim teaching employee dismissed for refusing to comply with clothing requirements***

The Rotterdam District Court has passed a judgment in a labour dispute between a female teaching employee and her employer, the board of a hospital.<sup>203</sup> In this case, a conflict arose because of the employee’s refusal to comply with the clothing requirements (wearing short sleeves), which were changed in the aftermath of the outbreak of a bacterial infection. The employee, on the ground of her religion, refused to work in short sleeves. Despite attempts at compromise, the employer ultimately decided to ask for her dismissal.

The Court judged that these clothing requirements, although indirectly discriminatory on the ground of religion, could be justified by the legitimate aim of preventing the risk of infection. It is remarkable that the District Court did not mention the fact that the clothing

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<sup>201</sup> Arnhem Court of Appeal, 5 November 2013, ECLI:NL:GHARL:2013:8304. The case is available at: <http://uitspraken.rechtspraak.nl/>, and may be found using its ECLI number. Also, see further: European Network of Legal Experts in the Field of Gender Equality, R. Holtmaat ‘Netherlands’ in: *European Gender Equality Law Review 2014/1*, pp. 90-94, European Commission 2014, available at: [http://www.cite.gov.pt/pt/destaques/complementosDestqs/DSAB14001ENN\\_002.pdf](http://www.cite.gov.pt/pt/destaques/complementosDestqs/DSAB14001ENN_002.pdf).

<sup>202</sup> Dutch Administrative High Court, 4 December 2013, ECLI:NL:CRVB:2013:2721. The case is available at: <http://uitspraken.rechtspraak.nl/>, and may be found using its ECLI number.

<sup>203</sup> District Court Rotterdam, 21 January 2014, ECLI:NL:RBROT:2014:2368. The case is available at: <http://uitspraken.rechtspraak.nl/>, and may be found using its ECLI number.



requirements do not only constitute indirect discrimination on the ground of religion, but also on the ground of sex, as only women have to cover their skin under the relevant religious rules.

### Equality body decisions/opinions

#### *Netherlands Institute for Human Rights (NIHR): lower insurance benefit for woman constitutes discrimination on the ground of sex*

A Dutch-Turkish 10-year old girl was the victim of a traffic accident. She became disabled as a result of the accident, in such a way that she would never be able to work. The motor driver's insurance company was liable for the girl's damages and offered her an insurance benefit to cover the harm caused by the accident. In its calculations, the insurance company, on the basis of actuarial statistics about the average number of years of labour market participation of Dutch-Turkish women, reasoned that the girl would work full time from the age of 17 until 26, stop working after having her first child, only to re-enter the labour market at the age of 37. She would then work half time until the age of 67. Consequently, the amount of the insurance benefit offered was considerably lower than the amount claimed by the girl's parents.

The girl's parents did not accept the insurance company's offer and decided to go to court. The District Court of The Hague, however, accepted the insurance company's reasoning, which caused a major commotion in the Dutch media.<sup>204</sup> Subsequently, her parents decided to bring the case to the Netherlands Institute for Human Rights (NIHR), claiming that the insurance company, in its calculations, had made a forbidden distinction on the ground of gender (no claim was made as regards discrimination on the ground of ethnic origin).<sup>205</sup>

The Dutch Government has always interpreted the grounds of exception under Article 5 Section 2 of Directive 2004/113/EC<sup>206</sup> in such a way that the use of gender-related statistics to determine insurance premiums and benefits is allowed, as long as they are based on trustworthy and accurate data. The NIHR has, in 2012, reported on the use of statistics in estimating insurance benefits, only focusing on distinctions made on the ground of gender, and agrees with the Government on this point in the conclusions of its report, although it warns against outdated stereotypes and gender discrimination.<sup>207</sup>

In this case, the NIHR decided that the insurance company had discriminated on the ground of gender. It deemed it highly improbable that the insurance company would have used similar statistics in the case of a man, judged the statistics used to be inaccurate, and therefore accepted the presumption that the insurance company had made a forbidden distinction. The insurance company had been unable to deliver evidence to the contrary, nor had it pointed to any objective justification grounds. The NIHR's opinions are non-binding, but it is expected that this opinion will play a role in the continuation of the negotiations on the final amount of insurance benefit.

In this decision and the accompanying press release, the NIHR emphasises in stronger language than before that the use of statistics relating to labour participation creates a large difference between men and women as regards insurance benefits. It calls upon insurance companies to eliminate this inequality and use fair assumptions.

<sup>204</sup> The Hague District Court 26-07-2013, ECLI:NL:RBDHA:2013:9276. The case is available at: <http://uitspraken.rechtspraak.nl/>, and may be found using its ECLI number. See further: R. Holtmaat 'Netherlands' in: *European Gender Equality Law Review 2014/1*, pp. 90-94, European Commission 2014, available at: [http://www.cite.gov.pt/pt/destaques/complementosDestqs/DSAB14001ENN\\_002.pdf](http://www.cite.gov.pt/pt/destaques/complementosDestqs/DSAB14001ENN_002.pdf).

<sup>205</sup> Opinion 2014-97 of the NIHR, 19 August 2014, available at: <https://mensenrechten.nl/publicaties/oordelen/2014-97/detail>, accessed 28 August 2014.

<sup>206</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

<sup>207</sup> The NIHR's report was published in 2012 under the name *Verkennend onderzoek letselschade* and is available at: <https://mensenrechten.nl/publicaties/detail/17392>, accessed 28 August 2014.

## Miscellaneous

### ***Report on the social security position of domestic workers in the household published***

In the Netherlands, only a part of labour law applies to domestic workers when they work for private households (see above). The social security position of this group is precarious, which has been pointed out by *inter alia*, the CEDAW Committee in its 2010 report on the Netherlands. Concluding observation 38 stated:

The Committee expresses serious concern that in the Netherlands several hundred thousand domestic workers working in private households and home-care workers financed by public schemes, 95 per cent of whom are women, have limited social rights and limited access to social security, notably unemployment and disability benefits and pensions.<sup>208</sup>

In 2011, the Convention concerning Decent Work for Domestic Workers (International Labour Organisation (ILO) Convention no. 189) has set labour standards for domestic workers. The Dutch government has not yet ratified this convention, as that would require the abolishment (or adjustment) of the ministerial regulation. With an eye to the ratification of the convention, a special committee was appointed to examine ways to improve the position of domestic workers in private households.

The committee, presided over by Ms Kalsbeek, a former MP, has recently published its report. The committee's conclusions can be divided in two: firstly, those applying to 'alpha-workers' (domestic workers who perform work in private households through the services of a professional home care organisation, see above); and secondly those applying to the remaining group of home helps.

As regards the alpha-workers, the committee concluded that the ministerial regulation should not apply to this group, and that instead they should be included under the scope of the statutory insurance schemes. As regards the second group, the committee is less decisive. It advises abolishing the regulation, as most domestic work takes place in the black market anyway, but fails to recommend a policy alternative, only describing a couple of possibilities used in other European countries.

The Committee did not manage to find a palatable solution to the conundrum it was confronted with: to find a way to provide domestic workers with proper social security rights without pushing them towards the black (labour) market. It is highly paradoxical that ratifying the ILO Convention, adopted with the purpose of improving labour standards for domestic workers, might in practice only result in an even bigger black market. Alternatives, such as the service cheque system as implemented in Belgium, seem to be lacking political support as they would require financial support from the government. The Dutch government has not yet published a reaction to the Committee's views.

### ***NIHR publishes annual report and draws attention to pregnancy discrimination***

The Netherlands Institute for Human Rights (NIHR) has published its Annual Report for 2013. According to the report, there has been 'explosive growth' in the number of questions about discrimination in the Netherlands over the past year. In total, the NIHR received 2,006 questions on equal treatment in 2013, a rise of no less than 75 % as compared with the year 2012. Many questions concerned pregnancy-related discrimination.<sup>209</sup>

In 2013, the Institute received over 300 pregnancy-related questions and delivered an Opinion concerning discrimination on pregnancy in 20 cases, which is presumably only the proverbial tip of the iceberg. The NIHR has pointed out these problems and has brought the results of a campaign, 'Pregnancy and Work', to the attention of the government, urging the

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<sup>208</sup> CEDAW's 2010 report (CEDAW.C.SR.916) on the Netherlands is available at:

<http://www2.ohchr.org/english/bodies/cedaw/cedaws45.htm>, accessed 28 August 2014.

<sup>209</sup> The NIHR's annual report, available at: <http://www.mensenrechten.nl/berichten/jaarverslag-college-voor-de-rechten-van-de-mens>, accessed 28 August 2014.

responsible minister to take measures. In March 2014 alone, the NIHR found discrimination in four cases in which the employer did not extend a pregnant employee's employment contract.

The growth in the number of questions asked about discrimination is, in the light of the increasing attention to discrimination, hardly surprising. It remains questionable whether this growth indicates more discrimination or, perhaps, growing public awareness of the anti-discrimination norms enshrined in the Dutch constitution and various statutory equal treatment acts.

***The Hague District Court considers possibility of a positive action plan for men***

An article in the Dutch newspaper *Algemeen Dagblad* announcing (on the basis of leaked information) that District Court of The Hague, in response to the increasing percentage of female judges, is considering the possibility of a positive action plan for men, was picked up by all major media.<sup>210</sup> Currently, a small majority of all judges is female, but as many as 75 % of the judges in the 30-40 year-old age category is female, leading to fears that the representativeness of the judiciary could be at risk in the near future.

In the Netherlands, positive action schemes are possible with respect to the grounds of sex, race and disability. Article 2(3) of the General Equal Treatment Act (GETA, covering the grounds of race and sex) imposes four conditions on positive action measures and policies:

- (i) the initiative must be a specific measure;
- (ii) the measure is aimed at the conferral of a preferential position for women or for people belonging to ethnic or cultural minorities;
- (iii) the measure is aimed at the removal or the reduction of factual inequalities; and
- (iv) there must be a proportionate relationship between the measure and the objective pursued.

The Dutch Association for Women and Law (VVR) was quick to condemn the proposal in an open letter, pointing to the fact that positive action schemes for men are not allowed under Dutch law, as Article 2(3) GETA and the Explanatory Memorandum to the Act only mention women.<sup>211</sup> Most other reactions in the media were neutral to positive, as many acknowledge the fact that the representativeness of the judiciary might be jeopardised in the future. The Court has refused to make any comment, and to the knowledge of the expert no decisions have been taken thus far.

## NORWAY – Helga Aune

### Legislative developments

***Proposals for amendments to existing legislation:***

***(i) the Working Environment Act – temporary work***

The Conservative Government's political statement and platform for governing announced amendments to the Working Environment Act (WEA<sup>212</sup>) to encourage a 'more flexible and family friendly employment market'. The proposed amendments were presented on 25 June 2014, and the political statement was included in the Sundvollen Declaration.<sup>213</sup> The cut-off date for public consultations is 9 October for all but the proposal regarding temporary employment contracts which has a cut-off date of 25 September 2014. The misuse of

<sup>210</sup> To be found at: <http://www.ad.nl/ad/nl/1040/Den-Haag/article/detail/3659492/2014/05/22/Rechtbank-wil-mannen-voortrekken-bij-sollicitatie.dhtml>, accessed 28 August 2014.

<sup>211</sup> The VVR's letter is available at: <http://www.vrouwenrecht.nl/2014/08/08/brief-vvr-en-proefprocessenfonds-aan-raad-voor-de-rechtspraak-en-rechtbank-den-haag-over-voorgenomen-voorkeursbeleid-voor-meer-mannen-in-de-rechtbank/>, accessed 28 August 2014.

<sup>212</sup> *Arbeidsmiljøloven* av 17 June 2005 no. 62.

<sup>213</sup> The Sundvollen Declaration of 7 October 2013.

temporary contracts has traditionally been seen in female dominated sectors of the employment market and the suggested amendments have a gender perspective in that respect.

Regarding temporary employment: the Ministry of Labour and Social Affairs proposes to introduce a general right to offer temporary work contracts for a limited period which will provide simple rules for all employers. At the same time the Ministry appreciates that there is a need for rules to ensure that temporary work contracts are not misused to circumvent the rule of permanent employment which still remains the main rule in Norwegian employment law. There are no suggestions about amending the rules on temporary work agencies.<sup>214</sup>

Regarding working time: several amendments to the current working time legislation are proposed in order to create a more flexible employment law. The proposals cover a wide range of options opening up the way for work periods of longer duration, for example, the way average working time is calculated, alternative calculations for work rotas and organisation of overtime work.<sup>215</sup>

***(ii) The State Pension Act and more – indirect sex discrimination against part-time workers regarding pensions***

Proposals have been made for amendments to the State Pension Act (*Statens pensjonskasse*), the Pension Act for Nurses (*Lov om pensjonsordning for sykepleiere*) and the Pension Act for Pharmacies (*Lov om pensjonsordning for apotekvirksomhet*). These proposals were made as a result of the Labour Court's judgment of 21 June 2013, which declared that the requirement of a minimum of 14 hours' work per week as a condition for obtaining membership of the additional occupational pension scheme under the collective agreement in the public sector was indirect discrimination against part-time workers, following the rules in the WEA Chapter 13 which implements Directive 97/81/EC. However, the majority of part-time workers are women and there is therefore also a gender perspective to this in reality. This caused the Government to evaluate equal thresholds in pensions regulated by law. The proposed amendments suggest that the new threshold is to be set at a minimum of work equal to 20 % of an equivalent full-time position. It is the total sum of a combination of several small positions that counts as 20 %. The reason for maintaining a 20 % threshold is that, due to tax law provisions, full membership of pension systems for positions below 20 % may lead to the situation where these employees pay contributions higher than the amount they will receive in total pension payments. The changes will affect 5,000 employees in the public sector.<sup>216</sup>

***Proposal of legislative amendments to the father's and mother's quota of parental leave***

On 30 June 2014, the Government proposed amendments to the legislation regarding the mother's and the father's quotas of parental leave, suggesting that there ought to be more opportunity to transfer as much as four weeks from these quotas to the spouse in cases where it would be difficult to take the full quota of leave because of illness, unemployment, work abroad, self-employment or the serving of a prison sentence. The mother's and the father's quotas of parental leave are designated periods of leave for each of the parents which they may not transfer to the spouse or any other person. The aim of this leave is to stimulate fathers to take more part in the care of a child in its first year and thus create more equality between parents. Under the present regime, the time of this quota of parental leave which is not taken by a parent is lost. On the downside, one should note that the increased flexibility

<sup>214</sup> See: [http://www.regjeringen.no/upload/ASD/Dokumenter/2014/Horing\\_AMS/Midlertidig\\_ansettelse\\_mm.pdf](http://www.regjeringen.no/upload/ASD/Dokumenter/2014/Horing_AMS/Midlertidig_ansettelse_mm.pdf), accessed 7 September 2014.

<sup>215</sup> See: [http://www.regjeringen.no/upload/ASD/Dokumenter/2014/Horing\\_AMS/Arbeidstid.pdf](http://www.regjeringen.no/upload/ASD/Dokumenter/2014/Horing_AMS/Arbeidstid.pdf), accessed 7 September 2014.

<sup>216</sup> See: <http://www.regjeringen.no/nb/dep/asd/dok/hoeringer/hoeringsdok/2014/Horing---minstegrense-for-rett-til-medlemskap-i-Statens-pensjonskasse-pensjonsordning-for-sykepleiere-og-pensjonsordning-for-apotekvirksomhet/Horningsnotat.html?id=765221>, accessed 7 September 2014.

may lead to fewer fathers taking their full possible quota of leave due to traditional gender roles in society.<sup>217</sup>

The cut-off date for comments on the proposal is 15 October 2014. The proposed amendments serve two purposes, namely, increased flexibility for the parents and ensuring that children get the amount of care due to them from a parent's leave.

### Equality body decisions/opinions

A complaint was made to the Ombud. A female security guard was not assigned work two weekends per month, as she was contractually entitled to, after her employer respected a customer's wish (who bought security guard services) not to receive female workers. The Equality and Anti-Discrimination Ombud (the Ombud) found the employer to be in breach of the prohibition of direct discrimination because of gender and suggested that the employer should pay compensation to the woman.<sup>218</sup>

### Miscellaneous

The Ombud reported a high level of harassment to women in general and especially to women of minority backgrounds, when they make use of their freedom of speech and take part in public debates. These incidents of harassment lead women to withdraw and become less visible in important debates in a viable democracy. Women receive far more comments about their looks than men after having taken part in public debates.<sup>219</sup> The Ombud will comment on the project of the organisation 'Fritt Ord' (Free Speech) entitled 'The status of freedom of expression in Norway – the Fritt Ord Foundation's monitoring project', which examines attitudes to and experiences of freedom of expression in Norway in different demographic groups and arenas.<sup>220</sup>

## POLAND – Eleonora Zielińska

### Policy developments

Among recent occurrences, significant from the perspective of equality policy was the nomination by the Prime Minister of Professor Małgorzata Fuszara as the new Government Plenipotentiary for Equal Treatment. The position became vacant from 1 August 2014, after the former plenipotentiary, A. Kozłowska Rajewicz, was elected to the European Parliament. Professor Fuszara is an eminent feminist lawyer, the founder and co-director of Gender Studies at Warsaw University. It has to be noted with approval that this time the Prime Minister has followed the suggestions of Women's Congress (NGO representing women of different political beliefs) and chose to nominate for this position not a politician, but a specialist in the area of equal treatment.

Following the resignation of Prime Minister D. Tusk, in connection with his election as President of the European Council, and of the deputy Prime Minister, E. Bieńkowska, who is to take over the position of European Commissioner for Internal Market etc., a new Government has been elected. Ewa Kopacz, who until now performed the duties of the Speaker of the lower chamber of the Polish Parliament (*Sejm*), has been nominated as the new

<sup>217</sup> Proposed amendments to legislation on transferability of the maternity and paternity leave (quotas) during the parental leave on public consultation, available at: <http://www.regjeringen.no/nb/dep/bld/dok/hoyringar/hoeringsdok/2014/Horing--ny-utvidet-unntaksordning-for-fedrekvoten-og-modrekvoten-i-foreldrepengeordningen/Horingsnotat.html?id=764854>, accessed 7 September 2014.

<sup>218</sup> <http://www.ido.no/no/Klagesaker/Arkiv/2014/1473-Diskriminering-a-nekte-vaktoppdrag-pa-grunn-av-kjonn/>, accessed 7 September 2014.

<sup>219</sup> <http://www.ido.no/no/ombudet/Aktuelt/Nyheter/Arkiv/Featured-news/--Tvinges-ut-av-samfunnsdebatten/>, accessed 7 September 2014.

<sup>220</sup> <http://www.fritt-ord.no/en/>, accessed 7 September 2014.

Prime Minister. The fact that, for the second time in Poland's history, a woman has become Prime Minister has to be assessed positively; the choice of E. Kopacz for this position, however, may raise some doubts as to her readiness to implement gender equality policy since she made some controversial decisions prior to resigning from her position of as Parliamentary Speaker. Namely, she interrupted legislative work on all draft legislation which was important from the gender perspective currently pending in the Parliament, but which was opposed by the right-wing parties; for example, the draft amendments to the so-called Anti-Discrimination Law,<sup>221</sup> and draft amendments to the Electoral Law, aimed at introducing the subsequent placement of male and female candidates on electoral lists (the so called 'zipper' system).<sup>222</sup> Also moved into the 'parliamentary freezer' was the Government draft allowing the President to ratify the Council of Europe Convention on preventing and combating violence against women and domestic violence, as well as a draft law regulating the admissibility of *in vitro* procedures.

It should also be noted that, following the crusade against 'gender ideology', there is currently another crusade in progress, this time against the conditions for invoking the conscience clause by medical doctors, which are set out in the Law on the medical profession. It obliges doctors who refuse to perform a legal abortion, to indicate to the woman another medical institution where she will have the possibility of such treatment. Failure to fulfil this obligation by the director of one of the biggest gynaecological clinics in Warsaw, resulted in the deadline for legal abortion being missed by the mother and eventually in the birth of a child which had no chance of living independently (the foetus did not develop a brain). For his misconduct the director was dismissed by the founding body of the hospital but, in protest against this decision, pro-life NGOs supported by Catholic Church officials started to circulate for signature among medics the 'declaration of belief with regard to sexuality and human fertility'.<sup>223</sup> The declaration was signed by approximately 4 000 medics, and by the Vice-President of the Parliamentary Commission for Health and the Vice-Marshall of the Senate.<sup>224</sup> Public signature of this declaration means the reservation of an unconditional right to refuse to provide those medical services which are contrary to a doctor's conscience, and hence a declaration of disobedience towards binding Polish law. This problem is worth emphasising because the announcement of such a declaration has also been made within the Association of Catholic Teachers, supported by some right-wing politicians (with regard to sex education). Apparently this initiative has, however, been stopped by a sharp reaction by the Minister of Education.<sup>225</sup> It should be added that this and similar actions, undertaken by Catholic circles, contribute to the atmosphere of a lack of respect for reproductive rights, especially with regard to women, and constitute an invitation to violate them.

<sup>221</sup> *Representatives' draft law on amendment of the Law of 3 December 2010 on implementation( transposition) of certain provisions of the European Union with regard to equal treatment, and some other laws( Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania* – Journal of Laws (JoL) no. 254 item 1700). Parliamentary document no. 1051, available at: <http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=1051>, accessed 4 September 2014. See further: European Network of Legal Experts in the Field of Gender Equality, E. Zielińska 'Poland' in: *European Gender Equality Law Review 1/2014* at pp. 96-101, European Commission 2014, available at: [http://www.cite.gov.pt/pt/destaques/complementosDestqs/DSAB14001ENN\\_002.pdf](http://www.cite.gov.pt/pt/destaques/complementosDestqs/DSAB14001ENN_002.pdf), accessed 20 September 2014.

<sup>222</sup> Sejm Document no. 1151, available at: <http://www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?id=998EB951BDD35FB3C1257B260044DC2E>. Representatives' draft law on amendment of the Electoral Code (Sejm document no. 1146), available at: <http://www.sejm.gov.pl/SQL2.nsf/poskomprocall?OpenAgent&7&1146>, both accessed 4 September 2014.

<sup>223</sup> See: <http://www.deklaracja-wiary.pl/>, accessed 10 September 2014.

<sup>224</sup> See: [http://www.deklaracja-wiary.pl/img/lista\\_pod\\_.pdf](http://www.deklaracja-wiary.pl/img/lista_pod_.pdf), accessed 10 September 2014.

<sup>225</sup> See: [http://wiadomosci.gazeta.pl/wiadomosci/1,114871,16394239,Deklaracja\\_wiary\\_nauczycieli\\_Kluzik\\_Rostkowska\\_Beda.html](http://wiadomosci.gazeta.pl/wiadomosci/1,114871,16394239,Deklaracja_wiary_nauczycieli_Kluzik_Rostkowska_Beda.html), accessed 28 October 2014. The Minister of Education, Joanna Kluzik-Rostkowska, that 'a public school should remain neutral with regard to the worldview. Teachers should also preserve this neutrality at work, otherwise they would breach the law'.

## Legislative developments

### *Draft law amending the provisions on parental leaves for lone fathers taking care of their children*

The Ministry for Labour and Social Policy prepared a draft law amending, among others, the Law on financial benefits from social security in case of sickness and maternity.<sup>226</sup> It aims to allow single fathers to take advantage of parental leave and to collect benefits in a case when the mother is dead or has left the child, when a court has decided that she is unable to provide for herself, or when her health prevents her from taking care of the child. Currently, the father is only entitled to parental leave in situations where the mother is working, and the father uses the first 14 weeks of the mother's maternity leave. Therefore, the father's right to parental leave is conditional on the right of the mother. If the mother is not entitled to the leave, then the father, even if he is paying insurance premiums, cannot take advantage of it. However, this draft law only partially resolves the problem, since the father's right to take parental leave still remains conditional.

## Case law of national courts

### *Punishment for the employer who dismissed a father-employee, who applied for paternity leave*

The press reported a ruling of the District Court in Warsaw (VII Labour and Social Insurance Division),<sup>227</sup> which awarded damages in the amount of EUR 4 000 (PLN 16 000) against an employer who fired a male worker because he applied for leave in order to take care of his family. The employer claimed he fired the man because he was a bad worker. The worker, however, provided a recording of a conversation during which the employer said that, if it were not for the leave, the worker would probably still be working for him. Both sides in the proceedings appealed this judgment. The claimant appealed because of the low compensation awarded (he demanded a total of EUR 8 718 (PLN 36 814) and received EUR 4 000 (PLN 16 891)).<sup>228</sup> The employer maintained his position that the dismissal was justified and had had nothing to do with the application by the claimant for parental leave. The appeals procedure, in which the claimant is supported by lawyers from the Polish Society of Anti-Discrimination Law (NGO), is still pending. The judgment of the Court of Appeal in this case might be crucial for other processes in similar discrimination cases

### *The problem of guilt in ruling on discrimination cases by Polish courts.*

The judgment of 26 June 2014 of a court of appeal addressed discrimination on the ground of sexual orientation.<sup>229</sup>

Relevant to this Law Review, however, is the fact that in this ruling of the Court of Appeal, the Court seems not to recognise the fact that in order to award damages for discrimination, there is no need to determine the fault of the perpetrator. This ruling is worth mentioning since it proves the shortcomings of Polish regulation on discrimination. On the one hand Article 13 of the Anti-Discrimination Law<sup>230</sup> states that, in a case of discrimination, everybody has the right to damages. On the other hand, however, the same Law requires the use of the provisions of the Civil Code in all discrimination cases, and these provisions are guided by different rules from those concerning the anti-discrimination procedure. In the above-mentioned ruling the Court of Appeal does not refer to the Anti-Discrimination Law at all, thus missing the chance to determine the relationship between this regulation and the

<sup>226</sup> See: <http://www.mpips.gov.pl/aktualnosci-wszystkie/prawo-pracy/art.6906.rodzicielski-takze-dla-samotnych-ojcow.html>, accessed 3 November 2014.

<sup>227</sup> Case no. VII P 270/12.

<sup>228</sup> Of which EUR 3 158.25 (PLN 13 667.86) claimed was for unlawful dismissal, EUR 3 084.75 (PLN 12 339.35) and EUR 2 500 (PLN 10 000) were for both for material damages and for moral damages, resulted from a violation of the principle of equal treatment.

<sup>229</sup> Case no. I ACa 40/14.

<sup>230</sup> Law of 3 December 2010, JoL 2010.254.1700 with further amendments.

provisions of the Civil Code, with respect to claims for damages for violation of the rule of equal treatment.

***Different treatment of men and women in the police in relation to appearance of uniformed police officers***

The Supreme Administrative Court (NSA) in its judgment of 4 April 2014 rejected a cassation claim which regarded disciplinary measures demotion) applied to a policeman who refused to follow an order of his commanding officer to cut his hair (he cut his hair halfway and wore it tied up while in service).<sup>231</sup> The NSA reaffirmed the position of the District Administrative Court, expressed in the judgment of 26 October 2012 (II SA/Wa 802/12).<sup>232</sup> Both the drill regulation of 20 May 1998 (issued by the Chief Police Commander, No. 1787/10/ KGP) which was in force at the time, and the binding order of 1 March 2013 (Official Monitor of the Chief Police Command No. 7) stipulate that a uniformed policeman with hair, beard or moustache, is obliged to maintain them ‘in a neat manner and trim cut’. In the case of women, when the hair is longer than the shoulders, it should be worn tied up in service. According to the District Court the order complies with Article 7 of the Law on the Police, according to which ‘the Chief Police Commander determines among others ... forms of performing duties’. By doing so the Commander also determines the obligations of the officers with regard to their appearance. Within the internal structure of the police, ‘the commanding officer of all policemen may determine the appearance of male and female police officers. An officer is obliged to follow those rules, while in service’. In the opinion of the District Administrative Court, reaffirmed by the Supreme Administrative Court, ‘a difference in determination of the appearance of women and men serving in the police forces does not violate the rule of equal treatment’. In its oral reasoning the NSA mentioned that the order of the Chief Police Commander was issued in accordance with the Commander’s statutory entitlement, without violating its limits. The court did not accept the argument of the police officer, supported by the NGO Helsinki Foundation for Human Rights, that the characteristic feature here is the fact of performing police service; therefore men and women should not be treated differently with regard to the length of their hair. The NSA stated that when it comes to the uniform or appearance of police officers, the ‘relevant characteristic features are both the fact of performing police service and the sex’. For this reason the NSA found that this regulation does not have a discriminatory character.

It is hard to agree with the opinion of the court, which opines that the Chief Police Commander is entitled to determine the appearance of uniformed police officers differently for men and women, because this is an act of determining ‘the form of performing of tasks’. Even if one were to accept that this is actually the case, in this matter there was no rational justification for differentiation in the length of hair in the case of male and female police officers.

**Miscellaneous**

***Discriminatory criteria in recruitment to police service***

The Defender of Human Rights has written to the Minister for Internal Affairs, regarding the qualification procedure for candidates applying for admission to the police forces, which in her opinion raises doubts as to its conformity with the Constitution of Poland.<sup>233</sup> In the police recruitment process uniform tests of physical condition are applied for male and female candidates, without recognising biological differences between the sexes. In the Defender’s opinion they limit in a disproportional way the chances of a woman being admitted to the police service. Additionally she notes that the mentioned limitation has been included in an

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<sup>231</sup> Information sourced from the Newsletter of the Helsinki Foundation for Human Rights, 31 March-7 April 2014, distributed via e-mail.

<sup>232</sup> Decision published at: <http://orzeczenia.nsa.gov.pl/doc/3BAF0732D9>, accessed 12 September 2014.

<sup>233</sup> See: <http://www.rpo.gov.pl/pl/content/do-msw-ws-skarg-dotyczacych-dyskryminacji-kobiet-przy-naborze-do-policji>, accessed 2 September 2014.



executive act; that contradicts Article 31(3) of the Constitution, which requires that any limitation of citizens' rights takes the form of a legislative act.

In the police, as well as in other services subordinate to the Minister of Internal Affairs, especially the National Fire Service, and the Office for Governmental Protection, there are positions that require the officers to be in a special physical condition. In such cases it is the special character of the tasks performed by members of the service which should determine the special physical requirements, which then may be the same for both sexes. The police service has, however, a different character and in some ranks generally good physical fitness will be sufficient. Hence there is no rational justification for already applying uniform criteria at the stage of accepting candidates for the police service. The justification for the same criteria of physical fitness for women and men candidates, by the requirement of special availability and the specificity of police service, is not convincing and therefore such provisions may be considered as indirect discrimination against women according to the meaning of the Law of 3 December 2010 on the implementation of selected EU provisions with regard to equal treatment, i.e. the Anti-Discrimination Law.<sup>234</sup>

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

There are no developments to report.

#### ROMANIA – *Iustina Ionescu*

##### Case law of national courts

On 12 May 2014, the Bucharest Tribunal (*Tribunalul Bucuresti*, appeal court) overturned a 2013 decision of the First Instance Court of the Second District Bucharest (*Judecatoria Sector 2 Bucuresti*), which granted EUR 10 000 as moral damages to a woman for being discriminated against on the grounds of her HIV status.<sup>235</sup>

In March 2013, the first instance court found the refusal of a hospital to hospitalise a woman living with HIV for a Caesarean section to be discrimination in access to public services and a violation of personal dignity.<sup>236</sup> The defence of the head of the hospital department arguing that there was not enough room available in the Neonatology Department, rejected by the first instance court, was now accepted by the appeal court.<sup>237</sup>

The motivation of the appeal court decision raises two particular concerns regarding the application of the gender equality and anti-discrimination legislation.

First, the appeal court overlooked the principle of the shift of the burden of proof regarding the defence of the head of the hospital department, who claimed at the time that only emergency cases were accepted for birth in the hospital; the complainant was asked to prove that new non-emergency cases (not under the supervision of a doctor from the hospital) were admitted for birth instead of her. Given that the complainant proved *prima facie* that she was entitled to birth by Caesarean section at 38 weeks and the head of department refused her for eight days, it was for the hospital to prove that it had other legitimate, objective, and reasonable motives to refuse to admit the complainant for birth by Caesarean section. Moreover, the complainant also brought evidence showing that the head of the hospital department refused her because she is HIV positive.

<sup>234</sup> JoL 2010.254.1700.

<sup>235</sup> First Instance Court of the Second District Bucharest (*Judecătoria Sectorului 2 Bucureşti*), Civil judgment of 27 March 2013.

<sup>236</sup> Government Ordinance No. 137/2000 regarding the prevention and sanctioning of all forms of discrimination (*Ordonanța Guvernului nr.137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), republished in Official Journal No. 99 of 8 February 2007, Articles 2(1), 2(5), 10(b) and 15.

<sup>237</sup> Bucharest Tribunal (*Tribunalul Bucuresti*), Civil decision No. 582A of 12.05.2014.

Second, the appeal court misapplied the definition of discrimination, in particular considering it to be unlawful behaviour to give priority for a Caesarean section at 38 weeks to a woman living with HIV before the other patients who were programmed for a Caesarean section or were new but emergency cases. The court called this treatment ‘positive discrimination’, which it considered to be an unlawful form of discrimination against the majority in favour of the minority, an argument that is often used in society to dismiss anti-discrimination legislation seen as a special right for minorities to the detriment of the majority. The court disregarded the fact that in Romanian legislation ‘positive discrimination’ is not unlawful. Moreover, the definition of ‘affirmative measures’ (Article 2(9) of the Anti-Discrimination Law) does not apply in this case because the medical intervention at 38 weeks in the case of the complainant was stipulated by law and medical standards for health reasons related to HIV mother-to-child transmission and not for reasons of ensuring substantive equality of opportunities or protecting a group exposed to discrimination, to which affirmative measures apply. Nevertheless, even if we accept that the prevention of HIV mother-to-child transmission is to be considered ‘affirmative measures’ or (in the language of the court) ‘positive discrimination’, such behaviour is under no circumstances punished by law as discrimination against the majority, as the court implies in its decision, but it is imposed by law on hospitals and medical personnel for preventing HIV transmission.

The case is currently under appeal on the grounds of law. It will be reviewed by the Court of Appeal of Bucharest (*Curtea de Apel Bucuresti*). Its significance is very high especially considering that NGOs have documented several cases of alleged discrimination in the healthcare system,<sup>238</sup> and sociological studies designate persons living with HIV to be the most vulnerable group exposed to discrimination in Romania.<sup>239</sup>

### Equality body decisions/opinions

At the beginning of July 2014, the *Consiliul National pentru Combaterea Discriminarii* (equality body, CNCD) penalised the mayor of Constanta for discrimination for the content of the public campaign ‘*Mamaia Style*’, designed to promote the Romanian seaside.

The *Mamaia Style* campaign included images and messages that were objectionable to women and incited sexual harassment against them. For example, an item called ‘bird watching’ suggested that tourists are encouraged to stalk women who are sunbathing on the beach (i.e. by watching them through binoculars). Moreover, women are called ‘birds’ – which is derogatory to women in the Romanian language. The CNCD qualified the content of the public campaign as ‘sexist’, ‘misogynistic’ and ‘discriminatory against women’.<sup>240</sup> According to CNCD, this behaviour was encouraged by the mayor of Constanta, the main town at the Romanian seaside, who ordered the campaign. At the press conference launching the campaign, Mayor Radu Mazare declared to the media that ‘young ladies are like gazelles that need to be hunted’.<sup>241</sup>

Despite the nature of the messages and the fact that it was a nationwide campaign, the CNCD only punished the authors of the public campaign with a warning instead of an administrative fine, even though the higher administrative sanction was available to the national equality body. This is particularly worrying in the context of the recent decision of the Court of Justice of the European Union finding in another case on Romanian Anti-

<sup>238</sup> Euroregional Centre for Public Initiatives, *Drepturile sexuale și ale reproducerii. Cazul femeilor care trăiesc cu HIV în România*, June 2011. See also Human Rights Watch, *Viața nu așteaptă. Eșecul României în protecția și susținerea copiilor și a tinerilor care trăiesc cu HIV*, (2006), HUMAN RIGHTS WATCH VOLUME 18, NO. 6(D).

<sup>239</sup> CNCD, *Percepții și atitudini privind discriminarea. Raport de cercetare*, 2013, available at <http://www.cncd.org.ro/files/file/Sondaj%20de%20opinie%20CNCD%202013.pdf>, accessed 8 September 2014.

<sup>240</sup> CNCD, Decision No. 376 of 2 July 2014.

<sup>241</sup> Flavia Dragan, ‘Radu Mazare sanctionat de CNCD după ce a spus că femeile trebuie vâdate ca niște gazele’ in *Romania Liberă*, 7 July 2014, <http://www.romanalibera.ro/actualitate/eveniment/radu-mazare-sanctionat-de-cncd--dupa-ce-a-spus-ca-femeile-trebuie-%E2%80%9Dvanate-ca-niste-gazele%E2%80%9D-342050>, accessed 8 September 2014.

Discrimination Law that warnings were not commensurate with the seriousness of a breach of the principle of equal treatment within the meaning of Directive 2000/78/EC, if warnings were generally only imposed in Romanian law for very minor offences.<sup>242</sup>

This case is a good example of how the legal standing of non-governmental organisations stipulated in Romanian Anti-Discrimination Law works in practice in the field of discrimination on the ground of sex. A group of five NGOs working on women's rights and gender equality, called the Gender Equality Coalition, filed a complaint to the CNCD using the legal standing in cases of discrimination affecting a group of persons or a community.<sup>243</sup> In these cases, there is no need for a power of attorney from actual or potential victims, only the proof that the NGO is promoting human rights or has an interest in the field of equality and non-discrimination which is usually shown in the organisation's by-laws or activity report.

The above-mentioned provision, which is stipulated in Article 28 of the Anti-Discrimination Law, is more generous than the equivalent one in the recently amended Gender Equality Law.<sup>244</sup> On 4 December 2012, the Government limited solely to administrative procedures the right of trade unions, human rights organisations and other entities to represent or assist a person exposed to discrimination on the ground of sex. The previous version of this paragraph was much broader and in compliance with the defence of rights under the relevant EU directives (for example Article 9(2) of Directive 2010/41/EU); it used to recognise a legal standing for these entities in both judicial and administrative procedures, similar to the case of discrimination on other grounds.

## SLOVAKIA – Zuzana Magurová

### Policy developments

#### *Two high-profile appointments of women in the judiciary*

On 2 October 2014 the President appointed Daniela Švecová as Supreme Court President. The general public welcomed changes in the top judicial positions, namely the victory of Švecová who is the first woman President of the Supreme Court in Slovakia's history and also the election of Jana Bajánková as the chairperson of the Judicial Council, also the first woman in the post.

#### *Statistics show that women in Slovakia are still paid less for work than men*

Slovakia, like many other countries, is facing a paradox. Despite the fact that more women graduate from universities, speak more foreign languages, and are prepared for professional life; ultimately in the same work sectors and in the same age-brackets, women earn less than men. The campaign entitled 'When I Grow Up',<sup>245</sup> organised since August 2014 by the Labour Ministry in cooperation with the European Commission's Representation to Slovakia points out the difference in the remuneration of men and women.<sup>246</sup> The campaign is funded with approximately EUR 400 000.

In autumn 2014, the Labour Ministry launched a campaign entitled 'Reconciling the Family and Professional Lives' which will follow up with a pilot project at the beginning of the year 2015. The project will be supported with EUR 23 million from the European Social

<sup>242</sup> CJEU, Case C-81/12 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, WLR [2013] at Paragraph 70.

<sup>243</sup> Government Ordinance No. 137/2000 regarding the prevention and sanctioning of all forms of discrimination (*Ordonanța Guvernului nr.137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), republished in Official Journal No. 99 of 8 February 2007, Article 28.

<sup>244</sup> Law 202/2002 on equal opportunities between women and men (*Legea 202/2002 privind egalitatea de șanse între femei și bărbați*), Article 35(2), republished in Official Journal No. 326 of 5 June 2013.

<sup>245</sup> Available at: <http://www.kedvyrastiem.sk/rodova-rovnost>, accessed 4 November 2014.

<sup>246</sup> Global report on gender equality in Slovakia 2013, approved by the Resolution of the Government of SR No. 337/2013 on 9 July 2014. In 2013 women earned 20.8 % less than men. Available at: <http://www.osveta.mil.sk/data/files/3966.pdf>, accessed 4 November 2014.

Fund. The first phase of the project is creating conditions for daycare centres, corporate crèches and other types of childcare. According to the Labour Ministry it is essential to create conditions for working mothers to be able to work, and thus avoid economic instability and even poverty at retirement age. The next phase is to enable or arrange for flexible working hours for mothers in order to be able to harmonise their work and family lives.

### **Legislative developments**

#### ***Protection of so-called ‘traditional marriage’ was introduced in the Constitution***

The much discussed constitutional amendment introducing the official protection of so-called ‘traditional marriage’ was passed by the Slovak Parliament on 4 June 2014.<sup>247</sup> Two sentences were added to Article 41 Section 1 of the Constitution: ‘Marriage is a unique bond between a man and a woman. The Slovak Republic protects marriage universally and contributes towards its well-being.’

The Gender Equality Committee warned in its Resolution no. 54 (20 May 2014)<sup>248</sup> that such a provision in the law could seriously threaten the already existing pro-family policies of the state, including those which protect single mothers and fathers, divorced mothers and fathers and their children. Committee members pointed out that such legislation could indirectly push women to enter into marriage as the only form of institutionalised relationship. On this basis the Committee called on Members of Parliament not to approve the proposed changes to the parliamentary draft Constitution and to refrain from all actions that would lead to legislative restriction of personal and property rights relating to partnership and family life.

The amendment was adopted. However, on 21 May 2014 the Government’s advisory body, the Labour Ministry’s Gender Equality Committee (acting as the part of the Government Council for Human Rights, National Minorities and Gender Equality), expressed concerns that the proposed definition of marriage is not in accordance with one of the main principles of Slovak family law – the protection of all forms of families.<sup>249</sup>

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

There has been no significant case law concerning sex discrimination from the national courts in the last six months. However, after exhausting domestic remedies a claimant has turned to the CEDAW Committee alleging discrimination related to maternity leave. The Slovak Foreign Affairs Ministry detailed this case in its report in July 2014 on individual complaints against Slovakia accepted by the UN human rights treaty bodies.<sup>250</sup> The claimant in this case objects to the alleged violation of her rights in the area of employment and right to work. The mother of two was allegedly dismissed after she had returned from maternity leave.<sup>251</sup> In their decisions, the national courts did not take into account EU law, in particular the prohibition to discriminate on grounds of pregnancy, which amounts to direct sex discrimination.

### **Miscellaneous**

The Slovak National Centre for Human Rights (equality body) has published a report on the observance of human rights including the observance of the principle of equal treatment in the Slovak Republic for the year 2013. This annual report is currently available also in English on

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<sup>247</sup> Available at: <http://www.kedvyrastiem.sk/rodova-rovnost>, accessed 4 November 2014.

<sup>248</sup> Available at: <http://www.employment.gov.sk/files/slovensky/ministerstvo/konzultacne-organy/rada-vlady-sr-ludske-prava-narodnostne-mensiny-rodovu-rovnost/vybor-rodovu-rovnost/uznesenia-50-55.pdf>, accessed 4 November 2014.

<sup>249</sup> Article 2 of the Basic Principles of Act No. 36/2005 Coll. on Family states that ‘society shall provide for the broad protection of all forms of families’.

<sup>250</sup> Available at: <http://www.rokovania.sk/Rokovanie.aspx/BodRokovaniaDetail?idMaterial=23747>, accessed 4 November 2014.

<sup>251</sup> Opinion of the CEDAW Committee not yet available.

the Slovak National Centre for Human Rights (Centre) website.<sup>252</sup> One part of this report is devoted to Reconciling Work and Family Life and Work-Life Balance. However, this section only contains a summary of legislation in force, limited information concerning a survey carried out by the Centre and the following very formal recommendations:

1. Employers shall look closely at the demographic situation in Slovakia and the economic crisis in Europe, to implement measures which will provide employees with work and private well-being which lead to proactivity and productivity in the workplace.
2. Employers shall consult their own provisions with experts on discrimination and the equal treatment principle, such as the experts from the Centre.
3. Employers shall follow the development of the work-life balance and the reconciliation of work and family life, and react promptly to all new trends within this field.
4. Employers shall communicate and cooperate closely with trade unions in discussing these matters.
5. The Centre recommends awareness raising among employees on the work-life balance and the reconciliation of work and family life issues through information campaigns and other available tools.
6. The Centre recommends improving the monitoring of observance to existing legislative measures relating to the reconciliation of work and family life and the work/life balance.
7. The Centre recommends that the National Labour Inspectorate utilises more sanctions regarding the violations of the Labour Code in the field of work-life balance.
8. The Centre itself shall intensify its efforts and focus on issues relating to the work-life balance, utilising the outcomes from several existing surveys.<sup>253</sup>

## SLOVENIA – Tanja Koderman Sever

### Policy developments

#### *Activities of the Ministry of Labour, Family, Social Affairs and Equal Opportunities*

The State Secretary at the Ministry of Labour, Family, Social Affairs and Equal Opportunities met with Slovenian mayors in April 2014. This was their seventh working meeting. At this meeting they discussed the reconciliation of work and private life of women in political decision-making positions.

In May 2014, the State Secretary at the Ministry of Labour, Family, Social Affairs and Equal Opportunities granted certificates of ‘Family-Friendly Company’ to companies which have committed to adopt special measures in order to facilitate the reconciliation of work and private life of their employees.<sup>254</sup> Among other things, he pointed out that companies that show social responsibility have a competitive advantage resulting in an increase in their productivity since the success of the company depends mainly on the employees. Furthermore, he pointed out that beside the importance of legal provisions, the role of employers and labour organisations is crucial in order to facilitate the reconciliation of work and private life.

#### *Elections to the National Assembly*

In comparison with the last elections, the share of female representatives in the National Assembly increased from 31 % to 36 %. This is the highest share of women in the National Assembly since 1991 when Slovenia became an independent state.

<sup>252</sup> [Report on the Observance of Human Rights Including the Observance of The Principle of Equal Treatment in the Slovak Republic for the Year 2013](http://www.snsfp.sk/?locale=en#page=2426), available at: <http://www.snsfp.sk/?locale=en#page=2426>, accessed 4 November 2014.

<sup>253</sup> Ibid. at p.135.

<sup>254</sup> See: [http://www.mddsz.gov.si/nc/si/medijsko\\_sredisce/novica/article/1966/7432/](http://www.mddsz.gov.si/nc/si/medijsko_sredisce/novica/article/1966/7432/), accessed 27 October 2014.

### ***Ombudsman activities***

The Human Rights Ombudsman submitted its Annual Report for 2013<sup>255</sup> to the National Assembly. The Ombudsman pointed out that the respect of human rights by a country in financial crisis is difficult. Nevertheless, the crisis should not be an excuse for human rights violations.

### **Legislative developments**

#### ***The New Parental Protection and Family Benefits Act***

The new Parental Protection and Family Benefits Act (hereinafter the PPFBA-1) was adopted in April 2014 and entered into force at the end of April 2014.<sup>256</sup> According to the PPFBA-1 there are three different types of leave: maternity leave, parental leave, and paternity leave (Article 15). Before, there were four different types of leave: maternity leave, paternity leave, childcare leave, and adoption leave. Female workers are entitled to maternity leave of 105 days out of which 15 days are compulsory (Article 19). The duration of parental leave is 260 days and is distributed between the parents. This means that each of the parents has an individual right to parental leave of 130 days, where the mother may transfer 100 days to the father and 30 days are non-transferable; the father may transfer all 130 days to the mother (Article 29). Before the adoption of the PPFBA-1, childcare leave of 260 days was granted to one of the parents, directly after the end of maternity leave, to take care of the child and then parents had to agree in writing on the use of that childcare leave. Parents are entitled to parental leave directly after the end of maternity leave in order to take care of the child. However, according to the PPFBA-1, part of the parental leave, up to a maximum of 75 days, can be transferred and used before the child finishes the first year of primary school. The adoptive parent, or the person to whom the child has been entrusted for raising and nursing for the purpose of adoption, is entitled to parental leave of the same duration as birth parents until the child finishes the first year of primary school (Article 39). Adoption leave is therefore not a separate category of leave but has been combined with parental leave. The adoptive parent may start using parental leave at the latest 30 days after the child has been placed in the family for the purpose of adoption. Paternity leave of 30 days is granted to fathers on a non-transferable basis. 15 days must be used on a full-time or a part-time basis until the baby is six months old and 15 days before the child finishes the first year of primary school. Before the PPFBA-1 fathers were entitled to a period of full-time paternity leave of 90 days, out of which 15 days had to be used before the baby was six months old and 75 days before the child was three years old. In addition, only 15 days of paternity leave were paid under the previous regime, now, according to the PPFBA-1, 30 days are paid.

#### ***The new Prevention of Undeclared Work and Employment Act***

At the end of April 2014, the new Prevention of Undeclared Work and Employment Act (hereinafter the PUWEA) was adopted.<sup>257</sup> It prohibits undeclared employment and is relevant to help provided by spouses or life partners of self-employed workers. According to the PUWEA, help provided by spouses or life partners is recognised as undeclared work with the exception of short-term work. Short-term work includes unpaid work in a micro-company, a private institute or with an entrepreneur with a maximum of 10 employees, if carried out by a spouse or a life partner of the entrepreneur, provided that the work does not exceed 40 hours per month (Article 12(a)). If the work of a spouse or a life partner exceeds the upper limit and their partner or spouse fails to conclude an employment contract or a civil law contract with them and fails to register them for health, pension and disability insurance, a fine will be imposed by the labour inspectorate on a legal entity or an entrepreneur.

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<sup>255</sup> Available at: <http://www.varuh-rs.si/publikacije-gradiva-izjave/letna-porocila-priporocila-dz-odzivna-porocila-vlade/>, accessed 27 October 2014.

<sup>256</sup> <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO6688>, accessed 27 October 2014.

<sup>257</sup> Available at: <http://www.uradni-list.si/1/content?id=117354>, accessed 27 October 2014.

## Case law of national courts

Although gender discrimination is not so rare in Slovenia, victims of discrimination rarely decide to bring a gender equality case before the courts. This is why there has been no case law worth mentioning in the area of gender equality in the past six months.

One of the reasons may lie in the existing system of legal protection against discrimination which is not as effective as it should be. Legal remedies mainly exist on paper and are not effective, user-friendly or dissuasive. Furthermore, assistance to victims of discrimination is not independent or effective.

## Miscellaneous

### *Conference on Gender Equality*

At the beginning of April 2014 the Ministry of Labour, Family, Social Affairs and Equal Opportunities organised a conference entitled ‘Reconciliation of work and private life in decision-making positions’ under the scope of the project ‘Let’s balance the powers between the sexes’, financed by the Norwegian Financial Mechanism 2009-2014. The purpose of the conference was to determine which additional measures, services and activities at the state level, local community level, or company level would be necessary to provide for easier reconciliation of professional and private life in decision-making positions. It pointed out that family responsibilities and challenges in reconciling work and private life are still one of the key barriers for deterring women from being involved and participating in decision-making positions in the economy, public sector or politics.

### *Findings of the ‘Gender pay gap’ project*

In March 2014, the Women’s Lobby together with the Association of Free Trade Unions of Slovenia presented the findings from the project ‘Gender pay gap’.<sup>258</sup> According to their findings, women’s gross monthly earnings were on average 5 % below those of men in Slovenia, despite good gender equality legislation. The biggest difference between male and female earnings is in the area of health care and social care where the gender pay gap amounted to 26.5 %. Furthermore, they pointed out that there is a need to establish an independent specialised body which would monitor and evaluate the implementation of gender equality legislation and a need to collect sex-disaggregated data. At the time of writing, employers are not obliged to gather data and statistics segregated by gender.

## SPAIN – María Amparo Ballester Pastor

### Policy developments

On 7 March 2014 the Council of Ministers adopted the new National Strategic Plan for Equal Opportunities between women and men (which immediately came into force).<sup>259</sup> EUR 3 127 million have been allocated to it. The plan has as a general objective the promotion of real equality between men and women. Almost 70 % of its budget will be devoted to the promotion of women’s employment and to facilitate compatibility between work and family responsibilities.

The three concrete objectives of the plan are the following: (a) promotion of female employment and fight against wage discrimination; (b) promotion of measures to achieve compatibility between family and work responsibilities; and (c) implementation of measures to fight against gender-based violence.

<sup>258</sup> See: <http://www.iusinfo.si/DnevneVsebine/Novice.aspx?id=114140>, accessed 27 October 2014.

<sup>259</sup> National Strategic Plan for Equal Opportunities between women and men (2014-2016), approved by the Council of Ministers on 7 March 2014. Available at: <http://www.lamoncloa.gob.es/ConsejodeMinistros/Enlaces/070314-igualdadoportunidades.htm>, accessed 30 August 2014.

## Legislative developments

The Autonomous Community of Andalusia has approved the law 2/2014, of 8 July 2014, for non-discrimination on grounds of gender identity.<sup>260</sup> The law has a territorial limitation since it only applies in the Autonomous Community of Andalusia, but even so it is of great relevance because it is the first legislation in Spain that expressly recognises the right to non-discrimination on grounds of sexual identity and that establishes measures for the promotion and specific protection of this group. Some of its contents are the following:

- (1) Article 5 establishes that the Public Administration must respect the human right to self-determination of gender identity;
- (2) Article 7 stipulates that the Government of the Autonomous Community of Andalusia will conduct outreach campaigns to combat discrimination and violence related to gender identity;
- (3) Article 10 provides that the public health system will provide free health care for gender reassignment;
- (4) Article 15 establishes that all necessary measures should be taken in the field of education to eliminate attitudes of prejudice on the grounds of sexual identity.

## Case law of national courts

It is not often that cases of indirect discrimination related to payment reach the Supreme Court. However, the Supreme Court has recently issued two judgments of great interest. (1) In its judgment of 14 May 2014 the Supreme Court determined that an additional remuneration established by a hotel was discriminatory if it was greater for those employed in the bar (mostly men) than for those employed in housekeeping (work done mostly by women that consists of the cleaning and maintenance of rooms).<sup>261</sup> (2) In its judgment of 22 April 2014<sup>262</sup> the Supreme Court upheld the judgment of the Superior Court of Castilla-Leon of 19 June 2013,<sup>263</sup> in which it was considered discriminatory that a voluntary payment made by a large department store to its employees in variable amounts was, on average, higher for men than for women. This judgment is of great interest because it identifies the indirect discrimination on the basis of the average amount of the remuneration. Until now, indirect discrimination in matters of compensatory and retributive payment had been recognised only in cases in which the categories occupied mainly by men had higher remuneration than the categories occupied by women.

There were also two other interesting judgments in relation to the right of both pregnant women and women who had recently given birth, not to be affected in their careers. First, the judgment of the Supreme Court of 14 March 2014 ruled that, if possible, the time and/or place of a written test for access to a position in the public sector must be adapted to the particular circumstances of a female candidate who is pregnant or who has just given birth.<sup>264</sup> The Supreme Court judgment established in this case the possibility of a change in the time and/or location of the written test, because it was technically and reasonably possible. The judgment is of great importance because it rules that in general, a pregnant woman or a woman in a situation of imminent or recent childbirth can claim for an adjustment in the conditions of access to the public sector. Before this judgment the Supreme Court had not been conclusive enough on the issue. On one occasion it had recognised the right of a pregnant candidate to a new date for a written exam (judgment of the Supreme Court of 27 April 2009),<sup>265</sup> but on

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<sup>260</sup> Andalusian Law 2/2014, of 8 July 2014 for non-discrimination on grounds of gender identity and for the recognition of the rights of transsexual people. Available at: <http://www.juntadeandalucia.es/boja/2014/139/1>, accessed 29 August 2014.

<sup>261</sup> Judgment of the Supreme Court of 14 May 2014, Appeal No. 2328/2013.

<sup>262</sup> Judgment of the Supreme Court of 22 April 2014, Appeal No. 2191/2013.

<sup>263</sup> Judgment of the Superior Court of Justice of Castilla-León of 19 June 2013, Appeal No. 909/2013.

<sup>264</sup> Judgment of the Supreme Court of 14 March 2014, Appeal No. 4371/2012.

<sup>265</sup> Judgment of the Supreme Court of 27 April 2009, Appeal No. 4595/2005.



another occasion the Supreme Court had ruled in the opposite way (judgment of the Supreme Court of 6 March 2006).<sup>266</sup>

Second, the judgment of the Constitutional Court 66/2014, of 5 May 2014, raised the following issue: a pregnant applicant requested to take a training course that was scheduled after she had passed a selection process later, given that the expected date of the birth of her child coincided with the initial date. The Public Administration acceded to her request and the applicant took the course the following year. However, once she finished the course, the Public Administration established as the date of her entry into the Administration (seniority) the date on which she had in fact concluded the training course. The female applicant claimed that her date of entry was the one that she would have had if she had not been pregnant and thus could have attended the course with the other people who had passed the selection process at the same time. The Constitutional Court accepted her claim.<sup>267</sup>

A judgment of the National Court (*Audiencia Nacional*) recently released must be mentioned. The National Court ruled in its judgment of 30 November 2013 about the impact of maternity leave on part of the salary received by a female worker whose actual amount of salary depended on her effective attendance at work during the whole year.<sup>268</sup> The woman had not attended work during all of the year because she had been on maternity leave, so the employer reduced proportionally the amount of this variable remuneration. The National Court considered that the worker was entitled to the full amount of the variable salary because she did not attend work only during the six mandatory weeks after the birth. The judgment held that the worker could not suffer any penalty as a result of conduct which she was legally obliged to carry out. However, the judgment did not establish explicitly that the same solution should be applied in a case where a woman had taken the whole maternity leave (sixteen weeks) and not only the six mandatory weeks after the birth.

## SWEDEN – Ann Numhauser-Henning

### Miscellaneous

A Governmental Inquiry recently presented a proposal regarding amended rules on active measures in the Discrimination Act (2008:567) in its report *Nya regler om aktiva åtgärder mot diskriminering* (New rules on active measures against discrimination).<sup>269</sup> Active measures imply ‘prevention and promotion measures aimed at preventing discrimination in a given establishment and serving in other ways to promote equal rights and opportunities’ (p. 33). The proposal is that rules on active measures in working life and higher education should continue to be a part of the 2008 Discrimination Act but should in the future encompass all grounds of discrimination, i.e. sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation and age. The work with active measures should be conducted methodically – as ‘systematic work’ – and in cooperation with employees and students, respectively. It is suggested that the current (three-yearly) plan requirement covering working life including wages should be replaced by (yearly) documentation requirements. The same goes for plan requirements within higher education. Failure to comply with the rules on active measures could result in financial penalties issued by the Equality Ombudsman, whilst the current special Board against Discrimination would be abolished. It is also suggested that the current rules on active measures in forms of schooling other than higher education should be moved from the Discrimination Act to the Education Act.

The proposal is now the object of a consideration procedure and it is too early to say whether it will really lead to amendments in the 2008 Discrimination Act.

<sup>266</sup> Judgment of the Supreme Court of 6 March 2006, Appeal No. 105/07.

<sup>267</sup> Judgment of the Constitutional Court 66/2014, of 5 May 2014. Available at: <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23962>, accessed 30 August 2014.

<sup>268</sup> Judgment of the National Court of 30 November 2013, No. 172/2013.

<sup>269</sup> SOU 2014:41. Governmental inquiries act as pre-legislation investigations.

**TURKEY – Nurhan Süral****Policy developments*****Turkey 2014 Progress Report***

Turkey's 2014 Progress Report was unveiled on 8 October 2014.<sup>270</sup> Chapter 19, 'Social policy and employment', pays attention to several issues: female participation (33.2 %) and employment (29.6 %) rates, which remain considerably below EU levels; the lack of an equality body; the lack of childcare facilities; shortcomings in the implementation and proper monitoring of the Government circular on increasing women's employment and equal opportunities; decent work conditions; and the necessity to examine the extent to which bullying and sexual harassment at work hinders employment of both men and women.

***New Government Programme***

The Programme of the 62<sup>nd</sup> Government of Turkey emphasises gender issues as policies to be pursued.<sup>271</sup> It summarises the developments realised so far, and states that to achieve a strong and stable society the development of women's rights and welfare, and the lifting of social barriers is crucial. High priority shall be given to encourage the greater participation of women in the labour force. To this end, the Government will take more measures to help to reconcile work and family responsibilities, develop childcare institutions, and continue to provide incentives for employers to increase women's employment.

***National Employment Strategy adopted***

The lack of a national employment strategy was criticised in the European Commission's 2013 Progress Report on Turkey.<sup>272</sup> Work on the National Employment Strategy that began in October 2009, with the coordination of the Ministry of Labour and Social Security, was finalised in May 2014.<sup>273</sup> It is a roadmap putting forward ambitious structural labour market reforms and policies to be implemented. This is the first time in Turkey that employment has been worked on by looking at the long term.<sup>274</sup> Some targets set for 2023 are:

1. the unemployment rate should be reduced to 5 % from its current level of 9 %;
2. the employment rate should be increased to 55 % from 47 %;
3. the female labour force participation rate should be increased to 41 % from 29 %; and
4. informal labour, which is currently over 30 %, should be reduced to 15 %.

Among the grounds for action is improvement of the employability of disadvantaged groups such as women, young people and the disabled. The measures taken since 2008 are emphasised in the National Employment Strategy:

1. the 5 % cut in social security premiums for employers;
2. social security incentives for women and young people in first-time employment; and
3. the development of active labour market policies, including vocational courses, for unemployed people, young people and women.

For more flexibility, the National Employment Strategy will also enforce measures to reconcile work and individual needs, particularly for women. In addition, the following strategies are suggested: support of child care through various incentives such as development

<sup>270</sup> Turkey 2014 Progress Report, COM(2014) 700, pp. 41-42, not yet available online.

<sup>271</sup> *Bakanlar Kurulu Hakkında Yapılan Güvenoylamasına İlişkin Karar ve eki 62. Hükümet Programı*, pp. 63, 113, and 158, Official Gazette, 7 September 2014, No. 29112.

<sup>272</sup> [http://www.abgs.gov.tr/files/strateji/tr\\_rapport\\_2013\\_en.pdf](http://www.abgs.gov.tr/files/strateji/tr_rapport_2013_en.pdf), p. 40, accessed 21 October 2014.

<sup>273</sup> Official Gazette 30 May 2014, No. 29015.

<sup>274</sup> Speech delivered by Ali Babacan, State Minister and the Deputy Prime Minister, <http://www.aa.com.tr/en/news/36500--we-are-working-on-national-employment-strategy-document--babacan>, accessed 21 October 2014.

and spreading of institutional support mechanisms, fighting harassment in the workplace, making public announcements on television encouraging women to work, continuation of the existing premium incentives for young people and women, and spending more resources on the active labour market policies.

### **Legislative developments**

#### ***Criminalising hate crimes and illegal force and intervention in personal lifestyles***

Measures of interest relating to gender issues in the democratisation package introduced on 30 September 2013 included the removal of legal barriers for women with headscarves wanting to take up public posts, the intention to penalise hate crimes (bias-motivated crimes), and the intention to criminalise illegal force and intervention in personal lifestyles. With an amendment made in October 2013 to the By-Law on the Garments of Public Personnel, women with headscarves may now hold public office.<sup>275</sup> Law no. 6529 was enacted in March 2014 to further realise the principles prescribed in the democratisation package.<sup>276</sup>

Law no. 6529, amending Article 115 of the Criminal Law, criminalises unlawful or forceful interventions in personal lifestyle choices arising from a person's ideas, beliefs or convictions. Such acts will be punishable by imprisonment of between one year and up to three years. The same rule is to be applied to preventions, either by force or by another illegal act, of the use of freedom to announce religious beliefs, opinions and convictions (Article 14). Although the Article is neutral, it especially protects women with headscarves who face such comments.

Hate crimes have a bias motive and therefore represent a distinct category of hostility. Legal regulations providing punishment of hate crimes were not included in the Criminal Law and this situation created a loophole for offenders who went unpunished or who were found guilty of another type of crime, such as assault, threats, violence, physical assault, damaging property or belongings, vandalism, or harassment. Article 15 of Law no. 6529 amends Article 122 of the Criminal Law. According to the amended Article, a person who discriminates as a result of hatred stemming from differences in language, race, nationality, sex, disability, political thought, belief or other considerations and accordingly hinders the employment of a particular person, or the sale, transfer or lease of any object to a person, or prevents someone from using a public service, will be punished by between one and three years' imprisonment. For the time being, hate crimes do not include provisions for those targeted because of their sexual orientation or ethnic identity.

#### ***Confidentiality for victims of domestic violence***

To provide a guarantee of confidentiality for victims of domestic violence with protection orders under the Law on the Protection of the Family and the Prevention of Violence Against Women, healthcare providers will not record their identities and contact details in the brief version of hospital reports (*icmal listesi*).<sup>277</sup>

#### ***Headscarf permitted in secondary education***

In September 2014, the By-Law (a legal implementing instrument) on Garments of Students in the Secondary Education was amended.<sup>278</sup> Female students in secondary education may now choose to wear headscarves in their schools.

<sup>275</sup> Official Gazette, 8 October 2013, No. 28789.

<sup>276</sup> *Temel Hak ve Hürriyetlerin Geliştirilmesi Amacıyla Çeşitli Kanunlarda Değişiklik Yapılmasına Dair Kanun*, Law no. 6529, Official Gazette, 13 March 2014, No. 28940.

<sup>277</sup> Social Security Institution Implementation Communiqué (*Sosyal Güvenlik Kurumu Sağlık Uygulama Tebliği*), Articles 5.3.1.B/1b and 5.3.2.B/1b as amended on 18 March 2014, Official Gazette 18 March 2014, No. 28945.

<sup>278</sup> Milli Eğitim Bakanlığına Bağlı Okul Öğrencilerinin Kılık ve Kıyafetlerine Dair Yönetmelikte Değişiklik Yapılması Hakkında *Yönetmelik*, Official Gazette, 27 September 2014, No. 29132.

***Amendments made by Law no. 6552 on entitlement to retirement and domestic workers***

Law no. 6552<sup>279</sup> amended the Labour Law (Law no. 4857) and the Social Insurance General Health Insurance Law (Law no. 5510). Some of these amendments concern working women.

In Turkey, there are legal rules easing entitlement to retirement for parental reasons, so that women can reconcile work and family responsibilities and not discontinue work permanently upon having children. Where a worker resigns due to pregnancy or having given birth, she may choose to pay contributions (premiums) for a maximum period of two years, during which she remains unemployed. These periods count as pensionable service. This period starts at the birth and the worker could benefit from this provision for two separate births (Law no. 5510, Art. 41). Law no. 6552 increases the number to three births meaning that a woman worker benefiting fully from this provision will retire six years earlier.

Article 68/5 of Law no. 5510 concerns *in vitro* fertilization. previously, the Social Security Institution paid for two trials and the woman worker, woman civil servant, or the self-employed woman undergoing the procedure contributed 30 % of the total amount for the first trial, and 25 % of the total amount for the second trial. With Law no. 6552, the number of trials is increased to three, and for the third trial the woman undergoing to procedure will contribute 20 % of the total amount.

Law no. 6552 also concerns domestic workers, the majority of whom are women. Domestic workers were covered by a State (compulsory) social security scheme, but many remained uncovered in practice. This was especially due to the fact that people hiring these workers were reluctant to follow procedures that were effectively the same as those followed by employers running businesses. Law no. 6552 eases and simplifies these procedures.

**Case law of national courts**

***Constitutional Court decision on headscarf-wearing lawyer***

Ms. Tuğba Arslan, a headscarf-wearing lawyer, was not admitted to a court in Ankara to represent her client, and the judge asked her client to have another lawyer. Ms. Tuğba Arslan made an individual application to the Constitutional Court upon which the court ruled that the lower court's decision had no legal basis, and constituted a violation of constitutional provisions on the freedom of religion and conscience, and on equality before the law.<sup>280</sup>

**UNITED KINGDOM – Aileen McColgan**

**Policy developments**

In July 2014 the Equality and Human Rights Commission (EHRC) published guidance on gender segregation in universities. The guidance resulted from an uproar in December 2013 over the publication the previous month by Universities UK, the representative body of UK universities, of guidance which appeared to condone the gender segregation of students. That guidance was directed at the management of controversial external speaker events on campus. It contained a number of case studies, one of which suggested that a speaker's demand to speak only to a gender segregated audience (i.e., one in which women and men were physically separated) could be accommodated if it was religiously motivated. The guidance did not condone, much less advocate, gender segregation of students during their studies, but suggested that gender segregation at the behest of an external speaker could be permitted if, for example, women and men were seated separately side by side rather than men at the front and women at the back.

<sup>279</sup> *İş Kanunu ile Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun*, Law no. 6552, Official Gazette, 11 September 2014, No. 2916bis.

<sup>280</sup> Constitutional Court decision, application no. 2014/256, decision date 25 June 2014, Official Gazette, 5 July 2014, No. 29051.

News coverage of Universities UK's guidance resulted in the publication of reports of a number of incidents of threats and physical force being employed to police gender segregation at university events and the guidance was withdrawn and subsequently republished in amended form. Universities UK said at the time that it would work with the Equality and Human Rights Commission.

The EHRC's guidance now suggests that voluntary segregation is lawful but warns that it is not straightforward to ensure and prove (in the event of a challenge) that segregation is truly voluntary 'both at the booking stage and during the event'. This requires, it is suggested, that 'all attendees would need to be at liberty freely to choose where they wished to sit without any direction, *whether explicit or merely an implicit expectation*' (emphasis added). 'Thus, attendees must have the freedom to choose where they may sit (except where specific seating is designated for speakers, or space is designated for other legitimate reasons, for example to meet childcare or disability access requirements).'<sup>281</sup>

In July 2014 the EHRC also published guidance on the equality law framework within which appointments to boards must be made. The guidance is intended for companies, nomination committees, search firms and recruitment agencies in England, Scotland and Wales.<sup>282</sup>

### Legislative developments

As indicated in the *European Gender Equality Law Review 2014-1*, the questionnaire procedure for discrimination claimants (and prospective claimants) ceased to be available in April 2014 by reason of the repeal of Section 138 of the Equality Act 2010.<sup>283</sup> However, the Advisory, Conciliation and Arbitration Service (ACAS) has issued non-statutory 'best practice' guidance *Asking and responding to questions of discrimination in the workplace*,<sup>284</sup> which provides detailed guidance on how prospective parties might behave. The guidance includes a six-step approach for individuals when asking questions and a three-step approach for employers to follow when responding. As under the statutory scheme, while there is no direct penalty for any failure to comply with the guidance, any failure to respond or any evasion in response may be taken into account by an employment tribunal hearing a subsequent claim against the employer. Interestingly, whereas the statutory questionnaire procedure restricted questions to those relevant to the claim, there is arguably more scope for broader questions to be asked with the abolition of the questionnaire procedure.

In June 2014 the Government published the draft Equality Act 2010 (Equal Pay Audits) Regulations 2014,<sup>285</sup> which came into force on 1 October 2014. The Regulations would apply only where an employer has been found to be in breach of equal pay legislation. They would require employment tribunals to order employers which had lost an equal pay claim to carry out and publish a pay audit unless an exception applies. Where a pay audit is ordered it must identify any differences in pay between the men and women specified in the order 'and the reasons for those differences' and must 'include the reasons for any potential equal pay breach identified by the audit' and 'the respondent's plan to avoid equal pay breaches occurring or continuing'.

Among the cases in which no equal pay audit would be required to be made is where it is clear without such an audit 'whether any action is required to avoid equal pay breaches occurring or continuing'. The strange thing about this exception is that the Government is in

<sup>281</sup> <http://www.equalityhumanrights.com/publication/gender-segregation-events-and-meetings-guidance-universities-and-students-unions>, accessed 3 October 2014.

<sup>282</sup> <http://www.equalityhumanrights.com/publication/appointments-boards-and-equality-law>, accessed 3 October 2014.

<sup>283</sup> A. McColgan 'United Kingdom' in: European Network of Legal Experts in the Field of Gender Equality *European Gender Equality Law Review 2014-1*, p. 115, European Commission 2014, available at: [http://www.cite.gov.pt/pt/destaques/complementosDestqs/DSAB14001ENN\\_002.pdf](http://www.cite.gov.pt/pt/destaques/complementosDestqs/DSAB14001ENN_002.pdf), accessed 3 October 2014.

<sup>284</sup> <http://www.acas.org.uk/media/pdf/m/p/Asking-and-responding-to-questions-of-discrimination-in-the-workplace.pdf>.

<sup>285</sup> <http://www.legislation.gov.uk/ukdsi/2014/9780111116753>.

the process of trying to repeal the power of tribunals to adopt wide-ranging recommendations in the event of successful discrimination claims, while it appears that the Regulations envisage the making of such a recommendation instead of a pay audit order.

### Case law of national courts

The decision in *R (Unison) v Lord Chancellor* was mentioned in the *European Gender Equality Law Review 2014-1*.<sup>286</sup> Shortly after that decision the official statistics disclosed a drop of around 80 % in tribunal claims generally, and sex discrimination claims in particular, in the first six months after fees were imposed. In May the Court of Appeal granted UNISON (a trade union) leave to appeal the decision of the High Court.<sup>287</sup>

Women in the UK currently qualify for the state pension at 60 whereas men have to wait until they are 65. Both ages of entitlement will increase over time and are in the process of being equalised. In *MB v Secretary of State for Work & Pensions* the Court of Appeal rejected a claim from a trans-woman that, because she not had been formally recognised as a woman under the Gender Recognition Act and was therefore not entitled to be treated as a woman for pension purposes, she had been subject to discrimination contrary to Council Directive 79/7/EEC.<sup>288</sup>

The claimant in this case was a trans-woman who had, when she was still living as a man, married a woman. When she had transitioned to living as a woman the claimant did not apply for recognition under the Gender Recognition Act 2004 because that would have required her to divorce her wife, which she was unwilling to do. As a result of the fact that she was not certified in her acquired gender she was treated as male rather than female for the purposes of the state pension age, and was thus refused the pension when she reached 60.

The Court of Appeal accepted, relying on the decision of the European Court of Human Rights in *Hämäläinen v Finland*,<sup>289</sup> that it was not disproportionate to require, as a precondition to legal recognition of an acquired gender, that the applicant's marriage be converted into a registered partnership, as that was a genuine option which provided legal protection for same-sex couples that was almost identical to that of marriage. That being the case, the Court of Appeal did not accept that the requirement of divorce as a precondition to gender certification gave rise to discrimination contrary to the principle of equal treatment in the Directive.

Note that as of 13 March 2014, with the implementation of the Marriage (Same Sex Couples) Act 2013, divorce is no longer a prerequisite for gender certification if both partners to the marriage wish to remain married.

*Williams v Ministry of Defence*<sup>290</sup> is only an employment tribunal decision but it is important because it is a relatively rare example of a tribunal making thoroughgoing use of the power to make broad recommendations where discrimination is found. The claim was brought by Group Captain Wendy Williams who had been unsuccessful in her attempts to gain promotion to a position which would have required that she be selected by the Royal Air Force (RAF) and compete against candidates selected by the Royal Navy and the Army. She was not selected as the RAF candidate because of her sex. The tribunal also ruled that she, as a nurse, had been subject to indirect sex discrimination in that personnel qualified as doctors were more likely than those qualified as nurses to be promoted to the position, and that this

<sup>286</sup> [2014] EWHC 218 (Admin) [2014] ICR 498. See: A. McColgan 'United Kingdom' in: European Network of Legal Experts in the Field of Gender Equality *European Gender Equality Law Review 2014-1*, pp. 115-116, European Commission 2014, available at: [http://www.cite.gov.pt/pt/destaques/complementosDestqs/DSAB14001ENN\\_002.pdf](http://www.cite.gov.pt/pt/destaques/complementosDestqs/DSAB14001ENN_002.pdf), accessed 3 October 2014.

<sup>287</sup> <http://www.bailii.org/ew/cases/EWHC/Admin/2014/218.html>, accessed 3 October 2014.

<sup>288</sup> [2014] EWCA Civ 1112. Available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2014/1112.html>, accessed 3 October 2014. See further: Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.

<sup>289</sup> [2014] ECHR, Application no. 37359/09.

<sup>290</sup> 16 April 2014; case no.1318158/11, Birmingham.

distinction was unjustified. The tribunal then ordered that the respondent pay the claimant EUR 421 580 (GBP 332 170) (grossed up to EUR 707 000 (GBP 557 038) to allow for tax) and made 13 recommendations. These concerned recruitment and promotion practices; complaint handling; and equality and diversity training, including requiring the Ministry of Defence (MOD) to ‘implement the recommendations’ to carry out research into female representation in the military service, which the MOD had set itself. As mentioned above and elsewhere, it is this power to make recommendations going beyond the position of the individual claimant which the Government is planning to remove from tribunals.

### **Miscellaneous**

The latest figures suggest that women now account for 20.7 % of all board positions in the top 100 UK companies, up from 12.5 % in 2011. This rise takes the UK towards the 25 % target set for 2015 by Lord Davies in his 2011 *Women on Boards* report, though the chief executive of the Davies Review steering group warned that the rate of progress was not sufficient to achieve that target which would require the appointment of a further 48 women in addition to the 90 or so recruited since 2011.<sup>291</sup> It is also worth noting that two boards remain exclusively male and that only 6.9 % of executive board positions (by comparison with 25.5 % of non-executive positions) are held by women. The pace of change in relation to executive roles has been very slow.

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<sup>291</sup> *Women on Boards* available at: <https://www.gov.uk/government/publications/women-on-boards-2014-third-annual-review>, accessed 3 October 2014.





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