



European equality law review

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

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IN THIS ISSUE

- Comparing pay transparency measures to tackle the Gender Pay Gap: best practices and challenges in Belgium, Denmark and Iceland
- Discrimination in healthcare: the Roma example in Bulgaria, Ireland and Slovakia
- Evaluations of national anti-discrimination laws in Austria, Belgium, Poland and Sweden

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Introduction on the state of play

The biannual European equality law review is produced by the European network of legal experts in gender equality and non-discrimination (EELN). 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. The present issue provides an overview of legal and policy developments across Europe and, as far as possible, reflects the state of affairs from 1 January to 30 June 2021.

In this issue

This issue opens with three in-depth articles. The first article, by Sara Benedí Lahuerta from University College Dublin, is a comparative analysis of best practices and challenges in respect of pay transparency measures in Belgium, Denmark and Iceland. The second article, by Daniela Mihailova of the Equal Opportunities Initiative Association (Bulgaria), explores the situation of Roma and Traveller communities in Bulgaria, Ireland and Slovakia in relation to healthcare. The final article, by Karolina Kędziora, President of the Polish Society of Anti-Discrimination Law, and independent expert Maciej Kułak, is a comparative analysis of the evaluations of national non-discrimination law that have been commissioned and/or undertaken by national authorities in recent years in Austria, Belgium, Poland and Sweden. As in previous issues of this publication, the following section provides an overview of the relevant case law of the Court of Justice of the EU and of the European Court of Human Rights. Finally, the section on national developments contains brief summaries of the most important developments in legislation, case law and policy at the national level in the 36 countries covered by the network.

Recent developments at the European level¹

In February 2021, European Commission launched a public consultation as part of its preparations for a legislative proposal to prevent and combat gender-based violence and domestic violence, which is expected to be submitted by the end of 2021. The aim of the consultation was to gather the views of the public on measures taken by the EU Member States to address gender-based violence and domestic violence.² The Commission sought to gather input from the widest possible range of stakeholders, including individual citizens, civil society organisations, social partners, equality bodies, Member States and national authorities. Member States were also consulted through a targeted consultation. Additionally, in the context of the preparations of the legislative proposal, the gender equality stream of the network produced a comparative analysis of the criminal law provisions that are applied to gender-based violence, including domestic violence and online violence. The report is based on data that was gathered through the national experts of the 27 EU Member States, the three EEA countries and the United Kingdom.³

The European Commission continues its recent practice of putting forward ambitious strategies for a 'Union of Equality', targeting discrimination on specific grounds. On 3 March 2021, the new *Strategy for*

1 This section, like the rest of the issue, covers the period from 1 January to 30 June 2021.

2 European Commission (2021), *Public Consultation 8 February-10 May 2021 on Combating gender-based violence-protecting victims and punishing offenders*, Brussels. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12682-Preventing-and-combating-gender-based-violence/public-consultation_en.

3 At the time of writing the report had not yet been published; the expected publication date is November 2021.

*the Rights of Persons with Disabilities 2021-2030*⁴ was published, with the aim of tackling ‘the diverse challenges that persons with disabilities face’, by building upon the progress achieved under the previous strategy. The three main themes of EU action in the strategy are to allow persons with disabilities to: (1) enjoy their EU citizenship rights on an equal basis with others; (2) enjoy quality of life and autonomy; and (3) live free from discrimination. When launching the new strategy, Commissioner Helena Dalli made a commitment that the Commission will ‘deliver efficiently, through actions to mainstream disability into policymaking and EU funding; lead by example as an institution ... and strengthen governance and measure progress in the implementation of the strategy’.⁵

Equal pay for work of equal value was identified as one of the key priorities of the EU in the *Gender Equality Strategy 2020-2025*, which was launched in March 2020.⁶ One year later, on 4 March 2021, the European Commission presented the proposal for a new directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.⁷ The proposal sets out pay transparency measures, such as pay information for job seekers, a right to know the average pay levels desegregated by sex for workers doing the same work, as well as gender pay gap reporting obligations for big companies. The proposal also strengthens the tools for workers to claim their rights and facilitates access to justice. The proposed directive ensures that employers will no longer be allowed to ask job seekers for their pay history and will have to provide pay-related anonymised data upon request by an employee. Employees will also have the right to claim compensation for discrimination in pay. With this proposal, the Commission has taken a major step in improving respect for the right to equal pay and tackling pay discrimination. An article providing insights on best practices in pay transparency measures in three different countries can be found later in this issue of the European equality law review.⁸

The European Commission adopted several important strategies during the reporting period. Already in December 2020, it had adopted a Strategy to strengthen the application of the Charter of Fundamental Rights in the EU,⁹ 20 years after its adoption. In early March 2021, the Commission adopted an action plan to implement the European Pillar of Social Rights.¹⁰ The European Pillar of Social Rights consists of principles and rights essential for fair and well-functioning labour markets and welfare systems, and the current plan presents concrete actions to implement those principles and targets for the EU to reach by 2030. The concrete actions aim to meet the requirements for the long-term transformation of the labour markets and economies, as well as the more immediate and drastic changes that the pandemic has brought to the labour market, education, economy, welfare systems and social life. The plan contains many important measures to combat discrimination on all grounds in those areas. Ambitious targets have been set for women’s participation in the labour market as well as the provision of early childhood education and care, which are essential elements in the context of gender equality. The plan also contains a number of relevant measures, notably with regard to age discrimination, such as targets on youth

4 European Commission (2021), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Union for Equality: Strategy for the Rights of Persons with Disabilities 2021-2030, Brussels, 03.03.2021, COM(2021) 101 final, available at: <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8376&furtherPubs=yes>.

5 Opening remarks by Commissioner Dalli on the *Strategy for the Rights of Persons with Disabilities 2021-2030*, 03.03.2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/speech_21_1015.

6 European Commission (2020) *Striving for a Union of Equality, The Gender Equality Strategy 2020-2025*, 05.03.2020, available at: [gender_equality_strategy_factsheet_en.pdf](https://ec.europa.eu/gender-equality-strategy-factsheet_en.pdf) (europa.eu).

7 European Commission (2021), Proposal for a directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, Brussels, 04.03.2021, COM(2021) 93 final, available at: [EUR-Lex - 52021PC0093 - EN - EUR-Lex \(europa.eu\)](https://eur-lex.europa.eu/EN - EUR-Lex (europa.eu)).

8 See page 1.

9 European Commission (2020), Strategy to strengthen the application of the Charter of Fundamental Rights in the EU, COM(2020) 711 final, Brussels, 2 December 2020, available at: https://ec.europa.eu/info/sites/default/files/strategy_to_strengthen_the_application_of_the_charter_of_fundamental_rights_en.pdf.

10 European Commission (2021), *Action Plan on the European Pillar of Social Rights*, Brussels, 04.03.2021, available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-action-plan_nl.

employment and long-life learning, and the professional inclusion of people with disabilities. Following the adoption of the action plan, the Portuguese presidency of the Council of the EU organised the Porto Social Summit in early May 2021, leading to the signing of the Porto Social Commitment between the Presidency, the Commission, the Parliament and the social partners. The aim of the summit and of the commitment was to ‘mark the European agenda for the next decade, ensuring that we face present and future challenges ... leaving no one behind’.¹¹

In March 2021, two important developments also took place at EU level in relation to racial equality. First, the Council Recommendation on Roma equality, inclusion and participation was adopted,¹² building upon the 2013 Recommendation on effective Roma integration measures in the Member States. Drawing from the experiences of those integration strategies, the focus of the new Recommendation shifts to equality and inclusion, paying particular attention to non-discrimination and, notably, antigypsyism. Secondly, on the eve of the International Day against Racial Discrimination, the first European Anti-Racism Summit was held, in digital form. At the event, Commission President von der Leyen referred to the EU motto ‘unity in diversity’, emphasising that the European Union is now more diverse than ever and yet racism is still very much present.¹³

Furthermore, on 19 March 2021, the European Commission published its joint report on the implementation of the Racial Equality and Employment Equality Directives,¹⁴ as well as a staff working document on equality bodies and the implementation of the Commission Recommendation on standards for equality bodies.¹⁵ While the implementation report was long-awaited and highly useful, providing an overview of all aspects related to the implementation of the directives, the staff working document on equality bodies was especially welcome. Analysing in some detail the mandates, effectiveness and independence of all the equality bodies of the EU-27 Member States, the document may prove to be particularly useful in the forthcoming discussions on binding standards for equality bodies.

The European Court of Auditors (ECA) concluded in a special audit report in May 2021, that too little has been done in recent years to mainstream gender in the EU budget.¹⁶ The ECA emphasises that gender responsive budgeting is about understanding the impact of budgetary and policy decisions on gender equality goals, and not just about funding explicit gender-equality initiatives. According to the ECA, the EU fails to integrate a gender perspective in its budgeting because key elements such as gender analysis, gender-related objectives, indicators and accountability through reporting are missing. For the report, the auditors assessed whether gender equality had been incorporated into selected EU funding programmes, covering 66 % of the 2014-2020 multiannual financial framework (MFF), worth EUR 1 087 billion. The report makes several recommendations to help the EU to live up to its commitment to gender mainstreaming. All the recommendations have been accepted partly or completely by the Commission.

Last but not least, on 9 June 2021, the European Commission launched infringement proceedings against Hungary for breaches of the Racial Equality and Employment Equality Directives. In particular, the letter

11 See website of the Porto Social Summit, available at: <https://www.2021portugal.eu/en/porto-social-summit/>.

12 Council Recommendation of 12 March 2021 on Roma equality, inclusion and participation, OJ 2021/C 93/01 of 19.03.2021, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOC_2021_093_R_0001.

13 Speech by President von der Leyen at the European Anti-Racism Summit, 19.03.2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/speech_21_1265.

14 European Commission (2021) *Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive')*, Brussels, 19.3.2021, COM(2021) 139 final, available at: https://ec.europa.eu/info/sites/default/files/report_on_the_application_of_the_racial_equality_directive_and_the_employment_equality_directive_en.pdf.

15 European Commission (2021) *Equality bodies and the implementation of the Commission Recommendation on standards for equality bodies*, Commission staff working document, Brussels, 19.03.2021, SWD(2021) 63 final, available at: https://ec.europa.eu/info/sites/default/files/commission_staff_working_document_-_equality_bodies_and_the_implementation_of_the_commission_recommendation_on_standards_for_equality_bodies_en.pdf.

16 European Court of Auditors (2021) *Special Report 10/2021: Gender mainstreaming in the EU budget: time to turn words into action*, Brussels, 26.05.2021, available at: <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=58678>.

of formal notice requests the Member State to amend its legislation on sanctions for discrimination in education and vocational training, adopted in July 2020.¹⁷ The new sanctions regime prevents courts from awarding financial compensation for moral damage following discrimination in this field. Instead, compensation for moral damage may only be awarded in the form of training or education services. The Commission argues that the legislation amounts to a breach of the requirement that sanctions be effective, proportionate and dissuasive, and of the non-regression clause.¹⁸

Network publications and activities

In March 2021, the network published two thematic reports. The first report, ‘Algorithmic discrimination in Europe: Challenges and opportunities for gender equality and non-discrimination law’ is written by Janneke Gerards (Utrecht University) and Raphaële Xenidis (University of Edinburgh and University of Copenhagen). The report investigates how the issue of algorithmic discrimination is framed, addressed and redressed in the EU, with a particular focus on gender equality. The second thematic report, by Jule Mulder (University of Bristol Law School), on indirect discrimination in employment, provides a theoretical analysis of and reflections on the CJEU case law and national application of the concept of indirect discrimination. In addition to these thematic reports, the network also published its annual comparative analyses of non-discrimination law in Europe 2020 and gender equality law in Europe 2020.

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

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17 For a brief analysis of the legislation and its background, see *European equality law review*, Issue 2021/1, pp 92-93, available at: <https://www.equalitylaw.eu/downloads/5448-european-equality-law-review-1-2021-pdf-1-277-kb>.

18 European Commission (2021), *June infringement package: Key decisions*, 09.06.2021, available at: https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_2743.

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Comparing pay transparency measures to tackle the Gender Pay Gap: best practices and challenges in Belgium, Denmark and Iceland¹

Sara Benedí Lahuerta*

1 Introduction

Gender differences in pay for the same work or work of equal value have been outlawed in many countries for a long time.² Traditionally, most of the efforts to address them focused on remedial action via equal pay claims taken by individual workers,³ or in best-case scenarios, by a group of workers through joint claims or collective complaints (e.g. class actions).⁴ In some contexts, they have also been at least partly addressed via collective bargaining.⁵ In the light of the persisting Gender Pay Gap (GPG) (still at 14.1 % in 2019 for the EU-27)⁶ and the widespread understanding that gender pay discrimination is unacceptable, yet very common,⁷ a relatively large number of jurisdictions have introduced pay transparency measures as a regulatory strategy to reduce the GPG as part of a broader policy mix.⁸ These measures are generally aimed at disclosing pay information to different groups of stakeholders⁹ in order to understand the sources of inequity and advance towards gender pay equity.¹⁰ Yet they also raise concerns on various fronts, i.e. they involve disclosing sensitive personal data and may add costs for employers, which may be more difficult to bear for Small and Medium Enterprises (SMEs).

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1 The author would like to sincerely thank Christian Højer Schjøler for his clarifications on various aspects of the Danish legal framework, as well as the peer-reviewers for their valuable comments. The usual disclaimer applies.

2 For example, in the International Labour Organisation (ILO) Equal Remuneration Convention of 1951 (No. 100), in the Treaty of Rome of 1957 (EEC Treaty, Article 119) or in the US Equal Pay Act of 1963.

3 See e.g. Fredman, S. (2008), 'Reforming Equal Pay Laws' *Industrial Law Journal* vol. 37, issue 3, pp. 193-218.

4 See e.g. Eisenberg, D. T. (2011), 'Wal-Mart Stores v Dukes: Lessons for the Legal Quest for Equal Pay' *New England Law Review*, vol. 46, p. 229.

5 See e.g. Conley, H., Gottardi, D., Healy, G., Mikołajczyk, B. and Marco Peruzzi, M. (eds) (2018), *The Gender Pay Gap and Social Partnership in Europe: Findings from 'Close the Deal, Fill the Gap'*, Abingdon, Routledge.

6 Percentage of gross hourly earnings of men in 2019, see Eurostat, 'Gender pay gap in unadjusted form (online data code: SDG_05_20)', https://ec.europa.eu/eurostat/databrowser/view/sdg_05_20/default/table?lang=en. On the difference between the unadjusted and the adjusted GPG and Eurostat's decomposition methodology, see Eurostat, Item 4.3. Adjusted gender pay gap, Doc. DSS/2018/March/4.3, pp. 2-3.

7 European Commission (2017) *Gender Equality 2017. Special Eurobarometer 465*.

8 See e.g. Veldman, A. (2017), *Pay Transparency in the EU – A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway*, European Network of Legal Experts in Gender Equality and Non-Discrimination, Luxembourg, POEU; European Commission (2017), *Report on the implementation of Commission Recommendation on strengthening the principle of equal pay between men and women through transparency*, COM(2017) 671 final, Luxembourg, POEU; Gregory C. and Hodgkiss, K. (2018), *Gender Pay Reporting. An International Survey*, DLA Piper.

9 For example, workers and/or their representatives, social partners, monitoring bodies or the general public.

10 There is already some empirical evidence of the positive effects of pay transparency at company level, see e.g. Bennedsen M., Simintzi, E., Tsoutsoura, M. and Wolfenzon, D. (2019) 'Do Firms Respond to Gender Pay Gap Transparency?' NBER Working Paper 2535.

Despite these concerns, pay transparency regulation is worth including in the policy mix to tackle the GPG. Indeed, there is increasing evidence that some of the key obstacles to achieving gender pay equity, such as the lack of awareness about pay differences and barriers to access justice,¹¹ can be effectively addressed through better pay transparency. At *collective* level,¹² the ‘proactive measures’¹³ require the employer (often with the social partners) to take the initiative to report and/or analyse pay data broken down by gender and to take action to address sources of pay inequity. This can have the important effect of obliging the employer to take active responsibility for assessing the gender neutrality of its pay structures, thus shifting the burden to address pay inequity from the workers to the employer. Furthermore, the preparation and publication of pay data and analyses can foster public awareness about pay inequity issues and can improve feelings of fairness and satisfaction at work.¹⁴

At *individual* level, various tools can be introduced to make it easier for workers to challenge pay inequity in courts, such as introducing an individual right to request pay information from the employer, clarifying the concepts of the ‘comparator’ and the shift of the burden of proof, and enhancing protection against retaliation.¹⁵

On the other hand, it must be acknowledged from the outset that pay transparency is not the panacea to eliminate the GPG. There are many factors directly or indirectly causing the GPG that cannot be effectively addressed by pay transparency measures. For instance, the unequal division of paid and unpaid care between genders (and its consequences on e.g. career choices and working patterns), gender segregation and the feminisation of low-paid sectors or differences in non-cognitive skills (e.g. different approaches to pay negotiation).¹⁶ Indeed, empirical evidence suggests that other crucial policy areas to address these factors include work-life balance policies (e.g. enhancing flexibility for workers) and the overall regulation of the labour market (e.g. statutory minimum wages and institutional support for pay setting through collective bargaining).¹⁷

While pay transparency is not a new tool to address the GPG,¹⁸ it has recently become much more popular, in Europe and elsewhere. Part of this impetus can be explained by the EU’s interest in a wide range of policy measures that can contribute to address gender inequalities, including the *Commission Recommendation on strengthening the principle of equal pay between men and women through transparency* (2014/124/EU, hereinafter, ‘the Recommendation’).¹⁹ Following the adoption of the European Pillar of Social Rights,²⁰ a series of complementary soft and hard-law EU measures could also become instrumental to tackle the GPG, like the Directive on Work-Life Balance,²¹ and most notably, the Proposal for a Directive to

11 Commission (EU), *Evaluation of the relevant provisions in the Directive 2006/54/EC implementing the Treaty principle on ‘equal pay for equal work or work of equal value’*, SWD(2020) 51 final, p. 50.

12 McColgan, A. (1997), *Just Wages for Women*, Oxford, OUP.

13 Cuneo, C. (1990), ‘The State of Pay Equity: Mediating Gender and Class through Political Parties in Ontario’, in Fudge, F. and McDermott, P. (eds), *Just wages: A feminist assessment of pay equity*, Toronto, University of Toronto Press, pp. 33-59.

14 Wagner, I. (2018), *Certified equality: The Icelandic equal pay standard*, Rapport – Institutt for samfunnsforskning; Holt, H. and Larsen, M. (2011) *Kønspødt lønstatistik og redegørelse om lige løn: Evaluering af loven*, København, SFI.

15 Commission (EU), *Evaluation of the relevant provisions in the Directive 2006/54/EC implementing the Treaty principle on ‘equal pay for equal work or work of equal value’*, SWD(2020) 51 final, p. 51.

16 See e.g. Blau, F. D. and Kahn, L. M. (2017), ‘The Gender Pay Gap: Extent, Trends, and Explanations’ *Journal of Economic Literature*, pp. 55(3), 789-865.

17 See e.g. Christofides, L. N., Polycarpou, A., and Vrachimis, K. (2013), ‘Gender wage gaps, “sticky floors” and “glass ceilings” in Europe’ *Labour Economics*, Vol. 21, pp. 100-101; Goldin, C. (2014), ‘A Grand Gender Convergence: Its Last Chapter’ *American Economic Review*, Vol. 104, issue 4, pp. 1091-1119; Grimshaw, D., Bosch, G. and Rubery, J. (2014), ‘Minimum wages and collective bargaining: what types of pay bargaining can foster positive pay equity outcomes?’ *British Journal of Industrial Relations*, 52(3), pp. 470-498. See also the Proposal for a Directive on adequate minimum wages in the European Union, COM(2020) 682 final, published on 28.10.2020, pp. 4, 5, 10.

18 Early examples of proactive measures include the Minnesota Local Government Pay Equity Act (1982), the Manitoba Pay Equity Act (1985) or the Ontario Pay Equity Act (1988).

19 See also the European Parliament Resolutions 2008/2012(INI) and P7_TA(2012)0225 and the more recent EU Action Plan 2017-2019 on ‘Tackling the gender pay gap’ (COM(2017)678) and Council Conclusions on ‘Tackling the GPG: Valuation and Distribution of Paid Work and Unpaid Care Work’ (02/12/2020, 13584/20).

20 Commission (EU), *Communications establishing a European Pillar of Social Rights*, COM/2017/0250 final.

21 Directive (EU) 2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 12.07.2019, pp. 79-93.

strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (hereinafter, ‘the Directive Proposal’).²²

This article analyses the legislation and experiences of three jurisdictions which already have pay transparency measures in place (Belgium, Denmark and Iceland), with reference to key features of the Recommendation and the Directive Proposal, where relevant. After introducing the EU and national regulatory context (Section 2), the article discusses the best practices and implementation challenges encountered in the selected jurisdictions focusing on four key features of proactive pay transparency measures, i.e. requirements to assess the relative value of work (Section 3.A), duties to report and analyse pay data and to take evidence-based action to address pay gaps (Section 3.B), the role of worker participation, social partners and collective bargaining (Section 3.C) and the clash between pay transparency measures and data protection (Section 3.D). Section 4 concludes the article.

2 The regulatory context at EU and national level

The EU Gender Equality Strategy focuses on a combination of diverse measures to improve gender equality across Member States.²³ Indeed, achieving gender equality, and as part of that, closing the GPG, requires a comprehensive approach that tackles all its complex causes. Within those measures, in the last seven years the EU has been pushing to achieve greater pay transparency, particularly through the 2014 Commission Recommendation. The latter suggested that Member States should ‘include one or more’ out of four possible actions in their national law, namely, (1) recognising a right of individual workers to obtain information on pay levels, (2) introduce employer reporting on the average pay levels broken down by gender for employers with at least 50 workers, (3) pay audits for employers with at least 250 workers, where the wage structure and gender pay differentials are systematically assessed, and (4) including equal pay and pay audits in collective bargaining discussions and negotiations.²⁴

The Recommendation has had a positive but limited impact at national level as there are still 15 Member States that have not introduced pay transparency measures.²⁵ Furthermore, difficulties to effectively apply Directive 2006/54/EC (hereinafter, ‘the Recast Directive’)²⁶ at national level persist largely due to ‘the lack of clarity and awareness of the concept of equal pay for equal work and work of equal value’ and obstacles to accessing justice²⁷ (e.g. inaccessibility of pay information of potential comparators, lack of clarity on thresholds to shift the burden of proof to the respondent, costs). To address these problems, the Commission has launched the Proposal for a Directive on Pay Transparency. The approach of this Proposal is very comprehensive and ‘truly European’²⁸ as it not only incorporates most of the elements of the Recommendation but also other useful tools based on prior CJEU case law and various Member States’ experiences. While this contribution does not lend itself to a detailed analysis of the Directive Proposal, Table 1 gives a condensed overview of the breadth of the measures envisaged and their relationship with the Recommendation.

22 Proposal for a Directive, COM(2021) 93 final, published on 4.03.2021, p. 2. For a comprehensive review of all relevant EU legislation in this field, see Commission (EU), Evaluation of the relevant provisions in the Directive 2006/54/EC implementing the Treaty principle on ‘equal pay for equal work or work of equal value’, SWD(2020) 51 final, Section 5.4.

23 Commission (EU), A Union of Equality: Gender Equality Strategy 2020-2025, COM(2020) 152 final.

24 Recommendation, points 2-6.

25 Commission (EU), Evaluation of the relevant provisions in the Directive 2006/54/EC implementing the Treaty principle on ‘equal pay for equal work or work of equal value’, SWD(2020) 51 final, Table 12. See also Commission (EU), Implementation Report (COM(2017) 671 final, p. 3, and Veldman, A. (2017), *Pay Transparency in the EU – A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway*, European Network of Legal Experts in Gender Equality and Non-Discrimination, Luxembourg: POEU, p. 7.

26 Council Directive of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.07.2006, pp. 23-36.

27 See Commission (EU), Evaluation of the relevant provisions in the Directive 2006/54/EC implementing the Treaty principle on ‘equal pay for equal work or work of equal value’, SWD(2020) 50 final.

28 Aumayr-Pintar, C. M. ‘The Gender Pay Transparency directive: A truly European proposal’ (Blog post, unpublished).

Table 1. Key pay transparency tools found in the Directive Proposal compared to the Recommendation

Type of measure	Key tools of the Directive Proposal	Present in the Recommendation?
Individual level / facilitating access to justice	Prior to employment: (Article 5) – Right to receive pay information from employer – Prohibition to enquire about pay history	No
	In employment: Right to pay information (Article 7)	Yes (Point 3)
	Litigation: – Clarifying that hypothetical comparators are permitted in equal pay claims (Article 4(4)) ²⁹ – Victimisation – protection from retaliation (Article 22) – Defence of Rights (Article 12) – Procedures on behalf or in support of workers (Article 13(1)) – Right to compensation ('full recovery of back pay and related bonuses or payments in kind') (Article 14) – Injunction orders (Article 15) – Enhanced shift of the burden of proof (Article 16) – Disclosure of evidence (Article 17) – Limitation periods (Article 18) – Legal and judicial costs (Article 19)	No
Collective level / proactive duties	Equal value of work and assessing the value of work: Need to assess work of equal value on the basis of gender-neutral and objective systems (Article 4)	Yes (Points 10-11)
	Reporting: – <i>Public</i> reporting of pay aggregated data by gender: 6 metrics (Article 7(1)(a)-(f) and Article 7(3)-(4),(6)) – <i>Internal</i> reporting of pay gaps 'by categories of workers' and gender (Article 7(1)(g) and (5))	Yes (Points 4-5: pay reports and pay audits)
	Joint pay assessments: (Article 9(1)-(3)) Action to remedy gaps: (Article 9(4))	Partly (Point 5: pay audits only)
	Collective bargaining	Yes (Point 6)
	Procedures on behalf or in support of several workers: (Article 13(2))	No
	Penalties for infringement of national provisions: (Article 20)	No
	Equal pay matters in public contracts and concessions: (Article 21)	No
	Enforcement and monitoring: – Competencies of equality bodies and other bodies (Article 25) – Monitoring bodies (Article 26) – Statistics (Article 28)	Partly (Points 7-8, 13-15)

Source: Author's own elaboration.

29 The EU definition of 'direct discrimination' applicable to equal pay claims already formally includes hypothetical comparisons ('where one person is treated less favourably on grounds of sex than another [...] would be treated in a comparable situation'; Directive 2006/54/EC, Article 2(1)(a), emphasis added). However, the CJEU ruling in Case 129/79 *Macarthy v Smith* (EU:C:1980:103) has often been interpreted as excluding hypothetical comparators in equal pay claims (see e.g. Barnard, C., *EU Employment Law*, 4th ed., OUP, 2012, p. 303), even though it predates the above-mentioned definition. In *Macarthy*, the CJEU stated that relying on a hypothetical comparator required 'as a prerequisite, the elaboration by the Community and national legislative bodies of criteria of assessment' (paragraph 15). Various commentators consider that it is now time to leave behind restrictive interpretations derived from *Macarthy*, see e.g. Barnard (above), p. 303; Fredman, S., 'Reforming Equal Pay Laws' (2008) 37 *Industrial Law Journal* 200-201; Steele, I. 'Beyond Equal Pay' (2008) 37 *Industrial Law Journal* 123. Article 4(4) of the Directive Proposal would contribute to abandon those restrictive interpretations by expressly clarifying that hypothetical comparators are permitted in equal pay claims.

The article focuses instead on analysing the experiences of Belgium, Denmark and Iceland with *proactive* pay transparency measures. In 2021, the three countries had relatively low median unadjusted GPGs (5.8 %, 14 % and 13.8 %) ³⁰ and were rated among the best 30 countries in the World Bank's Global Gender Gap Index (in 13th, 29th and 1st position, respectively). ³¹ Their approaches to pay transparency are different. Denmark gives the choice between pay reporting and pay audits, whereas in Iceland employers must obtain equal pay certification through a management standard and Belgium combines pay reporting with strong collective bargaining. Each of these systems has been praised for different reasons, e.g. the early adoption of transparency measures in Denmark, the bold and innovative approach of Iceland and the interplay between legislation and social dialogue in Belgium. ³² The key features of each of these approaches are summarised in Table 2 and they are analysed in more detail in Section 3.

Table 2. Comparison of key features of the proactive pay transparency measures implemented in Belgium, Denmark and Iceland

Jurisdiction	Gender-neutral job evaluation approach required?	Type of reporting and publicity	Reporting threshold	Analysis required?	Action required?	Sanctions?	Role of social partners	Support/adaption for SMEs
EU (Directive Proposal)	Yes (Article 4)	– <i>Public</i> reporting of pay aggregated data by gender: 6 metrics (Article 7(1)(a)-(f) and Article 7(3)-(4),(6)) – <i>Internal</i> reporting of pay gaps 'by categories of workers' and gender (Article 7(1)(g) and (5))	250 workers (Article 8)	Joint pay assessments (Article 9(1)-(3))	Action to remedy gaps: (Article 9(4)) (Only for employers with 250 or more workers)	Penalties for infringement of national provisions (Article 20)	Direct/indirect references linked to: – social dialogue (Article 11) – enforcement (Article 25) – collective bargaining (Article 27) – implementation (Article 30)	– Recognition of need to tailor measures to employers' sizes (Recital 22) – High reporting threshold (Article 8)

30 Eurostat, 'Gender pay gap in unadjusted form (online data code: SDG_05_20)', https://ec.europa.eu/eurostat/databrowser/view/sdg_05_20/default/table?lang=en. According to the latest available (2014) data, the adjusted (unexplained) GPG was 2.5 % in Belgium, 9.3 % in Denmark and 10.8 % in Iceland (i.e. lower than the EU average of 11.5 %), see Eurostat, Item 4.3, Adjusted gender pay gap, Doc. DSS/2018/March/4.3, p. 12.

31 World Bank, Global Gender Gap Report 2020, available at: https://tcdata360.worldbank.org/indicators/af52ebe9?country=BEL&indicator=27962&viz=line_chart&years=2006,2020#table-link. Note that economic participation is only one of the four criteria of this Index.

32 Aumayr-Pintar, C. (2018), 'Pay transparency in Europe: First experiences with gender pay reports and audits in four Member States', Eurofound; Wagner, I. (2018), Certified equality: The Icelandic equal pay standard, *Rapport – Institutt for samfunnsforskning*; Vandekerckhove, S. (2019), 'The Gender Pay Gap in Belgium: policy beyond the rules of law', The EU Mutual Learning Programme in Gender Equality. Equal Pay (Iceland, 27-28 May).

Jurisdiction	Gender-neutral job evaluation approach required?	Type of reporting and publicity	Reporting threshold	Analysis required?	Action required?	Sanctions?	Role of social partners	Support/adaption for SMEs
Belgium	No (only encouraged through Checklist)	Two types: – Annual Social Reports (publicly available) – Biennial Analytical Reports (confidential – only shared with works council or workers' representatives)	– Social Reports: required for all private companies – Analytical Reports: companies with 50+ workers	Not required, only encouraged	No	– Yes, but limited central monitoring and not dissuasive – Role of works mediator to find solutions for gender pay inequity, but appointment not compulsory	High	– Analytical report: less detailed form for companies with less than 100 workers
Denmark	No	Annual pay reports or pay audits (scope: one to three years). Reports not publicly available but workers entitled to receive them	35+ workers <i>and</i> at least 10 of each gender within the same work category ('10-10 rule')	Optional pay audits	No	Yes, in theory, but lack of application	Medium-low	– 10-10 rule – Choice between pay reports and pay audits – Option to have data supplied by Statistics Denmark
Iceland	Yes	Certification that requires pay audit (pay information and analysis remains at the internal level). Certified companies can use logo publicly	25+ workers	Yes	Yes	Yes, offending employers may be reported to the Directorate of Gender Equality by the social partners. – Fines of (ISK 50 000 - EUR 300 per diem) (Article. 18, para. 6 of the GEA)	Unclear	Different deadlines according to the size of the company

Source: Author's own elaboration.

3 The Belgian, Danish and Icelandic pay transparency proactive duties: best practices and challenges

A. Requirements to assess the relative value of work: a key initial step

Assessing the real *value* of work is a key first step to identify gender bias in pay structures. This is often achieved by developing a Job Classification (JC) or Job Evaluation System (JES).³³ The Recast Directive establishes that when JCs/JES are in place, they must be based on the same criteria for women and men and must not be discriminatory on the grounds of sex. The 2014 Recommendation sought to further encourage the adoption of JCs/JES to advance towards gender-neutral pay structures.³⁴ Most recently, the 2021 Directive Proposal provides that Member States must take steps to ensure that pay structures are equitable from a gender perspective, i.e. that ‘women and men are paid equally for the same work or work of equal *value*’³⁵ and that Member States should establish ‘tools or methodologies’ on the basis of non-biased criteria, *such as ‘gender-neutral job evaluation and classifications systems’*.³⁶

Out of the three jurisdictions considered in this study, the Icelandic Standard (ÍST 85:2012, ‘the Standard’) can be considered to be the best practice in line with international recommendations³⁷ as regards incentives for employers to develop gender-neutral evaluation systems to determine which jobs are of equal value. The ÍST 85:2012 demands that employers falling within its scope set up a gender-neutral *analytical* evaluation system³⁸ based on four factors, giving them both flexibility and detailed guidance to adapt the factors and subfactors to their own specificities.³⁹ The Standard provides extensive guidance on how to define the subfactors in a gender-neutral manner, including e.g. a list of possible subfactors for each criterion, worked examples with fictitious companies of various sectors/sizes where different sub-criteria have been applied⁴⁰ and how to test that the system established is gender neutral.⁴¹ Conducting this evaluation is a necessary first step in the Icelandic certification process, and one of its cornerstones to ensure that the whole wage structure does not undervalue female work. Furthermore, the ÍST 85:2012 is designed in such a manner that it has compliance incentives built in: organisations failing to successfully develop a gender-neutral Job Evaluation System (JES) will fail to obtain the Standard. In that case, the social partners could report the Company to the Centre for Gender Equality, which ‘may instruct [the employer] to take satisfactory measures to rectify the situation within a suitable period, failing which it shall be subject to per diem fines’.⁴²

Compared to the Icelandic system, Belgium and Denmark *do not require* that employers undertake a JES or JC to ensure that their wage structure is gender neutral. Out of the two, the Belgian system has the advantage of having developed a ‘Checklist – Gender neutrality in job evaluation and classification’

33 For discussion on the differences between these two tools, see e.g. Commission (EC), Memorandum on Equal Pay for Work of Equal Value, COM(94)6 final, Chapter 2; Veldman, A. (2017), *Pay Transparency in the EU – A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway*, European Network of Legal Experts in Gender Equality and Non-Discrimination, Luxembourg, POEU, pp. 41-42.

34 At 11-12.

35 Article 4(1).

36 Article 4(2)-(3). Emphasis added. In line with the CJEU case law, the wording of this provision denotes that establishing JCs or JES would not be compulsory but some sort of gender-neutral evaluation system should be in place (see Case 61/81 *Commission v UK*, ECLI:EU:C:1982:258).

37 For example, Chicha, M. T. (2008), *Promoting equity: Gender-neutral job evaluation for equal pay: A step-by-step guide*, Geneva, ILO.

38 ÍST 85:2012 (e), p. 17. For reference of analytical evaluation systems, the Standard cites the work by Armstrong, M. (2007), *Job Evaluation: A Guide to Achieving Equal Pay*, Kogan Page.

39 The four broad factors (competence, responsibility, strain and working conditions) may be adapted to each individual workplace, if appropriately justified, ÍST 85:2012 (e), pp. 18, 22.

40 ÍST 85:2012 (e), pp. 22-24, 27.

41 ÍST 85:2012 (e), pp. 27-28.

42 Regulation No. 1030 of 13 November 2017 on the certification of equal pay systems of companies and institutions according to the ÍST 85 Standard, Article 7 (available in English at: www.government.is/library/04-Legislation/Regulation_CertificatinOfEqualPaySytems_25012018.pdf). On enforcement, see below Section 2.B.

(*Check-list Non-sexisme dans l'évaluation et la classification des fonctions*)⁴³ that must be used at sectoral and company level to verify if a JES or JC is gender neutral, *but there is no requirement to have a JES or JC at either level*.⁴⁴ Conversely, Danish law is more flexible and only broadly requires a *general* – not analytical – assessment of the value of work and ensuring that the 'wage concept' applied is explained, consistent and not discriminatory on the grounds of gender.

In terms of enforcement, neither the Belgian nor the Danish legal framework go as far as the Icelandic certification system to encourage the adoption of gender-neutral job evaluation systems, i.e. no financial sanctions are envisaged. Nevertheless, Belgian law has established two softer mechanisms which apply *only* at the sectoral level. Joint Committees (*Commissions Paritaires*) have to submit their job evaluation systems to the Directorate General of Collective Work Relations (*Direction Générale des Relations collectives de travail du Service public fédéral, Emploi, Travail et Concertation sociale*), who checks their gender neutrality in the light of Collective Agreement No. 25 and the Gender-Neutral Checklist.⁴⁵ In 2013, a total of 255 Joint Committees were inspected and, among them, 45 were flagged as being gender biased. They were then given two years to draft an action plan to make them neutral,⁴⁶ following which they had three months to justify why they had not done so. The uncompliant ones were eventually included in a 'naming and shaming' list, which, as of 1 December 2019, included 11 Joint Committees.⁴⁷ This soft sanction could be more effective than the other sanctioning option, namely that the Minister proposes to the King not to make the relevant collective agreement binding.⁴⁸ This latter sanction could be counter-productive as it would deprive workers in the given sector from all the range of protections included in the relevant collective agreement,⁴⁹ so there may be less inclination to use it in practice.

B. Triggering action through transparency: incentives for pay reporting, pay analysis and action plans

The Recommendation established a fairly low threshold for pay reporting (i.e. employers with at least 50 workers should report pay information broken down by gender) and a considerably higher threshold for pay audits (i.e. recommended for employers with at least 250 workers).⁵⁰ The 2021 Directive Proposal has increased the threshold to 250 workers for both pay reports and joint pay assessments – akin to pay audits.⁵¹ Compared to the latter, the three jurisdictions considered in this study have substantially lower reporting thresholds. In Iceland, obtaining the ÍST 85:2012 is now compulsory for organisations with 25+ workers, whereas in Denmark the *pay reports* are mandatory for employers with 35+ workers (and with at least 10 workers of each gender per job category). In Belgium, all private companies are obliged to annually submit the Social Report, and those with 50+ workers are also obliged to produce the Analytical Report.

43 *Institut pour l'égalité des femmes et des hommes* (2010), 'Checklist – Gender neutrality in job evaluation and classification'.

44 At sectoral level, the responsibility for this check lies with the 'Joint Committee' (*Commission Paritaire, CP*), that negotiates wages in the given sector, see further Loi du 5 December 1968 on collective agreements (*Loi du 5 décembre 1968 sur les conventions collectives*), Article 50/1 (as amended by Law of 22 April 2012 aimed at combating the wage gap between men and women (*Loi du 22 avril 2012 visant à lutter contre l'écart salarial entre hommes et femmes*), Article 8). On the role of the Joint Committees see also Law of 15 January 1969 on collective agreements and joint committees (*Loi du 15 janvier 1969 sur les conventions collectives de travail et les commissions paritaires*), Chapter 3, and Vandekerckhove, S. (2018) *Collective bargaining in Belgium, 50 years after the Law of 1968: Never change a bargaining team?*, European Commission, p. 5. At company level, checking the neutrality of JES/JCs is part of the compulsory biennial gender pay reporting introduced in 2012 and must be performed in consultation with the works council or union's delegation, but the ultimate responsibility lies with the employer, see Law of 20 September 1948 on the Organisation of the Economy (*Loi du 20 septembre 1948 portant organisation de l'économie*), Article 15(m) (as amended by Law of 22 April 2012 (*Loi du 22 avril*), Article 6).

45 Law of 5 December 1968 (*Loi du 5 décembre 1968*), Article 50/1.

46 Law of 5 December 1968 (*Loi du 5 décembre 1968*), Article 50/2.

47 Publicly available at: https://emploi.belgique.be/fr/themes/egalite-et-non-discrimination/egalite-femmes-hommes-lecart-salarial#toc_heading_3.

48 Law of 5 December 1968 (*Loi du 5 décembre 1968*), Article 29.

49 See further Demagos, A. (2015), *L'écart salarial entre hommes et femmes*, Brussels, Primento pp. 138-139.

50 Recommendation, paragraphs 3 and 5. The reason for this different threshold in the Recommendation may be linked to the in-depth analysis required in pay audits, which can put a proportionally higher burden on smaller companies.

51 Articles 8 and 9, respectively.

Out of the three reporting systems, the Icelandic ÍST 85:2012 standard is possibly the one that best allows for the address and identification of pay inequity in a given organisation, for it obliges employers not only to allocate relative weight to all the jobs, but also to analyse their relative *value* within the organisation as part of the Job Evaluation Study (JES). Additionally, the Standard requires that, following the JES, a wage analysis is conducted so that unexplained gender-based wage differentials are identified.⁵² Employers are free to use the wage analysis system of their choice, although the Standard provides guidelines and two worked examples based on the ‘least squares’ method (linear regression analysis).⁵³ It also recommends ‘hir[ing] a neutral party to carry out th[e] survey’, although this is not compulsory.⁵⁴

The purpose of the wage analysis exercise is to analyse pay data by gender on the basis of job values and of all the factors that can have an influence on wage formation (e.g. length of service, education). If unexplained differences are found in any of the wage components (e.g. daytime work, overtime, premiums, paid expenses, in-kind benefits) and they cannot be satisfactorily explained, action must be taken to equalise them.⁵⁵ Acceptable explanations should ideally be based on objective factors such as seniority / length of service or previous management experience.⁵⁶ For example, Wagner reports how, after conducting a JES, an Icelandic company found that the ‘legal analyst’ and the ‘statistic analyst’ jobs had the same value. Yet the latter (performed by a woman) was paid less than the former (performed by a man). Following the wage analysis, the pay difference could not be justified, so the company raised the salary of the female statistic analyst.⁵⁷

This system has the virtue of obliging employers to think about the value of jobs in a fairly objective manner, separating the job itself from the person who performs it and the latter’s gender. It also compels them to follow a transparent and formalised methodology for their pay decisions, which contributes to pay predictability and to eliminate potential biases linked to individual managers’ discretion.⁵⁸ This can be crucial to fairly re-evaluate feminised jobs at intra-company level,⁵⁹ which has been deemed to have a likely long-term impact on the overall labour structure.⁶⁰ On the other hand, even if the justifications for pay differences must be clearly established, employers have some leeway to determine the ‘individual factors and particular personal skills’ that are considered for wage formation. This flexibility can potentially lead to the inclusion of some wage formation factors that may seem gender neutral but can be subject to biases.⁶¹ For instance, a performing arts company could pay a male actor more compared to that of various female actors who perform work of the same value and justify this on the basis that ‘he is more talented’, even though this may be a subjective appreciation which could hide gender biases.⁶²

Another advantage of the Icelandic Standard is that sanctions for non-compliance can be quite substantial if the delay is lengthy: fines amount to ISK 50 000 (i.e. approximately EUR 370/day). However, they are not adjusted according to the size of the organisation, which could lead to disproportionate fines for SMEs and may limit the dissuasiveness for large companies. Furthermore, the monitoring system may not be

52 See ÍST 85:2012, Annex C, which states that ‘[i]n the implementation of the equal wage standard it is assumed that one wage analysis has been conducted’ (p. 30).

53 The ordinary least-square regression analysis is also used in the software tool (module 1) developed in Switzerland and recommended for wage analysis in organisations with 50 or more workers, see further Swiss Confederation, *Modèle d’analyse standard de la Confédération. Descriptif méthodologique. Logib Modules 1 et 2* (version 2021.1), available at: <https://www.ebg.admin.ch/ebg/fr/home/prestations/logib-triage/logib-modul-1/standardanalysemodell-bund.html>.

54 ÍST 85:2012, Annex C, p. 30.

55 ÍST 85:2012, Annex C, pp. 29-30.

56 These examples are given in the Standard, Table C.14 and by Wagner, I. (2018), *Certified equality: The Icelandic equal pay standard, Rapport – Institutt for samfunnsforskning*, p. 28.

57 Wagner, I. (2018), *Certified equality: The Icelandic equal pay standard, Rapport – Institutt for samfunnsforskning*, p. 28.

58 Thorgeirsdóttir, H. K., ‘Equal pay certification – How Iceland became the first country to require proof of equal pay’, EU Mutual Learning Programme in Gender Equality (Iceland, 27-28 May 2019) p. 10.

59 Wagner, I. (2018), *Certified equality: The Icelandic equal pay standard, Rapport – Institutt for samfunnsforskning*.

60 Goldin, C. (2014), ‘A Grand Gender Convergence: Its Last Chapter’, *American Economic Review*, Vol. 104, Issue 4, 1091-1119.

61 In fact, the former Minister of Welfare has recognised that ‘[t]here’s still complete flexibility in what kind of a pay system you want to use. [...] You can, in that sense, discriminate in pay. You just have to have some reasons.’ (Wagner, I. (2018), *Certified equality: The Icelandic equal pay standard, Rapport – Institutt for samfunnsforskning*, p. 22).

62 Example inspired by Thorgeirsdóttir, H. K., ‘Equal pay certification – How Iceland became the first country to require proof of equal pay’, EU Mutual Learning Programme in Gender Equality (Iceland, 27-28 May 2019), p. 10.

strong enough to identify all potential breaches. The Directorate of Gender Equality has the mandate to monitor compliance with the Standard and confirm which institutions have obtained certification.⁶³ Yet, in practice, the Directorate plays a rather ‘passive role’ as it is instead for the social partners to take the initiative to report uncompliant employers to the Directorate.⁶⁴ Nevertheless, it is still too early to assess the effectiveness of the Icelandic enforcement system given that the deadlines for certification have been extended several times,⁶⁵ largely due to the certification being ‘more burdensome than expected’.⁶⁶

Moving on to consider the Danish simpler requirements, as pointed out earlier, the Consolidated Equal Pay Act (EPA)⁶⁷ requires that employers with at least 35 workers (and at least 10 workers of each gender – ‘the 10-10 rule’) prepare annual pay reports broken down by gender.⁶⁸ Alternatively, employers may choose to undertake pay audits which must comprise a period of one to three years instead of producing annual pay reports.⁶⁹ The choice has to be made in agreement with the workers and their representatives.⁷⁰ If the pay audit option is preferred, it must also be conducted in collaboration with workers but the ultimate responsibility to comply with the law lies with the employer.⁷¹ In practice, however, the annual reports tend to be the preferred option by almost all organisations bound by Article 5a of the EPA.⁷²

If the pay report option is chosen, pay data must be organised using the worker groups at the level of detail established in the 6-digit DISCO code (Statistics Denmark’s Classification of Occupations).⁷³ Accordingly, the data reported by each organisation is broken down by occupation (i.e. following the DISCO code) and by gender. The problem of this type of reporting is that it has limited potential to reveal pay inequity across occupations. Men and women’s wages for performing the same occupation under the same DISCO code are aggregated by gender and compared. For instance, the wages of men and women working under the DISCO code: ‘532110: Social and health work in institutions and hospitals’ should be compared in pay reports and differences by gender within that occupation will be visible. But it could be that ‘532110: Social and health work in institutions and hospitals’ is of the same *value* as work performed under the DISCO code: ‘532130: Porter work at institutions and hospitals’. Perhaps both men and women working under the DISCO code 532110 are being paid less than those working under code 532130, yet reporting according to occupation only, without considering job values, will not allow identification of that type of inequity. Furthermore, even if a GPG within occupations is identified, the reported data will not allow for further research as to whether socio-demographic factors such as working patterns, age, or length of service could explain that gap.

The Danish approach has a few other limitations. Firstly, organisations choosing to comply with the EPA by conducting pay reports are not legally required to take *action* to address potential pay inequity problems – as is the case when choosing pay audits. They are simply obliged to submit annual wage statistics to Statistics Denmark and share the wage reports broken down by gender *internally* with their

63 Article 10, Act No. 10/2008.

64 Act No. 10/2008, Articles 9 and 10.

65 Government of Iceland, FAQ, <https://www.government.is/topics/human-rights-and-equality/equality/equal-pay-certification/>.

66 Thorgeirsdóttir, H. K., ‘Equal pay certification – How Iceland became the first country to require proof of equal pay’, EU Mutual Learning Programme in Gender Equality (Iceland, 27-28 May 2019), p. 10.

67 Consolidation Act No. 156 of 22 February 2019 on Equal Pay for Men and Women (hereinafter, ‘EPA’) (*Bekendtgørelse af lov om lige løn til mænd og kvinder*), available in Danish at: <https://www.retsinformation.dk/eli/lt/2019/156>.

68 Most companies are under a duty to report their annual wage statistics to either Statistics Denmark or their employer organisation, which in turn sends back gender segregated wage statistics to the employer. The companies which do not report wage statistics to Statistics Denmark or an employer organisation must generate their own gender segregated wage statistic. The gender segregated wage statistics are mandated by Article 5a(1) of the EPA ‘for the purpose of consulting and informing the employees of wage gaps between men and women in the enterprise’. There is no obligation to submit the latter reports to any public authority.

69 Article 5a(6) EPA. Audits must include not only pay data but also an explanation about the factors considered to establish the wage structure and ‘an action plan with a view to preventing or reducing the pay gap’.

70 Article 5a(6).

71 Holt, H. and Larsen, M. (2011) *Kønsopdelt lønstatistik og redegørelse om lige løn: Evaluering af loven*, København, SFI.

72 Holt, H. and Larsen, M. (2011) *Kønsopdelt lønstatistik og redegørelse om lige løn: Evaluering af loven*, København, SFI.

73 The current DISCO-08 classification is a six-digit, five-level classification system that divides work functions into 563 groups. It can be accessed at: <https://www.dst.dk/da/Statistik/dokumentation/nomenklaturer/disco-08> (in Danish).

workers, in line with the Act on Information and Consultation of Workers (Section 4) or with the relevant collective agreement. Secondly, the enforcement system is rather weak. In principle, any worker who considers that the employer does not comply with its equal pay obligations under the EPA may initiate legal action⁷⁴ and employers breaching pay transparency duties may be sanctioned with a fine.⁷⁵ Yet, it appears that even though workers' organisations have threatened to initiate legal proceedings against non-compliant employers, no fines have been issued by criminal courts.⁷⁶

Nevertheless, there are some signs that the mere obligation to report and share the data has had some (positive) effects in Denmark. For instance, Holt and Larsen report that pay transparency duties have sharpened (companies') attention about pay and pay gaps, and it has enhanced the visibility of and dialogue around equal pay issues.⁷⁷ Bennedsen et al. also found empirical evidence that female workers are more likely to be promoted in firms bound by the law.⁷⁸

Compared to Denmark, Belgian reporting requirements are more comprehensive and they actually include two types of reports. Firstly, *all* Belgian companies are obliged to include in their Annual Accounts a Social Report (*Bilan Social*) with the workforce data broken down by type of contract, gender, level of studies and professional category.⁷⁹ The data must also be broken down by working pattern and state the number of temporary staff.⁸⁰ This information should be shared and analysed internally⁸¹ and must also be annually submitted to the National Bank (*Banque Nationale*), which then makes it publicly accessible from its website. Even though the information is quite concise and aggregated, it allows some simple calculations to be performed⁸² and its public availability can improve companies' accountability and allow comparability. For instance, looking at the Social Report of a large financial institution for 2021, it is visible that the higher wage costs of males (137 % higher compared to females) are likely to be linked not only to the fact that many more females work part-time (76 %), but also to the fact that there are far fewer females in management positions (only 3 %).⁸³ *Internally*, this could lead the employer and the workers' representatives to ask themselves: Why are there so many females working part-time? Are there any organisational factors pushing them to do so (explicit or implicit)? Are females working part-time given the same promotion opportunities as staff working full-time? What can be done to get more females in the promotion pipeline towards the highest management positions?⁸⁴ *Externally*, prospective workers and other stakeholders can compare these data with those of other companies to e.g. establish trends by sectors, differences between competitors, etc.

In practice, however, compliance with this part of the Social Report has been unsatisfactory. Two years after introducing this reporting duty, 8 % of companies did not report data broken down by gender and 31 % of them reported unrealistic data.⁸⁵ This lack of rigour may be partly explained by the fact that the

74 Article 6 EPA.

75 Article 6b(1) EPA. They may also 'be held criminally liable under the provisions of part 5 of the Danish Criminal Code' (Article 6b(2) EPA).

76 Bennedsen, M., Simintzi, E., Tsoutsoura, M. and Wolfenzon, D., 'Do Firms Respond to Gender Pay Gap Transparency?' (2019) NBER Working Paper 2535, pp. 56-57. Cases are referred to the criminal courts when employers do not accept the fines proposed by the police.

77 Holt, H. and Larsen, M. (2011) *Kønsopdelt lønstatistik og redegørelse om lige løn: Evaluering af loven*, København, SFI.

78 Bennedsen M., Simintzi, E., Tsoutsoura, M. and Wolfenzon, D. (2019), 'Do Firms Respond to Gender Pay Gap Transparency?' NBER Working Paper 2535, pp. 23-24.

79 I.e. managerial staff, workers (non-manual), manual workers and others.

80 Specifying in both cases: the average workforce, the number of hours worked, wage costs and benefits other than wages, see *Arrêté royal portant exécution du Code des sociétés et des associations*, Article 5:2.I^o.

81 See Section 3.C.

82 For example, the absolute GPG by professional category or the hourly GPG working pattern.

83 Annual accounts and other documents to be filed under the Companies and Associations Code (*Comptes annuels et autres documents à déposer en vertu du Code des sociétés et des associations*). Submission date: 01/06/2021, p. 72, downloaded from: <https://cri.nbb.be/bc9/web/catalog?execution=e1s1>.

84 See also other questions and analysis suggested by FGTB (2016), *Réduire l'écart salarial. La loi est de votre côté*, Brussels.

85 J. Pollet, '39 pour cent des entreprises ne respectent pas la loi visant à lutter contre l'écart salarial' (*Syndicat Chrétien*, 24 April 2014), cited by Demagos, A. (2015), *L'écart salarial entre hommes et femmes*, Brussels, Primento, p. 178.

sanctions for non-compliance are too low to be dissuasive and they are not proportionate to the size of the company.⁸⁶ Furthermore, these reporting obligations only apply in the private sector.

In addition to the *Bilan Social*, Belgian companies with 50 or more workers must also produce a more detailed biennial ‘Analytical Report’ (*Rapport d’Analyse*), which is only shared internally with the works council, or in its absence, the union’s delegation.⁸⁷ The pay data must be broken down not only by gender and occupation,⁸⁸ but also by length of service, qualification level and professional category.⁸⁹ Including these additional variables in the data can help identify and explain sources of pay inequity in the wage structure that would not have been visible in the Social Report. Nevertheless, unlike the Icelandic Standard – and despite its name – the Analytical Report does not require a detailed wage *analysis* and it does not compel companies to classify jobs on the basis of their *value*. It can thus be considered more rudimentary than the Icelandic Standard in terms of potential to find and address pay inequalities in a given organisation.

On paper, however, Belgian reporting obligations seem to go beyond the Danish ones. Firstly, Belgian employers must state in their reports if the Gender-Neutral Checklist has been used in the design of the wage structure, something which is not required in Denmark. Yet if the Checklist is not used by the company, there is not even a mild consequence (as is the case at sectoral level).⁹⁰ Secondly, as in Denmark, *data* included in the Analytical Report must be discussed within the company at the works council (or in its absence, with the union’s delegation).⁹¹ But going beyond Danish legislation, in Belgium this discussion must *consider the need* to set up an action plan to develop a gender-neutral wage structure.⁹² In reality, the adoption of action plans by Belgian companies will probably depend on various factors, including the employer’s willingness and the bargaining power of the workers’ representatives. Accordingly, neither Danish nor Belgian legislation requires the *actual* setting up of an action plan.⁹³

In practice, the relatively advanced Belgian reporting duty is likely to yield limited results due to weak monitoring and enforcement tools.⁹⁴ Indeed, the financial sanctions for companies not adhering to the

86 Social Penal Code, Articles 204-205. Sanctions range between EUR 20 and EUR 500 for administrative fines and between EUR 50 and EUR 1 000 for criminal fines. For a critique, see Demagos, A. (2015), *L’écart salarial entre hommes et femmes*, Brussels, Primento; Avis du 27 février 2012.

87 Law of 20 September 1948 (*Loi du 20 septembre 1948*), Article 15(m) and Law of 1 May 2007 to combat discrimination between women and men (*Loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes*), Article 13/1, paragraph 1, both as amended by Law of 22 April 2012 (*Loi du 22 avril 2012*) and Law of 12 July 2013 (*Loi du 12 juillet 2013*). See also Section 3.C.

88 Article 8 of Law of 22 April 2012 (*Loi du 22 avril 2012*) refers to the level of function according to the functions established in the company job/function classification (*niveau de fonction ‘réparti suivant les classes de fonction mentionnées dans le système de classification des fonctions applicable dans l’entreprise’*).

89 I.e. manual worker, worker (non-manual) or managerial staff, see Law of 22 April 2012 (*Loi du 22 avril 2012*), Article 8. The form is slightly simpler for companies with less than 100 workers than for those with 100+ workers. The forms were established under the Ministerial Decree fixing the forms that must serve as a basis for the analytical report on workers’ remuneration structure (*Arrêté Ministériel fixant les formulaires modèles qui doivent servir de base pour le rapport d’analyse de la structure de rémunération des travailleurs*), Moniteur Belge 15/05/2014. The forms are also available at: https://emploi.belgique.be/fr/themes/egalite-et-non-discrimination/egalite-femmes-hommes-lecart-salarial#toc_heading_4.

90 See above Section 3.A.

91 See further Section 3.C.

92 Under Law of 1 May 2007 (*Loi du 10 mai 2007*), Article 13/1, paragraph 1, employers have a duty to *engage in social dialogue* biennially to establish if the wage structure is gender neutral, and if that is not the case, devise avenues to advance towards a neutral structure. However, Law of 20 September 1948 on the Organization of the Economy (*Loi du 20 septembre 1948 portant organisation de l’économie*) clarifies in Article 15(m) that, in relation to the action plan, what is compulsory is ‘*decid[ing] whether an action plan should be established*’ (*‘juger l’opportunité d’établir [...] un plan d’action’*) (author’s translation, emphasis added).

93 Yet if a Belgian company establishes an action plan, it must at least include: (a) the concrete objectives; (b) the fields of action and the instruments to achieve them; (c) the deadline for completion; (d) a system to monitor its implementation and a progress report, Law of 20 September 1948 (*Loi du 20 septembre 1948*), Article 15(m), paragraphs 1 and 2.

94 While empirical studies are not available yet, there is some evidence that many companies do not perform a proper analysis, see Demagos, A. (2015), *L’écart salarial entre hommes et femmes*, Brussels, Primento, pp. 189-190.

Analytical Report rule are neither dissuasive nor proportionate to the size of the company.⁹⁵ Additionally, there is 'no centralised follow-up and hardly any sanctioning'.⁹⁶ While company auditors should verify annual reports (including pay reports broken down by gender), 'this obligation is not really effective as auditors do not systematically check the accuracy of figures provided'.⁹⁷ Alternatively, it has also been argued that Labour Inspectors could have a much more prominent role in promoting and monitoring compliance.⁹⁸ The role of the Company Mediator⁹⁹ could also be reinforced to turn the Mediator into a real internal expert in neutral wage structures who could enhance the effectiveness of this reporting duty if their appointment was compulsory and the position was protected against retaliation.¹⁰⁰

On the whole, the Icelandic system, while not perfect, is the one that is most likely to trigger the development of gender-neutral job evaluation systems, an analysis of the organisations' jobs based on their value and action to address gender inequity in pay. This is largely due to the fact that this is *mandated* by law, and substantial fines could be imposed on offending employers. In contrast, both Belgian and Danish legislation falls short of *mandating* value-based gender-neutral job evaluations and of demanding analysis and action to address organisational GPGs.¹⁰¹ In this regard, the 2021 EU Directive Proposal could trigger changes in the Belgian and Danish systems: the introduction of a requirement to apply value-based gender-neutral job assessment approach and to undertake joint pay assessments and actions to address the GPGs.¹⁰² The Proposal could also enhance compliance by requiring effective, proportionate and dissuasive sanctions (Article 20) and the setting up of a monitoring body (Article 26).¹⁰³

C. The role of participatory approaches, the social partners and collective bargaining

Social partners and/or workers' representatives can arguably play a useful role to address the GPG through their involvement in wage analysis processes and via collective bargaining. There are also signs that promoting internal discussions about the GPG and remuneration can increase workers' trust in the wage-setting system¹⁰⁴ and that wage-setting systems involving social partners are more likely to promote gender pay equity than managerial systems.¹⁰⁵

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- 95 Sanctions range from EUR 50 to EUR 500 for criminal fines and EUR 25 to EUR 250 for administrative fines (*Code du Droit Pénal Social*, Article 191/1). While initially Law of 22 April 2012 (*Loi du 22 avril 2012*) introduced financial sanctions that ought to be adapted according to the number of workers ('100 francs, multiplied by the number of workers employed in the company, up to a maximum of 100,000 francs', Law of 20 September 1948 (*Loi du 20 septembre 1948*), Article 32, *alinéa 1er*, 6°; author's translation) that provision was repealed by Royal Decree (*Arrêté Royal*) 2010-06-06/06 (Article 109, paragraph 10, 024) and never entered into force. For a critique, see Vastersavendts, M., *Projet de loi introduisant le Code pénal social. Rapport fait au nom de la Commission de la Justice (4 Mai 2010, Document parlementaire n° 4-1521/4)*, Section III (comments by Mme. Thibaut).
- 96 Vandekerckhove, S. (2019) 'The Gender Pay Gap in Belgium: policy beyond the rules of law', The EU Mutual Learning Programme in Gender Equality. Equal Pay (Iceland, 27-28 May) p. 5.
- 97 Burri, S. (2019), *National Cases and Good Practices on Equal Pay*, European Network of Legal Experts in Gender Equality and Non-Discrimination, Luxembourg, POEU, p. 48. The Institute of company auditors (*Institut des réviseurs d'entreprises / Instituut van de Bedrijfsrevisoren*) issued guidelines.
- 98 While they have already a role to play under Law of 20 September 1948 (*Loi du 20 septembre 1948*), Articles 23-39, it has been argued that their powers could be improved, see suggestions at Demagos, A. (2015), *L'écart salarial entre hommes et femmes*, Brussels, Primento, pp. 189-190 and *Avis du 17 février 2012 relatif à l'écart salarial. Rapport fait au nom du Comité d'Avis* (2011-12, Doc. Parl. No. 53-1675/6, p. 31).
- 99 Introduced by Law of 22 April 2012 (*Loi du 22 avril 2012*), Chapter 6.
- 100 Demagos, A. (2015), *L'écart salarial entre hommes et femmes*, Brussels, Primento, pp. 161-162.
- 101 There is evidence that employers are more likely to take action when it is mandatory or large GPGs are identified, Auymar-Pintar, C. (2018), 'Pay transparency in Europe: First experiences with gender pay reports and audits in four Member States', Eurofound, p. 12.
- 102 Directive Proposal, Articles 4 and 9. As the Proposal stands, these provisions would only apply to companies of 250 or more workers.
- 103 It also recognises that existing enforcement bodies, such as equality bodies and labour inspectorates, have a role to play in this field (Article 25). See a more comprehensive overview of the Directive Proposal in Table 1.
- 104 Wagner, I. (2018) Certified equality: The Icelandic equal pay standard, *Rapport – Institutt for samfunnsforskning*, p. 29.
- 105 See a revision of literature in Rubery, J. and Koukiadaki, A. (2018), *Closing the gender pay gap: A review of the issues, policy mechanisms and international evidence*, Geneva, ILO, Chapter 3.

The Directive Proposal expressly states that it does not affect ‘the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law or practice’.¹⁰⁶ Indeed, the potential involvement of social partners in the national wage-setting systems is a highly sensitive issue, which is considered to be largely within Member States’ competence.¹⁰⁷ Still, Article 11 of the Directive Proposal at least requires that ‘the rights and obligations under [the] Directive are *discussed* with social partners’.¹⁰⁸ Yet this article is so broad that it may be difficult to interpret and implement in practice. The role envisaged for social partners in the Proposal can perhaps be better understood by looking at a few of its other provisions. For instance, internal pay reports ought to be *shared* with ‘all workers and their representatives’, who have the right to ask for ‘clarifications and details’ about the data and for ‘explanations’ regarding any GPG.¹⁰⁹ Additionally, under Article 9, joint pay assessments must be undertaken ‘in cooperation’ with workers’ representatives.¹¹⁰ While the Proposal also envisages the involvement of workers’ representatives and/or social partners in enforcement procedures and monitoring duties,¹¹¹ the role of social partners in these provisions seems limited.¹¹²

The rest of this section analyses the extent to which the Belgian, Danish and Icelandic pay transparency legal frameworks incentivise participatory approaches (e.g. through social dialogue), with references to the relevant provisions of the Directive Proposal. In all three countries, levels of unionisation and collective bargaining coverage are high compared to the EU average (see Table 3) and collective bargaining plays an important role in determining wages. However, in each of the three countries, levels of workers’ consultation and participation in wage analysis processes and interaction with collective bargaining varies.

Table 3. Levels of unionisation and collective bargaining in Belgium, Denmark and Iceland (2019 data unless stated otherwise)

Country	Union density	Collective bargaining	Key level of collective bargaining	Minimum wage legislation?
Belgium	49 %	96 %	National level (cross-sectoral) sets the framework (pay increases) every two years. Then applied at industry and company level (for large companies) through specific agreements.	Yes, statutory minimum wage for all or most workers.
Denmark	68 %	80 %**	Large coverage at industry level, but much of pay package left to company collective agreements (that specify/ deviate from industry agreements).	No statutory minimum wage.
Iceland	92 %*	90 %	Predominance of industry level, with binding norms/ceilings to be respected by all further agreements.	No statutory minimum wage.
EU average	23 %	60 %	n/a	n/a

Sources: Author’s own elaboration with data from the OECD and ETUI (European Trade Union Institute, worker-participation.eu).

* 2020 data

** 2018 data

106 Article 27.

107 See Article 153(5) TFEU. Nevertheless, the social partners’ involvement is partly envisaged in Proposal for a Directive on adequate minimum wages in the European Union, COM(2020) 682 final, published on 28.10.2020, Article 7, Recitals 18 and 19.

108 Emphasis added. Article 27 also clarifies that the Directive Proposal does not affect collective bargaining procedures.

109 Articles 8(5)-(7).

110 If workers’ representatives are lacking, the Directive Proposal suggests that ‘the employer should *designate* one or more workers for this purpose’ (p. 13), while it would be preferable to give workers the chance to *choose* them.

111 See e.g. Articles 13 and 25.

112 For instance, there is no reference to involving the workers’ representatives in the development of gender-neutral job assessment methodologies (Article 4), as recommended in the ILO publication: Chicha, M. T. (2008), *Promoting Equity. Gender-Neutral Job Evaluation for Equal Pay: A Step-by-Step Guide*, Geneva, ILO, Chapter 2.

In Iceland, the Standard was developed through a long process that started in 2008 and was actually instigated by the social partners.¹¹³ However, now that the Standard is in place and has become binding, the role of social partners in the whole certification process is not formally established. The Standard itself does not expressly require that the social partners or workers' representatives get involved in the wage evaluation and analysis process leading to obtaining the Standard. Still, the fact that social partners play a monitoring role¹¹⁴ and can report uncompliant organisations to the Directorate¹¹⁵ is likely to put employers under pressure to include them in the certification process. In fact, social partners can request 'the information and materials which [they] consider necessary in order to carry out their monitoring'.¹¹⁶ In practice, anecdotal evidence suggests that in various companies the process was entirely led by management, although workers were sometimes consulted (e.g. through focus groups).¹¹⁷ In some cases, the whole process led to 'discussion [about pay] on a large scale for the first time in the company'.¹¹⁸ However, more empirical research is needed to actually establish whether social partners and workers' representatives are being able to get actively involved in the internal processes required to gain certification.

The interaction between the Icelandic Standard and collective bargaining has not been clearly established either. The former Ministry of Welfare expected this relationship 'to be addressed at the company level' and considered that 'it is the responsibility of the employers and the trade unions to arrive at a positive accord'.¹¹⁹ Experiences so far indicate that this lack of clarity may be an issue in organisations where wages are negotiated with many different trade unions representing various occupational groups with competing interests and diverse wage levels.¹²⁰ On the other hand, some companies have used collective agreements to their advantage to increase wages of large groups of workers at once to correct the unjustified differences identified through the certification process.¹²¹

As in Iceland, in Denmark, collective bargaining is a key tool in wage determination. Many collective agreements 'must comply with the principle of equal pay' and, in fact, a 1973 mediation agreement between two of the larger social partners¹²² abolished pay differences by gender in collective agreements signed by them.¹²³ Unlike Icelandic law, however, Danish pay reporting legislation has established a more explicit role for workers' representatives. Firstly, the choice between producing a pay report or conducting a pay audit has to be agreed with the workers' representatives.¹²⁴ Secondly, in accordance with the EPA¹²⁵ and the Act on Information and Consultation of Workers,¹²⁶ the gender pay reports or audits must be shared internally with the worker representatives, who ought to be consulted and be given the chance

113 I.e. the Icelandic Confederation of Labour, ASÍ and SA-Business Iceland (Wagner, I. (2018), Certified equality: The Icelandic equal pay standard, *Rapport – Institutt for samfunnsforskning*, p. 18).

114 Regulation No. 1030 of 13 November 2017, Article 7.

115 Holt, H. and Larsen, M. (2011) *Kønspødelte lønstatistik og redegørelse om lige løn: Evaluering af loven*, København, SFI.

116 Holt, H. and Larsen, M. (2011) *Kønspødelte lønstatistik og redegørelse om lige løn: Evaluering af loven*, København, SFI.

117 Wagner, I. (2018) Certified equality: The Icelandic equal pay standard, *Rapport – Institutt for samfunnsforskning*, pp. 27, 29.

118 Wagner, I. (2018) Certified equality: The Icelandic equal pay standard, *Rapport – Institutt for samfunnsforskning*, pp. 35-36.

119 Wagner, I. (2018) Certified equality: The Icelandic equal pay standard, *Rapport – Institutt for samfunnsforskning*, p. 33.

120 Wagner, I. (2018) Certified equality: The Icelandic equal pay standard, *Rapport – Institutt for samfunnsforskning*, p. 33.

121 Wagner, I. (2018) Certified equality: The Icelandic equal pay standard, *Rapport – Institutt for samfunnsforskning*, p. 33.

122 Videbæk Munkholm, N. (2020) *Country report. Gender equality: How are EU rules transposed into national law? – Denmark*, European Network of Legal Experts in Gender Equality and Non-Discrimination, Luxembourg, POEU, p. 23.

123 Videbæk Munkholm, N. (2020) *Country report. Gender equality: How are EU rules transposed into national law? – Denmark*, European Network of Legal Experts in Gender Equality and Non-Discrimination, Luxembourg, POEU, p. 23. Note that in Denmark collective agreements are private contracts and do not have *erga omnes* effects. While almost all public sector workers are covered by collective agreements, around 27% of private sector workers are not (Andersen, S. K., et al (2021) 'Employment Relations in Denmark', in Greg. J. Bamber et al (eds), *International and Comparative Employment Relations: Global Crises and Institutional Responses*, London, Sage, 221-223). There is, therefore, a group of workers for whom no minimum wage applies given that Denmark lacks minimum wage legislation. Nevertheless, they are still covered by equal pay legislation. See further Rasmussen, S., Refslund, B., Sørensen, O. H., & Larsen, T. (2016), *Reducing Precarious Work in Europe through Social Dialogue. The Case of Denmark*, Project VP/2014/004, pp.24-25, available at: <https://vbn.aau.dk/en/publications/reducing-precarious-work-in-europe-through-social-dialogue-the-ca>.

124 EPA, Article 5a(2), (6).

125 Article 5a(1).

126 Danish Act on Information and Consultation of Employees, Act No. 303 of 2 May 2005 (*Lov om information og høring af lønmodtagere*), Section 4 (available in Danish at: <https://www.retsinformation.dk/eli/lta/2005/303>).

to discuss the report with the employer. According to a 2011 survey, between one quarter and one third of the companies that produced pay reports compiled the data themselves, in some cases, with the involvement of workers' representatives.¹²⁷ In 80 % of the surveyed companies, the reports were shared both with management and workers' representatives but for at least one third of them there was very limited or total lack of dialogue about the data.¹²⁸

Out of the three jurisdictions considered in this study, Belgium is clearly the one where the role of collective bargaining and social partners is most prominent. Indeed, every two years, a collective agreement within the '*Groupe des 10*' is negotiated at the national (inter-professional) level.¹²⁹ Importantly, this '*Accord Central*' must not only establish basic salary structures, it should also include actions to address the GPG.¹³⁰ Considering that this agreement applies to all private sectors, used well, it could be a powerful tool to address the undervaluation of work in feminised sectors,¹³¹ something that tools targeting individual companies – like the Icelandic Standard – are less likely to achieve in the short and medium-term.¹³²

Additionally, as pointed out earlier, Collective Agreement No. 25 (as amended in 2008) demands that both Joint Sector Committees (*Commissions Paritaires, CPs*) and companies assess the neutrality of their job evaluation systems using the Gender-Neutral Checklist.¹³³ While establishing such systems is not compulsory in itself, many CPs have established one, and ensuring that it is gender neutral can contribute to improve gender pay equity in the whole sector concerned. Nonetheless, the drawback of this system is that the monitoring and enforcement of this duty is relatively weak.¹³⁴

Finally, at company level, Belgian social partners also play a 'pivotal role'.¹³⁵ Both the Social Report and the Analytical Report must be discussed at the works council, or in its absence, with the workers' representatives. In addition, for the Analytical Report, the employer and the works councils (or workers' representatives) *must agree* on the need to establish an action plan to achieve a gender-neutral wage structure¹³⁶ and participants in these discussions have the right to take notes, request additional information, ask questions, and express opinions, criticisms and suggestions.¹³⁷

Out of the three jurisdictions considered, Iceland is the one where the role of social partners and/or workers' representatives is the least prominent. The Icelandic pay transparency approach is management-led, and as it stands, it is up to management to involve the social partners. While the pay transparency approach of the Directive Proposal is also management-led, it gives a clearer – albeit limited – role to social partners and workers' representatives, especially in *discussing* pay reports and *cooperating* to draft pay assessments. Belgian and Danish legislation give a much weightier role to workers' representatives, with whom various key pay transparency decisions must be *agreed*.¹³⁸ Under the Belgian and Danish pay transparency approaches the social partners and/or workers' representatives could thus be considered

127 Holt, H. and Larsen, M. (2011) *Kønsopdelt lønstatistik og redegørelse om lige løn: Evaluering af loven*, København, SFI.

128 Holt, H. and Larsen, M. (2011) *Kønsopdelt lønstatistik og redegørelse om lige løn: Evaluering af loven*, København, SFI.

129 Demagos, A. (2015), *L'écart salarial entre hommes et femmes*, Brussels, Primento.

130 Demagos, A. (2015), *L'écart salarial entre hommes et femmes*, Brussels, Primento.

131 See e.g. Grimshaw, D. and Rubery, J. (2007), *Undervaluing women's work*. Working Paper Series No. 53, European Work and Employment Research Centre, Manchester: University of Manchester, Chapter 8; Grimshaw, D., Bosch, G. & Rubery, J. 2014, 'Minimum Wages and Collective Bargaining: What Types of Pay Bargaining Can Foster Positive Pay Equity Outcomes?: Minimum Wages and Collective Bargaining', *British journal of industrial relations*, Vol. 52, No. 3, pp. 470-498.

132 See further arguments in this line in Vandekerckhove, S. (2019), 'The Gender Pay Gap in Belgium: policy beyond the rules of law', *The EU Mutual Learning Programme in Gender Equality. Equal Pay (Iceland, 27-28 May)* p. 6; Wagner, I. (2018), *Certified equality: The Icelandic equal pay standard*, *Rapport – Institutt for samfunnsforskning*, p. 36.

133 See Section 3.A.

134 See Section 3.A.

135 Vandekerckhove, S. (2019), 'The Gender Pay Gap in Belgium: policy beyond the rules of law', *The EU Mutual Learning Programme in Gender Equality. Equal Pay (Iceland, 27-28 May)* p. 5.

136 Law of 1 May 2007 (*Loi du 10 mai 2007*), Article 13/1, paragraph 1; Law of 20 September 1948 (*Loi du 20 septembre 1948*), Article 15(m), paragraph 1.

137 Royal decree of 25 April 2014 on the analytical report on the workers' remuneration structure (*Arrêté Royal du 25 avril 2014 relatif au rapport d'analyse sur la structure de la rémunération des travailleurs*), Article 6.

138 For example, the choice between producing a pay report or conducting a pay audit in Denmark; the need to establish an action plan at company level in Belgium.

almost as *partners* of the employer, with a real decision-making capacity, whereas in the Directive Proposal they could be seen as *cooperators*, with a right merely to contribute to certain discussions. This is noteworthy because research shows that the involvement of workers' representatives in the reporting process can yield better compliance/enforcement results.¹³⁹ Finally, the Belgian legal framework is also the one that gives a more prominent role to collective bargaining with collective agreements such as the inter-professional '*Accord Central*' and No. 25 that give express consideration to actions to reduce the GPG.

D. Promoting transparency and protecting personal data: mission impossible?

As earlier discussion has demonstrated, addressing the GPG through pay transparency almost always requires disclosing pay information broken down by gender and other variables to one or various stakeholders. This can obviously create tensions between the potential benefits of disclosing pay data and workers' rights to protect their personal data.¹⁴⁰ The Directive Proposal recognises and addresses this issue by establishing that information disclosed in application of Articles 7 (right to information), 8 (pay reports) and 9 (joint pay assessments) complies with Regulation (EU) 2016/679 and that such information is only used to pursue equal pay.¹⁴¹ Additionally, if the data released in compliance with Articles 7-9 of the Proposal could directly or indirectly allow identification of a worker's pay, the Proposal requires that 'only the workers' representatives or the equality body shall have access to that information'.¹⁴² This could be the case if there was only one worker of each gender in a given job category and, pursuant to Article 8(1)(g), the GPG by job category was released to all workers. Avoiding the internal release of the data for that job category, but still sharing it with the workers' representatives or the equality body could protect the data of those workers while still allowing an independent third party (e.g. the equality body) to scrutinise it and 'advise workers regarding a possible claim under [the] Directive'.¹⁴³

Data protection safeguards are needed for all pay transparency measures, but especially for the individual right to request pay information of workers doing the same work or work of equal value, found in Article 7 of the Directive Proposal.¹⁴⁴ This right can be instrumental in facilitating equal pay litigation for those workers suspecting that they are being paid less than a potential comparator. However, disclosing pay information on a one-to-one basis can make it easily identifiable and raise more data protection concerns compared to the disclosure of aggregated data. Given that this contribution focuses on proactive and systemic measures, it will be just noted that the right to request pay information has been implemented in various European jurisdictions (Finland, Germany, Ireland, Norway and Slovenia)¹⁴⁵ with mixed results. In some of them, the right is so narrow that it has limited practical relevance. For instance, in Germany, the right only applies to companies with 200+ workers; in Finland and Slovenia, the comparators may oppose having their data disclosed, in which case, the employer is not obliged to do so.¹⁴⁶ The entitlement to oppose the disclosure may be justified on data protection grounds, but there could arguably be ways to protect personal data while also facilitating access to comparators' pay information. For example, in Norway, the comparators are informed that their pay data has been requested by another worker, but they cannot oppose the disclosure. At the same time, the worker receiving the information has a duty of

139 Rubery, J. and Koukiadaki, A. (2018), Institutional interactions in gender pay equity: A call for inclusive, equal and transparent labour markets, University of Oxford Human Rights Hub Journal, p. 115.

140 As established in the EU Charter of Fundamental Rights (Article 8) and Regulation (EU) 2016/679. This right is also acknowledged in the 2021 Directive Proposal (Recital 30).

141 Article 10(1)-(2).

142 Article 10(3).

143 Article 10(3).

144 See also Recommendation, paragraph 3.

145 Veldman, A. (2017), *Pay Transparency in the EU – A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway*, European Network of Legal Experts in Gender Equality and Non-Discrimination, Luxembourg: POEU, p. 25; Timmer, A. and Senden, L. (2020), *Comparative analysis of gender equality law in Europe 2019*, European Network of Legal Experts in Gender Equality and Non-Discrimination, Luxembourg, POEU, p. 47.

146 Timmer, A. and Senden, L. (2020), *Comparative analysis of gender equality law in Europe 2019*, European Network of Legal Experts in Gender Equality and Non-Discrimination, Luxembourg, POEU, p. 47.

secrecy.¹⁴⁷ Alternatively, in line with Article 10(3) of the Directive Proposal, pay information requested through this individual right could be disclosed to a third party with a duty of confidentiality (e.g. workers' representatives or equality bodies), who could then advise the requester about a possible pay gap and equal pay claim.

None of the three countries studied in this work have recognised a universal individual right to request pay information.¹⁴⁸ In Iceland, however, there is a milder version of the *right to request* pay information: the *right to disclose* one's own salary.¹⁴⁹ This can be useful to ensure that companies cannot introduce confidentiality clauses prohibiting voluntary salary disclosures, but it certainly stays short of the more powerful effects that the right to request pay information can have in terms of facilitating equal pay litigation.¹⁵⁰

In terms of guaranteeing data protection when pay aggregated data are collected and published, both Denmark and Iceland have chosen to require their circulation at internal level only by sharing the information with the social partners or workers' representatives. Accordingly, they may not necessarily be disclosed to all the workers, unless the employer voluntarily chooses to do so.¹⁵¹ In contrast, in Belgium, where two types of pay reports must be produced, the simpler Social Report is publicly available on the website of the National Bank, whereas the more detailed Analytical Report is only shared internally with the works council or workers' representatives.

Comparing these three national approaches, neither the Icelandic nor the Danish legislation requires the public disclosure of pay data broken down by gender. Belgian legislation is the only one going in the direction of the 2021 Directive Proposal, i.e. mandating the *public* disclosure of basic information and the *internal* disclosure of more detailed information by job category.¹⁵² This approach is useful for various reasons. The public availability of the Social Report and the fact that exactly the same metrics must be submitted by all private companies facilitates comparability between them and improves accountability.¹⁵³ It can foster public debate about the GPGs in certain companies or sectors and can allow the public to follow their evolution. It can also give prospective workers the chance to make informed choices when looking for jobs. While it is true that companies certified under the Icelandic Standard can be publicly visible through the use of the Standard's logo, more detailed comparisons are not possible.¹⁵⁴ Unlike the Belgian Social Report, the Belgian Analytical Report, which contains more detailed information that companies may not wish to disclose to competitors, is only shared with monitoring bodies and internally. Its purpose is to assess the neutrality of the pay structure and the need to set up an action plan. Accordingly, like the public and the internal reporting featured in the Directive Proposal,¹⁵⁵ each

147 Veldman, A. (2017), *Pay Transparency in the EU – A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway*, European Network of Legal Experts in Gender Equality and Non-Discrimination, Luxembourg: POEU, p. 26. Another option to enhance data protection could be to have the pay information disclosed to workers' representatives or the relevant equality body, instead of directly handing it to the requesting worker.

148 In Denmark, Act. No. 145 of 24/02/2020 on Public Access to Information (available in Danish at: <https://www.retsinformation.dk/>) allows to request pay information from public employers, with some limitations, but this Act does not apply to private employers.

149 GEA 2008, Article 19(3).

150 Timmer, A. and Senden, L. (2020), *Comparative analysis of gender equality law in Europe 2019*, European Network of Legal Experts in Gender Equality and Non-Discrimination, Luxembourg, POEU, p. 47 considers that it is not very effective due to the 'unlikelihood that men will disclose their higher wages to female colleagues'.

151 Furthermore, in Denmark the EPA establishes that '[i]f the gender-disaggregated wage statistics have been received as confidential for the sake of the company's legitimate interests, the information may not be passed on to unauthorized persons' (Article 5a(5)).

152 The Belgian Social Report plays a similar role to data that ought to be published under Article 8(1)(a)-(f) and 8(6) of the Directive Proposal, whereas the Belgian Analytical Report is comparable to data to be disclosed under Article 8(1)(g) and Article 8(5) of the Proposal. Note, however, that the Analytical Report must only be shared with the works' council, or in its absence, with the union delegation, and not with *all* the workers, as the internal report envisaged in the Directive Proposal.

153 A similar approach with even easier access to the data was introduced in the UK in 2017 (see The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172).

154 The nature of the Icelandic Standard itself would also render comparisons virtually impossible because, as discussed earlier, it is quite flexible in terms of how each company implements it internally.

155 Article 8(1),(5)-(6).

of the two Belgian reports plays a different role in tackling the GPG and they can be considered to be complementary.

Additionally, to safeguard workers' data protection, the Belgian legislature has introduced another rule that applies both to the Social and to the Analytical Report: if there are only three or fewer workers in any of the reporting categories, the relevant category should be excluded from the report.¹⁵⁶ This provision, which plays the same role as Article 10(3) of the Directive Proposal, adds an additional layer of protection for workers' data when, due to low numbers, they could be easily identifiable. Unlike Article 10(3) of Directive Proposal, however, Belgian law does not require that the pay data redacted from the reports is shared with a third party, which could hinder the possibility to scrutinise the existence of a GPG in job categories with three or fewer workers. Nevertheless, the Belgian formula shows that facilitating pay transparency and analysis while preserving workers' privacy rights *is* possible, and the Directive Proposal seems to be going in the right direction to achieve a balance between the two.

4 Conclusion

This contribution has compared proactive pay transparency measures in three jurisdictions, with references to EU initiatives and legislation, where relevant. The jurisdictions in question, Belgium, Denmark and Iceland, have lower GPGs than the EU average and have been praised for being either early adopters of pay transparency measures, for the innovative or comprehensive character of these measures or for their effectiveness in tackling the GPG. So what are the key takeaways from this comparative analysis?

Firstly, pay transparency measures should be as comprehensive as possible and encourage value-based job assessments. In this regard, the Icelandic Standard has the advantage of covering the whole wage-setting process, from requiring the setting up of a job evaluation study to assessing the relative *value* of jobs and analysing wages on that basis and correcting pay differentials which are not objectively justified. Certainly, this can be burdensome and expensive for organisations (especially SMEs), especially if they decide to hire an external consultant for this purpose.¹⁵⁷ But after implementing the whole process once, it should be possible to maintain it with relative ease and to integrate it with other management systems.¹⁵⁸

Secondly, pay transparency measures should facilitate the flow and comparability of pay information inside and outside the relevant organisation. On this point, the Belgian approach has the advantage of including two distinct reporting duties: the simpler Social Report, which applies to all private companies and is publicly available, and the more detailed Analytical Report, which is only circulated within the works council or with workers' representatives. This dual reporting is in line with the Directive Proposal's public and internal reporting system¹⁵⁹ and gives maximum transparency to basic data, thus improving employers' accountability and comparability. At the same time, it preserves more sensitive information from being publicly disclosed, but still requires the more detailed report to be internally circulated and discussed. Furthermore, for both reports, a data protection safeguard has been introduced, i.e. that data of job categories with less than three workers must not be published at any level.

Thirdly, the role that collective bargaining plays in Belgium at national (inter-professional) level and sectoral level shows that, if properly used, collective bargaining has the potential to tackle the

156 Law of 20 September 1948 (*Loi du 20 septembre 1948*), Article 15(m), paragraph 1; Royal Decree of 15 May 2014 (*Arrêté Royal du 15 avril 2014*), Article 5(2), paragraph 1.

157 On the burdens for SMEs see Wagner, I. (2018), *Certified equality: The Icelandic equal pay standard*, Rapport – *Instituttt for samfunnsforskning*. Nevertheless, Thorgeirsdottir points out that 'firms [...] agree that the requirement is fair and serves a worthwhile, legitimate aim', see 'Equal pay certification – How Iceland became the first country to require proof of equal pay', EU Mutual Learning Programme in Gender Equality (Iceland, 27-28 May) p. 14.

158 Companies obtaining certification only need to reapply every three years.

159 Article 7. See also Table 1.

undervaluation of work in feminised sectors.¹⁶⁰ In particular, the need for Joint Committees to check and improve the neutrality of their JES/JC goes in the right direction, although the enforcement mechanisms in cases of non-compliance are too weak.

Fourthly, acknowledging the needs and limitations of SMEs can also be determinant to achieve high compliance rates. Out of the three pay transparency systems considered, the Danish system is probably the one imposing the lightest and most flexible duties on employers. While the reporting threshold is one of the lowest in Europe (companies with 35+ workers), the additional '10-10 rule' potentially allows many SMEs companies to fall out of the scope of the reporting duty. Companies may also obtain their pay data from Statistics Denmark, although this has proved more cumbersome and confusing than helpful in practice.¹⁶¹ Furthermore, Danish employers (in agreement with workers' representatives) may choose between doing annual pay reports or pay audits every three years. Despite all this, research shows that Danish SMEs find it more difficult to comply with pay transparency measures than large companies.¹⁶² This demonstrates that adapting the requirements for SMEs (while still ensuring that they are meaningful) and providing support, training and extensive assistance is crucial to ensure proportionality and high compliance rates among this group.

Finally, a strong enforcement system with dissuasive and proportionate sanctions is also critical. Out of the three jurisdictions analysed, the Icelandic system can be considered to be strongest in terms of enforcement, given that its per diem fines can oblige offending companies to pay large sums of money if they have long delays in complying with the Standard. However, this system does not allow for adjustment of the fines according to the size of the companies, which could lead to disproportionately high fines for SMEs and low dissuasiveness for large companies. The Belgian and Danish enforcement systems can be considered to be even weaker due to the limited central supervision and, in the Belgian case, the fairly low fines. An alternative best practice could be the French enforcement system, which imposes financial penalties of up to 1 % of the total payroll amount (i.e. according to the size of the company).¹⁶³

In the light of this analysis, it can be concluded that the 2021 Directive Proposal, while not perfect, makes notable progress in the right direction. It not only combines collective with individual/remedial pay transparency measures, it also envisages proactive measures which, in line with the Icelandic Standard, are fairly comprehensive. Furthermore, like the Belgian dual reporting system, it imposes two types of reporting duties, with different metrics, depending on the level of disclosure required (public or internal). Perhaps the two key challenges for its forthcoming negotiation will be ensuring that the reporting threshold is low enough to cover a substantial part of the workforce while also devising ways to alleviate reporting burdens for SMEs, and encouraging national sanctions that are both dissuasive and proportionate.

160 The Icelandic system could also contribute to address this issue, albeit perhaps in a longer term, see text to footnotes 58-59.

161 For instance, employers complain that Statistics Denmark provides data that must be cleaned and reworked for the purposes of the pay report, see Holt, H. and Larsen, M. (2011) *Kønsopdelt lønstatistik og redegørelse om lige løn: Evaluering af loven*, København, SFI.

162 Similarly, Icelandic SMEs have complained about the costs and proportionately higher burden that they experience to comply with the Standard, Thorgeirsdóttir, H. K., 'Equal pay certification – How Iceland became the first country to require proof of equal pay', EU Mutual Learning Programme in Gender Equality (Iceland, 27-28 May).

163 French Labour Code, Article L2242-8.

Discrimination in healthcare: the Roma example in Bulgaria, Ireland and Slovakia

Daniela Mihailova*

Background

This analysis is based on a comprehensive desk review of EU policies, relevant EU legislation, relevant national legislation, national Roma inclusion strategies and relevant progress monitoring reports, data collected on cases of discrimination in access to healthcare services by national and international authorities, and civil society organisations in three EU countries: Bulgaria, Ireland and Slovakia. These countries were selected based on the existence both of similar negative developments in the Roma and Traveller communities' experience of healthcare services in the three countries and of good practices in addressing health challenges. Another reason for choosing these countries was the way the Roma and Traveller communities have been affected by the COVID-19 pandemic in the past two years. The analysis further explored health inequalities, applying a qualitative approach through semi-structured interviews with key stakeholders in the countries surveyed.

The findings of this analysis may be used in the further development and enhancement of healthcare policies and relevant action plans to adequately address health inequalities and the vulnerability of Roma and Traveller communities in Europe.

1 Introduction

Between 10 and 12 million Roma and Travellers live in the European Union and nearly 6 million of them are EU citizens. Recognised as the largest ethnic minority in the EU,¹ they have traditionally been perceived as the most marginalised, being subject to scapegoating and widespread social exclusion, discrimination and negative attitudes across EU Member States.

Since 2010 the European Union has been stressing the need for Member States to adopt a comprehensive framework for Roma inclusion concerning four key areas: education, employment, healthcare and housing. During the last decade, the European Commission has published several communications, recommendations and monitoring reports on the progress made by EU Member States. Overall, it has urged national governments to formulate effective policies and measures aimed at speeding up the Roma inclusion process.

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1 Council Recommendation of 12 March 2021 on Roma equality, inclusion and participation, 2021/C 93/01, available at: [EUR-Lex - 32021H0319\(01\) - EN - EUR-Lex \(europa.eu\)](#).

In the Council Recommendation of 9 December 2013,² the EU is particularly concerned about the status of Roma children due to poor health and living conditions which will ultimately have a severe impact on their lives. It further emphasises the need to remove barriers to healthcare systems which are accessible to the general population.

In 2020 the EU Commission set out a new Communication to the European Parliament and the Council on an EU Roma strategic framework to foster effective equality, socio-economic inclusion and meaningful participation of Roma in public life, with an extended horizon post -2020. Following the Council Recommendation of 12 March 2021,³ the Member States must adopt national strategic frameworks on Roma within their broader social inclusion policies to improve the situation of Roma. The Recommendation sets as horizontal objectives equality, inclusion and participation of Roma. Special attention is paid to the need to reduce inequalities by tackling the limited access by Roma to clean water, sanitary infrastructure and healthcare services, including vaccination services to address the negative impact of the COVID-19 pandemic on Roma communities. Measures are recommended especially regarding Roma women and children; and to combat discrimination in the area of healthcare.

Roma and Traveller communities in all the countries surveyed – particularly Roma in Bulgaria and Slovakia, and Traveller communities in Ireland, face similar challenges⁴ in access to essential social and healthcare services. Moreover, many experience serious institutional and individual discrimination and racism. In addition, most of them lack equitable access to employment, housing and education. Health vulnerability is growing in these countries precisely due to the ineffective and inadequate policies and support in employment, housing and education. Many Roma and Travellers live in extreme poverty and face grave challenges in securing sufficient income to purchase medications when they are needed. Malnutrition and severe food deprivation are frequently reported for as many as 48 % of Bulgarian Roma, 45 % of Slovak Roma⁵ and 10 % of Irish Travellers.⁶

It is reported that life expectancy for Roma in Bulgaria and Slovakia⁷ is five to ten years lower than for the general populations in those countries.⁸ Reports point out that the situation is equally critical for the Traveller community in Ireland because of the higher rate of chronic diseases in this group.⁹ According to research data available, life expectancy for Traveller women in Ireland is 11.5 years shorter than for women in the general population, while the figure for Traveller men is 15 years shorter.¹⁰ Travellers in Ireland experience considerably higher levels of mortality in all age groups compared to the general

2 Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H1224\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H1224(01)&from=en).

3 Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOC_2021_093_R_0001&qid=1616142185824.

4 Fundación Secretariado Gitano (2009), *Health and the Roma community, analysis of the situation in Europe: Bulgaria, Czech Republic, Greece, Portugal, Romania, Slovakia, Spain*, available at: https://bemis.org.uk/resources/gt/eu/Health_and_the_Roma_Community09_en.pdf; Matrix, for the European Commission, DG Health and Consumers (2014), *Roma health report: Health status of the Roma population – Data collection in the Member States of the European Union*, Executive summary, available at: https://ec.europa.eu/health/sites/default/files/social_determinants/docs/2014_roma_health_report_es_en.pdf; European Public Health Alliance (2016), *The European semester and Roma health: Briefing paper*, available at: <https://epha.org/wp-content/uploads/2016/11/Roma-health-sem-report-EPHA.pdf>.

5 European Union Agency for Fundamental Rights (2016), *Second European Union Minorities and Discrimination Study – Roma – Selected findings*, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-eu-minorities-survey-roma-selected-findings_en.pdf.

6 European Union Agency for Fundamental Rights (2020), *Roma and Travellers in six countries – ROMA AND TRAVELLERS SURVEY*, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-roma-travellers-six-countries_en.pdf.

7 Matrix, for the European Commission, DG Health and Consumers (2014), *Roma health report: Health status of the Roma population – Data collection in the Member States of the European Union*, Executive summary, available at: https://ec.europa.eu/health/sites/default/files/social_determinants/docs/2014_roma_health_report_es_en.pdf.

8 European Public Health Alliance (2018), *Closing the life expectancy gap of Roma in Europe*, available at: <https://epha.org/wp-content/uploads/2019/02/closing-the-life-expectancy-gap-of-roma-in-europe-study.pdf>.

9 Matrix Knowledge (2014), *Roma health report: Health status of the Roma population*, available at: https://ec.europa.eu/health/sites/default/files/social_determinants/docs/2014_roma_health_report_es_en.pdf.

10 Irish Traveller Movement (2021), *Submission to the Department of Children, Equality, Disability, Integration and Youth on Ireland's Third National Report under the United Nations Universal Periodic Review*, available at: <https://itmtrav.ie/wp-content/uploads/2021/03/Irish-Traveller-Movement-Submission-UPR-National-Report.pdf>.

population.¹¹ An alarming fact is that suicide is six times the national rate among Travellers in Ireland. It is reported that suicide was the cause of 11 % of all Traveller deaths and is most common among young Traveller men, aged 15-25.¹²

Although not substantiated by official data, the size of the Roma populations in the researched countries is relatively comparable, as are their marginalised living conditions and inequality regarding healthcare. A major common challenge is the segregated settlements inhabited by Roma, which further constrains access to healthcare services. The Traveller community in Ireland is traditionally nomadic, and many Travellers prefer to live in culturally appropriate accommodation, that is, halting sites or group housing schemes. Many Roma live in segregated communities and are exposed to critical levels of substances hazardous to health and such exposure is in part responsible for the extremely poor health status of the population.¹³

Limited or no employment to sustain households results in significantly lower levels of health insurance/ medical cards and therefore poor access to primary healthcare treatment and/or emergency care. Factors hindering the access of Roma from Bulgaria, for instance, and Travellers to healthcare include lack of funds for health insurance and treatment, lack of identity documents and lack of means of transport from remote areas to medical facilities, as well as, in many cases, language barriers, lack of information regarding healthcare facilities and mistrust.¹⁴ Historically, and because of a lack of adequate policies, many Roma and Traveller communities live on the periphery of urban areas, which further impedes their access to healthcare providers, general practitioners, primary healthcare and hospital treatment. Because of inadequate housing policies, there is a lack of culturally appropriate accommodation for Travellers, which leads to high rates of homelessness, as well as over-crowding and poor living conditions in Traveller-specific accommodation.¹⁵

Surveys refer to persistently high levels of infant mortality for Roma and Traveller communities in the three countries. Although the infant mortality rate in Bulgaria reached its lowest level in 2019 (5.6 per thousand), this is almost twice as high as the average for the general population in the EU Member States.¹⁶ In the case of Ireland, the rate has actually deteriorated compared to previous research in 1987. For example, in 2010 it was 3.6 times higher for Travellers than the general population.¹⁷ While the mortality rate is slowly declining in these two countries, the gap between these groups and the general population is still evident, however.¹⁸

Identity documents and official registration is another issue where Roma and Traveller communities tend to face high levels of discrimination.¹⁹ The lack of an identity document has a negative impact

11 '50% of Travellers die before 39 – study', *The Irish Times*, 25 June 2007, available at: <https://www.irishtimes.com/news/50-of-travellers-die-before-39-study-1.808703>.

12 Ibidem.

13 Belák, A.(2020), *Úrovne podmienok pre zdravie a zdravotné potreby vo vylúčených rómskych osídleniach na Slovensku* [Social determinants of health and health needs in excluded Roma communities in Slovakia], Košice: Univerzita P. J. Šafárika, available at: https://www.researchgate.net/publication/342591927_Urovne_podmienok_pre_zdravie_a_zdravotne_potreby_vovylucenych_romskych_osidleniach_na_Slovensku Social determinants of health and health needs in excluded Roma enclaves in Slovakia; Fundación Secretariado Gitano (2009), *Health and the Roma community, analysis of the situation in Europe: Bulgaria, Czech Republic, Greece, Portugal, Romania, Slovakia, Spain*, available at: https://bemis.org.uk/resources/gt/eu/Health_and_the_Roma_Community09_en.pdf; Pavee Point (2020) *Submission to Department of Children, Equality, Disability, Integration and Youth Statement of Strategy*, https://www.paveepoint.ie/wp-content/uploads/2020/11/FINAL_Pavee-Point-Submission-to-Dept.-of-CEDIY-Statement-of-Strategy_Nov-2020-1.pdf.

14 Ibidem.

15 Joyce, D., Norton, C., and Norris, M. (2019), *Traveller accommodation expert review*, available at: https://www.gov.ie/en/organisation/department-of-housing-local-government-and-heritage/?referrer=http://www.housing.gov.ie/sites/default/files/publications/files/2019_july_expert_review_group_traveller_%20accommodation-final_reportrt_00.pdf.

16 Ministry of Health of the Republic of Bulgaria, Проект на Национална здравна стратегия 2021-2030 [National Health Strategy 2021-2030, Draft], available at: https://www.mh.government.bg/media/filer_public/2020/12/29/proekt_na_natsionalna_zdravna_strategiia_2021-2030.pdf.

17 Abdalla, S. et al. (2010), *All Ireland Traveller Health Study*, available at: https://www.ucd.ie/issda/t4media/AITHS_SUMMARY.pdf.

18 Data on the infant mortality rate among Roma communities in Slovakia is not available.

19 Ministry of Interior, Bulgaria, collected data: 123 749 Bulgarian citizens lack permanent address registration and ID.

on equal access to healthcare, mostly because it is a general prerequisite to access public services, including healthcare. It is also closely related to poor living conditions, a nomadic lifestyle in the case of Traveller communities in Ireland, and life in geographically isolated, illegal and segregated settlements. These factors in their turn impede address registration and consequently obtaining personal identity documents. In Bulgaria, a necessary condition for issuing an identity document is the possession of a document of ownership of the dwelling in which the person wishes to register their permanent address. As a large proportion of Roma families living in segregated neighbourhoods live in illegal dwellings and do not have documents for them, they cannot obtain a certificate of registration at a permanent address and, accordingly, an identity document. Thus, in practice, the legal requirement that applies to everyone disproportionately affects Roma people and constitutes indirect discrimination on ethnic grounds.

The healthcare system in all three countries relies on solidarity and personal health insurance contributions and having relatively free access to primary healthcare for everyone. However, the system requires monthly contributions by everyone in employment. For many Roma and Travellers in the three countries studied, inclusion in the healthcare system in these circumstances is exceptionally difficult, given that many of them lack employment opportunities²⁰ and/or are not registered with employment offices as job seekers. A lack of health/medical insurance results in many Roma women not having access to prenatal care during pregnancy, which later leads to many health complications for childbirth and infant health outcomes. The long-term consequence is also seen in the shorter life expectancy for Roma and Traveller people.

Discrimination has been reported as the most critical factor in accessing healthcare services, especially in Slovakia. Roma women's experiences in reproductive health have been symptomatic of widespread human rights violations. There are studies showing that Roma women in Slovakia are subjected to various forms of discrimination, including segregation in different rooms in maternity wards, insults and relatively worse treatment from medical staff, as well as failure to provide the necessary medical information about their condition and that of their babies.²¹ Similar practices of not mixing Roma and non-Roma patients were reported in Bulgaria in early 2002, where Roma women were placed in separate delivery rooms in hospitals.²²

Forced and coercive sterilisation practices in Slovakia²³ are an illustration of the most severe health inequalities. In June 2021, in response to a letter of concern sent by the Council of Europe, the Slovak Justice Minister officially announced that the Slovak Government was considering compensating Roma women for the discriminatory and unjust treatment they had received.²⁴ In July the Slovak Parliamentary Committee for Human Rights approved a resolution supporting the adoption of specific legislation compensating the women who had been forcibly and coercively sterilised and called on the Slovak Government to apologise to the victims of this practice.²⁵

20 European Union Agency for Fundamental Rights (2014), *Roma survey – Data in focus. Poverty and employment: the situation of Roma in 11 EU Member States*, available at: https://fra.europa.eu/sites/default/files/fra-2014-roma-survey-employment_en.pdf; Pavee Point Traveller and Roma Centre (2019), *Civil society monitoring report on implementation of the National Roma Integration Strategy in Ireland: Assessing the progress in four key policy areas of the strategy*, available at: <https://cps.ceu.edu/sites/cps.ceu.edu/files/attachment/basicpage/3034/rcm-civil-society-monitoring-report-2-ireland-2018-eprint-fin-2.pdf>.

21 Center for Reproductive Rights, Poradňa pre občianske a ľudské práva [Center for Civil and Human Rights] (2017), *Vakeras zorales – Speaking out. Roma women's experiences in reproductive health care in Slovakia*, available at: <https://www.poradna-prava.sk/en/documents/vakeras-zorales-speaking-out-roma-womens-experiences-in-reproductive-health-care-in-slovakia/>.

22 Фондация „Отворено общество“ [Open Society Institute] (2002), *Здравните проблеми на ромите – същност, следствия и пътища за тяхното преодоляване* [The health problems of the Roma – nature, consequences and ways to overcome them], available at: [bg_pdf\(osis.bg\)](bg_pdf(osis.bg)).

23 Center for Reproductive Rights, Poradňa pre občianske a ľudské práva [Center for Civil and Human Rights] (2017), *Vakeras zorales – speaking out. Roma women's experiences in reproductive health care in Slovakia*, available at: <https://www.poradna-prava.sk/en/documents/vakeras-zorales-speaking-out-roma-womens-experiences-in-reproductive-health-care-in-slovakia/>.

24 Yar, L. (2021), 'Slovakia to compensate victims of forced sterilisation', *EURACTIV*, available at: https://www.euractiv.com/section/politics/short_news/slovakia-to-compensate-victims-of-forced-sterilisation/.

25 Human Rights and Ethnic Minorities Committee of the National Council of the Slovak Republic, Resolution No. 63 approved on 23 July 2021, available at: <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?WFTID=NRDK&MasterID=283191>.

Overall, cases of discrimination and hate speech have reportedly been growing in Bulgaria in recent years. According to research carried out in Sofia in 2016 by the Open Society Institute (OSI), negative attitudes and discrimination towards Roma have seen an overwhelming increase in comparison to those towards other groups such as migrants, LGBTI people and ethnic Turks. Roma continue to be the subject of hate speech according to 95 % of survey respondents.²⁶

According to an ECRI report, 37 % of Slovak Roma had been victims of general societal hate speech during the previous 12 months.²⁷ An assessment of the social determinants of the health and health needs of people in segregated Roma communities in Slovakia established that over 23 % of respondents reported that, in the last year, they or someone in their household had experienced direct discrimination in schools, over 24 % had had similar experiences in shops, over 27 % in public offices and over 23 % in access to public services.²⁸ The assessment resulted from extensive research initiated by Healthy Regions, a statutory body of the Ministry of Health of Slovakia. It covered 450 segregated Roma communities in 255 municipalities and included a total census of residents, buildings and selected material conditions. Close to 27 % of Slovak Roma have been discriminated against in accessing the healthcare system.

The situation in Ireland is virtually identical regarding discrimination and hate speech. A total of 46 % of people in Ireland shared that they have no desire to live together with Irish Travellers, while 4 out of 10 Traveller children have been discriminated against because of their ethnic identity.²⁹ The 2018 report on the National Needs Assessment for Roma reveals that 70.5 % of Roma respondents had experienced discrimination in accessing health services. In addition, 8.7 % of the survey respondents stated that they had no trust in health practitioners treating them and 5 % felt they had not been treated with respect and dignity.³⁰

Ethnic data collection is not endorsed, especially in Bulgaria, however data gathered by civil society organisations reveals that almost 45 % of Bulgarian Roma have no health insurance. In contrast, almost 95 % of Slovak Roma are included in the healthcare system.³¹

2 Legal framework

In 2000 the Council of the EU adopted Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.³² It aims to combat discrimination on the grounds of racial or ethnic origin, laying down minimum requirements for equal treatment in the European Union. The Directive aims to increase participation in economic and social life and to reduce social exclusion. It prohibits both direct and indirect discrimination, harassment, instructions to discriminate and victimisation. It applies to all persons and to certain sectors of activity, including access to social protection including healthcare. Furthermore, it does not oppose positive action, namely national measures aimed at preventing or compensating for disadvantages connected with race or ethnic origin.

26 Ivanova, I. et al. (2016), Обществени нагласи спрямо речта на омразата в България през 2016 г. [Public perceptions towards hate speech in Bulgaria in 2016], available at: [Hate-speech-BG-2016-interact.pdf \(osis.bg\)](https://osisis.org/bg/hate-speech-BG-2016-interact.pdf).

27 European Commission Against Racism and Intolerance (2020), *ECRI report on the Slovak Republic (sixth monitoring cycle)*, available at: <https://rm.coe.int/ecri-6th-report-on-the-slovak-republic/1680a0a088>.

28 Belák, A. (2020). Úrovně podmienok pre zdravie a zdravotné potreby vo vylúčených rómskych osídleniach na Slovensku [Social determinants of health and health needs in excluded Roma communities in Slovakia], Košice: Univerzita P. J. Šafárika, available at: https://www.researchgate.net/publication/342591927_Urovně_podmienok_pre_zdravie_a_zdravotne_potreby_vovylucených_romských_osídleniach_na_Slovensku_Social_determinants_of_health_and_health_needs_in_excludedRoma_enclaves_in_Slovakia.

29 Irish Traveller Movement (2021), *Irish Traveller Movement statement – Together against racism*, available at: <https://itmttrav.ie/irish-traveller-movement-statement-together-against-racism/>.

30 Pavee Point and Department of Justice and Equality (2018), *Roma in Ireland: A national needs assessment* (Dublin, Pavee Point), available at: <https://www.paveepoint.ie/wp-content/uploads/2015/04/RNA-PDF.pdf>.

31 European Union Agency for Fundamental Rights (2016), *Second European Union Minorities and Discrimination Study – Roma – Selected findings*, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-eu-minorities-survey-roma-selected-findings_en.pdf.

32 <https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=celex%3A32000L0043>.

The Directive sets remedies and an enforcement system, stating that anyone who believes themselves to be a victim of discrimination on grounds of racial or ethnic origin must have access to legal and/or administrative proceedings. Associations or other interested legal persons may also undertake proceedings, either on behalf of or in support of the complainant. EU countries had to transpose the Directive into national law by 19 July 2003.

Following the requirements set out in Directive 2000/43/EC, Bulgaria, Ireland and Slovakia incorporated protection measures into their national legal frameworks.

Bulgaria has also adopted comprehensive anti-discrimination legislation in the form of the Protection Against Discrimination Act (PADA), which covers prohibition of discrimination in the receipt of goods and services, including healthcare.³³ The PADA provides protection against direct and indirect discrimination, harassment, sexual harassment, incitement to discrimination, victimisation and racial segregation. Bulgarian law contains a special provision for the reversal of the burden of proof in cases of alleged discrimination.

It also provides for affirmative (special) measures in favour of disadvantaged persons or groups, stating that such measures shall not be deemed as discrimination if they are intended to equalise the status of these persons, to the extent and for as long as these measures are necessary. The same applies to special protection for pregnant women, women undergoing advanced in vitro treatment and mothers. The latter allows the adoption of by-laws that provide, inter alia, free examinations for uninsured pregnant women, which is particularly important for the health of Roma mothers and babies, as the percentage of people with health insurance among Roma is significantly lower than in the rest of the population.

The law allows victims of alleged discrimination, including on ethnic grounds, to seek protection by lodging cases with a specially created Commission for Protection Against Discrimination. Under the law, victims of alleged discrimination can also choose to go to court. In both procedures, the law provides an opportunity for class action in cases where the rights of many people are alleged to have been violated. The law also provides for an opportunity for civil organisations, registered in the public interest, to initiate procedures on their own behalf in cases where the rights of many people are alleged to have been violated. Both options facilitate the protection of the rights of Roma to equality, although in many cases Roma people refrain from initiating procedures, fearing further victimisation. The Commission for Protection Against Discrimination has the power to determine whether discrimination has taken place and to order the author of the infringement to restore the situation from before the violation, as well as to refrain from similar violations in the future. The Commission may impose fines, however it does not award non-pecuniary damages to the victims. Damages can only be awarded by the courts.

Ireland responded to the requirements of the Directive by adopting and amending the Equal Status Acts 2000-2018 ('the Acts'), which cover services provided by the State, including healthcare services.³⁴ These Acts promote equality, aim to protect individuals from direct and indirect discrimination, discrimination by association,³⁵ harassment, sexual harassment, incitement to discrimination and victimisation and allow a broad range of positive action measures. The Acts provide protection on a number of grounds, including race and membership of the Traveller community. The Acts allow positive measures to be taken when these are intended to promote equal opportunities for disadvantaged people or to serve the special needs of people who may require assistance. Under the Act, discrimination in the use of services and facilities, including public services in the area of healthcare, is forbidden. Claims under the Acts can be addressed to the Workplace Relations Commission and appealed before the courts. If there is a finding in favour of the person making a complaint, compensation of up to EUR 15 000 in total can be ordered.

33 Available at: https://www.legislationline.org/download/id/7046/file/Bulgaria_anti-discrimination_act_2003_2006_am.pdf.

34 Available at: <https://revisedacts.lawreform.ie/eli/2000/act/8/front/revised/en/html>; see also: <https://www.ihrec.ie/guides-and-tools/human-rights-and-equality-in-the-provision-of-good-and-services/what-does-the-law-say/equal-status-acts/>.

35 Discrimination by association occurs when a person who associates with another person is treated less favourably because that other person's difference under any of the specified grounds.

Slovakia passed Act No. 365/2004 of 20 May 2004 on equal treatment in certain areas and protection against discrimination, amending and supplementing certain other laws (Anti-Discrimination Act).³⁶ The Slovak Act defines direct and indirect discrimination and prohibits discrimination in education, social protection, healthcare and employment. In particular, the Act provides for equal treatment with regard to social security, provision of goods and services, education and employment. It prohibits harassment, instruction to discriminate, incitement to discrimination and victimisation. It is comprehensive legislation against discrimination, which states that everyone is obliged to adhere to the principle of equal treatment. Under the Act, the Slovak National Centre for Human Rights ensures legal protection for victims of discrimination. The Act allows for specific positive actions to prevent disadvantages linked to racial or ethnic origin with a view to ensuring full equality in practice and compliance with the principle of equal treatment.

Equality bodies exist in the three countries and a legal framework is in place to tackle both discrimination and human rights violations, including in the area of healthcare.

The Bulgarian equality body is the Commission for Protection Against Discrimination, established in 2004 under the Protection Against Discrimination Act. It is a quasi-judiciary body, which inter alia can review and decide on cases of alleged discrimination. Procedures can be initiated by the Commission for Protection Against Discrimination on its own volition by an affected person or legal entity submitting a claim, as well as by a person or legal entity reporting alleged discriminatory practice.

In Slovakia the equality body is the Slovak National Centre for Human Rights. Complaints of alleged discrimination can be addressed to the Slovak equality body, including regarding access to healthcare services. The Slovak National Centre for Human Rights decides on the complaints, issuing a decision or recommendations addressed to the parties (these are not legally binding). In addition, the Slovak equality body has the power to represent victims before the courts, to bring proceedings in its own name and to intervene before the courts in pending proceedings related to alleged discrimination. An alleged victim of discrimination may seek through the procedure a resolution whereby the person violating the principle of equal treatment is made to refrain from such conduct and, where possible, to rectify the illegal situation or provide adequate satisfaction or non-pecuniary damages.

The Irish Human Rights and Equality Commission may conduct an inquiry either of its own volition or if requested to do so by the Minister for Justice and Equality. The Commission does not decide on cases; it has the powers to appear as *amicus curiae* in proceedings that involve or are concerned with human rights or equality and to provide practical assistance, including legal representation, to individuals seeking to uphold their rights under human rights and anti-discrimination legislation. For healthcare-related cases, people in Ireland may address complaints to the Health Service Executive.³⁷ People who have exhausted the health service complaints process, may complain to the Ombudsman. The Office of the Ombudsman oversees an administrative process that examines complaints about decisions, refusals to take action and procedures of public bodies. The Ombudsman can examine a complaint about an action taken by one of those bodies if someone has been adversely affected, including in cases where the action was improperly discriminatory.³⁸

The equality bodies in all three countries have few if any recorded cases of health inequality and/or alleged healthcare rights violations brought by Roma. Looking at the evidence of discrimination against Roma and Travellers in the area of healthcare, the reason for this may be the fact that most Roma are unaware of anti-discrimination laws or organisations that can offer support³⁹ and often have no

36 Available at: https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=68611.

37 <https://www.hse.ie/eng/about/qavd/complaints/ysysguidance/ysys2017.pdf>.

38 <https://www.ombudsman.ie/>.

39 European Union Agency for Fundamental Rights (2016), *Second European Union Minorities and Discrimination Study – Roma – Selected findings*, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-eu-minorities-survey-roma-selected-findings_en.pdf.

information about how to address complaints concerning discrimination and ill treatment in access to healthcare.

Intermediary bodies such as civil society organisations and/or community-based organisations have also proved effective in providing support for the preparation of complaints. Alleged victims of discrimination can approach civil society organisations in each of the surveyed countries, for example the Bulgarian Helsinki Committee and the Equal Opportunities Initiative in Bulgaria, Pavee Point in Ireland and the Centre for Civil and Human Rights in Slovakia. It should be noted, however, that cases challenging discrimination against Roma and/or Travellers are limited in number. Civil society organisations trying to initiate strategic litigation cases in the area of healthcare meet with reluctance from victims to challenge the inequality they suffer. The reason is mainly that potential cases involve medical staff and medical facilities as respondents and the victims fear further victimisation if they dare to seek to exercise their rights to equal treatment. In the rare cases where discrimination against Roma in health services is challenged, the cases are mainly initiated by civil society organisations and other groups.

One example is a Bulgarian case from 2015,⁴⁰ where a claim for discrimination on the ground of ethnic origin was initiated by eight Members of Parliament from the political party Movement for Rights and Freedoms against the Bulgarian Minister of Health, challenging his public statement that he would prevent emergency medical units from visiting Roma settlements, as the Roma people insult and physically attack medical teams. The Commission for Protection Against Discrimination decided the case in favour of the respondent,⁴¹ stating that discrimination had not been proven in the case. The complainants' appeal⁴² to the Administrative Court was found inadmissible on the ground that the complainants failed to prove that they were personally affected. The decision of the Administrative Court was upheld by the Supreme Administrative Court which issued a final decision in the matter.⁴³

National organisations have also provided training for community-based groups to equip them with knowledge and tools to assist victims of discrimination.

3 National Roma inclusion strategies

The EU has been highlighting the need for improved Roma integration since 2010. In 2011 the European Commission set out the first framework for national Roma integration strategies. The Member States were required to adopt national Roma integration strategies centred on four key areas: education, employment, healthcare and housing. The strategic documents covered the period up to 2020.

Since 2013 the European Commission has been making available annual reports on the implementation of the national Roma integration strategies.⁴⁴ Though some progress has been identified in each of the countries surveyed, the annual reports have continued to stress the insufficiency of both the measures planned and the information available about their implementation. Shortcomings have been identified in each of the countries surveyed as regards equal access to healthcare for Roma and Travellers. The 2019 annual report, for example, points out that the most widely used promising practices are aimed at prevention through vaccination campaigns and the training and employment of health mediators of Roma origin (the latter in the case of Bulgaria and Slovakia). However, it also notes that it is important to overcome the challenges through planned support services, which are targeted at improving health awareness, changing behaviour and building long-term independence and the ability of Roma people to interact with key institutions, rather than dependence on permanent intermediaries and long-term

40 Case No 56/2015, Commission for Protection against Discrimination, Chetin Kazak and others against Petar Moskov, in his capacity of Minister of Health.

41 Decision No 503/20.12.2016 on case No 56/2015 of the Commission for Protection Against Discrimination.

42 Sofia Administrative Court, Case No 862/2017, 36 penal.

43 Supreme Administrative Court of Bulgaria, Case No 12247/2017.

44 Annual reports available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/roma-eu/roma-equality-inclusion-and-participation-eu/eu-roma-national-integration-strategies-2020_en.

parallel structures. Anti-discrimination measures targeted at health professionals are also identified as a priority for future actions and measures.⁴⁵

In October 2020 the European Commission adopted a new 10-year plan to support Roma in the EU, including a proposal for a Council Recommendation, which was adopted by the Council on 12 March 2021. When launching the plan, the European Commission stated that: 'There are seven key areas of focus: equality, inclusion, participation, education, employment, health and housing. For each area, the Commission has put forward new targets and recommendations for Member States on how to achieve them, both of which will serve as important tools to monitor progress and ensure that the EU makes more headway in providing the vital support that so many Roma living in the EU still need'.⁴⁶ The European Commission called on the Member States to submit national strategies by September 2021 and report on their implementation every two years. The Commission will monitor progress towards the 2030 targets, drawing on input from surveys carried out by the European Fundamental Rights Agency and input from civil society. There will also be an in-depth mid-term evaluation of the new 10-year plan in its entirety.

Bulgaria is still at the preparation stage of its new strategy for Roma equality, inclusion and participation. Given the current political crisis in the country and the continued cycles of parliamentary elections, it is almost certain that Bulgaria will not be able to meet the deadline for submission of the strategy. The current Irish National Traveller and Roma Inclusion Strategy covers the period 2017-2021. Slovakia had already adopted its new Strategy for Equality, Inclusion and Participation in April 2021.⁴⁷

The numbers of Roma and Traveller communities are shown in Table 1.

<i>Bulgaria</i>	<i>Ireland</i>	<i>Slovakia</i>
Official data		
325 343 ⁴⁸	29 571 ⁴⁹	106 000 ⁵⁰
Expert estimate		
800 000 ⁵¹	40 000 ⁵²	440 000 ⁵³

Table 1. Official data and expert estimates on Roma population in Bulgaria, Ireland and Slovakia

Data collected by official institutions often differ significantly from information presented by other sources – mainly civil society organisations or research institutions. That said, it is particularly difficult to assess the negative impact of the restricted access to healthcare. The lack of national disaggregated ethnicity data hampers the development of evidence-based strategies aimed at tackling the problems generally

45 European Commission, COM (2019) 406 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019DC0406>.

46 European Commission (2020), 'Commission launches new 10-year plan to support Roma in the EU', press release dated 7 October 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1813.

47 Available at: <https://www.equalitylaw.eu/downloads/5399-slovakia-the-slovak-government-adopted-the-strategy-for-equality-inclusion-and-participation-of-roma-till-2030-83-kb>.

48 National Statistical Institute, Census 2011, available at: ПРЕБРОЯВАНЕ 2011 (окончателни данни) (nsi.bg).

49 Department of Justice and Equality of the Republic of Ireland, National Traveller and Roma Inclusion Strategy 2017-2021, available at: <http://justice.ie/en/JELR/National%20Traveller%20and%20Roma%20Inclusion%20Strategy.%202017-2021.pdf/Files/National%20Traveller%20and%20Roma%20Inclusion%20Strategy.%202017-2021.pdf>.

50 Ministry of Interior of the Slovak Republic (2019), 'Ábel Ravasz introduced the new Atlas of Roma Communities – the trends are positive', available at: <https://www.minv.sk/?tlacove-spravy&sprava=abel-ravasz-predstavil-novy-atlas-romskych-komunit-trendy-su-pozitivne>. Content (europa.eu)

51 Ilieva, N. and Kazakov, B., National Institute of Geophysics, Geodesy and Geography, Bulgarian Academy of Sciences, Bulgaria (2019), *Projection of the Roma population in Bulgaria (2020-2050)*, available at: https://www.researchgate.net/publication/335576198_PROJECTION_OF_THE_ROMA_POPULATION_IN_BULGARIA_2020-2050.

52 European Union Agency for Fundamental Rights (2019), *Travellers in Ireland. Key results from the Roma and Travellers survey 2019*, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-roma-and-travellers-survey-country-sheet-ireland_en.pdf.

53 Kahanec, M., Kovackova, L., Polackova, Z. and Sedlakova, M., Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies (2020), *The social and employment situation of Roma communities in Slovakia*, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648778/IPOL_STU\(2020\)648778_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648778/IPOL_STU(2020)648778_EN.pdf).

identified. Specific policy actions within the framework of different national programmes on reducing health disparities between Roma and Travellers and the mainstream population are being implemented. These include programmes aimed at improving the access to and adaptation of health services to the dynamic characteristics of these groups, programmes to promote healthy lifestyles, the organisation of prevention and screening programmes and training programmes aimed at helping medical professionals to work better with disadvantaged groups, applying an integrated approach whereby various public services (social, health, education, etc.) are provided in coordination, support for cross-sectoral measures for social inclusion, including participation in the health insurance system by people from vulnerable groups, and the establishment of mechanisms to identify relevant specific needs and needs of vulnerable groups as a basis for health services planning.⁵⁴

However, it is important to ensure that innovative approaches are applied in cooperation and consultation with organisations that defend and represent vulnerable groups in order to secure the development of services that best suit their health and social needs and increase people's quality of life. Particular attention should be paid to overcoming stigmatisation and non-discrimination due to belonging to vulnerable groups in the process of providing health services.

Health vulnerability is a result of exclusionary processes related to inequalities in access to education, work, money and resources, as well as the conditions in which people are born, grow up, live and work. These social determinants of health affect individuals and social groups differently, creating continuous inclusion or exclusion and systematically increasing the social gradient of health. This gradient increases according to the level of deprivation, i.e. the lower a person's social status, the worse their health. People in the most disadvantaged groups and communities, who are subject to many different types of exclusionary processes, are in much worse health than those who are subject to a single such process or are part of a more advantaged social group. Roma and Travellers, who are often long-term unemployed and are likely to have become socially isolated and economically dependent on the state, have the highest level of health vulnerability.⁵⁵

The intention was to address these social determinants with the National Roma Inclusion Strategies (NRIS). All three countries researched have adopted NRISs, which include sections focused on healthcare. However, in all three countries only moderate progress has been observed regarding removing all obstacles to access by Roma and Traveller communities to the key areas listed in the strategic document, including the area of healthcare.

In Bulgaria, Ireland and Slovakia, the national governments have outlined mainstream measures to foster social inclusion.⁵⁶ Notably, in Bulgaria a major gap was identified by civil society organisations⁵⁷ regarding the monitoring and effectiveness of the measures applied, which results from not employing a participatory approach and a lack of adequate and measurable indicators. Only Slovakia planned specific social and health indicators to assess the impact of the implemented measures⁵⁸.

54 Проект на Национална здравна стратегия 2021-2030 [National Health Strategy 2021-2030, Draft], Ministry of Health of the Republic of Bulgaria, available at: https://www.mh.government.bg/media/filer_public/2020/12/29/proekt_na_natsionalna_zdravna_strategiia_2021-2030.pdf.

55 World Health Organization Europe (2003), *Social determinants of health. The solid facts*, Second edition, available at: https://www.euro.who.int/_data/assets/pdf_file/0005/98438/e81384.pdf; Farrell, C., McAvoy, H., Wilde, J. and Combat Poverty Agency (2008), *Tackling health inequalities. An all-Ireland approach to social determinants*, available at: https://www.drugsandalcohol.ie/11736/1/IPH_Tackling%2520health%2520inequalities_0.pdf.

56 Matrix Knowledge (2014), *Roma health report: Health status of the Roma population*, available at: https://ec.europa.eu/health/sites/default/files/social_determinants/docs/2014_roma_health_report_es_en.pdf.

57 Доц. д-р Пампоров, А. [Pamporov, A.] (2019), *Аналитичен доклад за напредъка на Република България по основните приоритети за социално включване на ромите* [Analytical report on the progress of the Republic of Bulgaria on the main priorities for social inclusion of the Roma], available at: https://nrpsystem.government.bg/KPIResults/7_Мониторингови%20доклади/Анализи/ISSK_BAS_Final_report_2019_NCCell_ver0404.pdf.

58 Kanovský, M., Skupnik, J., Belák, A., Kobes, T., Buzalka, J., Mokrá, L., Weibl, G. (2019), *Externé hodnotenie implementácie Stratégie Slovenskej republiky pre integráciu Rómov do roku 2020* [External evaluation of the implementation of the Strategy of the Slovak Republic on Roma Integration], available at: https://www.minv.sk/swift_data/source/romovia/Externe_hodnotenie_Strategie_AP_2016_2018_final.pdf.

The Bulgarian Roma Integration Strategy (2012-2020) presents a rather short analysis of the health situation of Roma, where some risk factors are defined, such as mass and severe impoverishment, high unemployment rates, deteriorating income and consumption structures, unfavourable environments and housing, lifestyle, genetic diseases and high rates of uninsured Roma. The analysis makes no mention of severe problems such as discrimination in healthcare services and segregation in hospitals.

The operational goal of the healthcare section of the Strategy is defined as ensuring equality in access to quality health services and prevention programmes. It sets five strategic objectives to be achieved: preventive care for maternal and child health; ensuring equality in access to health services for disadvantaged people belonging to ethnic minorities; increasing the number of qualified Roma working in the healthcare system and development of mediation and various forms of work for and in the community; increasing health knowledge and providing access to health information; and increasing the numbers of disadvantaged persons who belong to ethnic minorities who have health insurance, by taking legislative initiatives regarding health insurance for the socially disadvantaged, including long-term unemployed people. Specific measures to achieve the objectives are set out in the Action Plan for the implementation of the strategy.

The Slovak Roma Integration Strategy (2014-2020) also presents a short analysis of the health situation of Roma, noting that the overall health status of the Roma population has been deteriorating since 1989. The main reasons are found to be a result of the following main determinants: insufficient level of healthcare and social awareness; low standard of personal and communal hygiene; housing and environmental hazards; malnutrition as a consequence of poverty; and unequal access to healthcare due to a lack of financial resources for travelling to see a doctor. The analysis also identifies problems such as higher perinatal and infant mortality, lower vaccination rates in the Roma population, and lack of information about proper health protection.

The overall healthcare goal of the Strategy is to support access to healthcare and public health, including preventive healthcare and health education, and overcoming the gap in health status between the Roma and the majority population. The Slovak Strategy also sets out partial goals: improving hygiene in the Roma settlements, assessing levels of pollution, ensuring availability and quality of drinking water, ensuring accessibility of healthcare services, reducing occurrence of infectious diseases using health education and vaccination, increasing awareness of education about parenthood and reproductive health, educational activities focused on the prevention of substance misuse and violence, and optimising the network of community workers in the areas of health education, motherhood and childcare. Comprehensive actions to address gaps in social determinants in Slovakia and Bulgaria are missing from the relevant action plans for the implementation of the National Roma Integration Strategies.

The Irish National Traveller and Roma Inclusion Strategy (2017-2021) presents the most detailed analysis of the health situation of Travellers and Roma (in different sections) compared to the other two countries. The analysis contains concrete figures on the aspects of Travellers' health situation identified as problematic, such as average age, marital status, number of children per family, percentage within the prison population, higher suicide and mortality rate compared to the general population, lower life expectancy and educational status, discriminatory practices in the area of healthcare and limited access to healthcare services, and poorer housing conditions.

The Strategy sets objectives to be achieved with regard to Travellers and Roma: improved access, opportunities, participation rates and outcomes in the healthcare system; reducing health inequalities experienced by Travellers and Roma; delivering and developing healthcare services in a culturally appropriate way; and reducing the suicide rate and mental health problems within the Traveller and Roma communities. Concrete actions are planned which correspond to each of the objectives set.

The inadequate implementation of the goals and objectives set within the Strategies of the three countries reflects the lack of both appropriate funding and political will. To summarise, all three countries

have prioritised healthcare prevention programmes and a variety of actions subsidised by national and EU funds. However, lack of effective funding is evident in each of the three countries. Thus, for example, up to March 2021 Traveller health in Ireland had not received any new core development funding since 2008, with the exception of EUR 270 000 aimed at expanding the Traveller Health Units. In the case of Bulgaria, the Roma Inclusion National Focal Point has organised mobile prevention services for Roma across the country. However, the number of Roma served by these services is limited.

The lack of more significant results is also a result of the fact that the implementation of the strategies in the area of healthcare is more or less based on small-scale projects or pilots. There are still significant shortcomings as to the mainstreaming of the measures related to healthcare. This is essential, especially in order to limit discrimination, convincing the majority population that there is no favouritism towards Roma and Travellers with the adoption of the focused strategies.

Clearly, national authorities have been rigorously developing a variety of political documents. However, they remain to be implemented to ensure equality in access to healthcare services. The main reasons for this are the lack of clear targets, indicators, outcomes, timeframes and assigned budget lines.

4 Healthcare infrastructure, availability of information and awareness of how healthcare systems operate

In all three countries, healthcare system reforms have been taking place for more than 20 years. At this point in time, however, it is still evident that many of their citizens struggle to find up-to-date, adequate and relevant information regarding access to healthcare services, including primary healthcare and hospital treatment. In 2018, a National Needs Assessment in Ireland, carried out by Pavee Point, and research conducted by the Ministry of Justice disclosed that about 20.9 % of Roma and Traveller respondents need help with navigating healthcare services, 30.7 % of the respondents lacked basic knowledge about health, and 28 % of the respondents faced financial and social barriers to accessing healthcare.⁵⁹

National health mediator networks exist in Slovakia⁶⁰ and in Bulgaria.⁶¹ Both networks were established to support improved access to healthcare services and tackle health inequalities and access to information. Health mediators are in general nominated by local community-based organisations. In Bulgaria the health mediators are employed by local authorities. In Slovakia, they are employees of the Health Communities, which are subordinated to the Ministry of Health and funded by the state budget or EU funding. Once formally trained, their main responsibility is focused on facilitating support for vulnerable groups to access healthcare and social services. Their role and responsibilities, however, give them little or no authority over health institutions. Nevertheless, it is evident⁶² that the health mediator network is an effective tool and most often is the only reliable source of information for local Roma communities in need. The added value of the health mediators is centred on the trust they have gained within the communities they serve, as they themselves come from the same communities. In Slovakia, this initiative went further and extended its services to mothers in hospitals, in maternity and paediatric units.

59 Pavee Point and Department of Justice and Equality (2018) *Roma in Ireland: A national needs assessment*, Dublin, Pavee Point, p. 99, available at: <https://www.paveepoint.ie/wp-content/uploads/2015/04/RNA-PDF.pdf>.

60 Adamova, M. (2019), 'Health mediators in action in Slovak hospitals', *EPHA*, available at: <https://epha.org/health-awareness-raising-assistants-in-action-in-slovak-hospitals/>.

61 http://www.zdravenmediator.net/en/index.php?page_type=text&page_id=60.

62 National Network of Health Mediators, *Health Mediation Models in the EU: Examples of good practices*, available at: https://eea.iom.int/sites/eea/files/publication/document/Health_mediation_Models_EU_IOM.pdf.

In 2019, the health mediator network in Bulgaria comprised 245 mediators serving Roma in 130 municipalities.⁶³ In Slovakia, 250 mediators support Roma in 265 municipalities, with their work focused mostly on community-level awareness-raising around health.

Notably, the Traveller Community Health Workers initiative in Ireland has proven to be a cost-effective approach to the provision of primary healthcare to the Traveller Community. It further serves to bridge the gap between a community experiencing severe health inequalities and a health service unable to reach and engage that community effectively in health service provision. This is evidenced by the fact that 83 %⁶⁴ of Travellers receive health information from Traveller organisations.

Alas, there are no medical centres especially established in the isolated Roma and Traveller settlements in the three countries, although there are just a very few healthcare providers based directly in some settlements in Bulgaria and Slovakia. Thus the most marginalised communities are deprived of immediate access to healthcare services. Primary healthcare services are provided by general practitioners who as a rule are not based in the community. Yet another drawback is the fact that many Roma and Travellers are clearly unaware of whether they have been registered with a general practitioner or, indeed, of the need to register.

In all three countries, healthcare services are provided to children up to 18 years old free of charge, subject to restrictions such as having identity documents, being registered with a general practitioner or having proper and immediate access to a paediatrician and/or a general practitioner.

5 COVID-19 pandemic

The situation with the social rights of Roma and Traveller communities has further deteriorated in the past year and a half due to the COVID-19 health pandemic.⁶⁵ The pandemic seriously impacted the Roma and Traveller communities. Discrimination and a significant increase in negative attitudes and hate speech were observed.⁶⁶ The COVID-19 crisis aggravated vulnerable populations with lower socio-economic status, which in the three researched countries intersects with minority status. It also illuminated existing intersectoral discrimination, which clearly indicates the need to plan measures that take into account intersecting forms of discrimination and inequalities. For example, Roma are known to represent the highest percentage of the labour force engaged within the grey economy. Thus they have experienced multiple discrimination, as members of a minority and as unemployed. Higher numbers of Roma and Travellers don't have medical insurance compared to people among the general population. Thus they have also experienced multiple discrimination.

Governments failed to provide timely and adequate support both in terms of health assistance and food supplies for those in segregated, overcrowded communities. Complying with the most essential public health messages, such as social distancing, self-isolation and even handwashing, have been in many cases simply impossible for Roma and Travellers, given the fact that they live in poorer, overcrowded settlements and many do not even have access to running water.

63 Център за междуетнически диалог и толерантност „Амалипе“ и др. (Amalipe Center for Interethnic Dialogue and Tolerance et al.) (2018), Граждански мониторингов доклад за изпълнение на Националната стратегия за интеграция на ромите на Република България [Civil monitoring report for implementation of the National Strategy on Roma Integration of the Republic of Bulgaria], available at: <https://cps.ceu.edu/sites/cps.ceu.edu/files/attachment/basicpage/3034/rcm-civil-society-monitoring-report-2-bulgaria-2018-eprint-bg.pdf>.

64 Pavee Point (2020) *Submission to the Special Committee on Covid-19 Response*, pp. 6-7. https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/special_committee_on_covid_19_response/submissions/2020/2020-09-30_submission-ronnie-fay-director-pavee-point-traveller-and-roman-centre-scc19r-r-0426_en.pdf.

65 European Union Agency for Fundamental Rights (2020), *Coronavirus pandemic in the EU – impact on Roma and Travellers*, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-roma_en.pdf.

66 Barry, O. (2020), 'Roma persecution in Europe intensifies during the coronavirus pandemic', *The World*, available at: <https://www.pri.org/stories/2020-08-24/roma-persecution-intensifies-during-coronavirus-pandemic-europe>.

Unfortunately, health data on the effect of the pandemic and mortality rate among the Roma communities are not available in Bulgaria⁶⁷ and Slovakia.⁶⁸ In Ireland Travellers were noted to be at an elevated risk of infection, and among those aged 18-64 years there was an increased risk of severe disease.⁶⁹

Alarming, at the beginning of the pandemic many Roma communities were subject to disproportionate and discriminatory prevention measures by state and local authorities in Bulgaria⁷⁰ and Slovakia.⁷¹ Police and/or military checkpoints were introduced and local citizens were locked down in their settlements during the first wave of the pandemic. These measures were continued during the second wave in Slovakia. Imposing such harsh restrictions severely affected employment rates and education in both countries, as many community residents were not able to go to work and/or participate effectively in education.

The justification for the total lockdowns of Roma settlements provided in the case of Slovakia refers to the increased vulnerability of Roma to COVID-19, although consistent, evidence-based data are not available. When ordering the total lockdowns of Roma settlements in Slovakia, the state authorities referred to the marginalised Roma communities as ‘a specific and risk-bearing group’ with regard to the prevention and protection of the population from the spread of COVID-19,⁷² although consistent evidence-based data in this regard were not presented. In the case of Bulgaria, the public perceptions were that Roma were the main spreaders of the virus, as at the beginning of the pandemic there had been a mass movement of Roma migrants from Western European countries with higher levels of infection back to Bulgaria. In Bulgaria several Roma settlements were locked down and police checkpoints were introduced to control the movement of the inhabitants.

The practice of locking down Roma settlements in Bulgaria was challenged before the Commission for Protection Against Discrimination.⁷³ The case involved a total lockdown and establishment of police checkpoints to prevent the movement both into and out of the Rayna Knyaginya Roma settlement in the city of Yambol. The lockdown was ordered on 4 May 2020 through an order from the director of the Regional Health Inspectorate. The residents of the settlement were forbidden to move freely in the area to buy food and medicines and to obtain medical care. They were informed that they bore administrative responsibility in case of violations of the obligations introduced by the order. On 13 May 2020, through a decision by the mayor of the Yambol municipality, air disinfection of the residential area of Rayna Knyaginya settlement was ordered and took place in the middle of a night. This approach was defined as discriminatory, as it was targeted exclusively at the Roma community. The action was publicly covered in the media with reports on the spot. The restrictions described were lifted on 18 May 2020.

67 Фондация „Отворено общество“ [Open Society Institute] (2021), Ковид-19 в ромски квартали в България (март – декември 2020 г.) [Covid-19 in Roma settlements in Bulgaria (March-December 2020)], available at: <https://osis.bg/?p=3926>.

68 ‘Slovakia will test Romani settlement residents for COVID-19 and isolate infected people in state-run facilities’, online portal ROMEA, 1 April 2020. Available in English at: <http://www.romea.cz/en/news/world/slovakia-will-test-romani-settlement-residents-for-covid-19-and-isolate-infected-people-in-state-run-facilities>.

69 Health Information and Quality Authority (2021) *Evidence synthesis for groups in vaccine allocation group nine – those aged 18-64 years living or working in crowded conditions*, https://www.hiqa.ie/sites/default/files/2021-03/Evidence-synthesis_Vaccine-allocation-group-9.pdf.

70 European Union Agency for Fundamental Rights (2020), *Implications of COVID-19 pandemic on Roma and Traveller communities. Country: Bulgaria*, available at: https://fra.europa.eu/sites/default/files/fra_uploads/bg_report_-_covid-19_impact_on_roma_en.pdf.

71 Sirotnikova, M. (2020), *COVID-19 lockdown of Roma villages creates unease in Slovakia*, available at: <https://balkaninsight.com/2020/06/09/covid-19-lockdown-of-roma-villages-creates-unease-in-slovakia/>. ERGO Network (2020), *The Impact of Covid-19 on Roma communities in the European Union and the Western Balkans*, available at: <https://ergonetwork.org/wp-content/uploads/2021/04/Ergo-covidstudy-final-web-double-v2.pdf>.

72 Government of the Slovak Republic, Resolution No. 196/2020 of 3 April 2020, adopting a Plan on solving the disease of COVID-19 in marginalised Roma communities, available at: https://www.uvzsr.sk/index.php?option=com_content&view=article&id=4166:plan-rieenia-ochorenia-covid-19-v-marginalizovanych-romskych-komunitach&catid=250:koronavirus-2019-ncov&Itemid=153.

73 Case No 557/2020: Lilia Makaveeva, Executive director of Integro Association against Yambol Regional Health Inspectorate and Yambol municipality.

In the period between May and September 2020, the Equal Opportunities Initiative Association collected evidence to support the case, including data on persons infected within the restricted area. The evidence collected proved that the data on those infected within the restricted area was comparable with the data available for the rest of the city. Yet the lockdown was only introduced for the Roma settlement. The claim before the Commission for Protection Against Discrimination urged the Commission to decide that the measures introduced were disproportionate, unjustified, unsuitable for the purpose of limiting the spread of the infectious disease and led to less favourable treatment of the Roma community compared to the rest of the population, as the inhabitants of the Roma neighbourhood were placed in a particularly disadvantaged position, which represented discrimination on the grounds of ethnicity. The case was decided in favour of the complainant, with a settlement between the parties,⁷⁴ where the Yambol Regional Health Inspectorate admitted that the measures introduced put the inhabitants of the Roma settlement in a less favourable position and thus constituted discrimination on ethnic grounds, and agreed to avoid imposing such and similar measures in future.

Food provision was challenging for the Roma and Traveller populations in the three countries surveyed.⁷⁵ Not only that, but they had no access to medications, healthcare and social services during the lockdowns.⁷⁶

Reportedly, networks of health mediators and civil society organisations⁷⁷ were able to support and provide information and prevention materials to locked-down communities in the three countries, although health mediation does not exist in Ireland as it does in Bulgaria and Slovakia. Many households relied on financial support provided by their extended families living abroad.

6 Conclusions

Roma and Traveller communities are vulnerable in many different ways. Prevalent discrimination and negative attitudes towards those minority groups by healthcare professionals regarding their access to primary healthcare services and hospital treatment are evidenced in a variety of reviewed reports. Despite the policies and prevention programmes adopted, only modest progress has been observed towards offering inclusive and equitable access to healthcare systems in Bulgaria, Ireland and Slovakia.

Public policies and provisions still do not recognise Roma and Traveller culture, traditions and lifestyle. Unhealthy living conditions which do not even meet minimum standards often lead to a detrimental lifestyle and health inequalities. Education and employment heavily influence the occurrence of health inequalities and restricted access to healthcare. An overwhelming number of Roma still lack identity documents and thus have irregular access to healthcare services.

In order to improve the health outcomes and overcome health inequalities, Member States may consider the introduction of a universal healthcare system to support low-income and vulnerable communities across European Member States as a vehicle to preventing further deterioration of health outcomes.

Finally, specific data on discrimination, health vulnerability and equality are not available and/or consistently collected and are therefore often fragmented. This negatively affects the whole process of planning and implementation of adequate measures to address the less favourable situation of Roma and Travellers. Most importantly, it affects adequate planning for the funding which is necessary to implement strategies and actions.

74 Protocol decision from 24 June 2021 of the Commission for Protection Against Discrimination on case No 557/2020.

75 ERGO Network (2020), *The impact of Covid-19 on Roma communities in the European Union and the Western Balkans*, available at: <https://ergonetnetwork.org/wp-content/uploads/2021/04/Ergo-covidstudy-final-web-double-v2.pdf>.

76 Ibidem.

77 Villani, J. et al. (2021), *A community-health partnership response to mitigate the impact of the COVID-19 pandemic on Travellers and Roma in Ireland*, available at: <https://journals.sagepub.com/doi/full/10.1177/1757975921994075>.

Evaluations of national anti-discrimination laws in Austria, Belgium, Poland and Sweden

Karolina Kędziora*, Maciej Kułak**

Introduction

The aim of this article is to analyse and compare the evaluations of national anti-discrimination laws that have taken place in Austria, Belgium, Poland and Sweden, based first and foremost on information provided by the Network's national experts. These evaluations have been commissioned and/or produced by national authorities in the past five years and relate to various aspects of how national anti-discrimination law operates. However, these evaluations have not always been conducted by state authorities and have been performed in very different contexts and circumstances, applying different criteria. Therefore, the article does not review the effectiveness of legal measures in individual countries, but rather examines and compares the national evaluations. The minimum requirements laid down in the EU directives concerning equal treatment, which all four countries are required to observe, are, however, not the sole point of reference for the following analysis. The authors have also considered certain solutions either already adopted in the above-mentioned Member States or recommended in their national evaluations, which go beyond the minimum standard set by the directives but appear to be relevant for enhancing protection against discrimination in Austria, Belgium, Poland and Sweden.

The Austrian evaluation report, published in 2016, was carried out by the government in collaboration with numerous partners such as the national equality body, the federal provinces and social partners,¹ whereas both the Belgian and Swedish evaluation reports were commissioned by the national governments but conducted or coordinated by external experts. The Belgian Expert Commission for the Assessment of the Anti-Discrimination Federal Acts, consisting of representatives of the judiciary, lawyers and members proposed by the government, published its report in 2017.² In this case it is worth noting that periodic evaluations of anti-discrimination legislation are foreseen by the legislation itself.³ In Sweden the inquiry was carried out by a former Supreme Court Justice with the assistance of experts from various government agencies and resulted in the publication of a report in 2016 after consultations with relevant

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1 *Evaluierung der Instrumente des Gleichbehandlungsrechts* (Evaluation of the instruments of anti-discrimination law), conducted and published by the (former) Ministry of Labour, Social Affairs and Consumer Protection and the (former) Ministry of Health and Women in 2016, hereinafter referred to as the 'Austrian evaluation report', available at: https://www.bmfi.gv.at/dam/jcr:daed7727-f24a-4331-b5bc-b0ab9d827989/ExpertInnenbericht_Evaluierung_GlBG.pdf.

2 *Premier rapport d'évaluation* (First evaluation report), presented by the Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations in 2017, hereinafter referred to as the 'Belgian evaluation report', available at: https://www.unia.be/files/Documenten/Aanbevelingen-advies/Commission_évaluation_de_la_législation_fédérale_relative_à_la_lutte_contre_les_discriminations.pdf.

3 According to Article 52 of the Federal Act of 10 May 2007 pertaining to combating certain forms of discrimination.

governmental agencies and organisations representing diverse social groups.⁴ The Polish government has not yet published an evaluation of the national Equal Treatment Act. Therefore, a report on the legal status and social awareness concerning protection against discrimination in Poland published in 2020 by the national equality body has been used as a point of reference.⁵

The main focus is to analyse and compare the evaluations of those selected elements of national law that the authors deem most relevant for the enforcement and implementation of the principle of equal treatment. Hence, the article touches upon issues of awareness-raising and information for the general public, comprehensive support for victims of discrimination and intersectionality. It also explores issues around the burden of proof, the effectiveness, proportionality and dissuasiveness of sanctions and collective redress mechanisms, as well as financial and organisational support for the national equality body.

Awareness-raising and information campaigns for the general public

Raising public awareness and knowledge about available means of redress is a key task for Member States which seek to uphold the EU equality standards effectively. However, it is equally important to educate the general public as to why such mechanisms are necessary and valuable for society. Awareness-raising and information campaigns for the general public have an impact on the security of those who are prone to be discriminated against, the number of legal actions and prevention. As noted by the European Commission, ‘low awareness of the anti-discrimination legislation and of the existence of equality bodies that assist victims remain major challenges in fighting discrimination’.⁶

‘A comparative analysis of non-discrimination law in Europe 2020’⁷ shows that activities organised by Member States generally focus on disseminating information about the anti-discrimination legal framework. In some countries such activities are organised by their responsible ministries, for example by publishing basic information on the equal treatment principle or running information campaigns in the media and organising seminars. This happens in Sweden, for instance, where the mandate of the Equality Ombudsman includes awareness-raising activities. Nonetheless, according to the information from the Swedish evaluation report, there are challenges in this area.

Firstly, the evaluation report recommended that the Ombudsman should investigate more cases by notifying the party being reported so that they learn of the complaint and are given the opportunity to respond to it. Then more entities will learn they have been reported and public awareness about

4 *Bättre skydd mot diskriminering: Betänkande av Utredningen om bättre möjligheter att motverka diskriminering* (Better protection against discrimination: report from the inquiry into better ways to tackle discrimination) presented in 2016, hereinafter referred to as the ‘Swedish evaluation report’ of 2016, available at: <https://www.regeringen.se/4af295/contentassets/b42c019548304be987083fb37f73d74f/battre-skydd-mot-diskriminering-sou-201687>. An additional evaluation was initiated in 2018, with a more limited scope, leading to an evaluation report published on 15.12.2020: *Effektivare tillsyn över diskrimineringslagen: Aktiva åtgärder och det skollagsreglerade området*, available at: <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2020/12/sou-202079/>.

5 *Ochrona przed dyskryminacją w Polsce. Stan prawny i świadomość społeczna. Wnioski i rekomendacje RPO* (Protection against discrimination in Poland. Legal status and social awareness. Conclusions and recommendations of the Commissioner for Human Rights), presented by the Office of the Commissioner for Human Rights in 2020, hereinafter referred to as the ‘Polish evaluation report’, available at: <https://www.rpo.gov.pl/pl/content/ochrona-przed-dyskryminacja-w-polsce-stan-prawny-i-swiadomosc-spoleczna>.

6 Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘the Racial Equality Directive’) and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (‘the Employment Equality Directive’), COM(2021) 139 final, 19 March 2021, p. 12, available at: https://ec.europa.eu/info/sites/default/files/report_on_the_application_of_the_racial_equality_directive_and_the_employment_equality_directive_en.pdf.

7 European Commission (2021) *A comparative analysis of non-discrimination law in Europe 2020*, prepared by Isabelle Chopin and Catharina Germaine for the European network of legal experts in gender equality and non-discrimination in December 2020 (based on information current as of 1 January 2020) for the Directorate-General for Justice and Consumers, Section 6.1., available at: <https://www.equalitylaw.eu/downloads/5349-a-comparative-analysis-of-non-discrimination-law-in-europe-2020-1-31-mb>.

discrimination can spread. In the opinion of the national expert, the purpose of this recommendation was presumably to recognise that if the Ombudsman is to continue to receive so-called precedent-setting cases, this would be encouraged if there is a certain level of trust towards the Ombudsman among victims of discrimination. This level of trust seems to have been declining in recent years.

Secondly, there is a problem with a lack of understanding that equality bodies were created as an answer to the imbalance of power between victims and parties with the power to discriminate and access to both legal and economic resources as well as willingness to use them against victims of discrimination who often lack access to the same resources. Furthermore, the Swedish evaluation report also proposed that, 'by clarifying the county administrative boards' responsibility for awareness-raising, more municipalities, companies, organisations and others in the counties will be able to learn about discrimination. This in turn may lead to greater attention being paid to these issues and to fewer people becoming victims of discrimination.' The national expert criticised this proposal, however, as it assumes that the problem is that too few people know and understand discrimination – also implying that the law would not really be needed if only enough education were provided. The expert argued that such an approach ignores the fact that discrimination is based on power relations and not on a lack of enlightenment. At the same time, effective enforcement helps to ensure that those with the power to discriminate become enlightened.

Due to factors such as the Me Too movement and the previous inquiry mentioned above, the Swedish government commissioned another study on 30 August 2018, entitled 'An effective and efficient supervision of the Discrimination Act'.⁸ This study focuses on strengthening the part of the law requiring employers to undertake active measures to promote equality, and on the transfer of responsibility for enforcing the law in relation to education from the Equality Ombudsman to another authority, the Swedish Schools Inspectorate.⁹

The main findings of the Polish evaluation report underlined by the national expert are widening human rights education, introducing the topic of discrimination into the mainstream of public debate and changing social awareness of this phenomenon. It also stressed a special role which may be played by the cooperation of state bodies with non-governmental organisations.

According to annual studies commissioned by the Polish Commissioner for Human Rights (*Rzecznik Praw Obywatelskich*, hereinafter 'Ombudsman'), between 70 % and 90 % of people who believed that they had experienced discrimination in a given year had never reported it to any public institution. Moreover, the vast majority of people are unaware that discrimination is prohibited in areas such as employment and the labour market, even though the employer has an obligation to inform them about discrimination laws. The situation is even worse in the area of access to goods and services. According to the Ombudsman, there are multiple reasons for the lack of reporting and these include a low level of legal awareness; a lack of understanding of the notion of discrimination; a lack of trust in public bodies and institutions; a fear of retaliation as a result of reporting discrimination; a reluctance to disclose intimate information about one's life; and a lack of faith in both the potential result of a court case and the effectiveness of sanctions.

In Poland, the Ombudsman and the Government Plenipotentiary for Equal Treatment both have an obligation to promote, disseminate and propagate information about equal treatment. Since the Ombudsman became the equality body in 2011, it has organised numerous events on discrimination issues, commissioned research and published a number of reports and manuals. The Office of the Government Plenipotentiary for Equal Treatment also created a website (at the end of 2008), but it

8 *En effektiv och ändamålsenlig tillsyn över diskrimineringslagen* (An effective and efficient supervision of the Discrimination Act), Terms of Reference available at: <https://www.regeringen.se/rattsliga-dokument/kommitteredirektiv/2018/08/dir.-201899/>.

9 *Effektivare tillsyn över diskrimineringslagen: Aktiva åtgärder och det skollagsreglerade området* (A more effective supervision of the Discrimination Act: Active measures and supervision in the area covered by the Schools Act), evaluation report published on 15.12.2020, available at: <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2020/12/sou-202079/>.

is quite limited.¹⁰ The Plenipotentiary has dealt with various grounds of discrimination, but most of its activities were and still are focused on issues of sex discrimination.¹¹

Belgium has introduced permanent structures designed specifically to promote dialogue on equality issues with civil society and the social partners. The 'Country report, non-discrimination – Belgium 2020'¹² contained a number of examples regarding both the dissemination of information about legal protection against discrimination and measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment. In 2016 Unia (the Belgian equality body) launched its new website and published a brochure entitled 'For equality, against discrimination. How can we help?'¹³ in order to clarify its role and missions to the public. Unia has also been lauded for another campaign to raise awareness about disabilities: 'I have a disability and I have rights'.

Another very important Belgian initiative is worth mentioning here. Each year on 22 March an 'Anti-Discrimination Day' is organised, which provides a great many opportunities to disseminate information. A range of social and human rights NGOs and social partners take part and engage on the issue of combating discrimination and promoting diversity. Social partners and NGOs, as part of civil society and an important link with society, are a very important part of the process of awareness-raising and information campaigns for the general public.

The 2017 report by the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts made recommendations for further efforts in this regard. These included, notably, strengthening training for judges, police services and labour inspectorates in collaboration with Unia and adapting it to the needs of different groups such as employers.

The Austrian national expert highlighted public awareness-raising as one of the main areas of the Austrian evaluation report of 2016. The 'Country report, non-discrimination – Austria 2020'¹⁴ states that the obligation to disseminate information about the issues at stake is not given a high priority by the Federal Government, although there are some activities in this field. Most of the widely visible activities took place between 2004 and 2007. In general, basic information about the main functions of federal anti-discrimination legislation is now readily available online on the government website.¹⁵ Information about provincial legislation, bodies and structures is somewhat more difficult to find for some provinces (Burgenland and Vorarlberg) than others (Vienna, Upper Austria and Styria).

To sum up, the extent to which Member States conduct effective awareness-raising and information campaigns depends on the political will of a particular government. This is clearly visible in the example of Poland, where the level of activities implemented decreased when conservative parties came to power.

Comprehensive support for victims of discrimination

Undoubtedly, the main purpose of anti-discrimination legislation is to guarantee effective protection of the rights of people who experience discrimination or are at risk of it. Consequently, Member States are

¹⁰ <https://www.gov.pl/web/rownetraktowanie>.

¹¹ Government Plenipotentiary for Equal Treatment (2020), *Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2019 r. do 31 grudnia 2019 r.* (Report on the activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2019 – 31 December 2019), Warsaw, available at: [https://www.globalwps.org/data/POL/files/Report%202019%20\(PL\).pdf](https://www.globalwps.org/data/POL/files/Report%202019%20(PL).pdf).

¹² European Commission (2020), *Country report, non-discrimination – Belgium 2020*, European network of legal experts in gender equality and non-discrimination, Section 8.1, available at: <https://www.equalitylaw.eu/downloads/5269-belgium-country-report-non-discrimination-2020-2-09-mb>.

¹³ <https://www.unia.be/en/publications-statistics/publications/for-equality-against-discrimination-how-can-we-help>.

¹⁴ European Commission (2020), *Country report, non-discrimination – Austria 2020*, European network of legal experts in gender equality and non-discrimination, Section 8.1, available at: <https://www.equalitylaw.eu/downloads/5264-austria-country-report-non-discrimination-2020-1-37-mb>.

¹⁵ <https://www.bundeskanzleramt.gv.at/themen/volksgruppen/roma-strategie.html>.

obliged to ensure comprehensive support for victims of discrimination in order to safeguard this protection both in law and in practice. Effectiveness is a key concept for evaluating national anti-discrimination provisions in this regard. The main findings of the analysed national evaluations on this topic may be divided into three categories, i.e. clarity of national legislation, procedural issues and those concerning assistance for victims. This categorisation definitely does not aspire to be exhaustive and unambiguous, as many of the problems that national evaluations have touched upon are interconnected with regard to support for the victims. However, the objective is to ensure the clarity of the analysis presented, as well as to underscore the fact that some of the challenges that Member States face in respect of supporting victims of discrimination are common problems.

In reference to clarity of national anti-discrimination legislation, the Austrian, Polish and Belgian evaluation reports accentuate the lack of clarity as a problem in the effective protection of victims' rights. In the case of Austria, ambiguities leading to uncertain legal situations arise due to the scattered legislation that is a result of the way legislative competences are shared between the federal government and the states.¹⁶ In Poland, the problem lies in the multiplicity of sources of national law regarding various aspects of the principle of equal treatment.¹⁷ Both evaluation reports underline the fact that ambiguous legislation may cause problems with establishing the scope of protection against discrimination, which is a crucial issue for the effectiveness of this protection.

The Belgian evaluation report raises both of these problems in relation to the national legislative framework for combating discrimination. Firstly, the framework is described as multifaceted and complex as it is composed of several federal laws, such as the anti-discrimination law (the General Anti-Discrimination Federal Act) and the anti-racism law (the Racial Equality Federal Act). Secondly, provisions at the federal government level are supplemented by various provisions adopted by the federated entities. Therefore, reflection on the coherence of the legislative framework is mentioned as one of the most important aspects in the Belgian evaluation report.¹⁸ Not being able to assess one's rights, at least *prima facie*, without seeking professional legal assistance may dissuade victims from seeking judicial protection, especially if the accessibility of this assistance is restricted due to factors such as socio-economic status.

Thus the Member States' obligation to disseminate information about anti-discriminatory provisions¹⁹ may play a pivotal role in ensuring that such vagueness in the national legislation does not have a dissuasive effect. Moreover, lack of clarity may even pose a challenge for legal professionals and result in non-uniform application of anti-discrimination legislation, to the detriment of victims of unequal treatment. Accordingly, in order to effectively protect the rights of persons who face discrimination, clarity of national provisions is necessary and should be seen as part of the Member States' obligation to ensure comprehensive support for victims of discrimination.

In relation to procedural issues, the national evaluation reports mention plenty of problems that may have a negative impact on the effective protection of victims' rights, whereas effective enforcement of those rights could indeed contribute to dissuading potential wrongdoers from violating the principle of equal treatment.

Firstly, the Belgian evaluation report underscores the importance of simplicity in procedures designed to support victims and ensure respect for their rights. The existence of multiple equality bodies competent to deal with victims' cases in Belgium (such as Unia, the Institute for the Equality of Women and Men and certain regional bodies) and shared competence among several levels of power in the area of equal treatment are described as concerns for the protection of victims' rights.²⁰ Therefore, creating a 'one-stop

16 Austrian evaluation report, Section 5.3.2.

17 Polish evaluation report, p. 40.

18 Belgian evaluation report, paras. 42-50.

19 According to Article 10 of Council Directive 2000/43/EC, Article 12 of Council Directive 2000/78/EC, Article 15 of Council Directive 2004/113/EC, Article 30 of Directive 2006/54/EC and Article 13 of Directive 2010/41/EU.

20 Belgian evaluation report, paras. 149-155.

shop' system to help victims identify the appropriate body to support them is recommended to tackle this problem. Even though this structure of equality bodies is specifically characteristic of the Belgian system, the conclusion regarding the importance of simple procedures is universal.

In contrast to a one-stop-shop system focused on simplicity of procedures, Sweden has opted for a system favouring accessibility for victims, by establishing a network of publicly financed local anti-discrimination bureaux to which victims can turn.²¹ An added value of such a solution in the context of simplifying procedures is the fact that entities operating on a local level may seem more available to victims of discrimination than centralised institutions.

Secondly, the Austrian evaluation report identifies the need to speed up procedures before the Equal Treatment Commission, a national body which provides a forum for mediation prior to potential court proceedings.²² However, a recommendation to ensure reasonably expeditious and efficient scrutiny should apply to all conciliation, judicial and administrative procedures for the enforcement of the obligation to respect the principle of equal treatment. The uncertainty regarding the outcome of the scrutiny, combined with a possibly long duration of proceedings, may have an off-putting effect and discourage victims from seeking protection. Therefore, expediting these proceedings is an important part of guaranteeing comprehensive support for victims of discrimination, as it eliminates one of the risks that victims certainly assess before initiating the relevant procedures.

Thirdly, both the Austrian and the Polish evaluation reports touch upon another factor taken into account by victims when they weigh up whether to seek legal redress, namely the costs involved. The focal point of the Austrian evaluation report in this respect is the costs of litigation that individuals may potentially bear,²³ a problem that has been highlighted in the Swedish context as well.²⁴ In this area the Polish evaluation report concentrates on the recommendation for civil organisations entitled to participate in court proceedings in the field of equal treatment to be exempted from court costs.²⁵ In both cases, the risk of having to pay these costs, which may even include reimbursement of trial costs to the other party, may be seen as an obstacle to the assertion of legal claims.

With regard to individuals, the obligation to guarantee comprehensive support for them certainly does not imply creating proceedings that are free of charge. However, the rules on who pays the court costs must be established and enforced in a way that does not preclude effective protection of the right to equal treatment. Accordingly, in relation to non-governmental organisations the rules must be constructed and applied in a way that would not dissuade associations, organisations or other legal entities, which have a legitimate interest in ensuring that the provisions of the EU equality directives are complied with, from engaging in proceedings on behalf or in support of victims of unequal treatment.²⁶

Finally, the national evaluation reports mention the issue of assistance for victims of discrimination, with both the Belgian and the Polish assessments accentuating the importance of conducting training for practitioners. The Belgian evaluation report identifies the complexity of anti-discrimination law and its cross-cutting nature as a challenge for institutions and practitioners involved in providing professional help to victims of unequal treatment.²⁷ Furthermore, the Polish evaluation report acknowledges insufficient knowledge in this field as a result of the small number of cases compared to the actual scale of discrimination, among other things.²⁸ Thus it is recommended by the Polish evaluation report

21 European Commission (2020), *Country report, non-discrimination – Sweden 2020*, European network of legal experts in gender equality and non-discrimination, p. 9.

22 Austrian evaluation report, Section 5.2.1.

23 Austrian evaluation report, Section 5.2.9.

24 *Country report, non-discrimination – Sweden 2020*, p. 99.

25 Polish evaluation report, p. 45.

26 According to Article 7(2) of Council Directive 2000/43/EC, Article 9(2) of Council Directive 2000/78/EC, Article 8(3) of Council Directive 2004/113/EC, Article 17(2) of Directive 2006/54/EC and Article 9(2) of Directive 2010/41/EU.

27 Belgian evaluation report, paras. 203-208.

28 Polish evaluation report, p. 41.

that relevant training be provided to legal professionals, police officers, labour inspectors and other professionals who may be engaged in supporting people experiencing unequal treatment. Undoubtedly, equipping these professionals with knowledge and competence may contribute to ensuring comprehensive support for victims of discrimination.

As can be seen above, the national evaluation reports touch on many different issues that can be analysed from the perspective of guaranteeing comprehensive support for victims of unequal treatment. It is clear that guaranteeing this support poses a challenge for Member States as it is a multi-faceted problem that involves both legislative and procedural issues. Therefore, addressing this problem requires a variety of complementary measures, such as ensuring clarity of national anti-discrimination provisions, simplicity of procedures and conducting training for practitioners.

Intersectionality and multiple discrimination

Understanding how the interplay between diverse aspects of an individual's identity may affect their situation is of utmost importance for the enforcement of the principle of equal treatment, since every individual's identity is complex and cannot be reduced to a single characteristic.²⁹ Therefore, implementing an intersectional approach and recognising the problem of multiple discrimination is crucial for ensuring effective protection against discrimination.³⁰ However, acknowledging and tackling this phenomenon still poses a challenge for national anti-discrimination legislation, policymakers and judiciaries, which is reflected especially in the Belgian and the Austrian national evaluation reports.³¹

According to the Belgian evaluation report,³² the federal framework does not take unequal treatment on the basis of multiple characteristics into account, as it recognises only discrimination on a single ground.³³ Hence, a person seeking protection in case of intersectional or multiple discrimination may invoke several grounds in their claim, but the court would consider them separately without acknowledging the specific nature of this form of unequal treatment. Therefore, the recommendation of the Belgian evaluation report in this regard is to adapt the federal legal framework in order to recognise the problem of intersectional and multiple discrimination. Moreover, this recommendation is followed by the conclusion that analysis is also needed of appropriate sanctions and the equality bodies' mandate to initiate proceedings. Interestingly, according to the Belgian country report, multiple discrimination has already been recognised in case-law, even though it is not defined by any provisions.³⁴

In Austria, on the other hand, multiple discrimination must be taken into account when assessing damages for unequal treatment.³⁵ However, the concept itself is not defined in the national anti-discrimination provisions which, according to the evaluation, may make it difficult to enforce them in such cases. Therefore, the national evaluation report recommends considering a clarifying regulation on multiple discrimination.

29 E.g. Council Directive 2000/43/EC and Council Directive 2000/78/EC recognise that 'especially women are often the victims of multiple discrimination'.

30 See European Commission (2007), *Tackling multiple discrimination. Practices, policies and laws*, Luxembourg: Office for Official Publications of the European Communities.

31 It is worth noting in this regard that in the case C-443/15, *Parris v Trinity College Dublin et al.*, the CJEU stated that 'while discrimination may indeed be based on several of the grounds (...), there is, however, no new category of discrimination resulting from the combination of more than one of those grounds (...) that may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established'. Thus, the Court does not recognise intersectional discrimination as a separate form of discrimination since currently it does not appear to have any clear legal basis in the equality directives.

32 Belgian evaluation report, paras. 68-73.

33 However, according to the evaluation, the legislation adopted by the Flemish Region allows account to be taken of discrimination on multiple grounds.

34 *Country report, non-discrimination – Belgium 2020*, p. 25; *Country report, gender equality – Belgium 2020*, p. 12.

35 Austrian evaluation report, Section 2.7.

The Polish and Swedish evaluation reports do not particularly mention the problem of intersectionality and multiple discrimination. It should be noted though that, according to the Polish and Swedish country reports, this form of unequal treatment is not recognised by the relevant national provisions. Nevertheless, in Poland, as stated in the country report, cases of multiple discrimination may be adjudicated under the current provisions. They are, however, not treated differently from cases of unequal treatment on a single ground.³⁶ The Swedish country report, likewise, mentions that, even though there is no specific prohibition of multiple discrimination in the national provisions, this form of unequal treatment has been noted in case-law concerning cases that involved e.g. both sex and age.³⁷

The above-mentioned evaluations and country reports show that all four Member States still face challenges in addressing multiple discrimination and taking an intersectional approach in their anti-discrimination frameworks. Therefore, the Belgian and Austrian evaluation reports recommend introducing regulations recognising multiple discrimination as a specific form of unequal treatment. Even though the Polish and Swedish evaluation reports do not specifically mention this problem, the country reports by both the Polish and Swedish experts indicate that introducing clarifying regulations in this area would be appropriate.

Burden of proof

The reversal of the burden of proof is undoubtedly one of the fundamental provisions of EU anti-discrimination legislation, created in order to facilitate victims seeking redress for violations of equal treatment.³⁸ The four Member States analysed for this article have each incorporated into their national legislations a rule stating that the claimant must first establish facts from which it may be presumed that an act of discrimination has occurred and, subsequently, the respondent must prove that there has been no breach of the principle of equal treatment. However, the evaluations highlight problems in enforcing this rule in practice and, consequently, propose numerous solutions.

The Belgian evaluation report mentions that contrasting interpretations of the rule, including very restrictive ones, have been observed in practice, supposedly due to uncertainties as to what facts are likely to give rise to a presumption of discrimination and what arguments may be presented in order to rebut this presumption.³⁹ However, it is stated that the problems in implementing this principle lie in a lack of familiarity with it rather than lack of clarity in the national legislation. Thus, the creation of some sort of good practice guidelines for judges is recommended.

Correspondingly, the Austrian evaluation report acknowledges that it has been observed in practice that the standard for claimants to prove the reason for unequal treatment, as part of establishing the presumption of discrimination, tends to be set too high.⁴⁰ In this regard, the report mentions a proposal to train judges and disseminate information among them in relation to patterns of discrimination.⁴¹

On the other hand, the Swedish evaluation report proposes amending the national provisions in order to clarify that the rule on burden of proof is a presumption rule.⁴² It is stated that, even though the national courts seem to apply this rule as a presumption rule, clarifying provisions in this regard may have an educational effect and contribute to ensuring that the rule is applied correctly. Furthermore, this proposal,

36 European Commission (2020), *Country report, non-discrimination – Poland 2020*, European network of legal experts in gender equality and non-discrimination, p. 20.

37 *Country report, non-discrimination – Sweden 2020*, p. 20.

38 Article 8 of Council Directive 2000/43/EC, Article 10 of Council Directive 2000/78/EC, Article 9 of Council Directive 2004/113/EC, Article 19 of Directive 2006/54/EC and Article 9 of Directive 2010/41/EU.

39 Belgian evaluation report, paras. 287-320.

40 Austrian evaluation report, Section 5.2.1.

41 Austrian evaluation report, Section 5.2.1.

42 Swedish evaluation report, p. 464.

according to the report, may have a positive effect as to parties' awareness of how they should present their argumentation and line of reasoning in court.

Finally, the Polish evaluation report notes a worryingly low level of public awareness about the reversal of burden of proof,⁴³ which underscores the importance of raising awareness not solely among judges. Since the rule on the burden of proof is supposed to be one of the main factors intended to encourage victims to seek protection and facilitate pursuing and enforcing redress for breaches of the principle of equal treatment, public awareness may be seen as an important factor in ensuring effective protection against discrimination.

As can be seen above, the national evaluation reports identify some problems in enforcing the rule of the reversal of the burden of proof in practice, even though it is an established provision of the EU anti-discrimination legislation. The target group for the proposed measures in the Austrian, Belgian and Swedish evaluation reports is primarily the judiciary which bears the responsibility for enforcing the rule. However, those measures may be complemented, as the Polish evaluation report proposes, by addressing the issue of concern more widely, i.e. by raising public awareness about the reversal of the burden of proof.

Effectiveness, proportionality and dissuasiveness of sanctions

The EU equality directives establish a clear legal obligation for the member States to foresee that infringements of anti-discrimination laws are met with 'effective, proportionate and dissuasive' sanctions which may include compensation paid to the victim.⁴⁴ The meaning of this concept must be determined in each case in the light of individual circumstances. In practice, a wide range of possible remedies exist which vary depending on the type of law, the punitive or non-punitive nature of the remedies, their orientation as backward-looking or forward-looking and the level at which they are intended to operate. Remedies may be available through various, possibly complementary, enforcement processes (administrative, industrial relations and judicial processes). It may be argued that ultimately, no single national enforcement system appears to be truly all-encompassing and that they are all mostly based on an individualistic and remedial – rather than a preventative – approach.⁴⁵

We can see this problem reflected in some national evaluations. The Polish Equal Treatment Act only refers to 'compensation' (which in Polish law is generally interpreted to cover only material damage) and the case-law shows discrepancies in how different courts consider whether compensation for non-material damages can be awarded in discrimination cases. The main recommendation pointed out in the Polish country report is to include a clear statement in the provision that the compensation for breaches of the principle of equal treatment includes both material damage and non-material damage. No financial sanction within the meaning of the anti-discrimination law should be limited only to the material damage actually incurred. Moreover, such a sanction should be effective, proportionate and dissuasive, which basically requires it to exceed the mere symbolic coverage of the damage incurred.

Expanding the catalogue of sanctions to include sanctions other than financial ones was next proposed by the Polish Ombudsman's report. The EU anti-discrimination directives do not impose an obligation on the Member States to choose a specific sanction for violations of the prohibition of discrimination. Thus, they are free to choose from various solutions. This freedom is limited by the condition that the sanction chosen by the Member State must be effective, proportionate and dissuasive. The opinion concluded in the Polish evaluation report is that the proposed solution would increase the level of protection against

43 Polish evaluation report, p. 16.

44 Article 15, Racial Equality Directive; Article 17, Employment Equality Directive.

45 European Commission (2021) *A comparative analysis of non-discrimination law in Europe 2020*, available at: <https://www.equalitylaw.eu/downloads/5349-a-comparative-analysis-of-non-discrimination-law-in-europe-2020-1-31-mb>.

discrimination in Poland in accordance with the EU criteria of effective, proportionate and dissuasive sanctions.

It appears there are no limits in relation to either pecuniary or non-pecuniary damages in the national laws of Belgium and Sweden. National experts have not reported any information related to the evaluation of anti-discrimination law in this respect by national bodies. However, the country reports from 2020 issued by the European network of legal experts in gender equality and non-discrimination⁴⁶ do touch upon a few issues.

In Belgium, under the General Anti-Discrimination Federal Act and the Racial Equality Federal Act, a victim of discrimination may seek damages according to the usual principles of civil liability or opt for the payment of a lump sum as defined by law. The choice of the victim to seek the payment of damages either on the basis of 'effective' damage or on the basis of a lump sum as defined by law aims to ensure the effectiveness of the sanctions provided for instances of discrimination. There is no maximum amount set for compensation as such, but the victim is entitled to choose the lump sum as defined by law rather than seeking damages calculated on the basis of the 'effective' loss. The fact that victims can choose fixed rate damages was presented by the federal legislature as a way to improve the effectiveness of remedies.

However, in its 2017 report, the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts raised several questions as to the dissuasive effect of the sanctions. Even though the Commission intends to give further consideration to the matter in order to truly assess the effective, proportionate and dissuasive nature of the sanctions, it is already suggesting increasing the lump sums in cases of discrimination not relating to labour relations and providing for their indexation.

In Sweden an economic efficiency analysis of discrimination was commissioned by the Equality Ombudsman and undertaken by a professor of national economics (2015). The most basic deficiency according to the analysis is that the preventative elements of discrimination sanctions seem to be too low to prevent future infringements. The analysis also states that, from an econometric efficiency standpoint, the discrimination sanctions would need to be extremely high on some occasions if the low detection risk in many areas is to be properly taken into account. In the author's opinion, it should nevertheless be obvious that more considerable sanctions are necessary if the law is to become more effective. Better justification for this could come from understanding the substantial damage arising in various situations as well as the damage caused to third parties, as was pointed out in the above-mentioned report.⁴⁷

The Austrian national expert referred to the Austrian evaluation report of 2016⁴⁸ and pointed out that, with regard to the remedies and sanctions, the report argues that the average amounts awarded as non-material damages in discrimination cases are not high enough to deter and prevent. The report includes a few interesting proposals, which were unfortunately rejected by the social partners from trade, commerce and industry. Firstly, it considers the introduction of additional administrative penalties in order to safeguard the preventive effect of the prohibition of discrimination. Proposals also addressed increasing the amount of fines payable under the existing administrative penal provisions, increasing the number of institutions that can start administrative penal proceedings, and introducing a minimum amount of compensation payable of EUR 1 000 for all cases of discrimination.

⁴⁶ <https://www.equalitylaw.eu/>.

⁴⁷ *Country report, non-discrimination – Sweden 2020*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/5279-sweden-country-report-non-discrimination-2020-2-08-mb>.

⁴⁸ Available at: https://www.bmfi.gv.at/dam/jcr:daed7727-f24a-4331-b5bc-b0ab9d827989/ExpertInnenbericht_Evaluierung_GIBG.pdf.

Furthermore, it was pointed out in the Network's Austrian country report of 2020⁴⁹ that situations in which the penalty (maximum administrative fine of as low as EUR 360 and the exemption from punishment for employers who are first-time offenders (warning only) in cases of discriminatory job advertisements and discriminatory housing advertisements) shouldn't be considered as effective, dissuasive or proportionate. This applies to the limitation of compensation to a maximum amount (as low as EUR 500) if the employer proves that the victim would not have been recruited or promoted anyway.

The national experts showed that the national enforcement systems in Austria and Poland do not appear to be truly preventative, which has very serious consequences for victims of discrimination. Protection against discrimination can't be effective and dissuasive if the system takes into consideration only the individual circumstances of a violation. In the view of the authors, it is important to consider the wider aspect of the position of vulnerable groups in society and attitudes to the prohibition of discrimination presented by entities which violate equality standards.

Taking this perspective into account may lead to higher amounts of compensation for individuals and reduce the frequency of discrimination in the future.

Collective redress mechanisms

The European Commission has been assessing the need for a common EU approach to collective redress. In a working document published in 2011 it recognised that, 'collective redress is necessary where the same breach of rights provided under EU law affects a large number of persons, in particular when individual actions fail to reach any effective redress in terms of stopping an unlawful conduct and securing adequate compensation'.⁵⁰

In 2013 the Commission issued a recommendation⁵¹ to the effect that all Member States should introduce collective redress mechanisms to facilitate the enforcement of the rights that all EU citizens have under EU law. Such action is allowed but not explicitly required by the two anti-discrimination directives. Collective redress mechanisms can be divided into class action or group action (claims on behalf of an undefined group of claimants or identified claimants and multiple claims) and *actio popularis* (claims by organisations acting in the public interest on their own behalf and without a specific victim to support or represent).

In many countries there is no specific procedure for discrimination cases, but consumer protection law envisages a group action which can be relevant in the field of access to goods and services.⁵² However, in practice, the application of these provisions is subject to judicial interpretation in case-law.

Actio popularis is permitted by national law for discrimination cases, inter alia, in Austria and Belgium. The Belgian country report for 2020⁵³ shows that, although the concept of *actio popularis* involving a 'representative claimant' acting in court in the name of a collective interest is unknown in Belgian law if there is no identified victim, Unia (the equality body), associations, organisations or trade unions may act on their own behalf to challenge a breach of the anti-discrimination legislation. In the case of Unia, this *actio popularis* power gained European visibility and recognition in the Feryn case which came before the CJEU.⁵⁴ The case concerned the question of whether a public statement by Feryn's director that his

49 Country report, non-discrimination – Austria 2020.

50 European Commission (2011), *Commission Staff Working Document Public Consultation: Towards a coherent European approach to collective redress*, 4 February 2011.

51 European Commission (2013), *Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, OJ L 201, 26.7.2013, pp. 60-65.

52 *A comparative analysis of non-discrimination law in Europe 2020*.

53 Country report, non-discrimination – Belgium 2020, pp. 90-91.

54 CJEU, Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*.

company would not recruit people 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.

In Austria such action is possible only in cases of discrimination on the grounds of disability and can be brought only by three organisations – the Austrian National Council of Disabled Persons, the Litigation Association of NGOs Against Discrimination and the Ombud for People with Disabilities. No other legal means of redress exists for cases similar to the Feryn case.

Class actions (the ability to act for an individual who has a power of attorney granted by other victims in relation to claims arising from the same event) are permitted by law for discrimination cases in Sweden in a district court for claims arising from the same issue, but only for cases outside the area of employment.

The Polish evaluation report contains a recommendation to grant the independent body for equal treatment the power to bring *actio popularis* proceedings in cases of discrimination. Another important recommendation pertains to non-governmental organisations whose statutory tasks include protection of human rights and which have a legitimate interest in combating discrimination. The recommendation involves them being awarded procedural capacity (i.e. to bring an action and join the proceedings) in cases carried out in the public interest and without the consent of the party, even if there is no specific person affected by an act violating the principle of equal treatment.

In Austria there are requests reported by NGOs and experts to expand *actio popularis* to other grounds of discrimination apart from disability but the political will to do so does not seem strong at the moment.

Financial and organisational support for the national equality body

National equality bodies are an essential part of the system that Member States are obliged to establish in order to support equal treatment of all persons.⁵⁵ Therefore, the evaluation reports on national anti-discrimination laws in Austria, Belgium, Poland and Sweden examine the functioning and position of these bodies and identify where there is room for improvement. However, comparing findings in this matter may pose certain difficulties, since the position of the bodies in national systems of governance may be specific to Member States' constitutional and administrative frameworks. Nevertheless, Directive 2000/43/EC, Directive 2004/113/EC, Directive 2006/54/EC and Directive 2010/41/EU lay down minimum standards for the competencies of the equality bodies. These standards relate, notably, to the provision of independent assistance to victims of discrimination in pursuing their complaints about discrimination, the conducting of independent surveys concerning discrimination, the publication of independent reports and the issuing of recommendations on any issue relating to such discrimination.⁵⁶

The Austrian evaluation report recommends strengthening the impact of the national equality body's work.⁵⁷ Undoubtedly, a system which does not guarantee sufficient significance for national agencies' work in monitoring and promoting anti-discrimination provisions may have a negative impact on the effective protection of the principle of equal treatment. Therefore, Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies ('Commission Recommendation')⁵⁸ suggests that Member States should enable equality bodies to raise public awareness about their existence⁵⁹ and to engage in public debate, communicate with discriminated groups and promote good practices.⁶⁰

55 According to Article 13 of Council Directive 2000/43/EC, Article 12 of Council Directive 2004/113/EC, Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU.

56 See, notably, Article 13 of Directive 2000/43/EC.

57 Austrian evaluation report, Section 5.3.

58 OJ L 167/28.

59 Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, OJ L 167, Section 1.1.2(11).

60 Commission Recommendation, Section 1.1.2(12).

Providing financial and organisational support for national equality bodies for this work may contribute to building trust in them and promoting their work, and subsequently to strengthening their impact in the area of equal treatment.

The Belgian evaluation report recommends ‘inter-federalising’ the Institute for the Equality of Women and Men in order to strengthen its impact as a national body responsible for promoting gender equality.⁶¹ The Institute is a federal institution that collaborates with five federated entities. However, the evaluation mentions that, for example, the Flemish region has established its own body for gender equality, which in turn creates a complicated system where victims of discrimination must make a detailed assessment in order to know which body can assist them in protecting their rights. Therefore, introducing cooperation agreements with the federated entities is recommended to clarify the distribution of power between national and regional equality bodies.

Recommendations regarding the Polish national equality body are particularly interesting. Firstly, this role has been entrusted to the Commissioner for Human Rights (Ombudsman) whose constitutional role is to assist victims in upholding their rights when they are infringed by public authority bodies. This proves problematic in relation to the horizontal dimension of the principle of equal treatment. Hence, it is recommended by the evaluation report that the Ombudsman be granted the authority to substantively scrutinise complaints concerning discrimination between private entities.⁶² Otherwise the Polish equality body would not be able to fulfil its role of supporting equal treatment of all persons, whereas the Commission Recommendation clarifies that Member States should take into consideration such aspects of independent assistance to victims as handling individual or collective complaints, providing legal advice to victims, including in pursuing their complaints, and representing complainants in court.⁶³

Secondly, the Polish evaluation report accentuates the importance of the functional independence of the national equality body and appropriate financial resources for it to fulfil its role effectively.⁶⁴ The need to strengthen financial resources for combating discrimination is also mentioned by the Austrian evaluation report.⁶⁵ The relevance of these factors is noted in the Commission Recommendation which cites the need to ensure the human, technical and financial resources necessary for national bodies to perform their tasks and exercise their power effectively.⁶⁶ Moreover, it states that the resources allocated to these bodies can be considered adequate only if this enables them to carry out each of their functions effectively, within a reasonable timeframe and within the deadlines established by national law.⁶⁷ Undeniably, only equality bodies with guaranteed independence, sufficient financing and adequate organisational capacity can fulfil their obligations specified in the EU equality directives, since shortcomings in the areas mentioned may have a negative impact on the bodies’ effectiveness.

Finally, both the Swedish⁶⁸ and Polish⁶⁹ evaluation reports mention a proposal to establish a separate independent body competent to resolve disputes concerning the principle of equal treatment. This recommendation is beyond the scope of the minimum standard laid down in the directives as they do not specifically require the establishment of equality bodies as dispute-settlement bodies. However, this fact obviously does not preclude Member States from carrying out their own assessment of whether establishing such a body would contribute to providing more effective protection of victims’ rights, given the specific national circumstances. For instance, such separate bodies may offer a simple, low-cost and expeditious procedure for settling disputes, compared to court proceedings. They may also mediate in

61 Belgian evaluation report, paras. 146-148.

62 Polish evaluation report, p. 44.

63 Commission Recommendation, Section 1.1.2(1).

64 Polish evaluation report, p. 43.

65 Austrian evaluation report, Section 5.3.2.

66 Commission Recommendation, Section 1.2.2(1).

67 Commission Recommendation, Section 1.2.2(1).

68 Swedish evaluation report, Section 10.

69 Polish evaluation report, p. 44.

those disputes and actively seek consensual solutions or impose adequate, effective and proportionate sanctions, as required by EU equality directives.

All of the evaluation reports recognise the importance of national equality bodies for supporting the equal treatment of all persons. Thus the Austrian assessment recommends strengthening the impact of the national equality body's work. In this regard, the Belgian evaluation report proposes clarifying the distribution of power between national and regional equality bodies. Moreover, the Austrian and Polish evaluation reports accentuate the importance of providing appropriate financial resources for combating discrimination. The Polish evaluation report proposes also granting the Commissioner for Human Rights the authority to substantively scrutinise complaints concerning discrimination between private entities in order to recognise the horizontal dimension of the principle of equal treatment. Finally, both the Swedish and Polish evaluation reports mention a proposal to establish a separate independent body with competence to resolve disputes concerning the principle of equal treatment.

Conclusion

Comparing national measures adopted in order to ensure the effective protection of the principle of equal treatment may pose a challenge, since national anti-discrimination laws are essentially tailored to Member States' specific constitutional and administrative frameworks and their socio-economic systems. Nevertheless, the evaluations of national legislations in Austria, Belgium, Poland and Sweden prove that some significant conclusions regarding common problems of national anti-discrimination laws may be drawn.

Firstly, the evaluation reports accentuate the importance of raising awareness of both the general public and legal professionals regarding available means of redress and mechanisms for ensuring the effective protection of the principle of equal treatment. Undertaking active measures to promote equality and engaging various actors in dialogue are mentioned as measures that should be adopted for this.

Secondly, the Austrian, Belgian and Polish evaluation reports recognise the necessity of guaranteeing comprehensive support for victims of unequal treatment. The multiplicity of proposed measures in this respect include ensuring clarity of national legislation, the simplicity and efficiency of procedures and access to professional support. Furthermore, a need to implement an intersectional approach and define multiple discrimination in order to guarantee effective protection is noted.

Thirdly, the Austrian, Belgian and Polish evaluation reports highlight some procedural challenges concerning the enforcement of the principle of equal treatment. Restrictive interpretations of provisions regarding the burden of proof are mentioned in this regard. Therefore, the importance of providing appropriate training and support for judges in implementing the rule on the reversal of the burden of proof is underlined. In addition, according to the national evaluations, safeguarding the effectiveness, proportionality and dissuasiveness of sanctions presents an ongoing challenge for national legislations. Therefore, national systems of sanctions and remedies may require reconsideration. Introducing collective redress mechanisms, where the same breach of rights provided under EU law affects a large number of individuals, is mentioned as well.

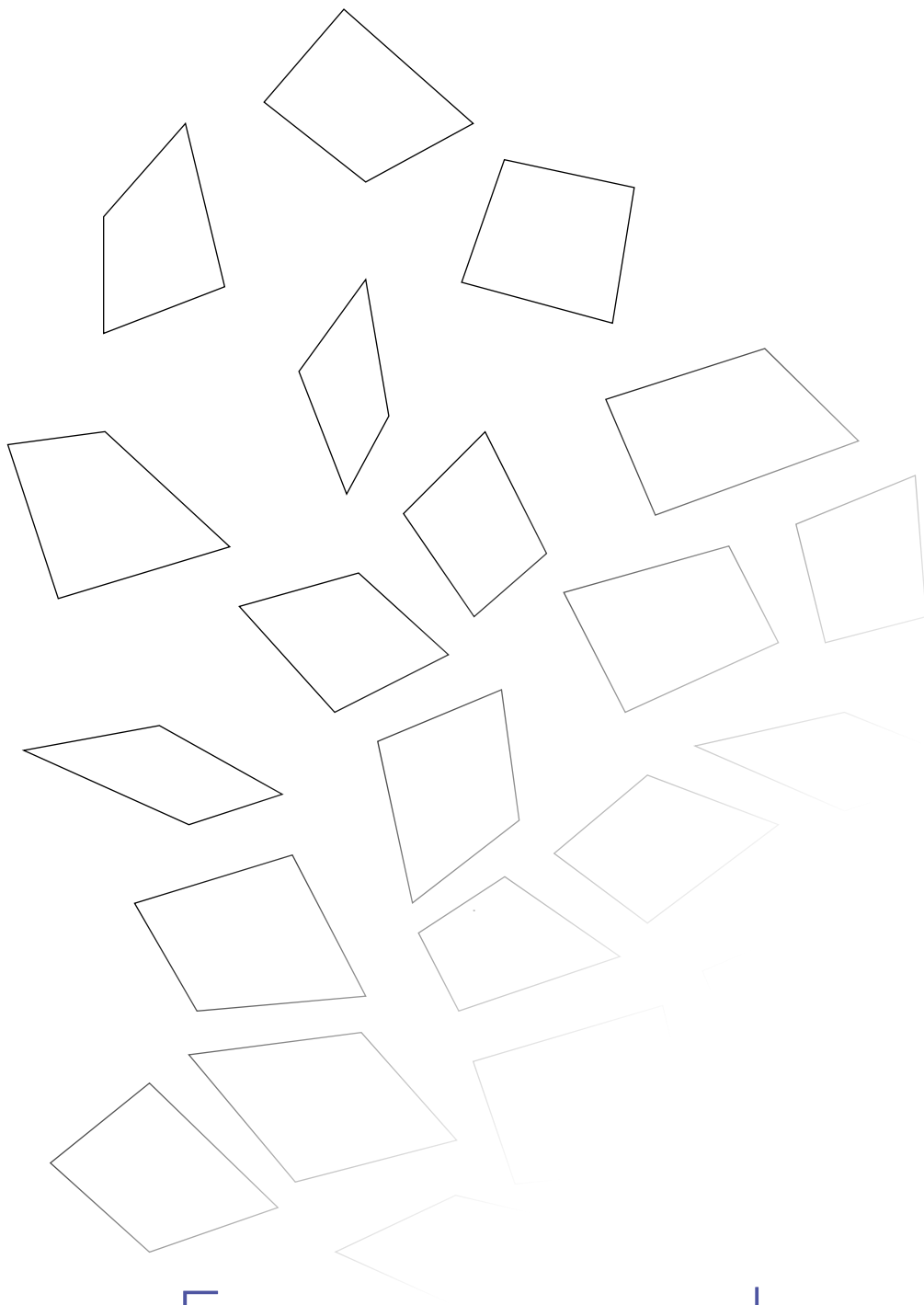
Fourthly, the national evaluation reports recognise the importance of the national equality bodies for protecting the principle of equal treatment. Hence, it is recommended that Member States strengthen the impact of the work of these bodies, guarantee their functional independence and provide appropriate financial resources so that they can fulfil their function. Furthermore, some of the national evaluations discuss establishing a separate independent body with competence to resolve disputes concerning discrimination.

Finally, it is perhaps worth reflecting on the process of preparing the national evaluation reports. As indicated in the introduction, the evaluations analysed in this article differ in terms of how they were commissioned and who executed them. The evaluation of the anti-discrimination legislation in Belgium was foreseen by the legislation itself, while in the other three countries evaluations were commissioned by state authorities or national equality bodies. In Austria the evaluation was carried out by the federal government as compared to a committee of experts in Belgium, an independent expert in Sweden and the national equality body in Poland.

There is clearly no single right approach to carrying out such evaluations. However, obliging state authorities to conduct them periodically, following the Belgian example, might be recommended. Otherwise, evaluating national anti-discrimination frameworks may be dependent on non-legal factors such as the political will of the state authorities or availability of funds. Furthermore, irrespective of who bears the main responsibility for such evaluations, broad participation by different actors involved in protecting the principle of equal treatment is recommended. State authorities, national equality bodies, non-governmental organisations and independent experts may contribute to developing appropriate recommendations by sharing their diverse views on and experiences with anti-discrimination legislation.

This comparative analysis of the problems presented in the national evaluation reports certainly does not aspire to be exhaustive in respect of the topic of implementing the standards laid down in the equality directives and adopting certain solutions that go beyond these standards but may enhance the protection against discrimination in Austria, Belgium, Poland and Sweden. However, the authors decided to underscore selected issues in order to present a variety of the challenges these Member States face when it comes to ensuring effective and comprehensive protection against unequal treatment, not only with regard to the national anti-discrimination legislation but also in relation to its enforcement.

Although the article focuses only on four Member States, one general conclusion may certainly be drawn: pursuit of an adequate level of protection against discrimination requires not only evaluating national legislative frameworks systematically but also establishing pathways for the implementation of the recommendations developed. Moreover, the evaluation reports analysed here prove that a follow-up process subsequent to the evaluations is very important, as carrying out evaluations every few years (and some of the evaluation reports were published in 2016 and 2017), does not in itself lead to the change that is needed. This, however, may certainly be a political issue rather than a legal one.



European case law update

This section provides an overview of the latest main developments in gender equality and non-discrimination cases pending or decided by the Court of Justice of the EU and the European Court of Human Rights, from 1 January to 30 June 2021.

Court of Justice of the European Union

REFERENCES FOR PRELIMINARY RULINGS – ADVOCATE GENERAL OPINIONS

Disability

Case C-824/19, TC, *UB v Komisija za zashtita ot diskriminatsia, VA*, Opinion of Advocate General Saugmandsgaard Øe, delivered on 22 April 2021, ECLI:EU:C:2021:324

This request for a preliminary ruling was submitted by the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) and questions whether the total exclusion of a blind person from participating in criminal proceedings as a paid juror can be justified on the basis of Article 4(1) of the Employment Equality Directive. In that sense, the referring court asks the Court of Justice whether sight may constitute a genuine and determining occupational requirement for the activity exercised by a juror.

The case sets the court president and a judge of a criminal chamber, on the one hand, in opposition to the Bulgarian equality body (the Commission for Protection against Discrimination, CPAD) and a blind juror of that criminal chamber, on the other. The CPAD had imposed fines on the original respondents when finding that they had discriminated against the original claimant by refusing to allow her to sit in court. Almost 18 months after being sworn in as a juror, the original claimant had still not been allowed by the two original respondents to participate in any criminal proceedings. At that time, an electronic system of allocating jurors had been put in place, which had thereby allowed the original claimant to exercise her right as a juror.

Having noted that the questions at hand do not concern all jurors in criminal proceedings but only those who exercise this activity in a paid, and therefore professional capacity, the Advocate General determined swiftly that a situation such as that of the original claimant falls within the scope of the Directive, and that the original claimant had experienced a difference of treatment based directly on her disability. The Advocate General then examined whether that difference of treatment could be covered by any of the derogations provided by the Directive. Having excluded the protection of the rights and freedoms of others (Article 2(5)) due to the requirement of a legislative measure, the Advocate General went on to analyse Article 4(1) of the Directive, providing an exception for genuine and determining occupational requirements.

Agreeing with the original respondents that ensuring a fair trial, which is a fundamental right enshrined notably in Article 47 of the EU Charter of Fundamental Rights, constitutes a legitimate aim, the Advocate General found that the core question which remained was ‘whether it is necessary for a juror to be able to see in order to ensure a fair trial and, if so, whether the exclusion of a blind person from participation as a juror in any criminal proceedings is an appropriate response which does not go beyond what is necessary to achieve that objective’ (paragraph 52).

Balancing the right to a fair trial on the one hand with the right not to be discriminated against on the other, the AG first concluded that it does not automatically follow from the rules and principles of criminal procedure that aim to ensure a fair trial that it is necessary for a juror hearing oral arguments to be able also to see, although there are situations where sight is required for the proper performance of the duties of a juror. To determine, secondly, whether a blind juror can be regarded as unable to carry out his or her duties in *all* criminal proceedings, the AG considered the prohibition of discrimination on the ground of disability in the employment field, examining whether the Directive read in light of the UN Convention on the Rights of Persons with Disabilities may have an effect on the wide discretion of Member States in the appointment of jurors in criminal matters.

Referring notably to the international principles and guidelines on access to justice for persons with disabilities published by the United Nations in 2020,¹ the AG noted the duty of Member States to ensure equal access of persons with disabilities to all aspects of the adjudicative process, including as jurors, and to provide appropriate accommodation measures to that end. The AG finally underlined that Member States have a certain leeway to limit the activity of blind jurors by adopting national rules of criminal procedure outlining jurors' tasks, such as potential visits to crime scenes involving reconstructions for instance, or the consideration of the role of body language during criminal proceedings. In the present case, however, the original claimant fulfilled the national criteria for eligibility as a juror and was admitted and sworn in as such. Her exclusion from exercising that activity was solely based on an assessment by two persons who considered her to be unable to exercise the activity of juror. Considering that Article 4(1) of the Directive stipulates that exceptions for genuine and determining occupational requirements must be provided for *by the Member State*, the AG concluded that the Directive, read in the light of the UN Convention, 'requires that the rules and principles of criminal law be interpreted in such a way as to ensure that a blind juror can, wherever possible, participate in criminal trials' (paragraph 97).

REFERENCES FOR PRELIMINARY RULINGS – JUDGMENTS

Case C-843/19, *Instituto Nacional de la Seguridad Social (INSS) v BT*, judgment of 21 January 2021, ECLI:EU:C:2021:55

Gender

This request for a preliminary ruling concerns the interpretation of Article 4(1) of Directive 79/7/EEC on equal treatment for men and women in matters of social security.² The request was submitted by the Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia, Spain), in the proceedings between the Instituto Nacional de la Seguridad Social (INSS) (National Social Security Institute) and BT, concerning the refusal to grant BT an early retirement pension.

The applicant made contributions to a Spanish social security scheme for domestic workers for an extended period of time during her employment. In December 2016, she requested early retirement at the age of 63, in accordance with the *Ley General de la Seguridad Social* (General Law on Social Security) (LGSS), Article 208, entitled 'Voluntary early retirement of the interested party'.³ However, her request was denied by the INSS because she had not fulfilled the criterion set out in Article 208(1)(c) of the LGSS, which requires 'that the amount of the voluntary early retirement must be higher than the amount of the minimum pension which would be due to the person concerned when turning 65'. The exclusion of persons who do not reach the legal minimum pension prevents the payment of pension supplements to these persons, which would otherwise entail extra costs to the national budget.

BT brought an action before the Juzgado de lo Social no 10 de Barcelona (Barcelona Social Court No. 10), which found that the provision of the LGSS constituted indirect discrimination on the ground of sex as it affects more women than men since domestic work is mainly performed by women. Moreover, if a worker contributed for 44.5 years to the social security scheme for domestic workers, they would still be unable to obtain early retirement at the age of 63. The INSS appealed this judgment before the referring court (the High Court of Justice). The High Court of Justice emphasises that the contribution to the social security scheme for domestic workers was (initially) lower than the contribution to the general social security scheme, which resulted in lower pensions for domestic workers. The referring court recognises that, according to statistics, 89 % of domestic workers enrolled in the aforementioned scheme are women. However, to determine whether Article 208(1)(c) of the LGSS gives rise to indirect discrimination,

1 The guidelines are available at: <https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2020/10/Access-to-Justice-EN.pdf>.

2 Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L6, pp. 24-25, 19.12.1978, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31979L0007>.

3 Spain, Royal Legislative Decree 8/2015 (*Real Decreto Legislativo 8/2015*) of 30 October 2015 (BOE No 261, 31 October 2015).

it is necessary to consider all persons who fall within the scope of that provision. Statistics show that a larger percentage of retired women than men receive a pension supplement in order to reach the legal minimum pension, which indicates that more women are disadvantaged by Article 208(1)(c) of the LGSS.⁴ In order to determine the (in)compatibility of Article 208(1)(c) of the LGSS with Article 4(1) of Directive 79/7/EEC the referring court decided to stay the proceedings to refer a preliminary question to the Court of Justice.

Essentially, the Court of Justice is asked whether Article 4(1) of Directive 79/7 must be interpreted to preclude national legislation that makes a worker's right to early retirement subject to the condition that the amount is higher than the amount that the worker would be entitled to at the age of 65, considering that legislation puts female workers at a particular disadvantage compared to male workers.

The Court starts out by recalling that Article 4(1) of Directive 79/7 prohibits all discrimination on the grounds of sex, *inter alia*, regarding the conditions for access to statutory schemes. Next, the Court notes that a rule, such as Article 208(1)(c) of the LGSS, is not directly discriminatory, because it applies without distinction to both male and female workers. However, the concept of indirect discrimination in the context of Directive 79/7 must be understood in the same way as in the context of Directive 2006/54.⁵ Article 2(1)(b) of Directive 2006/54 defines indirect discrimination as a situation where an apparently neutral criterion would particularly disadvantage persons of one sex, except if that criterion is objectively justified by a legitimate aim (and the means of achieving that aim are appropriate and necessary).

In the present case, the Court agrees with the referring court that all workers who are subject to the general social security scheme (which includes those workers enrolled in the social security scheme for domestic workers) should be considered. Moreover, the proportion of persons enrolled who are disadvantaged by Article 208(1)(c) of the LGSS can indeed be identified by considering the number of retired persons who receive a pension supplement in order to reach the minimum legal pension amount. The persons receiving a pension supplement would have been refused early retirement, since their pensions would have been lower than the minimum legal pension. However, to determine whether Article 208(1)(c) of the LGSS is contrary to Article 4(1) of Directive 79/7, persons who do not fulfil other conditions for early retirement (such as due to age and the length of their contributory period) should not be taken into account. Instead, as put forward by the INSS and the Spanish Government in their written observations, the number of newly retired persons that fulfil these conditions but still receive a pension supplement compared to the total number of newly retired persons should be taken into consideration. If the statistics show that more women receive a pension supplement than men, it would be necessary to hold that Article 208(1)(c) of the LGSS constitutes indirect discrimination based on sex, contrary to Article 4(1) of Directive 79/7, unless it were justified by objective factors.

The INSS and the Spanish Government justify the exclusion of these workers from early retirement by the aim of Article 208(1)(c) of the LGSS to maintain the viability of the Spanish social security scheme. A balance needs to be struck between the time spent in work and the time spent in retirement, above all because unrestricted access to early retirement would have serious financial consequences for the Spanish social security scheme. As previously held by the Court, budgetary considerations alone cannot justify discrimination. However, the objective of ensuring the long-term funding of retirement benefits may be considered legitimate and thus justify the difference in treatment. In the present case, the Court holds that the objectives put forward by the INSS and the Spanish Government can indeed justify a difference in treatment. The national legislation appears appropriate to achieve those objectives. Moreover, the Court notes that the legislation was put in place in a coherent and systematic manner and does not appear to go beyond what is necessary to achieve the objectives pursued. Therefore, it must be concluded that Article 4(1) of Directive 79/7 does not preclude the provision at issue in the case.

4 The referring court highlights the fact that, in 2018, 422 112 men received a pension supplement, which represents 15.23 % of men's pensions, compared to 468 822 women, or 31.45 % of women's pensions.

5 See judgment of 8 May 2019, *Villar Láiz*, C161/18, EU:C:2019:382, paragraph 37 and the case law cited.

Case C-16/19, *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, Grand Chamber judgment of 26 January 2021, ECLI:EU:C:2021:64


 Disability

This request for a preliminary ruling was submitted by the Sąd Okręgowy w Krakowie (Regional Court, Kraków, Poland) and concerns the payment of a disability allowance by an employer to those employees who submit disability certificates after a certain date. The aim of announcing the existence of such an allowance was to encourage employees with disabilities who had not yet submitted certificates to do so, in an attempt to reduce the amount of the contributions payable by the employer to the State Fund for the Rehabilitation of Persons with Disabilities. The claimant before the referring court (as well as 15 other employees) had submitted such a certificate before the date limit and was thus refused the allowance.

The Court first examined whether a difference in treatment occurring within a group of persons who have disabilities may be covered by the ‘concept of discrimination’ referred to in Article 2 of the Employment Equality Directive. First, with regard to the wording of the Directive, the Court noted that by referring to discrimination and less favourable treatment ‘on’ any of the protected grounds and by using the terms ‘another [person]’ and ‘other persons’, Article 2 cannot be interpreted as prohibiting only differences in treatment between persons who have disabilities and persons who do not. The less favourable treatment or disadvantage must however occur as a result of disability. The Court then noted that neither the context of the provision, nor the objective of the Directive can justify an interpretation limiting the potential comparator in cases of alleged discrimination on the ground of disability in such a way.

While recognising that the relevant comparator in instances of discrimination on the ground of disability is, as a general rule, a person without a disability, the Court noted that the protection provided by the Directive would be diminished if a situation where discrimination occurs within a group of persons who have disabilities is by definition not covered.

The Court went on to assess whether the practice at hand could be covered by the ‘concept of discrimination’ referred to in Article 2 of the Directive.

First, the Court examined the case from the perspective of potential direct discrimination. It thus noted that it was not disputed that the difference in treatment was less favourable to the workers with disabilities who had already submitted their disability certificates before the date decided by the employer. The Court further noted that, with regard to the purpose of the allowance, the workers who had already submitted their certificates and those who had not were in a comparable situation, as they had all entered the service of the employer before that date and they all contributed to the savings sought by the employer. A finding of direct discrimination would thus be necessary if the referring court were to determine that the temporal condition imposed by the employer for receiving the allowance constitutes a criterion that is inextricably linked to the disability of the workers who were refused that allowance. In this regard, the Court stated that a particularly relevant element to include in that assessment should be whether the practice made it impossible for a clearly identified group of workers – those disabled workers whose status was already known to the employer – to satisfy the temporal condition and thereby benefit from the allowance.

Assessing, secondly, whether the practice at hand could amount to indirect discrimination, the Court found that it would be for the referring court to determine whether the difference in treatment stems from an apparently neutral practice and, if so, whether it has the effect of placing persons who have certain disabilities at a particular disadvantage as compared with persons who have other disabilities. In this regard, the Court noted that it could be held that primarily workers with disabilities that were visible and/or required reasonable accommodation were, in practice, obliged to make their disability formally known to the employer before the date chosen to benefit from the allowance. Finally, the Court held that a difference in treatment such as that at hand – were it to be found by the referring court to

lead to a particular disadvantage for workers with certain disabilities – would not appear to be capable of being objectively justified by a legitimate aim seeing as the purpose sought by the employer was to save money.

Gender

Case C-129/20, *XI v Caisse pour l'avenir des enfants*, judgment of 25 February 2021, ECLI:EU:C:2021:140

This request for a preliminary ruling concerns the interpretation of the Framework Agreement on parental leave annexed to Directive 96/34 (the Framework Agreement) and its successor, the revised Framework Agreement. The request has been made by the Cour de cassation du Grand-Duché de Luxembourg (Court of Cassation of the Grand Duchy of Luxembourg) in proceedings between XI and the Caisse pour l'avenir des enfants (Children's Future Fund) concerning the latter's refusal to grant XI a right to parental leave to take care of her twins on the ground that she was not in paid employment on the day on which they were born.

In accordance with Luxembourg law, a parent may claim parental leave as long as they are lawfully employed at the time of the birth of the child, and have been employed for a period of at least 12 months immediately preceding the start of the parental leave. XI started working in September 2011 as a teacher in post-primary education for the Grand Duchy of Luxembourg. Her fixed-term contract ended on 26 January 2012, and on 4 March 2012 she gave birth to twins (while she was unemployed). After multiple fixed-term contracts, XI entered into a contract of indefinite duration with the Grand Duchy of Luxembourg in 2014. In March 2015, XI made a request to take up parental leave as of 15 September 2015. However, her request was denied on the ground that at the time of the birth of her children she was unemployed (and not affiliated in that regard to the social security scheme), pursuant to Article 29*bis* of the amended Law of 16 April 1979.

After different legal proceedings, XI argued before the referring court that the Framework Agreement annexed to Directive 96/34 precluded the application of Article 29*bis* of the amended Law of 16 April 1979. The Court of Cassation decided to stay the proceedings to refer to the Court of Justice the question whether Clauses 1.1, 1.2, 2.1 and 2.3(b) of the Framework Agreement must be interpreted as precluding the application of a provision of national law (such as Article 29*bis* of the amended Law of 16 April 1979) that lays down a condition for parental leave requiring that the worker is lawfully employed at the time of the birth of the child (and has been employed for a period of at least 12 months immediately preceding the start of parental leave).

The Court starts out by emphasising that it should be borne in mind that a new rule of law applies from the entry into force of the act introducing it. Article 4 of Directive 2010/18 stipulates that Directive 96/34 is repealed as of 8 March 2012. Pursuant to Article 3(1) of Directive 2010/18 and Clause 8.4 of the revised Framework Agreement, that date was the date by which the Member States had to comply with the provisions of Directive 2010/18 and of the revised Framework Agreement. Considering XI applied for parental leave in March 2015, the Court determined that her application is governed by the provisions of Directive 2010/18. Therefore, the Court analysed the question referred in light of the revised Framework Agreement.

First, the Court observes that it is apparent from the wording of Clause 3.1(b) of the revised Framework Agreement that the Member States may make the grant of parental leave subject to the condition of a prior period of work that may not exceed one year. Therefore, the condition laid down in Article 29*bis* of the amended Law of 16 April 1979, which requires a minimum of 12 months of employment before taking up the parental leave, is not precluded by the revised Framework Agreement. Secondly, as regards the condition of employment at the time of the birth of the child, the Court first emphasises that under Clause 2.1 of the revised Framework Agreement, the right to parental leave is an individual right to take care of your child until a given age (which may not exceed eight years). Certain conditions may be laid

down by Member States to govern this individual right. However, the requirement of employment at the time of the birth is incompatible with the objectives of the revised Framework Agreement, namely, to promote equality between men and women and to enable working parents to better reconcile their professional, private, and family life. Such a requirement would exclude parents who were not working at the time of the birth (or adoption) of their child from the possibility of taking parental leave at a later time in their lives. The exclusion of those parents would be contrary to the individual right of every worker to parental leave. Therefore, the Court holds that the revised Framework Agreement precludes national legislation, such as Article 29*bis* of the amended Law of 16 April 1979, which requires employment at the time of the birth to be able to take up parental leave.

Case C-30/19, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, Grand Chamber judgment of 15 April 2021, ECLI:EU:C:2021:269

Racial or
ethnic origin

This request for a preliminary ruling was submitted by the Högsta Domstolen (Supreme Court, Sweden), in the context of an action brought by the Swedish national equality body, the Equality Ombudsman, on behalf of an air passenger who considered himself to have been a victim of racial discrimination, against a national airline company. The question referred concerned the legality, under EU law, of the procedural possibility which was available to the respondent of acquiescing to the victim's claim for compensation, thereby bringing an end to the proceedings, without recognising the existence of discrimination.⁶ The referring court thus questioned whether the national legislation allowing such a means to end the proceedings is in compliance with Article 15 of the Racial Equality Directive read in the light of Article 47 of the EU Charter of Fundamental Rights, which guarantees every person the right to an effective judicial remedy.

Having recalled the meaning of Articles 7 and 15 of the Directive, referring to its body of relevant case law, the Court provided its analysis of the national law at hand. The Court noted that when a respondent acquiesces to the victim's claim for compensation while explicitly contesting the existence of the alleged discrimination, the court hearing the case will be obliged to order the payment of the sum claimed without being able to draw any conclusion regarding the existence of discrimination. Consequently, in such a situation, the victim will be unable to obtain a ruling by a civil court on the existence of the alleged discrimination. The Court concluded that such a national law necessarily infringes the requirements of Articles 7 and 15 of the Directive, read in the light of Article 47 of the Charter, and made the following four findings.

First: where the respondent does not recognise the discrimination alleged, the person who considers himself or herself to be the victim of discrimination must be able to obtain from the court a ruling on the possible breach of the rights that the procedures referred to in Article 7 of the Directive are intended to enforce. Consequently, 'the payment of a sum of money alone, even where it is the sum claimed by the claimant, is not such as to ensure effective judicial protection for a person who requests a finding that there was a breach of his or her right to equal treatment' (paragraph 47).

Second: the payment of a sum of money cannot, for the purpose of providing recognition for the victim of the reality of the alleged discrimination, be regarded as having a satisfactory compensatory function. Similarly, the requirement to pay a sum of money cannot be considered as having a truly deterrent effect as regards the respondent by inducing them not to repeat the discriminatory behaviour 'where, as in the present case, he or she contests the existence of any discrimination but considers it more advantageous, in terms of cost and reputation, to pay the compensation claimed by the claimant, while also thereby avoiding a finding by a national court that there had been discrimination' (paragraph 49). The availability of criminal procedures cannot remedy the failure of civil law remedies to comply with the Directive,

⁶ For a detailed summary of the facts of the case and an analysis of the Opinion of Advocate General Saugmandsgaard Øe of 14.05.2020, see *European equality law review*, Issue 2020/2, pp. 75-76.

notably due to the rules on the burden of proof applicable in criminal procedures that are unfavourable to the victim.

Third: procedural law principles or considerations cannot lead to a different interpretation. Notably, the national law at hand transfers the control of the procedure to the respondent rather than promoting an amicable settlement that would permit each party to retain the freedom to define its arguments. Furthermore, a national court examining the existence or otherwise of discrimination in a situation where the respondent has not recognised or even contested it, would not in any way infringe the principle that the subject matter of an action is defined by the parties.

Fourth: compliance with Articles 7 and 15 of the Directive would not, as argued by the respondent, require the creation of a new right of action, which would be contrary to EU law. Instead, the referring court is merely required to disapply a procedural rule of national law that is incompatible with those provisions of the Directive, in accordance with the principle of primacy of EU law.

The Court thus concluded that Articles 7 and 15 of the Directive, read in the light of Article 47 of the Charter, must be interpreted as precluding a national law such as that at hand.

Case C-511/19, *AB v Olympiako Athlitiko Kentro Athinon – Spyros Louis*, judgment of 15 April 2021, ECLI:EU:C:2021:274

This request for a preliminary ruling was submitted by the Areios Pagos (Court of Cassation, Greece), and concerned the compatibility with the Employment Equality Directive of a temporary measure put in place in 2011 in Greece to address the immediate need to reduce wage costs in the public sector in accordance with the agreement concluded between Greece and its creditors to tackle the economic crisis at that time. The measure placed staff under private law contracts in the public sector on reserve for a maximum of 24 months based on the criterion of the closest entitlement to retire on a full old-age pension corresponding to 35 years' insurance and having reached the minimum age of 58 years.

The case before the referring court was brought by a former employee who had been placed by his employer under the labour reserve system, causing a decrease of his salary to approximately 60 % of its previous level. When his contract was terminated, the severance pay to which he would have been entitled was offset against the remuneration he had received during his time on the labour reserve, in accordance with national law, and he therefore did not receive any severance pay. Before the national courts, he contested his transfer to the labour reserve system and argued that the system itself amounted to age discrimination contrary to the Employment Equality Directive.

To answer the long series of questions posed by the referring court, the Court of Justice first determined without any difficulty that the legislation at hand came within the scope of the Employment Equality Directive, and then examined whether it established a difference in treatment on the ground of age. Considering that the minimum age requirement of 58 years is an essential requirement for placement on the labour reserve system, the Court concluded that the application of that system is based on a criterion that is inextricably linked to age. There is therefore a difference in treatment directly based on age. Finally, the Court examined whether such a difference may be justified in the light of Article 6(1) of the Directive. In this regard, the Court noted that the objective of reducing public expenditure cannot, even in the context of an acute economic crisis, constitute in itself a legitimate aim under Article 6(1). However, the creation of the labour reserve system appeared to be pursuing legitimate employment-policy objectives in the sense of avoiding dismissing the workers concerned, thereby maintaining a high level of employment, and also establishing a balanced age structure among civil servants.

Having determined without much difficulty that the means used to achieve those aims were appropriate, the Court examined whether they were also necessary for that purpose. The Court thus examined whether

Age

the national legislature, 'in exercising its broad discretion in the field of social and employment policy, sought to attain the objectives pursued (...) without unduly prejudicing the interests of workers who have been placed under the labour reserve system' (paragraph 47). In this regard, the Court noted that the fall in remuneration, loss of opportunity for advancement and reduction or even abolition of severance pay experienced by the workers placed on the labour reserve did not appear to be unreasonable, first, seeing as that the workers were placed on the reserve for a relatively short period at the end of which they would benefit from a full pension, and, secondly, considering the economic context at the time. Noting also that the placement under the reserve system was accompanied by measures for the protection of the workers concerned, the Court finally concluded that the legislation does not appear to prejudice unreasonably the legitimate interests of those workers. Therefore, it did not go beyond what was necessary, in the context of an acute economic crisis, to achieve the employment-policy objectives pursued.

Case C-130/20, *Instituto Nacional de la Seguridad Social (INSS) v YJ*, judgment of 12 May 2021, ECLI:EU:C:2021:381

Gender

This request for a preliminary ruling was submitted by Social Court No. 3, Barcelona, Spain and concerns the interpretation of Article 4(1) of Council Directive 79/7/EEC regarding equal treatment for men and women in matters of social security.⁷ The request has been made in proceedings between YJ and the Instituto Nacional de la Seguridad Social (National Social Security Institute – INSS) concerning the latter's refusal to grant YJ a maternity supplement to her early retirement pension.

The applicant in the proceedings was granted early retirement by the INSS on 11 December 2017. Article 60 of the *Ley General de la Seguridad Social* (General Law on Social Security – LGSS) provides for a pension maternity supplement for women who have had at least two biological or adopted children in the event of retirement at the statutory age or early retirement on certain grounds laid down by law. Despite the fact that the applicant had two children during her employment period, she was denied the pension maternity supplement because she had requested the early retirement. Subsequently, YJ brought an action before the referring court, claiming, in essence, that Article 60 of the LGSS leads to discrimination against women who, on the ground that they have opted for early retirement, are not entitled to the pension maternity supplement.

The referring court asks the Court to clarify whether Article 4(1) of Directive 79/7 must be interpreted as precluding national legislation that provides that women who have had at least two biological or adopted children are entitled to a pension maternity supplement in the event of retirement at the statutory age or early retirement on certain grounds laid down by law, but not if the person concerned voluntarily takes early retirement.

The Court notes that the referring court's question is formulated in a general way, and does not indicate the provision(s) of Directive 79/7 that it seeks to have interpreted. The Court finds however, that it is apparent that the referring court in fact, seeks to determine whether there has been direct discrimination on the ground of sex within the meaning of Directive 79/7.⁸ The Court notes in that regard that the concept of direct discrimination 'on ground of sex', referred to in Article 4(1) of Directive 79/7, must be understood as covering any situation in which one person is treated less favourably on grounds of sex than another person is, has been, or would be treated in a comparable situation.⁹ It follows that, in order for direct discrimination to be 'on ground of sex', a person must be treated unfavourably on account of being male or female. Thus, it follows from this provision that the concept of 'discrimination on ground

7 Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L6, pp. 24-25, 19.12.1978, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31979L0007>.

8 Article 4(1) of Directive 79/7 provides that the principle of equal treatment for men and women in matters of social security means that there must be 'no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to the marital or family status' of the person concerned.

9 Judgment of 26 June 2018, *MB* (Change of gender and retirement pension), C-451/16, EU:C:2018:492, paragraph 34).

of sex’ can apply only to cases of discrimination between male workers, on the one hand, and female workers, on the other.

Directive 79/7 cannot apply to the situation at hand, since the alleged discriminatory treatment is not ‘on ground of sex’. Instead, the criterion on which the grant of the relevant pension maternity supplement is granted or denied relates not to the sex of the worker concerned, but to the detailed rules for that worker’s entitlement to retirement, which, in this case, is whether the early retirement is on a voluntary basis or not. Therefore, the situation in question does not relate to discrimination between male workers, on the one hand, and female workers, on the other, but to an alleged unequal treatment between female workers. In those circumstances, it must be held that the situation at issue in the main proceedings does not fall within the scope of Directive 79/7.

Case C-624/19, *K and others v Tesco Stores Ltd*, judgment of 3 June 2021, ECLI:EU:C:2021:429

Gender

This request for a preliminary ruling was submitted by the Watford Employment Tribunal, United Kingdom and concerns the interpretation of Article 157 TFEU on equal pay for work of equal value. More specifically, the referring court wished to receive clarification regarding the direct effect of the provision.

Some 6 000 claimants brought proceedings against their employer Tesco Stores Ltd (Tesco) on the ground that they had not received equal pay for equal work. Tesco is a retailer selling products online as well as in 3 200 stores located throughout the UK. The company employs approximately 250 000 workers in its stores, and approximately 11 000 employees in its network of distribution centres. The claimants of this case work in the company’s stores, and claim to have received less pay than their male colleagues working in the distribution centres whilst performing work of equal value. This is contrary to the Equality Act 2010¹⁰ and Article 157 TFEU. The claimants attest that even though they work in different establishments to their comparator, common terms and conditions are applicable in the stores and distribution centres. Moreover, Tesco Stores can be regarded as a ‘single source’ for the employment terms and conditions in the meaning of Article 157 TFEU.

Tesco on the other hand, contends that the claimants cannot compare themselves to the male employees of the distribution centres because there are no common terms of employment, and Tesco does not qualify as a ‘single source’ employer as required by Article 157 TFEU. Moreover, the direct effect of Article 157 is questioned by relying on the findings of the CJEU in *Defrenne*.¹¹

The referring court held that there is indeed uncertainty in the courts and tribunals in the UK with respect to the direct effect of Article 157 TFEU. This uncertainty results from the Court’s judgement in *Defrenne* where in paragraph 18, the distinction is articulated between discrimination that may be identified solely with the aid of criteria based on equal work and equal pay, and discrimination based on ‘work of equal value’ which can only be identified by reference to more explicit implementing provisions in EU or national law.¹² Given that the Tribunal is unsure whether the claims in the case at hand fall within the latter category, it asks the Court whether Article 157 TFEU must be interpreted as having direct effect in proceedings between individuals in which failure to observe the principle of equal pay for male and female workers for ‘work of equal value’, as referred to in that Article is pleaded.

The CJEU held that the interpretation of Tesco regarding the direct effect of Article 157 TFEU to the present case could not be supported by either the wording of the Article or the Court’s case law. Article 157

10 UK, Equality Act 2010, available at: <https://www.legislation.gov.uk/ukpga/2010/15/contents>.

11 CJEU, judgment of 8 April 1976, *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena*, C-43/75, EU:C:1976:56.

12 The referring tribunal makes reference, in that regard, to paragraph 18 of the judgment of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56.

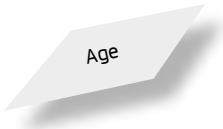
TFEU ‘imposes, clearly and precisely, an obligation to achieve a particular result and is mandatory as regards both “equal work” and “work of equal value”’. The Court further explained that, according to the Court’s case law the provision produces direct effects for individuals by creating rights which should be safeguarded by the national courts. In that context, it is a matter of factual assessment by the national court to determine whether the workers concerned perform ‘equal work’ or ‘work of equal value’, as referred to in Article 157 TFEU.

The Court also relied in its assessment on the objective pursued by Article 157 TFEU, namely the elimination, for equal work or work of equal value, of all discrimination on grounds of sex as regards all aspects and conditions of remuneration. In connection to this, it notes that the principle referred to in this provision, of equal pay for male and female workers for equal work, or work of equal value, forms ‘part of the foundations of the European Union’. Moreover, in accordance with the second subparagraph of Article 3(3) TEU, the European Union is to promote, inter alia, equality between men and women. Article 23 of the Charter of Fundamental Rights of the European Union states that equality between women and men must be ensured in all areas, including employment, work and pay. Therefore, in light of those factors, it must be held that if the direct effect of Article 157 TFEU would depend on whether the principle of equal pay for male and female workers is relied upon in respect of ‘equal work’ or of ‘work of equal value’ this would be contrary to the effectiveness and the attainment of the objective pursued by that Article.

Furthermore, the Court stipulated that Article 157 TFEU allows a comparison to be made between employees if there is a ‘single source’ that is responsible for setting their pay. This approach means that it does not matter whether the employees do different jobs in different places, as long as a single employer is responsible for ensuring equal pay. The Court attests that Tesco Stores appears to constitute in its capacity as employer, a single source to which the pay conditions of the workers performing their work in its stores as well as in the distribution centres may be attributed. It is, however, up to the national court to determine whether Tesco Stores is responsible for any discrimination prohibited pursuant to Article 157 TFEU.

Therefore, the Court concludes that the answer to the main question in the proceedings, is that Article 157 TFEU must be interpreted as having direct effect in proceedings between individuals in which failure to observe the principle of equal pay for male and female workers for ‘work of equal value’, as referred to in that Article, is pleaded.

Case C-914/19, *Ministero della Giustizia v GN*, judgment of 3 June 2021, ECLI:EU:C:2021:430


 Age

This request for a preliminary ruling was submitted by the Consiglio di Stato (Council of State, Italy) and concerned an age limit (50 years) imposed by the Ministry of Justice for the participation in a competitive exam to become a notary. The initial action before the referring court was brought by a claimant who challenged the decree establishing the age limit, as it prevented her from participating in the competition. The first instance administrative court adopted a temporary measure allowing the claimant to participate in the competitive exam, which she passed with success. The same court later declared that the claimant’s initial claim was inadmissible as her legitimate interest to bring an action had ceased to exist when she passed the competition. The Ministry of Justice appealed against the decision before the referring court, arguing that the first instance court should have rejected the claim on the merits.

The referring court considers that the claim should have been declared admissible and that the decree at hand complies with national law, but it questions the compatibility of the applicable national law with the Employment Equality Directive.

Having determined that the legislation at hand comes within the scope of the Directive and that it amounts to a difference in treatment based directly on age, the Court went on to examine whether this difference in treatment was justified under Article 6(1) of the Directive. The Italian Government argued that the age limit pursued three legitimate objectives: ensuring that notaries work a reasonable period before retiring so as to ensure the viability of the social security system for notaries; guaranteeing the proper functioning of notarial prerogatives characterised by a high degree of professionalism; and facilitating the generational renewal of the profession and promoting employment of young people within the profession. The Court examined the three objectives invoked and found that while all three objectives are legitimate and permitted by the Directive, the facts of the case appeared to indicate that none of them was sincerely pursued by the national legislation at hand. The Court concluded however that this assessment is left to the referring court, and therefore provided additional guidance in the event that the referring court were to find that the legislation at hand did pursue one of those legitimate objectives.

The Court noted that the referring court would need to determine whether the national legislation at hand is capable of achieving the legitimate objective without affecting in an excessive manner the legitimate interests of candidate notaries who are aged over 50 years. The Court examined the proportionality of the age limit at hand with regard to each of the three objectives invoked by the Government, concluding that it would appear to go beyond what was necessary to achieve either of the three objectives. The Court thus concluded that such a national measure would not appear to be compatible with Article 21 of the EU Charter of Fundamental Rights and Article 6(1) of the Employment Equality Directive, although the final evaluation is left to the referring court.

Case C-94/20, *Land Oberösterreich v KV*, judgment of 10 June 2021, ECLI:EU:C:2021:477

Racial or
ethnic origin

This request for a preliminary ruling was submitted by the Landesgericht Linz (Regional Court of Linz, Austria), and concerned the refusal by the state authorities to renew the original claimant's housing allocation. The claimant is a third-country national of Turkish origin who has a long-term residence permit in Austria. He had benefited from the housing allocation for 20 years when a new regulation entered into force, requiring persons of his status applying for a housing allocation to submit evidence that they have a basic knowledge of the German language. When the claimant failed to submit such evidence, he was refused the allocation. He argued that this refusal amounted to an unjustified disadvantage based on his ethnic origin, and claimed compensation for his material and non-material damage. The first question referred to the Court of Justice related to the interpretation of Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, but the referring court also asked whether the difference in treatment at hand based on nationality could amount to indirect discrimination on the ground of racial or ethnic origin within the meaning of the Racial Equality Directive, and if so, whether it would be justified by the objective of ensuring the social integration of third-country nationals residing in Austria (question 2), and whether the regulation at hand must be interpreted in compliance with Article 21 of the Charter of Fundamental Rights (question 3).

With regard to the second question, the Court concluded swiftly and without much difficulty that the difference in treatment at hand, between third-country nationals who are long-term residents, on the one hand, and Austrian nationals, on the other, does not cause a disadvantage to third-country nationals of a particular ethnic origin. The Racial Equality Directive is therefore not applicable to the present case. With regard to the third question, the Court recalled the limits of the scope of applicability of the Charter, citing Articles 6(1) of the Treaty on the European Union and 51(2) of the Charter itself. The Court thus noted that its conclusions with regard to the first two questions had found that neither Directive 2003/109 nor the Racial Equality Directive was applicable to the specific provision at hand. Therefore, the provision falls beyond the scope of the Charter and cannot be interpreted in the light of its Article 21. Finally, the Court found that if Directive 2003/109 were to be found to be applicable to the national provision at hand, the Charter would consequently also apply. However, in that case, the Court swiftly concluded that a difference in treatment between third-country nationals and Austrian nationals that does not cause a

disadvantage to people of any particular ethnic origin, cannot amount to discrimination on the ground of ethnic origin in the meaning of Article 21 of the Charter. The Court did not explore whether discrimination on 'any ground' within the meaning of that provision could have been at hand.

European Court of Human Rights

Gender

***Jurčić v Croatia* (Application No. 54711/15), judgment of 4 February 2021**

In the case of *Jurčić v Croatia*, the Court established unjustified sex discrimination based on the refusal of the Croatian Health Insurance Fund to pay employment-related benefits to a pregnant woman. The applicant in the case had been almost continuously employed from 1993 until 1 November 2009, and on 17 November 2009, she underwent in vitro fertilisation (IVF). Shortly after the procedure, she entered into a new employment contract. At the time of starting the new employment position, she could not have known whether the procedure would be successful. Nevertheless, three weeks after the employment contract was concluded, the applicant took sick leave on account of pregnancy-related complications and requested payment of salary compensation for the period of sick leave. However, the Croatian Health Insurance Fund ('the Fund'), rejected her application for registration as an insured employee, along with her request for salary compensation after a re-evaluation of her health insurance status. The Fund claimed that the applicant's employment was fictitious, since she was medically unfit for employment because of the IVF treatment, and because the location of her employment was in a town that was 360 kilometres away from her residence. Moreover, the applicant acted contrary to the doctor's advice who had recommended that she rest after the IVF procedure. The Fund concluded that the aim of the applicant's employment was solely to obtain salary compensation and other pecuniary advantages related to the status of employed persons.

After spending years unsuccessfully trying to prove her case of sex discrimination in Croatian courts, the applicant lodged the application before the ECtHR relying on Article 14 ECHR in conjunction with Article 1 of Protocol 1 of the Convention.

The Court firstly noted that the Fund's decision to refuse insurance status was based on the ground that the applicant's employment status was declared fictitious due to pregnancy. The Court recalled that a difference in treatment based on pregnancy can only be made in respect of a woman, and therefore constitutes a different treatment on the ground of sex. The retroactive decision of the authorities to deny her the status of an insured person was discriminatory according to the Court, because they would not have reached that conclusion in relation to a person who did not undergo an in vitro fertilisation procedure and who was not pregnant. The applicant explained that this practice was based on the premise that no 'reasonable' employer would employ a pregnant woman, and that no 'honest' pregnant woman would take up employment under such circumstances. The Government maintained that the factual checks performed by the authorities had the legitimate aim of preventing individuals from 'cheating the system' and were aimed at protecting the Government's funds. However, the Court pointed to the fact that the financial obligations imposed on the state during a woman's pregnancy alone could not constitute sufficiently weighty reasons to justify difference in treatment.

The Court reasoned that a pregnancy could not be fraudulent, and that, even though the authorities had been entitled to verify the validity of the facts on which the applicant had been insured, the case law from the Administrative Court indicated that such reviews frequently targeted pregnant women, which the Court classified as being problematic in itself.

The fact that the authorities limited themselves to concluding that, due to the in vitro fertilisation, the applicant was medically unfit to take up the employment in question, thereby implying that she had to refrain from doing so until her pregnancy was confirmed, was sufficient by itself to establish discrimination based on sex according to the Court. Additionally, the Court noted that the authorities failed to provide any explanation as to how the applicant could have consciously concluded a fraudulent

employment contract, in particular bearing in mind that she was under no legal obligation to report the fact that she had undergone an in vitro fertilisation procedure or that she might be pregnant at the moment of concluding her employment contract, especially because the national law prohibits the employer from asking any questions during job interviews that are unrelated to the employment relationship. Furthermore, the Court expressed its concern that the gender stereotyping displayed by the Croatian Health Insurance Fund in its practice of insurance verifications, implies that women should not work or seek employment during pregnancy (or when there is a mere possibility thereof), which presents a serious obstacle to the achievement of real substantive gender equality and is in direct contravention of both domestic and international law.

Taking all above mentioned points into consideration, the Court concludes that the difference in treatment constitutes direct discrimination on ground of sex. There had been no objective justification or necessity in light of the specific circumstances. Therefore, there had been a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 to the Convention. The Court held that Croatia was to pay the applicant EUR 7 500 in respect of non-pecuniary damage and EUR 1 150 in respect of costs and expenses.

***Behar and Gutman v Bulgaria* (Application No. 29335/13) and *Budinova and Chaprazov v Bulgaria* (Application No. 12567/13), judgments of 16 February 2021**

The two judgments presented here were delivered on the same day and originated in the same collective litigation before the Bulgarian courts. The applicants in both cases were claiming that the xenophobic propaganda campaigns of a well-known journalist and politician against the Jewish and Roma communities amounted to harassment and incitement to discrimination against them as members of those communities. The applicants, who were not directly targeted by the hate speech campaigns, sought a court order against the respondent to apologise publicly for a number of statements and to refrain from making such statements in the future. The national courts dismissed their claims, finding that the respondent had exercised his right to freedom of expression.¹³

Before the Court, the applicants' main complaints concerned alleged violations of Articles 8 and 14 of the Convention.

To determine the applicability of Article 8, and thereby of Article 14, the Court examined the severity of the antisemitic and anti-Roma statements made by the respondent. The Court thus developed a test to assess the harmfulness for community members of general anti-minority stereotyping. The criteria established by the Court in this regard were:

1. the characteristics of the group: size, homogeneity, vulnerability, status;
2. the content of the statements (negative stereotyping potential, and specific content); and
3. the form and context of the statements, their reach, the position and status of the author, and the potential to affect a core aspect of the group's identity/dignity.

Based on these criteria, the Court held that the antisemitic statements at hand in the *Behar and Gutman* case were targeting, as a group, Jews, a vulnerable minority. The Court further held that it could 'readily be recognised [...] they were virulently anti-Semitic', 'rehearsed timeworn anti-Semitic narratives', 'denying the Holocaust and casting it as a story contrived as means for financial extortion'. It could 'hardly be questioned' that they amounted to 'extreme negative stereotyping meant to vilify Jews and to stir up prejudice and hatred towards them'.¹⁴

¹³ Bulgaria, Sofia City Court, decision No. 2935 of 21.06.2010 in civil case No. 2703/2010, and Sofia City Court, decision No. 2935 of 20.12.2010 in civil case No. 80/2010. Both decisions became final when the Supreme Court of Cassation refused to hear the appeals against them; see: Ruling No. 972 of 08.08.2012 in civil case No. 1672/2011, and Ruling No.1215 of 15.11.2012 in civil case No. 533/2012.

¹⁴ ECtHR, *Behar and Gutman v Bulgaria* (Application No. 29335/13), judgment of 16.02.2021, paras. 69-71.

Racial or
ethnic origin

Religion
or belief

In the same manner, the Court held that the anti-Roma statements at hand in the *Budinova and Chaprazov* case were targeting, as a group, the Roma minority, ‘long acknowledged as disadvantaged and vulnerable, and in need of special protection’. All the statements were ‘deliberately couched in inflammatory terms, visibly sought to portray Roma [...] as exceptionally prone to crime and depravity’, ‘systematic and characterised by [...] extreme virulence’. The ‘message, conveyed bluntly and repeated many times over, was [...] that Roma were immoral social parasites who abused their rights, lived off the back of the Bulgarian majority, subjected that majority to systematic violence and crime without hindrance, and aimed to take over the country’. The Court thus concluded, similarly to the previous case, that the statements had the ‘capacity to stigmatise Roma [...] as a group and arouse hatred and prejudice against them’, and it was ‘beyond doubt’ that they amounted to ‘extreme negative stereotyping meant to vilify Roma [...] and to stir up prejudice and hatred [...]’.¹⁵

In each case, the Court then took into consideration the position of the respondent as a well-known journalist and politician with a considerable media presence, to conclude that his statements were able to have a sufficient impact on the Jewish and Roma senses of identity and on the self-worth of individual community members, to reach the ‘severity’ threshold for Articles 8 and 14 to apply.

The Court thus found a violation of Article 14 taken in conjunction with Article 8 due to the failure of the national courts to correctly balance the victims’ rights to their private life on the one hand against the respondent’s freedom of expression on the other. The national courts had thus failed to discharge their positive obligation to afford redress to the applicants for the respondent’s discriminatory public statements.

The Court has thus, for the first time, recognised standing under the Convention to victims of hate speech who have not been personally targeted but rather have been affected as members of the targeted group.

Gender

***Yocheva and Ganeva v Bulgaria* (Applications Nos. 18592/15 and 43863/15), judgment of 11 May 2021**

The case concerned discriminatory treatment of the applicants by the Bulgarian authorities based on sex and family status. The first applicant, a Bulgarian single mother of two children, applied for a family allowance ‘for families of children who have only one living parent’ provided by the Family Allowances for Children Act 2002 (FACA).¹⁶ She applied for this allowance because she was the only (living) parent caring for her children. The Bulgarian authorities refused to grant her the allowance because she had failed to submit the required documents for eligibility. More specifically she failed to submit proof of legal recognition of the father and of his death, as well as a certificate attesting that the children were their fathers’ statutory heirs. Subsequently, the first applicant brought judicial review proceedings based on the fact that given that her children’s paternity was unknown, it was impossible to provide a death or heirs certificate. According to the applicant, the refusal to grant her the allowance was unlawful and contrary to Article 6, paragraph 2 of the Constitution, which prohibits discrimination. The applicant further argued that the legal definition of ‘children with only one living parent’, could not exclude children who had not been recognised by their father. The lower courts ruled that the refusal to grant the allowance was indeed unlawful and contrary to the Constitution. However, the decision was appealed by the Bulgarian authorities, and the Supreme Administrative Court quashed the decision of the lower courts. Moreover, the Constitutional Court also rejected the request of the Ombudsperson to declare Section 7(9) of FACA unconstitutional.¹⁷

¹⁵ ECtHR, *Budinova and Chaprazov v Bulgaria* (Application No. 12567/13), judgment of 16.02.2021, paras. 64-65.

¹⁶ Bulgaria, Family Allowances for Children Act 2002, Section 7(9).

¹⁷ The second applicant’s case was declared inadmissible by the Court due to the fact that her request was submitted out of time. Therefore, the circumstances of her case are not included in this summary.

Relying on Articles 8 and 14 of the Convention, the applicants complained that the conditions for accessing payments were in breach of their private and family rights, and that interpreting the phrase ‘with only one living parent’ to mean ‘with one deceased parent’ discriminated against their families, where one parent is unknown.

The Court firstly assessed the admissibility of the cases and rejected the second applicant’s case because her request was submitted out of time. However, the first applicant’s case was declared admissible, and the Court proceeded with the *ratione materiae* of her case. The Court recalled that Article 14 is not a standalone article, and can only be relied on in conjunction with an article concerning substantive rights. Therefore, the Court turned to the applicability of Article 8 to the circumstances of the case and concluded that parental allowances and child benefits fall within the scope of Article 8.

The Bulgarian Government held that the claim should be declared inadmissible by the Court since the applicant did not suffer a ‘significant disadvantage’ as required by Article 35, paragraph 3(b) of the Convention. The monetary gain from the allowance for the applicant’s family would be minimal in the Governments’ view, and therefore not weighty enough to be considered by an international court. The Court notes that the issue in the present case, the exclusion of children with unknown fathers from the allowance provided by FACA, and the subsequent discrimination suffered by these families in relation to families with a deceased parent, cannot be reduced to a mere monetary issue, and that the disadvantage suffered by the applicant is significant enough to be considered by the Court. In connection to this, the Court also noted that the second part of the admissibility test of Article 35 paragraph 3(b) should be considered in this regard, namely the necessity to hear the case ‘if respect of human rights so requires’.¹⁸ The Court finds that the question raised by the applicant is one of a general nature and has broader repercussions in relation to the right to be free from discrimination and the right to private life. The present case affects families in a similar position as the applicant, who are sole carers of a family. Therefore, the Court holds it necessary to clarify the state’s obligations in the present case under Article 8 and Article 14 of the Convention.

With regards to the merits of the case, the Court recalled that States have a wide margin of appreciation in the sphere of economic and social policy, but also recalls in this respect that the advancement of gender equality is an important goal of Member States of the Council of Europe at this moment. Therefore, States need to bring forward very weighty reasons for a difference in treatment in this respect.

The Court considers that the applicant was subjected to a difference in treatment on two grounds. First, a difference of treatment is established on the ground of sex. The applicant was unable to provide a certificate of legal recognition by a father of her children, and therefore denied the family allowance provided by FACA. The Court holds that in the vast majority of cases, it is the children’s paternity and not maternity that is unknown, putting women in a disadvantaged position in this regard. A single father whose children’s mother had died would usually be able to provide the required documents under the applicable national law. The second ground on which a difference in treatment is established by the Court, is family status since the applicant was treated differently on account of being a single mother.

After establishing that there had been a difference in treatment of the applicant, the Court turned to the question as to whether the difference in treatment pursued a legitimate aim, and whether it was objectively and reasonably justified. Several arguments were presented by the Government to justify the disputed reasons for eligibility to receive the supplementary family allowance. Prior to assessing the different arguments, the Court established that the legal provision in question is based on a stereotypical, traditional and outdated view of what constitutes a family. The Court further held that the requirement for the applicant to undertake steps to provide certification of proof of paternity in order to be eligible for the allowance is a serious interference of her private and family life, which according the Court cannot be objectively justified. As regards the other justification arguments that were presented by the Government,

¹⁸ ECtHR, *Yocheva and Ganeva v Bulgaria* (Applications Nos. 18592/15 and 43863/15), judgment of 11.05.2021, paragraph 63.

namely the especially disadvantaged position of children who have lost a parent, the protection against fraudulent claims for the allowance, as well as the jeopardising of the financial sustainability of the provision if the group to which the applicant belonged were included, were all rejected by the Court as justifications for the difference in treatment.

Therefore, the Court ruled that the difference in treatment of the first applicant constituted discrimination based on sex and family status and established a violation by the Bulgarian State of Article 14 taken in conjunction with Article 8 of the Convention. The respondent State had to pay the applicant EUR 10 575 in damages.



Disability

***Caamaño Valle v Spain* (Application No. 43564/17), judgment of 11 May 2021**

The application concerned the right to vote of the applicant's daughter, who is placed under partial guardianship owing to her intellectual disability. When requesting that her daughter be deprived of her legal capacity, the applicant had specifically asked that she should retain her right to vote. This latter request was dismissed however by the first instance judge ruling on the matter, based on the fact that the applicant's daughter was highly influenceable and not aware of the consequences of any vote that she might cast. The applicant appealed against the decision of the first instance judge, but her appeals were dismissed by the regional court, the Supreme Court and the Constitutional Court. Two years later, while the application was pending before the ECtHR, the relevant legislation in Spain was amended, guaranteeing the right to vote to persons with disabilities, including the applicant's daughter.

Before the Court, the applicant complained of a violation of Article 3 of Protocol No. 1 (the right to vote in free elections), taken alone or in conjunction with Article 14 of the Convention and Article 1 of Protocol No. 12. It is noteworthy that the Commissioner for Human Rights of the Council of Europe submitted a third-party intervention in favour of the applicant, arguing that Article 3 of Protocol No. 1 should be interpreted in the light of, notably, Article 29 of the CRPD; and that the deprivation of persons with intellectual and psychosocial disabilities' right to vote amounted to discrimination with serious negative effects on the persons concerned, on society and on democracy.

In its preliminary remarks, the Court recalled that it lacks authority to ensure respect for international treaties or obligations other than the Convention, and that it has authority only to interpret and apply the Convention. The latter should however be interpreted, as far as possible, in harmony with other rules of international law.

The Court first noted that any exclusion by a State Party of any groups or categories of the general population from the right to vote must be reconcilable with the underlying purposes of Article 3 of Protocol No. 1, notably the obligation to 'ensure the free expression of the opinion of the people'.

The Court accepted that the measure complained of pursued the legitimate aim of ensuring that 'only citizens capable of assessing the consequences of their decisions and of making conscious and judicious decisions should participate in public affairs' (paragraph 64). Examining the proportionality of the measure, the Court then noted that Spanish law at the relevant time only provided for the deprivation of the right to vote in respect of the most serious cases of disability and in respect of persons ruled incapacitated or exercising the right to vote by a final judicial decision. Noting that the State Parties' margin of appreciation is relatively narrow in this regard, the Court examined whether the domestic courts thoroughly examined the justification for the limitation of the rights of the applicant's daughter. Examining the findings of the four different national courts, the Court concluded that the daughter's disenfranchisement was not disproportionate to the legitimate aim pursued. The Court then went on to analyse the national measure from the perspective of the obligation to ensure 'the free expression of the opinion of the people', determining that the measure at hand did not amount to a violation of Article 3 of Protocol No. 1.

Finally, the Court briefly examined the complaint under Article 14 in conjunction with Article 3 of Protocol No. 1, finding without much difficulty that a difference in treatment (in respect of restrictions on the right to vote) based on the respective mental capacity of each person 'pursues a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised' (paragraph 82). The Court thus concluded to the absence of any violation of the Convention in this regard, too.¹⁹

***Association Accept and others v Romania* (Application No. 19237/16), judgment of 1 June 2021**

Sexual
orientation

The application was brought by the LGBT organisation ACCEPT together with five individual applicants, and concerned the alleged failure of Romania to protect the applicants from homophobic verbal abuse and threats, which led to the interruption of an event organised by them, and to conduct a subsequent effective investigation into their complaint. In this regard, the applicants relied on Articles 8, 11 and 14 of the Convention.

The applicant association had organised a public movie screening on the theme of same-sex families, which was disturbed by a large group of people yelling homophobic verbal abuse, finally blocking the screening, which was postponed to another date. The police had been requested to attend the screening to protect the participants and avoid altercations, but their intervention was limited to observing the events, confiscating a few flags and checking the identity documents of 23 people at the end of the incident. The applicants lodged a criminal complaint against private individuals and against the police officers for failing to prevent and stop the violent behaviour. The complaint was first transferred multiple times to different prosecutors' offices but was finally dismissed with final effect, after several appeals, more than four years after the incident.

First, the Court found that the applicant association could not validly claim to be either a direct or indirect victim of a violation of Article 8 of the Convention, taken alone or in conjunction with Article 14, or a violation of Article 1 of Protocol No. 12. In this regard, the application was thus rejected as being incompatible *ratione personae* with the Convention.

The Court then examined the merits of the complaint, insofar as it was submitted by the individual applicants, under Article 14 taken in conjunction with Article 8 of the Convention. In this regard, the Court noted firstly that 'the authorities failed to correctly assess the risk incurred by the individual applicants at the hands of the intruders and to respond adequately in order to protect the individual applicants' dignity against homophobic attacks by a third party' (paragraph 113). Secondly, the Court also concluded that 'the authorities failed to discharge their positive obligation to investigate in an effective manner whether the verbal abuse directed towards the individual applicants constituted a criminal offence motivated by homophobia', and added that '[i]n doing so, the authorities showed their own bias towards members of the LGBT community' (paragraph 126). The Court thus found that there had been a violation of Article 14, taken in conjunction with Article 8 of the Convention.

The applicants also claimed that the authorities' failure to protect their right to freedom of peaceful assembly and to investigate the actions that had led to the interruption of the event had amounted to a violation of Article 11, taken alone or in conjunction with Article 14 of the Convention. In this regard, the Court reiterated its findings under Article 14 in conjunction with Article 8 regarding the failure of the national authorities to intervene to de-escalate the situation, and concluded that they thereby fell short of their positive obligations under Article 14 in conjunction with Article 11.

¹⁹ It is noteworthy however that Judge Lemmens submitted a dissenting opinion, finding that 'the interpretation of the Convention in this area requires updating', which would lead to a finding of a violation of both Article 3 of Protocol No. 1, Article 14 of the Convention and Article 1 of Protocol No. 12.



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

This section provides an overview of the main latest developments in gender equality and non-discrimination law (including case law) and policy at the national level in the 27 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, Serbia, Turkey and the United Kingdom, from 1 January to 30 June 2021.

BE

Belgium

LEGISLATIVE DEVELOPMENT

Disability

Constitutional amendment on the rights of persons with disabilities

In July 2020, the Senate adopted a proposal to amend the Constitution by adding a new Article 22^{ter} stating that ‘Every person with a disability has the right to full inclusion in society, including the right to reasonable accommodation’.¹ The proposal was finalised after several hearings and the input of expert opinions. On 11 March 2021, the proposal was adopted by the House of Representatives, too.

In both chambers, the amendment was adopted unanimously by all parties, with the exception of the Nieuw-Vlaamse Alliantie (N-VA), a Flemish right-wing party, and the Vlaams Belang, a Flemish far-right party, which abstained.

The terminology used in the amendment was carefully selected, referring to a ‘person with a disability’ rather than to a ‘disabled person’, and to inclusion rather than integration, in line with the UN Convention on the Rights of Persons with Disabilities.

Online source:

<https://www.senate.be/www/?Mlval=/dossier&LEG=7&NR=169&LANG=fr>

Religion or belief

Headscarf ban, neutrality policy and multiple discrimination based on religion and gender

A claimant had applied for two administrative positions (legal officer and business analyst) advertised by the body responsible for public transport in the Brussels-Capital Region (STIB). Although neither position required any contact with the public, the recruitment agency told the claimant that she would have to remove her Islamic headscarf if she was hired, as STIB’s regulations implement a policy of strict neutrality and prohibit the wearing of religious, political or philosophical signs. The claimant was not willing to remove her headscarf altogether but proposed wearing a light turban instead. Her applications were rejected.

Unia, the inter-federal equality body, filed a complaint on behalf of the claimant, who later joined the case. The Human Rights League also joined the case in support of the claimant to include the issue of intersectional discrimination, as Unia is not competent to deal with gender-based discrimination.

In May 2021, the Vice-President of the Labour Court of Brussels ruled on the case, finding that STIB’s working regulations amounted to two occurrences of discrimination against the claimant: direct discrimination on the ground of religion or belief and indirect discrimination on the ground of gender, due to the regulations’ disproportionate effect on women. In this regard, the court noted that, at the time of the case, less than 10 % of STIB’s employees were women, despite STIB being the biggest employer in Brussels.

According to the Court, the neutrality policy was not applied coherently. In addition, the general ban on all religious signs was disproportionate as STIB did not demonstrate that it was appropriate and necessary to achieve the aims pursued. Moreover, the policy harmed the objective of diversity, which is a key value of the company. Furthermore, the judge rejected the argument of social peace, given that such a statement presents a risk of prejudice towards people wearing a sign indicating their convictions.

1 The adopted text (in French and in Dutch) is available at: <https://www.senate.be/www/webdriver?MltabObj=pdf&MlcolObj=pdf&MlnamObj=pdfid&MltypeObj=application/pdf&MlvalObj=117440731>.

The judge ordered STIB to pay damages of EUR 51 000 to the victim, corresponding to six months of remuneration for each of the two jobs. However, the judge considered that the two occurrences of discrimination resulted in a single prejudicial act, so that damages could not be awarded twice.

The judge also ordered STIB 'to stop founding its employment policy on an exclusive neutrality principle prohibiting, in a general way, all staff members from wearing any sign of their conviction whatsoever (religious, political, philosophical, etc.).'²

The Government of the Brussels-Capital Region refrained from appealing against the decision but has announced that legislation is required to determine more clearly the rules on the requirements of the neutrality principle. However, the Centre d'action laïque, an NGO that promotes public secularism, has initiated third-party proceedings against the judgment.

Online source:

https://www.unia.be/files/Documenten/Rechtspraak/2021-05-03_Tribunal_de_travail_Bruxelles.pdf

POLICY OR OTHER RELEVANT DEVELOPMENTS

Belgium fails to guarantee the right to inclusive education for children with intellectual disabilities within the French Community

Disability

On 18 January 2017, the International Federation of Human Rights (FIDH) and Inclusion Europe lodged a collective complaint with the European Committee of Social Rights (ECSR) against Belgium. Unia (the inter-federal equality body) and the Delegate General for the Rights of the Child also filed *amicus curiae* briefs. The complaint alleges that the lack of sufficient efforts to promote the inclusion of children with intellectual disabilities in mainstream primary and secondary schools within the Wallonia-Brussels Federation (French Community) amounts to a breach of several provisions of the Revised European Social Charter: Article 15 (right of persons with disabilities to independence, social integration and participation in the life of the community), Article 17 (right of children and young persons to social, legal and economic protection) and Article E (non-discrimination). The ECSR rendered its decision on the merits on 9 September 2020 and made it public on 3 February 2021.³

As in the case of *MDAC v Belgium*⁴ concerning similar issues in the Flemish Community, the ECSR found that the legal conditions for admission to mainstream education in the French Community are based on the concept of integration rather than inclusion. The Committee noted that the right to inclusive education is a right protected by the Charter under which the child must be guaranteed access to quality education, underlining that 'Inclusive education guarantees the right of the child to attend regular school and the obligation of the school to accommodate the child, taking into account the child's educational abilities and needs, ensuring that the best interests of the child are a primary consideration'.⁵

The Committee unanimously found that the Belgian state's failure to guarantee the right to inclusive education for children with intellectual disabilities within the French Community amounted to a violation

² Belgium, Labour Court of Brussels, decision of 03.05.2021 in case R.G. 19/1755/A.

³ ECSR, *International Federation of Human Rights Leagues (FIDH) and Inclusion Europe v Belgium*, complaint No. 141/2017, decision on the merits of 09.09.2020, available at: <https://hudoc.esc.coe.int/eng#%7B%22sort%22:%5B%22ESCPublicationDate%20Descending%22%5D,%22tabview%22:%5B%22document%22%5D,%22ESCDIdentifier%22:%5B%22cc-141-2017-dmerits-en%22%5D%7D>.

⁴ ECSR, *Mental Disability Advocacy Centre (MDAC) v Belgium*, complaint No. 109/2014, decision on the merits of 29.03.2018, available at: [https://hudoc.esc.coe.int/eng#%7B%22fulltext%22:%5B%22Mental%20Disability%20Advocacy%20Centre%20\(MDAC\)%20v.%20Belgium%22%5D,%22sort%22:%5B%22ESCPublicationDate%20Descending%22%5D,%22ESCDIdentifier%22:%5B%22reschs-2018-3-en%22%5D%7D](https://hudoc.esc.coe.int/eng#%7B%22fulltext%22:%5B%22Mental%20Disability%20Advocacy%20Centre%20(MDAC)%20v.%20Belgium%22%5D,%22sort%22:%5B%22ESCPublicationDate%20Descending%22%5D,%22ESCDIdentifier%22:%5B%22reschs-2018-3-en%22%5D%7D).

⁵ ECSR, *FIDH and Inclusion Europe v Belgium*, No. 141/2017, decision on the merits of 09.09.2021, para. 181.

of Articles 15 and 17 of the Revised European Social Charter.⁶ Conversely, the Committee held that there was no violation of Article E in conjunction with Articles 15 and 17, noting that these latter provisions encompass discrimination on the ground of disability. The Committee rejected allegations of discrimination on the basis of socioeconomic origin ('low-income families would not be able to mobilise adequate resources to enable the pupil to be directed to mainstream education') due to the lack of 'specific evidence' to support them.⁷

This decision confirms the criticism expressed by the UN Committee on the Rights of Persons with Disabilities⁸ and the Commissioner for Human Rights of the Council of Europe⁹ about the Belgian education system. Both found that the system fails to promote the full inclusion of children with disabilities in mainstream education.

Following this decision, associations fighting for inclusive education are calling on the Wallonia-Brussels Federation to adopt a plan for the transition to inclusive education.¹⁰

Online source:

[https://hudoc.esc.coe.int/eng#{%22sort%22:\[%22ESCPublicationDate%20Descending%22\],%22tabview%22:\[%22document%22\],%22ESCDIdentifier%22:\[%22cc-141-2017-dmerits-en%22}}](https://hudoc.esc.coe.int/eng#{%22sort%22:[%22ESCPublicationDate%20Descending%22],%22tabview%22:[%22document%22],%22ESCDIdentifier%22:[%22cc-141-2017-dmerits-en%22}})

Gender impact assessment of the COVID-19 recovery plan

In April 2021, the Institute for the Equality of Women and Men was invited to give its opinion on the potential impact of the COVID-19 recovery plan on gender equality. As reported in a number of analyses,¹¹ the current COVID-19 health crisis has had serious social and economic effects. It has had a significant impact on the service sector where women are over-represented and where salaries are low. In parallel, the lockdown and the obligation to telework, in combination with closures of schools and a number of (child)care services, has had a disproportionate impact on women, who are still the main providers of care and domestic services within the family.

The need to take gender into account in policy measures adopted to reboot the economy is more essential than ever. The recovery plan in Belgium is structured along six strategic axes: (1) climate, sustainability and innovation; (2) digital transformation; (3) mobility; (4) social life and living together; (5) future economy and productivity; and (6) public finance. Following the reduction of public investment in Belgium during recent decades, this plan and the EU funds allocated to it represent an opportunity to boost on-going reforms (climate change, digitalisation, modal shift in mobility etc).

6 ECSR, *FIDH and Inclusion Europe v Belgium*, paras. 186 and 205.

7 ECSR, *FIDH and Inclusion Europe v Belgium*, paras. 195-197 and 210.

8 UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Belgium adopted by the Committee at its twelfth session* (15 September-3 October 2014): available at: www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx.

9 Commissioner for Human Rights of the Council of Europe (N. Muižnieks) (2016) *Report of the Commissioner for Human Rights following his visit to Belgium from 14 to 18 September 2015*, Strasbourg, 28.01.2016, pp. 2 and 21 and seq.

10 See Inclusion a.s.b.l (2021), 'Inclusion scolaire: le CEDS condamne la Belgique' (School inclusion: the ECSR condemns Belgium), statement available at: <https://www.inclusion-asbl.be/actualites/inclusion-scolaire-le-ceds-condamne-la-belgique/>.

11 National Bank of Belgium (2021), *Quel impact de la crise du COVID-19 sur les inégalités de genre sur le marché du travail?* (Impact of the COVID-19 crisis on gender equality in the labour market), available at: <https://www.nbb.be/fr/articles/quel-est-limpact-de-la-crise-du-covid-19-sur-les-inegalites-de-genre-sur-le-marche-du>; Brussels Council of equality between women and men (2021), *Rapport. L'impact du Covid-19 sur les inégalité entre les femmes et les hommes* (Report. Impact of Covid-19 on equality between women and men), Brussels Capital Region, available at: http://www.adviesraad-gelijke-kansen.irisnet.be/wp-content/uploads/2021/04/CONSEIL-BXL-EGALITE-FEMMES-HOMMES_RAPPORT-Fr-COVID19-2021-DEF-003.pdf.

The Institute for the Equality of Women and Men highlighted the following in its opinion¹² on the potential impact of the plan on gender equality: in the context of the recovery plan, the most significant difference between men and women in the labour market is related to the horizontal segregation of the labour market. Overall, the planned investments are largely oriented towards predominantly male sectors of activity (construction, energy, green jobs, circular economy, etc). In the short term, and taking into account the timeframe of the projects (by 2026), the increase in the workforce in those sectors risks reinforcing gender imbalances in terms of access to employment, income and economic independence. The Institute notes that it is therefore imperative to fight against stereotypes and to strengthen the presence of girls and women in these sectors and in the economic sectors of the future. In Belgium today, of women aged 2029, only 7.9 per thousand have a STEM (science, technology, engineering and mathematics) degree.

In the longer term, some of the planned investments could promote equality between women and men in terms of mobility (reinforcement of safe public transport, bicycle lanes etc.), reconciliation of private and professional life (opening of crèche places), fuel poverty (renovation of social housing) or social inclusion (projects aimed at women who are vulnerable in the labour market). Many other aspects, such as the renovation of infrastructure, the digitalisation of administrations, the development of the circular economy and green jobs, and the development of digital applications, can also contribute to strengthening equality if – and only if – they take into account the differences in situations and inequalities that exist between men and women.

Online source:

https://igvm-iefh.belgium.be/sites/default/files/advies/avis_impact_plan_de_reprise.pdf

Bulgaria

BG

CASE LAW

Supreme Administrative Court follow-up to the CJEU *CHEZ* case

In 2008, a complaint was submitted before the Bulgarian quasi-judicial equality body, the Protection Against Discrimination Commission (PADC), regarding an electricity company's practice of placing electricity meters at an inaccessible height in the urban district where the complainant ran a business. While the district was lived in mainly by Roma, the complainant was not of Roma origin. The aim of the practice was allegedly to prevent tampering and unlawful connections, but it interfered thereby with the ability of consumers to monitor their electricity consumption and subjected them to offensive stigmatisation.

In 2010, the PADC found that the complainant had been discriminated against on the grounds of the Roma ethnic origin of the majority of residents. Following a rehearing, the PADC found in 2012 that the discrimination had been based on personal status. The case was later referred to the CJEU, which delivered its preliminary ruling in 2015.¹³

Following the CJEU ruling, the PADC delivered a new decision in 2017, failing however to correctly implement the CJEU guidance. The decision was then quashed by the Sofia City Administrative Court (SCAC), and the case was remanded with instructions for the PADC. The new PADC decision was delivered in 2019, finding that no discrimination had occurred, but this decision was yet again quashed by the

Racial or ethnic origin

12 Gender Equality Institute, Opinion No. 2021-A/014 regarding the gender impact of the recovery and resilience plan, available at: https://igvm-iefh.belgium.be/sites/default/files/advies/avis_impact_plan_de_reprise.pdf.

13 CJEU, Grand Chamber judgment of 16.07.2015, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, C-83/14, ECLI:EU:C:2015:480.

SCAC in 2020. The SCAC again remanded the case for a rehearing, repeating its instructions to the PADC, notably to: specify the action that had constituted the alleged discrimination; analyse the protected ground on which it was based, in view of the fact that the complainant was a non-Roma individual; study the possible availability of alternative means to curb the alleged tampering with the electricity supply network; consider the fact that the proof of such tampering adduced by the respondent company concerned the period of 2010-2017, whereas the original complaint was filed in 2008; and to gather evidence of the company's practices in other residential areas where the electricity network was being tampered with, the ethnic composition of those areas, and whether the tampering had decreased as a result. The SCAC had found that the PADC had failed to implement the SCAC's previous instructions and the CJEU's guidance. The PADC appealed against this SCAC decision, which led to a review by the Supreme Administrative Court (SAC).

On 21 October 2020, the SAC confirmed the SCAC's decision whereby the case had been remanded to the PADC for a rehearing.¹⁴

Online source:

<http://www.sac.government.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/d04a10c08896ec6ec22586070045c849?OpenDocument>

General vilification of Roma by Deputy Prime Minister constitutes harassment

On 9 June 2021, the Supreme Administrative Court (SAC) repealed a judgment by the lower court, which in turn had confirmed a decision by the equality body in a case of general hate speech by a public official. The case had been brought before the national equality body, the PADC, by a Roma NGO claiming that in 2019, the Deputy Prime Minister and Minister of Defence had committed harassment and/or incitement to discrimination by means of his public, televised statements disparaging the Roma in Bulgaria in connection with a crime allegedly perpetrated by Roma. In January 2020, the PADC held that the concept of harassment required the impugned speech to be directed against a particular person, and that the statements in this case were protected by freedom of expression as they did not go beyond what was warranted in the circumstances, given the criminal context. Moreover, according to the body, the complainant's subjective perception of injury was not sufficient for a finding of discrimination.¹⁵

The first-instance court supported this conclusion, adding that a finding of harassment would have required the members of the complainant NGO to be personally placed in an intimidating environment.¹⁶ It further held that a finding of harassment implied systematic abusive conduct, and that one single incident was insufficient. The public nature of the statements and their wide dissemination were not material. Additionally, the alleged harasser was required to have intended to cause prejudice to a Roma person or group.

In its decision of June 2021, the SAC found that the above reasoning was flawed.¹⁷ The publicity of the statements was crucial, as the respondent was in a position to be aware of the likely dissemination of his statements. His freedom of expression did not encompass such abusive speech, as the ban on harassment was absolute, and applied equally to personal opinions. The respondent's intentions were irrelevant to the concept of harassment, as a deleterious result was sufficient, while an aim to cause such a result did not need to be proven. By their nature, the impugned statements necessarily stigmatised all Roma in Bulgaria. Accordingly, each member of the targeted community was affected, and no specific

14 Bulgaria, Supreme Administrative Court, decision No. 13045 of 21.10.2020 in administrative case No. 4671/2020.

15 Bulgaria, Protection Against Discrimination Commission, Decision No. 17 of 10.01.2020 in case No. 7/ 2019.

16 Bulgaria, Sofia City Administrative Court, Decision No. 3706 of 09.07.2020 in case No. 1334/ 2020.

17 Bulgaria, Supreme Administrative Court, Decision No. 6976 of 09.06.2021 in case No. 11591/2020.

individual target was required. The SAC relied notably on the recent jurisprudence of the European Court of Human Rights in *Budinova and Chaprazov v Bulgaria*.¹⁸

The concept of harassment did not require any iteration of the impugned conduct. One-off acts were capable of fitting the legal definition. Members of the targeted Roma community as well as employees of a Roma rights NGO were protected in such cases, and the NGO had standing, under national non-discrimination law, to enforce those individuals' rights on its own behalf. The SAC further held that a finding of harassment requires the impugned statements to be capable of affecting an 'impartial and reasonable observer, of normal sensitivity and perceptions', failing thereby to consider the vulnerability of marginalised minorities and their ensuing legitimate sensitivity to racist verbal abuse. Finally, the SAC concurred with the lower court and the equality body that the impugned statements did not amount to incitement to discrimination.

The SAC remanded the case to the equality body for a rehearing in line with the SAC's interpretation of the concept of harassment.

Online source:

<http://www.sac.government.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/1b221d78a94aae88c22586ee00405c16?OpenDocument>

Croatia

HR

LEGISLATIVE DEVELOPMENT

Sexual harassment as a criminal offence

A draft act, amending Article 156 of the Criminal Code concerning sexual harassment was submitted for public consultation on 23 March 2021.¹⁹ The amendments, abolishing the requirement for a victim to submit a proposal to initiate a criminal procedure within three months from the day the offence was committed, is expected to enter into force in the second trimester of 2021.²⁰

Gender

Sexual harassment is punishable as a criminal offence under Article 156 of the Criminal Code if the perpetrator is the victim's superior, or if the victim is dependent on the perpetrator, or especially vulnerable due to age, illness, disability, addiction, pregnancy or severe mental or physical incapacity.²¹ It is punishable by imprisonment up to two years.²² However, the victim has to submit a proposal to the public prosecutor to initiate a criminal procedure (Article 156(3) of the Criminal Code). The offence is only prosecuted *ex officio* if it is committed against a person who is especially vulnerable due to age. The time limit for filing a request for prosecution is three months from the day when the victim found

18 ECtHR, *Budinova and Chaprazov v Bulgaria*, No. 12567/13, judgment of 16.02.2021, available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22%5C%22CASE%20OF%20BEHAR%20AND%20GUTMAN%20v.%20BULGARIA%5C%22%22%5D,%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D,%22itemid%22:%5B%22001-207928%22%5D%7D>. For a summary of the judgment, see above pp. 65-66.

19 Croatia, Act on Amendments to the Criminal Code, PZ No. 88, text of the bill and details of the legislative procedure available at <https://www.sabor.hr/prijedlog-zakona-o-izmjeni-kaznenog-zakona-s-konacnim-prijedlogom-zakona-hitni-postupak-prvo-i?t=121861&tid=209204>; Act on Amendments to the Criminal Code, as submitted for public consultation on 23.03.2021, e-Savjetovanja, available at <https://esavjetovanja.gov.hr/Documents/List/16256>.

20 Croatia, Criminal Code, NN Nos. 125/2011, 144/2012, 56/2015, 101/2017, 118/2018 and 126/2019.

21 Sexual harassment as a criminal offence is defined as any verbal, non-verbal or physical unwanted conduct of a sexual nature with the aim or effect of violation of dignity and which causes fear, hostile, degrading or offensive environment. See Article 156(2) of the Criminal Code.

22 The punishment was increased from one to two years imprisonment with the amendment which entered into force on 1.01.2020 (Act on Amendments to the Criminal Code, NN No. 126/19).

out about the offence and the perpetrator (Article 47(1) of the Criminal Procedure Act).²³ Normally, the statute of limitation for initiating criminal prosecution under the Criminal Code is determined in relation to the duration of punishment. For this offence, the statute of limitation is 10 years from the date the offence was committed (Article 81(1) Criminal Code). However, the three months limitation period for the complaint/request has to be respected, which effectively shortens the statute of limitation. The short time limit and the appropriateness of the solution in which the criminal procedure can only be initiated at the victim's request came under fire in 2020 and especially at the beginning of 2021.

In January 2021, a regional #MeToo type movement (*#nisamtražila*, which roughly translated means, 'I did not ask for it') started on social media networks in neighbouring countries (Serbia, Bosnia and Herzegovina, Slovenia) and spread to Croatia, exposing multiple cases of sexual harassment at some universities in Zagreb (Academy of Dramatic Arts, Faculty of Humanities and Social Sciences, Faculty of Veterinary Medicine).²⁴ Whereas some complaints will probably lead to legal sanctions for the perpetrators in the field of labour law, the criminal prosecution in many cases will be limited by the fact that some complaints were made anonymously, and many relate to past cases in which the statute of limitation for prosecution has already come into effect. The same formal requirement prevented the criminal prosecution of an alleged perpetrator of multiple cases of sexual harassment at work.

In 2020, 17 female workers at the Croatian Employers' Association accused their superior (the organisation's deputy director) of sexual harassment, committed over a certain period of time. The competent State Attorney's Office dismissed their claims in December 2020 due to the fact that the deadline for the submission of a proposal to initiate criminal proceedings under Article 47(1) of the Criminal Procedure Act had lapsed.²⁵ The State Attorney's Office dismissed the complaint brought by the Ombudsperson for Gender Equality for the same reason.²⁶

Online sources:

<https://www.sabor.hr/prijedlog-zakona-o-izmjeni-kaznenog-zakona-s-konacnim-prijedlogom-zakona-hitni-postupak-prvo-i?t=121861&tid=209204>

<https://esavjetovanja.gov.hr/Documents/List/16256>

23 Croatia, Criminal Procedure Act, NN Nos. 152/2008, 76/2009, 80/2011, 91/2012, 143/2012, 56/2013, 145/2013, 152/2014, 70/2017 and 126/2019.

24 See Academy of Dramatic Art in Zagreb, Dean's letter available at: <https://www.adu.unizg.hr/wp-content/uploads/2021/01/Inicijativa-Nisam-tražila.pdf>; 'Profesora s Veterine prijavile smo još 2018. Ponižavao je i dodirivao studentice, svašta govorio', *Jutarnji list*, 25.01.2021, available at: <https://www.jutarnji.hr/vijesti/hrvatska/profesora-s-veterine-prijavile-smo-jos-2018-ponizavao-je-i-dodirivao-studentice-svasta-govorio-15045505>.

25 The State Attorney's Office admitted that the women's statements indicate a criminal offence, but the complaints were dismissed due to formal reasons, see <https://www.jutarnji.hr/vijesti/crna-kronika/tuziteljstvo-odbacilo-prijavu-protiv-bernarda-jakelica-je-se-zrtve-nisu-javile-na-vrijeme-15034623>. The complainants were informed that they can bring private criminal charges within eight days. There is no information available on whether they did so. The accused harasser has left the Croatian Employers' Organisation, based on a consensual termination of contract and with a sizeable severance package. The scandal has led to the resignations of the head director and the president of this organisation.

26 If the Ombudsperson for Gender Equality finds out, during the course of his/her duties, that a criminal offence in violation of gender equality has been committed, he/she has to submit a complaint to the competent State Attorney's Office (Article 23(2) Gender Equality Act).

Czechia

CZ

CASE LAW

Ruling of the Supreme Court on the discriminatory dismissal of a pregnant worker

Gender

On 16 March 2021, the Supreme Court ruled on a case regarding the dismissal of a pregnant worker.²⁷ An employee working for the state enterprise *Military forests and farms of the Czech Republic* was dismissed during her probation period after informing her employer that she was pregnant. According to her doctor, she could no longer work in the forest due to her pregnancy. Subsequently, she was informed by her employer that she was dismissed due to her pregnancy. The applicant turned to the courts, which rejected her claim, until the case reached the Supreme Court. The rejection of her claims by the lower courts were based on the argument that no justification is required for dismissal during a probation period.

However, the Supreme Court assessed that dismissal of a worker during their probation period is subject to the principle of equal treatment, and therefore may be reviewed from the perspective of the Anti-Discrimination Act.²⁸ Moreover, the Court concluded that in this case, the pregnancy was the real ground for the dismissal and therefore, she faced unequal treatment on grounds of her pregnancy (which falls under the discriminatory ground of 'sex'). Thus, the Supreme Court ruled that the dismissal of the pregnant worker during her probation period motivated only by her pregnancy constitutes unlawful discrimination. Hence, the Supreme Court returned the case to the first-instance court for re-evaluation, and the opinion of the Supreme Court is now binding for the lower instances.

POLICY AND OTHER RELEVANT DEVELOPMENTS

New strategies on gender equality

Gender

The Government of Czechia adopted two new strategies concerning gender equality in March 2021. The Government's gender equality strategy 2021-2030 and the ministerial plan 2021-2024 represent important developments establishing a gender-sensitive approach for the coming decade in education, public policies and practices. They include a thorough analysis of current challenges and show a deep, data-based understanding of gender-related issues. The most important aspects of the strategies are highlighted below.

Strategy on Gender Equality 2021-2030

The *Strategy on Gender Equality 2021-2030* was adopted on 8 March 2021,²⁹ and aims to increase the quality of life of women and men in the Czech Republic. The proposed measures also respond to the COVID-19 pandemic, which has exacerbated gender inequality in various ways. The strategy uses an intersectional approach and emphasises the need to involve men in the process of eradicating gender inequality.

The strategy tackles eight social areas: labour and care, decision making, safety, health, knowledge, society, external relationships, and institutions. Altogether, these areas contain 26 strategic goals.

²⁷ Czechia, Supreme Court, judgment of 16.03.2021, No. 21 Cdo 2410/2020.

²⁸ Czechia, Act No. 198/2009, Anti-Discrimination Code.

²⁹ Czechia (2021) *Government Strategy on Gender Equality 2021-2030*, available at: https://www.vlada.cz/assets/ppov/rovnoprilezitostizenamuzu/Aktuality/Strategie_rovnosti_zen_a_muzu.pdf.

The aims of the strategy are to:

- equalise the position of men and women regarding parenthood by ensuring greater availability of kindergartens and nurseries;
- increase transparency in salaries;
- increase participation of women in public decision making;
- improve access to services for victims of domestic and sexual violence;
- reduce inequalities in healthcare (and, in particular, to increase the wellbeing of women giving birth);
- include a gender-sensitive approach in education;
- decrease the feminisation of poverty;
- promote awareness regarding harmful gender stereotypes.

Plan on Support for Gender Equality by the Ministry of Youth, Education, and Sports 2021-2024

The Ministry of Youth, Education, and Sports published its plan on support for gender equality 2021-2024 on 1 March 2021.³⁰ This plan provides for a variety of goals concerning gender equality in schools of all levels. Specifically, the plan aims to implement the principle of equality in educational programmes by:

- ensuring that schoolbooks are in accordance with the principle of gender equality;
- eliminating gender stereotypes in relationships between pupils and teachers in primary and secondary schools;
- providing teachers with gender equality training;
- reaching a gender balance in teachers.

Online sources:

https://www.vlada.cz/assets/ppov/rovnoprilezitostizenamuzu/Aktuality/Strategie_rovnosti_zen_a_muzu.pdf

https://www.msmt.cz/file/54641_1_1/

Research published by the equality body regarding employment of people with disabilities in the public sector

On 8 April 2021, the Office of the Public Defender of Rights – the Czech equality body as well as the body monitoring the protection of rights of people with disability according to the CRPD – published two research papers regarding the employment of people with disabilities in the public sector. The first presented the perspective of employers (ministries and other public employers), while the second presented the perspective of employees with disabilities.

The main conclusions of the first study included the following:³¹

- Every institution approaches the employment of people with disabilities differently (varying from a lack of interest to an active strategy).
- People with more severe working limitations are hardly ever employed in the public sector.
- Nearly half of the premises of public sector workplaces are not accessible for people with disabilities.

30 Czechia (2021), *Plan on Support for Gender Equality by the Ministry of Youth, Education, and Sports 2021-2024*, available at: https://www.msmt.cz/file/54641_1_1/.

31 Public Defender of Rights (2021), 'Zaměstnávání lidí s postižením ve veřejném sektoru – pohled zaměstnavatelů' (Employment of people with disability in the public sector – employers' perspective) – research paper, available at: https://www.ochrance.cz/aktualne/stat_neumi_zamestnat_lidi_s_postizenim_ukazal_vyzkum_zastupkyne_ombudsmana/zamestnavani_-_pohled_zamestnavateleu.pdf.

- Levies paid to the state budget as an alternative to employing people with disabilities are not effective, fulfilling neither their punitive nor motivational functions. In 2019, the total amount paid was approximately EUR 1 600 000.

The main conclusions of the second study included the following:³²

- When looking for a job, people with disabilities tend to rely on their own contacts and efforts.
- People with disabilities find that job advertisement generally lack details on the work environment and sufficient specification of the work duties.
- People with disabilities tend to hide their disability at the recruitment stage.
- There is no unified approach to reasonable accommodation among public employers.
- People with disabilities consider the public sector to be an attractive employer.

Approximately 90 % of institutions do not have any experience with responding to the needs of (potential) employees with disabilities. Irrespective of existing equal treatment legislation, people with disabilities face numerous obstacles in finding and retaining employment in the public sector.

Online source:

https://www.ochrance.cz/aktualne/stat_neumi_zamestnat_lidi_s_postizenim_ukazal_vyzkum_zastupkyne_ombudsmana/employment_of_people_with_disabilities_in_the_public_sector.pdf

Denmark

DK

CASE LAW

Face masks and disability

In 2020 and 2021, the Board of Equal Treatment received several complaints concerning allegedly discriminatory implementation of the requirements to wear face masks due to the COVID-19 pandemic. The cases concerned people who were denied access to services such as restaurants because they were not wearing face masks, for reasons related to their medical conditions. According to the website of the Danish Health Authority, people who, due to physical or mental conditions, cannot use face masks correctly are exempted from the face mask requirements. In a newsletter, the Board of Equal Treatment explained that it cannot take a position on issues concerning the rules on face masks.³³ The Board can only deal with complaints about discrimination outside the labour market due to disability in accordance with the Act on the Prohibition of Discrimination due to Disability.

Two such complaints were processed by the Board in December 2020 and January 2021. Both complainants had been denied access to services (a kiosk and an indoor playground, respectively) as they had refused to wear a face mask, even though they were both encompassed by the exemption due to breathing difficulties. In both cases, the Board of Equal Treatment made several requests for the complainants to submit documentation of their disabilities, which they failed to do.

Disability

32 Public Defender of Rights (2021), 'Zaměstnávání lidí s postižením ve veřejném sektoru – pohled lidí s postižením' (Employment of people with disability in the public sector – perspective of people with disability) – research paper, available at: https://www.ochrance.cz/aktualne/stat_neumi_zamestnat_lidi_s_postizenim_ukazal_vyzkum_zastupkyne_ombudsmana/zamestnavani_pohled_lidi_s_postizenim.pdf.

33 Denmark, Board of Equal Treatment (2021) *Newsletter*, 23.03.2021, available at: <https://ast.dk/naevn/ligebehandlingsnaevnet/nyheder-fra-ligebehandlingsnaevnet/lbn/nyheder-2021/sager-om-mundbind>.

In both cases, the Board thus concluded that the complainants had not demonstrated facts indicating that they had been discriminated against on the ground of disability, and rejected the complaints as they could manifestly not be upheld.³⁴ It is for the complainant to prove that he or she has a disability covered by the law, notably by submitting medical records, etc.

Online sources:

<https://www.retsinformation.dk/eli/accn/W20210908225>

<https://www.retsinformation.dk/eli/accn/W20210912125>

Board of Equal Treatment test case on reasonable accommodation beyond employment

The case concerned a resident of a public housing association who claimed that he had been discriminated against due to disability because the housing association had declined to allocate a permanent disability parking space for him, due to the limited number of parking spaces available for the residents. The case was one of five test cases handled by the Board of Equal Treatment in January 2021 regarding the scope of the accessibility and reasonable accommodation duties beyond employment.

In this case, the Board noted that the Act on the Prohibition of Discrimination due to Disability does not contain an obligation for housing associations to establish reasonable accommodation. The Board thus concluded that the housing association did not have a duty to create a disability parking space for the complainant or to allocate a permanent parking space for him. On that basis, the Board rejected the complaint.³⁵

Three of the five test cases concerned complaints submitted by the same complainant who had dyslexia, and argued that he had been discriminated against because the websites of three different authorities were inaccessible for him. The Board found that according to the preparatory works, the Act on the Prohibition of Discrimination due to Disability does not require further accessibility than what is required by other legislation. The complaints were therefore rejected.³⁶

The last test case concerned a complainant who was visually impaired. He argued that he had been discriminated against by the Danish Appeals Permission Board when he filed an application to be granted leave to appeal to the Supreme Court, due to the Board's failure to go through documents with the complainant or to provide legal aid to the complainant before issuing a decision. The Board of Equal Treatment concluded that the Appeals Permission Board was under no duty to provide such additional services and rejected the complaint.³⁷

Online source:

<https://www.retsinformation.dk/eli/accn/W20210903825>

Discriminatory algorithms behind job advertisements on social media

In February 2021, the Board of Equal Treatment examined two cases brought by the Danish Institute of Human Rights as test cases of general public interest.³⁸

The respondent companies had advertised for labour on Facebook. The companies had not indicated in the actual advertisement that they preferred a person of a certain gender or age. However, when using

³⁴ Denmark, Board of Equal Treatment, decision No. 9082 of 3.12.2020 and decision No. 9121 of 26.01.2021.

³⁵ Denmark, Board of Equal Treatment, decision No. 9038 of 19.01.2021.

³⁶ Denmark, Board of Equal Treatment, decisions Nos. 9039, 9040 and 9041 of 19.01.2021.

³⁷ Denmark, Board of Equal Treatment, decision No. 9037 of 19.01.2021.

³⁸ Denmark, Consolidated Act No. 1230 of 2.10.2016, Section 1(7).

Facebook's advertising platform, both companies had indicated in the settings that the advertisements should only appear on the profiles belonging to Facebook users of a certain age and/or gender.

The first case concerned an advertisement for a manager, which was only displayed on the profiles belonging to Facebook users between 20 and 50 years of age.³⁹ The second case concerned an advertisement for 'stagehands', which was only displayed on the profiles belonging to male Facebook users between 20 and 43 years of age.⁴⁰

The Board assessed the advertisements as possible violations of two different prohibitions, each contained in both the Act on the Prohibition of Discrimination in the Labour Market etc. and the Act on Equal Treatment between Men and Women in Employment.⁴¹ First, the advertisements were assessed as potential breaches of the specific prohibition of discriminatory job advertising in Sections 5 and 6 of the respective acts. In this regard, the Board considered as particularly relevant the question of whether advertising had only taken place on Facebook based on the allegedly discriminatory settings, or whether other channels had also been used, to which all persons had equal access. Secondly, the advertisements were assessed as potential breaches of the general prohibition against unequal treatment on the grounds of age and/or gender in recruitment, as prescribed in Section 2, with reference to Section 1 of both acts.

In the first case concerning the advertisement for a manager, the Board concluded that discrimination based on age had not taken place. While the Facebook advertisement targeted only users between 20 and 50 years of age, the Board noted that the company had advertised the position broadly via other channels as well, including on LinkedIn and the company's website, and that they had encouraged Facebook users to share the job posting. Furthermore, the person hired for the advertised position was older than 50. On that basis, the Board did not find that the advertisement was in breach of the prohibition on discriminatory job advertising. The Board then considered whether the advertisement was in breach of the general prohibition against age discrimination in recruitment. The Board found that advertising specifically to a group delimited by age created a presumption that people outside this age group did not have the same opportunity to be considered for the position. However, the respondent lifted the burden of proof that the principle of non-discrimination had not been breached, by showing that they had encouraged Facebook-recipients to share the advertisement with others, and that they had in the end hired an applicant who was older than 50 for the position. Under these specific circumstances, the Board found that the advertisement was not in breach of the prohibition against age discrimination and rejected the complaint of the Danish Institute for Human Rights.

In the second case concerning the advertisement for 'stagehands', the Facebook setting decided that only male Facebook users between 20 and 43 years of age would see the job advertisement. First, the Board took into consideration that the company had also advertised the position on its website and on its general Facebook page. Furthermore, the company had encouraged Facebook users to share the post. On this basis, the Board concluded that there had been no breach of the prohibition of discriminatory job advertising. The Board then considered whether the advertisement was in breach of the general prohibition against discrimination on grounds of age and gender. The Board found that advertising specifically to a group delimited by age and gender created a presumption that women and individuals outside this age group did not have the same opportunity to be considered for the position, and thus held that facts had been established indicating that the company had breached the prohibitions on discrimination on grounds of gender and age. Despite several requests, the respondent company did not respond to the Board's inquiries regarding the case. Based on an overall assessment of the available information in the case, the Board concluded that the company had not lifted the burden of proof that

39 Denmark, Board of Equal Treatment, decision No. 9134 of 25.02.2021.

40 Denmark, Board of Equal Treatment, decision No. 9135 of 25.02.2021.

41 Denmark, Act No. 1001 of 24.08.2017 on prohibition of discrimination in the labour market, etc. available at: <https://www.retsinformation.dk/eli/lta/2017/1001>; Statutory Act No. 645 of 8.06.2011 on equal treatment between men and women in employment, etc. available at: <https://www.retsinformation.dk/eli/lta/2011/645>.

the principle of equal treatment had not been violated. On that basis, the Board upheld the complaint of the Danish Institute for Human Rights.

These cases show the importance of the legal standing of the Danish Institute for Human Rights, as the issue concerned would most likely not have been dealt with by the Board of Equal Treatment if the cases had not been brought by the Institute.

Online sources:

<https://www.retsinformation.dk/eli/accn/W20210913425>

<https://www.retsinformation.dk/eli/accn/W20210913525>

Workplace situation: Guide dog and allergies

The case concerned a visually impaired employee who was using a guide dog. When the employee relocated to another office, new restrictions were imposed on the use of her guide dog due to another colleague being allergic to dogs. Notably, the dog could not accompany the employee in the open-plan office but had to stay in a separate room.

The employee argued that the restrictions put her in a worse position than her colleagues, and made it difficult for her to carry out her profession on an equal footing with others. On that basis, the employee ultimately chose to resign. She then filed a complaint to the Board of Equal Treatment arguing that she was discriminated against because of disability.

The Board found that facts had been established that gave reason to believe that discrimination on the ground of disability had taken place. The Board found that, when relocating the complainant, the employer had not sufficiently investigated whether there was an office without employees allergic to dogs. The Board referred to the fact that the employer had a large workplace with a high number of employees with the same kind of educational background as the complainant.⁴²

Overall, the Board concluded that the employer had not sufficiently examined whether appropriate measures could have been initiated to meet the employee's need to have the guide dog by her side. Thus, the employer had failed to provide reasonable accommodation and the complainant was awarded financial compensation equal to six months' full salary.

Online source:

<https://www.retsinformation.dk/eli/retsinfo/2021/9226>

Written offer for deaf person

The complainant is a deaf man who received a telephone call to his private phone from an electricity company during his working hours. The complainant's interpreter answered for him and explained to the electricity company that the complainant was deaf, and could only use the interpreter for work. The complainant asked the electricity company to contact him by e-mail, as he wanted to know more about the special offer they proposed. The electricity company refused, mentioning that they only made offers over the telephone.

Before the Board of Equal Treatment, the complainant argued that he had been discriminated against based on his disability.

42 Denmark, Board of Equal Treatment, decision No. 9226 of 22.03.2021.

The Board first noted that the Act on the Prohibition of Discrimination due to Disability does not contain an obligation to provide reasonable accommodation beyond employment. In the case in question, the Board then argued that facts had been established that gave reason to believe that the complainant had experienced indirect discrimination. It was therefore incumbent on the electricity company to prove that discrimination had not taken place. The Board found that the company's rejection of the request to send a written offer with reference to fixed practices was objectively justified by cost reducing purposes. However, after an overall evaluation of the information in the case, the Board concluded that the electricity company had not lifted the burden of proof that it was necessary to reject the request for a written offer to achieve the purpose of reducing the company's costs.⁴³

The Board therefore upheld the claim and awarded the complainant compensation of approximately EUR 670.

Online source:

<https://www.retsinformation.dk/eli/accn/W20210931325>

Electric scooter on a bus trip

The complainant is a woman who is mobility impaired and depends on her walker and her electric scooter. Together with a travel companion, she had reserved a bus trip to France. She later informed the travel agent by e-mail of her disability and of her plan to bring a walker and a foldable electric scooter on the trip, explaining that the travel companion could handle the foldable scooter without the assistance of the bus driver. The travel agent answered that she was not allowed to bring an electric scooter on the journey. Before the Board of Equal Treatment, the complainant argued that she had been discriminated against based on her disability.

Disability

First, the Board held that the complainant's impairment constituted a disability within the meaning of the Act on the Prohibition of Discrimination due to Disability.⁴⁴

Secondly, the Board held that the complainant had demonstrated factual circumstances that gave reason to believe that at the time of the refusal she was subjected to indirect discrimination. The Board further held that the discrimination could be objectively justified considering the fact that a larger group was traveling together, and that the travel agency had a policy requiring travellers to be 100 % self-reliant and good walkers. The Board found, however, that the travel agency had not lifted the burden of proof that it was necessary to maintain the requirement towards the complainant. On that basis the Board concluded that the complainant had been discriminated against due to her disability. The complainant was awarded compensation of approximately EUR 670.

Online source:

<https://www.retsinformation.dk/eli/accn/W20210943425>

POLICY AND OTHER RELEVANT DEVELOPMENTS

Nurses go on strike for equal pay

The bravery of healthcare workers during the COVID-19 pandemic has been widely acknowledged in Denmark. This led the Danish Nurses Organisation to reopen the topic of nurses' pay. Nurses receive a lower pay when compared to male dominated jobs, such as construction engineers. Considering that

Gender

⁴³ Denmark, Board of Equal Treatment, decision No. 9313 of 21.04.2021.

⁴⁴ Denmark, Board of Equal Treatment, decision No. 9434 of 28.05.2021.

these jobs have the same educational requirements and the fact that it remains a female-dominated profession, it is a question of equal pay.⁴⁵

The issue of equal pay formed the backdrop of the negotiations, which took place in the spring of 2021 for the renewal of the public collective agreements for the state, regional and municipal sectors for the upcoming period 2021-2024. The negotiations led to a preliminary agreement containing a general salary increase for all nurses of 5.02 % spread over a three-year period. However, the members of the nurses' organisation rejected the agreements for the regional and municipal sector, when they were subsequently put to vote in the membership ballot. Hence, the negotiations for the regional and municipal sector were resumed under the supervision of the public conciliation Service in order to mediate between the parties. The mediation led to a settlement proposal by the public conciliator, which did not contain any further salary increases. Instead, issues of equal pay were intended to be addressed by forming a committee to deal with public sector salary structures. The committee was meant to propose recommendations and make conclusions with respect to collective bargaining of salaries and other working conditions in the public sector.

Participation in the nurses membership ballot on the settlement proposal was 74.4 % and 66.7 % voted against, which effectively reawakened the strike notice issued on 22 of April, which had been suspended during the negotiations. As a result, 10 % of the nurses in the regional and municipal sector went on strike on the 19 June, under the slogan, 'We're worth more' and a narrative that a major injustice took place in 1969 in the shape of the Public Servant Reform Act of 1969,⁴⁶ which was intended to modernise the employment system but placed female-dominated professions in a lower salary bracket in relation to other jobs with the same level of education and responsibility at the time. However, the narrative has been challenged as being misleading by labour market researchers who state that, among other things, the nursing programme at the time was a three-year trainee programme as opposed to the professional bachelor's degree that is required now.

Recently, there have been increased debates on which professions to compare nurses to, and whether to compare the base salary or the salary of experienced nurses, a third of which consists of a pay supplement and nuisance compensation, including compensation for working night shifts. Conversely, an equal pay committee was established in 2008 following an almost two-month long strike by the nurses after failed negotiations in 2008, and the report of the committee showed a gender pay gap in favour of the male-dominated technical professions. According to commentators, the Gordian knot of the gender pay gap is that the distribution of salaries between the professions occupied in the public sector is a zero-sum game, in which benefitting certain professional groups, such as nurses, will result in the reduction in the salaries of other professional groups.

Online sources:

<https://dsr.dk/loen-og-arbejdsvilkaar/ok21/danish-nurses-organization-declares-a-strike>

<https://nordics.info/show/artikel/unequal-pay-in-denmark-an-outdated-laws-far-reaching-consequences/>

⁴⁵ Denmark, Equal Pay Act, Consolidation Act No. 156, of 22.02.2019.

⁴⁶ The proposal for the reform act as well as the adopted act No. 13 of 18.06.1969 are available at: <https://www.folketings-tidende.dk/samling/19681/lovforslag/L169/index.htm>. A critique of the wage classification of nurses was put forward during the first reading of the act in the Parliament, but did not lead to any changes in the classification. The critique can be found in column 6334 here: https://www.folketingstidende.dk/samling/19681/lovforslag/L169/19681_L169_BEH1_M100_referat.pdf.

Estonia

EE

CASE LAW

Sexual harassment in the National Opera Theatre

On 17 February 2021, the Harju County Court delivered a judgment in a famous case concerning a sexual harassment scandal involving the director of the Estonian National Opera Theatre. The court ruled against the claims of sexual harassment.⁴⁷

Gender

The director of the Opera Theatre was accused of sexual harassment and inappropriate sexual behaviour by several women in June 2020. The Advisory Council of the Opera Theatre investigated the claims and concluded that the female employees lacked a sense of humour. However, the director stepped down after the in-house investigation in August 2020, and a remarkable amount of compensation was paid to the director. The police investigated the case and found the former director guilty of a misdemeanour (sexual harassment as penalised by Article 153.1 of the Penal Code) and issued a fine of EUR 400 on 21 October 2020.⁴⁸

The former director challenged the decision and denied committing the alleged acts. There were five court hearings of people invited by the director, and he hired two top lawyers. On 17 February 2021, the Harju County Court found no case of sexual harassment. Specifically, the county court did not find that the director's actions were against the will of the victim or that his conduct had resulted in degrading the victim's human dignity. However, the county court analysed only a few incidents, which related to only one of the victims. The police took the case to the Supreme Court in March 2021. The Supreme Court decided to not take the case on 20 May 2021.⁴⁹

Online source:

<https://www.riigiteataja.ee/kohtulahendid/detailid.html?id=285662494>

<https://ekspress.delfi.ee/artikkel/90207455/rahvusooper-estonia-tootajad-direktor-aivar-mae-alandab-ja-ahistab-naisi>

Finland

FI

POLICY AND OTHER RELEVANT DEVELOPMENTS

Reform of family related leave

On 16 February 2021, the Ministry of Social Affairs and Health published the promised reform of family-related leave, which would lengthen the duration of income-related family leave to about 14 months

Gender

47 Estonia, County Court of Harju, judgment of 17.02.2021, No. 4-20-4696, available at: <https://www.riigiteataja.ee/kohtulahendid/detailid.html?id=285662494>.

48 Article 153.1 of the Penal Code entered into force on 06.07.2017. The Article regards sexual harassment as a misdemeanour. The article's wording was a compromise among members of the Parliament and provides that sexual harassment is an intentional physical act of sexual nature against the will of another person committed against him or her with degrading objectives or consequences. This wording is narrower than in the Istanbul Convention, which talks about any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person. Sexual harassment is punishable by a fine of up to 300 fine units (EUR 1 200) or by detention.

49 No reasoning was provided by the Supreme Court for the refusal to take the case.

altogether. The reform also lengthens the non-transferable part of parental leave. The Government Bill on the matter is expected in autumn 2021.

The proposed reforms mentioned in the Government Programme were delayed due to the COVID-19 pandemic. According to the information published on 16 February 2021, both parents would have a quota of 164 weekdays, or about 6.6 months of parental leave. Both parents could use the parental leave flexibly until the child is two years old. At present, paternity leave is more flexible than maternity leave. However, according to the proposal, parental leave would no longer be defined by the sex of the parent, and it would not depend on whether the child is adopted or not. A single parent would be entitled to the entire leave period.

The transferable part would be 69 weekdays, and there would be around one month's pregnancy leave once the child is born. The period of leave covered by income-based benefits would increase (at present this is set until the child is 11.5 months, and the proposal proposes to extend this until the child is 13 months).

As was expected, the home care leave remained untouched, as there was no agreement on reforming home care leave in the Government coalition. As it stands, only a flat rate home care leave benefit is paid for children taken care of at home (maximum until the child is three years old).⁵⁰

Online source:

<https://www.youtube.com/watch?reload=9&v=u-S9uA-7MOA&feature=youtu.be>

<https://yle.fi/uutiset/3-11792438>

FR

France

CASE LAW

Court of Cassation determining the limits of the protection against victimisation

The claimant is an engineer who was employed by the respondent, a consulting firm, since 2008, and who was assigned to projects with clients of the firm.

In 2012, between two projects, after refusing a new assignment, the claimant wrote to the president of the group of companies to which the respondent belongs and to his line manager, making an unsubstantiated general accusation of discrimination on the ground of origin against the commercial director. He also addressed a complaint to the Defender of Rights, who closed the inquiry for lack of evidence in 2014.

One month after sending his complaint to his bosses, the claimant was dismissed on the ground that he had made accusations he knew to be false. The labour court and the Court of Appeal found that the claimant had committed a gross fault and that the dismissal was well founded.

In January 2021, the Supreme Judicial Court (Cour de Cassation) ruled on the case, first noting that no sanction can be taken against an employee for making a claim of discrimination unless bad faith is demonstrated. To establish bad faith, the employer cannot rely on the sole conclusion that the facts alleged have not been established, but must prove that the employee was aware that the facts alleged in support of their claim were false.⁵¹

⁵⁰ Finland, Sickness Insurance Act (1224/2004), Chapter 9.

⁵¹ France, Court of Cassation, decision of 13.01.2021, in case No. 19-21138.

In this case, the employer had established that the accusation of discrimination was made in the context of a prior refusal of a new project, at a time when the employee intended to leave, was disengaged from his work, had never before raised facts supporting allegations of discrimination on the ground of origin, did not raise precise facts in support of his allegations and intended to use the accusations to negotiate his compensation package.

In such a context of unfounded allegations, the Court concluded that the employer had satisfied his burden of establishing that the employee knew that the allegations were false and confirmed that the dismissal of the employee was well founded.

Online source:

https://www.courdecassation.fr/jurisprudence_2/arrets_publies_2986/chambre_sociale_3168/2021_9997/janvier_9998/64_13_46315.html

Reversal of defamation case against French #MeToo victim

A female journalist victim of sexual harassment who launched the hashtag 'name your pig' (*#balancetonporc*), had been convicted in first instance for defamation in 2017,⁵² but won on appeal on 23 March 2021.⁵³ The court decided that the hashtag was indeed an infringement of the perpetrator's honour, but the author of the hashtag was doing this 'in good faith', since she acted in the interest of the public and liberated the voice of women on the issue of sexual harassment and violence against women.⁵⁴

Gender

On 13 October 2017, a journalist (the victim of harassment in this case) tweeted *#name your pig*, encouraging women who were harassed to circulate their experience on twitter giving names and details. Shortly after launching the French #MeToo movement, she shared her own experience, and described the verbal abuse she suffered from her colleague, a TV producer who told her at a party: 'You have big breasts. You are my type of woman. I am going to make you come all night.' Her colleague later admitted to the verbal assault in a newspaper and expressed regret for his behaviour but then filed a lawsuit against the journalist for defamation. He won in first instance not because it was a false allegation but by producing evidence of the harm done by the tweet, once it went viral. This case illustrates how in France, defamation law can apply even when the allegation is true. Article 29 of the Law of 1881 defines defamation in a broad fashion linked mostly to its consequences as 'any allegation or accusation of a fact that infringes on a person's honour or consideration or on their body.'⁵⁵ The lower court recognised the infringement to his honour: as a pig, he was associated in all of France with Harvey Weinstein, although he considered he had not sexually assaulted the journalist. He also lost his job and his wife left him. The journalist had to pay a fine of EUR 10 000 in damages and EUR 5 000 in lawyers' fees for the TV producer.

The Paris Court of Appeal confirmed that the perpetrator of sexual harassment did suffer the harm that characterises defamation. However, the Court of Appeal still reversed the decision, by raising, beyond the truthfulness of the allegation (*exceptio veritas*), the good faith of the victim. The claimant had to prove the legitimate goal of the allegation, the absence of personal animosity, the seriousness

52 France, Civil Tribunal of Paris (First Instance), decision of 25.09.2019, RG No. 18/00402; news article available at: https://www.lemonde.fr/societe/article/2019/09/25/l-initiatrice-de-balancetonporc-condamnee-pour-avoir-diffame-l-homme-qu-elle-accusait-de-harcèlement_6013008_3224.html.

53 France, Paris Court of Appeal, decision of 31.03.2021, No. RG 19/19081; *#balancetonporc*: "Le bénéfice de la bonne foi doit être reconnu à Sandra Muller", estime la cour d'appel de Paris qui infirme sa condamnation pour diffamation, *Le Monde*, 31 March 2021, available at: https://www.lemonde.fr/societe/article/2021/03/31/balancetonporc-sandra-muller-gagne-en-appel-le-proces-en-diffamation-intente-par-eric-brion_6075159_3224.html; no official publication is available yet.

54 France, Paris Court of Appeal, decision of 31.03.2021, No. RG 19/19081; *#balancetonporc*: "Le bénéfice de la bonne foi doit être reconnu à Sandra Muller", *Le Monde*, 31 March 2021.

55 France, Law of 29.07.1881 on the freedom of the press, Articles 29(1) and 32(1).

of the preliminary inquiry and the prudence and the appropriateness of the expression. The Court of Appeal recognised this good faith defence, finding: ‘The tweet denounces the unwelcome inappropriate behaviour with sexual connotation of men affecting women in order for physical and verbal aggressions tolerated in the past or silenced to be made known and not perpetuated. The hashtags #NameYourPig and #MeToo were followed and supported by numerous celebrities and authorities and contributed to liberating women’s voices in a positive way, the limit being unjustified denunciations of men or lies on the social network. Notwithstanding this limit, this call to denounce these sexual and sexist acts is legitimate. Even though [the TV producer] suffered from the denunciation, the good faith defence of [the journalist] must be upheld since her tweet did not include an allegation he committed an assault and the tweet was published in line with a public interest debate on the liberation of women’s voices with sufficient factual basis for the verbal acts attributed to [the TV producer].’

Online source:

https://www.lemonde.fr/societe/article/2021/03/31/balancetonporc-sandra-muller-gagne-en-appel-le-proces-en-diffamation-intente-par-eric-brion_6075159_3224.html

Court of Cassation decision on the Islamic veil in the workplace

The claimant was a saleswoman in a fashion chain store. When she returned from parental leave, she was wearing an Islamic veil covering her head and neck up to her chin. When she refused to remove it upon the request of her superior, the employer suggested that she work in the back store. She refused this proposition and was put on paid leave while a decision was taken on her situation. She was finally dismissed for refusal to abide by the fashion chain’s (unwritten) dress code.

The first instance labour court dismissed her claim, accepting the employer’s argument that the dress code constituted a genuine and determining occupational requirement.⁵⁶ The claimant appealed the decision alleging (1) that the employer could not invoke a policy of neutrality when the necessity of a neutral dress code was not included in the firm’s written in-house regulation, and (2) that the employer’s arguments were based exclusively on commercial considerations and the expectation of clients, in violation of EU law following the CJEU decisions in the *Feryn*⁵⁷ and *Bougnaoui*⁵⁸ cases. The employer invoked the terms of the contract and of the in-house regulation requesting that salespersons be dressed in such a way as to represent the chain’s image and that they support the ends of the business and ensure client satisfaction.

The Court of Appeal cited the *Bougnaoui* and *Achbita* decisions of the CJEU, stating that to justify restrictions to religious freedom forbidding the Islamic veil, employers must either provide for a general neutrality clause in their in-house regulations in accordance with the Labour Code and justify its strict application to persons in contact with clients, or establish that the requirement constitutes a genuine and determining occupational requirement. The employer cannot invoke commercial considerations or client satisfaction to impose restrictions on religious freedom as a genuine and determining occupational requirement. Noting that the employer in this case did not provide for a general neutrality clause in its in-house regulations, the Court of Appeal concluded that the employer’s arguments were strictly based on its commercial policy and were therefore not admissible. The Court concluded that the dismissal was null and void and awarded EUR 10 000 in damages to the claimant.⁵⁹

The employer challenged the decision before the Court of Cassation, which delivered its ruling in April 2021.⁶⁰ First, the Court stated that according to Article L1321-3(2) of the Labour Code, the employer

56 France, Labour Court (*Conseil de Prud’Hommes*) of Toulouse, decision of 07.02.2017 in case No. F16/00403.

57 CJEU, judgment of 10 July 2008, *Feryn*, C-54/07, ECLI:EU:C:2008:397.

58 CJEU, judgment of 14 March 2017, *Asma Bougnaoui, ADDH v Micropole SA.*, C-188/15, EU:C:2017:204.

59 France, Court of Appeal of Toulouse, decision of 06.09.2019, in case No. 2019/524.

60 France, Court of Cassation, decision of 14.04.2021, in case No. 19-24079.

cannot impose restrictions on religious freedoms that are not required by a genuine and determining occupational requirement based on the nature and the conditions of execution of a specific professional activity. If the employer intends to impose restrictions to rights and freedoms through the imposition of a neutrality policy, it may only do so through the adoption of a neutrality clause in a written general instruction or its in-house regulation, in application of Article L1321-5 of the Labour Code.

The Court thus confirmed the finding of the Court of Appeal that the obligation imposed on the employee to remove her Islamic veil constituted direct discrimination on the ground of religion. It further confirmed the analysis that the chain's commercial policy relating to the physical appearance of saleswomen could not form the basis of a genuine and determining occupational requirement.

This case focused on discrimination based on religion but implicitly raised the question of intersectional discrimination on the basis of, notably, sex and religion or belief. As long as multiple or intersectional discrimination is not defined by law and not equipped with its own evidentiary rules, these cases will most likely be framed under a single axis standard.

Online source:

https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/479_14_46873.html

Impact of mental psychic disability on the appreciation of the fault of the employee

The claimant was dismissed for fault after having verbally assaulted (and attempted to physically assault) his superior. The claimant alleged that the assault could not constitute a fault considering that it was the result of an altered mental state requiring psychiatric care. The claimant produced 36 testimonies confirming that he was a reliable employee who behaved properly and professionally, and that he had never been the subject of disciplinary measures before.

The Court of Appeal found that the dismissal was unfounded because the employee's behaviour was a result of his pathological state, which was caused by the harassment that the claimant had experienced, and could therefore not constitute a fault. Consequently, the dismissal constituted discrimination on the ground of health and disability.

The Court stated that disciplinary rules do not apply to situations that can be linked to a mental illness. In such situations, the employer has a duty to provide reasonable accommodation by finding means and resources to handle the situation in such a way that the employee can maintain his/her employment.

The employer challenged the decision before the Court of Cassation, arguing that the gravity of the aggression was such that the fault could not be justified by the mental condition of the claimant and that the employer could therefore not be forced to keep the employee. The Court of Cassation confirmed the findings of the Court of Appeal, rejecting the employer's arguments.⁶¹

Online source:

https://www.legifrance.gouv.fr/juri/id/JURITEXT000043565870?init=true&page=1&query=arr%C3%AAt+20-10.512&searchField=ALL&tab_selection=all

Burden of proof of racial profiling in a case involving police identity checks

In March 2017, three male high school students, of Moroccan, Comorian and Malian origin respectively, returning with their class and teacher from a two-day school trip to visit Brussels, were the only persons subjected to a check by police on the train platform. Despite a request from the teacher, they received

⁶¹ France, Court of Cassation, decision No. 20-10512 of 12.05.2021.

Disability

Racial or ethnic origin

Age

Sex

no justification or explanation from the police officers. Subsequently, the police authorities also failed to respond to a registered letter also demanding justification for the targeted identity and baggage check.

The claimants initiated a recourse against the state for racial profiling and addressed a complaint to the national equality body, the Defender of Rights, which then presented conclusions before the court hearing the case.

In its conclusions, the Defender of Rights insisted on the shift in the burden of proof, invoking the fact that the only three persons checked, without cause, were apparently of foreign origin as sufficient to shift the burden of proof and arguing that the state must therefore establish that the check was justified by considerations that were unrelated to any discrimination.

The case was dismissed by the first-instance court on the ground that the checks were justified by general police methods to ensure public order and that the police could not have discriminated since the entire class was composed of students of foreign origin.⁶²

In June 2021, however, the case was heard by the Court of Appeal, which maintained the claimants' appeal. It concluded that a check based on the physical characteristics of the persons identified is discriminatory and constitutes a fault triggering the liability of the state.⁶³

Studies show that stereotyping in police checks mainly targets young men of foreign origin.⁶⁴ Since it was established that young women of the same group, adult train passengers getting out of the train and people who were not members of minorities were not checked, there was sufficient evidence to conclude a presumption of discrimination on the combined grounds of origin, age and sex.

The state argued that it was not in a position to establish the identity of persons checked by paper trail, and that public space surveillance videos were only kept for 72 hours, and thus unavailable. The Court responded that such videos were kept for 62 days, that police services should have proceeded to undertake the required verifications and documented the circumstances of the checks when it received the claimants' written request for justification within five days of the check, which it did not. The state also alleged that the checks were based on the behaviour of the person who was stopped since, according to one policeman, two of the claimants had big bags and were suspicious as they stood apart from the group. The Court concluded, however, that this report was insufficient as evidence, as it was written by only one of the three police officers, after the claimants had initiated their legal action against the state. The state's arguments based on limits related to the organisation of police services were dismissed, asserting the obligation of the state to be in a position to establish that checks are unrelated to discriminatory considerations.

The Court concluded that, after the burden of proof had been shifted to the state, it did not provide sufficient evidence that no discrimination had taken place. The state was thus ordered to pay EUR 1 500 in damages to each claimant and EUR 2 000 for the costs of each proceeding.

Online sources:

https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=39451&opac_view=-1

https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=39444&opac_view=-1

62 France, Judicial High Court of Paris (9th arrondissement), decision Nos. RG 17/06217 and RG 17/06214 of 17.12.2018.

63 France, Court of Appeal of Paris, decision Nos. RG 19/0065 and RG 19/00872 of 08.06.2021.

64 See for instance: Defender of Rights (2017), 'Relations police/population: le cas des contrôles d'identité' (Police/population relationships: the case of identity checks), available at: <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/enquete-relations-police-population-final2-11012017.pdf>; Jounin, N. (2015), *Le faciès du contrôle* (The face of control), l'Harmattan; Goris, I. (2009), *Police et minorités visibles: les contrôles d'identité à Paris* (Police and visible minorities: identity checks in Paris), Open society.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Creation of an online anti-discrimination platform

On 4 December 2020, the President of the Republic admitted the massive scale of discrimination on the ground of origin in France, and announced the creation of a multimedia platform for victims of discrimination that would be launched in 2021. The platform, which was launched on 12 February 2021, is managed by the Defender of Rights.

All grounds

The platform (www.antidiscriminations.fr) allows users to get information, call or chat with a dedicated service of specialised jurists, file complaints or be signposted towards a network of organisations, including dedicated state services for violence against women, police inspection services in cases of police violence or racial profiling, and anti-racist NGOs.

The objective of the antidiscrimination platform is to provide a one-stop service that guarantees rapid access to recourse and support for victims of discrimination.

The budget of the Defender of Rights was substantially increased to operate this platform and 15 employees were hired to cover the creation of the web application, the management of the platform and a widespread communication campaign promoting both the platform and the fight against discrimination in general.

In its first month of operation, the platform received 3 000 calls or requests for chat conversations. Some 29 % related to the ground of origin and 29 % to disability. Most inquiries related to the field of private employment (37 %), private life in relation to violence or hate speech (26 %), public services (19 %) and goods and services (15 %).

Online source:

<https://www.antidiscriminations.fr>

Germany

DE

CASE LAW

Age discrimination and admission to music events

Age

The case concerned a 44-year-old person claiming to have been discriminated against on the ground of age because he was denied access to a music event by the bouncer, due to his age. The event had a capacity of 1 500 people, and all tickets were sold directly at the event, after the entry checks. The claimant was not admitted because he was regarded as being too old for the age group that the event was designed to serve (18–28 years). Because of the limited capacity and in order to achieve the economic success of the event, the respondent had decided that a homogenous age group was necessary to create the desired atmosphere. Therefore, people who gave the impression of not fitting into this age group were denied access. The complainant argued that this amounted to discrimination on the ground of age, according to Sections 19.1 and 21.2 of the Equal Treatment Act. He demanded EUR 1 000 in compensation.

In May 2021, the Federal Court of Justice decided that there had been no impermissible discrimination on the ground of age. In this regard, the Court argued that Section 19.1(1) presupposes so called ‘bulk

business', i.e., business that is based on contracts that are concluded irrespective of the characteristics of the person concerned, in a substantial number of cases. This is the case when a provider offers their goods or services to anyone. The Court argued that according to the business practice of events of this sort, the admission of individuals was not bulk business, but limited to a specific age group. There was no reason to deny the respondent the right to take the business decision to follow this practice. On the same basis, admission to the event did not form a contract which is similar to *bulk business* either (where the personal characteristics have only minor importance). In this case, however, the age was regarded as decisive for the design and success of the event.⁶⁵

The case raises the question of under what circumstances age can be a legitimate criterion for limiting access to such events. The Court circumvented the question to a certain degree by focusing on the qualification of *bulk business*.

Online source:

<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=3&anz=640&pos=1&nr=117637&linked=pm&Blank=1>

EL

Greece

LEGISLATIVE DEVELOPMENTS

Religion
or belief

Positive action facilitating access of Muslim candidate students to higher education

In February 2021, the Greek Parliament adopted legislation introducing positive action to facilitate access to higher education by candidate students of the Muslim minority of Thrace, who are generally regarded as disadvantaged due to their bilingual status and a lack of proper integration by the state. The legislation stipulates that these candidate students are specifically exempted from the newly introduced strict system of requiring certain minimum scores at the national examinations for access to universities and technical colleges.⁶⁶

This positive measure followed previous policies to ensure equal opportunities for the Muslim minority of Thrace in education, such as quotas in higher education institutions.⁶⁷ Between 1996, when such quotas were first introduced, and 2020, the total number of students from this minority admitted to higher education institutions increased from 98 to approximately 500, which may indicate that positive action measures seem to function in a satisfactory way in this area.

Online source:

<https://www.e-nomothesia.gr/kat-ekpaideuse/nomos-4777-2021-phek-25a-17-2-2021.html>

Prohibition of incitement to violence or hatred against groups or persons vulnerable to discrimination

On 19 February 2021, the Greek Parliament adopted legislation transposing Directive 2010/13/EU concerning the provision of audio-visual media services (including television, internet, music, etc.), and,

⁶⁵ Germany, Federal Court of Justice, decision No. VIII ZR 78/20 of 05.05.2021.

⁶⁶ Greece, Law No. 4777/2021 on introduction to Higher Education, protection of academic freedom, upgrading of the academic environment and other provisions, Official Journal 25A/17.02.2021.

⁶⁷ Greece, Law No. 2341/1995 on regulation of issues of the teaching staff of minority schools of Thrace and the Special Pedagogical Academy of Thessaloniki and other provisions, Official Journal 208A/06.10.1995.

notably the prohibition of incitement to violence or hatred in such services.⁶⁸ According to the relevant provision:

‘audio-visual services must not incite violence or hatred against a group of people or members of a group determined on the basis of race, colour, national or ethnic origin, pedigree, religion, disability, sexual orientation, identity or gender characteristics’.

Initially, the provision also included the grounds of political beliefs and social origin as well as age, but these grounds were removed in the final version. While concerns relating to the protection of freedom of expression were the reason for removing the grounds of political beliefs and social origin, it is unknown why ‘pedigree’ was added, whereas ‘age’ was removed.

In the previous version, there was also a second paragraph stipulating that ‘audio-visual services must not involve public provocation in the commission of a terrorist crime punishable by the penal code’. In this regard, the wording was amended due to a fierce debate in Greece in early February 2021 relating to the perception that the provision would violate the freedom of expression.

In addition, the final legislation also imposed upon service providers a duty to increase constantly and progressively the accessibility of their services to persons with disabilities. The accessibility of services is specifically achieved by programme subtitling, use of sign language, audio description and oral subtitling. According to the new provision, service providers also need to develop plans concerning the accessibility of emergency information, including public information and announcements in the event of natural disasters.

From a gender perspective, Article 8 of Law 4779/2021 falls short of the wording of Article 6 of Directive (EU) 2010/13⁶⁹ in that it does not prohibit incitement to hatred or violence based on sex. This does not only constitute a breach of the Directive, but also of the gender equality provisions of the Treaties,⁷⁰ which impose obligations on both the EU and the Member States to actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities.

The omission of gender-based hate speech also falls short of the upcoming legislative initiatives at EU level: the envisaged extension of the list of Euro-crimes to include all forms (hence also based on gender and/or sex) of hate crime and hate speech⁷¹ and the new Digital Services Act proposal, which would, when accepted, apply to all illegal online content, including illegal hate speech on all grounds.⁷²



68 Greece, Law No. 4779/2021, Transposition into national law of Directive (EU) 2010/13 of the European Parliament and of the Council of 10 March 2010 on the coordination of certain laws, regulations and administrative provisions of the Member States relating to the provision of audiovisual media services, as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 and other provisions within the competence of the General Secretariat for Communication and Information, Official Journal 27 A/20.02.2021.

69 Article 6 of Directive 2010/13: ‘Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality’.

70 Article 2 TEU, which acknowledges equality between women and men as one of the values on which the EU is based; Article 3(3) TEU, which acknowledges the promotion of equality between men and women throughout the European Union as one of the essential tasks of the EU; Article 8 TFEU which specifies that: ‘In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women’; Article 10 TFEU, which contains a similar obligation for all the discrimination grounds mentioned in Article 19 TFEU, including sex: ‘In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’.

71 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission Work Programme 2021 A Union of vitality in a world of fragility, COM(2020) 690 final, 19 October 2020, p. 7.

72 Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final, recital Nos. 12 and 57. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52020PC0825>.

Online source:

<https://thegreeklawyer.gr/%CF%86%CE%B5%CE%BA-%CE%B1-27-2021-%CE%BD-4779-2021-%CE%B5%CE%BD%CF%83%CF%89%CE%BC%CE%AC%CF%84%CF%89%CF%83%CE%B7-%CF%83%CF%84%CE%B7%CE%BD-%CE%B5%CE%B8%CE%BD%CE%B9%CE%BA%CE%AE-%CE%BD%CE%BF%CE%BC/>

Establishment of National Accessibility Authority

In February 2021, the Greek Parliament established a National Accessibility Authority.⁷³ The purpose of the Authority is to remove discrimination or barriers and consequently facilitate the integration of people with disabilities into social, economic, political and cultural life, as dictated by the UN Convention on the Rights of Persons with Disabilities (CRPD).

The Authority is a consultative body of the state, and its responsibilities include the following:

- (a) to monitor the implementation of the international, EU and national accessibility framework;
- (b) to formulate proposals for comprehensive policies, regulatory interventions and specific actions on accessibility, advise on relevant issues, and consult public administration, civil society and the disability movement;
- (c) to recommend the development and updating of accessibility standards in all areas, such as the physical and digital environments, as well as communications, transport, products and services, and give advice on their implementation;
- (d) to cooperate with the Coordinating Mechanism of the Government and to submit proposals regarding the implementation and revision of the National Action Plan for the Rights of Persons with Disabilities;
- (e) to participate in the committees drafting laws related to its responsibilities or give an opinion on relevant provisions prior to their submission as to their compatibility with the CRPD;
- (f) to inform the public on issues relating to the access of people with disabilities to all areas of human activity, in cooperation with the relevant ministries.

The Authority consists of 12 members, more than half of which must be scientists of recognised prestige in relevant areas or citizens whose activity is related to the access of people with disabilities to all aspects of society, of which 3 should have disabilities themselves. All public services must facilitate the work of the Authority which may, in order to fulfil its mission, request from any public or private sector body or individual, any relevant information or document.

The same law that established the Authority also made some relevant amendments regarding the National Commission of Human Rights, which is an independent advisory body competent to provide legal opinions on legislative bills regarding human rights. Most importantly, its financial independence is established as the Commission will now draw up its own budget in complete independence.

Online source:

<https://www.e-nomothesia.gr/kat-anthropina-dikaionomata/nomos-4780-2021-phek-30a-28-2-2021.html>

73 Greece, Law No. 4780/2021 on the National Accessibility Authority, National Rights Commission of Humanity and National Committee on Bioethics and Techno-ethics, Official Journal 30A/28.02.2021.

Mandatory shared custody for all children in breach of the Istanbul Convention and EU law

Following strong pressure by well-known associations of fathers,⁷⁴ Act 4800/2021 entitled ‘Reforms regarding parent-child relations and other family law issues’ introduced for the first time mandatory shared custody. It was adopted by the Greek Parliament on 20 May 2021 with only the votes of all the MPs of the ruling party in favour (156 out of 300 MPs), with the exception of two prominent female MPs of the ruling party who voted against, together with all the MPs of the opposition parties.

Despite its proclaimed aim, to serve the best interests of the child, all national women’s NGOs and several human rights NGOs strongly protested, claiming that the bill (now Act 4800/2021) was in breach of international treaties ratified by Greece, which, according to the Greek Constitution, prevail over national legislation.⁷⁵ In particular, the bill would breach the European Convention on Human Rights (ECHR) (Article 8), the Istanbul Convention (IC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the UN Convention on the Rights of the Child (UNCRC); as well as EU law, in particular Article 24 of the EU Charter of Fundamental Rights (the Charter) and Directive 2012/29/EU on Victims’ Rights.⁷⁶

This alarming situation led to an emergency intervention during the debate in the Greek Parliament (something seldom done), by the UN Chair-Rapporteur of the working group on discrimination against women and girls, and the UN special rapporteur on violence against women, its causes and consequences. In a letter of 17 May 2021 to the Greek Prime Minister,⁷⁷ analysing the bill (article by article), they expressed their serious concerns on its compatibility with the IC, the CEDAW and the UNCRC, asking him to share the letter with Parliament at the earliest, albeit to no avail. Moreover, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) in its letter of 18 May 2021 to the Ambassador of Greece to the CoE (copied to the national monitoring body for the IC, the General Secretariat for Family Policy and Gender Equality)⁷⁸ voiced its concern on the incompatibility of the bill with Articles 31 and 48 of the IC, noting the upcoming evaluation of Greece by GREVIO, to be launched in September 2021. None of the above documents were disclosed to the MPs by the Government prior to the vote on the bill.⁷⁹ The first one was disclosed to Parliament by an opposition spokesperson on the day of the vote, but the Minister of Justice denied that the Prime Minister or himself had ever received it.

The new act does not provide for the child’s best interests to be assessed on an individual basis, but imposes a ‘joint and equally exercised parental custody’ as the rule for all children of separated parents. This is in flagrant breach of the UNCRC as interpreted by General Comment No. 14 (2013) of the committee monitoring its application, which requires the assessment of the child’s best interests to

74 The non-profit organisation Active Daddies for children’s rights, <https://www.energoimpampades.gr/>; the association Hellenic Council for Common Upbringing, <https://www.synepimelia.gr/?p=3012>; the campaign Act against Parental Alienation – GR, <https://www.facebook.com/actagainstPA/>; <https://www.gonis.gr/>.

75 According to the Greek Constitution (Articles 28 and 36, paragraph 2), a necessary prerequisite for the ratification of an international treaty, such as a human rights treaty, is its sanctioning by law, by virtue of which it is introduced into the Greek legal order and the will of the state to be bound by it is expressed. Following its ratification and its entry into force regarding the Greek State, the treaty acquires supra-legislative force, see Roucounas, E. (1976) ‘Le droit international dans la Constitution de la Grèce du 9 juin 1975’ (International law in the Constitution of Greece of 9 June 1975) *Revue Hellénique de Droit international*, pp. 51-73.

76 Directive 2012/29/EU on Victims’ Rights, transposed by Act 4478/2017, OJ A 91/23.06.2017.

77 United Nations, Mandates of the Working Group on discrimination against women and girls; and the Special Rapporteur on violence against women, its causes and consequences, reference: OL GRC 2/2021, 17.05.2021, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26416>.

78 Council of Europe, Directorate of Human Dignity, Equality and Governance, letter of the President of GREVIO Marceline Naudi to the Ambassador Extraordinary and Plenipotentiary Permanent Representative of Greece to the Council of Europe Mr Panayiotis Beglitis with copy to Ms Angeliki Papazoglou, Deputy Head of Directorate for Social Protection and Counselling Services, General Secretariat for Family Policy and Gender Equality, Ministry of Labour and Social Affairs, https://isotitahome.files.wordpress.com/2021/05/letter_president-grevio_greece_ce9dcf8ccebcbcf82-cea4cf83ceb9ceaccf81ceb1-200521.pdf.

79 ‘Νέες απειλές κατά δικαστών’ (New threats against judges), newspaper Εφημερίδα Συντακτών (*Efimerida Syntakton*), 24.05.2021, available at: https://www.efsyn.gr/ellada/dikaioisyni/295211_nees-apeiles-kata-dikaston.

be carried out on a case-by-case basis.⁸⁰ The European Commission has adopted the same position on the basis of Article 24 of the EU Charter of Fundamental Rights.⁸¹ Act 4800/2021 also applies to cases already pending before the courts. This may explain why, within only a few hours of the vote, it was published in the OJ.⁸²

Instead of leading to a social consensus, the new act has ignited gender hate speech against female scientists, activists of women's NGOs and mothers. More than 800 insulting digital comments had to be removed from the platform of the public consultation. In the same vein, 'groups' of fathers have been targeting judges, who awarded child custody to mothers. By drafting so-called 'black lists', they are calling for the submission of collective complaints, threatening any judge who 'stages war with them' etc, as denounced by the Union of Judges and Public Prosecutors.⁸³ Responding immediately, the First Instance Public Prosecutor of Athens *proprio motu* ordered an investigation for the eventual commitment of punishable acts against judges.⁸⁴ Soon after the vote in favour of the new act, the same threats were repeated by an organised group of fathers.⁸⁵ This sexist and 'hate' climate has been alarmingly expressed during the parliamentary debate.

Online source:

<https://www.e-nomothesia.gr/oikogeneia/nomos-4800-2021-phek-81a-21-5-2021.html>

Greece transposes Directive 2019/1158 on work-life balance

In June 2021, Directive 2019/1158 (the Work-life Balance Directive) was transposed by Chapters A and C, Part III, of Act 4808/2021.⁸⁶ The text of this omnibus Act⁸⁷ was drafted by the Ministry of Labour and Social Affairs (Ministry of Labour). Prior to its adoption there was no formal dialogue with trade unions,

Gender

- 80 General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, para. 1), CRC/C/GC/14, in particular par. 32: 'The concept of the child's best interests is complex and its content must be determined **on a case-by-case basis**... the concept of the child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child...'; available at: https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf.
- 81 European Commission, Directorate-General Justice and Consumers, JUST/A 1/HG/JS/jeh D(2016)900792 Ares(2016)382876, letter of 22.02.2016 to the President of COLIBRI, European Platform for Joint Custody, Co-Parenting and Childhood, http://www.synepimelia.gr/wp-content/uploads/2016/01/900792-Colibri-reply-Feb-2016-A1-and-C1_final_signed.pdf: '...The Commission ... is nevertheless of the opinion that in decisions concerning children the primary consideration shall be the best interests of the individual child assessed **on a case-by-case basis**, in line with General Comment No 14 (2013) of the UN Committee on the rights of the child to have his or her best interests taken as a primary consideration'.
- 82 See footnote No. 78.
- 83 Greek Union of Judges and Public Prosecutors, Resolution of 6.05.2021, 'Αθέμιτες πιέσεις σε δικαστικούς λειτουργούς σε υποθέσεις επιμέλειας ανηλίκων τέκνων (Illegal pressures to judges in cases of custody of minor children), available at: <https://ende.gr/%ce%b1%ce%b8%ce%ad%ce%bc%ce%b9%cf%84%ce%b5%cf%82-%cf%80%ce%b9%ce%ad%cf%83%ce%b5%ce%b9%cf%82-%cf%83%ce%b5-%ce%b4%ce%b9%ce%ba%ce%b1%cf%83%cf%84-%ce%b9%ce%ba%ce%bf%cf%8d%cf%82-%ce%bb%ce%b5%ce%b9%cf%84/>.
- 84 'Εισαγγελική παρέμβαση για τις «προγραφές» δικαστικών που έκριναν υποθέσεις επιμέλειας τέκνων' (Intervention of the Prosecutor for the 'proscriptions' of judges who adjudicated cases of child custody), Εφημερίδα Συντακτών (Efimerida Syntakton), 7.05.2021, available at: <https://www.efsyn.gr/node/292877>.
- 85 See footnote No. 78.
- 86 Greece, Act No. 4808/2021, Official Journal A 101/19.06.2021 on the promotion of work – establishment of an independent authority, the 'Labour Inspectorate' – sanctioning of ILO Convention 190 on the elimination of violence and harassment in the world of work – Sanctioning of ILO Convention 187 on a promotional framework for occupational safety and health – Transposal of Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance, other provisions of the Ministry of Labour and other urgent provisions.
- 87 Act 4808/2021 consists of six parts and 125 Articles in total: along with the sanctioning of C-190 and C-187 and the transposal of Directive 2019/1158, it introduces controversial radical labour law reforms, inter alia, on working time, dismissals and strike. The compilation of so many provisions in a single Bill has been strongly criticised by the NCHR in its report on the Bill dated 14 June 2021, https://www.nchr.gr/images/pdf/apofaseis/ergasia/paratiriseis_ergasiako_final.pdf.

women's NGOs or consultation with the National Commission for Human Rights (NCHR), as criticised in the NCHR report on the bill.⁸⁸

The notable points in relation to Articles 24-31 of the Act are listed below.

Personal scope:⁸⁹ natural, adoptive or foster parents employed under any relationship or form of employment, including part-time workers, fixed-term workers, persons with a contract of employment or employment relationship with a temporary agency and persons with a 'remunerated mandate', 'irrespective of the nature of the work performed'. The latter exceed the scope of the directive.

Definitions: the definitions of 'paternity leave', 'parental leave', 'carer's leave', 'carer' and 'flexible working arrangements' are copied from the Directive, whereas the definition of 'relative'⁹⁰ is broader, covering siblings and in-laws in the same line and of the same degree as those provided by the Directive.

Paternity leave:⁹¹ 14 working days fully paid by the employer (which is more favourable than the Directive) to be taken: i) either two days before the expected date of confinement and the rest 12 days, as a whole or on a piecemeal basis, within 30 days after the confinement; ii) or alternatively, all 14 days after confinement. By increasing paternity leave to 14 days, Greece now ranks in 5th position among OECD countries.⁹²

Parental leave:⁹³ four-months leave taken up to the age of eight years of the child consisting of:

- i) two months' leave paid by the Greek Manpower Employment Organisation (OAED) at the monthly minimum wage,⁹⁴ which, however, is far below the average wage in Greece. If the minimum wage is found to ensure a 'decent living standard' (which is highly questionable per se), it could discourage both parents (in particular, the primary earners, who are often men) from taking parental leave, thus undermining the objective of the Directive.⁹⁵
- ii) two months' non-paid leave.

Entitlement: i) working parents or persons exercising parental custody, ii) adoptive or foster parents following the placement of the child in the family. More favourable terms are provided for single parents and in the event of multiple births. The leave is subject to a one-year length of service and can be taken, as a whole or on a piecemeal basis.

Carer's leave:⁹⁶ five working days per calendar year, non-paid, subject to six months length of service (continuous or under consecutive fixed-term employment contracts) if the person cared for is in need of significant care or support for a serious medical reason upon medical certification.

88 See reference in footnote No. 86.

89 Greece, Act No. 4808/2021, Article 25(1), implementing Article 2 of Directive 2019/1158.

90 'Relative': the spouse, the partner in civil partnership, the natural or adoptive children, the parents, the siblings and the in-laws in the same line and of the same degree' (Article 26(d) of Act No. 4808/2021).

91 Greece, Act No. 4808/2021, Article 27, implementing Articles 4 and 8 of Directive 2019/1158.

92 Ministry of Labour and Social Affairs (2021), *Newsletter*, 10.05.2021, available at: <https://ypergasias.gov.gr/ti-provlepei-gia-tis-gonikes-adeies-to-nomoschedio-gia-tin-prostasia-tis-ergasias/>.

93 Greece, Act No. 4808/2021, Article 28, implementing Articles 5 and 8 of Directive 2019/1158.

94 Since 1.2.2019 the minimum wage as set by law is EUR 650 per month (Ministerial Decision 4241/127, OJ B 173/30.01.2019). Eurostat calculates national minimum wages as monthly rates, meaning that, when the minimum wage is paid for more than 12 months per year, data is adjusted to take these payments into account. For instance, for Greece, where it is paid for 14 months a year – 12 months plus Christmas bonus (one monthly salary), Easter bonus (0.5 monthly salary) and annual leave bonus (0.5 monthly salary) – the minimum wage is calculated as follows: (EUR 650 x 14) / 12 = EUR 758.33. See <https://tradingeconomics.com/greece/minimum-wages>.

95 Directive 2019/1158, Recitals 29 and 31; CJEU, *Gassmayr*, judgment of 1 July 2010, C-194/08, ECLI:EU:C:2010:386, para. 68; Oliveira, A., De la Corte-Rodriguez, M., Lütz, F. (2020), 'The New Directive on Work-Life Balance: Towards a New Paradigm of Family Care and Equality?', *European Law Review*, 2020/3, pp. 295-323.

96 Greece, Act No. 4808/2021, Article 29, implementing Article 6 of Directive 2019/1158.

Force majeure leave:⁹⁷ one working day, paid, up to twice yearly for parents or carers on grounds of *force majeure* for urgent family reasons.

Flexible working arrangements⁹⁸ for care reasons, in particular, in the form of telework, flexible hours or part-time work, for: i) parents with children up to the age of 12 (this is more favourable than the Directive) and ii) carers,⁹⁹ subject to six-months length of service, upon request.

ILO Convention 190 on Violence and Harassment incorporated into the Greek legal order

In response to the Greek #MeToo movement as well as a campaign by women's NGOs, human rights NGOs and the trade unions,¹⁰⁰ ILO Convention 190 on the Elimination of Violence and Harassment in the World of Work (C-190) was incorporated into national law by Act 4808/2021.¹⁰¹ Part I of the Act introduces C-190 into Greek law, while Part II contains implementing provisions.¹⁰²

The ratification of C-190 *per se* will undoubtedly be a significant step forward in the prevention and elimination of violence and harassment. Act 4808/2021 includes some innovative provisions. Articles 5-8 of Act 4808/2021 applies to all companies, irrespective of the number of employees, in both the private and the public sector, and provides:

- i) general measures for the prevention and elimination of violence and harassment (Article 5);
- ii) recognition of violence and harassment, including sexual harassment, as a psychosocial occupational health and safety risk (Article 6);
- iii) an obligation on the employer to provide information (Article 6) and to evaluate the risk of the occurrence of violence and harassment (Article 7);
- iv) new responsibilities in respect of violence and harassment for occupational health and safety doctors at enterprise level (Article 8).

Articles 9-11, which apply only to companies with more than 20 employees, introduce an obligation on employers to adopt internal policies for the prevention and elimination of violence and harassment at enterprise level (Article 9) and for the management of violence and harassment complaints (Article 10) either through collective agreements at enterprise level or through the internal rules of the enterprise or unilaterally (Article 11). Moreover, internal rules should define violence and harassment as a disciplinary offence (Article 11).

It can be argued that the Act creates inconsistencies between the existing EU law on sexual harassment, harassment related to sex and harassment related to the other grounds of discrimination at work and the domestic law transposing Directives 2006/54, 2000/43 and 2000/78 (the EU Directives)¹⁰³ as it

97 Greece, Act No. 4808/2021, Article 30, implementing Article 7 of Directive 2019/1158.

98 Greece, Act No. 4808/2021, Article 31, implementing Article 9 of Directive 2019/1158.

99 Due to the extended definition of 'relatives', to include siblings and relatives in-law, as mentioned above, the personal scope of carers has been significantly extended in relation to that of the Directive.

100 EELN flash report (Greece) of 12 March 2021 'ILO Convention 190 to be ratified by Greece in the near future', <https://www.equalitylaw.eu/downloads/5369-greece-ilo-convention-190-to-be-ratified-by-greece-in-the-near-future-120-kb>.

101 Greece, Act No. 4808/2021, Official Journal A 101/19.06.2021.

102 For size limitations, this new report is limited to Articles 1-15 of Act No. 4808/2021. Act No. 4808/2021 consists of six parts and 125 Articles in total: along with the incorporation of C-190 and C-187 and the transposition of Directive 2019/1158, it introduces controversial radical labour law reforms, including provisions on working time, dismissals and strike. The compilation of so many provisions in a single bill was strongly criticised by the NCHR in its report on the bill: NCHR (2021) 'Παρατηρήσεις στο ΣχΝ του Πρωτογενούς Εργατικού και Κοινωνικών Προβλημάτων', 14.06.2021, available at: https://www.nchr.gr/images/pdf/apofaseis/ergasia/paratiriseis_ergasiako_final.pdf.

103 Greece, Act No. 3896/2010, Official Journal A 207/8.12.2010, transposing 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); Act 4443/2016, Official Journal A 232/9.12.2016, transposing Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

failed to comply with the general principle of EU law of non-regression (reduction of protection).¹⁰⁴ The main issues are set out below.

- Definitions: following the NCHR's hearing of NGOs, two new definitions were added to the final draft of the bill: i) 'harassment' (Article 4(2)(b), including harassment related to sex or harassment related to the other grounds of discrimination;¹⁰⁵ and ii) 'harassment related to sex'¹⁰⁶ (Article 4(2)(c), including sexual harassment, harassment related to gender identity, gender expression¹⁰⁷ and gender characteristics and harassment related to sexual orientation.¹⁰⁸ There is no distinct definition on sexual harassment either explicitly or by reference to Act 3896/2010, transposing Directive 2006/54. This may be interpreted as breach of international and EU law which acknowledge sexual harassment as a fully autonomous concept and a distinct form of gender discrimination and of gender-based violence, in recognition of the structural nature of violence against women. The lack of cohesion with the definitions of EU law has also been deplored by the NCHR in its report on the bill.¹⁰⁹
- Personal scope: the personal scope of the law was extended to cover both the private¹¹⁰ and the public sector, irrespective of status, albeit the public sector was unjustifiably excluded from the application of Articles 9-11 of the Act on the obligation of internal policies (see below).
- Material scope: although Recommendation 206 (R-206) explicitly refers to violence and harassment involving third parties, such as clients, customers, service providers, users, patients and members of the public, the incorporating law is silent on it. Thus, it falls short of the scope of C-190 and of the scope of the EU Directives, as construed by the European Commission.¹¹¹
- Limited scope of internal procedures: Articles 9-11 apply only to private sector businesses with more than 20 employees¹¹² whereas they do not apply to the public sector at all. These exceptions are in breach of C-190 and the EU Directives.
- Safeguards: the anti-victimisation provision (Article 13) prohibits the dismissal or other adverse treatment of only the victim of violence and harassment. It does not cover witnesses and the persons

104 According to the CJEU, judgment of 22 November 2005, *Mangold*, C-144/04, ECLI:EU:C:2005:709, paras. 26 and 51, the general principle of non-regression on the implementation of EU directives (explicitly laid down in Article 27(2) Directive 2006/54) does not refer only to the original transposition of the directive, but also covers all domestic measures intended to ensure that the objective pursued by the directive may be attained, including those which, after transposition in the strict sense, add to or amend domestic rules previously adopted.

105 However, the grounds are not named either explicitly or by reference to Act No. 4443/2016, transposing Directives 2000/78/EC and 2000/43/EC, and this creates legal uncertainty.

106 Harassment related to sex is defined as 'a conduct related to the sex of a person with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment according to Article 2 Act 3896/2010 and Article 2(2) Act 4443/2016. This kind of conduct includes sexual harassment according to Act 3896/2010 as well as harassment related to sexual orientation and to gender expression, gender identity or gender characteristics of the person'.

107 The NGO Transgender Support Association has welcomed the first-ever use of the term 'gender expression' in the Greek legal order; Transgender Support Association (2021), *Newsletter*, 2 July 2021, <https://transgendersupportassociation.wordpress.com/2021/07/01/%ce%b4%ce%b5%ce%bb%cf%84%ce%b9%ce%bf-%cf%84%cf%85%cf%80%ce%bf%cf%85-%ce%b8%ce%b5%cf%84%ce%b9%ce%ba%ce%ae-%ce%b5%ce%be%ce%ad%ce%bb%ce%b9%ce%be%ce%b7-%ce%b7-%ce%b5%ce%b9%cf%83%ce%b1%ce%b3%cf%89/>.

108 In EU law, harassment related to sexual orientation is prohibited by Directive 2000/78/EC.

109 Articles 8(b) and 11 of the C-190 and Article 21 Directive 2006/54 and Article 13 Directive 2000/78.

110 In its report on the bill, the NCHR stressed that the personal scope of the incorporating law should be extended to explicitly cover in the private sector: i) domestic workers and agricultural workers (usually insured by the method of the 'labour ticket' ('ergosimo')), who are often third-country nationals; ii) persons employed in the public sector under private law contracts and with the system of outsourcing; and iii) jobseekers (not only job applicants).

111 The wording of Directive 2006/54/EC (and of its predecessor Directive 2002/73) does not explicitly indicate who the perpetrators of sexual harassment or harassment related to sex may be. In its report on the application of Directive 2002/73, COM(2009)409 final of July 2009, the European Commission clearly acknowledges that the scope of protection of the Directive is not limited to relations between workers and their superiors, but extends to relations with co-workers or other third parties, Petroglou, P. (2019) 'Sexual harassment and harassment related to sex at work: time for a new Directive building on the EU gender equality acquis', *European equality law review* 2019/2, <https://www.equalitylaw.eu/downloads/5005-european-equality-law-review-2-2019-pdf-3-201-kb>.

112 In its report on the bill, the NCHR considered that this limitation is in breach of C-190 and called for the extension of obligatory internal procedures to smaller enterprises as well (which are the majority). It also proposed that all violence and harassment complaints should be notified without delay to the Labour Inspectorate and the Ombudsman. This would facilitate the collection of data on violence and harassment cases, for the lack of which Greece has been repeatedly criticised by international and EU institutions.

who have provided, formally or informally, their support to the victim, as required by the EU *acquis*.¹¹³ Moreover, the *locus standi* of legal entities (Article 14) requires the victim's written 'consent',¹¹⁴ whereas the procedure can be cancelled upon the victim's request. This is also in breach of the EU Directives. Moreover, this provision is not incorporated in the procedural codes. As a result, it will probably remain unknown to the various stakeholders.

Finally, one of the novelties of C-190¹¹⁵ is the requirement of measures at work for victims of domestic violence (DV). Instead of horizontal measures applicable to all undertakings, Act 4808/2021 only provides for the employer's obligation to include in its internal policies 'the protection of employment and the support of DV victims, if possible, with any appropriate measure or reasonable accommodation' (Article 9). The wording 'if possible' makes questionable the effectiveness of this provision, which is already of limited scope, as Article 9 does not apply to private undertakings with fewer than 20 employees or to the public sector. In addition, Act 4808/2021 provides for occupational health and safety doctors at the enterprise level to advise the employer on the integration (or reintegration) in the production process of DV victims, including by suggesting reforms or reasonable accommodation at work. However, according to the domestic law, the employment of an occupational health and safety doctor is obligatory only in undertakings with more than 50 employees. As a result, both the provisions are of limited applicability.

CASE LAW

First Greek judgment to apply the reversal of the burden of proof

In judgment No. 1196/2020, the Thessaloniki Civil Court of Appeal¹¹⁶ (CCA), for the first time acknowledged sexual harassment at work as a form of gender discrimination and applied the rule on the transfer of the burden of proof.

A female victim of sexual harassment at work lodged a claim with the first instance Civil Court of Thessaloniki (FICC), alleging that she suffered sexual harassment by her employer and asked for the adjudication of moral damages of EUR 50 000. The claim was not based on Act 3896/2010 concerning gender equality,¹¹⁷ but on the general provisions of Articles 57 and 59 of the Civil Code on the protection of the personality¹¹⁸ in combination with Article 932 of the Civil Code on the right to moral damages in the event of a wilful and illegal act.

In parallel, the claimant sued her employer before the competent criminal courts of Thessaloniki. The employer was found guilty of repeatedly committing the misdemeanour¹¹⁹ of 'offence to sexual dignity' by exploiting the working position of the claimant and was sentenced to 20 months' imprisonment and a fine of EUR 6 000 by a final judgment.

The FICC found that there had been sexual harassment and adjudicated to the claimant the sum of EUR 10 000 for moral damages. The employer lodged an appeal. By its judgment No. 1196/2020, the CCA of Thessaloniki applied *ipso jure* Act 3896/2010: it acknowledged that sexual harassment constitutes

113 Article 24 of Directive 2006/54/EC, as interpreted by the CJEU in its judgment of 20 June 2019 in *Hakelbracht*, C-404/18, ECLI:EU:C:2019:523, para. 35, Article 9 of Directive 2000/43/EC and Article 11 of Directive 2000/78/EC.

114 Under Greek law, consent is given before the lodging of proceedings, whereas approval is given after it.

115 Article 18 of Recommendation 206 refers to leave, flexible work arrangements, temporary protection against dismissal, inclusion of DV in workplace risk assessments, etc.

116 Greece, Thessaloniki Civil Court of Appeal, Judgment No. 1196/2020, *Armenopoulos*, 1/2021, pp. 52-59 with comments by Goulas, D.

117 Greece, Act No. 3896/2010, Official Journal A 207/8.12.2010, transposing Directive 2006/54/EC.

118 An offence to the 'personality', under Greek civil law, is broader than 'dignity' and means 'a complex of components of a person's being, such as his/her honour (i.e. moral value and reputation), mental health and emotional realm': SCPC (Civil Section) No. 84/2011; Athens CA No. 1139/2011.

119 According to the Greek Penal Code, misdemeanours are punished with imprisonment, ranging from 10 days to 5 years (Article 53 PC) or only with a fine.

a form of gender discrimination prohibited by the law and applied the rule on the reversal of the burden of proof.¹²⁰

According to the findings of the Court, the circumstances of the case were as follows: the claimant was employed by a small family business in Thessaloniki. The employer showed towards her a persistent behaviour of intimacy, exceeding the boundaries of both a professional relationship and a friendship, which culminated in serious sexual harassment. After taking steps to be left alone with her in the premises of the company, he entered into her office, started kissing her and caressing her genitals and proposed sexual intercourse. The claimant pushed him away and refused his proposals. This incident ended when another employee entered the office. After work, the claimant returned to her home obviously upset and narrated the incident to her mother, although not to its real extent. Two days later, the claimant wrote about the incident by e-mail to a close female friend. She also narrated it to her ex-fiancé, who testified that before the criminal court. After that incident, the defendant kept harassing the claimant by calling her at work and sending her text messages, making indecent gestures and proposing sexual intercourse. One and a half months later he again tried to kiss her, hug her and caress her body. The claimant referred all these incidents to the harasser's sister, asking for her help to resolve the matter. Instead, the claimant was dismissed. The testimonies of the mother, the female friend and the ex-fiancé of the claimant (hearsay evidence) together with the criminal court's sentence, were deemed by the Court enough to satisfy the requirements of Article 24(1) Act 3896/2010 for the reversal of the burden of proof. As the defendant, to whom the burden of proof was transferred, failed to prove that there had been no sexual harassment, the Court upheld the claim and adjudicated to the claimant the sum of EUR 6 000 for moral damages.

This judgment is very important in that it is the first ever judgment in Greek case law: a) to apply the rule of the transfer of the burden of proof to the defendant in a sex discrimination case (also significant in that it is in a sexual harassment case with no eyewitnesses); b) to acknowledge sexual harassment as a form of gender discrimination governed by Act 3896/2010 transposing Directive 2006/54.

Online source:

<https://www.lawspot.gr/nomika-nea/apozimiosi-gia-ithiki-vlavi-exaitias-sexoyalikis-parenohlisis-se-varos-ergazomenis>

Hungary

NL

LEGISLATIVE DEVELOPMENT

Adoption of anti-LGBTQI legislation

The past two years in Hungary have been characterised by an intensifying anti-LGBTQI campaign carried out by members of the Government and the ruling party, often falsely associating homosexuality with paedophilia and drawing a distinction between 'Hungarians' and 'homosexuals'. The campaign has also been reflected in legislative developments. In May 2020,¹²¹ the Parliament adopted a law prohibiting legal gender recognition. The law provides that an individual's 'sex at birth' (defined as 'biological sex based on primary sex characteristics and chromosomes') must be recorded in the national registry of births, marriages and deaths, and cannot be changed later. In December 2020, Parliament passed a series of amendments (known as the 9th Amendment) to the Fundamental Law, Hungary's Constitution.

Sexual
orientation

Gender

Transgender

¹²⁰ As enshrined in Article 24(1) of Act No. 3896/2010, transposing Article 19 of Directive 2006/54/EC.

¹²¹ Hungary, Act XXX of 2020 on the Amendment of Certain Laws Related to Public Administration and on Donating Property, of 28.05.2020, available at: <http://www.kozlonyok.hu/nkonline/index.php?menuindex=200&pageindex=kozlart&ev=2020&szam=125>.

Notably, Article L(1) was amended to include the text ‘the mother is female, the father is male’, while Article XVI(1) now reads as follows: ‘Hungary shall protect the right of children to their identity aligning with their sex by birth, and shall ensure an upbringing in accordance with the values based on our homeland’s constitutional identity and Christian culture.’

Following these developments, on 26 May 2021, two MPs of the incumbent Government party submitted to Parliament a Bill¹²² on harsher sentencing for paedophile criminal offences and a criminal registry for perpetrators of such offences. The bill received support from practically all the parties. However, on 10 June, the Parliament’s Legislative Committee (where the ruling party has a majority) submitted a series of proposed amendments to the bill,¹²³ containing provisions that are discriminatory based on sexual orientation and gender identity and have serious normative consequences. Five days later, the law¹²⁴ was passed as Act LXXIX of 2021 on harsher action against paedophile criminal perpetrators and the amendment of certain laws with a view to protecting children, while most of the opposition parties boycotted the vote in protest against the bill’s discriminatory elements.

Act LXXIX of 2021 amended several different laws,¹²⁵ prohibiting notably the act of making available to persons under the age of 18 any advertisements or media content that ‘promote or portray deviation from [gender] identity aligning with birth at sex, gender reassignment, or homosexuality’. Amending the Act on National Public Education, the law provides that sessions delivered in educational institutions on sexual culture, sexual life, sexual orientation and sexual development ‘shall not be aimed at promoting deviation from the child’s gender-identity aligning with sex at birth, gender reassignment, or homosexuality’. Furthermore, only persons or organisations ‘registered by a designated state body shall be allowed to hold, in the framework of the regular curriculum or other activities organised for the students, a session on sexual culture, sexual life, sexual orientation, sexual development, and other issues related to physical and mental health development’. It is made clear that this provision is aimed at preventing LGBTQI NGO’s in particular from having access to educational institutions to raise students’ awareness of the issue of non-discrimination, and thereby attempting to ‘influence’ the sexual orientation of children.

The new Act LXXIX of 2021 can arguably be considered as overtly discriminatory as it *expressis verbis* differentiates between media content, advertisements and school programmes on the basis of the sexual orientation and gender identity they ‘portray’ or ‘promote’ (although these terms have not been defined). Furthermore, it appears that the main impact (possibly even the purpose) of the new law is the politically driven stigmatisation of LGBTQI people, the portrayal and promotion of whose inherent characteristics are presented as something that poses a threat to children under the age of 18, and who themselves are being associated with paedophilia when the legislature regulates the portrayal/promotion of homosexuality and gender reassignment in the same law that contains a new, harsher legislation regarding paedophilia.¹²⁶

Online source:

<https://mkogy.jogtar.hu/jogszabaly?docid=A2100079.TV>

122 <https://www.parlament.hu/irom41/16365/16365.pdf>.

123 <https://www.parlament.hu/irom41/16365/16365-0015.pdf>.

124 For the final text also containing the amendments proposed by the Legislative Committee, see: <https://www.parlament.hu/irom41/16365/16365-0019.pdf>.

125 Including: Act XXXI of 1997 on Child Protection and Guardianship Administration; Act CCXI of 2011 on the Protection of Families; Act XLVIII of 2008 on the Basic Conditions and Certain Restrictions of Commercial Advertising Activities; Act CLXXXV of 2010 on Media Services and Mass Communication; and Act CXC of 2011 on National Public Education.

126 After the cut-off date for this publication, on 15.07.2021, the European Commission announced its intention to initiate infringement proceedings against Hungary in relation to Act LXXIX of 2021 on the basis of the violation of a number of secondary norms, but also because in the Commission’s view, ‘the Hungarian provisions also violate human dignity, freedom of expression and information, the right to respect of private life as well as the right to non-discrimination as enshrined respectively in [...] the EU Charter of Fundamental Rights. Because of the gravity of these violations, the contested provisions also violate the values laid down in Article 2 TEU’. See: European Commission (2021), ‘EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people’, press release issued on 15.07.2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668.

CASE LAW

Ruling of the Constitutional Court regarding new rules on gender recognition proceedings

In March 2020, a bill was passed to amend the Registry Act, relating to the issue of legal recognition of gender.¹²⁷ The amended Registry Act came into force on 29 May 2020 and includes the concept of birth sex, defined as 'biological sex assigned on the basis of primary sexual characteristics and chromosomes'.¹²⁸ Data on birth sex will be included in birth certificates,¹²⁹ and this data cannot be changed.¹³⁰ By the adoption of this provision, legal recognition of gender transition became impossible in Hungary. Moreover, on-going legal gender recognition procedures were also terminated, due to a provision that the new rules should be applied to pending/repeated procedures as well.¹³¹

Transgender

Two NGOs, the Háttér Society and the Hungarian Helsinki Committee, initiated strategic litigation proceedings, challenging the latter provision via judicial review. In December 2020, the Miskolc Court of Appeal asked the Constitutional Court 'to declare the provision prescribing the application of the new law to on-going proceedings unconstitutional'¹³² in the form of a judicial initiative for norm control (in a specific case).¹³³

In March 2021, the Constitutional Court issued decision No. III/2030/2020,¹³⁴ which annulled the provision of the amended Registry Act providing for the application of the new rules to on-going proceedings. Essentially, the Constitutional Court annulled the provision that provided that the new rules of registration (e.g. the introduction of the immutable category of birth sex) 'shall apply to procedures pending that commenced before the entry into force of the Amending Act and to repeated procedures'.¹³⁵ According to the reasoning of the majority opinion of the Constitutional Court, the provision had a retroactive effect that violated the principle of legal certainty, implied in the constitutional provision that Hungary shall be a 'democratic rule-of-law State'.¹³⁶

The decision (the annulment of the provision) was adopted by an eight/six majority of the judges. Two judges, who agreed with the merits of the decision, attached concurring opinions, while the six judges opposing the decision attached (altogether four) dissenting opinions. The decision affects only those individuals seeking legal gender recognition whose procedure was already pending in May 2020. New legal gender recognition procedures cannot be initiated in Hungary since the amended Registry Act entered into force.

127 Hungary, Act XXX of 2020 on Changes of Certain Administrative Laws and Free Donation of Property, of 19.05.2020, Article 33.

128 Hungary, Act I of 2010 on civil registration procedure, Article 3 x. An unofficial English translation of the current version, as in force on 29.05.2020, published by the Ministry of Justice, is available at: https://njt.hu/translated/doc/J2010T0001P_20200529_FIN.pdf.

129 Hungary, Act I of 2010 on civil registration procedure, Article 69/B(1)be).

130 Hungary, Act I of 2010 on civil registration procedure, Article 69/B(3).

131 Hungary, Act I of 2010 on civil registration procedure, Article 101/A(2).

132 See Háttér Society (2021) 'Hungarian Constitutional Court: Retroactive prohibition of legal gender recognition unconstitutional', press release 12.03.2021, available at: <https://en.hatter.hu/news/annuled-provision>.

133 See the dynamic page of the case: <http://public.mkab.hu/dev/dontesek.nsf/0/CB4CA4E8F72D33DFC125863A00604976?OpenDocument>.

134 The decision was signed on 9 March, and made available to the public on 12 March.

135 Hungary, Act I of 2010 on civil registration procedure, Article 101/A(2).

136 Hungary, Fundamental Law, 25.04.2011, Article B(1). An unofficial English translation of the current version, as in force on 23.12.2020, published by the Ministry of Justice, is available at: https://njt.hu/translated/doc/TheFundamentalLawofHungary_20201223_FIN.pdf.

CASE LAW

Gender

Minister of Education and Culture appeals district court judgment to invalidate ruling of Gender Equality Complaints Committee

On 5 March 2021, the District Court of Reykjavík rejected the claim of the Minister of Education, Science and Culture seeking to invalidate the ruling of the Gender Equality Complaints Committee of 27 May 2020 (which found that the Minister had breached the Gender Equality Act No. 10/2008).¹³⁷

On 27 May 2020, the Gender Equality Complaints Committee held that enough likelihood had been adduced that the Minister had violated Article 26 of the Gender Equality Act (GEA) when appointing a man as the Permanent Secretary of her cabinet instead of a woman. The Cabinet Minister did not succeed in proving to the Gender Equality Complaints Committee that factors other than gender were at play.¹³⁸ According to the Gender Equality Act, the rulings of the Gender Equality Complaints Committee are binding. However, the parties may refer the Gender Equality Complaints Committee's rulings to the courts.¹³⁹

On 5 March 2021, the Reykjavík district court published a 41 page judgment¹⁴⁰ in *the State v Hafþís Helga Ólafsdóttir*, regarding the invalidation of the ruling of the Gender Equality Complaints Committee. The state's claim is based on the assertion that the Gender Equality Complaints Committee's ruling and handling of the case was not in accordance with the law. The district court's judgment emphasised that the ruling of the Complaints Committee is an administrative decision that cannot be invalidated other than on the basis of substantial procedural reasons. The court acknowledged that the employer has a certain discretion in the appointment process in laying down the criteria for the post/job and is ultimately accountable for their decision. The court held that the manner in which the Gender Equality Complaints Committee handled the case had been objective and in accordance with the rules of administrative law. Referring to Supreme Court decision 364/2017, the district court emphasised that there was a prerequisite for the Gender Equality Complaints Committee to review the appointment process when assessing whether the provisions of paragraph 4 of Article 26 of the GEA No. 10/2008 have been violated. Accordingly, the educational qualifications, working experience, specialised knowledge or other special talents demanded in the relevant position according to law or regulations, or which must otherwise be considered as being of use in the position, must be taken into account. The district court confirmed that the Gender Equality Complaints Committee handled the case within the framework of the law and in an objective manner. Therefore, the district court rejected the state's main assertion that there had been substantial defects in the Gender Equality Complaint Committee's review of the appointment process and hence no reason to invalidate its ruling. The costs of the defendant, ISK 4.5 million (EUR 30 000) were paid from the state Treasury.

Online sources:

<https://www.heradsdomstolar.is/default.aspx?pageid=347c3bb1-8926-11e5-80c6-005056bc6a40&id=52b31b2b-57a3-4e9c-9143-45bff459fef0>

<https://www.ruv.is/frett/2021/03/05/radherra-afryjar-til-landsrettar-og-veitir-ekki-vidtal>

137 Iceland, Equality Act No 10/2008, available at: <https://www.government.is/lisalib/getfile.aspx?itemid=90bec9b4-0275-11e8-9425-005056bc530c> (this act has been replaced with a new Gender Equality Act No. 150/2020 which took effect on 06.01.2021).

138 For further information, see EELN Flash report (Iceland) 'Minister of Education, Science and Culture found in breach of Gender Equality Act in appointing Permanent Secretary', available at: <https://www.equalitylaw.eu/downloads/5254-iceland-minister-of-education-science-and-culture-found-in-breach-of-gender-equality-act-in-appointing-permanent-secretary-104-kb>.

139 Iceland, Gender Equality Act No. 10/2008, Article 5(4).

140 Iceland, District Court, judgment No. 5061/2020 of 05.03.2021, available at: <https://www.heradsdomstolar.is/default.aspx?pageid=347c3bb1-8926-11e5-80c6-005056bc6a40&id=52b31b2b-57a3-4e9c-9143-45bff459fef0>.

Ireland

IE

POLICY AND OTHER RELEVANT DEVELOPMENTS

Citizens' Assembly on Gender Equality

Gender

In June 2021, the Citizens' Assembly on gender equality published a report making a number of recommendations on gender equality.¹⁴¹ The Assembly was set up in 2019 to 'consider gender equality and make recommendations to the Oireachtas [parliament] to advance gender equality by bringing forward proposals to:

- challenge the remaining barriers and social norms and attitudes that facilitate gender discrimination towards girls and boys, women and men;
- identify and dismantle economic and salary norms that result in gender inequalities, and reassess the economic value placed on work traditionally held by women;
- in particular, seek to ensure women's full and effective participation and equal opportunities for leadership at all levels of decision-making in the workplace, politics and public life;
- recognise the importance of early years parental care and seek to facilitate greater work-life balance;
- examine the social responsibility of care and women and men's co- responsibility for care, especially within the family; and
- scrutinise the structural pay inequalities that result in women being disproportionately represented in low pay sectors.'

Article 41.2 of the Constitution of Ireland 1937 provides:

'1. In particular, the State recognises that by her life within the home, woman gives the State a support without which the common good cannot be achieved.

2 The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.'

On this issue the report's recommendations are:

'1. Article 40.1 of the Constitution should be amended to refer explicitly to gender equality and non-discrimination.

2. Article 41 of the Constitution should be amended so that it would protect private and family life, with the protection afforded to the family not limited to the marital family.

3. Article 41.2 of the Constitution should be deleted and replaced with language that is not gender specific and obliges the State to take reasonable measures to support care within the home and wider community.'¹⁴²

Other recommendations include the improvement of the position of caregivers to include giving them higher social protection payments (to include the benefit of being able to take a certain amount of paid work). Paid caregivers should have a better career structure and terms and conditions of employment. In particular, caregivers should have state pensions. There should be more state support for childcare and more parental leave. The care of older persons should be reviewed with older persons being decisionmakers in their care to include remaining in their home with a statutory right to home care packages and nursing care. Various employment practices should be introduced to include access to remote working. There is a quota provision for male and female candidates for political parties in general

141 Citizens' Assembly (2021) *Report of the Citizens' Assembly on Gender Equality*, available at: <http://citizensassembly.ie/en/about-the-citizens-assembly/report-of-the-citizens-assembly-on-gender-equality.pdf>.

142 Citizens' Assembly (2021) *Report of the Citizens' Assembly on Gender Equality*, p. 12.

elections. This quota should be raised for the purposes of general elections and introduced for Seanad (upper house), local elections and European Parliament elections. There should be quotas for company boards and for sports and cultural bodies. The Assembly recommended that technology and social media companies should be held accountable for immediately removing online content that constitutes sexual harassment, bullying or stalking, and sexually violent or abusive content that they have identified or about which they have been informed. There should also be regular reviews to ensure that legislation keeps pace with technological advances.

Online sources:

<http://citizensassembly.ie/en/about-the-citizens-assembly/report-of-the-citizens-assembly-on-gender-equality.pdf>

<https://www.citizensassembly.ie/en/about-the-citizens-assembly/meetings/meeting-on-article-41-of-the-constitution/>

<https://www.citizensassembly.ie/en/about-the-citizens-assembly/public-consultation/>

IT

Italy

LEGISLATIVE DEVELOPMENT

Italy ratifies ILO Convention No. 190 on the elimination of violence and harassment in the world of work

On 15 January 2021, Italy, by Act No. 4,¹⁴³ was the first EU Member State to ratify ILO Convention No. 190 on the elimination of violence and harassment in the world of work.¹⁴⁴ The ILO Convention was adopted at the 108th Session of the International Labour Conference in Geneva on 21 June 2019. The ratification has been approved unanimously by both Chambers of Parliament.

The ILO Convention provides a broad definition of violence and harassment, including all:

‘unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment.’¹⁴⁵

All situations indirectly linked to work fall within the scope of the Convention, such as travels or business events that do not take place during business hours. The personal and objective scope is very wide, as the Convention applies to all ‘persons working irrespective of their contractual status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer’ as well as to ‘all sectors, whether private or public, both in the formal and informal economy, and whether in urban or rural areas.’¹⁴⁶ With its ratification, the Italian State undertakes to adopt a comprehensive strategy to combat violence and harassment, which also includes investigation, sanctions, access to justice, guidance and training activities.

143 Italy, Act No. 4 of 15.01.2021, on the ratification and implementation of ILO Convention No. 190, Official Journal No. 20 of 26.01.2021, <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2021-01-26&atto.codiceRedazionale=21G00007&atto.articolo.numero=0&qId=&tabID=0.03756662403411215&title=lbl.dettaglioAtto>.

144 ILO Convention No. 190 on the elimination of violence and harassment in the world of work adopted by the Conference at its 108th Session in Geneva on 21.06.2019, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190.

145 ILO Convention No. 190 on the elimination of violence and harassment in the world of work, Article 1.

146 ILO Convention No. 190 on the elimination of violence and harassment in the world of work, Articles 2 and 3.

Overall, the current Italian regulatory framework already appears to be in line with the provisions of the Convention. In fact, Article 26 of the Equal Opportunities Code (Decree No. 198/2006) establishes that sexual harassment constitutes discrimination on the ground of gender, which requires the same level of protection.¹⁴⁷ For instance, it includes the partial reversal of the burden of proof and the competence of equality advisors. Moreover, according to Decree No. 81/2008 on health and safety at work, the risk of harassment and sexual harassment at the workplace must be evaluated by the employer, as well as all other risks, as to provide adequate prevention tools.¹⁴⁸ Furthermore, with regard to criminal law, recent changes have been provided to further protect women in serious cases of sexual harassment at the workplace. Act No. 69 of 19 July 2019 on the protection of victims of domestic and gender-based violence, known as the Red Code, includes several measures to accelerate legal proceedings, improve the privacy of victims, introduce specific crimes for injuries to a person's identity or reputation and online revenge porn, and introduce compulsory professional training on these issues to the police forces.¹⁴⁹ The reform also includes the introduction of emergency orders to prevent violence, which could also be used against the employer if they are the perpetrator of the harassment.

Nevertheless, the ratification of the ILO Convention might be an opportunity for some further changes that could strengthen the protection against harassment and sexual harassment. In fact, although the national notion of harassment and sexual harassment is broader than the international one, as it does not require any regard to the damage caused to the victim, specific behaviours that are to be considered as harassment or sexual harassment could be specified. In particular, it would be useful to clarify that both physical and psychological unwanted behaviour can fall under the concept of sexual harassment. Moreover, in order to fully comply with Article 10(g) of the ILO Convention, it would be helpful to give resignation due to harassment equal status with discriminatory dismissal, including all legal consequences in terms of the right to reinstatement and the right to remuneration and compensation for damage, as the victim has no choice but to resign in order to avoid harassment.

Online source:

<https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=20210126&atto.codiceRedazionale=21G00007&atto.articolo.numero=0&qld=&tabID=0.03756662403411215&title=lbl.dettaglioAtto>

<https://www.cgilbo.it/wp-content/uploads/2020/06/2020-SCARPONI-Molestie-Nodi-critici-Convenzione-OIL.pdf>

Gender discrimination in professional sports

A female volleyball player recently posted a message on a social media platform regarding legal problems she faced with her volleyball club following pregnancy. The athlete in question had signed a contract to play for the club Pordenone for the 2018-19 volleyball season. When she became pregnant, her contract was terminated based on a clause that entitles the club to cease the contract in the event of pregnancy. A month later the complainant miscarried and asked the club to pay the salary owed for the last month that she played for the team, but the club refused to pay and the complainant obtained an order from the Tribunal. The club, in response, sued the athlete, accusing her of contract breach based on her pregnancy by not revealing her plans to have a child in an attempt to extract a higher salary. The

Gender

147 Italy, Decree No. 198 of 11.04.2006, Equal Opportunities Code, Official Journal No. 125 of 31.05.2006, o.s. n. 133, available at: <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=20060531&atto.codiceRedazionale=006G0216&atto.articolo.numero=0&qld=&tabID=0.03756662403411215&title=lbl.dettaglioAtto>.

148 Italy, Decree No. 81 of 09.04.2008, Consolidated Act on health and safety at work, Official Journal No. 101 of 30.04.2008, o.s. n. 108, available at: <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=20080430&atto.codiceRedazionale=008G0104&atto.articolo.numero=0&qld=&tabID=0.03756662403411215&title=lbl.dettaglioAtto>.

149 Italy, Act No. 69 of 19.07.2019 on amendments of the Criminal Code, Code of Criminal Procedure and of other provisions aimed at the protection against gender-based and domestic violence, Official Journal No. 173 of 25.07.2019, available at: <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=20190725&atto.codiceRedazionale=19G00076&atto.articolo.numero=0&qld=&tabID=0.03756662403411215&title=lbl.dettaglioAtto>.

club also asked for damages asserting that after she left the team the results worsened which resulted in the loss of sponsorship money.

This case sparked heated public debates among athletes and was planned to be heard by the court in May 2021. However, a few days before the hearing, the leaders of the volleyball club finally withdrew their complaint. Additionally, they promised to comply with their (financial) obligations, vis-à-vis their former player. The case is interesting because it has highlighted the lack of protection for a wide range of athletes, who are also victims of gender discrimination as a common practice. Actually, these problems are expected to be overcome soon by Decree No. 36 of 28 February 2021,¹⁵⁰ which will fully come into force from 1 July 2022 (in respect of working relationships).¹⁵¹ In fact, this wide reform of the rules regarding sports bodies and sports work will recognise the latter also in non-professional sectors. Moreover, it is expressly aimed at promoting equal opportunities for women in sports, both professional and non-professional.

Up to now, the regulation of professional athletes was only provided for by Act No. 91/1981. The choice to have a professional sector is up to different national federations following guidelines of the CONI (the National Olympic Committee), which has never issued them. Consequently, to date only four federations (football, biking, basket and golf) have a professional sector, but only for high levels and only for men. This means that female athletes are excluded from any kind of protection even if they perform their activity at the highest level.

Although Decree No. 36/2021 still leaves it to the federations to decide whether to accede to professionalism (Article 38), it will fully change the working condition of athletes. Under Article 2(1)(dd) and Article 25 of Decree No. 36/2021, ‘sports worker’ includes the following positions: athlete, coach, instructor, technical director, sports director, athlete coach, race director, who, without any distinction of gender and regardless of the professional or amateur sector, carries out the work for remuneration. The payment of the activity, regardless of its amateur nature, involves the athlete as a worker, whether autonomous or subordinate, and in any case he/she is covered by social security, according to the particular nature of the working relationship. In addition, the rules on the protection of motherhood and fatherhood, for autonomous or subordinate workers, are fully enforceable (Article 33(2)).

Just as provided by Act No. 91/1981,¹⁵² following the reform, the rules concerning the subordinate working relationship remain of a special nature. Many labour provisions are not enforceable in respect of these workers, such as for instance rules concerning fixed term contracts, the protection against unfair dismissal (apart from discriminatory dismissal, which is null and void in this sector as well) and the regulation on the exercise of disciplinary power (where a similar one is provided by collective agreements); and arbitration clauses to settle disputes between the club and the worker can be signed. The new provision only relates to professional sports sectors, in contrast to Article 27 of the Decree, under which a presumption of subordination operates for athletes (not for other categories mentioned above) whose sports work is their main activity and is performed with continuity. In this sector the contract between the athlete and the club must be written and respect the schemes prepared by the federation, otherwise it will be invalid.

150 Italy, Decree No. 36 of 28.02.2021, ruling professional and amateur sports bodies, and sports work, Official Journal No. 67 of 18.03.2021, available at: <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2021-03-18&atto.codiceRedazionale=21G00043&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.5308905478453783&title=lbl.dettaglioAtto>.

151 The reform will enter into force on 01 July 2022 (from Article 25 to 30 and from Article 32 to 37) as specifically regards the regulation of sports working relationships, while under the amendment approved by Article 30(7) of Decree No. 41/2021 the other provisions will enter into force on 01 January 2022.

152 Italy, Act No. 91 of 23.03.1981, on the regulations of the relationships between clubs and professional sportsmen, Official Journal No. 86 of 27.03.1981 available at: <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1981-03->.

The CONI remains entitled to draw up the necessary guidelines for the federations regarding the accession to professional sports federation, but Article 38 expressly provides that they must be gender neutral. In the event that the CONI does not provide for this regulation within eight months after the reform has entered into force, a decree will be issued by the Prime Minister or by a delegated subject.

Article 39 of the Decree will also absorb provisions that have been recently issued to encourage the federations to accede to female professionalism by the allocation of a specific fund to promote female athletes in professional sports.¹⁵³ The fund will mainly finance measures to tackle the COVID-19 crisis for the first year (2020) and finance recruiting and training of female athletes, as well as extending social security schemes to the latter for the following two years. Only federations that will have a professional female sector by 31 December 2022, will be entitled to access the fund.

As illustrated by this case, and as has been strongly and long requested by female athletes and their associations, a real and wide-reaching legislative change was needed to recognise the sports work that they have been doing for years, as well as ensuring gender equality. Decree No. 36/2021 is an essential step in this direction.

Online source:

<https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2021-03-18&atto.codiceRedazionale=21G00043&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.5308905478453783&title=lbl.dettaglioAtto>

Further measures aimed at supporting families to face the COVID-19 crisis

Article 2 of Decree No. 30 of 13 March 2021 allocated EUR 282.8 million to support families to take care of their children during the COVID-19 pandemic.¹⁵⁴ In fact, the Decree extended until 30 June 2021 all measures already provided by Decree No. 104 of 14 August 2020¹⁵⁵ and Decree No. 137 of 28 October 2020, as well as providing for some further amendments.

Autonomous and quasi-subordinated workers, defence personnel and public rescue sector personnel assigned to tackle the COVID-19 pandemic, health services workers (both public and affiliated staff, including doctors, nurses, medical, radiology and laboratory technicians, and social care workers) can benefit from a bonus of up to EUR 100 a week. The bonus is provided for babysitting or child care services in the event that a child of up to 14 years is quarantined by the health service following cases detected at school or in other educational activities, or where the school has had to suspend physical lessons and organise online ones. In respect of the latter circumstances, the Decree also extended smart working for workers in both the public and the private sector, and, where jobs cannot be performed in this flexible way, provides parental leave that is covered by figurative contributions as well as by an allowance of 50 % of the remuneration paid by the INPS (National Institute for Social Security). The same provision is enforceable in respect of seriously disabled children living with parents. In such cases, ordinary parental leave that has been taken up from January 2021 can be converted into the new and better remunerated type of leave. Similar measures are also provided for the parents of children up to 16 years, but in such cases the parental leave is neither remunerated nor covered by figurative contributions. The protection is limited to the ban on dismissal and the right of the parent to maintain their job. None of the measures (that is babysitting/child care services, access to smart working and 'emergency' parental leave) can be used by both parents at the same time. A further fund of EUR 10.2 million has also been allocated to provide for substitute personnel in schools, for those using parental leave.

Gender

¹⁵³ Italy, Decree No 104/2020, as amended by Act No. 126/2020, Article 12bis.

¹⁵⁴ Italy, Decree No. 30 of 13.03.2021, Official Journal No. 62 of 13.03.2021, available at: <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=20210313&atto.codiceRedazionale=21G00040&atto.articolo.numero=0&qId=&tabID=0.5329160538686681&title=lbl.dettaglioAtto>.

¹⁵⁵ Italy, Decree No. 104 of 14.08.2020, as amended by the Conversion Act No. 126 of 13.10.2020.

The Decree shows the continuous effort of the Government to adjust the different measures to the non-stop changes of the economy and the impact of the pandemic with a special eye to family needs. These measures provide important support in the emergency period. However, several critics have emphasised that, to date, no concrete measures have been taken to promote gender equality and that the traditional approach to these items has increased the burden of family care on women.

The serious impact that the crisis has already had on women's participation in the labour market requires a real change of pace, which is expected from the use of the next generation EU recovery fund. The speech of the Prime Minister on 8 March 2021 specified that in the implementation of the NGEU recovery instrument, gender equality will be among the criteria used to determine the financing of different projects. A comprehensive and integrated plan is needed, especially considering that the PNRR (the national plan for recovery and resilience) at the EU, will be mainly focussed on the ecological and digital transition, and women are at risk of being left out because they are underrepresented in those sectors.

Online source:

<https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=20210313&atto.codiceRedazionale=21G00040&atto.articolo.numero=0&qId=&tabID=0.5329160538686681&title=lbl.dettaglioAtto>

CASE LAW

Discrimination of workers through artificial intelligence

Three trade union associations submitted, on their own behalf, a complaint against a digital food delivery platform, arguing that their system of giving workers access to the platform to book sessions of work amounted to discrimination.

The platform provided, at least until 2 November 2020, two ways of booking work sessions, one of which was the subject of the dispute. This system involved staggered access to the calendar of available shifts, allowing different groups of workers to access the calendar at different times, based on their internal 'scores'. This scoring system was based on two parameters: reliability of the worker and participation. With regard to the reliability aspect, the profiling system did not distinguish between workers who had failed to participate in a booked session for trivial reasons and those who had relevant justification, such as going on strike, being sick or disabled, or assisting a person with disability or a sick child. Consequently, those with a higher score could access the calendar earlier than others and choose their preferred time slots.

The claimant trade unions alleged that the system amounted to discrimination on the ground of belief, i.e., in the case of workers using their right to strike.

The Tribunal of Bologna ruled on the case in December 2020.¹⁵⁶ No documents on the practical functioning of the algorithm were submitted by the parties, but the court drew its conclusions on the basis of available information from the website of the respondent and from evidence given by workers. The court found that the profiling system amounted to indirect discrimination on the ground of belief, understood as a political belief applied to workers and their right to strike. The respondent company was ordered to publish the order of the court on its website and an extract from it in the national newspaper *la Repubblica*, as well as to pay the trade unions compensation of EUR 50 000 and legal fees.

¹⁵⁶ Italy, Tribunal of Bologna, *FILCAMS CGIL Bologna, NIDIL CGIL Bologna, FILT CGIL Bologna v Deliveroo Italia s.r.l.*, decision of 31.12.2020 in case No. 2949/2019.

The court agreed with the respondent that the workers could in theory avoid the detrimental effects of joining a strike by cancelling the booked session in advance, allowing the respondent to replace them. However, the court recognised that this would, in practice, nullify the aims and effects of the strike.

The amount of compensation awarded is among the highest in Italy in a discrimination case. In this regard, the court underlined the importance of the preventive, dissuasive and punitive purpose of remedies.

Online source:

<http://www.bollettinoadapt.it/wp-content/uploads/2021/01/Ordinanza-Bologna.pdf>

Latvia

LV

LEGISLATIVE DEVELOPMENT

Impact of statutory social insurance regulation on part-time employees

On 1 July 2021, a legal regulation in the field of statutory social insurance entered into force, which has had a more significant impact on part-time employees.¹⁵⁷ The regulation stipulates that all employees must contribute to statutory social insurance, with the minimum contribution set at the level of the statutory minimum salary. If an employee is employed part time, and their part-time salary meets the statutory minimum salary, the remaining part of social security contributions (to meet the level of minimum contributions based on statutory minimum pay) must be provided by the employer.

The law provides for exemptions from such obligation to several categories of people working part time including: parents of a child below the age of 3; parents of more than 3 minor children or up to the age of 24 (if the adult child is a full-time student); parents of a child with disabilities; people who receive an old-age pension; full-time students up to age 24; and people with a disability classified as 'severe' or 'very severe' by the Disability Law.¹⁵⁸ However, the exemptions do not cover all groups of persons working part time due to personal/family related reasons, for example, people with a disability classified as 'moderate' and people who care for elderly family members. Furthermore, parents who are not married are in a less favourable situation since exemption from the obligation to provide statutory social insurance contributions for people earning statutory minimum pay also applies only when the children are registered as dependents of a married spouse. The legal regulation ignores the fact that around 50 % of parents of newborns are not married. The same legal obligation applies to self-employed persons.

The changes were introduced following a decision of the Constitutional Court in 2020.¹⁵⁹ The Constitutional Court found that minimum amounts of old-age and disability pensions, as well as minimum subsistence allowance, do not provide sufficient means for a decent living and therefore do not comply with Article 109 of the Constitution. The newly introduced changes in the statutory social insurance system, which are intended to ensure that all employees and self-employed are covered at least to the amount of the statutory minimum pay, were introduced to tackle this problem.

157 Latvia, Amendments to the Law on State Social Insurance, Official Gazette No.240A, 11.12.2020, available at: <https://likumi.lv/ta/id/319406-grozījumi-likuma-par-valsts-socialo-apdrošināšanu>.

158 The Disability Law of 25.05.2010 (Official Gazette No.91, 09.06.2010), defines three different degrees of disability. Group I disability is classified as very severe disability; group II as severe disability and group III as moderate disability. The law is available at: <https://likumi.lv/ta/id/211494-invaliditates-likums>.

159 Latvia, Constitutional Court, decision No.2019-27-03 of 27.03.2019, available at: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2019/11/2019-27-03_Spriedums-1.pdf#search=; decision No.2020-07-03 of 10.12.2020, available at <https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/01/2020-07-03-Spriedums.pdf#search=>.

The legal changes are currently the subject of heated public debates – employers as well as part-time employees are predicted to terminate employment contracts and many self-employed are expected to exit the labour market as it will be too costly for employers to employ part-time employees.

In the light of these legislative changes and their practical effect on an inclusive labour market, there is a concern whether the new statutory social insurance regulation complies with Council Directive 97/81/EC concerning the Framework Agreement on part-time work, particularly Clause I, which states that its purpose is 'to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organization of working time'. There is also concern that the measures may affect more women negatively than men, as they more frequently take up family and care obligations, which sometimes compels them to choose part-time employment instead of full-time employment.

Online source:

<https://likumi.lv/ta/id/319406-grozijumi-likuma-par-valsts-socialo-apdrosinasanu->

CASE LAW

Decision of the Constitutional Court on the compatibility of the Istanbul Convention with the Constitution

On 4 June 2021, the Constitutional Court of Latvia published a decision in case No. 2020-39-02 on the compatibility of the Istanbul Convention with the Constitution of Latvia.¹⁶⁰ Latvia signed the Istanbul Convention in 2016, but has not yet ratified it. After heated political debates between the highest ranking politicians, scholars and officials during the spring of 2016, concerning the substance of the Istanbul Convention – mainly instigated by the former Ministry of Justice, which opposes accession – the Minister of Welfare finally signed it in June 2016. Since then, the standard preparation process for its ratification has been ongoing. However, in February 2018, the Cabinet of Ministers decided to postpone the submission of a draft decision on the ratification to Parliament. This decision was influenced by the open opinion expressed by the Latvian Catholic Church and the Latvian Evangelical Lutheran Church, warning against the serious consequences that the Istanbul Convention may have on the concept of family and gender in the Latvian legal system, and thus strongly advising that it should not be ratified. The majority of politicians decided to follow this opinion.

In 2020, the political debate started again, and conservative political forces rejected the possibility of ratifying the Istanbul Convention. In turn, 21 members of the Parliament representing liberal political parties lodged an application before the Constitutional Court of Latvia requesting an opinion on whether the Istanbul Convention is compatible with the Constitution of the Republic of Latvia. The Constitutional Court decided to initiate case No. 2020-39-02 on 3 August 2020.¹⁶¹

The Constitutional Court found that Article 4(4) of the Istanbul Convention complies, and is thus not incompatible, with Article 91 of the Constitution protecting the principle of equal treatment and non-discrimination. The Court found that though men and women are in a similar and comparable situation with regard to the right to be protected against violence, the Istanbul Convention aims to protect women, and the difference in treatment of men and women in this regard is justifiable since in practice, due to existing social norms, women are more frequently subjected to violence than men. The Court dismissed the claims on the compatibility of the Istanbul Convention with Article 99 (freedom of thought, conscience, and religious beliefs) and Article 110 (protection of marriage and families) of the

160 Latvia, Constitutional Court, decision of 04.06.2021 in case No.2020-39-02, available at: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/08/2020-39-02_Spriedums.pdf#search=.

161 Constitutional Court (2020), Press release, 5 August 2020, available in English at: <https://www.satv.tiesa.gov.lv/en/press-release/a-case-initiated-with-respect-to-the-compliance-of-the-istanbul-convention-with-the-satversme/>.

Constitution. In particular, the Constitutional Court found that the Istanbul Convention does not restrict freedom of thought, conscience, and religious beliefs and that the Istanbul Convention does not affect the state's obligation to protect marriage and families.¹⁶²

The decision of the Constitutional Court, however, does not ensure that the Istanbul Convention will be ratified by Latvia as it is still a matter of a political decision in the Parliament, given that the coalition Government is formed of liberal and conservative parties, in which the latter strongly oppose ratification.

Online source:

<https://www.satv.tiesa.gov.lv/en/press-release/information-regarding-the-judgment-of-the-constitutional-court-of-the-republic-of-latvia-in-case-no-2020-39-02-on-the-compliance-of-the-istanbul-convention-with-the-constitution-of-latvia/>

Liechtenstein

LI

POLICY AND OTHER RELEVANT DEVELOPMENTS

Government response to Parliament request on the improved integration of persons with disabilities into the labour market

Disability

In 2012, the Liechtenstein Parliament asked the Government to review possible improvements to the integration of people with disabilities into the labour market, including the consideration of legislative changes as well as other accompanying measures. This request was initially based on the results of a working group established in 2006, which recommended the adoption of various measures by the Government, including the establishment of a central contact point within the Department of Social Affairs. However, no such contact point was ever established.

In March 2021, the Government of Liechtenstein finally submitted its response to the Parliament's request, which was then discussed by the Parliament in May 2021. The response set out measures that are already being implemented and listed the institutions concerned with the integration of people with disabilities into the labour market. It made further arguments against introducing a specific disability employment act or similar legislation in Liechtenstein, on the basis that it would not bring any added value.

The main points raised by the Government's response include:

- Various responsibilities related to the access of persons with disabilities to the labour market are delegated to private service providers. There are service agreements in this area between the Government and the Special Education Centre and Job Integration in Liechtenstein. Since 2007, the state disability insurance also offers supporting measures to keep or reintegrate people with disabilities into the labour market in order to avoid dependence on a disability pension;
- An obligation to employ persons with disabilities, as it exists in other countries, would be subject to a compensation tax in case of non-compliance. The Liechtenstein Association for People with Disabilities is reluctant to introduce such a regulation in Liechtenstein, considering it more sensible to support companies that employ people with disabilities than to fine defaulting companies.

¹⁶² For a more detailed description, see the Constitutional Court (2021) Press Release, 4 June 2021, available in English at: <https://www.satv.tiesa.gov.lv/en/press-release/information-regarding-the-judgment-of-the-constitutional-court-of-the-republic-of-latvia-in-case-no-2020-39-02-on-the-compliance-of-the-istanbul-convention-with-the-constitution-of-latvia/>.

- A large number of empirical studies prove that far-reaching anti-discrimination laws do not lead to an improvement in people's employment opportunities.¹⁶³
- The Convention on the Rights of Persons with Disabilities (signed by Liechtenstein in September 2020) does not impose any obligation to adopt legislation for the improved integration of persons with disabilities into the labour market.

In summary, the Government is of the opinion that greater success can be achieved by increased coordination among the various providers and corresponding awareness raising for employers, rather than through legally prescribed employment quotas or even protection against dismissal.

Online source:

<https://bua.regierung.li/BuA/default.aspx?nr=17&year=2021&backurl=modus%3dnr%26filter1%3d2021>

MT

Malta

LEGISLATIVE DEVELOPMENTS

Bill on decriminalisation of abortion

Gender

In May 2021, an independent member of Parliament tabled a bill proposing the decriminalisation of abortion. The purpose of the bill is to ensure that no person or medical professional can be criminalised for choices pertaining to their medical health and/or the provision of medical assistance in order to safeguard it (in instances of abortion). To this end, the bill proposes the deletion of the article in the Criminal Code that refers to the 'procurement of miscarriage' and that stipulates that 'whosoever, by any food, drink, medicine, or by violence, or by any other means whatsoever, shall cause the miscarriage of any woman with child, whether the woman be consenting or not, shall, on conviction, be liable to imprisonment for a term from 18 months to 3 years. The same punishment shall be awarded against any woman who shall procure her own miscarriage, or who shall have consented to the use of the means by which the miscarriage is procured.' Moreover, the bill proposes the deletion of a number of other articles in the Criminal Code, which refer to death or grievous bodily harm caused by the means used for the miscarriage: where a physician, surgeon, obstetrician or apothecary 'prescribes or administers' means for causing miscarriage and where the miscarriage is caused through 'imprudence, carelessness, lack of skill in his art or profession or non-observance of regulations'.

The bill proposes the inclusion of an article on forced abortion, stating that 'any person who for non-medical reasons, by means of violence, force, deceit, bribery, threats and/or coercion, causes the termination of a pregnancy without the person's full and informed consent shall be liable on conviction to imprisonment between 4 and 10 years' unless the facts constitute a more serious offence under any other provision of the Criminal Code. The bill's promoter an independent MP, challenged the political parties in Parliament to set up a citizens' assembly if they were 'too cowardly' to debate the bill in Parliament.

Malta is the only EU Member State that bans abortion in all cases without exception. Previously, the two political groups in the Parliament have expressed a position against abortion. The bill's promoter, an independent MP, stated that being pro-life should be perceived not as conflicting with women's self-determination and reproductive rights but as promoting and ensuring the wellbeing of women and children

¹⁶³ In this regard, the Government referred notably to an evaluation of the Swiss Federal Act on the Elimination of Discrimination against Persons with Disabilities: Swiss Federal Department of Home Affairs (2015) 'Evaluation des Bundesgesetzes über die Beseitigung von Benachteiligungen von Menschen mit Behinderungen – BehiG', available at: <https://www.zhaw.ch/storage/sml/institute-zentren/zsr/projekt-evaluation-behig-integrale-Fassung-2015.pdf>.

by creating a society where women enjoy equal opportunity for intellectual and economic independence, a supportive society that provides lifelong effective access to full women's healthcare services.

The bill has prompted numerous reactions, including that of the President of Malta, who declared that he would rather resign than give his assent to such a bill on abortion.

Online sources:

<https://timesofmalta.com/articles/view/decriminalising-versus-legalising-abortion-whats-the-difference.872143>

<https://timesofmalta.com/articles/view/mp-proposes-bill-decriminalising-abortion.871381>

Two legislative bills to reform the legal framework on disability-based discrimination

On 21 June 2021, two legislative bills were submitted to Parliament. The first, Bill No. 223, seeks to amend the Equal Opportunities (Persons with Disability) Act, which regulates the rights of persons with disability, prohibits discrimination and sets up the Commission for the Rights of Persons with Disability (CRPD). The second, Bill No 224, establishes a new act to safeguard the substantive rights of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

Disability

Bill No. 223, the Equal Opportunities (Persons with Disability) (Amendment) Bill¹⁶⁴ proposes the following notable changes:

1. Removal of the current definition of 'disability', to be replaced by the new definition of 'person with disability' contained in Bill No. 224, which in turn refers to Article 1 of the UN CRPD, which provides guidance on the concept of 'disability'.
2. Strengthening of the powers of the national CRPD, through different measures, including:
 - a. establishment of a redress panel within the CRPD, competent to hear petitioners claiming that a breach of any substantive rights that arise from the UN CRPD has been, is likely to be or is being committed. The panel will have exclusive jurisdiction over any substantive convention rights, unless the alleged discrimination is of a multiple or intersectional nature. The panel will be composed of people with (experiences of) disability.
 - b. establishment of an investigations unit within the CRPD to investigate complaints and an enforcement unit, which may take the regulated measures against persons who breach the legal provisions that the unit is entitled to enforce or who do not comply with any decision given by the investigations unit or the Test of Reasonableness Board.
 - c. strengthening of the Test of Reasonableness Board, which may consult the investigations unit on a case by case basis.

Bill No. 224, the United Nations Convention on the Rights of Persons with Disabilities Bill, incorporates Articles 5 to 30 of the Convention, which contain rights that are enforceable subject to the declaration and reservations made by the Government of Malta when signing the Convention in 2007. Bill No. 224 also provides for the possibility of civil action in cases of alleged breaches of those rights.

Article 4 of the bill provides that, in the event of any inconsistency with any other law, it would (once enacted) prevail, with the exception of the Constitution, the European Convention Act, the Equal Opportunities (Persons with Disability) Act, and the European Union Act.

The bill aims to establish a Directorate for Disability Issues (DDI) which would:

¹⁶⁴ Malta, Bill No. 223, dated 21.06.2021, available at: <https://parliament.mt/media/112828/bill-223-equal-opportunities-persons-with-disability-amendment-bill.pdf>.

1. be the national focal point for matters related to the implementation of the Convention, as required by its Article 33;
2. establish within its structures a UNCRPD National Coordination Mechanism to facilitate necessary action in connection with the Act (once enacted);
3. carry out duties of public administration including updating national policies, undertaking disability-related research, compiling necessary feedback and statistics, providing training and empowering schemes for persons with disability, collaborating with all relevant stakeholders in the field of awareness-raising and representing Malta's interests;
4. set up 'EMPOWER', a civil society participation mechanism within the DDI in line with the obligations set out in Article 4(3) of the Convention, to allow persons with disabilities, their families and support persons to engage directly with governmental institutions.

Online sources:

<https://parlament.mt/media/112829/bill-224-united-nations-convention-on-the-rights-of-persons-with-disabilities-bill.pdf>

<https://parlament.mt/media/112828/bill-223-equal-opportunities-persons-with-disability-amendment-bill.pdf>

NL

Netherlands

LEGISLATIVE DEVELOPMENTS

Women on company boards

Gender

On 22 February 2021, the Tweede Kamer (lower house of Parliament) adopted a bill entitled: 'Diversity at the top of business'. The law introduces a 'growth quota' for supervisory boards of listed companies. These companies will be obliged to ensure that their supervisory boards consist one-third of women. If a man is appointed when this target has not yet been met, the appointment will be declared null and void. In that case the seat on the supervisory board will remain empty until a female director is appointed. If a company has a one-tier board, the same rule will apply. The rule then applies to the non-executive members of the board.

In addition to the quota, the bill obliges large corporations to set appropriate and ambitious objectives in the form of a target to make the numbers of men and women in the management board, the supervisory board and senior management more balanced. The idea is that, by increasing the number of women in senior management, more of them will move on to the top. The companies will have to make a plan to realise these targets and to make this public. Furthermore, large companies will have to report on their diversity policy and the extent to which their targets have been met in their annual reports.

The case law of the CJEU has long been an obstacle for this legal development, and perhaps still is. The Dutch equality body, which was asked for an opinion in a number of cases about positive discrimination of women at universities, ruled that giving priority to female candidates is contrary to the case law of the CJEU.¹⁶⁵ This would therefore also apply to a quota for women. However, the Dutch legislature has decided to pursue the proposal with reference to the changed wording of Article 157(4) TFEU in comparison to the text at the time of the relevant CJEU judgments, the measures taken in other Member

¹⁶⁵ CJEU, judgment of 17 October 1995, *Kalanke*, C-450/93, ECLI:EU:C:1995:322; judgment of 11 November 1997, *Marschall*, C-409/95, ECLI:EU:C:1997:533; judgment of 28 March 2000, *Badeck*, C-158/97, ECLI:EU:C:2000:163; judgment of 6 July 2000, *Abrahamsson*, C-407/98, ECLI:EU:C:2000:367.

States, the stance that the European Commission takes on the draft directive on gender balance on corporate boards and the CEDAW Convention.¹⁶⁶

Online sources:

<https://www.rijksoverheid.nl/actueel/nieuws/2021/02/11/tweede-kamer-stemt-in-met-wetsvoorstel-diversiteit-in-de-top-van-het-bedrijfsleven>

<https://zoek.officielebekendmakingen.nl/kst-35628-2.html>

New law on parental leave

On 20 April 2021, the Tweede Kamer (lower house of Parliament) adopted a bill on paid parental leave that is the result of the implementation of the EU Work-Life Balance Directive.¹⁶⁷ The bill gives parents who take parental leave the right to nine weeks' paid leave at 50 % of their salary, capped at 50 % of the maximum daily wage set by the social security scheme (which is EUR 223.40 per day). The paid leave must be taken in the first year after the child is born. The payment of the leave benefits will be made by the Employment Insurance Agency (UWV), the agency responsible for the delivery of social security schemes. The employee can ask the employer to apply for the parental leave benefit. Parents who adopt a child are also entitled to paid parental leave.

Gender

The introduction of paid parental leave is a welcome development. However, the 50 % payment is rather low, which could result in fewer fathers taking up leave. This is especially true for families on lower incomes. During the parliamentary debate, several political parties asked the minister whether the payment should not be higher than 50 %, as research shows that men are not prepared to take the leave if less than 60 % of their income is covered. In reply, the minister said that there is no coverage for more than 50 %, but if political parties reach an agreement on a higher percentage during the formation of a new Government, the bill will be amended.

The law will come into effect on 2 August 2022.

Online source:

<https://www.rijksoverheid.nl/onderwerpen/ouderschapsverlof/invoering-van-2-maanden-betaald-ouderschapsverlof>

CASE LAW

Equality body considers the revised positive action policy of the Eindhoven University of Technology to be lawful

Last year, in its decision of 2 July 2020, the Netherlands Institute of Human Rights (NIHR) held that the Eindhoven University of Technology (TU/e) acted in breach of equality legislation by opening job vacancies for permanent academic staff to female candidates only during a period of six months. According to the NIHR, the TU/e's policy did not meet the proportionality test, as less far-reaching measures were possible. Subsequently, the TU/e adapted its policy. In the revised policy, vacancies only fall under the policy if the proportion of women in a particular job group in a department is less than 30 %. Moreover, no more than 30-50 % of the relevant vacancies will come under the policy. The TU/e then asked the NIHR whether the revised policy is in compliance with the equality legislation.

Gender

¹⁶⁶ On 28 September 2021, the First Chamber of Parliament (Senate) adopted the law proposal with the title 'diversity at the top of business'. Announcement available at: <https://www.rijksoverheid.nl/actueel/nieuws/2021/09/28/betere-man-vrouw-verhouding-geregeld-voor-top-bedrijfsleven>.

¹⁶⁷ Law proposal on paid parental leave (in Dutch), available at: <https://www.rijksoverheid.nl/onderwerpen/ouderschapsverlof/invoering-van-2-maanden-betaald-ouderschapsverlof>.

On 1 March 2021, the NIHR decided that the adapted policy is in accordance with equality legislation.¹⁶⁸ The two added requirements with respect to the degree of disadvantage of women and the percentage of vacancies that will be covered by the policy, have the effect that no more than 15 % of vacancies come under the policy. This leaves men with enough opportunities to obtain an academic position at the TU/e. The NIHR even considered that the policy has been adjusted too far, and therefore recommended that the percentage of women in a job group be adjusted upwards from 30 %, and that it should be decided on a case-by-case basis whether it is possible to include 50 % of the vacancies in the policy, rather than 30 %.

The second decision by the NIHR in this case makes it clear that it is not permissible to make it impossible for men to apply for a specific job position, but that some form of preferential policy for women is permitted. The NIHR observed that, strictly speaking, this preferential policy is contrary to the case law of the CJEU in *Kalanke*,¹⁶⁹ *Marschall*,¹⁷⁰ *Badeck*¹⁷¹ and *Abrahamsson*,¹⁷² but took the view that the policy should nevertheless be allowed if women are at a serious disadvantage in some positions. The NIHR underpinned this point of view by referring to the aim of ensuring full equality in practice between men and women in working life, as mentioned in Article 157(4) TFEU, and by reference to Article 4 of the CEDAW Convention, which stipulates those temporary measures may be necessary to reach full equality between men and women.

Online source:

<https://mensenrechten.nl/nl/oordeel/2021-19>

MK

North Macedonia

LEGISLATIVE DEVELOPMENTS

Establishment of a new equality body

Following the adoption of the new Law on Prevention and Protection against Discrimination in October 2020,¹⁷³ a new national equality body is being established in accordance with its provisions: the Commission for Prevention and Protection against Discrimination (CPPD). The CPPD is the successor to the Commission for Protection against Discrimination, which was in place until August 2019.¹⁷⁴

The new legislation sets out a procedure for the selection and appointment of the seven members of the equality body. According to this procedure, the Parliament should publish a public vacancy announcement for 30 days in the Official Gazette and on the websites of the Parliament and of the equality body. The announcement should mention the criteria for appointment as set out by the law, which are:

- citizenship of the Republic of North Macedonia;
- formal education at level VII/1 or 240 ECTS credits and a minimum of seven years of work experience in human rights (including five years related to equality and non-discrimination);
- no prison sentence of more than six months and no bar from carrying out a profession; and
- no function in a political party.

168 Netherlands, NIHR, Judgment No. 19/2021, available at: <https://mensenrechten.nl/nl/oordeel/2021-19>.

169 CJEU, judgment of 17 October 1995, *Kalanke*, C-450/93, ECLI:EU:C:1995:322.

170 CJEU, judgment of 11 November 1997, *Marschall*, C-409/95, ECLI:EU:C:1997:533.

171 CJEU, judgment of 28 March 2000, *Badeck*, C-158/97, ECLI:EU:C:2000:163.

172 CJEU, judgment of 6 July 2000, *Abrahamsson*, C-407/98, ECLI:EU:C:2000:367.

173 For further information, see *European equality law review*, Issue 2021/1, pp. 106-107.

174 For further information, see *European equality law review*, Issue 2020/1, p. 98.

The Parliamentary Committee on Elections and Appointments should organise a public discussion on the applications within 14 days after the application deadline, and should then submit a proposal of seven persons for a plenary vote in the Parliament. If the Parliament does not elect the proposed members, the procedure is to be repeated within 10 days.

The steps of this procedure were observed. The vacancy announcement closed on 24 December 2020, with public hearings taking place on 29 and 30 December 2020. The shortlist was drawn up on 4 January 2021 and the appointment vote took place on 25 January 2021. However, there are two significant issues of concern. First, the Committee on Elections and Appointments did not verify whether the applicants fulfilled the criteria for membership established by the law, despite persistent demands by the opposition. The list of members proposed by the majority MPs was adopted after a discussion of less than 10 minutes.¹⁷⁵ Secondly, although the law prescribes that the composition should reflect the composition of society at large, in particular with regards to ethnicity and gender, only two of the seven members are women, while five are men. In addition, although there were three candidates who self-identify as persons with disabilities, who clearly fulfilled the criteria and are well known public figures, none of them was appointed.

Following the appointment process, the body has encountered several setbacks in starting its work. First, the members were to complete a set of administrative tasks in order to get the body formally registered under the law, during which time they were not officially employed and insured, as required by law. Secondly, three weeks after the official appointment, one member resigned due to personal reasons.¹⁷⁶ At the time of writing, the Parliament had not yet opened a public call to fill this vacancy. Therefore, the CPPD now has only one female and five male members, further disturbing the gender balance in the body. Thirdly, the premises officially allocated for the CPPD in 2020 were later assigned for another purpose, leaving the CPPD without premises and forcing its members to work from home until June 2021 when new premises could be allocated and prepared.

New act on gender-based violence

The Law on Prevention and Protection against Violence against Women and Domestic Violence (GBV Act)¹⁷⁷ was adopted on 29 January 2021. It entered into force on 6 May 2021 and replaces the 2014 Law on Prevention and Protection against Domestic Violence.¹⁷⁸ The adoption of the law is part of the country's efforts to step up the implementation of the ratified Istanbul Convention.

Gender

The GBV Act defines violence against women as, *inter alia*, discrimination against women (Article 3). Gender-based violence against women is defined as violence targeting women because they are women or violence that has a disproportionately higher effect on women. It applies to both the private and the public sector. The GBV Act includes non-discrimination and the prohibition of victimisation as principles.

The act provides definitions of sex, gender and transgender persons, which may be useful in other contexts (such as the Law on Prevention of and Protection against Discrimination, the ADL). Sex is defined as: 'physical characteristics of an individual (reproductive system, chromosomes, hormones) according to which the sex of the individual is established upon birth by a combination of body characteristics

175 Parliament of the Republic of North Macedonia, Proposal for a Decision for Election of Members of the Commission on Prevention and Protection against Discrimination, available at: <https://www.sobranie.mk/materialdetails.nspix?materialId=4cea4c0c-fc15-4ec4-986d-73d997226ade>.

176 Parliament of the Republic of North Macedonia (2021), 'Оставка на Неда Чаловска Димовска од функцијата член на Комисијата за спречување и заштита од дискриминација' (Resignation by Neda Čalovska – Dimovska From the Function Member of the Commission on Prevention and Protection against Discrimination), 11 February 2021, <https://www.sobranie.mk/materialdetails.nspix?materialId=c0645f4a-1fac-4a3e-9d4c-32b29a94697b>.

177 North Macedonia, Law on Prevention and Protection against Violence against Women and Domestic Violence, Official Gazette of the Republic of North Macedonia, No. 24/2021.

178 North Macedonia, Law on Prevention and Protection against Domestic Violence, Official Gazette of the Republic of Macedonia, No. 138/2014, 33/2015, 150/2015.

and internal reproductive organs' (Article 3(6)). Gender is understood to refer to the socially constructed roles, behaviours, activities and attributes that a society considers to be appropriate for women and men (Article 3(7)). A transgender person is defined as a person that does not identify with the sex assigned to them at birth (Article 3(8)).

Chapter X of the GBV Act provides for different services for female victims of gender-based violence and domestic violence. These include free legal aid (Article 97), reparations (Article 87), possibility for mediation (Article 86) and for court proceedings, including via lawsuit for establishing responsibility for a breach of due diligence (Articles 82 and 83). Unlike under the previous law, the new act includes the shifting of the burden of proof as an important procedural safeguard. According to the GBV Act, the claimant is only to provide facts from which it may be presumed that there was a breach of the due diligence obligation (Article 85).

Online source:

<https://ldbis.pravda.gov.mk/PregledNaZakon.aspx?id=54941>

NO

Norway

CASE LAW

Equality Tribunal awards its highest amount in damages so far in a case on equal pay

In a statement of 15 February 2021, the Equality Tribunal awarded its highest amount in damages ever in a case on equal pay.¹⁷⁹ A female doctor working part time in a prison was awarded NOK 265 000 (approximately EUR 26 500) in damages and NOK 20 000 (approximately EUR 2 000) in compensation after the Equality Tribunal concluded that she was a victim of sex discrimination because her employer had acted contrary to the provision on the principle of equal pay in Article 34 of the General Equality and Anti-discrimination Act (GEADA).¹⁸⁰

For several years, a female doctor received a significantly lower salary than the male doctors working in the prison. When she and a male colleague were offered an extension of their positions in the prison she was offered a significantly lower yearly salary than her male colleague. If she had worked full time, she would have received NOK 200 000 (approximately EUR 20 000) a year less than her colleague. The woman brought her case before the Equality Tribunal questioning equal pay.

According to Article 34 of the GEADA, women and men in the same 'undertaking' shall receive equal pay for the same work or work of equal value. Pay shall be set in the same way, without regard to gender. The right to equal pay applies irrespective of whether the work relates to different branches or pay is governed by different wage agreements. Whether the work is of equal value is determined by means of an overall assessment in which emphasis is given to the expertise that is required to perform the work and other relevant factors, such as effort, responsibility and working conditions.

The Equality Tribunal unanimously found that the doctor was a victim of sex discrimination when she was offered a lower salary than her male colleague. Consequently, the employer had acted contrary to the principle of equal pay as prescribed by Article 34 of the GEADA.

¹⁷⁹ Equality Tribunal (2021) Statement of 15.02.2021, available at: <https://www.diskrimineringsnemnda.no/showcase/2020000207>.

¹⁸⁰ Norway, Act-2017-06-16-51, General Equality and Anti-Discrimination Act (GEADA), available at: <https://lovdata.no/dokument/NLE/lov/2017-06-16-51>.

The employer argued that even though the complainant received a lower salary than the other doctors in the prison, her pay (salary) was not lower than the general salary level for doctors in the municipality. The employer also stated that the pay difference between the woman and the male prison doctors was due to recruitment difficulties when hiring the male doctors, the so-called 'non-wage-setting agreements'. The Equality Tribunal concluded that the complainant's salary should be compared with the other prison doctors and not the general salary level for doctors in the municipality. The Equality Tribunal pointed out that work as a doctor in a prison requires special experience and skills. The complainant had a position as a doctor in the same prison as her male colleagues, and therefore performed work of equal value. Also, the Equality Tribunal found that the employer had not proven that the wage difference was based on gender-neutral criteria. The Equality Tribunal also concluded that the employer had violated the duty to provide information (as prescribed by Article 32 of the GEADA) when the employer resisted informing the complainant of the salary and the criteria used to determine the salary of the male doctors. The Tribunal stated that the duty to provide information applies in cases where the employee has a 'suspicion' that the salary has been determined in a discriminatory manner.

According to Article 12(1) of the Equality and Anti-Discrimination Ombud Act (EAOA), the Equality Tribunal can make an administrative decision concerning compensation in employment.¹⁸¹ According to Article 12(2) EAOA, the Equality Tribunal may also unanimously decide on damages for 'economic loss' if the defendant has no objections to the claim, or if the Equality Tribunal finds reasons to set aside the defendant's objections as 'manifestly untenable.' In this case, the Equality Tribunal found that the defendant's (employer's) objections were obviously untenable and could be set aside. The Equality Tribunal could therefore award damages.

Online source:

<https://www.diskrimineringsnemnda.no/media/2782/offentlig-versjon-av-vedtak.pdf>

Statement from the Equality Tribunal on sexual harassment

On 26 April 2021, the Equality Tribunal issued a statement on sexual harassment. The Tribunal has made other statements on this topic, but so far none has ever led to a conviction of sexual harassment. In its discussion, the Equality Tribunal refers to the Supreme Court judgment of 22 December 2020 on sexual harassment.¹⁸²

Gender

The case concerns a female nurse who complained to the Equality Tribunal, claiming that a male manager, her superior, had sexually harassed her. Until June 2020, the woman worked in a health facility, and the accused man was head of the department where she worked until he resigned in November 2019. The woman claimed to have been sexually harassed on three occasions by her superior. She had also complained to her employer about this. All the incidents took place at work-related social events.

The first incident happened during a business trip abroad. The complainant's superior joined the woman in her hotel room and initiated kissing and touching. The woman had audio-recorded parts of the incident, and provided the Equality Tribunal with this as evidence in the case. The second incident took place during a job seminar in 2014/2015. The manager had approached the complainant and asked if they should 'go to the room and have intercourse'. The woman had not documented this incident except for her own statement.

The woman also claimed that her superior had touched her thigh/body, had been verbally insistent that she should come home with him, and had initiated kissing outside a nightclub after a summer party in 2018. As evidence, the complainant provided the Tribunal with messages from her superior where

¹⁸¹ Norway, Act relating to the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal (EAOA), available at: <https://lovdata.no/dokument/NL/lov/2017-06-16-50?q=diskrimineringsombudsloven>.

¹⁸² Norway, Supreme Court, 22.12.2020, in case No. HR2020-2476-A.

he apologised for his behaviour on that particular evening. The superior denied that he had sexually harassed the woman, and claimed that she had also showed an interest in him.

According to Section 3 of GEADA,¹⁸³ the Act applies only to acts on Norwegian territory, and since one of the incidents had happened outside of Norwegian borders, the Equality Tribunal rejected this part of the complaint.

As specified in Article 8 of the former Gender Equality Act of 2013 (GEA),¹⁸⁴ and Article 13 of the GEADA, 'sexual harassment is any form of unwanted sexual attention with the purpose or effect to be offensive, intimidating, hostile, degrading, humiliating or troublesome' Whether the behaviour is troublesome must be decided on the basis of an overall assessment. Here, a number of factors are relevant, such as who the attention is directed to, the nature of the action, the time and place of the action and the relationship between the perpetrator and the person to whom the sexual attention is directed. Another important factor is whether the behaviour has had a negative impact on the victim.¹⁸⁵

The Equality Tribunal concluded that the superior had sexually harassed the woman, and stated that the two incidents that took place in Norway were regarded as unwanted and troublesome sexual attention. The complainant did not ask for compensation, therefore the Equality Tribunal did not address this issue.

According to Article 13, paragraph 6 of the GEADA, an employer has a duty to prevent and seek to prevent sexual harassment. The Equality Tribunal also assessed whether the woman's employer had fulfilled its duty in this specific case.¹⁸⁶ The Tribunal concluded that the employer had fulfilled its obligation. The employer had sufficient internal guidelines and measures on sexual harassment at the workplace. The Tribunal also concluded that the employer had prevented further incidents of sexual harassment when the complainant reported her experiences. The employer had received anonymous notifications about the manager's behaviour, but this was not decisive in the Tribunal's assessment of the employer's duty to seek to prevent sexual harassment because the notifications came after the manager had sexually harassed the woman.

Online source:

<https://www.diskrimineringsnemnda.no/media/2887/offentlig-versjon-av-vedtak-20-191.pdf>;

<https://www.diskrimineringsnemnda.no/media/2886/offentlig-versjon-av-uttalelse-20-152.pdf>

PL

Poland

LEGISLATIVE DEVELOPMENT

New law provides pharmacists the right to refuse to provide pharmaceutical services if its performance is potentially endangering the life or health of the patient or others

On 17 December 2020, the President of the Republic signed a new act, the Act on the pharmaceutical profession, which comprehensively regulates the role of pharmacists in the healthcare system.¹⁸⁷ The Act was adopted by the Sejm at its meeting of 10 December 2020, and entered into force on 16 April 2021. It introduces provisions under which a pharmacist and a pharmaceutical technician may refuse to provide any pharmaceutical service if its performance may potentially endanger the life or health of the patient

¹⁸³ Norway, Act-2017-06-16-51, General Equality and Anti-discrimination Act.

¹⁸⁴ Norway, Act-2013-06-21-59, Gender Equality Act.

¹⁸⁵ Norway, Preparatory works in Prop 81 L (2016-2017), p. 320.

¹⁸⁶ Norway, Equality Tribunal (2021) Statement of 26.04.2021 in case No. 20/152.

¹⁸⁷ Poland, Act on the pharmaceutical profession of 10.12.2020, Journal of Laws of 2021, item 97.

or others.¹⁸⁸ In the explanatory memorandum to the bill, the authors point out that this amendment is dictated by the need to adapt the rules to the new, broader competences of pharmacists. In their opinion, the existing arrangements were too narrow, which translated into an unjustified limitation on the decision-making abilities of pharmacists.¹⁸⁹ Until the introduction of the new rules, a pharmacist could only refuse to provide so-called medicinal products, i.e. products which reduce obesity and work by increasing the metabolism, but could not refuse to sell medicines. The amendments broaden the list of products that pharmacists may refuse to sell, apart from 'medical products' and includes means for regulating conception, such as barrier contraception: patches, condoms, cervical caps or intrauterine diaphragms. Under the new rules, a pharmacist may also refuse to sell a medicinal product in cases where: it may be used for non-medical use (e.g. to manufacture drugs); the prescription raises reasonable doubts; the person presenting the prescription is under the age of 13; or there have been changes in the composition of the formulation medicine.

Although the Act on the pharmaceutical profession adopted by the Sejm *expressis verbis* the permissibility of such refusals only in situations of danger to the life or health of the patient or other persons, the introduction of this provision should be placed in context. In recent years, the Government has been multifaceted in restricting access to contraception and information on reproductive health (including using the politically dependent Constitutional Tribunal). The Act of 25 May 2017 amending the Law on publicly funded healthcare benefits and certain other laws¹⁹⁰ introduced the sale of emergency contraception only on prescription. On 22 October 2020, the Constitutional Tribunal issued a ruling that results in a ban on embryopathological abortion.¹⁹¹ In the meantime, petitions by the Catholic Pharmacists' Association to introduce a 'conscience clause' for the profession¹⁹² were heard. In these proposals, pharmacists referred to, among other things, the judgment of the Constitutional Tribunal of 7 October 2015,¹⁹³ stating that 'freedom of conscience – including its element, which is conscientious objection – must be respected regardless of whether there are statutory provisions confirming it'.¹⁹⁴ Thus, although the amendment adopted by the Sejm does not formally introduce a conscience clause for pharmacists into the law, there are fears that the new rules may be abused in a way that discriminates against women in accessing legally available reproductive health services.

These concerns are particularly justified because the media has reported on this widely, and has presented such an understanding of this provision of the law, namely, that 'according to the amendment to the Law adopted by the Sejm, a pharmacist will have the right to legally refuse to sell barrier contraception. This means that where the dispensing of a measure may affect the health or life of the patient, he or she may not be able to buy condoms, patch caps, patches or intrauterine inserts at the pharmacy'.¹⁹⁵ Lawyers may point out that this is an unauthorised interpretation of the existing legislation, but most consumer-patients (as well as pharmacist-sellers) are aware of the changes through the media. Therefore, if this is

188 Poland, Article 96 section 5 of the Pharmaceutical Law, as amended by Article 83(9).c(1) of the Act of 10.12.2020 on the pharmaceutical profession, Journal of Laws of 2021, item 97.

189 <https://orka.sejm.gov.pl/Druki9ka.nsf/0/81EF45265766F78BC125850C003768D4/%24File/238.pdf>.

190 Poland, Act of 25.05.2017 amending the Law on publicly funded healthcare benefits and certain other laws, Journal of Laws of 2017, item 1200 as amended.

191 Poland, Constitutional Tribunal, Judgment of 22.10.2020 in case No. K 1/20, available at: <https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=K%201/20>.

192 <https://sfkp.pl/art.prosimy-o-podpisanie-petycji-do-ministra-zdrowia.html>.

193 Poland, Constitutional Tribunal, Judgment of 7.10.2015 in case No. K 12/14.

194 In 2014, the Supreme Medical Council challenged before the Constitutional Tribunal the provisions of the Law of 5 December 1996 on the professions of doctor and dental practitioner among others to the extent that they require a doctor to perform a health service which is incompatible with his conscience, even though delay in providing that benefit would not result in a risk of loss of life, serious injury or serious upset of health and in the part indicating that, if the doctor refrained from providing health services incompatible with his or her conscience, the doctor 'is required to indicate the real possibility of obtaining that benefit from another doctor or medical establishment.' In its judgment of 7 October 2015 (case no. K 12/14), the Constitutional Tribunal declared that those provisions were unconstitutional, see: <https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=2&dokument=13021&sprawa=13434>.

195 See for instance: https://www.24opole.pl/35056,Nowelizacja_ustawy_o_zawodzie_farmaceuty_co_oznacza_w_praktyce,wiadomosc.html.

the dominant portrayal of the change, there is a real danger that the newly introduced provision may be used by some pharmacists as a basis for restricting the sale of contraceptives.

Online sources:

<https://orka.sejm.gov.pl/Druki9ka.nsf/0/81EF45265766F78BC125850C003768D4/%24File/238.pdf>

<https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=K%201/20>

PT

Portugal

LEGISLATIVE DEVELOPMENT

Charter of human rights in the digital era

In May 2021, Parliament adopted legislation establishing the Portuguese Charter of Human Rights in the Digital Era, including the right to non-discrimination in the enjoyment of all rights recognised in the Charter.¹⁹⁶ The legislation regulates several matters related to the digital environment, including several provisions that guarantee the right to non-discrimination in internet access, use and governance, such as:

- the right to access the digital environment without discrimination of any kind, such as on the basis of ancestry, gender, race, language, territory of origin, religion, political or ideological beliefs, education, economic status, social status or sexual orientation;
- the duty of the State to provide active support to people with special physical, sensory or cognitive needs, by the elimination of barriers to accessing the internet, as well as to other vulnerable groups, including the elderly and youth, by promoting programs and materials to improve internet access and education;
- the freedom of opinion and expression on the internet without censorship;
- the right to protection against all forms of discrimination and crime in cyberspace, in particular incitement to hate speech and violence against an individual or a group of individuals on the grounds of their race, colour, ethnic or national origin, ancestry, religion, sex, sexual orientation, gender identity or physical or mental disability; sexual harassment or sexual exploitation of children; female genital mutilation and persecution;
- the use of artificial intelligence with respect for fundamental rights, ensuring a fair balance between the principles of explicability, security, transparency and accountability, which considers the circumstances of each specific case and establishes procedures to avoid any prejudice and forms of discrimination, in accordance with the principles and values enshrined in Article 2 of the Treaty on European Union;
- the right to digital data protection, which includes the prohibition of using a two-dimensional or larger code to treat and disseminate information about health status or any other aspect related to racial or ethnic origin, political opinions, religious or philosophical beliefs, or affiliation, as well as genetic data, biometric data or data relating to a person's sexual life or sexual orientation;
- the establishment of an *actio popularis* accessible for everyone, in order to defend the provisions of this legislation.

Online source:

<https://dre.pt/home/-/dre/163442504/details/maximized>

¹⁹⁶ Portugal, Law No. 27/2021 of 17.05.2021.

CASE LAW

Unlawful offences to the right to honour and the right to image of a family of African descent

In January 2021, during a televised debate for the presidential elections, the leader of the far-right political party Chega¹⁹⁷ showed a photograph in which the President of the Republic was accompanied by a group of people of African descent, inhabitants of the 'Jamaica' neighbourhood in Seixal. He claimed that the president had preferred to go to that neighbourhood to socialise with 'bandits' instead of visiting police officers who had been attacked days before there, and accused those groups of having come to Portugal 'to live on the welfare state'. The family who appeared in the photograph filed a civil action against the leader and his party.

Racial or ethnic origin

In May 2021, the judicial court of the district of Lisbon recognised 'the unlawfulness of offences to the right to honour and the right to image' of the claimant family and ordered the respondents to make a 'written or oral' apology of 'public retraction' regarding the facts committed, which should be published by the media where the 'offensive publications of personality rights' were 'originally disseminated' and also on the Chega Twitter account. If they failed to do so within 30 days of the sentence becoming final, the respondents would have to pay a penalty of EUR 500 per day of delay. In the decision, the judge also ordered the party leader not to make, in the future, 'statements or publications, written or oral, offensive to the good name' of members of the claimant family, under penalty of having to pay EUR 5 000 for each infraction.¹⁹⁸

However, the judicial decision did not specifically address the claimants' arguments relating to the allegedly discriminatory nature of the statements, considering that this was not the most relevant aspect of the case, and finding that it did not appear clear from the process that such discrimination was necessarily determined by the colour of the skin or by the socioeconomic condition of the persons targeted.

The party leader has refused the court order to apologise to the family and stated that he plans to appeal the decision.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Creation of a working group on racial or ethnic discrimination

In January 2021, a working group for the prevention and combating of racism and discrimination was created, composed of a total of 15 academics, investigators, experts, representatives of civil society organisations and public servants, under the coordination of one of the members of the High Commission for Migration.¹⁹⁹

Racial or ethnic origin

The task of this working group is to submit a final report with recommendations for public policies on preventing and combating racism and ethnic/racial discrimination, to the member of the Government responsible for citizenship and equality, by 30 June 2021. For that purpose, the working group will promote the hearing and participation of other entities and individuals whose contribution is considered relevant for the continuation of the work, namely specialists, representatives of observatories, consultative bodies, social partners and civil society associations, as well as other entities relevant to its mission.

197 Chega is one of the most recent and increasingly successful political parties in Portugal, which changed the political landscape by earning its first parliamentary seat in 2019.

198 Portugal, Judicial Court of the district of Lisbon, decision of 24.05.2021 in case No. 8777/21.3T8LSB.

199 Portugal, Ordinance No. 309/2021 of 08.01.2021.

The purpose of the working group is to implement a collaborative and intersectional understanding of ethnic and racial discrimination and to bring national public policies in line with international and European instruments and strategies.

Online source:

<https://dre.pt/home/-/dre/153341296/details/maximized>

RS

Serbia

LEGISLATIVE DEVELOPMENTS

Amendments to the Law on the Prohibition of Discrimination

After three years of intensive negotiations to change the 2009 Law on the Prohibition of Discrimination, in order to further align it with European standards, amendments were finally adopted on 20 May, and entered into force on 1 June 2021.²⁰⁰

The main changes are:

- the list of prohibited grounds of discrimination is extended to include discrimination based on gender, sexual characteristics, and income level, in addition to the already existing grounds;
- the list of forms of discrimination is extended to include sexual harassment and instruction to discrimination;
- sexual harassment is defined as ‘any verbal, non-verbal or physical unwanted behaviour, with the purpose or effect of violating the dignity of a person or his/her personal integrity, and which causes fear or creates an intimidating, hostile, degrading, humiliating or offensive environment’;
- instruction to discriminate exists ‘if a person or group of persons is discriminated against by the giving of instructions on how to take discriminatory actions or by inciting discrimination in another similar way’;
- an explicit prohibition of segregation, which is defined as ‘any act by which a natural or legal person excludes without objective and reasonable justification another person or group of persons based on personal characteristics stipulated in the Law. Voluntary separation from other persons based on personal characteristics does not constitute segregation’;
- Indirect discrimination is defined word-for-word as in the EU directives and is ‘where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared to other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’;
- discrimination based on sexual orientation and age are recognised as severe forms of discrimination;
- positive action is more precisely defined as to include temporary restrictions;
- employers are obliged to take appropriate measures in order to provide access to labour, reasonable accommodation, vocational training, and promotion for persons with disabilities, national minorities, women, men, persons of different sexual orientation and gender identity, elders, and others, unless these measures would impose a disproportionate burden on the employer;
- discrimination based on pregnancy and parental leave is expressly prohibited;
- the inclusion of several exceptions from direct discrimination based on age;
- the express prohibition of discrimination in the area of housing;
- a duty on the Commissioner for the Protection of Equality to cooperate with CSOs;
- labour inspectorates are given legal standing to submit complaints to the Commissioner;

200 Serbia, Amendments to the Law on the Prohibition of Discrimination, Official Gazette No. 52/2021, 24.05.2021.

- mediation is expressly specified as a possibility, and the process is free of charge;
- the Commissioner is responsible for keeping records on discrimination cases and in order to be able to perform this job, courts are obliged to keep their records on discrimination cases and to send them to the Commissioner by 31 March for the previous calendar year.

Online source:

<http://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/skupstina/zakon/2009/22/1/reg/>

Law on Gender Equality

In 2021, a new Law on Gender Equality was adopted, replacing the 2009 Law on Gender Equality.²⁰¹ The National Assembly adopted the text on 20 May, which entered into force on 1 June 2021.²⁰²

Gender

The new Law introduces the following key provisions:

- a definition of gender equality as ‘equal rights, responsibilities and opportunities, equal participation and balanced representation of women and men in all areas of social life, equal opportunities for exercising rights and freedoms, use of personal knowledge and abilities for personal and social development, equal opportunities and rights in access to goods and services, as well as achieving equal benefits from work results, taking into account biological, social and cultural differences between men and women and different interests, needs and priorities of women and men when making public and other policies and deciding on rights, obligations and law-based provisions, as well as constitutional provisions’;
- prohibition and definition of discrimination based on sex, sexual characteristics, and gender, including harassment and sexual harassment;
- an obligation for authorities to perform gender budgeting;
- the need for gender mainstreaming;
- a definition of gender-sensitive language as ‘language that promotes equality between women and men and is a means to influence the consciousness of those who use that language with the aim of achieving equality, including changes in opinions, attitudes and behaviour within the language used in personal and professional life’;
- an express prohibition on discrimination due to pregnancy, maternity, and parental leave;
- recognition of violence against women as a form of discrimination and a definition of domestic violence. The Law includes several provisions imposing an obligation to prevent and report violence and prescribe general and specialised support measures. It also provides for programmes for people who commit domestic violence;
- a definition of equal opportunities policy and measures for its achievement;
- a duty to adopt a strategy and an action plan as primary policy documents for the achievement of gender equality;
- a definition of areas in which measures are prescribed, which are: employment and self-employment, social and health protection; education and upbringing, science and technological development; information and communication technologies; defence and security; transportation; energy; health environment; culture; public information; sport; management and supervisory bodies; politics and public affairs; political parties, trade unions, and associations; sexual and reproductive health; and access to goods and services;
- an explicit prohibition of unequal pay for work of equal value;
- a definition of the bodies that are responsible for the creation, implementation, monitoring and improvement of policies for achieving gender equality: the Government, ministries and other state institutions, the Coordination Body for Gender Equality, bodies of the autonomous province and local self-government units, as well as other bodies;

201 Serbia, Law on Gender Equality, Official Gazette No. 104/2009, 24.12.2009.

202 Serbia, Law on Gender Equality, Official Gazette No. 52/2021, 24.05.2021.

- a requirement for public bodies and employers to produce gender-segregated data in all areas covered by the Law.

The law does not contain specific provisions on discrimination procedures for gender discrimination, which means that all legal mechanisms available in the Law on the Prohibition of Discrimination apply in cases of gender discrimination.

Online source:

<https://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/skupstina/zakon/2021/52/3/reg>

POLICY AND OTHER RELEVANT DEVELOPMENTS

Survey on Roma perceptions of discrimination

The Commissioner for Protection of Equality (CPE) conducted a survey and prepared a report on the *Perception of Roma community on discrimination*, published in February 2021.²⁰³ It is the first research of its kind in Serbia, and is composed of two parts: (1) a survey of a sample population of 310 Roma citizens conducted in early 2020; and (2) the results of three focus groups, organised with representatives of the National Council of Roma ethnic minority, representatives of CSOs dealing with Roma issues, students, etc.

Almost all respondents to the survey (94 %) are familiar with the word ‘discrimination’, but they understand it as any injustice, disrespect, humiliation, or harassment and link it to their overall position in society. Respondents are aware that discrimination is prohibited, but they are not familiar with the Law on Prohibition of Discrimination or with the institution of the Commissioner for the Protection of Equality. The respondents consider poverty to be one of the main reasons for discrimination.

Most respondents (55 %) believe that the attitude towards Roma in Serbia is the same as towards other citizens, while every third respondent (35 %) disagrees and considers that Roma are in an unequal position. The results show an evident correlation between the perception of discrimination on the one hand and education, employment, and regular incomes, leading to greater social participation, on the other.

One in four respondents (26 %) considers that they have experienced discrimination in the past, while about one in two (54 %) states that neither they nor any of their family members have been discriminated against. Among the former, the most common areas of discrimination were access to services provided by the municipality and other public institutions (64 %), by the centre for social work (61 %), or while searching for employment (60 %). The lowest levels of personal experiences of discrimination were reported in school or kindergarten (9 %), at work (9 %), and in restaurants (15 %).

When asked about their general perception of discrimination in society however, most respondents believe that Roma are most discriminated against in the area of employment. Three out of four respondents consider that Roma do not progress at work due to their lower level of education, and 88 % of respondents agree that education is the most important element for equality. However, 47 % of respondents agree that Roma do not sufficiently use the education opportunities provided to them. Special benefits for enrolment in high schools and universities are supported by 92 % of respondents.

Respondents also believe that the state recognises the problem of discrimination against Roma (70 %) and makes great efforts to improve their position (69 %). However, the research suggests that anti-discrimination mechanisms are still inaccessible to a significant number of Roma, with the notable

203 Commissioner for Protection of Equality (2021) *Perception of Roma Community on Discrimination*, GIZ, Belgrade, February 2021.

exception of those who receive support from Roma organisations and those who have positioned themselves in the community as 'leaders' and 'protectors'.

Participants in the three focus groups consider Roma to be the group that is most discriminated against in society. A majority of participants believe that although some progress towards Roma inclusion has been made, poverty remains one of the main reasons for discrimination.

Online source:

http://ravnopravnost.gov.rs/wp-content/uploads/2021/02/PERCEPCIJA-ROMSKE-ZAJEDNICE-O-DISKRIMINACIJI_final_compressed.pdf

Employment strategy 2021-2026

On 25 February 2021, the Government adopted a new Employment Strategy 2021 to 2026. The strategy aims to develop a labour market that provides access to employment under equal conditions for all and to achieve an inclusive labour market characterised by full and productive employment.²⁰⁴ The strategy is accompanied by the action plan for 2021 to 2022.

All grounds

The strategy identifies some groups as particularly vulnerable in the labour market, such as women, older and younger persons, as well as persons with disabilities and Roma.

The participation of women active in the labour force is 45 %, although they comprise 51.3 % of the total population. The female activity rate (61.3 %) is lower than the male activity rate (74.9 %), as is the female employment rate (54.3 % compared to 67.1 %). The unemployment rate for women is 11.5 %, and for men, 10.4 %.

The inactivity rate of youth (aged 15 to 30) is high (53 %), and the transition from education to the first stable and/or satisfactory job takes almost two years. For young people living in rural areas and those with a low level of education, this period is even longer (41 months). A particular challenge for young people is to find and keep a stable job, as they are often engaged in informal employment (24.3 %), while only 45.3 % have permanent contracts. Young women are particularly vulnerable in the labour market, as their unemployment rate is 37.4 %.

Changes in technology and production processes have contributed to the difficulties of many older people in adapting to the needs of the labour market, as their knowledge and skills are often outdated.

People with disabilities often face discrimination, with particular challenges including barriers to movement and use of public transport; accessibility of various public facilities, access to services and information; access to employment and opportunities for reasonable accommodation; and access to education and vocational training. There are officially 12 528 unemployed persons with disabilities, among whom 42.6 % are women, 6.6 % have higher education, 46.7 % are 50+ and 11.6 % are up to 30 years old. Some 76.4 % of unemployed persons with disabilities have been unemployed for more than 12 months, and 61.9 % for more than two years.

Roma experience difficulties in accessing the labour market for several reasons: unfavourable educational structure; lack of work experience, knowledge and skills; low motivation to enter the formal labour market; and pronounced discrimination and stereotyping. There are officially 27 595 unemployed persons declaring themselves as Roma, of whom 50.2 % are women. Among them, 10 % have finished secondary education, and only 0.6 % have finished higher education. Some 68.4 % have been unemployed for more than 12 months, and 53.7 % for more than two years.

²⁰⁴ Serbia, Employment Strategy from 2021 to 2026, Official Gazette No. 18/2021, of 08.03.2021.

The overall goal of the employment strategy is to establish stable and sustainable employment growth based on knowledge and decent work. The strategy envisages cross-sectoral measures that will be implemented in cooperation with the education, economy, finance and social protection sectors, while further development of local employment policy is planned with local self-government units. These cross-sectoral measures aim to improve labour supply and demand and lead to an increase in quality employment.

Special measures are envisaged to improve the position of women, youth, people with disabilities, and beneficiaries of financial social assistance, as well as Roma men and women. Those measures will include: 'activation' policies, certain benefits for employing jobseekers from vulnerable groups, and individualised assistance from the National Employment Service.

Online source:

<http://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/vlada/strategija/2011/37/1/reg/>

Annual report of the national equality body



In March 2021, the Commissioner for Protection of Equality (CPE) published its annual report for 2020, underlining that the year was marked by the COVID-19 pandemic and by parliamentary and local elections. These events caused a delay in the appointment of a new Commissioner, leaving the body without a head for six months. During this period, however, the institution remained active, particularly during the state of emergency (from 15 March to 6 May 2020). The institution received more than 3 000 requests for emergency support and assistance in exercising various rights and/or providing services during this time.

In 2020, 674 formal complaints were submitted to the CPE (compared to 711 in 2019). The Commissioner issued opinions in 29 cases, finding discrimination in 24 cases. In most cases, recommendations issued in cases where discrimination was found were followed (89 %). Most of the complaints concerned discrimination based on health condition (15.6 %), age (14.8 %), nationality or ethnic origin (14.7 %), or gender (13.5 %). Other grounds concerned were disability (11.5 %), marital and family status (7.2 %), property status (5.7 %), and membership in political organisations, trade unions and other organisations (3.9 %). Most complaints concerned discrimination by public authorities (28.5 %), in employment (27.3 %), in access to public services and facilities (14.1 %), in education and vocational training (5.5 %), in social protection (5.2 %), or in public information and media (3.1 %).

Two pieces of research were initiated: a survey on the perceptions of Roma on discrimination²⁰⁵ and an analysis of women's participation in public and political life. The CPE also submitted 12 initiatives for legislative amendments, provided 12 opinions on draft laws and general acts, and initiated 2 criminal charges, 12 warnings, 23 press releases, and 476 general recommendations (compared to 686 general recommendations issued in 2019). During the state of emergency alone, the CPE issued 312 general recommendations to different state bodies. The recommendations were related to issues such as the provision of information in accessible formats, regular provision of home help services to all users, and the provision of the necessary movement permits during curfew hours to persons providing this assistance. Recommendations were also issued that social and financial protection measures introduced to minimise the negative effects of the COVID-19 pandemic should cover all persons in need, and have broader coverage.

The CPE issued general and specific recommendations to improve equality in Serbian society. Most of these recommendations have been made on previous occasions, but are now more systematised. Specific recommendations concerning crisis situations include:

²⁰⁵ Commissioner for Protection of Equality (2021) *Perception of Roma Community on Discrimination*, GLZ, Belgrade, February 2021. For further information, see above pp. 130-131.

- to establish clear, precise, and applicable procedures for action at all stages during crises, based on quality and disaggregated population data, and after analysing the responses of the competent authorities at all levels;
- to involve experts from various fields, representatives of vulnerable groups and human rights institutions in the process of developing crisis management procedures;
- to improve access to adequate, comprehensive, and timely information on crisis events, as well as ways to overcome them;
- to improve overall the health and social protection system, as well as other public services in the fields of education, social care for children, culture, etc., to be able to fully respond to the needs and rights of the population;
- to ensure greater availability of psychological support and mental health care, especially in crises;
- to promote and facilitate volunteerism among all generations.

Other general recommendations concern the normative and strategic framework, mitigation of the consequences of social exclusion and poverty, as well as the promotion of equality and prevention of violence. Particular recommendations concern health status, age, nationality and ethnic origin, sex, marital and family status, and people with disabilities.

Online source:

http://ravnopravnost.gov.rs/wp-content/uploads/2021/03/Redovan-godisnji-izvestaj-Poverenika-za-zastitu-ravnopravnosti-za-2020-godinu_FIN_15.3.2021.pdf

Slovakia

SK

LEGISLATIVE DEVELOPMENT

Labour Code amendment allowing dismissal of an employee who reaches the age of 65 and pensionable age

On 4 February 2021, the Parliament approved an amendment to the Labour Code, allowing employers to terminate the employment contract of an employee who has reached the age of 65 and pensionable age for entitlement to a retirement pension. The amendment will be effective from 1 January 2022.

The legislation was proposed by an MP whose arguments were based on the promotion of overall employment in Slovakia, and on intergenerational exchange of employees in the workplace, which has been disrupted in previous years due to the shift in stages of the retirement age and by employees over the age of 65 remaining in employment.²⁰⁶

It is questionable whether this justification meets the requirements for reasonableness and proportionality as set by the domestic legislation²⁰⁷ and EU law.

Online source:

<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2021/76/20210301>

²⁰⁶ See daily newspaper article: 'The 65-year-old is due to termination of labour contract from next year', *SME* 04.02.2021, available at: <https://ekonomika.sme.sk/c/22589237/dovrsenie-65-rokov-ma-byt-od-buduceho-roka-dovodom-na-vypoved.html>.

²⁰⁷ Slovakia, Act No. 365/2004 on Equal Treatment in Certain Areas and Protection Against Discrimination, Section 8(1) and (3).

POLICY OR OTHER RELEVANT DEVELOPMENTS

Public Defender of Rights analysed the allegedly discriminatory impact of the emergency interruption to in-person education due to the COVID-19 pandemic

Racial or
ethnic origin

On 11 January 2021, the Public Defender of Rights (Ombudswoman) released information about the results of her legal analysis concerning the emergency interruption of in-person education from 11 October to 14 December 2020 due to the COVID-19 pandemic. The analysis followed several complaints that raised doubts regarding the proportionality of such a long interruption to in-person education and the potential violation of the constitutionally guaranteed right to education. The analysis also examined whether the interruption was discriminatory against certain groups of pupils in terms of their access to distance (online) education, which schools were ordered to ensure during this time.

The Ombudswoman found that some of the decisions of the Minister of Education could potentially constitute discrimination and thus violate constitutional provisions prohibiting discrimination in the exercise of guaranteed human rights. The analysis noted that different groups of children may be in different positions and have different requirements to ensure their equal access to education. State authorities have to reflect on and address these requirements, so that equal educational chances for all children are ensured. In particular, she found three ministerial decisions to be potentially discriminatory on the grounds of social origin, property and other standing.²⁰⁸

In particular, the decision of October 2020 suspending in-person education in upper-secondary schools and ordering school directors to ensure distance education without requiring them to take additional measures to address the impact of the decision on various groups of pupils,²⁰⁹ was found to constitute *de facto* a denial of the right to education of pupils without access to remote online education (via PC and internet). It also had a particularly negative effect on children from a socially disadvantaged environment. The analysis noted that at least the first year of upper-secondary education is still part of compulsory school education and that the state authorities therefore have to guarantee equal access to it. The other decisions were found to be insufficient to remove the negative effects of this first decision.²¹⁰

The analysis did not invoke specifically the possible discriminatory impact of these decisions on Roma children from a socially disadvantaged environment. However, given their significant number, it could easily be argued that such children were particularly affected by the measures. Schools with a high percentage of disadvantaged Roma children or Roma-only segregated schools were, in practice, largely unable to effectively ensure distance education and later in-person education in small groups, for all children.

Online source:

https://www.dajmedetomhlas.sk/wpcontent/uploads/2021/01/201216_VOP_prerusenie_skoly.pdf

Strategy for the equality, inclusion and participation of Roma until 2030

Racial or
ethnic origin

On 7 April 2021, the Government adopted a Strategy for the equality, inclusion and participation of Roma until 2030.²¹¹ The strategy defines priorities and the direction of public policies in order to achieve tangible progress in promoting the equality and inclusion of the Roma minority in Slovakia for the next years. As noted in its introduction, it resulted from the joint commitment of EU Member States in this

208 Due to her limited mandate, the Ombudswoman's analysis did not cover the ministerial decisions adopted as a result of restrictions to personal freedom and freedom of movement by the curfew imposed by the Government from 24.10.2020 to 14.11.2020. One of these ministerial decisions also suspended in-person education in higher grades of primary schools.

209 Slovakia, Government Decision No. 2020/17294:1-A1810 of 11.10.2020.

210 Slovakia, Government Decision No. 2020/18259:2-A1810 of 12.11.2020 and Decision No. 2020/18259:3-A1810 of 04.12.2020.

211 Slovakia, Government resolution No. 181/2021 of 07.04.2021.

area and reflects relevant EU documents, such as the Council Recommendation of March 2021 on Roma equality, inclusion and participation.²¹²

The strategy is presented as a set of starting points and goals, aiming to eliminate segregation of Roma communities, achieve a significant positive turnaround in social inclusion of Roma and prevent their discrimination. It also aims to improve coexistence between the Roma minority and the majority and to change negative attitudes towards Roma. The strategy notes that most Roma continue to face multiple disadvantages and as such, it targets Roma who live in marginalised communities as well as those who do not, but who still face structural inequalities. As a long-term strategic document, it remains open for updates, additions or revisions based on the monitoring or evaluation process.

Thematically, the strategy covers five priority areas: education; housing; employment; healthcare; and the fight against anti-Roma racism and support of Roma participation. As a next step, the defined global and partial goals for each priority area will be worked out in action plans as concrete measures and activities with a realistic quantification of the necessary financial requirements and identified suitable resources to cover them. The action plans will be regularly updated in line with the monitoring cycle of the strategy.

The preparation of the strategy was coordinated by the Office of the Plenipotentiary of the Government of the Slovak Republic for Roma Communities, which is also the national contact point for the implementation of the strategy. The strategy proposal followed on from the work of thematic working groups that included representatives of civil society organisations and was made available for public comments in December 2020.

Online source:

<https://rokovania.gov.sk/RVL/Material/25860/1>

Spain

ES

LEGISLATIVE DEVELOPMENT

New pension supplement to reduce the gender gap

On 2 February 2021, the Spanish Government adopted Royal Decree 3/2021,²¹³ modifying Article 60 of the General Law on Social Security,²¹⁴ which provided for a pension supplement for women with two or more children to compensate for their demographic contribution.

Gender

The CJEU judgment of 12 December 2019, in *WA v Spain*,²¹⁵ considered the pension supplement, which was given only to women with two or more children, direct discrimination on grounds of sex. The Court noted that the recognition of a demographic contribution supplement for women violated Directive 79/7/EEC by excluding men who are in an identical situation.

The Royal Decree replaces this maternity supplement with a supplement aimed at reducing the gender gap. The new supplement consists of a fixed annual amount for each child (up to a maximum of four), which is added to all types of retirement pension, voluntary early retirement, permanent disability and widowhood. The amount will be updated according to the revaluation of the pensions.

²¹² Council Recommendation No. 2021/C 93/01 of 12.03.2021 on Roma equality, inclusion and participation.

²¹³ Spain, Royal Decree No. 3/2021 of 02.02.2021, adopting measures for the reduction of the gender gap and other questions in the economic and social security fields, available at: <https://boe.es/boe/dias/2021/02/03/pdfs/BOE-A-2021-1529.pdf>.

²¹⁴ Spain, General Law of Social Security, Royal Legislative Decree No. 8/2015, of 30.10.2015.

²¹⁵ CJEU, judgment of 12 December 2019, *WA v Instituto Nacional de la Seguridad Social (INSS)*, C-450/18, ECLI:EU:C:2019:1075.

The supplement can be awarded to either the mother or the father. By default, the supplement is granted to the mother, but the father can claim the supplement if he is entitled to a survivor's benefit, or in the case of a retirement or disability pension, if he can prove that the birth or adoption of his children has impacted his professional career. To prove the impact, the father will need to show that there were more than 120 days without contributions to the pension fund in the three years after the child's birth or adoption (for cases prior to December 1994), or he will have to show that the sum of the contribution bases of the two years after the birth or adoption are reduced by more than 15 % than the sum of the contribution bases of the two years prior to the child's birth or adoption, and provided they are lower than those of the mother.

If both parents prove the impact or if neither of them does, the supplement will be paid to the mother. In the case of homosexual couples, the supplement will be recognised for the parent with the lowest pension.

From the point of view of the effectiveness of the new rule, it is estimated that the new supplement will have a greater scope than the previous one, since it is paid to those with just one child, to either the mother or the father, and it also includes voluntary early retirement pensions.

The new supplement is intended to reduce the gender gap in pensions, which in 2019 reached 34 % in Spain (19 % in new retirements).²¹⁶ The supplement to reduce the gender gap will be maintained as long as the gender gap in pensions is greater than 5 %. The gender gap is described in the explanatory memorandum of the Royal Decree as resulting from the insufficiency of the protective action of the social security system and a reflection of historical and structural discrimination against women in the labour market. Maternity and the sexual division of care work decisively affect the career path of women: contrary to what happens to men, women's employment rate decreases when the number of children increases; the difference in employment rates is 10 % when they do not have children, 20 % when they have two children under 12 years old and 40 % when they have three or more.²¹⁷

The new norm is thus established as an allegedly positive action measure. The Spanish Constitutional Court has endorsed positive action measures in favour of women, provided that there is a prior normative specification, that the measure is proportionate and that its effectiveness is temporary, until the situation of inequality disappears.

Online source:

<https://boe.es/boe/dias/2021/02/03/pdfs/BOE-A-2021-1529.pdf>

CASE LAW

Discriminatory dismissal on grounds of age

The complaint was filed by six former employees against their former employer, a large multinational company, for wrongful dismissal based on age discrimination. Five of the 6 employees were aged between 51 and 58 years at the time of dismissal while the sixth employee was aged 49.5 years. The employer claimed that the dismissal was motivated by the need to restructure the department where the claimants were working following a decrease in sales.

216 European network of legal experts in gender equality and non-discrimination (2020), *Spain: Country report on gender equality*, European Commission, DG Justice, available at: <https://www.equalitylaw.eu/downloads/5262-spain-country-report-gender-equality-2020-pdf-1-22-mb>.

217 European network of legal experts in gender equality and non-discrimination, (2020), *Spain: Country report on gender equality*, European Commission, DG Justice, available at: <https://www.equalitylaw.eu/downloads/5262-spain-country-report-gender-equality-2020-pdf-1-22-mb>, pp. 29ff.

The complaint was based on the following evidence:

- A speech by the President of the company in 2019 on leadership management, addressed to all employees, where the President proposed to establish an annual 10 % elimination rate for middle and senior management, and stated that employees should continue working until they were aged between 50 and 60 years. In his speech, the President drew several conclusions about leadership in the company, including a proposal to systematically study and design a mechanism for laying off managers. He also noted that ‘during a war we should focus on two things: dismissing the unskilled and recruiting the best minds. We should adjust the workforce structure and accelerate the pace of replacing the old with the new’.
- Statistical evidence of the company’s staff and dismissal records. In 2018, 23.07 % of employees in the 50+ age group were laid off compared to 6.5 % of employees in the 30-50 age group. In 2019, 13.7 % of employees in the 50+ age group were laid off compared to 4.9 % in the 30-50 age group.

The Labour Court considered that sufficient proof had been provided by the claimants to reasonably suspect that they had been dismissed due to their age. The Court held that it was clearly demonstrated that the employer’s dismissals affected the group of workers in the 50+ age group in a significantly higher proportion than younger workers.²¹⁸

However, the judge had to assess the age at which individuals need to be protected against discrimination. In this respect, the judge recalled that neither Spanish law nor Directive 2000/78 establish an age at which dismissal could be viewed as discriminatory. To establish such an age limit, the judge took into consideration the speech delivered by the company’s President proposing that staff continue working until they were 50 to 60 years old. The judge also took into consideration the fact that 50 is a legally relevant age limit in obtaining social security benefits, given the greater difficulty in finding employment after that age. Finally, the fact that five of the six claimants were over 50 was also considered by the Court.

The Court thus concluded that, in this specific case, it was appropriate to establish the age at which individuals need protection against unfair dismissal at 50 years old, meaning that any dismissal by this employer affecting people over this age could be considered discriminatory. Accordingly, the dismissal of the five workers aged above 50 years was declared null and without just cause, while the dismissal of the remaining claimant was not considered discriminatory.

Each claimant had claimed EUR 50 000 in compensation for moral damages. In this regard, the Court considered that the speech made by the President of the company provided a vision of labour relations that identified with times of war in which military-inspired behaviour was required in the pursuit of excellence and leadership, and in the removal or elimination of the mediocre. According to the judge, ‘Such a stark business philosophy and culture, aimed at maximising economic benefits and the employer’s social power is not in keeping with many of the values of the Old Europe, where people’s dignity forms the cornerstone of our legal system, Article 2 of the Treaty on European Union and Article 10.1 of the Spanish Constitution’. The judge found that dismissing workers based on the principle that the ‘old’ is no longer valid and must necessarily be replaced by the ‘new’ constituted prejudice since the rationale underlying this assertion had not been demonstrated. Moreover, dismissing employees for reaching a certain age placed them in a situation in which they were subjected to feelings of suffering, pain, uncertainty, anguish and anxiety.

On the basis of these arguments, the claimants who were over 50 years old were awarded EUR 20 000 each in compensation for non-pecuniary damages.

²¹⁸ Spain, Labour Court No. 33 of Madrid, decision of 18.11.2020. The decision itself is not publicly available but it was publicised by media on 18.03.2021, notably in the legal newspaper *La Ley*, available at: https://diariolaley.laleynext.es/content/Documento.aspx?params=H4sIAAAAAAEAMtMSbH1CjUwMDCzMDE3tDBUK0stKs7Mz7Mty0xPzStJBfEz0ypd8pNDKgtSbdMSc4pT1RKtTvNzSktSQ4sybUOKSIMBH4V_1UAAAA=WKE.

Online source:

<https://diariolaley.laleynext.es/>

Constitutional Court ruling on the denial of a survivor's pension to a woman married in accordance with Roma customs

The application was brought by a Roma woman who was denied a widow's pension following the death of her husband. Their marriage took place in 1994 in accordance with Roma customs, which is not recognised under Spanish law as a valid marriage for civil purposes, and they lived together for 15 years before his death. The National Institute of Social Security did not grant the woman a survivor's pension because she had not formally established herself as the 'common-law partner' of the person with whom she had been living, based on the relevant provisions of national law.²¹⁹ To be granted a survivor's pension, the beneficiary must provide proof of marriage or civil partnership with the deceased for a period of at least five years. A civil partnership must be registered or formalised in a public document at least two years prior to the date of death of the deceased.

The applicant challenged the denial of a survivor's pension before the Constitutional Court, alleging that it violated her right to non-discrimination on grounds of race and ethnic origin in accordance with Article 14 of the Spanish Constitution. The applicant argued that the European Court of Human Rights judgment in *Muñoz Díaz v Spain* of 8 December 2009 was applicable, where it was found that the applicant had acted *bona fide* in the belief that her marriage was valid for all intents and purposes. If this was not recognised, the claimant alleged that the requirement for civil partnerships to be officially registered may cause indirect discrimination against the Roma community due to their deeply-rooted traditions, closely linked to family and lifelong cohabiting partnerships, and to the belief held by the Roma that these partnerships are equal to any other union of a marital nature.

The National Institute of Social Security and the Public Prosecutor's Office argued that the European Court of Human Rights judgment was not applicable, given that, in the case at hand, the applicant had not acted in good faith regarding the validity of her marriage. In this regard, they noted that no reference was ever made to their union in documents issued by the Spanish authorities, for example, their children were registered as 'born to unmarried parents' in their birth certificates. In *Muñoz Díaz v Spain*, however, several official documents referred to the marriage of the parties. Concerning race neutrality, both institutions also claimed the legitimacy of the law in requiring that common-law couples must be legally constituted or registered in a public document.

Finally, the Public Prosecutor's Office further argued that the virginity test carried out on the bride in Roma marriage rites implied an assumption of sex-based discrimination. Thus, if the Constitutional Court ruled that the civil partnership registration requirement be modified due to the specific characteristics of the Roma people, it should also avoid making a distinction between a common-law couple married through a Roma ceremony and another Roma couple who share the same cultural values, but are not willing to accept the virginity test, do not observe this custom and live together as a married couple.

The Constitutional Court rejected the applicant's request, concluding that no discrimination on grounds of race or ethnic origin had taken place. The Court's main arguments were the following:

1. The *Muñoz Díaz v Spain* doctrine is not applicable in this case, due to the factual differences noted by the respondent.
2. The denial of a survivor's pension based on a union solemnised in accordance with Roma customs, which is not recognised as a valid form of civil union, does not imply direct discrimination on grounds of ethnicity.

²¹⁹ Spain, Royal Legislative Decree No. 1/1994, of 20.06.1994, approving the revised text of the General Law on Social Security, Article 174.3.

3. Failing to equate unions solemnised in accordance with Roma customs and legally recognised civil unions in order to grant a survivor's pension does not amount to direct discrimination on grounds of ethnicity (and there is no right for the Roma to receive specific treatment in this regard). The Constitutional Court recalled that 'discrimination resulting from failure to provide differential treatment' is not covered by Article 14 of the Constitution, as this provision is not accompanied by any subjective right to unequal regulatory treatment.
4. The legal requirement to formally register a civil partnership in order to obtain a survivor's pension does not amount to indirect discrimination on grounds of race or ethnicity, as no prejudice has been observed to indicate that this legal obligation has adverse effects on the Roma community. In this regard, no statistical evidence allowing this prejudice to be accredited was provided, nor was a greater or unfavourable prejudice for belonging to the Roma minority accredited.

Online source:

https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2021_009/2018-1343STC.pdf

Constitutional Court ruling on discrimination at work of public employee with Asperger syndrome

The applicant had been working as a court secretary in the Administration of Justice since 2013. Inspections carried out by the Administration detected serious problems in the running of the Court due to the applicant's failure to adequately execute his tasks. As a result, disciplinary actions were initiated against the applicant.

Disability

During the disciplinary sanction procedure, the applicant revealed (and proved, with medical certificates) that he had been diagnosed with Asperger's syndrome, information that he had reserved the right not to disclose until then to protect his privacy. The applicant asked the Administration to carry out another psychiatric assessment to confirm his doctor's diagnosis. He also asked for his right to 'reasonable adjustments' in his workplace to be recognised, arguing that the problems related to his work could be resolved if such adjustments were made.

When the Administration failed to respond to the applicant's requests, he claimed that he was being discriminated against because of his disability. The Administration finally suspended the applicant from work without pay for one year and a day due to serious misconduct for failing to fulfil his work duties.

When his claim was rejected by a normal court,²²⁰ the applicant filed a complaint before the Constitutional Court. He argued that the Administration of Justice had violated his right to protection from disability discrimination (Article 14 of the Spanish Constitution) due to the failure of the Administration to make reasonable adjustments to his workplace. In addition, he argued that the Administration had failed to take his disability into consideration when suspending him.

The Constitutional Court delivered its ruling in March 2021.²²¹ Noting first that Asperger's syndrome is a disorder that can lead to intellectual disability, the Court considered whether the Administration of Justice was under a duty to make reasonable adjustments in the applicant's workplace and, if so, whether its failure to meet that duty had prevented the applicant from fulfilling his work duties diligently, thereby absolving him from disciplinary sanctions.

First, the Constitutional Court found that the failure to adjust the applicant's workplace did indeed constitute discrimination. The Court held that an employee's request for reasonable adjustments due

220 Spain, National Court, decision No. 2/2017 of 22.06.2017, available at: <https://www.poderjudicial.es/search/indexAN.jsp?org=an&comunidad=13>.

221 Spain, Constitutional Court, decision No. 51/2021 of 15.03.2021, available at: <https://www.boe.es/boe/dias/2021/04/23/pdfs/BOE-A-2021-6597.pdf>.

to disability should be attended to by the employer as soon as the extent of the disability is proven. The employer's response should be expressly and duly motivated, particularly when the requested adjustments are denied.

Secondly, the Court also upheld the applicant's claim that the failure of the Administration to take his disability into account in the disciplinary procedure amounted to disability discrimination. In the context of public employment disciplinary actions, the Court noted that when employees make allegations that fundamental rights are being violated, and rational evidence is provided, the employer has the obligation to refute the allegations. In the present case, the Administration did not bear its burden of proof to undermine the arguments and evidence provided by the applicant. Furthermore, the Court held that due to its failure to make reasonable adjustments to the applicant's workplace, the Administration was unable to assess whether the claimant's conduct was diligent or not in order to impose sanctions.

As a result, the Constitutional Court declared the sanction imposed on the applicant null and void. The employer was ordered to reinstate the applicant in his former position and to adopt the measures requested by him to prevent discrimination.

Online source:

https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2021_029/2018-2950STC.pdf

SE

Sweden

LEGISLATIVE DEVELOPMENT

Law establishing the Swedish Institute for Human Rights

On 9 June 2021, Parliament adopted a law establishing a Swedish Institute for Human Rights.²²² The Institute will start its activities on 1 January 2022.

In 2011, the Swedish Equality Ombudsman applied for accreditation as an NHRI (National Human Rights Institute) but received only B-status due to a lack of full compliance with the Paris Principles. There were questions about the Ombudsman's mandate as well as its independence. Since the 2015 universal periodic review and various country recommendations that Sweden establish a fully compliant institute, the Government has been working on the establishment of such an institute.

According to Section 1 of the act, the Institute for Human Rights shall promote the safeguarding of human rights in Sweden, based on

1. the Constitution (composed of the Instrument of Government, the Freedom of the Press Ordinance and the Fundamental Law on Freedom of Expression);
2. the European Convention for the Protection of Human Rights and Fundamental Freedoms;
3. the Charter of Fundamental Rights of the European Union, and
4. other obligations binding on Sweden under international law in the field of human rights.

The institution shall perform the functions of an independent national mechanism in accordance with Article 33(2) of the Convention on the Rights of Persons with Disabilities.

²²² Sweden, Human Rights Institute Act (*Lag om Institutet för mänskliga rättigheter*), of 09.06.2021, Official Gazette (SF5) 2021:642.

As equality and non-discrimination are fundamental human rights, the work of the Institute will necessarily cover promotion and protection related to those issues. Civil society organisations with a focus on various discrimination grounds were a key component of the civil society alliance advocating for the establishment of a Swedish human rights institute. However, it is important to note that the Institute will not examine individual complaints concerning the violation of human rights.

Online sources:

<https://svenskfattningssamling.se/sites/default/files/sfs/2021-06/SFS2021-642.pdf>

<https://rwi.lu.se/2021/06/10/the-swedish-national-institute-for-human-rights/>

CASE LAW

Direct discrimination in connection with emergency healthcare

The case concerned the actions of emergency medical care employees in caring for a patient suffering from a cerebral haemorrhage. The emergency personnel who had been called to the home of the patient had, among other things, made notes in the ambulance journal such as 'playing unconscious', 'does not want to respond' and 'cultural fainting?'. The patient's wife also pointed out that the ambulance personnel disregarded her comments about her husband's state of health. The statements of the personnel concerning the state of health of the man were contradicted by their own written comments in the ambulance journal. These factors, including a comment by the ambulance personnel to the hospital personnel referring to 'simulation', in turn, led to the man being given a lower level of priority than was necessary for someone in his poor state of health upon arrival at the hospital. The medical personnel failed to act in a timely manner and provide the patient with the emergency medical care he needed within a sufficient time period, and he then died. The Swedish Equality Ombudsman (DO) sued the county council for discrimination related to ethnicity on behalf of the deceased man's estate and his widow.

Racial or
ethnic origin

The trial court held that the county council's treatment of the patient constituted discrimination, violating Chapter 2, Section 13 (prohibiting discrimination in health and medical care and social services etc). There was sufficient evidence to conclude that the patient's ethnicity played a role in the treatment he received. Approximately EUR 7 800 was awarded in compensation. Half of that amount constituted the prevention portion of the compensation. Furthermore, as it was established that the wife's relevant information about her husband was disregarded and that this was at least in part due to ethnicity, she was awarded approximately EUR 2 900 due to a violation of Chapter 2, Section 17, concerning discrimination by public employees in their interactions with the public. Half of the amount awarded constituted the prevention portion of the discrimination compensation. Finally, the respondent county council was ordered to reimburse the Equality Ombudsman's legal fees, amounting to about EUR 109 413.²²³

In June 2021, the Equality Ombudsman appealed the trial court decision.

Online source:

<https://www.do.se/globalassets/diskrimineringsarenanden/tingsratt/dom-tingsratt-pro-2019-7-tillganglig.pdf>

223 Sweden, District Court of Gothenburg, decision of 26.05.2021 in case No. T 17336-19.

UK

United Kingdom

LEGISLATIVE DEVELOPMENT

Domestic Abuse Act 2021

 The Domestic Abuse Act²²⁴ received royal assent on 29 April 2021. It moves the UK closer to compliance with the Istanbul Convention (in respect of extraterritorial jurisdiction) but not to full compliance (in respect of support for migrant victims of domestic abuse.) It will therefore not result in ratification of the Convention at this stage.

Key provisions in the Act include:

- A statutory definition (for the first time) of domestic abuse, emphasising that domestic abuse is not just physical violence, but can also be emotional, coercive or controlling, and economic abuse.
- Establishment of the office of Domestic Abuse Commissioner.
- Provision for a new Domestic Abuse Protection Notice and Domestic Abuse Protection Order.

However, there are concerns that the legislation does not go far enough, in particular, in relation to support for migrant victims of domestic abuse. The House of Lords had tabled amendments during the passage of the legislation that would have guaranteed greater protection for all victims of domestic abuse, regardless of migrant status. These amendments were not adopted by the Government.

Online source:

Domestic Abuse Act 2021, available at: <https://www.legislation.gov.uk/ukpga/2021/17/contents/enacted>

CASE LAW

Supreme Court ruling on worker status for protection under the Equality Act 2010

 Uber provides a private hire vehicle booking service in the UK whereby journeys are booked through a smartphone app, which connects passengers to drivers. The respondents are drivers who are or were active users of that app, and their case was brought as a test case to establish their employment status. The drivers claimed that they were ‘workers’ for the purposes of the Employment Rights Act 1996, the National Minimum Wage Act 1998 and the Working Time Regulations 1998, whilst actively using the app. This status would also give rise to rights under the Equality Act 2010. The claimants argue that the respondents were independent, third-party contractors and not ‘workers’. In the lower courts, the drivers had been found to be ‘workers’ when they had the claimants’ app switched on and were able and willing to accept assignments. The claimants appealed to the Supreme Court.

The Supreme Court unanimously rejected Uber’s appeal and found that the drivers were indeed ‘workers’ for the purposes of the protective legislation.²²⁵

The case is important for those who work in the ‘gig’ economy, particularly those using platform sharing devices, such as Uber. If claimants do not have the correct employment status, then they are not protected under the Equality Act 2010, and so, although the case does not directly raise questions under the Equality Act, it will have an impact on these workers’ rights under the Act.

²²⁴ United Kingdom, Domestic Abuse Act 2021, 29.04.2021, available at: <https://www.legislation.gov.uk/ukpga/2021/17/contents/enacted>.

²²⁵ United Kingdom, Supreme Court, *Uber BV v Aslam*, decision of 19.02.2021, UKSC 5.

The decision makes it very clear that workers using platform sharing devices meet the criteria for protection by employment laws and discrimination law, despite terms in their contracts that suggest the contrary. Employment status was determined by considering the relationship in practice between the parties. Statutory employment protection is provided to protect the vulnerabilities of workers, for example to being paid too little for the work they do, or to other forms of unfair treatment. In the Court's view, protective legislation should be interpreted with the purpose of the protection in mind, and so in this case, the protection of employment status should be provided to these vulnerable workers, particularly given that they are often in a subordinate and dependent position vis-à-vis their employers. In particular, the Supreme Court drew attention to the fact that Uber sets the fares and dictates how much drivers are paid, the contract terms are set by Uber and that Uber exercises significant control over the way that drivers do their job. The level of control over working conditions exerted by Uber puts the drivers in a subordinate and dependent position and so the protections of employment and discrimination law should apply.

Online source:

<https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf>

Supreme Court Decision on Equal Pay

Case *Asda Stores Ltd v Brierley and others* concerns an equal pay claim by around 35 000 female supermarket staff wanting to compare themselves with men working in a network of warehouses and distribution centres and operating under a different management structure.²²⁶ Under the Equality Act 2010 Section 79(4) (and formerly Section 1(6) of the Equal Pay Act 1970), a comparator working at a different establishment may be used where 'common terms' apply. The Court of Appeal had held that the claimants were entitled to compare themselves with the distribution centre workers under this test.

Gender

The Supreme Court rejected Asda's appeal and upheld the decision of the Court of Appeal that the claimants had satisfied the Section 79(4) test and were therefore entitled to compare themselves with the distribution centre workers. This means that the case can now proceed to examine the question of equal value. It is likely that the litigation will not be fully resolved for some years to come.

'Common terms' is not defined in the legislation and this was the first case where the relevant terms were not governed by collective agreements. In an earlier case (*North v Dumfries and Galloway Council* [2013] UKSC ICR 993) the Supreme Court had established that one mechanism for satisfying the common terms requirement was the 'North hypothetical test', which asks whether, if the comparator transferred their job to be in the same establishment as the claimant, they would remain under their original terms and conditions. In *Asda* the Supreme Court held that this test was satisfied on the facts.

The judgment offers some important guidance on the application of the Section 79(4) test in future cases. In particular, the Court stressed that the common terms requirement is only a threshold test with limited function. It is to be used to 'weed out' cases where comparators cannot be used because of differences based on 'geographical factors, and possibly also historical factors' and 'cases where the threshold test cannot be met are likely to be exceptional' (Paragraph 62). The Court further noted that employment tribunals should not conduct a 'prolonged enquiry' into the application of the threshold test, nor conduct a 'line by line' comparison of different sets of terms and conditions (Paragraphs 6870).

Online source:

<https://www.supremecourt.uk/cases/docs/uksc-2019-0039-judgment.pdf>

226 United Kingdom, Supreme Court, *Asda Stores Ltd v Brierley and others*, decision of 26.03.2021, UKSC 10, available at: <https://www.supremecourt.uk/cases/docs/uksc-2019-0039-judgment.pdf>.

Meaning of religion and belief – gender-critical belief

Religion
or belief

The claimant holds gender-critical beliefs that include the belief that sex is immutable and should not be conflated with gender identity, and that trans women are not women. She alleged that she was discriminated against when her employment contract was not renewed following complaints from colleagues at work that her views, expressed on social media, were offensive and transphobic. At the preliminary hearing on whether her belief was protected, the Employment Tribunal decided that her belief is not protected under the Equality Act 2010, on the basis that these beliefs were incompatible with human dignity and fundamental rights of others, and thus did not meet the criteria for being a protected belief. The tribunal drew attention to the fact that the beliefs were absolutist, and that it was a core component of the belief that she would refer to people by the sex she considered appropriate, even if to do so would violate their dignity. The claimant appealed.

The Employment Appeal Tribunal (EAT) held that the belief was a protected belief. A belief should only be excluded from protection if it was the kind of belief akin to Nazism or totalitarianism and thereby liable to be excluded from the protection of rights under Articles 9 and 10 of the European Convention of Human Rights (ECHR) by virtue of Article 17 thereof. The claimant's gender-critical beliefs, which were widely shared, and which did not seek to destroy the rights of trans persons, clearly did not fall into that category. The claimant's belief, whilst offensive to some, and notwithstanding its potential to result in the harassment of trans persons in some circumstances, fell within the protection under Article 9(1), ECHR and therefore within the protection of the Equality Act 2010. The case was remitted to a freshly constituted Tribunal to determine whether the treatment about which the claimant complained was because of or related to her belief.²²⁷

The EAT took a different approach to the Employment Tribunal (ET) on a key issue, which led to this different outcome. The ET view had been that the claimant's beliefs would necessarily and always lead her to misgender trans people. However, the EAT referred to evidence regarding the claimant's views, which showed that she would generally seek to be polite and respect their choice of pronoun, although she would not feel bound to in all circumstances. On this basis, the EAT was clear that it was determining only that the belief regarding gender identity was capable of meeting the statutory definition of belief. It was not determining that the claimant's manifestation of that belief through her activities on social media were necessarily protected. Indeed, the EAT was exceptionally clear that the decision does **not** mean that those with gender-critical beliefs can misgender trans persons with impunity. It was also clear that trans people are protected against discrimination and harassment under the Equality Act and that employers can continue to provide a safe environment for trans people. Moreover, the EAT deliberately expressed no view on the merits of either side of the transgender debate.

Online source:

<https://www.gov.uk/employment-appeal-tribunal-decisions/maya-forstater-v-cgd-europe-and-others-ukeat-slash-0105-slash-20-slash-joj>

227 United Kingdom, Employment Appeal Tribunal, *Maya Forstater v CGD Europe and Others*, decision of 10.06.2021, UKEAT/0105/20/JOJ.

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