



European equality law review

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

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IN THIS ISSUE

- Actio popularis – potentials and challenges
- Failure to provide a reasonable accommodation as a form of disability discrimination?
- Protecting trans, non-binary and intersex persons against discrimination in EU law
- Gender equality and pensions: time for an EU strategy to achieve substantive equality between men and women in old age

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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, on the transposition and implementation of the EU equality and non-discrimination directives. The current issue provides an overview of legal and policy developments across Europe and, as far as possible, reflects the state of affairs from 1 July to 31 December 2021.

In this issue

This issue opens with four in-depth articles. The first article, by András Kádár, the non-discrimination expert for Hungary, explores the role of *actio popularis* actions in promoting equal treatment of Roma in Bulgaria, Hungary, Romania and Slovakia. The second article, by Carmine Conte, legal policy analyst at the Migration Policy Group, explores the legal frameworks regarding the denial of reasonable accommodation to employees and jobseekers with disabilities in Denmark, France, Ireland and Italy. The third article, by Peter Cannoot and Sarah Ganty from the University of Ghent, looks at the protection against discrimination in EU law of trans, non-binary and intersex persons. The final article, by Sabrina D'Andrea, who holds a PhD from the European University Institute Florence, investigates the pension pay gap in the EU, and identifies ways forward for the EU in its efforts to achieve substantive gender equality in pensions. 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. The final 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

On 15 July 2021, the European Commission initiated three infringement proceedings for violations of fundamental rights of LGBTIQ people in Hungary and Poland.² The Commission initiated two proceedings against Hungary: one on the legislation adopted in June 2021, which prohibits or limits access to content that promotes or portrays so-called 'divergence from self-identity corresponding to sex at birth, sex change or homosexuality' for individuals under 18; and a second in relation to a disclaimer imposed on a children's book with LGBTIQ content. The infringement proceedings followed strong criticism from a wide array of stakeholders as well as, notably, a resolution of the European Parliament adopted on 8 July, which showed the Parliament's strong opposition to the Hungarian legislation.³ Finding that Hungary had failed to address its concerns in relation to both proceedings, the Commission sent two reasoned opinions in December 2021.⁴ In the proceedings against Poland, the Commission considered that Polish authorities had failed to fully and appropriately respond to its inquiry regarding the nature and impact of resolutions on so-called 'LGBT-ideology free zones', which have been adopted since 2019 by several Polish regions and municipalities. In parallel to the infringement proceedings, the Commission warned

1 This section, like the rest of the issue, covers the period from 1 July to 31 December 2021.

2 European Commission (2021) 'EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people', press release, 7 July 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668.

3 European Parliament resolution of 8 July 2021 on breaches of EU law and of the rights of LGBTIQ citizens in Hungary as a result of the legal changes adopted by the Hungarian Parliament (2021/2780(RSP)), available at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0362_EN.html.

4 European Commission (2021) 'December infringements package: Key decisions', press release, 2 December 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201.

the Polish regions that still maintained such resolutions that large amounts of EU regional funding may be blocked if the resolutions were not abolished.

In this context, the European Parliament adopted a resolution in September 2021 on LGBTIQ rights in Europe.⁵ The resolution calls for the recognition of same-sex spouses, registered partners and parents across the EU. The Parliament also urged the Commission to launch infringement proceedings against Romania, where the Government has failed to update national legislation to reflect the CJEU ruling in the *Coman* case.⁶ Finally, the resolution also pointed to the discrimination that LGBTIQ communities face in Poland and Hungary, and called for further EU action to address the situation.

In October 2021, the European Commission presented its first-ever Strategy on combating antisemitism and fostering Jewish life.⁷ The strategy, which is based on a wide consultation of relevant stakeholders, sets out the Commission's policy framework for the period 2021-2030 and aims to support and encourage cooperation between Member States and all stakeholders. The strategy comprises three pillars: preventing and combating all forms of antisemitism; protecting and fostering Jewish life in the EU; and education, research and Holocaust remembrance.

Also in October 2021, the European Parliament adopted a resolution on the rights of persons with disabilities, prompted by a long series of petitions from individual EU citizens.⁸ The Parliament calls for action on behalf of the EU institutions as well as the Member States in a wide array of areas, including governance and implementation, participation, accessibility, combating discrimination, employment and social affairs, education and protecting the rights of women with disabilities. With regard to combating discrimination, the Resolution highlights the lack of mutual recognition of disability status between Member States and stresses the urgent need for EU legislation aimed at protecting citizens against all forms of discrimination in the EU.

On 28 October 2021, the European Institute for Gender Equality (EIGE) published the 6th edition of its Gender Equality Index.⁹ The index serves as a benchmark for gender equality in the EU and covers a wide range of indicators in different domains. Despite the fact that the index is mostly based on data that was gathered in 2019, it provides evidence of the pandemic's negative repercussions on women in the areas of work, money, knowledge, time, power and health. The index also illustrates a remarkable rise in violence against women. The thematic focus of the 2021 index was health and looked specifically at mental, sexual and reproductive health, and the impact of the COVID-19 pandemic on these areas.

As announced in its 2022 work programme published in October 2021, the European Commission has initiated the process of proposing new legislation to strengthen national equality bodies. The wide margin of discretion left to the Member States by the directives' provisions on equality bodies has created important divergences in their implementation, notably with regard to the mandate, powers, leadership, independence, resources, accessibility and effectiveness of equality bodies. This results in a very unequal

5 European Parliament resolution of 14 September 2021 on LGBTIQ rights in the EU (2021/2679(RSP)), available at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0366_EN.html.

6 CJEU, Grand Chamber ruling of 5 June 2018, *Relu Adrian Coman and others v Inspectoratul General pentru Imigrări et Ministerul Afacerilor Interne*, C-673/16, ECLI:EU:C:2018:385.

7 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030), COM(2021) 615 final, presented on 5 October 2021, available at: https://ec.europa.eu/info/sites/default/files/eu-strategy-on-combating-antisemitism-and-fostering-jewish-life_october2021_en.pdf.

8 European Parliament resolution of 7 October 2021 on the protection of persons with disabilities through petitions: lessons learnt (Petitions Nos 2582/2013, 2551/2014, 0074/2015, 0098/2015, 1140/2015, 1305/2015, 1394/2015, 0172/2016, 0857/2016, 1056/2016, 1147/2016, 0535/2017, 1077/2017, 0356/2018, 0367/2018, 0371/2018, 0530/2018, 0724/2018, 0808/2018, 0959/2018, 0756/2019, 0758/2019, 0954/2019, 1124/2019, 1170/2019, 1262/2019, 0294/2020, 0470/2020, 0527/2020, 0608/2020, 0768/2020, 0988/2020, 1052/2020, 1139/2020, 1205/2020, 1299/2020, 0103/2021 and others) (2020/2209(INI)), available at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0414_EN.html.

9 European Institute for Gender Equality (EIGE) (2021), *Gender Equality Index 2021*, 28 October 2021, available at: <https://eige.europa.eu/gender-equality-index/2021>.

protection against discrimination across the EU. Despite the adoption in 2018 of a Recommendation on standards for equality bodies,¹⁰ the situation remains largely unresolved, as explained in the Commission's 2021 report on the application of the Racial Equality Directive and the Employment Equality Directive¹¹ and its accompanying staff working document on equality bodies.¹² In the context of this initiative, the Commission launched a public consultation in December 2021 to gather input from the widest possible range of stakeholders with an interest in the topic. The aim of the consultation is to inform the Commission's work on further measures to strengthen equality bodies by gathering opinions on the current situation of equality bodies and possible future improvement. The overall purpose of the Commission's initiative is to strengthen equality bodies by setting minimum standards for their functioning in relation to all grounds and fields covered by the EU Equality Directives.¹³

On Equal Pay Day, 8 November 2021, Vice-President Jourová and Commissioners Schmit and Dalli issued a statement to highlight the fact that despite improvements in women's position in social and professional life, pay differences remain wide and entrenched.¹⁴ The statement further drew attention to the proposal for a pay transparency directive which was presented earlier in 2021,¹⁵ and urged the European Parliament and the Council of the European Union to adopt the directive without undue delay. The aim of the Commission's pay transparency proposal is to empower workers with practical tools to assert their rights, and most importantly to strengthen the application of equal pay in companies.

Ahead of the International Day for the Elimination of Violence against Women on 25 November 2021, the European Commission and the High Representative/Vice-President Josep Borrell, issued a statement in which the Commission announced that it would step up action to combat violence against women and called upon other actors for continued commitment and collaboration in this regard.¹⁶ The statement acknowledged the severity of the problem, recognised violence against women as a human rights violation, and addressed the newer forms of violence against women including cyberviolence. The Commission also announced that it will propose extending the list of EU crimes set out in Article 83 TFEU to cover hate speech and hate crime in order to allow the EU to be able to criminalise gender-based hate speech and hate crime. In addition, it was announced that new legislation will be proposed to prevent and combat violence against women and domestic violence.¹⁷ Moreover, the EU's commitment to continue the EU-UN Spotlight Initiative, which extends the EU's fight against violence against women beyond the EU, was reiterated. The statement was followed by 16 days of activism against gender-based violence.

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- 10 Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018H0951&from=EN>.
 - 11 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.
 - 12 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.
 - 13 European Commission (2021), *Equality bodies – binding standards*, Public consultation launched on 10 December 2021, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13098-Equality-bodies-binding-standards/public-consultation_en.
 - 14 European Commission (2021), 'Joint Statement by Vice-President Jourová and Commissioners Schmit and Dalli on Equal Pay Day', 8 November 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5806.
 - 15 European Commission, 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, 4.3.2021, COM(2021) 93 final, available at: [EUR-Lex - 52021PC0093 - EN - EUR-Lex \(europa.eu\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0093&from=EN).
 - 16 European Commission (2021) 'Stop Violence Against Women: Statement of the European Commission and the High Representative/Vice President, Josep Borrell', 24 November 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_6211.
 - 17 The proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence was presented 8 March 2022 and falls outside the cut-off dates of this publication. The proposal can be found at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0105&from=EN>.

On 25 November, in a symbolic act, the EELN published its report on the criminalisation of gender-based violence against women in European states, including ICT-facilitated violence, which served as input for the Commission's legislative proposal.¹⁸

On 10 December 2021, the Commission also published its 2021 annual report on the application of the EU Charter of Fundamental Rights, exploring good practices and specific challenges in relation to the protection of fundamental rights in the digital age.¹⁹ The report highlighted a number of issues related to protection against discrimination, notably in relation to online content moderation and the use of artificial intelligence.

Network publications and activities

During the second half of 2021, the network published one thematic report, on the criminalisation of gender-based violence against women in European states, including ICT-facilitated violence, which was written by Lorena Sosa from Utrecht University and Sara de Vido from Venice University. In addition to this thematic report, the network published two issues of the European equality law review and organised its annual legal seminar.

As always, please check the network's website – www.equalitylaw.eu – for the full text of all reports and the various contributions to the legal seminar.

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18 For a summary of the CJEU Opinion 1/19 of 6 October 2021 on the EU accession to the Istanbul Convention, ECLI:EU:C:2021:832, see below pp. 77-78.

19 European Commission (2021) Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Protecting Fundamental Rights in the Digital Age – 2021 Annual Report on the Application of the EU Charter of Fundamental Rights, COM(2021) 819 final, adopted on 10 December 2021, available at: https://ec.europa.eu/info/sites/default/files/1_1_179442_ann_rep_en_0.pdf.

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Actio popularis – potentials and challenges

Actio popularis litigation in promoting the equal treatment of the Roma

András Kádár*

Introduction

Based on the formulation used by the Court of Justice of the European Union in its *Feryn* judgment,¹ actio popularis actions may be defined as legal or administrative proceedings brought by organisations (or, less frequently, individuals) acting in the public interest to enforce obligations stemming from specific legal norms without acting in the name of a specific complainant or in the absence of an identifiable complainant.

Such actions have the potential of being an efficient tool in combatting systemic discrimination against social groups at risk of discrimination for reasons of both procedure and substance. Procedurally speaking, it takes the burden of litigation off the concerned individuals for whom individual litigation may pose insurmountable difficulties – sometimes due precisely to their marginalised position stemming from the systemic discrimination that is targeted by the actio popularis action. As far as the substantive aspect is concerned, the focus of actio popularis actions on trends, patterns and practices makes it possible to grasp the structural nature of the discrimination, as a result of which such litigation will impact a larger group of individuals and therefore have a wider societal significance.

This article looks at what lessons may be drawn from actio popularis litigation conducted in four countries where the legal framework allows for this type of action and where it has been used by NGOs to address instances of systemic discrimination against Roma people: Bulgaria, Hungary, Romania and Slovakia.²

1 The advantages of actio popularis litigation

Discrimination is rarely the sole result of a one-off individual decision or action. Since this type of violation means the less favourable treatment of a person based on their actual or assumed affiliation with a certain (often marginalised) group, the dynamics between societal groups (most frequently between the majority in a given society and a minority that is often in a vulnerable position) is almost always at play when discrimination occurs, which then results in recurring patterns and practices of discrimination.

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1 CJEU, Judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, C-54/07, ECLI:EU:C:2008:397.

2 Detailed information on the respective jurisdictions was provided to me by the country experts in the non-discrimination field: Margarita S. Ilieva (BG), Romanița Elena Iordache (RO) and Vanda Durbáková (SK) whom the author would like to thank for their valuable insights, ideas and suggestions.

In the context of discrimination against the Roma, the EU-MIDIS II survey found that

‘Roma continue to face intolerable levels of discrimination in daily life – whether looking for work, at work, in education, healthcare, or when in contact with administrative bodies or entering a shop. Almost one in two Roma (41 %) felt discriminated against because of their ethnic origin at least once in one of these areas of daily life in the past five years.’³

It is obvious that systemic issues lie behind such pervasive discrimination, and it is also evident that – due to their volume, recurring nature and deep societal roots – these underlying problems cannot be effectively combatted by solely relying on the individual enforcement of the right to non-discrimination.

1.1 Procedural aspects

This is all the more so, because those victims are often in vulnerable positions, with very limited ability to enforce their rights due to an array of reasons, including a lack of awareness of the ban on discrimination and the available remedies; the financial and psychological costs of litigation; mistrust in the institutions (which stems from the victims’ experience of the pervasive nature of discrimination); as well as the enormous power imbalance between the victims and the discriminators, with the latter often having powerful means to exert pressure on the former.

It is therefore not surprising that the level of reporting of discrimination against the Roma is very low. The EU-MIDIS II survey found that while ‘Roma respondents continue to experience higher levels of discrimination than the average experienced by all groups in those countries’, they also ‘continue to report the most recently experienced incident less often than the average victims of discrimination do.’⁴ In the countries covered by the present article, the ratio of Roma victims of discrimination who reported the latest incident spanned from only 6 % in Hungary to 18 % in Slovakia.⁵ Among the reasons, the respondents listed scepticism about the impact of action; the difficulties of proving discrimination as well as the fear of retribution.⁶ The survey also revealed a widespread lack of awareness of possible remedial routes: ‘almost a third (27 %) of the Roma surveyed do not know of any law prohibiting discrimination based on ethnic origin, and most Roma (82 %) do not know any organisations offering support to victims of discrimination’.⁷

In addition, the systemic nature of the discrimination often requires means of proving discrimination that are well beyond what is available for the individual victims. An example is offered by the *Rimóc bicycle* case in Hungary,⁸ which concerned complaints about police action disproportionately targeting Roma people for lack of mandatory accessories on their bicycles. By conducting a thorough statistical analysis of all the fines imposed by the police within a given period of time, the Hungarian Helsinki Committee as actio popularis litigant demonstrated that the police practice of imposing fines was ethnically disproportionate: while Roma people accounted for approximately 25 % of the population of the village of Rimóc, 97 % of the fines issued for missing bicycle accessories were imposed on Roma persons. In this case, which ended with a friendly settlement,⁹ the enforcement of the individual victims’ rights would

3 European Union Agency for Fundamental Rights (2016), *Second European Union Minorities and Discrimination Survey. Roma – Selected findings*, p. 11.

4 European Union Agency for Fundamental Rights (2017), *Second European Union Minorities and Discrimination Survey – Main results*, p. 44.

5 European Union Agency for Fundamental Rights (2017), *Second European Union Minorities and Discrimination Survey – Main results*, p. 43.

6 European Union Agency for Fundamental Rights (2017), *Second European Union Minorities and Discrimination Survey – Main results*, p. 49.

7 European Union Agency for Fundamental Rights (2016), *Second European Union Minorities and Discrimination Survey. Roma – Selected findings*, p. 11.

8 Equal Treatment Authority, decision No. EBH/190/2012.

9 For a detailed description of the case, see: <https://helsinki.hu/en/practice-of-racial-profiling-against-the-roma-community-is-acknowledged-by-the-police/>.

have been extremely difficult not only because of their lack of resources and power imbalance compared to the local police, but also because the individual fines imposed by the police officers on the Roma persons concerned were in fact justified in the sense that none of the cyclists claimed that their bicycles had had all the necessary accessories. Therefore, all other impediments aside, it would have been close to impossible for the persons concerned to prove in a proceeding focusing on their respective individual fines alone that they had been subjected to a discriminatory practice.

1.2 Substantive aspects

While the above considerations focus on the advantages of actio popularis action from the point of view of overcoming the procedural impediments of individual access to justice, mention must be made of the added strategic value of actio popularis litigation, i.e. its ability to grasp the structural nature of the discrimination and address it systematically.

As Farkas puts it, actio popularis action

‘allows private or public entities to confront the most pressing societal issues instead of the ones where individuals suffering from discrimination are more likely to come forward. [...] Furthermore, such claims naturally lend themselves to serving as tools for advocacy, awareness raising, and lobbying’.¹⁰

In an ideal case, the authorisation to engage in actio popularis action enables the authorised entity to carefully choose the area of intervention on the basis of a number of factors, such as the prevalence, severity and nature of discrimination as well as the societal impact of discrimination in the given field. It makes it possible to build a case that is ‘right’ in terms of (i) the societal-political momentum for taking action; (ii) the specific case’s potential to raise awareness about the issue and influence public opinion and/or the jurisprudence; and (iii) factors closely related to the actual legal procedure, such as the available evidence in a given case or who the respondent should be.

An example illustrating how the directions of actio popularis litigation (including the respondent in a case) can be determined with a strategic approach, is the lawsuit initiated by the Chance for Children Foundation (CFCF), a Hungarian NGO specialised in strategic actio popularis litigation in the field of discrimination against the Roma in education, vis-à-vis the Ministry of Human Capacities (Hungary’s ministry responsible for education matters) for its failure to take effective measures against segregation in education. Segregation is pervasive in Hungarian education and its extent is on the rise.¹¹ CFCF launched and won several actio popularis lawsuits against individual schools and school operators,¹² however, it was obvious that the phenomenon could not be addressed through suing one-by-one each and every segregating school. Therefore, CFCF initiated an actio popularis lawsuit against the Ministry, as the entity ultimately responsible for the management of the Hungarian system of education. The Foundation asked the court to conclude that by not taking effective action against the segregation of Roma children in education, the Ministry failed to fulfil its obligations stemming from the Hungarian anti-discrimination

10 Farkas, L. (2014), ‘Collective actions under European anti-discrimination law’, In: *European Anti-discrimination Law Review*, no. 19-2014, p. 32.

11 See for instance: Hajdu, T., Hermann, Z., Horn, D. and Varga, J. (2019), *A közoktatás indikátorrendszere 2019* (The indicator system of public education 2019), available at: https://www.mtaki.hu/wp-content/uploads/2020/01/A_kozoktatasi_indikatorrendszere_2019.pdf, p. 181.

12 For examples see: Kádár, A. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Hungary*.

code.¹³ In its first instance judgment,¹⁴ the court concluded that the Ministry had violated the requirement of equal treatment in relation to Roma pupils in 28 primary schools by failing to desegregate them, and ordered a series of very specific measures to remedy the situation. The court of second instance upheld the conclusion regarding the Ministry's responsibility.¹⁵

In light of the above outlined advantages of *actio popularis* litigation, it is to be welcomed that, although such action is not explicitly covered by the EU anti-discrimination directives, some form of it is permitted by national law for discrimination cases in 15¹⁶ out of the 27 EU Member States.¹⁷ However, it would be worth considering the introduction of an explicit requirement that Member States should allow for this type of action in discrimination cases, similarly to the way in which Directive 2020/1828 on representative actions for the protection of the collective interests of consumers¹⁸ (hereafter: Directive 2020/1828) codifies the issue in relation to consumer protection.

2 The legal and organisational preconditions of effective *actio popularis* litigation

The existence of an obligation to allow for *actio popularis* action is not sufficient in itself: in terms of the effectiveness of such litigation, a lot depends on the details of the legal framework as well as the extra-legal factors that determine the societal conditions of such litigation. Below, I highlight some of these in the context of *actio popularis* litigation concerning the discrimination faced by the Roma in four jurisdictions: Bulgaria, Hungary, Romania and Slovakia.

2.1 The eligibility to launch an *actio popularis* action and impeding factors faced by *actio popularis* litigants

2.1.1 The legal framework

The legislation in all four countries is rather generous in terms of the authorisation to launch *actio popularis* action. All four allow civil society associations to engage in such actions with relatively few procedural and practical limitations.

In Bulgaria, the Protection Against Discrimination Act (BG-PADA) authorises any person or incorporated entity (even public authorities) to bring proceedings before the country's equality body, the Protection Against Discrimination Commission (PADC) without identifying a specific victim.¹⁹ Before the civil courts, trade unions and incorporated public interest non-profit organisations (or incorporated entities that have a non-profit character and can substantiate that their activities are useful for the public) can take *actio popularis* action, 'where the rights of many parties are infringed'.²⁰ The PADC itself also has standing to

13 Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról), 28 December 2003, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300125.TV. Hereafter: ETA.

14 Budapest Regional Court, Decision No. 40.P.23.675/2015/84, 18 April 2018, <http://cfcf.hu/sites/default/files/23675-2015-84-1%20%C3%ADt%C3%A9let%20Es%C3%A9lyt%20a%20H%C3%A1tr%C3%A1nyos%20-%20Nemzeti%20Er%C5%91forr%C3%A1s%20.pdf>.

15 Budapest Appeals Court, Judgment No. 2.Pf.21.145/2018/6/I, 14 February 2019.

16 Austria, Belgium, Bulgaria, Croatia, France, Germany, Hungary, Italy, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, Spain.

17 European network of legal experts in gender equality and non-discrimination (2021), *A comparative analysis of non-discrimination law in Europe 2020*, p. 88.

18 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, Article 4(1): 'Member States shall ensure that representative actions as provided for by this Directive can be brought by qualified entities designated by the Member States for this purpose.'

19 Protection Against Discrimination Act (BG-PADA) (Закон за защита от дискриминация), Article 50(3).

20 BG-PADA, Article 71(3).

request judicial review of administrative acts, to bring claims before the civil courts, and to intervene in court proceedings.²¹

In Hungary, under the Act on Equal Treatment and the Promotion of Equal Opportunities (HU-ETA), if the principle of equal treatment is violated or there is a direct danger thereof, a civil or a labour lawsuit may be brought by (i) the Public Prosecutor; (ii) the equality body; or 'non-governmental and interest representation organisations' provided that the violation of the principle of equal treatment or the direct danger thereof is based on a characteristic that is an essential feature of a human being, and the violation affects a larger group of persons that cannot be precisely determined.²² The term 'non-governmental and interest representation organisation' covers inter alia (i) officially incorporated NGOs whose statutes include as an organisational objective the promotion of equal social opportunities or the social inclusion of disadvantaged groups or the protection of human rights.²³ Non-governmental and interest representation organisations may also choose to initiate actio popularis proceedings before the equality body.²⁴ NGOs can only launch actio popularis cases in relation to those protected grounds that are listed in their statutes.

In Slovakia, the Anti-discrimination Act (SK-ADA)²⁵ allows the Slovak National Centre for Human Rights (the equality body of Slovakia) or any legal entity that is 'concerned with or active in protection against discrimination' to launch actio popularis action if a breach of the principle of equal treatment could violate rights or interests protected by law or freedoms of a greater or non-specified number of persons, or if the public interest could be otherwise seriously endangered by such a violation.

Finally, according to the Romanian Anti-discrimination Law (RO-ADL), associations which have as the mandate described in their by-laws the protection of human rights or combatting discrimination can file complaints in their own name with the courts, when the discrimination takes place in their area of intervention and when the target of discrimination is a group or a community.²⁶ This norm has been interpreted to also apply in cases filed by NGOs with the national equality body, the National Council for Combating Discrimination (NCCD). The Romanian Civil Procedure Code²⁷ reaffirms the authorisation by stipulating that

'in the cases and conditions specifically provided for by the law, complaints can be filed or defences can be submitted by persons, organisations, institutions or authorities which, without justifying a personal interest, act for the defence of rights and legitimate interests of persons who find themselves in special situations or, as necessary, with the purpose of protecting a group or a general interest'.

Though based on the Civil Procedure Code it might be argued that the NCCD or the Ombudsperson might have the standing to bring actio popularis cases before courts, this interpretation has never been tested.

In terms of the situations allowing for actio popularis action, Bulgaria is at the most permissive end of the scale (depending on judicial interpretation): there is no legal definition of what 'many' shall mean when the violation of the rights of 'many parties' is considered, and there is jurisprudence suggesting that as few as ten concerned victims are sufficient for this as long as it is arguable that the impugned

21 BG-PADA, Article 47(5).

22 Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (HU-ETA), (2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról), Article 20.

23 HU-ETA, Article 3.

24 HU-ETA, Article 18(3).

25 Act No. 365/2004 on Equal Treatment in Certain Areas and on Protection Against Discrimination (SK-ADA), as amended (zákon č. 365/2004 Z. z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (antidiskriminačný zákon) v znení neskorších predpisov), Article 9a.

26 Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination (Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare) (RO-ADL), Article 28(1).

27 Law 134/2010 Civil Procedure Code, Article 37.

act is symptomatic of a practice affecting an unidentified 'multitude'. In Hungary, if the victims of discrimination can be identified, *actio popularis* action is excluded even if the number of concerned persons is significant, which results in a situation where this type of action is most often resorted to regarding ongoing practices, where their potential impact on future – as yet unidentifiable – victims enables *actio popularis* litigants to overcome this definitional limitation. The Slovakian and Romanian legislations offer a flexible solution by making a reference to the protection of the general public interest, which allows for *actio popularis* litigation in cases of grave violations irrespective of the number or identifiability of the persons actually concerned by the discriminatory act.

2.1.2 The role of equality bodies in *actio popularis* litigation

With the exception of Romania,²⁸ the equality bodies of the countries under scrutiny have the right to launch *actio popularis* action if the nature of the discrimination and the circle of concerned persons satisfy the statutory preconditions. However, experience shows that they practically never avail themselves of this authorisation.

In Bulgaria, the PADC has never used this power since it was set up in 2005.²⁹ The PADC is primarily a quasi-judicial body, investigating, hearing and deciding cases of discrimination, and imposing penalties and injunctions on the discriminators.³⁰ Therefore, the body 'is occupied with its own case law [...] and defending its decisions before the administrative courts in judicial review proceedings'. In addition, the PADC 'has been seeking to build its own authority in the field of discrimination law [...] rather than defer to the courts'.³¹ In Ilieva's view, this in itself would not necessarily have a negative impact on the Roma, as the PADC has sufficient powers to address systemic discrimination based on ethnicity through conducting *ex officio* procedures instead of resorting to the slower and more rigid courts. However, while this power has been used to address systemic discrimination against other groups, e.g. people with disabilities, the PADC has not availed of it to tackle structural discrimination against the Roma (with the exception of isolated hate speech cases), which 'is a considerable weakness in the PADC's practice, depriving the Roma of their protection chances under the law'.³²

In Hungary, the equality body (between 2005 and 2020: the Equal Treatment Authority; as of 2021: the Commissioner for Fundamental Rights; hereafter: Ombudsman) has launched only one *actio popularis* lawsuit during its entire history. It was on the basis of the sexually charged advertisement of a food company, which promoted its products by depicting virtually naked women covered in different types of food. However, the court concluded that no harassment had taken place, as 'the advertisements [...] do not present the human body as a product'.³³ After the failure of a case that seems so clear cut, the equality body chose not to resort to this tool again, especially since the Hungarian equality body is also a quasi-judicial authority, which has the right to launch *ex officio* investigations into instances of discrimination and impose sanctions on perpetrators.³⁴

28 The fact that the NCCD cannot launch *actio popularis* cases in court, does not mean that the equality body is without any means to take measures against instances of systemic discrimination upon its own initiative. Like some of its counterparts (e.g. the equality body in Hungary), it is vested with the right to conduct *ex officio* examinations into such issues, and has actually used this power strategically, for example, with regard to the indirect impact of certain criteria used in social housing on the Roma, or the accessibility of public transportation in big cities.

29 Response of Margarita S. Ilieva, country expert in the non-discrimination field for Bulgaria.

30 Ilieva, M. S. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Bulgaria*, p. 87.

31 Ilieva, M. S. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Bulgaria*, p. 87.

32 Ilieva, M. S. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Bulgaria*, p. 87.

33 Kádár, A. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Hungary*, p. 110.

34 HU-ETA, Article 14(1)(a).

In Slovakia, the National Centre for Human Rights does investigate complaints of discrimination and formulates findings in individual cases, however, these findings are not legally binding.³⁵ This could be a reason for the body to resort to actio popularis litigation more often than its Bulgarian and Hungarian counterparts. However, despite promises to do so, the Centre has also not used its authorisation to engage in such litigation since this possibility was introduced into the anti-discrimination legislation in 2008.³⁶ Potential explanations include insufficient institutional and legal staff capacity as well as the fact that it is often state authorities that are responsible for structural discrimination, and the Centre seems hesitant to enter into legal proceedings against state authorities.³⁷

The above confirms, but also augments the findings of Crowley, who concludes that there are tensions where the equality body is accorded a decision-making function along with the promotion and prevention function and the support and litigation function.³⁸ Crowley identifies two fundamental reasons for this. On the one hand,

‘the decision-making function requires impartiality on the part of the equality body in implementing the function and in the image that it presents to the public. The promotion and prevention function and the support and litigation function involve the equality body in taking the side of those experiencing or alleging discrimination.’³⁹

On the other hand,

‘the more immediate and reactive demands of the decision-making function tend to take up available staff time to the detriment of the exercise of other functions’.⁴⁰

The scrutiny of the lack of actio popularis action by equality bodies in Bulgaria, Hungary and Slovakia adds to the list. If equality bodies have the possibility of achieving similar results through using their quasi-judicial powers in ex officio proceedings as through taking cases to court, they will prefer to do the former for a number of reasons: (i) the establishment of their organisational authority as adjudicators instead of equal parties; (ii) increased efficiency (in their quasi-judicial role they can oblige the discriminators to produce evidence and gather data from other state bodies and entities, in a lawsuit they could only ask the court to oblige the other party to submit evidence); lower risks in terms of litigation costs, etc.

The Slovak example also highlights the importance of organisational culture and how the equality body sees its role vis-à-vis other state entities. The reluctance of the National Centre for Human Rights to take action against state bodies is far from unprecedented in the Central and Eastern European region, where this kind of deference is often in place. In Romania for instance, the NCCD has informally developed a practice of adopting recommendations (instead of fines) when the perpetrators are central government agencies, although the law does not specifically envisage this type of sanction.⁴¹ In Hungary, the Equal Treatment Authority was for a long time less willing to impose fines on state and municipal authorities than on private entities,⁴² and in Bulgaria, the Supreme Administrative Court (SAC) ruled in 2019 that the PADC had no authority to issue injunctions to public bodies, only to private natural and legal persons.⁴³

35 Durbáková, V. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Slovakia*, p. 96.

36 Response of Vanda Durbáková, country expert in the non-discrimination field for Slovakia.

37 Durbáková, V. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Slovakia*, p. 92.

38 Crowley, N. (2018), *Equality bodies making a difference*, p. 9.

39 Crowley, N. (2018), *Equality bodies making a difference*, p. 71.

40 Crowley, N. (2018), *Equality bodies making a difference*, p. 72.

41 Iordache, R. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Romania*, p. 73.

42 Kádár, A. (2014), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC. Country report 2013. Hungary*, p. 128.

43 Ilieva, M. S. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Bulgaria*, p. 40.

2.1.3 The possibilities of NGOs in *actio popularis* litigation

Thus, the empirical evidence shows that while – based on their general mandate and their authorisations – it could be expected from equality bodies to use *actio popularis* litigation as a means to target structural discrimination, in practice, other actors will be much more likely to do so. When it comes to the systemic discrimination faced by the Roma, it will be NGOs. There are somewhat different requirements set in the four jurisdictions in terms of the conditions that persons or entities must meet in order to be able to engage in *actio popularis* litigation, but none of these requirements pose insurmountable obstacles for NGOs wishing to engage in such action.

As far as eligibility conditions are concerned, here again the Bulgarian legal framework appears to be the most permissive, as it allows individual activists (or even actual victims who are not the only victims of a practice or act that concerns a multitude of persons) to initiate *actio popularis* action before the PADC, whereas in Hungary, Slovakia and Romania, incorporation and some specification of non-discrimination or human rights work in the statutes are preconditions for launching representative action.

In terms of additional procedural limitations, mention must be made of the case of Bulgaria, where according to the SAC's case law⁴⁴ (seen as a backlash against legislation regarded by more conservative judges as too progressive and permissive),⁴⁵ those individuals, NGOs and trade unions that can launch *actio popularis* cases before the PADC, are excluded from seeking the judicial review of unfavourable PADC decisions on the basis that they 'lack a legal interest', as they are personally not affected by the PADC's decision.

Apart from this, there seem to be no serious legal-procedural impediments preventing the authorised entities from launching *actio popularis* action in the countries under scrutiny: In fact, there are several provisions that facilitate such action. By way of example, in Bulgaria (although jurisprudence has been controversial in this respect),⁴⁶ the BGPADA stipulates that both the judicial and the PADC procedures are exempt from costs, both state fees and expenses.⁴⁷ In Romania, discrimination claims brought before the NCCD or before the civil court are exempted from judicial taxes,⁴⁸ and in Hungary, the complainant must only bear the costs of the proceedings before the Ombudsman if they have acted in bad faith.⁴⁹ In addition, in Bulgaria, the equality body's proceedings are informal and accessible and it has quasi-investigative powers,⁵⁰ which facilitates the access for *actio popularis* litigants. Similarly, in Hungary, the equality body is obliged by law to discover and establish all the facts of the case, so it does not only rely on evidence put forth by the parties.⁵¹

Thus, it can be said that the legal framework is relatively conducive to *actio popularis* action, especially before the equality bodies, in all four jurisdictions under scrutiny. However, the practice of the courts and authorities as well as extra-legal, societal and financial factors are equally important in terms of the actual possibility of conducting effective public interest litigation.

44 For instance, SAC, Decision No. 7863 of 12 June 2018 in Case No. 697/2017; Ruling No. 6491 of 17 May 2018 in Case No. 5486/2018.

45 Response of Margarita S. Ilieva, country expert in the non-discrimination field for Bulgaria.

46 Ilieva, M. S. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Bulgaria*, pp. 68-69.

47 PADA, Articles 47, 50, and 68(1).

48 Iordache, R. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Romania*, p. 68.

49 HU-ETA, Article 16(4).

50 Ilieva, M. S. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Bulgaria*, p. 69.

51 Kádár, A. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Hungary*, p. 114.

2.1.3.1 Impediments external to NGOs

The jurisprudence of the Bulgarian courts offers an example of how the practice of the state authorities can pose an obstacle for effective actio popularis litigation even if the legal framework seems unproblematic. For instance, despite the BGPADA's provisions stipulating that discrimination procedures shall be exempt from costs, court jurisprudence

'has failed to respect this and parties have been ordered to pay each other's costs on losing. On top of that, the PADC has been successfully seeking costs when complainants appeal against its decisions before the administrative court.'⁵²

Although 'in 2019, the SAC explicitly recognised that the PADA, as *lex specialis*, provides for a special rule on fees and costs, and parties are therefore exempt from both', this ruling did not settle the issue, 'as in other cases the SAC has continued to award costs and demand court fees at the expense of the parties.'⁵³

The SAC's interpretation that actio popularis complainants are not eligible to seek the judicial review of unfavourable PADC decisions in the absence of a legal interest is another example of how interpretation of the law can act as an impediment for effective actio popularis litigation. In this regard it is also worth mentioning a recent case of a conservative NGO filing an action with the PADC against pro-Roma positive measures. The PADC dismissed the claim, but upon the NGO's request for judicial review, the court repealed the PADC decision. Upon review, the SAC upheld the judgment, thus departing from its earlier stance and accepting the NGO's legal standing to challenge the PADC's decision.⁵⁴ Taking into account reports indicating anti-Roma biases existing within the Bulgarian judiciary⁵⁵ and ECtHR case law⁵⁶ pointing in the same direction, one can only hope that the divergence from previous jurisprudence signals a true change in the judicial interpretation of the issue and is not in any way related to the fact that in this case the actio popularis action was launched to challenge positive measures favouring an ethnic minority facing widespread biases and discrimination in society.

In Slovakia, a significant barrier in access to justice for cases of discrimination is the extreme length of the judicial proceedings. For instance, an actio popularis case into the segregation of Roma women in the maternity wards of a hospital has been in progress at first instance for nine years without a ruling on the merits.⁵⁷ Such delays in administering justice regarding instances of severe systemic discrimination may very easily discourage NGOs from resorting to this course of action – not independently from the fact that it is very difficult to plan such lengthy litigation in terms of financial and human resources as well as in terms of the desired impact.

2.1.3.2 Impediments internal to NGOs

This brings us to a very important extra-legal aspect of actio popularis litigation: the capacity of NGOs to conduct such action in a strategic manner.

Some recurring forms of discrimination that lend themselves easily to actio popularis action, such as public hate speech cases, are not excessively complex or resource-intensive to litigate compared to more intricate instances of structural discrimination. Public hate speech violates the rights and dignity of many

52 Ilieva, M. S. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Bulgaria*, p. 69.

53 Ilieva, M. S. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Bulgaria*, p. 69.

54 SAC, Decision No. 458 of 13 January 2020 in Case No. 5375/2019.

55 Fair Trials (2020), *Uncovering anti-Roma discrimination in criminal justice systems in Europe*, pp. 24-25.

56 See for instance: European Court of Human Rights, *Paraskeva Todorova v Bulgaria*, application no. 37193/07, judgment of 25 March 2021.

57 Response of Vanda Durbáková, country expert in the non-discrimination field for Slovakia.

(whole minority communities), not all the concerned individuals are identifiable, and taking action against inciting utterances is obviously well within pressing general interest. At the same time, as Ilieva puts it,

‘litigation against hate speech is less complicated and less costly in terms of time and other resources [than litigation concerning more complex structural problems], there is no issue with proving the facts, as public statements are documented by the media. There is, furthermore, no relationship within which the litigant might face repercussions, as would be the case in an employment or education situation’.⁵⁸

While the abundance of anti-hate-speech litigation in Bulgaria is seen to stem primarily from the fact that such communications harm human dignity in such a far-reaching way that they must provoke a response,⁵⁹ these procedural characteristics are also among the reasons why in Bulgaria, the anti-discrimination legislation has been used in the framework of *actio popularis* litigation more extensively against instances of hate speech than against other forms of discrimination.⁶⁰

Actio popularis litigation has also been used against discriminatory speech both in Hungary and Romania. In Hungary, one example is offered by the Kiskunlacháza case, where in relation to a murder (with regard to which it turned out that it had been committed by a non-Roma person) the town’s mayor spoke at a public demonstration about the population having had enough of ‘Roma violence’ and made other statements implying that in his view the murder had been committed by Roma people. After several rounds of proceedings at different instances, the Kúria (Hungary’s high court) concluded in an *actio popularis* lawsuit that the mayor’s statements had amounted to harassment under the HUETA.⁶¹

In Romania, a case started by three NGOs against the Linguistics Institute of the Romanian Academy for the definition of Roma/Gypsy in the official dictionary may be mentioned. The plaintiffs argued that the definition (‘epithet for a person with an ugly outlook or bad habits’), endorsed by the Romanian Academy, in the most important scientific explanatory document, promotes discriminatory identification and racial stereotypes. Although the case was lost before the NCCD (which found that the comparative study of the different definitions for the term used exceeded its mandate and there had been no intention to discriminate), the publicity around the case led the Academy to seek a friendly agreement and offer to amend the definition in future dictionaries.⁶²

However, when it comes to complex structural issues – such as ethnic profiling by the police or the state’s failure to take measures against school segregation stemming from spontaneous geographical segregation – building, launching and seeing through an *actio popularis* case becomes extremely resource-intensive.

This is true for the legal work, and even more so for the non-legal work that is required if *actio popularis* litigation’s potential for awareness-raising, advocacy and stimulating systemic change is to be realised. As far as the legal aspects are concerned, the proving of such patterns of structural discrimination requires the gathering of large amounts of information that might not be readily available, and the thorough analysis of such information once it has been produced/collected. The complexity of the situations often calls for complex legal strategies. As certain aspects of the arising issues are regulated by the EU *acquis* and international norms, a knowledge of EU and international law is required. Since such cases often concern large systems owned and/or run by the state, municipalities or other powerful

58 Ilieva, M. S. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Bulgaria*, pp. 70-71.

59 Response of Margarita S. Ilieva, country expert in the non-discrimination field for Bulgaria.

60 Response of Margarita S. Ilieva, country expert in the non-discrimination field for Bulgaria.

61 For further details see: Haller, I., Iordache, R. and Kádár, A. (2016), ‘Using anti-discrimination remedies for discriminatory speech – the Hungarian and Romanian experiences’, in: *European equality law review*, 2/2016, pp. 1-21.

62 For more details see: Iordache, R. (2012), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC. Country Report 2011. Romania*, pp. 16-17.

actors, it must also be expected that the respondent will mobilise significant legal apparatus to challenge the actio popularis claims.

As far as the non-legal aspects are concerned, the task can be even more daunting. In many instances, the targeted structural issue concerns a minority community in a vulnerable position and its often conflict-filled relations with the majority population. In such a situation recognising and nurturing the community's agency is crucial. The actio popularis action disrupts the solidified local dynamics, creating – or rather making visible – sometimes enormous tensions, and exposing members of the community to different risks and pressures. Therefore, it is important to gain and maintain the trust and support of the local community, and assist them in preparing for the possible conflicts, the – possibly hostile – media attention, or the pressure that some community members may experience from those wanting to stop the litigation, who are often in positions of power, such as the school director, the mayor or the local police chief.

This kind of trust is also very important from the point of view of the legal procedure: without it, it is often practically impossible to gather reliable information or convince members of the community to testify before the authorities, which is very important for building a credible case and convincing the courts/authorities adjudicating the complaint. For instance, in the case that the Slovak NGO Centre for Civil and Human Rights launched into the segregation of Roma women in maternity wards, the NGO has been closely cooperating with a group of committed Roma women who widely support the ongoing action, have assisted in gathering evidence and provided testimonies before the court.⁶³

The community work that is a precondition for creating and maintaining the community's trust requires expertise way beyond a good command of the domestic and international law. The same is true for the communication activities that are needed so that representative action could fulfil its advocacy role and stand a chance of raising awareness and changing public perceptions when it comes to the Roma or other marginalised groups.

As Lilla Farkas, a CFCF Board Member, puts it, constant presence in the community is crucial and, as the actio popularis litigators are often regarded as outsiders by not only the majority but by the minority community too, 'gatekeepers' are needed who bridge the initial distance and help to build the vitally important trust.⁶⁴ This is confirmed by former CFCF lawyer, Adél Kegye, who points out that where the litigators have the support and involvement of the community, all aspects of the litigation become much more effective, including the enforcement of the decision, especially since the enforcement stage may take even longer than the actual procedure, and if the community is behind the case, they can be drivers of that process and make sure that it is not sabotaged.⁶⁵

Kegye mentions two examples from CFCF's practice. The first one is the lawsuit against the municipality of Nyíregyháza and the Greek Catholic Church. The Huszártelep school building in Nyíregyháza is located in a highly segregated area of the town. It was operating as a municipality-run school in 2007, when the Nyíregyháza municipal council closed it down in the face of actio popularis litigation by CFCF. However, in 2011, the new mayor reopened the school as part of the Greek Catholic Church's primary school. In the lawsuit initiated by CFCF, the courts of first and second instance established that since the large majority of the pupils in the school were of Roma origin and their separate education was not based on the voluntary initiative of their parents (e.g. because the municipality stopped the school bus service that could take the children to the mainstream schools), the children's right not to be segregated had been violated. However, the Kúria overturned the judgment. It accepted that most pupils in the Huszártelep school were Roma, and that segregation was a disadvantage in itself. However, it concluded that the separation could be exempted, as the school offered religious education and the parents had chosen

63 Response of Vanda Durbáková, country expert in the non-discrimination field for Slovakia.

64 Interview with Lilla Farkas.

65 Interview with Adél Kegye.

this education for their children. (The Kúria disregarded the fact that the geographical distance of other schools and the inability to afford transportation costs had prevented the parents from making a truly voluntary choice.)⁶⁶

The other case is the Gyöngyöspata lawsuit, which had both an *actio popularis* and a group action component. For over a decade, in each grade of the elementary school of the town of Gyöngyöspata, there were two classes: one with practically only Roma pupils and one where there were hardly any Roma children. The Roma and the non-Roma classes were separated physically too, and the Roma children were provided with lower quality education. In March 2015, the Kúria concluded in an *actio popularis* lawsuit launched by CFCF that the Roma pupils in the primary school of Gyöngyöspata had been segregated. Based on this decision, in February 2016, with the help of CFCF and pro bono lawyers, 63 former Roma pupils launched a lawsuit for damages caused by the long-term disadvantages they had suffered as a result of the segregation. The case ended before the Kúria, with substantial compensation granted to 60 complainants.⁶⁷

Kegye emphasises that while this might not have been decisive from the point of view of the different outcome of the two cases, there were significant differences as to the degree of community involvement. In Nyíregyháza, a lot of the concerned Roma persons participated in the public work scheme run by the municipality, which is a precondition for receiving social allowances. Also, several members of the community were tenants of municipality-owned real estate. This dependence on the municipality discouraged several people from supporting the proceedings. As opposed to this, in Gyöngyöspata, the municipality disregarded the Roma community to such an extent that ‘people had nothing to lose’, and the community unanimously stood behind the lawsuit. In addition, the leader of the community, the president of the Roma self-government, understood the stakes of the case, supported the *actio popularis* litigators and competently undertook the role of representing the community in the media.⁶⁸

Farkas confirms the importance of leadership, and points out that in the first round of events, when the Nyíregyháza municipality decided to close down the segregated school and promote the integration of the Roma pupils by launching a school bus, part of the success was the fact that the minority self-government, including its leader, supported the effort to integrate the Roma children. By the time the school was reopened, the Roma minority self-government was led by another president who chose not to go against the municipality on the issue of desegregation, and even testified in court in support of the segregating municipality.⁶⁹

Kegye, who is now the Director of the Rosa Parks Foundation, an NGO engaged in education-related litigation, emphasises that the foundation only takes cases where the fact that the case is initiated from the grassroots level secures the concerned community’s support from the very beginning.⁷⁰ Her view is confirmed by Durbáková, who calls attention to the importance of the support of the Roma parents in the Sarišské Michaľany school segregation case litigated by the Centre for Civil and Human Rights. The case was brought in 2010 against the elementary school where, for several years, the Roma children had been segregated from their non-Roma peers in separate classes located in a different part of the school building. The support of the parents was important especially because the school’s defence was that the segregation was favourable for the Roma children, as this way the teachers had the opportunity to use a more individualised approach when teaching them, and the Roma children did not have to be faced with a lag compared to the non-Roma pupils. The first instance court concluded that the practices of the school had constituted discrimination based on the ethnicity of the children, and held that they

66 For more details see: Kádár, A. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Hungary*, p. 52.

67 For more details see: Kádár, A. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Hungary*, pp. 56-57.

68 Interview with Adél Kegye.

69 Interview with Lilla Farkas.

70 Interview with Adél Kegye.

could not be justified by any of the reasons invoked by the school. The court of second instance upheld the judgment in all material parts.⁷¹

The final element of required NGO capacity is that of strategising. In order to increase the chances that an actio popularis case can realise its full potential, several strategic decisions must be made. As the differences between the Nyíregyháza and Gyöngyöspata cases illustrate, in addition to whether the actio popularis litigators have the support of the concerned community, it must also be considered whether there are less confrontational means to achieve the objectives of the litigation; who may be allies in the process; whether the evidence is convincing; how open the court that will adjudicate the case is likely to be to novel, acquis-based arguments; whether there is societal-political momentum for taking action; and so on.

To be able to perform all the above outlined tasks requires substantial legal, strategic and communication capacities as well as the ability to work at the grassroots level, which in turn requires substantial human and financial resources. In the countries under scrutiny very few – if any – NGOs that meet the legal requirements for launching actio popularis cases have all of those human and financial resources. For instance, regarding Slovakia, where the Centre for Civil and Human Rights is the only domestic NGO that uses actio popularis action to combat discrimination against the Roma, Durbáková mentions the severe absence of NGOs addressing discrimination by legal means, stemming from the lack of sufficient and independent funding and the related lack of legal personnel and expertise.⁷² In Hungary, the Chance for Children Foundation that has been very successful legally, winning several ground-breaking cases in court, had to suspend its operations due to the lack of funding.

The combined effect of the low legal threshold for engaging in actio popularis litigation and the lack of the sufficient resources to do it properly creates a trap that is easy to fall into. Lordache points out that the relative simplicity and the low costs of launching cases before the Romanian equality body result in a situation where NGOs may launch actio popularis cases on the spur of the moment ‘to establish a name for themselves’ and to satisfy expectations of the wider public and/or their direct constituency without having a clear legal strategy or the legal capacity to support the case (participating in the hearings, filing well-argued written submissions, and challenging negative decisions). This may have a devastating impact on the system as a whole, because such proceedings can lead to problematic precedence, which – especially if it remains unchallenged – erodes the very principle of non-discrimination as it ‘leaves the perpetrators and the general public with the impression that there is actually no effective punishment’.⁷³

The lack of community engagement is also mentioned by Lordache as a recurring problem. It is reported from Bulgaria that there have been no examples of community involvement in actio popularis litigation,⁷⁴ and in the Romanian practice there have also been some ‘hit and run’ NGO interventions that failed to bring on board the members of the concerned Roma community.⁷⁵ As a positive example, Lordache mentions the Pata Rât case of 2010, when the local authorities in Cluj Napoca forcibly evicted – without adequate preliminary notification or consultation – over 70 Roma families from the centre of the city and relocated them to inadequate housing conditions in the city’s rubbish dump. Activists of the Community Association of Roma from Coastei Street filed petitions on behalf of the forcibly evicted families both before the national equality body and before the civil courts. The NCCD imposed fines on the local authorities and recommended them to identify a proper housing solution for those evicted. The civil court obliged the local authorities to pay moral damages to the plaintiffs and ordered the defendants to provide adequate housing.⁷⁶ However, Lordache warns that this was not an actio popularis case (which means

71 The description of the case is based on: Discriminatory segregation of Roma in schools found in first ever actio popularis claim. In: *European Anti-discrimination Law Review*. No. 17 – 2013, pp. 81-82.

72 Response of Vanda Durbáková, country expert in the non-discrimination field for Slovakia.

73 Response of Romanita Lordache, country expert in the non-discrimination field for Romania.

74 Response of Margarita S. Ilieva, country expert in the non-discrimination field for Bulgaria.

75 Response of Romanita Lordache, country expert in the non-discrimination field for Romania.

76 The case description is based on the flash report submitted to the European network of legal experts in gender equality and non-discrimination by Romanita Lordache in January 2014.

that the incentive to work with the community is inevitably stronger, since otherwise it is not possible to make sure that the plaintiffs remain in the case), and that the concerned NGO has a fundamentally different, non-legal approach focusing less on the law and more on the community, which highlights the above-mentioned issue that – although not unprecedented – it is rather rare for organisations that do work of a primarily legal nature to have sufficient community-organising capacities.

In summary, the ease of initiating *actio popularis* litigation due to the relatively conducive legal environment is not sufficient to guarantee the truly effective use of this tool. For it to carry a potential for lasting impact, such litigation is very resource-intensive and requires – at a minimum – the close cooperation of lawyers, community organisers and media experts. Therefore, without sufficient NGO funding, the low procedural threshold can even be counterproductive. This is in no way an argument for any statutory limitations for NGOs to engage in *actio popularis* litigation, such as the requirements in the case of ‘qualified entities’ designated by Member States as qualified to bring representative actions for the protection of the interests of consumers.⁷⁷ As it is often state entities that are responsible for systemic discrimination (or at least for the failure to take measures to address it), any such legislative limitation could easily be the subject of abuse – a tool in the hands of the state authorities to prevent NGOs from calling them to account for violating the principle of equal treatment.

Therefore, as has also been suggested by the Commission’s ‘Feasibility Study for financial support for litigating cases relating to violations of democracy, rule of law and fundamental rights’,⁷⁸ the solution to this issue is the provision of flexible, predictable and long-term funding for NGO litigation, enabling the beneficiaries on the one hand to bring cases as the opportunity for a proceeding with lasting impact arises, and on the other hand to take the time that is needed to build a case (e.g. through gaining the community’s support), carry it out and also spend resources on enforcement and follow-up, which may take years even after the case is closed.

2.2 Sanctions and enforcement in *actio popularis* cases

From the point of view of having a lasting impact on the structural problem *actio popularis* litigation aims to address, it is of great importance what kind of sanctions are available in the given legal system, i.e. what the *actio popularis* litigant can actually ‘ask for’, and what the chances are of those sanctions being enforced. Below, the author looks at these questions in the context of the four countries under scrutiny.

2.2.1 Sanctions

In terms of Article 15 of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (RED), Member States shall make sure that sanctions are available in case the principle of equal treatment is breached. ‘The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.’ Especially when compared to the language used in Directive 2020/1828⁷⁹ (which prescribes the codification of injunctive measures and regulates the minimum requirements regarding such measures in relative detail⁸⁰), the wording of Article 15 referring to ‘dissuasion’ and the express mention of the payment of compensation give the impression that the primary form of sanction envisaged by the legislators was redress measures, and not so much injunctive relief. This is in line with the RED approaching discrimination more as an individual breach than a systemic phenomenon, which is exactly why in the *Feryn* case one of the

77 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, Article 4.

78 European Commission (2020), *Feasibility Study for financial support for litigating cases relating to violations of democracy, rule of law and fundamental rights*, pp. ii-iv.

79 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

80 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, Article 8.

questions was whether in the absence of an identifiable complainant it can still be concluded that direct discrimination within the meaning of RED has been committed.

When it comes to pervasive systemic discrimination, compensation as a remedy has its limitations. It is reactive, more oriented towards a past violation, and unless its volume is such as to have a real deterring effect, its preventive potential can be limited, especially if it is only applicable in the framework of individual litigation (on the basis that only individuals suffering discrimination can experience damages that are to be compensated, which is the dominant legal view in some of the jurisdictions under scrutiny). Administrative fines do not pose this latter problem, but it is also true for those that they must be of substantial volume to have a truly dissuasive impact.

This is exemplified by the case of the Baia Mare wall. In July 2011, the mayor of Baia Mare (Northern Romania) ordered the building of a two-metre-high concrete wall between a Roma neighbourhood and the main road. The NCCD launched an ex officio procedure and concluded that the wall amounted to harassment and infringed human dignity, imposed a fine, and recommended the demolishing of the wall, since the NCCD is not authorised to issue injunctions. The decision was upheld upon judicial review, however, the authorities left the wall in place. In 2017, the continuing presence of the segregating wall was challenged again before the NCCD, which found discrimination again. The courts upheld the NCCD decision. As the wall was still not demolished, the NGO 'Loving Colours' filed a complaint with the NCCD against the continuing segregation. In its decision of January 2020, the NCCD found discrimination again, and imposed a fine of RON 7 000 (approximately EUR 1 300) on the responsible administrative entity.⁸¹ Although the amount of the fine is considered high in the Romanian context, the authorities chose to pay it, and not demolish the wall⁸² (which is still standing at the time of writing this article) – most probably because the political gain is considered greater than the pecuniary loss suffered.

As opposed to damages and fines, injunctive measures are by their very nature aimed at addressing ongoing violations, often stemming from practices. As Article 8 of Directive 2020/1828 formulates it, they are provisional or definitive measures adopted 'to cease a practice or, where appropriate, to prohibit a practice, where that practice has been found to constitute an infringement'. Therefore, injunctive measures seem better suited to address the types of structural breaches that actio popularis litigation often aims to target. However, there is a qualification to that conclusion too, namely that such measures can only fulfil this potential if they are sufficiently specific, and go beyond the mere declaration that a certain practice must come to an end.

The systems of sanctions of the jurisdictions under scrutiny show a varied picture in this regard.

In Bulgaria, actio popularis litigation can be conducted before the PADC, which is a quasi-judicial administrative body, or the civil court. The PADC can impose financial sanctions (in both the private and public sectors) that are 'arguably [...] dissuasive to the majority of individuals and small enterprises', but not to medium-sized and large businesses.⁸³ The PADC can also order particular remedial action by discriminators.⁸⁴ For instance, in a 2018 hate speech case brought against a media company, in addition to the fine imposed, the PADC issued an injunction (i) to abstain from publishing any articles similar to the impugned one and (ii) to introduce internal prevention mechanisms to filter discriminatory material.⁸⁵ However, as mentioned above, the SAC ruled in 2019 that the PADC had no authority to issue injunctions to public bodies, only recommendations.

81 The case is described on the basis of Iordache, R. (2020), *New sanction issued by the NCCD for the segregation wall in Baia Mare*.

82 Response of Romanita Iordache, country expert in the non-discrimination field for Romania.

83 Ilieva, M. S. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Bulgaria*, p. 77.

84 Ilieva, M. S. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Bulgaria*, p. 78.

85 Ilieva, M. S. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Bulgaria*.

In the framework of *actio popularis* litigation before the civil courts, ‘a claim for damages is clearly, if implicitly, excluded’.⁸⁶ Courts may issue injunctions, however,

‘specific, detailed injunctions are not part of the legal tradition of the national courts. There is a certain deference on the part of judges to the discretion of administrative bodies and employers to make their expediency choices within the framework of what is lawful.’⁸⁷

In Slovakia, the equality body may only issue recommendations, however courts do have the power to impose both injunctive and redress-type remedies. The list of sanctions is not exhaustive, therefore, in *actio popularis* cases, the litigant may claim the declaration that the principle of equal treatment has been violated, that the respondent be ordered to refrain from the discriminatory conduct and, where possible, to rectify the illegal situation. In principle, damages could also be claimed, but this has not been tested in any of the *actio popularis* cases so far.⁸⁸ The injunctive measures ordered by the court can be sufficiently specific: in the above described Sarišské Michalany school segregation case, the court ordered the school to mix the classes in the future. In a series of other school segregation cases, the Slovak courts also seemed to accept the *actio popularis* litigant’s right to request that the respondents be ordered to adopt and implement desegregation plans, although these petitions were rejected on the merits, so the requested injunction was not examined in detail.⁸⁹

In Romania, the NCCD can issue only administrative sanctions, i.e. administrative warnings and fines, but has no right to apply injunctive measures.⁹⁰ As mentioned above, the NCCD, has developed the practice of adopting recommendations (instead of fines) when the perpetrators are central government agencies. Before the courts, the *actio popularis* litigants can in principle request pecuniary and moral damages and other types of sanctions, including the withdrawal or suspension of the licence of private entities providing services and other injunctive measures. However, due to a very conservative judicial understanding of ‘interest’ and damages, judges generally apply almost symbolic sanctions in *actio popularis* cases. An example from anti-discrimination work on the ground of sexual orientation is the lawsuit launched by the NGO ACCEPT on the harassment of its employee by clerks of the gas company when he went to pay the gas bills. While the court confirmed that the behaviour of the clerks had been degrading, and found that discrimination had happened both in relation to the employee and ACCEPT, it rejected the claim to order the company to conduct diversity trainings for its clerks on the basis that the claimants did not have an actual interest in the remedy and they did not provide a proof of direct and effective damage.⁹¹

In Hungary, the equality body can impose administrative fines on discriminators, and judicial interpretation has also acknowledged its right to issue meaningful injunctive measures.⁹² As far as court proceedings are concerned, *actio popularis* litigants may initiate civil lawsuits based on the Civil Code’s⁹³ provisions⁹⁴ stipulating that inherent personality rights⁹⁵ are protected by the law, and that the right to non-discrimination is an inherent personality right. Individual complainants may request the court to issue injunctive measures and also to grant them compensation for their pecuniary and moral damages. The HUETA authorises NGOs and other entities to launch a lawsuit into the violation of inherent personality rights if the conditions of *actio popularis* litigation are in place. However, although the legislation does

86 Ilieva, M. S. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Bulgaria*, p. 74.

87 Response of Margarita S. Ilieva, country expert in the non-discrimination field for Bulgaria.

88 Response of Vanda Durbáková, country expert in the non-discrimination field for Slovakia.

89 Response of Vanda Durbáková, country expert in the non-discrimination field for Slovakia.

90 Iordache, R. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Romania*, p. 73.

91 Response of Romanita Iordache, country expert in the non-discrimination field for Romania.

92 HU-ETA, Article 17/A.

93 Act V of 2013 on the Civil Code (2013. évi V. törvény a Polgári Törvénykönyvről), 26 February 2013, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1300177.TV.

94 Civil Code, Articles 2:42 and 2:43.

95 ‘Inherent’ personality rights are rights that are inalienably attached to the human personality.

not contain any explicit limitation in this regard, the jurisprudence does not allow actio popularis litigants to claim damages, with the reasoning that it is not their inherent personality rights that are violated by the discriminatory act, but those of the individuals constituting the group whose rights they strive to promote and protect. On the other hand, injunctive measures can be requested by the actio popularis litigants.

In Hungary, it was persistent and strategic actio popularis litigation by NGOs that generated the jurisprudence which rendered injunctive measures meaningful, and for that reason it is worth looking at how the relevant case law evolved. Article 2:51 of the Civil Code stipulates that a person whose inherent personality rights have been violated may – among other actions – demand the court to oblige the perpetrator to discontinue the violation, and refrain from future violations, and/or terminate the injurious situation and restore the previous state. For a long time, courts interpreted this provision as allowing them no more than to call on the discriminators in very general terms to put an end to the discrimination, but were not willing to prescribe how, and through what specific measures that should be done.

A change came about with the Kaposvár school segregation case.⁹⁶ In November 2010, the Supreme Court (predecessor of the Kúria) established in an actio popularis lawsuit that the Pécsi Street school in Kaposvár was ethnically segregated, and that its maintaining body, the Municipal Council of Kaposvár had violated the requirement of equal treatment by failing to act against the spontaneously developed segregation. Despite the court decision, the municipal council did not take any measures to put an end to the segregation. Consequently, CFCF decided to start another actio popularis lawsuit in late 2013, asking the court to order the closing down of the school. In its October 2016 judgment, the court of second instance ordered that the school must be closed down in a sequential system, and obliged the defendants to adopt a detailed desegregation plan for those first-grade pupils who lived in its catchment area. The Kúria upheld the decision, and stated that courts were not confined to ordering in general terms – without specifying the ‘how’ – that the defendant should put an end to a violation: they may also order specific measures to be taken to enforce the requirement of equal treatment.⁹⁷

This judgment was followed by a similar decision in the above described case, where the first instance court established the ministry’s responsibility for failing to take measures to combat the widespread segregation in the Hungarian school system.⁹⁸ The court ordered the ministry to take steps (i) to ban 13 segregated schools from admitting new first-graders; (ii) to assign those first-graders to other schools; (iii) to prepare and publish desegregation plans, and monitor their implementation; (iv) to amend the methodology of inspecting educational institutions’ compliance with the principle of non-discrimination; and (v) to pay significant punitive damages to be spent on the civil monitoring of desegregation programmes within the next five years. Although the second instance court shared the assessment that the ministry’s failure had amounted to discrimination, it quashed the judgment in relation to most of the actions prescribed for the ministry, and only upheld the obligation to adopt desegregation plans and pay punitive damages. Thus, the court of second instance took a much more cautious approach, but it still did not refuse to prescribe concrete steps to address systemic discrimination.

It was also jurisprudence that settled whether the equality body can prescribe specific measures under the scope of its authority to ‘prohibit the future continuation’ of discriminatory behaviours. In the so-called ‘Numbered Streets’ case in Miskolc, the town’s municipality terminated the tenancies of several Roma families without offering them alternative accommodation. The Equal Treatment Authority concluded that this had amounted to discrimination and obliged the municipality to take certain positive measures with the aim of preventing the homelessness of the removed families, such as the adoption of an action plan

96 Pécs Appeals Court, Pf.III.20.004/2016/4., 13 October 2016, available at: <http://cfcf.hu/sites/default/files/kaposvarllfok.pdf>.

97 Kúria, Pfv.IV.20.085/2017/9., 4 October 2017, available at: http://cfcf.hu/sites/default/files/Kaposvar2_Kuria.pdf.

98 Metropolitan Court, Decision No. 40.P.23.675/2015/84, 18 April 2018, <http://cfcf.hu/sites/default/files/23675-2015-84-1%20%C3%ADt%C3%A9let%20Es%C3%A9lyt%20a%20H%C3%A1tr%C3%A1nyos%20-%20Nemzeti%20Er%C5%91forr%C3%A1s%20.pdf>.

to that end. The court conducting the decision's judicial review⁹⁹ dismissed the respondent municipality's arguments that the Authority would not have been authorised to impose such an obligation, by pointing out that the statutory possibility of obliging the discriminator to terminate the injurious situation when the violation manifests itself in the form of an omission would be devoid of any meaning if the Authority could not oblige the violator to take specific action.

Based on the above, it can be concluded that in the majority of the jurisdictions, even if the possibility of granting damages to *actio popularis* litigants is not expressly excluded by the legal framework, courts are reluctant to do so. In Lordache's view, this may have to do with a legacy of the state socialist law doctrine of 'unjust enrichment' and judges' consequent reluctance to provide financial advantages to an entity that did not itself suffer the violation. Lordache also believes that judges fail to look at NGOs as defenders of public interest, which leads to a situation where in compliance with the RED, NGOs are provided with a legal standing in filing complaints, but when the remedies are issued, the next logical step of making available to them all the possible remedies is missing.¹⁰⁰ This judicial reluctance may also reflect a failure to think about the larger social context of systemic discrimination and how the granting of substantial compensations may contribute to eliminating instances thereof. In order to overcome this problem of practice, it would be advisable to expressly allow for the use of financial compensation in *actio popularis* cases. It would be possible to add qualifications to such a provision, e.g. the *actio popularis* litigant's obligation to use the amounts granted in their non-discrimination, or other public interest work.

Regarding injunctive measures, the examination of the four jurisdictions shows that due to the tradition of deference to state authorities and judicial reluctance to interfere with complex social problems by going beyond the declaration of a violation and the imposition of a general obligation to put an end to it, it would be important to expressly codify the right of courts (and equality bodies with a quasi-judicial function) to prescribe specific injunctive measures (with regard to both private and public actors) when it is warranted by the circumstances of a given case and/or structural problem. In this regard it is worth considering the adaptation of the provisions of Directive 2020/1828, which prescribes (in Article 8) that Member States shall ensure the availability of injunctive measures in the form of provisional or definitive measures to cease or prohibit an injurious practice, and clearly states (in point 33 of the Recital) that injunctive measures can require the entity concerned 'to take specific action'.

2.2.2 Enforcement

Finally, in order to assess the effectiveness of *actio popularis* action against discrimination, it is necessary to look at how the decisions handed down at the end of such proceedings are enforced – in principle and in practice. It can be said that while the enforcement of fines imposed by the equality bodies seems relatively straightforward (through voluntary execution or encashments), the execution of injunctive measures raises serious problems: although the possibility to impose enforcement fines on actors failing to execute an injunctive measure is in place in the systems of the countries under scrutiny, this does not always seem to guarantee the meaningful execution of these measures for a number of reasons.

The above-described case of the 'Numbered Streets' in Hungary illustrates the problems stemming from an overly formal examination of compliance. After the legal proceedings ended, the municipality of Miskolc formally complied with the obligation and adopted an action plan on 'solving the housing problems related to the elimination of the segregated neighbourhood of the Numbered Streets'.¹⁰¹ The plan was criticised by several NGOs and experts, among others, for (i) severely underestimating the need for alternative housing, (ii) not consulting with those concerned; (iii) the absence of adequate financial

99 Metropolitan Administrative and Labour Court, 6.K.33.048/2015/17, 25 January 2016, available at: <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> using the search function.

100 Response of Romanita Lordache, country expert in the non-discrimination field for Romania.

101 <https://docplayer.hu/23284887-Helyi-eselyegyenlosegi-program-miskolc-megyei-jogu-varos-onkormanyzata-miskolc-2016.html>, pp. 57-59.

resources earmarked for the realisation of the plan; (iv) the lack of any compensation for the families that had already moved out.¹⁰² The actio popularis litigant Legal Defence Bureau for National and Ethnic Minorities submitted a formal request for enforcing the decision, but the equality body took the view that, by adopting an action plan, the municipality had met its obligations stemming from the decision, although the subsequent developments substantiated the NGOs' concerns. No more than 10 % of all the affected people were provided with accommodation, and the majority of the families had to move to the outskirts of the town, further away from educational and healthcare infrastructure, into equally segregated, but often even more substandard neighbourhoods.¹⁰³

The aftermath of the above-mentioned Sarišské Michaľany school segregation case highlights another typical problem of enforcement that stems from the systemic nature of the violations triggering actio popularis action, as a result of which they often resurface unless the underlying structural problem is addressed. After the court handed down its final and binding decision, there were some efforts by NGOs and the Roma plenipotentiary to assist the school in the desegregation process, and the State School Inspection also carried out inspections to monitor the situation. However, these could not prevent class-level segregation from being turned into school-level segregation, when a school was established in the neighbouring village of Ostrovany where most of the Roma children who had gone to the segregated classes of the Sarišské Michaľany school lived. Due to the geographical proximity, the Roma children started to attend the Ostrovany school, which thus became a Roma-only school.¹⁰⁴

Conclusions

The Sarišské Michaľany case where after the legal victory the targeted educational segregation was recreated in a different form at a different level, offers several lessons regarding not only enforcement, but actio popularis action in general. One important take away from the case is the caution with which we have to approach the immediate impact of actio popularis action: it can be an important instrument in the toolbox of those determined to eliminate structural discrimination, but it is no magic wand. As some of the violations targeted by such litigation have deeply rooted societal causes, one legal case – however successful and ground-breaking at the level of litigation – is unlikely to solve the problem, especially if the political will is missing, which is often the case due to the very reason that makes the problem a structural one.

Sociological research suggests that the law can contribute to social change, but mostly indirectly, through 'changing the situations in which attitudes and beliefs are formed',¹⁰⁵ and therefore only very incrementally. The examination of the impact of actio popularis litigation in the four countries under scrutiny substantiates this conclusion. The targeted issues (such as hate speech in Bulgaria, educational segregation in Hungary or Slovakia) are far from being resolved in any of the four jurisdictions, but the actio popularis actions launched by NGOs have yielded important results.

In Bulgaria, such litigation has had an 'important, visible impact on the empowerment of Roma activists and groups' and 'has altered the helplessness of the victims, chipping away at the impunity of abusers'.¹⁰⁶ The Sarišské Michaľany case brought the problem of the segregation of Roma children in the Slovak society into the limelight of media and public attention, and – by lending the symbolic weight of the law to the issue – supported activists and professionals working against segregation in making stakeholders understand the importance and urgency of tackling the problem. Furthermore, it was instrumental in turning the State School Inspection's focus on the need to monitor segregation, and the inspection could

102 <http://dev.neki.hu/a-szamoszott-utcakkal-kapcsolatos-intezkedesi-terv-elfogadhatatlan/>.

103 https://nepszava.hu/1124790_szamoszott-utcak-nincstelensegbol-a-nyomorba-vezet-az-ut.

104 Response of Vanda Durbáková, country expert in the non-discrimination field for Slovakia.

105 Böcker, A. (2020), 'Can Non-discrimination Law Change Hearts and Minds?', *Erasmus Law Review*, Vol. 13, No. 3, p. 33.

106 Response of Margarita S. Ilieva, country expert in the non-discrimination field for Bulgaria.

rely on the judgment when attempting to address segregation in a number of other schools.¹⁰⁷ Similarly, in Hungary, the persistent *actio popularis* litigation into school segregation has directed public attention to the importance of integrated education, and even though it has triggered backlashes in some cases, it has forced the state authorities to pay attention to the problem of segregation in education. Furthermore, in certain instances (e.g. in the Huszártelep case described above) even unsuccessful *actio popularis* litigation has had some positive impacts, as it has been capable of vitalising Roma activism in the concerned communities.

To make the most of these positive impacts, and utilise them in promoting deeper reaching social change, sustainable engagement is required. And in that regard, it is crucial to reiterate the enormous resource intensiveness of effective *actio popularis* litigation and its dependence on community involvement. Exactly because it targets structural discrimination, *actio popularis* litigation can only have a lasting impact if it is followed up, if its enforcement is monitored and assisted by the litigant, and/or the concerned community and its allies, including public authorities and private entities. This requires significant resources to be spent on both the different phases of litigation (preparation, litigation, enforcement) and the addressing of the non-legal aspects, including communication and community organisation.

One way in which the EU could contribute to the success of *actio popularis* litigation in the area of non-discrimination is the provision of funding in addition to the existing sources of public and private funding. The ‘Feasibility Study for financial support for litigating cases relating to violations of democracy, rule of law and fundamental rights’ commissioned by the European Commission¹⁰⁸ concluded that funding for fundamental rights litigation ‘would be within the scope of Commission grants architecture’ and would ‘add substantial value because (1) there is a clear need for funding for such litigation, (2) there are opportunities to advance fundamental rights jurisprudence [...]’.¹⁰⁹ The feasibility study also points out that ‘flexibility and nimbleness are important features of grant-making in this context [of fundamental rights litigation], to enable litigators to respond to opportunities that require prompt responses’.¹¹⁰

While actual strategic fundamental rights litigation, including *actio popularis* litigation in the non-discrimination field is currently not directly fundable from EU sources, the author hopes that this approach might be reconsidered in accordance with the above-mentioned Feasibility Study, as the experiences of the CERV programme¹¹¹ start to accumulate in the coming years. The need for additional funding stems exactly from the structural nature of the discrimination targeted by such litigation, as it inevitably poses certain obstacles to acquiring sufficient resources by potential litigators. First, because the discrimination often stems from the practices of and omissions by public authorities, so public funding may be difficult to obtain, and second, because such discrimination frequently targets groups that the majority society looks upon with suspicion, rendering the raising of private funding problematic, especially in countries (such as the countries under scrutiny in this article), where the traditional areas attracting larger scale private donations do not necessarily include more controversial human rights issues. Therefore, more direct EU funding would, in the author’s opinion, be a desirable addition to those, all in all scarce, resources that are at present available for *actio popularis* litigators to take action with the highest possible impact.

There are also certain legislative changes that could improve the efficiency of *actio popularis* litigation in instances of discrimination. The lessons learnt from the scrutiny of the four jurisdictions analysed in this article identify areas where amendments of and/or additions to the respective national legislative

107 Response of Vanda Durbáková, country expert in the non-discrimination field for Slovakia.

108 European Commission (2020), *Feasibility Study for financial support for litigating cases relating to violations of democracy, rule of law and fundamental rights*.

109 European Commission (2020), *Feasibility Study for financial support for litigating cases relating to violations of democracy, rule of law and fundamental rights*, p. iii.

110 European Commission (2020), *Feasibility Study for financial support for litigating cases relating to violations of democracy, rule of law and fundamental rights*, p. iii.

111 See: Call for proposals on promoting capacity building and awareness on the EU Charter of Fundamental Rights and activities on strategic litigation relating to democracy, the rule of law and fundamental rights breaches – available at: <https://ec.europa.eu/newsroom/just/items/725683/en>.

frameworks would be desirable to allow litigants to make the most of actio popularis action. These are the following: (i) the requirement that actio popularis litigation in discrimination cases should be allowed where the general public interest warrants it, irrespective of the number and identifiability of the victims; (ii) the requirement that actio popularis litigants can use all the remedial forums (including the full scale of judicial review) that are available for individual litigants; (iii) the requirement to expressly allow for financial compensation in actio popularis cases (potentially with qualifications, such as the obligation on actio popularis litigants to use the amounts granted in their non-discrimination, or other public interest work); and (iv) reference to the right of courts and equality bodies with a quasi-judicial function to prescribe, in the framework of actio popularis cases, specific injunctive measures with regard to both private and public actors with a view to putting an end to discriminatory actions and practices when it is warranted by the circumstances of the given case.

The author is hopeful that the above issues will in due time find their way to the CJEU, and the body will thus have a chance to form an opinion on whether the requirement of effectiveness as set forth by Article 15 of the RED presupposes that (some of) these solutions be in place in the legal systems of the Member States.

With such backing in the *acquis* and also financial support allowing for sustainable engagement, actio popularis litigation could significantly contribute to combatting structural discrimination faced by the Roma and other minorities at risk of differential treatment in the European context.

Failure to provide a reasonable accommodation as a form of disability discrimination?

A comparative analysis of the legal situation in Denmark, France, Ireland and Italy

Carmine Conte*

Introduction

This article analyses the legal systems of Denmark, France, Ireland and Italy with respect to the implementation of the obligation to make reasonable accommodation for persons with disabilities in the workplace. This paper focuses on the unjustified refusal to provide reasonable accommodation, which is an explicit form of discrimination in France and Denmark, while in Ireland and Italy the law fails to classify such a refusal in this way. At the international level, the UN Convention on the Rights of Persons with Disabilities (CRPD) explicitly recognises that an unjustified denial of reasonable accommodation constitutes discrimination (Article 2). On the other hand, under EU law, the Employment Equality Directive fails explicitly to define an unjustified failure to make reasonable accommodation as a form of discrimination.

The prohibition of discrimination in the form of an unlawful denial of reasonable accommodation represents an important provision for the protection of workers with disabilities that could foster their participation in society and remove existing barriers in the workplace. Such a classification *inter alia* may provide more effective remedies for victims of discrimination, soften the burden of proof on the complainant and send a powerful signal to employers concerning the importance of accommodating persons with disabilities on the workplace. However, legislation in the EU Member States is still sometimes *ambiguous* about whether failure to provide reasonable accommodation is to be treated as a form of unlawful discrimination.

This article will first briefly present in Section 1 the main provisions on the unjustified denial of reasonable accommodation under EU and international law. Then it will consider in Sections 2, 3 and 4 whether, in each state, the unjustified denial of reasonable accommodation is recognised in law as a form of disability-based discrimination, to what extent national courts are in practice interpreting such a denial as a form of discrimination, and under which circumstances a failure to provide reasonable accommodation is

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considered to be unlawful discrimination or not. Finally, the article will draw some initial conclusions about the practical implications of recognising (or not) the unjustified denial of reasonable accommodation as a form of discrimination for the legal protection of persons with disabilities. It will do so by looking at those legislative frameworks and judicial reasonings emerging from the comparative assessment and the obligations set out by the CRPD.

1 The regulatory framework at international and EU level

The obligation to provide reasonable accommodation represents one of the cornerstones of the 'substantive model' of equality enshrined by the UN Convention on the Rights of Persons with Disabilities (CRPD) that was formally adopted by the UN General Assembly in December 2006 and entered into force in May 2008.¹ The Convention is the first human rights treaty to be open for signature by regional integration organisations and the European Union became a party to the CRPD in November 2009.² The EU's ratification of the Convention established a clear obligation in law for its provisions to be taken into account in interpreting EU primary and secondary legislation.³ According to the definition in Article 2 of the Convention, reasonable accommodation means 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. Article 5(3) CRPD also sets out that the obligation to provide reasonable accommodations applies to both public and private entities and has immediate effect.⁴

The CRPD also explicitly recognises that an unjustified denial of reasonable accommodation constitutes discrimination. This form of discrimination occurs when the modifications which are necessary for persons with disabilities to ensure the equal enjoyment of a fundamental right are denied. In this regard, in its General Comment No 6, the UN CRPD Committee pointed out that 'not accepting an accompanying person or refusing to otherwise accommodate a person with a disability are examples of denial of reasonable accommodation'.⁵ The CRPD Committee further clarified that 'any justification of the denial of reasonable accommodation must be based on objective criteria and analysed and communicated in a timely fashion to the person with a disability concerned. The justification test in reasonable accommodation is related to the length of the relationship between the duty bearer and the rights holder'.⁶ The legal framework delineated by the CRPD seems to show that the failure to make reasonable accommodation is a *separate or third form of discrimination* which does not fall under the scope of direct or indirect discrimination.⁷

At the EU level, the obligation to provide reasonable accommodation is set out in Article 5 of the Employment Equality Directive and seeks to enable persons with disabilities to have access to, participate in or advance in employment, or to undergo training. The identification of the proper accommodation

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- 1 Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007). The Convention on the Rights of Persons with Disabilities and its Optional Protocol was adopted on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007.
 - 2 Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC).
 - 3 According to Article 216(2) TFEU: 'agreements concluded by the Union are binding upon the institutions of the Union and on its Member States'. See also, Conte, C. (2022), *The impact of the Convention on the Rights of Persons with Disabilities on EU law and governance*, Hart Publishing.
 - 4 Waddington, L. and Broderick, A. (2018), *Combating disability discrimination and realising equality. A comparison of the UN CRPD and EU equality and non-discrimination law*, European Commission Directorate-General for Justice and Consumers; see also Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 23.
 - 5 Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, adopted by the Committee at its nineteenth session (14 February–9 March 2018).
 - 6 Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, adopted by the Committee at its nineteenth session (14 February–9 March 2018), para. 27.
 - 7 Waddington, L. and Broderick, A. (2018), *Combating disability discrimination and realising equality. A comparison of the UN CRPD and EU equality and non-discrimination law*, European Commission Directorate-General for Justice and Consumers.

must be based on a specific analysis of the individual situation and the employment at issue.⁸ The Directive gives guidance on appropriate measures to adapt the workplace to the disability of an individual and provides some examples of accommodations, such as the adaptation of premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.⁹ The reasonable accommodation must not impose a disproportionate burden on the employer. Recital 21 of the Preamble provides that, when assessing whether any measure would give rise to a ‘disproportionate burden’, account should be taken of the financial and other costs entailed, the scale and financial resources of the organisation and the possibility of obtaining public funding or other assistance.

Despite the existence of a clear obligation to provide reasonable accommodation under EU law, the Employment Equality Directive lacks a specific provision explicitly defining an unjustified failure to make reasonable accommodation as a form of discrimination. As argued by Waddington and Broderick, this could ‘possibly encourage the Member States to believe that such an approach is compatible with the CRPD, when in fact it is not’.¹⁰ The absence of an express provision under EU law that recognises the failure to make a reasonable accommodation as a form of discrimination is not in line with the CRPD. Nevertheless, Member States, which are also obliged to comply with the Convention, might wrongly assume that the EU has fully implemented the CRPD in this regard.¹¹ The CRPD Committee has clarified that in order to ensure reasonable accommodation as laid out in Article 5(3) of the CRPD, and achieve de facto equality in the work environment, State Parties must expressly recognise the unjustified denial of reasonable accommodation as discrimination.¹² It is worth noting that the European Commission’s 2008 proposal for a Horizontal Equality Directive specifically recognises the failure to make reasonable accommodation as a form of discrimination and is in line with the CRPD.¹³ The adoption of the Horizontal Directive is now a political priority under the Commission Work Programme 2022 and this could extensively improve the protection of persons with disabilities. The new Directive proposed by the Commission would provide a general framework to combat discrimination beyond the field of employment and occupation by means of a horizontal approach. The current proposal would positively include ‘denial of reasonable accommodation for persons with disabilities’ among the six different types of discrimination prohibited under EU law.¹⁴

In its judgments on the Employment Equality Directive and disability, the CJEU has thus far not explicitly defined the failure to comply with the reasonable accommodation duty as a form of discrimination. In *Ring and Skouboe Werge*, the Court made clear that the ‘adaptation of working hours’ is an example of reasonable accommodation that can be adopted by employers to foster the rights of workers with disabilities and drew attention to the importance of eliminating barriers that hamper the effective participation of persons with disabilities in professional life on an equal basis with other workers.¹⁵ In this case, even if it was not asked by the referring court to clarify whether the unjustified failure to make accommodation amounts to discrimination, the Court did not address the issues of classification.¹⁶

8 Waddington, L. and Lawson, A. (2009), *Disability and non-discrimination law in the European Union. An analysis of disability discrimination law within and beyond the employment field*, Luxembourg, Publications Office of the European Union.

9 Recital 20 of the Preamble to the Employment Equality Directive 2000/78/EC.

10 Waddington, L. and Broderick, A. (2018), *Combatting disability discrimination and realising equality. A comparison of the UN CRPD and EU equality and non-discrimination law*, European Commission Directorate-General for Justice and Consumers, p. 12.

11 Waddington, L. and Broderick, A. (2018), *Combatting disability discrimination and realising equality. A comparison of the UN CRPD and EU equality and non-discrimination law*, European Commission Directorate-General for Justice and Consumers, p. 12.

12 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 67(d). See the definition of ‘harassment’ in para. 18(d) of the Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on Equality and Non-Discrimination, UN Doc. CRPD/C/GC/6.

13 European Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final.

14 The Commission’s proposal is available at: <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX%3A52008PC0426/>.

15 CJEU, joined cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, 11 April 2013, ECLI:EU:C:2013:222.

16 Conte, C. (2022), *The impact of the Convention on the Rights of Persons with Disabilities on EU law and governance*, Hart Publishing.

In a more recent case, *DW v Nobel Plastiques Ibérica SA*, the Court was called to interpret Article 2(2)(b)(ii) of Directive 2000/78/EC setting out that indirect discrimination is to be taken to occur where an apparently neutral provision, criterion or practice would put persons having, inter alia, a particular disability, at a particular disadvantage compared with other persons. The Court found that this provision must be interpreted as meaning that dismissal for 'objective reasons' of a disabled worker on the ground that they met the selection criteria used by the employer to determine which individuals to dismiss, namely productivity below a given rate, a low level of multi-skilling in the undertaking's posts and a high rate of absenteeism, constitutes indirect discrimination on the ground of disability. The prohibition of indirect discrimination is breached unless the employer has provided the worker with the reasonable accommodation needed to guarantee compliance with the principle of equal treatment in relation to persons with disabilities. This is for the national court to determine.¹⁷ It is worth noting that the Court recalled that, 'under Article 2 of the UN Convention, discrimination on the grounds of disability includes all forms of discrimination, including denial of reasonable accommodation'.¹⁸

A similar approach has been adopted by the CJEU in the recent decision concerning the case of *XXXX v HR Rail SA*.¹⁹ Here, the Advocate General highlighted the importance of Article 2 of the CRPD, and interpreted Article 5 of Directive 2000/78/EC as meaning that, when a worker becomes definitively unable, due to a disability, to carry out the work for which they were hired by the company, the employer is required to reassign them to another job, if the worker possesses the required competence, capacity and availability and if such a measure does not impose a disproportionate burden on the employer.²⁰ Importantly, the Court again emphasised the content of Article 2 of the CRPD and concluded that Article 5 must be interpreted as meaning that the concept of reasonable accommodation for disabled persons requires that a worker, including someone undertaking a traineeship, who has been declared incapable of performing the essential functions of their post, be assigned to another position for which they have the necessary competence, capability and availability, unless that measure imposes a disproportionate burden on the employer.²¹

In both the *DW v Nobel Plastiques Ibérica SA* and the *XXXX v HR Rail SA* judgments, the Court recalled the content of Article 2 of the CRPD providing that discrimination on the ground of disability includes all forms of discrimination, including denial of reasonable accommodation. These specific statements by the Court could pave the way for further judicial elaboration on the nature of the unjustified denial of reasonable accommodation as a separate form of discrimination in its case law and EU equality law.

2 The domestic legal frameworks: differences and common ground

Legislations in Denmark, France, Ireland and Italy include the obligation to provide reasonable accommodation as set out in EU and international law. Nevertheless, there are still some differences among the ways in which legislation classifies (or not) a denial of reasonable accommodation as a form of discrimination, as well as in the interpretation of these legislations across the four Member States.

Both Danish and French law expressly define an unjustified failure to make reasonable accommodation as a form of discrimination. In particular, in Denmark, an unjustified failure to meet the duty of reasonable accommodation in employment for persons with disabilities is recognised as indirect discrimination according to Section 1(3) of the Act on the Prohibition of Discrimination in the Labour Market. Reasonable accommodation is described in Section 2(a) of the same Act, but is not defined in detail. Danish law merely states that the employer shall take reasonable measures in view of practical needs to provide a person with disabilities access to employment, to pursue employment or advance in employment, or to

17 CJEU, C-397/18, *DW v Nobel Plastiques Ibérica SA*, 11 September 2019, ECLI:EU:C:2019:703.

18 CJEU, C-397/18, *DW v Nobel Plastiques Ibérica SA*, 11 September 2019, ECLI:EU:C:2019:703, para 72.

19 CJEU, C-485/20, *XXXX v HR Rail SA*, 10 February 2022, ECLI:EU:C:2022:85.

20 CJEU, C-485/20 *XXXX v HR Rail SA*, Opinion of Advocate General Rantos delivered on 11 November 2021.

21 CJEU, C-485/20, *XXXX v HR Rail SA*, 10 February 2022, ECLI:EU:C:2022:85, para. 86.

give a person with disabilities access to vocational training. The obligation to provide accommodations does not apply if a ‘disproportionate burden’ is thereby imposed upon the employer. It follows from Section 2(a) that the burden will not be considered disproportionate if it is sufficiently covered by public measures, including financial assistance from the state.

In France, Article L5213-6 LC and Article 2(5) of Law No. 2008-496 provide that, in order to ensure respect for the principle of equal treatment and reasonable accommodation, employees with disabilities have the right to benefit from appropriate measures put in place by the employer.²² In addition, Article 5213-6 LC paragraph 4 expressly recognises that the failure to take all necessary measures to provide reasonable accommodation can constitute discrimination.²³ The obligation to provide reasonable accommodation covers: i) all employees officially recognised as disabled by the social and public framework; ii) disabled workers who have suffered an accident at work resulting in a degree of disability greater than 10 % and who have received compensation in this regard; iii) beneficiaries of disability pensions; and iv) disabled veterans. The obligation to provide reasonable accommodation applies at all stages and for all types of employment and is only subject to the limitation that making the accommodation should not entail a ‘disproportionate burden’. In 2017, as a result of a wide consultation with employers, NGOs and stakeholders, the national equality body, the Defender of Rights, produced a publication to provide general guidelines to employers and all agencies on the implementation of the duty to provide reasonable accommodation.²⁴ It remains the only comprehensive publication for employers which aims to clarify the scope of the obligation, its constraints and limits and its interaction with other applicable legal provisions.

On the other hand, in Ireland, the reasonable accommodation duty is embedded in Section 16 of the Employment Equality Acts 1998-2021 (EEA), which is entitled ‘Nature and extent of employer’s obligations in certain cases’. This section is characterised by a ‘*convoluted structure*’ as noted by Ryan and Bell, because it does not require employers to recruit, train, promote or retain an individual who is not fully competent and available to undertake the duties attached to a position, but it sets out that persons with disabilities shall be treated as fully competent if they can undertake ‘any duties’ with the provision of reasonable accommodation by their employer.²⁵ As a result, even if the employee is required to be fully capable of performing ‘the duties attached to that position’ after an accommodation has been put in place, it is still possible to consider an accommodation involving a redistribution of the core duties of the job.²⁶ Moreover, this section fails to explicitly define an unjustified refusal to make reasonable accommodation as discrimination. Case law since 2006 has instead established that failure to provide reasonable accommodation is a free-standing form of discrimination.²⁷

Similar to Ireland, in Italy the law does not define the unjustified denial of reasonable accommodation as discrimination, but Article 3(3-bis) of Legislative Decree No. 216/2003 states that employers have a duty to provide reasonable accommodation in order to apply the principle of equal treatment for persons with disabilities.²⁸ It is worth noting that, until 2013, Italian equality law lacked a specific provision

22 France, Article L5213-6 of the Labour Code and Article 2(5) of Law No. 2008-496 of 27 May 2008.

23 France, Article 5213-6 of the Labour Code.

24 Defender of Rights (2017), *Emploi des personnes en situation de handicap et aménagement raisonnable* (The employment of persons with disabilities and reasonable accommodation), December 2017: <https://www.defenseurdesdroits.fr/fr/guides/guide-amenagement-raisonnable>.

25 Ryan, D., and Bell, M. (2020) ‘Disability, reasonable accommodation and the employer’s obligations: Nano Nagle School v Daly’, *The Modern Law Review*, vol. 83 number 5, 1059-1071, p. 1061.

26 Ryan, D., and Bell, M. (2020) ‘Disability, reasonable accommodation and the employer’s obligations: Nano Nagle School v Daly’, *The Modern Law Review*, vol. 83 number 5, 1059-1071, p. 1061.

27 In a 2006 case about access to employment, the Equality Tribunal applied a free-standing duty to accommodate without reflecting on its nature as such: *O’Sullivan v Siemens Business Services Ltd*, DEC-E2006-058, 22 November 2006, <https://www.workplacerelations.ie/en/cases/2006/november/dec-e2006-058-full-case-report.html>. Upheld on appeal by the Labour Court (the reasonable accommodation dimension of the case was not under appeal) and award increased to EUR 12 000: *A Technology Company v A Worker*, EDA0714, 11 September 2007, <https://www.workplacerelations.ie/en/cases/2007/september/eda0714.html>.

28 Italy, Article 3(3-bis) of Legislative Decree No. 216/2003 of 9 July 2003 on the implementation of Directive 2000/78/EC for equal treatment in employment and occupation, available at <http://www.normattiva.it/eli/id/2003/08/13/003G0240/CONSOLIDATED/20220128>.

establishing a duty for employers to ensure reasonable accommodation. Legislative Decree No. 216 of 9 July 2003, transposing Directive 2000/78/EC, did not enshrine an explicit obligation to provide reasonable accommodation. However, Italian legislation was amended to increase the protection of persons with disabilities from discrimination, following the ruling of the CJEU in *Commission v Italy*.²⁹ In this case, Italy was found to have failed to comply with its obligations under EU law because it had not transposed Article 5 of Directive 2000/78/EC, concerning reasonable accommodations for disabled persons, into national law.³⁰ The Italian Parliament subsequently added Article 3-bis to Legislative Decree 216/2003³¹ which provides that 'in order to guarantee the principle of equal treatment, public and private employers have the obligation to adopt reasonable accommodations in accordance with the UN CRPD', but this is to be done 'without imposing new costly burdens on the financial budget' as far as public employees are concerned.

The law in Italy and Ireland is quite similar as it does not define the unjustified denial of reasonable accommodation as discrimination at all, leaving a wide margin of interpretation to the national courts to provide such a classification. However, some differences are found when comparing France and Denmark. On the one hand, French law classifies the failure to make reasonable accommodation as discrimination without specifying the type of discrimination. On the other hand, Danish law specifies that an unjustified denial of accommodation represents indirect discrimination and provides for a partial shift of the burden of proof from the complainant to the employer in such cases.³² Danish law therefore provides for a shared burden of proof entailing that where a person with disabilities is able to establish facts which provide evidence of a possible denial of reasonable accommodation, then the employer has to prove that no unjustified denial of reasonable accommodation has taken place.

3 How is the unjustified denial of reasonable accommodation interpreted in practice?

After comparing the legislation in place in the four countries, this section will briefly outline how an unjustified denial of reasonable accommodation is interpreted by national judges and what kind of discrimination it is considered to be. To this end, it will mainly focus on key judgments from higher courts at national level. In Denmark, a 2017 ruling from the Supreme Court clearly illustrates that, if an employee needs accommodation in the form of reduced working hours because of their disability, the employer must show a willingness to look into possible alternative solutions including flexi-jobs or part-time work.³³

This case involved a woman who had had serious brain surgery that caused her significant tiredness. She had therefore been on full sick leave for about two months and on partial sick leave for eight months. She wanted to return to her previous position, but could not work for more than 12 to 18 hours per week because of severe fatigue. The hospital and the employee's caseworker from the local municipality recommended a 'flexi-job' with reduced working hours. However, the employer rejected this suggestion from the complainant without looking into the feasibility of this option. After going on sick leave again, the claimant was dismissed and argued that the dismissal amounted to disability discrimination.

The Supreme Court found that there were no prospects for the woman to return to a full-time position as she had 'diagnosed disabling fatigue'. The Supreme Court concluded that the impairment at the time of the dismissal constituted a disability and that the employer had been aware of the disability. The Supreme Court also stated that the employer had failed to fulfil its obligation to provide reasonable

29 CJEU, Case C-312/11 *Commission v Italy*, 4 July 2013, EU:C:2013:446.

30 Waddington, L., Quinn, G. and Flynn, E. (2013) *European Yearbook of Disability Law*, vol. 4.

31 Italy, Law-Decree of 28 June 2013, No. 76, converted in law by Law 99/13.

32 Denmark, Section 7(a) of the Act on the Prohibition of Discrimination in the Labour Market.

33 Denmark, Supreme Court, judgment of 22 November 2017 in Case No. 305/2016. Appeal of Eastern High Court judgment of 30 June 2016, Case No. B-477-15. Printed in U.2018.853H.

accommodation. It is worth noting that this finding was based on the reasoning that the employer had refused to look into the possibility of providing a flexi-job arrangement and properly examine the options available to accommodate the claimant. Therefore, the dismissal constituted denial of reasonable accommodation and thus amounted to indirect discrimination based on disability.

This case illustrates what is now an accepted interpretation of the obligation under Danish law. In concrete terms, the employer must look into and evaluate the possibility of providing reasonable accommodation for a worker with a disability before dismissing the worker on the grounds that they are unable to carry out the job. In the event of dismissal, an employer must be able to document the steps taken to provide reasonable accommodation to meet an employee's specific needs before the decision on dismissal is made in order not to indirectly discriminate against the employee. In contrast, if an employer fails to consider different and potential options to accommodate a person with disabilities, this lack of action may result in a breach of anti-discrimination law.

In France, a landmark decision on the issue of reasonable accommodation in the public service was handed down by the Supreme Administrative Court, the Council of State (*Conseil d'État*), in the case of *Vaulot-Pfister v France*.³⁴ The claimant was a magistrate with the public prosecution office who became deaf. His impairment led to the redefinition of his duties and those of his colleagues. In particular, the magistrate was exempted from public hearings and these obligations were replaced by administrative duties. As a consequence of the redefinition of his duties, the magistrate experienced a significant reduction in the variable portion of his remuneration and, in fact, his bonus rate became the lowest in the jurisdiction. On appeal, the Conseil d'Etat held that the duty of reasonable accommodation implies that the measures taken should not create a disadvantage in terms of remuneration or prevent proper professional progression.³⁵ Specifically, the Court found that, if a disabled worker receives lower remuneration in comparison with other colleagues as a result of the accommodation put in place by the employer, this measure would amount to indirect discrimination.

Another important decision on the denial of reasonable accommodation was handed down by the French Court of Cassation in 2020.³⁶ In this case, the claimant was declared not suitable to pursue his job as a consequence of a work accident and was dismissed because it was deemed impossible for him to be reassigned to a different task. He claimed that his dismissal was discriminatory on the ground of disability. Significantly, the Court emphasised that an employer has the duty to 'pursue seriously and with loyalty the obligation to reassign a disabled employee' once they have been declared unfit to work. To do so, the employer should undertake work profile studies, an evaluation of potential reasonable accommodation measures and a consultation with public services assisting disabled employees. The Court decided that the employer failed to make reasonable accommodation and the dismissal was discriminatory and null and void.

It may be said that this judgment clarifies some *crucial steps* that the employer has to take in order to comply with the duty to provide reasonable accommodation. First, the employer is required to try to reassign the employee to another position within one month, unless the occupational doctor recognises the existence of some exemptions. Then an assessment of the reasonableness of the adjustments has to be carried out to verify whether they are technically possible and suitable to accommodate the person with disabilities. At the same time, the resulting burden on the employer must not be disproportionate. This procedure must take place on a case-by-case basis that considers the concrete circumstances of the

34 France, Conseil d'État, *Vaulot-Pfister vs France*, decision of 11 July 2012 in case No. 347703, available at: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000026198987>.

35 Waddington, L. B. (2015) 'Fine-tuning non-discrimination law: Exceptions and justifications allowing for different treatment on the ground of disability' *International Journal of Discrimination and the Law*, 15(1-2), 11-37. <https://doi.org/10.1177/1358229114558546>.

36 France, Court of Cassation, Social chamber, decision of 3 June 2020 in case No. 18-21993, available at: <https://www.legifrance.gouv.fr/juri/id/JURITEXT000041995790/>.

individual and the workplace. To do so, the employer must also engage in a dialogue with various actors to identify all the possible options.

In this case, the employee requested twice that the employer consult the support service for the employment of disabled workers, but the employer did not undertake any study or research to adapt the employee's position. Despite the large size of the company workforce and the availability of different professional roles, the employer failed to take any of the required steps to accommodate the worker with disabilities. The employer's deficiency in following the necessary procedure allowed the Court of Cassation to find a refusal to provide reasonable accommodation that is discriminatory. However, the Court omitted to clarify the evidentiary requirements to prove discrimination and the direct or indirect nature of the discrimination.

Among the four legal frameworks analysed in this article, Irish employment law is characterised by the absence of an express provision that formally acknowledges the denial of reasonable accommodation as discrimination. Nonetheless, national judges have recognised that the failure to provide reasonable accommodation is a free-standing form of discrimination in a line of cases dating back to 2006.³⁷ In the first of these cases, the Equality Tribunal found that a deaf person was discriminated against when a deferral of his interview was refused.³⁸ The respondent company failed to provide reasonable accommodation for the complainant because they did not consider or provide the opportunity to undertake the interview with the aid of a computer. The Tribunal positively clarified that, 'as the 2004 amendment of the Act was designed to implement, inter alia, the Framework Directive, it should be interpreted in a manner to achieve the result envisaged by the Directive. I am satisfied that this Article creates an independent requirement to provide reasonable accommodation where it is needed in a particular case'.³⁹ This quote shows an interpretive approach in compliance with Directive 2000/78/EC,⁴⁰ that has been confirmed by numerous later decisions.⁴¹

Despite these positive developments, the lack of a specific provision on the denial of reasonable accommodation in the law has contributed to some challenges in the protection of persons with disabilities, especially in relation to the violations of the *procedural* elements of the duty. To give an example, in the case of *Nano Nagle School v Daly*, the Supreme Court disagreed with the Court of Appeal's interpretation of the reasonable accommodation provision and held that there is no distinction between the 'essential' functions or duties of a job and any 'non-essential tasks' an employee must undertake.⁴² The Court stated that, on a proper construction of Section 16 of the Employment Equality Acts 1998-2021 (EEA), employers are obliged to consider all appropriate measures that could be undertaken to

37 In a 2006 case about access to employment, the Equality Tribunal applied a free-standing duty to accommodate without reflecting on its nature as such: *O'Sullivan v Siemens Business Services Ltd*, DEC-E2006-058, 22 November 2006, <https://www.workplacerelations.ie/en/cases/2006/november/dec-e2006-058-full-case-report.html>. Upheld on appeal by the Labour Court (the reasonable accommodation dimension of the case was not under appeal) and award increased to EUR 12 000: *A Technology Company v A Worker*, EDA0714, 11 September 2007, <https://www.workplacerelations.ie/en/cases/2007/september/eda0714.html>.

38 *O'Sullivan v Siemens Business Services Ltd*, DEC-E2006-058, 22 November 2006, <https://www.workplacerelations.ie/en/cases/2006/november/dec-e2006-058-full-case-report.html>.

39 *A Complainant v An Employer*, DEC-E2008-068, 30 December 2008, <https://www.workplacerelations.ie/en/cases/2008/december/dec-e2008-068-full-case-report.html>.

40 Bolger, M., Bruton C., and Kimber, C. (2012) *Employment equality law*, Dublin, Thomson Reuters, pp. 366-367. Prior to its amendment under the Equality Act 2004, the duty did not give rise to a free-standing cause of action. It functioned rather to negate reliance on the defence provided for under Section 16(1): Labour Court, *An Employer v A Worker (Mr O) Number 1*, EDA0419, 5 January 2005, <https://www.workplacerelations.ie/en/cases/2005/january/eda0419.html>. On occasion, adjudicators tempered the limitations of Section 16 by finding that failure to treat disabled workers differently amounted to direct discrimination, e.g., Labour Court, *A Government Department v A Worker*, EDA0612, 13 September 2006, <https://www.workplacerelations.ie/en/cases/2006/september/eda0612.html>.

41 E.g., Equality Tribunal, *Ms. Z v A Chain Store*, DEC-E2009-111, 8 December 2009, <https://www.workplacerelations.ie/en/cases/2009/december/dec-e2009-111-full-case-report.html>; Equality Tribunal, *Desmond v Thomas Clarke and Company*, DEC-E2010-130, 13 July 2010, para 5.6 <https://www.workplacerelations.ie/en/cases/2010/july/dec-e2010-130-full-case-report.html>; Equality Tribunal, *An Employee v A Broadcasting Company*, DEC-E2011-195, 14 October 2011, <https://www.workplacerelations.ie/en/cases/2011/october/dec-e2011-195-full-case-report.html>. Labour Court, *Wojcik v Sodexo Ireland Ltd*, EDA1517, 23 November 2015.

42 Ireland, Supreme Court, *Nano Nagle School v Daly* [2019] IESC 63, 31 July 2019.

provide reasonable accommodation, even where these include removing or redistributing an employee's 'duties or essential functions'. However, it underlined that, according to a test of 'reasonableness and proportionality', an employer cannot be under a duty to entirely re-designate or create a different job to facilitate an employee.⁴³

The Court also considered whether, in discharging its obligation to provide reasonable accommodation, an employer is obliged to consult with the disabled employee. The Court specifically found that there is no mandatory duty of consultation with an employee in each claim of reasonable accommodation. However, it stated that a 'wise employer' would engage in such a process, thereby providing 'meaningful participation in vindication of his or her duty' under the EEA.⁴⁴ The CRPD Committee instead emphasises that the provision of reasonable accommodation *requires* the duty bearer to enter into dialogue with the person with a disability.⁴⁵ The Irish approach seems not to be in line with the CRPD. This is because the failure of an employer to consult a worker with disabilities does not of itself amount to discrimination and it could leave some individuals without a legal remedy according to Buckley and Quinlivan. They argue that without 'a duty of consultation, employers may simply assume that reasonable accommodation is impossible, or may offer inappropriate accommodations, and employees or potential employees may have no opportunity to address this'.⁴⁶

In Italy, the case of *GC v L. SRL*⁴⁷ is highly interesting because it shows that the refusal to adopt reasonable accommodation or the dismissal of an employee resulting from a lack of reasonable accommodation constitutes a form of discrimination.⁴⁸ The claimant was dismissed as she was considered unable to perform her job as a warehouse handler and unsuitable to be delegated to different tasks. She claimed that the employer breached the duty to provide reasonable accommodation and the dismissal constituted discrimination on the ground of disability. The Court emphasised that the dismissal was discriminatory on the ground of disability, because the employer failed to explore the feasibility of possible accommodation that could have allowed the employee to continue working in the same company.

A similar decision was handed down by the Court of Bologna, even before the CJEU's decision against Italy, which correctly applied both Directive 2000/78/EC and the UNCRPD.⁴⁹ The first instance Court of Bologna was asked to decide whether the refusal of a hospital to hire for six months a nurse who was unable to work during night shifts could be considered a discriminatory treatment. The Court found that the refusal to conclude the contract was discriminatory and breached the duty to provide reasonable accommodation in the workplace. In particular, the Court considered that a working shift of 12 hours exclusively in the daytime would not have caused a disproportionate burden for the local health service provider and would not have affected the patterns of working time of other workers. The Court therefore held that the employer was liable for the failure to provide reasonable accommodation for a disabled employee and required it to pay compensation of damages equivalent to the six months' salary the claimant would have earned if she had been hired.

43 Ireland, Supreme Court, *Nano Nagle School v Daly* [2019] IESC 63, 31 July 2019.

44 Ireland, Supreme Court, *Nano Nagle School v Daly* [2019] IESC 63, 31 July 2019, para. 105: 'I do not go so far as to say there is a mandatory duty of consultation with an employee in each and every case, the section does not provide for this, still less does it provide for compensation simply for the absence of consultation in an employment situation. But, even as a counsel of prudence, a wise employer will provide meaningful participation in vindication of his or her duty under the Act. But absence of consultation cannot, in itself constitute discrimination under s.8 of the Act.' https://www.courts.ie/view/judgments/77ed9bc6-3c69-482e-9390-a73c341a3192/c26bcc73-99ab-4fa5-9d71-b35590fd120f/2019_IESC_63_1.pdf/pdf.

45 UN Committee, General Comment No 6 (2018) on Equality and Non-Discrimination, CRPD/C/GC/6, 26 April 2018, para 26 at <https://digitallibrary.un.org/record/1626976>.

46 Buckley, L. and Quinlivan, S. (2021) 'Reasonable accommodation in Irish equality law: an incomplete transformation', *Legal Studies*, vol. 41, 19–38, p. 32.

47 Italy, Court of Pisa, *CG v L. SRL*, decision of 16 April 2015, available at: <http://www.osservatoriodiscriminazioni.org/index.php/2015/10/19/tribunale-pisa-ordinanza-del-16-aprile-2015/>.

48 Maino, A. and Serra, M. (2016), 'Reasonable accommodation and the prohibition of discrimination on grounds of disability' 20 *Legal Signs* 65.

49 Italy, Court of Bologna, judgment of 17 June 2013, available at: http://adapt.it/adapt-indice-a-z/wp-content/uploads/2013/08/trib_bg_18_6_13.pdf.

This comparative overview of some key cases in the four countries shows a common approach by the national courts when it comes to identifying the steps that an employer has to take before making (or not) the reasonable adjustments. In most cases, the courts require employers to explore the feasibility of potential adaptations of the working environment and also to initiate a dialogue with the person with disabilities to find possible solutions. If the employer fails to take these necessary steps, it may result in a finding of discrimination. The consultation of persons with disabilities seems a crucial procedural element in France, while it is not always considered compulsory in Ireland. It is also common for national courts to refrain from providing detailed reasoning on the nature (direct or indirect) of the discrimination at issue, while they are more focused on the actions taken or not taken by the employers when refusing to make reasonable accommodation and their potential impact on the workplace.

4 Justifying the refusal to provide reasonable accommodation: key legal issues and limits

In all the countries assessed the refusal to provide reasonable accommodation does not represent discrimination when the accommodation is a 'disproportionate burden' on the employer. This clause allows employers to justify their refusal to put in place reasonable accommodation in the workplace under certain circumstances, mainly related to the financial impact of the measures on the employer.

In Denmark the obligation to provide accommodation does not apply if a disproportionate burden is imposed upon the employer and the burden will not be considered to be disproportionate if it is sufficiently eased by public measures, which includes financial assistance from the state.⁵⁰ This means that if public authorities can cover some or all of the expenses, the burden will rarely be considered disproportionate, even if there is no obligation on the employer to apply for public funding to cover these expenses.

This is clearly illustrated in a landmark ruling from the Maritime and Commercial Court.⁵¹ The case dealt with an employee who had severe permanent backache and for this reason the employer decided to terminate the training agreement. The employer refused a proposal from the municipality to provide a personal assistant arrangement and therefore the Court concluded that the obligation to provide reasonable accommodation was violated and that indirect discrimination based on disability took place.

Another important factor to evaluate the disproportionality of the burden is the size of the employer's business. In another case before the Maritime and Commercial Court, a colour-blind seaman was not allowed to perform essential tasks on the ship he worked on because of his condition and was therefore dismissed.⁵² The Court found that in order to accommodate the seaman, the only effective option would have been to hire an extra worker during the two weeks the seaman in question was at sea. However, such a measure would have been unreasonable for the employer because the shipping company had limited economic capacity and only a few employees.

Like Denmark, in France the Labour Code also provides that measures to be taken to accommodate persons with disabilities must not constitute a disproportionate burden, taking into account any financial support available to the employer. The law, however, seems to provide little guidance to assess if a refusal to make accommodation is discriminatory or what is a disproportionate burden in practice and national courts have not yet provided an exhaustive interpretation of these concepts. The law only sets some criteria for determining the financial support provided to the employer which are based on the level of impairment and the additional costs of work resulting from the implementation of reasonable

50 Denmark, Section 2(a) of the Act on the Prohibition of Discrimination in the Labour Market.

51 Denmark, Maritime and Commercial Court, judgment of 2 April 2009, Case No. Sag F-27-07. Published in U.2009.1948SH.

52 Denmark, Maritime and Commercial Court, judgment of 22 December 2014, Case No. F-2-13. Published in U2015.1053S.

accommodation.⁵³ In this regard, the employer in fact has the duty to prove the disproportionate burden of providing reasonable accommodation and to have taken all necessary measures required by law.

A few cases give some clarity on the judicial approach of the courts when evaluating the disproportionality of the burden. In particular, they illustrate that an employer has to prove they have explored potential solutions for the worker with disabilities and have formally applied for public financial assistance from the fund for the integration of persons with disabilities.⁵⁴ For instance, in a judgment by the Court of Appeal of Toulouse, it was decided that if an employer fails to look ‘seriously and in good faith’ for possible solutions to keep the employee’s job in line with their qualifications, the employer cannot rely on the disproportionate burden justification.⁵⁵ Another decision by the Administrative Court of Caen concerned a request for an adapted vehicle for travelling to work submitted by a civil servant.⁵⁶ This request was initially refused by the employer on the basis of disproportionate costs because the required adaptations were not covered by the available public financial support. However, the Court rejected the defence based on disproportionate costs as the employer did not provide evidence of having applied for financial assistance and could not therefore justify as unreasonable the costs resulting from implementing the proposed accommodation.

Similarly, in Ireland, the meaning of disproportionate burden is elaborated in the law, which provides that in ‘determining whether the measures would impose such a burden account shall be taken, in particular, of (i) the financial and other costs entailed, (ii) the scale and financial resources of the employer’s business, and (iii) the possibility of obtaining public funding or other assistance.’⁵⁷ The case of *Multinational Employer v A Worker* exemplifies the concrete application of this clause. Here, the respondent estimated the cost of providing an accessible toilet in the store where the complainant worked at EUR 22 000.⁵⁸ Since the respondent was a large multi-national company, that expenditure ‘could not by any standard be regarded as imposing a disproportionate burden in vindicating the complainant’s right to work on the same basis as others’.

In another case, the Workplace Relations Commission (WRC) examined the provision of reasonable accommodation to a worker in a manufacturing plant. By reason of several medical conditions, the complainant was no longer capable of undertaking many of the key essential duties of the job for which she was employed. The WRC first found that the removal of all the duties was ‘not tenable in the circumstances’ and would amount to a disproportionate burden. It then assessed whether the respondent’s reasonable accommodation duty required it to create a different job or to redesignate the complainant to an entirely different role. The WRC determined that there were no suitable alternative roles in the company which would satisfy the requirements outlined in an occupational therapist’s report. The only option to accommodate the worker with disabilities would have been the creation of an entirely new post, but by applying the principles set out in *Nano Nagle*, the WRC found that, ‘the Respondent’s obligation to provide reasonable accommodation in the specific circumstances of the present case does not extend so far as to compel it to create an entirely different job to facilitate the Complainant’.

Irish case law seems to illustrate that employers do not have a general duty to create new posts to accommodate persons with disabilities. However, the scale and financial resources of the employer’s business do play a crucial role in determining whether or not a disproportionate burden exists, implying that this clause is less likely to justify the denial of reasonable accommodation for large multinational companies.

53 France, Decree No. 2006-134 of 9 February 2006 on the recognition of the severity of the disability; Decree No. 2006-501 of 3 May 2006 on the fund for the professional integration of persons with disabilities.

54 Latraverse, S., *Country report. Non-discrimination. France 2021*, European Commission Directorate-General for Justice and Consumers.

55 France, Toulouse Court of Appeal, No. 17/01861, decision of 26 January 2018.

56 France, Administrative Court of Caen, No. 0802480, decision of 1 October 2009.

57 Ireland, Section 16(3)(c) of the Employment Equality Acts 1998-2021 (EEA).

58 Ireland, Labour Court, EDA1435, decision of 10 November 2014, available at: <https://www.workplacelrelations.ie/en/cases/2014/november/eda1435.html>.

In Italy, public employers have to make reasonable accommodation only if there is no additional burden on them and using the human, financial and technical resources already available in the workplace. According to anti-discrimination law, there is no additional public funding allocated for providing reasonable accommodation for persons with disabilities. This is a standard formula included in various laws to limit public spending, which is likely to breach Article 5 of Directive 2000/78/EC that waives the duty to provide reasonable accommodation only in case of a disproportionate burden on the employer. This limit is regularly applied to private sector employees who are in practice required to bear the costs of the reasonable accommodation duty, unless those costs are disproportionate.

In this regard, the Supreme Court has recently issued an important judgment that identifies the existence of two main legal criteria defining the private employer's obligation: the 'express limit of the disproportionate cost' and 'the adjective qualifying the adjustment as reasonable'.⁵⁹ This judgement raises some concerns because the Court stated that the 'reasonableness' criteria has an independent literal value and represents a further limit that could exempt the employer from making the adjustment. This additional limit seems to be in contrast with the General recommendation No. 6 on equality and non-discrimination adopted by the UN Committee on the Rights of Persons with Disabilities.⁶⁰ The Committee expressly rules out the possibility that the reasonableness of the arrangements constitutes 'an exception clause, a distinct qualifier or modifier to the duty'.⁶¹ It clarifies that 'reasonable accommodation is a single term and reasonable should not be misunderstood as an exception clause' and 'it is not a means by which the costs of accommodation or the availability of resources can be assessed'.⁶² Rather, the reasonableness of an accommodation is a reference to its relevance, appropriateness and effectiveness for the person with a disability. An accommodation is reasonable, therefore, if it achieves the purpose (or purposes) for which it is being made and is tailored to meet the requirements of the person with a disability.⁶³ According to the Committee's interpretation, it seems clear that the reasonableness of the arrangement is only related to its appropriateness for the person with disabilities, while the limit of the obligation is marked by the disproportionate effort imposed on the employer.

Under EU law and the wording of Article 5 of Directive 2000/78/EC, this limit is represented more specifically by the disproportionate financial burden, which is determined by taking into account the financial or other costs incurred by the measures, the size and financial resources of the organisation or undertaking and the possibility of obtaining public funds or other subsidies.⁶⁴ The Italian Supreme Court has introduced a further condition for the implementation of the principle of equality which is extraneous to the content of the supranational rules. This addition may be very problematic on the practical application level because the reasonableness of the arrangements is a much vaguer concept than that of disproportionate costs.

The comparative analysis highlights that the main limit in the law concerning the duty to provide reasonable accommodation is represented by the disproportionate burden in Ireland, France and Denmark in line with the main provisions of Directive 2000/78/EC. The scale and financial resources of the employer and the possibility of resorting to public funds are essential factors to determine whether or not an employer has unlawfully failed to provide accommodation in these countries. In contrast, the Italian Supreme Court has introduced the additional 'reasonableness' criteria that could exempt the

59 Italy, Supreme Court, judgment of 9 March 2021, No. 6497/21, available at: https://www.italianequalitynetwork.it/archivio_sentenze/36.pdf.

60 Committee on the Rights of Persons with Disabilities (2018), General comment No. 6 on equality and non-discrimination, available at: <https://digitallibrary.un.org/record/1626976?ln=en>.

61 Committee on the Rights of Persons with Disabilities (2018), General comment No. 6 on equality and non-discrimination, available at: <https://digitallibrary.un.org/record/1626976?ln=en>, point 25, lett. a).

62 Committee on the Rights of Persons with Disabilities (2018), General comment No. 6 on equality and non-discrimination, available at: <https://digitallibrary.un.org/record/1626976?ln=en>, point 25, lett. a).

63 Committee on the Rights of Persons with Disabilities (2018), General comment No. 6 on equality and non-discrimination, available at: <https://digitallibrary.un.org/record/1626976?ln=en>, point 25, lett. a).

64 Recital 21 of the Preamble to the Employment Equality Directive 2000/78/EC.

employer from making the adjustment, but it does not comply with the main conclusions of the CRPD Committee on equality and non-discrimination.

Conclusions: The implications of recognising (or not) the denial of reasonable accommodation as a form of unlawful discrimination

The obligation to provide reasonable accommodation is the cornerstone of the protection of persons with disabilities under the Employment Equality Directive because it seeks to enable them to have access to, participate in, or advance in employment or to undergo training. To do so, it imposes on employers concrete obligations to remove environmental barriers to achieve full equality in practice.⁶⁵ The express recognition of the denial of reasonable accommodation as discrimination is also a crucial means to ensure the effective participation of persons with disabilities in professional life on an equal basis with other workers, because it fosters ‘awareness of the rights-based nature of the duty to accommodate’ and ‘the seriousness of a failure to comply with the duty’ amongst both persons with disabilities and duty-bearers, as argued by Waddington.⁶⁶

However, the comparative analysis raises some questions about whether the denial of reasonable discrimination should constitute direct, indirect or a *sui generis* form of discrimination. If it is recognised in the law as a form of direct discrimination, the need to identify a comparator (hypothetical or actual) would impose an additional evidential burden on persons with disabilities.⁶⁷ The evidential requirement for establishing direct discrimination can be very rigid and impose on the complainants the burden of demonstrating that the detriment suffered was not or would not be experienced by a comparator. Adducing this type of evidence is relatively complex in those situations where a particular treatment is experienced exclusively by people who are members of the same group as the complainant (e.g. a care home for older people). Therefore, in several cases, the complainants fail to provide any evidence of *less favourable* treatment. In addition, considering that direct discrimination generally includes less favourable treatment which deviates from a norm (the treatment afforded to other people), it goes beyond the pure definition of this concept to argue that it entails treatment (reasonable accommodation) which requires taking into account how an individual’s circumstances interact with the workplace environment. The interaction between the individual impairment and the external environment may be unique to a given employee and so it involves more than deviation from a norm but an obligation to create ‘new’ individualised standards.

Indirect discrimination instead occurs when an apparently neutral rule disadvantages a person or a group sharing the same characteristics and therefore does not appear suitable to tackle reasonable accommodation. Indirect discrimination is in fact typically assessed in terms of the effects on a group, while a claim of reasonable accommodation should be based on an individual assessment. The CRPD underlines that the obligation to provide reasonable accommodation is an individual measure and entails an assessment of a given individual’s working environment, while establishing a disadvantage shared by all members of the group would pose significant difficulties for cases on disability grounds.

In addition, the comparative analysis highlights that the current state of the law in Denmark which defines the denial of reasonable accommodation as indirect discrimination may generate confusion in the practical application of this provision. Employers seem to have difficulties in understanding the justification test required in situations of denial of reasonable accommodation, which is not the

65 Lord, J. E. and Brown, R. (2011), ‘The role of reasonable accommodation in securing substantive equality for persons with disabilities: The UN Convention on the Rights of Persons with Disabilities’ in Rioux, M. H., Basser, L. A. and Jones, M. (eds), *Critical perspectives on human rights and disability policy*, Martinus Nijhoff, The Hague.

66 Waddington, L. (2013), ‘Equal to the task: Re-examining EU equality law in light of the United Nations Convention on the Rights of Persons with Disabilities’, *European Yearbook of Disability Law*, vol. 4, Intersentia, pp. 169-200, at p. 190.

67 It is worth noting that in France there is no need to identify a comparator to establish discrimination as the rule in itself may in some cases be deemed discriminatory. Hypothetical reasoning is instead allowed under French law.

same in other cases of indirect discrimination. The analysis may suggest that the denial of reasonable accommodation could constitute a separate and *sui generis* form of unlawful discrimination. This solution would provide a clear distinction between the denial of reasonable accommodation and direct as well as indirect discrimination and it would establish a more transparent state of law for employers, job applicants and employees with disabilities.

Moreover, an explicit recognition in the law of this form of discrimination would provide persons with disabilities with a legally enforceable right, which clearly emphasises that some individuals need appropriate adjustments to be able to enjoy and exercise their fundamental human rights. As a result, an individual could obtain redress by means of a ruling stating that they have been unlawfully discriminated against as well as financial compensation. Access to effective remedies in case of a violation of anti-discrimination norms would be an important legal benefit for persons with disabilities. It may be said that, by recognising the denial of reasonable accommodation as unlawful discrimination, the duty would be interpreted as belonging to anti-discrimination law and not to employment law. For instance, in Italy this shift would significantly lower the burden of proof on workers when claiming that the duty has been violated and would also ensure a more favourable ‘fast-track’ procedure for anti-discrimination actions.⁶⁸ Under the fast-track procedure, a victim of discrimination would even be able to apply in person (whereas in ordinary labour cases the assistance of a lawyer is compulsory) to the ordinary civil court with jurisdiction over their place of residence (an exception to the general principle which sets out that the courts of the respondent’s place of residence should hear the case). The court can also issue a judgment ordering cessation of the discriminatory activity as well as damages (including for non-pecuniary losses, ordinarily excluded from civil cases) and can order an anti-discrimination plan to be drafted. The opportunity for persons with disabilities to access the judicial procedure and the legal remedies available under anti-discrimination law would foster the enforceability of their rights.

Generally speaking, the prohibition of discrimination in the form of an unlawful refusal to provide reasonable accommodation could also send a powerful signal to employers who are required to enter into a dialogue with workers with disabilities to find the most suitable ways to accommodate their needs. As noted above, the primary difficulty under Irish law, which lacks a specific provision on the denial of reasonable accommodation, concerns those breaches of the procedural limb of the duty, in particular the failure to consult a worker. The obvious impact, should that duty of consultation be construed narrowly, is that individuals will not have access to any remedy. By contrast, in France the Court of Cassation has positively clarified that employers have to undertake a consultation with those public services that assist employees with disabilities. A clear requirement to consult persons with disabilities or at least their representative organisations, as part of the prohibition of discrimination in the form of an unjustified refusal to provide a reasonable accommodation, would facilitate the identification of the necessary adjustments and create an open dialogue between the employer and the person with disabilities. In this regard, the CRPD Committee points out that the obligation to provide reasonable accommodation must be interpreted as requiring the duty-bearer to enter into a dialogue with the person concerned.

The comparative overview in this paper shows that, even if it is not required by Directive 2000/78/EC, France and Denmark have expressly classified a breach of the duty to provide reasonable accommodation as a form of discrimination. However, some key differences still remain in the legal and judicial approach towards the nature (direct or indirect) of the discrimination and its implications for persons with disabilities. In contrast, Italy and Ireland do not have such a classification at all in the law, but this gap has been filled by an extensive interpretation by the national courts of the duty to provide reasonable accommodation. One could argue that Member States should better align with the obligations stemming from the CRPD and the remarks of the CRPD Committee by explicitly recognising the failure to make accommodation as a *sui generis* form of discrimination. This author agrees with Waddington and Broderick on the fact ‘that the Employment Equality Directive risks sending out the message that not defining an unjustified denial

68 Italy, Article 28 of Legislative Decree 150/2011.

of reasonable accommodation as a form of discrimination is compatible with the CRPD'.⁶⁹ Considering that the EU has ratified the CRPD and is working on the proposal for a new non-discrimination Directive, it may be recommended to expressly define the denial of reasonable accommodation as discrimination to fully comply with the CRPD and promote further harmonisation at national level. In this respect, the express recognition of 'the denial of reasonable accommodation for persons with disabilities' as a form of discrimination under Article 2(1)(a) of the new directive will be crucial to strengthen the protection of persons with disabilities by ensuring they have adequate remedies, a more favourable burden of proof and constructive dialogue with employers.

⁶⁹ Waddington, L. and Broderick, A. (2018), *Combating disability discrimination and realising equality. A comparison of the UN CRPD and EU equality and non-discrimination law*, European Commission Directorate-General for Justice and Consumers, p. 71.

Protecting trans, non-binary and intersex persons against discrimination in EU law

Pieter Cannoot & Sarah Ganty*

1 Introduction

In November 2020, the European Commission announced its first-ever LGBTIQ Equality Strategy.¹ Recognising that discrimination, violence and social exclusion of lesbian, gay, bisexual, trans, non-binary, intersex and queer (LGBTIQ) people persists throughout the European Union (EU), the Commission put forward several action points to advance LGBTIQ equality in the EU, in close cooperation with the Member States. Importantly, the Commission explicitly pointed out the importance of adopting an intersectional approach and paying attention to ‘the diversity of LGBTIQ people’s needs and to the most vulnerable, including [...] trans, non-binary and intersex people, who are among the least accepted groups in society and generally experience more discrimination and violence than others in the LGBTIQ communities’.² Moreover, whereas discrimination against LGBTIQ people occurs across the entire EU, the Commission acknowledged the worrying trend of increased hostility towards LGBTIQ people in certain Member States,³ which coincides with the rise of the so-called anti-‘gender ideology’ movement and threats to democracy and the rule of law.⁴

Based on a large-scale survey among LGBTIQ people, the EU Fundamental Rights Agency (FRA) reported in 2020 that a significant proportion of LGBTIQ people continue to experience discrimination, harassment and violence, simply because of their sexual orientation, gender identity, gender expression and/or sex characteristics.⁵ Compared with the results of the previous survey from 2012, the FRA noticed ‘little, if any progress in the way LGBTI people experience their human and fundamental rights in daily life’.⁶ Overall, 43 % of respondents felt discriminated against in the year before the survey was conducted.

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1 European Commission (2020), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Union of Equality: LGBTIQ Equality Strategy 2020-2025, COM(2020) 698 final, available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025_en.

2 European Commission (2020), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Union of Equality: LGBTIQ Equality Strategy 2020-2025, COM(2020) 698 final, available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025_en, p. 3.

3 European Commission (2020), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Union of Equality: LGBTIQ Equality Strategy 2020-2025, COM(2020) 698 final, available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025_en, p. 2.

4 On the anti-‘gender ideology’ movement and its links to other threats to democracy and the rule of law, see Kováts, E. (2018), ‘Questioning consensus: Right-wing populism, anti-populism, and the threat of “gender ideology”’, *Sociological Research Online*, <https://doi.org/10.1177/1360780418764735>.

5 European Union Agency for Fundamental Rights (2020), *EU-LGBTI II: A long way to go for LGBTI equality*, available at <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results>.

6 European Union Agency for Fundamental Rights (2020), *EU-LGBTI II: A long way to go for LGBTI equality*, available at <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results>, p. 10.

Discrimination occurs in all spheres of life, including in employment, access to goods and services, in healthcare settings and in education. Moreover, the survey results showed that trans and intersex people are most affected by discrimination: 60 % of trans respondents and 62 % of intersex respondents felt discriminated against.

However, despite their significant vulnerability to discrimination, harassment and violence, LGBTIQ people are not fully protected in EU Law, as will be explained below. In this article, we examine whether and how trans, non-binary and intersex people are currently protected against discrimination in EU law, and how that protection could be improved.

In order to gain a clear understanding of the scope of such legal protection, we first elaborate on how basic terms such as gender identity, gender expression and sex characteristics have to be conceptualised and how they relate to each other (2.). Secondly, we will briefly examine the extent to which trans, non-binary and intersex people are currently protected against discrimination in EU and national law (3.). Before concluding, we will identify several lacunae and/or challenges in the legal protection of trans, non-binary and intersex people against discrimination and how these could be addressed or remedied (4.).

2 Relevant terminology

The terminology with which the law and society in general address issues regarding sex, gender identity/ expression and sexual orientation is varied, inconsistent and constantly evolving. A clear definition and demarcation are therefore of paramount importance. However, the question arises as to whether such definition and demarcation are actually possible, considering that many LGBTIQ people find the habitual terminology unsatisfactory to reflect the versatility that they feel or aspire to.⁷ Indeed, the precise wording and terms used in debates surrounding (variations of) sex characteristics, gender identity and sexual orientation often reflect the personal views and feelings of the individual concerned and are often an area of very intense disagreement.⁸ Trans, non-binary and intersex people, as illustrated by the Commission's LGBTIQ Equality Strategy, are often included under the acronym 'LGBTIQ'. Although LGBTIQ people face different issues, they are all considered to be 'sexual minorities'.⁹

The concepts of 'sex (characteristics)', 'sexual orientation', 'gender identity' and 'gender expression' are often discussed together. Indeed, sex, gender identity, gender expression and sexual orientation together form a person's sexual identity. Although society and the law tend to conflate these concepts, they are independent constructs. In order to fully grasp the discrimination faced by LGBTIQ people, and the underlying causes thereof, it is therefore still essential to conceptualise a few key concepts. Given our focus in this article on trans, non-binary and intersex people, we will not deal with notions related to 'sexual orientation'.

2.1 Sex – variations of sex characteristics – intersex people

'Sex' is traditionally seen as a biological concept of a factual nature, determined by the presence of a certain configuration of chromosomes, hormones, gonads, internal morphology, external genitalia and

7 Motmans, J. (2009) *Leven als transgender in België. De sociale en juridische situatie van transgender personen in kaart gebracht*, (Living as a transgender person in Belgium. Mapping the social and legal situation of transgender people), Brussels, Instituut voor de gelijkheid van vrouwen en mannen, p. 28.

8 Scherpe, J. M. (2016) 'The legal status of transsexual and transgender persons – An introduction' in Scherpe J. M. (ed.), *The legal status of transsexual and transgender persons*, Cambridge, Intersentia, 2016, p. 2.

9 Although the acronym 'LGBTIQ' has increased the visibility of sexual minorities and their claims regarding law and policy, it has also been criticised for not working inclusively, since the designation of separate categories serves to highlight the differences between and among individuals based on their sexual identities and/or experiences. See Fineman, M. A. (2014) 'Vulnerability, resilience, and LGBT youth', *Temple Political & Civil Rights Law Review* 2013-14, Vol. 23, p. 314 and Ammaturo, F. R. (2017) *European sexual citizenship. Human rights, bodies and identities*, London, Palgrave, 2017, pp. 34-35.

secondary characteristics in an individual.¹⁰ In other words, a person's sex is composed of multiple sex characteristics. According to the Preamble to the Yogyakarta Principles +10, 'sex characteristics' refer to 'each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty'.¹¹ Although external genitalia are only one of the constituting elements of a person's sex, they are usually decisive for determining a person's sex at birth, including in terms of official sex registration.¹²

The concept of 'sex' is usually seen as a person's 'biological status as male or female',¹³ hence referring to 'sex' as a binary notion. Indeed, European societies are premised on the assumption that human beings are discretely 'sexed' into two categories.¹⁴ However, advances in science, as well as the experiences of individuals with variations of sex characteristics reveal that sex is much more nuanced than the binary categories would have us believe.¹⁵ Indeed, although in most individuals the aforementioned sex markers are congruent, and therefore 'typically' male or 'typically' female, this is not the case for all human beings.¹⁶ Sex is fraught with indeterminacy, since there is no simple or singular test to decide on a person's 'correct' sex marker.¹⁷ The conceptualisation of 'sex' as a binary construct is therefore a social construct,¹⁸ informed and defined by ideas of gender identity and gender roles,¹⁹ and thus is not a pre-discursive notion that is fixed on individuals.²⁰

People whose sex characteristics do not match the socially constructed normality of the male/female sex are referred to with a variety of terms, such as intersex people, people with variations of sex characteristics or people with differences in sex development (DSD). Some will identify as *being* 'intersex', while others indicate *having* an atypical development of sex characteristics, referring to the medical term of 'DSD' or the more neutral 'variations of sex characteristics'.²¹ While intersex people will have sex characteristics that fall outside of the male/female binary, the majority of people with variations of sex characteristics still identify their gender within the binary, i.e. as a man or a woman.²²

Variations of sex characteristics cannot be explained satisfactorily under the essentialist binary theory of sex. The predominant modern social response approach towards intersex people has consisted of medically modifying the 'abnormality' shortly after birth, or sometimes during adolescence, to bring the individual concerned in accordance with the binary categories of 'male' or 'female'.²³ Intersex people

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- 10 Silver, A. E. (2013) 'An offer you can't refuse: Coercing consent to surgery through the medicalisation of gender identity', *Columbia Journal of Gender and Law* 2013-14, Vol. 26, p. 490.
 - 11 The Yogyakarta Principles+10 are a universal guide to human rights that applies generally binding international legal standards to the situation of LGBTIQ+ people. Although the Yogyakarta Principles+10 are not legally binding, they are considered to be very influential for policy-makers, courts and other human rights actors.
 - 12 Picarra, E. and Visser, C. (2012) 'Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism', *South African Journal on Human Rights*, Vol. 28, p. 508.
 - 13 Reeves, A. R. (2009) 'Sexual identity as a fundamental human right', *Buffalo Human Rights Law Review* 2009, Vol. 15, p. 218.
 - 14 Callens, N. (2014) *The past, the present, the future: genital treatment practices in disorders of sex development under scrutiny*, Ghent, University Press, p. 239.
 - 15 Clark Hofman, D. L. (2012) 'Male, female, and other: How science, medicine and law treat the intersexed, and the implications for sex-dependent law', *Tulane Journal of Law & Sexuality*, Vol. 21, p. 2.
 - 16 Greenberg, J. A. (1999) 'Defining male and female: Intersexuality and the collision between law and biology', *Arizona Law Review*, Vol. 41, p. 269.
 - 17 Currah, P. (1997) 'Defending genders: Sex and gender non-conformity in the civil rights strategies of sexual minorities', *Hastings Law Journal* 1996-97, Vol. 48, p. 1373.
 - 18 Greenberg, J. A. (1999) 'Defining male and female: Intersexuality and the collision between law and biology', *Arizona Law Review*, Vol. 41, p. 272. See also Lembke, U. (2016) 'Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies', *European Equality Law Review*, No. 2, p. 47.
 - 19 Clark Hofman, D. L. (2012) 'Male, female, and other: How science, medicine and law treat the intersexed, and the implications for sex-dependent law', *Tulane Journal of Law & Sexuality*, Vol. 21, p. 3.
 - 20 Butler, J. (1999) *Gender trouble: Feminism and the subversion of identity*, New York, Routledge, (10th ed.), p. 11.
 - 21 See Carpenter, M. (2018) 'The "normalisation" of intersex bodies and "othering" of intersex identities' in Scherpe, J. M., Dutta, A. and Helms, T. (eds.), *The legal status of intersex persons*, Cambridge, Intersentia, p. 486.
 - 22 Richards, C. et al. (2016), 'Non-binary or genderqueer genders', *International Review of Psychiatry*, Vol. 28(1), p. 95. See also Dunne, P. (2018) 'Towards trans and intersex equality: Conflict or complementarity?' in Scherpe, J. M., Dutta, A. and Helms, T. (eds.), *The legal status of intersex persons*, Cambridge, Intersentia, p. 236.
 - 23 Garland, F. and Travis, M. (2018) 'Legislating intersex equality: Building the resilience of intersex people through law', *Legal Studies*, available at <https://doi.org/10.1017/lst.2018.17>, p. 3.

have thus routinely been subjected to surgical treatments – while still very young – to align their physical appearance with either of the binary sexes without their prior and fully informed consent, even though they do not usually face actual health problems due to their status.²⁴ The aforementioned 2019 LGBTI survey by the FRA showed that 62 % of intersex respondents did not provide – and were not asked for – their or their parents’ consent before undergoing surgical intervention to modify their sex characteristics.²⁵ Although it goes beyond the scope of this article to discuss so-called sex ‘normalising’ treatment, it has been widely accepted that such non-consensual deferrable treatment is a violation of human rights.²⁶

2.2 Gender identity – gender expression – trans and non-binary people

The Preamble to the Yogyakarta Principles +10 defines ‘gender identity’ as ‘each person’s deeply felt internal and individual experience of gender, which may or may not correspond to the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms’. Although ‘gender expression’ is already covered by the definition of ‘gender identity’ (bodily appearance, dress, speech and mannerisms), the Preamble also provides a separate definition. ‘Gender expression’ is described as ‘each person’s presentation of the person’s gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references’. With most people, gender expression is in conformity with the social expectations associated with their gender identity, but this is not necessarily the case with all individuals. Since gender is understood as an amorphous social construct, there are as many ways to experience and express gender as there are human beings on the planet.²⁷

While arguably all (or at least most)²⁸ human beings have a gender identity and gender expression, most attention is focused on those people whose gender is considered to be not in conformity with societal normative expectations and stereotypes, i.e. trans and non-binary people. By contrast, the term ‘cisgender person’ is used for those (binary) persons whose gender identity is in conformity with the sex assigned to them at birth.

Although ‘sex’ and ‘gender identity’ are different concepts, it is clear that they interrelate in current society. Indeed, in part, gender identity is constructed from the consequences attached by society to the physical differences between the (binary) sexes. There are particular dress codes, speech patterns, gaits etc. assigned to the sexes, resulting in gender stereotypes based on the naturalness and sanctity of the binary system.²⁹ People who disrupt these gender norms are often faced with stigma, discrimination, harassment and violence, in order to restore the ‘natural’ gender order.

The term ‘trans people’ is increasingly used as an umbrella term for anyone whose gender identity and/or gender expression does not match the sex assigned to them at birth and the expectations society usually attaches to that sex. The notion of ‘trans’ represents a spectrum of gender variance, including people

24 Council of Europe Commissioner for Human Rights (2015), *Human rights and intersex people*, available at <https://book.coe.int/en/commissioner-for-human-rights/6683-pdf-human-rights-and-intersex-people.html#>, p. 14.

25 European Union Agency for Fundamental Rights (2020), *EU-LGBTI II: A long way to go for LGBTI equality*, available at <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results>, p. 51.

26 See, for instance, Council of Europe, Resolution 2191 (2017) Promoting the human rights of and eliminating discrimination against intersex people, adopted by the Parliamentary Assembly of the Council of Europe, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&lang=en>; European Parliament (2019), Resolution on the rights of intersex people (2018/2878(RSP)), adopted by the European Parliament on 14 February 2019, available at https://www.europarl.europa.eu/doceo/document/TA-8-2019-0128_EN.html.

27 Reineck, K. (2017) ‘Running from the gender police: reconceptualizing gender to ensure protection for non-binary people’, *Michigan Journal of Gender & Law*, Vol. 24, p. 289.

28 Dianne Otto argues that, although ‘the definition sets out to be inclusive by acknowledging that everyone has a gender identity, those who do not experience gender as an “identity” or feel they have no gender or are gender neutral are excluded’. See Otto, D. (2017) ‘Queering gender [identity] in international law’ in Hellum, A. (ed.), *Human rights, sexual orientation, and gender identity*, London, Routledge, p. 36.

29 Picarra, E. and Visser, C. (2012) ‘Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism’, *South African Journal on Human Rights*, Vol. 28, p. 508.

who identify as a man or woman and people whose gender cannot be described in a binary way ('non-binary people'). The term 'non-binary people' is often used as an umbrella term for anyone who identifies as neither male nor female, as both male and female at the same time, as different genders at different times, or as no gender at all. While many trans and non-binary people seek access to gender-affirming treatment in order to establish (greater) congruence between their bodies and gender identity, trans identities should not be reduced to a medicalised lens. Beside the fact that many trans and non-binary people do not desire to undergo medical treatment, personal, familial, religious, socioeconomic and/or institutional reasons may hinder effective access to trans-specific healthcare.³⁰

Over the last decade, the right to gender self-determination has been increasingly recognised among international human rights actors, such as the Council of Europe,³¹ at EU level,³² and at the national level, predominantly in the sphere of legal gender recognition.³³ For instance, in the EU/EFTA, nine countries – Belgium, Denmark, Iceland, Ireland, Luxembourg, Malta, Norway, Portugal and Switzerland – have abolished all pathologising requirements for legal gender recognition (for adults). Two more – France and Greece – have abolished the requirement of a mandatory diagnosis, but they still respectively impose a judicial procedure and mandatory divorce. With these exceptions, however, all other Member States still require one or more medical conditions such as mandatory diagnosis/psychological assessment, sterility or gender-affirming treatment for legal gender recognition.

3 State of play in EU law and at Member State level

Trans, non-binary and intersex people are stigmatised and discriminated against because their gender identity, gender expression and/or sex characteristics do not correspond to socially constructed and pervasive stereotypes. As the European Commission noted, they are among the most vulnerable communities in society.³⁴ It is therefore important to analyse to what extent they are currently included within the protective scope of anti-discrimination law, both at the level of the EU (3.1.) and the Member States (3.2.).

3.1 The gap in the protection of the EU anti-discrimination law framework

The EU anti-discrimination law framework

The EU anti-discrimination law framework offers very limited protection when it comes to LGBTIQ people. Despite the EU's general competence to adopt secondary legislation to combat discrimination based on sexual orientation within the scope of EU law, legal protection against such discrimination is limited

30 Cannoot, P. (2019) "'#WontBeErased': The effects of (de)pathologisation and (de)medicalisation on the legal capacity of trans* persons', *International Journal of Law and Psychiatry*, Vol. 66, <https://doi.org/10.1016/j.ijlp.2019.101478>, p. 4.

31 See, for instance, Council of Europe Resolution 2048 (2015) Discrimination against transgender people in Europe, adopted by the Parliamentary Assembly of the Council of Europe, available at <http://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=21736>, and the case law of the European Court of Human Rights: ECtHR 11 July 2002, 28957/95, *Christine Goodwin v the United Kingdom*; 6 April 2017, 79885/12, 52471/13, 52596/13, *A.P. Garçon and Nicot v France*; 11 October 2018, 55216/08, *S.V. v Italy*; 17 January 2019, 29683/16, *X v the Former Yugoslav Republic of Macedonia*; 9 July 2020, 41701/16, *Y.T. v Bulgaria*; 19 January 2021, 2145/16 and 20607/2016, *X. and Y. v Romania*; 17 February 2022, 74131/14, *Y. v Poland*.

32 See, for instance, EU Commission, (2020) 'Legal gender recognition in the EU: the journeys of trans people towards full equality', available at: https://ec.europa.eu/info/sites/default/files/legal_gender_recognition_in_the_eu_the_journeys_of_trans_people_towards_full_equality_sept_en.pdf.

33 See Cannoot, P. (2019) "'#WontBeErased': The effects of (de)pathologisation and (de)medicalisation on the legal capacity of trans* persons', *International Journal of Law and Psychiatry* 2019, Vol. 66, <https://doi.org/10.1016/j.ijlp.2019.101478>, pp. 5-8.

34 European Commission (2020), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Union of Equality: LGBTIQ Equality Strategy 2020-2025, COM(2020) 698 final, available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025_en, p. 3.

to employment, occupation and vocational training by means of the Employment Equality Directive.³⁵ Moreover, gender identity, gender expression and sex characteristics are not explicitly included as prohibited grounds for discrimination in EU Treaties, the Charter of Fundamental Rights (EUCFR) and the directives that together form the EU anti-discrimination law framework.

Indeed, Article 19 of the Treaty on the Functioning of the EU (TFEU) explicitly prohibits discrimination (inter alia) on the ground of sex, while Article 157 TFEU enshrines the principle of equal pay for male and female workers for equal work or work of equal value. Article 10 TFEU recalls that, in defining and implementing its policies and activities, the EU aims to combat discrimination based on sex and sexual orientation. The Treaty on European Union (TEU) further mentions that equality of treatment between men and women is a fundamental value of the EU (Articles 2 and 3(3)). Several directives have been adopted on the basis of the two aforementioned articles of the TFEU, including the Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (Directive 2004/113/EC),³⁶ as well as the recast Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast Directive 2006/54/EC).³⁷ They all concern equal treatment between men and women. Finally, Article 21(1) of the EUCFR prohibits discrimination on any ground, including on grounds of sex and sexual orientation, while Article 23 of the Charter concerns equality between women and men in all areas, including employment, work and pay, and allows for the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.³⁸

It is striking that today EU anti-discrimination law still mainly uses the expression of ‘equal treatment between men and women’ as well as ‘sex discrimination’, which appears to exclusively refer to a binary approach to sex and does not explicitly protect trans, non-binary and intersex people. Only Recital 3 of the Recast Directive 2006/54/EC, relying on case law of the CJEU, specifies that the directive also applies to discrimination arising from the ‘gender reassignment’ of a person. Indeed, without abandoning a binary conception of sex, the CJEU has interpreted the prohibition of discrimination based on sex in primary and secondary law as also prohibiting discrimination based on ‘gender reassignment’.

The CJEU's extensive interpretation of the prohibition of discrimination on the ground of sex

According to the CJEU's case law, gender identity is protected to a limited extent under the ground of sex/gender, insofar as it covers individuals who intend to undergo, are undergoing or have undergone gender-affirming surgery. The Court successfully dealt with discrepancies of biological sex, gender identity and legal recognition for the first time in *P v S and Cornwall County Council*.³⁹ The CJEU found sex discrimination when a trans woman who underwent a process of medical transition was removed from

35 Council Directive 2000/78/EC of 27 November establishing a general framework for equal treatment in employment and occupation, *OJ L* 303, 2 December 2000, pp. 16-22. On the limitation of the protection against discrimination on grounds of sexual orientation, see Kochenov, D. (2009) ‘On options of citizens and moral choices of states: Gays and European federalism’, *Fordham International Law Journal*, Vol. 33, p. 156.

36 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *OJ L* 373, 21 December 2004, pp. 37-43.

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

38 Mention should also be made of the Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Directive 79/7/EEC) adopted on grounds of Article 352 TFEU (ex-Article 308 TEC, 235 EEC Treaty) (Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, *OJ L* 6, 10 January 1979, p. 24).

39 Lembke, U. (2016) ‘Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies’, *European Equality Law Review*, No. 2, p. 52. See also: CJEU, C-13/94, *P v S and Cornwall County*, 30 April 1996, EU:C:1996:170, para. 41.

her employment. Interestingly, this was also the point when the Court started using the term 'gender'. Since then, it has used this term as an indiscriminate substitute for the term 'sex'.⁴⁰

In the same vein, the Court judged in *K.B.* that national legislation, which precludes a trans person, in the absence of recognition of his gender identity, from fulfilling a requirement which must be met in order to be entitled to a right protected by Community law, must be regarded as being, *in principle*, incompatible with the requirements of Community law.⁴¹ The *K.B.* case was about a trans partner, R., who was not entitled to a survivor's pension payable solely to a surviving spouse. R., who was assigned the female sex at birth and was registered as such in the Register of Births, had not been able to amend his birth certificate to reflect his gender transition. As a result, and contrary to their wishes, K.B. and R. were not able to marry and hence K.B. was not able to nominate her partner as the beneficiary of a survivor's pension. This situation – the national framework excluding trans people from the scope of survivors' pension rights according to their gender identity – was deemed by the Court not to be compatible with the principle of sex equality enshrined in Article 157 TFEU.⁴²

In the field of social security, the Court found in *Richards* that Article 4(1) of Directive 79/7/EEC precludes legislation which denies a trans woman, who had undergone gender-affirming surgery (and therefore a medical and social transition), entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.⁴³ In other words, although states have a margin of appreciation in matters of gender recognition, the UK could not refuse to recognise, in such absolute terms, that the applicant was a woman and, on that basis, deny her the pension rights she was entitled to as a woman.

More recently, in *MB v Secretary of State for Work and Pensions*, the Court interpreted the Directive as 'precluding national legislation which requires a person who has changed gender not only to fulfil physical, social and psychological criteria but also to satisfy the condition of not being married to a person of the gender that he or she has acquired as a result of that change, in order to be able to claim a State retirement pension as from the statutory pensionable age applicable to persons of his or her acquired gender'.⁴⁴ In other words, the applicant was treated unfavourably in comparison to cisgender married people who did not need to annul their marriage in order to benefit from retirement pensions, since the retirement pension was not conditional on marital status.

Finally, Directive 2004/113/EC enshrines the principle of equal treatment between men and women in access to goods and services and, as is the case for most of the EU anti-discrimination law instruments, it is deeply grounded in a binary perception of sex.⁴⁵ No case concerning discrimination against trans, intersex or non-binary people has yet been brought before the CJEU. The directive is silent on whether it also provides protection from discrimination on grounds of 'gender reassignment', as opposed to Recast

40 Lembke, U. (2016) 'Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies', *European Equality Law Review*, No. 2, p. 50. On p. 52 Lembke rightly explains that, 'In some cases, the discrimination against LGBTI* persons is discrimination based upon (biological) sex; in some cases, it is discrimination because of sex-based assumptions, expectations, stereotypes, or norms (gender); and, in many cases, the boundaries are blurring. The CJEU should consequently apply its approach of sex discrimination developed in *P. v S.* and *K.B.* to disadvantageous non-conformist sexes as well as to gender performances'.

41 Article 157 TFEU (previously Article 141 EC) as well as the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ L 204*, 26 July 2006, pp. 23-36 (previously Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women). See CJEU, C117/01, *K.B. v National Health Service Pensions Agency and Secretary of State for Health*, 7 January 2004, EU:C:2004:7, paras. 30 to 34.

42 Van den Brink, M. and Dunne, P. (2018) 'Trans and intersex equality rights in Europe – a comparative analysis', available at <https://ec.europa.eu/newsroom/just/items/638586/en>.

43 See CJEU, C-423/04, *Sarah Margaret Richards v Secretary of State for Work and Pensions*, 27 April 2006, EU:C:2006:25, para. 33.

44 CJEU (GC), C-451/16, *MB v Secretary of State for Work and Pensions*, 26 June 2018, EU:C:2018:492.

45 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 84.

Directive 2006/54/EC. However, the Commission has made clear that the protection in Directive 2004/113/EC should be in line with the CJEU's case law.⁴⁶

As a consequence, the protected ground of sex is not limited to discrimination between (cisgender) men and (cisgender) women, but also serves as a proxy to include 'gender reassignment'. To date, the Court has not ruled on further cases regarding gender identity, gender expression and sex characteristics, especially concerning non-binary and intersex people. The only other mentions of gender identity which can be found in the case law of the Court are related to asylum cases when it comes to the determination of refugee status and the use of expert reports and the respect for private life⁴⁷ or to the procedure attached to it.⁴⁸

International protection and the Victims' Rights Directive

More generally, the Recast Qualification Directive⁴⁹ and the Recast Procedure Directive⁵⁰ in the matter of international protection formally acknowledge gender identity and the necessity for asylum seekers to be protected when they are victims of maltreatment on that basis. The inclusive language of these directives should be taken as a model of trans and intersex-inclusive provisions.⁵¹

The Recast Qualification Directive, defining membership of a particular social group (one of the reasons for persecution, a condition in order to be granted refugee protection)⁵² specifies that 'gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group'.⁵³ The ground of gender identity is included as one 'gender related aspect' among others. On this basis, it could be argued that other 'gender related aspects' such as sex characteristics or gender expression could be taken into consideration to assess the reasons for persecution based on belonging to a particular social group.

46 European Commission (2015), *Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services*, COM(2015) 190 final, 5 May 2015, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0190>. See also: Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 48.

47 See CJEU, C-473/16, *F. v Bevándorlási és Állampolgársági Hivatal*, 25 January 2018, EU:C:2018:36: 'It is also necessary to take account, in order to assess the seriousness of the interference arising from the preparation and use of a psychologist's expert report, such as that at issue in the main proceedings, of Principle 18 of the Yogyakarta principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, to which the French and Netherlands Governments have referred, which states, inter alia, that no person may be forced to undergo any form of psychological test on account of his sexual orientation or gender identity' (para. 62). See also CJEU 17 December 2020, *European Commission v Hungary*, C-808/18, EU:C:2020:1029, para. 188.

48 See CJEU, C517/17, *Milkiyas Addis v Bundesrepublik Deutschland*, 16 July 2020, EU:C:2020:579, para. 65.

49 Recital 30 and Article 10(d) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2011 L 337, p. 9.

50 Recital 29 and Articles 11(3) and 15(3) of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ 2013 L 180, p. 60.

51 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 49.

52 Article 10 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2011 L 337, p. 9.

53 Article 10(1)(d) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2011 L 337, p. 9. See also Recital 30 of Directive 2011/95/EU.

The Recast Procedure Directive provides that special procedural guarantees may be recognised because of the applicant's gender identity,⁵⁴ especially regarding the interview and the person who conducts it.⁵⁵ However, as opposed to the Recast Qualification Directive, this Directive does not adopt the broad wording of 'gender related aspects'.

It should also be recalled that EU law has strengthened the rights of victims of crime, in respect of people who are particularly vulnerable and, in this context, understands gender-based violence as including violence on grounds of a person's gender identity or gender expression.⁵⁶ As opposed to the two aforementioned Directives, the Victims' Rights Directive explicitly covers the ground of gender expression, yet does not mention the ground of sex characteristics.

The gaps and limits of EU anti-discrimination law

Although the CJEU has given an extensive interpretation of discrimination based on sex which also covers 'gender reassignment' and despite the fact that a few secondary instruments use inclusive language, the protection of trans, non-binary and intersex people against discrimination in EU law remains limited. As van den Brink and Dunne point out, while the CJEU has been willing to employ a progressive interpretation of sex equality standards, it has consistently made use of a highly medicalised picture of trans people.⁵⁷ Moreover, the CJEU sticks to a binary understanding of sex and gender, while the binary view of sex/gender has been increasingly challenged at many levels and should also be questioned in anti-discrimination law. In this context, given the binary understanding of sex/gender, as well as the importance of gender-affirming surgery in the CJEU's relevant case law, several authors have raised doubts over whether all trans, non-binary and intersex people fall within the protective scope of EU anti-discrimination law.⁵⁸

Furthermore, beyond the limits of CJEU case law, the fact that the grounds of gender identity, gender expression and sex characteristics are not explicitly recognised in the EU's anti-discrimination framework means there are many gaps and uncertainties in the protection of trans, non-binary and intersex people against discrimination. For instance, Recital 12 of Directive 2004/113/EC explains that, 'healthcare services, which result from physical differences between women and men, do not relate to comparable situations and, therefore, do not constitute discrimination', without mentioning gender-affirming treatment which is generally trans-specific. In other words, when comparisons are drawn between men and women, they might not take into account the specificity of trans people undergoing gender-affirming treatment; for instance, breast augmentation is often considered as cosmetic and is therefore often not reimbursed by health insurance.⁵⁹

54 Recital 29 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2011 L 337, p. 9.

55 Article 15(3)(a) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2011 L 337, p. 9. See also Article 11(3) of Directive 2011/95/EU regarding applications made on behalf of dependants or minors.

56 See Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ 2012 L 315, p. 57 and more specifically Recital 17.

57 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 9.

58 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, pp. 108-109. Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, pp. 58-64.

59 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, pp. 80-81.

Beyond the matter of gender-affirming treatment, the directive also does not consider the more general medical needs of trans people. A cis woman and a trans man may, for instance, need similar medical treatment, e.g. gynaecological interventions, and trans people may need other specific treatments too. In other words, the simple idea that ‘men’ and ‘women’ need different healthcare services based on their physical differences, does not take into account the complexity of variations in sex and gender among human beings.

Another example detailed below is the provision of single-sex facilities: Recital 17 of Directive 2004/113/EC states that access to goods and services does not require that facilities should always be provided to men and women on a shared basis, with the consequence that this binary understanding of sex/gender may not be accommodating for people identifying as non-binary.⁶⁰ Another gap identified in the field of employment or education is the absence from work or education due to trans or intersex-related treatment, which is, once again, trans/intersex-specific.⁶¹ As explained in the last section, the issue of pregnancy, which EU law links to women only,⁶² is likely to raise issues for pregnant trans and non-binary individuals who might fall through the cracks of protection.⁶³

Finally, although the list enumerated in Article 21(1) of the EUCFR is an open-ended one and therefore likely to protect discrimination on grounds of gender identity, gender expression and sex characteristics, the scope of protection is narrower due to the limited scope of the Charter defined by its Article 51(1).⁶⁴ Moreover, Article 21(1) is not part of the EU anti-discrimination legal framework *per se* (i.e. the anti-discrimination law directives which are mainly adopted on the basis of Article 19 TFEU), which comprises definitions, remedies, enforcement mechanisms and bodies for the promotion of equal treatment. As a result, even when Article 21(1) is likely to apply according to Article 51(1) EUCFR, EU law does not require Member States to give a mandate to equality bodies to act on this basis. In other terms, under EU law, equality bodies have no competence to help victims of discrimination which would fall outside the scope of protection provided by anti-discrimination law as defined by Article 19 TFEU, but inside the scope of application of Article 21(1) EUCFR.⁶⁵

3.2 Greater protection in some national legislation

National authorities also have an essential role to play when it comes to the protection of trans, non-binary and intersex people. The vast majority of trans and non-binary people around the world do not have access to legal gender recognition by the state. This generates stigma and prejudice ‘that tacitly permits, encourages and rewards with impunity the acts of violence and discrimination against them, and

60 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 84.

61 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 97.

62 See Articles 2(2)(c), 3 and 14(2) Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ L* 204, 26 July 2006, pp. 23-36.

63 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 100.

64 For instance, CJEU, C-206/13, *Cruciano Siragusa c. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, 6 March 2014, EU:C:2014:126, paras. 19-22.

65 Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, p. 21.

leads to a situation of de facto criminalization'.⁶⁶ Out of 39 European states,⁶⁷ a majority of states went beyond the protected ground of sex to enshrine the grounds of gender identity, gender expression and sex characteristics in different fields: 21 states explicitly prohibit discrimination on the basis of at least one of these three grounds (predominantly 'gender identity' and occasionally 'sex characteristics').⁶⁸ Besides this, the UK only recognises the ground of 'gender reassignment'. Thus, many states do not explicitly prohibit discrimination on the basis of at least one of these grounds.⁶⁹ However, in some countries, such as Germany, the ground of sex/gender has played the role of proxy to protect people who are victims of discrimination based on gender identity, gender expression and sex characteristics.⁷⁰ Furthermore, even though they do not explicitly recognise the grounds of gender identity, gender expression and sex characteristics, a few Member States also enshrine in their legal order an open-ended non-discrimination clause which could include these grounds.⁷¹

As a consequence, the grounds of gender identity, gender expression and sex characteristics show diverging degrees of protection in domestic anti-discrimination legislation across European countries. While these grounds have found recognition mainly through the interpretation of the ground of sex and/or the open-ended clause, they are not explicitly recognised, or only partially recognised, in many countries, some of which have deployed strategies to protect people discriminated against based on these grounds through sex/gender and through sexual orientation.⁷² However, this may lead to contradictions and difficulties, depending on how courts choose to interpret the concepts. Moreover, it can also lead to important gaps such as in EU law or limited protection when courts adopt a medicalised view of trans people.

4 Improving the protection of trans, non-binary and intersex people against discrimination and challenges

The previous section showed that trans, non-binary and intersex people only enjoy (very) limited protection against discrimination in the EU, and especially at EU level. The question therefore arises of how their position in the EU equality law framework could be improved. As van den Brink and Dunne have already identified, there appear to be (at least) three ways forward: an extensive interpretation of the existing ground of 'sex', the explicit addition of three new grounds (gender identity, gender expression and sex characteristics) in the (primary and secondary) EU equality law framework, and the explicit clarification in the (primary and secondary) EU equality law framework that 'sex' also includes gender identity, gender expression and sex characteristics.⁷³ Moreover, the introduction of an open-ended clause in the TFEU

66 United Nations General Assembly (2018) *Protection against violence and discrimination based on sexual orientation and gender identity. Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity A/73/152*, 12 July 2018, para. 25.

67 Chopin, I. and Germaine, C. (2021) *A comparative analysis of non-discrimination law in Europe 2020. The 27 EU Member States, Albania, North Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia Turkey and the United Kingdom compared*, European network of legal experts in gender equality and non-discrimination, pp. 121-133, available at <https://op.europa.eu/en/publication-detail/-/publication/a88ed4a7-7879-11ea-a07e-01aa75ed71a1>. Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, pp. 15-16.

68 Albania (gender identity only), Belgium, France, Greece (gender identity or gender characteristics), Hungary (sexual identity), Iceland, Malta, Montenegro (gender identity, intersex characteristics), Serbia, Slovenia, Sweden, Georgia (gender identity and expression), Kosovo (gender identity only), Czechia (the term 'gender identification' is used, but according to Czechia's Public Defender of Rights, this means gender identity), Finland, Luxembourg, Netherlands, Norway, Portugal, Croatia and North Macedonia.

69 Austria, Cyprus, Denmark, Estonia, Germany, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Poland, Romania, Slovakia, Spain, Turkey, Bulgaria, Moldova and the UK.

70 In 2017, the Federal Constitutional Court of Germany clarified that the prohibition of sex discrimination covers gender identity: BVerfG, Beschluss des Ersten Senats vom 10. Oktober 2017 1 BvR 2019/16 – Rn. (1 – 69), DE:BVerfG:2017:rs20171010.1bvr201916.

71 Moldova, Slovakia, Estonia (to a limited extent), Latvia, Romania and Bulgaria.

72 Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, pp. 61-64.

73 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 108.

would be an additional way to protect trans, non-binary and intersex people against discrimination. It is clear that all four options come with benefits and challenges. In this section, we will briefly explore how the EU could move forward.

4.1 Extensive interpretation of ‘sex’ discrimination

In our opinion, the prohibition of discrimination on the basis of sex – contained in both EU primary law and EU secondary law – naturally includes a prohibition of discrimination on the basis of gender identity, gender expression and sex characteristics. Indeed, as has been explained in Section 2, trans, non-binary and intersex people face stigma and discrimination because of the fact that their gender identity, gender expression and/or sex characteristics does not correspond to socially constructed and persistent expectations that accompany the sex assigned to them. Indeed, a person assigned the male sex who identifies as a woman or as non-binary or who adopts a non-masculine gender expression transgresses the societal expectation that they would develop a masculine gender identity or appear masculine.⁷⁴ Similarly, a person who has a variation in sex characteristics defies the socially constructed stereotype that everyone is of either a ‘typically’ male or ‘typically’ female sex.⁷⁵ In both cases, an individual who abides by the socially constructed expectations connected to the binary sex assigned to them at birth (cisgender people and people without variations of sex characteristics) will escape the specific types of discrimination that trans, non-binary and intersex persons face.⁷⁶ In other words, ‘sex’ plays a decisive role in the discrimination with which trans, non-binary and intersex people are confronted.⁷⁷

As Lembke holds, ‘when tackling sex discrimination, non-discrimination law has to cover both detrimental conformist gender roles and disadvantageous non-conformist sexes or gender performances. Both dimensions of sex discrimination are rooted in the binary sex model’.⁷⁸ In 2020, the US Supreme Court reached the same conclusion in the case of *Bostock v Clayton County*, in which it held that the prohibition of sex discrimination in Title VII of the Civil Rights Act includes the prohibition of discrimination on the basis of gender identity.⁷⁹

As mentioned above, the CJEU already held that the prohibition of sex discrimination laid down in the EU gender equality directives includes discrimination based on ‘gender reassignment’, and therefore goes beyond discrimination on the ground of an individual being a man or a woman. By analogy, the CJEU could interpret the directives as also prohibiting discrimination based on the fact that a (trans, non-binary or intersex) person fails to act, identify or appear in conformity with the stereotypes connected to the sex assigned to them at birth. Interestingly, in his opinion in the case of *P v S and Cornwall County Council*, Advocate General Giuseppe Tesauro already pointed out that ‘sex’ should be interpreted as a continuum and that the prohibition of sex discrimination applies to those persons who fall outside of the male/female dichotomy and are treated unfavourably ‘precisely because of their sex and/or sexual

74 See Lembke, U. (2016) ‘Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies’, *European Equality Law Review*, No. 2, p. 48.

75 Lembke, U. (2016) ‘Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies’, *European Equality Law Review*, No. 2, p. 51. See also Tobler, C. (2014) ‘Equality and non-discrimination under the ECHR and EU Law. A comparison focusing on discrimination against LGBTI persons’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 74(3), 541.

76 Note that cisgender persons may also encounter gender discrimination because of challenging stereotypes and gender roles connected to their sex/gender, e.g. cisgender women and men challenging traditional notions of ‘femininity’ and ‘masculinity’.

77 Lembke, U. (2016) ‘Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies’, *European Equality Law Review*, No. 2, p. 48. See also Tobler, C. (2014) ‘Equality and non-discrimination under the ECHR and EU Law. A comparison focusing on discrimination against LGBTI persons’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 74(3), 536-537, 545.

78 Lembke, U. (2016) ‘Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies’, *European Equality Law Review*, No. 2. Lembke refers to the external and internal gender hierarchy: cisgender men and women are favoured in comparison with gender non-conforming people (external hierarchy), while men are favoured in comparison with women (internal hierarchy).

79 US Supreme Court 15 June 2020, *Bostock v Clayton County*, 590 US (2020).

identity'.⁸⁰ The European Commission has also argued that the expansive protective approach used by the Court in the aforementioned cases concerning 'gender reassignment' should be materially similar in other cases of discrimination based on gender identity.⁸¹

There is thus no inherent reason why the CJEU could not extensively interpret the prohibition of sex discrimination to fully include trans, non-binary and intersex people in its protective scope. However, as noted by van den Brink and Dunne, an approach that only relies on the interpretation given in case law comes with legal uncertainty.⁸² Given that there has only been a handful of cases concerning trans people, and no cases concerning non-binary and intersex people, that have reached the CJEU so far, legal progress through judicial interpretation could be very slow.

4.2 Addition of new discrimination grounds or legal clarification of 'sex'

As Ganty and Benito Sanchez recently argued, another approach could consist of the explicit addition of three new discrimination grounds, i.e. gender identity, gender expression and sex characteristics, both in EU primary law – such as Article 21 EUCFR and Article 19 TFEU – as well as in the EU gender equality directives.⁸³ Even though there is no absolute necessity to do so, the addition of new grounds still has a number of benefits.⁸⁴ Firstly, adding new grounds would increase the visibility of trans, non-binary and intersex people and symbolically recognise their vulnerability to discrimination. Secondly, it would end the legal uncertainty that accompanies the sole reliance on judicial interpretation by the CJEU. Thirdly, explicitly recognised grounds could catalyse data collection and research, which would facilitate the evidencing of indirect and structural discrimination. Fourthly, adding new grounds to the EU equality law framework (in particular in secondary law) would oblige all Member States to include them in national anti-discrimination legislation.

However, given the fact that unanimity among Member States is required both to amend Treaty provisions and to amend the equality directives adopted on the basis of Article 19 TFEU, it appears utopian to assume that gender identity, gender expression and sex characteristics may be added to the EU equality law framework in the near future. Indeed, state-sponsored hostility towards LGBTIQ people in Member States such as Poland and Hungary is well-documented. At this point, it seems impossible to assume that all EU Member States would support the explicit recognition that trans, non-binary and intersex people are in need of better protection against discrimination in EU law. In any case, even assuming that current provisions of primary EU equality law remain unamended, arguably, in our opinion, the Commission still has the competence to propose the addition of gender identity, gender expression and sex characteristics to the EU gender equality directives as proper non-discrimination grounds next to 'sex'. Indeed, as we explained in the previous section, the notion of 'sex' included in Article 19 TFEU needs to be extensively interpreted. However, the unanimity rule imposed by Article 19 TFEU to adopt and amend equality law directives makes this option unlikely.

Closely related to the addition of three new discrimination grounds is the approach that consists of providing a clarification in the gender equality directives that the prohibition of discrimination on the

80 CJEU, C-13/94, *P v S and Cornwall County Council*, Opinion of AG Tesouro, para. 17. See also Bell, M. (2012) 'Gender identity and sexual orientation: Alternative pathways in EU equality law', *The American Journal of Comparative Law*, Vol. 60(1), p. 136.

81 EU Commission (2015), *Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services*, COM(2015) 190 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0190>, p. 4.

82 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 71.

83 Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, pp. 62 and seq.

84 Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>.

basis of sex also includes discrimination on the basis of gender identity, gender expression and sex characteristics. This approach has already been taken before. Indeed, following the CJEU's case law, Recital 3 was added to Recast Directive 2006/54/EC, pointing out that its provisions also applied to discrimination arising from a person's 'gender reassignment'. In the absence of CJEU case law covering the entire spectrum of trans, non-binary and intersex people, a Treaty revision that explicitly grants the competence to adopt legislative provisions prohibiting discrimination on the basis of gender identity, gender expression and sex characteristics, or amendments to the equality directives that explicitly add the three grounds besides sex, this approach could potentially be a politically acceptable middle road. The approach of a legislative clarification would generate benefits similar to the explicit addition of new grounds: it would result in increased visibility and symbolic recognition of trans, non-binary and intersex people, reduce legal uncertainty and be a catalyst for anti-discrimination action plans and data gathering.

4.3 The utility of an open-ended clause in EU anti-discrimination law

An open-ended clause is a clause stating that grounds beyond those explicitly mentioned in it may also be invoked. For instance, the ECtHR has made it clear in many instances that the list set out in Article 14 ECHR 'is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "*notamment*") [...] and the inclusion in the list of the phrase "any other status" (in French "*toute autre situation*")'⁸⁵ and has held that Article 14 encompasses the ground of gender identity.⁸⁶

Regarding EU law, the academic literature agrees that Article 21(1) EUCFR is an open-ended provision⁸⁷ and the CJEU has confirmed this in several discrimination cases on grounds which are not enshrined in Article 21(1).⁸⁸ Moreover, it is now clear that this article has a horizontal direct effect, meaning that individuals can invoke this provision before domestic courts.⁸⁹ However, it is important to recall that the scope of Article 21(1) is limited to Article 51(1) EUCFR, i.e. EU institutions and agencies, and Member States only insofar as they are implementing EU law. In short, because Article 21(1) EUCFR contains an open-ended list of grounds, it provides a tool to protect against discrimination which occurs on grounds which are not enshrined in Article 19 TFEU and the EU anti-discrimination law directives. There are therefore some limited opportunities for claims of discrimination based on grounds not enshrined in Article 19 TFEU.⁹⁰

Ganty and Benito Sanchez have explored the potentiality of such a clause in EU law, including in Article 19 TFEU. Setting aside the unanimity issue necessary to change the Treaty, they acknowledge that such a clause could lead to legal uncertainty and unpredictability, especially for horizontal discrimination, for which legal certainty is essential.⁹¹ Along the same lines, the question arises as to whether an open-ended list could be enshrined in Article 19 TFEU. Indeed, the legal bases related to EU competences have to be very precise and an open-ended clause might be too uncertain, legally speaking. The authors also state that this difficulty could be overcome by defining precisely what would qualify as a ground under an open-ended clause and propose such a definition.⁹²

85 ECtHR (plenary) 23 November 1976, 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, *Engel and others v the Netherlands*, para. 72; ECtHR (GC) 16 March 2010, 42184/05, *Carson and Others v the United Kingdom*, para. 70.

86 ECtHR 12 May 2015, 73235/12, *Identoba and others v Georgia*, para. 96; 6 July 2021, 47220/19, *A.M. and others v Russia*, para. 73.

87 See, for instance, Craig, P. and de Búrca, G. (2015) *EU Law: Text, cases, and materials*, Oxford University Press, p. 895.

88 See, for instance, CJEU, C-177/18, *Almudena Baldonado Martín v Ayuntamiento de Madrid*, 22 January 2022, EU:C:2020:26.

89 CJEU (GC) C-414/16, *Egenberger*, 17 April 2018, EU:C:2018:257, paras. 87-79.

90 Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, p. 5.

91 Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, pp. 58-76.

92 Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, p. 75.

Although the inclusion of an open-ended clause within Article 19 TFEU would not be a panacea for the protection of trans, non-binary and intersex people against discrimination, it does present one advantage that the other ways forward described above do not offer (at least not so easily): protection against intersectional and multiple discrimination. Intersectional discrimination refers to ‘the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone’.⁹³ It arises, ‘where the grounds cannot be separated because there is a synergy between them’.⁹⁴ Multiple discrimination is different in that it takes place on the basis of several grounds operating separately in one specific case.

It has been shown that discrimination on grounds of gender identity, gender expression and sex characteristics is often linked to other discrimination grounds. For instance, the FRA 2020 LGBTI survey found that 40 % of respondents mentioned their ethnic origin or immigrant background as an additional ground for discrimination, besides being LGBTI.⁹⁵ There is also a strong connection with socio-economic status: intersex (52 %) and trans (46 %) respondents’ households face more difficulties in making ends meet.⁹⁶ There is therefore a need to address these situations from an intersectional or multiple perspective.⁹⁷

While invoking multiple discrimination under EU law would not be a problem, as long as the grounds which operate separately are protected, the case is different for intersectional discrimination. Indeed, in the *Parris* case, the CJEU found that Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, ‘must be interpreted as meaning that a national rule [...] is not capable of creating discrimination as a result of the combined effect of sexual orientation and age, where that rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation’.⁹⁸ And it is highly likely that the same finding would be reached under the gender equality directives.

When intersectional discrimination is not recognised as such in the law, it could be argued that the open-ended clause prohibits such discrimination. In other words, the open-ended clause is likely to cover a unique form of discrimination which derives from several grounds operating in synergy. The case law of the ECtHR pleads for such an interpretation. Indeed, although the Court has never used the term ‘intersectional’ as such, it has found instances of intersectional discrimination under Article 14 ECHR.⁹⁹

Finally, even in the instance of multiple discrimination, if one ground at stake is not enshrined – e.g. socioeconomic status – it will be impossible for the applicant to claim such discrimination, whereas the open-ended clause could remedy this gap.

93 Hannett, S. (2003) ‘Equality at the intersections: The legislative and judicial failure to tackle multiple discrimination’, *Oxford Journal of Legal Studies*, Vol. 23, p. 68. Kimberlé Crenshaw coined the term ‘intersectionality’: Crenshaw, K. (1989) ‘Demarginalizing the intersection of race and sex: A Black feminist critique of anti-discrimination doctrine, feminist theory and antiracist politics’, *University of Chicago Legal Forum*, p. 1.

94 Solanke, I. (2018) ‘The anti-stigma principle-centralising intersectionality in the theory of anti-discrimination law’ in *Multiplication des critères de discrimination, Enjeux, effets et perspectives, Actes du colloque, 18-19 Janvier 2018*, Défenseur des droits, p. 146. See also Crenshaw, K. (1989) ‘Demarginalizing the intersection of race and sex: A Black feminist critique of anti-discrimination doctrine, feminist theory and antiracist politics’, *University of Chicago Legal Forum*: 1; and Hannett, S. (2003) ‘Equality at the intersections: The legislative and judicial failure to tackle multiple discrimination’, *Oxford Journal of Legal Studies*, Vol. 23, p. 65.

95 European Union Agency for Fundamental Rights (2020), *EU-LGBTI II: A long way to go for LGBTI equality*, p. 21, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf.

96 European Union Agency for Fundamental Rights (2020), *EU-LGBTI II: A long way to go for LGBTI equality*, p. 21, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf, p. 63.

97 Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, p. 59.

98 CJEU, C-443/15, *David L. Parris v Trinity College Dublin and Others*, 24 November 2016, EU:C:2016:897.

99 See, for instance, ECtHR 24 July 2012, 47159/08, *B.S. v Spain*.

As a consequence, although there are some objections to be raised concerning the open-ended clause, the advantages that it is likely to bring regarding protection against multiple and intersectional discrimination should be considered to better protect trans, non-binary and intersex people.

4.4 Potential future challenges

The previous sections discussed how trans, non-binary and intersex people could be fully included in the EU equality law framework. As we pointed out, there does not seem to be an obvious reason why the prohibition of sex discrimination could not be interpreted as also applying to discrimination based on gender identity, gender expression and sex characteristics, given the centrality of (binary) sex to gender stereotypes in society. In view of the pervasiveness of gendered stereotypes concerning sex, gender identity and gender expression, the full inclusion of trans, non-binary and intersex people in the EU equality law framework could present some challenges. Given the scope of this article, we briefly address two which we mentioned previously: measures related to pregnancy and sex/gender-segregated goods and services.

Pregnancy-related measures

As van den Brink and Dunne have explained,¹⁰⁰ EU law is relevant to pregnancy in two ways: it offers protection to anyone going through pregnancy, before and after the birth, through positive measures (such as paid leave)¹⁰¹ and it prohibits discrimination on the basis of pregnancy in the sphere of employment and occupation.¹⁰² On the basis of consistent CJEU case law, pregnancy-related discrimination is considered to be a form of direct discrimination on the basis of sex and more specifically direct discrimination against *women* as ‘only women can be refused employment on grounds of pregnancy’.¹⁰³ Both the Pregnant Workers Directive and the Recast Directive 2006/54/EC seem to limit the scope of the protective measures to women, by using terminology such as ‘unfavourable treatment of a woman related to pregnancy or maternity’,¹⁰⁴ ‘a woman’s biological condition during pregnancy’,¹⁰⁵ ‘female workers’¹⁰⁶ or by using female pronouns such as ‘her’.¹⁰⁷

The importance of protection against pregnancy-related unfavourable treatment cannot be disputed. Indeed, discrimination based on pregnancy is one of the most persistent forms of discrimination in

100 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 100.

101 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), *OJ L* 348, 28 November 1992, pp. 1-7 (hereafter the Pregnant Workers Directive). These measures are considered to be necessary to achieve substantive equality of women, see Recital 24 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ L* 204, 26 July 2006, pp. 23-36.

102 Recitals 23 and 24 and Article 2(2)(c) Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ L* 204, 26 July 2006, pp. 23-36.

103 CJEU, C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, 8 November 1990, para. 12.

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

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

106 Article 3(2) Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), *OJ L* 348, 28 November 1992, pp. 1-7.

107 Article 2 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), *OJ L* 348, 28 November 1992, pp. 1-7.

the EU.¹⁰⁸ While it also cannot be disputed that pregnancy-related discrimination predominantly affects (cisgender) women, the current regulatory framework is underinclusive and, arguably, is difficult to maintain. Indeed, trans men and non-binary people may also get pregnant and give birth. Given that a requirement of mandatory sterility in order to access gender-affirming treatment or legal gender recognition is considered to be a violation of fundamental rights¹⁰⁹ and an increasing number of EU Member States are considering or have already recognised non-binary official sex/gender markers,¹¹⁰ it may be expected that the number of pregnant people who do not (legally) identify as women will only continue to grow.

In our opinion, there is no convincing reason to conclude that pregnant men and non-binary people are explicitly excluded from the scope of the Pregnant Workers Directive or the Recast Directive 2006/54/EC. Indeed, even though an individual may not identify or be legally recognised as a woman, the objective of the pregnancy-related measures is to protect the individual against unfavourable treatment due to the fact that they are pregnant. Given the reality that – currently – only people with certain ‘typically’ female sex characteristics can get pregnant and give birth, pregnancy-related discrimination or protections are therefore always *sex*-based. However, in order to avoid legal uncertainty, either a clarification could be added to the Pregnant Workers Directive and the Recast Directive 2006/54/EC, by adding a reference to trans and non-binary people to the existing references to women, or their provisions could be formulated in a gender-neutral way, next to keeping an explicit reference to women. Clarifying the personal scope of these directives would not have any effect on their scope *ratione materiae*.

Beside the question of whether pregnant men and non-binary people fall within the scope of pregnancy-related protective measures in EU law, another important issue needs to be addressed. Although trans men and non-binary people of reproductive age will probably not be as vulnerable to stereotypical expectations that they will soon ‘get pregnant and reduce their activities on the labour market’ as young (cisgender) women, they are likely to be confronted with additional prejudice, harassment and stereotypical attitudes when they (try to) get pregnant and give birth.¹¹¹ Indeed, a pregnant trans man or non-binary person would be likely to be regarded as transgressing socially accepted gender norms. For this reason, it is important that gender identity, gender expression (and to a lesser extent sex characteristics) are included, either explicitly or through judicial interpretation, in the EU gender equality law framework.

Sex/gender segregated goods and services

Another future challenge that has recently received a lot of attention is related to the provision of publicly accessible goods and services reserved for people of one sex or gender (mostly women). Goods and services that are segregated along sex/gender lines are very common throughout the EU.¹¹² While in some cases sex/gender segregation is required by law, for instance sanitary facilities at work, segregated goods or services are usually based on considerations of privacy, safety and social morality. In recent years, much of public debate has concerned the access of trans women (and to a lesser extent non-binary people) to ‘women-only spaces’, especially in light of the increasing acceptance of gender self-determination in procedures of legal gender recognition across Europe. Several so-called ‘gender-critical’ feminist activists and scholars fear that the inclusion of trans women in women-only spaces would

108 See European Commission (2022), *A comparative analysis of gender equality law in Europe 2021*, available at <https://op.europa.eu/en/publication-detail/-/publication/e33e56da-8fa2-11ec-8c40-01aa75ed71a1/language-en/format-PDF/source-search>; Masselot, A., Caracciolo Di Torella, E. and Burri, S. (2013) *Fighting discrimination based on the grounds of pregnancy, maternity and parenthood. The application of EU and national law in practice in 33 European countries*, available at <https://op.europa.eu/en/publication-detail/-/publication/f115fb16-787b-41b5-b41a-b407790cf701/language-en/format-PDF/source-252567618>.

109 ECtHR 10 March 2015, 14793/08, *Y.Y. v Turkey*; 6 April 2017, 79885/12, 52471/13, 52596/13, *A.P., Garçon and Nicot v France*.

110 Including Austria, Belgium, Denmark, Germany and Malta.

111 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 101.

112 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 109.

put (cisgender) women at higher risk of sexual harassment and violence.¹¹³ Some therefore call for the recognition of ‘sex-based rights’ and the importance of female embodiment in order to protect (cisgender) women’s rights.¹¹⁴

The EU equality law framework explicitly allows the provision of sex/gender-segregated goods and services. Indeed, Directive 2004/113/EC states that it does not ‘preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.’¹¹⁵ In this light, Recital 16 explains that a legitimate aim for introducing sex/gender segregation may be, for instance, the protection of victims of sex-related violence, reasons of privacy and decency, the promotion of gender equality, freedom of association and the organisation of sporting activities.

Since the means to achieve those aims must be appropriate and necessary, it is clear that a general blanket ban of all trans women (or non-binary people) from receiving women-only public goods or services, because they are not ‘sufficiently female’ in the eyes of a gatekeeper, is hard to reconcile with the principle of proportionality. Indeed, empirical research does not support the claim that trans-inclusionary women-only spaces would facilitate higher levels of sexual harassment or violence.¹¹⁶ Besides, given the fact that sex/gender segregation is most often interpreted in a binary way (i.e. separate goods or services for men and/or women), a strict interpretation of what ‘single-sex/gender’ means could lead to a general exclusion of non-binary people. However, it cannot be fully ruled out that in some circumstances differential treatment of trans, non-binary and/or intersex people could be justified in light of a legitimate aim.¹¹⁷ As any such exclusion would be likely to be challenged before the courts or equality bodies, the limits to proportionality will have to be crystallised over time in case law.¹¹⁸ Moreover, as we explained above, the prohibition of sex-based discrimination naturally also includes a prohibition of discrimination based on gender identity, gender expression and sex characteristics. This finding supports a narrow interpretation of the possibility to exclude trans, non-binary and/or intersex persons from sex/gender segregated goods and services.¹¹⁹ In the absence of any relevant case law of the CJEU, an explicit clarification in Directive 2004/113/EC could reduce legal uncertainty.

Given the rapidly increasing recognition of non-binary people in society and law, another issue, which will need to be settled soon, concerns inclusion of people who do not identify as men or women in a society that takes the binary for granted. Indeed, beside the issue of whether non-binary people could be legally excluded from accessing goods or services that are exclusively reserved for women or men, the question arises as to whether they should be forced to make a choice in the first place. Under the prohibition of discrimination on the basis of gender identity, a non-binary person could legally challenge the absence of services or goods that match their gender identity when such goods or services are offered separately to

113 Portuondo, L. (2018) ‘The overdue case against sex-segregated bathrooms’, *Yale Journal of Law and Feminism*, Vol. 29, pp. 465-526.

114 See Cooper, D. and Emerton, R. (2020) ‘Pulling the thread of decertification: What challenges are raised by the proposal to reform legal gender status?’, *Feminists@Law*, Vol. 10(2), p. 10.

115 Article 4(5), Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *OJ L* 373, 21 December 2004, pp. 37-43.

116 Hasenbush, A., Flores, A. R. and Herman, J. L. (2018) ‘Gender identity nondiscrimination laws in public accommodations: a review of evidence regarding safety and privacy in public restrooms, locker rooms, and changing rooms’, *Sexuality Research and Social Policy*, <https://doi.org/10.1007/s13178-018-0335-z>, pp. 1-14.

117 See Sharpe, A. (2020) ‘Will gender self-determination undermine women’s rights and lead to an increase in harms?’, *Modern Law Review*, Vol. 83(3), pp. 539-557; Cooper, D. (2019) ‘A very binary drama: The conceptual struggle for gender’s future’, *Feminists@Law*, <https://doi.org/10.22024/UniKent/03/fal.655>.

118 See a recent decision by the Netherlands Institute for Human Rights in which it held that a trans woman, who had not undergone genital surgery and was excluded from the women’s sanitary facilities in her local gym, was directly discriminated against on the basis of sex. The Institute held that there were less restrictive means available to address concerns of cisgender women than a blanket ban. See *College voor de Rechten van de Mens*, Case 2021-139, 25 November 2021.

119 Given the prohibition of discrimination based on gender identity, gender expression and sex characteristics, and the generally observed move in Europe and around the world towards the recognition of gender self-determination as a fundamental right, a blanket exclusion of individuals who are not legally registered as women but who identify as women from ‘women-only spaces’, solely because of their official sex/gender registration, would arguably be disproportionate.

men and women only. While this issue goes beyond the scope of this article, it is clear that policy-makers should soon start paying attention to the position of non-binary people in almost inherently binary societies. In this light, Clarke has already suggested three possible solutions:¹²⁰

- Recognition: the explicit recognition of non-binary people would not only lead to the addition of categories for official sex/gender registration, but would also lead to the creation of separate spaces in society for people who do not identify as men or women. Taking the example of sex/gender-segregated public sanitary facilities, separate facilities would have to be available for non-binary people;
- Neutrality:¹²¹ under a neutrality approach, sex/gender segregation in goods and services would become the exception. This approach would probably lead to a fundamental and inclusive redesign of society in order to guarantee gender neutrality, while still maintaining legitimate expectations of privacy and safety;
- Integration: integrating non-binary people in current society would strongly resemble the *status quo*. Indeed, currently, people who are non-binary but are confronted with goods or services segregated along sex/gender binary lines often have to choose one category over the other. If the integration model were to be followed, it would become hard to simply exclude non-binary people from single-sex spaces without a clear and convincing justification for doing so.

Each of these three options would generate benefits and new challenges. In any case, it does not seem necessary to adopt a ‘one-size-fits-all’ solution. Indeed, the prohibition of discrimination on the basis of gender identity, gender expression and sex characteristics requires a case-by-case analysis and should therefore be sufficiently flexible to allow a balance of interests, taking into account the specific circumstances at hand.¹²²

5 Conclusion

Trans, non-binary and intersex people are among the most vulnerable communities in the EU. It is striking, however, that EU anti-discrimination law does not explicitly protect them against discrimination on grounds of gender identity, gender expression and sex characteristics. Some progress towards more protection has been made in the case law though: through an extensive interpretation of the ground of sex, the CJEU has protected people who are victims of discrimination on the ground of ‘gender reassignment’. However, the protective scope of EU anti-discrimination law remains limited to a binary understanding of sex and the CJEU continues to place particular importance on gender-affirming surgery. Moreover, EU anti-discrimination law does not take into account some specificities of trans people’s experiences in life.

Several ways forward to overcome the limitative scope of protection have been examined: an extensive interpretation of the existing ground of ‘sex’, the explicit addition of three new grounds to the EU equality law framework, the explicit clarification in the EU equality law framework that ‘sex’ also includes gender identity, gender expression and sex characteristics, and the use of the open-ended clause within the EU equality law framework. Although the explicit addition of three new grounds in primary law and secondary law may appear to be the most suitable solution, this nonetheless comes with some challenges, such as in the case of measures related to pregnancy and sex/gender-segregated goods and services.

¹²⁰ Clarke, J. (2019) ‘They, them and theirs’, *Harvard Law Review*, pp. 901-902.

¹²¹ This could also be described as gender *inclusivity*.

¹²² Clarke, J. (2019) ‘They, them and theirs’, *Harvard Law Review*, pp. 901-902, 945.

Gender equality and pensions: time for an EU strategy to achieve substantive equality between men and women in old age

Sabrina D'Andrea*

Introduction

That women frequently earn less than men throughout their working life is no secret; however, inequalities between men and women in pensions are given considerably less attention in the gender equality debate. Yet gender inequalities become more pronounced with old age and the gender pension gap is considerably larger than the gender pay gap: on average in the EU, women receive a pension that is 30 % lower than that received by men, whereas the pay gap amounts to 14 %.¹

The EU has partially addressed the question of gender inequalities in pensions through legislation, case law and policy coordination. However, it has not always done so in a productive or satisfactory way: its efforts have not necessarily contributed to substantive equality for women and many European pension systems still embody systemic gender inequalities. While equal opportunities for men and women to acquire pension rights are enshrined in Pillar 15 of the European Pillar of Social Rights, it is crucial that the EU makes pension equity a key priority of its gender equality policy.

This article critically evaluates the EU's involvement with the issue of gender equality and pensions to date and identifies how the EU could move forward to address the pension gap between men and women

The first part of the article describes how inequalities in the labour market are reflected and accentuated by the design of pension schemes and explores the different ways through which laws and policy can remediate this, distinguishing between formal and substantive equality.

The second part details how the legal framework through which the EU influences gender equality and pensions is based on the principle of equal treatment and embodies a formal equality strategy. It explains how the framework developed by the EU since the 1970s has been expanded by the case law of the CJEU and depicts how the latter has impeded any substantive gender equality endeavour in relation to pensions.

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1 EUROSTAT (2021), 'Closing the gender pension gap', <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20210203-1>; EUROSTAT (2022), 'Gender pay gap in unadjusted form', https://ec.europa.eu/eurostat/databrowser/product/view/SDG_05_20?lang=en; See https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en. In this article, the term 'pension' encompasses both statutory and non-statutory pension schemes.

The third part looks at how the CJEU has made efforts towards the application of substantive equality in relation to pension entitlements for part-time working women, starting from the ground-breaking *Bilka*² judgment in 1984, to more recent cases such as *Villar Laiz*³ and *Elbal Moreno*,⁴ in which the Court to a certain extent moved away from a strictly formal conception of equality and looked more closely at the actual consequences of the application of pension scheme rules.

The fourth part considers ways forward for the EU in order to contribute to substantive gender equality in pensions. It calls for the EU and in particular the Commission to make a clear statement in relation to pension care credits, which are an essential way to guarantee gender equality in old age. In addition, it advocates for the revision of the Framework Agreement on Part-time Work⁵ adopted by the Council in 1997, which needs to incorporate the more recent and positive developments of EU case law. Finally, it advises the Commission to mainstream a substantive equality strategy into every policy coordination initiative of the EU in relation to pensions, moving away from a solely formal approach to equality.

1 Gender inequalities in pensions and the law

1.1 From unequal labour markets to unequal pensions: the gender pension gap

Pensions are a fertile ground for gender inequalities. Throughout the EU, the gender pension gap is considerable, amounting to an average of 30 %.⁶ This is fuelled by the gender pay gap, but also by the design of pension schemes, which reflect and accentuate labour market inequalities between men and women. By rewarding full-time, continuous employment over careers interrupted because of childcare or part-time work, pension schemes privilege male working patterns, leaving women with lower pensions on average and an increased risk of poverty in old age.⁷ Even when time spent outside the labour market because of caring responsibilities is taken into account in the calculation of pension benefits, such efforts are insufficient to properly compensate women for the time spent outside of formal employment.⁸ In addition, the horizontal labour market segregation market causing women to be over-represented in sectors and occupations offering lower pay contributes greatly to the gender pay gap and to the pension gap between men and women.⁹ Hence, women's lower pension income is due to inequalities in the labour market throughout their life course, but also to the way that their diverse paid and unpaid working patterns are treated by pension schemes.¹⁰ Women often earn insufficient entitlements to be

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- 2 CJEU, Case 170/86, *Bilka Kaufhaus GmbH v Karin Weber von Hartz*, 13 May 1986, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61984CJ0170>.
 - 3 CJEU, Case C-161/18, *Violeta Villar Laiz v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*, 8 May 2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0161>.
 - 4 CJEU, Case C-385/11, *Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS)*, 2 November 2012, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0385>.
 - 5 Council Directive 1997/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (the Part-time Work Directive), OJ L 14, 9–14, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31997L0081>.
 - 6 EUROSTAT (2021), 'Closing the gender pension gap', <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20210203-1>.
 - 7 Luckhaus, L., Ward, S. (1997), 'Equal pension rights for men and women: a realistic perspective', *Journal of European Social Policy*, Vol. 7, No. 3, pp. 237–253; Sefton, T., Evandrou M., Falkingham J. (2010), 'Family ties: Women's work and family histories and their association with incomes in later life in the UK', *Journal of Social Policy*, Vol. 40, No. 1, pp. 41–69.
 - 8 Vlachantoni, A. (2019), 'Socio-economic inequalities in later life: the role of gender', in: Westwood, S. (ed.), *Ageing, diversity and equality: Social justice perspectives*, Oxford and New York, Routledge, pp. 25–35, 30, <https://eprints.soton.ac.uk/417102/>; Buckner, L., Yeandle, S. (2015), *Valuing carers 2015. The rising value of carers' support*, London, Carers UK, https://www.carersuk.org/for-professionals/policy/policy-library?task=download&file=policy_file&id=5479.
 - 9 European Commission (2017), Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, EU Action Plan 2017–2019: Tackling the gender pay gap, COM(2017) 678 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017DC0678&from=EN>.
 - 10 Vlachantoni, A. (2019), 'Socio-economic inequalities in later life: the role of gender' in: Westwood, S. (ed.), *Ageing, diversity and equality: Social justice perspectives*, Oxford and New York, Routledge, p. 30, <https://eprints.soton.ac.uk/417102/>.

economically independent in old age, which ultimately entrenches their dependency on a male partner and fails to deliver income security, which is the primary objective of pensions.¹¹

In the EU, the risk of poverty in later life is considerably higher for women than for men.¹² This situation is likely to be exacerbated by the effects of the COVID-19 pandemic, as women have taken on a disproportionate burden of unpaid care work as a result of lockdowns, school closures and the unavailability of care facilities.¹³ Without any adequate corrective gender equality measures, women are likely to find themselves in an even more vulnerable position in the years after the pandemic, with the risk of widening the pension gap in the future.¹⁴

1.2 Legal remedies for addressing pensions inequalities: providing formal or substantive equality?

Policies and laws have a crucial role to play in securing equal opportunities for women to acquire pension rights. However, the way that equality is understood has an impact on the policy outcome.

One way to conceive equality is equal treatment, that is equality before the law. This conception of equality requires that men and women are granted the same treatment and prohibits different treatment according to sex in laws and regulations. While ensuring consistency of treatment, this conception can be criticised as ‘procedural’ and ‘formal’, since it seeks to ensure equality in the rules, not in the outcome.

Another way to envision gender equality is to focus on the necessity of delivering a just outcome, privileging equity over equality.¹⁵ This conception, often labelled as ‘substantive equality’ is more context-sensitive and aims to deliver a just outcome, even if it may mean allowing for specific rights in favour of women, whether permanent (such as maternity protection) or temporary (positive actions).

This article makes the claim that in order to deliver substantive equality for women in pensions, the European Union and its Member States should not only focus on equality of treatment, but also pay attention to the context and the effect of the application of pension rules, so as to guarantee equality in substance and not only in form. Welfare states and their pension schemes have historically provided specific rights for women in order to compensate for their vulnerable position in society, through for example lower pensionable ages, widows’ benefits or mothers’ pensions.¹⁶ These mechanisms have relied on normative gender stereotypes regarding women’s role in the home and their dependency on a traditional male breadwinner’s wage, but also on the effective existence of gendered differences in work

11 Luckhaus, L. (2000) ‘Equal treatment, social protection and income security for women’, *International Labour Review*, Vol. 139, pp. 149-178, p. 149; Gilbert, N. (ed.) (2006), *Gender and social security reform: What’s fair for women?*, New Brunswick, Transaction Publishers.

12 European Commission, Social Protection Committee (2021), *The 2021 Pension Adequacy Report: current and future income adequacy in old age in the EU*, Vol. 1, p. 50, <https://op.europa.eu/en/publication-detail/-/publication/4ee6cadd-cd83-11eb-ac72-01aa75ed71a1>.

13 Böök, B., van Hoof, F., Senden, L., Timmer, A. (2020), ‘Gendering the COVID-19 crisis: a mapping of its impact and call for action in light of EU gender equality law and policy’, *European Equality Law Review*, No. 2, <https://op.europa.eu/en/publication-detail/-/publication/6b9c44bf-2ae6-11eb-9d7e-01aa75ed71a1>.

14 European Parliament (2021), ‘COVID-19 and its economic impact on women and women’s poverty’, https://www.europarl.europa.eu/RegData/etudes/STUD/2021/693183/IPOL_STU%282021%29693183_EN.pdf.

15 For further discussion on the concept of substantive gender equality see Fredman, S. (2016), ‘Substantive equality revisited’, *International Journal of Constitutional Law*, Vol. 14, Nr. 3, pp. 712-738; Barnard C., Hepple B. (2000), ‘Substantive equality’, *Cambridge Law Journal*, Vol. 59, Nr. 3 pp. 562-585; Schiek, D. (2016), ‘Broadening the scope and the norms of EU gender equality law’, D’Andrea, S. (2021), *Fluctuating conceptions of gender equality in EU law: a conceptual, legal and political analysis of EU policy, law and case law concerning work and care (1980-2020)*, PhD thesis, European University Institute, <https://cadmus.eui.eu/handle/1814/70998>.

16 Luckhaus, L. (2000), ‘Equal treatment, social protection and income security for women’, *International Labour Review*, Vol. 139, p. 149.

and caring patterns. Hence, these mechanisms have a redistributive effect that should not be overlooked, and that can to a certain extent help alleviate poverty for women in old age.¹⁷

Formal equality of treatment has, on the other hand, been a more modern endeavour of gender equality policy, which has ordered social policy and pension schemes to treat women the same as men and vice-versa. While it is desirable for the law to treat all citizens alike, this approach does not go all the way to ensure that women have the same opportunities as men to acquire pension rights. Indeed, if women are not able to comply with male working patterns, and if entitlements continue to be modelled upon male standards, equal treatment could indirectly increase women's dependency on a male wage and lead to higher risks of female poverty.¹⁸ Indeed, equal treatment can lead to the levelling-down of social provisions and deprive women of preferential treatment, rather than making this treatment available to both men and women. Finally, equal treatment in relation to pensions poses problems of transitional justice, as women's working patterns differ greatly across generations, with older women being less likely to having assumed full-time working patterns. In this context, it is women who could be asked to 'pay the price' of equal treatment. Hence, guaranteeing equal treatment cannot be seen as a sufficient step in the quest for gender equality in pensions.

Another set of measures could make a significant step in the quest for substantive gender equality in pensions: measures compensating for the consequences of parenthood and caring responsibilities in pensions. An example of this is pension care credits, which are discussed later in this article. However, for pension calculation rules to be fairer, pensions entitlements would need to be based on criteria other than work history and include also non-contributory criteria, such as age, health or other determinants of social or economic status. This would facilitate the coverage of those deviating from standard, 'male' schemes of working patterns, such as unpaid carers and women, who limit their engagement on the labour market because of care obligations and face difficulties in earning social security entitlements.¹⁹

While other interventions are needed to address the pension gap, such as improving childcare provision to allow women to be able to reconcile their working and caring responsibilities, as well as direct measures to improve the more equal sharing of care responsibilities between men and women, this article focuses mainly on the issue of the design of pension schemes and its effect.

The next sections assess the strategies employed by the EU to address gender inequalities in pensions, highlighting their gaps and criticalities in order to indicate some ways forward for the EU to implement substantive equality in pensions.

2 The preference of EU law and case law for formal equality over substantive equality in relation to pensions

2.1 The EU legal framework: establishing equal treatment between the sexes in pensions

The current EU legal framework for equality in relation to social security and pensions has its roots in the 1970s. In 1979, the then European Economic Community adopted the Directive on equal treatment for men and women in statutory social security (the Statutory Social Security Directive),²⁰ followed in

17 Especially for widows' pensions and care credits. See European Commission, Social Protection Committee (2021), *The 2021 Pension Adequacy Report*, p. 118.

18 See Sohrab, J. (1996), *Sexing the benefit: Women, social security and financial independence in EC sex equality law*, Dartmouth.

19 International Labour Organization (2011), *World Social Security Report 2010/11 Providing coverage in times of crisis and beyond*, p. 14, https://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_142209/lang-en/index.htm; European Commission, Social Protection Committee (2021), *The 2021 Pension Adequacy Report*, p. 118.

20 Council Directive 1979/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Statutory Social Security Directive), OJ L 6, pp. 24–25, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31979L0007>.

1986 by the Directive on equal treatment for men and women in occupational social security schemes (the Occupational Social Security Directive).²¹ Whilst the first instrument applies to social insurance and benefits provided by the state, the latter regulated occupational schemes, that is those schemes provided to workers of a certain business, area or sector as a complement to or replacement of benefits provided by the state,²² and is now incorporated into the Recast Directive of 2006.²³

The two Directives mentioned above (the ‘Social Security Directives’) established that men and women were to be treated equally in social security and that there should be no direct or indirect discrimination on the basis of sex. This regarded the scope of the schemes, the conditions of accession, the obligation to contribute and the calculation of contributions.²⁴ At the same time, the Social Security Directives allowed for some exceptions to equal treatment: benefits meant to protect women in the event of maternity, sex-based pensionable ages and survivor’s pensions were excluded from the scope of equality.²⁵ These derogations were mainly aimed at safeguarding the specific social protection in favour of women, such as lower pensionable age and widows’ benefits, which were traditional features of social protection meant to protect vulnerable women. In addition, since the EU lacked and still lacks formal competence in relation to social security,²⁶ and the cost of making these provisions available to men would have implied significant costs for Member States and businesses, it was important that the directives did not impose excessive financial burdens on Member States.²⁷ These exceptions were considered temporary, but also sometimes necessary to achieve the overarching objectives of the directive.²⁸ As will be explored below, the derogations of the Social Security Directives have progressively been partially eroded by the case law of the CJEU, not always to the immediate advantage of women.

2.2 Broadening and expanding the principle of equal treatment in pensions

2.2.1 *Equal treatment in relation to pensionable age: Barber and subsequent case law*

A common feature of many pension systems in the past was the possibility or the obligation for women to retire earlier than men, based on the assumption that they would need to take care of their husband, usually older, and their family.²⁹ Differences in pensionable ages have ambivalent repercussions on the situation of women. On the one hand, earlier pensionable ages for women rely on gender stereotypes and lead to unequal opportunities in employment and shorter working lives, which in turn fuel the gender pension gap when pensions are calculated on the basis of years of participation in the labour market. On the other hand, however, the possibility to retire earlier has also been conceived as a form of compensation for women’s lifelong double-burden and is often supplemented by other advantages such as pension credits for mothers. Hence, equalising pensionable ages between men and women can contribute to increasing women’s chances of gaining equal pension entitlements and promote their advancement in senior positions. However, it also prompts women to work longer in order to earn the right to a pension when equality is achieved by raising the pension age of women.

21 Council Directive 1986/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (Occupational Social Security Directive), OJ L 225, pp. 40–42, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31986L0378>.

22 In 2004, this principle was extended to private insurances and pensions schemes by Article 5 of Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (the Goods and Services Directive), OJ L 373, pp. 37–43, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0113>.

23 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (the Recast Directive), OJ L 204, pp. 23–36, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0113>.

24 Article 4 of the Statutory Social Security Directive and Article 5 of the Occupational Social Security Directive.

25 Articles 4.2 and 7.1 of the Statutory Social Security Directive; Articles 5.2 and 9 Occupational Social Security Directive.

26 It has only competence to support and complement national activities, see Article 153 TFEU.

27 Van der Vleuten, A. (2007), *The price of gender equality: Member States and governance in the European Union*, Aldershot and Hampshire, Ashgate, p. 120.

28 CJEU, Case C-9/91, *The Queen v Secretary of State for Social Security, ex parte Equal Opportunities Commission*, 7 July 1992, 13, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61991CJ0009>.

29 Fredman, S. (1996), ‘The poverty of equality: Pensions and the ECJ’, *Industrial Law Journal*, Vol. 25, pp. 91–109.

Both EU Social Security Directives allowed for the existence of difference pensionable ages for men and women. However, in 1990, with its historical ruling in *Barber*,³⁰ the Court invalidated this exception in occupational social security schemes, claiming that it amounted to sex discrimination. The *Barber* case shook the equality landscape of the time and is still remembered as a landmark of EU gender equality law. However, *Barber* has also been blamed for applying a 'formal if not formalist approach' to equality and embodying a 'strictly gender-blind treatment of men and women' which disregards existing differences between men and women.³¹ Indeed, as some have emphasised, the equalisation of pension age was not necessarily an advance for gender equality, if it meant increasing women's pension age to match that of men.³²

The CJEU had provided that *Barber* was not retroactive, allowing Member States to adapt their legislation and to consider issues of transitional justice. In addition, it was able to temporarily avoid the levelling down of provisions by ruling that, until the adoption of complying measures by pension funds, equality was to be reached by treating men as favourably as women (also known as the 'Barber window').³³ Nonetheless, the CJEU allowed that when schemes changed their rules so as to provide for equal pensionable ages, they could level down the provision concerned.³⁴ By paving the way for schemes to raise women's pensionable age from 60 to 65, the CJEU did not consider the argument that equality was not to be achieved by withdrawing rights from women.³⁵

Lower pensionable ages for women are now prohibited in occupational pension schemes under EU law.³⁶ However, these rulings have been rightly criticised for not showing any commitment to improving the lives of either sex, although 'technically producing equality'.³⁷ While lower pensionable ages for women might not be an optimum *desiderata*, it is questionable whether this formal, procedural strategy to gender equality, insisting on equality of treatment rather than taking into consideration women's particular situation, can be considered enough to achieve substantive equality. Unsurprisingly, the vast majority of pensionable age cases concerned male applicants, suggesting that the immediate beneficiaries of the new measures were not necessarily women.³⁸

2.2.2 The end of widow's pensions: allowing for a levelling-down of rights

Another historical legal remedy for gender equality has been the provision of pensions or benefits to women in the event of the death of their spouse. All Member States have some kind of survivors' schemes, which benefit a great majority women.³⁹ However, welfare states and their social security schemes traditionally reserved these advantages for women, intended as a substitute income for

30 CJEU, Case C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, 17 May 1990, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61988CJ0262>.

31 Peters, A. (1996), 'The many meanings of equality and positive actions in favour of women under European Community law': A conceptual analysis', *European Law Journal*, Vol. 2, No. 2, pp. 177-196, p. 180.

32 Egan, M. (1998), 'Gendered integration', *Women & Politics*, Vol. 19, No. 4, pp. 23-52.

33 CJEU, Case C-408/92, *Smith and others v Avdel Systems Ltd*, 28 September 1994, <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:61992CJ0408>, paragraph 17.

34 CJEU, Case C-408/92 *Smith and others v Avdel Systems Ltd*, 28 September 1994, <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:61992CJ0408>.

35 Kenner, J. (2002), *EU employment law: From Rome to Amsterdam and beyond*, Oxford, Hart Publishing, p. 353.

36 The Court has significantly expanded the scope of application of this principle, by considering that schemes applicable to civil servants governed directly by statute constituted pay for the purpose of Article 119 of the Treaty, which prohibits unequal pensionable ages; CJEU, Case C-7/93, *Bestuur van het Algemeen Burgerlijk Pensioenfonds v G. A. Beune*, 28 September 1994, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0007>.

37 Luckhaus, L., Ward, S. (1997), 'Equal pension rights for men and women: a realistic perspective', *Journal of European Social Policy*, Vol. 7, No. 3; Ellis, E. (1998), 'Recent developments in European Community sex equality law', *Common Market Law Review*, Vol. 35, No. 2, pp. 379-408, at p. 408.

38 Together with *Barber* and *Beune* cited above, the following cases all concerned male claimants: CJEU, Case C-109/91, *Gerardus Cornelis Ten Oever v Stichting Bedrijfspensioenfonds*, 6 October 1993; CJEU, Case C110/91, *Michael Moroni v Collo GmbH*, 14 December 1993; CJEU, Case C-200/91, *Coloroll Pension Trustees Ltd v James Richard Russell*, 28 September 1994; CJEU, Case C-132/92, *Birds Eye Walls Ltd. v Friedel M. Roberts*, 9 November 1993; CJEU, Case C-152/91, *David Neath v Hugh Steeper Ltd*, 22 December 1993.

39 European Commission, Social Protection Committee (2021), *The 2021 Pension Adequacy Report*, p. 15.

housewives dependent on a male wage. When they were initially implemented in the 1980s, both EU Social Security Directives excluded these benefits from their scope, allowing for differential treatment of widows compared to widowers.⁴⁰ The Court ruled in 1993 in *Ten Oever* that the restriction of benefits to female survivors in occupational social security schemes was unlawful under the Treaty principle of equal pay. The Court progressively extended this principle to statutory social security, by ruling that widowers should be treated the same as widows.⁴¹

At first sight, these developments in favour of equality of treatment might appear to serve the cause of gender equality. Nevertheless, the cases decided by the Court in this matter benefitted more men than women, as they mostly concerned male widowers who were excluded from the right to a widowers' pension or who had to pay higher contributions in view of such schemes.⁴² Most importantly, the principle of equal treatment in this context did not guarantee a levelling-up strategy for achieving equality in the long term. Although the Court insisted that before any new equality measures were taken, the disadvantaged class should be granted the same rights as the favoured one,⁴³ once the equalisation measures were adopted, there was no guarantee of the preservation of women's rights as widows. Hence, in the name of formal equality, the Court required that social security schemes stopped relying on women's dependence on a male as single breadwinner, without however acknowledging that many women, especially in old age, faced situations of poverty and dependence and would not be advantaged by the implementation of strict equality of treatment. While the intention of the CJEU may not have been to ban these benefits all together, the effect of its case law may have been detrimental to survivors' pensions which, given women's lower pension entitlements combined with their longer life expectancy in relation to men, play a key role in reducing gender gaps in pension entitlements.⁴⁴

Equality in the context of survivors' pensions has been conceived exclusively in terms of formal equal treatment, removing any specific rights attributed to women in view of their particular position in society, without however ensuring that they would not be disadvantaged by the application of formal equality. This is where the EU should intervene to prevent national legislatures and pension schemes from removing social protection as a result of equality of treatment, for example by refining the principle of non-regression and use it as a shield against the lowering of social protection.

2.3 The CJEU's refusal to allow for positive actions in relation to pensions: banning pension care credits in the name of formal equality?

The CJEU has also consistently refused to allow for the existence of positive actions in relation to pensions. This has been clearly expressed especially in relation to pension age, where it has consistently argued that lower pensionable ages could not be considered as positive actions for women compensating

40 Article 3.2 Statutory Social Security Directive; while the Occupational Social Security Directive applied to survivors' benefits (Article 4.b) but provided Member States with the possibility to defer the application of equal treatment in relation to widows' pensions (Article 9.b) from May 1990.

41 CJEU, Case C-373/89, *Caisse d'assurances sociales pour travailleurs indépendants "Integrity" v Nadine Rouvroy*, 21 November 1990, <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:61989CJ0373>; CJEU, Case C-337/91, *A. M. van Gemert-Derks v Nieuwe Industriële Bedrijfsvereniging*, 27 October 1993, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61991CJ0337>; CJEU, Case C-338/91, *H. Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel*, 27 October 1993, <https://eur-lex.europa.eu/legal-content/SV/TXT/?uri=CELEX:61991CJ0338>; CJEU, Case C-147/95, *Dimossia Epicheirissi Ilektrismou (DEI) v Efthimios Evrenopoulos*, 17 April 1997, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CJ0147>.

42 Ellis, E. (1998), 'Recent developments in European Community sex equality law', *Common Market Law Review*, Vol. 35, No. 2, p. 329.

43 CJEU, Case C-200/91, *Coloroll Pension Trustees Ltd v James Richard Russell*, 28 September 1994, paragraph 32.

44 Camaji, L. (2016), 'Avantages familiaux de retraite: quelle(s) inégalité(s) pour la retraite entre les femmes et les hommes?' (Retirement family benefits: what (in)equality for retirement between women and men?), *Regards*, Vol. 50, No. 2, pp. 137-146, at p. 138, <https://www.cairn.info/revue-regards-2016-2-page-137.htm>; European Commission, Social Protection Committee (2021), *The 2021 Pension Adequacy Report*, pp. 15-18.

for their specific role within the family and the disadvantages suffered during their professional life, not considering it to be an appropriate measure to advance women's careers.⁴⁵

Similarly, the CJEU has refused to allow for the existence of positive actions in relation to social security in its judgments concerning pension care credits. These mechanisms provide pension entitlements to carers, parents or mothers in view of career interruptions linked to family reasons, care responsibilities or the fact of having children. Care credits have an obvious potential for gender equality and constitute a key redistribution mechanism from male breadwinners to female caregivers.⁴⁶ To the extent that they recognise and compensate for the existence of differentiated life courses, they embody a substantive conception of gender equality.⁴⁷

In most EU Member States, some kind of pension credits for childcare breaks exists, sometimes qualified as 'mothers' pensions', which are however in most cases available to men under certain conditions.⁴⁸ The CJEU has expressed its opinion several times in the last two decades regarding the lawfulness of pension care credits. All the cases concerned fathers who had initiated legal actions to contest the rejection of their request to receive the credit, and in each case the CJEU considered that the pension care credit in question was in breach of EU gender equality law.⁴⁹ While in *Griesmar*,⁵⁰ *Moufflin*⁵¹ and more recently *WA v INSS*,⁵² the contested provision was available to mothers only,⁵³ the case of *Leone* concerned a pension care credit provided to both mothers and fathers.⁵⁴

In *Griesmar* and *WA v INSS*, the French and the Spanish government argued that the credit was meant to offset the occupational disadvantages arising for female workers as a result of bringing up children. The Court refused that such an argument could justify the measures, considering that this did not prevent women's situation from being 'comparable' to that of male civil servants who had taken on care responsibilities and had thereby been exposed to the same career-related disadvantages.⁵⁵ The CJEU considered that, being in comparable situations, male and female civil servants should be treated the same with regard to childcare pension credits.

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- 45 Notwithstanding the arguments put forward by the Italian and Greek governments in response to the infringement procedures initiated by the Commission in the early 2000's, see CJEU, Case C-46/07, *Commission of the European Communities v Italian Republic*, 13 November 2008, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62007CJ0046>; CJEU, Case C-559/07, *Commission of the European Communities v Hellenic Republic*, 26 March 2009, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62007CA0559>.
- 46 European Commission, Social Protection Committee (2021), *The 2021 Pension Adequacy Report*, p. 120.
- 47 Vlachantoni, A. (2008), 'Care credits in European pension systems', *Discussion Paper No. 0801*, Centre for Research on Ageing, School of Social Science, University of Southampton, UK, Discussion Paper No. 0801, https://eprints.soton.ac.uk/166799/1/Microsoft_Word_-_CRA_DP_0801.pdf.
- 48 Mostly in statutory pension schemes, and to a minor extent in occupational schemes, European Commission, Social Protection Committee (2021), *The 2021 Pension Adequacy Report*, p. 119.
- 49 In *Griesmar* and *Moufflin*, the pension care credits were condemned on the basis of the Treaty article on equal pay, whereas in *WA v INSS*, the Court considered the pension care credit to be in breach of the Statutory Social Security Directive.
- 50 CJEU, Case C-366/99, *Joseph Griesmar v Ministre de l'Economie*, 29 November 2001, <https://eur-lex.europa.eu/legal-content/GA/ALL/?uri=CELEX:61999CJ0366>.
- 51 CJEU, Case C-206/00, *Henri Moufflin v Recteur de l'académie de Reims*, 13 December 2001, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A2001%3A695>.
- 52 CJEU, Case C-450/18, *WA v Instituto Nacional de la Seguridad Social (INSS)*, 12 December 2019, <https://curia.europa.eu/juris/liste.jsf?num=C-450/18&%3Blanguage=EN>.
- 53 *Griesmar* concerned a French law granting additional service credit to female civil servants who have raised children while *Moufflin* considered a French civil servant scheme providing for immediate entitlement to a civil pension for female public servants in the event that their husband suffered from a disability or incurable illness making it impossible for him to undertake employment, and in *WA v INSS* a Spanish law reserved pension supplements to women with at least two children.
- 54 CJEU, Case C-173/13, *Maurice Leone and Blandine Leone v Garde des Sceaux*, 17 July 2014, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0173>.
- 55 CJEU, Case C-366/99, *Joseph Griesmar v Ministre de l'Economie*, 29 November 2001, <https://eur-lex.europa.eu/legal-content/GA/ALL/?uri=CELEX:61999CJ0366>, paragraph 45, CJEU, Case C-206/00, *Henri Moufflin v Recteur de l'académie de Reims*, 13 December 2001, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A2001%3A695>, paragraph 29 ; CJEU, Case C-450/18, *WA v Instituto Nacional de la Seguridad Social (INSS)*, 12 December 2019, <https://curia.europa.eu/juris/liste.jsf?num=C-450/18&%3Blanguage=EN>, paragraph 53.

This abstract comparability approach is highly problematic in terms of achieving gender equality. Considering men and women to be comparable or in similar situations in relation to the upbringing of children and career-related disadvantages is blind to the existence of inequalities based on gender and to the fact that men and women are *not* comparable regarding the impact of children on their working lives and ultimately on their pensions. This was emphasised by Advocate General Siegbert Alber in his opinion in *Griesmar*, which considered that the negative impact of motherhood on women's careers should be a permissible basis for the calculation of different retirement benefits, arguing for substantive rather than formal equality.⁵⁶

However, a more striking point in the CJEU's reasoning in *Griesmar*, *Mouflin* and *WA v INSS* is its refusal to allow for the possibility of positive actions in relation to social security. The Court considered that Article 157.4 TFEU allowing for positive actions was not applicable, since the pension care credits did not help women to conduct their professional life on an equal footing with men but acted as compensation without providing a remedy for the problems faced by women during their professional careers, similar to what it had stated in relation to pensionable ages.

The position of the CJEU is questionable in several aspects. First, it testifies to a very narrow understanding of positive actions, excluding any compensatory measures in pensions. Yet pensions are by essence compensatory as they rely on past working life. This runs counter to the wording of Article 157.4 TFEU which also allows Member States to adopt measures to provide for specific advantages for the underrepresented sex in order to prevent but also to 'compensate for disadvantages in professional careers'.⁵⁷ Second, this restrictive conception of positive actions also contradicts the fact that the CJEU has gradually broadened its interpretation of positive actions.⁵⁸ Third, in the case of *WA v INSS* which was decided on the basis of the Statutory Social Security Directive adopted in 1979, it is worth underlining that the time of its adoption explains the lack of any provision in relation to positive action, since this concept was introduced into EU primary law with the the Amsterdam Treaty in 1997. Nearly all EU gender equality laws adopted in recent decades contain a provision on positive actions, considering them a valid way to implement gender equality.⁵⁹

As the CJEU in *WA v INSS* did not scrutinise the care credits under Article 157.4, it missed the opportunity to clarify under which conditions positive actions and pension care credits could be allowed in pensions, making itself guilty of a 'lack of discursive accountability'.⁶⁰ The consequences of such an approach on gender equality was discussed by Advocate General Michal Bobek in his opinion in the *WA v INSS* case. He argued that the practical result of excluding positive actions in relation to pensions 'would be morally questionable', since it would exclude any form of compensation to women after they exit the labour market, even though they suffer disadvantages directly linked to inequalities experienced during their working lives.⁶¹ He considered that pension care credits could be consider positive actions and that neither *Griesmar* nor *Leone* could be interpreted as excluding any resort to Article 157.4 TFEU.

The above considerations together with the reflection of Advocate General Michal Bobek leave a possibility open for allowing for the existence of positive actions in relation to pensions, with the conditionality

56 Opinion of Advocate General Alber delivered on 22 February 2001, CJEU, Case C-366/99, *Joseph Griesmar, v Ministre de l'Economie*, 29 November 2001, <https://eur-lex.europa.eu/legal-content/GA/ALL/?uri=CELEX:61999CJ0366>, point 83-84.

57 Emphasis added.

58 See Mair, S. (2021) 'Why less is not always more: Mother's pensions and parenthood in WA', *Common Market Law Review*, No. 58, pp. 201-222, at 213.

59 See Art. 3 of the Recast Directive, Art. 6 of the Goods and Services Directive, Art. 5 of Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, pp. 1-6, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010L0041>.

60 Mair, S. (2021), 'Why less is not always more: Mother's pensions and parenthood in WA', *Common Market Law Review*, No. 58, p. 215.

61 Opinion of Advocate General Bobek delivered on 10 September 2019, CJEU, Case C-450/18, *WA v Instituto Nacional de la Seguridad Social (INSS)*, 12 December 2019, <https://curia.europa.eu/juris/liste.jsf?num=C-450/18&lang=EN>, point 111.

attached to positive actions. While mother-only pension care credits might support outdated gender stereotypes about women's role within the home, they can be a temporary solution to remedy for past injustices. The idea of allowing for specific advantages for women in pensions in order to compensate for disadvantages in professional careers according to the wording of Article 157.4 should be given proper consideration in the gender equality debate. While the concept might be unpopular for the tenants of strict equality of treatment, it could represent a temporary solution in a context in which the gender pension gap amounts to 30 %. Unfortunately, any reflection of this kind were notably absent from the above case law. It is worth noting in this regard that the opposite approach was adopted by the ECtHR, which considered in *Andrle* that pension advantages for women who have raised children could be justified until social and economic changes remove the need for special treatment for women.⁶²

As a result of the CJEU's judgments in *Griesmar* and *Mouflin*, pension care credits reserved for women were invalidated by the French Supreme Court and pension care credits are now harder for parents to obtain under French legislation.⁶³ The same is likely to happen in Spanish legislation after *WA v INSS*. Hence the CJEU's case law in relation to pension care credit is most likely to lead to a levelling-down of rights, leaving women even more vulnerable to poverty in old age. As every equality endeavour should be guided by the necessity to preserve rights rather than eroding them in the name of equal treatment, the approach of the CJEU is highly problematic in this regard. This issue should be addressed and corrected by the EU legislature by means which are discussed further in this article.

2.4 Considering pension care credits to be indirectly discriminatory against men

Of all the CJEU cases concerning pension care credits, *Leone* best exposes the detrimental effects of the formal equality approach. This case concerned a pensions care credit granted to men and women on an ungendered basis, something that France had changed after its condemnation in *Griesmar*. The Court held that taking such a neutral criterion as having taken time off to raise a child could amount to indirect discrimination against men, since its formulation reduced the number of men able to benefit from the pension advantage and placed them at a disadvantage in relation to female civil servants.⁶⁴ The Court recognised that the concern to compensate for the disadvantages suffered in the course of their career by all workers who have taken a career break in order to care for children constituted a legitimate social policy aim.⁶⁵ Nonetheless, it considered that mere generalisations were insufficient to show that the aim was unrelated to any sex discrimination and that the chosen method was appropriate to achieve that aim.⁶⁶ The CJEU posed very unrealistic requirements to the pension care credit in question, considering that it was not apparent that it was 'liable to compensate for the career-related disadvantages resulting from taking a career break... for childbirth... and bringing-up of children', something that might not have been an easy task to prove for a newly adopted provision.⁶⁷

Once again, the CJEU was blind to the gendered social realities within which rules apply and failed to acknowledge the different needs of women and men in relation to pensions. A more substantive equality approach was defended by Advocate General Niilo Jääskinen who in his opinion considered the

62 ECtHR, *Andrle v The Czech Republic*, No. 6268/08, 17 January 2011.

63 Koldinská, K. (2011), 'Shouldn't fathers raise their children? Two ECHR and ECJ cases on gender equality in pension rights', *European Gender Equality Law Review*, No. 2, pp. 14-21, at p. 20; Camaji, L. (2016), 'Avantages familiaux de retraite' (Retirement family benefits: what (in)equality for retirement between women and men?), *Regards*, Vol. 50, No. 2, at p. 14, Cour de Cassation, No. 07-20668, Chambre Civile 2, 19 February 2009.

64 CJEU, Case C-173/13, *Maurice Leone and Blandine Leone v Garde des Sceaux*, 17 July 2014, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0173>, paragraph 51.

65 CJEU, Case C-173/13, *Maurice Leone and Blandine Leone v Garde des Sceaux*, 17 July 2014, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0173>, paragraph 58.

66 CJEU, Case C-173/13, *Maurice Leone and Blandine Leone v Garde des Sceaux*, 17 July 2014, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0173>, paragraph 59.

67 CJEU, Case C-173/13, *Maurice Leone and Blandine Leone v Garde des Sceaux*, 17 July 2014, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0173>, paragraph 90.

French provisions to be justified since they served the legitimate objective of offsetting a sex-related disadvantage.⁶⁸

The Court's abstract, symmetrical and formal conception of equality in *Leone* is destructive to say the least. While the Court's intention was surely to combat gender stereotypes, the consequences of its judgment are more likely to entrench them than to promote a more equal sharing of care responsibilities. Indeed, it does little to de-gender the use of care leaves; condemning pension care credits as indirect discrimination against men removes social protection that accommodates childcare responsibilities and fails to make parental leave more attractive to fathers. It is topical that the EU states clearly that the protection of parents is not in contradiction with the pursuit of gender equality, even if it is easier for women to benefit from these protection mechanisms.

Pension care credits are a key policy lever to protect the pension rights of carers and support gender equality.⁶⁹ Should the CJEU choose to discard them bluntly as contrary to gender equality, it would be an aberration, contrary to the recommendations of the Social Protection Committee advising Member States to continue to support these kinds of measures.⁷⁰ If anything, pension care credits need to be encouraged, not hindered, by EU law.

2.5 Is equal treatment bringing EU pensions closer to substantive equality?

The above sections have exposed the shortcomings of the EU's formal equal treatment framework in relation to pensions. By expanding the application of the principle of equal treatment without regard to its consequences for women's pension rights, the EU and especially the CJEU have refused to take into account the existence of gendered social realities and rejected the possibility of positive actions in pensions, leading to all the criticisms highlighted above. While equality of treatment might be a first step towards achieving gender equality, it cannot bring justice for women on its own, especially in relation to pensions where intergenerational equality is at stake. The EU needs to expand its equality toolbox beyond equal treatment if it wants to address the gender pension gap and implement substantive equality.

3 Progress in perspective: securing pension entitlements for part-time working women in the EU

Moving into another area of EU law – part-time work – prospects for substantive gender equality in pensions are much more optimistic.

In the EU, 32 % of women work part-time, compared to 8 % of men.⁷¹ Apart from contributing greatly to the gender pay gap and the existing labour market segregation, part-time work is also associated with weakened social protection. It reduces women's pension incomes by entitling them to lower benefits due to their lower earnings and smaller contributions to pensions schemes and, in certain cases, it bluntly excludes them from pension schemes.⁷²

68 Opinion of Advocate General Jääskinen delivered on 27 February 2014, CJEU, Case C-173/13, *Maurice Leone and Blandine Leone v Garde des Sceaux*, 17 July 2014, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0173>, point 58.

69 European Commission, Social Protection Committee (2021), *The 2021 Pension Adequacy Report*, p. 115.

70 European Commission, Social Protection Committee (2021), *The 2021 Pension Adequacy Report*, p. 17.

71 ELGE (2020), *Gender inequalities in care and pay in the EU*, <https://eige.europa.eu/publications/gender-inequalities-care-and-consequences-labour-market>.

72 Ginn, J., Arber, S., (1998), 'How does part-time work lead to low pension income', in: O'Reilly, J., Fagan, C. (eds.), *Part-time prospects: An international comparison of part-time work in Europe, North America and the Pacific*, London, Routledge, pp. 156-173.

The CJEU has addressed inequalities in relation to part-time workers starting from its ground-breaking case *Bilka* in 1984 in which it ruled that their exclusion from occupational pension schemes is contrary to the Treaty principle of equal pay and amounts to indirect discrimination of women, when women constitute the majority of part-time workers. This principle has been expanded by the case law of the Court, which through an innovative use of the concept of indirect discrimination has allowed part-time working women across the EU to be granted the same working conditions as men in many regards in situations in which they constituted the majority of part-time workers – in many cases proving this is not a difficult task.

This allowed the CJEU in the past to circumvent the Council's resistance to the regulation of part-time work at EU level: a Directive on Part-time Work was only adopted in 1997, with the Framework Agreement on Part-time Work.⁷³ The latter provides for equal treatment between full-time and part-time workers in relation to pay, working conditions, training and promotion as well as in occupational pensions and insurance, but excludes statutory social security from its scope. Clause 4.2 provides that, wherever it is justified, the principle of *pro rata temporis* should apply, that is the rights of part-time workers should be calculated in proportion to the amount of time worked.

The CJEU has succeeded in many cases in guaranteeing substantive equality for part-time workers, expanding the principle of equality into a wider set of aspects than those considered by the Directive, such as sick pay, occupational pensions and to a lesser extent statutory social security. While differential treatment of part-time workers can still be justified, the CJEU has established that such a justification must rest on objective grounds, be necessary and proportionate,⁷⁴ or rely on aims of social policy when it occurs in relation to statutory social security.⁷⁵

In many cases, the CJEU has ensured a correct application of the *pro rata temporis* principle, ensuring that it did not prejudice part-time workers more than necessary. This principle does allow pension entitlements to be reduced proportionally to the amount of time worked by part-time time workers,⁷⁶ however, the CJEU has set limits for its application: it cannot be used to disadvantage part-time workers by a proportion greater than that resulting from their part-time work.⁷⁷ It has likewise ruled that the *pro rata temporis principle* does not apply to the determination of the time required to acquire statutory pension rights, raising part-time workers' chance of gaining pension entitlements.⁷⁸

The *pro rata temporis* principle was likewise limited in the important judgment *Elbal Moreno*, which concerned the entitlement of part-time workers to a statutory pension. In order to qualify for the pension, a minimum contributory period of 15 years was necessary. A special rule for part-time workers stated that only the full-time equivalent period of contribution would be credited: taking into account the 10 % rate that Ms Elbal Moreno worked at, she would have had to work 100 years in order to win a pension entitlement.⁷⁹ In its reasoning, the Court refused to consider that the need to ensure the financial equilibrium of the social security system could be used to justify such a rule, since part-time workers had paid the due contributions.⁸⁰ The Court concluded that such a calculation of the contribution period

73 As the Commission's first proposal for such a Directive was initially rejected by the Council; European Commission, Proposal for a Council Directive on voluntary part-time work, COM(1981) 775 final, OJ 1982, p. 62.

74 CJEU, Case 170/86, *Bilka Kaufhaus GmbH v Karin Weber von Hartz*, 13 May 1986, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61984CJ0170>, paragraph 36.

75 CJEU, Case 171/88, *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG*, 13 July 1989, paragraph 14.

76 See CJEU, Joint Cases C-395/08 and C-396/08, *Instituto nazionale della previdenza sociale v Tiziana Bruno, Massimo Pettini (Bruno)*, 10 June 2010.

77 CJEU, Joined cases C-4/02 *Schönheit* and C-5/02 *Becker*, 23 October 2003, paragraph 93.

78 See for example CJEU, Joint Cases C-395/08 and C-396/08, *Instituto nazionale della previdenza sociale v Tiziana Bruno, Massimo Pettini (Bruno)*, 10 June 2010.

79 CJEU, Case C-385/11, *Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS)*, 2 November 2012, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0385>, paragraph 17.

80 CJEU, Case C-385/11, *Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS)*, 2 November 2012, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0385>, paragraph 35.

was discriminatory as it impeded women from obtaining a retirement pension. In *Elbal Moreno*, the Court applied a substantive conception of equality: rather than seeking for procedural equality of treatment, it emphasised the unequal *outcome* of the rule. Such a conception was undeniably bold, as it dealt a hard blow to the Spanish pension policies: the rule had to be modified in order to take into consideration the reduced time worked by part-time workers, but not the rate of part-time work.⁸¹

The CJEU also ruled in *Villar Laiz* that pension calculation rules could not apply a reduction factor leading to a drop in pension benefits exceeding the *pro rata* principle. In this case, pension benefits were calculated on the basis of an average contribution based on the average wage for a certain period of years. This already disadvantaged part-time workers since they earned less, but in addition, a special rule provided that this had to be multiplied by the full-time equivalent period of contribution, corrected by a multiplying factor of 1.5. This had detrimental effects on part-time workers and in the case of the claimant it would have granted her a lower percentage than a full-time worker with the same number of years of employment. The CJEU specified that while the *pro rata temporis* principle could be used to calculate the basic amount of contribution (the remuneration actually received), it could not be used to calculate in addition a reduction of the percentage without going beyond what is necessary to attain the aim of social policy, since it entailed for part-time workers a reduction of pension benefits greater than was proportional. *Villar Laiz* marks an important landmark towards better pension rights for part-time workers, although one could argue for a complete removal of affiliation thresholds for part-time workers, as they are often responsible for the exclusion of part-time workers from contributory schemes.⁸²

The CJEU has thus made a substantive contribution towards ensuring proper pension entitlements for part-time workers. Its case law in relation to part-time work embodies to a large extent a substantive conception of equality, going beyond the formal equal treatment principle and considering the *effect* of the rules when applied to part-time workers. The concept of indirect discrimination in itself is substantive to the extent that it looks at the context of application of the rule (such as that it applies to a majority of women) and its effect (that it disadvantages this particular category of workers).

Nonetheless, the CJEU sometimes lacks consistency and in certain cases such as *Kleinsteinuber* and *Cachaldora*,⁸³ it has refused to acknowledge the different treatment of part-time workers, reverting to a more formal conception of equality, referring to the need for an objective calculation method and refusing to acknowledge discrimination even when a rule systematically disadvantages part-time working women. In addition, it has sometimes allowed for differential treatment of part-time workers in relation to pensions to be justified in occupational pensions, considering that a discriminatory rule could be justified by the aim of the occupational pension scheme to establish a balance between the interests at issue, viewing the latter as ‘public interest objectives’,⁸⁴ and hence threatening the principle of equality in relation to part-time workers.⁸⁵ It is to be hoped that the substantive standards of equality established by the Court in *Villar Laiz* will create a precedent and that more ambiguous cases such as *Kleinsteinuber* will not be repeated. In particular, *Villar Laiz* is important as other Member States have provisions identical to the cases of *Elbal Moreno* and *Villar Laiz*.⁸⁶

81 Hermida del Llano, M. (2016), ‘Discrimination and equality: Affirmative action in Spain and in the European Union’, in: Arnold, R. (ed.), *The convergence of the fundamental rights protection in Europe*, Springer, p. 80; De la Corte-Rodríguez, M. (2021), ‘Recent cases and the future of Directive 79/7 on equal treatment for men and women in social security: How to realise its full potential’, *European Journal of Social Security*, Vol. 23, No. 1, pp. 44-61, at p. 47.

82 De la Corte-Rodríguez, M. (2021), ‘Recent cases and the future of Directive 79/7 on equal treatment for men and women in social security’, *European Journal of Social Security*, Vol. 23, No. 1, pp. 44-61, p. 45.

83 CJEU, Case C-354/16, *Ute Kleinsteinuber v Mars GmbH*, 13 July 2017; CJEU, Case C-527/13, *Lourdes Cachaldora Fernández v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*, 14 April 2015.

84 CJEU, Case C-354/16, *Ute Kleinsteinuber v Mars GmbH*, 13 July 2017, paragraph 65.

85 Knoop, S. (2018), ‘Occupational pension schemes for part-time workers: Equality in the eye of the beholder?’, *European Journal of Social Security*, Vol. 20, No. 4, pp. 309-324, at p. 320.

86 Cyprus, Greece, Hungary, Italy and Slovenia are reported to have exactly the same provisions prejudicing part-time workers in relation to benefit calculation and access to pension schemes.

While the advances of the CJEU in relation to the protection of part-time workers is to be applauded, as it allowed pension rules to be applied to part-time workers in a less disadvantageous way, more is needed for EU law to correctly address the inequalities faced by part-time working women in relation to pensions. Indeed, the regulation of part-time work through judicial instances has important limits. As the CJEU is only able to rule on a case-by-case basis and can sometimes lack consistency, EU law should be revised to take into consideration and codify the advancements of the CJEU in this regard, ensuring legal certainty and effectiveness.

4 Ways forward for implementing substantive gender equality in pensions in the EU

In order to adequately address gender equality, the EU needs to make the fight against inequalities in pensions a key priority. This entails focusing not only on discriminatory rules, but also on the disparate effect that equal rules have on men and women. The following ways forward are suggested in order for the EU to implement substantive equality in pensions.

First, it is urgent that the Court revise its case law in relation to pension care credits to scrutinise the possibility of positive actions in pensions and to state clearly that ungendered pension care credits are not discriminatory, but on the contrary are an important tool for providing parents and carers with equal opportunities to acquire pension rights. The European Commission should use the full range of the legislative and political actions at its disposal here to place pension equality at the top of its policy agenda and to send out a clear message to its Member States: pension care credits are not a discriminatory provision, but an essential instrument for gender equality in a context in which caring responsibilities affect women's careers disproportionately. The Commission could also suggest legislation in this regard, introducing an obligation for Member States to ensure that both statutory and occupational pension schemes have some kind of care credits, available to both men and women on the basis of childcare responsibilities. It would be of topical importance here to include a non-regression clause, stating that no care credits should be removed as the result of making this measure available to both sexes. Promoting the use of care credits would align not only with the EU's objectives in terms of gender equality, but also contribute to the achievement of another important priority of the EU, that is work-life balance and the equal sharing of care responsibilities between parents.⁸⁷

Second, it is time the EU revise its legislation in relation to part-time workers in order to integrate the developments of EU case law in this regard. As seen above, the CJEU has contributed greatly towards safeguarding part-time working women's entitlements to pension schemes, both by ensuring access to these schemes and through fair calculation rules which do not prejudice them in a disproportionate manner. It has done so both through a generous interpretation of the Part-time Work Directive and through the application of the principle of indirect discrimination. However, judicial application of equality has its limits: it can be erratic and the case-by-case nature of the assessment makes it difficult to extract clear, general rules applicable to all part-time workers. As such, the EU should codify these developments through a revision of the Part-time Workers Directive adopted in 1997 and the Recast Directive which contains provisions in relation to occupational pension schemes. Meanwhile, the Commission could monitor national pension schemes for part-time workers, ensuring its alignment with the generous case law of the CJEU and advising countries on how to avoid rules affecting part-time workers.

Lastly but most importantly, the EU needs to mainstream a substantive gender equality strategy into every policy coordination initiative touching upon pensions. Indeed, notwithstanding the EU's limited competence in relation to national pension systems, it has made steps towards the coordination of pensions policies both through the Open Method of Coordination (OMC) and the European Semester. This

87 Directive 2019/1158/EU of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU OJ L 188, 12.7.2019, 79–93.

has allowed the EU to extend its role in relation to pensions while respecting national competencies and diversities.⁸⁸ When establishing the OMC for the coordination of national pension policies in 2002, the Council focused only to a limited extent on gender.⁸⁹ Gender equality has been insufficiently mainstreamed into coordination mechanisms and poorly defined, leaving the door open to divergent interpretations in this regard, with reforms for gender equality varying greatly across Member States.⁹⁰

The European Semester is yet another avenue for the EU to intervene in national pension schemes. This policy dialogue and the country-specific recommendations adopted in this context can affect national pension systems to the extent that it affects economic objectives of the EU and that the country-specific approach allows for tailor-made, potentially more intrusive, policies.⁹¹ The non-respect of the country-specific recommendations can be sanctioned, allowing for a certain accountability mechanism. This could, theoretically, represent an effective way for the EU to impact national pension regulations in a way that alleviates the gender pay gap. However, the country-specific recommendations concerning pension systems have in recent years focused on the financial sustainability of pensions and the need to limit expenditure,⁹² and Member States have introduced reforms focusing mainly on increasing the pensionable age, requiring longer contribution periods and removing early retirement opportunities, aggravating gender inequalities in pensions.⁹³

The coordination of national policies in relation to gender is an opportunity to mainstream a substantive gender equality agenda. It could also be a possible route for the Commission to take a lead role in encouraging Member States to adopt fairer pension calculation rules and to tackle the main obstacle to women's adequate entitlement to pensions: the conditions for benefits. Indeed, as long as the gender pay gap is salient, women's lower earnings and their particular working patterns are reflected and amplified by pension calculation rules dependent on previous earnings. The more the conditions for pension benefits depend on previous earnings and participation in the labour market, the more it penalises women with shorter, more interrupted and often lower paid occupations.⁹⁴ The Commission should prompt Member States to ensure that time spent outside of the labour market on caring activities is given due consideration in pension schemes, not only to raise women's pension entitlements but also to provide incentives to fathers to take more time off from the labour market to care for children.

The Council Recommendation on access to social protection for workers and the self-employed adopted in 2019⁹⁵ is an important framework for addressing pension gaps. It encourages EU Member States to allow non-standard workers to adhere to social security schemes and to adopt measures allowing them to build up adequate social benefits. The Commission is supporting Member States in achieving

88 Natali, D. (2009), 'The Open Method of Coordination on pensions: Does it de-politicise pensions policy?', *West European Politics*, Vol. 32, No. 4, pp. 810-828.

89 Natali, D. (2009), 'The Open Method of Coordination on pensions: Does it de-politicise pensions policy?' *West European Politics*, Vol. 32, No. 4, pp. 810-828; European Council (2001) Presidency conclusions, SN 300/1/01, Laeken, 14-15 December 2001; Earles, K. (2013), 'The gendered consequences of the European Union's pensions policy', *Women's Studies International Forum*, Vol. 39, pp. 22-29; Stratigaki, M. (2012), 'Gendering the social policy agenda: Anti-discrimination, social inclusion and social protection', in: Abels G., Mushaben, J. (eds.), *Gendering the, European Union*, Palgrave, Macmillan, pp. 169-186, at pp. 174.

90 Vlachantoni, A. (2008), 'Care credits in European pension systems', *Discussion Paper No. 0801*, Centre for Research on Ageing, School of Social Science, University of Southampton, UK, https://eprints.soton.ac.uk/166799/1/Microsoft_Word_-_CRA_DP_0801.pdf, p. 4.

91 Van Meerten, H. (2019), *EU pension law*, Amsterdam University Press, p. 33.

92 Carone, G., Eckfeldt, P., Giamboni, L., Laine, V., Pamies S. (2016), *Pension reforms in the EU since the early 2000s: Achievements and challenges ahead*, https://ec.europa.eu/info/publications/economy-finance/pension-reforms-eu-early-2000s-achievements-and-challenges-ahead_en.

93 Earles, K. (2013), 'The gendered consequences of the European Union's pensions policy', *Women's Studies International Forum*, Vol. 39, pp. 22-29.

94 Vlachantoni, A. (2019), 'Socio-economic inequalities in later life: the role of gender', in: Westwood, S. (ed.), *Ageing, Diversity and Equality: Social Justice Perspectives*, Oxford and New York, Routledge, pp. 25-35, 30, <https://eprints.soton.ac.uk/417102/>; Sefton, T., Evandrou M., Falkingham J. (2010), 'Family ties: Women's work and family histories and their association with incomes in later life in the UK', *Journal of Social Policy*, Vol. 40, No. 1, pp. 41-69.

95 Council Recommendation 2019/C 387/01 of 8 November 2019 on access to social protection for workers and the self-employed, OJ C 387, 15.11.2019, pp. 1-8, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019H1115\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019H1115(01)&from=EN).

the objectives of the recommendation through dialogue and mutual learning activities. However, the national plans submitted by Member States in 2021 vary significantly in their level of ambition.⁹⁶ The Commission's proactive guidance in this process will be essential to guarantee that the implementing measures contribute to equal opportunities for women to acquire pension rights.

Conclusion: taking a proactive role in implementing substantive gender equality in pensions

This article has shown that the EU's response to the gender pension gap has been inadequate and insufficient. Inadequate, because it has relied on formal strategies for equality and insisted on the principle of equal treatment only, without consideration of women's particular situation in pensions. Insufficient, because the EU holds many more possibilities for addressing the gender pension gap, such as proposing legislation in relation to pension care credits, codifying the judicial developments in relation to part-time work and promoting policy dialogue and policy coordination around the issue of gender inequalities and pensions.

The EU's solely formal conception of equality in this regard is threatening the accommodation of gender injustices, but also of parental responsibilities, in pension schemes (see the discussion above about the *Leone* case). This 'liberal interpretation of equality',⁹⁷ requiring only negative regulation (the removal of direct discrimination in pension schemes) might serve the economic interests of the common market and of pension schemes, however it does not fully address the inequalities experienced by women in relation to pensions. As seen throughout this article, the application of the formal equal treatment principle does not go all the way in guaranteeing equal opportunities for women to acquire pension rights, as enshrined in Pillar 15 of the European Pillar of Social Rights. In addition, the CJEU has created serious obstacles, through its case law in *Leone* and *WA v INSS*, to measures of social engineering in the field of social security, undermining gender equality, the very aim it intended to pursue. This needs to be seriously reconsidered if the goal is to improve women's earnings in old age.

The gender pension gap is the main cause of women's higher risk of poverty in old age. Yet it is often too low a priority of gender equality action, which predominantly focuses on inequalities in the workplace and the labour market. However, as those same inequalities are reflected and greatly amplified by pension schemes, it is time for the EU to take on its role as policy maker and policy coordinator to prompt Member States to revise their legislation in order to prioritise substantive equality for all generations of women. For this, gender equality needs not only to be prioritised, but also redefined so as to avoid focusing solely on formal equality and implement a more substantive version of gender equality.

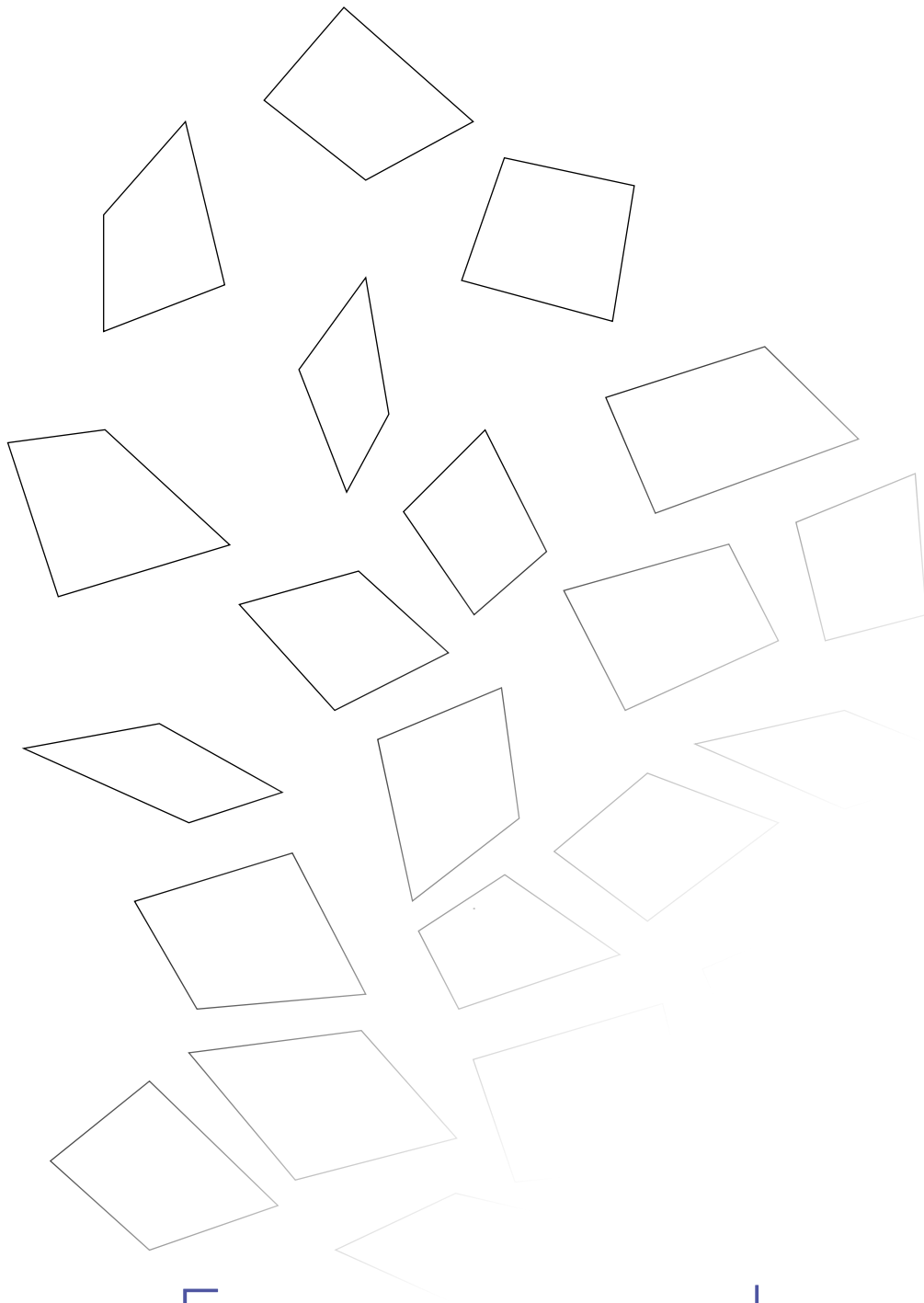
96 European Commission, Social Protection Committee (2021), Update on the national plans under the Council Recommendation on Access to Social Protection for workers and the self-employed, 14150/21, Brussels, 19 November 2021, https://www.parlament.gv.at/PAKT/EU/XXVII/EU/08/08/EU_80889/imfname_11109041.pdf. See the plans here: <https://ec.europa.eu/social/main.jsp?catId=1312&langId=en>.

97 Ostner, I. and Lewis, J. (1995), 'Gender and the evolution of European social policy', in Leibfried S., Pierson P., *European social policy: between fragmentation and integration*, Washington D.C.: The Brookings Institution, p. 33; Mazey, S. (1998), 'The European Union and women's rights: from the Europeanization of national agendas to the nationalization of a European agenda?', *Journal of European Public Policy*, Vol. 5, No. 1, p. 140.

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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 July to 31 December 2021.

Court of Justice of the European Union

REFERENCES FOR PRELIMINARY RULINGS – ADVOCATE GENERAL OPINIONS

C-389/20, *CJ v Tesorería General de la Seguridad Social (TGSS)*, Opinion of Advocate General Szpunar, delivered on 30 September 2021, ECLI:EU:C:2021:777

Gender

The opinion by Advocate General Szpunar follows a request for a preliminary ruling from the Juzgado de lo Contencioso-Administrativo No. 2 de Vigo (Administrative Court, Vigo, Spain) concerning, inter alia, the interpretation of Article 4(1) of Directive 79/7/ECC on the progressive implementation of the principle of equal treatment for men and women in matters of social security. The case refers to a domestic worker who is prevented from paying contributions to the statutory social security scheme and therefore excluded from unemployment benefits. As a domestic worker, the applicant is covered by a 'special scheme for domestic workers', which does not give the right to benefits in the event of unemployment, in accordance with Article 251(d) of the General Law on Social Security (LGSS).

The AG gives an opinion on whether this provision constitutes indirect discrimination on the ground of sex, prohibited by Article 4(1) of Directive 79/7/ECC. The question arises because the provision at issue seems to exclude an entire category of workers, overwhelmingly consisting of women, from unemployment benefits.

The Spanish Government argues that there is no discrimination on grounds of sex because the situation of domestic workers is not comparable to that of other workers under the general scheme. However, the AG notes, first, that the two situations are comparable in terms of entitlement to unemployment benefits and, secondly, that the Spanish Government is confusing direct and indirect discrimination. Indeed, the AG agrees that there is no direct discrimination in place, as the provision applies, without distinction, to domestic workers of either sex. However, he raises concerns about the possibility of indirect discrimination.

According to Article 2(1)(b) of Directive 2006/54, 'indirect discrimination based on sex' happens where 'an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex.' In the case in question, it is important to note that women represent almost 100 % of the workers covered by the special scheme for domestic workers. Thus, the formally neutral criterion in Article 251(d) LGSS contains in substance indirect discrimination on grounds of sex because it puts an entire category of female workers at a particular disadvantage. The provision denies the group of domestic workers, which mainly consists of women, the possibility to obtain welfare benefits for unemployment by preventing them from contributing to cover that risk.

Therefore, according to the AG, Article 251(d) LGSS is contrary to Article 4(1) of Directive 79/7/EEC, unless justified by objective factors unrelated to any discrimination on grounds of sex. In this case, the Spanish Government and the TGSS invoked two justifications for the exclusion of domestic workers from unemployment benefits: the need to safeguard the level of employment, and the need to combat illegal work and social security fraud, as opening the entitlement to the benefits to the particular group of domestic workers could lead to an increase in contributions to the social security fund, and therefore also increase illegal working. The AG holds that the justifications are objective, but not unrelated to any discrimination on the grounds of sex because they reinforce the traditional social view of gender roles, consisting in considering men as the heads of the family who work and bear all the costs relating to the household. Therefore, those justifications may not apply to the present case.

Advocate General Szpunar concludes that Article 4 of Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as meaning that 'it precludes a national provision which excludes unemployment benefits from the benefits granted to domestic workers by a statutory social security scheme where it is found that those workers are almost exclusively women'.

C-485/20, XXXX v HR Rail SA, Opinion of AG Rantos, delivered on 11 November 2021, ECLI:EU:C:2021:916


 Disability

This opinion is in response to a reference for a preliminary ruling submitted by the Conseil d'Etat (Council of State, Belgium). The claimant in the case pending before the referring court was completing a long-term internship in the context of a recruitment process. He subsequently experienced health problems requiring the fitting of a heart stimulator, which rendered him incapable of exercising the functions set out by his contract. The employer first informed the claimant that they would explore alternative employment options for which he would be capable. In the meantime, he was assigned to another position. Two months later, however, the employer terminated the contract, indicating that its internal regulations did not provide for a reassignment to another position in this case. The question referred was, in substance, whether the employer had failed to meet its duty to provide reasonable accommodation, notably by reassigning the claimant to another position, for which he was capable.

Advocate General Rantos first determined that a recruitment internship such as that at hand must be considered to fall within the material scope of the Employment Equality Directive as it is related to access to employment. The Advocate General further determined that the claimant's impairment must be considered to constitute a 'disability' within the meaning of the Directive as interpreted by the Court. The remainder of the analysis examined the concept of 'reasonable accommodation' provided by Article 5 of the Directive. By reading this provision in the light of Recitals 17 and 20, the Advocate General found that reasonable accommodation measures should preferably and as far as possible accommodate the workplace of the person with a disability, but not that they should be limited to the workplace as such. In the present case, no organisational, physical or educational measures could allow the claimant to maintain his position, due to the medical incompatibility of his heart stimulator with the functions of the position. The question is thus whether the employer had a duty to reassign the claimant to another position, for which he was capable.

In this regard, the Advocate General cited Article 27(1) of the UN CRPD and Article 21 of the EU Charter of Fundamental Rights to conclude that the fundamental aim of reasonable accommodation measures is the maintenance in employment of persons with disabilities. Therefore, the reassignment of a person whose disability prevents him from performing the functions of his position, to another position, must be considered to constitute a reasonable accommodation measure, as long as two conditions are fulfilled. First, the person must be competent, capable and available to perform the functions required by the alternative position. Secondly, the reassignment to another position must not impose a disproportionate burden on the employer. In this regard, the Advocate General held that the reassignment should not require the termination of the employment of another employee, leading to the conclusion that the burden would more easily be considered proportionate in cases where at least one vacant position is available or where there is some flexibility within the employment situation, such as within larger employers. It is thus for the referring court to determine whether these two conditions were fulfilled in the context of the case at hand.

OPINIONS OF THE COURT

C-1/19, Opinion of the Court (Grand Chamber) on the conclusion, on behalf of the EU, of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), delivered on 6 October 2021, ECLI:EU:C:2021:832

Gender

On 6 October 2021, the Grand Chamber of the European Court of Justice gave its opinion on the conclusion of the Council of Europe Convention, on behalf of the EU, of the Istanbul Convention. This opinion was requested by the European Parliament, in accordance with the procedure set out in Article 218(11) TFEU.

On 4 March 2016, the European Commission submitted to the Council of the European Union a proposal for a Council Decision on the signing of the Istanbul Convention on behalf of the European Union. On the same day, it also submitted a proposal for a Council decision to authorise the conclusion of the European Union of that convention. The legal basis for both proposals was found in Articles 82(2) and 84 TFEU. However, it was feared by the Council's preparatory bodies that the Council would not attain the required majority vote for the Commission's proposals, which is why it was decided to reduce the scope of the Union's conclusion of the Istanbul Convention and limit it to those competences that fall within the exclusive competence of the Union. Consequently, the legal bases of the proposal was found in Articles 83(1) and 78(2) TFEU to Article 82(2) TFEU and the reference to Article 84 TFEU was removed. It was also decided to split the Commission's proposal for a Council decision to sign the Istanbul Convention into two parts, and to adopt two decisions in order to take account of the particular positions of Ireland and the United Kingdom as envisaged by Protocol No. 21 annexed to the TEU and the TFEU. However, to date, despite the fact that the Istanbul Convention was signed on behalf of the European Union in 2017, the Council has not yet adopted any decision on the conclusion of the convention by the European Union. The Council holds that the adoption of such a decision depends on the prior existence of a 'common accord' of all the Member States to be bound by that convention in the areas within their competence.

On 9 July 2019, the European Parliament submitted to the Court a request for an opinion under Article 218(11) TFEU concerning the conclusion of the Istanbul Convention by the European Union. The Court was asked to answer three questions: first, whether Articles 82(2) and 84 TFEU are the appropriate legal bases for the act that concludes the Istanbul Convention on behalf of the European Union; secondly, whether and, if so, under what conditions, the Council may or must split a decision to conclude an international agreement into several separate decisions; and thirdly, whether that conclusion would be compatible with the Treaties, despite the absence of a common accord of all Member States through which they give their consent to being bound by the Istanbul Convention.

On the first question, concerning the legal basis of the concluding act, the Court is first required to define the subject matter and scope of its examination. The Court holds that it is for the Council, with the consent of the European Parliament, to conclude the act for the adoption of the convention, and therefore also for these institutions to specify, within the limits of the question referred, the scope of the 'agreement envisaged' within the meaning of Article 218(11) TFEU. Accordingly, the Court examined the Istanbul Convention solely in the light of the parts of the convention that are to be covered by the concluding act, assuming that the act will relate to the provisions of the Istanbul Convention that are linked to judicial cooperation in criminal matters, asylum and non-refoulement and the obligations of the institutions and public administration of the European Union, in so far as those provisions fall within the competence of the European Union.

The Court holds that Articles 82(2) and 84 TFEU on judicial cooperation in criminal matters, should be among the legal bases of the act concluding the convention in view of their broad scope of application.

However, the Court holds that Article 83(1) TFEU¹ cannot provide a legal basis for the concluding act, since the scope of the obligations contained in the Istanbul Convention falling within the area covered by this article is very limited for the European Union. Additionally, the Court specifies that that act should also be based on Article 336 TFEU, in relation to matters of public administration, and Article 78(2), in matters of asylum and non-refoulement.

Regarding the second question, the Court states that the Council can divide an international agreement into two separate decisions only as far as that decision considers Ireland and the Kingdom of Denmark as non-participants in the measures adopted in respect of the conclusions of that agreement.

Lastly, the Court answers the third question by affirming that the Treaties do not prohibit the Council from waiting for the 'common accord of all Member States' before adopting the decision concluding the Istanbul Convention. Nevertheless, the Treaties do prohibit the Council from adding a further step to the conclusion procedure by making the adoption of the decision concluding the Convention dependant on the prior establishment of such a 'common accord'.

REFERENCES FOR PRELIMINARY RULINGS – JUDGMENTS

Joined cases C-804/18, *IX v WABE eV* and C-341/19, *MH Müller Handels GmbH v MJ*, Grand Chamber judgment of 15 July 2021, ECLI:EU:C:2021:594

These requests for a preliminary ruling were submitted by the Arbeitsgericht Hamburg (Labour Court, Hamburg, Germany) (C-804/18) and the Bundesarbeitsgericht (Federal Labour Court, Germany) (C-341/19). In both cases, the initial claimants were employees who were prevented by their employers from wearing religious headscarves at work.

The claimant in the first case (C-804/18) was employed by an organisation running a large number of child day care centres. Two years after being employed, the claimant started wearing an Islamic headscarf at work. Six months later, she went on parental leave. During her leave, the organisation adopted a new set of internal regulations, which included the requirement that employees refrain from wearing any signs of political, philosophical or religious beliefs that are visible to parents, children and third parties. When refusing to remove her headscarf upon her return from parental leave, the claimant was suspended and received several warnings. The referring court asked, in essence, whether the employer's treatment of the claimant can be considered to amount to (a) direct discrimination on the grounds of religion or (b) indirect discrimination on the grounds of religion and/or gender.

With regard to the issue of potential direct discrimination on the grounds of religion, the Court recalled that an internal neutrality rule does not constitute direct discrimination provided that it covers any manifestation of religious beliefs without distinction and treats all workers in the same way. The fact that some workers observe religious precepts requiring certain clothing to be worn does not change the fact that such a neutrality rule does not establish a difference of treatment between workers based on a criterion that is inextricably linked to religion or belief. It is for the referring court to assess whether the neutrality rule at hand was applied in a general and undifferentiated way to all workers.

With regard to the issue of potential indirect discrimination, the Court first noted that the request for a preliminary ruling only related to the Employment Equality Directive, which does not cover discrimination on the grounds of gender. Therefore, the Court did not examine the part of the question related to gender. With regard to potential indirect discrimination on the grounds of religion or belief, the Court noted that

Religion
or belief

¹ In accordance with that provision, the European Union has competence to establish minimum rules concerning the definition of criminal offences and sanctions in, *inter alia*, the area of trafficking in human beings and sexual exploitation of women and children.

the referring court had found that the neutrality rule at hand affected, statistically, almost exclusively female workers wearing a headscarf because of their Muslim faith. Examining thus whether such an indirect difference of treatment could be justified, the Court first recalled that an employer's wish to project an image of neutrality towards customers may be regarded as a legitimate aim, in particular where workers are only affected insofar as they enter into contact with customers. The Court further specified, however, that the employer must, in such a case, demonstrate that the neutrality policy meets a genuine need. In this regard, the rights and legitimate wishes of customers or users can be taken into consideration, as well as the adverse consequences that the employer would suffer in the absence of such a policy, given the nature of its activities and the context in which they are carried out. Furthermore, the Court also specified that the difference of treatment must be appropriate for the purpose of ensuring that the employer's policy of neutrality is properly applied, which entails that the policy is pursued in a consistent and systematic manner. Finally, the prohibition in question must be limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid.

The claimant in the second case (C-341/19) was employed as a sales assistant and cashier in a store. When she started to wear an Islamic headscarf, her employer requested that she remove it, which she refused. She was then transferred to another post where she remained for two years. The employer then again requested that she remove the headscarf, which she refused. The employer sent the claimant home and issued an instruction that she refrain from wearing any conspicuous, large-sized signs of any political, philosophical or religious beliefs. This instruction was based on an 'internal directive' prohibiting the use of such signs of beliefs, which had just been adopted. The referring court thus sought to determine, in essence, whether employers' internal regulations may only prohibit employees from wearing any visible signs of political, philosophical or religious, or whether they may, more specifically, prohibit only such signs as are prominent and large sized.

As a preliminary note, the Court pointed out that, while the referring court phrased its questions only in terms of potential indirect discrimination, the case at hand could possibly have been interpreted as one of direct discrimination. In this regard, the Court noted that a prohibition imposed by an employer on its workers wearing conspicuous, large-sized signs of political, philosophical or religious beliefs may amount to direct discrimination on the grounds of religion or belief, where the criterion of wearing such signs is inextricably linked to one or more specific religions or beliefs.

With regard to the questions referred, related to indirect discrimination, the Court first noted that it was apparent from the request for a preliminary ruling that the aim pursued by the employer was to avoid social conflicts within the undertaking, particularly in view of tensions that had occurred in the past. Citing its earlier conclusions in relation to Case C-804/18, the Court then noted that it is for the employer to demonstrate that the measure at hand meets a genuine need on its part. The Court noted, however, that it must still be verified whether the internal measure is proportionate with regard to the aim pursued. In this regard, the Court noted unequivocally that a prohibition such as that at hand can only be justified if it covers *all* visible forms of expression of political, philosophical or religious beliefs, since authorising the wearing of some, even small, signs of such beliefs would call into question the consistency of the neutrality policy. The Court's conclusion with regard to the question of potential *indirect* discrimination is thus that a prohibition that is limited to conspicuous, large-sized signs of beliefs is liable to constitute *direct* discrimination, which cannot be justified.

Finally, the Court examined an issue raised by the referring courts in both cases, regarding whether national constitutional provisions protecting the freedom of religion may be taken into account as more favourable provisions within the meaning of Article 8(1) of the Employment Equality Directive in examining the appropriateness of a difference of treatment indirectly based on religion or belief. Both referring courts cited specifically Article 4(1) of the German Basic Law, which requires that an employer, in a situation such as that at issue in both disputes at hand, demonstrates a sufficiently specific risk of the aim pursued being undermined if the measure is not maintained. Such specific risks could concern

specific disturbances within the undertaking or a loss of income. First, the Court noted that such a requirement forms part of the context as regards the justification of an indirect difference of treatment on the grounds of religion. Secondly, the Court also concluded that national provisions protecting freedom of thought, belief and religion may be taken into account as provisions more favourable to the protection of the principle of equal treatment, within the meaning of Article 8(1), when examining what constitutes a difference of treatment based on religion or belief.

C-795/19, *XX v Tartu Vangla*, judgment of 15 July 2021, ECLI:EU:C:2021:606


 Disability

This reference for a preliminary ruling was submitted by the Riigikohus (Supreme Court, Estonia) which questioned the proportionality of a hearing requirement for prison officers. The claimant in the initial proceedings challenged his dismissal, which was based on the hearing requirement, as discriminatory on the ground of disability. The question referred concerned the compatibility of an absolute ban on the (continued) employment of prison officers whose auditory acuity does not meet the requirement, with Articles 2(2) and 4(1) of the Employment Equality Directive.²

Noting that Article 4(1), which provides for an exception to the prohibition of discrimination when a characteristic related to a ground of discrimination constitutes a genuine and determining occupational requirement, must be interpreted strictly, the Court first found that the concern to ensure the operational capacity and proper functioning of the prison services constitutes a legitimate aim within the meaning of that provision. Further, the Court found that the nature of a prison officer's duties and the context in which they are carried out justify a national regulation setting a certain level of auditory acuity as a genuine and determining occupational requirement. The Court then examined whether the national regulation at hand was appropriate for attaining the legitimate objectives sought and whether it went beyond what is necessary to attain them.

With regard to the appropriateness of the national regulation at hand, the Court found that it may be accepted that such a regulation may prevent the use of hearing aids during the assessment of the auditory acuity of prison officers, to ensure that such officers are able to exercise their functions even in the case of an attack causing the loss or deterioration of their hearing aids. The Court further held however, that the national regulation at hand may only be considered appropriate if it genuinely reflects a concern to attain the objective pursued, in a consistent and systematic manner. In this regard, the Court noted that the same national regulation allowed prison officers to use corrective devices such as contact lenses or spectacles when their compliance with the visual acuity standards laid down in the same regulation was assessed.

With regard to the necessity of the hearing requirement, the Court noted that non-compliance with the requirement constituted an absolute impediment to the exercise of the duties of any prison officer, to which no derogations existed and for which no individual assessment was performed. Noting that the absolute nature of the national regulation at hand prevented the employer from meeting the duty to provide reasonable accommodation measures, where needed in a particular case, to enable a person with a disability to have access to, participate in or advance in employment, the Court concluded that the regulation appeared to have imposed a requirement that goes beyond what is necessary to attain the objectives pursued.

² For a detailed summary of the facts of the case, the question referred and the Opinion of the Advocate General, see *European equality law review* 2021/1, pp. 57-58, available at: <https://www.equalitylaw.eu/downloads/5448-european-equality-law-review-1-2021-pdf-1-277-kb>.

C-824/19, TC, UB v Komisija za zashtita ot diskriminatsia, VA, judgment of 21 October 2021, ECLI:EU:C:2021:862*Disability*

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. The original claimant was selected and sworn in as a paid juror in criminal proceedings, but was not assigned to any proceedings as the judges responsible for assigning jurors considered that the claimant's visual impairment prevented her from exercising that activity in compliance with the principles of the criminal justice system aiming at ensuring a fair trial. In that sense, the referring court asked the Court of Justice, in essence, whether sight may constitute a genuine and determining occupational requirement for the activity exercised by a juror.³

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 Court determined swiftly that a situation such as that at hand falls within the material scope of the Directive, and that the visual impairment of the original claimant amounted to a disability within the meaning of the Directive. Further, the Court determined that the claimant had experienced a difference of treatment based directly on her disability and examined whether this difference of treatment was justified.

In this regard, the Court noted that due to the nature of the duties of a juror in criminal proceedings and the context in which they are carried out, which may involve the examining and evaluation of visual evidence materials, sight may constitute a genuine and determining occupational requirement for this activity. Ensuring full compliance with the principles of the criminal justice system is, furthermore, to be considered as a legitimate aim within the meaning of Article 4(1) of the Directive. The Court thus examined, finally, whether the total exclusion of a blind person from exercising the activity of juror in criminal proceedings is a proportionate means of achieving that aim. In this regard, the Court noted that the individual capacities of the claimant were not assessed and that no alternative means of remedying any eventual difficulties were explored. The Court recalled the duty of employers to provide reasonable accommodation measures stipulated in Article 5 of the Employment Equality Directive, noting that this duty must be read in the light of Article 26 of the EU Charter of Fundamental Rights as well as the UN CRPD. Finally, the Court noted that the claimant did participate in criminal proceedings as a paid juror once the system of assigning jurors was changed, which would appear to indicate that she was indeed capable of exercising this activity in compliance with the principles of the criminal justice system. The Court concluded, therefore, that the total exclusion from this activity would appear to go beyond what was necessary to achieve the legitimate aim pursued.

3 For a detailed summary of the facts of the case, the questions referred and the Opinion of the Advocate General, please see *European equality law review*, 2021/2, pp. 52-53, available at: <https://www.equalitylaw.eu/downloads/5536-european-equality-law-review-2-2021-pdf-1-349-kb>.

European Court of Human Rights

***Šaltinytė v Lithuania*, Application No. 32934/19, judgment of 26 October 2021**

Age

The applicant in this case was a single mother of a young child who had applied for a housing subsidy available to 'young families', where neither parent (or the only parent) is aged above 35, when buying their first home. The applicant was denied the subsidy due to her age (37) and lodged an age discrimination complaint before the national courts, which was rejected.

First, the Court accepted that the applicant was in a relevantly similar situation to a younger single mother who, in the same circumstances, would have likely been granted the housing subsidy in question. The Court thus found that there had been a difference in treatment on the ground of age. To determine whether the difference in treatment was justified, the Court first concluded that it could not accept the Government's main argument, which was based on the need to correct 'factual inequalities' between different types of families, as it did not find that the statistical data presented by the Government constituted evidence of inequalities or hardship allegedly experienced by 'young families'. The Court did, however, accept that the measure pursued the legitimate aim of encouraging a positive demographic shift. With regard to the issue of proportionality, the Court acknowledged the merit of the applicant's arguments but nevertheless recalled that the state authorities are best placed to assess the priorities in the context of the allocation of limited state resources. Taking into consideration the statistical evidence presented by the Government, the Court thus concluded that the state had not overstepped its wide margin of appreciation when deciding to provide additional housing assistance to 'young families' where neither parent is aged above 35. It further concluded that there was a reasonable relationship of proportionality between the impugned difference in treatment and the legitimate aim pursued.

***Toplak and Mrak v Slovenia*, Applications Nos 34591/19 and 42545/19, judgment of 26 October 2021**

Disability

The applicants in this case had muscular dystrophy and were, together with a number of other persons with disabilities, involved in numerous sets of proceedings aimed at improving the access of persons with disabilities to the voting process. Throughout this series of proceedings, the claimants were overall mainly unsuccessful before the national courts. The applications before the Court concerned the applicants' access to the voting process at a national referendum held in December 2015 and at the European Parliament elections held in May 2019, and the lack of available remedies capable of addressing their complaints in this regard.

In 2014, the Constitutional Court had found that the relevant provision of the applicable Elections Act did not constitute an appropriate 'accommodation' sufficient to enable persons with disabilities to independently physically access polling stations in public buildings. This shortcoming amounted to indirect discrimination on the grounds of disability. The Court required that all polling stations be made accessible within two years. Following this decision, the national Elections Act was amended in 2017, requiring all polling stations to be 'accessible' to persons with disabilities as of 1 February 2018, and introducing voting by post as an option for voters with disabilities.

With regard to the 2015 referendum, no remedies were available that would have prevented (a continuation of) the alleged violation or enabled the applicants to obtain any form of compensation for it. The Court thus concluded a violation of Article 13 taken in conjunction with Article 1 of Protocol No. 12.

With regard to the 2019 European Parliament elections, the Court concluded that the applicants did have access to effective remedies, and therefore found no violation in this regard.

The Court then went on to examine the applications regarding alleged violations of Article 1 of Protocol No. 12 and of Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1. The Court first noted that the relevant question at hand is whether the national authorities have complied with their positive obligation to take appropriate measures to enable the applicants, whose mobility was impaired due to disability, to exercise their right to vote on an equal basis with others. With regard to the 2015 referendum, the Court concluded that the polling stations of both applicants were made accessible, at their request, allowing them to participate in the referendum. Even if the applicants did encounter certain problems, related notably to the voting booths, tables, etc., those problems do not appear to have produced a particularly prejudicial impact on them and been such as to have reached the threshold of discrimination or to indicate indifference to their needs on the part of the respondent Member State. There has therefore been no violation of Article 1 of Protocol No. 12 as regards the 2015 referendum with respect to both applicants.

With regard to the 2019 EP elections, the first applicant did not vote due to his inability to hold a pen, and argued before the Court that he should have been given the opportunity to use a voting machine. All available voting options would have required the applicant to be assisted in the sense that he would have been obliged to disclose his electoral choice to the person assisting him. Noting that a voting machine might have afforded a higher level of autonomy to the applicant, the Court concluded, however, that the national authorities are best placed to determine whether such machines are to be used or not, while taking into serious consideration the impact on persons with disabilities. In the present case, this question has been examined and decided by the Slovenian Constitutional Court on the basis of a careful and well argued assessment. Thus, the Court concluded that the state cannot be said to have failed to strike a fair balance between the protection of the interests of the community and respect for the applicants' rights and freedoms. There was thus no violation of Article 14, read in conjunction with Article 3 of Protocol No. 1.

***León Madrid v Spain*, Application No. 30306/13, judgment of 26 October 2021**

Gender

The applicant in this case, a single mother, claimed to be discriminated against on the basis of sex because her request to reverse the surnames of her minor daughter was denied by the Spanish authorities. When her daughter was born in 2005, the girl received the mothers' two surnames. There was no contact with the biological father – after announcing her pregnancy to the biological father, he had insisted she would terminate the pregnancy. However, in 2006, the father of the child, brought a non-marital paternity suit during which it was established that he was the biological father. Subsequently, the judge ruled that the child would bear the surname of the father followed by that of the mother. At the relevant time, Spanish law provided that in case of disagreement between the parents, the child would bear the father's surname followed by that of the mother.⁴

Relying on Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) of the Convention, the applicant filed a complaint with the European Court of Human Rights on the basis that this regulation was discriminatory and that the order of surnames should take into account the specific circumstances of the case.

The Court noted that the automatic application of the rule that in case of disagreement between parents, the child would bear the father's surname followed by that of the mother, had not allowed the judge to take into consideration the concrete and relevant circumstances of the case. The fact that the father had

4 Spain, Article 194 of the Regulation implementing the Law on the registration of births, marriages and deaths.

initially wanted to terminate the pregnancy, and the child had borne the mother's surnames for over a year were important circumstances of the case.

The Court then turned to the question whether there had been a difference in treatment based on gender and whether this was contrary to Article 14 in conjunction with Article 8 of the Convention. The Court noted that two individuals in a similar situation – the applicant and the child's father – had been treated differently and that the distinction was based exclusively on grounds of sex. It is up to the national authorities to strike a fair balance in this regard, namely between the applicant's private interests in reversing the order of her daughter's surnames on the one hand, and the public interest in regulating the choice of names on the other.

The Spanish Government argued that the applicant's daughter would be able to change the order of her surnames once she reached the age of 18, and therefore it does not regard the regulation to be discriminatory. The Court however established that the duration of this measure would have an unquestionable impact on a minor's personality rights and identity when she is obliged to use her father's surname with whom there is only a biological connection. Moreover, the Court could not overlook the effects of the measure on the applicant's life too, who was confronted on a daily basis with the consequences of the discrimination caused by the inability to change her child's name.

The Court held that the regulation itself, establishing that the father's name should be placed first in case of a disagreement between the parents, may be necessary in practice and was not necessarily incompatible with the Convention, but the inability to derogate from the rule was excessively stringent and constitutes discrimination against women. Additionally, while placing the paternal surname first can provide legal certainty, having the maternal surname in that position can serve the same purpose.

Therefore, the Court ruled that the reasons given by the Spanish Government had not been sufficiently objective and reasonable in order to justify the difference in treatment imposed on the applicant. Therefore, the Court established a violation of Article 14 in conjunction with Article 8 of the Convention.

***X v Poland*, Application No. 20741/10, judgment of 16 September 2021**

The applicant in this case alleged that she had been discriminated against on the basis of her sexual orientation in proceedings for full parental rights and custody rights over her youngest child. The applicant started a relationship with another woman during the divorce proceedings with her former husband, with whom she had four children. Throughout the proceedings for parental and custody rights of the children, the adjudicating courts referred extensively and repeatedly to the applicant's same-sex relationship and to her 'excessive proximity' with her girlfriend. When the father was finally granted full parental rights of all four children, the three oldest went to live with him while the youngest continued to live with the applicant. It was recognised by several independent expert opinions that the child had a very strong emotional bond with his mother and did not want to live with his father. These opinions were, however, not relied on by the courts, which referred instead to the initial opinion of a family consultation centre, which had expressed strong opinions against the applicant and her same-sex relationship. After having lived with the applicant and her partner from the age of three until the age of six, the child was finally forcefully removed from the applicant's care, and all her appeals were dismissed. The applicant invoked a violation of Article 14 read in conjunction with Article 8 of the Convention.

The Court first noted that the references to the applicant's homosexuality and same-sex relationship were predominant in all sets of the proceedings concerning the parental rights of the children. The Court thus concluded that there had indeed been a difference in treatment, based on the applicant's sexual orientation, between her and any other parent wishing to have full custody of his or her child.

Sexual
orientation

Examining whether the difference in treatment was justified, the Court accepted that the domestic decisions pursued the legitimate aim of protecting the rights of others. The Court then noted that the applicant and her former husband were both considered to have similar parenting abilities and qualities, in which case the interests of the child are of primary importance. The two main arguments presented by the national courts when finally deciding to dismiss the applicant's request regarding the parental rights of her youngest child were (1) the advantages of all the siblings living together and (2) the importance of a 'male role model' in the boy's upbringing. With regard to the first of these arguments, the Court noted that the national courts had noted the benefits of the stability resulting from the siblings living together but had discarded the strong bond that the child was clearly shown to have with his mother, the applicant, as opposed to his father. With regard to the second argument, the Court noted that the stereotypical view that a young boy needs a male role model was not supported by any of the expert reports as none of them found any cause for concern regarding the child's stage of development or wellbeing or any proven damage or risk to the child who had been living from the age of three until the age of six with his mother and her partner. Finally, there was no evidence of any concern regarding the contact that the child would have with his father if the applicant had been granted parental and custody rights. The Court thus concluded that the national court's reliance on the 'male role model' was discriminatory.

The Court further noted that the domestic authorities never examined the applicant's partner's attitudes and the role she played in the life of the child, as would have been justified. Instead, the authorities assessed negatively the applicant's relationship with her partner on the former's parenting abilities. Furthermore, the allegedly negative impact of the applicant's partner on the three older children was taken into account in the proceedings for parental and custody rights of the youngest child, instead of examining the relationship of the individual child himself with the applicant's partner. Finally, the national courts considered that a positive assessment of the applicant's competencies as a primary carer for her children depended on her ending her same-sex relationship. The Court thus concluded that the national courts had, when refusing to grant the applicant full parental rights and custody rights in respect of her youngest child, made a distinction based solely or decisively on considerations regarding her sexual orientation, amounting to a violation of Article 14 in conjunction with Article 8.



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

This section provides an overview of the latest main 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 July to 31 December 2021.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Policy developments related to gender equality in Albanian national strategies

During the second half of 2021 several strategic plans have been adopted including provisions concerning gender equality.

The Albanian National Strategy on Gender Equality (AL-SGE), 2021-2030, was approved on 30 June 2021 by a Decision of the Council of Ministers (DCM) and published in the *Official Journal* of 15 July 2021.¹ The new strategy is strongly linked to the EU Gender Equality Strategy 2020-2025, and is based on the objectives and measures set out in the Gender Equality Action Plan (EU GAP III) 2021-2025. It includes a gender transformative approach, addresses intersectionality by acknowledging gender with other forms of discrimination, and adopts a human rights-based approach to the principles set out in the previous AL-SGE.

The strategic objectives of the new gender equality strategy are focused on:

- fulfilling the economic and social rights of women, young women, girls and men, young people, ‘boys in society’ and empowerment of women, aiming at the growth;
- and sustainability of the (green) environmental economy, as well as their equal participation in digitalisation;
- fulfilling the rights of women and men, young people, boys and girls of all groups, for equal participation, representation and leadership in political and public decision making at the local level;
- reducing all forms of harmful practices, gender-based violence and domestic violence;
- applying gender mainstreaming as the main tool for achieving gender equality and justice in society.

Other strategies that were adopted during the second half of 2021, which included gender equality measures include:

- The Albanian Strategy on the development of Business and Investments (AL-SBI), 2021-2027,² sets out the main direction of the Albanian Government on the mid-term economic development and is focused especially on micro, small and medium-sized enterprises and investments. This strategy reflects the recommendations of the European Commission Report on Albania 2020 and in its first strategic objective, puts special emphasis on promoting women’s entrepreneurship skills and creating a favourable climate for increasing the number of women entrepreneurs and the size of existing women-run businesses.
- The National Strategy on Education (AL-SEd), 2021-2026 and its action plan,³ is in full coherence with the strategic objectives of the European framework for the cooperation between European Union countries in the field of education and training, with the EU framework for the key competences on

1 Albania, Decision of the Council of Ministers (DCM) No. 400, dated 30.6.2021 ‘On the approval of the National Strategy on Gender Equality, 2021-2030, and its Action Plan’ (*Për miratimin e Strategjisë Kombëtare për Barazinë Gjinore, 2021-2030, dhe të Planit të saj të Veprimit*), published in the Albanian Official Journal No. 112 of 15 July 2021, available at: <https://qbz.gov.al/eli/fz/2021/112/09a2849b-98f1-4800-8b90-fd824b449346>.

2 Albania, DCM No. 466, dated 30.7.2021 ‘On the approval of the National Strategy on the development of business and investments, 2021-2027, and its Action Plan’ (*Për miratimin e Strategjisë së zhvillimit të biznesit dhe investimeve, 2021-2027, dhe të Planit të saj të Veprimit*), published in the Albanian Official Journal No. 127 of 10 August 2021, available at: <https://qbz.gov.al/eli/fz/2021/127/98681fa5-eaf0-4c10-bdc4-12611192d738>.

3 Albania, DCM No. 621, dated 22.10.2021 ‘On the approval of the National Strategy on Education, 2021-2026, and its Action Plan’ (*Për miratimin e Strategjisë Kombëtare për Arsimin, 2021-2026, dhe të Planit të saj të Veprimit*), published in the Albanian Official Journal No. 168 of 29 October 2021, available at: <https://qbz.gov.al/eli/fz/2021/168/933a6b59-482f-4c0e-a4a3-a055d5c44e9f>.

lifelong learning, as well as the objective of the UN 2030 Agenda for Sustainable Development.⁴ The vision of AL-SEd 2021-2026 concerns an educational quality system based on the principles of inclusion and lifelong learning. One of the impact indicators is the gender parity index by levels of International Standard Classification of Education (ISCED). This index is calculated as the quotient of the number of females and males registered at a certain level of ISCED. Moreover, gender education of pupils is one of the goals of educational policies included within this strategy.

- The National Agenda on Children's Rights (AL-AChR), 2021-2026,⁵ stipulates that one of its strategic objectives is to provide a supportive environment for children to grow up in, with positive parenting practices that protect them from violence and abuse. Among the measures provided for is the expansion of a parenting course/programme to raise children free from gender stereotypes.

National Action Plan for equality, inclusion and participation of Roma and Egyptian people

In November 2021, the Government launched a new National Action Plan for equality, inclusion and participation of Roma and Egyptian people for the period 2021-2025.⁶ The draft action plan had been through a long public consultation process with international organisations in Albania, governmental institutions, independent bodies and NGOs.

Racial or
ethnic origin

The action plan sets out the following seven policy objectives:

- to guarantee equal access to justice and civil registration for all members of the Roma and Egyptian communities;
- to improve housing conditions for members of the Roma and Egyptian minorities, and to legalise all informal settlements;
- to reduce the health equality gap between Roma and Egyptians and the rest of the population;
- to increase equal access to quality and inclusive education for Roma and Egyptians at all levels of education;
- to create equal opportunities for quality and sustainable employment for Roma and Egyptians;
- to improve the access of Roma and Egyptians to social protection programmes;
- to recognise and address anti-Gypsyism in public policy, as well as through systemic and structural changes, to guarantee a society free from discrimination against Roma and Egyptian people.

The Ministry of Health and Social Protection has a coordinating role. The Directorate of Social Inclusion and Gender Equality within this ministry will monitor the implementation of this cross-cutting plan and will draft the progress reports.

Online source:

<https://qbz.gov.al/eli/vendim/2021/11/18/701/a92f26f9-3da7-4e78-af10-5ad130f085e3>

4 United Nations Sustainable Development Goals, available at: <https://www.un.org/sustainabledevelopment/>.

5 Albania, DCM No. 659, dated 3.11.2021 'On the approval of the National Agenda on Children Rights, 2021-2026' (*Për miratimin e Agjendës Kombëtare për të drejtat e fëmijëve, 2021-2026*), published in the Albanian Official Journal No. 178 of 16 November 2021, available at: <https://qbz.gov.al/eli/fz/2021/178/98db15d8-482e-46ed-a2e5-ec1e73e67284>.

6 Albania, Decision of the Council of Ministers No. 701, dated 18 November 2021, on the adoption of the National Action Plan for equality, inclusion and the participation of Roma and Egyptian people, Official Journal No. 186 of 3 December 2021, available at: [Pamja e dokumentit - Qendra e Botimeve Zyrtare \(qbz.gov.al\)](https://qbz.gov.al/eli/vendim/2021/11/18/701/a92f26f9-3da7-4e78-af10-5ad130f085e3).

National Action Plan for LGBTI+ persons

In November 2021, the Government launched a new National Action Plan for LGBTI+ persons for the period 2021-2027.⁷ The draft of the action plan had been through a long public consultation process with international organisations, government institutions, independent bodies and NGOs.

The action plan was drafted in compliance with principles such as the universal enjoyment of human rights, the enjoyment of state protection, non-discrimination as a starting point in the provision of services, the affirmation and respect of personal identity, the confidentiality and protection of personal data, the setting of the LGBTI+ person in the centre of the service, as well as safety, dignity, diversity and access to services.

The action plan sets out the three following policy objectives:

- improving the access of LGBTI+ persons to public services and specialised services that are effective and available throughout the country, in accordance with their specific needs and with national as well as European/international standards;
- ensuring protection and security for LGBTI+ persons by improving the legal framework, its effective implementation, as well as increasing the access of LGBTI+ persons to the justice system;
- creating an inclusive society that is not discriminatory against LGBTI+ persons.

The strategic objectives of the action plan are focused on:

- providing quality and friendly social care services and ensuring access to healthcare services for LGBTI+ people throughout the country;
- reducing inequality and discrimination in education and increasing access to decent work, including non-traditional employment sectors;
- strengthening legal protection for LGBTI+ persons against hate crime, hate speech and violence;
- public awareness raising (including for private employers) on the principles of equality, inclusiveness and non-discrimination of LGBTI+ persons.

The assessment of the implementation of the previous action plan (2016-2020), stressed the need for amendments in the legislation in several areas, including the Family Code, the Criminal Code, the law on adoptions and the law on the recognition of gender identity, as well as bylaws for the protection of intersex persons in Albania. These issues are further provided for as measures to be taken in the context of the implementation of the new plan's specific objectives.

The financial effects of the implementation of the action plan are calculated for each measure, based on the activities and the needs analysis. The financial effects will be covered by the budget of the institution in charge of the implementation of each measure (as the main institution responsible or as a partner institution), as well as donors.

The Ministry of Health and Social Protection will lead and coordinate the process of monitoring the action plan, based on information provided by all responsible or partner institutions.

The action plan also contains an annex providing the definitions of terms such as: LGBTI+, transgender persons, biological sex, misgendering, the obtained gender, gender orientation, queer, the dimensions of gender affiliation, gender identity, social gender affiliation, personal gender affiliation, etc.

⁷ Albania, Decision of the Council of Ministers No. 700, dated 18 November 2021, on the adoption of the National Action Plan for LGBTI+ persons, Official Journal No. 183 of 25 November 2021, available at: [Pamja e dokumentit - Qendra e Botimeve Zyrtare \(qbz.gov.al\)](#).

Online source:

<https://qbz.gov.al/eli/vendim/2021/11/18/700/bc51fc35-6193-4676-aa40-9b4bf7ec9877>

Belgium

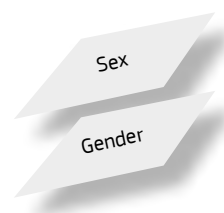
BE

CASE LAW

Discrimination based on maternity

A physical therapy practice was recruiting a full-time medical secretary in April 2015. The job offer provided details of the tasks to be performed (mainly related to the organisation of the secretariat, encoding work, drafting of minutes, etc).

A candidate introduced herself and, in her cover letter, stated that she had worked in the administrative area of a hospital (receptionist). She also detailed her skills (computer skills, sense of responsibility, etc). After her interview, she received a letter informing her that her application had not been accepted. The letter explained that '(...) your role as a mother must take precedence over your career and we are looking for someone who is free of family commitments and flexible in terms of working hours'.



On 30 June 2021,⁸ the Labour Court of Brussels considered that the interested party had provided proof that she was the victim of direct discrimination related to maternity. The company therefore had to establish that it did not discriminate against the interested party because of her maternity. In this respect, the absence of an intentional element is irrelevant: there may be discrimination even if the employer does not consciously intend to discriminate. Similarly, the hiring policy and the fact of concluding contracts for the provision of services with female physiotherapists was deemed irrelevant for judging whether the hiring practice was based on factors unrelated to any discrimination based on maternity; the hiring, seven months later, of a woman with a young child does not overturn this.

Moreover, since the company invoked reasons other than maternity (lack of flexibility and availability), the court recalled that the burden of proving these reasons lay with the company. If there are several reasons, the fact that one of them is maternity is sufficient to conclude that direct discrimination exists. Since the presumption was not overturned, the court granted the request. Noting that the interested party had opted for lump-sum compensation – which could be either six or three months' pay – the court held that the company had sufficiently established that the refusal of employment would also have occurred in the absence of discrimination related to maternity and awarded the equivalent of three months' remuneration.⁹

This ruling contains several points of interest:

- With regard to discrimination in hiring on the basis of sex, the Court recalls that discrimination on the basis of sex is, by virtue of the legal text, a direct distinction made on the basis of pregnancy, childbirth and maternity.
- The victim is obliged to provide proof of specific facts that allow for the presumption of the existence of discrimination, and once these facts have been proven, it is up to the defendant to provide proof of the absence of discriminatory behaviour.

⁸ The case falls outside the cut-off dates of this issue of the *European equality law review*, but was only published on 14 February 2022, *Discrimination à l'embauche sur la base de la maternité* - Terralaboris asbl.

⁹ Labour Court of Brussels, decision of 30 June 2021, case No. R.G. 2018/AB/695, available at: <https://www.terralaboris.be/spip.php?article3304>.

- The application of the rule that, in the event of multiple reasons for refusal to hire, the existence of a single prohibited reason makes it possible to establish the existence of discrimination.
- Finally, in terms of the penalty, it is recalled that this penalty, in its lump sum component, may be six or three months' remuneration, pursuant to Article 23(2)(2), of the Law of 10 May 2007, and that the amount of three months' pay being the amount applied when, in the case of multiple motives, it is noted that the refusal to hire would also have taken place even in the absence of discrimination.

Online source:

<https://www.terralaboris.be/spip.php?article3304>

CY

Cyprus

CASE LAW

Court decision on a Turkish Cypriot property

One year after the 1974 war, the Council of Ministers issued a general requisition order for all Turkish Cypriot properties located in the Republic-controlled south, for the purpose of their administration and protection in the owners' absence. In practice, the Turkish Cypriot properties were largely utilised for the benefit of the Greek Cypriots, for example, to house Greek Cypriot displaced persons or build state infrastructure. In 1991, legislation was adopted to set up the institution of the Guardian of Turkish Cypriot Properties (the Guardian Law).¹⁰ In 2010, the legislation was amended¹¹ to entitle the Guardian to lift the administration of Turkish Cypriot properties, taking into consideration the circumstances of each case, on the basis of non-exhaustive criteria. Several Turkish Cypriots claimed their properties via legal action; in most cases the national courts referred to the doctrine of necessity to justify the differential treatment of Turkish Cypriots and deny them access to their properties.

The case concerned the heiress of a deceased Turkish Cypriot, whose property fell under the scope of the Guardian Law. When the Guardian denied her permission to sell the property to a third party, she applied to the court seeking (1) an order enabling her to sell the property, (2) a statement from the court that the Guardian Law is not compliant with the EU *acquis* and the principle of non-discrimination in particular, and (3) a referral to the CJEU regarding the compliance of the Guardian Law with the Racial Equality Directive. The District Court of Nicosia delivered its judgment in 2021.¹²

The testimony of the claimant was assessed by the court as non-credible and was rejected in its entirety, including the description of the property and the contents of the sale agreement concluded with the third party. Having rejected the substance of the claim, the court went on to evaluate the allegation that the Guardian Law infringed the Racial Equality Directive.

In this regard, the court found that the sale of the property to a third party was impossible not because the seller was a Turkish Cypriot but because the property fell within the scope of the Guardian Law. The court added that the Guardian was justified in refusing to lift the 'administration' from this property because the claimant was in possession of a property belonging to a Greek Cypriot in the Turkish-controlled territory in the north of Cyprus. The court ignored the expert witness's argument that there was a *prima facie* case of less-favourable treatment, which should reverse the burden of proof, such

10 Cyprus, Laws on Turkish-Cypriot Properties (Administration and other matters) (Temporary provisions) 1991-1997 (*Οι περί Τουρκοκυπριακών Περιουσιών (Διαχείριση και Άλλα Θέματα) (Προσωρινές Διατάξεις) Νόμοι του 1991 έως 1997*) N.139/1991.

11 Cyprus, Law N.39(I)/2010, amending the original law of 1991, Article 2.

12 Cyprus, Nicosia District Court, *Djemil Cufi v Republic of Cyprus*, No. 4193/08, 27 January 2021, ECLI:CY:EDLEF:2021:A48.

that it would be for the state authorities to prove that they had acted lawfully. The court also rejected the claimant's request for referral to the CJEU, concluding that the request lacked an evidential basis.

The court concluded that the claimant's right to the property was temporarily and objectively subject to legitimate and lawful restrictions derived from a law, through a reasonable and well-founded objective justification, using proportionate and necessary means. No details were presented as to the legitimate aim served by the restrictions or how these were proportionate to the aim. The court's conclusion appears to be premised on the Cypriot judicial tradition of legitimising less-favourable treatment when this is 'reasonable', interpreting Article 28 of the Constitution rather than the Racial Equality Directive.

Online source:

<http://www.cylaw.org/cgi-bin/open.pl?file=apofaseised/pol/2021/1120210049.htm&qstring=Djemil%20and%20CuFi>

Czechia

CZ

CASE LAW

Constitutional Court ruling in a case concerning home births and the related right of women to be heard

On 1 December 2021, the Constitutional Court ruled in a case concerning home births and the right of the women involved to be heard.¹³ The case concerned a midwife who was fined (approximately EUR 4 700) for assisting in home births. The women who were giving birth demanded to take part in the proceedings, and to express their stance. However, their presence was rejected by the lower courts. According to the Court, the lower courts had violated women's rights to be heard in court as they did not take into consideration the whole range complex of rights at stake. Home births are a very controversial topic in Czechia at the moment. Legally, women can choose the place of giving birth. However, at the same time, midwives may not carry out their activity in a home setting,¹⁴ and they face high administrative fines if they do so. This means that women may theoretically give birth at home, but they are not allowed to be aided by a midwife. This poses a higher risk than a home birth with the assistance of a midwife. Thus, home births have become a 'grey area' in the legal order, a fact that was acknowledged in a 2016 judgment by the ECtHR.¹⁵ The judge rapporteur recalled that: 'if we legally recognise that it is a part of a woman's fundamental rights to choose to give birth at home, and at the same time we prevent her from having a trained midwife with her, we interfere with important fundamental rights such as the right to bodily integrity, the right to health and the right to privacy.'¹⁶

Gender

The Constitutional Court upheld that the three women who wanted to be heard by the courts in this case, could be heard. The decision mainly concerns participation in the proceedings and it does not address any legal opinion on home births. Nevertheless, although the verdict is procedural in nature, it may affect the public debate on home births.

13 Czech Constitutional Court, decision of 24 November 2021 (published 1 December 2021), No. II. ÚS 1238/21. Available at: [https://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezky/2021/II. US 1238 21 an.pdf](https://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezky/2021/II._US_1238_21_an.pdf).

14 Czechia, Decree no. 92/2012 Coll., on Minimal Technical and Material Equipment of Health Facilities and Home-care Premises, Annex no. 2, Section 2.11.2.

15 ECtHR, *Dubská and Krejzová v the Czech Republic* [GC], Nos. 28859/11, 28473/12, 15 November 2016.

16 Seznam zprávy (2021), 'Ústavní soud vyhověl třem ženám, které nemohly hájit domácí porody' (The Constitutional Court upheld three women who could not defend home births), 1 December 2021, news article, available at: <https://www.seznamzpravy.cz/clanek/domaci-ustavni-soud-vyhovel-trem-zenam-ktere-nemohly-hajit-domaci-porody-182316>.

Online source:

https://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezky/2021/II_US_1238_21_an.pdf

DK

Denmark

LEGISLATIVE DEVELOPMENT

New legal protection against discrimination based on gender identity

On 28 December 2021, Parliament passed Act No. 2591 (the Amendment Act), which entered into force on 1 January 2022.¹⁷ The Act amends several regulations on the prohibition of discrimination and the right to equal treatment of men and women in society, and specifies that LGBTI+ persons are protected against discrimination in the existing regulation and can file complaints with the Board of Equal Treatment.

The Amendment Act section 1 amends the Act on Equal Treatment of Men and Women (Equal Treatment Act).¹⁸ The Equal Treatment Act now specifies that its purpose is to counteract direct and indirect discrimination based on gender, sexual orientation, inter-gender (gender identity), gender expression, and gender characteristics as well as preventing harassment and sexual harassment (new Section 1(2)). In the entire Act, the term 'gender' is supplemented by the terms sexual orientation, gender identity, gender expression and gender characteristics.¹⁹

The Amendment Act section 2 amends the Act on the Prohibition of Discrimination in the Labour Market etc.²⁰ The Act already included sexual orientation in its grounds of discrimination. It now specifically includes the terms gender identity, gender expression and gender characteristics in the list of prohibited grounds in all provisions mentioning the protected grounds.²¹

The Amendment Act section 3 amends the Act on the Board of Equal Treatment.²² The Act on the Board of Equal Treatment now specifically includes gender identity, gender expression and gender characteristics on the list of grounds for claims for breach of rights.

The Amendment Act in section 5 amends the Act on Prohibition of Discrimination due to Race etc.,²³ which is a penal code prohibiting discrimination in the provision of goods or services as well as in access to public places. The act already included the discrimination ground of sexual orientation and now also includes gender identity, gender expression and gender characteristics in the list of discrimination grounds in Section 1(1).

17 Denmark, Statutory Act No. 2591 of 28 December 2021, amending the Act on Equal Treatment of Men and Women, the Act on Prohibition of Discrimination in the Labour Market etc., the Criminal Code, and other acts, available at: <https://www.retsinformation.dk/eli/lta/2021/2591>.

18 Denmark, Statutory Act No. 751 of 6 April 2021 with later amendments, Act on Equal Treatment of Men and Women: <https://www.retsinformation.dk/eli/lta/2021/751>.

19 Denmark, Proposal No. L18 FT 2021-2022, preparatory works: available at: https://www.ft.dk/samling/20211/lovforslag/L18/som_fremsat.htm.

20 Denmark, Statutory Act No. 1001 of 24 August 2017 with later amendments on the Prohibition of Discrimination in the Labour Market etc.: <https://www.retsinformation.dk/eli/lta/2017/1001>.

21 e.g. Sections 1(1)-(3) and (5) of new Act No. 2591.

22 Denmark, Statutory Act No. 1230 of 2 October 2016 with later amendments, Act on the Board of Equal Treatment: <https://www.retsinformation.dk/eli/lta/2016/1230>.

23 Denmark, Statutory Act No. 626 of 29 September 1987 with later amendments, Act on Prohibition of Discrimination Due to Race etc.: <https://www.retsinformation.dk/eli/lta/1987/626>.

The Amendment Act in section 4 amends the Criminal Code.²⁴ Section 81(6) of the Criminal Code now states that if a crime is wholly or partially based on the ground of ethnic origin, belief, disability, sexual orientation, gender identity, gender expression and gender characteristics or the like, that is to be treated as an aggravating circumstance when deciding on a penalty or sentence. Furthermore, Section 266b of the Criminal Code on hate speech is amended to include disability as well as gender identity, gender expression and gender characteristics as prohibited discrimination grounds. The grounds of gender identity, gender expression and gender characteristics were introduced by Amendment Act No. 2591 of 28 December 2021. The ground of disability was introduced by Amendment Act No. 709 of 26 April 2021.²⁵

Finally, the Amendment Act section 6 amends the Act on the Institute for Human Rights (NHRI).²⁶ The Danish NHRI operates under two EU mandates: as a specialised equality body on race or ethnic origin as well as on gender. Section 2(2) of the Act has now been amended and the mandate of the NHRI has been expanded to encompass not only race/ethnic origin and gender but also 'sexual orientation, gender identity, gender expression and gender characteristics'.

Online source:

https://www.ft.dk/samling/20211/lovforslag/L18/som_fremsat.htm

CASE LAW

Direct gender discrimination in health insurance coverage

A female health insurance policyholder presented a complaint to the Danish Board of Equal Treatment because in 2019, her insurance provider denied her coverage for the cost of physiotherapy treatments on the grounds that her need for treatment had arisen in connection to giving birth.²⁷ The insurance provider based their refusal of coverage on the insurance conditions, which stipulated that the health insurance policy in question did not cover the cost of treatments in connection with physical inconveniences related to giving birth.

In its ruling of 23 August 2021, the Board of Equal Treatment assessed that the insurance conditions were an expression of direct discrimination on grounds of gender. The board assessed that the compensation for the woman for the breach of her rights under the Act would amount to DKK 5 000 (approximately EUR 700) taking into consideration all the circumstances of the situation, including the graveness and the character of the refusal. The board did not award an additional allowance.

The case was part of a surge of cases initiated by a development in 2020, where the national insurance and pension sector – through their sectoral organisation, Forsikring & Pension – became aware that the prohibition of gender discrimination posed a challenge with regard to health insurance policies. Many companies had provisions in their insurance policy conditions exempting treatments related to giving birth. The companies admitted to having had a practice of not covering pregnancy-related disorders, which was in breach of the Act on Equal Treatment between Men and Women in insurance, pension and similar financial services,²⁸ with later amendments.

Gender

24 Denmark, Statutory Act no. 1851 of 20 September 2021 with later amendments, the Criminal Code: <https://www.retsinformation.dk/eli/lt/2021/1851>.

25 Denmark, Amendment Act No. 709 of 26 April 2021 entered into force on 1 May 2021.

26 Denmark, Statutory Act no 553 of 18 June 2012 with later amendments, Act on the Institute for Human Rights – the National Human Rights Institution of Denmark: <https://www.retsinformation.dk/eli/lt/2012/553>.

27 Denmark, Board of Equal Treatment, Ruling No. 9691 of 23 August 2021, journal no. 20-44072, available at: <https://www.retsinformation.dk/eli/accn/W20210969125>.

28 Denmark, Act no 950 of 14 August 2015 on Equal Treatment between men and women in matters relating to insurance, pension and similar financial services, <https://www.retsinformation.dk/eli/lt/2015/950>.

A number of complaints, including the one described above, were presented to the Board of Equal Treatment in order to establish a precedent for the level of compensation to be awarded to the victims. Many of the victims were assisted in their efforts to seek compensation by the Danish national equality body, the Danish Institute for Human Rights.

Furthermore, in October 2020, the development led the Danish Financial Supervisory Authority to initiate an investigation into the possible gender discriminatory practice and conditions of 23 insurance and pension providers. The conclusion of the investigation was that 14 of the 23 companies had, to a greater or lesser extent, either at the time of the investigation or in recent years, specified insurance conditions that contained provisions exempting coverage connected to pregnancy or childbirth. The authority issued a good practice order to the majority of investigated companies informing them that they had insurance terms that were in violation of the rules of the Act on Equal Treatment between Men and Women in insurance, pension and similar financial services, and ordering them to contact all current and former policyholders who were covered by the discriminatory terms and for whom the terms might be relevant.

Health insurance is often an integral part of a pension scheme provided by employers. As many as 4 200 women have wrongly been refused insurance coverage for costs of health treatments, as the conditions were related to pregnancy or giving birth.

The discriminatory practice is now in the process of being eradicated, and according to the reports, both the Danish Financial Supervisory Authority and the Danish Institute for Human Rights have been informed about the efforts of the sector to end the discriminatory conditions and practices. Both the authority and the institute have assisted by providing input for a new set of guidelines on the interpretation of the regulatory framework on equal treatment in relation to insurance coverage.

Online source:

<https://www.retsinformation.dk/eli/accn/W20210969125>

Requirement to use the word ‘psych’ on the vest of a service dog

The complainant is a woman who is diagnosed with post-traumatic stress disorder. She is a member of an association that trains and certifies psychiatric service dogs and owns one of these dogs herself.

The association required the complainant to use a vest for her service dog with the text ‘psych service dog’. The complainant had asked the association to use an alternative vest with the words ‘service dog’ or ‘support dog’, arguing that the word ‘psych’ would cause her further stigmatisation. Following extensive correspondence on the issue, the association finally stated that to remain a certified member of the association, she was required to use the service dog vest with the word ‘psych’.

Before the Board of Equal Treatment, the complainant argued, first, that the association’s requirement constituted discrimination due to disability. The association argued that the requirement was justified by the association’s goal and purpose of creating recognition of psychosocial disabilities and raising awareness of psychiatric service dogs.

The Board emphasised the private nature of health information and noted that, as far as possible, each individual should be able to control whether it is shared publicly or not. The Board also noted that the complainant felt exposed and stigmatised by the fact that the outside world, against her will, would become aware that she has a psychosocial disability. On that basis, the Board found that facts had been established that gave reason to believe that the complainant had been subjected to direct discrimination in violation of the Act on the Prohibition of Discrimination due to Disability.²⁹

²⁹ Denmark, Board of Equal Treatment, Decision No. 9915 of 28 October 2021.

The Board then assessed the claim by the association that psychosocial disabilities are still taboo, and that the visible service dog vests help to raise public awareness. Based on that claim, the Board found that the discrimination was objectively justified by the legitimate aim pursued by the association.³⁰ However, the Board also found that the association had not lifted the burden of proof that it was necessary and reasonable to maintain the requirement in order to achieve the desired purpose. In this assessment, the Board emphasised that it must be possible to spread the knowledge of psychosocial disabilities without individuals being obliged to display that they have a psychiatric service dog because of such a disability. Thus, the Board concluded that the complainant had been discriminated against based on her disability.

Upholding the complainant's second claim, the Board also found that the management of the association had subjected the complainant to harassment as a result of her complaint to the Board, notably due to an email sent to all members about the complaint.

The complainant was awarded compensation of DKK 10 000 (approximately EUR 1 345).

Online source:

<https://www.retsinformation.dk/eli/accn/W20210991525>

Estonia

EE

LEGISLATIVE DEVELOPMENT

Removal of hierarchy of grounds of discrimination

On 4 January 2022, a bill amending the Equal Treatment Act (ETA) was submitted to the Government session for approval following consultation in December 2021.³¹ The main aim of amending the ETA is to change the scope of protection in such a way that protection against discrimination extends equally to all groups referred to in Article 1(1) of the ETA, i.e. on grounds of nationality (ethnic origin), race, colour, religion or other beliefs, age, disability or sexual orientation. When the amendment enters into force, people who suspect discrimination on grounds of religion or belief, age, disability and sexual orientation will be able to turn to the Gender Equality and Equal Treatment Commissioner (Equality Commissioner), a multi-mandate equality body, in three new areas (access to and supply of goods and services that are available to the public, including housing, social protection, including healthcare, and education). The amendment is planned to enter into force on 1 July 2023 due to necessary changes to the work arrangements of the Equality Commissioner. Several civil society organisations support the bill, although the Equality Commissioner and the Association of Estonian Cities and Municipalities oppose the bill.

All grounds

In the Equal Treatment Act (ETA), areas protected against discrimination are divided into two categories. Discrimination based on racial or ethnic origin and colour is prohibited in areas of employment, education, access to goods and services, and social security, but discrimination based on religion or belief, age, disability and sexual orientation is only prohibited in the area of employment and vocational training.³² The Gender Equality Act offers protection on the basis of gender in all areas of society and further stipulates the public sector obligation to promote gender equality and gender mainstreaming. The aim

30 As a general rule, Danish law does not permit direct discrimination – not even if it could be argued to be objectively justified and proportionate. However, Section 7 of the Act on the Prohibition of Discrimination due to Disability regulating areas outside of the labour market does allow for both direct and indirect discrimination based on disability. This is the case if the differential treatment pursues a legitimate aim and is appropriate and necessary to obtain the desired aim.

31 The Government Office, [https://dhs.riigikantselei.ee/avalikteave.nsf/documents/NT00391CEE?open;Eelnõude Infosüsteem, 'Võrdse kohtlemise seaduse muutmise seaduse eelnõu'](https://dhs.riigikantselei.ee/avalikteave.nsf/documents/NT00391CEE?open;Eelnõude%20Infosüsteem,%20Võrdse%20kohtlemise%20seaduse%20muutmise%20seaduse%20eelnoou) (Bill on the Amendments to the Equal Treatment Act), File No. 21-1401. 2021. Available in Estonian at: <https://eelnooud.valitsus.ee/main#Esul7zsG>.

32 The scope of the constitutional provision on prohibition of discrimination is the same across all the grounds.

of the amendment is to ensure effective protection against discrimination regardless of a person's nationality (ethnicity), race, colour, religion or belief, disability, age or sexual orientation.

There was already an attempt to make the amendment to the ETA in 2016-2019. The draft of amended Article 2 of the ETA (196 SE) entered parliamentary proceedings in 2016, was debated only once and rejected on 21 February 2019 by the Government Office.³³ Between 2019 and 2020, the equality legislation was neither amended nor debated by the legislature. The Bill on Amendments to the Equal Treatment Act submitted in November 2021 is almost identical with the one previously drafted.

In an Opinion published on 6 December 2021, the Equality Commissioner opposed the draft and argued that the bill is not progressive enough and cannot tackle discrimination in all areas of social life.³⁴ She agrees that people who suspect discrimination in relation to the (non-)provision of services will receive protection based on age, social status or sexual orientation and that that is an important and necessary extension of the legal protection of the Estonian people.

The Association of Estonian Cities and Municipalities oppose the bill due to high costs in connection with accessibility. The association points out that there has been no analysis of the costs and of a possible source of budget.

The Equality Policies Department (Ministry of Social Affairs) officials do not agree with the Equality Commissioner. The explanatory memorandum states that there is a plan to adopt a law in 2022 regarding the Gender Equality and Equal Treatment Commissioner's mandate, power and functions. However, the explanatory memorandum for the new bill also states that a mandate for the Equality Commissioner was not drafted in the bill, because 'the EC is drafting a new directive on standards of equality bodies and it is not wise to rush national law on this subject'.³⁵

Online source:

<https://eelnoud.valitsus.ee/main#Esul7zsG>.

FI

Finland

CASE LAW

Supreme Administrative Court decision on reasonable accommodation in access to flight services



Disability

The case concerned a flight passenger who needed three seats due to her disability, and who was required by the airline to pay full price for the seats. The Non-Discrimination Ombudsman brought the case before the Equality and Non-Discrimination Tribunal, which found that the airline had discriminated against the passenger on the grounds of her disability. The Regional Administrative Court overturned the decision of the Tribunal, following which the case was taken to the Administrative High Court by the Non-Discrimination Ombudsman.

33 The bill on the Amendments of the Equal Treatment Act was rejected due to MPs' ignorance and the parliamentary election on 3 March 2019.

34 Equality Commissioner (2021), 'Opinion on the draft Bill on Amendments to the Equal Treatment Act', 6 December 2021, File No. 21-1401. 2021. Available in Estonian at: <https://eelnoud.valitsus.ee/main#Esul7zsG>.

35 *Võrdse kohtlemise seaduse muutmise seaduse eelnõu seletuskiri*, 21.12.2021 (Explanatory memorandum to the Bill on Amendments to the Equal Treatment Act of 21 December 2021), File No. 21-1401/05. Available in Estonian at: <https://eelnoud.valitsus.ee/main#HexAPvQ9>.

The Administrative High Court stated that the duty of reasonable accommodation foreseen by the Non-Discrimination Act is to be interpreted consistently with the UN Convention on the Rights of Persons with Disabilities (CRPD) and the interpretation of the UN Committee on the Rights of Persons with Disabilities of the Convention. The Court stated that this duty included a duty to arrange the flight of the passenger who needed additional space due to her disability. The airline could only be exempted from this duty if the expenses occurring from this arrangement would amount to an unreasonable level.³⁶

The Court noted that the service provider (in this case the airline) has a right to decide what kind of accommodation to provide to meet the needs of a person with disabilities. However, requiring payment for each of the three seats was not adequate to meet the needs of the passenger. The Court noted that the airline had several alternatives to choose from when arranging the transport of a person who needs more leg space, including placing the passenger in a front row seat or another seat with more leg space. The Court also noted that the airline cannot in advance deny the reasonable accommodation solely because the aeroplane serving a certain route might, in some circumstances, be changed on short notice.

The Court concluded that reasonable accommodation could have been to provide the passenger with several seats at a reduced price or other measures leading to expenses for the service provider. The Court clearly overruled the interpretation of the Regional Administrative Court, which had stated that the accommodation duty does not extend to discounts or other than minor alterations in providing the services.

The Administrative High Court rejected the argument of the airline that the freedom to conduct business and pricing freedom would prevent the use of financial discounts as part of reasonable accommodation measures.

Online source:

<https://www.kho.fi/fi/index/paatokset/vuosikirjapaatokset/1640067772579.html>

France

FR

LEGISLATIVE DEVELOPMENT

New Law on professional and economic equality of women and men

On 24 December 2021, a new law was adopted with the aim to accelerate professional and economic equality between men and women in France. The new law has a large scope and takes a gender mainstreaming approach to eliminate barriers to the inclusion of women and men in different spheres of the labour market.³⁷ The measures include; increasing the number of women in high-ranking positions outside executive boards by extending parity rules, reinforcing wage transparency rules, reducing risks of economic violence in the domestic sphere, promoting investment in start-ups, providing a right to professional training before the end of parental leave, developing gender statistics in higher education and facilitating remote working for pregnant workers.

Gender

The new law introduces several provisions to reinforce equal access of women and men to positions in executive management of companies. Article 14 states that from 1 March 2022 onwards, companies with at least 1 000 employees, must publish each year the number of female and male employee

³⁶ Finland, Administrative High Court, Decision of 22 December 2021, ECLI:FI:KHO:2021:189.

³⁷ France, Act No. 2021-1774 on accelerating professional and economic equality between men and women, 24 December 2021, available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044559192>.

top executive officers, managers and members of executive committees/bodies.³⁸ The information on the disparities of representation between women and men in these job groups must be included in a general Data Base on Economic, Social and Environmental information (BDESE).³⁹ And by March 2023, this information must also be published on the website of the Ministry of Labour.⁴⁰

According to the new law, companies with at least 100 employees will have to reach a percentage of at least 30 % of persons of each sex among the top executive officers, managers, and members of the executive committees by 1 March 2026. By 1 March 2029, this percentage must reach 40 %.

Obligations for companies to publish wage disparity indicators between women and men are also reinforced by the new law. Companies with at least 50 employees are now legally obliged to publish all their wage disparity indicators regarding the gender wage gap on the website of the Ministry of Labour. An upcoming Decree will further specify the requirements which must be met in this regard.⁴¹

According to Article 16 of the new law, public loans to companies (by BPI France) will now only be granted on the condition that companies of at least 50 employees respect the obligation to publish wage disparity indicators.

The new law further includes several other provisions including; a collective bargaining agreement on the facilitation of working remotely or alternatively a company policy facilitating working remotely for pregnant employees.⁴² It also contains provisions for access to professional/career training for parents benefitting from allowance during parental leave. Furthermore, the new law introduces the obligation for the public authority in charge of public loans (BPI France) and companies which receive financial support, to publish indicators of gender representation.

Additionally, article 9 of the new law specifies that school counsellors shall receive training on gender stereotypes,⁴³ and that institutions of higher education must publish statistics on gender disparities in their different programs and measures to correct inequalities.

CASE LAW

The right of public employees to refuse to swear a secular pledge due to their Christian faith

The claimant was hired by the public transport network of Paris as a ticket inspector, but was required to be sworn in, in order to be authorised to issue sworn statements. She refused however to cite the secular pledge provided by the Court, on the ground that it was incompatible with her Christian religion. She was not allowed to swear on the Bible, as she requested, and she was therefore dismissed. The employer alleged that her refusal to pledge was a fault that did not allow her to pursue her mission.

The claimant challenged her dismissal before the Labour Court and the Court of Appeal. She argued that she had a right to make a statement in the form accepted by her religion and that she could not have committed a fault by proposing an alternative formulation. Therefore, she alleged that she was dismissed by reason of her religious convictions and that her dismissal was null and void as it was contrary to Article L1132-1 of the Labour Code and Article 9 ECHR.

38 Article 14 introduces a new Article L 1142-11 in the Labour Code.

39 BDESE is a data base which contains all the strategic economic and demographic statistics and indicators of companies that must be collected by law in accordance with the French Labour Code Article L 2312-18.

40 France, Labour Code, Article L 1142-11.

41 Labour Code, Article L 1142-8.

42 France, Act No. 2021-1774 Article 5, on accelerating professional and economic equality between men and women, 24 December 2021.

43 Article 9 of the new law modifying [Article L 313-1](#) of the Educational code.

The Court of Appeal invoked the principle of neutrality of public authorities to find that representatives of public authorities do not swear on the Bible or any religious text. The Court thus concluded that the High Judicial Court judge was well founded in refusing to modify the pledge and that the employer acted in accordance with the law and was well founded in requiring that employees discharging inspection duties be sworn in according to the proposed pledge. Therefore, the claimant's refusal to proceed with the pledge was a fault justifying dismissal. The claimant brought the case before the Court of Cassation.

The Court of Cassation quashed the Court of Appeal's decision. It held that the duty of neutrality of the State is such that none of its agents have a power to appreciate the legitimacy of religious beliefs, expressions and practices.⁴⁴ However, the claimant's dismissal was not null and void because it was not deemed to be based on her religion, but rather on the fact that the claimant could not be sworn in, by reason of the decision of a third party, the judge.⁴⁵ Her dismissal was nevertheless without cause, considering that she had a right to be sworn in according to the requirements of her faith.

An annulment of the dismissal would have allowed the claimant to request her reinstatement and the payment of all salaries incurred, but the finding of dismissal without cause only provides for compensation for damages established by evidence, deducted from all revenues received during the period. In this case, there were more than 10 years between the dismissal and the decision, and therefore this choice of reasoning has a significant impact on the amount of compensation.

Online source:

https://www.legifrance.gouv.fr/juri/id/JURITEXT000043782032?init=true&page=1&query=20-16.206&searchField=ALL&tab_selection=all

Discrimination on the ground of age of the conditions of application to the National Magistrates' School

In France, judicial judges are recruited through various selective processes that gives them access to a two-year training programme at the National Magistrates' School or to directly enter a probationary period of two years. The relevant legislation provides for two different processes to access the school's training programme, depending on the candidate's age.

Candidates *under* 31 years of age are selected to attend the programme through a series of competitive and particularly challenging examinations.⁴⁶ Persons aged *above* 31 years of age with eight years of various professional experience or with a legal education and four years of experience of legal work are exempted from the examinations and can instead be selected through a facilitated procedure based on their education and experience.

Exceptionally, the Employment Equality Directive has not been transposed in the national legislation applicable to the status of the French judiciary.⁴⁷

The claimant meets the requirements to submit a candidacy based on her education and experience, but she is under 31 years of age and is therefore too young to access to the training programme on the basis of the alternative, facilitated procedure. Before the Supreme Administrative Court (Council of State), she challenged the legality and conformity of the relevant regulation to the Constitution and to the Employment Equality Directive, alleging that it was discriminatory on the ground of age.

⁴⁴ France, Court of Cassation, social chamber, 7 July 2021 in case No. 20-16206.

⁴⁵ This finding is contrary to a previous decision of the same court in a similar case, where the dismissal was found to amount to discrimination on the ground of religion. See Court of Cassation, decision of 01.02.2017 in case No. 16-10459.

⁴⁶ This procedure is also available to civil servants with four years of experience in the civil service under 40 years of age.

⁴⁷ France, Executive Order No. 58-1270 of 22 December 1958.

The Court ruled on the case in September 2021.⁴⁸ While the Constitutional Council had already concluded that the regulation was in conformity with the Constitution in 1992, the Court now concluded that it was not in compliance with the directive. In this regard, the Court noted that students can access the Magistrates' School before 31 years of age under certain circumstances, while the State did not present evidence that age constituted a genuine and determining occupational requirement for this specific selection process. The State alleged the necessity to limit access to the school for candidates under 31 to entry examinations, but it did not present justifications that such a requirement for this age group was appropriate or necessary.

The Court ordered the State to repeal the relevant regulation within one month. The regulation was effectively repealed in December 2021.⁴⁹

Online source:

<http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-09-08/453471>

DE

Germany

CASE LAW

Religious discrimination in employment

The claimant is a cook who worked in a kindergarten belonging to the network of charity institutions of the Protestant church in Germany and was dismissed when he ceased to be a member of the Protestant church. The Protestant church argued that a cook belongs to the 'union of service' of the church, meaning that each employee serves the mission of the church equally. It argued notably that, although not having much contact with children, the claimant was still supposed to teach the children the value of food, the joy of eating and the religious rhythm of eating during the year.

The Regional Labour Court of Baden-Württemberg⁵⁰ argued that the dismissal amounted to direct discrimination on the ground of religion. The discrimination was not justified by Article 9.2 of the Federal General Equal Treatment Act (AGG), which provides an exception to the prohibition of discrimination when the difference in treatment aims to secure essential occupational requirements derived from the ethos of a religious community. The Court invoked the case law of the CJEU, *Egenberger*⁵¹ as well as subsequent decisions by the Federal Labour Court, noting that it is necessary to differentiate between different kinds of occupations. A cook who has no contact with children beyond handing them beverages does not fulfil tasks that are sufficiently related to the ethos and religious mission of the Protestant church to trigger the applicability of this exception. Membership in the church is therefore not an essential and proportional occupational requirement for a cook. The dismissal was therefore void.

Islamic headscarf and limits of justified unequal treatment on the ground of religion

The case concerns a nurse of Muslim faith who decided, after a leave of absence following 18 years of employment with a Christian hospital run by the Protestant Church in Germany, to wear an Islamic headscarf during work. In communication with her, the employer indicated that to work as a nurse with a visible non-Christian religious symbol would amount to a violation of the duties of loyalty that she

48 France, Supreme Administrative Court (Council of State), decision of 8 September 2021 in case No. 453471.

49 France, Decree No.2021-1686 of 16 December 2021.

50 Germany, Regional Labour Court of Baden-Württemberg, Judgement No. 4 SA 27/20, of 10.02.2021 (not immediately reported).

51 CJEU, Judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257.

had agreed to respect in her employment contract. The nurse still intended to work wearing an Islamic headscarf and, therefore, was ultimately dismissed because of breach of her duties of loyalty.

The second instance court⁵² confirmed the decision of the lower instance court, finding that the dismissal of the nurse was legal. The court weighed the nurse's duties of loyalty derived from her employment contract on the one hand against her freedom of religion on the other. The court found that the dismissal was proportionate due to the religious character of the hospital, which was justified in fearing that if it allowed the nurse to wear an Islamic headscarf, other employees would display other religious symbols and thus undermine the Christian character of the hospital. It also considered whether there was discrimination on the ground of religion and religious belief. Invoking the standards outlined by CJEU *Egenberger*,⁵³ the Court argued that the nature of the nurse's tasks implied a duty to represent the Christian mission of the hospital while at work. The requirement not to wear an Islamic headscarf was thus justified.

Online source:

http://www.justiz.nrw.de/nrwe/arbgs/hamm/lag_hamm/j2021/18_Sa_1197_20_Urteil_20210325.html

Discrimination on the ground of disability by legislative omission

The case concerns a constitutional complaint initiated by several persons with disabilities. The complainants considered that the lack of a legislative regulation setting criteria for physicians' decisions about priority treatment of certain groups of people regarding access to health services in case of insufficient resources to treat all patients in need, so-called 'triage', constituted a breach of constitutional law. This problem became particularly relevant in the context of the COVID-19 pandemic, in which insufficient intensive care facilities might be available and where decisions would have to be taken concerning the priority treatment of different patients. The complainants feared that disability may become an implicit criterion of such selection decisions. As there is no regulation in place in this regard, the complainants argued that a legislative omission had led to a breach of constitutional law, in particular the prohibition of discrimination on the ground of disability.

Disability

The German Federal Constitutional Court decided⁵⁴ that the complaint was well-founded, arguing that the legislature has a positive obligation to protect persons with disabilities from discrimination. It held that there is a tangible danger that persons with disabilities may be discriminated against in decisions about access to health services, and, therefore, the legislature has a duty to enact concrete regulations in respect of such situations. The existing legislative rules, including the General Equal Treatment Act, are not sufficient to fulfil this legislative duty. The Court underlined that while the legislature enjoys a certain discretion in this regard, any such regulation must respect the equal value of each human life, derived from the guarantee of human dignity, which is ultimately the reason for the prohibition of discrimination on the ground of disability in German constitutional law.

Online source:

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/12/rs20211216_1_bvr154120.html

52 Germany, Regional Labour Court of Hamm, Judgment of 25 March 2021 – 18SA1197-20 ECLI:DE:LAGHAM:2021:0325.18 SA1197.20.00.

53 CJEU, Judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257.

54 Germany, Federal Constitutional Court, decision of 16 December 2021, No. 1 BvR 1541/20.

LEGISLATIVE DEVELOPMENT

New criminal provisions on violence against women

Gender

Act 4855/2021, adopted on 12 November 2021,⁵⁵ extensively amended the Penal Code (PC).⁵⁶ Among others, amendments were introduced regarding the following four offences: rape, sexual harassment, human trafficking and exploitation of the prostitution of others. Although worded in a gender-neutral way, the relevant provisions are mainly of interest in the field of violence against women.

i) *Sexual violence, including rape*

Although originally the *attempt* of a sexual act without the victim's consent was regarded as rape, the new provision of Article 336(4) PC, as amended by Act 4855/2021, only punishes the performance of a sexual act without the victim's consent as rape. This is more restrictive and could therefore lead to a reduction in the conviction of perpetrators.⁵⁷

For the first time, the rape of a victim who is a minor is punished with a life sentence. The same punishment applies to a gang rape or a rape that resulted in the death of the victim.⁵⁸

As a derogation from the rule of *ex officio* prosecution, no criminal prosecution takes place upon the victim's declaration that publicity resulting from the prosecution will cause her/him a serious psychic trauma.⁵⁹ The preservation of this provision has been criticised as anachronistic in that it allows transactions which, in practice, proves to be in favour of the economically powerful perpetrators; instead, procedural alternatives should be exploited to ensure the protection of the victim's psychological wellbeing.⁶⁰

Act 4855/2021 provides stricter punishments for other forms of sexual offences, including: the abuse of a person unable to provide resistance to a sexual act⁶¹ and sexual acts with minors or in their presence.⁶² For the first time, both these offences are punished with a life sentence if they resulted in the victim's death.⁶³

ii) *Offence to sexual dignity/Sexual harassment*

Due to the lack of an explicit criminal provision, as required by Article 40 of the Istanbul Convention, sexual harassment usually falls under the 'offence to sexual dignity',⁶⁴ which, as a rule, is prosecuted *ex parte*. Act 4855/2021 for the first time provided prosecution *ex officio* in the case of victims who are minors (Article 337(1) PC, as amended by Act 4855/2021). Moreover, the existing coverage provided for persons in employment subordination was extended to victims seeking employment, whose status has been exploited by the perpetrator. In both above cases, a stricter punishment is provided and, most importantly, prosecution is *ex officio* (Article 337(4) PC, as amended by Act 4855/2021).

55 Greece, Act 4855/2021 published in OJ A 215/12.11.2021.

56 The Penal Code was adopted by Act 4619/2019, OJ A 95/11.06.2019, replacing the previous Penal Code of the year 1950.

57 Papadakis, K. (2021) 'Ο Κώστας Παπαδάκης γράφει για τον Νέο Ποινικό Κώδικα: Αποπροσανατολισμός, Οπισθοδρόμηση και Πολιτικές σκοπιμότητες' (Kostas Papadakis writes about the New Penal Code: Disorientation, Regression and Political Opportunism), 12 October 2021, <https://www.koutipandoras.gr/article/o-kostis-papadakis-grafei-gia-ton-neo-poiniko-kodika-apoprosanatolismos-opisthodromisi-kai>.

58 Article 336(3) PC, as amended by Act 4855/2021.

59 Article 344 PC, as amended by Act 4855/2021.

60 Papadakis, K. (2021).

61 Article 338 PC, as amended by Act 4855/2021.

62 Article 339 PC, as amended by Act 4855/2021.

63 Article 340, as added by Act 4855/2021.

64 Under the 'offence to sexual dignity' fall the 'lighter' acts of sexual violence, such as gestures, caress, committing sexual acts before other persons, public exposure of genitals, lewd proposals for sexual acts, etc.

iii) Human trafficking

A stricter punishment of imprisonment of at least 10 years is provided for the offence of human trafficking when: i) it is committed systematically, ii) it is committed by public officials in the performance of their duties or by public officials who, taking advantage of their capacity, commit or participate therein; iii) is connected with the illegal entry, residence or exit of the victim from the country or iv) resulted in serious physical harm to the victim. If the offence resulted in the victim's death, a life sentence applies.

iv) Exploitation of the prostitution of others

The offence of the exploitation of the prostitution of others,⁶⁵ which had been abolished by Act 4619/2019, was reintroduced with a punishment of imprisonment of at least 18 months and a pecuniary sanction. The committing of this offence (or participation therein) by public officials in the performance of their duties is regarded as an aggravating circumstance (Article 349(3), as amended by Act 4855/2021).

v) Time limitation of sexual offences against minors

Last but not least, for the first time, the time limitation of offences against sexual freedom and those of sexual exploitation of sexual life committed against victims who are minors have been extended beyond majority (18 years of age): by one year in the case of a misdemeanour; by three years in the case of a felony⁶⁶ (Article 113(4) PC, as amended by Act 4855/2021).

CASE LAW

Parental leave requirements for newly appointed schoolteachers in breach of Directive 2010/18/EU

In the public sector, Article 53(2) of the Civil Servants Code,⁶⁷ provides nine months' fully paid leave to (natural, adoptive or foster) parents of a child under the age of four as an alternative to a paid daily time reduction.⁶⁸

A Circular of the Ministry of Education and Religious Affairs set new rules for the granting of a right to parental leave for newly appointed schoolteachers.⁶⁹ According to the circular, teachers who at the time of their appointment were (natural, adoptive or foster) parents of a child above the age of two years were not entitled to the nine months' fully paid leave. If the child was below the age of two years, entitlement to the leave was granted by analogy.⁷⁰

In August 2020, a newly appointed female teacher lodged a petition for annulment of the circular before the Council of State (Supreme Administrative Court). The Council of State (CS) annulled the circular for technical reasons, i.e. for not having been published in the Official Journal even though it was introducing new rules.⁷¹ However, the CS seized the opportunity to examine the circular's compatibility with national and EU law. The circular was found to be in breach of: (i) Article 21(1)(5) of the Greek

Gender

65 Directive 2011/36, Article 2(3) provides for the exploitation of the prostitution of others as a form of sexual exploitation. Article 4 of the same Directive obliges Member States to punish the offence with specific penalties and to ensure that commitment thereof by public officials in the performance of their duties should be regarded as an aggravating circumstance.

66 Article 113(4) PC, as amended by Act 4855/2021.

67 As amended by Article 47(4)(a) Act 4674/2020, OJ A 53/11.3.2020.

68 Alternatively, a paid daily working time reduction (by two hours until the child reaches the age of two and by one hour until he or she reaches the age of four; in the event of the birth of a fourth child and any child born beyond the fourth, the daily working time reduction is extended for two more years).

69 Circular No 108357/E3/21.08.2020.

70 Nine months of fully paid leave corresponds to 21 months of reduced hours.

71 Council of State, judgment No 2367, 16.12.2021.

Constitution on the protection of family, maternity and children; (ii) Articles 24 (the rights of the child) and 33(2) (family and professional life)⁷² of the Charter of Fundamental Rights of the European Union; and (iii) Directive 2010/18/EU.

The CS acknowledged the reconciliation of family and professional life as a principle of EU law enshrined in Article 33(2) of the Charter and in the Parental Leave Directives (former Directive 96/34/EC, now Directive 2010/18/EU).⁷³ In regulating parental leave, the Greek legislature enjoys a large margin of appreciation. However, compliance with the minimum standards of Directive 2010/18/EU should be ensured both regarding the four months' minimum duration of parental leave and the length of service qualification that should not exceed one year. By reference to the recent CJEU *Caisse pour l'avenir des enfants* judgment,⁷⁴ the CS emphasised that national legislation should not make the granting of a right to parental leave subject to the condition that the parent has the status of a worker at the time of the birth (or adoption) of his or her child.

In the light of the above provisions, the CS found that the granting of parental leave should not be made dependent on the parent's entitlement to reduced hours that is provided up to the age of two years of the child. Such a requirement would be in breach of Directive 2010/18/EU in that: (i) it would make the right to the nine months' fully paid leave subject to the condition that the parent has the status of an appointed teacher at the time of the birth, which is contrary to the CJEU *Caisse pour l'avenir des enfants* judgment; and (ii) if the child is born later than 12 months after the appointment, it would practically result in introducing a length of service requirement that exceeds the maximum of one year set by Directive 2010/18/EU.

The CS concluded that a newly appointed teacher with a child under the age of two years at the time of his/her appointment is entitled to either the reduced hours until the child reaches the age of two years, or the nine months' fully paid leave. A newly appointed teacher with a child above the age of two years, although not entitled to the reduced hours, is still entitled to the nine months' fully paid leave.

Following insistent protests by the Civil Servants Confederation,⁷⁵ the Ministry of Education proceeded to annul its previous circular in order to comply with the CS No 2367/16.12.2021 judgment.⁷⁶

Online sources:

<https://adedy.gr/apofasiste236721kenhmerwtikoshmeiwma/>

<https://www.especial.gr/wp-content/uploads/2022/02/akirwsi-egkykliou-adeias-anatrofis.pdf>

Minimum height requirements for entry to semi-military schools constitute indirect discrimination on the grounds of sex

In the second half of 2021, there were two important rulings in cases regarding physical requirements for entry into semi-military schools.

The post-*Kalliri* judgment: The requirement of a physical height of at least 1.70m, whatever the sex of the candidates, for entry to the police school.

72 Article 33(2) CFREU: '2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child'.

73 Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, *OJL* 68, 18.3.2010, pp. 13-20.

74 CJEU, judgment of 25 February 2021, *Caisse pour l'avenir des enfants*, C-129/20, ECLI:EU:C:2021:140, paras 40-41 & 46-51.

75 <https://adedy.gr/apofasiste236721kenhmerwtikoshmeiwma/>.

76 The Ministry of Education communicated its decision through document No. 11919/E3/03.02.2022.

Following the CJEU *Kalliri* judgment⁷⁷ and the referring judgment,⁷⁸ on 18 June 2021, the Council of State (major full section) in its judgment No. 902/2021, unanimously held that the requirement for entry to the police school of a physical height of at least 1.70m, whatever the sex of the candidates, undoubtedly constitutes unjustified indirect discrimination on the grounds of sex to the disadvantage of female candidates, contrary to the EU gender equality directive (at the time of the application, Directive 76/207). In this regard, the CS took into account that the common minimum height of 1.70m is 7cm higher than the average height of women aged 18-24 years; as a result, the percentage of potential female candidates who were excluded due to their lower height is quadruple that of potential male applicants who were excluded for the same reason. The minimum height requirement was also found to be in breach of the constitutional provisions on gender equality and proportionality.

In compliance with the CS full section judgments, on 16 December 2021, the common minimum height requirement of 1.70m was abolished as a requirement for entry to the police school; instead, the minimum height requirement was set at 1.70m for men and 1.63 for women.⁷⁹ The new provision will apply for the first time to the State exams for entry to the police school of the year 2022.

The CS found that the defendant (the Greek State), which bears the relevant burden of proof, failed to justify whether the said minimum height was appropriate and necessary to achieve the legitimate objective that it pursued, i.e. to ensure the operational capacity and proper functioning of the police services. The State's allegations that the 'tall height' entails 'power of enforcement, facilitating the execution of defence and attack techniques' cannot be accepted as a justification of the above indirect discrimination.

One could have reasonably anticipated that the findings of the CS in its above judgments would be in line with the CJEU *Kalliri* judgment. What is impressive and extremely unusual is the unanimity achieved (30 out of 30 members) whereas the referring judgment was taken only by majority (five out of seven members).

It is also noteworthy that, to the author's knowledge, for the first time the CS has explicitly applied the EU law norm of the transfer of the burden of proof in gender equality cases (Article 19, Directive 2006/54, transposed to the Greek legal order by Article 24 Act 3896/2010, OJ A 207/8.12.2010), while also referring to the CJEU jurisprudence on the use of statistical data as a means of proof of indirect discrimination.⁸⁰

The requirement of a physical height of at least 1.65m for female candidates opposed to 1.70m for male candidates for entry to the Port Police.

77 In the CJEU's judgment of 18 October 2017, *Kalliri*, C-409/16, ECLI:EU:C:2017:767, the CJEU found that the provisions of Council Directive 76/207/EEC, as amended by Directive 2002/73/EC, must be interpreted as precluding any law of a Member State that makes candidates' admission to the competition for entry to the Member State's police school subject to a height requirement of at least 1.70 m, regardless of their sex. The Court held that the law at issue in the main proceedings put a far greater number of women in a disadvantaged position than men and that it appeared to be neither appropriate nor necessary to achieve the legitimate objective that it pursued, which it is up to the national court to determine.

78 CS seven-member section No 2055/2019.

79 Article 73 Act 4873/2021, OJ A 248/16.12.2021, amending Article 1(2)(a) Act 2226/1994, OJ A 122/21.7.1994.

80 CJEU, judgment of 2 October 1997, *Kording*, C-100/95, ECLI:EU:C:1997:453, para. 20; judgment of 8 May 2019, *Violeta Villar Láiz*, C-161/18, ECLI:EU:C:2019:382, para. 46; judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, ECLI:EU:C:2019:828, para. 46.

Following the CJEU *Kalliri* judgment and the referring judgment,⁸¹ the Council of State (major full section) in its judgment No. 1363/2021, held by a vast majority (27 out of 30 members)⁸² that the minimum height requirement of 1.65m for female (as opposed to that of 1.70m for male) candidates to the Port Police constituted ‘undoubtedly’ an unjustified indirect discrimination on the grounds of sex to the disadvantage of female candidates, contrary to the EU gender equality directive (at the time of the application, Directive 76/207). In this regard, the CS took into account that the minimum height requirement for women (1.65m) is 2cm higher than the average height of women aged 18-24 years whereas the minimum height requirement for men (1.70m) is 7cm lower than the average height of men of the same age group; as a result, the percentage of potential female candidates who were excluded due to their lower height is more than double (to triple) that of potential male applicants who were excluded for the same reason. According to the CS, this difference exceeds the ‘materiality threshold’ as applied by the CJEU jurisprudence.⁸³ The minimum height requirement in question was also found to be in breach of the constitutional provisions of gender equality, meritocracy and proportionality.

According to the CS, the defendant (the Greek State), which bore the relevant burden of proof, failed to justify whether the minimum height was appropriate and necessary to achieve the legitimate objective that it pursued, i.e. to ensure the operational capacity and proper functioning of the Port Police services. The CS also noted that the State’s failure was intensified by the fact that over a short period of time, the minimum height requirement for female candidates to the Port Police had undergone unjustified increases and decreases by various other ministerial decisions.⁸⁴ According to the CS, that shows a total lack of cohesion and raises doubts as to whether the minimum height requirement for female candidates at issue (1.65m) constitutes an appropriate means for the accomplishment of the aim pursued. To that effect, the CS recalled the CJEU case law, according to which ‘national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner’.⁸⁵ Following the above post-*Kalliri* judgment, the CS explicitly applied the EU law norm of the transfer of the burden of proof in gender equality cases (Article 19, Directive 2006/54, transposed to the Greek legal order by Article 24, Act 3896/2010, OJ A 207/8.12.2010), while also referring to the CJEU jurisprudence on the use of statistical data as a means of proof of indirect discrimination.⁸⁶

Last but not least, both cases took more than 13 years until the issue of the CS full section judgments. This raises the issue of the excessive duration of trials in gender equality cases as a disincentive for gender equality litigation.

81 Following the rejection of her petition by judgment No. 598/2009 of the Administrative Court of Appeal of Piraeus, the female candidate appealed before the Council of State (CS) in 2010. The issue of her appeal being considered of major importance, the case was referred to the seven-member section of the CS, which by its judgment No. 1426/2016 adjourned its decision until the publication of the CJEU judgment in the *Kalliri* case. In CS judgment No. 2353/2019, the case was referred to the full section of the CS due to the importance of the issues raised regarding the compatibility of the impugned provision with the Greek Constitution and EU law and the relevance of the case to the CS’s *Kalliri* case, which by CS judgment No. 2055/2019 had also been referred to the CS full section.

82 Three judges expressed a dissenting opinion.

83 CJEU, judgment of 20 October 2011, *Brachner*, C-123/10, ECLI:EU:C:2011:675, paragraph 63 and the Opinion of AG, ECLI:EU:C:2011:400, paragraphs 63-72.

84 Originally, in 1996, it was set at 1.6 m (for men at 1.70m), in the years between 1997 and 2001, it was raised to 1.65m (for men it remained at 1.70m), in the year 2003 it was decreased to 1.60m (for men it was decreased to 1.65m), and in the year at issue, 2007, it was again raised to 1.65m (for men it was raised to 1.70m). Finally, in the years 2011, 2014 and 2015, the MHR for female candidates was decreased again to 1.60m (for men it remained at 1.70m).

85 CJEU judgments of 10.3.2009, *Hartlauer*, C-169/07, ECLI:EU:C:2009:141, paragraph 55; of 12.1.2010, *Petersen*, C-341/08, ECLI:EU:C:2010:4, paragraph 53; *Brachner*, C-123/10, paragraph 71; of 26.9.2013, *HK Danmark*, C-476/11, ECLI:EU:C:2013:590, paragraph 67; of 15.10.2015, *Grupo Itevelesa SL*, C-168/14, ECLI:EU:C:2015:685, paragraph 76; and of 29.7.2019, *European Commission v Austria*, C-209/18, ECLI:EU:C:2019:632, paragraph 94 etc.

86 CJEU, *Kording*, C-100/95, para. 20; *Violeta Villar Láiz*, C-161/18, para. 46; *Schuch-Ghannadan*, C-274/18, para. 46.

Administrative fine imposed on a TV channel for gender discrimination and stereotyping

Relying on its competence under Article 24 of Act 4604/2019,⁸⁷ the National Council for Radio and Television (NCRTV)⁸⁸ imposed an administrative fine of EUR 50 000 on a TV channel⁸⁹ for breaching the principle of gender equality and for the reproduction of gender stereotypes regarding the reality TV show *The Bachelor II*, broadcast in September 2021. According to the scenario, 20 unmarried women aged 19–39 years live in the same house with an unmarried man aged 30 years and compete for a relationship with him; at the end, the winner will be the woman to whom the man chooses to make a marriage proposal. It is a ‘confinement’ show of a duration of four months during which the participants have no contact with the outside world and are filmed daily. In September 2021, the NCRTV received 17 complaints against this reality show (including several from women’s NGOs and gender equality departments of political parties). Moreover, an electronic complaint in the form of a petition against this show addressed to the NCRTV was organised by the platform Avaaz, which collected 24 557 signatures by 12 October 2021. NCRTV’s decision to impose a fine was given wide publicity and was welcomed by women’s NGOs. However, the long duration of the proceedings before the NCRTV (the case was heard on 23 November 2021, decided on 21 December 2021 and made public on 8 February 2022) raises the issue of efficiency (at the time of the issue of the decision, the show in question had been playing for four months).

Gender

In its decision,⁹⁰ the NCRTV found that through dialogue, images and the behaviour of the contestants, the TV show in question presented women in a manner that was based on deprecatory stereotypes. It also illustrated men and women in stereotypical roles within society and defined and limited by their sex. In particular, gender stereotypes were reproduced through the presentation of the means and methods used by female contestants to compete for the Bachelor (in particular, through their external appearance and sexuality) and through the objectification of women in their efforts to win him (repeated intense debates among the contestants, verbal attacks and offensive characterisations exchanged among them with the sole aim of overcoming others for the claim of a man). All these things promote low-value role models for contemporary women. As TV shapes the opinion and the will of the public by addressing an unlimited number of persons and by using of the power of images, which have a stronger impact, the broadcasting of a programme with such a content intensifies the risk of the promotion of behaviour that perpetuates prejudices and deep-rooted social and cultural stereotypes.

It is notable that the NCRTV based its reasoning, *inter alia*, on Articles 4(2)⁹¹ (gender equality in all fields) and 116(2)⁹² (statutory obligation for positive action in favour of the underrepresented sex, in particular women) of the Greek Constitution. According to the NCRTV, it derives its duty from the latter, through its direct control of radio and television, to secure gender equality and the non-promotion of gender stereotypes in the broadcasting of radio and TV programmes. Moreover, for the first time, the NCRTV included in the legal basis of its decision the Council of Europe’s Recommendation on preventing and

87 Article 24 Act 4604/2019 provides that the social media (including the electronic ones) and advertising should act for the promotion of substantive equality by presenting a non-stereotypical image of persons. This can be achieved through the adoption of provisions that aim to realise substantive equality and to eradicate sexism and gender stereotypes in the codes of ethics and in self-binding rules; moreover, the social media should draft a yearly report on the adoption of the above provisions and submit it to the competent ministry. The radio and the television should promote the presence of women in all the areas of social, economic, cultural and political aspects of life in the country.

88 The Greek National Council for Radio and Television (NCRTV) is a Greek independent administrative authority that supervises and regulates the radio/television market, founded in 1989 by virtue of Act 1866/1989, OJ A 322/6.10.1989, as amended by Act 2863/2000, OJ A 262/29.11.2000 and Act 3051/2002, OJ A 220/30.9.2002.

89 Another fine of EUR 80 000 was imposed for the offence of qualitative degradation of the programme (non-compliance with the rules of decency in language and behaviour); another fine of EUR 50 000 was imposed for the offence of harm of the personality and decency of the spectators of TV.

90 National Council for Radio and Television (NCRTV), decision No. 210/23.11.2021.

91 Article 4(2) of the Greek Constitution (‘Greek men and women have equal rights and obligations’) requires (substantive) sex equality in all areas; it implicitly prohibits sex discrimination.

92 Article 116(2) of the Constitution states that, ‘Positive measures aiming at promoting equality between men and women do not constitute discrimination on grounds of sex. The State shall take measures to eliminate inequalities existing in practice, in particular those detrimental to women.’

combating sexism (CM/Rec(2019)1),⁹³ referring to it extensively, including paragraph II.C of its appendix on media, advertising and other communication products and services.⁹⁴

According to the NCRTV, the provisions of the recommendation place an obligation on radio and TV stations to broadcast programmes that eradicate sexism and gender stereotypes and promote gender equality and non-discrimination on the grounds of sex. It is the NCRTV's duty to monitor compliance with these obligations in order to secure gender equality and prevent the promotion of gender stereotypes in the broadcasting of radio and TV programmes.

Online source:

<https://www.reader.gr/sites/default/files/files/2022-02/EZP-Bachelor-ALPHA.pdf>

HU

Hungary

CASE LAW

High court decision regarding the refusal of listing an LGBTQI organisation among family organisations

Over a period of more than six months, the Hungarian LGBT Alliance requested that its member organisation, the Rainbow Families Foundation, be added to the list of 'family organisations' published on the Government's information portal on family policy. When the request was denied, the Alliance sent a letter to both the maintainer of the website and the ministry responsible for it, informing them that this amounted to a violation of the requirement for equal treatment. After almost one year without any response, the Rainbow Families Foundation filed a complaint with the Equal Treatment Authority.

In 2017, the Equal Treatment Authority concluded that the respondents had discriminated against the complainant on the basis of sexual orientation.⁹⁵ Following a judicial review requested by the respondents, the Metropolitan Regional Court quashed the decision of the Equal Treatment Authority, finding that the initial complaint was submitted after the one-year time limit.⁹⁶ The Authority challenged the judgment before the Kúria (Hungary's high court), which quashed the judgment and ordered the court to retry the case on the basis of the following interpretation of Article 17 of the Equal Treatment Act: if a violation is of a continuing nature, the time limit for submitting a complaint under the ETA does not start as long as the violation is on-going. If a violation is on-going at the time of submitting the complaint, then the complaint cannot be time-barred.⁹⁷ Based on this decision, the Metropolitan Regional Court retried the

Sexual
orientation

93 The Council of Europe Recommendation CM/Rec(2019)1 of the Committee of Ministers to member States on preventing and combating sexism (Adopted by the Committee of Ministers on 27 March 2019 at the 1342nd meeting of the Ministers' Deputies).

94 Appendix to Recommendation CM/Rec(2019)1, under 'II.C. Media, advertising and other communication products and services': 'Sexism in the media – electronic, print, visual and audio – contributes to an environment that tolerates and trivialises "everyday" sexism. It is manifested through: – sexual, sexualised and racialised depictions and objectification of women, men, girls and boys, including in advertising, films, television, video games and pornographic material; – derogatory or trivialising reporting about women's appearance, dress and behaviour rather than balanced and informed discussion of their views and opinions; – reporting and imaging women and men in stereotypical roles within the family and community; – reproducing and perpetuating gender stereotypes with respect to victims of gender-based violence; – unbalanced representation and the lack of meaningful participation of women in diverse professional and informative roles (experts, commentators), especially with respect to minority women.'

95 Hungary, Equal Treatment Authority, decision No. EBH/450/20/2017 of 15 November 2017.

96 Hungary, Metropolitan Regional Court, judgment No. 15.K.700.064/2018/21, no date available.

97 Hungary, High Court, decision No. Kfv.III.37.881/2018/6 of 21 January 2020. For a more detailed summary of the decision, please see *European equality law review*, Issue 2/2020, pp. 121-122.

case and upheld the Equal Treatment Authority's initial decision.⁹⁸ The respondents requested a review from the Kúria.

In April 2021, the Kúria quashed the judgment of the Metropolitan Regional Court as well as the decision of the Equal Treatment Authority and rejected the complaint on the basis of the following arguments.⁹⁹ First, the failure of the complainant to find a relevant comparator, because (i) there is no other LGBTQI organisation on the list, so the complainant could not have suffered any disadvantage compared to other LGBTQI organisations, and (ii) 'if we compare the [complainant] to groups working generally for families, then there is no disadvantage, because such organisations constitute a much larger group than those who are included in the list'. In this regard, the Kúria also noted that the list is not exhaustive, i.e., not only the complainant, but several other, traditional as well as alternative, family organisations are missing from the list. Therefore, no direct discrimination can be found. Secondly, the Kúria found it problematic that the complainant had only claimed that it had suffered a disadvantage, but had not adequately substantiated this claim. The Kúria also concluded that since there was no statutory obligation to compile the list, (i) it was within the respondents' discretion to make a decision about whom to include, and (ii) there was no prescribed deadline for the respondents to make a decision about the complainant's request. Finally, the fact that the respondents submitted agreements of cooperation with only three of the close to 40 organisations on the list did not refute the claim that only those organisations were included in the list that had some form of cooperation with the respondents, as there could have been verbal agreements.

Upon the complainant's appeal, the case is pending before the Constitutional Court.

Ombudsman's decision concerning a case of a trans employee

A trans-identifying employee who had received feminising hormonal treatment and surgery, requested access to a women's changing room and bathroom that was located on the first floor of the company building. The employer held an anonymous vote amongst female employees about this request, and almost two-thirds of the female employees voted against it. The employer then offered the use of a unisex bathroom, located on the ground floor, for the trans-identifying employee, who found this measure unacceptable and filed a complaint with the relevant authority. The complaint was based on three main claims: i) direct discrimination based on the grounds of gender identity, because the employer had not provided the complainant with gender-appropriate bathroom access; ii) direct discrimination based on gender identity, because the voting question included the complainant's legal (male) name and not the complainant's self-chosen (female) name; and, iii) the employer's above-mentioned nonfeasance and discriminatory measure amounted to harassment based on gender identity.

Gender-identity

The case was decided by Hungary's new equal treatment body in July 2021,¹⁰⁰ the Equal Treatment Directorate of the Commissioner for Fundamental Rights (functioning from January 2021 as the successor to the Equal Treatment Authority).¹⁰¹

The Commissioner's decision found that the complaint was partially justified regarding the three claims.

- i) The decision established that the employer's nonfeasance (not providing the complainant with gender-appropriate bathroom access) is to be considered direct discrimination based on gender identity and ordered the employer to cease this discriminatory practice. Moreover, the decision ordered the employer to settle the bathroom access issue with attention to the complainant's gender identity within 90 days in one of the following ways: by granting the complainant access to the women's

⁹⁸ Hungary, Metropolitan Regional Court, decision No. 46.K.701.141/2020/5 of 2 June 2020.

⁹⁹ Hungary, High Court, judgment No. Kfv.III.37.156/2021/3 of 13 April 2021.

¹⁰⁰ Hungary, Decision of the Equal Treatment Directorate of the Office of the Commissioner for Fundamental Rights No. EBF-AJBH-187/2021, July 2021.

¹⁰¹ For further information regarding these developments, see European equality law review, Issue 2021/2, pp. 94-96, available at: <https://www.equalitylaw.eu/downloads/5536-european-equality-law-review-2-2021-pdf-1-349-kb>.

changing room and bathroom (either by leaving this facility in its current form or by setting up cubicles inside the room); by setting up single-user changing rooms and bathrooms to be used by all employees, including the complainant; by assigning a changing room and bathroom for the exclusive use of the complainant; or by any other means that is acceptable to the complainant.

- ii) The Commissioner's decision found that displaying the complainant's legal name on the voting sheet did not amount to discrimination, as the employer rightly considered the voting sheet to be an official document in which a person's legal name should be used (the employer explained that on other occasions the complainant's self-chosen/preferred name was used in the internal communication of the company, and in informal conversations among colleagues as well).
- iii) According to the reasoning of the Commissioner's decision, the lack of acceptable bathroom access and the name-use controversy apparently caused distress to the complainant. However, it is already established that the nonfeasance of the employer amounts to discrimination, and experiencing discrimination may be distressing, but no additional layer of harm can be identified that may qualify as harassment in light of the objective legal standards. As for the issue of the complainant's name, the employer accommodated the complainant's preference whenever it was possible and an atmosphere of harassment could not be detected in relation to this matter.

This case is to be considered the second of its kind regarding the issue at stake (access to women's bathroom). The first such case was dealt with by the Equal Treatment Authority in 2019;¹⁰² in that case, the Authority endorsed a settlement in which the employer undertook to accommodate the complainant's bathroom-related claims.

Similar to the 2019 case, the complainant in the 2021 case was supported with legal representation by a Hungarian LGBTQI organisation, Háttér Society (Háttér Társaság). Háttér Society's press release about the decision includes personal comments from the complainant, referred to by the name Petra, who was distressed by the fact that some female employees made decisions related to the bathroom dispute 'driven by their own views and preferences'.¹⁰³

The decision refers to the fact that the complainant started (feminising) hormone replacement treatment two years ago, before spending 'a longer period of time on paid sick leave' due to 'gender modification surgery'; but it is not explained whether the treatment included the removal of the male genitalia.

Moreover, the decision does not provide information about whether the complainant, who legally still has a man's name, ever applied for legal gender recognition when it was still possible in Hungary, before 29 May 2020.¹⁰⁴ However, despite the lack of opportunity for legal gender recognition, the Equal Treatment Act still explicitly lists 'gender identity' among the protected grounds in all fields, including employment.

Online source:

https://www.ajbh.hu/documents/10180/4041334/EBF_AJBH_187_2021_nemi_identitas_foglalkoztatasi.pdf/6b61ec91-c386-c92c-df83-e1e2b31e9c81?version=1.0&t=1634901244590

102 Decision of the Equal Treatment Authority No. 118/2019. See the summary of the case: Balogh, L. (2019), 'Hungary: Choosing changing room in line with gender identity', 1 July 2019, available at: <https://www.equalitylaw.eu/downloads/4925-hungary-choosing-changing-room-in-line-with-gender-identity-pdf-81-kb>.

103 The press release is available only in Hungarian; see Háttér Society (2021) 'Ombudsman: a munkáltatónak biztosítania kell a transznemű munkavállalók megfelelő öltöző- és mellékhelyiség-használatát' (Ombudsman: The employer must provide transgender employees with appropriate changing room and restroom access), <https://hatter.hu/hirek/ombudsman-a-munkaltatonak-biztositania-kell-a-transznemu-munkavallalok-megfelelo-oltozo-es>.

104 See about this development: Balogh, L. (2020), 'Amendment of the provisions on legal recognition of gender', 30 June 2020, <https://www.equalitylaw.eu/downloads/5168-hungary-amendment-of-the-provisions-on-legal-recognition-of-gender-137-kb>.

Ministry's failure to take action against unjustified removal of Roma children from their families amounts to discrimination

The European Roma Rights Centre (ERRC) launched an *actio popularis* lawsuit against the Ministry of Human Capacities, claiming that the practice of the child protection institutions in Nógrád County, which are under the ministry's control, of taking Roma children into care on the basis of the families' social status and poverty, in much larger proportions than non-Roma children, amounts to discrimination. Research carried out on behalf of the ERRC in 2015-2016 showed that although Roma make up less than 20 % of the county's population, Roma children represent over 80 % of those in state care. Even though under the relevant Hungarian legislation, children should not be removed from their family solely for material reasons, the poverty of the affected families was clearly a significant reason for most removals. The UN Committee on the Rights of the Child (UN CRC) also repeatedly called on Hungary to 'fully implement the prohibition of the separation of children from their families and their placement in alternative care on the basis of the economic situation of those families'.

Racial or ethnic origin

ERRC argued that, by failing to take effective action against this practice, the ministry had failed to fulfil its obligations stemming from the Equal Treatment Act, the Child Protection Act and the relevant Government Decree, notably to conduct an investigation into the overrepresentation of Roma children in the child protection system, and to develop protocols on how to prevent finance-based removals and the ethnically disproportionate practice of removals (which would have also required the collection of ethnic data on Roma children entering the child protection system).

In October 2021, the Budapest Regional Court concluded that the ministry had violated the right to equal treatment of all Nógrád County children who had been removed from their families solely on the basis of their families' financial situation, and, in particular, those of Roma origin.¹⁰⁵ The ministry should have conducted a targeted investigation into the fact that Roma children are significantly overrepresented among such children. The court ordered the ministry

- i) to put an end to the violation;
- ii) to assess for the next five years the number of children in the Nógrád County child protection system who can be regarded as being of Roma origin on the basis of perception, and to publish annually the results of the assessment and any measure subsequently taken based on those results;
- iii) to carry out an investigation into the extent to which the ban on discrimination based on Roma ethnicity and financial status is complied with in the course of the removal of children from families in Nógrád County, and to prepare an action plan based on the results of the investigation;
- iv) to monitor the implementation of the action plan, and to publish the results.

In the judgment, the court made some important points, notably regarding the shift of the burden of proof. Indeed, the court clarified that the claimant's obligation to substantiate (and not fully prove) the disadvantage and the existence of the protected ground means that it is sufficient for the claimant to assert that a given fact is in the 'possible-not excludable' range. The research results, the recommendations of the UN CRC and the conclusions of a previous Ombudsman's report as presented by ERRC satisfied this requirement. It was also clear that the respondent was aware of these results and documents, and still failed to take action to remedy the problems, or even conduct an in-depth investigation into the issue. The court also concluded that, given that the Hungarian rules concerning ethnic data collection are indeed very strict, the ministry would not be able to assess whether the practice of the child protection authorities is discriminatory and whether any intervention is necessary, which is an obligation of the State (and thus, the ministry) under international treaties, including the European Convention on Human Rights. Therefore, the collection of data on the ethnicity of the children removed from their families must be regarded as necessary for compliance with international treaties and must therefore be permissible under the pertaining domestic rules. Finally, the court also concluded that the civil court can go beyond

¹⁰⁵ Hungary, Budapest Regional Court, judgment No. 27.P.20.939/2020/44 of 4 October 2021.

generally obliging the respondent to put an end to the violation, and may describe in detail how that should be done (injunctive relief), even if the issue of discrimination arises in a relationship regulated by public law (as in the present case).

Online source:

<http://www.errc.org/press-releases/budapest-court-rules-state-removal-of-romani-children-from-families-is-discrimination>

POLICY AND OTHER RELEVANT DEVELOPMENTS

The Global Alliance of National Human Rights Institutions recommends that Hungary's Ombudsman be downgraded to B status due to lack of functional independence

On 1 December 2020, the Parliament passed legislation abolishing Hungary's equality body, the Equal Treatment Authority and transferring its mandate to the Commissioner for Fundamental Rights (Hungary's Ombudsman).¹⁰⁶ The law entered into force on 1 January 2021.

The amendment was met with strong objections from domestic as well as international organisations representing protected groups. Their main concern was that while the Equal Treatment Authority was one of the best functioning rights protection bodies in Hungary, not shying away from delivering decisions in sensitive, complex cases to protect vulnerable minority groups, there were serious doubts as to the Ombudsman's willingness to confront the Government on politically sensitive matters.

The Ombudsman is Hungary's national human rights institution (NHRI), and, as such, it is subject to regular review regarding its independence by the Sub-Committee on Accreditation (SCA) of the Global Alliance of National Human Rights Institutions (GANHRI), which assesses whether a particular NHRI meets the requirements of the Paris Principles.¹⁰⁷ They require NHRIs to be independent in law, membership, operations, policy and control of resources. NHRIs that comply with the Paris Principles are accredited with A status, while those that partially comply are accredited with B status.

In October 2019, the SCA deferred the review of the Ombudsman's A status because it did 'not demonstrate adequate efforts in addressing all human rights issues, nor has it spoken out in a manner that promotes and protects all human rights'. Also, the Ombudsman made limited use of international human rights mechanisms 'in relation to sensitive issues'.¹⁰⁸ The deferral would have provided the Ombudsman with the possibility to refute these doubts, however, the Ombudsman's activities were not sufficient to do so. When the deferred evaluation was carried out in June 2021, its results fully confirmed the concerns of civil society. The SCA expressed the view that

'the CFR [Commissioner for Fundamental Rights] has not effectively engaged on and publicly addressed all human rights issues, including in relation to vulnerable groups such as ethnic minorities, LGBTI, refugees and migrants as well as constitutional court cases deemed political and institutional, media pluralism, civic space and judicial independence. The SCA is of the view that the CFR has not spoken out in a manner that promotes protection of all human rights. The failure to do so demonstrates a lack of

¹⁰⁶ For further information, see *European equality law review*, Issue 2021/1, pp. 94-95.

¹⁰⁷ Resolution 48/134 of the UN General Assembly Principles adopted on 20 December 1993 relating to the Status of National Institutions.

¹⁰⁸ Global Alliance of National Human Rights Institutions (GANHRI) (2019), *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)*, 14-18 October 2019, https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/GANHRI/SCA_Report_October_2019_English.pdf, pp. 23-26.

sufficient independence. Therefore, the SCA is of the view that the CFR is operating in a way that has seriously compromised its compliance with the Paris Principles.¹⁰⁹

Moreover, the SCA mentioned that according to information from civil society organisations, ‘the CFR had failed to step up in support of the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence, known as the Istanbul Convention’. Unless the Ombudsman demonstrates significant improvement by next year, the recommendation will be upheld, and the Hungarian Ombudsman will be downgraded to B status.

Online source:

<https://www.ohchr.org/Documents/Countries/NHRI/GANHRI/EN-SCA-Report-June-2021.pdf>

Venice Commission opinion on the merging of the Equal Treatment Authority into the Ombudsman’s Office

Following the abolition of the Equal Treatment Authority and the merging of its competences into the Ombudsman’s Office which entered into force on 1 January 2021, the European Commission for Democracy through Law (Venice Commission) of the Council of Europe examined the legislation based on a request from the Parliamentary Assembly of the Council of Europe (PACE). It consulted with representatives of the Ministry of Justice, the Ombudsman’s Office, political parties, as well as with representatives of civil society. The Venice Commission adopted its opinion in October 2021.

All grounds

Legislative process – the Commission expressed its regret ‘that the Acts in question were adopted during the state of emergency, in a rushed manner, apparently without consultation with civil society and other stakeholders’.

Human resources – the Commission noted with regret that neither a director general for equality treatment (DGET), nor a deputy DGET had been appointed, nine months after the merger, and that the Equal Treatment Directorate was understaffed, which affected the overall quality of its performance. The Commission concluded that ‘Without a DGET, it is hard to imagine the promotion and visibility of the equality mandate as required by ECRI General Policy Recommendation No 2.’ For that reason, the Commission encouraged ‘the Hungarian authorities to ensure a timely appointment of a DGET and his/her Deputy in accordance with clear and transparent criteria defined by law’. However, at the time of writing, neither a director general for equality treatment, nor a deputy director general has been appointed.

Financial resources – During its meeting with the Ombudsman, the Venice Commission was not provided with accurate information on the Equal Treatment Directorate’s budget. In the absence of accurate information, the Venice Commission could only remain ‘hopeful that ETD is under no risk of under financing and that work on equality issues, as a result of the merger, is taken to a higher level’.

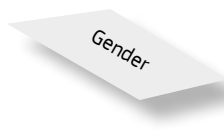
Procedural issues – Reflecting the concerns of stakeholders who raised their voices against the merger, the Venice Commission is of the view that ‘the new system of protection against discrimination is overall more complicated and thus has the potential to be less effective than the previous one’; and that ‘collision of the competences already enjoyed by the Commissioner under Act CXI and those acquired in his/her capacity as successor of the Equal Treatment Authority, is a clear demonstration of a risk that may undermine the effectiveness of the work in the field of promoting equality and combating discrimination’.

Online source:

[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)034-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)034-e)

109 GANHRI (2021), Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation (SCA), 14-24 June 2021.

LEGISLATIVE DEVELOPMENT

Per diem fines levied on companies failing to implement the equal pay certification standard


The Directorate of Equality is authorised to levy per diem fines for companies who fail to meet the requirements of equal pay certification.¹¹⁰ As stipulated in Article 7 of the Gender Equality Act (GEA),¹¹¹ a company or institution with an average of 25 or more employees, must acquire equal pay certification following a certification body's audit of the company's or institution's equal pay system. The certificate must confirm that the equal pay system and its implementation meet the requirements of the Equal Pay Standard ÍST 85:2012.¹¹² Upon completion of the equal pay certification, the certification body will send a copy of the equal pay certificate to the Directorate of Equality, together with a report on the outcome of the audit. The equal pay certificate must be renewed every three years. The certification body must also inform the Directorate of Equality if the audit does not result in equal pay certification, and state the reasons for this by submitting a report on the outcome of the audit.

An amended regulation No. 1030/2017, on the equal pay certification process of companies and institutions on under the Standards ÍST 85 set the deadline at the end of 2019 for public institutions, funds and state owned companies with a minimum of 25 employees in principle per annum. The deadline for public limited companies with more than 250 employees in principle per annum, was also set at the end of 2019. The deadline for public limited companies with 150-249 employees in principle per annum, was set at the end of 2020. The deadline for public limited companies with 90-149 employees in principle per annum, was set at the end of 2021.¹¹³

By the end of 2021, the Directorate of Equality published an overview on the status of the equal pay certification process. Out of 415 parties 94 had not terminated the process. Those who were supposed to be finished by the end of 2019 and 2020 were granted a generous postponement due to the pandemic. The Directorate of Equality, however, considered that time limit had expired and announced that it was now preparing announcements regarding per diem fines for those companies who failed to meet the requirements.¹¹⁴

The Standard ÍST 85 is a management requirement standard and can be used by all companies and institutions regardless of the size of the workplace, operation, role or gender balance amongst staff. The Standard ÍST 85 ensures professional working methods in order to prevent direct or indirect discrimination.

Accredited certification bodies shall confirm that a company's or institution's equal pay system and its implementation thereof meet the requirements of the Standard ÍST 85.

110 Iceland, Gender Equality Act No. 150/2020, Article 5, <https://www.government.is/library/04-Legislation/Act%20on%20Equal%20Status%20and%20Equal%20Rights%20Irrespective%20of%20Gender.pdf>.

111 Iceland, Gender Equality Act No. 150/2020, available at: <https://www.althingi.is/lagas/nuna/2020150.html>; <https://www.government.is/library/04-Legislation/Act%20on%20Equal%20Status%20and%20Equal%20Rights%20Irrespective%20of%20Gender.pdf>.

112 Equal Pay Standard ÍST85, available at: <http://www.kvenrettindafelag.is/wp-content/uploads/2015/03/The-Equal-Pay-Standard-%C3%8DST-85-www.vel.is.pdf>.

113 Number of employees in principle per annum: The average number of employees for any given employer, regardless of employment ratio, who received pay in the last calendar year. The average number per annum is calculated as the combined number of employees during each month of the calendar year, divided by twelve.

114 Morgunblaðið (2022), 'Geta átt dagsektir yfir höfði sér' (Can face daily fines), 27 January 2021, <https://www.jafnretti.is/is/um-jafnrettisstofu/frettir/stada-jafnlaunavottunar-i-lok-arsins-2021> <https://www.mbl.is/frettir/innlent/2022/01/27/geta-att-dagsektir-yfir-hofdi-ser/>.

Despite the obligation for equal pay certification, a company which employs an average of 25-49 employees can choose to either undergo an equal pay certification or to receive an equal pay confirmation following the submission of documentation showing that its equal pay system and its implementation comply with the requirements of the Directorate of Equality for the confirmation.¹¹⁵

Online sources:

https://www.mbl.is/frettir/innlent/2022/01/27/geta_att_dagsektir_yfir_hofdi_ser/

<https://www.government.is/library/04-Legislation/Act%20on%20Equal%20Status%20and%20Equal%20Rights%20Irrespective%20of%20Gender.pdf>

CASE LAW

The State to pay damages for a violation of the Gender Equality Act (GEA) by a cabinet minister

In Iceland, a new Government was formed in the autumn of 2021. The current Minister of Education has decided to halt further legal proceedings in an on-going case pending before the Court of Appeals (Landsréttur) regarding the violation of the Gender Equality Act (GEA) and to pay the victim of gender-equality discrimination compensatory damages for personal injury in the amount of ISK 2.3 million (EUR 16 166), in addition to legal fees.

Gender

On 27 May 2020, the Gender Equality Complaints Committee held that enough likelihood had been adduced that the Minister of Education had violated Article 26 of the GEA when appointing a man as the permanent secretary of her cabinet instead of a woman. The cabinet minister failed to prove to the Gender Equality Complaints Committee that factors other than gender were at play. According to the GEA, the rulings of the Gender Equality Complaints Committee are binding. Moreover, the parties may refer the Gender Equality Complaints Committee's rulings to the courts.¹¹⁶ The Minister of Culture sought legal advice before deciding to proceed against the ruling of the Gender Equality Complaints Committee. Accordingly, the minister was advised that there were legal shortcomings in the ruling and, furthermore, that the ruling, if uncontested, would bring with it legal uncertainty. After the Reykjavík District Court rejected the claim of the Minister of Education, Science and Culture, she decided to appeal the case to the Court of Appeals.

Just before the case was about to be dealt with by the Court of Appeals on 28 February 2021, the parties reached an agreement, on the initiative of the victim, to end the case without further legal proceedings.

The settlement entailed paying compensation for personal injury (emotional damages) to the victim. However, it was held that she could not be paid compensatory damages because it was not evident that she would have been appointed Permanent Secretary. Indeed, out of a total of 13 applicants, she had not been included among the four applicants considered 'best qualified' for the post. Instead, she had only been considered as 'well qualified' for the post. In light of this, it was not possible to pay her compensatory damages for the loss of earnings based on the difference between the salary of the permanent secretary and her current post, and therefore she only received emotional damages.

The litigation costs for the State before the district court was ISK 8.7 million (EUR 61 152). It was estimated that the cost of litigation before the Court of Appeals would have been around ISK 900 000 to

¹¹⁵ Government of Iceland, Equal pay certification, available at: <https://www.government.is/topics/human-rights-and-equality/equality/equal-pay-certification/>.

¹¹⁶ Iceland, Gender Equality Act No. 10/2008, Article 5(4).

1.2 million (EUR 7 000), in addition to the damages paid. The litigation cost for the victim, ISK 4.5 million (EUR 31 600) was also paid from the Treasury.¹¹⁷

The administration of gender equality has been amended in the wake of this case. Now, the Gender Equality Complaints Committee can itself be a party to a case if its ruling is contested before a court of law.

Online sources:

<https://www.stjornarradid.is/efst-a-baugi/frettir/stok-frett/2022/02/25/Mali-vegna-skipunar-raduneytistjora-lokid-med-satt/>

<https://www.ruv.is/frett/2022/02/25/rikid-greidir-baetur-vegna-brots-lilju-a-jafnrettislogum>

<https://kjarninn.is/skyring/islenska-rikid-fellur-fra-malarekstrinum-gegn-hafdisi-helgu-og-greidir-henni-miskabaetur/>

IE

Ireland

LEGISLATIVE DEVELOPMENT

Gender Pay Gap Information Act signed into law

The Gender Pay Gap Information Act 2021 was signed into law on 13 July 2021. The Act provides the statutory basis for gender pay gap reporting. However, in order to commence reporting under the Act, regulations under the Act will be published in the next few weeks.¹¹⁸

The Act of 2021 provides that organisations with over 250 employees will have to report on the gender pay gap with a 'snapshot' date in June 2022 and then the hourly gender pay gap for the same employees will be taken in December 2022. The information employers will be asked to provide in their report includes:

- the mean and median hourly wage gap, the former reflecting the entire pay range in an organisation and the latter excluding the impact of unusually high earners;
- data on bonus pay;
- the mean and median pay gaps for part-time employees and for employees on temporary contracts;
- the proportions of male and female employees in the lower, lower middle, upper middle and upper quartile pay bands.

Employers are also required to publish a statement setting out, in the employer's opinion, the reasons for the gender pay gap in their company and what measures are being taken or are proposed to be taken by the employer to eliminate or reduce that pay gap. The legislation will encompass organisations with 150 employees in 2024 and 50 or more employees in 2025.

117 Juliussun, P.S. (2022) 'Íslenska ríkið fellur frá málarekstrinum gegn Hafdisi Helgu og greiðir henni miskabætur', *Kjarninn*, 25 February 2022, <https://kjarninn.is/skyring/islenska-rikid-fellur-fra-malarekstrinum-gegn-hafdisi-helgu-og-greidir-henni-miskabaetur/>.

118 On 9 March 2022, the Irish Human Rights and Equality Commission (IHREC) published a *Code of Practice on Equal Pay*. The code of practice is a useful and well written document on the application of the principles of equal pay as provided for in both EU directives and Irish legislation and both EU and Irish case law. The document provides guidance for employers on the elimination of any pay inequality with pay reviews and job evaluation. A code of practice is admissible in proceedings before a court or tribunal.

Online sources:

https://www.ihrec.ie/app/uploads/2022/03/Codes-of-Practice-Equal-Pay-FA_Digital.pdf

<https://www.gov.ie/en/press-release/aa331-minister-ogorman-announces-introduction-of-gender-pay-gap-reporting-in-2022/>

<https://www.irishstatutebook.ie/eli/2021/act/20/enacted/en/print.html>

POLICY AND OTHER RELEVANT DEVELOPMENTS

Review of equality legislation

The Minister for Children, Equality, Disability, Integration and Youth launched a consultation seeking the public's views on a review of the Employment Equality Acts 1998 to 2012,¹¹⁹ and the Equal Status Acts 2000 to 2018.¹²⁰ The consultation process was open from 6 July 2021 to 29 November 2021. The programme for Government commitments on the introduction of a socioeconomic ground for discrimination and the amendment of the gender ground will be considered as part of the review. In addition, the review will examine the use of non-disclosure agreements by employers in cases of sexual harassment and discrimination. It will also give consideration to the issue of access to justice.

All grounds

The public consultation sought views on:

1. The functioning of the Acts and their effectiveness in combating discrimination and promoting equality;
2. The degree to which those experiencing discrimination are aware of the legislation and whether there are obstacles which deter them from taking an action;
3. The scope of the current definitions of the nine equality grounds which are sex, civil status, family status, age, sexual orientation, religion, disability and the Traveller ground. The review will include consideration of the gender ground, the disability ground and whether new grounds should be added such as the ground of socioeconomic discrimination;¹²¹
4. Whether the legislation adequately addresses intersectionality or the intersection of discrimination across a number of grounds;
5. Whether existing exemptions in the legislation should be modified or removed; and
6. Any other issues arising from the legislation.

The issue of intersectionality and the obtaining of redress where a person is discriminated against on more than one ground is very important. Currently, if a person is discriminated against on more than one ground, they may only receive redress on the basis that they have been successful on one ground solely.

According to the minister's note, the Government will use the consultation findings to inform which aspects of the legislation should be considered as part of the review and to inform recommendations arising from the review. Review recommendations may take the form of proposals for legislative changes, policy development or changes to the practical operation of the redress mechanisms.

This public consultation will underpin the first comprehensive review of Irish anti-discrimination law since its enactment over two decades ago. To date, reform initiatives have addressed a relatively narrow set of issues and have been mostly driven by the need to ensure compliance with the equality directives. The open nature of the process and its broad scope is welcome.

119 Ireland, Employment Equality Acts 1998 to 2012, available at: <https://revisedacts.lawreform.ie/eli/1998/act/21/front/revised/en/html>.

120 Ireland, Equal Status Acts 2000 to 2018, available at: <https://revisedacts.lawreform.ie/eli/2000/act/8/front/revised/en/html>.

121 The note from the Department fails to mention the housing assistance ground under the Equal Status Act.

Online source:

<https://www.gov.ie/en/consultation/066b6-review-of-the-equality-acts/>

IT

Italy

LEGISLATIVE DEVELOPMENT

Amendments to the Code of Equal Opportunities aimed at reducing the gender pay gap



Act No. 162 of 5 November 2021, which entered into force on 3 December 2021, partially amended the Code for Equal Opportunities to further implement the principle of gender equality.¹²² The main changes relate to the concept of direct and indirect discrimination with regard to equal pay, and the instruments to detect it. Reducing the gender pay gap is particularly high on the agenda in Italy, which is why various changes have been introduced including further sanctions for companies failing to comply with the obligation of biennial reporting on the ratios of male and female employees. At the same time, incentives for virtuous companies within the recent gender equality certification system have been introduced by the Act. The reform was unanimously approved by the High Chamber of Parliament without introducing further changes.

The amendment provided by Article 25 of the Code for Equal Opportunities expressly refers to the prohibition of direct and indirect discrimination during the selection of personnel. Moreover, the new Article 25(2bis) extends the concept of indirect discrimination. In particular, the concept of discrimination now includes all changes at the organisational level and in working conditions and scheduling of working hours at the workplace, which put or could put persons having a particular protected characteristic (age, care duties, pregnancy or motherhood/fatherhood, including adoption, or taking up related rights) at a disadvantage compared to others or hamper their participation in life or in their career.

Under the amended paragraph 1 of Article 46, the biennial report concerning the percentage of male and female employees in all job categories of a company, will be compulsory for enterprises employing more than 50 workers (100 employees under the previous wording). Smaller companies will be facilitated to submit the same report on a voluntary basis. The report will be published online on the website of the Ministry of Labour. The regional equality advisers will be in charge of analysing the results to be transmitted to the territorial offices of the National Labour Inspectorate, the Minister of Labour, the Department for Equal Opportunities at the Prime Minister's Office, the National Institute for Statistics (ISTAT) and the National Council for Labour and Economy (CNEL). The website of the Ministry of Labour will publish a list of defaulting companies.

A Decree of the Minister of Labour which is expected to be issued in 2022, will further specify the data to be submitted in the biannual report, which will have to be particularly detailed as regards remuneration (including all kinds of incentives) and clearly show the percentage of part-time workers. Moreover, the Decree will extend the content of the report to hiring procedures, career paths, professional training for management, conciliation measures, company policies on an inclusive work environment, and provide procedures to enable workers and unions to access data that may be used to take legal action under the Code. An administrative sanction from EUR 1 000 up to a maximum of EUR 5 000 may be applied by the Labour Inspectorate in the event a report is incomplete or presents false data. Failure to submit after a

¹²² Italy, Act No. 162 of 5 November 2021 amending the Code for Equal Opportunities, published on OJ No. 275 of 18 November 2021, <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2021-11-18&atto.codiceRedazionale=21G00175&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.7892958121112634&title=lbl.dettaglioAtto>.

reminder from the Labour Inspectorate was already punishable under the previous version of the Code for Equal Opportunities.

The gender equality certification system has been enhanced from 1 January 2022 under the guidelines issued by a Decree of the Prime Minister following the proposal of the Department for Equal Opportunities, the Minister of Labour and the Minister of the Economic Development. The certification will show different policies and measures undertaken at the enterprise level in order to close the gender gap in remuneration and career prospects and will be evaluated to comply with national and EU legislation.

Additionally, a fund of EUR 50 million has been allocated for 2022 to fund a cut in annual social security contributions of 1 % (up to a maximum of EUR 50 000) as an incentive for enterprises that obtain the gender equality certification.

Finally, Article 6 of Act No. 162/2021 extended the ruling on quotas in the election of directors of listed companies and State subsidiary companies to the latter which do not operate on the stock exchange market. The quota system is provided for under Article 147^{ter(1ter)} of Decree No. 58 of 24 February 1998,¹²³ which states that for six elections a percentage of two fifths of the company board must be assured to the underrepresented gender.

Online source:

<https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2021-11-18&atto.codiceRedazionale=21G00175&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.7892958121112634&title=lbl.dettaglioAtto>

Gender Equality provisions in the Budget Act for 2022

The Budget Act for 2022 includes some provisions regarding gender equality that are mainly aimed at increasing women's participation in the labour market both in terms of numbers as well as equal representation. The 10 days' compulsory paternity leave were finally changed into a permanent measure and funds were allocated to sustain the implementation of the recently issued Act on Gender Equality in Pay and to favour working mother's returning to their job. Further funds have also been allocated in order to combat gender-based and domestic violence.¹²⁴

Gender

Article 1(134) of the Budget Act turns the 10 days of compulsory paternity leave into a permanent measure, fully remunerated, to be used within five months from the birth, which was already provided by Article 1(354) of Act No. 232 of 11 December 2016. This measure was introduced to address the gender gap by developing models of shared parental responsibility in caring for children and equalising labour costs for men and women.

Article 1(137) includes an experimental measure for the year 2022 aimed at encouraging working mothers to return to work. In the private sector, they will benefit from a 50 % cut in social security contributions for one year after the compulsory maternity leave.

123 Italy, Decree No. 58 of 24 February 1998, on the Consolidating Act on Financial Intermediation, available at: <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1998-03-26&atto.codiceRedazionale=098G0073&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.3121523594853959&title=lbl.dettaglioAtto>.

124 Italy, Act No. 234 of 30 December 2021, Budget Act for 2022, published in OJ No. 310 of 31 December 2021, ordinary supplement No. 49, available at <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2021-12-31&atto.codiceRedazionale=21G00256&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.6187640273131392&title=lbl.dettaglioAtto>.

Another provision, Article 1(239), regards autonomous workers with low revenues. In the event that their annual income in the year before the birth of the child is lower than EUR 8 145 indexed to inflation, they can benefit from three additional months of maternity allowance.

Some amendments to the funding that had been introduced by the Budget Act for 2021 to promote the social and economic value of gender pay equality at work could see a remarkable step forward in the implementation of the principle of gender equality. Article 1(138) increased this fund to EUR 52 million in 2022 and extended its scope to increasing the participation of women in the labour market. In particular, the fund will make it possible to finance the reward mechanisms in favour of companies that have introduced a certification system on gender equality, including those with fewer than 50 employees, as provided for the law on Equal Pay (Act. No. 162 of 5 November 2021).¹²⁵ Article 1(660) allocated another fund (of EUR 3 million for 2022) to the Minister of Labour to support professional training regarding the procedures required to obtain gender equality certification.

Article 1(139) and following provide for the publication of a national strategic plan for gender equality, which is aimed at reducing the gender gap in the labour market. In order to ensure full implementation of the plan, an interinstitutional monitoring office and a National Observatory has been set up at the Department for Equal Opportunities. The latter has also been assigned the task of developing the gender equality certification system, the criteria of which will be fixed by a Decree of the Prime Minister.

In addition to the certification system, analogous provisions (Article 1(149)-(150)) have been made to support the fight against gender-based and domestic violence. Decree No. 93 of 14 August 2013¹²⁶ was slightly modified and increased the fund for equal opportunities for 2022 in order to fight gender-based and domestic violence (Article 1(661)-(664)). In particular, a national strategic plan to combat gender violence will be issued at least every three years by the Prime Minister and an interinstitutional monitoring office as well as an Observatory on gender-based and domestic violence against women will be set up at the Department for Equal Opportunities.

Online source:

<https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2021-12-31&atto.codiceRedazionale=21G00256&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.6187640273131392&title=lbl.dettaglioAtto>

The implementation of Act No. 46 of 1 April 2021 on the new general family allowance

On 21 December 2021, Decree No. 230¹²⁷ was passed which implemented Act No. 46/2021,¹²⁸ enabling the Government to issue some decrees reordering, simplifying and strengthening the measures to support parents of dependent children. The new decrees will provide a single and general allowance to support parenthood and employment, particularly of women, and increase birth rates.

Following the principles stated in Act No. 46 of 1 April 2021, the new measure replaces all other different pieces of legislation, such as tax allowances and the so-called bonus that was paid after giving birth. It is a universal benefit that applies to all families, irrespective of the parents' income and working activity.

125 Italy, Act No. 162 of 5 November 2021, amending the Code for Equal Opportunities, published on OJ No. 275 of 18 November 2021.

126 Italy, Decree No. 93 of 14 August 2013, on measures to fight gender-based violence, published in OJ. No. 191 of 16 August 2013.

127 Italy, Decree No. 230 of 21 December 2021, implementing Act No. 46 of 1 April 2021 on the new general family allowance published on OJ No. 309 of 30 December 2021, <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2021-12-30&atto.codiceRedazionale=21G00252&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.46863411230600205&title=lbl.dettaglioAtto>.

128 Italy, Act No. 46 of 1 April 2021 on the new general family allowance, published on OJ No. 82 of 6 April 2021, <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2021-04-06&atto.codiceRedazionale=21G00057&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.9307039077435453&title=lbl.dettaglioAtto>.

The allowance will be paid by the INPS (National Institute for Social Security) following the submission of an annual application.

Parents are entitled to this grant from the seventh month of pregnancy up to the 21st year of age of the dependent child attending school or university or following an internship (under condition that their annual income is lower than EUR 8 000) or searching for a job. It is addressed to a wide audience of beneficiaries, including self-employed workers and people receiving income support.

The grant amount is adjusted on the basis of the total economic condition of the household (ISEE),¹²⁹ the age of the dependent child, and the possible effect of being a disincentive for the second earner in the household to work. Households whose ISEE is lower than EUR 15 000 are entitled to a grant of EUR 175 per child. This amount decreases as the ISEE increases, until it stabilises at EUR 50 per month per child for households with an ISEE equal to or higher than EUR 40 000. This basic sum decreases to a minimum of EUR 25 and a maximum of EUR 85 for adult children. Different increases are to be added for: each child following the second one, households with more than four children, mothers under the age of 21 and households with two income earners. As regards disabled children, the grant is recognised with no age limit and, for minors, its amount also depends on the severity of the disability.

On the whole, the reform modernises Italy's welfare system by making it simpler, more transparent and inclusive. Child support will increase for most Italian families, especially for parents who were barely covered or not at all (such as, for instance, self-employed, long-term unemployed and atypical workers). Nevertheless, considering the new grant replaces several measures, it is quite hard to evaluate its real impact on some categories. Moreover, the reform will probably weaken the support for families of employees with a low or medium income. In order to avoid this risk, a safeguard clause has been provided to guarantee automatic compensation for the next three years.

Online source:

<https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2021-12-30&atto.codiceRedazionale=21G00252&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.46863411230600205&title=lbl.dettaglioAtto>

Latvia

LV

LEGISLATIVE DEVELOPMENT

Extension of scope of protection against discrimination in access to goods and services

Following the infringement procedure against Latvia on 23 September 2021, the Parliament adopted amendments to the Law on the Prohibition of Discrimination of Natural Persons – Performers of Economic Activity.¹³⁰ The amendments entered into force as of 29 September 2021. The amendments widen the scope of protection against discrimination in the field of supply of and access to goods and services by extending the principle of non-discrimination to the legal transactions between private individuals who offer and sell goods and services outside their professional activities. Prior to these amendments, not all goods and services publicly available were covered by non-discrimination rights. Latvian law did not

All grounds

¹²⁹ It is a value which includes all movable, immovable properties and annual income of the household and self-certified by the applicant through a calculation system made available by the National Institute for Social Security.

¹³⁰ Latvia, Law on the Prohibition of Discrimination of Natural Persons – Performers of Economic Activity (*Fizisko personu — saimnieciskās darbības veicēju — diskriminācijas aizlieguma likums*), Official Gazette No. 199, 19 December 2012; amendments Official Gazette No.187A, 28 September 2021, available in Latvian at: <https://likumi.lv/ta/id/326411-grozījumi-fizisko-personu-saimnieciskās-darbības-veicēju-diskriminācijas-aizlieguma-likuma>.

cover goods and services that are publicly offered by natural persons outside commercial activities – for example, if a natural person publicly advertises the sale of his/her own apartment.

The amendments also changed the title of the law, which is now ‘the Law on Prohibition of Discrimination of Natural Persons – Parties to a Legal Transaction’.

The previous version of the law in question, the Law on Prohibition of Discrimination of Natural Persons – Performers of Economic Activity, was intended to implement Directive 2006/54/EC,¹³¹ Directive 2010/41/EU,¹³² Directive 2000/43/EC¹³³ and Directive 2000/78/EC¹³⁴ with regard to protection against discrimination of self-employed persons on the basis of sex. However, the new version of the law, with its extended scope, protects persons against discrimination in legal transactions between private individuals on all six grounds of discrimination. It means that current legal regulation goes beyond the EU law as it also protects against discrimination in legal transactions between individuals acting outside their professional activity on the grounds of age, religion and belief and sexual orientation. At the same time, protection against discrimination in legal transactions between an individual and natural or legal person acting within his/her/its professional activities remains covered by the Law on the Protection of Consumer Rights,¹³⁵ which protects persons against discrimination only on the grounds of sex, race or ethnic origin and disability.

Online source:

<https://likumi.lv/ta/id/326411-grozijumi-fizisko-personu-saimnieciskas-darbibas-veiceju-diskriminacijas-aizlieguma-likuma>

LT

Lithuania

LEGISLATIVE DEVELOPMENT

Repeal of discriminatory age requirements in legislation on voluntary traineeships

Under the Law on Employment, individuals have the right to enter into voluntary traineeship agreements with companies, institutions or organisations. The state provides social insurance for health and accidents at work and occupational diseases for the trainees. However, until December 2021, only persons under the age of 29 had the right to enter into such traineeship agreements, creating direct discrimination on the grounds of age. On 21 December 2021, the Law on Employment was amended to remove the age limit.¹³⁶

The amendment was prompted by complaints from individuals to the Equal Opportunities Ombudsman about possible age discrimination under the law. Following these complaints, in 2019 and 2020 the

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

132 Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

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

134 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

135 Latvia, Law on the Protection of Consumer Rights (*Patērētāju tiesību aizsardzības likums*), Official Gazette No. 104/105, 1 April 1999.

136 Lithuania, Law on Amendments to Article 10 of the Law on Employment No. XII-2470 (*Lietuvos Respublikos užimtumo įstatymo Nr. XII-2470 10 straipsnio pakeitimo įstatymas*), 21 December 2021, No. XIV-811, available in Lithuanian at: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/f2432410626811ecb2fe9975f8a9e52e?jfwid=-wwknhdxf4>.

Ombudsman urged the Seimas (Parliament) to amend the law. In addition, the European Commission published a report on Lithuania in 2020,¹³⁷ which noted that adult participation in learning remains well below the EU average and policies for getting people into work are little used to improve the level of skills. Low participation in adult learning limits the ability of the workforce to adapt to changes in the labour market.

Given the high level of unemployment in the country, retraining for people over the age of 29 is important. In the context of voluntary practice, age cannot be an objective indicator to prevent individuals from gaining a new profession or new practical work experience, especially when such changes in their professional skills are imposed by external factors such as digitisation or the COVID-19 pandemic.

The abolition of the discriminatory provision will contribute to the implementation of the concept of lifelong learning and reduce age discrimination in the field of employment.

Online source:

<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/b9ca8ad03de611e68f278e2f1841c088/asr>

Netherlands

NL

LEGISLATIVE DEVELOPMENT

Law proposal '*Diversity at the top of business*' adopted

On 28 September 2021, the Senate (Eerste Kamer – the upper house of Parliament) adopted a legislative proposal entitled 'diversity at the top of business'. This legislative proposal was originally called the 'law to improve gender balance on company boards' and was submitted to Parliament on 6 November 2020. The law introduces a 'growth quota' for supervisory boards of listed companies. These companies will be obliged to ensure that one-third of their supervisory boards consist of women. If a man is appointed while 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.

Gender

In addition to the quota, the legislative proposal obliges large corporations to set appropriate and ambitious objectives in the form of a target to make the numbers of men and women on the management board, the supervisory board and in senior management more balanced. The idea is that, by enlarging the number of women in the senior management, more of them will move on to the top positions. The companies will have to make a plan for realising these targets and to make this public. Furthermore, in their annual reports, large companies will have to report on their diversity policy and the extent to which their targets have been met.

The case law of the CJEU has long been an obstacle for this legal development, and perhaps remains so. The Dutch legislature has, however, decided to pursue the proposal with reference to the changed wording of Article 157(4) in comparison to the text at the time of the relevant CJEU judgments, the

¹³⁷ European Commission (2020), Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank and the Eurogroup: 2020 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No. 1176/2011, Brussels, 26 February 2020, SWD(2020) 514 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020SC0514&from=LT>.

measures taken in other Member States, the stance the Commission takes on the draft directive on women on boards and the CEDAW-convention.

Online source:

<https://zoek.officielebekendmakingen.nl/kst-35628-2.html>

Law on payment of parental leave



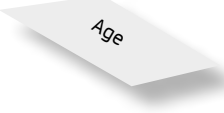
Following the Directive on the Work-Life Balance the Dutch government decided to introduce paid parental leave as of 2 August 2022. At first the government proposed to grant a payment of 50% of the salary during the leave. However, later this percentage was changed into 70%.¹³⁸ On the basis of the law proposal each parent who takes parental leave has the right to nine weeks' payment of 70 % of their salary, with a maximum of 70 % of the maximum daily wage for the social security (which is set at EUR 223.40 per day). Parents are not required to take the leave. However, if they want the leave to be paid, they must take it within the first year after the child is born. It is an individual right, thus both parents can each individually take the leave. The payment will be made by the Employee Insurance Agency (UWV), which is responsible for the execution of social security schemes. The employee can ask the employer to submit the required form to the UWV. Parents who adopt a child are also entitled to paid parental leave. The law will come into effect as of 2 August 2022.

Online source:

<https://www.rijksoverheid.nl/onderwerpen/ouderschapsverlof/invoering-van-2-maanden-betaald-ouderschapsverlof>

CASE LAW

Mandatory retirement age for judges not age discrimination



The applicant worked as a judge and later as a deputy judge at the Amsterdam district court. After reaching the age of 70, he was automatically dismissed from his judicial function, in conformity with Dutch legislation on the legal status of members of the judiciary. The applicant appealed against his dismissal on the ground that the 70-year age limit for judges constituted prohibited age discrimination. He relied on the Employment Equality Directive and the EU Charter of Fundamental Rights. The applicant accepted that the age limit served the legitimate aims of enabling mobility within the judicial profession and guaranteeing judicial independence. However, he claimed that the age limit was no longer a necessary or suitable means towards this aim because of increased life expectancy and given that Dutch Government policy aimed to make people work until a later age. The applicant further argued that an age limit was wholly unnecessary for deputy judges because they were only called upon in case of need and the judiciary could simply cease to engage them if they reached a point where their age became an obstacle to the performance of their judicial function. In this regard the applicant pointed out that the age limit for deputy judges had been temporarily extended to 73 in order to remedy backlogs resulting from the COVID-19 pandemic.

The application was brought before the Central Appeals Tribunal acting as a single instance court in cases concerning the legal status of members of the judiciary.

The Central Appeals Tribunal dismissed the appeal and held the 70-year age limit for both judges and deputy judges to be compatible with the prohibition of age discrimination in EU law. The court assessed

¹³⁸ In a letter of 8 March 2022 the Minister of Social Affairs and Employment informed both Chambers of Parliament that the cabinet decided to increase the percentage of the salary parents will be entitled to when taking parental leave to 70 %.

the applicant's claim in view of the prohibition of age discrimination laid down in the Employment Equality Directive and relevant CJEU case law.¹³⁹

The Tribunal determined that the mandatory retirement of judges after reaching their 70th birthday constitutes direct age discrimination within the meaning of Article 2(2)(a) of the Employment Equality Directive. However, it considered the distinction to be objectively and reasonably justified according to the criteria of Article 6(1) of the Employment Equality Directive. Following the test formulated by the CJEU, the Tribunal recalled the broad discretion left to Member States both in deciding which aims of social and labour market policy to pursue and in determining the measures to achieve those aims. It accepted that both aims pursued by the Dutch legislature were legitimate and that the age limit was an appropriate and necessary means to reach those aims. According to the Tribunal, the fixing of a mandatory retirement age avoids the need for individual assessment of the capacity of (deputy) judges to continue their function and as such constitutes a guarantee for judicial independence. Moreover, the Tribunal considered that the Dutch legislature had remained within the limits of its discretion by keeping the mandatory retirement age at 70 despite the increased life expectancy. In this regard the Tribunal pointed out that 70 is still several years older than the statutory pension age (currently 67) and that retired judges remained free to take up other forms of paid work. Lastly, the Tribunal decided that the temporary extension of the age limit for deputy judges to 73 constituted an exceptional measure that had been taken to address a lack of judicial capacity resulting from an extraordinary situation (the COVID-19 pandemic) and that the introduction of this measure did not affect the appropriateness or the legality of the general 70-year age limit.

The reasoning of the Central Appeals Tribunal hinges on the Tribunal's application of the objective and reasonable justification test, which in itself does not raise any specific issues. What makes the case relevant nevertheless is that the mandatory age limit for judges is commonly viewed (in the Netherlands and other Member States) as a primary guarantee of judicial independence, which is also laid down in the Dutch Constitution. Although the specific age at which judges must retire is laid down in a statutory act (the Act on the legal status of members of the judiciary), a finding that an age limit as such is not a necessary or appropriate means to achieve a legitimate aim would have necessitated a constitutional amendment.

In so far as the Employment Equality Directive concerns age discrimination, it is implemented in the Netherlands in the Age Discrimination Act (ADA). However, the age limit for judges is laid down in a statutory act, which can deviate from the ADA (also a statutory act). For this reason, the Central Appeals Tribunal assessed the age limit directly in relation to (higher ranking) EU law. The Tribunal took into account the framework for age discrimination as laid down in the Employment Equality Directive and developed by the CJEU.

Online source:

<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:CRVB:2021:1803>

District court allows ethnic profiling in immigration checks

On 22 September 2021, the district court of The Hague issued a judgment in a prominent case on ethnic profiling. The case was brought by three NGOs (Amnesty International, Controle Alt Delete and the Dutch Section of the International Commission of Jurists (NJCM)), and a local anti-discrimination facility (Radar), all acting in the public interest. Two individual claimants joined the proceedings on their own behalf. The claim concerned ethnic profiling by the Dutch border police in the course of immigration checks at Dutch airports and on trains and roads near the borders with Belgium and Germany. The checks are aimed at detecting foreigners who are unlawfully present in the Netherlands. Risk profiles are used

Racial or
ethnic origin

¹³⁹ Netherlands, Central Appeals Tribunal, ruling of 12 August 2021, ECLI:NL:CRVB:2021:1803.

to determine when and where the checks will be performed. These profiles are based on information regarding (possible) patterns of irregular migration (e.g. smuggling routes). During the checks, border police officers select persons who match the risk profiles, who can then be stopped to check whether they are lawfully present in the Netherlands.

The claims were directed against the use of ethnic criteria, including skin colour and other physical characteristics, in the risk profiles or as selection criteria to decide who would be stopped during the immigration checks. The claimants asked the court to declare the use of such criteria unlawful (under the prohibition of discrimination laid down in *inter alia* the European Convention on Human Rights) and to prohibit their use in the future.

The court dismissed all the claims. It found that it had not been established that ethnic criteria formed part of the risk profiles used by the border police. It did accept that ethnic criteria, including physical characteristics, were among those used to decide who matched the risk profiles and would be stopped during immigration controls. However, the court found that the use of ethnic criteria in the selection decisions was objectively justified in view of the need to combat irregular migration. In the court's view, such criteria are relevant because they can provide an indication of a person's origin and nationality and therefore of their immigration status. The court also attached value to the fact that persons are never stopped only on the basis of ethnic criteria, as selection decisions are always based on a combination of factors that can also include, for example, age, travel route and behaviour.¹⁴⁰ The claimants have already announced that they will appeal the decision.

The case is significant because clear legal standards on the admissibility of ethnic profiling have not yet been developed in the Netherlands (nor at the European level); this court decision is a first step towards more concrete standards. The case did not concern the question of *whether* the border police practised ethnic profiling, as the State did not dispute that ethnic criteria were amongst the reasons for selecting and stopping individuals during immigration controls. Therefore, the focus of the case was on determining whether this form of ethnic profiling is compatible with the prohibition of racial or ethnic discrimination.

The claimants based their action on multiple legal instruments, including the ECHR but also international human rights treaties (ICERD and ICCPR) and provisions of EU law (Article 10 TFEU, Article 2 TEU, Articles 20 and 21 EU Charter of Fundamental Rights and Article 7 Schengen Borders Code). The court nevertheless focused its assessment on the provisions of the ECHR (and the case law of the ECtHR), stating that an assessment of the other provisions would not lead to a different result.

Although it was established that ethnic criteria were used to select persons for immigration control, the court did not apply the 'very weighty reasons test' normally applied by the ECtHR in cases of presumed racial or ethnic discrimination (e.g. *Biao v Denmark*, (GC) No. 38590/10, 24 May 2016). According to the court, the selection decisions were always based on a combination of criteria and never only on ethnic criteria, therefore those decisions could not be said to be based 'exclusively or to a decisive extent' on ethnic origin (cf. the ECtHR in *Timishev v Russia*, Nos. 55762/00 and 55974/00, 12 December 2005). It did not follow the argument made by the claimants that ethnic criteria are in fact decisive, because the other criteria by themselves would not have led to the decision to stop someone.

Online sources:

<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2021:10283>

<https://pilpnjcm.nl/en/dutch-court-allows-racial-profiling/>

140 Netherlands, The Hague District Court, ruling of 22 September 2021, ECLI:NL:RBDHA:2021:10283.

Exclusion of healthcare workers in personal households from social security contrary to EU Council Directive 79/7/EEC

On 16 December 2021, the Rotterdam Administrative Court ruled that the exclusion from the Unemployment Act of workers who work fewer than four days per week in private households, constitutes indirect discrimination against women for which there is no justification.

The case concerned a female employee who worked on the basis of a 'personal budget' (pgb) in two private households. On the basis of the Dutch Act on Social Support (WMO) persons with a disability can apply for a personal budget to pay a healthcare professional in order to take care of them. The budget is granted by the Social Security Bank (SVB), but the person with the disability (the household) has to enter into an employment contract with the healthcare worker. These healthcare workers are considered to fall within the scope of the Dutch Regulation on services in private households (*Regeling dienstverlening aan huis*). This regulation applies to all workers who work on four days or less per week in a private household. These workers have significantly fewer employment rights and are excluded from social security; 95 % of these workers are women. Most of them are domestic workers, but part of the group consists of healthcare workers who are paid with public money: the personal budget on the basis of the WMO.

The worker in this case lost her work in one of the households, because her patient/employer moved to a nursing home. She subsequently applied for an unemployment benefit, which was refused with reference to the regulation for household workers. The worker also applied for registration of her employment history. This request was refused as well, because, according to the social security authorities, there was no need to register her employment history, as she could not qualify for social security anyway.

In the subsequent court case, the Rotterdam court ruled that the exclusion from social security constituted indirect discrimination of women, as the large majority of household workers are women. The court took the view that there was no objective justification for this discrimination in as far as healthcare workers are concerned who are being paid with public money. The court considered that the Regulation on household workers aims to stimulate the labour market for personal services and to prevent illegal work. These are legitimate objectives. However, in this specific case, the exclusion from social security is not appropriate and not necessary. In this respect the court referred to the report of March 2014 of the Kalsbeek committee, which was established by the Government in order to advise on the possibility of improving the position of domestic workers. The Kalsbeek committee concluded that the exclusion from social security did not have any effect on stimulating employment for healthcare workers and that illegal employment was not carried out in this sector. On that basis the court concluded that the derogation for healthcare workers is not justified and is contrary to Article 4 of EU Council Directive 79/7/EEC on progressive implementation of the principle of equal treatment for men and women in matters of social security.

This is a landmark case, as the weak legal position of domestic workers has been criticised for a long time. The Government is aware of this issue, but so far has not been willing to take measures due to the costs involved. The vulnerable and weak position of domestic workers is of course not resolved by this judgment. The social security authorities have to take a new decision on the unemployment rights of the worker involved and they may also take the case to the court of appeal. Moreover, the judgment applies only to those workers who are paid from a personal budget (pgb) and not to other domestic workers. Further action is necessary in that respect.

Online source:

<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2021:12432>

Gender

NO

Norway

CASE LAW

Discrimination because of gender identity/gender



In a case before the Equality and Anti-discrimination Tribunal,¹⁴¹ the complainant 'A' changed her first name and legal gender from man to woman at the end of 2019. She was diagnosed with gender incongruence in October 2020. In the summer of 2021, she went camping. She checked in at a camping facility nearby, and used the sanitary facility for women. The next day the owner of the campsite, B, asked her to use the men's sanitary facilities. Two days later, he reminded her that she had to use the men's facilities or leave the campsite. A informed B that she was a woman, and offered to show her passport. When B still asked her to use the men's facilities, she left the campsite. B did not charge her for the stay.

According to Section 6 of GEADA,¹⁴² discrimination based on gender identity and gender expression is prohibited. The Act applies to all sectors of society. The Equality Tribunal found that B had treated A worse than the other camping guests, when he had asked her to leave the campsite. She was asked to leave because she had changed gender, and did not want to use the men's facility at the campsite. Therefore, the Equality Tribunal concluded that B had discriminated against her on the ground of gender identity and gender expression.

The Equality Tribunal then discussed whether B had acted lawfully in compliance with Section 9 of the GEADA. The questions raised were whether his actions had a legitimate aim, were necessary and not disproportionate. When it comes to whether B had a legitimate aim for his action, B explained that he asked A to use the men's facilities or leave the campsite because other guests at the campsite had complained and left the campsite. He had to think about the business, and take the complaints from other guests seriously. To act on guests' expressed concerns are a responsibility that B has as the owner of the campsite, and the tribunal found this to be a legitimate aim. However, the Equality Tribunal did not find that it was necessary for B to ask A to leave the campsite because he had other alternatives.

The Equality Tribunal did not discuss whether B had acted disproportionately since the tribunal had already found that it was not necessary to ask A to leave the campsite.

Online source:

<https://www.diskrimineringsnemnda.no/media/3135/offentlig-versjon-av-vedtak-21-387.pdf>

Wearing of a face mask as a requirement for obtaining goods and services



In December 2021, the Equality and Anti-Discrimination Tribunal decided on two separate cases involving complainants who were asked to wear a face mask to access services, due to COVID-19 restrictions. Both complainants explained that they could not wear such masks due to their medical diagnoses but did not discuss these diagnoses in detail with the respective service providers. In the case of the first complainant, the staff of the store refused to allow her entry. The company later apologised and stated that the staff member should have contacted a manager to allow the complainant to discuss her diagnosis in a more private manner. In the case of the second complainant, staff of the bakery allowed her entry but refused

¹⁴¹ The Equality and Anti-Discrimination Tribunal, Case No. DIN-2021-387, 1 December 2021, <https://www.diskrimineringsnemnda.no/media/3135/offentlig-versjon-av-vedtak-21-387.pdf>.

¹⁴² Norway, Gender Equality and Anti-Discrimination Act (GEADA), 16 June 2017, available at: <https://lovdata.no/dokument/NLE/lov/2017-06-16-51>.

to allow her to purchase anything without wearing a mask, despite the fact that she wished to take the food with her. This company also later apologised.

In the first case, the Equality Tribunal concluded that the complainant had been subject to differential treatment on the basis of her disability, but that the treatment was justified and necessary, for the sake of not spreading the COVID-19 virus. The Equality Tribunal considered that allowing the complainant entrance without any information or documentation would have weakened the rules significantly.¹⁴³ While persons unable to wear face masks for medical reasons were exempted from the local regulations,¹⁴³ the Equality Tribunal found that it was reasonable and proportionate to require the complainant to provide a medical certificate without necessarily revealing sensitive health information, in particular as the events took place when measures against COVID-19 had been in place for some time. The Equality Tribunal did not consider the alternative solution of allowing the complainant to explain her diagnosis in private to a manager. On this basis, the Equality Tribunal concluded that the complainant had not been discriminated against.¹⁴⁴

In the second case, the Equality Tribunal also found that the refusal of service amounted to differential treatment which pursued a legitimate aim. In this regard, the Tribunal interpreted the local regulations in force at the time to require face mask to be worn when visiting all places where food was served without any exceptions. The Equality Tribunal did not assess the proportionality of this rule with regard to the Equality and Anti-Discrimination Act, only stating that they assumed that the municipality had made such an assessment before concluding that the differential treatment was proportionate. On this basis, the Equality Tribunal concluded that the complainant had not been discriminated against.¹⁴⁵

Online sources:

<https://www.diskrimineringsnemnda.no/media/3162/offentlig-versjon-av-uttalelse-sak-21-271.pdf>

<https://www.diskrimineringsnemnda.no/media/3161/offentlig-versjon-av-uttalelse-sak-21-303.pdf>

The Equality Tribunal awards compensation in sexual harassment case

The Equality and Anti-Discrimination Tribunal awarded for the first time compensation to a victim in a case of discrimination. The claims of the victim were treated as two separate cases by the Tribunal.¹⁴⁶ The claimant of this case, 'A', maintained that her male superior at work, 'B', had sexually harassed her. She also filed a complaint against her employer for failure to follow up on the harassment. The entire case was treated in an oral hearing in accordance with Section 9 of the Equality and Anti-Discrimination Ombuds Act (EAOA),¹⁴⁷ with explanation from the parties, and several witnesses were heard. The Equality Tribunal treated the case against B (Case DIN-2020-363) and the employer in the same hearing, but the case against the employer was given another case number (case DIN-2021-98).

Case DIN-2020-363: A claimed that B had sexually harassed her several times both verbally and physically. He had asked her to wear specific tight fitting clothes so that he could see the contours of her body, he pinched and touched her on private body parts on a daily basis and asked her inappropriate questions of a asexual nature.

Gender

Sex

143 Oslo Municipality, Regulation on the prevention of the spread of the coronavirus (*Forskrift om forebygging av koronasmitte*), Oslo (FOR-2020-12-10-2660) Section 6, in force from 10 December 2020 to 26 May 2021.

144 Norway, Equality and Anti-Discrimination Tribunal, decision of 21 December 2021 in case No. DIN-2021-271.

145 Norway, Equality and Anti-Discrimination Tribunal, decision of 21 December 2021 in case No. DIN-2021-303.

146 Norway, Equality and Anti-Discrimination Tribunal, decision of 21 December 2021 in case No. DIN-2021-363, <https://www.diskrimineringsnemnda.no/media/3176/20-363-offentlig-versjon-av-vedtak-150171.pdf>, and Decision of 20 December 2021 in case No. DIN-2021-98, <https://www.diskrimineringsnemnda.no/media/3175/21-98-offentlig-versjon-av-uttalelse-og-vedtak-146973.pdf>.

147 Norwegian Equality and Anti-Discrimination Ombuds Act (EAOA) of 16.06.2017 No. 50 available at <https://lovdata.no/dokument/NL/lov/2017-06-16-50?q=diskrimineringsombudsloven>.

Section 13 of the GEADA states that ‘sexual harassment is any form of unwanted sexual attention with 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 for which a number of factors are relevant. For example, who the attention is directed towards, the nature of the action, the time and place of the action and the relationship between the perpetrator and the person towards whom the sexual attention is directed. Another factor is whether the behaviour has had a negative impact on the victim.

After hearing the explanations from the parties and the witnesses during the hearing, the Equality Tribunal was divided into a majority of two members against a minority of one member. The majority found reason to believe that B had made subjected A to inappropriate sexual comments and exposed A to repeated physical sexual approaches. The majority’s conclusion was that B had sexually harassed A.

The tribunal highlighted some of the explanations from the witnesses, A’s detailed description of the different events, the vocabulary that was used, as well as the emotional reactions from A and the fact that B had changed his statement about the incident from June 2020 several times, as well as what he had said.

The majority also found that both the statements and the physical approaches taken together with an incident in June 2020, where he pulled her panties, were to be regarded as sexual harassment in accordance with Section 13 of the GEADA.

The tribunal’s minority, a female member, expressed doubts, but did not find evidence that B had sexually harassed A. She highlighted that she had found it difficult to assess the evidence in the case, both individually and collectively. She also stated that the evidence showed that there in fact had been episodes of unfortunate behaviour and statements with a certain sexual character from B. However, she regarded this as clumsy and as an expression of a lack of understanding of the role of a superior and of how he was perceived, and not as sexual harassment.

Case DIN-2021-98: A also made a complaint towards the company where she worked. She claimed that the company was responsible for B’s sexual harassment of her. She also claimed that the company had acted in breach of the obligation to prevent and seek to prevent sexual harassment in accordance with the GEADA. She asked the company for compensation.

According to the Norwegian Court of Appeal¹⁴⁸ and the Equality Tribunal,¹⁴⁹ an employer can be held directly responsible for sexual harassment committed by an employee, if an employee committing sexual harassment holds a managerial or leading position commits the harassment.

Since one of the members of the tribunal had concluded that B had not sexually harassed A, the minority did not find reason to hold the company accountable for X’s actions either. However, the majority of the tribunal found that B, with his leading position in the company and his job description, could be identified with the company where A worked, X. The majority therefore held the employer responsible for the harassment by B. In accordance with Sections 12 and 38 of the GEADA, the Equality Tribunal awarded A compensation from the company of NOK 60 000 (approximately EUR 7 500).

However, the tribunal did not find that the company had acted in breach of the obligation to prevent and seek to prevent sexual harassment according to Section 13 of the GEADA. The duty to seek to prevent harassment means to seize the matter in situations of alleged harassment, investigate what has happened, and to suggest possible solutions. Anyone who experiences harassment should not have

148 Norway, Hålogaland Court of Appeal, Judgment in Case No. LH-2019-87696, 12 December 2019.

149 Norway, Equality Tribunal, Decision in Case No. LDN-2014-10, 9 October 2014.

to prove that harassment has occurred. This should also not be the subject of evidence by enforcing the provision.

The tribunal highlighted that the case investigation by the company was not good enough, but that the treatment overall had met the requirements of the GEADA. The company had given B a warning and he eventually had to change workplace.

This is the first case on sexual harassment where the tribunal has awarded compensation to a victim. In a 2020 case from the Supreme Court on sexual harassment the amount was set to only NOK 20 000 (approximately EUR 2 500).¹⁵⁰ The amount awarded in this case, NOK 60 000, is also not so high, but at least indicates some progress. The case is also important as it shows that an employer could be held accountable for sexual harassment carried out at the workplace by an employee.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Research report on living conditions for LGBT+ persons in Norway

Sexual orientation, transgender

In 2021, a research report was published concerning the living conditions for LGBT+ persons in Norway.¹⁵¹ The report was commissioned by the Department for Equality and Universal Design in the Directorate for Children, Youth and Family Affairs, and is a follow-up of two reports published in 2013, one on LGB persons¹⁵² and one on transgender persons.¹⁵³

The report contains detailed, comparative data on the share of transgender, homosexual, bisexual and heterosexual men and women who have experienced discrimination, harassment, health problems, etc. during the past year (2020). The data showed some worrying changes in living conditions between 2013 and 2020. A significantly higher proportion of LGB respondents reported hiding their sexual orientation at least once a month in 2020 compared to 2013, and more LGBT persons reported that they have poor health. Finally, the finding in the 2013 report that bisexual women and men experienced more difficulties than homosexual men and women has become clearer in the 2021 report.

Online source:

<https://www.nordlandsforskning.no/sites/default/files/files/Seksuell%20orientering%20kj%C3%B8nnsmangfold%20og%20levet%C3%A5r%20210621%20III.pdf>

New action plan against domestic violence

The Norwegian Government launched a new action plan against domestic violence, 'Freedom from violence', on 13 August 2021. The action plan covers 2021-2024, and consists of 82 measures to strengthen the work against domestic violence and includes several important action points:

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- 150 Norwegian Supreme Court, judgment of 22 December 2020 in Case No. HR-2020-2476-A. See Flash report of 18 January 2021; <https://www.equalitylaw.eu/downloads/5337-norway-the-norwegian-supreme-court-finds-breach-of-the-protection-provision-against-sexual-harassment-96-kb>.
- 151 Anderssen, N., Eggebø, H., Stubberud, E. and Holmelid, Ø. (2021) *Seksuell orientering, kjønns mangfold og levetår. Resultater fra spørreundersøkelsen 2020*. Bergen, Bergen University. Available at [Seksuell orientering kjønns mangfold og levetår 210621 III.pdf](https://www.nordlandsforskning.no/files/Seksuell%20orientering%20kj%C3%B8nnsmangfold%20og%20levet%C3%A5r%20210621%20III.pdf) ([nordlandsforskning.no](https://www.nordlandsforskning.no)).
- 152 Anderssen, N. and Malterud, K. (2013), *Seksuell orientering og levetår*. Bergen, Uni Helse. This report did not include transgender persons.
- 153 Van der Ros, J. (2013) *Alskens folk. Levetår, livssituasjon og livskvalitet for personer med kjønnsidentitetstematikk* (All Kinds of People. Living conditions, life situation and quality of life for people with gender identity issues) Hamar, Likestillingssenteret.

Sexual
orientation

Transgender

Gender

- Increased use of reversed violence alarms – a contact ban with electronic tagging- and to investigate the use of a reversed violence alarm as a restraining order; the establishment of a permanent partner homicide commission and more active use of police councils to strengthen preventive work.
- The establishment of national help for female inmates in cooperation with women's shelters; to assist female inmates who are victims of domestic violence. This measure means that female inmates who are victims of abuse will receive the same type of help that abused women get elsewhere in society, including assistance from shelters to process their experiences of violence and support for how they can protect themselves from violence after release. The measure also includes competence-enhancing measures for prison care employees.
- Proposals for legislative changes and evaluation of measures to increase the quality of the women's shelters.

The plan also focuses on the fact that growing up in violent families is a significant risk factor for violent partnerships or parenthood later in life. With the plan, the Government wants to contribute to strengthening the preventive efforts by addressing the causes of the violence to a greater extent. Measures in the plan include steps to strengthen skills in the child welfare service in relation violence and abuse.

Furthermore, the action plan also strongly focuses on domestic violence in the Sami population. There have been reports of several cases of domestic abuse in the Sami communities, and Sami women have also come forward with self-experienced violence to demand openness around this topic. The action plan highlights the importance of knowledge of the Sami language and culture, and states a desire to strengthen this in the police and aid mechanisms. The Government also wants to establish a national Sami competence centre for family protection, child welfare and crisis centres. In addition, the Government wants to strengthen the research on violence and abuse in Sami communities.

The measures are well targeted, and the plan is important especially in light of the COVID19 pandemic as the police, crisis centres and other help centres have reported on the challenges of working with domestic violence cases during the pandemic. For the first time, the action plan also importantly includes several equality issues concerning the Sami population and important measures such as more knowledge about the Sami culture and language in the police and courts.

Online source:

<https://www.regjeringen.no/contentassets/2dda3b36640d4dfbbac11598a1dc792/209755-jd-frihetfravold-web.pdf>

PL

Poland

LEGISLATIVE DEVELOPMENT

Introducing the obligation to register pregnancy

A Senator of the opposition party Civic Platform, wrote on Twitter that the Ministry of Health is working on an amendment to the Regulation of the Minister of Health of 26 June 2020.¹⁵⁴ The Regulation is to be amended in such a way as to oblige public providers of health services, as well as private health service providers, to report the pregnancy of a patient to the Medical Information System. As of 1 January 2022, healthcare service providers, regardless of the source of funding, will have to report pregnancies to

¹⁵⁴ The Regulation concerns a detailed scope of data of a medical event processed in the information system and the manner and deadlines for transferring such data to the Medical Information System.

the Medical Information System, irrespective of whether a patient was seeking medical care for the pregnancy or for an unrelated issue. The service provider, that is the entity providing healthcare services, also has an obligation to report to the system information about medical devices implanted in the patient (such as, for example, an intrauterine device), her allergies and blood group. As of 1 January 2022, the indicated data on pregnancies, medical devices, allergies, etc. may be reported on an optional basis, and, starting from 1 July 2022 it will be mandatory.¹⁵⁵ The Government Centre for e-Health issued a statement indicating that 'the need to report and obtain information about pregnancy is dictated by medical reasons', including those related to prescribing medications, while the Minister of Health has explained that it is only a transition from information recorded on paper in a traditional patient card, to digital information solutions, that save exactly the same information in an electronic version.¹⁵⁶

The collection of data on pregnant women in itself would not necessarily be of concern. However, after the abortion law was tightened by the Constitutional Tribunal, which upheld the legal provision permitting abortion only on the grounds of embryo pathological premise, there is some legal uncertainty about when abortion is possible legally, and this has already led to women having difficulty accessing abortion even when their life depends on it.¹⁵⁷ Under such circumstances, the 'pregnancy registry' is perceived as another form of oppression.¹⁵⁸ Opponents of the project point out that the implementation of changes to the ordinance may result in further attempts to limit women's rights in Poland.

Both free media and civic organisations have expressed concern over how pregnancy data can be used by State authorities. There is a concern that the regulations are being introduced to control female reproduction more closely, monitor pregnancies and, if necessary, verify how the pregnancy ended. The Medical Information System is by definition not open to public prosecutors. However, in the event of an on-going investigation, the prosecutor, having obtained any grounds for suspicion, may request information from the Medical Information System. Thus, in practice, this information, collected in the form of an electronic database will be relatively easily accessible.¹⁵⁹ Potentially, prosecutors can investigate whether there was a natural miscarriage, whether the pregnant woman left Poland, what doctors she was with, etc. Women's organisations also emphasise that the introduction of a pregnancy registry may be the beginning of a chilling effect, e.g. in the form of calls for interrogation from the prosecutor's office addressed at women who did not report their pregnancy.¹⁶⁰ The Federation for Women and Family Planning has issued a statement on this matter, in which it explicitly states that: 'The pregnancy registry can be used as a scarecrow for women and those planning parenthood.'¹⁶¹

155 Senator Krzysztof Brejza (2021) comment on Twitter (available after logging in): https://twitter.com/KrzysztofBrejza/status/1463186113498165257?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E14tw%2561134%20%25%203A%25%202F%25%202Fpulseembed.eu%25%202Fp2em%25%202FJUakFwDg%25%202F%20. The tweet was also published in Gazeta Wyborcza (2021), J. Dobrosz-Oracz, W. Walenciak, 'Senator KO o rejestracji ciąży: To jak kolczykowanie kobiet rodem z systemów autorytarnych' ('Senator KO on pregnancy registry: It's like piercing women straight from authoritarian systems'), 24 November 2021, available at: <https://wyborcza.pl/7,82983,27838244,rzad-chce-wprowadzic-rejestracje-ciąż-senator-ko-to-jak-kolczykowanie.html>.

156 M. Glanc, 'Ministerstwo Zdrowia: "Nie ma żadnego rejestru ciąży. To zwykłe kłamstwo"' ('The Ministry of Health: There is no registry of pregnancies. This is an ordinary lie'), 30 November 2021, available at: <https://kobieta.onet.pl/wiadomosci/rejestr-ciąż-ministerstwo-zdrowia-to-zwykle-klamstwo/vq56nv>.

157 A. Cybulko, 'The ECtHR accepts the case of refusal of the right to abortion for embryopathological reasons', 26.11.2021, available at: <https://www.equalitylaw.eu/downloads/5552-poland-the-ecthr-accepts-the-case-of-refusal-of-the-right-to-abortion-for-embryopathological-reasons-119-kb>.

158 M. Glanc, 'Ministerstwo Zdrowia: "Nie ma żadnego rejestru ciąży. To zwykłe kłamstwo"' ('The Ministry of Health: There is no registry of pregnancies. This is an ordinary lie'), 30 November 2021, available at: <https://kobieta.onet.pl/wiadomosci/rejestr-ciąż-ministerstwo-zdrowia-to-zwykle-klamstwo/vq56nv3>.

159 J. Piąsta, 'Co dla pacjentek oznacza rejestr ciąży? "To jest dalszy postęp torturowania kobiet"' ('What does the pregnancy registry mean for female patients? "This is further progress in torturing the women"'), 3 November 2021, portal: dziendobry.tvn, available at: <https://dziendobry.tvn.pl/gorace-tematy/rejestr-ciąż-co-to-oznacza-dla-kobiet-jakie-beda-konsekwencje-5508120>.

160 J. Ojczyk, 'Nie rejestr ciąży jest groźny, ale bezmyślność przepisu' ('It is not the pregnancy registry that is dangerous, but the thoughtlessness of the provision of law'), 25 November 2022, portal: Prawo.pl, available at: <https://www.prawo.pl/zdrowie/obowiazek-rejestracji-ciązy-przez-lekarza,511947.html>.

161 Statement issued by The Federation for Women and Family Planning, posted on 25.11.2021, available at: <https://federa.org.pl/stanowisko-ws-rejestru-ciąż/>.

Doubts are also raised by the method of introducing the provisions into the legal system. It is indicated that the introduction of the changes by a regulation, that is a lower-level legal act, violates the Constitution (Article 51(1),(2),(5)) and the standards for the protection of personal data specified in the GDPR (Article 9(2)(h)): pursuant to Article 51 of the Constitution, according to which the principles and procedure of data collection are to be established by an Act (Section 5)).¹⁶² It is also inconsistent with the opinion of the Constitutional Tribunal, which in the judgment of 18 December 2014 (K 33/13) indicated that the scope of data that may be collected in medical registers must result from an Act.¹⁶³

POLICY AND OTHER RELEVANT DEVELOPMENTS

16 Polish cities adopt the European Charter for Equality between Women and Men in Local Life

On 11 October 2021, during the Local Trends meeting¹⁶⁴ in Poznań, 16 Polish cities signed the European Charter for Equality of Women and Men in Local Life. The signing ceremony of the Charter was organised by the Council of European Municipalities and Regions CEMR and the Association of Polish Cities.

The Charter for Equality between Women and Men in Local Life is based on six principles, including the recognition that equality between women and men is a fundamental right, that the balanced participation of women and men in decision making is a prerequisite for a democratic society, and that the elimination of gender stereotypes is the basis for achieving equality between women and men.¹⁶⁵ The signing of the Charter is a public commitment that means recognising diversity and ensuring equal rights and opportunities for women and men in all areas of life and spheres of functioning influenced by local government. Until recently the Charter had been signed only by three Polish local government authorities: Nysa (2008), Aleksandrów Kujawski (2012) and Kraków (2020).¹⁶⁶

The City Council of Warsaw has passed a resolution of 15 April 2020 expressing support for this initiative.¹⁶⁷ The City of Świdnica states on its website that it signed the Charter in December 2020, but this is not confirmed in the atlas of signatories.

The European Charter for Equality of Women and Men in Local Life was developed 15 years ago by the Council of Municipalities and Regions of Europe. It is still little known in Poland, and attempts to implement it arouse a lot of controversy in traditional, nationalist and catholic circles and those surrounding the ruling party. Signing the Charter is a kind of statement and an important pro-equality declaration, which is especially difficult in the current political context, when at the same time many local governments in Poland contest equality on the basis of sexual orientation and transgenderism by adopting various documents stating that a given area is a 'LGBT-free zone' or a 'zone free from LGBT ideology'.¹⁶⁸

162 M. Sokołowska, 'Rejestr ciąży: narzędzie inwigilacji czy postęp technologiczny?' ('Pregnancy register: surveillance tool or technological progress?'), 2 December 2022, blog: codozasady, available at: <https://codozasady.pl/p/rejestr-ciazy-narzedzie-inwigilacji-czy-postep-technologiczny->.

163 J. Ojczyk, 'Nie rejestr ciąży jest groźny, ale bezmyślność przepisu' ('It is not the pregnancy registry that is dangerous, but the thoughtlessness of the provision of law'), 25 November 2022, portal: Prawo.pl, available at: <https://www.prawo.pl/zdrowie/obowiazek-rejestracji-ciazy-przez-lekarza,511947.html>.

164 J. Ojczyk, 'Nie rejestr ciąży jest groźny, ale bezmyślność przepisu' ('It is not the pregnancy registry that is dangerous, but the thoughtlessness of the provision of law'), 25 November 2022, portal: Prawo.pl, available at: <https://www.prawo.pl/zdrowie/obowiazek-rejestracji-ciazy-przez-lekarza,511947.html>.

165 European Charter for Equality between Women and Men in Local Life of the Council of European Municipalities and regions (CEMR), https://ccre.org/img/uploads/piecesjointe/filename/charte_egalite_pl.pdf.

166 Observatory. European Charter of Equality of Women and Men in Local Life: https://charter-equality.eu/atlas-of-signatories-of-the-charter/signataires.html?send=ok&c_id=30&nh_id=0&ct_id=0.

167 Information from the Warsaw City Hall: <https://um.warszawa.pl/-/warszawa-miastem-rownosci>. Information from the web page of the City of Świdnica: <http://um.swidnica.pl/pages/posts/prezydentswidnicy-podpisala-bdquoeeuropejska-karte-rownosci-kobiet-i-mezczyzn-w-zyciu-lokalnymrdquo-3819.php>.

168 Council of European Municipalities and Regions (CEMR), (2021) '16 pioneering cities commit to going above and beyond for local equality', press release, 8.10.2021, available at: <https://www.ccre.org/en/actualites/view/4225>.

In the recent past, the signing of the European Charter of Equality between Women and Men in Local Life by local authorities often met with repercussions from central Government representatives. Such a situation took place, for example, in Poznań, where the resolution of the City Council was challenged by the Voivode (provincial governor). In February 2020, Poznań City Council issued a resolution adopting the provisions of the European Charter of Equality between Women and Men in Local Life. In mid-March, the Wielkopolska Voivode annulled the resolution of the Poznań City Council. The Voivode assessed that the city council adopted the resolution without being related to the tasks and procedures relevant to the functioning of local government bodies, i.e. without a legal basis. In May 2020, Poznań councillors voted to appeal against the supervisory decision of the Wielkopolska Voivode to the Administrative Court.¹⁶⁹ In May 2021, the standing committee for Equal Treatment of the CEMR adopted the Poznań Declaration, which supports Polish local and regional authorities wishing to sign the European Charter of Equality and recognises their commitment regardless of possible subsequent problems on the part of the national administration. This document was also approved by the CEMR Political Committee. The solemn, collective signing of the Charter by several cities in October 2021 was organised in order to encourage local governments to sign the document and facilitate their implementation of this goal.

Portugal

PT

LEGISLATIVE DEVELOPMENT

Legislation establishing the 'right to be forgotten' for people who have overcome serious health issues and disabilities

In November 2021, the Government approved legislation that establishes the 'right to be forgotten' for persons who have overcome or mitigated serious health issues or disabilities. The legislation aims to improve their access to consumer credit and the associated mandatory and/or optional insurance contracts.¹⁷⁰

Disability

Under this law, insurers may no longer refuse to issue policies to anyone who has suffered from illnesses that may result in reduced life expectancy such as cancer, HIV, diabetes and hepatitis C. As a result, it will protect persons who have overcome serious illnesses from discrimination in access to loans or insurance of any kind. More specifically, the legislation guarantees that:

- those affected must not be subjected to an increase in insurance premiums or excluded from any insurance contract coverage;
- no health information regarding a medical condition that originated from, or is aggravated by, health risk or disability may be collected or processed by credit institutions/insurers in a pre-contractual context after an uninterrupted period of
 - 10 years since the termination of the therapeutic protocol, in cases of aggravated health risk or overcoming disability,
 - 5 years since the end of the therapeutic protocol, in cases of overcoming the pathology before the age of 21,
 - 2 years of continuous and effective therapeutic protocol have lapsed, in the case of aggravated health risk or mitigated disability.

169 Dziennik Gazeta Prawna (2020) 'Poznan: Sprawa Europejskiej karty równości kobiet i mężczyzn trafi do sądu administracyjnego' (Poznań: The European Charter for Equality between Women and Men will go to the administrative court), 19.05.2020, available at: <https://www.gazetaprawna.pl/wiadomosci/artykuly/1477781.poznan-europejskia-karta-rownosci-kobiet-i-mezczyzn.html>.

170 Portugal, Law No. 75/2021 of 18 November, available at: <https://files.dre.pt/1s/2021/11/22400/0000400008.pdf>.

The new law also amended Law No. 46/2006 of 28 August, which prohibits and punishes discrimination on the basis of disability and/or the existence of aggravated health risks, notably providing a new definition of ‘person with an aggravated risk to health’. In relation to persons who have overcome such illnesses or disabilities, insurers must provide objective justification regarding their risks for the purpose of conclusion, execution and termination of the insurance contract, based on rigorous statistical and actuarial data considered relevant under the terms of the principles of insurance. This is subject to control by the Portuguese Insurance and Pension Funds Supervisory Authority.

Finally, in the event of a refusal to take out an insurance contract or an increase of the premium on the grounds of disability or aggravated health risk, the insurer must, on the basis of the data obtained, provide the applicant with information on the ratio between the specific risk factors and the risk factors of a person in a comparable situation but not affected by that disability or aggravated health risk.

Online source:

<https://files.dre.pt/1s/2021/11/22400/0000400008.pdf>

CASE LAW

Court of Appeal orders the reopening of criminal proceedings regarding media hate speech

The case concerned a newspaper article published in 2017 that contained generalising statements of an offensive nature regarding groups such as ‘Africans’ and ‘Gypsies’. The first instance court closed the criminal procedure without examining the merits, and the NGO SOS Racismo asked the Court of Appeal to reopen the investigation. In July 2021, the Lisbon Court of Appeal decided on the request. Noting that the generalising statements were ‘directed at groups identified by ethnicity, skin colour or national origin’ and based on value judgments related to the alleged historical and cultural past of these groups and to their alleged behaviours and practices, the Court concluded that these generalisations revealed ‘a manifestation of supposed inferiority of these groups regarding other groups that are supposedly more civilised, intellectually developed and with higher moral values.’ Therefore, the Court concluded that the statements were ‘explicitly and unequivocally discriminatory and offensive to those groups identified as “gypsies” and “Africans”, damaging to their right to equality, honour, and consideration’.¹⁷¹ The proceedings will be reopened by the first instance court.

Racial or
ethnic origin

Unlawful offences to the rights to honour and 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 Chega showed a photograph in which the President of the Republic was accompanied by a group of people of African descent, and claimed that the president was socialising with ‘bandits’ who had 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. In May 2021, the first instance court recognised ‘the unlawfulness of offences to the right to honour and the right to image’ of the claimant family but failed to address their arguments relating to the allegedly discriminatory nature of the statements. In this regard, the court noted that this was not the most relevant aspect of the case, and found that it did not appear clear from the process that such discrimination was necessarily determined by the skin colour or socioeconomic condition of the persons targeted.¹⁷²

Racial or
ethnic origin

¹⁷¹ Portugal, Lisbon Court of Appeal, judgment of 6 July 2021 in case No. 5551/19.0T9LSB-5, available at: <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/53d43a27fb12dafc802587480047ae12>.

¹⁷² Portugal, Judicial court of the district of Lisbon, decision of 24.05.2021 in case No. 8777/21.3T8LSB. For further information regarding the first instance court decision, please see *European equality law review*, Issue 2021/2, p. 127.

The respondents appealed the decision and the Lisbon Court of Appeal ruled on the appeal in September 2021.¹⁷³ The Court agreed with the first instance decision that it was not procedurally necessary to examine separately the discrimination claims for the purpose of ruling on the case as it accepted the assumption by the court that the imputed, and recognised, offences to the honour and the right to image of the claimants 'absorb the discriminatory aspect based on the colour of the skin and the socioeconomic situation of the plaintiffs'. The Court further held that the respondents 'used the photograph as a weapon of social segregation' while the claimants, by consenting to its being taken, 'aimed to give expression to an event (visit of the President of the Republic) that would foster the social inclusion of the claimants and other inhabitants of the neighbourhood'. The Court finally recalled that 'Portugal is a sovereign republic based on the dignity of the human person, with all citizens having the same social dignity and not being discriminated against because of their race, economic situation, or social condition'.

Online source:

<http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/0e71bdbb89eaa24a8025876000400276>

POLICY AND OTHER RELEVANT DEVELOPMENTS

Adoption of the national plan to combat racism and discrimination 2021-2025

In July 2021, the Council of Ministers adopted the 'National plan to combat racism and discrimination (PNCRD) 2021-2025 – Portugal Against Racism'.¹⁷⁴ The resolution acknowledges the work of various civil society agencies on this important issue, the contributions and recommendations of the Working Group for the Prevention and Combating of Racism and Discrimination (coordinated by the High Commission for Migration) and a related public consultation process. This is the first national plan on racism and discrimination and was the result of intensive intersectoral collaboration. The document is organised around four transversal principles: deconstruction of stereotypes; coordination, integrated governance and territorialisation; integrated intervention in the fight against inequalities; and intersectionality. These principles cover 10 areas of intervention: governance, information and knowledge; education and culture; higher education; work and employment; housing; health and social action; justice, security and rights; participation and representation; sports; and media and digitalisation.

Racial or
ethnic origin

Slovakia

SK

CASE LAW

Barriers in access to justice in cases of discrimination against Roma people in access to goods and services

The complainants in this case argued that in November 2005 they were refused service at a pub by a waiter who told them that the pub did not serve customers of Roma ethnicity. The owner of the pub later made a statement that she indeed ordered the staff to refuse service to Roma due to alleged negative experiences with Roma customers several years previously. In 2009, the district court decided that the complainants were discriminated against due to their Roma ethnicity and not, as argued by the

Racial or
ethnic origin

¹⁷³ Lisbon Court of Appeal, decision of 14.09.2021 in case No. 8777/21.3T8LSB-7.

¹⁷⁴ Portugal, Resolution of the Council of Ministers No. 101/2021 of 28.07.2021, available at: <https://dre.pt/dre/detalhe/resolucao-conselho-ministros/101-2021-168475294>.

respondent, refused service due to being drunk. The court ordered the respondent to pay each of the complainants approximately EUR 165 in compensation for non-pecuniary damage.¹⁷⁵

However, the regional court quashed the decision and dismissed the complainants' claims.¹⁷⁶ In the years following, the first instance court repeatedly upheld the complainants' claim, but the appeal court repeatedly changed this decision and dismissed the claim. The Supreme Court quashed two of the appeal court's decisions rejecting the lawsuit and returned the case for further proceedings each time. In 2014, the appeal court rejected the lawsuit for the third time¹⁷⁷ and the complainants filed the third extraordinary appeal with the Supreme Court.¹⁷⁸

In 2021, after almost seven years, the Supreme Court decided on the case again, dismissing the complainants' extraordinary appeal and confirming the reasoning of the appeal court that had rejected the complaint.¹⁷⁹ The Supreme Court made several conclusions.

- While the appeal court has repeatedly examined the evidence and has indeed evaluated the facts presented differently from the first instance court, this was not done in such a way that it amounted to an 'extreme contradiction' with the legal principles of the evaluation of the evidence. The conclusions of the appeal court follow from the performed evidence and none of them were fabricated; the complainants' right to a fair trial has thus not been violated.
- The owner and the staff of the pub were provoked to say that *'they do not serve Gypsies'* by the complainants, as was confirmed by the owner's husband and other witnesses. In addition, given the tense situation at that moment in the pub, such emotional verbal outbursts can be understandable.
- The appeal court has applied the principle of the reversed burden of proof correctly and has shifted it to the respondent.
- Unlike the first instance court, the appeal court has rightly also taken into account testimonies of witnesses, who were present in the pub during the incident and did not prove discrimination. Moreover, the Trade Inspectorate inspected the pub on another occasion and did not find that discrimination took place. In addition, no other cases of discrimination against other Roma were reported there.
- The testimonies proved that the waiter, at first, started taking orders from the complainants and refused to serve them only after it was allegedly made clear to her that they were drunk.

The complainants intend to file a new complaint with the Constitutional Court, claiming violations of their right to a fair trial. They argue in particular that the principle of equality of arms has been violated by the general courts, as they considered only the evidence in favour of the respondent and ignored that submitted by the complainants. They also hold that racial prejudice and stereotypes against Roma impacted the courts' decisions.

Online source:

<https://www.supcourt.sk/rozhodnutia/5cdo912019/>

National court finding that the education of Roma children in special classes for children with intellectually disabilities amounted to discrimination

Three Roma children (the complainants) brought an anti-discrimination lawsuit as part of the strategic litigation programme of the NGO Centre for Civil and Human Rights.

175 Slovakia, Vranov nad Topľou District Court, decision of 20 March 2009, No. 4 C 70/2006 – 214.

176 Slovakia, Prešov Regional Court, decision of 29 September 2009, No. 12 Co/36/2009.

177 Slovakia, Prešov Regional Court, decision of 4 February 2014, No. 12 Co/54/2013.

178 In the meantime, in 2019, the Constitutional Court upheld the complainants' constitutional complaint, finding that the general courts violated their constitutional right to a hearing of their case within a reasonable time, without any delays. See: Constitutional Court, decision of 11 June 2019, No. I ÚS103/2019- 51.

179 Slovakia, Supreme Court, decision of 29 June 2021, No. 5Cdo/91/2019 (delivered on 26 July 2021).

The complaint was brought against (1) a Private Centre for Special Pedagogical Counselling, which had performed psychological evaluations of the complainants for the purpose of determining whether they were to be educated in special classes for children with mild intellectual disabilities, (2) the local primary school which had, upon the recommendation of the Centre, enrolled and educated them in such classes, and (3) the Ministry of Education. The complainants underlined that the classes were segregated from the main school building and the mainstream classes, and that almost 90 % of school-age Roma children from the nearby segregated Roma community were educated according to the educational plan for children with intellectual disabilities. Furthermore, the psychological evaluations of the children performed by an independent psychologist at the request of the parents did not confirm the intellectual disability diagnosis.

In November 2021, the Prešov District Court delivered its first-instance decision in the case, upholding the lawsuit to a substantial extent. First, it ruled that the respondent counselling centre had discriminated against Roma children in education on the ground of their Roma ethnicity. The court reasoned that the centre had failed to prove that the complainants' psychological evaluations were correctly performed and that they met the criteria to be placed in special classes. Moreover, the court stressed that the overall disproportionately high percentage of Roma children who were educated in special classes in the school also indicated errors in the psychological evaluations.¹⁸⁰

Secondly, the court ruled that the respondent primary school also discriminated against the complainants by ignoring the fact that a large number of Roma children were educated in special classes and not taking any remedial action, for example by verifying their psychological testing at another counselling centre. In addition, the court confirmed the school's responsibility for segregating the special classes, attended exclusively by Roma children, outside the main school building.

Thirdly, with regard to the State's alleged responsibility for its failure to take effective measures to prevent the discrimination, the court dismissed the complainants' claim due to their failure to specify sufficiently how the State had discriminated against them. It essentially concluded that the State did not have competence to influence the overall process of enrolment of the complainants in the special classes.

The district court ordered the first two respondents to apologise to the complainants and awarded them financial compensation of EUR 5 000 each. The complainants' appeal against the third part of the ruling is pending.

This is the first court decision in favour of Roma children who have been illegally educated in the special education system in Slovakia.

Online source:

<https://poradna-prava.sk/wp-content/uploads/2021/12/Decision-of-the-District-court-form-24-November-2021.pdf>

POLICY AND OTHER RELEVANT DEVELOPMENTS

Research report highlighting existing barriers for persons with disabilities in rail transport

In August 2021, the Public Defender of Rights (Ombudswoman) published a research report exploring (1) the State authorities' perceptions of their role and responsibilities in ensuring the accessibility of

Disability

¹⁸⁰ Slovakia, Prešov District Court, decision of 24 November 2021, No. 15C/14/2016-557.

rail transport and (2) the perceptions of persons with disabilities in Slovakia of the observance of their human rights when travelling by train.

The conclusions and recommendations of the report are based on the experiences of persons with disabilities when travelling by train and information provided by carriers and railway operators as well as the Ministry of Transport and Construction. The conclusions concern the following.

- A lack of comprehensive information on the accessibility of rail transport for persons with disabilities and reduced mobility. Individual data varies and information provided to the public is ambiguous and incomplete. The carriers declare their interest in the issue of accessibility of their services and are aware of the shortcomings but emphasise that there is a lack of funding.
- A lack of low-floor trains in service; railway stations, stops and platforms need to be gradually adapted to the needs of persons with disabilities.
- A lack of information within the Slovak railways about current shortcomings. There is no comprehensive plan for the removal of barriers; such measures are rare and not planned systematically.
- The Ministry of Transport did not respond to the question of how it sees its role and responsibility in the process of removing barriers in rail transport. As a central Government authority, it is supposed to coordinate, manage and monitor the processes in this area, but lacks initiative. The little progress made in this area over recent years can barely be measured due to the lack of information.
- The information from the Ministry of Transport suggests that, in general, Slovakia does not meet the obligations set by the UN Convention on the Rights of Persons with Disabilities in the context of ensuring the accessibility of rail transport.

Based on the findings, the Ombudswoman proposed a range of recommendations for the Parliament and the Ministry of Transport to address the existing shortcomings.

Online source:

<https://www.vop.gov.sk/vo-vlakoch-st-le-pretrv-va-mnoho-bari-r-t-tu-ch-ba-pl-n-na-ich-systematick-odstr-nenie>

Government apology for the practice of forced sterilisations (1966–2004) of (primarily) Roma women

On 24 November 2021 the Slovak Government adopted a resolution by which it apologised for and condemned the practice of forced sterilisations that occurred between 1966 and 2004 and predominantly affected women of Roma ethnic origin.¹⁸¹

In the report related to the resolution, the Government acknowledged that in 1966–1989, some state policies of the former communist Czechoslovakia were aimed at reducing the size of the Roma population through sterilisation by putting pressure on and financially motivating Roma women to undergo this medical intervention, without providing them with sufficient information on the consequences. Moreover, in 1990–2004, after the creation of an independent Slovakia, many women – many of whom were Roma – underwent sterilisation without sufficient understanding of the nature of such an intervention or because of pressure from medical staff during labour pains and without sufficient time for consideration of such an intervention. The illegal practice was eventually stopped after the introduction of informed consent procedures in 2004.

The apology is primarily the result of the long-term research, legal and advocacy efforts of the Centre for Civil and Human Rights, a grassroots NGO that closely cooperated with a group of committed Roma women activists, many of whom were directly harmed by this practice. As a result of international

¹⁸¹ Government of the Slovak Republic, Resolution No. 674/2021. Negotiated material No. UV-26719/2021. Adopted on 24 November 2021.

advocacy and strategic litigation, the practice of forced sterilisation has been the subject of repeated condemnation by international human rights bodies and judgments of the European Court of Human Rights.¹⁸² Moreover, in recent years, the Ombudswoman has brought attention to the practice and repeatedly called on the Government to address the issue. At her initiative, in July 2021, the Human Rights and Ethnic Minorities Committee of the Parliament discussed the issue in the presence of two affected Roma women and a representative of the Centre for Civil and Human Rights, and called on the Government to make a public apology and to adopt specific legislation granting compensation to the survivors. At the time of writing, no such legislation has been adopted.

Online source:

<https://rokovania.gov.sk/RVL/Material/26642/1>

Slovenia

SI

CASE LAW

Religious discrimination against a gynaecologist due to conscientious objection

A candidate for medical specialisation in gynaecology and obstetrics was refused the position following the recruitment interview. She argued that the attitude of the interview commission changed after she announced that she would invoke conscientious objection concerning abortion and certain forms of contraception. She lodged an anti-discrimination lawsuit, claiming discrimination on the grounds of religious beliefs.

Religion
or belief

The first instance court found in favour of the claimant. The burden of proof was shifted to the respondent (the Medical Association of Slovenia) who failed to prove – through the testimonies of the members of the commission that conducted the interview – that the reasons for the evaluation of the candidate were justified. The court granted the claimant compensation of EUR 1 000 and ordered the respondent to publish the judgment in its newsletter.¹⁸³

The Medical Association appealed the judgment. In July 2021, the High Court of Ljubljana confirmed the first instance judgment.¹⁸⁴ Although the judgment has become final, the respondent referred the case to the Supreme Court for a revision, which is an extraordinary legal remedy. The procedure was pending at the time of writing.

This is the first judgment ever issued in Slovenia based on Article 39 of the Protection Against Discrimination Act (PADA), which provides a specific legal remedy in cases of discrimination. Contrary to the relevant provisions of the Obligations Act, material or immaterial damages are not required to claim compensation under Article 39 of the PADA.

Online sources:

<http://online.pubhtml5.com/agma/bftc/#p=15>

https://www.zdravniskazbornica.si/docs/default-source/specijaliacije/sodba-v-imenu-ljudstva.pdf?Status=Temp&sfvrsn=36563436_2

182 EctHR, *V.C. v Slovakia* (2011), Application No. 18968/07; *N.B. v Slovakia* (2012), Application No. 29518/10; *I.G. and Others v Slovakia* (2013), Application No. 15966/04.

183 Slovenia, Ljubljana County Court, judgment No. III P 7/2021 of 25 February 2021, available at: https://www.zdravniskazbornica.si/docs/default-source/specijaliacije/sodba-v-imenu-ljudstva.pdf?Status=Temp&sfvrsn=36563436_2.

184 Slovenia, Ljubljana High Court, judgment and conclusion No. II Cp 1016/2021 of 14 July 2021, available at: <http://online.pubhtml5.com/agma/bftc/#p=15>.

A media article was discriminatory on the grounds of race

Racial or
ethnic origin

In December 2020, the Advocate of the Principle of Equality received a complaint against a column published in a weekly magazine. The column discussed, in allegorical terms, ideas such as ‘God will create a virus that will only attack people of other skin colours’, and ‘Jesus was also white, not black or yellow’. The complainant claimed that the content of the column constituted incitement to discrimination prohibited by Article 10 of the Protection Against Discrimination Act (PADA).

Immediately after its publication, the column provoked outraged reactions from various groups of the public. The editor-in-chief of the magazine argued that the disputed parts of the column had been taken out of context and that the column was a satire and therefore fell within the framework of the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), which specifically protects artistic and satirical speech.

The Advocate found that the author of the column justified ideas about the dominance and superiority of one group of people over other groups, based on their skin colour, ethnic origin and religious belief. This is explicitly prohibited by Article 10 of the PADA. The Advocate also found that the column amounted to a case of abuse of the right to freedom of speech protected by the ECHR, and that its contents denied the essence of the principles of equality and equal dignity of all people. The Advocate decided that the column violated the prohibition of discrimination under Article 10 of the PADA regardless of whether it was a satire, but also concluded that it did not fulfil the criteria of a ‘satirical’ publication.¹⁸⁵

Under anti-discrimination law, the Advocate does not have a mandate to issue sanctions, and, in any case, the PADA does not provide any sanctions in the event of a violation of Article 10.

Online source:

<http://www.zagovornik.si/podjetje-nova-obzorja-zaloznistvo-je-z-objavo-presezki-5-v-reviji-demokracija-krsilo-prepoved-diskriminacije/>

County court confirmed that age discrimination took place in the first strategic litigation case in which the Advocate of the Principle of Equality represented the victim

Age

The case concerns an individual who, at the age of 70, automatically lost the right to continue his work within a sports association as a sports referee (a cycling commissaire). In 2018, the Advocate of the Principle of Equality (the national equality body) issued a decision in this case, finding that the age limit was too general and was applied without distinction, regardless of the individual's capabilities. The respondent association based its defence on the same age limit contained in the statute of the international association but did not provide further reasons why the age limit would be necessary. The Advocate found that the rules of an international sports association – which is essentially an international non-governmental organisation – do not overrule national legislation and European law. It found that the association did not meet its burden of proof as it made no attempt to establish the proportionality of the measure, or which legitimate aim it would pursue. The Advocate invoked the Employment Equality Directive, as the measure prevented persons aged over 70 from engaging in paid work with the association.

In 2019, the Advocate took over the representation of the claimant, initiating its first ever strategic litigation case. The claimant argued that the discrimination must be brought to an end, claimed compensation of EUR 3 500 and requested the publication of the judgment in the media.

¹⁸⁵ Slovenia, Advocate of the Principle of Equality, Decision No. 0700-52/2020/11 of 20 September 2021, available at: <http://www.zagovornik.si/podjetje-nova-obzorja-zaloznistvo-je-z-objavo-presezki-5-v-reviji-demokracija-krsilo-prepoved-diskriminacije/>.

In October 2021, the Ljubljana County Court confirmed that age discrimination (ageism) had taken place. It instructed the association to end the discrimination by issuing the claimant with a sports referee licence, to pay compensation of EUR 2 000 to the claimant and to publish the judgment in the media at its own expense. It rejected the rest of the compensation claimed and the claim that the association should change its bylaws allowing for age discrimination.¹⁸⁶ Both the applicant and the association appealed the first instance court judgment.

Article 41 of the Protection Against Discrimination Act establishes the competence of the Advocate to represent victims of discrimination, through a staff member who has passed the State legal exam. The representation competence is separated from the body's decision-making competence by ensuring that different staff members are responsible for the two tasks.

Online source:

<https://www.zagovornik.si/okrajno-sodisce-pritrtilo-zagovorniku-da-je-kolesarski-sodnik-zrtev-starizma/>

Prolonged online learning during COVID-19 lockdown amounted to discrimination, notably of vulnerable children

During the 52 school weeks between March 2020 and June 2021, schools in Slovenia were fully or partially closed for 47 weeks. During this time, schools performed distance or online learning through videoconferencing etc. Based on several complaints, the Advocate of the Principle of Equality assessed the decisions of the Minister of Education to close the schools from the perspective of the prohibition of discrimination. The Advocate concluded that complete or partial school closure of such a prolonged duration, while the majority of other facilities in the country (businesses, offices, non-essential stores etc.) were open under some conditions, constituted discrimination against children, on the ground of age, in their access to education. The Advocate also found that the closure of schools had particularly negative consequences for vulnerable groups of children (children with disabilities, children whose mother tongue is not Slovenian and immigrant children, children whose parents are not able to help them with distance learning due to disability or social status, students who do not have internet access due to their socioeconomic status or place of residence). The State significantly restricted them in their constitutional right to education compared to children who had easy access to distance learning. In addition to passing on knowledge to children, the Advocate noted that schools also serve the functions of providing socialisation and social care, organised sports training, extracurricular activities, a safe environment, and hot meals for children from socially disadvantaged groups.¹⁸⁷

Age

Disability

Racial or ethnic origin

The Advocate issued a recommendation to the competent ministry to refrain from such prolonged school closures in the future, particularly if other sectors of society are functioning almost normally during the COVID-19 epidemic, under certain precautionary measures (such as masks, hand disinfection, COVID pass etc.).

The Constitutional Court also issued a decision regarding the legality of the Ministry of Education's decisions on school closure. While this decision did not focus on discrimination, the Constitutional Court underlined the lack of safeguards regarding children for whom such education is not possible. The Court mentioned in particular children with special needs, as well as to those who, for example, lack adequate home facilities, computer equipment or a sufficient internet connection.¹⁸⁸

Online source:

<http://www.zagovornik.si/wp-content/uploads/2021/10/Ocena-diskriminarnosti-solanje-na-daljavo.pdf>

¹⁸⁶ Slovenia, Ljubljana County Court, judgment No. IV P 1366/2019 of 8 October 2021, available at: <https://www.zagovornik.si/okrajno-sodisce-pritrtilo-zagovorniku-da-je-kolesarski-sodnik-zrtev-starizma/>.

¹⁸⁷ Slovenia, Advocate of the Principle of Equality, Assessment of 19 October 2021, available at: <http://www.zagovornik.si/wp-content/uploads/2021/10/Ocena-diskriminarnosti-solanje-na-daljavo.pdf>.

¹⁸⁸ Slovenia, Constitutional Court, Decision No. U-I-445/20-22 and U-I-473/20-22 of 16 September 2021, available at: <http://www.zagovornik.si/wp-content/uploads/2021/10/Ocena-diskriminarnosti-solanje-na-daljavo.pdf>.

Court annuls national equality body decision on religious discrimination

Religion
or belief

In 2019 the Advocate of the Principle of Equality issued a decision in a case concerning a pro-life association whose marketing campaign had been terminated by the provider of marketing services. The termination of the campaign was motivated by a social media outcry against the campaign, which was perceived as a violation of the right to abortion guaranteed by the Constitution. The Advocate found that the termination of the campaign constituted discrimination on the grounds of religion in access to (marketing) services. The Advocate found in particular that the city bus company that had instructed the marketing agency to remove the advertisements from its buses had thus committed the offence of giving 'instructions to discriminate' as prohibited by the Protection Against Discrimination Act (PADA).¹⁸⁹

The bus company challenged the Advocate's decision before the Administrative Court, claiming that it interfered with the company's constitutional freedom of enterprise. They claimed that they were entitled to order the removal of the advertisements on the basis of the contract with the pro-life association, as the advertisements provoked intolerance, which is a ground for removal based on the terms and conditions of the city bus company. They also claimed that the case falls outside the material scope of the anti-discrimination law of the Republic of Slovenia.

In November 2021, the Administrative Court found in favour of the claimant bus company. The Court annulled the decision issued by the Advocate and ordered the Advocate to issue a new decision in a repeat administrative procedure.¹⁹⁰ The Court found that the Advocate had not sufficiently weighed the opposing rights that are at stake in the case concerned, namely the association's right to be free from religious discrimination on the one hand and the company's freedom of enterprise on the other hand. Furthermore, the Advocate did not sufficiently assess whether the advertisement itself has to express intolerance for the company to have the right to remove it, or whether it is sufficient that the advertisement provokes intolerant discussions in the public space.

The repeat procedure before the Advocate of the Principle of Equality was pending at the time of writing.

Online source:

<https://www.rtv slo.si/slovenija/sodisce-razveljavilo-odlocbo-da-je-bila-odstranitev-oglasov-nasprot-nikov-splava-diskriminatorna/605267>

Criteria for blood donation are discriminatory based on sexual orientation and gender

Sexual
orientation

Gender

The Advocate of the Principle of Equality, the national equality body, received a complaint against the *de facto* ban on blood donation for men who have had sex with men. In the investigation procedure, the Advocate noted that the ban was not defined by law but was carried out in practice and announced on the website of the national Blood Transfusion Centre of Slovenia. Each candidate for blood donation was asked to fill in a questionnaire, on the basis of which male candidates who declared that they had had sexual intercourse with another man were permanently banned from donating blood.

In December 2021, the Advocate decided on the complaint against this ban. It found that the ban was based on the legitimate aim of ensuring the safety of blood donations for the patients who receive the donated blood. Statistics show that a large proportion of, but not all, people living with HIV in Slovenia are men who have had sex with men. However, the proportionality test determined that the ban was not fully appropriate nor necessary to achieve this aim. Namely, while HIV and other blood-borne viruses are also transmitted through heterosexual sex, blood donation is prohibited in advance and permanently

¹⁸⁹ Slovenia, Advocate of the Principle of Equality, decision No. 0700-2/2019 of 4 July 2019. For further information, see *European equality law review*, Issue 2020/1, p. 107.

¹⁹⁰ Slovenia, Administrative Court, judgment No. I U 1228/2019-42 of 10 November 2021, available at: <https://www.rtv slo.si/slovenija/sodisce-razveljavilo-odlocbo-da-je-bila-odstranitev-oglasov-nasprot-nikov-splava-diskriminatorna/605267>.

only for men who have had sex with other men, without any individual examination of their personal circumstances. The ban is applied despite the fact that the safety of blood donation is also ensured through testing. The Advocate concluded that the automatic permanent ban on blood donation was discriminatory on the grounds of sexual orientation and gender. The entities found to be responsible for discrimination are the Ministry of Health and the Blood Transfusion Centre.¹⁹¹

The Advocate took into account the decision of the Court of Justice of the EU in the *Léger* case, where the CJEU found that a permanent ban on blood donation can constitute discrimination within the meaning of Article 21 of the EU Charter of Fundamental Rights, unless it is prescribed by law, necessary and proportionate.¹⁹²

Online source:

https://www.zagovornik.si/wp-content/uploads/2021/12/ODLOCBA_Trajno-izkljucevanje-vseh-istospolno-usmerjenih-moskih-iz-krvodajalstva-je-diskriminacija-1.pdf

Spain

ES

CASE LAW

Constitutional Court ruling on discrimination in access to permanent disability pension

The claimant was born in 1954 and has a significant visual impairment. From 1987 to 2013, she worked as a lottery coupon seller for the National Organisation for the Blind. In 2013, she was granted 'early retirement' based on her disability. Subsequently, in July 2016 (at the age of 62), she applied to the National Social Security Institute for a permanent severe disability pension as she had a certified disability of over 64 %. This meant that she required the assistance of a third person for basic life activities. Permanent pensions for severe disability are accompanied by a financial supplement intended to compensate the person assisting the beneficiary.

Disability

The claimant's application was rejected due to her 'early retirement due to disability' status which, according to the relevant legislation, cannot be changed to a status of permanent severe disability, which can only be recognised before the person retires. However, in certain cases, despite having taken early retirement, a person may obtain a permanent disability pension if he or she has not yet reached the 'official retirement age' (65 or 67 years of age, depending on the length of contribution periods). While the claimant fell into this category and could thus *a priori* have been granted the pension requested, the courts ruling on her application came to another conclusion. They underlined that, specifically in cases of early retirement due to disability, the retirement age is lowered without any reduction in the amount of the pension received. As a result, and in accordance with other court decisions in this matter, in cases of early retirement due to disability, the normal retirement age is not 65 or 67 (at which point a permanent disability pension can no longer be claimed), but the age resulting from legally established age reduction coefficients.

The case was brought before the Constitutional Court, which was called upon to assess whether the interpretation made by the courts violated the principle of non-discrimination recognised by Article 14 of

191 Slovenia, Advocate of the Principle of Equality, decision No. 0700-41/2020/15 of 3 December 2021, available at: https://www.zagovornik.si/wp-content/uploads/2021/12/ODLOCBA_Trajno-izkljucevanje-vseh-istospolno-usmerjenih-moskih-iz-krvodajalstva-je-diskriminacija-1.pdf.

192 CJEU, judgment of 29 April 2015, *Geoffrey Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes, Établissement français du sang*, C-528/13, ECLI:EU:C:2015:288, available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=164021&pageIndex=0&doclang=SL&mode=lst&dir=&occ=first&part=1&cid=7415268>.

the Constitution. The Court upheld the appeal of the claimant and allowed her to apply for a permanent severe disability pension. The Court confirmed that the interpretation made by the courts led to the exclusion of people who take early retirement due to disability from access to a permanent disability pension, as opposed to other cases of early retirement. The Court added that the argument that early retirement due to disability is more beneficial financially than other forms of early retirement is irrelevant for the purpose of interpreting the legislation. In this regard, the interpretation should be based on the values of national and international disability legislation.¹⁹³

Specifically, the Court referred to the fact that early retirement due to disability constituted a ‘positive action measure’, adding however that once retirement is granted, no unequal treatment should exist between different situations of early retirement without legal objective justification or just cause: ‘Otherwise, the paradox arises that the positive action measure established for access to a certain situation (early retirement due to disability) becomes, at the same time, a form of negative discrimination against people in this situation [...] The measure would no longer be adequate for its intended purpose since it would not allow real and effective equality to be achieved.’

Online source:

<https://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/26822>

UK

United Kingdom

CASE LAW

Discrimination against gay and lesbian foster parents due to the religion and belief of the adoption agency

Cornerstone is an independent fostering agency (IFA), specialising in offering foster and permanent homes to children in the care of local authorities. The charity operates according to its perception of evangelical Christian principles, such that it will only recruit carers who are prepared to abide by its statement of beliefs and code of practice. The code of practice requires staff, volunteers and carers to be evangelical Christians and to refrain from ‘homosexual behaviour’. Following an inspection of Cornerstone, a statutory body whose functions include regulation of IFAs concluded that Cornerstone’s recruitment policy violated provisions of the Equality Act 2010 prohibiting discrimination on grounds of sexual orientation in the provision of goods and services. It required Cornerstone to change its policy. Cornerstone challenged the conclusions. In July 2020, the High Court ruled that the recruitment policy amounted to discrimination on grounds of sexual orientation, both direct and indirect, and that any indirect discrimination could not be justified.¹⁹⁴ The case was appealed to the Court of Appeal.

The Court of Appeal upheld the decision of the High Court, finding that Cornerstone’s policy, which specifically requires carers not to engage in homosexual behaviour, ‘is as clear an instance of direct discrimination “because of” a protected characteristic as can be imagined’. Alternatively, any indirect discrimination could not be justified. Moreover, the Court of Appeal refused the right to appeal on the

Sexual
orientation

¹⁹³ Spain, Constitutional Court, judgment No. 172/2021 of 7 October 2021, available at: <https://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/26822>.

¹⁹⁴ United Kingdom, High Court of England and Wales, R (Cornerstone (North East) Adoption and Fostering Service Ltd) v The Office for Standards In Education, Children’s Services and Skills, Decision of 7 July 2020, No. 1679 (Admin). For further information, see European equality law review, Issue 2021/1, p. 125.

question of whether Cornerstone was a 'service provider', effectively confirming the High Court's decision that this was the case.¹⁹⁵

While the finding that the treatment was not justified is the same outcome as the High Court decision, the reasons given are not identical.

In relation to the direct discrimination claim, the Court of Appeal refused to adopt Cornerstone's doctrinal definition of evangelical Christians so as to find that gay and lesbian evangelical Christians do not exist and that there were therefore no victims of the disputed policy. The Court also confirmed that discrimination on the basis of homosexual sexual behaviour clearly amounts to discrimination on the basis of sexual orientation.

In relation to the justification of any indirect discrimination, the Court found several factors of relevance to the assessment. It pointed out that Parliament has, in relation to religious organisations that offer a service to the public, given a clear indication that discrimination on the basis of sexual orientation is impermissible. Although it ruled that this factor is not conclusive on the matter of justification (circumstances can be envisaged in which otherwise discriminatory treatment could be justified, for example where there was good evidence that a significant number of children would not otherwise be fostered); nonetheless there was no evidence of such facts in this case, and so the discrimination could not be justified.

In undertaking the assessment of proportionality, the Court of Appeal weighed some factors differently from the High Court, recognising for example the success Cornerstone had had in placing children with particular needs; and the additional support carers reportedly gained from being part of a common venture with co-religionists. However, despite these additional factors, nonetheless the Court found the different treatment arising from Cornerstone's policy to be unjustified.

Online source:

<https://www.bailii.org/ew/cases/EWCA/Civ/2021/1390.html>

Compulsory retirement: justifying age discrimination

The first claimant was employed as an associate professor and as an official fellow and tutor at Oxford University. On reaching the age of 67, he was compulsorily retired from both employments, the employers relying on the employer justified retirement age (EJRA) to justify any resulting age discrimination. The EJRA scheme operated by the employers allowed employees to apply for an extension, but the claimant's application was refused. An employment tribunal dismissed his claims of direct age discrimination and unfair dismissal, finding that the EJRA was justified and the dismissals fair. The claimant appealed.

The second claimant was an associate professor at Oxford University. He initially obtained an extension of his employment by taking up a fixed-term position. His application for a further extension was unsuccessful and he was also compulsorily retired. A different employment tribunal upheld his claims of direct age discrimination and unfair dismissal, finding that the university had not shown the EJRA to be justified. The university appealed the decision on the age discrimination claim.

The two appeals were combined and heard by the Employment Appeal Tribunal (EAT).

The EJRA has three legitimate aims: inter-generational fairness; succession planning by maintaining predictable retirement dates; and equality and diversity. The EJRA is said to achieve these aims by

¹⁹⁵ United Kingdom, Court of Appeal, *R (Cornerstone (North East) Adoption and Fostering Service Ltd)) v The Office for Standards In Education, Children's Services and Skills*, Decision of 24 September 2021, No. Civ 1390.

ensuring vacancy creation was not delayed; and recruitment into senior academic roles might take place from a younger, more diverse cohort. These aims were accepted as being legitimate.

The EAT held that neither employment tribunal had erred in law in assessing whether the application of the EJRA was justified as a proportionate means to achieve the legitimate aims. Each had reached a conclusion that was based on evidence before them and after proper assessment of the proportionality of imposing the EJRA on the case before it. The EAT held that the nature of the proportionality assessment was that different employment tribunals could reach different conclusions even when considering the same measure adopted by the same employer.¹⁹⁶

The EAT confirmed that the EJRA will not, of itself, be sufficient to achieve any of the legitimate aims; the most that it can do is to support or facilitate other measures in order to promote or achieve those aims. It also found that the achievement of vacancies is important for the employers in seeking to further their legitimate aims. It also noted that when determining the question of objective justification, it is possible for different tribunals to reach different conclusions when considering the same measure adopted by the same employer in respect of the same aims. Whilst acknowledging that this conclusion was an undesirable outcome in these cases, the EAT noted that its role was not to find a single answer, but to consider whether either tribunal had erred in its application of the law, for example by reaching a perverse decision.

It might be possible for two employment tribunals to hear the same evidence and still reach opposite conclusions, without any error of law, but in these cases the evidence did differ in ways which were significant. First, there was statistical evidence regarding the impact of the EJRA on the creation of vacancies in the second claimant's case, which was not before the tribunal in the first claimant's case. Instead, the tribunal in the first claimant's case had given greater weight to other factors. Secondly, the impact of retirement differed in the two cases. Whereas the first claimant could continue with his research as an emeritus professor, the second claimant's research required access to university facilities as part of a project team. This meant that the evidence regarding detriment to him was different from the evidence in the first claimant's case.

Online source:

<https://www.bailii.org/uk/cases/UKCAT/2021/2019-000638.pdf>

¹⁹⁶ United Kingdom, Employment Appeal Tribunal, *Pitcher v University of Oxford and University of Oxford v Ewart*, Decision of 27 September 2021, EA-2019-000638-RN; and EA-2020-000128-RN.

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