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Introduction on the state of play

This is the ninth issue of the biannual *European equality law review*, produced by the European network of legal experts in gender equality and non-discrimination (EELN). The Network is pleased to confirm that the *European equality law review* will continue to be published for another four years.[1] This issue provides an overview of legal and policy developments across Europe and as far as possible reflects the state of affairs from 1 July to 31 December 2018. The aim of the EELN is to provide the European Commission and the general public with independent information regarding gender equality and non-discrimination law and, more specifically, the transposition and implementation of the EU equality and non-discrimination directives.

In this issue

This Law Review opens with four in-depth analytical articles. First, Tamás Kádár, Deputy Director and Head of Legal and Policy at Equinet, the European Network of Equality Bodies, analyses the legal standing of equality bodies with a particular focus on Belgium, Romania and Sweden. The article explores different forms of legal standing as well as the different ways in which equality bodies have used their standing to ensure effective enforcement of the EU non-discrimination directives. In the second article, Sybe de Vries, Professor of EU Single Market Law and Fundamental Rights at Utrecht University, explores the question of the horizontal direct effects of the EU Charter of Fundamental Rights for gender equality after the 2018 landmark decision of the CJEU in *Bauer*.[2] In the third article, the Romanian non-discrimination expert Romanița Iordache examines the practice of invoking a religious ethos to discriminate notably on grounds of sexual orientation in access to goods and services. Finally, the article section of this Law Review closes with an article by the Icelandic gender equality expert Herdís Thorgeirsdóttir tackling the issue of victimisation and the protection afforded by EU gender equality law. This Law Review also offers a section presenting the most recent case law of the Court of Justice of the European Union and of the European Court of Human Rights in the field of gender equality and non-discrimination, and closes with a section detailing the most recent developments in legislation, case law and policy at the national level.[3]

Recent developments at the European level[4]

In July 2018, the European Parliament published its revised guidelines on how to use gender-neutral language in the Parliament.[5] The guidelines were first published in 2008 and provide practical advice in all official languages of the European Union on the use of gender-fair and gender-inclusive language. The aim of these guidelines is to encourage Members of the European Parliament to adopt a gender-neutral/gender-fair/non-sexist use of language in order to reflect the principle of gender equality and non-discrimination on grounds of gender which is deeply rooted in the Treaties and the Charter of Fundamental Rights of the European Union. The guidelines are also to be applied in parliamentary publications and communications. It is hoped that using gender-fair and inclusive language also helps to reduce gender stereotyping, promotes social change and contributes to achieving gender equality.

1 The intention is four years upon annual renewal.
2 C-569/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, Judgment of 6.11.2018, EU:C:2018:871.
3 On the basis of information provided by the national experts, the sections on non-discrimination were drafted by Catharina Germaine of the Migration Policy Group while the sections on gender equality were drafted by Raphaële Xenidis and Franka van Hoof of Utrecht University. Catharina Germaine made the final compilation.
4 This section, like the rest of the Review, covers the period of 1 July to 31 December 2018.
5 *Gender-neutral language in the European Parliament*, full text available at: www.europarl.europa.eu/cmsdata/151780/GNL_Guidelines_EN.pdf.

Protocol No 16 to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms[6] was ratified by 10 State parties[7] and entered into force on 1 August 2018, allowing the higher courts of ratifying states to request advisory opinions from the ECtHR on the interpretation or application of the Convention and the rights it protects. The first request under this protocol was made by the French *Cour de Cassation* on 11 October 2018 in the context of domestic judicial proceedings concerning the legal recognition of parents of a child born abroad through a surrogacy arrangement. On 3 December 2018, the Strasbourg Court agreed to review the French court's request and questions.[8] In accordance with Protocol 16, the opinion of the ECtHR will be issued by the Grand Chamber's panel of five judges and will not be binding.

Members of the European Parliament adopted an own-initiative report on measures to prevent and combat mobbing and sexual harassment at the workplace, in public spaces and in political life in the EU on 11 September 2018.[9] Following up on the #MeToo movement, MEPs from the Women's Rights and Gender Equality Committee (FEMM) drafted the report proposing measures to combat mobbing and sexual harassment in the EU. FEMM calls on the EU Commission to propose a directive against all forms of violence against women, including updated definitions and legal standards treating it as a crime. The report has been forwarded to the European Commission for consideration.

In October 2018, the European Parliament adopted a resolution calling for action against the recent surge in racism, fascism and xenophobia, voicing concern about the increasing normalisation of such movements in some Member States.[10] Denouncing the lack of serious action against neo-Fascist and neo-Nazi groups in Europe, Parliament called on national authorities to effectively ban groups, foundations and associations that 'exalt and glorify' Nazism and fascism.

The European Union Agency for Fundamental Rights (FRA) published two reports in November 2018 which were of direct relevance to the work of the Network. First, a report providing an overview of data available in the EU on antisemitism between 2007 and 2017 was published, drawing on international organisations as well as official and unofficial sources in the Member States.[11] The report highlighted the concerning levels of antisemitic hate speech and hate crime, discrimination, unequal treatment and harassment, while noting the importance of relevant equality data. The second FRA report attempted to provide a picture of what 'Being Black in the EU'[12] means, by outlining some selected results from its second EU MIDIS survey on migrants and minorities. The report examined the experiences of almost 6 000 people of African descent across 12 EU Member States, showing that both discrimination and harassment as well as racial profiling by police are common phenomena in the everyday lives of black Europeans.

In November 2018, the European Commission's High-Level Group on combating racism, xenophobia and other forms of intolerance published a Guidance Note on the practical application of the Framework

6 Council of Europe Treaty Series-N0.214, Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg 2.X.2013, available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084832.

7 Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, Netherlands, San Marino, Slovenia and Ukraine.

8 See Registrar of the Court, Press release ECHR 415 (2018), 'Grand Chamber Panel accepts first request for an advisory opinion under Protocol 16' (European Court of Human Rights, 4 December 2018) available at: http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-6269064-8165703&filename=Grand%20Chamber%20Panel%20accepts%20first%20request%20for%20an%20advisory%20opinion%20under%20Protocole%2016.pdf.

9 European Parliament resolution of 11 September 2018 on measures to prevent and combat mobbing and sexual harassment at workplace, in public spaces, and political life in the EU (2018/2055(INI)), available at: http://www.europarl.europa.eu/doceo/document/TA-8-2018-0331_EN.html?redirect.

10 European Parliament resolution of 25 October 2018 on the rise of neo-fascist violence in Europe (2018/2869(RSP)), available at: http://www.europarl.europa.eu/doceo/document/TA-8-2018-0428_EN.html?redirect.

11 FRA (2018), *Antisemitism – Overview of data available in the European Union 2007-2017*, available at: http://fra.europa.eu/en/publication/2018/antisemitism-overview-2007-2017.

12 FRA (2018), *Being Black in the EU – Second European Union Minorities and Discrimination Survey*, available at: http://fra.europa.eu/en/publication/2018/eumidis-ii-being-black.

Decision on Combating Racism and Xenophobia[13] on its 10-year anniversary. The aim of the Guidance Note is to assist national authorities in addressing common issues encountered in the practical application of the Framework Decision and to ensure effective investigation, prosecution and sentencing of hate crime and hate speech on the ground.

On 29 November 2018, the Rights, Equality and Citizenship (REC) Annual Work Programme for 2019 was adopted.[14] With a total budget of EUR 64 771 000, the Work Programme will finance activities that strive to protect rights or promote non-discrimination, aiming to contribute to the Commission's priority 'An area of Justice and Fundamental Rights Based on Mutual Trust'. More particularly, the relevant budget line related to the promotion of non-discrimination and equality amounts to EUR 37 262 000 and contains a number of highly relevant focus areas for future projects.

Finally, in further response to the #MeToo movement, the Gender Equality Commission (GEC) of the Council of Europe (CoE) adopted the draft Committee of Ministers recommendation on preventing and combating sexism on 7 December 2018.[15] The recommendation provides an international definition of sexism and proposes a list of comprehensive measures to address it. The recommendation, which is the first international legal instrument to prevent sexism, is embedded in the legal framework of the Istanbul Convention which provides the legal basis for its implementation. Parties to the Convention are required, "to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men", and also requires that "parties criminalise stalking and take the necessary measures to ensure that sexual harassment is subject to criminal or other legal sanctions".[16] The Recommendation was finally adopted by the Committee of Ministers on 28 March 2019.[17]

Network publications and activities

On 30 November 2018, the Network held its annual legal seminar in Brussels, including a highly appreciated keynote address delivered by Eleanor Sharpston, Advocate General at the Court of Justice of the EU. Similar to previous years, thematic workshops were also held in relation to the issues covered by the thematic reports published that year by the Network, in addition to the recurring workshop providing an update on recent case law of the Court of Justice and of the European Court of Human Rights.

Five thematic reports were published during the second half of 2018, including one on the rights of transgender and intersex people, by Marjolein van den Brink and Peter Dunne, which analyses the national, EU and international legal developments in relation to discrimination on the grounds of sex, gender identity and gender expression. This report was selected by the EU Publications Office as one of the key publications of the European Union for 2019.

13 High-Level Group on combating racism, xenophobia and other forms of intolerance (2018), *Guidance note on the practical application of Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law*, available at: https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=51025.

14 Commission Implementing Decision on the financing of the Rights, Equality and Citizenship Programme and the adoption of the work programme for 2019, C(2018) 7916 final, Brussels, 29.11.2018. Available at: https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=639676.

15 Council of Europe, Gender Equality Commission, CEG-DC sexism (2018) draft Committee of Ministers recommendation to prevent and combat sexism, Strasbourg 21 September 2018, available at: https://rm.coe.int/gec-dc-sexism-2018-report-september/16808ec28a.

16 All EU Member States and the European Union are party to the Council of Europe Convention on preventing and combating violence against women (Istanbul Convention). Full text of the Istanbul Convention is available at: www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e.

17 Recommendation CM/Rec(2019)1 of the Committee of Ministers to member States on preventing and combating sexism, Strasbourg, 27 March 2019, available at: https://search.coe.int/cm/pages/result_details.aspx?objectid=090000168093b26a.

With regard to non-discrimination, two thematic reports were published. Firstly, Lisa Waddington and Andrea Broderick authored a report related to disability equality and non-discrimination, providing a comprehensive analysis of the UN and EU legal provisions addressing disability equality and non-discrimination. Secondly, a thematic report, entitled *Equality bodies making a difference*, was produced by Niall Crowley, former chief executive of the Equality Body in Ireland and an independent expert in equality and human rights. The report established the state of play of equality bodies in Europe by building on, updating and developing further the existing literature on the topic.

Two thematic reports were also published in the area of gender equality. In the first of these, Annick Masselot, a professor at the University of Canterbury, analysed the enforcement of the protection against dismissal and unfavourable treatment in relation to the take-up of family-related leave. Masselot identified enforcement gaps and good practices at EU and national level across the 28 Member States and three EEA countries: Iceland, Liechtenstein and Norway.

In a second thematic report on gender equality, Susanne Burri, former coordinator for gender equality of the Network and associate professor at Utrecht University, looked back at 60 years of gender equality *acquis* and provided a comprehensive update on the central concepts, legal instruments and enforcement mechanisms of EU gender equality law. In addition to these thematic reports, the Network also published its annual comparative analyses of non-discrimination law in Europe 2018 and gender equality law in Europe 2018, as well as two issues of the *European equality law review*.

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

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IN MEMORIAM

Nada Bodiroga-Vukobrat

Our dear friend and colleague Nada Bodiroga-Vukobrat, gender equality expert for Croatia, passed away on 21 March 2019, leaving a void in the European network of legal experts in gender equality and non-discrimination.

Over the years we got to know Nada as a very engaged, inspiring and cheerful person, who in her professional career was strongly dedicated to the social dimension of the European integration process. Nada's commitment to this cause was not only visible through her work for the Network, but also in her position as Jean Monnet chairholder where she organised many conferences and projects on European, national and transnational labour relations and on European values. Despite her difficult circumstances, her contributions have always been of high quality and of great value for the European Commission and other engaged parties.

On behalf of the European Commission, all the members of the network and its supporting staff, we wish to say that it was a great honour to have her in the network. We are very sad to see her go so early in life; she will be deeply missed.

Linda Senden
Specialist coordinator gender equality

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

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The legal standing of equality bodies

Tamás Kádár*

The definition of legal standing

At its simplest, legal standing or *locus standi* means the right or ability to bring a legal action to a court of law, or to appear in a court.[1] Legal standing can be viewed as a key element of access to justice as it determines who is entitled to initiate legal proceedings, either before a court or before a non-judicial body.[2] Legislative texts at the European level, such as the Racial Equality Directive[3] do not necessarily use the concept of legal standing but may instead focus on listing the different powers granted to relevant natural and legal persons in relation to court proceedings.[4] This, coupled with the variations between the national legal systems in Europe, leads to a complex picture and might lead to different interpretations of legal standing.

A further layer of complication is added in the case of the legal standing of equality bodies as they do not acquire legal standing due to their status as victims of discrimination. Rather, their powers are based on normative provisions granting them legal standing as public institutions set up to promote equality and combat discrimination. Granting them this standing has the potential to improve the enforcement of legislation and access to justice for victims of discrimination and is a typical approach to ensuring that equality bodies can provide the independent assistance to victims of discrimination in pursuing their complaints about discrimination required under the Racial Equality Directive[5] and the gender equality directives[6] as one of the key competences and raison d'être of equality bodies.

Taking into account the multiple definitions, the legal standing of equality bodies, for the purposes of this article, is understood to include all situations in which equality bodies appear before the courts for reasons linked to their core mandate under the EU equal treatment directives. Broadly speaking, this covers situations in which equality bodies:

1. **Represent victims of discrimination before the courts**: the use of this power could be exercised through representation by the equality body's own staff or by engaging and paying for a lawyer to represent the person before the court. In either case, the consent or approval of the victim of discrimination is necessary.

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1 Cambridge Dictionary (https://dictionary.cambridge.org/dictionary/english/locus-standi).

2 Explanatory memorandum by Mr Viorel Riceard Badea, Rapporteur of the Parliamentary Assembly of the Council of Europe Resolution 2054 (2015) on equality and non-discrimination in the access to justice.

3 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

4 See, for instance, Article 7 of the Racial Equality Directive on the defence of rights.

5 Article 13(2) of the Racial Equality Directive.

6 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 (Gender Goods and Services Directive) and 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 (Gender Recast Directive).

2. **Bring proceedings in their own name**: this power is understood as the equality body taking a case before the court with no identifiable victim as a party to the proceedings. This covers situations of *actio popularis* when the equality body represents the common good in the absence of an identifiable victim, where the discrimination affects a larger, unidentifiable group of persons holding the same protected characteristics. Depending on the legal system and traditions, the equality body may also bring proceedings in its own name when taking up the case of an identifiable victim, with their consent, who does not become a party to the proceedings.
3. **Intervene in support of a party**: this covers situations where the victim of discrimination is a party to the proceedings and the equality body intervenes on their side as an interested party to seek a particular outcome in the case. This may be subject to approval by the victim and/or the court.
4. **File an amicus curiae brief or similar**: this covers situations where the equality body submits its observations as an expert institution in equality law to assist the court, without seeking a particular outcome or taking the side of one party. The equality body may request leave from the court to submit such a contribution, be invited by the court or obliged by legislation to do so.
5. **Defend their legally binding decisions before the courts**: this competence is relevant for quasi-judicial equality bodies vested with the power to issue legally binding decisions that can be appealed before the courts.

European standards for the legal standing of equality bodies

The purpose and objective of the EU equal treatment directives is to put into effect and ensure the principle of equal treatment.[7] This is the result that Member States have an obligation to achieve, although the directives leave the choice of form and methods for doing so to the national authorities.[8] European Union legislation provides only limited guidance for the legal standing of equality bodies. Article 13 of the Racial Equality Directive requires the designation of an equality body or bodies with the overall aim of promoting equal treatment and it stipulates that equality bodies should have competence to provide independent assistance to victims of discrimination in pursuing their complaints about discrimination.[9] Similar provisions can be found in Article 12 of the Gender Goods and Services Directive and Article 20 of the Gender Recast Directive. A noteworthy difference is that the two gender equality directives also require Member States to 'make the necessary arrangements' for the equality body or bodies. One could argue that making the necessary arrangements should include ensuring an appropriate legal standing for the equality body to effectively exercise its function of independent assistance to victims of discrimination in light of this being one of the key competences and *differentia specifica* of these institutions. However, it is evident that some Member States transposed the EU directives by designating an equality body with a primarily decision-making function. In some of these cases, legal standing is not granted for equality bodies or the legal standing is not or rarely used in practice.[10] The latest reports by the European Commission on the implementation of the EU Racial Equality Directive and the gender equality directives[11] and some inputs to it by civil society[12] seem to indicate that the Commission and at least parts of civil society do not take issue with the compliance of such equality bodies with the directives.

7 Article 1 of all EU equal treatment directives.
8 See Articles 288 and 291 of the Treaty on Functioning of the European Union (TFEU).
9 See also Recital 24 of the Racial Equality Directive.
10 See, for example, the case of Bulgaria, Czech Republic, Hungary and the Netherlands. Crowley, N., *Equality bodies making a difference*, European network of legal experts in gender equality and non-discrimination, European Commission, 2018, p. 107.
11 Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive) and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive), p. 12; Report on the application of 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), p. 10; Report on the application of 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, pp. 11-12.
12 Hermanin, C. and de Kroon, E., *The Race Equality Directive: a Shadow Report. Lessons learnt from the implementation in nine EU member states*, Open Society European Policy Institute, 2013.

Article 7 of the Racial Equality Directive[13] on the defence of rights requires Member States to ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this directive. This opens up the possibility for Member States to accord legal standing to equality bodies under this article.[14] Importantly, Article 6 provides that these provisions are only minimum requirements, therefore Member States are allowed to introduce more favourable provisions and, conversely, the directive cannot constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States. It is on this basis that the Court of Justice of the EU clarified in its renowned Feryn judgment that 'Article 7 of Directive 2000/43 does not preclude Member States from laying down, in their national legislation, the right for associations with a legitimate interest in ensuring compliance with that directive, or for the body or bodies designated pursuant to Article 13 thereof, to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant'.[15] Feryn also makes it clear that the objectives of the Racial Equality Directive would be difficult to achieve if it was left to rely on individual enforcement only.[16] In light of this and the general duty of Member States to ensure the implementation of directives, one could argue that Member States have a duty to provide for public enforcement in the absence of an identifiable complainant and that equality bodies are logical vehicles to do so. While Articles 6 and 7 do not constitute an obligation for Member States to accord legal standing to equality bodies, they nonetheless provide for this possibility, including going beyond engaging on behalf or in support of the complainant and potentially encompassing bringing proceedings in their own name.

In June 2018 the European Commission adopted its Recommendation on standards for equality bodies with the objective of setting out measures that Member States may apply to help improve the equality bodies' independence and effectiveness, in particular as regards their capacity to ensure that individuals and groups that are discriminated against can fully enjoy their rights.[17] Commission recommendations are EU legal acts, allowing the Commission to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed as they have no legally binding force.[18] In interpreting the competence of independent assistance, the recommendation proposes that Member States should take into consideration inter alia representing complainants in court and acting as amicus curiae or expert.[19] The recommendation also proposes that independent assistance can include strategic litigation by granting equality bodies the possibility to engage or assist in litigation in order to address structural and systematic discrimination in cases selected by the bodies themselves because of their abundance, their seriousness or their need for legal clarification. Depending on national procedural law, such litigation could take place either in the body's own name or in the name of the victims or organisations representing the victims.[20] The recommendation also stipulates that equality bodies should be granted the power to gather relevant evidence and information, something that can also underpin their legal standing.[21] Importantly, the recommendation acknowledges that assistance to victims can

13 See also Article 8 of the Gender Goods and Services Directive and Article 17 of the Gender Recast Directive.
14 Legally, it is also possible to go one step further and argue that, since equality bodies are legal entities with a legitimate interest in ensuring that the provisions of the directives are complied with, they should be recognised a right according to the respective directive to go to court in a similar manner to the right enjoyed by interested associations (either on behalf or in support of the complainant, with his or her approval).
15 Paras 26-27 of Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*.
16 Para. 24 of Feryn (C-54/07).
17 European Commission Recommendation of 22.6.2018 on standards for equality bodies.
18 Article 288 of Treaty on Functioning of the European Union, see also at https://ec.europa.eu/info/law/law-making-process/types-eu-law_en.
19 Point 1.1.2 (1) of the Commission Recommendation.
20 Point 1.1.2 (2) of the Commission Recommendation.
21 Point 1.1.2 (4) of the Commission Recommendation. The gathering of evidence and information is necessary for equality bodies to effectively assist victims of discrimination before the courts (or, in the case of bodies with a decision-making function, to decide a case).

include issuing recommendations or legally binding decisions with adequate, effective and proportionate sanctions in individual or collective cases of discrimination.[22]

The Council of Europe's European Commission against Racism and Intolerance (ECRI) adopted its General Policy Recommendation No. 2 (GPR 2) on equality bodies to combat racism and intolerance at national level in 2017, revising its original GPR 2 adopted in 1997.[23] While, similarly to the European Commission recommendation and other comparable standards,[24] the ECRI standards are not legally binding, they carry a substantial political weight as monitoring of their implementation will form part of the country monitoring and constructive dialogue between ECRI and the Council of Europe Member States.[25] ECRI's GPR 2 provides a detailed and ambitious set of standards for the establishment, mandate and functions, independence and effectiveness of equality bodies and it includes provisions for the legal standing of equality bodies. GPR 2 foresees that equality bodies should be assigned a promotion and prevention function as well as a support and litigation function and they may also be assigned a decision-making function.[26] For equality bodies that hold both a support and litigation and a decision-making function (something that ECRI considers suboptimal due to the competing requirements of taking the side of the complainant on one hand and impartiality on the other hand),[27] it is necessary to ensure that each function is provided by a different unit or by different staff and that appropriate human and financial resources are allocated to both functions.[28] GPR 2 stipulates that equality bodies holding a support and litigation function should have the competence to represent, with their consent, people exposed to discrimination or intolerance; bring cases of individual and structural discrimination or intolerance in the equality body's own name; and intervene as amicus curiae, third party or expert before institutions, adjudicatory bodies and the courts.[29] Equality bodies should be allowed to conduct strategic litigation based on published criteria established by them[30] and have powers to obtain evidence and information.[31] The staff of equality bodies should have the multiple skills required for fulfilling all functions and competences assigned to the equality body.[32]

The Explanatory Memorandum of GPR 2 offers valuable details on the interpretation of these various legal powers and forms of legal standing. Representing people exposed to discrimination or intolerance can be performed through the equality body's own staff, but also by engaging and paying for a lawyer to represent the person before the court.[33] Equality bodies need the competence to bring cases in their own name, particularly where there is no identified complainant as a whole category of persons is discriminated against. This competence is also relevant where the person exposed to discrimination and intolerance feels unable to bring forward a case in their own name, for example in areas where people are fearful of victimisation.[34] In order for equality bodies to effectively support victims in structural discrimination cases and strategic litigation, GPR 2 requires the provision of sufficient resources to enable equality bodies to represent people exposed to discrimination and intolerance.[35]

In 2015 the Parliamentary Assembly of the Council of Europe adopted a resolution on equality and non-discrimination in the access to justice, calling on Member States to ensure that all categories of people

22 Point 1.1.2 (3) and (5). For a criticism of this aspect of the recommendation see Crowley (2018), p. 70. He takes the view that hearing cases cannot be considered a form of assistance where those experiencing discrimination need assistance to access such a hearing effectively and refers to the challenge of impartiality required from such equality bodies.
23 See https://rm.coe.int/ecri-general-policy-/16808b5a23.
24 For example, the UN Principles relating to the Status of National Institutions (Paris Principles) for National Human Rights Institutions.
25 Point 41 of GPR 2.
26 Point 10 of GPR 2.
27 See point 45 of the explanatory memorandum in GPR 2.
28 Point 11 of GPR 2.
29 Point 14 of GPR 2.
30 Point 15 of GPR 2.
31 Point 21 of GPR 2.
32 Point 39 of GPR 2.
33 Point 75 of the explanatory memorandum in GPR 2.
34 Point 77 of the explanatory memorandum in GPR 2.
35 Point 83 of the explanatory memorandum in GPR 2.

have access to effective remedies and, in particular, to remove legal obstacles to legal standing, notably by allowing courts to accept the submission of third-party interventions and equality bodies to represent individuals in legal proceedings in certain cases.[36] The explanatory memorandum to the resolution makes a clear connection between the legal standing of equality bodies and access to justice.[37]

In his Opinion on national structures for promoting equality, the former Council of Europe's Commissioner for Human Rights found it important for Member States to ensure that equality bodies that are not focused on decision-making can take cases on their own initiative and bring cases to court.[38]

For a comparison, it is interesting to note that the legal standing of data protection authorities (DPAs) is expressis verbis guaranteed by the EU's General Data Protection Regulation (GDPR) in order to ensure effective enforcement of the GDPR. According to the GDPR, each Member State shall provide by law that its supervisory authority shall have the power to bring infringements of this Regulation to the attention of the judicial authorities and, where appropriate, to commence or engage otherwise in legal proceedings, in order to enforce the provisions of this Regulation.[39] While this provision leaves a certain margin of appreciation for Member States, it can be considered a stronger guarantee of effective public enforcement of data protection rules and consistency in EU law as regards the legal standing of DPAs than what is available for equality bodies. This is hardly surprising as the guarantees of independence and effectiveness of DPAs stipulated in the GDPR also exceed those for equality bodies.

The legal standing of equality bodies in Europe

The legal standing of equality bodies is to date an under-researched field of equality law. Different legal traditions, codes of procedure and different interpretations of legal standing and legal powers make comparisons difficult, potentially resulting in different findings on the same issue or country.

In 2010 Equinet, the European Network of Equality Bodies, published a report on the ability of equality bodies to influence the interpretation of national and EU anti-discrimination law, based on a survey covering 25 equality bodies in 20 countries.[40] While the results are likely to be outdated, it is still interesting to give a short overview of the structure of the report, its interpretation of legal standing and its results. According to the report, 15 of the surveyed equality bodies had the power to represent individuals in court and a little over half of them made use of this power in practice. The main barriers to using litigation powers were financial considerations and, to a lesser extent, national procedural rules.[41] Seventeen equality bodies reported holding powers to bring proceedings in their own name, seen as particularly useful in cases where there are no identifiable victims of discrimination. However, only six equality bodies reported making use of this power in practice. Potential barriers to using this power included the lack of clarity about using it, financial considerations and the perceived conflict with the impartial decision-making role of the equality body.[42] Thirteen equality bodies reported holding powers to intervene in national proceedings before a court and/or a tribunal, but only three of them reported using these in practice. Besides financial considerations and a lack of clarity about holding this power, some equality bodies also reported courts being reluctant to permit interventions.[43] The report also examined

36 Parliamentary Assembly of the Council of Europe Resolution 2054 (2015) on equality and non-discrimination in the access to justice.
37 Explanatory memorandum by Mr Viorel Riceard Badea, Rapporteur of the Parliamentary Assembly of the Council of Europe Resolution 2054 (2015) on equality and non-discrimination in the access to justice.
38 Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality, Strasbourg, 2011.
39 Article 58(5) of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
40 Jacobsen, B.D. (2010), *Influencing the law through legal proceedings – The powers and practices of equality bodies*, Equinet, Brussels.
41 Jacobsen (2010), pp. 13-14.
42 Jacobsen (2010), pp. 16-17.
43 Jacobsen (2010), pp. 19-20.

the role of equality bodies before the Court of Justice of the EU (CJEU) and proposed that European institutions should consider whether equality bodies should be permitted under the Statute of the CJEU to make submissions to the CJEU in all cases concerning the interpretation of the anti-discrimination directives.[44]

Equinet's European Directory of Equality Bodies, a unique source of information from and about the mandates, functions and accountability of equality bodies, provides more up-to-date information about the legal powers of equality bodies. The directory lists a membership of 49 equality bodies. Of these, 12 can represent victims before the courts, 19 can bring proceedings in the equality body's own name and 16 can intervene before the courts. Notably, this compares with 27 equality bodies that have the power to formally decide on complaints (legally binding or not).[45] This appears to suggest that more countries decided to grant decision-making powers to their equality bodies than legal standing before the courts.

Another key source on the topic is the European network of legal experts in gender equality and non-discrimination, supported by the European Commission. The network issues annual comparative analyses of non-discrimination law[46] and of gender equality law[47] in Europe and annual country reports on non-discrimination and on gender equality. With dedicated sections on equality bodies and on legal standing, they provide a wealth of information even in the absence of a comprehensive focus on the topic. The same network published Crowley's report, entitled *Equality bodies making a difference*, analysing the potential and practical work of equality bodies, in 2018.[48] This report, covering a total of 43 equality bodies in 31 EU Member States and EFTA countries, provides valuable information, notably regarding the legal standing of equality bodies.

Crowley's report uses the ECRI GPR 2's classification of functions, differentiating between promotion and prevention, support and litigation and decision-making functions. Of the 43 equality bodies covered, seven are found not to have a support and litigation function, although in four cases another equality body vested with this function exists in the country.[49] Crowley, referring also to the ECRI GPR 2, underlines the challenge of holding a mix of functions where one of these functions is decision-making, given the possible tension between the impartiality required by this function and the need to take the side of those experiencing or alleging discrimination for fulfilling the support and litigation function.[50] A total of 25 equality bodies are found to have some form of legal standing before the courts, leaving 18 of the equality bodies covered without any such competence.[51] Crowley identifies 17 equality bodies as lacking or having only limited legal standing to take cases of discrimination or act as amicus curiae before the courts, but this appears to omit at least some of the equality bodies that do not hold support and litigation functions. Various limitations of legal standing are identified, including some equality bodies that are limited to submitting amicus curiae or observations to courts; others are limited to taking cases or to taking cases only in limited circumstances.[52] Another important factor in the effective use of legal standing is taking a strategic approach to using the equality body's powers and measuring the impact of the work. Crowley identifies that 25 out of the 43 equality bodies do not have a strategic plan and only 10 equality bodies have engaged in any form of evaluation.[53] Developing a strategic plan and putting in place evaluation measures can yield high returns in terms of the effectiveness of the equality body and doing so appears to be entirely within the power of equality bodies and therefore relatively easy to undertake as internal measures without necessitating external guidance or support. One of Crowley's

44 Jacobsen (2010), p. 34.
45 Equinet, *European Directory of Equality Bodies,* http://equineteurope.org/comparative-data/functions/.
46 For the latest information, see: European network of legal experts in gender equality and non-discrimination (2019), *A comparative analysis of non-discrimination law in Europe*, Brussels.
47 For the latest information, see: European network of legal experts in gender equality and non-discrimination (2019), *A comparative analysis of gender equality law in Europe*, Brussels.
48 Crowley (2018).
49 Crowley (2018), p. 47.
50 Crowley (2018), p. 47, p. 71.
51 Crowley (2018), pp. 73-77.
52 Crowley (2018), p. 105.
53 Crowley (2018), p. 108.

key learnings, central to the topic of this article, is that the support and litigation function of many equality bodies is undermined where they are not afforded adequate legal standing before the courts.[54] Consequently, Crowley proposes to review the competences afforded to equality bodies with steps to ensure they have the full range of competences required to give effect to their functions, in particular the competence to have legal standing before the courts.[55]

In the following, the article will analyse the legal standing of three equality bodies as case studies, observing a balance in terms of geography and functions. The analysis relies on the country reports on non-discrimination by the European network of legal experts in gender equality and non-discrimination and specific inputs from the country experts on non-discrimination and the equality bodies themselves.

Belgium – Unia (Interfederal Centre for Equal Opportunities)

The predecessor of Unia[56] was set up in 1993 as a federal institution, hence counting among the European equality bodies with a long history preceding the EU law obligation to set up such institutions. An important change occurred in 2014 when, following a Cooperation Agreement signed by the federal state, the regions and the communities, Unia became an inter-federal *Centre competent* (competent authority) for promoting equal opportunities and fighting any kind of distinction, exclusion or restriction based on the prohibited grounds contained in various anti-discrimination instruments adopted at both regional and federal levels.[57] Unia is competent in relation to all the protected grounds listed in the federal and regional anti-discrimination legislation, apart from language (for which no equality body has been set up) and gender (which is covered by the Institute for the Equality of Women and Men). While not an open list of grounds, Unia's competence goes well beyond the scope of EU equal treatment directives, covering in excess of 15 protected characteristics.[58]

According to Crowley, Unia holds two out of the three types of functions (promotion and prevention, support and litigation).[59] The lack of a decision-making function is generally seen by Crowley as a positive aspect as he identifies tensions for equality bodies holding a mix of all three functions. Unia also has the competence to negotiate settlements which the author sees as part of the support and litigation function, while Crowley does not seem to accept that it provides effective assistance to victims and rather sees it under the same umbrella as decision-making.[60] This is of key relevance for Unia as, according to Bribosia and Rorive, it is an equality body with significant expertise and is especially renowned for its practice of assisting victims in having the alleged perpetrator of the discrimination agree to some form of amicable settlement.[61] In effectively using alternative dispute resolution, Unia ought to be helped by its strong legal standing, which can be triggered should the mediation efforts not bear fruit.

According to Bribosia and Rorive, Unia has legal standing to bring discrimination complaints on behalf of an identified victim or on its own behalf. They state that the General Anti-Discrimination Federal Act and most of the regional statutory laws give Unia the power to file suits, and thus to contribute to the defence of legal principles in the name of the public interest.[62]

Unia follows two distinct procedures depending on whether the alleged violation has an identifiable victim (either a natural or a legal person). In cases where there is an identifiable victim, Unia's action

54 Crowley (2018), p. 110.
55 Crowley (2018), p. 14.
56 Centre for Equal Opportunities and Opposition to Racism.
57 Bribosia, E. and Rorive, I. (2018), *Country report non-discrimination: Belgium*, European network of legal experts in gender equality and non-discrimination, European Commission, p. 128.
58 Bribosia and Rorive (2018), p. 133.
59 Crowley (2018), p. 50.
60 Crowley (2018), pp. 70-71.
61 Bribosia and Rorive (2018), p. 138.
62 Bribosia and Rorive (2018), p. 138.

can be classified as intervention in support of the victim according to the classification detailed above. The power to file a suit is conditional upon the consent of the victim and is used for an intervention supporting the victim's case. The main reason for this legal avenue (rather than representing the victim) is that sometimes the action of the victim and the action of Unia may differ. Therefore, Unia wishes to remain able to define its strategy of action without undermining or being undermined by the victim's strategy before the court.[63] A leading example of Unia's use of such legal standing can be observed in the seminal Achbita judgment of the CJEU.[64] In essence, this case concerned the circumstances under which private companies could prohibit employees from expressing their religion in the workplace, by wearing a headscarf, for example. The case was taken to court by Ms Achbita, supported by her trade union, who alleged that she was a victim of discrimination. Unia's predecessor, the Centre for Equal Opportunities and Opposition to Racism appeared as a plaintiff in the case as it joined the case intervening on the side of Ms Achbita.

If there is no identified victim, Unia may act on its own behalf to challenge a breach of the anti-discrimination legislation. This actio popularis power granted to Unia gained European visibility and recognition in the Feryn case before the CJEU.[65] This case concerned the question of whether a public statement by Feryn's director that his company would not recruit persons of Moroccan origin because the company's customers did not want them in their homes could be seen as applying a discriminatory recruitment policy. Unia's predecessor took the case to court on its own behalf given the lack of an identifiable victim. Ireland and the United Kingdom questioned the legal standing of the equality body in the absence of an identifiable victim. Therefore the CJEU in its seminal judgment analysed this issue and established that the Racial Equality Directive does not preclude national legislation granting the equality body the right to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant.[66] The CJEU went on to rule that such public statements constitute direct discrimination and are enough to shift the burden of proof and that sanctions must be effective, proportionate and dissuasive, even where there is no identifiable victim.

The creation of Unia's predecessor in 1993 is the result of a suggestion by the Royal Commissariat for Immigrant Policy, a body that had observed the lack of effectiveness of the Act of 30 July 1981 aiming to combat certain acts inspired by racism or xenophobia with criminal law measures. This Act had not led to any convictions in the early 1990s, proving to be the main reason for granting the power to Unia's predecessor to take legal action alongside the victim. The Act's explanatory memorandum stated that 'the Center may assist any person wishing to initiate proceedings or wishing to lodge a complaint, because this concerns a matter of principle or because it would be unjustifiable to give no assistance in view of the complexity of the case or the position of the offended person, or any other special reason. Assistance may include advice, conciliation assistance, legal or legal advice, legal assistance and any other appropriate form of assistance. This corresponds to one of the tasks of the British Commission for Racial Equality'. First granted in the field of criminal law, this power of action was extended to the civil domain (from 2003) and to discrimination grounds other than race as Unia's mandate was extended.[67]

Unia may also intervene as amicus curiae in cases concerning discrimination, when such intervention is possible according to judicial procedure law. However, this power is not seen as particularly useful at national level, given that Unia has the power and legal standing to engage in court cases either in support of the victim or acting on its own behalf.[68] Unia's annual report for 2017 references an amicus curiae

63 Input to the article from Emmanuelle Bribosia and Isabelle Rorive, country experts for Belgium in the European network of legal experts in gender equality and non-discrimination.
64 C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*.
65 C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*.
66 C-54/07, Section 27.
67 Input to the article from Emmanuelle Bribosia and Isabelle Rorive, country experts for Belgium in the European network of legal experts in gender equality and non-discrimination.
68 Input to the article from Emmanuelle Bribosia and Isabelle Rorive, country experts for Belgium in the European network of legal experts in gender equality and non-discrimination.

brief submitted to the Council of Europe's European Committee of Social Rights concerning inclusive education.[69]

In 2017 Unia received 6 602 complaints and it opened 2 017 files.[70] As explained by Bribosia and Rorive as well as Unia in its annual report, Unia prioritises alternative dispute resolution in order to achieve structural responses, such as the adaptation of certain rules and procedures besides offering solutions to the individual problems. On average, therefore, Unia takes cases to court in only around 1 % of all files, focusing on strategic litigation. These are cases where the facts are particularly serious or where a dialogue with the alleged perpetrator did not prove to be possible.[71] In 2016 a total of 18 cases were taken to court;[72] in 2017 the figure was 13.[73] Importantly, while the competence of a majority of equality bodies is limited to civil and administrative law, Unia also has legal standing in criminal matters and in 2017 four out of its 13 judicial actions concerned criminal law, including discrimination, hate speech and hate crime cases.

A key challenge for the effective use of Unia's legal standing is keeping the potential cost of litigation reasonable. This is all the more relevant given Unia's strategic litigation approach and its record of successfully proposing to courts to send a reference for a preliminary ruling to the CJEU, extending the length and costs of the procedure. While Unia's budget should in principle suffice for the legal procedures it brings, based on a decision of its Management Board, it should be noted that parliamentary questions were raised on the costs of the Achbita case (considered exorbitant). Litigation costs can be prohibitively high, especially when cases are in appellate courts and/or are referred to the CJEU. As detailed in Equinet's handbook on strategic litigation, when considering whether to pursue a strategic case, the equality body should determine whether it has sufficient funds and internal resources to cover the costs of the other parties (as well as its own) if the case is lost. Furthermore, it should be established that the possible benefit from successful litigation justifies the possible costs. Where funding is limited, it is better to focus on cases with little or no factual dispute in order to reduce costs and avoid poor settlement agreements which do not require the perpetrator to admit guilt or rectify a policy or behaviour.[74]

Another important challenge is to build trust and confidence among groups vulnerable to discrimination and their organisations and thereby contribute to tackling under-reporting of discrimination. Unia's approach of litigating in only around 1 % of all cases and otherwise focusing on alternative dispute resolution constitutes an immense challenge in this respect. A satisfactory balance needs to be found and clearly communicated between strategic litigation and effective assistance to all or most victims in order to avoid undermining a positive and helpful relationship with victims' groups and their organisations. Equinet's handbook on strategic litigation lists external pressure as a potential risk and suggests that, as statutory public bodies, equality bodies have a strong standing and their support for cases is requested by various actors. In high-profile cases, the equality body might find itself under immense pressure to support the case. While not doing so might risk harsh criticism towards the equality body, it remains important to stick to an objective assessment based on the published and transparent selection criteria.[75] Unia has not published such a litigation strategy to date and could usefully consider doing so.

Romania – National Council for Combating Discrimination

The National Council for Combating Discrimination (Consiliul Național pentru Combaterea Discriminării, NCCD) is the Romanian specialised national equality body mandated to monitor and combat all forms

69 Unia, *Rapport Annuel 2017 – Refuser l'inertie*, Brussels, 2018, p. 48.
70 When Unia considers itself competent to process a complaint and this reporting goes beyond a simple request for information, it gives rise to the opening of a file. Unia (2018), p. 61.
71 Unia (2018), pp. 61-62.
72 Unia, *Rapport Annuel 2016 - Pour une société inclusive : par où (re)commencer?*, Brussels, 2017, p. 75.
73 Unia (2018), p. 65.
74 Equinet (2018), *Strategic Litigation. An Equinet Handbook*, Brussels, p. 21.
75 Equinet (2018), p. 32.

of discrimination. Set up in 2002, the current mandate of the NCCD goes beyond the required powers established by the EU equal treatment directives. The institution covers an open list of grounds and it has administrative-jurisdictional powers with legally binding decisions.[76] According to Crowley, the NCCD holds all three types of functions (promotion and prevention, support and litigation, decision-making),[77] but Iordache makes it clear that it is predominantly a quasi-judicial body.[78] The equality body is one of the best-known state institutions in Romania owing not the least to taking a large number of cases involving politicians.[79]

As a result of its quasi-judicial function, the NCCD has legal standing and uses it in every case to act as defendant when its decision is appealed to the courts under administrative law provisions. In such cases, an NCCD representative can be expected to appear in court almost every time the hearing takes place in Bucharest, while such representation is not always possible if the hearing takes place outside the capital given that the NCCD has only three legal advisors available for such representation.[80] According to its recent annual reports, the NCCD achieves a solid judicial success rate of around 80 % or more in the appeals against its decisions.[81] Legal standing to defend their decisions can be seen as a necessary and standard competence for quasi-judicial bodies with legally binding decision-making powers.

Amendments to the anti-discrimination law in 2006 introduced a special and rare, if not unparalleled, competence whereby the NCCD must be subpoenaed as an expert in all cases on grounds of the anti-discrimination law filed directly with the civil courts. While it is not rare for courts to invite or allow equality bodies to submit expert opinions, this power is noteworthy as the NCCD's legal standing to provide such expert opinions is mandatory and not a result of the assessment and discretionary power of the judges. These expert opinions do not amount to interventions on the side of the victim but rather to providing an informed commentary on the relevant legal and societal context of discrimination. Iordache defines this competence as an amicus curiae duty set out in imperative terms in the law and sees its main value in informing and educating judges and ensuring uniformity in discrimination cases.[82]

Perhaps the most striking example thus far of the NCCD using its legal standing as an expert or amicus curiae came in the Coman case[83] before the CJEU. In essence, the case concerned the interpretation of the term 'spouse' in Article 2(2)(a) of the Free Movement Directive (2004/38/EC) and whether the term includes same-sex couples. The NCCD was subpoenaed in the case at national level and when the Constitutional Court requested a preliminary ruling from the CJEU, it also provided a submission before the CJEU. It is worth noting for our purposes that the CJEU seems to have grappled with the right label for the NCCD's position in the case, incorrectly listing the equality body among the respondents in the Advocate General's Opinion, but correctly as an intervener in the judgment by the Court. In its intervention, the NCCD supported an inclusive interpretation of the term, referring to the principle of non-discrimination, the Charter of Fundamental Rights of the EU, the right to human dignity and respect for private and family life, and relevant European Court of Human Rights jurisprudence.[84] Iordache describes this pro-active contribution by the NCCD as its biggest achievement in using its legal standing and contributing to further developing equality legislation.[85] At the same time, the position of the NCCD in

76 Iordache, R., *Country report non-discrimination: Romania*, European network of legal experts in gender equality and non-discrimination, European Commission, 2018, p. 104.
77 Crowley (2018), p. 53.
78 Iordache (2018), p. 104.
79 Iordache (2018), p. 106.
80 Information provided by the NCCD.
81 See Iordache (2018), p. 113. In 2016 the NCCD had to defend its decisions before the administrative courts in 351 cases. The courts decided in favour of the NCCD in 236 cases and 281 cases are still pending. In 2017 the courts decided in favour of the NCCD in 130 cases, against the NCCD in 35 cases, and 365 cases are still pending.
82 Iordache (2018), p. 112.
83 C-673/16, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*.
84 Written submission to the CJEU, received from the NCCD.
85 Input to the article from Romanița Iordache, country expert for Romania in the European network of legal experts in gender equality and non-discrimination.

the Coman case both before the CJEU and the Romanian Constitutional Court also led to criticism and attacks against the equality body.[86]

Notwithstanding the virtues of such a mandatory amicus curiae function, it puts an immense strain on the already stretched resources of the equality body as it does not seem to have come with a significant and stable increase in the NCCD's budget. In 2017 the NCCD's presence as an expert in court cases was required in over 1 400 cases.[87] According to Iordache, both NCCD members and NGOs mention that the equality body is not able to send representatives for all the cases at which it is invited to appear because it lacks the human and material resources to do so.[88] There appears to be no clear internal procedure or strategy determining the cases for which the NCCD should send a person to represent the position of the institution before the court, for which cases a written submission should be sent or for which cases nothing at all should be done. Cases were reported in which the courts ordered the NCCD to file a position.[89] A clear strategy for the use of this legal standing as mandatory amicus curiae or expert would also be useful and relevant in maximising the effectiveness of the NCCD's submissions by focusing on strategic cases that have the potential to clarify or further develop equality law and jurisprudence. Another potential challenge to this competence could be that providing expert opinions in court cases might jeopardise the NCCD's impartiality as a decision-making body. However, this challenge can be refuted as, on one hand, the expert opinions do not amount to interventions on the side of one party and, on the other hand, a firewall is in place between the two functions, as decisions in the NCCD are taken by the Steering Board while the presence in court is provided by the Legal department.

Sweden – Equality Ombudsman

The Equality Ombudsman (DO)[90] is an independent government agency, formed in 2009 when four existing anti-discrimination ombudsmen were merged into a new body by an Act of Parliament. The mandate of the DO goes beyond the requirements of the EU equal treatment directives, covering seven discrimination grounds (the six grounds listed in the EU directives, plus transgender identity and expression) in many fields of life.

According to Crowley, the DO holds all three types of functions (promotion and prevention, support and litigation and decision-making).[91] The DO's legally non-binding decision-making powers in discrimination cases relate to requiring the suspected discriminator to provide information, allow access to their premises and enter into discussions as well as supervising active measures by employers. In 2018 the DO issued 650 supervisory decisions, following investigations of complaints and ex officio investigations, mainly of active measures and equality duties by employers.[92]

According to the Equality Ombudsman Act, the DO has the right to investigate complaints concerning discrimination as well as the right to represent individuals.[93] This provision grants the DO legal standing to bring discrimination complaints on behalf of identified victims provided that it has received a power of attorney. In such situations, the DO becomes the named party in the case instead of the individual victim. Therefore, in practice, the use of the DO's legal standing also means that the individual victim will

86 Iordache, R., *Attacks against the Romanian equality body (NCCD)*, news report by the European network of legal experts in gender equality and non-discrimination, 31.10.2018 (https://www.equalitylaw.eu/downloads/4710-romania-attacks-against-the-romanian-equality-body-nccd-pdf-193-kb).
87 NCCD Annual Report 2017, cited by Iordache (2018), p. 114.
88 Iordache (2018), p. 109.
89 Input to the article from Romanița Iordache, country expert for Romania in the European network of legal experts in gender equality and non-discrimination.
90 Abbreviation based on Diskrimineringsombudsmannen, the Swedish name of the equality body.
91 Crowley (2018), p. 54.
92 DO Annual Report 2018, p. 34, available in Swedish at: http://www.do.se/globalassets/om-do/diskrimineringsombudsmannens-arsredovisning-20182.pdf.
93 Lappalainen, P., *Country report non-discrimination: Sweden*, European network of legal experts in gender equality and non-discrimination, European Commission, 2018, p. 115.

not use their own legal standing. This method, also used when an NGO or a trade union takes on a case, is an answer to the problem of the 'loser pays' system whereby the losing party becomes liable not only for their own, but also for the opposing party's legal costs.[94] This solution is intended to help overcome the potentially exorbitant legal costs that may plausibly deter individuals, particularly of a disadvantaged socio-economic status, from taking their case to court themselves.

Since it was set up, the DO has brought a number of important and strategic cases concerning a wide variety of different grounds and fields, aiming to clarify or establish a point of law; to overturn 'bad case law'; to achieve a change in law; to obtain judicial clarity on the application of the law; to establish that non-discrimination law covers a particular situation; to highlight a serious issue; and to ensure that non-discrimination law is upheld.[95] Some of these leading cases are mentioned below. The use of the DO's legal standing to bring cases is necessary not only due to the inequality of arms between victims and perpetrators of discrimination, but also in view of the fact that litigating, especially by the less powerful, is not common practice in Sweden.[96]

Under Swedish law, an employer may lawfully dismiss a person from permanent employment without due cause at the time when the person turns 67. This 67-year rule, as it is known, has been deemed a legitimate exception from the prohibition against discrimination on grounds of age by the CJEU.[97] A major bus operator had a 70-year age limit for bus drivers applying for fixed-term (one-year) employment. Despite the fact that drivers could show through rigorous annual health checks that they were fit to drive, they were excluded from fixed-term employment possibilities after having turned 70. The DO brought a case to the Swedish Labour Court (a court of last instance) for three drivers. The Labour Court held that the exception to age discrimination provided for in the 67-year rule did not apply to fixed-term employment and that the age limit prescribed by the bus operator was discriminatory and could not be justified by occupational demands or generalised safety concerns. The Labour Court awarded the three workers SEK 40 000 (approximately EUR 4 400) each as a discrimination award. The case has had significant impact in Sweden by providing fixed-term employment possibilities to persons above the age of 67.[98]

Another case concerned certain legal measures taken post 9/11 requiring companies to block money transfers from persons who could be suspected of being on the 'UN terror lists'. As a consequence of these legal measures, a financial institution blocked all transactions from persons whose names matched those on the terror lists. The DO brought a claim against the institution on behalf of certain individuals whose transactions had been blocked, claiming the practice of the institution to be indirectly discriminatory on grounds of ethnicity since it overwhelmingly affected persons with Arab or Muslim names. The main charge was that the institution in question did not collect other relevant data regarding the individual (date of birth, etc.) before blocking the transaction. The court found in the DO's favour and held that the financial institution's practice amounted to indirect discrimination. The case was important to ensure respect for non-discrimination law in the context of anti-terrorism measures. Specifically, it limits the permissibility of simplistic measures liable to negatively affect certain persons based on their ethnicity and/or religion.[99]

The DO does not have legal standing to bring discrimination complaints to court in its own name in the absence of an identified victim and it cannot intervene in support of a party or act as amicus curiae.[100]

94 Input to the article from Paul Lappalainen, country expert for Sweden in the European network of legal experts in gender equality and non-discrimination.
95 For the objectives of strategic litigation see Equinet (2018), pp. 9-15.
96 Input to the article from Paul Lappalainen, country expert for Sweden in the European network of legal experts in gender equality and non-discrimination.
97 C-141/11, *Hörnfeldt v Posten meddelande AB*.
98 *Equality Ombudsman v Keolis Sverige AB* (Swedish Labour Court, A 73/15, A 75/15 and A 76/15).
99 *Equality Ombudsman v Western Union Financial Services GmbH* (Stockholm District Court T 9176-08).
100 The 2017 report on Sweden for the European network of legal experts in gender equality and non-discrimination claims that the DO has the power to intervene on the side of the victim, while Equinet's European Directory of Equality Bodies

Crowley considers this to be an important practical limitation of competences relating to legal standing.[101] Lappalainen observes that, from a legal standpoint, neither the directives nor the Feryn judgment of the CJEU can be seen as requiring all equality bodies to be granted legal standing in the absence of an identified complainant.[102] As far as the amicus curiae powers are concerned, their absence is not specific to the DO as Swedish law in general does not currently recognise the use of amicus curiae briefs.[103]

The major point of criticism against the DO with regard to the use of its legal standing appears to be the low number of cases taken up by the organisation. Crowley identifies it as a concern that the DO investigates only about 15 % to 20 % of complaints received and has not used its litigation powers to a significant extent.[104] In Lappalainen's opinion a key problem is that there are insufficient resources dedicated to the reported complaints and thus there is little risk that a discriminator will end up in court. A related issue for Lappalainen is trust in the DO by victims of discrimination and NGOs which he claims can be eroded if a critical mass of complaints are not investigated and taken to court.[105] A government inquiry investigating how more people can receive help in pursuing discrimination complaints found that most complaints received by the DO are not investigated. While acknowledging that it is not reasonable to expect the DO to investigate all complaints, it recommended that more of them should be investigated. The inquiry also recommended that the DO could adopt a more creative approach to settlements and provide clearer explanations when it decides not to take particular cases to court. Lappalainen also notes that the DO basically rejected the inquiry's recommendations in its response.[106] In contrast, the DO claims that in recent years it has come to focus more on strategic litigation and that the overall conclusions of the inquiry support this approach.[107] The DO holds that in light of its main mandate of promoting equality and preventing discrimination (prevention and enforcement) it is justified in not investigating all complaints and not focusing on settlements providing redress of a purely individual character. It is also claimed that the notifications that the DO may receive are not representative of the discrimination problems that occur in society, for instance due to the different levels of under-reporting among different groups. Equinet's handbook on strategic litigation, drafted with the participation of the DO, claims that drafting and publishing a strategic litigation policy can facilitate equality bodies' success and that the policy should clarify the selection criteria and describe current strategic objectives, thus informing stakeholders, victims and others that the equality body will only consider cases that can be expected to further these objectives and in which there is a clear public interest. In order to pre-empt critique of subjectivity and lack of transparency, the policy should be published and the reasons underpinning it explained, also stressing the complexity of the assessment. The Equinet handbook also lists possible strategic criteria and practical criteria for case selection and it also analyses key guiding questions for the assessment.[108] While there are important differences of opinion as regards the right strategy to be taken by the DO for handling complaints, the key issue for our purposes is that there seems to be agreement that once the DO takes on a case it seriously invests time and energy in the case and this has resulted in a number of important judgments in recent years.[109] In order to prevent or respond to some of the criticism, the DO might usefully consider making its guidelines for strategic litigation (a public document) openly available on its website.

states that besides representing victims, the DO can also bring proceedings in its own name. These discrepancies illustrate the definitional difficulties around different forms of legal standing. Input to the article from Paul Lappalainen confirmed the situation as described in the current article.

101 Crowley (2018), p. 105.

102 Lappalainen (2018), p. 122.

103 Input to the article from Paul Lappalainen, country expert for Sweden in the European network of legal experts in gender equality and non-discrimination.

104 Crowley (2018), p. 107.

105 Lappalainen (2018), p. 109, p. 115.

106 Lappalainen (2018), pp. 115-117.

107 Answer of the DO to the government inquiry, available in Swedish at: http://www.do.se/om-do/vad-gor-do/remissvar/remissvar-under-2017/battre-skydd-mot-diskriminering/.

108 Equinet (2018), Chapter 2.

109 Input to the article from Paul Lappalainen, country expert for Sweden in the European network of legal experts in gender equality and non-discrimination.

Another challenge identified by Lappalainen is the Swedish legal tradition of adopting laws and/or implementing them in ways that are intended to change opinions and attitudes while lacking in remedies and enforcement. This can result in situations where violations of the law lack effective sanctions. While educating duty bearers can be important, the reason for the EU directives requiring sanctions that are 'effective, proportionate and dissuasive' is to affect behaviour. An implementation strategy focusing primarily on attitudes is a problem when most of those duty bearers with the power to discriminate already have good attitudes. What is needed is a focus on the *behaviour* of those with the power to discriminate, regardless of their *attitudes*. According to Lappalainen, a focus on behaviour should also lead to more effective long-term sustainable changes in attitudes.[110]

Conclusion and recommendations

This overview of legal standing of equality bodies in Europe, together with the three case studies, while far from being comprehensive, allow us to draw some conclusions. A first key learning concerns the complexity of legal standing, a concept that is deeply rooted in and linked to national procedural law and legal traditions. International instruments such as EU law, the Commission or ECRI recommendations, as well as general studies of equality legislation and equality bodies, are necessary and useful tools to provide and analyse general principles and guidelines, but they cannot be capable of describing all national situations in detail. This is evident, for instance, when looking at the multitude of situations 'representing victims of discrimination' or 'bringing cases in the equality body's own name' may cover in different jurisdictions. As demonstrated by the Belgian and Swedish examples, what is generally described as legal standing to represent victims may in practice mean intervening on the side of the victim or litigating in the equality body's own name in terms of procedural law. At the end of the day, however, the key issue remains to ensure that the different and complex national procedural rules and legal traditions do not undermine the effective work of the equality bodies in assisting victims of discrimination.

Notwithstanding the different national circumstances, some common challenges can also be identified that are shared by most equality bodies.

A general lack of adequate funding for equality bodies to investigate and litigate cases is evident. This, together with the threat of excessive legal costs being awarded against the equality body when losing a court case, can result in an inability of equality bodies to use their legal standing and litigate to the extent necessary to fulfil their potential. It might also influence their decision on whether or not to litigate in a particular case, potentially leading to litigating primarily in relatively straightforward and low-risk cases at the expense of other, perhaps equally strategic but more controversial cases. As demonstrated above, a small number of cases taken up by an equality body may risk limiting the effectiveness of assistance to victims, leading to limited dissuasive effect and diminishing trust among victims of discrimination and their organisations. At the same time, investigating and litigating in all or most cases will likely strain the equality body's budget and may be hard to reconcile with a strategic approach, leading to individual redress instead.

The tension between support and litigation on one hand and impartial decision-making on the other hand may also influence how the equality body uses its legal standing, although it appears that in practice equality bodies holding both these competences tend to have a clear vision for prioritising one or the other or they build in safeguards such as clear firewalls between the units deploying the different competences.

110 Input to the article from Paul Lappalainen, country expert for Sweden in the European network of legal experts in gender equality and non-discrimination.

Interventions and amicus curiae powers are not granted to equality bodies in all jurisdictions. However, even where they are granted such powers, the reluctance of courts to allow equality bodies to use them in practice appears to be a considerable challenge.

The internal rules and procedures of equality bodies also constitute an important challenge when they lack a clear and well-thought-through strategy for the use of their legal standing.

In light of the challenges identified, the following proposals are offered for consideration to effectively strengthen the legal standing of equality bodies:

- Member States should implement all aspects of the recently adopted European Commission and ECRI recommendations, ensuring the independence of equality bodies and granting them sufficient financial and staff resources to effectively deploy their litigation powers.
- Member States should ensure that the national equality body or at least one of the national equality bodies has support and litigation competences in order to assist victims of discrimination in court.
- Member States could usefully ensure that equality bodies with support and litigation competences are granted the full range of legal powers relating to legal standing described in this article, allowing them to effectively assist victims of discrimination.
- Member States could usefully consider revising the 'loser pays' system for discrimination cases in light of the typically significant power imbalance in these cases.
- The European Commission could usefully ensure that its recommendation on standards for equality bodies is monitored and followed up, including the provisions relating to legal standing. The upcoming reports of the Commission on the application of the EU equal treatment directives provide an opportunity for such follow-up.[111]
- Equality bodies should develop and publish clear strategies for the use of their litigation powers and legal standing and ensure that the strategy and its practical implementation is regularly monitored and evaluated.
- Equality bodies need to strive to find the right balance between providing assistance to individual victims of discrimination and strategic litigation. They need to build a sufficient body of case law and an image of an institution effectively assisting victims. At the same time, they cannot reasonably strive to bring all complaints to court and will need to focus their litigation efforts on cases that have a broader legal and societal impact and can also lead to general prevention.[112] The development, publication and public explanation of litigation strategies and policies will also be helpful in this regard, as will a strategic approach to amicable settlements.[113]
- Equality bodies need to make use and test the limits of their legal standing and litigation powers. This may include, for example, clarifying and testing the use of amicus curiae powers if this instrument is not explicitly prohibited in the jurisdiction.[114]

111 The provisions of all EU equal treatment directives include a requirement for Member States to report periodically (typically every five years, with the exception of the Gender Recast Directive) on the application of the directive. In turn, the Commission draws up a report on the application of the directive to the European Parliament and the Council. The latest (joint) report of the Commission on the Racial Equality Directive and the Employment Equality Directive was published in January 2014; on the Gender Goods and Services Directive in May 2015; and on the Gender Recast Directive in December 2013.

112 See in this respect Equinet's handbook on strategic litigation, Equinet (2018).

113 Notice in this respect the different approach to amicable settlements taken by Unia and the DO.

114 Jacobsen (2010) shares some interesting examples from Great Britain and Hungary in this regard on p. 20.

The *Bauer et al.* and *Max Planck* judgments and EU citizens' fundamental rights: An outlook for harmony

Sybe A. de Vries*

Introduction

On 6 November 2018, the Court of Justice of the EU (hereafter CJEU or Court) delivered important judgments in two similar cases: one in joined cases *Bauer* and *Broßonn* (hereafter Bauer et al.), and one in *Max-Planck-Gesellschaft* (hereafter Max Planck). In these cases the Court determined that Article 31(2) of the EU Charter on paid annual leave has direct effect and horizontal application.[1] The judgments constitute a crucial step in the further strengthening of citizens' fundamental rights in general, including the principle of non-discrimination and gender equality and social rights in particular, also vis-à-vis other private individuals. Not only did the Court unequivocally hold that EU Charter rights may have horizontal direct effect, but also that this extends to rights included in the Solidarity Title; i.e., social rights.

In this article the focus will lie on the impact of the *Bauer et al.* and *Max Planck* judgments on the direct effect and horizontal application of the EU Charter in general and on fundamental social rights in particular. Although the judgments do not directly concern gender equality and non-discrimination, they bring the Court's case law in relation to the horizontal applicability of the EU Charter, including Article 21 as set out in *Egenberger*,[2] to a higher level. By enhancing the legal effects of fundamental social rights contained in the Charter and by clarifying the conditions under which Charter provisions have horizontal application, these judgments necessarily have repercussions for the principles of gender equality (contained in Art. 23 EU Charter) and non-discrimination (Art. 21 EU Charter) in the EU. This article thus provides a thorough analysis of these judgments and assesses their consequences for EU equality law.

The judgments build upon the narrative of the recognition of (horizontal) direct effect of EU law as it has unfolded in a number of seminal cases. This narrative starts with the foundational judgment of the Court in *Van Gend & Loos,* where it set out the doctrine of direct effect for Treaty provisions, and *Defrenne,* in which it recognised the horizontal direct effect of Article 157 Treaty on the Functioning of the European Union (TFEU), which establishes the principle of equal pay for men and women. This continues with, *inter alia*, *Van Duyn* – in respect of direct effect of directives – and *Faccini Dori* – in

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1 CJEU 6 November 2018 *Stadt Wuppertal v Maria Elisabeth Bauer* and *Volker Willmeroth v Martina Broßonn* joined cases C-569/16 and C-570/16; CJEU 6 November 2018 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu* Case C-684/16.

2 CJEU 17 April 2018, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* Case C-414/16.

respect of the non-horizontality of Directives. Finally, the narrative ends (for now, at least) with the horizontal nature of the EU Charter.[3]

By analogy with Piet Mondriaan's painting 'Composition with Yellow, Blue and Red', the development of the Court's case law can be categorised into three stages. During the first stage, the Court – similarly to the painter who draws horizontal and vertical lines – defines and demarcates the conditions under which EU law has vertical and horizontal direct effect. During the second stage, the painter uses colours to fill in blank spaces. The different colours may well reflect the different status of fundamental rights and the extent to which they have been subject to secondary legislation, been given shape and meaning in case law, and have (horizontal) direct effect.

During the third and final stage, whereas the painter illustrates a lookout for harmony, the Court works towards a harmonious and 'seamless web of judicial protection'[4] for citizens within the EU. We will then be able to assess how fundamental (social) rights, in particular the right to non-discrimination, have been strengthened and may further contribute to the social and human face of the EU.

Introduction: the *Bauer et al.* and *Max Planck* judgments

The case of *Max Planck* concerns an employee of Max-Planck-Gesellschaft (Mr. Shimizu) who had not taken his right to 51 days of paid annual leave before the termination of his employment, and who unsuccessfully sought payment from Max Planck of an allowance corresponding to this 51 days of paid annual leave. In the procedure that followed, the referring German court noted that 'Max Planck is a non-profit-making organisation governed by private law which is, admittedly, largely financed from public funds but which, however, has no special powers as compared to the rules applicable between individuals, so that it should be regarded as an individual'.[5] The dispute between Max Planck and Mr. Shimizu was thus horizontal in nature, which raises questions on the horizontal application of the EU Charter.

The preliminary ruling in *Bauer et al.* stems from two distinct yet similar cases. After the death of her husband, Mrs. Bauer, who was the sole legal heir of her husband, claimed nearly EUR 6 000 from Stadt Wuppertal, the employer of her husband and a public authority. This amount corresponded to 25 days of outstanding paid annual leave, which her husband had not taken prior to his death. However, Stadt Wuppertal rejected Mrs. Bauer's request.

Mrs. Broßonn was also the sole legal heir of her husband, who had been employed by a private company, TWI Technische Wartung und Instandsetzung Volker Willmeroth e.K., owned by Mr. Volker Willmeroth. Mrs. Broßonn claimed an amount of almost EUR 4 000, which corresponded to 32 days of outstanding paid annual leave, which her husband had not taken prior to his death. Therefore, contrary to the case of *Bauer* but (highly) similar to *Max Planck*, the dispute between Mrs. Broßonn and Mr. Willmeroth was horizontal in nature.

According to German law, the right to paid annual leave lapsing upon a worker's death or, in the case of Mr. Shimizu, upon the expiring of the employment relationship, cannot be converted into an entitlement to an allowance in lieu or form part of the deceased's estate. According to the referring German court, any other interpretation of the provisions of the national law would be *contra legem*.[6]

3 CJEU 5 February 1963 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* Case C-26/62; CJEU 8 April 1976 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* Case C-43/75; CJEU 8 April 1976 *Defrenne v Sabena (II)* Case C-43/75; CJEU 4 December 1974 *Yvonne van Duyn v Home Office* Case 41/74; CJEU 14 July 1994 *Paola Faccini Dori v Recreb Sri* Case C-91/92.

4 Prechal, S. and de Vries, S. (2009), 'Seamless Web of Judicial Protection in the Internal Market?' *European Law Review* vol. 34 issue 5.

5 CJEU 6 November 2018 *Max-Planck-Gesellschaft* Case C-684/16.

6 CJEU 6 November 2018 *Bauer* and *Broßonn* joined cases C-569/16 and C-570/16, para. 15.

In both cases, the CJEU was asked to interpret Article 7 of Directive 2003/88[7] concerning certain aspects of the organisation of working time and Article 31(2) of the EU Charter of Fundamental Rights.[8] Article 7 of Directive 2003/88 provides the following:

> '(1) Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.
> (2) The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

Article 31(2), which is laid down in the Solidarity Chapter of the EU Charter, stipulates the right of every worker to a limitation of maximum working hours, to daily and weekly rest periods, and to an annual period of paid leave. In the following assessment I refer mainly to the relevant paragraphs of the *Bauer et al.* judgment, as the Court in *Max Planck* in part refers to *Bauer et al.*

The Court first looked into *the reach and nature of the right to paid annual leave*;[9] or, in other words, into the question of whether the right to paid annual leave under Article 7 of Directive 2003/88 and Article 31(2) of the EU Charter can give rise to an entitlement after a worker's death, and whether that can be passed on to the worker's legal heirs by inheritance. According to the referring court, 'the purpose of the right to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure', which no longer appears once the person concerned has died.[10]

According to the Court, however, the right to paid annual leave must be considered as a 'particularly important principle of EU social law', and 'in order to ensure respect for that fundamental right affirmed in EU law, Article 7 of Directive 2003/88 may not be interpreted restrictively at the expense of the rights that workers derive from it'.[11] Furthermore, the 'receipt of financial compensation if the employment relationship is terminated by reason of the worker's death is essential to ensure the effectiveness of the entitlement to paid annual leave'.[12]

The Court goes on by emphasising the fundamental nature of the right to paid annual leave, which is expressly recognised by Article 31(2) of the EU Charter and which applies to national legislation implementing Article 7 of Directive 2003/88. That right can only be limited under strict conditions as stipulated by Article 52(1) of the EU Charter.

According to Article 52(1) of the EU Charter:

> 'any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

The Court stated that Article 7 of Directive 2003/88 read in light of Article 31(2) of the Charter does not allow a Member State to adopt legislation 'pursuant to which the death of a worker retroactively deprives

7 Council Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, pp. 9-19.
8 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391-407.
9 Frantziou, E. (2018) 'Joined Cases C-569/16 and C-570/16, Bauer et al: (Most of) the Charter of Fundamental Rights is Horizontally Applicable', *European Law Blog*, 19 November 2018: available at: http://europeanlawblog.eu/2018/11/19/joined-cases-c-569-16-and-c-570-16-bauer-et-al-most-of-the-charter-of-fundamental-rights-is-horizontally-applicable/.
10 CJEU 6 November 2018 *Bauer* and *Broßonn* joined cases C-569/16 and C-570/16, para. 37.
11 CJEU 6 November 2018 *Bauer* and *Broßonn* joined cases C-569/16 and C-570/16, para. 38.
12 CJEU 6 November 2018 *Bauer* and *Broßonn* joined cases C-569/16 and C-570/16, para. 50.

him of the right to paid annual leave acquired before his death, and, accordingly, his legal heirs of the allowance in lieu thereof by way of the financial settlement of those rights'.[13]

In a similar vein, in *Max Planck* the Court held that where a worker has not asked to exercise their right to paid annual leave during the reference period concerned, Article 7 of Directive 2003/88 and Article 31(2) of the Charter preclude national legislation. This automatically, and without prior verification of whether the employer had in fact enabled them to exercise that right, excludes a right to an allowance in lieu of paid annual leave not taken in the event that the employment relationship is terminated.

The Court has thus 'used' Article 31(2) of the EU Charter to provide for a particularly broad interpretation of Article 7 of Directive 2003/88, underlining the fundamental status of the principle of paid annual leave and leaving no or little discretion for Member States to delineate this principle in national law.

The second question relates to the *consequences* of the Court's interpretation of the Directive and Article 31(2) of the EU Charter for the applicable national law, and in particular, the *horizontal dispute* between Mrs. Broßonn and the private employer Mr. Willmeroth. In the case of *Max Planck*, the second question related to the horizontal dispute between Mr. Shimizu and Max Planck.

Regarding *Bauer et al.*, the Court first states that the national legislation should be interpreted in conformity with EU law, the possibility of which is for the national court to decide. The Court then holds that Article 7 of Directive 2003/88 is sufficiently precise and unconditional and is thus capable of producing direct effect. In the case of *Bauer*, which after all concerned a *vertical* dispute between Bauer and a public authority, the national court must disapply the national legislation that precludes the award of the financial allowance by Stadt Wuppertal.

However, in *Broßonn* – and in its judgment in *Max Planck*[14] – the Court reiterates its case law that confirms Directives cannot impose obligations upon individuals, and that Article 7 of Directive 2003/88 cannot apply in a dispute exclusively between private persons. In this light it must be assessed, according to the Court, whether Article 31(2) of the EU Charter may be invoked in a dispute between individuals with a view to require the national court to set aside national legislation and grant Mrs. Broßonn an allowance in lieu of paid annual leave not taken by her deceased husband.

By referring to the Community Charter of Fundamental Social Rights, Article 151 TFEU on social policy, and other international instruments the CJEU states that the right to paid annual leave constitutes an essential principle of EU social law, which is mandatory and unconditional in nature and does not require concrete expression by the provisions of EU or national law. This means that Article 31(2) of the EU Charter can be relied upon by workers in a dispute between them and their employer, in a field covered by EU law. Furthermore, Article 51(1) of the EU Charter, which states that the provisions of the Charter are addressed to the institutions, bodies, offices, and agencies of the European Union, and to Member States only when they are implementing EU law, cannot be interpreted as precluding the possibility that private individuals may be required to comply with the Charter.

First, the Court observes that provisions of primary law addressed to Member States can be relied upon vis-à-vis other individuals. Here it refers to its judgment in *Egenberger,* where the Court referred to case law on the Treaty freedoms and non-discrimination on grounds of nationality, including *Defrenne, Angonese, Ferlini*, and *Viking Line*.[15] Ms. Vera Egenberger's application for a job with Evangelisches Werk

13 CJEU 6 November 2018 *Bauer* and *Broßonn* joined cases C-569/16 and C-570/16, para. 61.
14 CJEU *Max-Planck-Gesellschaft* Case C-684/16, para. 67.
15 CJEU *Defrenne* Case C-43/75, para. 39; CJEU 6 June 2000, *Roman Angonese v Cassa di Risparmio di Bolzano SpA* Case C-281/98, paras. 33-36; CJEU 3 October 2000, *Angelo Ferlini v Centre hospitalier de Luxembourg* Case C-411/98 Paragraph 50; CJEU 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* Case C-438/05, paras. 57-61;CJEU 17 April 2018, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* Case C-414/16, para. 77.

was rejected, as she did not belong to a denomination. In the ensuing dispute, Ms. Egenberger relied upon the prohibition of discrimination on grounds of religion to claim compensation. In particular, she relied on Article 4(2) of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, and on Article 21(1) of the EU Charter prohibiting discrimination on any grounds such as sex, race [...], religion or belief [...]. Second, and as the Court held in *Egenberger*, the Court confirmed that Article 21(1) of the EU Charter, which establishes the prohibition of discrimination, can be invoked in a dispute between private actors. Finally, Article 31(2) of the EU Charter itself entails by its very nature a corresponding obligation on the employer, whether a public or private actor, to grant periods of paid leave.

The Court concludes by stating that the judicial protection for individuals flowing from Article 31(2) of the EU Charter and the guarantee of full effectiveness of this provision require the national court to disapply conflicting national legislation, if needed.

Stage I: Painting vertical and horizontal lines

The clear strand of argumentation that is used in *Bauer et al.* and *Max Planck* to support direct effect of Article 31(2) of the EU Charter and its horizontal application should certainly be welcomed. I will first examine the doctrine of direct effect in general, particularly in relation to the EU Charter, before turning to the Charter's horizontal application.

1 Drawing vertical lines: the doctrine of direct effect

1.1 Direct effect and EU law in general

The doctrine of direct effect finds its origin in the well-known and seminal *Van Gend & Loos* judgment, where the Court held that for provisions of EU law to have direct effect, there must be clear and precise obligations for Member States, the obligation must be unconditional, compliance with the obligation must not require any further legal action, and the Member States have no discretion regarding the implementation of the obligation.[16] Later, the Court gradually extended the doctrine of direct effect. First, it relaxed the conditions for provisions to have direct effect – i.e., provisions must be sufficiently precise and unconditional – and second, it turned the doctrine into a test of justiciability: is the norm sufficiently operational to be applied by a court?[17] The key test, as mentioned above, is whether provisions are unconditional and sufficiently precise.

Defrenne, a landmark gender equality case, may well serve as an illustration of how the Court determines that a treaty provision – in this case Article 157 TFEU on equal pay for male and female workers – has direct effect. First, the Court held that the principle of equal pay for men and women forms part of the foundations of the Community. It then stated that Article 157 TFEU is mandatory in the sense that Member States are bound to ensure and maintain the application of the principle of equal pay. It concluded by stating 'the Court is in a position to establish all the facts which enable it to decide whether a woman is receiving lower pay than a male worker performing the same tasks', and that Article 157 TFEU 'is directly applicable and may thus give rights to individual rights which the courts must protect'.[18]

16 Jans, J., de Lange, R., Prechal, S., and Widdershoven, R. (2007) *Europeanisation of Public Law*, Europa Law Publishing, 88-93; see also de Vries, S. (2018) 'Securing private actors' respect for civil rights within the EU: actual and potential horizontal effects of instruments', in: de Vries, S., de Waele, H., and Granger, M.P. (eds.) (2018), *Civil Rights and EU Citizenship – Challenges at the Crossroads of the European, National and Private Spheres*, Cheltenham, Edward Elgar, 2018, p. 46.

17 De Witte, B. 'Direct Effect, Primacy and the Nature of the Legal Order', in: Craig P. and De Burca, G. (eds) (2011), *The Evolution of EU Law*, Oxford University Press, p. 323.

18 CJEU *Defrenne II* Case 43/75, paras. 12, 16, 23 and 24.

We now know that a number of core provisions of EU primary law, including Article 18 TFEU establishing the principle of non-discrimination on grounds of nationality, the four freedoms, Article 157 TFEU on the principle of equal pay for men and women, and the general principles of EU law have direct effect. Regulations are directly applicable and are therefore by their very nature capable of having direct effect.[19] Furthermore, directives have direct effect insofar as their provisions are unconditional and sufficiently precise.

1.2 Direct effect and the EU Charter

The situation is somewhat more complicated with regard to the EU Charter, at least for the following two reasons: first, the EU Charter will only apply to Member States, when, in the words of Article 51(1), Member States are implementing EU law. Second, the EU Charter, through Article 52(5) of the Charter, introduced a new type of distinction in EU law, namely between rights that are directly enforceable and principles that require further elaboration in EU or national law.

Scope of application of the EU Charter

According to the Court, the word 'implementing' in Article 51 applies when a Member State acts within the scope of application of EU law.[20] However, from the Court's case law it is not always clear what exactly this entails. There is a minimum threshold, as the Charter does not operate in a vacuum, which means that there must be another 'accompanying' or 'supportive' provision of primary or secondary EU law that triggers the application of the EU Charter. Whereas in some cases the Court denied jurisdiction to apply the Charter because of the lack of a (sufficient) connection with EU law, although the national measures were adopted within the framework of EU legislation, in others the Court did not and allowed for the application of the Charter.[21]

One such case where the Court was unwilling to apply the Charter concerned the unemployed Romanian Elisabeta Dano, a legal resident in Germany[22] who was refused the right to social assistance. She could not seek a remedy under the EU Charter; according to the CJEU, Member States are competent to determine the conditions for granting social benefits and thus also to establish the level of social protection. The outcome of this case may well be reasonable, but the way in which the Court restricts the scope of application of the Charter stands in sharp contrast with other decisions. Although Germany did not implement EU law, it did act within the framework of EU legislation,[23] which should normally suffice to trigger the application of the EU Charter. This lack of clarity regarding the scope of application of the EU Charter is undesirable, because once a 'legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction'.[24]

19 CJEU 17 May 1972, *Orsolina Leonesio v Ministero dell'agricoltura e foreste* Case 93/71; see also Jans, J., de Lange, R., Prechal, S., and Widdershoven, R. (2007) *Europeanisation of Public Law*, Europa Law Publishing, p. 65.

20 CJEU 26 February 2013, *Åklagaren v Hans Åkerberg Fransson* Case C-617/10; see also Ward, A. (2014), 'Article 51', in: Peers, S., Hervey, T., Kenner, J., and Ward, A. (eds.) (2014), *The EU Charter of Fundamental Rights – A Commenatry*, (Hart Publishing, Oxford, p. 1428.

21 See for instance CJEU 7 March 2013, *Sindicato dos Bancários do Norte and Others v BPN – Banco Português de Negócios SA* Case C-128/12; see also Barnard, C. (2013) 'The Charter, the Court – and the Crisis', *Legal Studies Research Paper Series No. 18/2013, University of Cambridge*; and Barnard, C. (2015) 'The Silence of the Charter: Social Rights and the Court of Justice' in: de Vries, S. Bernitz, U. and Weatherill, S. (eds.) (2015) *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing*, Hart Publishing, pp. 173-188.

22 CJEU 11 November 2014, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* Case C-333/13.

23 Regulation (EC) 883/2004 No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ 2004, L 166/1; Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 77-123.

24 Pech, L. and Platon, S. (2018) 'Judicial independence under threat: The Court of Justice to the rescue in the ASJP case Case C-64/16, *Associação Sindicaldos Juízes Portugueses*', Common Market Law Review, vol. 55, 1833. Citizens will then have to take recourse to other human rights instruments, see: de Vries, S. 'Protecting Fundamental (Social) Rights through the Lens

The situations in the *Bauer et al.* and *Max Planck* cases, however, were clearly governed by EU law. *Bauer et al.* builds upon previous case law in the field of non-discrimination. This includes the *Egenberger* case, where Directive 2000/78 establishing a general framework for equal treatment in employment and occupation[25] was held to constitute the linchpin of the relationship between the existing EU legislation and the principle of non-discrimination on grounds of religion, as contained in Article 21 of the EU Charter. According to the Court in *Bauer et al.*, '[s]ince the national legislation at issue in the main proceedings is an implementation of Directive 2003/88, it follows that Article 31(2) of the Charter is intended to apply in the main proceedings' (para 53). Furthermore, according to the Court, a national court must, as a consequence of Article 31(2) of the Charter, disapply national legislation in situations falling within the scope of the Charter (para. 86). The Directive's mere existence and the corresponding domestic measures seeking to implement the Directive, warrant, although incorrectly, the application of the Charter.[26]

Despite this, questions remain on the relationship between the EU Charter and secondary EU legislation. First, could the Charter be used to extend the scope of application of EU law, and thereby the reach of a Directive, which in turn materializes the right established in the Charter? The answer should probably be 'no', as anything else would lead to a situation whereby Article 51(1) of the Charter is circumvented. However, the Charter can be used to ensure the full effectiveness of the Directive through the application of the Charter to a national measure at first sight not clearly covered by the Directive itself. This was the case in *CCOO*, where A-G Pitruzzella held that the lack of a national system for measuring working time is incompatible with Directive 2003/88 and Article 31 of the Charter, even though the Directive does not include a specific provision and obligation for measuring working time:

'In particular, the obligation upon Member States to take the 'necessary measures' should extend not only to the transposition of the rules on working time into national law, but also to the introduction of whatever is necessary to safeguard the fundamental rights enshrined in Article 31 of the Charter and to eliminate any impediment that might in fact restrict or undermine the enjoyment of the rights conferred on individuals for that purpose by Directive 2003/88, which, as I observed in point 36 of this Opinion, is a measure implementing Article 31 of the Charter.'[27]

In a similar vein, in *Google Spain* the EU Charter – in particular Articles 7 and 8 – played an important role in providing for a broad scope of application of the rights to privacy and protection of personal data elaborated by the former Data Protection Directive 95/46, including a right to be forgotten.[28] The Court will have the chance to shed more light on the question concerning the relationship between directives and the EU Charter in two pending Finnish cases, *AKT* and *TSN,* which both concern the reach of Directive 2003/88/EC and Article 31(2) of the EU Charter in relation to a national provision in a collective agreement.[29]

Second, could Article 21(1) of the EU Charter, which is broader in scope than Article 19 TFEU, be invoked to challenge discrimination on grounds that are not elaborated in the equal treatment directives, based on Article 19 TFEU? Next to the grounds mentioned in Article 19, Article 21(1) of the Charter also prohibits discrimination on grounds of colour, social origin, genetic features, language, political or any

of the EU Single Market: the Quest for a More "Holistic Approach"' (2016), *The International Journal of Comparative Labour Law and Industrial Relations,* vol. 32, issue no. 2, pp. 207-208.

25 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000 pp. 16-22.

26 Fontanelli, F. (2018) 'You can teach a new court Mangold tricks – the horizontal effect of the Charter right to paid annual leave', *EU Law Analysis*, 11 November 2018, available at: http://eulawanalysis.blogspot.com/2018/11/you-can-teach-new-court-mangold-tricks.html.

27 Opinion of Advocate General Pitruzzella delivered on 31 January 2019 in *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE* Case C-55/18, para. 51.

28 CJEU 13 May 2014, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* Case C-131/12.

29 CJEU Cases *Terveys- ja sosiaalialan neuvottelujärjestö (TSN)* C-609/17, and *Auto- ja Kuljetusalan Työntekijäliitto (AKT)* C-610/17, both lodged on 24 October 2017 and currently pending. See also Rossi, L., http://eulawanalysis.blogspot.com/2019/02/the-relationship-between-eu-charter-of.html.

other opinion, membership of a national minority, property and birth. The point of departure is that as these grounds are not the object of EU legislation, they cannot be invoked in a national procedure merely to challenge national discriminatory rules. Neither *Bauer et al.* nor *Egenberger* give rise to a different conclusion on this matter.

This means that a tension continues to exist between Article 21(1) of the Charter and Article 19 TFEU, as the grounds not mentioned in the latter provision may find themselves in a certain vacuum.[30] This can also be inferred from the Court's decision in *Kaltoft.* Here the Court was asked to decide on discrimination on grounds of obesity, and whether this ground would fall within the scope of Directive 2000/78, which prohibits, *inter alia*, discrimination on grounds of disability. According to the Court, obesity cannot be regarded as a ground protected by Directive 2000/78, and since neither Article 19 nor the Directive refer to obesity, the provisions of the Charter were inapplicable.[31] The only possibility in this case to invoke the equal treatment Directive and/or Article 21(1) of the Charter would be if obesity constituted disability within the meaning of the Directive; something the Court, for that matter, did not exclude.

However, the scope of application of some fundamental rights seems to be broader. This appears true for the principle of non-discrimination on grounds of nationality, which constitutes the cornerstone of EU Single Market law and is laid down in Articles 18 TFEU and 21(2) of the EU Charter. This principle is triggered either 'when the interstate trade is affected in some way (even indirectly), or when there is some competence within the Treaty to act on a certain issue'.[32]

The second Charter provision with a broad of application is Article 47 on effective judicial protection. Article 47 was applied in *Egenberger* alongside the principle of non-discrimination on grounds of religion, but it did not specifically materialise in the equal treatment Directive. It rather served to support the horizontal direct effect of Article 21(1) of the Charter in the dispute between Ms. Egenberger and the Evangelical Foundation ('Evangelisches Werk').

That Article 47 of the Charter in itself could have horizontal application had been suggested by the English Court of Appeal in the case *Benkharbouche v Sudan and Janah v Libya*. This case involved two UK workers that brought employment law complaints against the embassies of Sudan and Libya. The question was whether invoking state immunity amounted to a breach of fundamental rights, in particular Article 6 of the European Convention on Human Rights (ECHR) and the corresponding provision in the EU Charter, Article 47, on effective judicial protection. The Court of Appeal assimilated the embassies of non-EU Member States to private parties,[33] and held that Article 47 must fall into the category of Charter provisions that can be the subject of horizontal direct effect.[34]

There are limits to the broad scope of Article 47 of the EU Charter. In the *Portuguese judges* case on the principle of independence of the judiciary, the Court preferred to apply Article 19(1) Treaty on European Union (TEU) on effective legal protection, which has a broader scope of application and could be seen as 'a systematic requirement used *in abstracto* to challenge national measures affecting the independence of judges, to Article 47 of the Charter'.[35]

30 Dudek, T. 'EU citizenship and EU anti-discrimination law' (2018) in: de Vries, S. de Waele, H., and Granger, M. P. (eds.) (2018), *Civil Rights and EU Citizenship – Challenges at the Crossroads of the European, National and Private Spheres*, Edward Elgar, Cheltenham, p. 141.

31 CJEU 18 December 2014, *Fag og Arbejde (FOA) (Kaltoft) v KL* Case C-354/13, paras. 34-39.

32 Prechal, S. de Vries, S., and van Eijken, H. (2011), 'Chapter 12 – The Principle of Attributed Powers and the "Scope of EU Law"' in: Besselink, L., Pennings, F., and Prechal, S. (2011), *The Eclipse of the Legality Principle in the European Union*, Kluwer Law International, Alphen a/d Rijn 2011, p. 221.

33 Peers, S., EU law analysis at: http://eulawanalysis.blogspot.nl/2015/02/rights-remedies-and-state-immunity.html.

34 UK Court of Appeal (civil devision), 5 February 2015, *Benkharbouche v Sudan Embassy and Janah v Libya*, EWCA Civ 3, para. 78.

35 CJEU 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* Case C-64/16, See in particular Pech, L. and Platon, S. (2018) 'Judicial independence under threat: The Court of Justice to the rescue in the ASJP case Case C-64/16, *Associação Sindicaldos Juízes Portugueses*', Common Market Law Review, vol. 55, p. 1839.

Rights and principles

The second complication relates to Article 52(5) of the EU Charter, which distinguishes between rights and principles. The idea behind this distinction is that there exists a 'dichotomy between individual and fully enforceable rights on the one hand, and programmatic norms (principles) that require the intervention of the legislator or the executive [...] on the other'.[36] But, although the aim of Article 52(5) was to clarify the judicial nature of rights and principles and thereby reinforce legal certainty,[37] it has been questioned whether Article 52(5) does not in fact lead to more confusion. Deciding which provision contains a right or principle is complex, and introducing a new category of principles – especially considering that EU law already contains a range of various principles – is not altogether helpful.[38]

It is therefore perhaps not surprising that the Court in *AMS* avoided the question of whether Article 27 of the EU Charter on workers' representation or the right to information and consultation should be considered as a right or a principle. One of the questions raised in this case was whether Article 27 could be invoked to disapply a rule that excluded certain categories of employees from the threshold that triggers a right to information and consultation. The Court confined its analysis to whether Article 27 could be considered fully effective or not, and came to the conclusion that it was not directly effective. This led many to believe that the social rights in the Solidarity Title should be considered principles; until the Court's decisions in *Bauer et al* and *Max Planck*.[39]

By contrast, the early case law of the Court made clear that the principle of non-discrimination on grounds of nationality (EU free movement law) or sex (*Defrenne*) has direct effect. Later the Court confirmed that the principle of non-discrimination or the right not to be discriminated on the grounds elaborated in the equal treatment directives based on Article 19(1) TFEU (race, gender, sexual orientation, disability, religion and belief, and age) is directly effective. Article 21(1) of the EU Charter reinforces the 'rights character' of the principle of non-discrimination, which was made unequivocally clear by the Court in respect of discrimination on grounds of religion in *Egenberger.* According to the Court, Article 21(1) of the EU Charter on the prohibition of discrimination does not have to be made specific in EU or national law and is sufficient in itself. The Court held that:

> 'the prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law.'[40]

With respect to the mandatory effect of Article 21 of the Charter, the situation is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals.'[41]

By reiterating its doctrine of (vertical) direct effect in respect of directives and treaty provisions, the Court has in *Bauer et al.* and *Max Planck* now developed a *general* test to be applied to all the rights protected by the Charter. This test 'is based on a twofold condition', according to which Charter rights have direct

36 Peers, S. and Prechal, S. (2014), 'Article 52- Scope and Interpretation of Rights and Principles', in: Peers, S., Hervey, T., Kenner, J., and Ward, A. (eds.), *The EU Charter of Fundamental Rights – A Commentary*, Hart Publishing, pp. 1505-1506.

37 Peers, S. and Prechal, S. (2014), 'Article 52- Scope and Interpretation of Rights and Principles', in: Peers, S., Hervey, T., Kenner, J., and Ward, A. (eds.), *The EU Charter of Fundamental Rights – A Commentary*, Hart Publishing, p. 1506.

38 Peers, S. and Prechal, S. (2014), 'Article 52- Scope and Interpretation of Rights and Principles', in: Peers, S., Hervey, T., Kenner, J., and Ward, A. (eds.), *The EU Charter of Fundamental Rights – A Commentary*, Hart Publishing, p. 1506.

39 See also Barnard, C. (2019), 'Brexit and the Charter of Fundamental Rights', *Modern Law Review* vol. 82, issue 2, p. 354.

40 CJEU *Egenberger*, Case C-414/16, para. 76 (See, with respect to the principle of non-discrimination on grounds of age, judgment of 15 January 2014, *Association de médiation sociale*, C176/12, EU:C:2014:2, Paragraph 47).

41 CJEU *Egenberger*, Case C-414/16, para. 77 (see, by analogy, judgment of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56, Paragraph 39; of 6 June 2000, *Angonese*, C281/98, EU:C:2000:296, Paragraphs 33 to 36; of 3 October 2000, *Ferlini*, C411/98, EU:C:2000:530, Paragraph 50; and of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union*, C438/05, EU:C:2007:772, Paragraphs 57 to 61).

effect if they are (i) unconditional in nature, and (ii) mandatory.[42] We must thereby assess whether the Charter provisions themselves do not explicitly contain the caveat 'the conditions provided for by Union law and national laws and practices' – as it was the case with Article 27 of the Charter, and which was at issue in the *AMS* case. If such a reference is absent in the Charter provision itself, the fundamental (social) right may be an individually enforceable right, which is only subject to the limitations laid down in the general derogations clause in Article 52 of the Charter.[43]

2 Drawing horizontal lines: horizontal application of the EU Charter

2.1 Horizontal application and direct effect of fundamental rights in general

The classic approach to fundamental rights relates to the vertical relationship between the state and the citizen. However, in EU law we have seen that the principles of non-discrimination on grounds of nationality and of equal pay for male and female workers could be invoked in horizontal disputes. This was not self-evident, as the point of departure was that the treaty provisions on free movement, incorporating the principle of non-discrimination on grounds of nationality, were primarily drafted for Member States or public authorities. In a similar vein, Article 157 TFEU only refers to Member States. The EU provisions on competition, however, were drafted for private parties; companies.[44]

However, the Court has extended the scope of application of EU free movement provisions and Article 157 TFEU to private actors. If we look at this case law the following three strands of argumentation can be discerned:[45] the first argument is based on the *effet utile* principle, which implies that neither the State nor private law bodies may detract from the useful effectiveness of EU law. The free movement provisions would be prevented from functioning effectively if private organisations were allowed to create or maintain obstacles that governments are not allowed to create or maintain.[46] A second and related argument for the Court to accept a (limited) form of horizontal direct effect is the aspect of dominance; or, in other words, the fact that certain private organisations exercise a certain power over (other) individuals.[47] In *Raccanelli* it was the prestigious research institute, Max-Planck-Gesellschaft, which undoubtedly exercises some powers over (especially young) researchers.

The third and final argument relates to the fundamental (mandatory) nature of the freedoms and the key role of the principle of non-discrimination. The fact that the principle of non-discrimination may have triggered horizontal direct effect could be deduced from *Angonese*,[48] where the Court emphasised the fact that Article 45 TFEU constitutes a specific application of the general principle of non-discrimination, as contained in Article 18 TFEU. It could therefore be argued that the fundamental rights character of the non-discrimination principle is crucial in creating obligations for private individuals. A similar approach can be found in the cases of *Defrenne* and *Viking & Laval*.[49]

42 Rossi, L., http://eulawanalysis.blogspot.com/2019/02/the-relationship-between-eu-charter-of.html.
43 Barnard, C. (2019), 'Brexit and the Charter of Fundamental Rights', *Modern Law Review* vol. 82, issue 2, p. 355.
44 Mortelmans, K. (2001), 'Towards Convergence in the Application of the Rules on Free Movement and on Competition?' *Common Market Law Review*, vol. 38, pp. 613-614. This dividing line has been marked by the terms 'imperium' and 'dominium', or public and private interests.
45 De Vries, S. and van Mastrigt, R. (2013). 'The Horizontal Direct Effect of the Four Freedoms: From a Hodgepodge of Cases to a Seamless Web of Judicial Protection in the EU Single Market?', in: Bernitz, U., Groussot, X., and Schulyok, F. (eds.) (2013) *General Principles of EU law and European Private Law*, Kluwer Law International, Alphen a/d Rijn, pp. 264-265.
46 CJEU 12 December 1974 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* Case C-36/74; CJEU 15 December 1995 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* Case C-415/93; CJEU *Viking* Case C-438/05, and CJEU 18 December 2007 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* Case C-341/05.
47 For instance, CJEU *Ferlini* Case C-411/98.
48 CJEU *Angonese* Case C-281/98.
49 CJEU *Defrenne II* Case C-43/75.

The acceptance by the Court of (limited) forms of horizontal direct effect of EU treaty provisions has thus also caused ramifications for fundamental rights; this despite the rather rigorous dividing line between the vertical and horizontal dimensions of fundamental rights in the legal systems of most Member States.[50] In addition, the Court in the *Mangold et seq* case law recognised the horizontal application of the principle of non-discrimination on grounds other than nationality as a general principle of EU law.[51] This particularly served to circumvent the prohibition of horizontal direct effect of directives, which led at first to considerable confusion as to whether it was the directive, despite its lack of horizontal direct effect, or the general principle that has the capacity to be invoked in a horizontal dispute. However, Mangold is especially significant, as it was the first case wherein the Court recognised the horizontal direct effect of a fundamental right, thereby using the Directive as a metaphoric trampoline.

2.2 Horizontal application of fundamental rights enshrined in the EU Charter

As some of the general principles are incorporated in the EU Charter as fundamental rights, it would seem self-evident that Charter rights could also apply and be invoked in horizontal disputes between private parties. The main legal obstacle for accepting horizontal direct effect of EU Charter rights appears to be Article 51(1) of the Charter. Advocate General Trstenjak at the time of the *Dominguez* case argued in favour of a restrictive reading of the EU Charter. According to her, Article 31 of the Charter could not apply in a horizontal dispute, as Articles 51(1) and 52(2) of the Charter 'indicate an intentional restricting of the parties to whom fundamental rights are addressed'.[52] This point of view, however, was clearly not shared by everyone. In his Opinion in *AMS*, Advocate General Cruz Villalon noted, contrary to AG Trstenjak, that 'it would be paradoxical if the advent of the Charter changed this state of affairs [i.e. the recognition in the Court's case law of horizontal direct effect of Treaty provisions and general principles prior to the Charter] in a negative sense' and held:[53]

> '[…] There is nothing in the wording of the article or, unless I am mistaken, in the preparatory works or the Explanations relating to the Charter, which suggests that there was any intention, through the language of that article, to address the very complex issue of the effectiveness of fundamental rights in relations between individuals.'[54]

The Court itself in *AMS* did not exclude the possibility of horizontal direct effect of Charter provisions per se.[55]

The reasoning of the Court with respect to the horizontal application of the EU Charter in *Bauer et al.* largely rests upon its previous judgment in *Egenberger*, although it is more detailed and extensive. In *Egenberger* the Court basically uses two arguments for the horizontal direct effect of the principle of non-discrimination on grounds of religion. First, it states that it is mandatory as a general principle of law, and that Article 21(1) of the EU Charter is no different from various provisions of the TFEU prohibiting discrimination. Here it refers to the case law on free movement (the judgments in *Angonese* and *Viking*) and its judgment in *Defrenne* (see above). This outcome is not really surprising, and implies that with respect to the grounds of discrimination elaborated in EU directives based on Article 19 TFEU and discrimination on grounds of nationality and sex (Article 157 TFEU), the EU Charter can be invoked in a horizontal dispute.

50 Walkila, S. (2016) *Horizontal Effect of Fundamental Rights in EU L*aw, Europa Law Publishing, Groningen; de Vries, S. (2018) 'Securing private actors' respect for civil rights within the EU: actual and potential horizontal effects of instruments', in: de Vries, S., de Waele, H., and Granger, M.P. (eds.) (2018), *Civil Rights and EU Citizenship – Challenges at the Crossroads of the European, National and Private Spheres*, Cheltenham, Edward Elgar, 2018, p. 47.

51 CJEU 22 November 2005, *Werner Mangold v Rüdiger Helm* Case C-144/04; CJEU 19 January 2010, *Seda Kücükdeveci v Swedex GmbH and Co.* Case C-555/07.

52 CJEU Opinion of AG Trstenjak, delivered on 8 September 2011, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* Case C-282/10, para. 80.

53 See Ward, A. (2014), 'Article 51 – Field of Application' in Peers, S. and others (eds.) (2014), *The EU Charter of Fundamental Rights: A Commentary*, Oxford, Hart Publishing, p. 1429.

54 CJEU 15 January 2014, *Association de médiation sociale v Union locale des syndicats CGT (AMS)* Case C-176/12 (Opinion of AG Cruz Villalón), para 31.

55 CJEU 15 January 2014, *Association de médiation sociale v Union locale des syndicats CGT (AMS)* Case C-176/12.

Contrary to *Egenberger*, the Court in *Bauer et al.* and *Max Planck* explicitly refers to Article 51(1) of the Charter and the addressees mentioned therein. By pondering on its *personal* scope of application, the Court in *Bauer et al.* affirms for the first time the horizontality (in principle) of the EU Charter.[56] Furthermore, the Court emphasises that in Article 31 of the Charter there is an explicit reference to 'worker', which necessarily entails that there is an obligation for the employer to grant the right to a limitation of working hours. This individualisation of addressees leads to a 'strong presumption in favour of horizontal application'.[57] Lastly, the Court regards Article 31(2) as the *essential principle of EU social law* based on various international instruments and EU law itself. The national constitutional traditions to which the Court refers in the equal treatment case law, including in the *Egenberger* case, are not mentioned in its judgment in *Bauer et al*. Does this mean that national constitutional traditions are not a relevant criterion anymore for a Charter right to be considered mandatory and to have (horizontal) direct effect? Does the Court herewith leave the door ajar to accepting the (horizontal) direct effect of Article 21(1) of the Charter as a whole, where other grounds than those elaborated in the equal treatment directives are at issue and whose fundamental rights' status is perhaps not recognised in all Member States, but is at EU level, simply because they are in the Charter?

Stage II: Filling in the white blanks with yellow, blue and red: Strengthening the social face of the EU

Turning to the second stage of Mondriaan's painting, and to spaces filled with the non-colours white and grey and the primary colours red, yellow and blue, we can discern a certain pattern in the status and scope of fundamental rights enshrined in the Charter.

At the background in the white spaces, 'creating a point of rest', remain those fundamental rights which need to be further clarified and elaborated in EU or national legislation. These rights must probably be seen as principles within the meaning of Article 52(5) of the Charter. An example is Article 27 on workers' rights to information, as can be inferred from the *AMS* case. After *AMS* it was unclear to what extent social rights stipulated in the Solidarity Title could be considered enforceable. Advocate General Cruz Villalon held that social and employment rights generally belong to the category of principles, but this view should, after *Bauer et al.* and *Max Planck*, be put into perspective.

The primary colours red, yellow and blue represent the Charter rights, which are directly enforceable and not subject to the caveat in the Charter provision itself 'provided for by Union law and national laws and practices'. Here we find Article 21(1) and Article 31(2) of the Charter, but also other important rights, including the rights to privacy and protection of personal data (Articles 7 and 8), right to property (Article 17) or the right to freedom of expression (Article 11).

However, depending on the fundamental right at issue, the colour may be bright red, yellow or blue. As set out above, the principles of non-discrimination on grounds of nationality, sex, and effective judicial protection have a far-reaching scope of application. Treaty provisions or the EU Charter are easily triggered, also in horizontal disputes. For discrimination on the grounds mentioned in Article 19 TFEU, however, the scope of application of Article 21 of the Charter is more limited, as it can be invoked only in respect of the grounds corresponding to those in Article 19 TFEU and the directives. That there should be a clear connection with EU secondary law also appears from *Bauer et al.*

56 Frantziou, E. (2018) 'Joined Cases C-569/16 and C-570/16, Bauer et al: (Most of) the Charter of Fundamental Rights is Horizontally Applicable', *European Law Blog*, 19 November 2018: available at: http://europeanlawblog.eu/2018/11/19/joined-cases-c-569-16-and-c-570-16-bauer-et-al-most-of-the-charter-of-fundamental-rights-is-horizontally-applicable/.

57 Sarmiento, D. (2018), 'Sharpening the Teeth of EU Social Fundamental Rights: A Comment on Bauer', 8 November 2018, available at: https://despiteourdifferencesblog.wordpress.com/2018/11/08/sharpening-the-teeth-of-eu-social-fundamental-rights-a-comment-on-bauer/.

The importance of this judgment is, though, that the Court has taken a first and important step in recognising that fundamental social rights produce (horizontal) direct effect, which so far seemed to have been reserved to the domain of non-discrimination. The Court has now finally extended this rationale to social rights differently to discrimination, 'thus opening up a new playing-field in the enforcement of social rights in Europe'.[58]

Concluding Stage III: Towards a harmonious and 'seamless web of judicial protection' for EU citizens?

It is assumed that Mondriaan's painting is a depiction of the essence of life. The interplay of contrasting pictorial elements is indicative of the inner harmony of life that lies beneath the surface.[59] Creating more convergence and harmony between different EU rules having their own modes of application has perhaps been at the back of the Court's mind when it developed judicial techniques such as horizontal direct effect. These techniques, as Sacha Prechal and I argued ten years ago, served to fill the gap in judicial protection of citizens against breaches of EU free movement and competition law.[60]

Similarly, the acceptance of horizontal direct effect of EU Charter provisions supports the development of a harmonious and seamless web of judicial protection for EU citizens. That there can be a gap in protection caused by, for instance, the prohibition of horizontal direct effect of directives materialising fundamental rights, becomes most strikingly clear from the *Bauer et al.* case. After all, in *Bauer* we are dealing with two similar situations, which, as a result of the non-horizontality of directives, could have led to entirely different outcomes. Whereas *Bauer* could invoke the directly effective provision of the Directive vis-à-vis the public authority (Stadt Wuppertal), Broßonn could not do so vis-à-vis the private employer. The Court uses Article 31(2) of the Charter to fill this gap in judicial protection. It is however unclear whether all private actors, irrespective of their dominance and possibility to exercise a certain power over individuals, can be bound by a fundamental right like Article 31(2). *Max Planck* is quite a different private individual compared to Mr. Wilmeroth in the *Bauer et al* case.

Together with the *Max Planck* and the *Egenberger* cases, *Bauer et al.* demonstrates how the Court recognises the role of private employers in regulating gainful employment. Whether this also means that the Court more generally accepts the increasingly important role of private actors in our mixed economies and the fading dividing lines between the public and private, remains to be seen. In our increasingly digitalised societies, private actors play a major role. Think, for instance, about the five big tech companies, whose actions have a significant impact on the fundamental rights of EU citizens. To what extent could these private actors be obliged to comply with EU fundamental rights as enshrined in the Charter, like Article 21 on non-discrimination, Articles 7 and 8 on privacy and protection of personal data, or Article 11 on the freedom of information and expression, in a dispute with citizens before a national civil court?[61]

The creation of a truly seamless web of judicial protection against infringements of fundamental rights, including the right not be discriminated, runs up against certain limits that are – at least to some extent – inherent in EU law. First, the lack of clarity regarding the scope of application of the EU Charter leads to legal uncertainty about when exactly citizens can invoke the EU Charter. It seems that a certain hierarchy exists between EU fundamental rights, with the principle of non-discrimination on grounds of nationality and sex and the principle of effective judicial protection taking the lead.

58 Sarmiento, D. (2018), 'Sharpening the Teeth of EU Social Fundamental Rights: A Comment on Bauer', 8 November 2018, available at: https://despiteourdifferencesblog.wordpress.com/2018/11/08/sharpening-the-teeth-of-eu-social-fundamental-rights-a-comment-on-bauer/.

59 'Composition with Red Blue and Yellow', painting by Piet Mondriaan, 1929.

60 Prechal, S. and de Vries, S. (2009), 'Seamless Web of Judicial Protection in the Internal Market?' *European Law Review* vol. 34 issue 5.

61 CJEU *Google Spain* Case C-131/12.

Second, this hierarchy between fundamental rights may be reinforced through the adoption of secondary legislation in areas where the EU legislator has competence, for instance the field of the internal market or (closely related) non-discrimination and employment. Once the EU has adopted legislation that materialises certain fundamental rights, the EU Charter can be easily triggered in disputes between citizens and domestic public or private actors. These fundamental rights may, as a consequence, gain more prominence than others that remain second division.

Next to the development of a seamless web of judicial protection, the value of *Bauer et al.* lies in the Court's reiteration of the EU's social values and objectives, which have been inherent in the economic integration process right from the inception of the EEC (*Defrenne*), as well as the EU's respect for non-discrimination and equality between men and women, which according to Article 2 TEU, belong to the EU's foundational values. The Court affirms the constitutional status of fundamental social rights as enshrined in the EU Charter, and aligns them with, for instance, the right to equal treatment. Against this background, *Bauer at al.* strengthens the position and status of the right to gender equality and non-discrimination in EU law. This approach may also contribute to the attainment of a social market economy as set out in the objectives of the Treaty (Article 3(3) TEU) and give the EU a human face.

Matters of individual conscience or non-discriminatory access to public services and goods?

Denial of access to public goods and services under the colours of religious ethos

Romanița Elena Iordache*

Abstract:

In the changing tides of illiberalism eroding the space of fundamental freedoms and liberties, religiously motivated individuals increasingly invoke their religious ethos, or claim to be conscientious objectors, in the attempt to be exempted from the non-discrimination principle, while effectively denying or limiting the rights of others. Whether it is the therapist working for a relationship counselling service who refuses his services; the owner of a bed and breakfast, or of the cake shop or photo shop denying services to same-sex families, believing that such services would condone homosexuality; the health care professionals refusing to provide particular health services; or pharmacists who refuse to sell properly prescribed legal drugs to women or to trans persons – there is a common thread: those denying services or goods felt that to provide the services requested would be incompatible with their religious beliefs and asked to be exempted from the general principle of non-discrimination. Conscientious objection was developed in relation to mandatory military service, articulating the obligation of states to guarantee the effective exercise of the right to freedom of conscience. It was further revisited in the context of health services. However, not all religiously motivated conduct is recognised as deserving protection. This article seeks to shed light on the standards emerging at ECHR and EU level, to assess the challenging task of balancing the expression of religious ethos with the prohibition of discrimination – including discrimination on grounds of sexual orientation and gender identity – or with women's rights to personal integrity, life, health, and autonomy and concludes that, in spite of the conservative rhetoric, there is no emerging right to discriminate.

It is now well-established that when exercising a public function as a representative of the state, a public official cannot invoke private religious constraints in order to refuse to provide state services such as those to be ensured by judges, registrars or marriage commissioners.[1] There is, however, an increasingly present debate about religious individuals who provide public services or goods and invoke their religious ethos when denying access to such services on discriminatory grounds. Media often present such

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1 ECtHR, *Eweida, Ladele, McFarlane v UK*, Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15.01.2013. See also Supreme Court of Spain, *Interpuesto por Pablo de la Rubio Comos,* No 69/2007, 11.05.2009 available at: https://e00-elmundo.uecdn.es/documentos/2009/05/29/sentencia.pdf.

incidents as newsworthy scandals – religious beliefs invoked for women being denied contraceptive pills by the pharmacists;[2] transgender women being denied prescribed hormone therapy by pharmacists;[3] the entire Ob-Gyn departments of public hospitals refusing to provide health services such as abortion, during religious celebrations, or permanently;[4] the contractor refusing to provide building services to a man he assumes is homosexual;[5] the printing house which refuses to print the roll-up banner for an LGBTI initiative[6] or invitations for the celebration of a civil partnership.[7] Some of the cases, however, end up developing into conflicts which reach the highest courts. In Europe, one of the most discussed cases in the jurisprudence of the Strasbourg Court is the one of Mr McFarlane, a therapist working for a confidential sex therapy and relationship counselling service, who refused to carry out some of his duties and work with same-sex couples, as he felt that such a service was incompatible with his religious belief that homosexuality is against God's law. After being warned and subsequently dismissed by his employer, when the British courts refused to punish the dismissal, he alleged that British law had failed to protect his right to manifest his religious beliefs. He complained before the Strasbourg Court, without any success.[8]

An earlier case which did not get the attention it deserved states briefly the key concerns and the approach applied by the Strasbourg Court in cases when religious considerations are invoked in order to deny public services and goods. In *Pichon and Sajous v France*, the two joint owners of a pharmacy in rural France invoked their religious beliefs in defence when convicted under the Consumers' Code and the Public Health Law, as they refused to stock, or sell contraceptives to three women.[9]

The 'gay cake' cases, made famous by the debates before the US Supreme Court in *Masterpiece Cakeshop v Colorado Civil Rights Commission*,[10] had earlier European counterparts in the UK, with the decision of the Court of Appeal in Northern Ireland in *Lee v McArthur and Ashers Baking*. In this case, the court upheld the decision that the owners of a customised cakes baking service, Ashers Bakery, had discriminated on grounds of sexual orientation, religious belief and political opinion, as they refused to bake a cake requested by the claimant, because the message the cake was supposed to display was 'Support Gay Marriage'.[11] This decision was overturned by the UK Supreme Court.[12] In an earlier, similar case in 2008, the Bulls, who were Christian hoteliers, preferred to let their rooms to heterosexual married couples. They were subsequently held to have directly discriminated against a same-sex couple in a civil partnership, a

2 US Supreme Court, *Stormans Inc et al v Wiesman,* 576 US_(2016) decided on 28.06.2016, denying the writ of certiorari for the Washington State pharmacists contesting state regulations requiring them to provide emergency contraceptives.

3 Palmieri, G., Arizona Republic, 'Transgender woman: A CVS pharmacist in Fountain Hills denied my hormone prescription' published 25.07.2018, available at: https://eu.azcentral.com/story/news/local/scottsdale/2018/07/20/hilde-hall-arizona-transgender-woman-speaks-out-after-being-denied-hormone-prescription/805381002/.

4 Neagu, A., Cozmei, V., Hotnews, 'Harta interactivă: 51 de spitale din România nu fac avorturi la cerere, iar alte 36 refuză procedura în perioada sărbătorilor religioase ' (Interactive map: 51 hospitals do not perform abortions by request and another 36 refuse the procedure during religious holidays in Romania), 28.06.2019, available at: https://www.hotnews.ro/stiri-sanatate-23228667-harta-interactiva-51-spitale-din-romania-nu-fac-avorturi-cerere-iar-alte-36-refuza-procedura-perioada-sarbatorilor-religioase**.** Notably, a research using the same methodology in 2018 revealed that there were 12 hospitals refusing this service as for 29.09.2018. Hotnews, '12 spitale din Romania nu fac avorturi la cerere' (12 hospitals in Romania do not perform abortions by request) available at: https://www.hotnews.ro/stiri-sanatate-22727735-12-spitale-din-rom-nia-nu-fac-avorturi-cerere-spune-legea-spun-doctorii-medic-interzicerea-avortului-ntoarcere-abrupt-ntuneric.htm.

5 ILGA Europe, Third party intervention in *Ladele v UK*, available at: https://www.ilga-europe.org/sites/default/files/Attachments/third_party_submission_ladele_v_uk_2.pdf.

6 European network of legal experts in gender equality and non-discrimination, Poland, available at: https://www.equalitylaw.eu/downloads/4648-poland-printing-house-employee-guilty-of-refusal-to-print-a-roll-up-for-lgbt-initiative-supreme-court-upholds-the-verdict-pdf-166-kb.

7 Workplace Relations Commission, *Brennan v Beulah Print*, DEC-S2018-020, 09 November 2018, available at: https://www.workplacerelations.ie/en/cases/2018/november/dec-s2018-020.html.

8 ECtHR, *Eweida and Others v the United Kingdom*, Chamber judgment, 15.01.2013.

9 ECtHR, *Pichon and Sajous v France* (dec.), no. 49853/99, ECHR 2001-X, 02.10.2001.

10 US Supreme Court, *Masterpiece Cakeshop v Colorado Civil Rights Commission*, 584 U.S. 4.07.2018.

11 Court of Appeal in Northern Ireland, *Lee v McArthur & Ors* [2016] NICA 39, 24.10.2016, available here: www.bailii.org/nie/cases/NICA/2016/39.html.

12 UK Supreme Court, *Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants)* (Northern Ireland), 10.10.2018 available at: https://www.supremecourt.uk/cases/docs/uksc-2017-0020-judgment.pdf.

decision confirmed by the England and Wales Court of Appeal in 2012 and by the UK Supreme Court in 2013 in *Bull & Bull v Hall & Preddy*.[13]

The discussions around invoking religious ethos, seeking reasonable accommodation on religious grounds or presenting religiously motivated objections as conscientious objections when denying access to public goods and services, provide a rich source of inspiration. The moment when 'businesses find their conscience' is a good opportunity to discuss human rights and what they actually mean.[14] Such debates require diving into the substantive content of freedom of religion, conscience and thought, and its limits: assessing the ambit of religious ethos as an exception to the prohibition of discrimination; the balancing exercise courts have to ensure between the effective exercise of religious freedom and the rights of those affected by a discriminatory exercise of religious freedom, as well as the more theoretical discussion about the conceptions of equality and non-discrimination, bringing forth the theory of equality as protective of 'prized public goods.' In this context, human rights are subsumed to such 'public goods' which are goods or services provided by the state or public authorities, or even by private individuals who are offering their services to the public.[15]

What does conscientious objection mean? Is there any link between mandatory military service, provision of health services, and access to public goods and services?

The concept of conscientious objection was developed in international jurisprudence in the context of mandatory military service.[16] In response to countries in which the constitution made military service mandatory and criminalised or punished the refusal to serve in the army, the UN Commission on Human Rights adopted its Resolution 1989/59, in which it affirmed:

> 'the right of everyone to have conscientious objections to military service as a legitimate exercise of the right of freedom of thought, conscience and religion, as laid down in article 18 of the Universal Declaration of Human Rights and article 18 of the International Covenant on Civil and Political Rights.'[17]

For the Human Rights Committee, the right to conscientious objection to military service 'could be derived from article 18 in as much as the obligation to use lethal force might seriously conflict with freedom of conscience and the right to manifest one's religion or belief.'[18] Notably, the Human Rights Committee guarantees conscientious objection to military service derived not only from religions, but also 'from principles and reasons of conscience, including profound convictions, arising from religious, ethical, humanitarian or similar motives.'[19] Similarly, the European Court of Human Rights found that the right

13 England and Wales Court of Appeal, *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83, 10.02.2012, available here: https://www.icj.org/wp-content/uploads/2010/01/Hall-v.-Bull-Court-of-Appeal-United-Kingdom.pdf. Final decision of the Supreme Court [2013] UKSC 73 available here https://www.supremecourt.uk/cases/docs/uksc-2012-0065-judgment.pdf.

14 Bribosia, E; Rorive, I, 'Why a Global Approach to Non-discrimination Law Matters? Struggling with the "Conscience" of Companies' in *Human Rights Tectonics, Global Dynamics of Integration and Fragmentation,* Intersentia 2018.

15 McCrudden, C and Kountouros, H, 'Human rights and European equality law' in Meenan, H. (ed), *Equality Law in an Enlarged European Union – Understanding the Article 13 Directives* (Cambridge University Press, Cambridge, 2007).

16 ECtHR, *Bayatyan v Armenia,* No. 23459/03, 7.07.2011, para. 110.

17 UN, Commission on Human Rights, Res. 1989/59, 8.03.1989.

18 UN, Human Rights Council, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, *Approaches and challenges with regard to application procedures for obtaining the status of conscientious objector to military service in accordance with human rights standards,* A/HRC/41/23, 24.05.2019.

19 UN, Human Rights Council, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, *Approaches and challenges with regard to application procedures for obtaining the status of conscientious objector to military service in accordance with human rights standards,* A/HRC/41/23, 24.05.2019, Paragraph 27.

to conscientious objection to obligatory military service is derived from the right to freedom of thought, conscience, and religion under Article 9 of the European Convention. However, the Strasbourg Court jurisprudence also indicates that the Court will assess the interference under Article 9(2), balancing the general interests of society as a whole with those of the conscientious objector, and that conscientious objectors cannot expect that their objections will always be accepted.[20]

From here, the next step was invoking individual conscience or religious considerations in order to object to providing health services, in particular in the context of sexual and reproductive rights.[21] The number of cases in which health care professionals may legitimately refuse to provide specific health-related services, under the justification that such services would be contrary to their personal beliefs and convictions, increased gradually.[22] When consulted, however, the European Court made it clear in the context of abortion, that

> 'services should not be made difficult or impossible to obtain because of conscientious objections by individuals.'[23]

Although this is only soft law, the Parliamentary Assembly of the Council of Europe in its 2013 Resolution already proposed a broader coverage, going beyond mandatory military service and health services, and calls Member States to

> 'ensure the right to well-defined conscientious objection in relation to morally-sensitive matters such as military service or other services related to health care and education ... provided that the rights of others to be free from discrimination are respected and that the access to lawful services is guaranteed.'[24]

However, conscientious objections to mandatory military service are quite different from arguments raised when denying access to public goods and services. There is therefore a need to distinguish between the two situations. The individual constraints, the overall impact, and the degree to which the religious objections affect the rights of others, are significantly different. In the case of mandatory military service, the failure to accommodate the expression of a religious belief leads to an infringement of the religious freedom of the person who is forced into a practice contrary to his religious beliefs, or penalised for failing to observe the practice. Quite differently, the failure to ensure accommodation of the religious ethos in cases of denial of access to goods and services is not aimed to directly target the individuals invoking their religious beliefs. In this case, the requested accommodation of the religious expression leading to the denial of rights makes it imperative to check whether or not the denial of access to services or goods is disproportionately affecting other concerns, such as public safety or the rights of others.

In the case of religious motives invoked as justification when denying particular public services or goods, the starting point is different, as it is the personal choice of the individuals, and not an obligatory service imposed from outside, to enter into a certain profession or to provide certain goods and services which entails observing the regulatory considerations of the field in which they choose to act. Also, the religious ethos put into action leads to a direct and immediate effect on the rights of other persons, be it the right not to be discriminated against or the rights to dignity, personal integrity, autonomy, health, and

20 ECtHR, *Bayatyan v Armenia, Ercep v Turkey*, No. 43965/04, 22.11.2011, *Savda v Turkey,* No. 42730/05, 12.06.2012.

21 Center for Reproductive Rights, *Conscientious Objection and Reproductive Rights,* International Human Rights Standards, available at: https://reproductiverights.org/document/conscientious-objection-and-reproductive-rights-international-human-rights-standards.

22 Fiala, C; Gemzell Danielsson, K; Heikinheimo, O; Guðmundsson, J & Arthur, J, '*Yes we can! Successful examples of disallowing "conscientious objection" in reproductive health care*', The European Journal of Contraception & Reproductive Health Care, 21:3, 201-206, DOI: 10.3109/13625187.2016.1138458.

23 ECtHR, *Tysiąc v Poland*, No. 5410/03, 20.03,2007, para. 116. Also, *R.R. v Poland,* No. 27617/04, 26.05.2011.

24 Parliamentary Assembly of the Council of Europe, Resolution 1928 (2013), Safeguarding human rights in relation to religion or belief, and protecting religious communities from violence, para. 9.10 and para. 9.11.

(in extreme situations) even the right to life, when someone's life depends on the timely provision of a particular service. The role of the State is also different, entailing a positive obligation as the duty bearer of securing access to public services, as suggested in the General Recommendation 24 of the UN Committee on the Elimination of Discrimination against Women:

> '[i]t is discriminatory for a state party to refuse to provide legally for the performance of certain reproductive health services for women. If health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers.'[25]

What are the limits of invoking religious ethos in the context of denying access to public goods or services?

A terminological and conceptual clarification is needed as a starting point. Freedom of religion protects a person's private sphere of conscience but not necessarily any public conduct inspired by that conscience. As stated by the European Court of Human Rights, freedom of conscience and of religion does not protect each and every act or form of behaviour motivated or inspired by a religion or a belief.[26] The difference between conscientious objections and invoking religious ethos as a public expression of a religious belief, with the result of directly or indirectly affecting the rights of other persons, cannot be blurred. The concept of *forum externum* as 'public expression of a religious belief' is developed in its case law by the Strasbourg Court as well as the Luxembourg Court.[27] The Human Rights Committee in its General Comment 22 uses the terminology of 'freedom to manifest religion or belief', providing examples.[28]

When assessing conscientious objectors, from the perspective of Article 18(3) of the International Covenant on Civil and Political Rights, or of Article 9(2) of the European Convention, one of the first principles emerging is that freedom of conscience cannot be restricted, while the external manifestation or the expression of the religious belief can be limited under a strict necessity and proportionality test. This test involves balancing the exercise of one's religious beliefs with the public interest (public safety, order, health or morals) and the rights of other persons. This balancing exercise was intentionally and falsely presented as women's or LGBTI rights trumping religious freedom.[29] Such an approach is, however, untenable.

Notably, the UN Human Rights Committee (HRC) in its General Comment 22, when interpreting the right to freedom of thought, conscience, and religion, as established in Article 18 of the ICCPR, distinguishes between freedom of thought, conscience, religion, and belief, and the freedom to express one's own religion or beliefs.[30] The HRC General Comment 22 highlights that although no limits can be placed on

25 UN, CEDAW Committee, *General Recommendation No. 24: Women and health (Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women)*, (20th Session, 1999), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, (Vol. II) (2008).

26 ECtHR, *Pichon and Sajous v France* (dec.), no. 49853/99, ECHR 2001-X, 02.10.2001. Inadmissibility decision.

27 CJEU, C157/15, *G4S Secure Solution,* 14.03.2017, para. 28, and C188/15, *Bougnaoui and ADDH* of 14.03.2017, para. 30.

28 UN, Human Rights Committee (HRC), *General Comment No. 22: Freedom of thought, conscience and religion* (Article 18), (48th Session, 1993), in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, at 245, UN Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008). Paragraph 4: 'The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.'

29 European Centre for Law and Justice, Grégor Puppinck, *Conscientious Objection and Human Rights: A Systematic Analysis*, Brill, 2017, available at: https://eclj.org/conscientious-objection/echr/objection-de-conscience-et-droits-de-lhomme-essai-danalyse-systmatique?lng=en.

30 UN, Human Rights Committee (HRC), *General Comment No. 22: Freedom of thought, conscience and religion* (Article 18), (48th Session, 1993), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 245, para. 11, UN Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008).

freedom of religion, quite differently, the freedom to express one's religion or beliefs may be subject to restrictions. The HRC goes further in clarifying that any limitations on the freedom to express one's religion or beliefs must be established by law and must be necessary for the protection of public safety, order, health, or morals, or the fundamental rights and freedoms of others.[31] A similar type of assessment is applied in the case law of the Strasbourg Court, while in the case of EU law, a preliminary scrutiny of the jurisprudence would suggest the use of an even more restrictive approach to cases when religious ethos was invoked to deny access to employment.

Invoking religious beliefs before the European Court of Human Rights in the context of denying access to public services or goods

Freedom of thought, conscience and religion, as spelled out in Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, can be restricted but only if the restriction is prescribed by law and it is necessary 'in a democratic society' as specified by Article 9(2). The Convention further mentions that such restrictions should be for the protection of public safety, public health or morals, or for the protection of the rights and freedoms of others. The formula 'the protection of the rights and freedoms of others' includes the right not to be discriminated against, as provided for in Article 14 and Protocol 12 of the Convention. The test developed by the Strasbourg Court in assessing any limitation of the rights guaranteed by the Convention has established that 'necessary in a democratic society' means that the interference must fulfil a pressing social need and must be proportionate to the legitimate aim pursued.[32] The principle of proportionality applied requires, as a must, the reasonable relationship between the aim of the restriction and the means employed to achieve the aim sought.

The ECtHR case law also established that limitations to the principle of non-discrimination as provided by Article 14 can be justified. The Strasbourg Court held that the equal treatment principle in Article 14 is only violated if the distinction has no objective and reasonable justification.[33] Discrimination on some (suspect) grounds had been deemed by the Court as particularly serious and requiring very weighty reasons to justify the different treatment.[34] In the case of the right not to be discriminated against on the grounds of sex or sexual orientation, particularly serious reasons need to be presented as justification before the Court proceeds to examine whether the means employed to achieve the legitimate aim sought were appropriate. Only at this later stage can we speak about the balancing between the competing interests.

In *Pichon and Sajous v France*, the case of the two owners of a pharmacy in rural France who were sanctioned under the Consumer's Code and the Public Health Law after they refused to sell contraceptives to three women and justified their conduct by invoking their religious convictions, the Strasbourg Court swiftly decided the inadmissibility of the application as manifestly ill-founded. The Court considered that their conviction did not interfere with the rights guaranteed by Article 9:

31 UN, Human Rights Committee (HRC), *General Comment No. 22: Freedom of thought, conscience and religion* (Article 18), (48th Session, 1993), Paragraph 8: 'Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are *prescribed by law* and are *necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others*… In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in Articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in Article 18. The Committee observes that Paragraph 3 of Article 18 is to *be strictly interpreted:* restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be *applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated*. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.' (emphasis added)

32 ECtHR, *Handyside v UK,* No. 5493/72, 7.12.1976, para. 49.

33 ECtHR, *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v Belgium* Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23.07.1968, B para. 10.

34 ECtHR*, Smith and Grady v UK* para. 94. See also *SL v Austria*, 9.01.2003, para. 29*, Karner v Austria*, 24.07.2003, para. 37 or *EB v France*, 22.01.2008, para. 91.

> 'It considers that, as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere.
>
> It follows that the applicants' conviction for refusal to sell did not interfere with the exercise of the rights guaranteed by Article 9 of the Convention and that the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.'[35]

The key principle spelled out by the Strasbourg Court in *Pichon and Sajous v France* provides guidance in establishing the ambit of the religious ethos:

> 'Article 9 of the Convention does not always guarantee the right to behave in public in a manner governed by that belief. The word "practice" used in Article 9 § 1 does not denote each and every act or form of behaviour motivated or inspired by a religion or a belief.'[36]

This principle is further invoked and confirmed by the Court in similar cases, for example, in responding to the argument of the Polish government which claimed to protect the conscientious objectors in the health profession in the case *R.R. v Poland.*[37] This establishes the baseline used by the Court in understanding the differences between individual objectors and cases of institutional objections and in the scrutiny of the positive duties incumbent on the states. In providing a proper balance between the conflicting interests, the Court stated that if the choice of the state is to allow for religious objections, there is a correlative obligation for the state to create the necessary framework to ensure the full exercise of the rights by those who would otherwise be affected. In R.R. v Poland the Court stated that

> '(the states) are obliged to organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.'[38]

The same position is spelled out by the Strasbourg Court in *P.* and *S. v Poland*, a case in which the Court found that Poland had violated Articles 3 (prohibition of torture), 5(1) (right to liberty and security), and 8 (right to respect for private and family life) of the European Convention, given that P., a 14-year-old Polish girl, who became pregnant after being raped, suffered numerous hindrances and abuses from medical professionals who invoked their religious beliefs to justify their refusal to provide a legal abortion.[39]

Notably, the Strasbourg Court does not use the term 'conscientious objector' when mentioning the applicants in *Pichon and Sajous v France* or the medical personnel who denied access to legal health services in *R. v Poland* or in *P. and S. v Poland.* Only in *Eweida, Ladele and McFarlane*, the two dissenting judges treated Ladele and McFarlane as conscientious objectors, while the Court itself did not refer to either Ladele or McFarlane as such, but focused its reasoning on the proportionality of the restriction of their right to freedom of religion or belief, balancing their rights with the public interest in providing non-discriminatory services and 'ensuring that members of the public, regardless of their sexual orientation, are treated with dignity and have equal access to services.'[40]

35 ECtHR, *Pichon and Sajous v France (dec.),* 02.10.2001.
36 ECtHR, *Pichon and Sajous v France (dec.),* 02.10.2001.
37 ECtHR, *R.R. v Poland*, 26.05.2011.
38 ECtHR, *R.R. v Poland*, 26.05.2011, para. 200 and 206.
39 ECtHR, *P. and S. v Poland,* 30.10.2012.
40 Observations of the Government of the United Kingdom in *Ladele and McFarlane v UK*, 14.10.2011.

Religious ethos in the context of the prohibition of discrimination in EU Law

Articles 20 and 21 of the Charter of Fundamental Rights of the European Union contain the right to equality and non-discrimination including a comprehensive list of protected grounds and Article 10 guarantees the freedom of thought, conscience and religion in a language similar to Article 9 of the European Convention.[41] The prohibition of all discrimination as laid down in Article 21(1) of the Charter is mandatory as a general principle of EU law and it has reached the position in which it 'is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law.'[42]

In EU law there is no clear-cut provision prohibiting discrimination in access to goods and services on grounds other than ethnic origin and gender. However, the Directives 2000/43/EC and 2004/113/EC do not mention religious ethos as a potential exemption from the prohibition of discrimination. In cases of indirect discrimination, where the right to religious freedom might be invoked as justification for the apparently neutral rules leading to differential treatment consisting of the refusal to provide certain goods or services, the strict test would be applied to assess the 'disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group'.[43]

The proposal of a horizontal directive prohibiting discrimination on the grounds of religion or belief, disability, age or sexual orientation in all areas of social life is not adopted so far.[44] In the absence of a horizontal directive, there is no clearly justiciable content in cases of denial of access to public goods or services under the justification of religious ethos. There are, however, enough helpful mileposts established by the Luxembourg Court when interpreting the justification of religious ethos in employment discrimination cases based on the clearly defined exemption provided in Article 4(2) of the Council Directive 2000/78/EC of 27 November 2000. Still, it has to be underlined that the analogy with Article 4(2) of the Council Directive 2000/78/EC and the subsequent case law is not perfect, given that the current draft of the horizontal directive prohibiting discrimination on the grounds of religion or belief, disability, age or sexual orientation in all areas of social life does not include any specific exemption clauses regarding religious ethos.[45] Furthermore, the proposed Article 2.8 (using the same wording as the current Article 2.5 of Directive 2000/78/EC) specifically mentions that

> 'This Directive shall be without prejudice to general measures laid down in national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and the protection of the rights and freedoms of others.'

The EU has adopted Directive 2000/78/EC prohibiting discrimination in employment and occupation on the grounds of religion or belief, as well as discrimination on grounds of sexual orientation, age or disability. Under EU law, be it Directive 2000/43/EC, 2000/78/EC or 2002/73/EC, direct discrimination cannot be justified. In addition to Article 2.5 of Directive 2000/78/EC mentioned above, the Directives provide for exceptions, prescribed in detail: the genuine occupational requirements and the positive action. Under the umbrella of the genuine occupational requirements, the Directive includes the exemptions for churches

41 European Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26.10.2012.
42 CJEU, *Case* C414/16, *Egenberger*, 17.04.2018, para 76. CJEU, *Case C193/17, Cresco Investigation GmbH v Markus Achatzi*, paras. 76-77.
43 ECtHR [Grand Chamber], *Biao v Denmark, 24.05.2016,* para.103. Also, ECtHR, *D.H. and Others v the Czech Republic* [Grand Chamber], 13.11.2007, para.184.
44 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181} /* COM/2008/0426 final – CNS 2008/0140 */.
45 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181} /* COM/2008/0426 final – CNS 2008/0140 */.

and organisations with an ethos based on religion or belief, as spelled out in Article 4(2) of the Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation:

> 'Art. 4 2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.
>
> Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.'

Notably, as an exception to the prohibition of discrimination, the exception of the religious ethos under Article 4(2) must be interpreted restrictively[46] and it is subjected to a strict test of effective judicial review. The exception applies solely in the context of employment and occupation, only to churches or other religious organisations whose ethos is based on religion or belief. From the language of Article 4(2) and the case law of the Luxembourg Court the exception does not apply to for-profit corporations or individuals.[47] It allows difference of treatment based on a person's religion or belief only in cases where, by reason of the specific nature of the activities concerned or the particular context in which the activities are to be carried out, 'religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation.'[48] The principle of proportionality as developed in EU law will be applied.[49]

The 'religious ethos' exception provided for in Article 4(2) of Directive 2000/78/EC was interpreted by the Court of Justice in 2018 in C-414/16 *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*[50] and in C-68/17 *IR v JQ*.[51] In both cases, the Luxembourg Court linked the exception of the religious ethos to the principle of proportionality:

> 'The requirement in Article 4(2) of Directive 2000/78 must comply with the principle of proportionality. While that provision, unlike Article 4(1) of the directive, does not expressly provide that the requirement must be "proportionate", it nonetheless provides that any difference of treatment must take account of the "general principles of Community law". As the principle of proportionality is one of the general principles of EU law…the national courts must ascertain whether the requirement in question is appropriate and does not go beyond what is necessary for attaining the objective pursued.
>
> In the light of those considerations … Article 4(2) of Directive 2000/78 must be interpreted as meaning that the genuine, legitimate and justified occupational requirement it refers to is a

46 CJEU, C447/0913 *Prigge and Others,* 2.09.2011, paras. 55 and 56, and C267/12 *Hay*, 12.12.2013, para. 46.
47 CJEU, C-414/16, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, 17.04.2018, para. 65. Also, C-68/17 *IR v JQ*, 11.09.2018.
48 CJEU, C-414/16, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, 17.04.2018, para. 59.
49 CJEU, C190/16, *Fries*, 5.07.2017, para. 44.
50 CJEU, C-414/16, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, 17.04.2018.
51 CJEU, C-68/17, *IR v JQ*, 11.09.2018.

> requirement that is necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation. That requirement must comply with the principle of proportionality.'[52]

In C-68/17 *IR v JQ*, judgment of 11 September 2018, the Luxembourg Court further clarified the application of the proportionality test in this context, and underlined the need to show a clear connection between the specific employment position and the maintenance of the religious ethos of the religious entity in the case. Even if it is still premature to imagine cases of religiously motivated denial of public services or goods making their way up to the Luxembourg Court, there are no reasons to speculate that the Court will not maintain its restrictive interpretation of the exceptions from the prohibition of discrimination.

Strict test applied to exceptions to the prohibition of discrimination in domestic laws

In application of the general prohibition of discrimination as derived from international and European standards, all EU Member States adopted legislation prohibiting discrimination relating to access to public goods and services. A comparative survey of the norms adopted reveals that there is no country in which the domestic legislation incorporated an explicit provision with a specific exemption for discrimination in access to public goods and services for individuals who hold religious beliefs. In the UK, Regulation 14 of the Equality Act (Sexual Orientation) Regulations 2007, later replaced by the 2010 Equality Act, provides for a specific and 'carefully tailored exemption for religious organisations and ministers of religion from the prohibition of both direct and indirect discrimination on grounds of sexual orientation,'[53] which cannot, however, be used by religious individuals.[54]

Though not being tested in the case law, also of interest in alluding to the type of strict test applied to cases where the expression of religious beliefs and the prohibition of discrimination in access to public goods and services need to be balanced, is the provision in the Hungarian Equal Treatment Act which includes, as a general rule, Article 7(2):

> 'Article 7(2) Unless this law stipulates otherwise, an action, conduct, omission, requirement, order or practice (hereinafter: action) shall not be deemed to violate the requirement of equal treatment if
> a) it restricts the aggrieved party's fundamental right for the sake of the enforcement of another fundamental right, provided that the restriction is absolutely necessary, suitable for achieving the aim and proportionate with the aim, or
> b) in cases not falling under the scope of point a), it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation,
> (3) Paragraph (2) shall not be applied concerning differentiation based on points b)-e) of Article 8 [racial affiliation, colour of skin, nationality (not in the sense of citizenship), belonging to a national minority].'[55]

52 CJEU, C-414/16, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, 17.04.2018, paras. 68-69.
53 UK Supreme Court, *Bull & Bull v Hall & Preddy*, para. 38 available here: https://www.supremecourt.uk/cases/docs/uksc-2012-0065-judgment.pdf.
54 UK, The Equality Act (Sexual Orientation) Regulations 2007, Regulation 14, Organisations relating to religion or belief, available at: http://www.legislation.gov.uk/uksi/2007/1263/contents/made. Equality Act 2010 available at: http://www.legislation.gov.uk/ukpga/2010/15/contents.
55 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, available at: https://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.HUN.3-Annex3.pdf.

In Poland, when upholding the verdict which found against the employee of a printing house who refused to provide services to an LGBTI initiative, the Polish Supreme Court stated that freedom of conscience and religious beliefs may justify a refusal to provide a service, however, a balance between freedom of conscience and religious beliefs and the prohibition of discrimination should always be struck in light of the circumstances of the case.[56] According to the Polish Supreme Court:

> 'When religious beliefs are in obvious contradiction with the features and character of the service, it is allowed to refuse to perform such a service, even if it is in conflict with other values, including constitutional ones, such as the prohibition of discrimination. However, a refusal can not be justified by individual characteristics of persons for whom this service is to be performed, such as religious denomination, manifested views or sexual preferences'.[57]

In this case, the Court ordered the defendant (the printer) to pay a fine of EUR 45 (PLN 200), while underlining that he had no legitimate reason to invoke his Catholic convictions when refusing to provide the service requested. The service he was supposed to provide (printing a roll-up banner) was purely reproductive (not entailing artistic work) and only involved the performance of purely technical activities. The Polish Supreme Court also noted that the roll-up contained only the logotype of the NGO, thus the contents of the roll-up could not be deemed as to promote behaviours that could be contrary to the values and canons of the Catholic faith.

Although the French legal context is quite specific given the constitutional value of the *laïcité* (secularity) principle in relation to public education and public servants, it is worth mentioning the rationale applied by the French Council of State when balancing the expression of religious beliefs with other public interests, as the reasoning might be applied through analogy to cases of denial of access to public goods and services on grounds of religious beliefs. In the report published by the Council of State in the case of public school authorities refusing to allow mothers wearing the Islamic veil to accompany children on field trips, the Council of State expressly underlined that in the professional field, outside the public service, restrictions to expression of religious freedom cannot be justified by the secularity of the State or by the principle of neutrality of public service.[58] Restrictions to forms of expression of religious freedom can be established solely on the ground of the task to be accomplished in as much as they are proportionate. The Council of State illustrated such restrictions by referring to the jurisprudence of the European Court of Human Rights on the execution of the labour contract – the religious ethos and convictions of the employer and requirements related to safety considerations – and defined the duty of neutrality of the public service as strictly opposable to public agents in the exercise of their function, while also affirming its position against an expansion of the duty of neutrality beyond the public sphere.

In applying the provisions of the Equal Status Acts 2000-2018, which are the primary laws notably prohibiting discrimination in the provision of goods and services in Ireland, the Workplace Relations Commission (WRC) found in *Brennan v Beulah Print* that a respondent's motive (based on Christian beliefs) does not operate as a defence to less favourable treatment (direct discrimination) under the Equal Status Acts 2000-2018 and directed the respondent company to pay EUR 2 500 in compensation. In the case, the printing company conceded that it refused to print invitations for the celebration of the complainant's civil partnership. A complaint of discrimination on grounds of sexual orientation was upheld before the Workplace Relations Commission (the first instance forum for determining complaints under the Equal Status Acts 2000-2018). The business owners argued that their refusal to provide

56 European network of legal experts in gender equality and non-discrimination, Poland, available at: https://www.equalitylaw.eu/downloads/4648-poland-printing-house-employee-guilty-of-refusal-to-print-a-roll-up-for-lgbt-initiative-supreme-court-upholds-the-verdict-pdf-166-kb.

57 Poland, Supreme Court, 14.06.2018; II KK 333/17 cited in European network of legal experts in gender equality and non-discrimination, Poland, available at: https://www.equalitylaw.eu/downloads/4648-poland-printing-house-employee-guilty-of-refusal-to-print-a-roll-up-for-lgbt-initiative-supreme-court-upholds-the-verdict-pdf-166-kb.

58 France, Council of State, *Application du principe de neutralité religieuse dans les services publics – Etude du Conseil d'Etat*, 23.12.2013.

the printing service was not due to the complainant's sexual orientation per se but was based on their objection to gay marriage as Christians.[59] The Adjudication Officer did not accept the proposed argument:

> 'The respondent in this case is submitting that the motive for their refusal to provide the service to the complainant is due to their Christian beliefs but the case being advanced by the complainant is that he was refused this service due to his sexual orientation….
>
> The respondent in this case refused to provide its wedding invitation service to the complainant, a gay man, who was seeking to access a service which is freely available to heterosexual couples. Thus, it is clear that whatever the respondent's reasons for refusing to provide the complainant with the wedding invitation service the complainant could have accessed that service but for the fact that he is a gay man. I am thus satisfied that in refusing to provide the service to the complainant the respondent did discriminate against the complainant on the ground of his sexual orientation.'[60]

In the United Kingdom, the case *Bull v Hall*[61] gave the Supreme Court the opportunity to discuss whether the requirement – later incorporated in the Equality Act 2010 section 29 and schedule 3 para. 29[62] – not to discriminate on grounds of sexual orientation when providing services, amounts to disproportionate interference by the State in someone's right to live according to their religious beliefs.[63] The hoteliers, Mr and Mrs Bull, refused to let a same-sex couple in a civil partnership stay in a double room at their hotel in Cornwall, claiming that they do not allow unmarried couples to stay in double rooms in their hotel. The hoteliers claimed that this policy was operated by them due to the fact that they were devout Christians who let double rooms to 'heterosexual married couples only.' The complainants were a gay couple who were in a civil partnership recognized under British law as having similar rights to those enjoyed by heterosexual married couples.[64] In the first instance, the county court judge found in favour of the complainants, finding that they were discriminated against on grounds of their sexual orientation, as they were treated differently from a heterosexual married couple and that this treatment was on the grounds of their sexual orientation. The judgment was appealed by the hotel owners who argued that the requirement not to discriminate on grounds of sexual orientation in the Equality Act Regulations 2007 (subsequently replaced by the Equality Act 2010) imposed a disproportionate burden on their right to freedom of religion and that the Regulations were therefore incompatible with Article 9 of the European Convention on Human Rights. Both the Court of Appeal and the Supreme Court upheld the decision in favour of the complainants.[65]

The England and Wales Court of Appeal concluded that the Regulations did limit the hoteliers' right to manifest their religious beliefs within the meaning of Article 9. The Court underlined that 'the limitation imposed upon them by the Regulations was necessary in a democratic society for the protection of the rights of others.'[66] In its decision, the UK Supreme Court started from the baseline that 'a fair balance should be struck between the [hoteliers'] right to manifest their faith and the right of [the complainants]

59 The owners of the printing company informed the WRC that they had previously provided printing services to the complainant for his hairdressing business and did not object to providing a printing service to him but objected to providing a printing service in respect of something which was contrary to their beliefs.

60 Workplace Relations Commission, *Brennan v Beulah Print*, DEC-S2018-020, 09.11.2018, para. 5.3.20, available at: https://www.workplacerelations.ie/en/cases/2018/november/dec-s2018-020.html.

61 UK Supreme Court, *Bull & Bull v Hall & Preddy*, 27.11.2013, available at: https://www.supremecourt.uk/cases/docs/uksc-2012-0065-judgment.pdf.

62 UK Equality Act, 2010 available at: https://www.legislation.gov.uk/ukpga/2010/15/section/29.

63 https://www.equalityhumanrights.com/en/legal-work-scotland/bull-v-hall-why-supreme-court-found-direct-discrimination.

64 At the time of the relevant facts, the right to marriage was restricted in the UK to opposite-sex couples only.

65 England and Wales Court of Appeal, *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83, 10.02.2012, available here: https://www.icj.org/wp-content/uploads/2010/01/Hall-v.-Bull-Court-of-Appeal-United-Kingdom.pdf. Final decision of the Supreme Court [2013] UKSC 73 available here: https://www.supremecourt.uk/cases/docs/uksc-2012-0065-judgment.pdf.

66 England and Wales Court of Appeal, *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83, 10.02.2012, available here: https://www.icj.org/wp-content/uploads/2010/01/Hall-v.-Bull-Court-of-Appeal-United-Kingdom.pdf.

to obtain goods, facilities and services without discrimination on grounds of their sexual orientation.'[67] Lady Hale writing for the British Supreme Court proceeded to underline that:

> 'To permit someone to discriminate on the ground that he did not believe that persons of homosexual orientation should be treated equally with persons of heterosexual orientation would be to create a class of people who were exempt from the discrimination legislation. We do not normally allow people to behave in a way which the law prohibits because they disagree with the law. But to allow discrimination against persons of homosexual orientation (or indeed of heterosexual orientation) because of a belief, however sincerely held, and however based on the biblical text, would be to do just that. ...
>
> Mr and Mrs Bull are, of course, free to manifest their religion in many other ways. They do this by the symbolism of their stationery and various decorative items in the hotel, by the provision of bibles and gospel tracts, and by the use of their premises by local churches. ... They are also free to continue to deny double-bedded rooms to same sex and unmarried couples, provided that they also deny them to married couples.'[68]

Concluding remarks

Neither the ECtHR nor national courts deemed the requirement to provide public goods and services in a non-discriminatory manner to be an unjustified interference with religious freedom. Furthermore, the interference of the national authorities was justified by the courts, given the legitimate aim of combating discrimination and protecting the rights of other persons. The status of conscientious objector was not recognised in any of the cases in which religiously-motivated conduct – which did not amount to an act of religious practice – took the form of denial of public goods or services and this led to the interference of the state in the form of penalising the discrimination. As noticed by Donald and Howard:

> 'it has never been accepted by the ECtHR or any other international human rights institution that an objection to providing goods or services to same-sex couples can be seen as comparable to conscientious objection to either military service or abortion.'[69]

Though currently still in the form of a proposal under EU law, the prohibition of discrimination in access to goods and services, including discrimination on grounds of sexual orientation, would probably benefit from the same type of enhanced scrutiny with a focus on the proportionality of the measures taken. Accommodating the behaviour or the expression motivated or inspired by religion or belief, 'which is not an act of practice of a religion in a generally recognised form,'[70] is not only unprotected by Article 9 but it would effectively establish a right to discriminate, as suggested by the British Supreme Court in *Bull & Bull v Hall & Preddy*. In her reasoning, Lady Hale also touched upon an important aspect: that the impact of the denial of public goods or services is reflected not only on the individual victims of discrimination, as the harm caused through the infringement of equality and dignity affects entire communities:

> 'Homosexuals can enjoy the same freedom and the same relationships as any others. But we should not underestimate the continuing legacy of those centuries of discrimination, persecution even, which is still going on in many parts of the world. It is no doubt for that reason that Strasbourg requires "very weighty reasons" to justify discrimination on grounds of sexual orientation. It is for

67 UK Supreme Court [2013] *Bull & Bull v Hall & Preddy* UKSC 73 para. 34 available here: https://www.supremecourt.uk/cases/docs/uksc-2012-0065-judgment.pdf.

68 UK Supreme Court [2013] *Bull & Bull v Hall & Preddy* UKSC 73 para. 37 and 39 available here: https://www.supremecourt.uk/cases/docs/uksc-2012-0065-judgment.pdf.

69 Alice Donald and Erica Howard, 'The right to freedom of religion or belief and its intersection with other rights', a research paper for ILGA-Europe, January 2015 available at: https://www.ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights__0.pdf.

70 Observations of the Government of the United Kingdom in *Ladele and McFarlane v UK*, 14.10.2011.

> that reason that we should be slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion.'[71]

In 1789, the French *Déclaration des droits de l'homme et du citoyen* stated '*La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui*.'[72] Those exercising religious freedom as a fundamental right are entitled to full protection. However, the right to manifest religious freedom is limited to the obligation not to infringe the rights of others, their equality and dignity, in particular when making a voluntary choice of entering into the commercial sphere and providing public goods and services. Religious freedom does not protect action based on religious beliefs in a way that is detrimental to others, by discriminating against them or causing harm in other ways, by trying to impose our own beliefs on others. There are no exemptions in international law for individuals invoking religious beliefs in order to discriminate and no duty to ensure accommodation of such beliefs is envisaged – accommodation is reasonable only when it does not result in disproportionate harm or in perpetuating existing prejudice.[73]

The balancing exercise which must be performed by courts in order to ensure a fair balance between the competing fundamental rights of religious freedom and non-discrimination will continue to be one of the most challenging areas of human rights law, and it is prone to controversies and attempts to misrepresent or misinterpret existing standards, given that no matter what legal or policy solution is chosen, one or all of the parties – as well as the social fabric – will be harmed. The limits to expressing one's own religion and conscience continues to be established in accordance with the negative effects that such an expression could have on the protection of other individuals' dignity, rights and freedoms. The denial of public services or goods on grounds of sexual orientation, gender identity, gender, or pregnancy status, disguised under the colours of exercising religious freedom, amounts to unequal treatment and is not benefiting of protection as religious freedom.

71 UK Supreme Court [2013] *Bull & Bull v Hall & Preddy* UKSC 73 para. 53 available here: https://www.supremecourt.uk/cases/docs/uksc-2012-0065-judgment.pdf.

72 'Freedom is to be able to do anything that does not harm others.'

73 INCLO, 'Drawing the Line – Tackling tensions between religious freedom and equality', 2015, available at: https://ccla.org/cclanewsite/wp-content/uploads/2015/09/INCLO-Report-Drawing-the-Line-EQ-vs-FoR.pdf.

Protection from victimisation in the workplace: Comparative EU-Icelandic perspectives

Herdís Kjerulf Thorgeirsdóttir*

1 Introduction

'*You have enemies? Good. That means you've stood up for something, sometime in your life*.'
Winston Churchill

In a well-known case on victimisation in the UK, *Nagarajan v London Regional Transport*, Judge Lord Steyn stated, '[t]he victimisation of those who complain of discrimination under the equality legislation should be treated as seriously as the discrimination itself'.[1] He furthermore added that in 'every case' the crucial question is 'why the complainant received unfavourable treatment'.[2]

The following account of the victimisation of a woman who filed a complaint against her colleague demonstrates what is at stake: a lecturer in social sciences in one of Britain's leading universities described entering 'a Kafkaesque nightmare' after submitting a formal bullying (harassment) complaint against a colleague. It culminated in her being pushed to resign and sign a confidentiality agreement in exchange for a financial settlement. As her family's primary earner, she felt forced to comply, and she was escorted out of her workplace of many years by a security guard. 'They legally gagged me and threatened me', she said. 'I lost my job, our entire family income and nearly my sanity. There are silenced victims like me all over the country trying to rebuild our shattered lives while the perpetrators carry on building their careers.'[3]

It amounts to victimisation if an employer retaliates against an employee's complaint or intention to seek redress.[4] Such retaliation can take the form of a wide range of unfair treatment involving bullying from co-workers in a competitive working environment. Therefore, many victims are reluctant to bring a complaint for fear of victimisation; they cannot trust their employer to act and ensure an honest outcome

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1 Lord Steyn in UK House of Lords, *Nagarajan v London Regional Transport* (1999) 4 All ER 65; Connolly, M. (2017), 'Statutory Interpretation, Victimisation under Equality Law, and Its "On–Off' Relationship with Contempt of Court', 38 (3) Stanford Law Review, vol. 38, issue 3.

2 Hepple, B. (2014), *Equality: The Legal Framework*, Hart Publishing, ftn. 47.

3 Devlin, H. and Marsh S., Academics: Hundreds of academics at top UK universities accused of bullying, The Guardian, 28 September, 2018 (https://www.theguardian.com/education/2018/sep/28/academics-uk-universities-accused-bullying-students-colleagues.

4 Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23-36, Article 24 and respective provisions in national laws; Icelandic Gender Equality Act No. 10/2008, Article 27.

and fear retaliation.[5] Victimisation is not only caused by the direct actions of management – it may also be part of the workplace culture whereby those who have fallen out of favour with management will be harassed. This is what I term 'victimisation through harassment' (see below).

Protection against victimisation is part of strengthening the rights of employees on the labour market. This article will question the strength of the EU legal framework and its implementation into Icelandic domestic law in order to address the many forms of victimisation that occur in the aftermath of making a complaint. The unfair treatment that prevents victims out of fear and powerlessness from seeking any kind of redress[6] stands in the way of the full realisation of the basic human rights of gender equality (non-discrimination) and justice. It must therefore be questioned whether the EU legal framework in the area of gender equality offers adequate protection against such victimisation in the workplace.

The focus here lies on the gender equality dimension and the forms of victimisation subject to such legislation within the EU gender equality framework, along with the Icelandic legal perspective where relevant. At the outset, it is important to stress that aside from the legal framework, there is a shortage of case law on victimisation from the Court of Justice of the European Union (CJEU) and none by Icelandic courts, except in relation to harassment cases. Therefore, comparative materials, especially case law from other jurisdictions, may be used where pertinent to show what relevant standards could help interpret the EU provisions.

2 Factors contributing to victimisation

When scrutinising the phenomenon of victimisation, it is important to acknowledge the obstacles that those whose rights have been violated face when seeking remedies or attempting to access justice. It is one thing to face discrimination and another to refuse to accept it – with the knowledge that it will entail a fight and possibly a greater sacrifice than that caused by the initial, allegedly unlawful act.

2.1 Fear of retaliation

Fear of victimisation appears to be a major deterrent against complaining of discrimination. The US Supreme Court stated in a case of victimisation that 'fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination'.[7] Self-censorship occurs when people fear the consequences of speaking up, and it is what John Stuart Mill termed 'mental slavery.[8] The employee who has already suffered discrimination or other illegal conduct in the workplace may, out of fear of the anticipated consequences, choose to do nothing. In this sense the victim is thrust into acquiescence, as the one who is silent is assumed to have agreed (*qui tacet consentire videtur).*

The same goes for a third party that might be able to provide information in support of the victim but does not do so out of fear for the consequences. Michael Connolly, who has focused on the problem of

5 UK House of Commons, Women and Equalities Committee (2018), *Sexual Harassment in the Workplace*, Fifth Report of Session 2017-2019, available at: https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf.

6 The findings presented by Fernando, D., and Prasad, A. (2018) in 'Sex-based harassment and organizational silencing: How women are led to reluctant acquiescence in academia', *Human Relations* reveal that organisational silence is the product of various third party actors (for instance line managers, HR, and colleagues) who mobilise a myriad of discourses to persuade victims not to voice their discontent. The authors develop the concept of 'reluctant acquiescence' to explain a victim's response to organisational silencing. In terms of its contributions to the extant literature, this article: (i) moves away from explanations of sex-based harassment that focus solely (or predominately) on the actions of individual perpetrators; and (ii) shows how reluctant acquiescence leads to maintaining the status quo in the organisation.

7 US Supreme Court, *Crawford v Metropolitan Government of Nashville* 129 S Ct 846, 852 (2007), citing Brake, D. (2005), 'Retaliation' *Minnesota Law Review* vol. 90, 18, at p. 20. This case centred around those who complained of discrimination against others rather than passive friends, relatives, or associates of the complainant. See also US Civil Rights Act 1964, Title VII, Section 704 (42 USC para.2000e-3).

8 Thorgeirsdóttir, H. (2005), *Journalism Worthy of the Name: the Affirmative Side of Article 10 of the ECHR*, Kluwer Law International, p. 285; MacKinnon, C. (1993), *Only Words,* Harvard University Press, p. 77.

victimising third parties, points to the US Civil Rights Act from 1964 that outlaws less favourable treatment of a worker 'because he has' opposed discrimination or participated in discrimination proceedings.[9] In a case that came before the US Supreme Court, a large company fired a worker who subsequently alleged this was retaliation against his fiancée who had previously filed a charge of discrimination. The Supreme Court held that the worker who was fired was entitled to sue 'as a person aggrieved', as 'injuring him was the employer's intended means of punishing her'.[10] The CJEU in *Coleman* – a case that concerned a mother working as a secretary for a law firm who accused her of using her disabled child to abusively request working time arrangements[11] – dealt with the question of whether the discrimination policy under the Employment Equality Framework Directive 2000/78 covered individuals who suffer discrimination due to their affiliation with a disabled person. The CJEU ruled in favour of the mother, stating that the purpose of the Directive 2000/78 is to combat all forms of discrimination on grounds of disability. This landmark decision was perceived as giving third parties, in this case a caretaking mother, more rights in the workplace.

It is foreseeable that complaining about the conduct of one's employer or superior(s) can have negative consequences for an employee who may feel that they are 'biting the hand that feeds them' by making such a complaint. Institutions, business organisations, or any employer might consider a complaining employee an ungrateful nuisance. Although it may require experience to know for sure, most employees are aware of the fact that complaining about an employer may not only affect their job but also kill their career. It is a challenging lesson to learn, but finding a new job after being demoted or dismissed may prove to be difficult – even though the dismissal was wrongful, illegitimate, and unjust. This is the reason why many employees would rather bite their tongue than the hand that feeds them.[12]

2.2 Stigmatisation and the risk of dismissal

Victimisation can be described as the dark side of working life. An atmosphere of fear breeds more intimidation and creates a hostile working environment, making it difficult for employees to do their work. Surveys have shown that complainants' fears of victimisation or retaliation acts as a barrier to seeking redress or accessing justice. These fears appear particularly problematic within the workplace of small, professional communities where co-workers have hierarchical and often close relationships with the discriminating party.[13]

For instance, the highly competitive and hierarchical environment associated with academia is well-known as a fertile breeding ground for bullying behavior, not least gender-based harassment. Recent studies in the US demonstrate how bullying (which can fall under the rubric of gender-based harassment) is just as common as sexual harassment, particularly for women and ethnic minorities. These studies illustrate that for both genders, 38 % of workers witness or experience bullying during their careers and that for every bully caught, ten times as many victims lose their jobs through transfers, redundancies, terminations, or quitting.[14] Adding high internal competition to situations where co-workers have become vulnerable due to attempts to obtain redress for an unjust situation with superiors increases the likelihood

9 Connolly, M. (2010), 'Victimising third parties: the equality directives, the European Convention on Human Rights, and EU general principles', *European Law Review*, vol. 35, issue 6, pp. 822-836, referring to US Civil Rights Act 1964, Title VII, Section 704 (42 USC para.2000e-3).

10 US Supreme Court, *Thompson v North American Stainless* 131 S.Ct. 863 (2011).

11 CJEU 17 July 2008, *S. Coleman v Attridge Law*, case C-303/06.

12 See for instance a recent news story on the alleged victimisation of a woman in India who accused a judge of the highest court in the country of sexual harassment and lost her job and so did her husband and numerous relatives: https://www.theguardian.com/world/2019/apr/20/indias-top-judge-denies-victimising-worker-over-alleged-harassment.

13 Fundamental Rights Agency (2010), *Access to Justice in Europe: an overview of challenges and opportunities*, available at: https://fra.europa.eu/sites/default/files/fra_uploads/1520-report-access-to-justice_EN.pdf.

14 Academics Anonymous Universities, 'We need bigger conversation about bullying in academia', The Guardian, 26 January 2018 (https://www.theguardian.com/higher-education-network/2018/jan/26/we-need-a-bigger-conversation-about-bullying-in-academia; https://www.workplacebullying.org/wbiresearch/wbi-2017-survey/.

of victimisation.[15] Another survey in the UK shows that hundreds of academics have been accused of bullying students and colleagues in the past five years, prompting concerns that a climate of harassment and intimidation is thriving in top British universities.[16] These studies indicate that workplace harassment and victimisation through such conduct is endemic, and that attempts by victims to stop such conduct might lead to a loss of economic opportunity or even dismissal.

In organisational cultures and professional environments characterized by strong hierarchies, harassing a co-worker might be employed by some as a strategy to seek professional advancement. Bullying conduct most cited within academic contexts include threats to professional status and obstructive behaviours designed to inhibit competing co-workers from achieving their goals.[17] Since professional networks in some work environments, for instance academia, are extremely important; threats to one's reputation can become a tool for victimisation, and any stigma could thus negatively influence job opportunities and a victim's professional life.[18] As pointed out by Michael Connolly, 'any stigma associated with dismissal is an aggravating factor – it sends a signal to prospective employers that the victim was "so little valued to be expendable"'.[19] The stigma of being dismissed from any high level organisations is a terrifying prospect for many who have spent a bulk of their lifetime to obtain high academic degrees or sacrificed a lot getting there. Not surprisingly many will stop before stepping over the threshold to seek redress.

2.3 Women not part of 'old-boy' networks

While the principle of gender equality applies to both sexes as a basic human right, victimisation within the workplace is more likely to affect women than men.[20] Women more often do not enjoy the same support from colleagues as men and are therefore in a weaker position to defend themselves from abuse of power by the wrongdoer.[21] Women furthermore tend to occupy lower and medium level posts in industries in which only a few women hold positions on the highest managerial level, for instance in political and economic sectors.[22] It also appears to be the prevailing view that there is less scope for women in higher positions than men, and women who do reach the higher echelons are frequently regarded as the token exceptions. As such, women often have limited access to the networks that men in higher ranks of hierarchies form within organisations – the so-called 'old-boy' networks.[23] A recent study shows that family responsibilities and other societal barriers often prevent female workers from joining male-dominated networks that offer professional benefits.[24] This situation could partly account for gender inequality in the workplace, because professional networks that are formed by and composed

15 Workplace Bullying Institute, US Workplace Bullying Survey 2044, https://www.workplacebullying.org/wbiresearch/wbi-2014-us-survey/; https://careertrend.com/file-bully-complaint-losing-job-9421.html.

16 Devlin, H. and Marsh, S. Academics: Hundreds of academics at top UK universities accused of bullying, https://www.theguardian.com/education/2018/sep/28/academics-uk-universities-accused-bullying-students-colleagues.

17 McKay, R. et al. (2008), 'Workplace Bullying in Academia: A Canadian Study', *Employee Responsibilities and Rights Journal*, vol. 20, issue 2, pp. 77-100. See also: Farley, S. and Sprig, C. 'Culture of Cruelty: Why bullying thrives in higher education', The Guardian, 3 November 2014, available at: https://www.theguardian.com/higher-education-network/blog/2014/nov/03/why-bullying-thrives-higher-education.

18 Connolly, M. (2010), 'Victimising third parties: the equality directives, the European Convention on Human Rights, and EU general principles', *European Law Review*, vol. 35, issue 6, pp. 822-836.

19 Connolly, M. (2010), 'Victimising third parties: the equality directives, the European Convention on Human Rights, and EU general principles', *European Law Review*, vol. 35, issue 6, pp. 822-836.

20 European Foundation for the Improvement of Living and Working Conditions (Eurofound) (2013), *Physical and Psychological Violence at the Workplace*, Dublin, 2013; Lopez, S.H., Hodson, R., and Roscigno, V.J., 'Power, status, and abuse at work: General and sexual harassment compared', *The Sociological Quarterly*, vol. 50, 2009, pp. 2-27; Meloy, M. L. and Miller, S. (2019), *The Victimisation of Women: Law, Policies and Politics*, Oxford University Press.

21 See also: Einersen, S. et al., 'The Concept of Bullying and Harassment at Work: The European Tradition' in: Einersen, S. et al. (eds.) (2010), *Bullying and harassment in the workplace: developments in theory, research and practice*, CRC Press, 2nd edition, pp. 3-40.

22 EUR-LEX (2015), *Gender balance in business leadership*, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:1710_2.

23 Klaile, A. (2013), 'Why are so few women promoted into top management positions?', Department of Economics, Hanken School of Economics, Helsinki, available at: https://kauppakamari.fi/wp-content/uploads/2014/10/annaklaile-why-are-so-few-women.pdf.

24 EUR-LEX (2015), *Gender balance in business leadership*. See also: Nikolaou, A. (2017), 'Barriers and Biases: A case study of women's experiences of underrepresentation at senior management levels', University of Gothenburg (Strategic Human

of men tend to offer important career advantages, such as information about professional opportunities, technical knowledge, and strategic insight. The same study also shows that self-doubt, along with limited faith in one's ability to make valuable contributions to male-dominated networks, can hold women back from seeking to join those circles.[25]

Women face harsher responses than men when seeking remedies after receiving wrongful treatment when responding assertively and attempting to defend themselves. Women are also often in less powerful roles than men and may subsequently enjoy less support from colleagues or male peers to fight back. Women may also be regarded as intruders by co-workers of both sexes if they are manifestly ambitious, while such an attribute is generally accepted for men. The risk of being victimised thus appears much higher for women.[26]

3 Victimisation through harassment

The concepts of victimsation and harassment have quite distinct meanings in EU gender equality law (see below) and various gender equality acts. In everyday language the concepts are sometimes used interchangeably, perhaps because employees who file complaints against their employer for any kind of discrimination are often punished with harassment. Women are overwhelmingly the victims of sexual harassment, where they are objectified and belittled.[27] Women are also more likely to be victims of gender-based harassment which is not sexual in nature but linked to gender and other factors (age, status etc.) Victimisation can and often does take the form of harassment, involving hostile behaviour towards an employee who has openly complained about discrimination[28] in the workplace or who has assisted a colleague with a previous harassment concern.[29]

3.1 Female socialisation and victimisation

Victimisation through harassment can fall under the scope of gender discrimination; even though it is devoid of sexual conduct, what counts is that the victim is usually in a less powerful position than the aggressor(s). It has also been argued that there is a relationship between female socialisation and victimisation, as gender-based psychological underpinnings often indicate that women will be 'nice' in tense and uncomfortable situations.[30] For the same reason, many women will also refrain from provoking their colleagues. Self-blame is characteristic of victimisation, especially in cases where the original cause is sexual harassment. Although it goes without saying that victims of discrimination within the workplace

Resource Management and Labour Relations), available at: https://pdfs.semanticscholar.org/4b26/890abc142265ecc195fb7a7ddc78eb6600ae.pdf.

25 Gewin, V. (2018), 'Women can benefit from female-led networks', Nature: International Journal of Science, available at: https://www.nature.com/articles/d41586-018-07878-w; referring to E. Greguletz et al. (2018) 'Why women build less effective networks than men: The role of structural exclusion and personal hesitation', *Human Relations*, available at: https://doi.org/10.1177/0018726718804303.

26 Einersen, S. et al. (eds.) (2010), *Bullying and harassment in the workplace: developments in theory, research and practice*, CRC Press, 2nd edition.

27 UK House of Commons, Women and Equalities Committee (2018), *Sexual Harassment in the Workplace* referring to: Close the Gap, written submission (http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/sexual-harassment-in-the-workplace/written/80301.html); 38 Degrees, written submission (http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/sexual-harassment-in-the-workplace/written/80195.html); ComRes, *BBC: Sexual harassment in the work place 2017*, survey November 2017 (https://www.comresglobal.com/polls/bbc-sexual-harassment-in-the-work-place-2017/); ComRes, *BBC Radio 5 Live: Sexual harassment in the workplace 2017*, survey October 2017 (https://www.comresglobal.com/polls/bbc-radio-5live-sexual-harassment-in-the-workplace-survey/); Trades Union Congress (TUC), *Still just a bit of banter? Sexual harassment in the workplace in 2016*, August 2016 (https://www.tuc.org.uk/sites/default/files/SexualHarassmentreport2016.pdf).

28 Iceland Supreme Court, case no. H 267/2011.

29 https://damianmccarthy.com/law/bullying-and-harassment/.

30 Ubelacker, S. (2016), 'Experts say socialisation can affect how women deal with sexual assault', CTV News Atlantic, The Canadian Press, 11 February 11 2016, available at: https://atlantic.ctvnews.ca/experts-say-socialization-can-affect-how-women-deal-with-sexual-assault-1.2773507.

are not responsible for the discriminatory conduct, the act of denying or challenging that it occurred or is occurring fuels the feeling of self-blame or self-victimisation, which increases the vulnerability of the victim.[31]

Gender-based victimisation through harassment can also be perpetrated by the same sex; for instance, where women harass women, even for being assertive. There are certain traits that characterise both the harassment and victimisation of an employee who stays in the workplace and is punished with repetitive, vexatious conduct. This can affect the dignity, self-esteem, and psychological integrity of the victim and can create a hostile work environment.[32]

3.2 The low number of complaints and culture of silence

By clarifying what amounts to sexual harassment, the path-breaking #MeToo movement has indirectly shed light on the concept of victimisation, as it so often takes the form of harassment. The #MeToo movement raised the issue of sexual harassment in the form of victimisation to the forefront of public concern, calling attention to what constitutes sexual harassment and the trauma experienced by victims of such conduct. Victims fear retaliation and the damage that could be done to their professional life.[33] While there is widespread knowledge amongst women about workplace sexual harassment, there is very little awareness at the most senior levels of employers about the extent of sexual harassment in their organisations. This lack of awareness is, arguably, in part a symptom of the long-standing underrepresentation of women in leadership positions.[34]

The EU Ombudsman, Emily O'Reilly, wrote recently in relation to findings of her work that:

> '... all EU institutions and agencies have anti-harassment policies in place but the main issue we identified is the low number of complaints being filed. Underreporting suggests that the 'old' culture of silence still lingers. There is not yet a fully-shared acceptance of what constitutes harassment and consequently no shared outrage when it happens. At worst, the victim can be deemed part of the problem. The low number of cases being reported is a pity but hardly surprising. Harassment is not exactly like having your handbag stolen. It isn't neatly defined, it encourages others to evaluate you as a likely or unlikely victim of harassment, it risks further sexualising you in cases of sexual abuse, and there is the risk of being branded as trouble, as difficult, with the inevitable consequence for one's career.'[35]

The EU Ombudsman sums up the silencing impact and fear of victimisation when it occurs in relation to harassment – in this case sexual harassment – with the imminent stigma or smear campaign to which an employee is typically subjected. They are labelled a troublemaker, ostracised by co-workers, removed of their tasks and responsibilities, and finally dismissed – if they had not already fled the workplace.

31 Making victims feel guilty: UK House of Lords, *St Helens Metropolitan Borough Council v Derbyshire* (2007] IRLR 540 (Advisory Bulletin 528). The House of Lords held that two letters sent to equal pay claimants by their employer warning that some of their colleagues could be made redundant if their claims were successful amounted to victimisation under the UK Sex Discrimination Act.

32 Tolhurst H. et al. (2003), 'Rural general practitioner apprehension about work related violence in Australia', Australia Journal of Rural Health vol. 11, pp. 237–241; Lin Y.H. and Liu H.E. (2005), 'The impact of workplace violence on nurses in South Taiwan', International Journal of Nursing Students, vol. 42, pp. 773-778.

33 Description of the now famous landmark testimony of professor Anita Hill on sexual harassment, during the hearings on the appointment of Clarence Thomas to the US Supreme Court https://www.youtube.com/watch?v=4oPnd911FcM.

34 UK House of Commons, Women and Equalities Committee (2018), *Sexual Harassment in the Workplace*, Fifth Report of Session 2017-2019, available at: https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf.

35 O'Reilly, E. (2019), 'Me Too turning the tide on abuse of power' (Opinion), *Parliament Magazine*, 7 February 2019. The EU Ombudsman is an independent and impartial body that holds the EU's institutions and bodies to account, as well as promoting good administration. https://www.theparliamentmagazine.eu/articles/opinion/metoo-turning-tide-abuse-power.

4 A workplace stresser dealt with from an equality perspective

When it takes the form of retaliation against an employee, victimisation has consequences for the entire workplace – absenteeism and job turnover will increase, whereas organisational commitment, performance, and morale will decrease.[36] This may lead to a vicious cycle in which female employees quit their jobs or are dismissed. If the victimisation takes the form of harassment it can result in various health problems, amongst them mental illness and cardiovascular diseases due to prolonged stress.[37]

4.1 Health and safety regulation

The problem of victimisation can be addressed by means of two routes of intervention: either through health and safety legislation that addresses it as a psychosocial risk, or through equality and anti-discrimination legislation. The Administration of Occupational Health and Safety in Iceland is the body that oversees the implementation of occupational health and safety and regulations on measures against bullying, sexual harassment, gender-based harassment, and violence in the workplace. It does not, however, decide whether certain behaviours are considered sexual or gender-based harassment or violence; its role is to ensure that employers fulfil their obligations under applicable regulations.

Regulation No. 1009/2015,[38] on the basis of the Icelandic Act on Occupational Safety and Health in the Workplace (No. 46/1980), was issued in November 2015 and entails measures against harassment in the workplace (not victimisation per se, but sexual harassment, gender-based harassment, and violence).[39] All employers are obliged to establish measures against the above threats and subsequent reactions. They are under a duty to assess what triggers harassing behaviour, considering factors such as mental and social factors, the age of employees, gender ratio, differences in cultural backgrounds, working hours, and stress.[40]

4.2 Avoiding depoliticising victimisation

Dealing with victimisation primarily under health and safety legislation risks its depoliticisation, divorcing it from the wider issue of gender (in)equality. Although victimisation, not least through harassment, is an attack on the dignity of the individual, it is still first and foremost addressed as discriminatory conduct under laws that prohibit gender-based discrimination. Proclaiming this as a dignity problem may, in the same manner as labelling it a health problem, depoliticise the issue.[41] The risk is that it emphasises the dignity of the targeted individual rather than how victimisation stands in the way of equal opportunities in competitive job markets.[42] The approach of gender equality to victimisation does not isolate the

36 Osh Wiki Network Knowledge, 'Sexual harassment and victimisation: What happens in the workplace?', available at: https://oshwiki.eu/wiki/Sexual_harassment_and_victimisation:_what_happens_in_the_workplace.

37 Simon, H. B., Harvard Health Publishing, Harvard Medical School, 'Women, work, stress and heart disease: 5 ways to protect yourself', available at: https://www.health.harvard.edu/healthbeat/women-work-stress-and-heart-disease-5-ways-to-protect-yourself.

38 Icelandic Administration for Occupational Safety and Health (homepage), 'Responses to bullying, sexual harassment, gender-based harassment and violence' (*Viðbrögð við einelti, kynferðislegri áreitni, kynbundinni áreitni og ofbeldi*), available at: https://www.vinnueftirlit.is/vinnuvernd/adbunadur/einelti-areitni-ofbeldi/. See also: https://www.vinnueftirlit.is/media/sem-heyra-undir-vinnuvernd/B_nr_1009_2015.pdf.

39 The directives implemented in the Act on Occupational Safety and Health are the following: Council Directive 89/391/EC on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1-8; Council Directive 93/104/EC concerning certain aspects of the organization of working time, OJ L 307, 13.12.1993, p. 18-24 repealed by Council Directive 2003/88/EC concerning certain aspects of the organization of working time, OJ L 299, 18.11.2003, p. 9-19; and Council Directive 2000/34/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive, OJ L 195, 1.8.2000, p. 41-45.

40 https://www.stjornarradid.is/verkefni/allar-frettir/frett/2015/11/06/Ny-reglugerdgegn-einelti-areitni-og-ofbeldi-a-vinnustodum/.

41 Abrams, K. (1998), 'The New Jurisprudence of Sexual Harassment' Cornell Law Review, vol. 83, 1169.

42 As Susanne Baer (1995) discussed in 'Worde oder Gleichheit?: Zur angemessenen grundrechtiichen Konzeption von Recht gegen Diskriminierung am Beispiel sexueller Beilistigung am Arbeitsplatz in der Bundesrepublik Deutschland und den USA' ('Dignity or Equality: On the appropriate fundamental conception of law against discrimination, using the example of sexual harassment in the workplace'), *Schriften zur Gleichstellung der Frau*, vol. 13.

bullying behaviour from the economy of the workplace, as it clearly recognises that women may be disproportionately affected when victimised.[43] Discrimination prevents equal opportunities and has serious consequences for livelihoods and careers.[44] It is therefore important to scrutinise victimisation an anti-discrimination perspective, with the aim to contribute to eradicating the social structures[45] that have so far disempowered women and question whether the EU legal framework on gender equality offers adequate protection against victimisation.

5 EU legal framework prohibiting victimisation

The EU Equal Treatment Directive from 1976 consolidated the rights of men and women to equal treatment in employment.[46] Article 7 provided that 'Member States shall take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment'.

Today, the so-called Recast Directive is the most important instrument in the EU acquis and the parent directive of equality legislation.[47] It has brought together older directives (among the 1976 Equal Treatment Directive) in a single text with the purpose to simplify the abundant legislation and to facilitate the better regulation of gender equality in employment.[48] The Recast Directive requires Member States to prohibit direct and indirect sex discrimination, harassment, and sexual harassment in pay and other working conditions, (access to) employment, and in occupational social security schemes; and to provide adequate judicial protection against victimisation.[49] It states in its Preamble:[50]

> 'Having regard to the fundamental nature of the right to effective legal protection, it is appropriate to ensure that workers continue to enjoy such protection even after the relationship giving rise to an alleged breach of the principle of equal treatment has ended. An employee defending or giving evidence on behalf of a person protected under this Directive should be entitled to the same protection.'

The obligations regarding victimisation, provided for in Article 24 of the Recast Directive, are formulated in more restrictive terms than the above Preamble, which explicitly mentions the need to also protect a third party, for instance an employee that defends or gives evidence on behalf of a co-worker. Article 24 of the Recast Directive stipulates:

> 'Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national

43 Whitman, J. Q. and Friedman, G. S. (2003), 'The European Transformation of Harassment Law', *Faculty Scholarship Series*, vol. 647, available at: https://digitalcommons.law.yale.edu/fss_papers/647.

44 Batty, D., Wealeand, S. and Bannock, C. (2017), 'Sexual harassment at "epidemic levels" in UK universities', The Guardian, 5 March 2017, available at: https://www.theguardian.com/education/2017/mar/05/students-staff-uk-universities-sexual-harassment-epidemic.

45 The findings presented by Fernando, D., and Prasad, A. (2018) in 'Sex-based harassment and organizational silencing: How women are led to reluctant acquiescence in academia', *Human Relations* reveal that organisational silence is the product of various third-party actors (for instance line managers, HR, and colleagues) who mobilise a myriad of discourses to persuade victims not to voice their discontent. The authors develop the concept of 'reluctant acquiescence' to explain a victim's response to organisational silencing. In terms of its contributions to the extant literature, this article: (i) moves away from explanations of sex-based harassment that focus solely (or predominately) on the actions of individual perpetrators; and (ii) shows how reluctant acquiescence leads to maintaining the status quo in the organisation.

46 Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14.2.1976, p. 40-42.

47 Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23-36.

48 Brzezińska, A. (2009), 'Gender Equality in the Case Law of the European Court of Justice', *Institute for European Studies working paper 2/2009*, available at: http://aei.pitt.edu/60826/1/2009.2.pdf.

49 Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23-36, Article 24.

50 Recital 34.

> laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.'

Interestingly, the first CJEU judgment on victimisation, rendered on 20 June 2019, clarified the breath of the scope of protection afforded by Article 24.[51] This decision arose from a request for a preliminary ruling from the Labour Court in Belgium lodged on 19 June 2018 by Jamina Hakelbracht, Tine Vandenbon and the Insitute of Equality for Women and Men in Brussels against WTG Retail BVBA. Ms. Hakelbracht, the applicant, had been successfully interviewed by a manager of one of WTG Retail's licensed stores, Ms. Vandenbon. The applicant had informed the manager that she was three months pregnant during the interview, and the manager had decided to hire her and transmitted the information to the company, WTG Retail. However, the company informed the manager that it did not want to hire the applicant because of her pregnancy, to which the manager replied that such a decision would be unlawful. As the manager informed the applicant that the company confirmed its decision not to hire her, the applicant lodged a complaint of sex discrimination in relation to her pregnancy. The manager was subsequently made redundant by the company, because she was accused to have triggered the complaint lodged by the applicant. The manager subsequently decided to seek redress for being subjected to retaliation by the company. In this context, the question posed by the Belgian court to the CJEU is whether Article 24 of the Recast Directive can be interpreted as precluding national legislation that only affords protection against retaliation and victimisation to persons who act as witnesses and, in the context of the investigation of a complaint, present signed and dated documents related to a witness statement.[52] Instead, in the view of the Belgian court, Article 24 provides a wider protection, which 'should not, in its view, be limited solely to official witnesses, but should also extend to persons who defend or support the person who has lodged a complaint of discrimination'.[53] The Court of Justice confirmed this broad interpretation and clarified that the protection against victimisation also applies to 'employees who have informally supported the person who has been discriminated against'.[54]

The Recast Directive goes further than the older Employment Equality Directive,[55] which did not expressly outlaw victimisation (see below for how the CJEU solved that problem in the case of *Coote v Granada*), save for instances of dismissal. Beyond employment, victimisation is also prohibited in the areas of the access to, and supply of, goods and services by Article 10 of Directive 2004/113/EC, and in the area of work-life balance by Article 14 of the newly adopted Directive on work-life balance for parents and carers.[56] However, existing provisions have been criticised for the ambivalence of the phrase 'other adverse treatment by the employer', which may be described as too hands-off regarding the employer's responsibility and insufficiently comprehensive as compared to, for instance, the parallel Icelandic provision (see below).[57]

6 The Icelandic legal perspective on victimisation

The prohibition against victimisation was first introduced by gender equality legislation through Act No. 96/2000, which has since been replaced by Act No. 10/2008 ('GEA' hereinafter). The new Act gives

51 CJEU *Tine Vandenbon and Others v WTG Retail BVBA*, 20 June 2019, case C404/18.
52 CJEU *Tine Vandenbon and Others v WTG Retail BVBA*, 20 June 2019, case C404/18, at Paragraphs 10-22.
53 CJEU *Tine Vandenbon and Others v WTG Retail BVBA*, 20 June 2019, case C 404/18, at Paragraphs 10-22.
54 CJEU *Tine Vandenbon and Others v WTG Retail BVBA*, 20 June 2019, case C404/18, at Paragraph 36.
55 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16-22.
56 See European Parliament legislative resolution of 4 April 2019 on the proposal for a directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (COM(2017)0253 – C8-0137/2017 – 2017/0085(COD)).
57 However, other directives on gender equality also address 'victimisation' in other areas. See e.g. Directive 2004/113 on the access to goods and services (Article 10) and the new Directive on work-life balance for parents and carers (Article 14).

effect to Directive 2006/54/EC on equal treatment in employment and occupation as well as Directive 2004/113/EC on equal treatment in access to and supply of goods and services.[58]

Protection against victimisation is found in Article 27 of the GEA, which prohibits dismissal and injustice in connection with a complaint or demand for redress, stating:

> 'Employers may not dismiss employees for demanding redress on the basis of this Act. Furthermore, employers shall ensure that employees are not subjected to injustice in their work, e.g. as regards job security, terms of employment or performance assessment, on the grounds of having submitted a complaint or provided information regarding gender-based or sexual harassment or sexual discrimination. If a likelihood is adduced that this provision has been violated, the employer shall demonstrate that the dismissal, or alleged injustice, is not based on the employee's demand for redress, complaint or provision of information regarding gender-based or sexual harassment or sexual discrimination. This shall not apply if the dismissal takes place more than one year after the employee made his/her demand for redress under this Act.'

The prior gender equality law – Article 25 of Act No. 96/200 – prohibited only dismissal of an employee in connection with a complaint or demand for address.[59]

Article 27 of the GEA also awards broader protection for a third party that provides information in a case on sexual harassment or gender discrimination, although the *Hakelbracht* case has now clarified that the protection against victimisation afforded by the Recast Directive also extends to third parties, i.e. an employee who submits evidence on behalf of another employee complaining of discrimination, and thus in this regard aligns with the GEA.

However, the GEA still exceeds the protection of the Recast Directive by imposing on employers the positive obligation to 'ensure' a safe working environment for individuals who may complain. It is a more comprehensive protection than the hands-off approach in the Recast Directive, which only prohibits employers from treating employees (who complained) unfairly. However, the rules on the reversal of the burden of proof in Article 19 of the Recast Directive place responsibility on the employer to prove no misconduct occurred. Finally, Article 30 of the GEA prohibits any person from waiving the rights set forth in law.

The Icelandic legal framework formally guarantees that everyone is entitled to a working environment characterised by mutual respect in communication and protection against gender-based, sexual harassment, and other forms of violence in the workplace. The GEA rests on fundamental laws that afford strong protection to gender equality. For instance, Article 65 of the Constitution provides in its first paragraph that everyone shall be equal before the law and enjoy basic human rights irrespective of gender, religion, opinions, national origin, race, colour, property, birth or other status. The second paragraph reiterates that men and women shall enjoy equal rights in all respects.

58 See Article 34 of the GEA, Act No. 10/2008. This Act gives effect to 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, to which reference is made in Annex XVIII of the Agreement on the European Economic Area as amended by the Decision of the EEA Joint Committee No. 33/2008. In addition, this Act gives effect to Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, to which reference is made in Annex XVIII of the Agreement on the European Economic Area as amended by the Decision of the EEA Joint Committee No. 84/2011.] 1) [This Act gives effect to Directive 2004/113/EC of the Council, on implementing the principle of equal treatment between women and men regarding access to and supply of goods and services, referred to in Annex XVIII to the EEA Agreement as amended by decision of the EEA Joint Committee No. 147/2009.] 2) – Act No. 62/2014, Article 6. 2) Act No. 79/2015, Article 2.

59 Alþingi homepage, available at: https://www.althingi.is/altext/125/s/0373.html.

The objective of the GEA is to create and maintain equal rights and opportunities for women and men, and in so doing equalise the status of both genders in all spheres of society.[60] Apart from the explicit protection from victimisation in Article 27, Article 24 establishes a general prohibition of discrimination, stating:

> 'All forms of discrimination, direct or indirect, on grounds of gender, are prohibited. Giving instructions to discriminate on grounds of gender also constitutes discrimination under this Act. Furthermore, gender-based harassment or sexual harassment constitute discrimination under this Act, as does all unfavourable treatment of an individual that may be attributed to the fact that the individual has rejected gender-based harassment or sexual harassment, or has submitted to it
>
> However, affirmative action shall not be regarded as being contrary to this Act. The same shall apply if there are valid reasons to support employing an individual of a particular gender in view of objective factors relating to the job. Special consideration to women in connection with pregnancy and childbirth shall not be regarded as discrimination.'

The above provision clarifies the prohibition of victimisation in the first paragraph by providing that 'all unfavourable treatment' suffered as a result of an individual rejecting sex-based harassment constitutes discrimination. Subsequently, Paragraph 2 provides scope for affirmative action to further protect against discrimination. This provision thus constitutes a general preventative measure against victimisation, consistent with the Recast Directive that requires Member States to establish appropriate procedures for the effective implementation of equal treatment. Article 22 of the GEA provides that employers shall take special measures to protect employees from any kind of sex-based harassment, which is relevant to victimisation insofar as the punishment for complaining (often) takes the form of harassment, as discussed above.

7 Case law on victimisation

Very little case law exists on victimisation; the CJEU has examined the issue only a few times, and just one case has come before the Supreme Court in Iceland, where the facts revealed victimisation in the wake of sexual harassment, and the employer was acquitted.[61]

7.1 CJEU: Effective judicial protection for victims

The CJEU case law on victimisation is scarce. Until *Hakelbracht*, the problem had only been brought to the attention of the Court in a few instances. The root of the Court's approach to victimisation in the Recast Directive (as well as in the Race Directive 2000/43/EC and the Framework Directive 2000/78/EC)[62] can be traced to the case of *Coote v Granada*.[63]

In *Coote*, the employer had refused to provide a reference after the claimant, Ms. Coote, had left the company. She had previously pursued a claim for sex discrimination, alleging that her employer's dismissal of her had been motivated by her pregnancy; the claim was later settled. Ms. Coote argued that after her dismissal her former employer had victimised her by refusing to provide any reference regarding her employment that would assist her in obtaining an alternative job.

60 The Icelandic Ministry of Welfare is responsible for enforcing the Act. The Centre for Gender Equality is an independent institution operating under the auspices of the Ministry, which supervises the implementation of the Act, provides advice, public education, and information concerning gender equality.
61 Supreme Court judgment H 267/2011; See also Gender Complaints Committee case no. 10/2002, *A v D.*, 13 June 2003.
62 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16-22, Article 11.
63 CJEU *Coote v Granada Hospitality Ltd*, 22 September 1998, case C-185/97.

After the initial proceedings were over, Ms. Coote again brought an action against him for victimisation. As there was no explicit provision protecting against victimisation in the (then prevailing) gender equality Directive 76/207/EEC, she based her case on Article 6, which provided that Member States should 'introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment (...) to pursue their claims by judicial process (...)'.

The CJEU held that the state has a duty to protect workers against retaliation after employment has been terminated by employers against whom a claim for sex discrimination had been successful. Victimisation included the failure to provide proper reference to a former employee, according to the CJEU and referring to Directive 76/207/EEC, and it was irrelevant whether the reference was refused during the period of employment or after its termination, or whether the employer decided on the refusal before or after the termination of the period of employment. The CJEU pointed to Article 6 of Directive 76/207/EC on effective judicial control providing that if there were no legal remedies against victimisation, the fear of an employer's retaliation might deter workers who considered themselves victims of discrimination from pursuing their claims, and would consequently seriously jeopardise the implementation of the aims pursued by the Directive.[64]

In *Helen Marshall v Southampton* (1993), the CJEU in its judgment built upon Article 6 of Directive 76/207/EC to provide access to a full remedy. Following the judgment in *Marshall* (No. 1) from 1986[65] – in which the CJEU held that Marshall could rely on Directive 76/207 against her public employer to challenge the termination of her employment at age 62, while men could continue to work until age 65 – the case was remitted to the national court to assess compensation. The amount the Industrial Tribunal assessed was much higher than the maximum amount permitted under the UK Sex Discrimination Act of 1975. The CJEU held that the fixing of an upper limit, as in this case, could not by definition constitute proper implementation of Article 6 of the Directive. By fixing a limit, the amount of compensation is restricted *a priori* to a level that is not necessarily consistent with the requirement to ensure real equality of opportunity through adequate reparation for the loss and damage sustained as a result of a discriminatory dismissal. Compensation may not be limited *a priori*, and a person who has been injured as a result of discriminatory dismissal must be able to rely upon Article 6 of the Directive against an authority of the State acting in its capacity as an employer, to set aside a national provision that imposes limits on the amount of compensation recoverable by way of reparation.[66] The payment of compensation must be effective, proportionate and dissuasive to the damage suffered, as requiredy Article 18 of the Recast Directive. The fixing of a prior upper limit cannot restrict such compensation, as Article 18 of the Recast Directive clarifies.

Finally, in the case of *Francovich*,[67] the CJEU established that the EU could be liable to pay compensation to individuals who suffered loss due to a Member State's failure to transpose an EU directive into national law. The CJEU in this judgment laid the ground for further development of the principle of effective judicial protection to include a new cause of action.[68]

64 CJEU *Coote v Granada Hospitality Ltd*, 22 September 1998, case C-185/97.

65 CJEU *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, 26 February 1986, case C-152/84.

66 Craig, P. and de Burca, G. (1997), *EC Law: Text, Cases & Materials*, Oxford University Press.

67 Case C-6/90 *Francovich Italian Republic* [1991] E.C.R. 1-05357.

68 Connolly, M. (2011), 'The Chilling Effect and the Most Ancient Form of Vengeance: Discrimination and Victimising Third Parties', Internationnal Journal of Discrimination and Law, vol. 11, 123. See also Drake, S. (2006), 'Scope of Courage and the principle of 'individual liability for damages: further development of the principle of effective judicial protection by the Court of Justice', European Law Review, vol. 31, issue 6, 841-864; Szyszczak, E. (1992), 'European Community Law: New Remedies, New Directions' vol. 55, issue 5, Modern Law Review, vol. 84, 690-697; Fitzpatrick, B. and Szyszczak, E. 'Remedies and Effective Judicial Protection in Community Law' (1994), Modern Law Review, vol. 57, issue 3, 434-441. When the European Court of Justice gave judgment in *Francovich* it was hailed as a triumph, not necessarily for its erudite reasoning, but because it allowed an individual to claim damages from a Member State for its failure to comply with Community law obligations, thus providing a method of redress where none previously existed. Although the scope of the remedy was unclear and appeared superficially limited to the facts of the case, it represents the final element necessary to establish a coherent doctrine for the effective protection of an individual's Community law rights.

In addition to the principle of effective judicial protection, the recent *Hakelbracht* case clarified the scope of Article 24 of the Recast Directive,[69] providing that the protection against victimisation broadly extends to third party employees who support a victim of discrimination in the workplace.

7.2 Icelandic Supreme Court case on victimisation

The Icelandic Supreme Court has only addressed the issue once, where in 2012 it overturned the district court's verdict that had found in favour of the claimant in a case of sexual harassment and subsequent victimisation.[70]

The claimant, a young woman, A, initiated legal proceedings in May 2010 against the respondent company, B. A subsequently claimed unpaid wages and non-pecuniary damages for victimisation and sexual harassment by her boss, E, an employee of the respondent company. The claimant argued that the reaction of the respondent against her allegations of sexual harassment were not in accordance with the gravity of her boss's conduct, and that the terms of her employment were changed so that she could no longer perform her job.

The complaint of sexual harassment complaint preceded the alleged victimisation and concerned an overnight working trip to a summer house in the spring of 2010, which was attended by A's boss and a colleague, and where the aim was to clarify certain tasks and introduce new responsibilities for A. During the trip, A felt sexually harassed when repeatedly asked to join her naked boss and co-worker in a hot tub. Later during the night her boss tried to enter her room, which she could not lock, so she had placed a suitcase in front of her door to hinder access. After A complained to the respondent company, her boss was reprimanded and an agreement was made to change her employment terms so that the alleged harasser would no longer be her boss. The respondent company paid for A's visits in the following months to see a psychologist and a medical doctor. The situation at the workplace did not, however, improve, and A claimed that her former boss was negatively interfering with her work. Despite this, the respondent company declared the case closed five months after the incident. The respondent referred to two lawyers' statements (one of them the company's lawyer), proclaiming that no sexual harassment had occurred during the overnight trip to the summerhouse. The initial reaction of the company to reprimand A's boss and draw up an agreement to protect the alleged victim from further communication with her 'harasser' in the workplace was apparently not fully respected.

After ongoing communications between A's lawyer and the respondent company, A left the workplace in the autumn of 2010 with a physician's certificate that she was not capable of continuing. The note of A's psychologist during court proceedings confirmed that A was a victim of sexual harassment, which can have longstanding consequences 'especially if the reaction by the employer is such as was the case here'. Her physician's sick note confirmed A's illness due to the previous conduct and her victimisation, and the district court's judgment awarded A pecuniary damage for victimisation on the basis of the Tort Damages Act.[71]

The respondent company appealed to the Supreme Court, which overturned the judgment and held that the behaviour of A's boss did not fit the definition of sexual harassment in the GEA, 'as more would have been needed'. The GEA defines sexual harassment in Article 2 as '[a]ny type of sexual behaviour which is unwelcome to the person affected by it and is intended to impair the self-respect of the person concerned, or which has this effect, particularly when the behaviour results in a threatening, hostile, degrading, humiliating or insulting situation'.

69 CJEU *Tine Vandenbon and Others v WTG Retail BVBA*, 20 June 2019, case C404/18.
70 Icelandic Supreme Court case no. H 267/2011, judgment 16 February 2012.
71 Iceland, Tort Damages Act No. 50/1993, Article 26.

The Supreme Court held that it had not been proven that A had been victimised, i.e. unjustly treated with regard to her job security and terms as defined in Article 27 (2) of the GEA and that her argument of receiving wages after she left the appellant company was not convincing, hence the respondent company was acquitted of her claims.[72]

7.3 Comparative analytical assessment

The competences of Icelandic courts and the Court of Justice of the EU differ significantly. The former apply Icelandic law to individual situations, whereas the CJEU checks the transposition of EU law into national legislation. The CJEU adjudicates on the proceedings against Member States or institutions that have not fulfilled their obligations under EU law. In 1991, in the case of *Francovich*, the Court developed a fundamental concept: the liability of a Member State towards individuals for damage it caused to them due to its failure to transpose a directive into national law, or to do so in good time. Iceland, as an EEA country, is within the jurisdiction of the European Free Trade Association Court which has an obligation to pay due account to the principles established by the relevant rulings of the CJEU. Given the fact that the CJEU has shown itself to be a very important actor — in some instances a driving force — in various judgments relating to discrimination in the workplace, it is interesting to compare the approaches of the CJEU and the Icelandic Supreme Court to victimisation. This comparison is detailed below.

The principle of effective judicial protection in the wake of victimisation has certainly been strengthened with the above CJEU case law. The judgment in *Coote* confirmed the prohibition of victimisation and that employees claiming sex discrimination are protected against victimisation whether during employment or post-termination. A former employee who is given a bad reference for having brought a claim could argue for legal protection as a means of effective enforcement of EU law. The principle developed in *Coote* regarding post employment reference can also be taken to mean that the employer has a duty to protect the employee in the wake of dismissal and ensure that the employee is not stigmatised for having made a lawful complaint. The Marshall case provided access to full remedy and finally the Francovich judgment endorsed that that a Member State could be liable to an individual for failing to implement a directive, thus denying the individual an effective remedy under EC law.

In the only case of victimisation that has come before the Supreme Court in Iceland, the victim was let down. The Supreme Court overturned a district court judgment and acquitted the respondent company (her employer), and the victim left her job without recognition of the victimisation she allegedly suffered on top of the sexual harassment that triggered her case and which the Supreme Court also refused to recognise. The victim, A, had argued that the reaction of her employer to her allegations of sexual harassment and victimisation had not been in accordance with the gravity of her boss's conduct. The Court unfortunately did not share this assessment, despite A's psychologist providing a note, presented during court proceedings, confirming that A was a victim of sexual harassment, which can have longstanding consequences 'especially if the reaction by the employer is such as was the case here'. Furthermore, a physician's sick note also confirmed that the previous conduct of A's boss and of her victimisation was

72 In the wake of the above judgment, the individual accused of sexual harassment was dismissed by the company that was aquitted of victimising the woman after she complained of sexual harassment. The company claimed that the media coverage after the initial district court judgment confirming sexual harassment and victimisation of the woman in 2011 was one of the reasons leading to dismissing the employee, her former boss. He, the boss, initiated legal proceedings against his former employer company claiming that his dismissal was illegitimate. The district court did not confirm his claim, maintaining that the employer was entitled to some discretion not least with respect to the inappropriate conduct leading to the original court case and the employee's subsequent dismissal. The company was acquitted, and the employee appealed to the Supreme Court. In its judgment in 2014, the Supreme Court (case no. H 326/2014) overturned the lower court's judgment, awarding the appellate (the boss) non-pecuniary damages for the way his dismissal had arisen, referring to an agreement made after the woman's initial sexual harassment claim against him that the Supreme Court, both in this case and the one above, held he had kept. The woman had always maintained that he had continued harassing her after the agreement was made in April 2010. It does appear that a man who claims to have been unfairly treated enjoys more sympathy in court than a woman. Ultimately, it was the boss who sat fully unclothed in front of his employee and who attempted to enter, unvited, the room of another of his employees who received damages, while the woman whose room he tried to enter felt victimised without her previous job and received no damages.

responsible for her illness. The judgment was rendered shortly after the adoption of a new gender equality act with strong and elaborate prohibition against both sexual harassment and victimisation. However, despite the new law imposing on employers the duty to ensure justice in the wake of complaints, A was left without effective judicial protection. The Court did not treat victimisation as seriously as it should have. Finally, this 2012 judgment deters potential claimants from commencing legal proceedings, as the cost will likely outweigh any benefit. Had the Icelandic Supreme Court considered the serious aspect of victimisation, it might have stretched the protection to new heights.

8 Closing remarks: the need for broader understanding of victimisation through harassment

The principle of effective judicial protection in the wake of victimisation has undoubtedly been strengthened through the CJEU case law discussed above, even to the extent to entrench the duty of the employer to protect an employee in the wake of dismissal. The requirement to provide post-employment reference (*Coote*) may *mutatis mutandis* be understood as entailing an obligation of the employer to protect the employee from the stigma of dismissal. The Icelandic Supreme Court case did not, however, live up to the standards of effective judicial protection when it overturned a district court's judgment that awarded the claimant damages for victimisation. By overturning the decision, the Supreme Court has missed an opportunity to ensure that future victims are not subjected to injustice in the wake of their complaints.

The Icelandic victimisation provision in the GEA goes further than the EU Recast Directive by imposing on the employer the positive obligation to 'ensure' a safe working environment, where employees are not 'subjected to injustice in their work as regards job security, terms of employment or performance assessment on the grounds of having submitted complaints'. It is a more comprehensive protection than the hands-off approach of the Recast Directive, which only requires that measures must be adopted as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the enterprise. The broad interpretation of Article 24 of the Recast Directive by the CJEU in the recent *Hakelbracht* case is, however, a positive development, as it clarifies that employees who support victims of discrimination in the workplace are protected from victimisation, irrespective of their status as formal witnesses.[73] This case aligns the protection afforded by EU law with that which is offered by the Icelandic GEA.

Yet, despite the stronger wording in the Icelandic victimisation provision, the scope of victimisation remains unclear with almost negligible case law to further define it. The judgment of the Icelandic Supreme Court in 2012 discussed above will deter, and probably aleady has deterred, alleged victims from embarking on an uncertain journey – although dismissal may be seen as a clear-cut retaliation by the employer, victimisation through harassment remains unexplored territory. Victimisation is undeniably a tricky phenomenon, in particular when it takes the form of harassment or bullying with the impact of silencing the victim instead of compelling her/him to take legal action. Had the Icelandic Supreme Court considered the serious aspect of victimisation it could have stretched the protection into new dimensions, never to go back to the old ones.

The hithereto lack of complaints and case law both before the CJEU and in Iceland is an indicator that severity of victimisation is not fully recognised. There is a significant gap between the formal protection of the Icelandic gender equality legislation and the case law – victimisation through harassment is as much a part of the Icelandic workplace fabric as anywhere else. The silence that surrounds this phenomenon the phenomena may even indicate that the situation is worse than elsewhere – not least in light of the proximity in professional circles. This is a problem that grows in the pall of fear and secrecy. Victimisation through harassment or bullying is a pervasive problem, even a workplace epidemic, that deserves more attention. The stigma of being labelled a troublemaker is a serious deterrent for an individual seeking

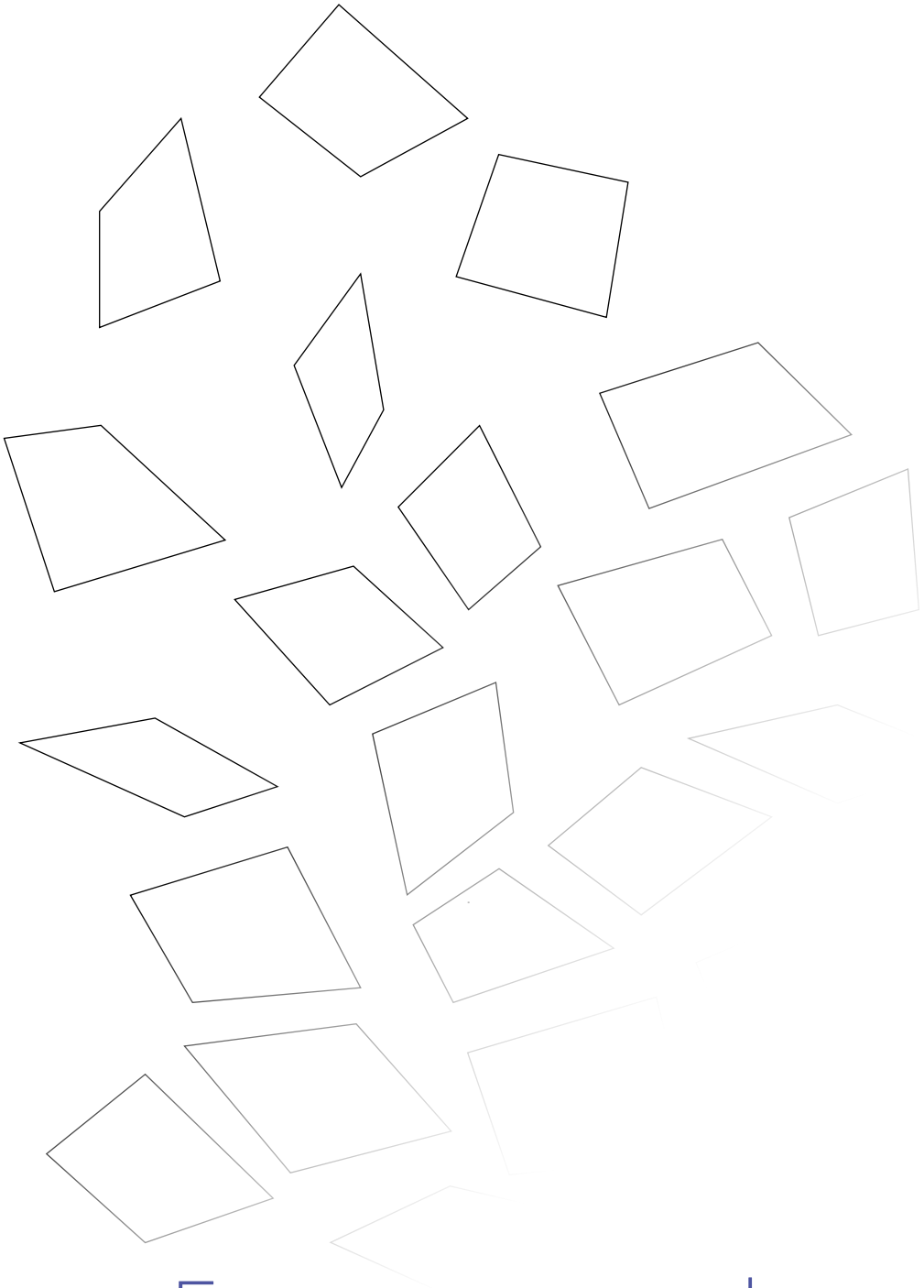
73 CJEU *Tine Vandenbon and Others v WTG Retail BVBA*, 20 June 2019, case C404/18.

redress for wrongs that occurred in the workplace. Any employee will contemplate whether to complain to correct a bad situation or otherwise risk their career by sending out a signal of being undervalued and easily dispensable. The reality of this chilling effect is why victimisation remains such an invisible, oppressive injustice. In a competitive job market, the threat of victimisation may become the strongest tool for employers who do not care about principles of gender equality, or who are perhaps unconcerned with the future of the respective organisation. The threat of victimisation is also a potential tool for 'bullying' colleagues who may, in some cases, be acting upon a company-wide decision to expel an employee, despite their (more than) adequate job performance. There are silenced victims everywhere trying to rebuild their shattered lives, whilst the perpetrators continue building their careers.

Given the serious consequences of dismissal or harmed reputation due to victimisation, the possibility of restoration to the original status in cases where courts find in favour of claimants ought to be contemplated.[74] Damages only go so far, and if a court recognises that a dismissal was retaliatory and thus illegitimate, it ought to be able to impose reinstatement of the employee who suffered such retaliation.

The grey area of 'other adverse treatment by the employer' provided for in the EU Recast Directive still remains problematic, and it is questioned whether the above term is sufficiently comprehensive. Victimisation is probably one of the most difficult manifestations of gender discrimination to prove, even though the burden of proof that the alleged injustice is not based on the employee's demand for redress lies with the alleged discriminator. Employees who have a compelling case against their employer must not be priced out of justice; there must be a deterrent for employers who tend to victimise their employees in the wake of complaints or who do not respond in accordance with the gravity of a given situation. It is the employer's responsibility to prevent a toxic workplace culture, where two root causes are the old culture of silence and employees' fear of victimisation. Shared acceptance of what constitutes victimisation through harassment and consequently a shared condemnation when it occurs is the first step to understand and tackle this problem.

74 The Supreme Court in Iceland in case no. H 374/1999 held that an unlawful dismissal (public limited company) amounted to defamation for the individual dismissed. Article 26 of the Icelandic Tort Damages Act No. 50/1993 provides for non-pecuniary damages for defamation.



European case law update

This section provides an overview of the main latest developments in gender equality and non-discrimination cases pending or decided by the Court of Justice of the EU and the European Court of Human Rights, from 1 July to 31 December 2018.

Court of Justice of the European Union

REFERENCES FOR PRELIMINARY RULINGS – ADVOCATE GENERAL OPINIONS

Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi*, Opinion of Advocate General Bobek delivered on 25 July 2018, ECLI:EU:C:2018:614

Religion or belief

The request for a preliminary ruling was submitted by the Supreme Court of Austria and concerned the interpretation of the Employment Equality Directive regarding religious holidays in employment. The case before the referring court concerned a provision of Austrian law which stipulates that Good Friday is a (paid) public holiday for members of four specific churches only and that only the members of those churches are entitled to double pay if they do work on that day. The claimant does not belong to any of the four churches covered by this provision and sued his employer when he did not receive double pay for working on Good Friday in 2015. The referring court enquired whether the relevant provision of national law amounted to discrimination on the ground of religion or belief, whether the measure could be justified with regard to the protection of rights and freedoms of others or whether it could amount to 'positive action', but also invited the Court to be quite specific regarding the direct consequences of any incompatibility with the Directive. In this regard, the Advocate General (AG) underlined the importance of determining exactly which provision of EU law imposes exactly which consequence, considering that the referring court had invoked not only the Directive but also Article 21 of the Charter of Fundamental Rights.

Having rejected the arguments invoked by the Italian and Polish governments to the effect that the Court would not be competent to reply to the questions referred or that the subject matter would fall outside the EU's jurisdiction, AG Bobek went on to examine the substance of the questions referred.

The AG noted firstly that it was fairly obvious that the national provision at hand caused less favourable treatment on the ground of religion, while the issue of finding the right comparator was more complex and required further analysis. In this regard, he noted that all parties proposed to compare the same groups, namely members of the four churches, on the one hand, and the Applicant '*as someone who is not a member of any of the four churches*' on the other. Noting, however, that the alleged discrimination in this case originated not from the employer but from legislative provisions and that the Court is invited to assess the compatibility of those provisions with EU law, the AG concluded that the correct comparison is between groups defined in legislation rather than specific individuals.

Noting that the benefit concerned in the present case must be 'the indemnity' (i.e. the double pay received by members of the four churches if they do work on Good Friday), the AG concluded that the correct comparator must be employees who work on Good Friday and 'who are being distinguished from other employees on the basis of religion in relation to remuneration for that day'. In this regard, the AG concluded that all employees working on Good Friday, irrespective of their religious beliefs, are in a comparable – albeit not identical – situation with regard to the indemnity payment. The logical consequence of this conclusion is that the claimant before the referring court had indeed been treated less favourably than employees who received double pay when working on Good Friday. The AG thus invited the Court to respond to the first question of the referring court that the national provision at hand is precluded by Article 21 of the Charter read in conjunction with the Directive.

The second question referred sought to determine whether the discriminatory measure of national law can be justified either under Article 52(1) of the Charter or under Article 2(5) of the Directive. Despite

some formal differences, both provisions refer to the 'protection of the rights and freedoms of others', both must be interpreted restrictively, and both are subject to a test of proportionality. The AG concluded that neither of the two provisions could be applied to justify the national measure at hand, notably due to its selective nature (granting the indemnity to only the members of four specific churches when they work on Good Friday but not providing the same benefit to other religious groups whose specific days of worship are not covered by the national calendar of public holidays). The selective nature of the measure implied that it would not appear to fulfil the *appropriateness* criterion with regard to the protection of the rights and freedoms of 'others'. Furthermore, the AG noted in this regard that, 'It is difficult to see how being paid double one's wages for *not worshipping* on Good Friday is appropriate for achieving the aim of protecting the (even selectively awarded) freedom of religion and worship'. For the same reasons, the AG concluded that the national provision at hand cannot be found to constitute a measure of 'positive action', thus responding to the referring court's third question.

Finally, examining possibly the most complex issue raised by the referring court, the AG went on to discuss the appropriate remedies for the discriminatory situation, in particular between private parties. Noting in this regard that an interpretation of national law that would conform to the Directive is not possible, the AG cited the Court's judgment in *Egenberger* to state that individuals may invoke Article 21(1) of the Charter in combination with the Directive, in the context of a dispute with (an)other individual(s), to have the court 'set aside' or 'disapply' a conflicting provision of national law. However, instead of recognising the horizontal direct effect of the Charter provision (with all its potential consequences in horizontal relationships), the AG went on to recommend that the Court focus on the issue of remedies. In this regard, the AG invited the Court to provide guidance as to what is implied by the right to an effective remedy in a case such as this one. The direct question of the referring court in this regard referred to the possible solutions of 'levelling up' and 'levelling down', i.e. making Good Friday a paid public holiday for all or for no-one. However, the AG noted in this regard that neither solution would be satisfactory in this case, notably when considering the source of the discrimination (legislation) and thus concluded that the finding of the Court should instead be based on its case law related to effective remedies.

Regarding the final question of who should provide the remedy to ensure its effectiveness, the AG noted two options: the employer or the State. Considering in this regard that the employer was neither the source of the discrimination, nor benefited from it, and was not at fault in any way by simply applying binding national legislation, the AG concluded that EU law does not *require* that there be a remedy against the employer in a case such as the one at hand. Instead, effective judicial protection should, in the opinion of the AG, take the form of an action for damages against the State. This conclusion is further supported by the previous interim conclusion that the framework of comparability is one of groups, not individuals. Indeed, if an individual victim of the discriminatory provision were to take action against their employer without having any colleague who had benefited from favourable treatment (because of being a member of one of the four churches), how could that employer possibly be found to have discriminated?

Case C-378/17, *Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission*, Opinion of Advocate General Wahl delivered on 11 September 2018, ECLI:EU:C:2018:698

All grounds

The reference for a preliminary ruling was submitted by the Supreme Court of Ireland and sought to determine whether a national equality body established by law in order to ensure enforcement of EU non-discrimination law must be able to disapply a rule of national law that is contrary to EU law. The initial case before the referring court had been brought before the (then) Equality Tribunal (replaced in 2015 by the Workplace Relations Commission) by three applicants who had been rejected from the recruitment procedure for new police officers as they were above the maximum age for recruitment laid down by national law.

While the Minister for Justice and Equality (respondent) had argued that only courts established under the Constitution of Ireland had jurisdiction to disapply – if necessary – a provision of national law, the Equality Tribunal had decided that it would proceed to consider the complaints, examining the issue of jurisdiction together with the complaints. The Minister then brought an action before the High Court which issued an order prohibiting the Equality Tribunal from ruling on the relevant complaints, stating that the power to adopt legally binding decisions that national law is contrary to EU law was expressly reserved to the High Court under the Constitution. The Equality Tribunal appealed against that order to the Supreme Court which referred the case for a preliminary ruling to the Court of Justice of the EU.

The referring court noted that under national law the jurisdiction to hear cases relating to equality in employment is shared between the Equality Tribunal (now the Workplace Relations Commission) on the one hand and the High Court – in the limited cases where it may be required to disapply provisions of national law that conflict with EU law – on the other. The referring court further held that such a division of jurisdiction appears to comply with the principles of equivalence and effectiveness. The Workplace Relations Commission argued, however, that it must have all the powers necessary to fulfil its general obligation which is to ensure compliance with national and EU law relating to equality in employment.

In his introductory remarks, before embarking on his analysis of the case and the question referred, Advocate General Wahl framed the issue at stake as being related to the 'procedural autonomy' of Member States and asked to what extent the principle of primacy of EU law *circumscribes* the possibility for Member States to apply their constitutional rules concerning the attribution of jurisdiction in a particular field. His conclusion is therefore perhaps not entirely surprising.[1] Indeed, the Opinion analysed the interplay between the principle of primacy of EU law and the procedural autonomy of Member States, citing the *Simmenthal* judgment to recall that national courts have an obligation to disapply national law conflicting with EU law. AG Wahl further referred to more recent judgments in the cases of *Costanzo* and *CIF* respectively to note that the obligation to disapply conflicting national law not only applies to courts but also to administrative authorities on the national level. However, the AG concluded, 'It must be emphasised that, in accordance with the dictum of the Court in *Simmenthal*, such an obligation exists only where the organ in question is acting *within the limits of the jurisdiction conferred upon it* (as a matter of national law)' (para. 54).

At this stage, the AG rejected the approach taken, notably, by the European Commission and the Workplace Relations Commission itself, amounting to the conclusion that the Workplace Relations Commission must be able to disapply the provisions of national law which it deems contrary to the Employment Equality Directive. In fact, AG Wahl concluded that the rule of jurisdiction at issue in the main proceedings does not call into question the primacy of EU law, nor, by extension, the full effectiveness of EU law, but rather that the case was about, 'whether EU law mandates which judicial body ought to have jurisdiction to deal with a particular category of case' (paras. 62-63). The AG then noted that in his view the case law of the Court did not seek to interfere with the attribution of jurisdiction over cases between courts or administrative bodies. Indeed, he held that Member States enjoy procedural autonomy in this regard as long as the principles of equivalence and effectiveness are complied with – as the referring court found them to be in the present case. Drawing an interim conclusion at this stage, the AG noted that bodies such as the Workplace Relations Commission may not be best suited to adjudicate all types of disputes, including in particular, 'those raising important questions of principle with broader legal implications' (para. 88).

The AG then examined relatively briefly whether the principles of equivalence and effectiveness were complied with in this case, coming to the same conclusion as the referring court in this regard; namely that the division of jurisdiction at stake did not infringe the relevant principles of EU law.

1 However, in its judgment dated 4 December 2018 the Court of Justice did not follow the same line of reasoning but approached the issue from a different angle. For a summary of the judgment, see below p. 70.

Case C-457/17, *Heiko Jonny Maniero v Studienstiftung des deutschen Volkes eV*, Opinion of Advocate General Sharpston delivered on 11 September 2018, ECLI:EU:C:2018:697

Racial or ethnic origin

The request for a preliminary ruling was submitted by the German Federal Court of Justice and concerned the interpretation of the Racial Equality Directive. The complaint before the referring court was brought by an Italian national, born and residing in Germany, who had obtained a Bachelor of Laws in Armenia and then wished to apply for a scholarship with the German Academic Scholarship Foundation. While the scholarship was reserved for students having passed the First State Law Examination in Germany, the claimant argued that his degree obtained in Armenia was equivalent to that examination and that the refusal of an application on this basis could amount to discrimination on the ground of ethnic or social origin. The claimant's action and subsequent appeal were both dismissed, following which he introduced an appeal on a point of law before the referring court.

The questions referred concerned whether the award of scholarships intended to promote projects for research and studies abroad by a registered association falls within the scope of Article 3(1)(g) of Directive 2000/43 as being related to 'education'.[2]

Having recalled that 'education', for the purposes of the Directive, is an autonomous concept of EU law which must be interpreted in a uniform manner across the EU, the AG went on to note that the usual meaning of the term refers to an intellectual process and that it is not apparent that it would necessarily cover the award of scholarships. She thus went on to examine the context and objective of the relevant provisions, recalling that, 'In the light of the objective of Directive 2000/43 and the nature of the rights which it seeks to safeguard, its scope cannot be defined restrictively' (para. 28) and that this applies to the terms defining its material scope.

While the award of scholarships does not form part of the 'intellectual process' itself, it does concern *access to* education which, in the opinion of the AG, is an essential component of education itself, in particular in the context of a legal instrument combating discrimination. Indeed, to separate the two would, 'denude the directive of its purpose to combat discrimination related to education' (para. 32). The AG further held – by looking briefly beyond the specific scope of non-discrimination law and examining other areas of EU law – that financing is an essential aspect of access to education. Finally, the AG rejected an argument invoked by the respondent before the referring court as well as the German government concerning the legislative history of the Directive and, more specifically, the removal from the final text of an explanation that the scope of education was to include, 'grants and scholarships, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity'. In this regard, the AG underlined that the deletion simplifies the wording of the provision without changing its scope and that it may well have been designed to ensure a broad definition of 'education'.

AG Sharpston thus concluded that, 'The term 'education' in the context of Directive 2000/43 must be interpreted broadly and that it includes aspects that are related to access to education, such as financing by means of scholarships', while specifying that there must be a genuine link between the financing and education, which it is for the national court to verify.

2 In the event that the Court would respond in the affirmative to this question, the referring court had submitted additional questions. However, upon the explicit request of the Court, the Advocate General limited her Opinion to the first question referred. For a summary of the judgment of the Court, see below, p. 69.

REFERENCES FOR PRELIMINARY RULINGS – JUDGMENTS

Case C-68/17, *IR v JQ*, Grand Chamber judgment of 11 September 2018, ECLI:EU:C:2018:696

Religion or belief

The request for a preliminary ruling concerned the interpretation of Article 4(2) of the Employment Equality Directive which provides an exception to the prohibition of discrimination on the ground of religion or belief for employers with a religious ethos. The respondent before the referring court is a German private limited company owned by the Catholic Church with the principal mission of operating hospitals. The claimant is a medical doctor of the Roman Catholic faith who was employed as head of the department of internal medicine. He was divorced from his previous wife and was subsequently dismissed when he remarried although his previous marriage had not been annulled. The claimant's employment contract was regulated by the basic regulations on employment relationships in the service of the Church which make reference to canon law in relation to employees of the Roman Catholic faith. However, the relevant regulations stipulate that an individual occupying the same position as the claimant who remarried under the same circumstances as the claimant would not have been dismissed if he or she had not been of the Roman Catholic faith, as provisions of canon law would not be applicable to them. The claimant thus held that he had been discriminated against on the ground of his religious beliefs. The employer, on the other hand, argued that by entering into a marriage that was invalid under canon law, the claimant had clearly infringed his duty of 'good faith and loyalty' to the employer's ethos, as foreseen by his employment contract.

The referring court considered that the outcome of the dispute would depend on the interpretation of Paragraph 9(2) of the German General Law on Equal Treatment which stipulates notably that nothing prevents religious communities[3] from requiring their employees to, 'act in good faith and with loyalty in accordance with [the] self-perception [of the religious community]'. This provision must be interpreted in accordance with EU law and more specifically with Article 4(2) of the Directive. The principal question referred concerned a difference of treatment directly based on religion between those employees who share the religious ethos of the employer and those who do not, when it comes to their duty to act in good faith and with loyalty to that ethos.

For the purpose of defining the scope *ratione personae* of Article 4(2), the Court first recalled that the specific exception it foresees only applies to churches and other public or private organisations, 'the ethos of which is based on religion or belief' and that it is limited to the occupational activities of individuals working for such organisations. Referring to its previous judgment in the case of *Egenberger*,[4] the Court then underlined the importance of effective judicial review being available to ascertain that the criteria set out in Article 4(2) are satisfied in a particular situation where the duty to act in good faith and with loyalty to an employer with a religious ethos is invoked. The Court then noted that a difference of treatment in respect of the said duty which is based solely on the faith of the employees, must comply, inter alia, with the criteria set out in the first subparagraph of Article 4(2) of the Directive. As such, the Court held that:

'A church or other public or private organisation the ethos of which is based on religion or belief can treat its employees in managerial positions differently, as regards the requirement to act in good faith and with loyalty to that ethos, depending on their affiliation to a particular religion or adherence to the belief of that church or other organisation only if, bearing in mind *the nature of the occupational activities concerned or the context in which they are carried out*, the religion or belief is a *genuine, legitimate and justified occupational requirement* in the light of that ethos.' (para. 55, emphasis added)

3 The provision refers to, 'religious communities, institutions affiliated to them, regardless of their legal form, or associations that devote themselves to the communal nurture of a religion or belief'.

4 CJEU, Judgment of 17 April 2018, *Egenberger*, C 414/16, EU:C:2018:257. See also *European equality law review*, Issue 2018/2, pp 98-99.

By way of providing guidance to the referring court – which has sole jurisdiction to give judgment in the case before it – the Court noted that adherence to the, 'sacred and indissoluble nature of religious marriage' does not appear to be necessary for the promotion of the respondent's ethos. In this regard, the Court considered in particular the nature of the occupational activities carried out by the claimant and the fact that similar positions to that of the claimant were entrusted to employees who were not of the Roman Catholic faith and, consequently, not subject to the same duty of loyalty to the respondent's ethos.

In response to a subsidiary question referred, the Court held, finally, that if the referring court were to find that the national provision at hand cannot be interpreted in a way that is consistent with Article 4(2) of the Directive, it would be, 'under an obligation to provide, within the limits of its jurisdiction, the legal protection which individuals derive from EU law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to the principle prohibiting discrimination on grounds of religion or belief' (para. 68). In this regard, the scope *ratione temporis* of the Charter of Fundamental Rights and its Article 21 was irrelevant, considering that the prohibition of all discrimination on grounds of religion or belief is, 'a mandatory general principle of EU law and is sufficient in itself to confer on individuals a right that they may actually rely on in disputes between them in a field covered by EU law' (para 69).

Case C-41/17, *Isabel González Castro v Mutua Umivale and Others*, Judgment of 19 September 2018, EU:C:2018:736

Gender

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

In this case, Ms González Castro was employed as a security guard with a Spanish company and worked following a variable rotating pattern of eight-hour shifts during which she was sometimes alone and which were in part performed at night. Subsequent to the birth of her son, she applied for a medical certificate indicating the existence of a risk to breastfeeding posed by her work, in order to obtain leave and an allowance in respect of risk during breastfeeding. Despite the absence of 'evidence that the workplace ha[d] anywhere suitable for breastfeeding or, as the case may be, for expressing breast milk' and the possibility that the applicant, as part of her work, might have to, 'respond to emergencies, such as criminal behaviour, fire and other incidents of that kind' (para. 35), her application for the medical certificate was rejected by the mutual insurer responsible for the risk assessment procedure. The insurer denied the existence of any risk to the applicant's health or safety, resulting in her inability to access the breastfeeding leave and allowance.

The referring court first sought clarification of the meaning of 'night work' as set out in Article 7 of Directive 92/85, asking the CJEU whether it also covers workers who do not perform all of their work but only some of their shifts at night. Secondly, the referring court asked the CJEU whether the rules on the reversal of the burden of proof laid down in Article 19(1) of Directive 2006/54 should be applied to the case, with the consequence that the employer would have to prove that the risk assessment procedure was properly conducted and that Ms González Castro's work did not pose any risk to her health or safety in relation to breastfeeding (para. 36 and 37(2)). In the event that the existence of a risk to the applicant's health and safety in relation to breastfeeding were to be confirmed, the referring court asked the CJEU whether the refusal to grant leave should be regarded as direct or indirect discrimination (para. 37(3)). Finally, the referring court asked the CJEU whether it is for the employee, in order to be granted

the leave, to show that her working hours and/or conditions cannot be adjusted and that she cannot be moved to another job, or if this is for the employer to demonstrate (para. 37(4)).

The CJEU first clarified that a worker whose work shifts are partly performed at night must be regarded as a night worker and is covered under Article 7 of Directive 92/85/EC, which provides that pregnant and breastfeeding women, as well as women who have recently given birth, should not be obliged to do night work when it poses a risk to their health and safety. Responding to the remainder of the referring court's questions, the CJEU then recalled that an employer must, 'adjust the working conditions of a worker or move her to another job' if her work poses risks to her health and safety in relation to breastfeeding (para. 56). If that cannot be done, the worker must be entitled to breastfeeding leave.

The CJEU recalled that, following *Oteros Ramos*, failure to properly assess such risks in accordance with Article 4(1) of Directive 92/84 must be regarded as direct discrimination on grounds of sex under Article 2(2)(c) of Directive 2006/54/EC.[5] Following AG Sharpston's opinion,[6] the CJEU considered from the file of the case that the applicant's employer did not conduct a specific risk assessment taking into account the individual situation of the worker, who was therefore discriminated against (para. 80). This establishes a presumption of direct discrimination on grounds of sex, which it is for the employer to rebut by showing that a specific risk assessment was conducted. In the absence of such evidence, the CJEU considers that the applicant has been discriminated against on grounds of her sex.

Case C-312/17, *Surjit Singh Bedi v Bundesrepublik Deutschland, Bundesrepublik Deutschland in Prozessstandschaft für das Vereinigte Königreich von Großbritannien und Nordirland*, Judgment of 19 September 2018, ECLI:EU:C:2018:734

Disability

Age

The request for a preliminary ruling was submitted by the Higher Labour Court of Hamm (Germany) and concerned the interpretation of Article 2(2) of the Employment Equality Directive. The claimant before the referring court is recognised as having a severe disability and was employed as a security guard by the United Kingdom armed forces stationed in Germany. When the UK army base at which he was employed closed, he was made redundant and received, as per his employment contract and the applicable collective agreement, so-called bridging assistance with the aim of ensuring him a reasonable means of subsistence until he would be entitled to a retirement pension under the statutory pension scheme. However, the bridging assistance payments ended when the claimant became entitled to early payment of a retirement pension for severely disabled people. As a result of losing the bridging assistance, his monthly income decreased significantly, which caused him to bring an action before the German Labour Courts.

The referring court is uncertain about the compatibility with the Employment Equality Directive of the national provision which stipulates that the right to bridging assistance is lost when the individual becomes entitled to an early retirement pension for severely disabled people.

After having found that the bridging assistance must be considered to constitute 'pay' in the meaning of Article 157(2) TFEU, the Court concluded that the national provision at hand falls within the scope of the Directive. It further examined whether the provision amounted to discrimination on the ground of disability, finding firstly that there could be no direct discrimination as it was not only severely disabled people who were entitled to an early pension and thereby lost their entitlement to bridging assistance. With regard to indirect discrimination, the Court then noted that a non-disabled person in a similar situation to that of the claimant would be entitled to a retirement pension between one and three years later than the claimant and would thereby receive the bridging assistance during that time. The income

5 C-531/15 *Elda Otero Ramos v Servicio Galego de Saúde and Instituto Nacional de la Seguridad Social* EU:C:2017:789.

6 C-41/17 *Isabel González Castro v Mutua Umivale Prosegur España SL Instituto Nacional de la Seguridad Social (INSS)*, Opinion of AG Sharpston, delivered on 26 April 2018, EU:C:2018:289. See also *European equality law review*, Issue 2018/2, p. 94.

of such a person would thus be higher than that of the claimant during that period of time and it is thus apparent that the national provision at hand is liable to place severely disabled people at a disadvantage and to cause a difference in treatment which is indirectly based on disability.

To examine whether the difference in treatment can pass the justification test foreseen by Article 2(2) b(i) of the Directive, the Court then recalled its judgment in the case of *Odar* from 2012, noting that, 'providing compensation for the future of workers who have been made redundant and facilitating their reintegration into employment, whilst taking account of the need to achieve a fair distribution of limited financial resources, can be deemed legitimate aims within the meaning of [the Directive]' (para. 61). In those circumstances, the Court went on to accept that, 'those aims must in principle be held to be capable of justifying 'objectively and reasonably' a difference in treatment on grounds of disability'. The Court finally examined the proportionality of the national provision, responding firstly to the argument invoked by the German government claiming that social partners, in respect of collective agreements, are not required to choose the most equal, reasonable or appropriate solution. In this regard, the Court recalled that social partners must, when adopting measures that come within the scope of the Employment Equality Directive, comply with that Directive. Underlining how the social partners in this instance had failed to have regard to the specific needs of severely disabled workers, the Court concluded that the national provision in question, 'has an excessive adverse effect on the legitimate interests of severely disabled workers and therefore goes beyond what is necessary to achieve the social policy aims pursued by the German social partners' (para. 77). The measure is thus found to amount to unjustified indirect discrimination on the ground of disability.

Case C-457/17, *Heiko Jonny Maniero v Studienstiftung des deutschen Volkes eV*, Judgment of 15 November 2018, ECLI:EU:C:2018:912

Racial or ethnic origin

The request for a preliminary ruling was submitted by the German Federal Court of Justice and sought to determine whether a private foundation providing a scholarship only for students having passed a specific German examination discriminated against students with equivalent diplomas from other (non-EU) countries, in violation of the Racial Equality Directive which prohibits discrimination on the ground of racial or ethnic origin in the field of, inter alia, education.[7]

The questions referred concerned, essentially, whether the award of scholarships forms part of the concept of 'education' within the meaning of the Directive and, if so, whether the exclusion from such a scholarship of students who have not passed a specific examination under national law amounts to indirect discrimination prohibited by the Directive where the student is an EU citizen with full command of the national language who could have studied in the country and passed the relevant examination but who, instead, studied and obtained their diploma in a third country. The Court requested the Advocate General to limit her analysis to the first question.

In its relatively short and straightforward decision, the Court referred repeatedly to the Opinion of Advocate General Sharpston, which it followed on all accounts with regard to the first question referred. It thus concluded without difficulty that the award by a private foundation of scholarships destined to fund studies or research abroad falls within the concept of 'education' within the meaning of the Directive, as long as there is a sufficiently direct link between the financing and the actual educational activities.

Regarding the second question referred, the Court recalled its finding from the *CHEZ* and *Jyske Finans* rulings, that indirect discrimination can be found only if the relevant measure is capable of causing a disadvantage to a specific racial or ethnic group. The Court noted in this regard that nothing in the case at

7 For a brief summary of the case before the referring court and of the Opinion of the Advocate General, please see above, p. 65.

hand indicated such a disadvantage to a particular group and thus concluded quite briefly that no indirect discrimination had taken place.

Case C-378/17, *Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission*, Grand Chamber judgment of 4 December 2018, ECLI:EU:C:2018:979

All grounds

The reference for a preliminary ruling was submitted by the Supreme Court of Ireland and sought to determine whether a national equality body established by law in order to ensure enforcement of EU non-discrimination law must be able to disapply a rule of national law that is contrary to EU law.[8]

The referring court underlined that under national law the jurisdiction to hear cases relating to equality in employment is shared between the Workplace Relations Commission and the High Court (in the limited cases where it may be required to disapply provisions of national law that conflict with EU law) and that such a division of jurisdiction appears to comply with the principles of equivalence and effectiveness. The Workplace Relations Commission argued, however, that it must have all the powers necessary to fulfil its general obligation to ensure that national and EU law relating to equality in employment are complied with.

In its ruling, the Grand Chamber departed from the Opinion of Advocate General Wahl and adopted a different approach to the case based on the principle of primacy of EU law. The Court thus recalled that this fundamental principle '*requires* not only the courts but all the bodies of the Member States to give *full effect* to EU rules' (para. 39, emphasis added), thereby imposing upon them a duty to disapply national legislation that is contrary to EU law. Instead of examining, as the referring Court as well as the Advocate General had done, whether the division of jurisdiction in national law complied or not with the principles of equivalence and effectiveness, the Court focused on the role and nature of the Workplace Relations Commission as such. It thus underlined that it would be contradictory if an individual were able to rely on the provisions of EU equality law in employment before the Workplace Relations Commission, but that body were under no obligation to actually apply those provisions in the sense of refraining from applying national provisions which conflict with them. Furthermore, the Court noted that the Workplace Relations Commission must be considered to be a 'court or tribunal' which may refer questions for a preliminary ruling to the Court[9] and which would in such cases be bound by the judgment of the Court and be obliged to disapply conflicting provisions of national law, if necessary. The Court thus concluded that the provisions of the Employment Equality Directive which the Workplace Relations Commission was set up to apply would be rendered less effective if that body were unable to disapply conflicting provisions of national law.

Consequently, the Grand Chamber ruled that, 'EU law, in particular the principle of primacy of EU law, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law'.

8 For a brief summary of the case before the referring court and of the Opinion of the Advocate General, please see above, p. 64.

9 The Court referred in this regard to its judgment of 18 March 2014 in the case of *Z.*, C-363/12, EU:C:2014:159, delivered before the institutional reform which replaced the previous Equality Tribunal with the current Workplace Relations Commission.

European Court of Human Rights

Case of *S.V. v Italy*, Application No. 55216/08, Judgment of 11 October 2018

Gender

In this case, the applicant challenged a refusal from the Italian state authorities to change her legally registered forename to make it correspond to her gender identity. The applicant was registered as male at birth but subsequently identified, lived, appeared and presented herself as a woman for many years. She was known in her professional circle under a female forename and appeared as female on her identity card picture. After starting her gender transition process, she sought authorisation from an Italian court to undergo gender reassignment surgery, which was granted to her.

Contemporaneously, the applicant applied for a change of her male forename on her identification papers in order to have her female forename legally recognised on official documents. However, the prefecture refused to change her forename as long as no court had confirmed the gender reassignment surgery, in accordance with Italian Law no. 164 of 1982. The applicant therefore had to wait two and a half years for her forename to be changed on her identity papers, until surgery had been performed and confirmed by a judicial ruling. Her challenge before the Strasbourg court concerned a violation of her right to respect for private life under Article 8 of the European Convention on Human Rights (ECHR) in conjunction with the right not to be discriminated against under Article 14 ECHR.

Notable in this case are the third-party interventions of two NGOs in support of the Italian government, the Alliance Defending Freedom, a US Christian advocacy organisation, and *Unione Giuristi Cattolici Italiani*, an association of Italian Catholic lawyers.

The European Court of Human Rights (ECtHR) first confirmed that the claim was a matter falling within the scope of the right to private life under Article 8 ECHR. It recalled that, in relation to questions regarding the right to gender identity, a restricted margin of appreciation applies to State parties (para. 62). Balancing out the general public interest and the applicant's private interest that her forename corresponds to her gender identity, the Court questioned the proportionate nature of the decision of the Italian administration not to change the applicant's forename before judicial confirmation that her gender reassignment surgery had been completed. In so doing, the Strasbourg court considered that the Italian state authorities interpreted Law No. 164 of 1982 in a restrictive and formal manner without taking into account the applicant's specific situation, in particular the fact that her social identity and appearance had been female for many years. The ECtHR considered that the applicant had to wait for an 'unreasonable' period of time for her forename to be changed, an 'abnormal' situation causing her 'feelings of vulnerability, humiliation and anxiety'.[10] Therefore, the ECtHR recognised that Italy disrespected its positive obligation to guarantee the right to private life under Article 8 ECHR.

Despite referring to the Recommendation CM/Rec(2010)5 of the Committee of Ministers to State parties on measures to combat discrimination on grounds of sexual orientation or gender identity (para. 73), the Court declared that it was not necessary to examine the applicant's claim of discrimination under Article 14 given the findings related to Article 8.

10 See para. 72 (author's translation, decision only available in French).

Case of *Lakatošová and Lakatoš v Slovakia*, Application No. 655/16, Judgment of 11 December 2018

Racial or ethnic origin

The case was brought by two applicants (husband and wife) of Roma origin who claimed that the national authorities had failed to effectively investigate the (alleged) racial overtones of the violent crime committed against them and their family. They also challenged the lack of reasoning in the sentencing judgment, making it impossible to demonstrate any accountability for the racist motive for the crime. They relied on Articles 2 and 14 of the Convention.

The facts of the case were related to an attack by an off-duty police officer who entered the garden of the applicants' family home and started shooting at the people who were there. Three of the applicants' close family members were killed while they themselves were severely injured. During questioning by police, the gunman mentioned on several occasions that he had wanted to 'deal with' the situation of the 'unintegrated Roma' living in the town, and the experts who were called upon to examine his mental state noted 'anger, rage and hatred' concerning 'those of the Roma minority', although they were unable to 'unequivocally' determine a racial motive for the violent crime.

However, the bill of indictment filed by the prosecutor did not indicate any racial motivation or mention the ethnicity of the victims in any way. Furthermore, due to the fact that both the accused, his lawyer and the prosecutor had waived their right to appeal, the final sentencing judgment did not contain any legal reasoning. The accused was sentenced to nine years' imprisonment, but the sentence was exceptionally reduced due to his diminished soundness of mind. He was ordered to undergo protective psychological treatment in an institution, together with protective supervision amounting to three years. In their capacity as civil parties, the applicants were unable to appeal and they were referred to the civil courts regarding their claims of compensation for damages.

The Court concluded that the prosecuting authorities had, 'failed to examine a possible racist motive in the face of powerful racist indicators and in particular failed to give any reasons whatsoever whether the attack (...) had or had not been motivated by racial hatred'. The authorities' actions were thus inadequate, 'to an extent that is irreconcilable with the State's obligation in this field to conduct vigorous investigations, having regard to the need to continuously reassert society's condemnation of racism in order to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence' (para 96). The Court thus found that there had been a violation of Article 14, read in conjunction with Article 2 of the Convention.

Case of *Molla Sali v Greece*, Application No. 20452/14, Grand Chamber judgment of 19 December 2018

Religion or belief

With this judgment, the Grand Chamber provided its first finding of discrimination by association, although it could be argued (and was by the concurring judge Mitis) that the religious beliefs of the applicant herself could also have been considered.

The applicant's case concerned the inheritance rights to the property of her deceased husband, who was a member of the Muslim community of Thrace in eastern Greece.[11] A few years before he died, the applicant's husband had drawn up a public will in accordance with the Greek Civil Code, bequeathing his entire estate to his wife. The legality of this will was later challenged by the deceased's two sisters, who claimed that their brother's inheritance rights were subject to Sharia law and to the jurisdiction of the mufti rather than the provisions of the Civil Code, according to which the will had been drawn up.

11 The protection of the religious distinctiveness of Greek Muslims in Thrace is based on three international treaties: the Treaty of Athens of 14 November 1913, the Treaty of Sèvres of 10 August 1920 and the Lausanne Peace Treaty of 24 July 1923. They foresee, under certain conditions, the applicability of Islamic religious law (Sharia law) to relationships between Muslims in matters of family law.

While the first instance and appeal courts dismissed the deceased's sisters' claim, the Court of Cassation upheld it and remitted the case back to the court of appeal. Following the decision of the Court of Cassation, the court of appeal held that the relevant legislative provisions had been intended to protect the Muslim community of Thrace, constituted a special body of law and did not breach the principle of equality or the right of access to a court (as invoked by the applicant). The applicant appealed on points of law, but her appeal was dismissed by the Court of Cassation and as a consequence she was deprived of three-quarters of the property bequeathed to her.

The Court first recalled that in cases such as this, 'the relevant test is whether, but for the alleged discrimination, the applicant would have had a right, enforceable under domestic law, in respect of the asset in question' (para 127). Noting in this regard that the applicant had accepted her husband's estate in application of the will and registered the property and that the domestic courts of first and second instance had validated the will, the Court concluded that the applicant would have inherited her husband's entire estate on the basis of the will, had the testator not been of the Muslim faith. Thus, the applicant's proprietary rights fell within the ambit of Article 1 of Protocol No. 1 (right to respect for property) which was sufficient to render Article 14 (non-discrimination) applicable as well.

Examining the comparator element, the Court then noted that the applicant, 'as the beneficiary of a will made in accordance with the Civil Code by a testator of Muslim faith, was in a relevantly similar situation to that of a beneficiary of a will made in accordance with the Civil Code by a non-Muslim testator'.[12] The Court further concluded that the applicant was thus treated differently, 'on the basis of 'other status', namely the testator's religion' (para. 141). Finally, with regard to the objective justification of the difference in treatment, the Court recognised that Greece is bound by its international obligations concerning the protection of the Thrace Muslim minority (invoked by the State Party) but did not find that the impugned measure was proportionate to the aim of ensuring the protection of that minority.

Since the 1960s, the approach of the Greek Court of Cassation to inheritance cases involving members of the Muslim minority had been that such cases should be governed by Sharia law, on the basis of the 1913 Treaty of Athens and national legislation enacted pursuant to that treaty. The Court noted that the effect of this approach was that notarised wills drawn up by Greek nationals of Muslim faith were devoid of legal effect and then provided a relatively long list of reasons why this was not justifiable. Most importantly, perhaps, the Court stated that the State cannot, 'take on the role of guarantor of the minority identity of a specific population *group* to the detriment of the right of that group's *members* to choose not to belong to it or not to follow its practices and rules' (para. 156, emphasis added). In this regard, the Court found that, '[r]efusing members of a religious minority the right to voluntarily opt for and benefit from ordinary law amounts not only to discriminatory treatment but also to a breach of a right of cardinal importance in the field of protection of minorities, that is to say the right to free self-identification' (para. 157). Noting finally that Greece was the only country to apply Sharia law to its citizens against their wishes, the Court concluded that the difference in treatment of the applicant on the basis of her late husband's religious beliefs had no objective and reasonable justification. It found a violation of Article 14 read in conjunction with Article 1 of Protocol No. 1.

12 In the opinion of the concurring judge Mitis, the religious beliefs of the applicant herself should also have been considered – in addition to those of her husband – notably due to the concern raised by a number of international organisations regarding the situation of Muslim women and children in Western Thrace. The Grand Chamber appears, however, to have made a point of refraining from mentioning in any way the fact that the applicant was herself of the Muslim faith.

Key developments at national level in legislation, case law and policy

This section provides an overview of the main recent developments in gender equality and non-discrimination law (including case law) and policy at the national level in the 28 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, Republic of North Macedonia, Norway, Serbia and Turkey, from 1 July to 31 December 2018.

AL Albania

LEGISLATIVE DEVELOPMENT

Legal developments in compliance with the Istanbul Convention

Gender

During the second half of 2018 several laws were adopted in Albania aimed at addressing gender equality and gender-related violence.

On 23 July 2018, the Albanian Assembly adopted Law no 47/2018, amending law no. 9669 on 'Measures against violence in family relations'.[1] The specific definitions and concepts provided by this new law are in compliance with the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). The aims of this legal amendment are: the prevention and reduction of cases of domestic violence; increasing the efficiency and cooperation of responsible institutions; increasing the participation of perpetrators in specific rehabilitation services; and increasing judicial support for victims of domestic violence.

New provisions of interest are those related to issuing a Preliminary Immediate Protection Order. This court order[2] is issued within 48 hours after the complaint before a domestic violence case is even registered, and contains immediate measures to protect the victim of domestic violence until the court issues the final Protection Order. Other new provisions of interest are the presence and participation of a psychologist in cases of domestic violence and the preparation of a report by the psychologist when the case is submitted to the police. The amendment was prepared with the support of international actors, the United Nations Development Programme Albania and through wide consultations with institutions and civil society. Such legal amendments were highly necessary considering the situation of domestic violence in the country and the eminent need to address such cases effectively.

Following the above-mentioned legal amendment, on 27 November 2018, the Minister of Health and Social Protection adopted Instruction No. 816, on 'The approval of service provision standards and functioning of crisis management centres for cases of sexual violence'. Now that standards for crisis management centres for sexual violence are regulated, the possibility is opened up for such centres to be established. Two other acts, implementing Law no 47/2018, are currently in the process of being drafted.

The Albanian Parliament also adopted Law No.22 /2018 on social housing,[3] which is considered a further step to meeting the standards of the Istanbul Convention.[4] The law has expanded and strengthened support, among other things, for victims of domestic violence, victims of trafficking and potential victims of trafficking and for social housing programmes.

Online sources:
https://qbz.gov.al/eli/ligj/2006/12/18/9669/3257bc3f-964e-4d84-aca0-57122d81f986
https://qbz.gov.al/eli/fz/2018/79/63abe2a7-88f8-4978-912b-681593b9e996;q=strehim%20social%2022%2F2018

1 Albania, Changes and additions to law no. 9669, of 18 December 2006, 'Measures against violence in family relations', amended *(Për disa shtesa dhe ndryshime në ligjin nr. 9669, datë 18.12.2006, 'Për masa ndaj dhunës në marrëdhëniet familjare', i ndryshuar).* See Official Journal: https://qbz.gov.al/eli/fz/2006/150/6e92777f-ca6c-4c80-84c1-fc5aa8284d00.

2 The Immediate Protection Order thus provides immediate protection to victims of domestic violence, even before the Court issues the Protection Order. As per the law, the Protection Order is issued through a court decision within 15 days upon registration of the lawsuit. Thus, the Immediate Protection Order fills in the gap of protection to victims until the Protection Order is issued.

3 See Albanian Official Journal: https://qbz.gov.al/eli/fz/2018/79/63abe2a7-88f8-4978-912b-681593b9e996.

4 See the opinion of Albanian non-governmental organisation, Qendra për Nisma Ligjore Qytetare, at: http://www.qag-al.org/publikime/ligji_strehimi.pdf.

CASE LAW

Administrative Court confirms equality body decision on discrimination against convicted or detained persons in the field of employment

Other ground

The General Directorate of Prisons had brought an action before the Administrative Court of Tirana, challenging a decision[5] of the Commissioner for Protection from Discrimination (national equality body) regarding discrimination against convicted or detained people due to their social status, in the field of employment. The issue concerned the practice within some penitentiary institutions of remunerating the work performed by those detained through reductions to their punishment. This practice was based on an old Presidential Decree which had never been explicitly abrogated, although it was contrary to subsequent legislation. While the General Prosecutor had objected to this practice since 2004, it had continued in some institutions, causing a difference in treatment among detained and convicted people but also between these people and any other person employed outside the penitentiary institutions in accordance with the Labour Code.

The national equality body had found that this practice amounted to discrimination on the ground of social status and the Administrative Court of Tirana upheld this finding and rejected the arguments invoked by the General Directorate of Prisons.[6] The Court confirmed thus that the working conditions of convicted or detained people should be similar to those in the rest of society and defined by the Labour Code and that their salary cannot be lower than the minimum wage.

Before the Court, the General Directorate of Prisons expressed their willingness to take into consideration the recommendations of the equality body, the Albanian Helsinki Committee and the People's Advocate (Ombudsman) during the drafting process of the forthcoming Decision of the Council of Ministers 'On promotion and reward for work of prisoners'.

Belgium BE

LEGISLATIVE DEVELOPMENT

Amendments to adoption leave

Gender

Under Article 30 of the Employment Contracts Act of 3 July 1978, any employee who adopts a child is entitled to leave of six weeks if the child is under the age of three years and four weeks if the child has reached the age of three and is less than eight years old. The Act of 6 September 2018[7] considerably improved these provisions, as of 1 January 2019.

The basic duration of the leave period is now six weeks for any adopting employee, whatever the child's age provided he or she is a minor (under 18). To this basic duration of six (or in the case of an adopting couple six plus six weeks, i.e. a total of 12 weeks), an additional week is added as of 1 January 2019. This prolongation will additionally be increased by one week every two years to reach a total of five weeks as of 1 January 2027. This supplement is to be shared between the two partners in the couple. Where applicable, another supplement of two weeks for each parent is added in the case of the simultaneous adoption of more than one child.

5 Albania, Commissioner for Protection of Discrimination, Decision No. 100/5.04.2018.
6 Albania, First Instance Administrative Court of Tirana, Decision No. 4172/19.11.2018.
7 Belgium, Federal Act of 6.09.2018, Law amending existing measures aimed to strengthen adoption leave and establish a foster parental leave (*Loi modifiant la réglementation en vue de renforcer le congé d'adoption et d'instaurer le congé parental d'accueil, M.B./B.S)*. Published in the Moniteur Belge/Belgisch Staatsblad of 26.09.2018, p. 73774.

During the leave period, no remuneration is paid by the employer after the first three days, but the Healthcare and Sickness Insurance Scheme provides a benefit equal to 82 % of normal remuneration up to a ceiling of EUR 101.79 per day as of 1 January 2019.

However, the generous reform summarised above has the surprising effect that, as of 1 January 2019, adoptive parents will be in a more privileged position in terms of the duration of leave compared to employees who are pregnant or have given birth. Maternity leave (15 weeks, which may be extended up to 20 weeks under certain circumstances) gives the right to a social benefit equal to 82 % of normal remuneration (with no ceiling) during the first 30 days and 75 % (with the ceiling mentioned above) for the remainder of the leave.

The Council of Equal Opportunity for Men and Women, an advisory body with the federal government, which in repeated opinions recommended that the rate of 82 % be maintained during the whole maternity leave, immediately questioned the competent minister about this difference in treatment.

Online source:
http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2018090612&table_name=loi

CASE LAW

Burkini ban in swimming pools

Religion or belief

On 5 July 2018, the Tribunal of Ghent ruled in two first instance judgments that the ban on 'burkinis' (body-covering swimwear) in two municipal swimming pools was unlawful.[8] Relying on the case law of the European Court of Human Rights, the judge stressed that it was not the role of the court to discuss whether the Muslim faith imposes the wearing of such clothing or not, nor to consider the legitimacy of such a practice. Regarding the issue of discrimination, the Tribunal ruled that the 'burkini ban' does not amount to direct discrimination since it stems from the general internal rules of the swimming pool which require the wearing of a swimsuit to access the pool. However, the ban did amount to indirect discrimination against Muslim women wishing to wear a burkini for religious reasons. Although a requirement of neutrality can be imposed upon the providers of public services, the same may not be required of the users of these services. According to the Tribunal, the bans could not be justified on grounds of security or hygiene as invoked by the respondents, in particular when considering the opinion of a regional health agency. The bans were therefore unlawful and the claimants were entitled to receive compensation for moral damages.

Denial of reasonable accommodation in nursery school for a pupil with Down's Syndrome

Disability

A pupil with Down's syndrome who had completed his first year at a nursery school was prevented from re-enrolling in the same school for a second year. The school officials carried out an informal enquiry among the teachers and teaching assistants to find who was ready to welcome him into their classroom and to provide suitable support. When no teacher responded positively, the school asked the parents to look for another school. Due to the seemingly discriminatory treatment, the equality body UNIA decided to bring the case to court.

On 7 November 2018, the Court of First Instance of Antwerp found that refusing to enrol the child under these circumstances was a denial of reasonable accommodation which amounted to discrimination within the meaning of the Flemish Decree of 10 June 2008 on equal opportunities and equal treatment.

8 Belgium, First Instance Court of East Flanders (Ghent department), Case No. 2018/8813, Piscine Van Eyck and Case No. 2018/8812, Piscine Merelbeke.

According to the Court, the school did not demonstrate how the required accommodation was unreasonable, nor did it attempt to find any accommodation that could have been put in place. Instead, it focused on what the child was unable to do and on the problems faced by the teachers. The judge confirmed that specialised education for disabled students must remain the exception and concluded that all necessary adjustments are in principle reasonable until their disproportionate nature is established. The Court ordered the school to pay EUR 650 in damages for moral prejudice.

Online source:
https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-premiere-instance-anvers-7-novembre-2018

Bulgaria

BG

LEGISLATIVE DEVELOPMENT

New rights-based legislation replaces the Integration of Persons with Disabilities Act

On 18 December 2018, Parliament adopted a new law governing the rights of persons with disabilities in line with the UN Convention on the Rights of Persons with Disabilities (CRPD). The new Persons with Disabilities Act (PDA) is one of several disability-related laws adopted in December 2018 and will enter into force on 1 January 2019, although certain individual provisions have later entry-into-force dates. The language of the PDA is rights-based and it aims to guarantee people with disabilities full and equal enjoyment of rights and dignity, while making their social inclusion possible and supporting them and their families. The law is explicitly based on the principles of equal treatment based on an individual approach and an individual assessment of needs, as well as personal choice and independence, accessibility and full participation.

Disability

The PDA repeals and replaces the previous Integration of Persons with Disabilities Act (IPDA) and provides new definitions of a range of relevant concepts such as 'persons with disabilities' and 'reasonable accommodation'. For instance, persons with disabilities are defined as 'persons with a physical, mental, intellectual and sensory insufficiency, which in interaction with the environment may hinder their full and effective participation in social life'. While the new definitions are closer to the language of Article 1 of the CRPD compared to those in the repealed IPDA, the definition of long-term disability still unfortunately retains the medical approach to disability.[9]

Among many other measures of positive action in the field of employment, the PDA introduces employment quotas requiring employers with 50 to 99 employees to employ at least one person with a long-term disability. Employers with more than 100 employees must ensure that at least 2 % of their employees are people with long-term disabilities. In case of non-compliance, employers are subject to fines of up to BGN 5 000 (EUR 2 500), which are doubled in cases of repeat violations.

For the purpose of providing reasonable accommodation to disabled employees, employers are eligible for public funding awarded by the Agency for Persons with Disabilities in addition to various other economic stimuli and reliefs linked to employing people with disabilities. Furthermore, the new law defines and governs specialised enterprises and cooperatives of people with disabilities, which are entitled to subsidies and tax/ social security reliefs, as well as protected employment centres designed to provide employment for people with multiple long-term disabilities.

9 The PDA defines 'persons with long-term disabilities' as 'persons with a long-term physical, mental, intellectual or sensory insufficiency, which in interaction with the environment may hinder their full and effective participation in social life, and who were medically certified as having a degree of disability of 50 percent or more'.

The PDA provides for support interventions in a wide variety of fields, including healthcare, education, employment, housing, information and justice. It envisages rehabilitation, social services, labour support, accessible information, reasonable accommodation, access to justice and legal defence, personal assistance and personal mobility, and more. The law foresees the creation of a Monitoring Council comprising nine members, to observe and report on compliance with the UN CRPD. It includes representatives of the Ombudsman, the Protection Against Discrimination Commission, organisations of and for people with disabilities and academia. In addition, a National Council for Persons with Disabilities is to be created within the Council of Ministers and will have a consultative role. Its members represent the state, organisations of and for people with disabilities, employees' and employers' organisations and municipalities. It will be a vehicle for cooperation and coordination in formulating disability rights policy and will give opinions on draft legislation, strategic programming and plans.

Finally, the Agency for Persons with Disabilities is to create and maintain a database on people with disabilities, including a personal profile for every individual, reflecting their health, educational and socio-economic status, social inclusion possibilities, demographics and other aspects. The data is to be used for policy-formulation.

As opposed to the repealed IPDA, the new law does not ban or define any forms of discrimination. The previous unnecessary overlap and confusion between the IPDA and the Protection Against Discrimination Act (PADA) have thus been abolished.

Online source:
www.lex.bg/bg/laws/ldoc/2137189213

CASE LAW

National courts confirm equality body finding of discrimination

Disability

In July 2018, it was publicly reported that a ruling by the equality body dated June 2016[10] had entered into force after being confirmed by the courts. The case concerned a mobile network company which required clients to visit their offices in person in order to conclude a contract.

The complainant wished to conclude a contract with the company but was unable to visit their offices in person due to mobility issues, and therefore authorised her son to represent her for this purpose. Although a public notary verified her power of attorney, the company declined to conclude the contract with the complainant's representative, on the basis of their general terms and conditions which required prospective clients to visit the offices in person. In the proceedings, the company argued that their policy did not target people with disabilities and that they were entitled to fix their own terms and conditions. They further claimed that the complainant should have disclosed her condition.

The equality body found that the impugned policy, while applicable to all, by its nature put people with disabilities at a disadvantage, for which the company had failed to present any justification. As such, it amounted to unjustified indirect discrimination. The equality body held that the company's demand for the complainant to disclose her condition was at odds with the principles of dignity, choice and independence for people with disabilities under the UN Convention on the Rights of Persons with Disabilities. The body ordered the company to immediately discontinue their practice of requiring in-person conclusion of contracts, to change their terms in that respect and to pay a fine of BGN 2 500 (EUR 1 250). Following

10 Bulgaria, Protection Against Discrimination Commission, Decision No. 234 of 15 June 2016.

appeals by the respondent company, the decision of the equality body was confirmed by two judicial instances.[11]

Roma awarded court compensation for discriminatory criminal trial

Racial or ethnic origin

In June 2018, the Supreme Court of Cassation refused to admit in appeal (thereby making it final) a ruling by the Plovdiv Appellate Court in a compensation case brought by a Roma woman against the Plovdiv District Court and the Plovdiv Regional Court.[12] The latter two courts discriminated against the claimant in her criminal trial by sentencing her to effective imprisonment (as opposed to probation), explicitly reasoning that this was necessary due to 'a feeling of impunity among minority groups'. In 2010, the ECtHR, in its judgment in the case,[13] found that this race-based refusal to suspend the applicant's sentence constituted discrimination.

Further to the ECtHR's judgment, the criminal case against the applicant was reopened at the national level and her sentence substituted for a suspended one. She consequently filed a compensation claim against the courts for discriminating against her and was awarded BGN 5 000 (EUR 2 500) for almost two years of discriminatory imprisonment. (She had claimed BGN 80 000.)

Online source:
https://news.lex.bg/%D0%B4%D0%B2%D0%B5-%D1%81%D1%8A%D0%B4%D0%B8%D0%BB%D0%B8%D1%89%D0%B0-%D1%89%D0%B5-%D0%BF%D0%BB%D0%B0%D1%89%D0%B0%D1%82-%D0%B7%D0%B0-%D0%B4%D0%B8%D1%81%D0%BA%D1%80%D0%B8%D0%BC%D0%B8%D0%BD%D0%B0%D1%86/

Croatia HR

POLICY AND OTHER RELEVANT DEVELOPMENTS

Absence of a new national gender equality policy

Gender

Three years after the end of the period of validity of the previous National Gender Equality Policy (2011 to 2015), the new Policy has still not yet been published. The Government's Office for Gender Equality is in charge of coordinating the work for the preparation of the new Policy and the only official explanation as to why the new Policy has still not been prepared is that the process of forming the working group and including various stakeholders (non-governmental organisations) took longer than anticipated. Meanwhile, Croatia is left without a coherent strategic policy document for the promotion of gender equality. The only existing policy guidelines in the field of gender equality are included in the Government's Programme for the Mandate 2016 to 2020, which identifies two specific priorities for the Government.

The first priority is gender equality in the labour market, political and public life. This includes adopting positive action measures to support women in the field of politics and economics, promoting women as entrepreneurs and encouraging the (re-)integration of women into the labour market, as well supporting work-life balance. The second priority is the protection of victims of domestic violence. This includes improving the system of protection against domestic violence, increasing the number of shelters, as well

11 Bulgaria, Supreme Administrative Court, Decision No. 6072 of 10 May 2018; Sofia City Administrative Court, case No. 7231/ 2016.
12 Bulgaria, Supreme Court of Cassation, Ruling No. 478 of 18.06.2018 in civil case No. 462/ 2018.
13 European Court of Human Rights, Case of *Paraskeva Todorova v Bulgaria*, Application No. 37193/07.

as facilitating legal and financial aid. However, there are no clearly identifiable entities in charge of the above-mentioned measures, nor deadlines for their implementation.

The drafting of the Fifth National Policy for the Promotion of Gender Equality started with the formation of the Working Group in 2015. However, due to a political and governmental crisis throughout 2016 and the first half of 2017, the composition of the Working Group changed several times and the work is still in progress. Given the delay, it was decided that the Fifth National Policy will cover the period from 2017 to 2020, instead of the previously planned period of 2016. However, at the end of 2018, there was still no policy or any public consultation about the priorities for its drafting.

Online source:
Programme of the Government of the Republic of Croatia for the mandate 2016 to 2020: https://vlada.gov.hr/UserDocsImages//ZPPI/Dokumenti%20Vlada//Program_Vlada_RH_2016_2020.pdf

Results of the twinning project 'Support for Gender Equality'

Gender

The objective of the twinning project was to enhance the coordinated implementation, monitoring and evaluation of gender equality principles, as well as to increase public awareness and trust in protection from gender-based discrimination. Its aim was also to strengthen the institutional mechanisms for gender equality and efficiency of the judiciary in the area of gender-based discrimination. As part of the project, five manuals were prepared: a Gender Mainstreaming Manual for judges and legal practitioners, a Gender Mainstreaming Manual for political decision-makers, a Gender Mainstreaming Manual for Gender Equality Coordinators in state administration bodies, a Gender Mainstreaming Manual for Town, Municipal and County Commissions for Gender Equality, and a Gender Mainstreaming Manual for employees of the Office for Gender Equality. Each manual contains targeted practical advice and case-study examples on the application of gender equality principles and EU and Croatian gender equality legislation. The manuals were published in print, but since 2018 they are also easily accessible online on the website of the Office for Gender Equality (in Croatian and English).

Online source:
Office for Gender Equality: https://ravnopravnost.gov.hr/twinning-projekt-podrska-ravnopravnosti-spolova/2878

CY Cyprus

CASE LAW

Family appeal court decision on the jurisdiction of the courts to try disputes between members of the Turkish Community

Racial or ethnic origin

The appellant and the respondent are both Cypriot citizens and members of the Turkish Community. They were previously married and residing in the area controlled by the Republic of Cyprus (the south), but when they separated the wife applied to the family court to resolve their property differences. At first instance, the family court decided that it had no jurisdiction to try the case, citing Article 152(2) of the Constitution which provides that civil disputes relating to personal status are matters for the Communal Courts of each Community. Although the Greek Communal Court was abolished in 1965 and its jurisdiction was transferred to the District Court,[14] no equivalent provision was made for the Turkish

14 Cyprus, Law on the transfer of the exercise of jurisdiction of the Greek Communal Chamber and on the Ministry of Education of 1965, N. 12/1965 (*Ο περί Μεταβιβάσεως της Ασκήσεως των Αρμοδιοτήτων της Ελληνικής Κοινοτικής Συνελεύσεως*

Communal Court. In 2003, the jurisdiction of the abolished Turkish Communal Court was transferred to the District Court, but only in matters relating to 'marital disputes',[15] which the family court did not consider included property disputes. The appellant filed an appeal arguing that the failure of the court to try her claim infringed Articles 13 and 14 of the ECHR (right to an effective remedy and prohibition of discrimination).

The appeal was rejected. The Appeal Court concluded that the Turkish Communal Courts have not been officially dissolved and that the legal gap cannot be remedied through a court decision but only through a legislative act. The appellant's references to ECHR Articles 13 and 14 were not considered,[16] despite the fact that Cyprus has been found by the ECtHR to violate Article 14 in another case where the country had failed to regulate the access of Turkish Cypriots to other public services.[17] The ECtHR has in fact repeatedly ruled that the sensitive nature of peace processes or post-conflict arrangements do not justify differential treatment on the ground of ethnic origin.[18]

Online source:
www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2018/1-201809-38-15fam-anony.htm&qstring=%E4%E9%E1%EA%F1%E9%F3%2A%20and%202018

Supreme Court reverses trial court decision about the legality of an age restriction in a disability welfare scheme

Age

Disability

The claimant filed a judicial review application seeking to reverse a decision of the Ministry of Finance that had rejected his application for a grant under a scheme which funds the acquisition of a car for people with disabilities. The rejection was motivated by the fact that he had turned 70 which was the age limit foreseen in the scheme. At first instance, the trial court upheld his claim, ruling that his exclusion from the scheme amounted to unlawful discrimination. The Republic appealed the trial court ruling arguing that the claimant had not been treated less favourably than other people of his age under the same circumstances.

On 4 October 2018, the Supreme Court concluded that equality is infringed only if the differential treatment does not rely on an 'objective and reasonable discrimination' and that differential treatment must be examined in connection with the aim it serves and the realities on the ground at any given time. The age limit of 70 was found not to infringe the equality provision of the Constitution, as the 'essential nature of things' in the given case justified the imposition of reasonable discrimination premised upon objective criteria applied to all affected people without exception. Removing the age restriction in the scheme was likely to lead to an uncontrollable and sharp increase in the number of eligible people which would render the scheme economically unsustainable, given the state of public finances. The Court further concluded that the case at hand fell outside the scope of the laws transposing the equality acquis which had been invoked by the claimant, since there was no act of discrimination prohibited by law or any violation of the equal treatment principle so as to trigger the application of these laws.

According to the Court's interpretation, differential treatment based on age may be lawful if it is reasonable and based on objective criteria, which include the state of public finances. If other people bearing the same characteristics as the claimant (including the claimant's age) are or would be treated

και περί Υπουργείου Παιδείας Νόμος του 1965 (12/1965), available at www.cylaw.org/nomoi/enop/non-ind/1965_1_12/index.html.

15 Cyprus, Law providing for the application of the marriage law of 2003 to the members of the Turkish Community, N. 120(I)/2003 (*Νόμος που προνοεί για την προσωρινή εφαρμογήη του Περι Γαμου Νόμου του 2003 και σε μέλη της Τουρκικής κοινότητας*), available at www.cylaw.org/nomoi/arith/2003_1_120.pdf.

16 Cyprus, Family Court, Appeal Jurisdiction, *G.M. v H.V. and L.A.* (2018), Appeal No. 38/2015, judgment delivered on 10.09.2018.

17 European Court of Human Rights, *Aziz v Cyprus* (Application no. 69949/01), 22.06.2004.

18 European Court of Human Rights, *Sedjic and Finci v Bosnia and Herzegovina* (Applications nos. 27996/06 and 34836/06); European Court of Human Rights, *Dokic v Bosnia and Herzegovina* (Application No. 6518/04), 27.05.2010.

equally, then no prohibited discrimination has occurred. At this stage of the judicial examination, the equality legislation which draws on the acquis did not come into play and therefore could not affect the Court's reasoning. Since this examination led to the conclusion that the differential treatment was reasonable, the conclusion is that it is not prohibited by law. This conclusion places the act complained of outside the scope of the equality legislation.

The Court allowed the appeal of the Republic and reversed the trial court decision, essentially rejecting the claimant's argument that the age limit in the disability scheme was discriminatory. The decision established that the constitutional equality provision does not prohibit 'reasonable discrimination' premised upon an objective assessment of essentially different real situations based on the public interest.[19]

Online source:
www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2018/3-201810-190-12-3anony.htm&qstring=%E4%E9%E1%EA%F1%E9%F3%2A

The independent mechanism for the implementation of the CRPD delivers two conflicting decisions on complaints for disability discrimination in education

Disability

The first case concerned a child with ADHD and the failure of the Ministry of Education and of the school to promptly diagnose his disorder, resulting in the child being labelled 'naughty' and regularly blamed for every problem in the classroom. Even after being diagnosed with ADHD, the student did not receive adequate support. At the end of the school year 2016-2017 the school decided that the student should repeat the same grade, without the right to take the end-of-term exam, because of too many absences, in line with school policy. The absences were the result of the student being late and sometimes leaving the classroom without permission. The educational psychologist confirmed that the student's fragmented class attendance was a symptom of his ADHD and recommended that his disorder be taken into account when assessing his performance. Although the school policy foresees the possibility to make an exception in cases where the absences are justified as a result of a health issue, the school did not do so.

The Ombudsman decided in October 2018 that the school ought to have used their discretion to avoid the sanction, noting that treating unequal things in the same manner amounts to discrimination. The report concluded that the school's decision ignored the student's disorder and as such was disproportionate. The report added, however, that the decision could serve merely as moral justification for the student and his family; it was issued more than a year after the complaint was received. The report described the new regulations issued in 2017 regarding the operation of secondary education schools, pointing out that, although there is no explicit provision in the regulations about disability and the duty to safeguard full enjoyment of rights by children with disabilities, the Ministry of Education is in any case under a duty to ensure that the regulations are interpreted and implemented in light of the CRPD. The report recommended the Ministry to provide training for teachers on the special behavioural issues emanating from mental health conditions and to adjust teaching methods and systemic procedures, removing barriers which impede effective access and promoting integration of students at risk of exclusion or marginalisation.[20]

The second case concerned the refusal of a private kindergarten to enrol a child with Down's syndrome. The parents of the child complained that the kindergarten's principal had sought to justify his refusal by claiming that the child was overweight and unable to walk and would therefore require an escort

19 Cyprus, Supreme Court, Appeal Jurisdiction, *Republic of Cyprus through the Finance Ministry v Lakatamites*, Review Appeal No. 190/2012, 4.10.2018.

20 Report of the independent mechanism for protection and monitoring of the UN Convention on the Rights of Persons with Disabilities on the decision not to allow a student with ADHD to advance to the next grade due to incomplete attendance as a result of unjustified absences, Ref. SAA 86/2017, 30.10.2018.

which the school was unable to provide. The parents rejected these allegations, stating that their child was in fact walking and running when they visited the kindergarten and did not require any special accommodation. They argued that the refusal was based on prejudice against children with disabilities and infringed the principle of equal treatment.

The Ombudsman concluded that the legal framework regulating the operation of kindergartens does not include any provision regarding the equal treatment of children with disabilities and does not implement the relevant provisions of the UN CRPD. Due to the gaps in the legal framework, the Ombudsman decided not to issue an order imposing any sanctions.[21]

Online sources:
www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/C68178ADB3C514E4C2258345002BA7F3/$file/saa126_2017.pdf?OpenElement
http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/90CEC4825B2AC4DFC225833800244A40/$file/86_.pdf?OpenElement

POLICY AND OTHER RELEVANT DEVELOPMENTS

Code of conduct for the prevention of sexual harassment in employment in the public sector

On 18 July 2018, the Ombudsperson presented a code of conduct to prevent and deal with sexual harassment within the civil service.

Gender

The code provides practical guidance to employers and employees aiming at securing appropriate procedures to deal with sexual harassment and harassment incidents, through prevention but also through sanctions. The code of conduct provides definitions of what constitutes harassment, sexual harassment, unwanted behaviour and behaviour of a sexual nature and provides a list of misconceptions and stereotypes about harassment

It provides useful advice and instructions for employees and their employers in order to facilitate effective prevention and a strong response to sexual harassment and harassment in the field of employment. The text will also be a guide for the government, as the employer, to take immediate measures to avert acts – isolated or repeated – that constitute harassment, sexual harassment and victimisation of those who may report such behaviour. The document lists the responsibilities of each authority, including measures for prevention and dealing with such behaviour and providing support to the victim. The code stresses the importance of discretion with which reported cases must be dealt.

The Ombudsperson stated that each supervisor, each competent authority and the public administration in general must know that harassment and sexual harassment in the workplace constitutes gender discrimination which is forbidden by law and employers have the legal responsibility to ensure a safe, dignified, healthy and friendly working environment. She further stated that if employers do not take action, they will be held jointly responsible with the perpetrator for any harassment. The current code of conduct was developed for the civil service, but a code is also being drafted for the private sector.

Online source:
http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/2348CE8BA625D720C2257E8100412689?OpenDocument

21 Report of the independent mechanism for protection and monitoring of the UN Convention on the Rights of Persons with Disabilities regarding the integration of children with disabilities in child care centres and kindergartens, File No. SAA 126/2017, 12.11.2018.

DK Denmark

LEGISLATIVE DEVELOPMENTS

New laws to prevent and dismantle ghettos and parallel societies in Denmark

Racial or ethnic origin

In May 2018, the Danish government entered into six political agreements with various parties in the Parliament, based on the government's strategy, 'A Denmark without parallel societies – No ghettos by 2030'.[22] In October 2018, the government put forward a number of legislative bills to implement the agreements which included plans to prevent and dismantle so-called ghettos and parallel societies in Denmark. By the time of writing, all but one of the bills have been adopted.

The new legislation defines 'marginalised residential areas' according to a number of criteria including level of income, number of convicted individuals, level of education and unemployment rate. 'Ghettos' are furthermore defined as marginalised areas where the share of immigrants and their descendants from third countries exceeds 50 %. The legislation includes the following measures:

- Mandatory daycare education for any child over the age of one who lives in a marginalised residential area and who is not enrolled in a daycare centre. The 25 hours a week daycare education must include the Danish language as well as Danish traditions, norms and values.[23]
- Redistribution of young children at daycare centres to ensure that no more than 30 % of children in a daycare centre come from a marginalised residential area.[24]
- Prohibition for housing associations in marginalised residential areas to allocate housing to applicants who receive public integration benefits.[25]
- Authorisation for the police to designate a defined geographical area as a 'strict penalty zone', if it is characterised by an extraordinary crime situation that creates insecurity for people living in the area. The penalties for certain crimes committed in such zones are doubled, including violence, fighting in public, vandalism, arson, theft and robbery and drug dealing.[26]
- Proposal to establish mandatory Danish language tests in schools with a high percentage of students coming from marginalised residential areas. Passing the language test will be a requirement for the student's promotion to the next class.[27]

22 See: www.regeringen.dk/nyheder/ghettoudspil.

23 Denmark, Bill No. L 7 (*L 7 Forslag til lov om* ændring *af dagtilbudsloven og lov om en børne- og ungeydelse*) of 3.10.2018, adopted on 13.12.2018: https://www.ft.dk/samling/20181/lovforslag/l7/index.htm. See Act No. 1529 of 18.12.2018, which entered into force on 01.07.2019. Act No. 1529 was incorporated into Consolidated Act No. 176 of 26.02.2019.

24 Denmark, Bill No. L 6 (*L 6 Forslag til lov om* ændring *af dagtilbudsloven*) of 3.10.2018, adopted on 13.12.2018: www.ft.dk/samling/20181/lovforslag/l6/index.htm. See Act No. 1528 of 18.12.2018, which entered into force on 01.01.2019. Act No. 1528 was incorporated into Consolidated Act No. 176 of 26.02.2019.

25 The same prohibition is thought to apply if family members of the housing applicant are in receipt of public integration benefits. Bill No. L 38 (*L 38 Forslag til lov om* ændring *af lov om almene boliger m.v., lov om leje af almene boliger og lov om leje*) of 3.10.2018, adopted on 22.11.2018: www.ft.dk/samling/20181/lovforslag/l38/index.htm. See Act No. 1322 of 27.11.2018 entering into force on 01.07.2019. More than 90 % of individuals receiving public integration benefits have an ethnic minority background and are not Danish citizens. See Ministry of Foreigners and Integration: http://uim.dk/nyheder/integration-i-tal/integration-i-tal-nr-4-4-januar-2017/hvem-er-integrationsydelsesmodtagerne.

26 Denmark, Bill No. L 22 B (*L 22 Forslag til lov om* ændring *af straffeloven, pasloven og lov om politiets virksomhed*), adopted on 4.12.2018. For the original bill including preparatory works, see L22: https://www.ft.dk/samling/20181/lovforslag/l22/index.htm. See Act No. 1543 of 18.12.2018, which entered into force on 01.01.2019.

27 Denmark, Bill No. L 60 (*Forslag til Lov om* ændring *af lov om folkeskolen, lov om institutioner for almengymnasiale uddannelser og almen voksenuddannelse m.v., lov om institutioner for erhvervsrettet uddannelse og forskellige andre love*) of 4.10.2018. See: https://www.retsinformation.dk/Forms/R0710.aspx?id=203372. See Act No. 278 of 26.03.2019. According to section 5 of the Act, the Minister of Education will decide on the date of entry into force.

The new legislation primarily affects ethnic minorities. The various acts raise legitimate questions of possible illegal indirect discrimination because of ethnic origin within the areas of housing, education and social services.[28]

New legislation requires individuals to shake hands with a Danish official to obtain citizenship

Religion or belief

On 29 June 2018, the Danish government entered into a political agreement with the Danish People's Party and the Social Democratic Party regarding naturalisation. The parties agreed that, in addition to passing a naturalisation test and fulfilling a number of financial and residential requirements, the obtaining of Danish citizenship should be determined by participation in a municipal ceremony.

On 20 December 2018, Parliament adopted Bill No. L80, imposing new requirements for naturalisation, including passing a test and fulfilling a number of financial and residential requirements. In addition, the new rules require that an individual who has been awarded Danish citizenship by law must in addition take part in a ceremony in their local municipality. At the ceremony, the individual is required to sign a document to demonstrate that they will respect Danish laws and values, and to behave respectfully towards the mayor or other public authority representatives. According to the preparatory works of the Bill, 'respectful behaviour' is considered to include shaking the hand of the mayor or other public authority representatives, 'without gloves, palm against palm'.[29] If an individual does not live up to these ceremonial requirements, he or she will lose the right to become a Danish citizen.

A minority of Jews and Muslims in Denmark believe that it is against their religion to shake hands with a representative of the public authorities, in particular if the representative is of the opposite gender. For those participants at the naturalisation ceremonies who have such beliefs, the gender of the individual mayor or public authority representative will in all probability determine whether or not they will obtain Danish citizenship. On this basis, the handshake requirement may constitute indirect discrimination because of religion.[30]

Online source:
https://www.ft.dk/samling/20181/lovforslag/L80/index.htm

Estonia

EE

LEGISLATIVE DEVELOPMENT

Legal amendments to reduce the gender pay gap

Gender

In 2017-2018, the Ministry of Social Affairs developed a draft amendment to the Gender Equality Act and other related acts[31] with the aim of reducing the gender pay gap.[32] The Government submitted the

28 See https://menneskeret.dk/monitorering/hoeringssvar for hearing statements from the Danish Institute for Human Rights.
29 Denmark, Bill No. L80 (*L 80 Forslag til lov om* ændring *af lov om dansk indfødsret og lov om danskuddannelse til voksne udlændinge m.fl*) of 25.10.2018, section 2.2.2. page 5.
30 See https://menneskeret.dk/monitorering/hoeringssvar for hearing statement from the Danish Institute for Human Rights.
31 Estonia, Bill on Amendments to the Gender Equality Act and Other Related Acts Amendment Act 683 SE (*Soolise võrdõiguslikkuse seaduse muutmise ja sellega seonduvalt teiste seaduste muutmise seadus 683 SE*), available at: https://www.riigikogu.ee/tegevus/eelnoud/eelnou/920bb10b-1e71-48fa-896d-c8f2c473867a/Soolise%20v%C3%B5rd%C3%B5iguslikkuse%20seaduse%20muutmise%20ja%20sellega.
32 See also: ERR (2018), Estonia to target gender pay gap in public sector, News, 10 February 2018, https://news.err.ee/682168/estonia-to-target-gender-pay-gap-in-public-sector.

draft Gender Equality Act to the Parliament on 24 August 2018, but the draft law got stuck at the Legal Affairs Committee after receiving strong criticism and was not sent for the second and third reading.

The draft's main objective was to provide public sector employers with the necessary tools to effectively analyse the difference in pay of women and men. The proposed law suggested establishing a compliance centre for equal pay with the Labour Inspectorate. The compliance centre's task would be to supervise public sector employers to ensure compliance with the principle of equal pay for equal work and to conduct wage audits with public sector employers with 10 or more employees in case of doubt. It also stipulated that if objective reasons for the pay gap were to be found, an action plan should be developed by the employer to tackle the discrepancies in pay.

Despite the fact that the draft was supported by several feminist organisations and by the Equality Policies Department of the Ministry of Social Affairs, it was also opposed by a number of organisations and institutions (e.g. Estonian Women's Roundtable, the Gender Equality and Equal Treatment Commissioner and the Estonian Chamber of Commerce). Arguments against the draft related to the sector selection (questioning its application to the public sector only), the increased administrative burden (employers with 10 or more employees were targeted), the poor use of existing institutions (i.e. gender equality bodies and agencies) and an overall questioning of the necessity of establishing yet another institution in the form of the compliance centre. The Legal Affairs Committee did not send the draft law to the plenary sittings due to pressure exerted by conservative forces.

Online source:
https://www.riigikogu.ee/tegevus/eelnoud/eelnou/920bb10b-1e71-48fa-896d-c8f2c473867a/Soolise%20võrdõiguslikkuse%20seaduse%20muutmise%20ja%20sellega

CASE LAW

Police investigation of sexual harassment cases

Gender

With the adoption of Article 153.1 of the Penal Code on 6 July 2017, sexual harassment is defined as an intentional physical act of a sexual nature against the will of another person with degrading objectives.[33] The act is considered a misdemeanour and extra-judicial proceedings in cases of sexual harassment are to be conducted by the Police and Border Guard Board. Sexual harassment is punishable by a fine of up to 300 fine units (EUR 1 200) or by detention.

In the spring of 2018, several women reported to the media that they had been subjected to sexual harassment by a healer and astrologist named Igor Mang. Despite the numerous accusations broadcast by the media, only one complaint of sexual harassment against Igor Mang was officially filed with the police, who convicted him of sexual harassment and charged a fine of EUR 96.[34] On 18 July 2018, following the extra-judicial proceedings by the Police and Border Guard Board, the decision in the Mang case was broadcast on the news. Public discussions followed regarding the (low) amount of the fine imposed on the perpetrator. The police stated that the purpose of the fine was above all to prevent subsequent offences.[35]

The case received wide media coverage and triggered a public debate raising general awareness about sexual harassment. This case illustrates that in practice only a few cases of sexual harassment are reported to the police, whilst media reports show that in fact it occurs on a much larger scale in Estonia.

33 Estonia, Article 153.1 of the Penal Code, 6.07.2017, available at: https://www.riigiteataja.ee/en/eli/509072018004/consolide.
34 https://www.delfi.ee/news/paevauudised/eesti/politsei-pole-ahistamisskandaali-sattunud-igor-mangi-suhtes-uusi-avaldusi-saanud?id=82091785.
35 https://www.err.ee/847528/politsei-mangi-juhtumist-trahvi-eesmark-on-ennekoike-ara-hoida-jargnevad-suuteod.

The Mang case also demonstrates that sanctions for sexual harassment are not effectively applied in Estonia and are thus unlikely to foster changes in the future.

Online source:
https://www.err.ee/830003/pealtnagija-mitu-naist-suudistavad-igor-mangi-seksuaalses-ahistamises

Finland FI

CASE LAW

Multiple discrimination in assessing creditworthiness

Gender

Age

The Non-Discrimination Ombudsman requested the National Non-Discrimination and Equality Tribunal to investigate whether a credit institution company had discriminated against an individual by refusing to grant credit to them, based on personal characteristics including gender and age.

The victim had applied for credit in order to purchase building supplies online. The credit was instantly denied based on the scoring system of the credit institution company which based its scoring among other things on the applicant's language, gender, age and place of residence. The system had checked that the victim did not have payment defaults but no individual assessment of the payment ability (such as income or other debts) was made. Had the victim been female, older, had Swedish as his first language instead of Finnish or had he lived in a different location he would have been granted credit.

The Non-Discrimination Act prohibits discrimination e.g. on grounds of age, language and other personal characteristics when providing goods and services. The Tribunal considered the treatment of the credit applicant to be multiple, direct discrimination on grounds of gender, language, age and residence.

The Tribunal prohibited the credit institution company from continuing its practice, against anyone, and imposed a conditional fine of EUR 100 000 to enforce its prohibitive decision. The decision is final as it was not appealed against.[36]

Online source:
https://www.yvtltk.fi/material/attachments/ytaltk/tapausselosteet/45LI2c6dD/YVTltk-tapausseloste-_21.3.2018-luotto-moniperusteinen_syrjinta-S-en_2.pdf

Police stop and search found to be discriminatory

Racial or ethnic origin

On 19 December 2018, the National Non-Discrimination and Equality Tribunal found that Helsinki Police had practised ethnic profiling amounting to direct discrimination prohibited by the Non-Discrimination Act.

The case concerned two black women who had been stopped and searched by two police officers who were on surveillance of suspected prostitutes and performing immigration status checks. The police officers denied discriminating against the women but admitted that their actions were in part influenced by the fact that the women were black, explaining that many foreign prostitutes lack the right to reside in Finland and may even be victims of human trafficking.

36 Finland, National Non-Discrimination and Equality Tribunal decision No. 216/2017, of 21.03.2018.

The Tribunal considered that the aim pursued – to combat street prostitution and human trafficking – was an acceptable aim needed for justification for direct discrimination.[37] However, the means used by the police were not proportionate and therefore there was no justification for discrimination. The Tribunal pointed out, in particular, that the white man, whom the police officers saw talking with the women, was not stopped by the police, even though the legislation prohibits both the purchase and offering of sexual services in a public place. The Tribunal thus confirmed that the Non-discrimination Act has a wide scope of applicability and that discrimination is prohibited in all fields of life including the acts of authorities such as the police.

The Tribunal ordered the police to refrain from repeating such discriminatory stop and search practices and imposed a conditional fine of EUR 10 000 in order to enforce compliance with its injunction.[38]

Online sources:
www.yvtltk.fi/fi/index/tiedotteet/2019/02/yhdenvertaisuus-jatasa-arvolautakuntakatsoipoliisinmenetelleensyrjintakiellonvastaisestikatuprostituutionvalvonnassa_0.html
www.yvtltk.fi/material/attachments/ytaltk/tapausselosteet/kmnntSkQp/YVTltk-tapausseloste-_19.12.2018-etninen_profilointi.pdf

FR France

LEGISLATIVE DEVELOPMENT

Bill relating to the authorisation and control of parking by Travellers

Racial or ethnic origin

On 23 October 2018, the Senate adopted without amendments a legislative bill intended to amend the Law No. 2000-614 of 5 July 2000 relating to parking sites and domiciles of Travellers, in order to simplify relations between local authorities and Travellers and to facilitate the control of illegal occupation of land and parking sites.

The measures contained in the bill include:

- The creation of administrative units composed of groups of cities and towns that cooperate to collectively manage parking sites to fulfil their requirements to implement a certain number of parking sites.
- The possibility for towns that have met their obligation to provide Travellers with parking sites to forbid Travellers from parking in any other area than those provided for that purpose, even if the other towns in the administrative unit have not collectively implemented their obligations.
- The possibility of unilaterally imposing a fine of EUR 500 in cases of illegal parking, thus facilitating controls by local authorities.
- Sanctions of criminal law are doubled in case of public prosecutions before the penal courts for illegal occupation of land, bringing the maximum sanctions to 12 months in prison and a fine of EUR 7 500.
- A requirement that local authorities be informed three months in advance before any important event where more than 150 caravans will arrive in a town, assemble and require parking.

37 Section 11(1) of the Non-Discrimination Act stipulates a general justification defence of direct discrimination in situations governed by the Racial Equality Directive and when public power is used. It reads: 'differential treatment is only allowed if the treatment is based on legislation, the treatment has an acceptable aim and the means used are in due proportion for achieving this aim'.

38 Finland, National Non-Discrimination and Equality Tribunal decision of 19.12.2018, No. 337/2018.

The legislation adopted is the result of large-scale negotiations between all parties over more than a year and is far less repressive than what was initially foreseen.

Online source:
www.senat.fr/petite-loi-ameli/2018-2019/33.html

CASE LAW

Legality of the decision to remove alternative meals in school on the ground of secularism of public services

Religion or belief

In France, state school cafeterias are managed and financed by cities and towns. From 1984, the town of Chalon-sur-Saône provided alternative meals to children in the school cafeteria when serving pork.

In September 2015, the Municipal Council abrogated the municipal by-law authorising alternative meals on the ground that it was illegal and contrary to the principles of neutrality and secularism of the public services and approved a new catering programme that did not provide alternative meals when pork was served.

An NGO challenged the new municipal by-law before the administrative court on the grounds of illegality and religious discrimination. The court requested the observations of the Defender of Rights (the equality body) and the National Consultative Committee on Human Rights (the national human rights institution). The court concluded that the by-law was illegal because it was exclusively based on the will to implement the principle of secularism and because it was contrary to the higher interests of children, an issue raised by the National Consultative Committee on Human Rights.

The Mayor appealed the decision before the Administrative Court of Appeal, which delivered its ruling on 23 October 2018. Due to a procedural irregularity, the first instance court decision was quashed, although the Administrative Court of Appeal maintained the arguments raised by the claimant NGO and the Defender of Rights to annul the by-law. It stated that principles of secularism and neutrality of the public service do not prevent the provision of alternative meals in substitution of pork and that modifications to the organisation of a public service could only result from considerations related to constraints due to necessities of service. The town had not raised any element that would indicate that the provision of this service for more than 30 years had created any such constraints and the decision was therefore found to be illegal.

The claimant NGO and the Defender of Rights had presented arguments that the municipal by-law constituted discrimination on the ground of religion, but this argument was not examined by the court due to the legal principle of economy of means.[39]

Online source:
https://juridique.defenseurdesdroits.fr

39 France, Dijon Administrative Appeal Court, 23.10.2018, n° 17LY03323, Town of Chalon-sur-Saône.

POLICY AND OTHER RELEVANT DEVELOPMENTS

UN Committee decision on non-conformity of Supreme Court decision on religious freedom in employment with the International Covenant on Civil and Political Rights

Religion or belief

The case before the Human Rights Committee concerned the conformity of a decision of the Court of Cassation (Supreme Court) with Articles 18 (freedom of religion) and 26 (non-discrimination) of the International Covenant on Civil and Political Rights (ICCPR). The case was brought before the Committee by a claimant who had been dismissed from her position as deputy director of a daycare centre for underprivileged children when she refused to remove the veil which she wore due to her religious beliefs, in violation of in-house regulations. She filed a complaint with the Labour Court alleging that the dismissal was null and void as it violated the principle of non-discrimination on the ground of religion in employment.

After a first decision by the Social Chamber of the Court of Cassation stating that the principle of neutrality (invoked by the employer) did not apply to private employment and concluding that the dismissal of the claimant was discriminatory,[40] the Paris Court of Appeal concluded that the prohibition of the veil could be an occupational requirement based on the secular ethos of the childcare centre.[41]

The case returned before the plenary assembly of the Court of Cassation, which adopted yet another view on the case by examining whether the ban on the veil constituted a 'legitimate restriction' to the freedom of religion which can be imposed by an employer on the basis of Articles L1121-1 and L1321-3 of the Labour Code, through the adoption of in-house regulations. Taking into consideration facts such as the role of the daycare centre in promoting social stability; kinship in the respect of the various origins of the children and their parents in a disadvantaged neighbourhood; and the close contact between all employees, the parents and the children, the Court concluded that the employer had demonstrated that the limitation to religious freedom was justified by the nature of the operation and the specific function of the claimant. The limitation was found to be proportionate to the legitimate objective pursued. The Court did not address the issue of potential discrimination.[42]

The claimant argued that the decision was a restriction to freedom of religion that is not foreseen by law; that is not necessary in a democratic society since it cannot be justified by the protection of security, public order or public health; that is not proportionate since it gave rise to her dismissal without compensation; and finally, that the internal regulation was illegal because it was general, imprecise and disproportionate.

After stating that national law protects freedom of religion and that the principle in private employment is the freedom to manifest one's religion, the French State argued that the present restriction to the expression of religion was in conformity with the ICCPR. In this regard, the State argued that the restriction was prescribed by law through Articles L1121-1 and L1321-3 of the Labour Code, that it pursued the legitimate aim of protecting the freedom of others (i.e. the children and the parents) and that it was proportionate considering that it was only applicable when the claimant was present in the childcare centre. Therefore, the State concluded that the internal regulation was not discriminatory in light of Article 26 of the Covenant, since it did not target a particular religion and was justified as it was legitimate and reasonable.

40 France, Social Chamber of the Court of Cassation, *Baby-Loup Case* No. 536 of 19.03.2013 (11-28.845), ECLI:FR:CCASS:2013:SO00536. Available at: https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/536_19_25762.html.

41 France, Appeal Court of Paris, *Baby-Loup Case* No. 13/02981 of 27.11.2013. Available at: https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=7450.

42 France, Plenary Court of Cassation, *Baby-Loup Case* n° 612 of 25.06.2014 (13-28.369), ECLI:FR:CCASS:2014:AP00612. Available at: https://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/612_25_29566.html. See also *European equality law review,* Issue 2015/1, pp 105-106.

On 10 August 2018, the Committee published its views concerning the case. It found that the State did not explain how wearing a headscarf alters the claimant's capacity to ensure social stability, kinship and the rights of the children and their parents. Moreover, the State did not explain how wearing a headscarf is incompatible with the purpose of the daycare centre to 'work in support of early childhood in deprived areas and to promote the social and professional integration of women' in those areas. For the Committee, it is also not clear from the State's arguments how the claimant's headscarf interfered with the fundamental rights and freedoms of the children and parents.

Wearing a headscarf does not constitute a proselytising act. The restriction imposed is therefore not proportionate to the objective pursued. The claimant's dismissal further to her refusal to remove her headscarf was not in conformity with Article 18 para. 3 of the ICCPR and constituted intersectional discrimination based on gender and religion, violating Article 26 of the Covenant.[43]

Online source:
https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F123%2FD%2F2662%2F2015&Lang=en

Germany DE

CASE LAW

Rejection of applicant teacher wearing a headscarf

Religion or belief

An applicant for a teaching position at a state school claimed that her application had been unsuccessful because she wears a Muslim headscarf and that she was therefore unlawfully discriminated against on religious grounds. In the view of the first instance court, the wearing of the headscarf was the main reason for the rejection of her application, yet her claim was dismissed.[44]

In its ruling of 27 November 2018, the appeal court ruled that the claimant had been discriminated against in the sense of Article 7 of the General Equal Treatment Act and awarded her compensation of 1.5 months' salary (EUR 5 159.88). The Court found that the so-called Berlin Neutrality Act (according to which no religious or ideological symbols should be worn in schools by teachers),[45] invoked by the defendant (the Land Berlin) offered no justification for her treatment. The court argued that this act has to be interpreted in accordance with the jurisprudence of the Federal German Constitutional Court which held in 2015 that an abstract, general ban on religious symbols worn by teachers is unconstitutional.[46] An exception is a situation of concrete dangers to the peace of the school or state neutrality, but there was no reason to assume that such a danger existed in this case.[47]

Online source:
http://www.berlin.de/gerichte/arbeitsgericht/presse/pressemitteilungen/2018/pressemitteilung.761600.php

43 UN Human Rights Committee Complaint procedure CCPR/c/123/D/2662/2015 of 18 June 2018 (published 10 August 2018) of *F.A. v France*.
44 Germany, Berlin Labour Court, 24.05.2018, Az. 58 Ca 7193/17.
45 Germany, Act on Article 29 of the Constitution of Berlin of 27.01.2005, GVBl. 2005, 92.
46 German Federal Constitutional Court BVerfG, 27.01.2015, 1 BvR 471/10, 1 BvR 1181/10.
47 Germany, Berlin-Brandenburg Land Labour Court, 27.11.2018, Az. 7 Sa 963/18.

EL Greece

LEGISLATIVE DEVELOPMENT

Repeal of the fiscal law provision obliging spouses to submit a joint income tax return

Gender

In February 2018, the Council of the State ruled that a husband may submit a joint income tax return including his wife's income, only if both spouses agree to it (the agreement is deemed to exist even tacitly by the mere submission of a joint income tax return), whereas if either of the spouses informs the tax authorities explicitly of the absence of his/her consent, the spouses may submit separate income tax returns.[48]

Following this judgment, on 18 December 2018, Parliament adopted an amendment[49] to the relevant provision of Article 67(4) of the Income Tax Code[50] which previously required that spouses submit a joint income tax return. According to the new provision, spouses may submit separate income tax returns if either of them chooses to do so by submitting an irrevocable declaration to the tax authorities for each fiscal year.

The obligation of spouses to submit a joint income tax return had been denounced by women's rights NGOs for many years as direct discrimination to the detriment of married women on the ground of their marital status, since it was only men who could submit, in their name, a joint tax return.

This is an exemplary case of the immediate and effective application of Council of State case law by the Greek legislator, although this reform has been long overdue.

CASE LAW

Parental leave recognised as working time

Gender

A female worker, employed by a private bank, brought a case to the court complaining that her period of non-paid parental leave (one year, five months and one day) from December 1999 to May 2001 was not recognised by her employer as working time for the purpose of pay calculation (the pay system was set in pay scales based on seniority), although this period had been recognised as insurable time by the social security scheme due to the payment of both the employer's and the employee's contribution by the female worker herself. The employee had submitted written petitions regarding this issue to her employer upon her return from parental leave, which were never answered. Whilst she was employed, she was afraid of victimisation and therefore waited until her retirement in September 2013 to bring the case to court.

48 Greece, Council of State judgment No. 330/14.02.2018.
49 Greece, Act 4583/2018, OJ A 212/18.12.2018, Article 59(5).
50 Greece, Act 4172/2013, OJ A 167/23.07.2013. Article 67(4) of the Income Tax Code provided that spouses, during their marriage, were obliged to submit a joint income tax return; however, the income tax, the corresponding fees and the contributions were calculated separately for each spouse on the basis of his/her income. According to the same Article, the parties to a life partnership agreement might also submit a joint income tax return (in this case it is optional); if they did, they had the same treatment as married spouses. The husband (or the party to the life partnership agreement who is declared as the principal taxpayer) was obliged to submit the income tax return not only for his income but for the income of his wife (or of the other party to the partnership agreement) as well. Separate income tax returns were allowed only (a) if the marital cohabitation had ceased (or the life partnership had been dissolved); the relevant burden of proof was born by the taxpayer, (b) if one of the spouses (or one of the parties to a life partnership agreement) had been declared bankrupt or had been put under guardianship by judicial decision for lack of mental capacity.

The claimant alleged that the bank's refusal to recognise this period as working time constituted direct gender discrimination in breach of Act 3896/2010, implementing Directive 2006/54/EC, to be interpreted in the light of Articles 4(2) and 21(1) of the Greek Constitution, the CEDAW, Directive 2006/54/EC and Articles 21 and 33 of the Charter of Fundamental Rights of the EU. She claimed the relevant pay arrears (regarding the pay difference) for the five last years, given that pay arrears for the previous period had been time-barred.

In its judgment of 20 July 2018, the Athens Court of Appeal did not explicitly identify as direct gender discrimination the non-recognition of non-paid parental leave as working time for the purpose of the calculation of the claimants' salary. However, the Court of Appeal found that this practice was contrary to Act 3896/2010 implementing Directive 2006/54/EC, in particular to Article 3(1) of the said Act, prohibiting direct and indirect discrimination on the ground of gender, to Article 4 of the said Act providing the principle of equal pay between women and men for the same work or work of equal value, to Article 18 of the said Act providing that the less favourable treatment of parents due to the take up of parental leave is considered discrimination for the purposes of the said Act and Article 21(1) of the Constitution requiring the protection of maternity; the Court therefore awarded the female employee the relevant loss of pay in the form of pay arrears (EUR 6 118.12) for the last five and a half years of service.[51]

Discrimination against female cleaners

A recent case, inspired by the CJEU judgment in *Nikoloudi* (C-196/02),[52] concerned the decision of a private bank to close down the cleaners' department in order to outsource the cleaning activities. This resulted in the redundancy of 64 cleaners, all of them women (with the exception of one male cleaner). A great majority of the cleaners accepted the employer's offer to resign in order to be paid a bonus, which amounted to double or triple the legal redundancy compensation. The female cleaners who declined the offer were dismissed. One of them brought the case before the First Instance Court of Athens alleging, inter alia, that she was the victim of direct (or indirect) sex discrimination. According to the claimant, her employment in a predominantly female department was terminated without her being offered the possibility of being transferred to another position, whereas in predominantly male departments, such as those of blue-collar workers or clerks, employees were given the possibility of being transferred to other positions within the bank.

In its judgment of 12 December 2018, the First Instance Civil Court of Athens found that the provision of the internal rules of the bank, as modified in June 2014, that excluded the cleaners[53] from the possibility of being transferred to other jobs, whereas workers in predominantly male departments were offered that possibility, constituted indirect sex discrimination in breach of Act 3846/2010,[54] which implements Directive 2006/54/EC.[55]

However, the Court did not find that the termination of the employment contract per se constituted (direct or indirect) sex discrimination. The reasoning of the Court was as follows: the termination was due to the implementation of the business decision of the bank to close down the cleaners' department and not due to any other ground which would amount to or could be deemed sex discrimination. This wording shows that the Court was looking for a possible 'fault' by the employer, which it did not find. Nonetheless, the termination was found null and void in breach of other national law provisions, which are not of interest under EU law and in the present context.

51 Greece, Athens Court of Appeal, judgment No. 3693/2018 of 20 July 2018.
52 CJEU 10 March 2005 *Nikoloudi v Organismos Tilepikinonion Ellados AE* Case C-196/02, ECLI:EU:C:2005:141.
53 The word in Greek is used in the female gender given that it is a predominantly female profession.
54 Greece, Act 3896/2010, 'Implementation of the Principle of Equal Treatment of Men and Women in Matters of Employment and Occupation. Harmonisation of Existing Legislation with Directive 2006/54/EC of the European Parliament and the Council,' OJ A 207/08.12.2010.
55 Greece, First Instance Civil Court of Athens, judgment of 12 December 2018, No. 2323/12.12.2018.

After the aforementioned CJEU preliminary ruling in *Nikoloudi*, this is the only Greek judgment applying the notion of indirect discrimination on the grounds of sex in private sector employment. Therefore, this judgment is of great importance. However, it is obvious that the Court subjected the finding of discrimination to the requirement of fault, which is contrary to the ECJ case law in *Draehmpaehl*[56] and *Dekker*.[57]

Although a big step forward, this judgment shows the difficulties in the implementation of the concepts of EU anti-discrimination law by the national courts, in particular the concepts of indirect discrimination and the non-requirement of fault. It also shows that the concept of indirect discrimination is still unclear, which explains the scarcity (almost nonexistence) of relevant case law in employment in the private sector.

It should be also noted that the applicant requested the shift of the burden of proof, but the court neither responded to this request nor applied EU law on the shift of the burden of proof.

HU Hungary

CASE LAW

Dismissal of a pregnant employee during probationary period

Gender

The complainant in this case started work at a hospital as a kitchen aide and became pregnant during her probationary period. She informed her direct supervisor and a few days later became sick and subsequently went on sick leave. One week after she went on sick leave, her employer informed her via phone that her employment was terminated with immediate effect because of her pregnancy. The employee filed a complaint with the Equal Treatment Authority claiming that the termination of her employment was discriminatory due to the fact that it was based on her pregnancy and health condition.

The Equal Treatment Authority launched an investigation into the case. The respondent claimed that it did not violate the complainant's right to equal treatment since her contract was terminated during her probationary period when both parties can lawfully terminate the employment with immediate effect without the obligation to provide reason for the termination. The respondent rejected the allegation that the employment contract was terminated due to the pregnancy, but was unable to provide an acceptable explanation for the termination of her contract.

The Equal Treatment Authority found in its decision of 3 July 2018 that the respondent was not able to prove that it observed the right to equal treatment or that it was exempted from this obligation, based on the Equal Treatment Act. The Equal Treatment Authority found that the respondent violated the complainant's right to equal treatment and directly discriminated against her based on her pregnancy and health condition. A causal connection was established between the pregnancy and health condition of the complainant and the subsequent termination of her employment. The fact that labour regulations allow the immediate termination of employment during a probationary period does not provide a lower level of scrutiny for proof under the anti-discrimination framework and therefore does not waive the obligation for the employer to observe the requirement of equal treatment.[58]

The decision of the Equal Treatment Authority refers to the decision in principle no. 23/2018 in administrative law of the Curia.[59]

56 ECJ, 22 April 1997 *Draehmpaehl v Urania Immobilienservice OHG*, Case C-180/95, ECLI:EU:C:1997:208.
57 ECJ, 8 November 1990 *Dekker v Stichting Vormingscentrum voor Jong Volwassenen* Case C-177/88, ECLI:EU:C:1990:383.
58 Hungary, Equal Treatment Authority, decision No. EBH/308/2018 of 3.07.2018.
59 Hungary, Curia, judgment No. Kfv.III.37.585/2017 of 5.06.2018.

Online source:
www.egyenlobanasmod.hu/sites/default/files/nyilvanos_hatarozat/30.08.28.309.18..pdf

First instance court decision on damages for segregation in education

Racial or ethnic origin

In March 2015, the Curia (Hungary's Supreme Court) had concluded in an *actio popularis* lawsuit launched by the Chance for Children Foundation (CFCF) that the Roma pupils in the Nekcsei Demeter elementary school of Gyöngyöspata had been unlawfully segregated. In each grade there were two classes, one with practically only Roma pupils and one where there were almost none.[60] Furthermore, the Roma and non-Roma classes were separated physically by being placed on different floors of the school building and the Roma children were provided with lower quality education than their non-Roma peers. The Curia's judgment was based on the conclusions of the Minorities Ombudsman that in December 2011 neither the school nor the municipality had taken any measure to remedy the situation that had been disclosed in April of the same year, nor had they complied with any of the Ombudsman's recommendations.

Based on the Curia's final and binding decision, 63 former pupils of the segregated Roma classes, with the help of CFCF and pro bono lawyers, launched a lawsuit for damages in February 2016 against the school, the Municipal Council and the Klebelsberg School Maintaining Centre.[61] Their claims concerned the long-term disadvantages they had suffered as a result of their substandard education (e.g. the loss of the real possibility to succeed in the labour market). Each former pupil claimed HUF 500 000 (EUR 1 560) per school year spent in segregated classes. The respondents requested the court to reject the claim, arguing that a maximum of 10 % of the claims (i.e. EUR 156 per claimant) would be realistic and that the responsibility of the individuals for their failure in education and employment should also be considered.

On 16 October 2018, the Eger Regional Court delivered a first instance judgment in the case.[62] The Court agreed with the Curia judgment that the respondents had violated the claimants' right to equal treatment and eventually adjudicated the claims of 62 claimants after individually examining their circumstances, including the number of school years they had spent in segregated education and how the discrimination they had suffered impacted on their lives. It rejected the claim of two claimants, fully granted the requested compensation in 12 cases and granted part of the requested compensation in 48 cases. The claimants originally claimed HUF 290 million (EUR 906 250) in damages altogether, which they later modified to HUF 143 million (EUR 447 900). Of this, the court granted them a total of HUF 89 million (EUR 278 120).[63]

Online sources:
https://birosag.hu/aktualis-kozlemenyek/egri-torvenyszek-itelet-gyongyospatai-szegregacios-ugyben (press release from the Eger Regional Court);
https://168ora.hu/itthon/tortenelmi-itelet-karterites-jar-a-gyongyospatai-gyerekeknek-a-szegregacio-miatt-157638 (press report on the decision).

First instance court decision on the harassing practices of the Municipality of Miskolc

Racial or ethnic origin

In December 2018, the Regional Court of Miskolc delivered its judgment in one of the most large-scale cases of discrimination in Hungary, ruling on the combined harassing effect of a series of different

60 The proportion of Roma children within the student population at the relevant time was around 50 %.
61 KLIK is the state body that – as of 1.01.2013 – became the municipality's legal successor as a result of the national centralisation of school management.
62 At the time of writing, the first instance court decision has still not been published. The summary here is based on the court's press release and media coverage of the decision.
63 The lowest amount a plaintiff received was HUF 200 000 (EUR 635), the highest amount HUF 3.5 million (EUR 10 940). The aggregate number of school years with regard to which damages were granted was 226.

practices and actions targeting the local Roma population taken by Miskolc Municipal Council over a period of more than five years.

Firstly, the municipal authorities responsible for areas including public health and child protection performed recurring and concentrated inspections in the segregated, mainly Roma neighbourhoods. Secondly, the municipal Social Housing Decree, as amended in May 2014, clearly aimed to drive out indigent (mainly Roma) social housing residents from the municipality by offering them compensation for the termination of their social housing contracts provided they undertook to move out of Miskolc. Thirdly, the municipality started to systematically terminate the social housing tenancies of people living in low-standard accommodation in a highly segregated part of the town, called the 'Numbered Streets', without taking any measures to provide the tenants with alternative housing and thus exposing them to the threat of homelessness.

The Curia (Hungary's Supreme Court) had already concluded in 2015 that the amendment of the Miskolc municipal decree discriminated against people living in low-standard social housing, thus quashing the amendment.[64] In parallel, the Ombudsman issued a report stating that the same amendment amounted to direct discrimination on the basis of financial situation and indirect discrimination on the ground of race. Furthermore, the report severely criticised the practice of concentrated administrative inspections in segregated areas and formulated a number of recommendations.

Also in 2015, the Equal Treatment Authority established that the municipality of Miskolc subjected the residents of the Numbered Streets to the threat of homelessness or having to move to other segregated areas and, by doing so, discriminated against them on the basis of their social status, financial situation and Roma origin. The Authority also ordered the municipality to put an end to the discriminatory situation by developing two separate action plans (by 30 September and 31 December 2015 respectively) on the provision of alternative housing of an adequate standard for the tenants of the Numbered Streets. Finally, the Authority imposed a fine of HUF 500 000 (EUR 1 670) on the municipality.[65] The decision of the equality body was upheld on all counts by the national courts.

However, despite adopting the requested action plans, the municipality did not change its practices and continued the process of driving the poor Roma population out of town. Two NGOs, the Hungarian Civil Liberties Union (TASZ) and the Legal Defence Bureau for National and Ethnic Minorities (NEKI), then submitted an *actio popularis* civil law claim to the Miskolc Regional Court.

In its decision of 12 December 2018, the Miskolc Regional Court concluded that through the raids held in the Roma neighbourhoods, the elimination of social housing without providing adequate guarantees against homelessness and the manner in which the municipality communicated the issue to the public, the Municipality of Miskolc and the Miskolc Municipal Law Enforcement Body had violated the human dignity and the right to non-discrimination of the Roma of Miskolc. The Court held that the practices of the municipality amounted to harassment based on ethnicity and ordered the respondents to publish an apology on the municipal website and through the Hungarian news agency, and to pay a so-called public interest fine of HUF 10 million (approx. EUR 31 000). The municipality submitted an appeal against the decision and the mayor declared publicly that he had no intention of changing his policies. Among other things, he said: 'I have some bad news for TASZ and NEKI: [...] we will pay the fines if we must, like we have done in the past, but it is not HCLU and especially not NEKI who can tell us what we must do in Miskolc to protect public safety. We will see them in court!'

Online sources:
https://nepszava.hu/3018359_szamozott-utcak-az-orszag-legnagyobb-diszkriminacio-ellenes-peret-nyerte-meg-a-tasz and

64 Hungary, Curia, decision No. Köf.5003/2015/4, of 13.05.2015.
65 Hungary, Equal Treatment Authority, decision No. EBH/67/22/2015 of 15.07.2015.

https://borsodihir.hu/helyben-jaro/2018/12/miskolc-polgarmestere-elkuldte-a-jogvedoket-a-fenebe

POLICY AND OTHER RELEVANT DEVELOPMENTS

Report of Ombudsperson on preferential treatment of women concerning repayment conditions for student loans

Gender

The Ombudsperson, after receiving complaints from individuals, implemented an *ex officio* investigation regarding recent amendments (in effect since 1 January 2018) of the Governmental Decree on the System of Student Loans. According to the new provisions, women are entitled to a relief of 50 % of their student loans after giving birth to (or adopting) a second child and a relief of 100 % after giving birth to (or adopting) a third child. Moreover, pregnant women may suspend the repayment of their student loans from the 91st day of their pregnancy, for a total duration of 36 months. Fathers (either biological or adoptive) are not entitled to this relief, even in situations when the parents are living together and the mother has already repaid or never had a student loan, the entitlement is not transferrable to the male spouse/partner. Single fathers, either raising biological or adopted children, are also excluded from this entitlement. According to the conclusions of the Ombudsperson, the government should consider revising the amendment.

The Ombudsperson's report of 24 July 2018 stated that the preferential treatment of women should not be considered necessarily as discriminatory or unconstitutional, if the policy in question qualifies as an *ex gratia* allowance/relief. The Ombudsperson states that the preferential treatment of women in this situation is justified, taking into consideration the extra burden of childbearing in cases of biological mothers, as compared to fathers. However, it holds that the student loan repayment rules (that the entitlement for relief is not transferrable) are 'unreasonable' in cases where the parents are living together. The Ombudsperson explains that there are single biological fathers who are raising their children alone from the earliest stage (e.g. because the mother died or left the family), in which case the policy is 'worrisome in relation to the requirement of equal treatment'. Moreover, in the cases of single adoptive mothers and fathers, the differentiation between women and men is not justified (because there are obviously no differences between their parental burdens) and thus the policy is 'anomalous in relation to the requirement of equal treatment'.

Online source:
https://www.ajbh.hu/documents/10180/2805034/Jelentés+a+nullázható+diákhitel+kapcsán+978_2018/809493ba-7ede-bfb5-a034-46d085dc6a14?version=1.0

Iceland IS

LEGISLATIVE DEVELOPMENT

Higher ceiling for payments during maternity/paternity leave

Gender

The Minister of Social Affairs and Equality signed a new regulation in December 2018 amending the regulation on payments from the Maternity/Paternity Leave Fund as amended[66] by which payments to parents on maternity/paternity leave will be raised from 1 January 2019 up to the amount of EUR 4 303

66 Iceland, Act on Maternity/Paternity Leave and Parental Leave, No. 95/2000 as amended, available at: https://www.government.is/media/velferdarraduneyti-media/media/acrobat-enskar_sidur/Act-on-maternity-paternity-leave-95-2000-with-subsequent-amendments.pdf.

(ISK 600 000) (from the previously planned amount of EUR 3 728 (ISK 520 000) foreseen in the Government Fiscal Policy which was introduced on 11 September 2018).[67]

The ceiling for maternity/paternity leave payments has never been higher, but the value has decreased since the financial collapse in 2008. By increasing payments, it is hoped that fathers will be more inclined to take the leave they are entitled to.[68] According to the Act on Maternity/Paternity Leave and Parental Leave, parents shall each have an independent entitlement to maternity/paternity leave for up to three months after giving birth, primary adoption or upon receiving a child into permanent foster care. This entitlement shall not be transferable. In addition, the parents shall have a joint entitlement to an additional three months, which either parent may draw in its entirety or the parents may divide between them (Article 8 of Act No. 95/2000).

A parent acquires the right to payments from the Maternity/Paternity Leave Fund after she/he has been active on the domestic labour market for six consecutive months prior to the birth of a child or the date on which an adoptive or foster child enters the home. The work contribution of a self-employed parent shall be based on the payment of the insurance levy on calculated remuneration for the same period.

The Maternity/Paternity Leave Fund's monthly payment to an employee during maternity/paternity leave amounts to 80 % of her/his average wage during a 12-month consecutive period, ending two months prior to the first day of the maternity/paternity leave. Included in such wages shall be all forms of wages and other remunerations under the Insurance Levy Act.[69] The maximum and minimum monthly payments from the Maternity/Paternity Leave Fund for each year are published on the Fund's website.[70]

Online source:
https://www.ruv.is/spila/ruv/frettir/20181218

POLICY AND OTHER RELEVANT DEVELOPMENTS

Gender quotas not meeting expectations

Gender

The Act respecting Amendment to the Act on Public Limited Companies and Act on Private Limited Companies (Ownership, Sex Ratios and acting Chairmen of Boards of Directors) No. 13/2010 [71] has not led to the results expected within the corporate world. The number of women holding the highest positions has not increased, according to recent research by Deloitte published in October 2018.[72] Roughly, more than 80 % of company boards of the largest firms in the country consist mainly of male members. The gender quota law stipulates that the boards of public limited companies as well as private limited companies with more than 50 employees must be composed of at least 40 % of members of the under-represented sex. The gender quota act became binding on state-owned companies in 2010 and on public limited companies in 2013.

67 The Fiscal Budget for 2019 was introduced on 11.09.2018 and is available at: https://www.stjornarradid.is/verkefni/efnahagsmal-og-opinber-fjarmal/fjarlog/fjarlog-fyrir-arid-2019/. See also: https://eyjan.dv.is/eyjan/2018/12/18/asmundur-haekkar-faedingarorlofid-um-80-thusund-kall-manudi-lod-vogarskalar-aukins-kynjajafnrettis/.

68 https://www.ruv.is/frett/hamarksgreidslur-faedingarorlofs-taka-kipp.

69 Iceland, Article 13 (2) of the Act on Maternity/Paternity and Parental Leave No. 95/2000 as amended.

70 http://www.faedingarorlof.is/files/Upph%C3%A6%C3%B0ir%202019_232393447.pdf.

71 Iceland, Act respecting Amendment to Act on Public Limited Companies and Act on Private Limited Companies (Ownership, Sex Ratios and acting Chairmen of Boards of Directors) (*Lög um breytingu á lögum um hlutafélög og lögum um einkahlutafélög (eignarhald, kynjahlutföll og starfandi stjórnarformenn*) No. 13/2010, text available in English at: www.government.is/library/04-Legislation/Act%20No%202-1995.pdf.

72 The Association of Women in Business (*Félag kvenna í atvinnurekstri, FKA*) presented the results of the Deloitte analysis of the 100 largest companies in Iceland: https://www.frettabladid.is/frettir/loeg-um-kynjakvota-ekki-skila-naegilegum-arangri/.

According to this research, women make up only 10 % of the directors of the 250 largest companies in Iceland. Men make up the large majority of the members of the boards of directors of these companies (82 %). There are no current signs that the number of women is increasing in the highest echelons of these corporations. Interestingly, the research also shows that the number of women on company boards is higher in companies where women are directors.

While there are currently no women at all on 23.2 % of company boards in Iceland, the sex representation ratio is equal on only 8.6 % of company boards and women outnumber men on only 9.4 % of the boards.

Online source:
https://www.ruv.is/frett/ahrif-kynjakvotalaganna-litil-i-fyrirtaekjum

Equal pay certification

The Minister of Welfare and Equality has granted companies a postponement of one year to obtain an equal pay certification. This deferral applies to private corporations and institutions, independent of their size, but not to public institutions, funds or state-owned companies.

The reason for this postponement is a lack of parties able to conduct the certification process to implement the law.

The amendment to the Gender Equality Act No. 10/2008 which came into force on 1 January 2018 makes it obligatory for companies and institutions employing 25 or more workers on an annual basis to obtain equal pay certification of their equal pay system and the implementation thereof. The purpose of this obligatory certification is to enforce the current legislation prohibiting discriminatory practices based on gender and requiring that women and men working for the same employer shall be paid equal wages and enjoy equal terms of employment for the same jobs or work of equal value.[73]

According to the law, companies and institutions with more than 250 employees were to be ready to obtain pay certification by the end of 2018. To date, 39 companies have obtained this certification.

The amendment to Regulation No. 1030/2017 drafted by the Minister of Welfare and Equality came into effect on 14 November 2018. The amended regulation stipulates the following time limits for obtaining equal pay certification:[74]

- Companies and institutions with more than 250 employees – 31 December 2019;
- Companies and institutions with 150-249 employees – 31 December 2020;
- Companies and institutions with 90-149 employees – 31 December 2021;
- Companies and institutions with 25-89 employees – 31 December 2022.

Online source:
www.ruv.is/frett/krofu-um-jafnlaunavottun-frestad-um-12-manudi

73 Regulation No. 1030 of 13.11.2017 on the certification of equal pay systems of companies and institutions according to the ÍST 85 Standard, available at: https://www.government.is/library/04-Legislation/Regulation_CertificatinOfEqualPaySytems_25012018.pdf.

74 News from the Government on 14.11.2018 https://www.stjornarradid.is/verkefni/allar-frettir/frett/2018/11/14/Frestur-fyrirtaekja-og-stofnana-til-ad-odlast-jafnlaunavottun-framlengdur-um-12-manudi/.

IE Ireland

Positive discrimination in Irish higher education institutions

Gender

On 12 November 2018, the Prime Minister (An Taoiseach Leo Varadkar) and Mary Mitchell O'Connor, Minister of State with special responsibility for Higher Education, launched the 'Gender Action Plan 2018-2020: Accelerating gender equality in Irish higher education institutions'. The Action Plan is designed to transform the higher education sector's gender equality performance. The government initiative is that 45 senior academic posts will be established for which only women may apply. Such appointments are to take place over three years and there is to be additional state funding for such posts. The minister also wants 40 % of professors in institutes of higher education to be female by 2024. The Gender Equality Taskforce was established in November 2017 to build on the work of the Higher Education Authority (HEA) 'National review of gender equality in Irish higher education institutions' (2016). The Taskforce identified significant measures that will further accelerate progress in achieving gender equality in Irish higher education institutions following the recommendations of the HEA Expert Group (2016).

To date there are no precise details published as to the nature of these appointments save that they will be new permanent, pensionable posts. It is not known whether these posts will be in Irish universities or in institutes of technology or in what fields, e.g. science or engineering. The Employment Equality Acts 1998 to 2015 make limited provision for positive discrimination and do not provide for quotas. Section 24 of the 1998 Act (as amended) provides that the Act is without prejudice to ensuring full equality in practice between men and women in their employment by providing specific advantages so as to make it easier for an under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. This section of the Act has not been litigated in Ireland and it is possible that there could be litigation depending on the nature of the proposed posts. The Electoral (Amendment) (Political Funding) Act 2012 provided that political parties had to have a certain quota of female candidates in general elections in order to obtain political funding. This approach was criticised at the time and has resulted in only a marginal increase in the number of women elected to parliament.

The controversy in respect of appointments to professorial posts in Irish institutes of higher education stems in the main from the case of *Sheehy Skeffington v National University of Ireland Galway* where the complainant, a lecturer, failed to be appointed to a senior lecturer post.[75] The statistics for that particular constituent college of the National University of Ireland showed that few women were appointed to senior posts, i.e. one in two men and one in three women would get promotion at the college. The complainant had applied for promotion on numerous occasions.

Looking deeper into this case, it was badly handled by the respondent employer and there was a breach of fair procedures in the appeal process. The complainant made out a prima facie case of discrimination. In respect of indirect discrimination, the equality officer considered that there was one neutral criterion that put women at a disadvantage, namely that the application form for senior lecturers asks people to state when they were on maternity leave or other unpaid leave. Male applicants left this part of the form 'blank'. The complainant had taken leave to look after her elderly mother and other female applicants had taken maternity, adoptive and parental leave. The only successful woman candidate had taken no leave. Such caring responsibilities were seen as a disadvantage to women. The equality officer ordered promotion of the complainant from 1 July 2009 with all necessary adjustments to salary and benefits and payment of EUR 70 000 (being approximately one year's salary). In addition, the respondent must conduct a review of its policies with respect to the gender ground with a report on progress to be made to the Irish Human Rights and Equality Commission.

75 Ireland, Equality Tribunal, Decision No. DEC-E2014-078 of 13.12.2014, available at: www.workplacerelations.ie/en/Cases/2014/November/DEC-E2014-078.html.

Online source:
www.workplacerelations.ie/en/Cases/2014/November/DEC-E2014-078.html

Italy

CASE LAW

The ban on dismissal on grounds of marriage does not apply to male workers

Gender

A male worker contested his dismissal, maintaining that it was discriminatory under Article 35 of the Code of Equal Opportunities between Women and Men[76] as it took place within the year following his marriage. He argued that the ban on dismissal after the first year of marriage to protect against discrimination applies to male workers in the same way as to female workers. In fact, although Article 35 expressly refers to female workers, it aims to protect the worker's right to have a family. Moreover, he argued that the personal scope of the Code for Equal Opportunities (Decree No. 198/2006) includes both sexes and that differential treatment would not be consistent with Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, as it amounts to sex discrimination.

The Court of Cassation, in its decision of 12 November 2018, confirmed the second instance judgment which deemed the personal scope of Article 35 to be limited to female workers. This provision is the expression of the specific constitutional protection awarded to working women. The Court underlined that the protection against discriminatory dismissal on grounds of marriage had been introduced in the 1960s to strengthen the protection of women's employment rights. This specific protection is perfectly in line with the social reality, since employers tend to dismiss recently married female workers as they expect long absences from work when women become pregnant. Moreover, it responds to the same objectives as the constitutional principles of both the protection of motherhood and equality, which provide that maternity shall not be an obstacle to women's effective participation in the labour market. Consequently, this stronger protection awarded to women is not discriminatory, not even under EU law. This can justify differential treatment as men are not in an analogous situation.[77]

The Court underlined once again the principle ruled by the Constitutional Court, following which different protection based on gender cannot be deemed to be discriminatory in itself. It mainly shed light on the development of the protection of female workers as mothers in Italian legislation, in order to clarify the reason for excluding male workers from the personal scope of Article 35 and the consistency of this exclusion with the principle of equal opportunities. In particular, it recalled the legitimacy of measures of protection of maternity as an instrument to achieve substantial equality for working women, in line with well-established CJEU case law.[78]

Online source:
www.neldiritto.it/public/pdf/CASS_28926_2018.pdf

76 Italy, *Code of Equal Opportunities between men and women* Decree No. 198/2006 of 11.04.2006, published in OJ No. 125 of 31.05.2006, o.s. No. 133, available at: www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2006-05-31&atto.codiceRedazionale=006G0216&currentPage=1.

77 Italy, Court of Cassation decision No. 28926 of 12.11.2018, available at: http://www.neldiritto.it/public/pdf/.

78 Such as, for instance, C 476/99, judgment *Lommers* of 19.03.2002, published at https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:61999CJ0476&rid=1, or C 232/09, Judgment *Danosa* of 11.11.2010, published at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0232&rid=1.

CASE LAW

The Constitutional Court strengthens the right to compulsory maternity leave

Gender

The Constitutional Court delivered a judgment on 13 July 2018, in which it ruled that Paragraph 3 of Article 24 of Decree No. 151/2001 on the Protection of Motherhood and Fatherhood[79] contradicts the Constitution. Article 24 extends the right to maternity allowance for the period of compulsory maternity leave to working mothers who, at the beginning of this period, are temporarily absent from work or on leave from work with no right to remuneration or have been unemployed for less than 60 days. Under Article 24, para. 3, absences due to illness or an accident at work, leave due to care for a sick child, absence due to foster care or periods of interruption of work in case of a vertical part-time contract are exceptions and not to be reckoned for the time limit of 60 days.[80]

The Constitutional Court ruled that Paragraph 3, which does not include periods of leave to care for disabled relatives in these exceptions, is not in compliance with Articles 3, 31 and 37 of the Constitution, ensuring the principle of equality and the protection of the family and of motherhood.[81]

The Court underlined in its ruling that the remunerated period of leave to care for a disabled relative, which is grounded on objective and strict requirements, must be included in the other exceptions provided by the law mentioned above as it responds to the need to ensure that the necessary care for disabled people can be provided by their family.

Not recognising the need to care for a disabled relative would also arbitrarily sacrifice the special protection granted by Article 37 of the Constitution to both the mother and the child, as it would compel the mother to choose between taking care of the disabled person or returning to work to benefit from the maternity allowance. The judgment of the Constitutional Court, which added the period of leave to care for disabled people to the exceptions expressly laid down by Paragraph 3 of Article 24, further strengthened the protection of maternity and was a necessary intervention (as stated by the Court itself), as case law could not merely add it to the list of exceptions by way of interpretation.

Online source:
www.giurcost.org/decisioni/index.html

LV Latvia

POLICY AND OTHER RELEVANT DEVELOPMENTS

UN CERD publishes conclusions and recommendations on Latvia's periodic reports

Racial or ethnic origin

On 30 August 2018 the UN Committee on the Elimination of Racial Discrimination (CERD) published its concluding observations on the sixth to twelfth combined periodic reports on Latvia, which had been submitted with a 10-year delay.[82]

79 Italy, Decree No. 151 of 26.03.2001 on the Protection of Motherhood and Fatherhood, published in OJ No. 96 of 26.04.2001.
80 A vertical part-time employment scheme provides for full working days but only at predetermined times, that is, on some days of the week, in some weeks of the month or in some months of the year.
81 Italy, Constitutional Court judgment No. 158 of 13.07.2018, available at: www.giurcost.org/decisioni/index.html.
82 Combined sixth to twelfth periodic reports submitted by Latvia under Article 9 of the Convention, due in 2007, distributed 10.11.2017. Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fLVA%2f6-12&Lang=en.

Reiterating to a large extent the concerns raised consistently by the UN and regional treaty bodies in recent years, CERD expressed concern about a number of issues, including:

- the lack of reliable disaggregated statistics on the enjoyment of economic and social rights by people belonging to various ethnic groups;
- the lack of adequate financial and human resources for the Ombudsman's Office to fully discharge its mandate and the reported reduction in its work concerning racial discrimination;
- the lack of a comprehensive anti-discrimination law and of measures to ensure the effective implementation of legal provisions prohibiting racial discrimination;
- recent amendments to the Law on Education that reduce the proportion of minority language education in the last three grades of basic education in minority schools;[83]
- the risk that the State Language Law may result in unnecessary restrictions having the effect of creating or perpetuating ethnic discrimination or impede the ability of ethnic minorities to access employment in the public and/or private sectors;
- the high numbers of ethnic minorities among the prison population and the insufficient analysis of the reasons behind this phenomenon;
- the concerning number of people with no nationality (stateless people or 'non-citizens').[84]

Concerning the situation of Roma, the Committee urged Latvia to take effective measures, including adopting and implementing a national action plan with timelines and concrete targets to eliminate discrimination against Roma.

Two NGOs submitted shadow reports: the Latvian Centre for Human Rights, highlighting the disproportionate number of Roma children in special education, the symbolic value of granting automatic citizenship to non-citizen's children, the Ombudsman's low capacity to fight racial discrimination and the concerning issue of hate crimes/hate speech; and the Latvian Human Rights Committee, focusing on the use of minority languages, political hate speech, etc. The Ombudsman has accused the two NGOs of spreading false information allegedly to discredit Latvia.[85]

Online source:
https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/LVA/CERD_C_LVA_CO_6-12_32235_E.pdf

Luxembourg LU

LEGISLATIVE DEVELOPMENT

Change of gender in the civil registry

Gender

On 10 August 2018, an amendment was adopted to the Civil Code establishing the possibility for an individual to change their gender and first name(s) in the civil registry.[86] The Law entered into force on 16 September 2018.

The law opens the possibility of changing the gender registration of adult citizens of Luxembourg without obliging the applicant to undergo medical or surgical treatments. A declaration, signed by the applicant,

83 Currently, the Education Law foresees 60 % Latvian / 40 % minority language in grades 10-12 in schools with bilingual education programmes. The amendments envisage a language ratio of 80 % / 20 % in 2019/2020.
84 'Non-citizens' are former USSR citizens who were resident in Latvia on 1.07.1991 and have not obtained any citizenship. According to the Office of Citizenship and Migration Affairs, as of 1.07.2018 there are 228,855 non-citizens in Latvia.
85 Statement published by the Ombudsman on 9.08.2018, available at: www.tiesibsargs.lv/news/en/ombudsman-is-critical-about-effectiveness-of-the-un-committee.
86 The law was published with Memorial No. 797 on 12.09.2018.

of 'intimate and stable conviction' that his/her gender does not correlate with the sex indicated on his/her birth certificate suffices. Minors of five years and older, non-Luxembourg nationals, refugees and stateless persons can also apply under special conditions.

The new law confirms the ruling of the Administrative Tribunal of Luxembourg in the case of a request for gender change in the civil registry in 2016. Prior to this judgment, judges requested medical certificates confirming a diagnosis of transgender and establishing the irreversible nature of sex-change by hormone therapy and gender reassignment surgery. The Court ruled in this case that, '*with regard to the international evolution inciting the States to abolish sterilisation and the principles laid down in Article 8 of the European Convention on Human Rights, the tribunal considers that the principle of the irreversible nature of sex-change by gender reassignment surgery leading to sterilisation can no longer be maintained*' and '*that, consequently, the irreversible nature of sex-change should only focus on the change in appearance of the individual*'.[87]

The law transfers the competency to deal with requests to change gender in the civil registry from the administrative tribunal to the Ministry of Justice.

Online sources:
http://legilux.public.lu/eli/etat/leg/loi/2018/08/10/a797/;
https://itgl.lu/legal/loi-relative-a-la-modification-de-la-mention-du-sexe-et-du-ou-des-prenoms-a-letat-civil/

NL Netherlands

LEGISLATIVE DEVELOPMENT

Bill to extend paternity leave adopted by the House of Parliament

Gender

On 2 October 2018, the House of Parliament (Second Chamber) adopted a bill that extends paid birth leave for the mother's partner from two days to one working week. During the leave, the partner will continue to receive 100 % of their remuneration. The partner may choose whether he/she takes the week directly after the birth of the child or at any other time during the first four weeks after the birth. In most cases, the partner will be the father of the child, but this does not have to be the case. The regulation applies to the person to whom the mother of the child is married, the registered partner, the person she co-habits with or the person who is the legal guardian of the child. The regulation entered into force on 1 January 2019.

Partners are allowed to request additional birth leave up to a maximum of five weeks, which must be taken within six months after the birth. The employer is not obliged to pay salary during this leave, but the employee can apply to the social security authorities for a benefit of 70 % of their daily salary. This benefit has a cap and cannot be more than EUR 3 218.80 gross per month.[88] The provision for the additional leave enters into force on 1 July 2020. Prior to this amendment, an employee whose partner gave birth to a child was entitled to two days paid birth leave and three days of unpaid parental leave.

In addition to birth leave, adoption leave and leave to care for a foster child have also been extended from four to six consecutive weeks. Adoption or foster care leave can be taken within six months after

87 Luxembourg, Judgment No. 173/2016 of 1.06.2016 of the Administrative Tribunal of Luxembourg (civil affairs).
88 The amount that applies as of 1 July 2018.

the arrival of the child. Furthermore, the right to a benefit (of 100 % of the daily salary) will be extended from four to six weeks. This regulation also entered into force on 1 January 2019.

The purpose of the extension of the different types of leave for partners is to strengthen the bond between the partner/father and the child, which could ultimately have a positive impact on the position of women on the labour market. If the difference in the duration of leave for mothers and fathers is reduced, this could strengthen the position of women in the labour market. In addition, the regulation should contribute to a better division of tasks between men and women and in this way, create a better work-life balance for both. When the care for children is shared more equally between men and women, there should be more room for women's development and for them to continue to work more hours.

The extension of paternity leave has been the subject of discussion for many years in the Netherlands. On 1 December 2001, the right to birth leave of two days for partners was introduced. In 2014, a proposal to extend this leave to five days failed because of the costs. In November 2016, a new proposal was submitted to extend the leave to five days, but this proposal was withdrawn after the elections of 22 March 2017. Subsequently, the present government introduced the newly adopted bill.

The government referred to the European Commission's proposal for a directive on work-life balance, which also contains a regulation on paternity leave (10 days) and a regulation on partly paid parental leave of six weeks. However, the government did not want to await the final outcome and adoption of the proposed directive before amending the legislation on birth leave/paternity leave. The government is of the opinion that the Dutch proposal meets the standard set in the draft directive on paternity leave/ birth leave. This is different with respect to parental leave. The Dutch government is not in favour of a paid parental leave of six weeks, because of the costs. It therefore does not want to anticipate the Commission's proposal in this area.

Also the Dutch birth leave will be one working week, whereas the Commission suggested 10 days. In this respect, the government stated that the Commission's proposal does not require member states to guarantee payment during these 10 days.

Online source:
www.rijksoverheid.nl/documenten/kamerstukken/2018/06/14/wetsvoorstel-invoering-extra-geboorte verlof-incl.-memorie-van-toelichting

CASE LAW

Judgment by the Council of State on discrimination against a pregnant woman who applied for a research grant

Gender

On 31 October 2018, the Council of State delivered its judgment in the case of a female academic researcher who had applied for a (substantial) grant for her research. On 19 October 2015, the applicant sent an email to NWO (Netherlands Organisation for Scientific Research), the organisation in charge of selecting recipients of research subsides, to inform them of her pregnancy and to ask them to take this into account during the application process. During the application procedure, an applicant has five days to submit a reply/defence to the reports, which are drafted by referees regarding his/her application. This deadline lay on or around the date the applicant was due to give birth. When the applicant asked for a deferral, NWO informed her that this was not possible. Therefore, the applicant asked if the NWO could send the referee reports with comments and questions regarding her application to her as soon as possible after receiving them so that she could already start to work on formulating her response to the reports. NWO received the reports on 10 November, 26 November and 21 December 2015. On 5 January 2016, the applicant contacted the NWO to find out if the reports had already been received. Subsequently she received the reports on 7 January. She submitted her reply three days before giving

birth on 13 January. Her application was rejected in May 2016. The applicant argued that NWO acted in a discriminatory way by not paying due attention to the fact that she was pregnant and was due to give birth.

The lower administrative court dismissed the case, but was overruled in appeal by the Council of State's decision. The Council observed that the policies of NWO were not discriminatory *per se*. NWO has a 'Diversity Policy' which takes into account the specific situation of pregnant applicants. However, the decisions by NWO in this individual case did not meet the high standards that are applicable when civil rights are at stake. '*The degree of assertiveness of the pregnant applicant cannot determine the extent to which her fundamental rights are respected*', so the Council ruled. NWO should have contacted the applicant to discuss the appropriate period for the response, taking into account the interests of other applicants. This was especially the case, as NWO was informed of the pregnancy and the due date and because they had already received the referee reports in November and December 2015, but did not send them to the applicant until 7 January 2016.

The Council revoked the decision by NWO and ruled that if the applicant still wants to continue with her application for the grant, her application must be included in the next application round.

This is a relevant judgment for several reasons. Firstly, there have been discussions about equal treatment by NWO, but this is the first time that the issue has been the subject of a court ruling. Secondly, the subsidies that NWO can grant can be substantial amounts (up to EUR 800 000 in this case) and are very important for academics, especially academics in the first stages of their career. These grants are usually awarded during a phase of life in which women often become pregnant. As the time schedules for the NWO applications are very strict, it is very difficult for women who are pregnant or have young children to deliver the necessary high quality within the set time limits. In view of this, it is important that the Council of State explicitly ruled that NWO must pay due attention to the interests of pregnant women and that it is the basic right of a pregnant woman to be treated equally in a situation like this.

Online source:
www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=97095

POLICY AND OTHER RELEVANT DEVELOPMENTS

New housing policy for Roma to ensure non-discrimination and the enjoyment of their cultural rights

Racial or ethnic origin

In July 2018 the Minister of the Interior and Kingdom Relations issued a new housing policy framework for Roma, Sinti and Travellers.[89] The aim is to prevent discrimination, ensure the cultural rights of the target groups and to provide legal security in the area of housing. The policy framework provides guidelines for municipal authorities, effectively limiting their power to autonomously shape housing policy regarding Roma, Sinti and Travellers. In particular, municipalities are required to provide more space for the target groups to live in accordance with their own cultural identity and to ensure they have the opportunity to obtain a place to live in a trailer park within a reasonable timeframe. Most importantly, municipalities are no longer allowed to pursue policies aimed at eliminating trailer parks.

During the last decades, many municipalities have been very reluctant to provide adequate housing for Roma, Sinti and Travellers at trailer parks or even pursued 'elimination policies' regarding such parks, aiming instead to make the inhabitants settle in more regular housing. Both the national equality body, the Netherlands Institute for Human Rights (NIHR), and the National Ombudsman had held in the past

89 *Beleidskader Gemeentelijk woonwagen- en standplaatsenbeleid*, available at: www.rijksoverheid.nl/documenten/rapporten/2018/07/02/beleidskader-gemeentelijk-woonwagen-en-standplaatsenbeleid.

that such elimination policies were in violation of the prohibition of discrimination on the grounds of race or ethnic origin.[90] The new policy framework is in line with the recommendations of both institutions to provide housing opportunities for Roma, Sinti and Travellers that respect their cultural identity and human rights.

Online source:
www.rijksoverheid.nl/documenten/rapporten/2018/07/02/beleidskader-gemeentelijk-woonwagen-en-standplaatsenbeleid

Poland

PL

LEGISLATIVE DEVELOPMENTS

The proposed draft amendments to the law of 2005 on family violence are not in compliance with the Istanbul Convention

On 31 December 2018, the governmental draft law amending the law of 2005 on counteracting family violence was published on the website of the Ministry for Family, Employment and Social Policy.[91] The proposed amendments may be considered as a step backwards in the protection of victims of gender-based violence.

Gender

The controversial amendments included a change to the name of the Act, by replacing the term 'violence in the family' (in Poland, the family is considered an institution that should always be protected and kept on a pedestal, regardless of circumstances) with the term 'domestic violence'. Other proposed changes of the law are clearly not in compliance with standards provided for in the Istanbul Convention. For instance, alterations to the definition of family (domestic) violence in the current proposal considers as domestic violence only recurring acts of violence. Thus all forms of protection and assistance to victims provided for in the law would not apply to one-off cases. In addition, the procedure for issuing the uniform protocol of the so-called 'Blue Card',[92] initiated mainly by the police in the event of discovering cases of domestic violence, in order to document the history of its interventions, was also changed and made dependent on the victim's consent. This change didn't take into account the fact that in most domestic violence cases the victims are intimidated by the perpetrators, so a lack of consent may arise from the victim's fears for their own life or health or that of their children. In response to heavy criticisms from experts, the Prime Minister withdrew this proposal on 3 January 2019, assuring the public that all 'dubious changes' proposed will be removed. The resignation of the deputy Minister of Family, Labour and Social Policy, who was responsible for the preparation of the draft amendment, was also announced on that day.

Online sources:
www.tvn24.pl/wiadomosci-z-kraju,3/jednorazowa-przemoc-nie-bylaby-przemoca-projekt-nowelizacji-ustawy-o-przemocy-w-rodzinie,896663.html;
http://wyborcza.pl/7,75398,24344225,morawiecki-zdymisjonowal-wiceminister-odpowiedzialna-za-projekt.html

90 Netherlands, NIHR opinions Nos. 2015-6, 2016-19, 2016-22, 2016-71, 2016-72; 2017-55; 2017-103; 2017-136; 2017-137. All opinions can be found at https://mensenrechten.nl/nl/oordelen. See also National Ombudsman, *'Woonwagenbewoner zoekt standplaats. Een onderzoek naar de betrouwbaarheid van de overheid voor woonwagenbewoners'* [Trailer resident seeks trailer site. An investigation into the reliability of the public authorities for trailer inhabitants], available at: www.nationaleombudsman.nl/system/files/bijlage/DEF%20Rapport%202017060%20Woonwagenbewoner%20zoekt%20standplaats.pdf.

91 http://wyborcza.pl/7,75398,24327192,ministerstwo-rodziny-projekt-ustawy-o-przemocy-w-rodzinie-zostal.html.

92 The Blue Card procedure is a multi-agency intervention system and procedure for domestic violence.

Unequal retirement age for female and male academics and scientists

Gender

On 1 October 2018, most provisions of the Law of 3 July 2018 on higher education and science (informally called by the drafters the 'Constitution for science 2.0 or Law 2.0') entered into force. This Law does not provide for any special regulations regarding the retirement age of academics and scientists. As a result, the general rules on retirement apply, providing for a differentiated retirement age for women (60 years) and men (65 years). The original ministerial draft of the Law on higher education (dated 22 January 2018) provided in Article 146 §1 for an equal retirement age for academic teachers, at the age of 65, regardless of their sex. However, this provision was removed even before the draft was submitted to the Parliament, despite protests from the academic community.

In addition to numerous well-known general arguments in favour of an equal retirement age for all working women and men, e.g. the lower amount of retirement benefits received by women compared to men, there are also specific arguments relating in particular to scientists and academic teachers.[93] The academic careers of women are often delayed by their activities in relation to maternity and childcare. If subjected to a lower retirement age, female academics and scientists have less time to progress towards higher academic levels. Many women may not be able to become professors at all. While Law 2.0 emphasises that all scientists have to compete according to the same rules, in practice women will not be able to compete on equal terms because they will have five years' less time to achieve what male scientists may continue to strive to achieve until the age of 65. According to research presented by the Ministry of Science and Higher Education, the title of professor is awarded on average at the age of 57. Should a woman become professor at that age and finally achieve a prestigious position and the recognition of her academic abilities, she would only be able to enjoy this stable employment situation for three years before her retirement (at the age of 60).

It should also be mentioned that there are far fewer women employed in higher education than men. The lowering of the retirement age for women will result in fewer possibilities for intergenerational exchange between established female academics and their younger female peers.[94] The earlier retirement age, generally discriminatory for all female workers, and in particular for female academics and scientists, will result in fewer opportunities for women to participate in decision-making processes concerning science and university education. The same goes for female academics' chances to participate actively in decision-making in the academic and scientific world. It should be noted that the management structures of Polish universities are currently already mainly dominated by men over the age of 60. For example, the management board of the Conference of Rectors of Polish Academic Schools does not include a single woman.

Online sources:
www.petycjeonline.com/list_rodowiska_akademickiego_do_prezydenta_rzeczypos
http://serwisy.gazetaprawna.pl/edukacja/artykuly/1113722,wiek-emerytalnynaukowcow-kobiety-chca-pracowac-dluzej.html

93 According to a report prepared by the Polish Social Security Institution in 2017, the average retirement benefit for men amounted to PLN 2,699.52 (approx. EUR 750), while in the case of women it amounted to PLN 1,614.39 (approx. EUR 400).

94 It should be noted that for academics who are already full professors the retirement age is the same for women and men: 70 years. It still means however that women have 5 years less in order to obtain the title of professor since their retirement age before having this title is 60 while for men it is 65.

Portugal

PT

LEGISLATIVE DEVELOPMENT

Gender

New law on the promotion of equal pay for men and women

On 21 August 2018, Law No. 60/2018 on the promotion of equal pay for men and women for equal work or work of the same value was adopted.[95] This law entered into force six months after its publication, as established by Article 19 of the law.

The main goal of this piece of legislation is to establish a set of measures directly intended to contribute to a better implementation of the principle of equal pay. These measures are the following:

- The Ministry of Employment and Social Affairs will publish detailed statistics on a yearly basis regarding the salary gap between men and women, at both the general and sectoral levels; and statistics specifically per company, profession and qualification level, based upon the annual balance sheet provided by the companies (Article 3);
- Employers must implement a transparent wage policy in their companies (Article 4);
- Following the publication of the statistical data mentioned above, if the Gender Equality Agency in Employment (CITE) detects wage inequalities in a company, it notifies the employer that they must present an, 'evaluation plan of the wage differences in the company' which is intended both to justify those differences and to eliminate those with no objective justification; the plan will be put in place for a period of 12 months (Article 5);
- Workers and union representatives also have the right to ask the CITE for advice on alleged discriminatory gender pay practices within the company; if the CITE concludes that wage discrimination on the ground of sex is in place, the employer is compelled to eradicate it and may be subjected to a fine (Article 6);
- The dismissal or application of disciplinary measures against a worker until one year after he/she has asked the CITE for the advice indicated above is presumed unlawful (Article 7).

The measures now approved are examples of possible good practices in this field, since they go significantly beyond the level of protection granted by EU law. However, they may be difficult to implement in practice (mainly as regards the assessment tasks of the CITE). At another level, this Act repeats some of the definitions and some of the rules that are already inscribed in the Labour Code, apparently with the aim of reinforcing the protection already granted in this field. However, since the content of both the definitions and the rules is not always equivalent, some technical problems may arise in the application of this legislation.

95 Portugal, Law No. 60/2018 of 21 August 2018, published in the Official Journal of 21.08.2018 (www.dre.pt).

RO Romania

LEGISLATIVE DEVELOPMENTS

Gender

Legal amendments to the Gender Equality Law: harassment prohibited, level of fines reduced

On 6 August 2018, a new amendment of the Gender Equality Law entered into force after being adopted by the Parliament on 10 July 2018 and promulgated by the President on 2 August 2018.[96]

The Chief of the Commission on Equal Opportunities between Women and Men from the Chamber of Representatives promoted the amendment, as a bill to prohibit harassment in the street. Before the adoption of the amendment, the Gender Equality Law only provided definitions of harassment, sexual harassment and psychological harassment, omitting to include these in the list of behaviours prohibited by Article 37 of the Gender Equality Law.

The new provisions give the police, gendarmes and local police, the mandate to sanction all harassment, sexual harassment and psychological harassment behaviours, irrespective of whether it takes place in the public or private sphere.

However, the amendment also divides by ten the maximum level of administrative fines that can be issued in case of all forms of sex discrimination, including harassment. Instead of ranging from EUR 631 (RON 3 000) to EUR 21 052 (RON 100 000), fines can now range from EUR 631 (RON 3 000) to EUR 2 105 (RON 10 000).

The inaccuracies in the Gender Equality Law, including the fact that harassment was not previously included in the list of forbidden behaviours that are sanctioned by this law, are caused by repeated amendments of the law which are not well coordinated. This amendment aims to address these inaccuracies. At the same time, because several national laws overlap in the field of equality and non-discrimination – for example the Gender Equality Law and the Anti-Discrimination Law – definitions and institutional mandates also overlap.

For example, before the adoption of Law 232/2018, harassment, including harassment on the ground of sex, was already prohibited under the Anti-discrimination Law.[97] The National Council for Combating Discrimination sanctioned several cases of sexual harassment or harassment on the ground of sex, basing its decisions on the Anti-Discrimination Law, not on the Gender Equality Law. From this point of view, this amendment is only duplicating provisions which already exist. The novelty of Law 232/2018 is that it gives power to the police and gendarmes to sanction sexual harassment, instead of the National Council for Combating Discrimination, an institution that has developed a certain level of expertise in equality and non-discrimination over the last 15 years.

Along with sending the message that sex discrimination and harassment is no longer considered as serious an offence as it was before, this change also places sex discrimination on an inferior scale compared to discrimination on all other protected grounds, because the provisions of the Anti-Discrimination Law stipulate higher fines. According to Article 26 of the Anti-Discrimination Law, the fines range between EUR 210 (RON 1,000) and EUR 6,310 (RON 30,000) for discrimination against an individual and EUR 420 (RON 2 000) and EUR 21 052 (RON 100 000) for discrimination against a group or a community.

96 The legislative process is available at: www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=17052.
97 Romania, Government Ordinance No.137/2000 on the prevention and prohibiting of all forms of discrimination, Articles 2 (5) and 26 (1).

Online source:
www.cdep.ro/pls/proiecte/docs/2018/pr258_18.pdf

Legal amendments to the Gender Equality Law: new and revised structures

On 19 July 2018, a new amendment to the Gender Equality Law entered into force after being adopted by the Parliament on 18 June 2018 and promulgated by the President on 16 July 2018.[98]

The amendment regulates the professional status of equal opportunities experts and specialists. It establishes the main competences that fall under these professions (Article 2(5) of Law 202/2002), including assessing gender inequality with the employer and proposing solutions, such as drafting action plans and implementing projects and programmes aimed at addressing gender inequality.

The new provisions only create the possibility, not the obligation, for public and private employers with more than 50 employees to assign the competences mentioned above to an employee who is already working for them or to hire a gender equality expert/specialist, depending on available budget.

The amendment also establishes the governing structure of COJES, the county level commission in the field of equal opportunities for women and men (*Comisia județeană de egalitate de sanse intre femei si barbați*), by explicitly mentioning which institutions from the local level appoint the President, Vice President, and Executive Secretary of COJES. It also assigns to the National Institute for Scientific Research in the Field of Labour and Social Protection the legal obligation to provide data and information necessary for drafting strategies and policies in the field of equal opportunities and treatment of women and men.

The Government, in particular the National Agency for Equal Opportunities for Women and Men (ANES), promoted this bill. Its aim is to establish an effective structure at the local level (COJES) that ANES can work with to implement policies and projects on gender equality throughout the country.

The Explanatory Statement accompanying the bill clarifies that the regulation of the professions of gender equality expert and gender equality specialist was necessary because ANES trained experts and specialists in a project implemented in 2015 using European structural funds. Moreover, Romania joining UN Women's 'HeForShe' campaign involved committing to 70 % of the 1 680 national and local public institutions including gender equality experts/specialists in their organisational chart.

In addition, the change in the COJES governance structure aims to ensure the functioning of these local commissions and the representation and participation in COJES of the local institutions that have a mandate and could contribute to tackling violence against women and ensuring equal opportunities and equal treatment of women and men, for example the General Department for Social Assistance and Child Protection.

Online sources:
www.cdep.ro/pls/proiecte/docs/2018/pr171_18.pdf
www.cdep.ro/proiecte/2018/100/70/1/em226.pdf (Explanatory statement)

98 The legislative process is available at: www.cdep.ro/proiecte/2018/100/70/1/em226.pdf.

New anti-money-laundering legislation may paralyse NGOs supporting vulnerable groups

All grounds

The anti-money-laundering law adopted by Parliament on 25 October 2018 for the purpose of transposing Directive 2015/849[99] is criticised for having a 'chilling effect' on civil society organisations, as well as for irregularities in the voting procedures.[100] The law qualifies NGOs as 'reporting entities' similar to for-profit entities such as banking institutions, auditors, etc. insofar as they provide financial services. Additional due diligence obligations are thus imposed upon these organisations,[101] the sanction for failure to comply being the dissolution of the organisation.

Furthermore, the inaccurate translation of certain terms in the text of the law imply that every single person actually assisted in any way by a civil society organisation would have to be reported to the anti-money-laundering authorities, regardless of the type of service or assistance provided. Personal data of beneficiaries, including vulnerable groups targeted by discrimination, will thus be shared with the relevant authorities, possibly in violation of the EU General Data Protection Regulation.

Online source:
www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=17322

POLICY AND OTHER RELEVANT DEVELOPMENTS

Attacks against the National Council for Combating Discrimination (equality body)

All grounds

In the context of the failed constitutional referendum which sought to redefine family, and of a draft bill on civil partnership which is publicly supported by the equality body, the National Council for Combating Discrimination (NCCD), there have been more and more calls in the public arena targeting the body. The Vice President of the Liberal Party, as well as other politicians, has asked for the institution to be closed down, arguing notably that it is 'a Gestapo-type institution' aiming to oppress freedom of expression and freedom of religion.

In addition to conservative politicians criticising the NCCD for being a 'policeman of political correctness', an online petition was launched against the institution and notably against the fact that the President and the spokesperson for the Orthodox Church, for instance, were called to attend hearings before the NCCD when petitions were filed against them.[102] Criticism is also directed at the partnership between the NCCD and the LGBT organisation, ACCEPT, and their combined efforts to train judges, prosecutors, lawyers, teachers, medical doctors and social assistants. Finally, the position of the NCCD in the *Coman* case before both the CJEU and the Romanian Constitutional Court has been heavily criticised.[103]

Online source:
https://romanialibera.ro/politica/motivele-pentru-care-se-cere-desfiintarea-cncd-757261?fbclid=IwAR2_PPBZEsT9-ZMNgRFEFp8vOogHk6NZlsRS5YaKjdWAC1-soed-0TRSlGY

99 Directive 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.
100 An appeal in English against the provisions is available at: https://civilsocietyeuropedoteu.files.wordpress.com/2018/10/letter-to-vp-timmermans-commissioner-jourova-aml-transposition-romania-public.pdf.
101 The 18 organisations representing national minorities present in Parliament are exempted. Other NGOs representing the same national and ethnic minorities are not exempted.
102 Petition available at 2018 – www.petitieonline.com/petitie_pentru_desfiintarea_consiliului_national_pentru_combaterea_discriminarii_cncd.
103 See CJEU, C-673/16, Grand Chamber judgment of 5 June 2018, ECLI:EU:C:2018:385 as well as the final ruling of the Romanian Constitutional Court of 18 July 2018.

Slovakia

SK

CASE LAW

Expert opinion of the equality body on age discrimination

Age

The claimant had applied for a position of train steward with a private train company for which she met all the required criteria, yet she was not selected. The employer had informed her that applicants born after 1986 had been prioritised, while it had been deduced from her CV that she must have been at least ten years older. The claimant filed a complaint with the national equality body, claiming that she had been discriminated on the ground of age.

Before the equality body, the employer stated that, among other criteria, an assessment had been made of how the applicants would fit in the current team of train stewards. In this regard, the employer explained that all the train stewards on the given train route were young people who spend time together not only at work, but who also share joint company accommodation when they have to stay overnight. The employer generally concluded that, in order to secure the effective functioning of the working team and satisfaction of its members, it limited the selection of the candidates by taking into consideration the fact that its oldest currently employed steward was 31 years old. The CVs of the selected candidates showed that the claimant only differed from them in age and that her work experience was particularly relevant for the position as described in the job advertisement.

The National Centre for Human Rights concluded that the exclusion of the candidate on the ground of her age for the given employment position could not be objectively justified.[104] In this regard it pointed out that differential treatment on the ground of age can only be lawfully considered in specific circumstances, as specified by law. It thus concluded that the employer had discriminated against the claimant on the ground of age. The Slovak equality body cannot impose any duties on the employer, but its expert opinion can be relied upon before the national courts if the claimant were to bring a case before them.

Online source:
http://www.snslp.sk/CCMS/files/Odborné_stanovisko_-_Diskriminácia_z_dôvodu_veku_v_predzmluvných_pracovnoprávnych_vzťahoch.pdf

Constitutional court dismissed a complaint on the failure of public prosecution offices to assess the discriminatory impact of a municipal housing regulation

Racial or ethnic origin

In July 2016, the town of Prešov adopted a binding regulation on social housing which gave tenants the possibility of swapping flats with each other, upon the mayor's agreement, but only within their own neighbourhood. In one of these neighbourhoods, there is a significant proportion of Roma inhabitants. A local human rights NGO challenged the relevant provision at a district prosecution office, arguing that it amounted to indirect discrimination of Roma tenants living in the given area as it effectively prevented them from swapping their flats with tenants from other areas of the town. As such it contributed to maintaining their housing segregation and ghettoisation.

The district and, subsequently, the regional and general prosecution offices dismissed the complaint, leading the NGO to bring the issue to the attention of the Constitutional Court, arguing a violation of its right to judicial and other legal protection and the right to fair trial guaranteed by the Slovak Constitution and European Convention on Human Rights. In particular, it argued that the prosecution offices did not

104 Expert opinion of the Slovak National Centre for Human Rights dated 11.07.2018. Available at: http://www.snslp.sk/CCMS/files/Odborné_stanovisko_-_Diskriminácia_z_dôvodu_veku_v_predzmluvných_pracovnoprávnych_vzťahoch.pdf.

duly investigate its complaints and did not take into account its legal argumentation, thus violating the principle of equality of legal arms.

The Constitutional Court dismissed the constitutional complaint as manifestly ill-founded. Although it noted that the claimant's arguments could have been analysed in greater depth, it stated that the prosecution offices sufficiently substantiated their decisions. The Court also disregarded the NGO's claim regarding an alleged violation of its right to effective remedies under Article 6 of the International Convention on the Elimination of Racial Discrimination. In this regard the Court concluded that the claimant, as a legal entity, does not have an ethnic origin that could form the basis for racial discrimination and violation of rights under the Convention.[105]

Online source:
www.ustavnysud.sk/vyhladavanie-rozhodnuti#!DecisionsSearchResultView

Constitutional Court decision on liability for discriminatory treatment in access to services

Racial or ethnic origin

All grounds

The claimant filed a constitutional complaint against the decisions of the general courts[106] in his case of racial discrimination which concerned the refusal by a mobile telephone operating company to provide him with a fixed-price phone service.[107] The general courts, including the Supreme Court, had dismissed his claim due to the particular circumstances of the case which prevented the liability of either of the respondents. The courts had found that the person who was responsible for the discriminatory treatment was an employee of the company providing the mobile telephone operating company's services under an agency contract at the relevant time, but this service provider no longer has a contract with the mobile operator. As the rights to human dignity and protection from discrimination are personal rights, the general courts found that the service provider's successor could not be deemed responsible. Furthermore, the mobile telephone operating company could not be deemed responsible either as it had not been in direct contact with the claimant.

Before the Constitutional Court, the claimant argued that the general courts had violated his right to a fair trial guaranteed by the Slovak Constitution.

On 15 November 2018, the Constitutional Court dismissed the claimant's constitutional complaint, finding that the legal opinion and reasoning of the general courts regarding the lack of responsibility of the respondents for discriminatory treatment had not been in breach of the Constitution. The Court confirmed that a violation of the principle of equal treatment has a personal character and cannot be transferred by contract to the legal entity's successor.

Online source:
www.ustavnysud.sk/vyhladavanie-rozhodnuti#!DecisionsSearchResultView

105 Slovakia, Constitutional Court, 1.08.2018, No. IV. ÚS 435/2018-13, delivered on 10.09.2018 in the case *Poradňa pre občianske a* ľudské *práva* (Centre for Civil and Human Rights) *v District prosecution Prešov* in the proceeding file no. Pd 267/16/7707, Regional prosecution in Prešov in the proceeding file no. Kd 78/17/7700 and General prosecution of Slovak republic in the proceeding file no. VI/2 Gd 411/17/1000-9.
106 Slovakia, Regional Court in Kosice, 18.09.2013 No. 5 Co 197/2012; and Supreme Court, 8.12.2016, No. 3 Cdo 405/2015 – 773.
107 See also *European equality law review*, Issue 2017/1, pp 130-131.

Spain ES

LEGISLATIVE DEVELOPMENTS

Comprehensive bill for equal treatment and non-discrimination

In 2011, the socialist government presented an important equality bill to fill the existing gaps in Spanish non-discrimination law. Due to early elections and the subsequent appointment of a new conservative government, however, the bill was never approved.

All grounds

In March 2017, the Socialist Parliamentary Group presented a bill similar to the bill of 2011, which has been pending since then. In June 2018, a new socialist government was formed and one of its main priorities was to strengthen equality policies and promote the 2017 bill.

The bill covers all grounds listed in Article 14 of the Constitution, i.e. all those covered by the EU directives as well as disease and sexual identity and 'any other personal or social condition or circumstance'. All fields of application covered by Directives 2000/43 and 2000/78 are covered by the bill, in addition to the area of media and advertising.

The bill proposes definitions that are consistent with the Directives, and also defines and prohibits multiple discrimination ('when various causes of those provided in this law are combined or interact, generating a specific form of discrimination'), as well as discrimination 'by mistake' ('founded on an incorrect assessment of the characteristics of the person discriminated against'). As far as judicial protection and administrative action against discrimination are concerned, a wide array of potential remedies is listed in the bill, including invalidity declaration, termination, repair, prevention, and compensation for material and moral damages. Rules regarding the burden of proof are provided for in accordance with the Directives, as is the participation of organisations in civil, social and administrative procedures. With regard to public authorities, the bill foresees an obligation to act when they have knowledge of an act of discrimination. Furthermore, it stipulates that a national strategy for equal treatment and non-discrimination is to be developed as well as positive action measures. Finally, public authorities are to collect and systematise statistical data so as to diagnose the reality of discrimination and to design new policies.

The bill also foresees the creation of an authority for equal treatment and non-discrimination, to exercise the equality body mandate as foreseen by the Racial Equality Directive. It would be an independent body and its duties would include the functions foreseen by the Directive as well as additional functions such as mediation, investigation of cases of discrimination on its own initiative, intervention in litigation, training, etc. It would have jurisdiction on all grounds of discrimination, which implies that the two existing bodies (dealing with racial and gender discrimination, respectively) would be abolished or change their functions.

Last but not least, a comprehensive regime for infractions and sanctions is foreseen, to replace the current system where sanctions are laid down for all grounds only in the field of employment and in all fields for gender and disability.[108]

Online source:
www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-97-1.PDF#page=1

108 After the cut-off date for this publication, on 13.02.2019, Parliament rejected the draft General State Budget presented by the government and as a result, the President of the government dissolved the Parliament. As a result, all bills, including the Comprehensive Bill for Equal Treatment and Non-Discrimination, were withdrawn.

Calculation of unemployment benefits for part-time workers in conformity with the CJEU judgment in *Espadas Recio* of 9 November 2017

Gender

Royal Decree 950/2018, of 27 July 2018, has implemented the judgment of the CJEU of 9 November 2017, C-98/15 (*Espadas Recio*) and, accordingly, modified social security legislation so that for part-time workers the calculation of the right to unemployment benefits takes into consideration the days that they have contributed to the social security system rather than only the days that they have effectively worked.[109]

In its judgment, the CJEU considered that, by excluding the days not worked for calculating the unemployment benefit, Article 3(4) of Royal Decree 625/1985[110] established a difference in treatment to the detriment of 'vertical' part-time workers. Given that 'vertical' part-time workers were adversely affected by this national measure and given that 70 % to 80 % of 'vertical' part-time workers are women, Article 3 (4) of the Royal Decree 625/1985 is discriminatory against women (indirect discrimination). The CJEU considered, then, that Article 3 (4) of the Royal Decree 625/1985 goes against Article 4 (1) of the 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 new legislation has simply established that the duration of the unemployment benefit must be based on the number of days for which social security contributions were paid in the preceding six years, which is the system applied to full-time workers.

Online source:
www.boe.es/diario_boe/txt.php?id=BOE-A-2018-10652

Paternity leave extended to five weeks

Gender

Law 6/2018 of 3 July 2018 (Final Disposition 38) has extended paternity leave from four to five weeks.[111]

Paternity leave was first established in 2007 by the Organic Law on Effective Equality.[112] This provision granted new fathers 13 fully paid days of leave and stated the intent to extend it to four weeks within six years after implementation of the law. However, the promised extension of paternity leave was continuously postponed and only finally came into force on 1 January 2017.

The State budget act for 2018 extending paternity leave to five weeks was approved by means of Law 6/2018 on 3 July 2018.[113] This was the second extension of paternity leave within two years. This new law has changed Article 48.7 of the Workers' Statute and Article 49.c) of the Basic Statute of the Public Employee and applies to both workers in the private sector and civil servants. Apart from a prolongation of the leave, the act also introduced the possibility of taking up paternity leave in two separate periods within the first nine months after the birth of a child.

109 Spain, Royal Decree No. 950/2018, of 27.07.2018, which modifies Article 3(4) of Royal Decree No. 625/1985, of 2 April 1985, available at: www.boe.es/diario_boe/txt.php?id=BOE-A-2018-10652.
110 Spain, Article 3 (4) of the Royal Decree 625/1985, of 2.04.1985, on unemployment benefit, available at: www.boe.es/buscar/act.php?id=BOE-A-1985-8124.
111 Spain, Article 48.7 of the Workers' Statute, approved by Royal Legislative Decree 2/2015, of 23 October 2015, modified by Law 6/2018, of 3 July 2018, www.boe.es/buscar/act.php?id=BOE-A-2015-11430.
112 Spain, Organic Law on Effective Equality, Law 3/2007, 22 September 2007
113 Spain, State Budget Act for 2018, approved by Law No. 6/2018, of 3.07.2018, available at: www.boe.es/diario_boe/txt.php?id=BOE-A-2018-9268.

Proposed draft reform of Article 49 of the Constitution on the rights of persons with disabilities

Disability

Article 49 of the Spanish Constitution, approved in 1978, was aimed at protecting people with disabilities and since then a rich body of legislation has developed on the basis of that provision. On 7 December 2018, a draft proposal was adopted by the Government to adapt Article 49 to the CRPD, radically modifying the language and structure of the provision. The wording proposed is based on the work carried out by the Commission for Comprehensive Disability Policies of the Congress of Deputies, with the active participation of the Committee of Representatives of People with Disabilities.

The draft provision is worded as follows:

1. 'Persons with disabilities are holders of the rights and duties set forth in this Title in conditions of real and effective freedom and equality, without discrimination.
2. The public authorities shall implement the necessary policies to guarantee full personal autonomy and social inclusion of persons with disabilities. These policies will respect their freedom of choice and preferences and will be adopted with the participation of organisations representing persons with disabilities. The specific needs of women and girls with disabilities will be particularly addressed.
3. The reinforced protection of persons with disabilities will be regulated for the full exercise of their rights and duties.
4. Persons with disabilities enjoy the protection provided in international agreements that ensure their rights.'

The Government's proposal represents a vast improvement, notably due to the conceptual approach to disability which focuses on a social rather than medical and rehabilitative model and emphasises the rights and duties of persons with disabilities. Furthermore, it foresees the active participation of representative organisations of persons with disabilities in the establishment of relevant policies.

The preliminary draft of the Government would need to be approved by Parliament to be adopted.[114]

Online source:
www.lamoncloa.gob.es/consejodeministros/referencias/Paginas/2018/refc20181207.aspx

CASE LAW

The National Court rejects the right of a sex workers' association to create a union

Gender

The National Court stated in a judgment of 19 November 2018 that, under Spanish Law, the existence of a sex workers' union is null and void given that it is not possible to conclude an employment contract for the purpose of prostitution.

In the summer of 2018 OTRAS (a sex workers' organisation) sent a request to the General Directorate of Labour to be registered as a union. The accompanying statutes stated that the purpose of this union was to defend the labour interests of sex workers. This included prostitutes, but also workers related to other sex activities such as porn actors. In accordance with Spanish legislation, which recognises the freedom of association in the Freedom of Association Organic Law (Organic Law 11/1985, of 2 August 1985), public authorisation for the creation of unions is not necessary, but the Labour Authority may refuse to register a union or may request changes if the application does not comply with current legislation.

114 Following the dissolution of Parliament by the Government after the cut-off date of this report, the proposal is now put on hold pending new general elections.

Two human rights associations and the public prosecutor's office filed a complaint against the statutes of OTRAS, alleging that it is illegal to hire people to practise prostitution and that, therefore, the union is illegal. OTRAS, supported by several feminist organisations, maintained that defending the labour rights of prostitutes was appropriate because women should be free to use their body as they please. Nevertheless, most feminist organisations consider prostitution to be a form of exploitation of women which should be abolished. The two positions clashed in a debate that concluded, for now, with the ruling of the National Court of 19 November 2018, which ruled that it is not possible to register a sex workers' union. The National Court ruled that, according to the law, it is illegal to conclude an employment contract for the purpose of prostitution. The Court also stated that, although the right to create a union falls under the freedom of association which is a fundamental right, it can only be granted to persons holding the status of worker, which presupposes the existence of a legitimate employer and legal employment contract. Based on the absence of a legal status of both employer and employee in the sex industry, a union established to defend and negotiate labour rights for this occupational group is not legal.

Online sources:
www.finanzas.com/noticias/20180904/dimite-directora-general-trabajo-3902846.html
www.eldiario.es/economia/Audiencia-Nacional-estatutos-sindicato-prostitutas_0_838166337.html

SE Sweden

CASE LAW

Handshake requirement as indirect discrimination in employment

Religion or belief

The claimant applied for a position as an 'internal interpreter' (providing interpreting services by telephone or through a video link) and was invited for an interview. During the interview she was introduced to the manager, but instead of shaking hands with him she smiled and put her hand on her heart. The applicant indicated that her refusal was due to religious beliefs as a Muslim where shaking hands with a man outside of the family was considered too intimate. The claimant also said that she does not shake hands with women either when there are men present, in order to avoid hurting their feelings. The manager ended the interview after the handshake incident and stated that she could not work there. He made clear that his refusal was linked to the claimant's religious beliefs by stating that, by contrast, a refusal to shake hands due to a fear of germs would not have had an impact on his hiring decision. The claimant submitted a complaint to the Equality Ombudsman (DO), which agreed to pursue the case in court on her behalf.

The employer had an equality policy which required employees to shake hands with men and women but indicated that circumstances such as fear of germs are legitimate reasons to refrain from shaking hands. The employer argued that the refusal to shake hands due to religion was not protected by the European Convention on Human Rights (ECHR) and thus not protected under the Discrimination Act either.

The Labour Court ruled that the employer had violated the prohibition against indirect discrimination on the ground of religion.[115] According to the Court, a manifestation of religion such as a refusal to shake hands is protected by Article 9 of the European Convention on Human Rights (ECHR), even if that manifestation is shared only by a minority within the specific religion. This also meant that the company policy particularly disadvantaged people with a certain religion, which brought it within the scope of the prohibition of indirect discrimination in the Discrimination Act. Finally, even though the company policy had a legitimate purpose, the Court held that the policy was not necessary and appropriate to achieve

115 Sweden, Labour Court, decision of 15.08.2018 (AD 2018 No. 51).

that purpose, indicating that it would have been sufficient to require equal treatment in the greeting of men and women. The claimant had indeed indicated that she treated men and women the same when men were present. She was awarded SEK 40 000 (EUR 3 800) as compensation.

It is important to note that two of the five judges on the Labour Court dissented, holding that the policy was necessary and appropriate, both concerning colleagues and others in the workplace as well as in relation to the job of being an interpreter, which requires impartiality and neutrality.

Online source:
www.arbetsdomstolen.se/upload/pdf/2018/51-18.pdf

Interruption of probationary employment in connection with pregnancy

Gender

On 28 November 2018, the Swedish Labour Court[116] ruled in a case on sex discrimination regarding the termination of the probationary employment of a woman shortly after she had given birth to a child. The woman informed the employer about the pregnancy prior to her employment. She had received positive feedback from her supervisors regarding her performance during her employment. In agreement with her employer, the employee had planned to take a period of parental leave before the delivery. Due to pregnancy-related sick leave which lasted until the child was born, she had stopped working earlier than anticipated. Three weeks after the birth of her child, the employer terminated the probationary employment.

According to the Swedish Employment Protection Act, an employer is free to terminate probationary employment at any time, without the requirement to provide justification. However, if the employee demonstrates circumstances that give reason to presume that the termination was discriminatory, the Discrimination Act applies a shift in the burden of proof and requires the employer to show that there was no discrimination. In this case, the Swedish Labour Court ruled upon whether the employee had established a presumption of discrimination.

The Swedish Labour Court acknowledged the timing between the interruption of the probationary employment and the pregnancy-related sick leave. However, the employment was not terminated until after the birth of the child. At that point, the woman was no longer pregnant and, according to the Swedish Labour Court, there was no reason to believe that she was about to become pregnant again in the foreseeable future. For that reason, the Swedish Labour Court ruled that the timing was not sufficient to establish a presumption of discrimination. The Swedish Labour Court also stated that the mere fact that an employer interrupts a probationary employment before the end of the trial period for a worker who is pregnant during the probationary period and has a reduced capacity to work as a result of her pregnancy, does not give cause to assume that the interruption was related to the pregnancy. Thus, the Swedish Labour Court did not shift the burden of proof to the employer to show that discrimination or reprisals have not occurred. Instead, the discrimination claim was rejected.

Online source:
www.arbetsdomstolen.se/upload/pdf/2018/74-18%20-%20NY.pdf

Music festival marketed as cis-man free

Gender

In the summer of 2018, an association organised a music festival marketed as 'the world's first major music festival for women, non-binary and transgender only'. Following reports and media attention, the Equality Ombudsman initiated an investigation regarding the possible discriminatory nature of the festival.

116 Swedish Labour Court judgment AD 2018 No. 74.

In its decision of 17 December 2018, the Equality Ombudsman found no clear indication of discrimination in relation to a specific person at the festival itself. The organisers claimed that everyone over the minimum age holding a valid ticket had been allowed to enter the festival.

However, with reference to the judgment of the CJEU in case C-54/07 Firma Feryn, the Equality Ombudsman found that the organisers of the festival had breached the ban on gender discrimination in the marketing and information preceding the festival. On the association's website and in the media, the organisers had explicitly stated that cis-gender people identifying themselves as men were excluded from participating in the festival and that only women, non-binary and trans people were welcome. The Equality Ombudsman found that this could only be understood as meaning that the festival was closed to cis-men and that people belonging to this group would be denied access to the festival. The marketing for the festival had thus been intended to dissuade cis-men from coming to and participating in the festival, which constitutes a breach of the Discrimination Act (Chapter 2 Section 12.1.2).

The Swedish Discrimination Act only provides for sanctions (damages) in cases involving discrimination against a specific individual (in addition, a financial penalty can be ordered when a natural or legal person does not comply with a request ordered by the Equality Ombudsman to fulfil his or her obligation according to the Act). The decision of the Equality Ombudsman regarding the cis-man-free festival is merely of a guiding nature. It does not concern discrimination of a specific individual and it does not entail any sanctions for the organisers of the festival. However, in the decision, the Equality Ombudsman stressed that it cannot be ruled out that the information about the festival spread by the organisers led to discrimination against one or more individuals who were dissuaded from participating in the festival.

Online source:
www.do.se/globalassets/stallningstaganden/ovriga/tillsynsbeslut-festival-til-2018_63.pdf

TR Turkey

The dismissal of a female civil servant for wearing a headscarf

Religion or belief

The applicant in this case was a civil servant who was dismissed in 2001 for wearing a headscarf at work. After various appeals against the decisions of lower courts and requests for rectification of the Conseil d'Etat's decision in favour of the employer, the applicant lodged an individual application with the Constitutional Court.

On 18 July 2018, the Second Section of the Constitutional Court found a violation of the freedom of religion safeguarded by Article 24 of the Constitution. The Court argued that the freedom of religion and conscience, enshrined in Article 24 of the Constitution, is fundamental for establishing and maintaining an effective and sound democracy based on the rule of law.

The argument that it is a breach of the principle of secularism to allow public officers on duty to wear a headscarf on religious grounds – without taking into consideration the specific circumstances of their public office – is considered unacceptable by the Constitutional Court. Considering practices such as wearing a headscarf by public officers as a threat to social unity is not in conformity with democracy and the understanding of pluralist secularism. Such practices reflect social diversity rather than constituting a threat against it. Dismissing the applicant based on the fact that she was wearing a religious headscarf is a sanction that constitutes an interference with the applicant's right to follow her religion. In the assessment of this case, the focus should, according to the Court, be on the issue of whether the grounds established by the inferior courts for their judgments are in compliance with the requisites of a democratic society. Any interference with the freedom of religion on a ground failing to fulfil the

criteria set by the Constitutional Court would be a breach of Article 24 of the Constitution. The Court regarded the arguments presented by the employer and the inferior courts to be in breach of Article 24 of the Constitution as they did not make any assessment of the problems caused or likely to be caused by her wearing a headscarf. The Court found that it was unclear which pressing social need justified the dismissal on grounds of maintaining public order and regarded the dismissal a disproportionate measure.

However, the Constitutional Court failed to fully engage with the issue of gender equality and to identify the potential harm linked to the exclusion of women from public work in its decision. As a result of the ban in Turkey, women wearing headscarves could not enter university campuses, the work environment or Parliament and they were not able to participate in public life as they may have wished. If a feminist analysis is to be undertaken, the harm done to these women must be taken into account.

Online source:
www.lexpera.com.tr/Appendix/PUBLICATION_TR/RG801Y2018N30497P5_258839534_1.pdf

United Kingdom

CASE LAW

Supreme Court ruling in the 'gay cake case' on discrimination in access to goods and services

Sexual orientation

The case concerned an appeal from the Court of Appeal in Northern Ireland (CANI) which had ruled that a bakery had discriminated on grounds of sexual orientation, religious belief and political opinion when it refused to bake a cake at the request of the claimant, Gareth Lee, because the cake was to bear the slogan 'Support Gay Marriage'. While concluding that the bakery had discriminated unlawfully for reasons 'associated with homosexuality', the CANI had explicitly stated that this finding was not incompatible with the bakers' freedom of expression rights under the ECHR. The bakery appealed and on 10 October 2018 the Supreme Court overturned the decision of the CANI.

In relation to the sexual orientation claim, the Supreme Court held that the refusal of service was not because of the claimant's actual or perceived sexual orientation but was due to an objection as to the message to be printed on the cake. It also held that the message was not indissociable from the sexual orientation of the customer, as gay marriage could be supported by those of any sexual orientation. As the bakers' objection was thus to being required to promote the message on the cake, the situation was not comparable with people being refused services simply because of their sexual orientation or their religious faith.

In relation to discrimination on grounds of religious belief or political opinion (which is constitutionally protected in Northern Ireland), the Supreme Court held that discrimination could not be based on the religion or belief of the alleged discriminator.

While the bakery could not refuse to provide the cake to the claimant because he was a gay man or because he supported gay marriage (which in the view of the Supreme Court had not happened in this case), it was not legally obliged to supply a cake decorated with a message with which the bakers profoundly disagreed. The finding of discrimination for reasons of association with sexual orientation was thus overturned.

In relation to the freedom of expression aspects of the case, the Supreme Court referred to the case law of the European Court of Human Rights and held that the bakery could not be required to promote

or support a view with which it did not agree. Freedom of speech also includes freedom not to speak in support of a view which a person does not hold.[117]

Online source:
www.bailii.org/uk/cases/UKSC/2018/49.html

Supreme Court ruling on discrimination in the field of employment

Disability

The claimant was employed by Swansea University for 13 years until his retirement on ill health grounds at the age of 38. He satisfied the definition of 'disability' under the Equality Act 2010 and had been a member of the university pension scheme throughout his employment. He had worked full-time for the first 10 years before moving to part-time for his final three years of work, due to his disabilities. Part of his pension was provided on the basis of his final salary (for the years until 2009) and thereafter, until 2013, on career average earnings. As well as additional entitlements under the provisions for ill-health early retirement for a lump sum and annuity (which were not in dispute), he was also entitled to an enhancement calculated on the basis of his actual salary at the date of retirement and this enhanced element was under dispute in the case. The claimant argued that basing the enhancement on his actual (part-time) salary amounted to less favourable treatment under the 2010 Equality Act because he was working part-time due to his disabilities. The claimant's argument was accepted by the Employment Tribunal but was rejected on appeal by the Employment Appeal Tribunal and the Court of Appeal. The decision was further appealed to the Supreme Court on the question of the meaning of the expression 'unfavourable treatment' under the Equality Act 2010.

The Supreme Court dismissed the appeal, ruling that the treatment was not unfavourable. In this case, the treatment in question was the award of the pension. The reason for giving the relevant enhancement of the pension was because of his disabilities and if he had been able to work full-time he would not have been entitled to the early and enhanced pension payment. Therefore, the award could not be said to be unfavourable.[118]

Online source:
www.bailii.org/uk/cases/UKSC/2018/65.html

117 United Kingdom, Supreme Court, *Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants)* (Northern Ireland) [2018] UKSC 49, decision of 10.10.2018.
118 United Kingdom, Supreme Court, *Williams v Trustees of Swansea University Pension & Assurance Scheme & Anor* [2018] UKSC 65, decision of 17.12.2018.

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