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European equality law review

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

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- Intersectionality from critique to practice: Towards an intersectional discrimination test in the context of 'neutral dress codes'
- Safeguards and redress for victimisation: Examples from Belgium, Bulgaria, Italy and Poland
- Formal and informal mediation of discrimination complaints: A comparison of the legal framework and practice of Austria, Belgium, Ireland and Portugal in discrimination cases

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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 January to 30 June 2022.

In this issue

This issue opens with four in-depth articles. The first article by Laura Carlson from Stockholm University explores effective enforcement mechanisms and sanctions in the European Commission's proposed directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms. The second article on intersectional discrimination, by Raphaële Xenidis from the University of Edinburgh, focuses on the engagement of the Court of Justice of the EU with the issue of intersectional discrimination in the context of the so-called 'headscarf' cases. The third article, by Margarita S. Ilieva and András Kádár, the national non-discrimination experts for Bulgaria and Hungary respectively, explores the regulation of victimisation in Belgium, Bulgaria, Italy and Poland, and identifies good practices as well as gaps and shortcomings in these jurisdictions. The final article, by Cathérine Van de Graaf from the University of Ghent, explores the legal frameworks and practice of mediation procedures in discrimination cases in Austria, Belgium, Ireland and Portugal.

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 level[1]

On international women's day, 8 March 2022, the European Commission presented the long awaited proposal for a directive on combating violence against women and domestic violence.[2] The proposed directive is an important tool in the Commission's efforts to combat violence against women as it criminalises various acts that were previously not expressly covered at the European level, and introduces new standards for protection and support mechanisms as well as improved access to justice for victims. Some of the key elements of the proposed directive include: the criminalisation of several acts including rape based on lack of consent; female genital mutilation; and cyber violence, which includes non-consensual sharing of intimate images, cyber stalking, cyber harassment, and cyber incitement to violence or hatred. Cyber violence, or ICT-facilitated violence against women, is a widespread practice in Europe which needs to be addressed at a European level. The proposed directive is the first legal instrument to cover offences committed in the digital world that are not explicitly included in the Istanbul Convention. Besides the criminalisation of these offences, the proposal also introduces new ways to report acts of violence, which are gender sensitive, easier and safer. Additionally, new standards are

1 This section, like the rest of the issue, covers the period from 1 January to 30 June 2022.

2 European Commission, Proposal for a Directive of the European parliament and of the Council on combating violence against women and domestic violence, Strasbourg, 08.03.2022, COM/2022/105 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0105.

proposed in order to increase the respect for victims' privacy in judicial proceedings as well as the right to compensation including the right to claim full compensation from offenders for damages. Furthermore, the proposed directive includes provisions for Member States to exchange best practice and consult each other in criminal cases, including via Eurojust and the European Judicial Network. The proposal is an important step by the Commission in its fight against violence against women and domestic violence, and will hopefully be adopted in the near future.

The European Commission also published its 2022 report on gender equality in the EU on international women's day.[3] This report is the second report under the new Gender Equality Strategy 2020-2025, and takes stock of where the EU and its Member States stand on gender equality. It highlights the EU's achievements in the five key areas covered by the strategy, and gives inspiring examples from the Member States and EU-funded projects in these areas. The report shows that during 2021, the gendered impact of the COVID-19 crisis continued to manifest its disproportionate effect on women. The continued lockdowns resulted in a greater care burden, a greater share of lost income and heightened precariousness for women, as well as a steep increase in domestic violence. However, the report also emphasises the important European legislative developments that have taken place regarding gender equality during this time, in particular concerning women's pay.[4] The European Commission's proposed directive on pay transparency secured a general agreement in the Council, paving the way for negotiations with the European Parliament and final adoption, and the proposal for a directive on adequate minimum wages has reached a decisive stage of negotiations.

In March 2022, the Commission also targeted the fight against racial discrimination and racism, marking the international day for the elimination of racism on 21 March by organising the European Anti-Racism Summit.[5] The summit focused on several key topical issues such as racialised communities' experiences of law enforcement; environmental racism and climate justice; and enhancing the participation of racialised youth in the fight against discrimination. Furthermore, responding to the EU anti-racism action plan's call for Member States to adopt national action plans, the summit also focused on the development and implementation of such national plans and discussed relevant good practice. A few days before the summit, the Subgroup on the national implementation of the EU anti-racism action plan 2020-2025 under the High-Level Group on Non-discrimination, Equality and Diversity published common guiding principles for the implementation of national action plans against racism,[6] providing a highly relevant and useful framework for discussion at national and European level. The guiding principles are intended to shape each phase of the development and realisation process of the national action plans against racism, i.e. preparation, development, implementation and monitoring and evaluation. In addition, there are three cross-cutting actions that should be embedded in the whole process: the collection and use of equality data; a participatory approach; and structured cooperation and coordination.

3 European Commission (2022), *2022 Report on gender equality in the EU*, Luxembourg, 08.03.2022, available at: https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/annual_report_ge_2022_printable_en.pdf.

4 European Commission (2020), Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, Brussels, 28 October 2020, COM(2020) 682 final available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0682&qid=1668445986494 and European Commission (2021), Proposal for a directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, Brussels, 04.03.2021, COM(2021) 93 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0093&qid=1668446074843.

5 European Anti-Racism Summit, 21 March 2022. For more information, see: https://antiracism-eusummit2022.eu/agenda/.

6 European Commission, High-Level Group on Non-discrimination, Equality and Diversity, Subgroup on the national implementation of the EU anti-racism action plan 2020-2025 (2022), *Common guiding principles for the implementation of national action plans against racism*, available at: https://ec.europa.eu/info/sites/default/files/common_guiding_principles_for_national_action_plans_against_racism_and_racial_discrimination.pdf.

In April 2022, the European Parliament and the Council reached a political agreement on the Digital Services Act,[7] which aims to provide extended protection against illegal content online, notably hate speech against individuals who are subjected to discrimination and groups such as women, ethnic, racial or racialised and religious minorities, LGBTIQ people and persons with disabilities. The Act, which was adopted in October 2022,[8] attempts to create a 'safe and accountable online environment' by establishing new and extended duties for online platforms as well as monitoring powers for the European Commission, in particular with regard to the largest platforms.

In May 2022, the LGBTIQ equality subgroup under the High-Level Group on Non-discrimination, Equality and Diversity published a set of guidelines for strategies and action plans to advance LGBTIQ equality,[9] targeting all relevant stakeholders at national, regional and local level. The guidelines are intended to support Member States' efforts to 'affirm LGBTIQ equality in a strategic and evidence-based manner' and define implementable steps and measures. Through the adoption in November 2020 of the EU LGBTIQ Equality Strategy 2020-2025, the Commission had already committed to supporting the Member States to adopt national plans on LGBTIQ equality. The new guidelines will provide a relevant framework and guidance for the adoption of such plans and strategies at national level across the EU.

On 7 June 2022, a political agreement was reached between the European Parliament and the Council on the proposed directive on improving the gender-balance among non-executive directors of companies listed on stock exchanges and related measures.[10] This political agreement had been long awaited since the proposal was first presented by the European Commission on 17 November 2012.[11] Women remain underrepresented in high-level positions including on corporate boards in the EU, despite high levels of education. Although various initiatives have been taken in this regard, the directive will be an important instrument as progress in this field has been very slow. The directive sets a target for EU companies listed on the EU stock exchanges to accelerate the achievement of better gender balance. It sets a share of 40 % of the underrepresented sex among non-executive directors and 33 % among all directors. These companies must ensure that board appointment procedures are clear and transparent, and that applicants are assessed objectively based on their individual merits, irrespective of gender. The political agreement is another step in the direction of achieving a fairer and more equal society and an economy in which all people can thrive equally irrespective of their gender.

Network publications and activities

In February 2022, the network published two thematic reports. The first report, *Effectively enforcing the right to non-discrimination*, by Romanița Iordache and Iustina Ionescu, explores a wide variety of examples of positive practices of enforcement at national level. The second thematic report, *Directive 2004/113/EC on Gender Equality in Goods and Services – In search of the potential of a forgotten Directive* by Eugenia Caracciolo di Torella, considers the unexplored possibilities presented by the Goods and Services Directive.

7 European Commission (2022), 'Digital Services Act: Commission welcomes political agreement on rules ensuring a safe and accountable online environment', press release, 23 April 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2545.

8 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27.10.2022, p. 1-102, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2065.

9 European Commission, High-Level Group on Non-discrimination, Equality and Diversity, LGBTIQ equality subgroup (2022), *Guidelines for Strategies and Action Plans to Enhance LGBTIQ Equality*, available at: https://ec.europa.eu/info/sites/default/files/guidelines_for_strategies_and_action_plans_to_enhance_lgbtiq_equality_2022final16_05.pdf.

10 European Commission (2022), 'Commission welcomes political agreement on gender balance on corporate boards', press release, Brussels, 07.06.2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3478.

11 European Commission (2012), Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, Brussels, 14.11.2012, COM(2012) 614, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012PC0614&from=EN.

In addition to these thematic reports, the network also published its annual comparative analyses of non-discrimination law in Europe 2021 and gender equality law in Europe 2021.

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

Isabelle Chopin
Migration Policy Group

Linda Senden
Utrecht University

Jos Kösters
Human European Consultancy

IN MEMORIAM

Sophia Koukoulis-Spiliotopoulos

Sophia Koukoulis-Spiliotopoulos passed away on 4 October 2022. She was a founding member of the European Network of Legal Experts in Gender Equality in 1983 and the national gender expert for Greece for 35 years.

Sophia was one of a kind: an excellent jurist, but also a prominent feminist and a fervent activist, putting all her wisdom, knowledge, commitment and diplomacy (including her personal connections) into achieving progress in the fields of gender equality, antidiscrimination, social rights and the rights of children. More than that, she was also a loving and caring person, who generously offered her knowledge, advice and support to encourage younger lawyers to engage in human rights and gender equality law and activism.

Sophia tirelessly promoted gender equality as a fundamental value and a proactive right at all levels, especially in Greece and Europe. Representing European women's NGOs (the Association of Women of Southern Europe and the European Women Lawyers Association), she was actively involved in the drafting process of the EU Charter of Fundamental Rights and the Lisbon Treaty. She aimed for the inclusion of gender equality in a distinct Charter article and for gender equality to be included in the EU's fundamental values and as a transversal EU objective and obligation in all its policies and actions. She initiated ground-breaking case law before the CJEU and national courts, published widely in academic journals in Greek, French and English and headed European and national NGOs, promoting their work.

As a jurist and member of national women's NGOs, Sophia successfully fought for the inclusion of gender equality as a proactive principle and right in the Greek Constitution. She personally drafted the wording of the Constitution's Article 116(2), requiring positive action. She also fought for the rights of children and contributed significantly to the drafting of the Greek child-centred family law, implementing gender equality in 1983. Recently, she fought against compulsory shared custody for all children, which was nevertheless introduced by the new Greek family law in 2021.

The conclusion of an article that Sophia wrote with Hélène Masse-Dessen (former network member) on thirty years of the gender equality network is an excellent reflection of her conception of gender equality:

> *"It is important to note that women, the main victims of violations of gender equality, are neither a group nor a minority, but one of the two forms of the human being and therefore constitutive of more than half of humanity. The Convention that elaborated the EU Charter of Fundamental Rights was convinced by this argument to include Article 23 in the Charter, in addition to Article 21. This is crucial in times of socio-economic crises, where women are particularly vulnerable to poverty and social exclusion; as well as to episodes of multiple discrimination within the framework of the deregulation of employment and social security, and the collapse of the welfare state".*[1]

We have lost a most valued, esteemed and loved member of our network, who will be deeply missed. She was a great example for so many people and it was a privilege to know her.

On behalf of the European Commission, all the members of the network and its supporting staff, we wish to say that it was a great honour to have her in the network and we will cherish the memory of her.

Susanne Burri, senior expert in gender equality
Panagiota (Deta) Petroglou, gender expert for Greece

1 See Koukoulis-Spiliotopoulos, S. and Masse-Dessen, H. (2014), 'Thirty years of the Gender Equality Network, Who We Are, What We Do and Why We Do It', European Gender Equality Law Review 2014/1, available at: https://www.equalitylaw.eu/downloads/2802-european-gender-equality-law-review-1-2014.

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The EU pay transparency proposed directive – general overview and some comments on the rules on enforcement and sanctions[1]

Laura Carlson*

1 Introduction

The European Commission's 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 is ground-breaking in two aspects: first, in using pay transparency at the EU and Member State levels as a tool to tackle gender-based discrimination and gender biases in pay settings; and secondly – and the focus of this article – by placing greater emphasis on procedure to ensure victims' access to justice through the enforcement of pay claims.

This strengthening of access to justice, and the invocation of both collective and individual claims through private enforcement presents different challenges to the Member States depending upon the national industrial relations constellation in place, as well as the roles exercised by Government agencies, equality bodies and non-governmental organisations. In labour markets where, to a large extent, the social partners are involved in wage setting process, such as in the Nordic countries, empowering individuals through access to justice changes the power dynamics of wage-setting. In jurisdictions such as the United Kingdom, where private enforcement has historically been essential, the labour unions have acted as facilitators, for example by funding collective actions concerning pay, as seen with the recent *Asda* case.[2] The avenues of enforcement as well as remedies also vary greatly between the Member States. Private enforcement is not envisioned in the proposed directive as the only avenue to address equal pay, but as one of several tools that has been underutilised in at least some, if not most, Member States.[3]

The role played by equality bodies in relation to discrimination and equal pay across EU Member States also shows great variation: there is little action in some Member States, whereas in others, the equality bodies are a driving force. This role is also challenged by the greater emphasis on private enforcement in the proposed directive, leading ideally to healthier competition between equality bodies, labour unions and individuals with respect to addressing issues of equal pay. A richer case law in questions of equal

* Laura Carlson is a professor in private law at the Department of Law, Stockholm University.

1 Please note that, after this article was drafted, on 15 December 2022 a political agreement was reached between the European Parliament and the Council on the Directive proposed by the Commission. The text of the Directive is expected to be published in the EU Official Journal in the beginning of 2023.

2 See Guilluame, C. and Chappe, V-A. (2022), 'Mobilizing anti-discrimination law: the litigation strategies of UK and French trade union compared', *Journal of Law and Society*, 49 (2), pp. 294-316.

3 More generally see Böök, B., Burri, S., Senden, L., Timmer, A. (2022), *A comparative analysis of gender equality law in Europe 2021*, European Commission, p. 99: 'Another general concern relates to the enforcement of equality law, which can be seen as one of the major challenges to overcome in the future, as the lack of litigation in most states can be taken as an indicator that the practical effectiveness of the legal framework is weak.'

pay at the Member State level can provide better guidance for the social partners as well as supervisory agencies, creating a stronger basis upon which labour unions and agencies can in their turn be more active.

First, this article addresses the proposed directive and the transparency requirements, as well as strengthened access to justice mechanisms. Secondly, it examines effective remedies and sanctions, as well as enforcement, as set out in the Commission's proposal. Finally, some comments will be given regarding the roles of the social partners, supervisory authorities and monitoring bodies.

2 The proposed EC pay transparency directive

The proposed pay transparency directive is one of several EU law approaches to creating greater gender equality. Gender equality is a founding principle of the European Union as now espoused in Article 8 of the Treaty on the Functioning of the European Union (TFEU) and in Articles 2 and 3 of the Treaty of the European Union (TEU).[4] Striving for a 'Union of Equality', a Union where 'all women and men, girls and boys in all their diversity – are equal' has inspired the European Commission's Gender Equality Strategy 2020-2025. Three of the prongs of the Commission's Gender Equality Strategy include women:

1. being free from violence and stereotypes;
2. leading equally throughout society; and
3. thriving in a gender-equal economy.[5]

The last prong comprises closing gender gaps in the labour market, achieving equal participation across different sectors of the economy, and closing the gender care gap as well as addressing the gender pay and pension gaps. With respect to gender and equal pay, the Commission found that in 2020, women in the EU earned on average 16 % less than men.[6] In line with these objectives, the Commission drafted a proposal for a directive concerning pay transparency and enforcement mechanisms in March 2021.[7]

The right to equal pay between women and men for equal work as well as for work of equal value has been a founding principle of the European Union since the 1957 Treaty of Rome.[8] The requirement on Member States to ensure equal pay is now set out in Article 157 TFEU and in Article 4 of the 2006 Directive on the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (the Recast Directive).[9] The Commission later adopted a Recommendation on strengthening

4 Consolidated version of the Treaty of the Functioning of the European Union, 2012/C 326/01.

5 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, A Union of Equality: Gender Equality Strategy 2020-2025, Brussels, 5 March 2020, COM(2020) 152 final.

6 European Commission (2020), Gender Equality Strategy: Striving for a Union of equality, press release, Brussels, 5 March 2020.

7 European Commission (2021), Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, Brussels, 4 March 2021, 2021/0050 COM/2021/93 final (hereinafter Commission Proposal).

8 Article 119 of the Treaty Establishing the European Economic Community, 25 March 1957, also known as the Treaty of Rome or the EEC Treaty. Article 119 of the 1957 Treaty of Rome (now Article 157 TFEU) specifically addressed equal pay between women and men for equal work as an issue of social dumping. France worked for the inclusion of Article 119 providing for equal pay for women and men in the draft of the treaty as it had had equal pay provisions in place since World War II and, at that time, had one of the smallest pay differentials between women and men: 7 % as compared to up to 40 % in Italy (see Budiner, M. (1975), *Le droit de la femme a l'égalité de salaire et law convention no. 100 De L'organsition Internationale du Travail*, Librairie Générale de Droit et de Jurisprudence, Paris). Article 119 was to be implemented by the Member States by 1961.

9 Official Journal of the European Union, 26.7.2006, L 204/23, 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). This directive replaced both 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 and Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

the principle of equal pay between men and women through transparency in March 2014.[10] Reports on the efficacy of the 2006 Directive and the 2014 Recommendation urged even stronger measures.[11] In June 2019 the Council called on the Commission to develop concrete measures to increase pay transparency, which resulted in the drafting of the proposed directive discussed here.[12] The 2021 Commission proposal rests on two core elements to achieve equal pay: pay transparency as well as better access to justice for victims of pay discrimination. Many of the elements in the proposal already exist elsewhere in EU law or in the national legislation of certain Member States, although in others, little has been done.

3 A brief overview of the proposed pay transparency measures

Greater pay transparency for job applicants, workers and the public is seen by the Commission as a necessary vehicle for empowering individual job applicants and workers when negotiating, understanding and comparing pay and pay structures. The Commission also views transparency as a way to shine 'light on gender bias in pay systems and job-grading that do not value the work of women and men equally and in a gender neutral way' and through this, raise awareness and begin to tackle unconscious bias.[13]

Under Article 5 of the proposed directive, employers will be obliged to provide information about initial pay levels or ranges in the job vacancy notice or before a job interview. Employers are not allowed to ask prospective workers, orally or in writing, about their pay history. Article 7 creates a right for workers to request information from their employer on their individual pay level and on the average pay levels broken down by sex for categories of workers doing the same work or work of equal value. Employers are to annually inform all workers of this right. Workers are also allowed to request this information via a union or equality body, and the employer is to provide the requested information within a reasonable period of time and if so requested, in an accessible form for workers with disabilities. Confidentiality clauses are prohibited where the disclosure as to pay information aims at enforcing the right to equal pay. Employers may, however, request that the information disclosed is not used for any other purpose. Employers are also required to make easily accessible to their workers a description of the criteria used to determine pay levels and career progression for workers. These criteria are to be gender neutral.

Under Article 8, private and public employers with at least 250 workers are to publish information on the pay gap between female and male workers in their organisation:

(a) the pay gap between all female and male workers;
(b) the pay gap between all female and male workers in complementary or variable components;
(c) the median pay gap between all female and male workers;
(d) the median pay gap between all female and male workers in complementary or variable components;
(e) the proportion of female and male workers receiving complementary or variable components;
(f) the proportion of female and male workers in each quartile pay band.

10 Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency (2014/124/EU).

11 European Commission (2013), Report on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) SWD(2013) 512 final; European Commission (2014), Impact assessment accompanying the Pay Transparency Recommendation, SWD(2014) 59 final; European Commission (2017), Report on the implementation of the Commission Recommendation on strengthening the principle of equal pay between men and women through transparency COM(2017) 671 final; European Commission (2020), Evaluation of the relevant provision in Directive 2006/54/EC implementing the Treaty principle on 'equal pay for equal work or work of equal value', SWD(2020) 50; and European Commission (2020), Report on the implementation of the EU Action Plan 2017-2019 on tackling the gender pay gap, COM(2020) 101 final.

12 Council of the European Union (2019), Closing the Gender Pay Gap – Draft Council Conclusions, Brussels, 29 May 2019, 9804/19.

13 European Commission (2021), Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM(2021) 93 final, p. 2.

By having the same criteria for all employers, pay comparisons can be made between different employers for informational purposes. If the compared workers' pay is effectively set by a 'single source', equal pay claims can be made across employers, as recently confirmed in the June 2021 judgment by the Court of Justice of the European Union (CJEU) in the *Tesco* case.[14]

According to the proposal, the accuracy of the gender pay gap information is to be confirmed by the employer's management, and published on its website or made publicly available in another way.[15] Gender pay gap information as to the previous four years is to be made available upon request. For internal purposes, employers should also provide information on the pay gap between female and male workers by categories of workers doing the same work or work of equal value.

In addition, information as to the pay gap between female and male workers by categories of workers broken down by ordinary basic salary and complementary or variable components is to be made available to all workers and their representatives, as well as to the designated Member State monitoring body. Workers and their representatives, labour inspectorates and equality bodies are to have the right to ask the employer for additional clarifications and details. Where pay reporting reveals a gender pay gap of at least 5 %, and where the employer cannot justify the gap on objective gender-neutral factors, employers will have to carry out a pay assessment in cooperation with workers' representatives, as set out in Article 9. The joint pay assessment is to be made available by the employer to workers, workers' representatives, the monitoring body, the equality body and the labour inspectorate. Where the joint pay assessment reveals differences in pay that cannot be justified by objective and gender-neutral criteria, the employer is to remedy the situation in close cooperation with the workers' representatives, labour inspectorate and/or equality body.

4 The thresholds of equal pay reporting

Several actors are empowered under the proposed directive to act to prevent, address or redress situations concerning unequal pay: the individual whose pay is found to not be equal, the social partners and labour unions, equality bodies and national agencies. An innovation introduced by Article 13 of the proposed directive, at least for some Member States, is that equality bodies and workers' representatives are to have the right to act on behalf of several workers with their consent, in other words, to make a collective claim. An initial threshold for each of these actors however is who has the right to information about equal pay and the pay situation at the employer in question.

A range currently exists with respect to employer size and reporting requirements within the EU Member States' pay transparency legislation, from the German requirement of at least 500 employees down to for example the Danish reporting for organisations having more than 35 employees.[16] Different requirements can also be in place for public and private employers. The German Transparency in Wage Structures Act,[17] effective from 2017, mandates in Section 21 that employers with more than 500 workers[18] have to file reports on gender equality and equal pay describing their measures to promote equality between women and men and their impact, as well as to create equal pay for women and men, or give grounds for the

14 CJEU Judgment of 3 June 2021, *K and Others, L, M, N and Others, O, P, Q, R, S, T v Tesco Stores Ltd.*, C-624/19, EU:C:2021:429. See also, much earlier, Allonby (case C-256/01) and Lawrence (case C-320/00).

15 For comparisons of the gender pay gap reporting obligations within certain Member States, see Benedì Lahuerta, S. (2021), 'Comparing pay transparency measures to tackle the Gender Pay Gap: best practices and challenges in Belgium, Denmark and Iceland', Issue 2/2021 *European equality law review*, European network of legal experts in gender equality and non-discrimination, pp. 1-21; and Profeta, P., Passador, M.L. and Calò, X. (2021), *Study on Reporting Obligations Regarding Gender Equality and Equal Pay regarding Italy, France, Germany, Denmark, Iceland, and Spain*, European Parliament.

16 Denmark, Consolidation Act No. 156 of 22 February 2019 on Equal Pay for Men and Women (hereinafter, 'EPA') (Bekendtgørelse af lov om lige løn til mænd og kvinder), available in Danish at: https://www.retsinformation.dk/eli/lta/2019/156.

17 Germany, *Entgelttransparenzgesetz*. An English translation of this Act is available on the website of the German Ministry for Justice: http://www.gesetze-im-internet.de/englisch_entgtranspg/.

18 The employers are also required to file a management report pursuant to Sections 264 and 289 of the German Commercial Code.

absence of such measures. Employers with collective agreements need only report every five years, and those without must report every three. The report is to be attached to the next management report and published in the German *Federal Gazette*. The UK, while still a Member State, also adopted reporting requirements for both private and public organisations with more than 250 employees, requiring them to publish details of their gender pay gap on both their own website and a designated Government website at gov.uk.[19] Under Article 46 of the Italian Labour Code ('Report on the situation of personnel'), public and private companies employing over 100 people are required to draw up a report at least every two years, containing information on male and female workers with specific reference to their working conditions and especially their overall remuneration. The report is forwarded to the union representatives and the competent public authorities as established by the Labour Code. The final report then is sent to the Ministry of Labour. Employers with fewer than 50 employees can voluntarily prepare a report.[20] France has enacted legislation[21] mandating that every company with more than 50 employees publish and report gender pay gap information, and an equal pay index where the criteria vary depending upon the number of employees. The company's score in terms of equal pay, based on the equal pay index, is to be published on the company's website each year.[22] Belgium also has pay transparency reporting requirements for those employers with over 50 employees. Differences in pay and labour costs between men and women, a component in what is referred to as the 'social balance sheet', are to be outlined in the company's annual audit, which is sent to the National Bank and is publicly available.[23] In 2020, Norway, an EFTA member, adopted pay and equality reporting requirements.[24] Employers with more than 50 workers must biannually submit a report including a pay analysis as to gender pay differences within which risks as to not achieving gender equal pay are to be identified, with the remedial measures taken, and reporting on their impact. The reports must also include information on the progress made, an update with parental leave, and the status of part-time employment. The reports are to be available upon request to employees, representatives of employees, the Norwegian Anti-Discrimination Committee, the Equality and Discrimination Ombudsman, and to researchers for the purpose of investigating allegations of unlawful pay inequality. Norwegian employers of 20-50 employees can voluntarily report, but have a duty to do so under the law when requested to do so by the employee representative. Iceland has the lowest number of employees in their mandatory reporting requirement: employers with 25 or more employees where at least 10 are of each gender.[25]

Enterprise size consequently is determinative with regard to the employer gender pay gap information provided at least initially to all actors. Given this range in the Member States of 500 to 20 employees, the proposed directive sets the requirement in Article 8 for the reporting of pay information for those employers with at least 250 employees, thus adopting a mid-point. Employers of more than 250 employees are considered 'large enterprises', while small or medium-sized enterprises (SMEs) have fewer than 250 employees, and micro-enterprises often are set at fewer than 10 employees. Within OECD countries, on average, large enterprises in manufacturing account for 40 % of the employment,

19 UK, Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (SI 2017/172), governing the private sector in effect in 2017, and the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 (SI 2017/353), governing the public sector in effect 2018, taken in response to the EC 2014 recommendations as to greater gender pay gap wage transparency.

20 Italy, Legge 5 novembre 2021, n. 162 Modifiche al codice di cui al decreto legislativo 11 aprile 2006, n. 198, e altre disposizioni in materia di pari opportunita' tra uomo e donna in ambito lavorativo. (21G00175) (GU Serie Generale No. 275) 18 November 2021.

21 France, Act No. 2018-771 5 September 2018 on the individual's freedom to choose their future professional life *(Loi* n° 2018-771 du 5 *septembre 2018 pour la liberté de choisir son avenir professionnel)*; see also Articles 104 and 105 of Act No. 2018-771 5 September 2018, Decree No 2019-15 of 8th January 2019 (JO January 9th, 2019) and Articles D 1142, 1442, and L. 1142 of the French Labour Code.

22 France, Loi visant à lutter contre l'écart salarial entre hommes et femmes, 22 April 2012.

23 Belgium, Those companies that have to publish their annual accounts must draw up a social balance sheet that is to be forwarded to the National Bank of Belgium and contain specific information such as the number of employees, differences between pay and labour costs for women and men, personnel movements, training activities, see Act on reducing the gender pay gap on 22 April 2012.

24 Norway, *Lov om likestilling og forbud mot diskriminering* LOV-2017-06-16-51.

25 Iceland, Act on Equal Status and Equal Rights Irrespective of Gender, No. 150/2020, Article 25; Regulation No. 1030 of 13 November 2017 on the certification of equal pay systems of companies and institutions according to the ÍST 85 Standard.

compared to 25 % in services.[26] Consequently, employment outside large enterprises under the proposal is not held to the same requirements of pay transparency. Finding that women are overrepresented in micro-enterprises and SMEs, the 2022 European Parliament Report on the proposed directive suggests instead setting the requirement for employers having at least 50 employees, including both large enterprises and larger SMEs.[27]

5 The protected grounds

An innovation under the proposed directive is that equal pay analyses can explicitly take into account intersectional discrimination and not simply the sole discrimination ground of gender. The focus in EU law on equal pay between men and women, and the insertion of the option to take into account intersectionality in the proposed directive should first be seen against the background of the developments in international law,[28] which historically has recognised the right to equal pay on grounds other than just sex. The 1919 Treaty of Versailles, setting out the terms of the peace of World War I and laying the foundations of the International Labour Organization (ILO), included in the ILO's General Principles[29] that men and women should receive equal remuneration for work of equal value. In the wake of World War II, however, the United Nations gave recognition to the need for equal pay for equal work in Article 23(2) of the 1948 UN Universal Declaration of Human Rights (UNDHR), not just limited to sex, but extended also to race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The 1965 UN International Convention on the Elimination of All Forms of Racial Discrimination (CERD) provides for the protection of equal pay regardless of race, colour, descent, or national or ethnic origin for equal work. Article 7(d) of the 1966 UN International Covenant on Economic, Social and Cultural Rights (ICESCR) prescribes '[f]air wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.' The UN 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) protects in its Article 11(d) the 'right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.' Within the United Nations 2030 Agenda for Sustainable Development, sustainable development goal 8.5 sets out achieving full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value.

The proposed directive opens the door in its Article 3 to including protected grounds other than simply sex in assessments of pay discrimination: 'Pay discrimination under this Directive includes discrimination based on a combination of sex and any other ground or grounds of discrimination protected under Directive 2000/43/EC or Directive 2000/78/EC.' This can particularly be the case in determining an appropriate comparator, assessing proportionality and with respect to remedies.[30] This aspect of intersectionality was strengthened in the EP Report, with the proposal for the inclusion of a definition of the term 'intersectional discrimination' in Article 3, 'a situation in which grounds of discrimination prohibited under Directive 2006/54/EC and one or more grounds of discrimination prohibited under Directive 2000/43/EC or 2000/78/EC interact with each other at the same time in such a way as to

26 OECD (2017), *Entrepreneurship at a Glance 2017*, OECD Publishing, Paris, p. 42.

27 See European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendments 30 and 33, Recitals 22 and 25. At the time of the writing, the Report produced by the EU Employment Committee and the Committee on Women's Rights and Gender Equality is tabled with the decision to enter into interinstitutional negotiations.

28 European law has also had a focus on equal pay simply between men and women, see for example, Article 4 of the 1961 European Social Charter (retained in the 1996 version) espouses the 'right of men and women workers to equal pay for work of equal value.'

29 The subsequent ILO Convention No. 100 on the Equal Remuneration for Men and Women Workers for Work of Equal Value of 1951 was also restricted to men and women.

30 European Commission (2021), Explanatory Memorandum, Proposed EC directive, Article 3(3).

be inseparable, producing distinct and specific forms of discrimination.' Among other EP Report amendments, assessments are to explicitly take into consideration intersectional discrimination with respect to compensation or reparation under Article 14, and intersectional discrimination is to be deemed an aggravating factor under Article 20 when assessing administrative and criminal penalties.[31] The EP Report amendments in general also include a movement away from the use of the term 'sex' towards 'gender' instead.

Consistent with both existing EU and European law, the majority of, if not all, EU Member States define equal pay as simply between men and women. The 2006 German General Equal Treatment Act[32] does not even specifically take up equal pay, instead simply mandating equal treatment between women and men. The German 2017 Transparency in Wage Structures Act explicitly addresses equal pay in its Section 4, which defines equal work as where 'female and male workers perform equal work if they carry out an identical or similar activity at different workplaces or successively at the same workplace' and work of equal value is defined here as taking into consideration the totality of factors where women and men can be seen as being in a comparable situation. The UK equal pay legislation targets the gender pay gap, but many public employers publish pay gap information on other protected grounds as a component of the UK public sector equality duty, and not gender pay gap reporting, both established while the UK was still an EU member.[33] Unequal treatment on the basis of any of the EU protected grounds, whether a question of employment or pay, is of course still prohibited under the Member States' discrimination legislation based on EU law. Consequently, unequal pay on the basis of race is a violation of the equal treatment principle. However, the inclusion of intersectionality in the proposed directive provides a more explicit reminder and avenue of redress for some of the most vulnerable groups of women.

The EP Report, in addition to the proposals replacing 'sex', and often 'women and men' with simply 'gender', and refining intersectionality, also places a specific emphasis on protections for persons with disabilities as well as the protected ground of age, further explicitly expanding the protected discrimination grounds in the proposed directive. This can be seen by the proposed new paragraph in Recital 3,[34] which recognises that pay discrimination is often the result of multiple discrimination. Women with disabilities are added to the group of vulnerable women in Recital 14,[35] ending with the new text: 'This Directive should also ensure that the specific obstacles experienced by and the needs of workers with disabilities are taken into account, including in relation to its scope, accessibility to information, the right to compensation and data disaggregation, in compliance with the United Nations Convention on the Rights of Persons with Disabilities (CRPD) of 13 December 2006.' The requirement of accessibility has been added to Recital 20:[36] 'The information should be provided in a manner accessible to persons with disabilities in accordance with Union law, in particular with Directives (EU) 2016/2102 and (EU) 2019/882.' This requirement of accessibility as to information is also added to Recitals 21, 23, 24 and 25 as well as to

31 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendments 67 and 133.

32 Germany, *Allgemeines Gleichbehandlungsgesetz* (General Equal Treatment Act). See the Ministry of Justice (2019), Guide to the General Equal Treatment Act.

33 See for example, Regulator of Social Housing (2022), *Transparency data, Equality information report and ethnicity pay gap report 2020-2021*, 30 March 2022. The public sector equality duty is set out in the UK Equality Act 2010 and the Equality Act 2010 (Specific Duties) Regulations 2011.

34 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendment 6, Recital 3 c (new).

35 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendment 21, Recital 14.

36 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendment 28, Recital 20.

Article 5.[37] Accessibility as to access to justice and legal remedies is taken up in Recital 32.[38] Disability and age are added to the statistics mentioned in Recital 49, and disability is added to the statistics taken up in Article 28.[39]

6 Access to justice aspects of the proposed pay transparency directive

The need for access to justice – to be able to actually successfully assert, not just have, human rights – such as protections against unlawful discrimination, has been felt more and more urgently in both European and EU law.[40] On the EU treaty level, access to justice is found in the Charter of Fundamental Rights, Article 47 (right to an effective remedy), Article 51 (field of application), Article 52(3) (scope of interpretation of rights and principles), in the Treaty on European Union, Article 4 (3)(duty to loyally implement EU law) and Article 19 (effective remedies), and in the European Convention of Human Rights (ECHR) Article 6 (right to a fair trial), Article 13 (right to an effective remedy), Article 35 (admissibility criteria), and Article 46 (binding force and execution of judgments). The proposed directive clearly articulates in Article 12[41] that the Member States are to ensure, in the event conciliation is unsuccessful, that judicial procedures with respect to the enforcement of equal pay claims are to be easily available to all workers who can make such a claim, or those acting on their behalf, even if the individual is no longer employed.

Access to justice creates an equality of arms between claimants who have suffered unlawful discrimination and employers who, in the vast majority of cases, have greater financial and legal resources, as well as information about their own decisions and practices. The EU Fundamental Rights Agency (FRA)[42] has identified several key components with respect to access to justice, three of which are taken up in the proposed directive: the shifting of the burden of proof, access to evidence, and a reasonable limitations period as an extension of access to courts. Protections against victimisation can also be viewed as an access to justice component as without them, claimants will not go to court. Article 22 contains a requirement that the exercise of the right to equal pay should not to result in less favourable treatment, and the filing of a complaint must not result in a dismissal or other adverse treatment.

6.1 Shifting the burden of proof

The shifting burden of proof means that claimants have the burden of persuasion and that defendants have the burden of proof. Many Member States have instead applied this shifted burden of proof, first

37 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendments 29, 31, 32, 33, 82, 84 and 106, Recitals 21, 23, 24 and 25, and Articles 5, 6 and 8 respectively.

38 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendment 41, Recital 32.

39 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendments 54 and 167, Recital 49 and Article 28, respectively.

40 A recent affirmation of the paramount importance of access to justice can be seen in the 2017 *Unison* judgment by the UK Supreme Court, in which the Court held that access to justice was a constitutional right, founded squarely in both European and UK law, see *R (Unison) v Lord Chancellor* [2017] UKSC 51.

41 The EP Report inserts conciliation 'and dialogue with the social partners' in this Article, as well as introducing the obligation for Member States to promote conciliation, reduce procedural obstacles, and recognise that conciliation suspends the limitation period, as well as further refining collective redress. See Amendments 127-131.

42 Fundamental Rights Agency (2016), *Handbook on European law relating to access to justice*.

introduced in legislation in the 1997 Burden of Proof Directive,[43] as a shared burden of proof, often placing high evidentiary burdens on claimants before allowing the burden of proof to shift to employers. The proposal in Article 16 more clearly elucidates that where a claimant has shown a *prima facie* case of discrimination the defendant must prove that there has been no unlawful discrimination. Article 16 also requires that where an employer has not complied with the pay transparency obligations in the proposed directive, the worker need not even show a *prima facie* case of discrimination, but rather, the burden of proof shifts immediately to the employer concerning non-compliance, an additional incentive for employers to comply with the directive.

6.2 Access to evidence

The size of the enterprise obliged to report information on the gender pay gap, as discussed above, directly impacts the number of employees having access to information, as well as those employers obliged to report. In some Member States the obligation for an employer to assess the gender pay gap exists, for example as is the case in Sweden, but there is no reporting requirement, which consequently limits even further those who have access to such information.[44] The proposed directive through the reporting requirement expands the group of those having access to information beyond current employees only to potential employees and the public at large.

Article 17 further addresses access to evidence by providing that national courts or other competent authorities are to have the authority to order defendants to disclose relevant evidence containing confidential information[45] within their control during proceedings concerning a gender pay discrimination claim. In particular, national courts are to have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the claim, while having effective measures to protect such information. Confidential information could take the form of legal advice given to the management, a protocol of a shareholders' meeting, personal data etc. necessary for the exercise or defence of legal gender pay discrimination claims. This closes off the avenue of employers invoking confidentiality clauses to prevent any disclosures of information.

6.3 Limitations period

Other barriers to making equal pay and discrimination claims are short limitation periods. Article 18 sets out a common standard on limitation periods for bringing gender pay discrimination claims within at least three years. The period is not to run before the violation of the equal pay principle or any infringement of the rights or obligations under the Directive has ceased and the claimant knows about the violation. The limitation period furthermore is to be suspended as soon as a claimant undertakes action by lodging a claim or bringing the claim to the attention of the employer, the workers' representatives, the labour

43 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex. The 1997 Directive was a codification of ECJ case law, the first ECJ case applying the shifted burden of proof was an equal pay case, Judgment of the Court of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, C 109-88, ECLI:UE:C:1989:383. The first case applying a shifted burden of proof with respect to a discrimination claim in general is the United States Supreme Court case, *McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1973). The 1997 Burden of Proof Directive was then taken up in the Racial Equality Directive 2000/43/EC, the Framework Directive 2000/78/EC, and the Recast Directive 2006/54 on sex discrimination. The application of the shifted burden of proof has been problematic in the EU with Member States often applying it instead as a shared burden of proof. For the most recent clarification that it is a shifted burden of proof, see Article 16 of the 2021 EC Commission Proposal concerning pay transparency.

44 Sweden, Discrimination Act, *Diskrimineringslagen* (2008:567) Sections 3:8-10.

45 The EP Report proposes deleting 'containing confidential information', see European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendment 140, Article 17.

inspectorate or the equality body. The EP Report suggests expanding the limitation period to five years.[46] In addition, recourse to conciliation should suspend the five-year limitation period.[47]

7 Remedies and sanctions

The proposed directive not only strengthens the ability to pursue equal pay claims through litigation, but also emphasises a proactive approach with respect to the social partners, their social dialogue, the collective bargaining system and autonomy. Under Article 30, the Member States can entrust the social partners with the transposition of the directive through collective agreements. In this spirit, Article 9 mandates that with the finding of an unjustified 5 % gender pay gap, employers of more than 250 employees will be required to conduct a joint pay assessment with the workers' representatives. In addition, the employer will be required to justify 'any pay difference in any category of workers, including differences below 5 %, by objective and gender-neutral factors and remedy the situation'.[48]

7.1 Injunctive powers

Article 15 mandates a right for courts and other competent authorities to be able to issue injunctive orders to stop violations of the right to equal pay. The courts or competent authorities are to have the power to require employers to take structural or organisational measures to comply with their obligations relating to equal pay. To ensure swift compliance, the courts or competent authorities are to also have the power to impose recurring penalties. The EP Report proposes further defining these powers to include reviewing the pay setting mechanism based on gender-neutral job evaluation or classification systems, the establishment of an action plan to eliminate the discrepancies discovered, and measures to reduce any unjustified gender pay gaps.[49]

7.2 Right to compensation

Article 14 contains a strengthened requirement concerning compensation in order to provide incentives for victims of gender pay discrimination to make claims. Consistent with the EU discrimination directives and CJEU case law, full compensation for those who have suffered gender pay discrimination is to be awarded, including full recovery of back pay and related bonuses or payments in kind. Any compensation or reparation is to ensure real and effective compensation for the loss and damage sustained, in a way that is dissuasive and proportionate to the damage suffered. The EP Report proposes adding that where intersectional discrimination has been found, the compensation or reparation is to be adjusted accordingly.[50] Comparisons of judgment awards for findings of unjustified unequal pay between Member

46 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendment 48, Recital 40.

47 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendment 128, Article 12.

48 The EP Report suggests several significant amendments to Article 9 in its Amendments 110-122, including employers of more than 50 employees, a gap of 2.5 percent, the addition of a gender action plan, a time limit of six months for an employer's corrections, the total abolition of any unjustified gender pay gap within eight years, statistics broken down by gender, as well as a monitoring report to assess the effectiveness of the gender action plan.

49 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendment 138, Article 15.

50 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendment 133.

States are difficult, given that what is included in such awards varies, as do the incomes of the persons involved in the claims as well as the time period over which the inequality in pay occurred. A recent all-time high award based on the UK law taken while still an EU member was over GBP 2.08 million in total.[51] However, a 2017 more general comparison of EU countries' discrimination awards found that with the exception of the UK and Ireland, the levels of compensation in most countries was relatively low. Examples given of sanctions that are seen in the report as hardly effective or dissuasive included one national range of EUR 1 700 to EUR 13 000.[52]

7.3 The reallocation of legal and judicial costs and fees

Most of the EU Member States apply the loser-pays principle when it comes to litigation, in which the party who fails to prevail has to pay the prevailing party's legal costs and fees.[53] Article 19 requires a reallocation of legal and judicial costs and fees, deviating from the loser-pays rule. The costs of litigation and the economic risks involved are often prohibitive when it comes to individuals making discrimination or equal pay claims. The Commission found these to 'constitute a key procedural obstacle creating a serious disincentive for victims of gender pay discrimination to claim their right to equal pay, leading to insufficient protection and enforcement of the right to equal pay.'[54] Under the reallocation of costs and fees in Article 19, claimants who prevail on a pay discrimination claim have the right to recover legal and expert fees and costs from the defendant, while defendants who prevail do not have a similar right, i.e. to recover any legal and experts' fees and costs from the claimant. Exceptions are made where the claim is brought in bad faith, is frivolous or where the non-recovery is considered unreasonable under the specific circumstances of the case.[55] This reallocation of fees can be seen as central to whether claimants can exercise their right to make equal pay claims. In jurisdictions where equal pay or discrimination claims are seldom successful, individual claimants cannot take the economic risk of bearing both their own as well as the employer's legal costs and fees. The same is true in those jurisdictions that award low amounts of compensation for proven discrimination. If the economic risks of the legal costs and fees outweigh any compensation that can be granted, claimants will again be deterred from bringing claims. The reallocation of legal costs and fees mitigates the economic risks of the claimants. This reallocation recognises the role that claimants can play not only in recovering compensation for themselves, but also in changing norms in a way that helps to achieve the long-term societal goal of the directive, i.e. equal pay.[56]

51 See UK Employment Tribunal, *S Macken v BNP Paribas London Branch: 2208142/2017 and others*. This included GPBP 401 797 for the equal pay claim, GBP 860 120 for future losses, GBP 35 000 for injured feelings, GBP 15 000 for aggravated damages and GBP 317 016 for the employer's failure to follow the UK ACAS Code of practice on disciplinary and grievance procedures.

52 This was the case in Sweden; see Chopin, I. and Germaine, C. (2017), A comparative analysis of non-discrimination law in Europe 2017: The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey compared, European Commission, pp. 103107. Sweden is, however, not alone at least in the Nordic countries with respect to low compensation awards, see for example, Bauge, M. and Lovdal, L. (2022), 'Access to Justice in Discrimination Cases in Norway in Equality', Scandinivanian Studies in Law Volume 68 (Stockholm), pp. 373-402, at p. 396.

53 Pfennigstorf, W. (1984), 'The European Experience with Attorney Fee Shifting', *Law and Contemporary Problems*, Vol. 47, Issue 1 (Winter 1984), pp. 37-124.

54 Commission proposal at 17. For more on the award of discrimination damages, as well as the allocation of legal costs and fees in Sweden, see Carlson, L. (2017), 'Discrimination Damages – Promoting or Preventing Access to Justice' in Rönnmar, M. and Julén Votinius, J. (eds.), *Festskrift till Ann Numhauser-Henning*, pp. 129-143.

55 See for example, *Newman v Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

56 This proposed reallocation of costs and fees mirrors the American private attorney general doctrine, an exception to the American rule of each party bearing its own costs, allowing for the reallocation of costs and fees in human and civil rights cases. Under this doctrine, if the plaintiff prevails, the defendant pays the legal costs and fees, if the defendant prevails, each party bears their own legal costs and fees. The reasoning is similar to that in the proposed directive, based on an equitable principle that allows a party who brings a lawsuit that benefits a significant number of people or which has resulted in the enforcement of an important right affecting the public interest to recover reasonable legal fees. The purpose is to encourage suits of societal importance, which private parties otherwise would not have an incentive to pursue.

7.4 Penalties

Under Article 20, Member States are to introduce penalties, either administrative or criminal, distinct from the compensation in individual cases, with regards to infringements of the national provisions adopted pursuant to the proposed directive. These penalties are to be effective, proportionate, dissuasive and to be effectively applied in practice. Fines are to be assessed for infringements of the equal pay principle, with the minimum level ensuring a real deterrent effect. The level of fines is to take into account the gravity and duration of the infringement, the employer's intent or serious negligence, and any other relevant aggravating or mitigating factor. Specific penalties are to be imposed for recurrent infringements of the equal pay principle. The EP Report suggests that the fines be based, by way of example, on the employer's gross annual turnover or total payroll. Repeated infringements are to be included under an assessment of the gravity of the actions, and intersectional discrimination under aggravating factors.[57]

Those Member States having reporting requirements have taken a variety of approaches with respect to the use of penalties. There is the name-and-shame approach for example in the UK, which basically entails publication of the data. Many Member States have structures in place that provide both benefits and sanctions with respect to both reporting and achieving certain standards. Iceland's ISO equal pay certification system designates compliant employers as equal pay employers, and such a designation has a certification mark that can be used in public. However, the failure to obtain a certificate by the set deadlines can result in fines up to approximately EUR 360 (ISK 50 000) per day.[58] France has put in place a workplace equality index, with possible scores up to 100 points, the passing score being 75, with the average for 2020 being 85.[59] Where the score is less than 75, the employer has three years to implement corrective measures or financial sanctions will be imposed of up to 1 % of the employer's total payroll. Under the Italian legislation, companies submitting the required equality report and meeting the set requirements (pay accounting for 20 % of these) can apply for a gender equality certificate. Those private companies that have obtained a gender equality certificate can receive a reduction of their employer social security taxes equal to 1 %, up to EUR 50 000 per company per year. If there is a failure to submit an equality report or the submissions are incomplete, the company is not eligible for this reduction and can be fined from EUR 1 000 up to a maximum of EUR 5 000. Belgium has taken a different path: with a finding that the reported social balance sheet raises a suspicion of pay discrimination, a trained internal mediator[60] can be appointed to determine whether there is an unjustified pay differential, and if so, attempt to reach a solution with the employer. As seen above, some Member States already demonstrate a variety of sanction systems that easily fit within the terms of the proposed directive. The challenge here is particularly for those Member States lacking in any effective sanctions generally.

7.5 Exclusion from Public Procurement

Article 21 allows Member State authorities to exclude economic operators from participating in a public procurement procedure where the actor has an unjustified gender pay gap of 5 %. The EP Report

57 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendments 146-149, Article 20.

58 Iceland, Regulation No. 1030 of 13 November 2017 on the certification of equal pay systems of companies and institutions according to the ÍST 85 Standard. For more detail on the Icelandic certification system, see Wagner, I. (2022), 'Equal Pay for Work of Equal Value? Iceland and the Equal Pay Standard', *Social Politics: International Studies in Gender, State & Society*, Volume 29, Issue 2, Summer 2022, pp. 477-496.

59 French Republic (2020), Index de l'égalité professionnelle femmes-hommes : un bilan 2020 mitigé, 8 March 2021.

60 Belgium, Royal Decree of 25 April 2014 (*Koninklijk besluit van 25 april 2014 betreffende de bemiddelaar in het kader van de bestrijding van de loonkloof tussen mannen en vrouwen*) sets out the role and the qualifications of the mediator, and the rules and mediation procedures to be used.

suggests amending this article to have a threshold of an unjustified gender pay gap of 2.5 %.[61] As public procurement contracts are significant parts of most national economies, the barring of actors for having such a gender pay gap would constitute a significant sanction.

8 The public enforcement of equal pay

The avenues available for enforcement of the equal pay principle are closely tied to the national industrial relations models as well as to the availability of access to justice mechanisms. Individual claimants can have different avenues depending upon their national system. Private litigation is almost always available. However, given the potential costs and risks related to litigation, most private individuals must turn to other paths. Alternative dispute resolution mechanisms, such as conciliation, are available in some Member States, and this alternative is promoted in the proposed directive. The most prevalent avenues are however labour unions as well as equality bodies and other national agencies such as labour inspectorates, each of which are incorporated within the regulations of the proposed directive. That each Member State is to have a dedicated monitoring body under the proposed directive adds to these bodies addressing the gender pay gap.

8.1 The role of the labour unions

The unions have historically contributed to the creation of the structures in the labour market that pose challenges to gender pay equality, with entrenched gendered wages, job classifications and power structures. At the same time, the unions under the proposed directive are seen as one of the primary actors in eradicating equal pay barriers. The proposed directive necessarily incorporates a balance of these different roles. As noted above, the proposed directive explicitly allows the Member States to entrust its implementation to the social partners through collective agreements.[62] As the explanatory memorandum notes, the social partners are key to establishing gender-neutral job evaluation and classification methods. The labour unions as envisioned under the proposed directive are to take appropriate actions to enforce the right to equal pay. The proposed directive also notes that Member States 'should take appropriate measures, such as programmes supporting social partners, practical guidance as well as an active participation of the government in a social dialogue at national level. Such measures should encourage social partners to pay due attention to equal pay matters, including discussions at the appropriate level of collective bargaining and the development of gender-neutral job evaluation and classification systems.'[63] The EP Report suggests the addition that Member States should provide support to employers and the social partners, by 'providing guidelines, templates, and training with the aim of facilitating the fulfilment of reporting obligations and reducing the burden on employers, in particular SMEs.'[64] The EP report also proposes an amendment stating that the 'direct involvement of the social partners in national equality policies is necessary to ensure continuous and coordinated

61 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendment 151, Article 21.

62 For a deeper analysis of the complicated role of the social partners and the gender pay gap, see generally Milner, S. and Pochic, S. (eds) (2022), *Social Partners and Gender Equality: Change and Continuity in Gendered Corporatism in Europe*, Springer; and Conley, H., Gottardi, D., Healy, G., Mikołajczyk, B. and Peruzzi, M. (eds) (2019), *The Gender Pay Gap and Social Partnership in Europe: Findings from "Close the Deal, Fill the Gap"*, Routledge.

63 European Commission (2021), Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms COM(2021) 93 final, Recital 31.

64 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendment 35, Recital 27.

involvement of the social partners.'[65] Strengthening the role of the social partners in promoting gender equality and tackling pay discrimination and 'the undervaluation of work that is predominantly carried out by women, with the aim of achieving equal pay for work of equal value' is added in a new paragraph.[66]

The current roles of labour unions generally depend on the industrial relations model invoked in the tripartite relationship between employers, unions and the state, the latter often in the form of legislation and agency action. Worker representation outside of labour unions is also central here, for example whether Works Councils or other types of worker representatives are in place at the employer. The power of individual unions naturally stems from these roles, as well as from levels of union density and membership, and whether collective agreements can have *erga omnes* effect. Another complication in the context of equal pay is where wages are set by sector, and the relevant unions represent male or female-dominated sectors and subsequently the unions are male- or female dominated. Consequently, there is great variation in the Member States as to the positions, activities, strength and roles of labour unions with respect to wage-setting.

An example of this complexity at one end of the spectrum is Sweden. Sweden, as most of the Nordic countries, has a single-channel labour law model in which the state has the weakest role, with little legislation in the field, and most labour market issues handled by the social partners. Employees are to be represented only by the union. Wage negotiations are conducted primarily between employers and labour unions. There is no minimum wage legislation in Denmark, Finland and Sweden.[67] In Sweden, union density is about 70 %, with collective agreements having a normative effect (not through *erga omnes*) on about 90 % of all employees.[68] Wage negotiations between the social partners have been politically coupled since the 1970s with keeping inflation in check and the state then lowering taxes. Under the 1997 Industry Agreement,[69] the confederation of unions within industry, i.e. male-dominated unions, is the first to negotiate wages, and the percentage wage increase achieved by the confederation of industry unions – the mark – is followed by the other unions. The Industry Wage Agreement was chosen as the wage 'leader' as it is seen as the most internationally competitive sector, and tying all wage increases to industry is assumed to reduce inflation in Sweden, fostering industrial peace as well as creating stability and true wage increases.[70] Sweden has wage audit requirements, but no reporting requirements as in the proposed directive, and there is no state follow-up. Responses by the Swedish social partners

65 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendment 42, Recital 33.

66 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendment 125, Article 11 – paragraph 1 a (new).

67 A relevant example here is minimum wage legislation, currently existing in all EU member states except Sweden, Denmark, Finland, Italy, Cyrus and Austria. The Nordic countries have left the issue of wages entirely to the social partners. The now adopted Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union is seen as a direct threat to this Nordic collective bargaining model. The main objections by the Nordic countries are that politicians should not be involved in wage formation, the EU has no mandate with respect to wage formation, and the CJEU would have the ultimate decision-making in such issues, not the unions or member states. Collective agreements in the Nordic countries are seen as a balance of wages, training, integration, youth employment, in essence all terms and conditions of work and not simply wages, and minimum wage legislation disturbs this balance. These arguments resonate with those raised by the Nordic countries also with respect to pay transparency, see Rolfer, B. and Wallin, G. (2022), 'Nordics split as EU minimum wage proposal delayed', *Nordic Labour Journal*.

68 See OECD (2017), *Collective Bargaining Sweden*.

69 Now the 2022 Industrial Agreement (*Industriavtalet*). For example, in 2019, the union Industrifacket Metall had 21 % women in the workforce and 18 % female union representatives, see IF Metall (2019), *Jämställdhet Aha! i organisationen*. The annual wage increases set by the industry unions since 1998 have been between 1.73 %-3.4 %, see Torstensson, S. (2021), 'Märket och Industriavtalet', *Ekonomifakta*, 6 May.

70 Having industry set the mark for wage negotiations has been criticised for cementing gendered-pay structures. In response, ad hoc exceptions to the industry mark have been made in the form of equality pots (*jämställdhetspotter* or *kvinnolönepotten*) and larger increases in low-wage sectors (*låglönesatsningar*), see for example, Erikson, J. (2022), 'Conflicts Over Gender Equality Bargaining: The Introduction of a Gender Equality Fund in Sweden' in Milner, S. and Pochic, S. (eds), *Social Partners and Gender Equality: Change and Continuity in Gendered Corporatism in Europe* (Springer), pp. 49-70; and Lönelotsarna (2019), *Strukturella Löneskillnader 2019 På hela arbetsmarknaden och i välfärdens bristyrken*.

to the proposed pay transparency directive emphasise the importance of the Swedish collective model not only in setting wages, but also with respect to resolving conflicts. The umbrella blue-collar workers organisation, Landsorganisationen (LO) makes the argument specifically that a reallocation of costs and fees is not necessary as it is almost exclusively the Equality Ombudsman or the unions that litigate equal pay claims, and that such a reallocation would result in an increase in claims.[71] Individual access to justice is seen as an incursion on the strength of the social partners and wage transparency as only fostering conflict at workplaces. Other aspects of the Swedish labour law model's strength include the absence of collective agreements with *ergo omnes* effect and minimum wage legislation. However, it needs be noted that the Swedish gender pay gap of 11.2 % is less than the EU average of 13 % (2020).[72] As seen by the arguments of the Swedish social partners, the proposed directive presents significant challenges to the power of the social partners in wage-setting.

Several EU Member States have labour law models in which the State plays a more significant role with detailed legislation and active enforcement including currently in place equal pay reporting requirements. In Belgium, for example, the social partners have an important role in setting wages but within parameters as set out and enforced by the State. Minimum wage legislation was adopted in 1975, with minimum wages determined by the National Labour Council in conjunction with the social partners.[73] Belgium has a dual channel system of worker representation with labour unions and works councils at those employers with more than 100 employees. Union density is 50 %, with 90 % of employees covered by collective agreements under *erga omnes*.[74] The 2012 Equal Pay Act incorporates combatting the gender pay gap as a theme in the social dialogue. The Belgium Central Economic Council's annual technical report includes information on the gender pay gap and is to serve as a starting point for wage negotiations by the social partners. Gender-neutral job classifications are also central to these efforts, with the Federal Public Service Employment, Labour And Social Dialogue checking that sectoral classifications are gender neutral.[75] The Belgium model, in contrast with the Swedish model above, in some ways goes beyond the requirements of the proposed directive and consequently the role of the social partners is not challenged by the proposed directive in the same way as in the Nordic countries. It can be mentioned here that the Belgium gender pay gap is one of the lowest in the EU at 5.3 %.[76]

Germany also has a system of dual-channel worker representation with labour unions and works councils for employers of more than five employees. In contrast to the high union density rates in the Nordic countries and Belgium, only approximately 16.5 % of German workers are unionised, with 60 % of all workers covered by collective agreements through erga omnes.[77] Minimum wage legislation was adopted in 2015 and is seen to have contributed to reducing the German gender wage gap.[78] The German Transparency in Wage Structures Act[79] was enacted in 2017, encompassing employers of more than 500 employees and defining for the first time by statute equal pay. The social partners are to enter into collective agreements consistent with the Act, and those employers having collective agreements need only report on equal pay every five years, in contrast to every three years for those employers not having a collective agreement. Employees have the right to request information from the employer,

71 The Swedish Trade Union Confederation- Landsorganisationen i Sverige (LO) (2021), Gender pay gap – transparency on pay for men and women, feedback from LO (*LO's ytrande över EU:S förslag till direktiv om åtgärder för transparens vid lönesättning*), feedback reference F2256513, submitted on 12 April 2021. By way of example, Sweden has not had a successfully litigated equal pay case since 1996, see Swedish Labour Court, Judgment AD 1996 No. 79, where even though the claimant was successful in the equal pay claim, the Court ordered each party to bear their own legal costs and fees.

72 See Eurostat (2020), *Statistics Explained: Gender pay gap statistics 2020*. For information on the gender pay gap in the Nordic countries, See Nordic Statistics (2020), The gender pay gap, existing but decreasing, 8 March 2020.

73 See Plasman, P. (2015), *The minimum wages system in Belgium – The mismatch in Brussel's Region*, DULBEA.

74 See OECD (2017), *Collective Bargaining Belgium*.

75 See Khattar, R. (2021), *Equal pay in collective bargaining, 5.2.1 Belgium in OECD, Pay Transparency Tools to Close the Gender Wage Gap*, OECD.

76 See Eurostat (2020), Statistics Explained: Gender pay gap statistics 2020.

77 See OECD (2017), *Collective Bargaining Germany*.

78 See Caliendo, M., and Wittbrodt, L. (2021), *Did the Minimum Wage Reduce the Gender Wage Gap in Germany?*, Discussion Paper Series, ISA DP No. 14926, IZA Institute of Labour Economics.

79 Germany, *Entgelttransparenzgesetz*. An English translation of this Act is available on the website of the German Ministry for Justice: http://www.gesetze-im-internet.de/englisch_entgtranspg/.

however, employees are to turn to the works councils with respect to information requests and not the unions in the first hand. The works councils have a right, on behalf of the individual worker, to request pay information under the Act, however, they do not have the right themselves to request such information for monitoring purposes.[80] The DGB, the German Trade Union Confederation representing about 6 of the 7.6 million unionised German workers, reported in 2019 that all three core elements of the 2017 act, the right to information, the test procedure and the reporting requirement did not have the intended effect of achieving equal pay. The DGB called for stricter statutory requirements on employers including completely removing the threshold as to number of employees, removing the special status of collective agreements with respect to reporting and allowing for collective employee actions.[81] The proposed directive challenges the present system in Germany in several significant respects, the most apparent in the employers covered. However, the largest labour umbrella organisation has called for stricter legislation in line with the proposed directive. Germany has a gender wage gap of 18.3 %.[82]

Where the labour unions are strong, they have the greatest potential to both monitor and effect gender equality, and particularly to decrease the gender wage gap, given their current and historical roles in the labour market when it comes to wage-setting procedures as well as job classifications.[83] Labour unions can also have the greatest resources to enable them to up unequal pay claims, particularly collective claims. As the successful *Tesco* case,[84] which was taken to the CJEU, demonstrates, such collective actions can have extensive effects, with the *Tesco* case involving claims possibly by as many as 25 000 workers for back pay of more than GBP 2.5 billion in total. Through negotiations, and if necessary, litigation, labour unions in conjunction with employers are best positioned to achieve equal pay, as seen by the proposed directive's explicit recognition of the social partners being able to transpose the proposed directive through collective agreements.

8.2 The role of equality bodies

The third prong with respect to enforcement after individuals and the social partners is national agencies, and in particularly equality bodies. The reality today is that the roles of Member State equality bodies vary considerably. Three mandates are identified with respect to equality bodies; promotion and prevention, support and litigation, and decision-making. A 2018 EU Commission report found that 18 of the then existing 43 equality bodies (including EFTA countries) had all three mandates.[85] Ten equality bodies worked with an open list of grounds,[86] while ten were single-ground equality bodies.[87] A 2021 Commission staff working document found that Member State equality bodies often had inadequate resources, limited independence, limited legal standing, did not cover all EU protected discrimination grounds and that there was often little awareness as to their existence.[88] As part of its work programme for 2022, the Commission presented a proposal for two directives on binding standards for equality

80 See judgment dated 28 July 2020, Federal Labour Court, 1 ABR 6/19.
81 See DGB, Government must sharpen pay transparency law, 10 July 2019.
82 See Eurostat (2020), *Statistics Explained: Gender pay gap statistics 2020*.
83 See generally, Rubbery, J. and Johnson, M. (2019), *Closing the Gender Pay Gap: What Role for Trade Unions?* (ILO).
84 CJEU Judgment of 3 June 2021, *K and Others, L, M, N and Others, O, P, Q, R, S, T v Tesco Stores Ltd.*, C-624/19, EU:C:2021:429.
85 See Crowley, N. (2018), *Equality bodies making a difference*, European Commission, namely: Bulgaria, Croatia (2 EBs), the Czech Republic, Estonia, Finland (2 EBs), France, Hungary, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal (Commission for Equality and Against Racial Discrimination), Romania, Slovakia, Slovenia and Sweden.
86 See Crowley, N. (2018), *Equality bodies making a difference*, European Commission, namely Bulgaria, Estonia, Finland (Non-Discrimination Ombudsman), Hungary, Latvia, Liechtenstein, Poland, Romania, Slovakia and Slovenia.
87 See Crowley, N. (2018), *Equality bodies making a difference*, European Commission, namely with respect to the single ground of gender, Gender: Belgium, Croatia (includes grounds of gender identity and expression, sexual orientation, marital or family status), Finland, Iceland, Italy, and Portugal (CIG and CITE), with racial or ethnic origin: Portugal and Spain, and with disability: Liechtenstein.
88 See the staff working document: European Commission (2021), *Equality bodies and the implementation of the Commission Recommendation on standards for equality bodies*, SWD(2021) 63 final.

bodies in December 2022, seen as necessary in order for the equality bodies to fulfil their role as set out in the proposed directive.[89]

Equality bodies were first taken up in EU law as 'bodies for the promotion of equal treatment' in Article 13 of the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.[90] Equality bodies were next defined and expanded under Article 3 as a 'body or bodies designated pursuant to Article 20 of Directive 2006/54/EC (the Equal Treatment Directive), for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex.' Under Article 20 of the 2006 directive, such 'bodies may form part of agencies with responsibility at national level for the defence of human rights or the safeguard of individuals' rights.' The 2006 Recast Directive also prescribes that the competences of these bodies include independent victim support and representation, conducting surveys, publishing reports and recommendations as well as exchanging information with comparable EU and Member State bodies.[91] The EP Report on the proposal for a Pay Transparency Directive proposes deleting 'without discrimination on grounds of sex' from the 2006 directive's Article 3, consequently broadening the protections offered to a more intersectional approach and the responsibilities placed on equality bodies.[92] The provisions of Article 4 are supplemented in the report with the requirement for the Member States to take necessary measures, after cooperation with the social partners and after consultation with equality bodies.[93]

Equality bodies are given a place of prominence in the proposed directive and having an active role with respect to wage transparency. Workers are to be able to request wage information through an equality body (Article 7), equality bodies are to be able to request information as well as clarification and details from employers for their own purposes (Article 8), receive joint pay assessments as well as be involved in remedial actions (Article 9), bring equal pay claims to court on behalf of one or more workers (Article 13), with the bringing of a claim by the employee to the body suspending the limitation period (Article 18). The proposed directive also emphasises in its recital 35, as well as stating in Article 25, the need for Member States to allocate sufficient resources to equality bodies for the effective and adequate performance of these tasks.

89 See European Commission (2022), Proposal for a Council Directive on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC, COM (2022)689 and Proposal for a Directive of the European Parliament and the Council on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU, COM (2022)689, both of 7 December 2022.

90 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Chapter III, Bodies for the promotion of equal treatment, Article 13: '1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights. 2. Member States shall ensure that the competences of these bodies include: – without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, – conducting independent surveys concerning discrimination, – publishing independent reports and making recommendations on any issue relating to such discrimination.'

91 The Commission issued a set of recommendations to improve the independence and effectiveness of Member State equality bodies, see Commission Recommendation of 22.6.2018 on standards for equality bodies, C(2018) 3850 final.

92 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendment 68, Article 3.

93 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendment 72, Article 4.

8.3 Labour inspectorates

Labour inspectorates are the second to the last piece of the puzzle under the proposed directive with respect to creating a public enforcement structure for pay transparency and equality. With respect to labour inspectorates at the EU level today, the EU Senior Labour Inspectors' Committee (SLIC), begun in 1982, provides a platform for national labour inspectorates, and has the mandate to give its opinion on all matters relating to the enforcement by the Member States of EU legislation on health and safety at work. Five functions have been categorised for labour inspectorates: occupational safety and health, general conditions of work including at times wages, industrial relations, employment-related matters such as illegal employment, vocational training and employment promotion, and social security issues.[94] Three national models are generally identified with respect to labour inspectorates: the first model is mostly concerned with occupational safety and health (OSH) (Austria, Denmark, Germany and Sweden). The second model combines the first with varying inspectorates (Cyprus, Greece, Italy, Malta, and the UK). The different inspectorates in this model can include those with competence over foreign workers and social security. The third OSH and Labour model is the General Inspectorate (Belgium, Czechia, Estonia, Spain, Finland, France, Hungary, Croatia, Lithuania, Lichtenstein, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia and the Netherlands). 17 of these have competence with respect to equality issues. 28 labour inspectorates were in place 2018, all of which had competence in the areas of occupational safety and health, as well as working time. 24 had competence with respect to salaries.[95] Extensive difference also exists with respect to the organisation, inspections, enforcement and funding of the different national labour inspectorates.

Under the proposed directive, labour inspectorates are defined under the proposed Article 3(1)(k) as the national body or bodies that have an inspection function on the labour market in a Member State. The EP Report proposes a clarification to Recital 25 in that the Member States should ensure 'that the human, technical and financial resources of equality bodies and national bodies and authorities with responsibility for inspection and supervision such as labour inspectorates are used to effectively and adequately perform their respective tasks and responsibilities, in particular those related to gender pay.[96] Labour inspectorates are to be able to obtain information upon request under the proposed Article 8, as well as be able to ask for clarifications and details regarding this information. Where any gender pay differences are not justified by objective and gender-neutral factors, the employer is required to remedy the situation in close cooperation with the workers' representatives, the labour inspectorate and/or the equality body under the proposed Article 9. Any joint pay assessments are also to be made available to labour inspectorates. Under the proposed Article 18, where a claimant has undertaken an action or lodged a claim with a labour inspectorate, the limitation period is to be suspended. Proposed Article 25 delineates that national equality bodies are to be competent with respect to matters falling within the scope of the directive without prejudice to labour inspectorates. Close cooperation and coordination are to occur between national equality bodies and labour inspectorates. The EP Report reiterates the need of labour inspectorates for adequate and sufficient resources in its proposed amendment to Article 25, necessary to effectively carry out their new functions.[97]

94 See Walters, D. (2016), 'Labour inspection and health and safety in the EU' *HesaMag #14*.

95 Velázquez, M. (2018), Chairman of the SLIC Working Group on Cross-border Enforcement, *Presentation – Setting the scene III: Labour Inspectorates in the European Union*, EU-Georgia Dialogue.

96 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendment 44, Recital 35.

97 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendment 158, Article 25.

8.4 The proposed designated monitoring body

The last piece, found in proposed Article 26 – Monitoring and awareness-raising – requires each Member State to have a dedicated monitoring body. The body is to have the resources necessary to function properly in order to ensure the proper monitoring of the implementation of the right to equal pay. This monitoring body can be part of an existing body pursuing similar objectives. The proposed directive envisions the main functions of the monitoring body being to aggregate the data and reports produced pursuant to the pay transparency measures and to ensure their publication in a user-friendly manner, as well as to provide the Commission with annual data concerning equal pay complaints and litigation. This monitoring body is also to tackle the causes of the gender pay gap and provide tools to analyse and assess pay inequalities. It is also to raise awareness among public and private businesses and organisations, social partners and the general public to promote the principle of equal pay and pay transparency.

The EP Report further articulates these duties, requiring not just the proper functioning of the monitoring bodies, but also adequate resources.[98] The EP amendments also strengthen the obligation of the monitoring bodies to work with the social partners, labour inspectorates, and other bodies on equal pay issues, as well as the need to tackle intersectional discrimination and share employer good practices. The monitoring body is not just to focus on the current GPG, but also the eradication of its causes. The aggregated data collected is also to include data for the purposes of identifying and addressing multiple, intersectional or cross-sectional forms of discrimination, with a particular focus on female-dominated sectors. The EP Report also expands the mandate of the monitoring bodies to be able to issue recommendations, warnings, as well as fines in cases of non-compliance. The Member States are also to be able to broaden the bodies' mandates.

The EP Report also includes the creation of a new concept, pay equality plans on both the EU and Member State levels. The Commission is to create a Union pay equality plan for a five-year period. It is to set out the priorities and targets to fill in concrete measures and corrective actions based on data on labour market segregation and the biases in equal pay for equal work or work of equal value in the EU. Each Member State is also to have national pay equality plans. The Commission is to set out guidelines for these with concrete measures and corrective actions to address the GPG. The Member States are to first assess the situation, based on the collected data on the segregation of labour markets and the biases in equal pay and make those data and analytical tools publicly available. After consulting the social partners and the national authorities, the Commission is to designate the European Institute for Gender Equality (EIGE) to create an online interactive pay transparency and equality tool that is easy to use and free of charge, to facilitate the analysis and assessment of gendered pay in SMEs.

9 Conclusion

It is debatable whether pay transparency is sufficient in itself to address the gender pay gap and lead to more gender equality in general. However, the proposed directive goes far beyond the question of simply pay transparency, by creating a structure by which protections against human rights violations in the form of unlawful discrimination can be addressed. Access to justice mechanisms have been part of EU law arguably at least explicitly since the Burden of Proof Directive 97/80/EC, with the requirement of real, effective, dissuasive and proportionate compensation quickly following on its heels. The current proposed directive not only fortifies the array of access to justice mechanisms available, but also adds, among other things, injunctive relief, reallocation of legal costs and fees, and a truly shifted burden of proof. In addition, there is a strengthening of the positions of potential, current and former employees

98 European Parliament, Report – A9-0056/2022 Report on the 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 (EP Report), 22.3.2022, (COM(2021)0093, Amendments 159-166, Article 26.

with respect to employers with regard to accessing information. Finally, the roles of the social partners as well as equality bodies are also strengthened, with the designated monitoring bodies closing the loop by monitoring these processes as a whole. These aspects create a system that is well-suited to addressing much more than equal pay claims.

It has also been debated whether the bringing of claims will remedy existing inequalities. The proposed directive also addresses this, with its emphasis on social dialogue and the role of the social partners in collective bargaining, equality bodies and labour inspectorates equipped to address inequalities, with the designated monitoring bodies again providing information and support. Decisions and judgments that are public can provide clarification on certain questions of law and create a degree of legal certainty upon which potential claimants can in turn rely. This will help to achieve changes in the current norms. A greater body of case law and precedents can actually strengthen the position of the labour unions and equality bodies in bringing claims. This should lead to more strategic litigation as well as creating the necessary critical mass of cases. Such case law needs to be seen not simply as remedial actions but also as steps towards the long-term promotion of the proactive measures necessary to establish the pay equality norms that are the primary goal of the directive. Active labour unions, equality bodies and labour inspectorates are necessary with respect not only to negotiations and monitoring, but also to enforcement. Combined with the strengthening of the potential of private enforcement under the directive's proposals concerning the reallocation of legal costs, a unified approach between these players (individuals, unions, equality bodies and monitoring bodies) is facilitated. The creation of this type of structure with which to both proactively and reactively address claims of equal pay and discrimination is the true innovation in the proposed pay transparency directive as well as establishing a pattern as potential agents of change in other areas of human rights.

Intersectionality from critique to practice: Towards an intersectional discrimination test in the context of 'neutral dress codes'

Raphaële Xenidis*

Introduction

In the EU Gender Equality Strategy 2020-2025, the European Commission committed to 'using intersectionality as a cross-cutting principle'.[1] It described intersectionality as a notion capturing 'the combination of gender with other personal characteristics or identities and how these intersections contribute to unique experiences of discrimination'.[2] This policy development is an important interpretive lens when it comes to reading existing EU law provisions on multiple discrimination. Recitals 14 and 3 of Directive 2000/43/EC and Directive 2000/78/EC respectively, which together lay down a legal framework against discrimination on grounds of race or ethnic origin, disability, sexual orientation, religion or belief and age, clarify that '[i]n implementing the principle of equal treatment, the Community should [...] aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination'.[3]

From this joint reading, one could deduce the existence of a mandate for the European Court of Justice (hereinafter ECJ or Court of Justice) to redress intersectional discrimination, which seems particularly explicit when it comes to gendered inequalities.[4] Yet in 2016, the ECJ failed to grapple with intersectional discrimination in its decision in *Parris*.[5] This decision, which held that 'no new category of discrimination resulting from the combination of more than one [...protected...] groun[d] [...]may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established', sent a chilling signal across the EU to litigants seeking redress for intersectional discrimination.[6]

* Lecturer in EU law, School of Law, University of Edinburgh. The author is very grateful to Prof. Isabelle Rorive and Dr. Birte Böök for their very helpful comments on an earlier draft of this article.

1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A Union of Equality: Gender Equality Strategy 20202025' COM/2020/152 final.

2 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A Union of Equality: Gender Equality Strategy 20202025' COM/2020/152 final.

3 See Recital (14) of Directive 2000/43/EC and Recital (3) of Directive 2000/78/EC.

4 The European legislator is in the process of confirming such a mandate, as demonstrated by Recital (14) of the European Commission's proposal on pay transparency, in which it highlights the need to 'ensure that the courts or other competent authorities take due account of any situation of disadvantage arising from intersectional discrimination, in particular for substantive and procedural purposes, including to recognise the existence of discrimination, to decide on the appropriate comparator, to assess the proportionality, and to determine, where relevant, the level of compensation awarded or penalties imposed'. See 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 COM(2021) 93 final.

5 Case C-443/15 *David L. Parris v Trinity College Dublin and Others*, 24 November 206, ECLI:EU:C:2016:897.

6 Case C-443/15 *David L. Parris v Trinity College Dublin and Others*, 24 November 206, ECLI:EU:C:2016:897, [80].

Despite the lack of favourable precedents and the scarcity of legal opportunities, applicants and their lawyers have timidly but progressively integrated intersectionality into their litigation strategies. Incorporating insights from academic scholarship, they have brought the question of intersectional discrimination to courts, including the Court of Justice. In particular, the series of so-called 'headscarf cases' referred to the ECJ since 2015 provides important opportunities to reflect on the litigation and consequences of intersectional discrimination in Europe.

Although academic discussions have highlighted the inherently gendered nature of the mechanics of stereotyping and of the exclusionary effects at stake in so-called 'neutral dress' rules, the first cases referred to the ECJ – *Achbita* and *Bougnaoui* – were mainly framed in terms of religious discrimination.[7] Yet a clear evolution has taken place since these initial cases. In *WABE*, the applicant argued that the ban gave rise to discrimination based on religion, gender and ethnicity and the Hamburg Labour Court explicitly invited the ECJ to address discrimination on 'grounds of religion and/or gender'.[8] In the case of *S.C.R.L.* most recently decided by the ECJ, the applicant claimed an infringement of anti-discrimination law 'on the basis… of religious belief and gender/sex', a position reflected in the questions referred by the *Tribunal du travail francophone de Bruxelles* to the ECJ.[9]

This article probes these recent litigation efforts and the obstacles that hinder such endeavours before reviewing the answers offered by the ECJ in *WABE*, *Müller* and *S.C.R.L.* It addresses the following questions: (1) How can neutral clothing policies amount to intersectional discrimination? (2) How and why do litigants engage with intersectionality? (3) How has the ECJ responded to the issue of intersectional discrimination in the context of the so-called 'headscarf' cases? Reflecting on the Court's engagement with intersectionality beyond headscarf bans and 'neutrality' rules, the article then presents elements of a novel intersectional discrimination test.

I 'Neutral' clothing policies: a case of intersectional discrimination

This section offers working definitions of intersectionality and intersectional discrimination and locates the ban on intersectional discrimination in the EU equality law and policy framework (1). It then theorises so-called 'neutral dress codes' as a form of intersectional discrimination (2).

1 Intersectionality, intersectional discrimination and the EU equality framework

The theoretical corpus underpinning the notion of intersectionality has a long history anchored in black and postcolonial feminism.[10] This section purports to offer working definitions but cannot possibly do justice to the rich interdisciplinary theoretical corpus of intersectionality studies.[11]

Intersectionality is both a 'descriptive' and a diagnostic term.[12] As a *descriptor*, intersectionality 'refers to the ways human identity is shaped by multiple social vectors and overlapping identity categories (such as

7 Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, 14 March 2017, ECLI:EU:C:2017:203 and Case C-188/15 *Asma Bougnaoui et Association de défense des droits de l'homme (ADDH) contre Micropole SA*, 14 March 2017, ECLI:EU:C:2017:204.

8 See the request for a preliminary ruling of the Hamburg Labour Court in Case C-804/18 *IX v WABE eV*, 15 July 2021, ECLI:EU:C:2021:594.

9 Case C-344/20 *S.C.R.L. (Vêtement à connotation religieuse)*, 13 October 2022, ECLI:EU:C:2022:774.

10 See e.g. Combahee River Collective (1986), *The Combahee River Collective Statement: Black feminist organizing in the seventies and eighties*, Kitchen Table: Women of Color Press; Collins, P. H. (1990), *Black feminist thought: Knowledge consciousness and the politics of empowerment*, Unwin Hyman; Crenshaw, K. (1990), 'Mapping the margins: Intersectionality, identity politics, and violence against women of color' *Stan L Rev* 43, p. 1241; Davis, A. (1983), *Women, race and class*, Vintage Books.

11 For an intellectual history, see Hancock, A.-M. (2016), *Intersectionality: an intellectual history*, Oxford University Press.

12 Ruíz, E. (2017), 'Framing intersectionality' in Taylor, P. C., Alcoff, L. M. and Anderson, L. (eds), *The Routledge companion to philosophy of race*, Routledge, pp. 335-336.

sex, race, class)'.[13] It describes '[d]iscrimination that takes place on the basis of several personal grounds or characteristics/identities, which operate and interact with each other at the same time in such a way as to be inseparable'.[14] It accounts for how 'mutually constitutive inequalities… produce an effect which is different from what each of their dimensions would produce separately, and also different from the addition of their separate parts together'.[15]

As an *analytical* or *diagnostic* tool, intersectionality 'captures the confluence of power and domination on the social construction of identity in order to remedy concrete harms that result from this convergence'.[16] In this second assertion, intersectionality is 'a *theoretical framework* and *strategy* that begins with the experiences of marginalized groups and examines the interconnected structures of power that affect individual and group identities and choices' and which 'promotes social justice and social change by linking research and practice'.[17] In other words, intersectionality is 'an *analytical tool* for studying, understanding and responding to the ways in which [a ground of discrimination] intersect[s] with other personal characteristics/identities, and how these intersections contribute to unique experiences of discrimination'.[18]

EU equality law only alludes to intersectional discrimination without explicitly including its prohibition within a legally binding provision. The preambles of Directive 2000/43/EC and Directive 2000/78/EC only mention that 'women are often the victims of *multiple discrimination*' and that the principle of equal treatment between men and women should be mainstreamed in other anti-discrimination provisions.[19] Commentators have insisted on the differences between *intersectional* and *multiple* and other forms of compound, additive or combined discrimination.[20] Atrey suggests for example that 'multiple discrimination… admits multiple grounds of discrimination but considers them as causing discrimination independently' and that '[m]ultiple discrimination is thus nothing but multiple claims of single-axis discrimination'.[21] Advocate General Kokott echoed this view in her opinion in *Parris*, stating that the term '"multiple discrimination"… may be misleading as it suggests the presence of two differences of treatment each of which would in its own right — completely independently of the other — have to be regarded as discrimination and would at most be aggravated by the existence of further grounds for a difference of treatment' whereas intersectional discrimination 'concerns the combination of two or more factors neither of which, in and of itself, gives rise to discrimination against the persons concerned'.[22]

Yet these theoretical distinctions seem to fade when intersectionality is operationalised in law and legal analysis. Looking at the explanatory memoranda of the equality directives of the 2000s justifies interpreting the provisions on multiple discrimination as giving EU equality law and the ECJ a mandate to redress intersectional discrimination involving gender-based discrimination:

13 Ruíz, E. (2017), 'Framing intersectionality' in Taylor, P. C., Alcoff, L. M. and Anderson, L. (eds), *The Routledge companion to philosophy of race*, Routledge, pp. 335-336.
14 European Institute for Gender Equality (2019), 'Intersectional discrimination', European Union, https://eige.europa.eu/thesaurus/terms/1492, accessed 12 September 2019.
15 Crowley, N. (2016), *Innovating at the intersections: Equality bodies tackling intersectional discrimination*, Equinet: European Network of Equality Bodies, Brussels, p. 21.
16 Ruíz, E. (2017), 'Framing intersectionality' in Taylor, P. C., Alcoff, L. M. and Anderson, L. (eds), *The Routledge companion to philosophy of race*, Routledge.
17 Latino Research Institute (2021), 'On intersectionality' (The University of Texas at Austin), https://liberalarts.utexas.edu/lri/research/, accessed 28 November 2022 and Consortium on Race Gender and Ethnicity (2019), *Intersectionality*, University of Maryland, http://crge.umd.edu/, accessed 12 September 2019.
18 European Institute for Gender Equality (2019), *Intersectionality*, European Union, http://eige.europa.eu/rdc/thesaurus/terms/1263, accessed 12 September 2019 (emphasis added).
19 See Recital (14) of Directive 2000/43/EC and Recital (3) of Directive 2000/78/EC (emphasis added).
20 See e.g. Fredman, S. (2016), *Intersectional discrimination in EU gender equality and non-discrimination law*, European Network of legal experts in gender equality and non-discrimination and European Commission, May 2016 (European Network of legal scholars in gender equality and non-discrimination and European Commission, May 2016 (emphasis added).
21 Atrey, S. (2019), *Intersectional discrimination*, Oxford University Press, p. 84.
22 Opinion of Advocate General Juliane Kokott, Case C-443/15, *David L. Parris v Trinity College Dublin and Others*, 30 June 2016, ECLI:EU:C:2016:493, footnote 74.

> 'Although equal treatment on the grounds of sex is not covered as such by this Directive, it is nevertheless recognised that discrimination on the grounds of either race/ethnic origin, disability, age, religion/belief or sexual orientation may affect women and men differently. The structural inequalities linked to sex and gender roles of women and men are frequently even more important in the context of dual, triple or multiple discrimination on any of the grounds included in Article 13 of the Treaty [now Art. 19 TFEU]'.[23]

More recently, the semantics of intersectionality have explicitly permeated EU equality policy. As mentioned earlier, the EU Gender Equality Strategy 2020-2025 recognises intersectionality as a 'cross-cutting principle'.[24] The legislative proposal on pay transparency offers another indication that intersectionality is making inroads into EU gender equality law. Its explanatory memorandum and its recital (14) recognise that '[g]ender-based pay discrimination may involve an intersection of various axes of discrimination' and its Article 3(3) defines pay discrimination as 'includ[ing] discrimination based on a combination of sex and any other ground or grounds of discrimination protected' under EU secondary law.[25] Arguably, this policy commitment should be used as a contextual indication of the wider objectives of the Union regarding the protection of the fundamental right to equality when it comes to interpreting existing EU law provisions.

2 Theorising 'headscarf bans' and 'neutral' dress codes as intersectional discrimination on grounds of gender, religion and ethnicity

In 2020, an experiment assessed the labour market chances of female applicants who wear a headscarf by way of a testing procedure that included sending the same job application, but changing the name and picture of the applicant, to comparable vacancies for office worker positions in major German cities.[26] The results reveal that the CV of the applicant who had a Turkish-sounding name (Meryem Öztürk) and wore a headscarf yielded a significantly smaller amount of positive responses (4.2 %) than the applicant who had a German-sounding name (Sandra Bauer) and did not wear a headscarf (18.8 %).[27] The conclusions drawn by the author of the study are telling: 'the candidate with the headscarf has to send 4.5 times as many applications as an identical applicant with a German name and no headscarf to receive the same number of callbacks for interview'.[28] This clearly points to the existence of discriminatory barriers to entering the labour market for women wearing a headscarf.

The existence of a 'headscarf penalty' was confirmed by a 2022 study that compared job market chances in Germany, the Netherlands and Spain for female Muslim applicants wearing a headscarf and female Muslim applicants not wearing one.[29] Muslim applicants wearing a veil received fewer callbacks in Germany and the Netherlands compared to Muslim applicants not wearing one.[30] In addition to this 'strong evidence of employer discrimination against veiled Muslim women', the researchers also found that discrimination in Germany and the Netherlands was the highest in jobs with high customer contact

23 Commission of the European Communities, *Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation COM (1999) 565 final OJ C 177E/42*, European Union, 27 June 2000.

24 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A Union of Equality: Gender Equality Strategy 20202025' COM/2020/152 final.

25 Explanatory memorandum, Recital (14) and Article 3(3), 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 COM(2021) 93 final.

26 See Weichselbaumer, D. (2020), 'Multiple discrimination against female immigrants wearing headscarves', *ILR Review* 73(3).

27 Weichselbaumer, D. (2020), 'Multiple discrimination against female immigrants wearing headscarves', *ILR Review* 73(3), pp. 612-614.

28 Weichselbaumer, D. (2020), 'Multiple discrimination against female immigrants wearing headscarves', *ILR Review* 73(3), p. 614.

29 See Fernández-Reino, M., Di Stasio, V. and Veit, S. (2022), 'Discrimination unveiled: A field experiment on the barriers faced by Muslim women in Germany, the Netherlands, and Spain' in *European Sociological Review*.

30 Fernández-Reino, M., Di Stasio, V. and Veit, S. (2022), 'Discrimination unveiled: A field experiment on the barriers faced by Muslim women in Germany, the Netherlands, and Spain' in *European Sociological Review*, pp. 11-13. This contrasted with Spain, where the researchers "found no evidence of discrimination, regardless of whether or how the applicants indicated their Muslimness". The authors do not elaborate on the reasons behind these contrasting results.

compared to jobs with low contact with clients.[31] As will be explained below, the Court's case law on assessing the proportionality of a neutral dress code differently depending on whether the job requires contact with customers is particularly problematic in light of this finding.[32]

The discrimination highlighted by these experiments can be understood against the background of 'Islamophobia', a form of discrimination that has been defined as 'fear, prejudice and hatred of Muslims or non-Muslim individuals… [m]otivated by institutional, ideological, political and religious hostility that transcends into structural and cultural racism which targets the symbols and markers of a being a Muslim'.[33] An intersectional analysis of discrimination on this basis in the context of so-called neutral dress codes reveals the interplay of three vectors of disadvantage: gender, ethnicity and religion.

Commentators have pointed out 'a noticeable tendency to overlook or underestimate the gender dimensions of the *hijab* controversy' and deplored that 'the intersection of gender and religion inherent in the "Islamic headscarf"… has not been adequately considered or analysed'.[34] So-called neutral dress codes can be understood in the context of the policing of gender performance, i.e. sets of requirements dictating how women should perform 'femininity', for instance by showing their hair in Western societies and complying with certain socially accepted images.[35] By analogy and through the lens of gender performance and policing, one could compare the 'neutrality requirements' imposed by employers with company policies that require women to wear and dress in a feminine manner and which have been declared to amount to sex discrimination in the US because they are based on sexist stereotypes.[36]

However, such injunctions pertaining to gender performance should be understood in the context of Islamophobia as a form of cultural racism projected onto religious markers.[37] In 1988, Balibar already described this phenomenon in the French context as 'carr[ying] with it an image of Islam as a "conception of the world" which is incompatible with Europeanness'.[38] Othering processes crystallise into negative stereotypes and prejudices that represent Muslims as a group threatening the politico-cultural order of Western societies. In this context, the headscarf becomes an archetypal symbol of this othering process.[39] Neutrality policies can therefore be understood as a form of policing and disciplining of difference. Hennette-Vauchez has for instance juxtaposed the US critique of colour-blindness with the European notion of neutrality to unravel how so-called neutral dress codes work towards erasing perceived 'others' – women wearing a headscarf – from certain social spaces such as the workplace.[40]

Hence, intersectionality offers an analytical device for diagnosing the ways in which social hierarchies and exclusionary systems based on race, religion and gender co-constitute specific forms of stereotyping,

31 Fernández-Reino, M., Di Stasio, V. and Veit, S. (2022), 'Discrimination unveiled: A field experiment on the barriers faced by Muslim women in Germany, the Netherlands, and Spain' in *European Sociological Review*, p. 12.

32 See section III and the decision in Case C-157/15 *Achbita*, 14 March 2017.

33 Awan, I. and Zempi, I. (2020), *A working definition of Islamophobia: A briefing paper prepared for the Special Rapporteur on freedom of religion or belief in preparation for the report to the 46th Session of Human Rights Council*, 3, available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Religion/Islamophobia-AntiMuslim/Civil%20Society%20or%20Individuals/ProfAwan-2.pdf.

34 Vakulenko, A. (2007), '"Islamic headscarves" and the European Convention on Human Rights: an intersectional perspective', *Social and Legal Studies* 16, p. 184.

35 Forms of gender policing vary contextually, e.g. headscarf debates take on different meanings and dimensions in parts of the world other than Western Europe. Depending on the prevalent form of gender policing, women's claim to autonomy can take the form of a fight either to be able to wear or to remove the headscarf.

36 See *Price Waterhouse v Hopkins*, 490 U.S. 228 (1989) and *Rogers v American Airlines*, 527 F. Supp. 229 (S.D.N.Y 1981); and the stark critiques of *Jespersen v Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. Apr. 14, 2006) which declared compatible with discrimination law a differentiated dress policy for men and women that forced women to wear make-up and dress in a feminine manner.

37 See Meer, N. (2013), 'Racialization and religion: race, culture and difference in the study of antisemitism and Islamophobia', *Ethnic and Racial Studies*, 36, and Meer, N. and Modood, T. (2009), 'Refutations of racism in the "Muslim question"', *Patterns of Prejudice*, 43.

38 Balibar, E. and Wallerstein, I. (1988), *Race, nation, classe, les identités ambiguës* (Race, nation, class, ambiguous identities), La Découverte.

39 See Joshi, K. Y. (2006), 'The racialization of Hinduism, Islam, and Sikhism in the United States' *Equity & Excellence in Education*, 39.

40 See Hennette-Vauchez, S. (2021), 'Neutralité religieuse, laïcité et colorblindness: essai d'analyse comparée' (Religious neutrality, secularism and colour-blindness: a comparative analysis), *Droit et société*, pp. 353, 355-6, 360-1.

erasures and discrimination. Arguably, intersectionality can be put to the service of litigation strategies disputing the lawfulness of 'neutral' dress codes. The next section examines how litigants and legal professionals engage with intersectionality in the context of preliminary references disputing headscarf bans and 'neutrality' rules in front of the ECJ.

II Litigants' engagement with intersectionality

While acknowledging the theoretical importance of distinctions between intersectional and other types of multidimensional discrimination, locating intersectionality in local praxes requires being attentive to alternative semantics. Litigants', lawyers' and legal professionals' engagement with intersectionality is often framed in other terms. This section reviews how these types of engagement have operationalised the notion in legal reasoning and how they aim to transform courts' understanding of discrimination in the context of neutral dress codes (1). It then evaluates the obstacles and procedural difficulties that limit the access of intersectional discrimination claims to the Court of Justice of the EU (2).

1 An evolution in framing strategies? From Achbita and Bougnaoui to WABE, Müller and S.C.R.L.

Several factors can explain why intersectional discrimination has not featured more widely on the agenda of the ECJ. Prior to legal proceedings, the filtering operated by lawyers when codifying victims' lived experiences in the terms of a legal dispute could explain the lack of litigation of intersectional discrimination in courts. A review of the framing of discrimination claims that have reached the ECJ in the context of neutral dress codes and headscarf bans points towards an evolution of litigation strategies. While the first preliminary references were framed in terms of religious discrimination, later cases introduce claims of discrimination on grounds of religion and gender.

Religion and belief have been protected under EU anti-discrimination law since the adoption of Directive 2000/78/EC in 2000, but the first preliminary references pertaining to religious discrimination only reached the ECJ 15 years later. In 2015, the Belgian and the French courts of cassation referred several questions on the interpretation of the notion of religious discrimination in the context of the *Achbita* and *Bougnaoui* cases.[41] Both cases concerned the wearing of an Islamic headscarf by female Muslim employees. Both cases have been profusely commented on and this article only aims to offer a brief summary of the disputes and main arguments in order to provide context for the present analysis.[42]

In *Achbita*, the dispute arose when the applicant informed her employer that she would start to wear an Islamic headscarf during work hours. Her employer claimed that it would breach the company's (unwritten) neutrality rule and refused. After Ms Achbita started wearing an Islamic headscarf at work, the company dismissed her. At that time, it also amended its workplace regulations, introducing a new written rule prohibiting 'employees… in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from engaging in any observance of such beliefs'.[43] Ms Achbita started legal action supported by Unia, the Belgian equality body, and her trade union. The case went to

41 Case C-157/15 *Achbita*, 14 March 2017 and Case C-188/15 *Bougnaoui*, 14 March 2017.

42 See e.g. Cloots, E. (2018), 'Safe harbour or open sea for corporate headscarf bans? Achbita and Bougnaoui', *Common Market Law Review* 55(2); Bribosia, E. and Rorive, I. (2017), 'Affaires Achbita et Bougnaoui: entre neutralité et préjugés (obs. sous CJUE, Gde Ch., arrêts Achbita et Bougnaoui, 14 mars 2017)', *Revue trimestrielle des droits de l'homme*, 112; Hennette-Vauchez, S. (2017), 'Equality and the market: the unhappy fate of religious discrimination in Europe: ECJ 14 March 2017, Case C-188/15, *Asma Bougnaoui & ADDH v Micropole SA*; ECJ 14 March 2017, Case C-157/15, *Samira Achbita & Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*', *European Constitutional Law Review*, 13; Howard, E. (2017), 'Islamic headscarves and the CJEU: Achbita and Bougnaoui', *Maastricht journal of European comparative law*, 24; Vickers, L. (2017), 'Achbita and Bougnaoui: One step forward and two steps back for religious diversity in the workplace', *European Labour Law Journal*, 8; Weiler, J. (2017), 'Je suis Achbita' (I am Achbita) *European Journal of International Law* 28; Relaño Pastor, E. (2019), 'Religious discrimination in the workplace: Achbita and Bougnaoui', in Belavusau, U. and Henrard, K. (eds), *EU anti-discrimination law beyond gender: Achievements, flaws, and prospects*, Hart Publishing.

43 Case C-157/15 *Achbita*, 14 March 2017, [15].

the Court of Cassation, which referred it to the ECJ asking whether a rule prohibiting employees from wearing 'outward signs of political, philosophical and religious beliefs at the workplace' constitutes direct discrimination.

In *Bougnaoui*, the applicant was dismissed by her employer because clients had complained about her wearing a headscarf during external appointments. Ms Bougnaoui, supported by the *Collectif Contre l'Islamophobie en France*, initiated legal action, arguing that the dismissal was discriminatory on grounds of her religion. The French Court of Cassation asked the ECJ whether clients' preferences for not having services performed by a worker wearing an Islamic headscarf represents a genuine and determining occupational requirement. Both ECJ decisions in *Achbita* and *Bougnaoui* were criticised for not addressing intersectional discrimination.[44] National proceedings suggest, however, that both cases were strongly framed in terms of religious discrimination and that other dimensions such as discrimination on grounds of sex or ethnic origin did not feature prominently in the claims put forward by the litigants and their lawyers.

Investigating why intersectional discrimination claims are 'filtered out' of legal disputes at the litigation stage reveals the role played by the fragmentation of the legal and institutional anti-discrimination framework along the lines of recognised axes of discrimination. For instance, the Belgian inter-federal equality body Unia, which supported strategic litigation in the *Achbita* case, is not competent for matters of gender equality or sex discrimination, which fall within the mandate of another equality body, the Institute for the equality of women and men. Such fragmentation of mandates can lead to erasing the intersectional dimension of discrimination claims in the absence of cooperation across competent institutions.

This fragmentation also has strategic implications. Arguably, the legal participants at the time of the *Achbita* and *Bougnaoui* referrals were keen to mobilise the ECJ to carve out EU-wide legal opportunities to address religious discrimination in the context of headscarf bans and neutrality rules at work. In light of the failure of this litigation strategy in the aftermath of the *Achbita* decision, legal participants might have been willing to test intersectionality as an alternative litigation strategy. This could explain the slight proliferation of intersectional framing of discrimination in later 'headscarf' cases.[45]

Referred in 2018 and 2019 by German courts, the cases of *WABE* and *Müller* involved proceedings against neutrality dress codes in the workplace initiated by female Muslim employees wearing a headscarf. In *Müller*, the national proceedings and the request put forward by the Federal Labour Court (*Bundesarbeitsgericht*) do not seem to indicate engagement with intersectional discrimination.[46] Rather, the claim is consistently framed as religious discrimination and the questions referred pertain to the lawfulness of the policy of the employer, the drugstore chain Müller Handels, prohibiting the wearing of conspicuous, large-sized signs of a political, philosophical or religious nature in the workplace.

In *WABE*, however, the question referred by the Hamburg Labour Court revolved around whether 'a unilateral instruction from the employer prohibiting the wearing of any visible sign of political, ideological or religious beliefs constitute[s] indirect *discrimination on the grounds of religion and/or gender*... against a female employee who, due to her Muslim faith, wears a headscarf'[47] The case raises, *inter alia*, the

44 See Schiek, D. (2018), 'On uses, mis-uses and non-uses of intersectionality before the European Court of Justice (ECJ): The ECJ rulings Parris (C-433/15), Achbita (C-157/15) and Bougnaoui (C-188/15) as a Bermuda Triangle?', *International Journal of Discrimination and the Law*, 18, p. 82.

45 See below. In *Achbita*, the ECJ ruled that a general neutrality rule pertaining to employees' dress code cannot amount to direct discrimination on grounds of religion. This decision has been strongly criticised *inter alia* for its failure to recognise that the neutrality policy resulted in a differential treatment of employees whose religion mandates the wearing of distinctive signs such as clothing (*forum externum*). The decision was also criticised for its permissive justification of the neutrality rule within the framework of indirect discrimination and has been perceived as legitimising customers' prejudices towards religious minorities.

46 See Request for a preliminary ruling of the Bundesarbeitsgericht in C-341/19 *MH Müller Handels GmbH v MJ*.

47 Request for a preliminary ruling of the Hamburg Labour Court in Case C-804/18 *IX v WABE eV*, 2 (emphasis added).

question of intersectional stereotyping in the aftermath of *Achbita*, asking the ECJ whether 'discrimination on the grounds of religion and/or gender [can] be justified under Directive 2000/78/EC… even where the employer… seeks to meet the subjective wishes of his customers' through a neutral dress policy.[48]

It appears from the national court's request for a preliminary ruling that the litigant and her lawyer explicitly framed the claim as discrimination on grounds of religion, gender and ethnicity:

> 'The headscarf ban furthermore exclusively affected women and was therefore also to be examined from the perspective of discrimination on grounds of gender. In addition, a headscarf ban affected women with a migration background with disproportionate frequency, which meant that discrimination on grounds of ethnic origin was also to be considered.'[49]

The national court's request reflects arguments about the interactive effects of different vectors of disadvantage. It acknowledges for instance that *'[t]he ban on displaying religious symbols actually* affects some religions more than others and the sexes in a different way'.[50] As a result, it introduces both gender and religion as necessary variables of its comparative discrimination test:

> '…religious Jewish women wear a wig, which is usually not recognisable as such. They are therefore allowed to fulfil the religious covering requirement. In contrast, Muslim women – like Jewish men – are prohibited from fulfilling that requirement, as their religious characteristic – the wearing of the headscarf or kippah – is visible. Christians can conceal the wearing of a cross around their neck beneath a further item of clothing. It is therefore possible for them to fulfil this religious requirement even when applying a rule of neutrality.'[51]

This intersectional comparative exercise reveals that '[s]tatistically, the defendant's regulation almost exclusively affects Muslim women, as the majority of teachers in child day care centres are female and the number of religious Jews among the male teachers is extremely small'.[52] The national court in its request in *WABE* also criticised the ECJ for failing 'to discuss whether a requirement of neutrality in the workplace is to be regarded as indirect discrimination of women, as this ban concerns (Muslim) women in the vast majority of cases'.[53] This argumentation reflects the framing strategy adopted by the litigants, which brings together multiple vectors of discrimination and therefore points towards an engagement with theories of intersectionality.

In the most recent preliminary reference C-344/20 *L.F. v S.C.R.L.*, the applicant claimed that a property management company discriminated against her 'on the basis, either directly or indirectly, of religious belief and gender/sex' by rejecting her internship application after she indicated during an interview that she would not remove her headscarf at work.[54] The employer also rejected a second application by the same candidate where she proposed to wear another type of head covering and indicated that the strict neutrality policy did not allow any type of headgear. According to the referring court, the *Tribunal du travail francophone de Bruxelles*, the applicant argued that a 'distinction based on the fact that a woman wears a headscarf constitutes a distinction based on religious beliefs and gender'.[55] From the order for referral issued by the Belgian tribunal, it is apparent that the litigant and her lawyer dedicated an entire section of their argumentation to the 'intersectional dimension of the discrimination at stake'.[56] In the applicant's litigation strategy, the engagement with intersectionality appears to be key to articulating the relationship between sex and religion as vectors of discrimination.

48 Request for a preliminary ruling of the Hamburg Labour Court in Case C-804/18 *IX v WABE eV*.
49 Request for a preliminary ruling of the Hamburg Labour Court in Case C-804/18 *IX v WABE eV*, 5.
50 Request for a preliminary ruling of the Hamburg Labour Court in Case C-804/18 *IX v WABE eV*, 13 (emphasis added).
51 Request for a preliminary ruling of the Hamburg Labour Court in Case C-804/18 *IX v WABE eV*.
52 Request for a preliminary ruling of the Hamburg Labour Court in Case C-804/18 *IX v WABE eV*.
53 Request for a preliminary ruling of the Hamburg Labour Court in Case C-804/18 *IX v WABE eV*.
54 Request for a preliminary ruling of the Tribunal du travail francophone de Bruxelles in C-344/20 *SCRL*, [1].
55 Request for a preliminary ruling of the Tribunal du travail francophone de Bruxelles in C-344/20 *SCRL*, [22].
56 Tribunal du travail francophone de Bruxelles, Ordonnance 19/2070/A (17 July 2020).

2 Explaining the difficult 'legal translation' of intersectionality: some hypotheses

The review of litigation strategies above shows an evolution towards more engagement with intersectionality at national level. Against this background, why has the Court of Justice had so few chances to grapple with intersectional discrimination? Part of the answer lies in the specific architecture of the preliminary reference mechanism based on Article 267 TFEU. Litigants first have to convince the national judge to refer the case and to put forward the issue of intersectional discrimination. At this stage, litigants can face resistance for various reasons.[57] Several explanations can be put forward in relation to intersectionality, which are well illustrated by the position of the Belgian tribunal in *L.F. v S.C.R.L.* Visibly ill-at-ease with the applicant's argumentation strategy, the Belgian tribunal indicated that 'such a presentation, which mixes without distinguishing between pleas and *general theoretical statements*… only *complicates* the task of the judge'.[58] It therefore decided that:

> '…the lengthy theoretical developments of the applicant on the intersectional dimension of the alleged discrimination, although not without scientific interest, will not be addressed in the present decision.'[59]

This shows discomfort on the part of the national judge with engaging with the theoretical complexity of the notion of intersectionality, which is perceived as presenting scientific but not legal interest.[60]

This reluctance reveals persisting doubts among legal professionals, and judges in particular, on how to translate the theoretical contribution of intersectionality into legally actionable devices.[61] For example, in *L.F. v S.C.R.L.*, this appears clearly in the national court's statement that:

> 'Not only does the applicant fail to specify which legal regime would apply to the intersectional discrimination she denounces, but she also fails to draw any consequences from her analysis on the merits of her claim.'[62]

A concrete example of the legal difficulties which the referring court sees arising from the litigant's engagement with intersectionality is that of the 'question of the compensation of multiple discrimination'.[63] The lack of judicial receptivity for arguments rooted in theories of intersectionality thus appears to be linked to a lack of legal certainty regarding the relevance, validity and effects of the notion in law.

The absence of explicit legislative provisions on intersectional discrimination also seems to play an important role in the domestic court's decision not to engage with intersectionality:

57 In the field of migration, for instance, see Passalacqua, V. (2021), 'Legal mobilization via preliminary reference: Insights from the case of migrant rights', *Common Market Law Review* 58(3). There are also incentives for a national judge to refer a case to the ECJ, see for example, Pavone, T. (2019), 'From marx to market: Lawyers, European law, and the contentious transformation of the port of Genoa', *Law & Society Review* 53(3), p. 867.

58 Tribunal du travail francophone de Bruxelles, Ordonnance 19/2070/A (17 July 2020), [41] (emphasis added).

59 Tribunal du travail francophone de Bruxelles, Ordonnance 19/2070/A (17 July 2020), [43].

60 In a later Belgian case of discrimination against a job candidate wearing an Islamic headscarf, the same national judge responded to the claim of intersectional discrimination on grounds of religion and gender put forward by the Belgian organisation 'Ligue des Droits Humains' by recognising, separately, direct discrimination on grounds of religious beliefs and indirect gender-based discrimination. See Tribunal du Travail de Bruxelles, *Unia, M.T., LDH c. STIB*, 3 mai 2021, and Rorive, I. et al, 'Carte blanche : Pour une politique de neutralité respectueuse du droit de la non-discrimination' (3 June 2021) *Le Soir* available at: https://www.lesoir.be/375911/article/2021-06-03/carte-blanche-pour-une-politique-de-neutralite-respectueuse-du-droit-de-la-non (last accessed 29 November 2022).

61 This observation drove scholars to propose an 'instruction manual' for addressing intersectional discrimination in law, see Bribosia, E., Médard Inghilterra, R. and Rorive, I. (2021), 'Discrimination intersectionnelle en droit: mode d'emploi' ('Intersectional discrimination in law: instruction manual'), *Revue trimestrielle des droits de l'Homme* 126, p. 241.

62 Tribunal du travail francophone de Bruxelles, Ordonnance 19/2070/A (17 July 2020) (own translation).

63 Tribunal du travail francophone de Bruxelles, Ordonnance 19/2070/A (17 July 2020), [30] (own translation).

> '…it must be noted that the notion of intersectional discrimination is largely absent from EU law and that [Belgian] anti-discrimination laws… do not define or settle the issue of intersectional discrimination, any more than they do for multiple discrimination.'[64]

Hence, the domestic court seems to consider that neither its anti-discrimination mandate nor that of the European Court of Justice encompasses the redress of intersectional discrimination – a position that can be challenged as explained below – and ousts the question from its preliminary reference.

In turn, the domestic court's failure to engage with the applicant's intersectionality-driven arguments drives it to conclude that:

> 'Through the purely theoretical considerations she puts forward and the peremptory assertion that "a distinction based on the wearing of a headscarf by a woman constitutes a distinction based on religious beliefs and gender", the complainant does not establish facts that allow a presumption of the existence of direct discrimination based on gender.'[65]

Given this rejection, it is surprising that the domestic court still refers to discrimination on the basis of 'religious beliefs and/or sex' in its application to the ECJ.[66] In addition, when disputing the neutrality of the dress code at stake in the case, the national court reintroduces gender in the comparative test that it puts forward. In the questions referred to the ECJ, it implicitly compares the position of male and female Muslim employees who manifest their religion:

> '…the applicant who intends to exercise her freedom of religion by wearing a visible sign… in this case a headscarf, is treated less favourably than another worker with the same beliefs who chooses to manifest them by wearing a beard, which is not specifically prohibited by the terms of employment, unlike manifestation through clothing.'[67]

Despite an explicit rejection of the applicant's arguments on direct intersectional discrimination, some elements of the national court's reasoning reflect an implicit understanding that both gender and religion are co-constitutive vectors of disadvantage in the case at hand, at least within the framework of indirect discrimination.

Nevertheless, *L.F. v S.C.R.L.* illustrates how attempts by applicants and their lawyers to mobilise the analytical apparatus of intersectionality to craft new legal opportunities for redressing intersectional discrimination are filtered out both at national level and during the preliminary reference process before they can reach the ECJ. Judicial agendas are another factor that can explain national judges' lack of engagement with intersectionality. In *L.F. v S.C.R.L.* for instance, the national court's reference makes it clear that the main interest resides in obtaining an alternative interpretation of the notion of direct discrimination on grounds of religion after the widely criticised 2017 decision of the ECJ in *Achbita*.

III The ECJ's ambivalent approach to intersectional discrimination: Between overt rejection and prudent acknowledgment

Even when intersectionality reaches the ECJ, judicial receptivity is limited. A thorough analysis of the decisions pertaining to headscarf bans and neutrality rules shows that the Court evades the question of intersectional discrimination. By contrast, some (current and former) Advocates General are increasingly engaging with intersectionality. At the same time, a closer look at the wider case law of the ECJ reveals an ambivalent approach to intersectional discrimination. Some cases show how the Court has engaged

64 Tribunal du travail francophone de Bruxelles, Ordonnance 19/2070/A (17 July 2020), [43] (own translation).
65 Tribunal du travail francophone de Bruxelles, Ordonnance 19/2070/A (17 July 2020), [81] (own translation).
66 Request for a preliminary ruling of the Tribunal du travail francophone de Bruxelles in C-344/20 *S.C.R.L.*
67 Request for a preliminary ruling of the Tribunal du travail francophone de Bruxelles in C-344/20 *S.C.R.L.*, [38].

with intersectionality in implicit ways and could serve as future reference points for an intersectional discrimination test.

1 Between ignoring and prudently acknowledging intersectional discrimination

In *Achbita* and *Bougnaoui*, the ECJ did not address the issue of intersectional discrimination. However, as noted by Bribosia and Rorive, Advocate General Kokott hints at intersectional discrimination in her opinion in *Achbita*,[68] opening the door for a consideration of modifying vectors of disadvantage at the stage of the proportionality analysis:

> '…it is important to take into account, when striking a balance between the interests involved, whether differences of treatment on other grounds are also present. The fact, for example, that a ban imposed by the employer puts not only employees of a particular religion but also employees of a particular sex, colour or ethnic background at a particular disadvantage (Article 2(2)(b) of Directive 2000/78) might indicate that that ban is disproportionate.'[69]

Advocate General Kokott concludes that such a disadvantage does not arise on grounds of either sex or ethnic origin. Even though the conclusion is disputable from an intersectional analytical perspective, the choice of potential comparators – men and 'employees of a particular ethnic background' – shows some sensitivity to intersectionality.[70]

In her opinion in *Bougnaoui*, Advocate General Sharpston also acknowledges that, 'a measure amounting to discrimination on grounds of religion or belief may also, depending on the circumstances, represent discrimination on grounds of sex or race'.[71] Without explicitly addressing intersectional or even multiple discrimination, she offers some context regarding the relationship between religious freedom and gender equality. She argues, in particular, that wearing the headscarf 'is best understood as an expression of cultural and religious freedom' and not as an encroachment upon gender equality, as had been argued by the European Court of Human Rights in early case law.[72]

In the following decisions in joined cases *WABE* and *Müller*, the ECJ also avoided the question of intersectional discrimination. Although acknowledging the referring court's observation that the neutrality rule, 'in practice concerns certain religions more than others and affects women more than men', it notes that 'that ground of discrimination [gender] does not fall within the scope of Directive 2000/78, which is the only EU law measure to which th[e] question relates' and concludes that '[i]t is not therefore necessary to examine whether there is such discrimination'.[73] Given the Court's practice of reformulating referred questions, this refusal to consider a relevant aspect of the national court's question on formalistic grounds is surprising. This approach follows Advocate General Rantos' opinion, who also asserted that in

68 Bribosia, E. and Rorive, I. (2017), 'Affaires Achbita et Bougnaoui : entre neutralité et préjugés (obs. sous C.J.U.E., Gde Ch., arrêts Achbita et Bougnaoui, 14 mars 2017)', *Revue trimestrielle des droits de l'homme* 112, pp. 1017, 1025-1026.

69 Opinion of Advocate General Kokott, Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, ECLI:EU:C:2016:382, [121].

70 Opinion of Advocate General Kokott, Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, ECLI:EU:C:2016:382, [121].

71 Opinion of Advocate General Sharpston, Case C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, ECLI:EU:C:2016:553, footnote 71.

72 Opinion of Advocate General Sharpston, Case C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, ECLI:EU:C:2016:553, [53]-[54], [75]. After recalling the shift in the European Court of Human Rights' approach to headscarf bans from *Dahlab v Switzerland, Leyla Şahin v Turkey* to *SAS v France*, she argues that '[s]ome perceive wearing the headscarf as a feminist statement, as it represents a woman's right to assert her choice and her religious freedom to be a Muslim who wishes to manifest her faith in that way. Others see the headscarf as a symbol of oppression of women… What the Court should not do, in my view, is to adopt the view that, because there may be some occasions where the wearing of the headscarf should or could be deemed oppressive, that is so in every instance. Rather, I would adopt the attitude of the Strasbourg Court… the matter is best understood as an expression of cultural and religious freedom'.

73 Joined Cases C-804/18 and C-341/19 *IX and MH Müller Handels GmbH v WABE eV and MJ*, 15 July 2021, ECLI:EU:C:2021:594, [57]-[58].

his view 'the order for reference does not contain sufficient facts to consider whether discrimination on the grounds of gender exists in a case such as that in the main proceedings'.[74] In *S.C.R.L.* the Court did not address the question of intersectional discrimination at all, although it had featured prominently in the litigation at national level and question 3(f) of the referring court pondered about the relevance of gender as a vector of discrimination in the case.[75]

On the contrary, former Advocate General Sharpston's 'shadow opinion' on the cases of *WABE* and *Müller* offers an interesting contrast to these formalistic interpretations of EU anti-discrimination law. She dedicates a section of her elaborate reflections to assessing headscarf bans and neutrality rules from the perspective of what she terms 'double' and 'triple discrimination' on grounds of religion, gender and ethnic origin.[76] Her position is that a so-called neutrality rule in this sector of the labour market primarily disadvantages female workers with a migration background. This is because this category of workers makes up most of the workforce in the childcare sector (as in *WABE*) and in relation to cashier positions (as in *Müller*). According to her, this should trigger 'an enhanced level of scrutiny to the sequential aspects of the justification being advanced by the employer'.[77] In the context of what she calls 'double' or 'triple' discrimination, Sharpston warns that '[o]nly a very rigorous examination of that justification… will provide adequate safeguards to these very vulnerable categories of potential employees'.[78] Hence, following Sharpston, intersectionality could translate in a heightening of judicial review standards in the Court's proportionality test.[79]

In addition, even though not made explicit in Sharpston's 'shadow opinion', another avenue for the legal translation of intersectionality appears to be the comparison test traditionally conducted by the ECJ to assess situations of alleged discrimination. Although Sharpston concludes, like Advocate General Rantos, that the facts before the Court do not allow for a factual assessment of the issue, she argues that '"neutrality" that in reality predictably denies employment opportunities to particular, very identifiable, minority groups is false neutrality' as opposed to 'true' neutrality that accommodates diversity and fosters religious tolerance.[80] Her reasoning is based on the idea that the comparison test conducted by the Court to assess whether the neutrality rule is directly discriminatory should juxtapose employees wearing 'mandated religious apparel' and employees not wearing such apparel. According to her, the notion of direct discrimination should be enlarged to extend to measures that specifically disadvantage a clearly identifiable minority group' such as employees wearing 'mandated religious apparel'.[81] In other words, direct discrimination should capture situations where 'an employer imposes a criterion that he either knows or ought reasonably to have known will inevitably place a member of a particular group in a less favourable position on the basis of any of the [protected] grounds'.[82] This approach would *de facto* require employers to consider *a priori* the exclusionary effects of neutrality policies on groups

74 Opinion of Advocate General Rantos, Joined cases C-804/18 and C-341/19 *IX v WABE e.V and MH Müller Handels GmbH v MJ*, 25 February 2021, ECLI:EU:C:2021:144, [59].

75 See Case C-344/20 *S.C.R.L. (Vêtement à connotation religieuse)*, 13 October 2022, ECLI:EU:C:2022:774, [23], [41]. The Court, however, offered an important contribution compared to its decision in *WABE* and *Müller*, in that it proposed an interpretation of the proportionality test 'inspired by the concern to encourage, as a matter of principle, tolerance and respect, as well as acceptance of a greater degree of diversity, and to avoid abuse of a policy of neutrality established within an undertaking to the detriment of workers who observe religious precepts requiring the wearing of certain items of clothing'.

76 See Eleanor Sharpston (2021), *Shadow opinion in Joined cases C-804/18 and C-341/19 IX v WABE e.V and MH Müller Handels GmbH v MJ*, [267], [296].

77 Eleanor Sharpston (2021), *Shadow opinion in Joined cases C-804/18 and C-341/19 IX v WABE e.V and MH Müller Handels GmbH v MJ*, [270].

78 Eleanor Sharpston (2021), *Shadow opinion in Joined cases C-804/18 and C-341/19 IX v WABE e.V and MH Müller Handels GmbH v MJ*.

79 A similar suggestion was also made by Advocate General Kokott, see Opinion of Advocate General Kokott, C-443/15 *David L. Parris v Trinity College Dublin and Others*, 30 June 2016, [157].

80 Eleanor Sharpston (2021), *Shadow opinion in Joined cases C-804/18 and C-341/19 IX v WABE e.V and MH Müller Handels GmbH v MJ*, [265].

81 Eleanor Sharpston (2021), *Shadow opinion in Joined cases C-804/18 and C-341/19 IX v WABE e.V and MH Müller Handels GmbH v MJ*, [123].

82 Eleanor Sharpston (2021), *Shadow opinion in Joined cases C-804/18 and C-341/19 IX v WABE e.V and MH Müller Handels GmbH v MJ*, [263].

situated at the intersection of systems of disadvantage marked by gender and religion. An intersectional approach to the comparative dimension of the Court's discrimination test can help reveal what Sharpston names 'intra-group discrimination' whereas selecting the normative baseline for comparison 'outside' the protected group treats the group as homogeneous and can obfuscate intersectional discrimination.[83]

Another aspect of Sharpston's reflections dedicated to stereotyping highlights how intersectionality can inform the Court's discrimination test. Examining the motivations underpinning so-called 'neutrality' rules, she argues that they 'assum[e] that wearing mandated religious apparel that covers the head… makes the employee look "untidy"'.[84] Sharpston's reasoning can be read against the background of critiques expressed in the context of US jurisprudence, which highlight how neutrality rules targeting employees' hairstyles conceal intersectional stereotypes that disadvantage women of colour and in effect exclude them from valuable work opportunities.[85] The 'implicit value judgements' underpinning neutral dress codes appear to be grounded in sexist and racist prejudices that are used to justify policing the appearance of minority groups based on majority norms. So-called 'neutrality rules' thereby erase and exclude difference instead of accommodating diversity. Even though intersectionality does not emerge explicitly in this part of Sharpston's analysis, her reasoning shows how its analytical framework can offer diagnostic tools that could strengthen the Court's discrimination test.

In the case of *L.F. v S.C.R.L.*, Advocate General Medina noted the referring court's observation that 'the applicant does not establish facts from which it may be inferred that there has been direct discrimination based on gender'.[86] Referring to former Advocate General Sharpston's 'shadow opinion' in *WABE and Müller*, Advocate General Medina nevertheless reintroduces the issue of intersectional discrimination, explaining that,

> 'if employers impose internal neutrality rules as a generalised policy, Muslim women may in reality not only experience "particular inconveniences", but a deep disadvantage to becoming employees. That may lead in turn to setting them apart from the labour market – a source of personal development and social integration – resulting then in discrimination going beyond religion and extending also to gender'.[87]

Advocate General Medina's acknowledgment that 'double discrimination is a real possibility' bears important consequences for the legal reasoning that ensues.[88] She argues indeed that 'double discrimination can be legitimately addressed by Member States by enhancing the level of protection for religion and religious beliefs, as an autonomous ground of discrimination, under Article 8 of Directive 2000/78'.[89] In other terms, the minimum harmonisation approach of the Directive would allow Member States to grant a higher level of protection against intersectional discrimination on grounds of gender and religion. Extrapolating the Advocate General's finding, intersectionality could arguably play a key role as it could legitimise bypassing the restrictive interpretation of the notion of direct discrimination on grounds of religion imposed by the ECJ in *Achbita* and partially confirmed in *WABE*.

Advocate General opinions have offered pointers on how to integrate intersectionality into the Court's discrimination test. Avenues for the legal translation of intersectionality include adapting the proportionality test, choosing comparators that reflect several vectors of disadvantage, and enhancing

83 Opinion of Advocate General Medina in Case C-344/20 *SCRL*, 28 April 2022, ECLI:EU:C:2022:774, [598], [608]; compare with Opinion of Advocate General Rantos, Joined cases 804/18 and 341/19 *WABE*, 25 February 2021, [48], [55].
84 Eleanor Sharpston (2021), *Shadow opinion in Joined cases C-804/18 and C-341/19 IX v WABE e.V and MH Müller Handels GmbH v MJ*, [132]-[133].
85 See the analysis of the case *Rogers v American Airlines* 527 F. Supp. 229 (S.D.N.Y. 1981) in Caldwell, P.M. (1991), 'A hair piece: Perspectives on the intersection of race and gender frontiers of legal thought: Gender, race, and culture in the law', *Duke Law Journal* 365.
86 Opinion of Advocate General Medina in Case C-344/20 *SCRL*, 28 April 2022, ECLI:EU:C:2022:774, [19].
87 Opinion of Advocate General Medina in Case C-344/20 *SCRL*, 28 April 2022, ECLI:EU:C:2022:774, [66].
88 Opinion of Advocate General Medina in Case C-344/20 *SCRL*, 28 April 2022, ECLI:EU:C:2022:774, [66].
89 Opinion of Advocate General Medina in Case C-344/20 *SCRL*, 28 April 2022, ECLI:EU:C:2022:774, [66].

the level of protection in relation to some prohibited grounds of discrimination. In turn, the Court has not engaged with the issue of intersectional discrimination at the core of headscarf bans and so-called neutrality rules. The avoidance strategies deployed by the Court in these cases are surprising because, as the next section shows, the Court has implicitly grappled with the problem of intersectional discrimination in past decisions.

2 Towards an intersectional discrimination test at the ECJ: some building blocks

In *E.B.* for example, the applicant, a former police officer, claimed that a disciplinary sanction taken against him in the 1970s for 'an attempted offence of same-sex indecency' against two minors was discriminatory on grounds of sexual orientation.[90] He argued that the sanction for a similar offence involving 'heterosexual or lesbian acts' would have been 'significantly less severe'.[91] The ECJ acknowledged that the sanction was different for male and female 'homosexual acts' because the latter were treated similarly to 'heterosexual acts' whereas the sanction was more severe for men.[92] Although the case was presented as involving discrimination on grounds of sexual orientation, the Court's analysis clearly recognises the intersection of discrimination on grounds of gender and sexual orientation. This is visible in the comparison test conducted by the Court, which delineates the groups to compare based on both gender and sexual orientation, namely individuals convicted for 'male homosexual indecency' and those convicted for 'heterosexual or female homosexual indecency'.[93] Integrating intersectionality within the comparison test, even though implicitly, allowed the Court to find direct discrimination based on sexual orientation in this case.[94] If the Court had performed a comparison exclusively based on sexual orientation, it would have been unclear whether that is the ground for differentiation because 'lesbian acts' were, like 'heterosexual acts', subjected to a less severe disciplinary sanction.[95] This shows that the Court has demonstrated awareness of intersectional discrimination and integrated intersectionality to some of its analytical devices, and in particular the comparison-based test, even when approaching cases from a single protected ground.

In *Odar* and *Bedi*, the Court considered how age and disability shaped the disadvantage experienced by the applicants.[96] In *Bedi*, the applicant ceased to receive a bridging assistance when he became entitled to early retirement on grounds of his disability. In *Odar*, the applicant's compensation was reduced based on calculations taking into account the earliest possible retirement age, which was earlier than the general pensionable age due to the applicant's disability. The Court noted in both cases 'that severely disabled persons have specific needs stemming both from the protection their condition requires and the need to anticipate possible worsening of their condition'.[97] The analysis acknowledged 'the risk that severely disabled persons may have financial requirements arising from their disability which cannot be adjusted and/or that, with advancing age, those financial requirements may increase'.[98] This shows how awareness of the ways in which intersecting vectors of disadvantage shape discrimination can trigger a purposive interpretation (geared towards tackling specific vulnerabilities) as opposed to a formalistic interpretation (geared towards ensuring symmetrical treatment) of EU equality law.

90 Case C-258/17 *E.B. v Versicherungsanstalt öffentlich Bediensteter BVA*, 15 January 2019, ECLI:EU:C:2019:17, [20]. Because of the continuous effects of the sanction (a reduction in the applicant's retirement pension), the case fell within the temporal scope of EU discrimination law.

91 Case C-258/17 *E.B. v Versicherungsanstalt öffentlich Bediensteter BVA*, 15 January 2019, ECLI:EU:C:2019:17, [36].

92 Case C-258/17 *E.B. v Versicherungsanstalt öffentlich Bediensteter BVA*, 15 January 2019, ECLI:EU:C:2019:17, [67].

93 Case C-258/17 *E.B. v Versicherungsanstalt öffentlich Bediensteter BVA*, 15 January 2019, ECLI:EU:C:2019:17, [60].

94 For a similar reasoning, see Opinion in Case C-528/13, *Geoffrey Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang*, 29 April 2015, ECLI:EU:C:2014:2112, [44]: Advocate General Paolo Mengozzi had found 'clear indirect discrimination''consisting of a combination of different treatment on grounds of sex – since the criterion in question relates only to men – and sexual orientation – since the criterion in question relates almost exclusively to homosexual and bisexual men'.

95 Case C-258/17 *E.B. v Versicherungsanstalt öffentlich Bediensteter BVA*, 15 January 2019, ECLI:EU:C:2019:17, [67].

96 Case C-152/11 *Johann Odar v Baxter Deutschland GmbH*, 6 December 2012, ECLI:EU:C:2012:772 and Case C-312/17 *Surjit Singh Bedi v Bundesrepublik Deutschland and Bundesrepublik Deutschland in Prozessstandschaft für das Vereinigte Königreich von Großbritannien und Nordirland*, 19 September 2018, ECLI:EU:C:2018:734.

97 C-312/17 *Bedi* (2018), [75] and C-152/11 Odar (2012), [69].

98 C-312/17 *Bedi* (2018), [75] and C-152/11 Odar (2012), [69].

Moreover, Advocate General Kokott's opinion in the widely commented *Parris* case offers further pointers that could help the Court develop an intersectional discrimination test. For instance, she argues for a higher standard of judicial review as well as a stricter proportionality test:

> 'the combination of two or more of the grounds for a difference of treatment… may also mean that, in the context of the reconciliation of conflicting interests for the purposes of the proportionality test, the interests of the disadvantaged employees carry greater weight, which increases the likelihood of undue prejudice to the persons concerned, thus infringing the requirements of proportionality sensu stricto'.[99]

This bears influence on two levels. On the one hand, Advocate General Kokott argued that when two or more grounds of discrimination combine, the ensuing discrimination requires heightened scrutiny because 'the likelihood of undue prejudice to the persons concerned' 'increases'.[100] On the other hand, it becomes necessary to 'infring[e] the requirements of proportionality' and ascribe 'greater weight' to the interests of the applicant.

Advocate General Kokott's opinion in *Parris* also gives indications on how intersectionality should affect the structure of the Court's legal reasoning. She suggests that '[t]he Court's judgment will reflect real life only if it duly analyses the combination of those two factors, rather than… in isolation'.[101] This is because,

> '[t]he combination of two or more different grounds for a difference of treatment is a feature which lends a new dimension to a case such as this and must be taken duly into account in its assessment under EU law. After all, it would be inconsistent with the meaning of the prohibition on discrimination… for a situation such as that at issue here to be split and assessed exclusively from the point of view of one or other of the grounds for a difference of treatment in isolation'.[102]

Systematising the interventions above allows the contours of an intersectional discrimination test at the Court of Justice to be outlined. They reveal that intersectionality plays a double, diagnostic and prescriptive, function when operated in discrimination law.[103] At the diagnostic level, intersectionality alters the analytical tenets of the discrimination test by highlighting (1) legal invisibility at the intersection of different grounds of discrimination, (2) how discrimination law's categorisations perform exclusion by failing to acknowledge the social complexity of legal subjects, (3) how isolating one ground of discrimination obfuscates the multiplicity of social hierarchies and systems of disadvantage in which phenomena of discrimination are inscribed.[104] As Bribosia et al. put it, intersectionality contributes to 'understanding the facts' of a case by requiring that the plurality of grounds of discrimination and the context in which it takes place be duly recognised.[105] These analytical interventions can help give visibility to issues of discrimination that might otherwise have fallen into the cracks of the ECJ's discrimination test.

99 Opinion of Advocate General Kokott, Case C-443/15 *David L. Parris v Trinity College Dublin and Others*, 30 June 2016, ECLI:EU:C:2016:493, [157].

100 Opinion of Advocate General Kokott, Case C-443/15 *David L. Parris v Trinity College Dublin and Others*, 30 June 2016, ECLI:EU:C:2016:493.

101 Opinion of Advocate General Kokott, Case C-443/15 *David L. Parris v Trinity College Dublin and Others*, 30 June 2016, ECLI:EU:C:2016:493, [4].

102 Opinion of Advocate General Kokott, C-443/15 *David L. Parris v Trinity College Dublin and Others*, 30 June 2016, ECLI:EU:C:2016:493, [99], [146] and [153].

103 This double function is adapted from the framing functions outlined by Snow, D. A. et al (1986), 'Frame alignment processes, micromobilization, and movement participation', *American Sociological Review* 51, p. 464. See Xenidis, R. (2020), 'Beyond the "master's tools": putting intersectionality to work in European non-discrimination law: a study of the European Union and the Council of Europe non-discrimination law regimes', European University Institute.

104 See Xenidis, R. (2020), 'Beyond the "master's tools": putting intersectionality to work in European non-discrimination law: a study of the European Union and the Council of Europe non-discrimination law regimes', European University Institute, pp. 78-96 and pp. 192-204.

105 Bribosia, E., Médard Inghilterra, R. and Rorive, I. (2021), 'Discrimination intersectionnelle en droit: mode d'emploi' ('Intersectional discrimination in law: instruction manual'), *Revue trimestrielle des droits de l'Homme* 126, pp. 248-257.

At the prescriptive level, intersectionality alters the interpretive tenets of the discrimination test by demanding (1) an expansive interpretation of non-discrimination grounds and their personal scope that accommodates the heterogeneity of the groups they cover, (2) a heightened standard of review via a modified proportionality test to remedy the law's blind spots, (3) an adapted selection of relevant comparators and use of the comparison-based test and (4) a departure from the traditional evidentiary standard that requires discrimination to be proved on the basis of each protected ground invoked.[106] Furthermore, intersectionality contributes to the legal 'qualification of facts' by facilitating the applicant's task of establishing a *prima facie* case of discrimination, and it requires that the specificity of harms be taken into account and reflected in the damages awarded.[107] Hence, intersectionality makes important prescriptive contributions to the building blocks of the traditional non-discrimination reasoning. It shifts the parameters of existing legal remedies within what could be called an intersectional discrimination test.

Conclusions

This article has shown that the series of so-called 'headscarf cases' referred to the Court of Justice of the EU since 2015 has provided important opportunities to reflect on the consequences of intersectional discrimination in Europe. So-called 'neutral dress' rules contribute to erasing minority groups from key social spaces and create exclusion on grounds of religion, gender and ethnicity. This article has explored litigants' increasing engagement with intersectionality, the obstacles they face in doing so, and the patchy judicial receptivity for such arguments at national and European level. Exploring the case law of the ECJ in depth, this article has nonetheless identified opportunities for embedding intersectionality into the Court's discrimination test. It has proposed a framework for operating intersectionality as a diagnostic and prescriptive device that alters the central analytical and interpretive tenets of the discrimination test used by the Court of Justice. In so doing, the article contributes to existing scholarly efforts to respond to interrogations on how to put intersectionality into practice in EU equality law.

Attempts to subsume intersectional discrimination into the equality protection mandate of the European Court of Justice finds support in the evolving jurisprudence of major international institutions. For instance, the decisions of the UN Human Rights Committee offer a basis for conceptualising neutrality rules and headscarf bans through the lens of intersectional discrimination on grounds of gender and religion, and possibly ethnic background. In the cases of *Baby Loup* and *Naïma Mezhoud*, the Committee recognised respectively that a 'dismissal, based on the internal regulations of [a] childcare centre imposing neutrality on employees' and 'the refusal to allow [an applicant] to participate in [a] training course while wearing a headscarf' both 'constitut[e] intersectional discrimination based on gender and religion'.[108]

In addition, some decisions of the European Court of Human Rights provide interesting templates for reading intersectional discrimination into the prohibited forms of discrimination recognised in EU law. For instance, in *Carvalho Pinto de Sousa Morais*, the ECtHR recognised the existence of discrimination arising from intersectional stereotypes linked to an applicant's sex and age, and in *B.S. v Spain*, the applicant's particular vulnerability based on her gender, ethnic origin and professional status.[109]

106 Xenidis, R. (2020), 'Beyond the "master's tools": putting intersectionality to work in European non-discrimination law: a study of the European Union and the Council of Europe non-discrimination law regimes', European University Institute.

107 Bribosia, E., Médard Inghilterra, R. and Rorive, I. (2021), 'Discrimination intersectionnelle en droit: mode d'emploi' ('Intersectional discrimination in law: instruction manual'), *Revue trimestrielle des droits de l'Homme* 126, pp. 258-266, 267-274.

108 UN Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2662/2015, CCPR/C/123/D/2662/2015, para. 8-13 and Views adopted by the Committee under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 2921/2016, CCPR/C/134/D/2921/2016, para. 8.13-8.14.

109 Application No. 17484/15, *Carvalho Pinto de Sousa Morais v Portugal* (2017), paras. 52-56. See also Application No. 47159/08 *B.S. v* Spain (2012), para. 62.

Looking outside the EU therefore supports litigants' efforts to legally translate intersectionality into an intersectional discrimination test at the ECJ.[110] As the central – analytical and prescriptive – tenets of this test become clearer, the reluctance of domestic courts and the ECJ to acknowledge intersectional discrimination will likely decrease.

110 Strategic litigation also target the ECtHR, see e.g. The Human Rights Centre at Ghent University and The Equality Law Clinic at the Université Libre De Bruxelles, *Third Party Intervention in Application No. 50681/20, Mikyas and others v Belgium* (pending).

Safeguards and redress for victimisation: Examples from Belgium, Bulgaria, Italy and Poland

Margarita S. Ilieva – András Kádár*

Introduction

Non-discrimination law has several specificities that stem from the fact that it regulates relationships that are often characterised by an asymmetry of power and resources. The people suffering discrimination are in a position that is much weaker in several aspects than that of the discriminator. For instance, when an employer discriminates against an employee by breaching the 'equal pay for equal work' principle, the employee may not be in a position to know for sure that this is the case, as all the relevant information (salary levels, information about the tasks, qualifications, professional experience, and so on of the workers) is in the employer's possession. Moreover, if the employee decides to file a complaint, they may have to face negative consequences, including future disadvantages in remuneration, promotion, or working conditions. Furthermore, even if there are colleagues who may be able to support the employee in the pursuit of the complaint, because they are aware of certain facts or have witnessed events that could help the complaining employee, they may be reluctant to come forward for the exact same reason of 'being at the employer's mercy' regarding important aspects of their employment.

These problems are well reflected in the results of the EU-MIDIS II survey, which found that lack of proof was the second most common reason for not reporting discrimination experienced in relation to housing and the third most common reason in relation to access to employment, whereas fear of negative consequences was the single most common reason for not reporting discrimination in education.[1]

Non-discrimination law attempts to offset the informational asymmetry through one of its specific features, the shifted burden of proof. The latter is the rule that it is the respondent's responsibility to refute any possible inference of discrimination stemming from facts established by the complainant.[2] A respondent may rebut such a presumption by proving a legitimate reason for the treatment or by proving that it was not in fact less favourable. The potential reluctance of complainants and those who would support them in seeking remedy is addressed through the ban on victimisation: Article 9 of Directive 2000/43/EC (the Racial Equality Directive, RED) provides for protection of individuals from 'any

* Margarita S. Ilieva is the non-discrimination expert for Bulgaria in the European network of legal experts in gender equality and non-discrimination. She is a strategic litigator at the international level and an advisor and analyst for a range of international organisations. András Kádár is the non-discrimination expert for Hungary in the European network of legal experts in gender equality and non-discrimination. He is a lawyer and co-chair of the Hungarian Helsinki Committee, one of Hungary's oldest and largest human rights watchdog organisations.

1 European Union Agency for Fundamental Rights (FRA) (2017), *Second European Union Minorities and Discrimination Survey – Main results*, p. 49, at: https://fra.europa.eu/en/publication/2017/second-european-union-minorities-and-discrimination-survey-main-results.

2 Among other authorities, Article 8(1) of Directive 2000/43: 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment'.

adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment'.

The regulation of victimisation is relatively laconic in the RED and in Directive 2000/78 (the Equality Framework Directive or EFD). The latter contains similar language, although due to the EFD's material scope it is narrowed down to protection against victimisation by the employer: 'Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment'. The recitals of both Directives provide little detail regarding exactly how this protection should be construed,[3] and, as Liu and O'Cinneide put it, the Court of Justice of the European Union (CJEU) has yet to clarify the concept of victimisation, although it is 'a significant element of procedural non-discrimination law, in that it protects individuals from retaliation for seeking to enforce the law'.[4]

This article looks at how victimisation (also mentioned in this article as 'reprisal' or 'retaliation') is regulated in four EU Member States (Belgium, Bulgaria, Italy and Poland),[5] and identifies good practices as well as gaps and shortcomings in these jurisdictions with the objective of formulating recommendations for how the RED and EFD and their domestic implementation could be developed with respect to this important safeguard against the obstruction of remedying discrimination. In particular, it will look at: the personal scope of protection from victimisation; the scope of protected action – the underlying seeking of rectification for discrimination; the type of action constituting litigable retaliation; the burden of proof in such cases; and the sanctions applicable to victimisation.

1 The personal scope of victimisation

The first question arising with regard to victimisation is the personal scope of the ban: who is to be protected from whom? As far as the *acquis* – outside the area of gender equality – is concerned, protection from victimisation connected to the grounds listed in Article 1 of the EFD (religion or belief, disability, age or sexual orientation) exists with regard to employees vis-à-vis the employer, whereas victimisation connected to discrimination based on racial or ethnic origin is banned in relation to any person who is subjected to adverse treatment or consequences 'as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.'

The text of the RED is formulated in a way that suggests that a very wide circle of actors fall under the personal scope of the provision regulating victimisation on the side of both those protected (provided that they face adverse consequences that can be regarded as a reaction to any complaint or enforcement attempt) and those against whom the protection must be provided. In particular, the RED specifies no limit to the persons having victim status – it simply uses the term 'individuals', therefore, virtually anyone could be a victim of victimisation. Moreover, the RED does not even mention the victimiser, enabling any party to be established as such, as long as they are responsible for an adverse reaction to seeking equality.

In addition to the broad language of the RED's provisions, the CJEU has confirmed that they are subject to an inclusive, teleological construction (see in more detail below).

3 Both recitals state that 'the effective implementation of the principle of equality requires adequate judicial protection against victimisation'.

4 Liu, K. and O'Cinneide, C. (2019), *The ongoing evolution of the case-law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC*, p. 14.

5 Detailed information on the respective jurisdictions was provided to us by the country experts in the non-discrimination field, Sébastien van Drooghenbroeck (BE); Chiara Favilli (IT) and Łukasz Bojarski (PL), whom the authors are grateful to and thank for their valuable contributions, insights, and suggestions. This article would not be possible without their generous support.

1.1 Persons protected against victimisation

1.1.1 Enablers

A look at the regulation in the jurisdictions under scrutiny shows that in the course of the implementation process, legislators tended to adopt an approach substantiating such a wide interpretation. In three out of the four legal systems (Bulgaria, Italy and Poland), in addition to the victim/complainant, the following categories also fall under the scope of protection from victimisation either explicitly, or implicitly, depending on judicial interpretation:

- witnesses;
- legal and other representatives;
- *actio popularis* complainants and their supporters and representatives;
- equality body staff, for instance, when acting as advocates/representatives of victims, or claimants in *actio popularis* cases;
- providers of non-legal victim support; or
- people characterised by the same protected ground as the alleged discrimination victim but not directly associated with the victim, where they suffer reprisals linked to the alleged victim's pro-equality action.

The implementation process in these jurisdictions seems, in some respects, to have gone beyond what is strictly required by the *acquis* in this regard, which is wide enough in itself. The Italian regulation for instance proclaims that judicial protection is applied against any prejudicial behaviour towards a person affected by direct or indirect discrimination or towards *any other person* as a reaction against *any activity* aimed at obtaining equality of treatment.[6] Indeed, the proposition of 'any activity', which seems to go beyond 'a complaint or proceedings', is a purposive approach in line with the general position of the CJEU that the RED is to be construed broadly in order to give effect to its purpose.[7] A case in which the Varallo municipality was sanctioned for victimising (through an ignominious communications campaign) four citizens who sued the municipality for putting up racist posters, but who had lost the case for lack of standing (they were not members of the groups targeted by the posters), illustrates that the judicial interpretation of the legislation can also be rather wide.[8]

In Poland, the Equal Treatment Act (ETA)[9] provides that rights arising from a breach of the principle of equal treatment must not form the basis for adverse treatment and must not cause *any negative consequences* for the individual.[10] The protection corresponds to the broad scope of the RED (protecting any 'individuals') and 'extends to a person who in any way supports someone exercising their rights (such as a witness or a person helping the victim to bring a complaint).'[11] Specific rules pertain to labour relationships, where, under the Labour Code[12] any adverse treatment and negative consequences in reaction to a discrimination complaint are prohibited in relation to complainants, as well as to any employee who in any way supports a victim of discrimination.

The Bulgarian legislation is particularly interesting, as it also accepts the right to be protected on the basis of *associated* and *presumed future equality-seeking/enforcement* attempts. The Protection Against

6 Article 4-*bis* of Legislative Decree 215/2003 (transposing Directive 2000/43) and Legislative Decree 216/2003 (transposing Directive 2000/78).
7 Among many other authorities, see judgment of 16 July 2016, *CHEZ*, Case C83/14, ECLI:EU:C:2015:480, paras 55-58.
8 For a detailed description of the case, see section 1.2.3, below.
9 Act on the implementation of certain provisions of the European Union in the field of equal treatment (*Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*), 3 December 2010.
10 ETA, Article 17.
11 Bojarski, Ł. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Poland*, p. 83.
12 Act on the Labour Code (*Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy*), 26 June 1974, Article 18(3e).

Discrimination Act (PADA)[13] defines victimisation as: a) less favourable treatment of a person who has taken, is presumed to have taken or will presumably take any action for protection against discrimination; b) less favourable treatment of a person where a person associated with them has taken, is presumed to have taken, or will presumably take any action for protection against discrimination; c) less favourable treatment of a person who refused to discriminate. Thus, the definition extends the protection against victimisation to those who are treated less favourably because they are presumed to be taking action for protection against discrimination in the future. In light of the empirical data showing the reluctance of victims to launch discrimination proceedings for fear of reprisal (EU-MIDIS II, cited), such an explicit expansion of the scope of protection to future action could be particularly useful in countering pre-emptive measures of retaliation on the part of the discriminator or anyone else interested in preventing the enforcement of the principle of equal treatment.

The protection is further expanded by the application of the concepts of assumption and association to the issue of victimisation. The PADA expressly includes in the definition of victimisation the less favourable treatment of a person not only if they have taken an action for protection against discrimination, but also if they are assumed to have taken such action or if they are associated with someone who has taken or is assumed to have taken such action. Persons who are assumed to have taken or to be taking pro-equality action and persons associated with those who have taken or are assumed to be taking action to enforce the principle of equal treatment are also covered by the ban on victimisation in Italy,[14] and, depending on judicial interpretation, may be covered in Poland.[15]

1.1.2 Barriers

In the jurisdictions under scrutiny, two problematic limitations have been identified as far as the scope of persons protected by the legal framework against victimisation is concerned. In Bulgaria, the statutory definition of victimisation requires a comparative disadvantage to be established (as only those who are 'treated less favourably' in relation to the enforcement of the principle of non-discrimination can claim the legal protection against victimisation),[16] which in turn makes it necessary to identify a comparator. This is not in line with the directives, which require only that there has been 'adverse treatment or adverse consequence' as such and do not demand a comparison to be made.

While there is no comprehensive information on the ensuing difficulties in legal practice, there have been individual cases where this requirement has posed additional obstacles to the enforcement of the right to non-discrimination. For instance, in 2018, the Sofia City Court (SCtC) confirmed a judgment by the Sofia District Court upholding a claim by an equal rights activist that a television host had victimised him by using his show to disparage him, impairing his reputation (e.g. vilifying him as a 'snitch'), in response to proceedings the activist brought with the Protection Against Discrimination Commission (PADC) against the journalist for hate speech.[17] The journalist was ordered to publish the decision in a daily newspaper chosen by the claimant and to abstain from further victimising him in any manner, he was also ordered to pay the activist compensation for non-pecuniary damages of EUR 750 (BGN 1 500). In this case, the court required the complainant (as a precondition for the admissibility of his victimisation claim) to explicate the implied comparison – who the comparator was and how they and the claimant compared – thus requiring him to set out how he had been treated less favourably than any other person who was not targeted by the respondent television host in the impugned show.

While in most cases it may not be very difficult to show how the treatment of someone targeted with this type of retaliation for trying to enforce the principle of equal treatment is less favourable than the

13 Protection Against Discrimination Act (BG-PADA) (Закон за защита от дискриминация), Additional Provision Section 1.3.
14 Response of Chiara Favilli, country expert in the non-discrimination field for Italy.
15 Response of Łukasz Bojarski, country expert in the non-discrimination field for Poland.
16 Protection Against Discrimination Act, Additional Provisions, Section 1.3.
17 SCtC, Decision of 20 December 2018 in Case No. 1476/2018.

treatment of others who do not have to face similar adverse consequences, the statutory requirement set for litigants by the Bulgarian regulation poses a limitation to the protection against victimisation that seems to go beyond what is acceptable under the EU *acquis*, in the authors' opinion. (In fact, in its guidelines on the shared burden of proof, the Hungarian Equal Treatment Advisory Board, an expert body set up to assist with professional advice the work of the Hungarian equality body, expressly stated that in the case of victimisation the complainant shall not be required to identify a person or group in a comparable situation.)[18]

Another problematic issue has been identified in Belgium, where the federal legislation has by far the most restrictive regime of those examined here when it comes to the scope of persons protected from victimisation. The General Anti-Discrimination Federal Act of 10 May 2007[19] and the Racial Equality Federal Act of 10 May 2007[20] protect from reprisals victims filing a complaint (including persons on whose behalf a complaint has been submitted by an association or by UNIA, the Belgian equality body), and any witness in the procedure, however, 'persons having otherwise assisted in the preparation or the filing of the complaint are not included'[21] in the scope of protection. Furthermore, the notion of 'witness' is construed in a very limited manner. In a 28 December 2010 ruling, the Ghent Labour Appeal Court confirmed[22] that 'the protection of a witness against reprisal [...] only applies to a person who acknowledges the facts of the case in a signed and dated document as part of the trade union investigation of the presumed discrimination or to a person who appears as a witness in the proceeding before the labour inspector.'[23]

The regulation and its strict interpretation have been criticised as non-compliant with the EU *acquis* by several experts, including the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts, which, in its 2022 report, suggested the extension of the protection against reprisals to any person intervening as a counsel, defender or in support of the alleged victim of discrimination.[24]

The Expert Commission's assessment was confirmed by the Court of Justice of the European Union (CJEU) in the *Hakelbracht* judgment of 20 June 2019.[25] Although the case concerns gender-based discrimination and falls under the scope of Directive 2006/54/EC,[26] it is worth describing in more detail, as the judgment provides important guidelines on how the scope of protection from victimisation will be construed to be in line with the *acquis*. The case concerned a recruitment procedure, in the course of which a shop manager, Ms Vandenbon, wished to employ as a salesperson Ms Hakelbracht who stated during the job interview that she was three months pregnant. Her employer, WTG Retail, informed Ms Vandenbon that they did not want to hire Ms Hakelbracht because of her pregnancy, and although Ms Vandenbon warned the company that this was unlawful, the company refused to recruit Ms Hakelbracht. Ms Vandenbon informed Ms Hakelbracht that her candidacy had not been accepted because of her pregnancy, and after Ms Hakelbracht lodged a complaint with the Institute for Equality of Women and Men, WTG Retail blamed Vandenbon for being the cause of the complaint and eventually terminated her employment (allegedly for reasons not related to the recruitment of Ms Hakelbracht).

18 Hungarian Equal Treatment Advisory Board (2008), Guideline 384/4/2008. (III.28.) TT. on the Shared Burden of Proof, p. 2.
19 OJ (Moniteur belge), 30 May 2007.
20 OJ (Moniteur belge), 30 May 2007.
21 Bribosia, E. and Rorive, I. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Belgium*, p. 94.
22 Rechtskundig Weekblad, 2011-12, no. 29, 17 March 2012, p. 1304-1305.
23 Bribosia, E. and Rorive, I. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Belgium*, p. 94.
24 Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2022), *Rapport final: Combattre la discrimination, les discours de haine et les crimes de haine: une responsabilité partagée*, pp. 118-120.
25 CJEU, judgment of 20 June 2019, *Hakelbracht*, C-404/18, ECLI:EU:C:2019:523.
26 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).

Since according to the Belgian regulations outlined above Ms Vandenbon could not have relied on protection from victimisation (as she was not a formal witness in the proceedings launched by Ms Hakelbracht), the Labour Court of Antwerp asked the CJEU whether Directive 2006/54 must be interpreted in the sense that it precludes national legislation under which a person who supports an employee who believes that they have been discriminated against is protected from retaliatory measures only if they have 'acted as a witness in the context of the investigation of that complaint' and the supporting employee's witness statement 'satisfies formal requirements under that legislation'.[27]

The CJEU pointed out that 'the category of employees who are entitled to the protection provided by [the Directive] must be interpreted broadly and include all employees who may be subject to retaliatory measures taken by an employer in response to a complaint of discrimination on grounds of sex, without that category being otherwise delineated'. This broad interpretation is supported by the Directive's objective 'of ensuring the implementation of the principle of equal treatment' and the principle of effective judicial protection, which would be deprived of its essence if 'it did not cover the measures which an employer might take against employees having, formally or informally, defended the protected person or testified in that person's favour. Those employees, who are ideally placed to support that person and to become aware of cases of discrimination committed by their employer, could then be discouraged from intervening on behalf of that person for fear of being deprived of protection if they do not meet certain formal requirements, such as those at issue in the main proceedings, which could seriously jeopardise attaining the objective pursued by Directive 2006/54 by reducing the likelihood that cases of discrimination on grounds of sex are detected and resolved'. Accordingly, Directive 2006/54 should be interpreted in the sense 'that employees […], other than the person who has been discriminated against on grounds of sex, must be protected to the extent that such employees are likely to be disadvantaged by their employer because of the support they have provided, formally or informally, to the person who has been discriminated against.'[28]

It remains to be seen whether the CJEU will apply the principles of the *Hakelbracht* judgment directly to the wider context of the RED, i.e. outside the scope of an employment relationship and therefore extending protection to persons who procedurally speaking may be distanced from the individual complainant. However, it remains valid that, as per the CJEU's case law under the RED and the EFD, the objective of ensuring the implementation of the principle of equal treatment through effective judicial protection warrants interpretations of the directives that are capable of achieving that objective. It seems fair to say that this can justify the opening of the scope of protection quite wide to be able to offset the power imbalance that is often in place between the discriminators/victimisers on the one hand, and the targets of discrimination/victimisation and their supporters on the other.

In any case, the adaptation of the Belgian federal legislation as required by the *Hakelbracht* judgment has already started and is currently under discussion.[29] It must also be mentioned that most of the federated (community and regional) laws applicable in Belgium are broader and more generous than the federal legislation in their identification of persons entitled to protection against retaliation, which may facilitate the *acquis*-compatible reform of the latter (for example, the 'Framework Ordinance to ensure a Diversity Policy and to combat discrimination in the local Brussels Civil Service' of 25 April 2019 provides that 'the prohibition on prejudicial measures by the employer shall also apply to any workers who act as a witness, defender, counsel or support in favour of the person who has filed the complaint').[30]

27 CJEU, judgment of 20 June 2019, *Hakelbracht*, C-404/18, ECLI:EU:C:2019:523, para 23.
28 CJEU, judgment of 20 June 2019, *Hakelbracht*, C-404/18, ECLI:EU:C:2019:523, paras 27-35.
29 Response of Sébastien van Drooghenbroeck, country expert in the non-discrimination field for Belgium. See also: Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2022), *Rapport final: Combattre la discrimination, les discours de haine et les crimes de haine: une responsabilité partagée*, p. 120.
30 Response of Sébastien van Drooghenbroeck, country expert in the non-discrimination field for Belgium.

1.2 The type of action that warrants protection from victimisation

Closely connected to the issue of personal scope, it is worth looking at the types of reprisal that trigger the application of the ban on victimisation, and what conditions this action must satisfy to warrant protection from retaliation.

1.2.1 The intent of the complainant regarding the underlying discrimination complaint

The first question that arises in this regard is whether the good or bad faith of the complainant professed in the course of the original anti-discrimination action is relevant from the point of view of the protection from victimisation, i.e. whether there is a requirement for the alleged victim to have acted in good faith in order to qualify for victimisation protection.

Italian case law suggests that the good faith of the complainant may be taken into account when the court decides on whether protection from victimisation is to be granted. A case decided by the Supreme Court of Italy in 2019 involved a member of the board of a company who was dismissed after having protected an employer from discrimination on the ground of race and ethnic origin. The Supreme Court held that according to the Civil Code, even if the dismissal is unfair, the aggrieved party has no right to be reinstated, and is only entitled to compensation, however, the anti-discrimination law provides for a special regime that should prevail and be applied in such cases. Thus, when the dismissal is a reaction to an initiative carried out *with good faith and fairness* by the dismissed person in order to assure the principle of equal treatment irrespective of race and ethnic origin, the dismissed person is in turn a victim of a discriminatory conduct under the terms of the RED and is therefore entitled to be reinstated to their position.[31]

In Bulgaria, there are no explicit requirements under the legislation regarding *bona fide* action, and the jurisprudence is scarce and somewhat inconsistent in this regard. In the above-quoted case regarding the retaliatory actions of a television host, the court implied no *bona fide* requirement for standing, whereas in at least one other case, a good faith requirement was implied regarding an instance of retaliation through legal action. In a criminal libel case, the Sofia City Court confirmed in its 2020 judgment the acquittal of a former employee who had lodged a complaint of harassment and discriminatory dismissal (on race and religious grounds) against her employer with the PADC, and was subsequently accused of libel against the employer.[32] Both the first and second instance courts held that the accused had exercised her constitutional right to complain by bringing a case before the PADC. The SCtC held that the aim pursued by such a complaint was determinative – an action could not be qualified as libel if its objective was to defend impaired rights as opposed to inflicting damage on the other party.

In Belgium, there is, in the current state of the law, no *bona fide* requirement, however, there are some limitations aimed at managing a purported risk of abuse of the protection from victimisation. Outside the field of employment, the judge is authorised to shorten the period during which the presumption of retaliation (see below) applies, and while the law does not specify the factors that the judge may base such a decision on, the complainant's bad faith could be one such factor.[33] Furthermore, reckless and vexatious litigation may, in accordance with the general rules of civil liability, result in the claimant being ordered to pay damages.[34] In addition, in the context of the reform of the Belgian system of victimisation necessitated by the CJEU's *Hakelbracht* judgment, there has been some discussion of putting in place a system of forfeiture of protection in the event of abuse in order to offset the extension of the circle of persons benefiting from protection against victimisation,[35] (although the suggested policy does not seem

31 Supreme Court of Italy, judgment no. 31660, 4 December 2019. Quoted in the response of Chiara Favilli, country expert in the non-discrimination field for Italy.
32 Sofia City Court, Decision No. 374 of 12 June 2020 in Case No. 2760/2019.
33 Response of Sébastien van Drooghenbroeck, country expert in the non-discrimination field for Belgium.
34 Response of Sébastien van Drooghenbroeck, country expert in the non-discrimination field for Belgium.
35 Response of Sébastien van Drooghenbroeck, country expert in the non-discrimination field for Belgium.

to be based on facts, as there is no data to suggest that people abuse the existing protections, whereas on the contrary, victimisation and discrimination appear to be underreported and underlitigated).

The directives' definition contains no 'good faith' element attached to complaints or proceedings aimed at enforcing compliance with the principle of equal treatment. While protection from victimisation may be abused – like almost any other right – it is clear that an individual seeking protection from victimisation should not have to prove their own good faith in pursuing their right to non-discrimination in the first place. The onus should be on the respondent to prove that the purported equality seeker acted in bad faith. In the authors' opinion, any other legislation or judicial interpretation would be contradictory to the *acquis*.

1.2.2 Action aimed at substantiating a discrimination complaint

A Polish case raised an interesting issue, namely whether unlawful acts serving the purpose of enforcing the principle of non-discrimination may still enjoy the protection of banning victimisation. The case concerned an employee who, due to her position in the company, had full access to the personal data of the employees and thus discovered gender-based pay gaps in the salaries paid by the company. She filed a lawsuit aimed at compensation for the employer's breach of the principle of equal treatment as regards remuneration and she attached to the claim copies of documents from the personal files of former and current employees of the respondent company. After the claim with the attachments was delivered to the employer, it terminated the complainant's employment contract due to a serious breach of fundamental obligations stemming from the employment relationship (including the requirement of professional secrecy). The complainant challenged her dismissal, but lower-level courts rejected her claim on the basis that the professional breach and the use of personal data for private purposes 'deserved particular disapproval and was rightly qualified by the employer as a serious infringement of basic employment duties'.[36]

However, the Polish Supreme Court came to a different conclusion.[37] It recalled that Article 183e(1) of the Labour Code stipulates that the exercise by an employee of their rights due to an infringement of the principle of equal treatment in employment must not be the basis for unfavourable treatment of the employee, and should not lead to any negative consequences for the employee, in particular it does not constitute a reason justifying termination of the employment relationship or its termination without notice. The Court reasoned that there is no doubt that any lawful action taken by an employee in relation to a breach of the principle of equal treatment must not have any negative consequences. The situation becomes more complex when the employee resorts to action that is unlawful. Substantiating unequal treatment with regard to remuneration may not be possible without referring to the remuneration of other employees, and employers should be prevented from abusing confidentiality provisions with the purpose of defending themselves against claims of breach of the principle of equal treatment. The Supreme Court recalled that in a similar case[38] it had already ruled that disclosing to other employees data covered by the salary confidentiality clause, in order to counteract violation of the principle of equal treatment and manifestations of wage discrimination between employees, does not constitute a reason justifying termination of the employment contract without notice.

Similarly, the Court held that the objective of the violation (i.e. the enforcement of the principle of equal treatment) should be taken into account when assessing the proportionality of the employer's reaction to it. Not all actions of an employee related to counteracting a breach of the principle of equal treatment are exempted from possible sanctions on this basis, however, the adjudication of the case should take into account the entirety of the circumstances, including the issue whether, under the given

36 The judgment of the Regional Court as quoted in Polish Supreme Court judgment no. I PK 12/11, 15 July 2011.
37 Polish Supreme Court judgment no. I PK 12/11, 15 July 2011.
38 Polish Supreme Court judgment no. II PK 304/10, 26 May 2011.

circumstances, the Labour Code's provisions related to victimisation exempt the employee from the legal consequences applied by the employer.

This case highlights the need to recognise the importance of protecting through the ban on victimisation action that is aimed at substantiating suspicions regarding a discriminatory action or practice (as a means of offsetting the informational power imbalance that is frequently present between the violator and the victim in discrimination cases), although it is also important to clarify where the allowable limits of obtaining and using evidence are (including the differentiation between using the information in court or other anti-discrimination proceedings on the one hand, and for purposes that are not legitimate, on the other). In the authors' view, the acquisition of information substantiating discrimination should be regulated no less favourably than protections available for whistle-blowers. The authors are of the view that due to the specificities of individual cases, there is no clear normative manner in which the significance of a complainant's intent and the lawfulness of the means they resort to with the purpose of enforcing the principle of non-discrimination could be unambiguously codified. In the absence of a normative solution to this issue, it is likely to fall to the CJEU to clarify the main principles guiding such situations on a case-by-case basis.

1.2.3 The outcome of the underlying equality complaint or proceedings

Another question regarding the actions triggering protection from victimisation is whether the outcome of the original complaint or proceedings against discrimination has any bearing on the applicability of the protection, i.e. whether the complainant's inability to win their discrimination case has a bearing on their standing as a target of victimisation.

In Italy, protection against victimisation is not dependent on the outcome of the initial discrimination case – not even if the case is lost because the complainant has no legal standing.[39] One lawsuit that illustrates this is the above-mentioned case of four private Italian citizens who sued the Varallo municipality for disseminating racist posters around the city against foreign 'hawkers' without licenses and women wearing the burqa. The Court of Appeal of Turin rejected the petition on the basis that the municipality had removed the posters before the judgment was handed down. The court also found that the claimants, who were Italian citizens, had no legal standing, because they were not victims and did not live in Varallo. After the case was closed, further posters were put on display around the city, naming and ridiculing the claimants for wasting the municipality's resources by suing it. The four Italian citizens launched further lawsuits against the municipality for victimising them.

The Tribunal of Milan rejected one of the claims, but the Court of Appeal of Milan quashed the judgment and found that this had been a case of victimisation even if the claimants were not found to be victims of discrimination. The Court found that the protection against retaliation extended to anyone who suffered a disadvantage connected to any activity aimed at promoting equal treatment. The Court underlined that actions against discrimination should be enhanced and protected, even if those taking them are not victims themselves. The Court of Appeal granted compensation of EUR 5 000 to each claimant and ordered the publication of the judgment in a local newspaper and on the municipality's website and Facebook page.[40]

Similarly, in Belgium, the fact that the underlying discrimination complaint is ultimately found to be without merit does not preclude protection against victimisation. A presumption of retaliation applies in such cases (explained in more detail below), and if the person against whom the complaint is directed

39 Response of Chiara Favilli, country expert in the non-discrimination field for Italy.
40 The case description is based on the flash report by Chiara Favilli: European network of legal experts in gender equality and non-discrimination (2017), 'Victimisation by politicians against non-discrimination law defenders', July 2017.

cannot refute this presumption, the sanctions set out by the law will apply, even if no discrimination is found in the original proceeding.[41]

In Bulgaria too, the outcome of the original complaint is not decisive in respect of the protection from victimisation. In the 2020 libel judgment discussed above, the SCtC confirmed that there was no legal requirement to substantiate one's rights claim (in general, not only regarding discrimination) in order to benefit from protection against legal action in retaliation for that claim.[42]

1.2.4 The requirement of formal proceedings

Another question that arises is what type of action aimed at the enforcement of the principle of equal treatment triggers the legal protection from victimisation. The language of the EFD suggests that a certain degree of formality is required in this regard, as it talks about 'a complaint within the undertaking' or 'any legal proceedings'. However, the RED uses language that is open to more flexible interpretations, as it encompasses any type of proceedings (not only legal ones) and, as an expressly separate category, complaints irrespective of the forum to which they are addressed or the form in which they are made.

In the authors' view, this means not only that a complaint can be any kind of remedial action that does not take the form of a (legal) proceeding, but also that the term 'complaint' can encompass any amicable resolution rather than enforcement of an adversary nature, providing the responsible party with an opportunity to address the issue based on goodwill. Such initiatives should be protected in cases where, instead of returning the goodwill of the victim, the responsible party acts in bad faith and punishes or suppresses them. *A fortiori* because such cooperative victims deserve encouragement – it is in everyone's best interests and in the public interest for the parties to cooperate and avoid legal proceedings.

Our scrutiny of the four domestic systems shows that, with regard to the formality of the proceedings, a wide approach has been taken in the course of their implementation.

Neither in Bulgaria nor Italy does the legislation prevent a person from having standing for protection against victimisation if they have opted for non-legal (intra-organisational or other informal, or public) channels of advocacy against discrimination (including complaints addressed to NGOs), rather than legal/formal proceedings to assert the principle of equal treatment.[43]

The Belgian federal legislation is again rather restrictive in this regard: a 'complaint' for the purposes of protection from victimisation is (i) a complaint addressed to the organisation or company against which the discrimination is alleged, in accordance with the procedures in force; (ii) a complaint to the administrative services in charge of monitoring compliance with social laws, or (iii) a lawsuit. In addition, when it does not take the form of a lawsuit, the complaint must meet strict formal requirements: it must be in writing, dated, signed and sent by registered mail.[44]

In Poland, the issue is subject to judicial interpretation. In the case discussed above regarding the unlawful in-court use of other employees' data, the Supreme Court has clarified that when the pertaining provision of the Labour Code[45] uses the phrase 'exercise of rights by the employee', it cannot be equated only with the employees' making claims against the employer, as this notion undoubtedly also includes the employees' actions aimed at the clarification of the existence of differential treatment (such as the collection of data showing whether there is a pay discrepancy). The language used by the Supreme Court in another case[46] when referring to the protection of 'lawful action' undertaken by an employee

41 Response of Sébastien van Drooghenbroeck, country expert in the non-discrimination field for Belgium.
42 Sofia City Court, Decision No. 374 of 12 June 2020 in Case No. 2760/2019.
43 Response of Chiara Favilli, country expert in the non-discrimination field for Italy.
44 Response of Sébastien van Drooghenbroeck, country expert in the non-discrimination field for Belgium.
45 Article 183e(1) of the Labour Code.
46 Polish Supreme Court judgment no. II PK 140/18, 4 June 2019.

in relation to a breach of the principle of equal treatment, is not decisive on whether 'action' means a formal legal action or any activity that is in accordance with the laws.[47]

1.3 Persons liable for victimisation and their actions

1.3.1 Persons liable for victimisation

Significant differences of approach between the jurisdictions under scrutiny may be observed regarding the scope of liability for victimisation. In Belgium, the protection from victimisation is in place only vis-à-vis the person against whom the discrimination complaint is directed,[48] whereas in Bulgaria and Italy the circle of potential victimisers includes third parties, i.e. persons and entities other than those against whom pro-equality action was taken. Thus, where third parties victimise a complainant or a person providing the complainant with support, without being associated with the alleged discriminator but acting in solidarity with the latter, their conduct would qualify as victimisation. In Poland, this might be the case depending on judicial interpretation.

The potential circle of liable persons may, based on judicial interpretation, extend to negative stereotyping by judges and other authorities in the course of their proceedings and in their decision. In other words, if in the context of an equality case a claimant faces discriminatory references, such as victim-blaming, on the part of the judge or case officer hearing their case, they may be eligible for protection against victimisation. This is relevant in light of the judgment handed down by the European Court of Human Rights (ECtHR) in the *J.L. v Italy* case,[49] where the ECtHR found Italy in breach of the applicant's rights to respect for private life and personal integrity in the course of criminal proceedings against seven men who had been charged with the gang rape of the applicant and had been acquitted by the Italian courts. The ECtHR 'held that the applicant's rights and interests under Article 8 had not been adequately protected, given the wording of the Florence Court of Appeal's judgment. In particular, the national authorities had not protected the applicant from secondary victimisation throughout the entire proceedings, in which the wording of the judgment played a very important role, especially in view of its public character.'[50] The ECtHR concluded that the Italian courts' comments regarding the applicant's 'nonlinear life', bisexuality, relationships prior to the events, the inappropriate considerations regarding the applicant's 'ambivalent attitude towards sex', and the Italian court's negative qualifications concerning the applicant's decision to lodge a complaint, were irrelevant and 'conveyed prejudices existing in Italian society regarding the role of women and were likely to be an obstacle to providing effective protection for the rights of victims of gender-based violence'. The Italian courts' procedure and comments exposed the applicant to secondary victimisation by 'making guilt-inducing and judgmental comments that were capable of discouraging victims' trust in the justice system'.[51] Although the ECtHR's judgment can be criticised for a lack of coherence and its failure to look at whether in terms of case outcome the applicant had been treated less favourably than a (heterosexual) male victim in a comparable situation would have been,[52] it is important in highlighting an unresearched aspect of victimisation, when the adverse consequences are imposed on a complainant by those to whom they turn for redress. It remains to be seen whether *acquis*-related case law will confirm this interpretation and qualify such action by adjudicating bodies as a form of victimisation.

47 Response of Łukasz Bojarski, country expert in the non-discrimination field for Poland.
48 Response of Sébastien van Drooghenbroeck, country expert in the non-discrimination field for Belgium.
49 European Court of Human Rights, *J.L. v Italy*, application No. 5671/16, judgment of 27 May 2021.
50 Registrar of the European Court of Human Rights (2021), 'Allegations of gang rape: certain passages in the appeal court's judgment breached the presumed victim's private and intimate life', press release, 27 May 2021.
51 Registrar of the European Court of Human Rights (2021), 'Allegations of gang rape: certain passages in the appeal court's judgment breached the presumed victim's private and intimate life', press release, 27 May 2021.
52 For a more in-depth analysis of the problems see: Ilieva, M. S. (2021), 'J.L. v. Italy: A survivor of trivictimisation – naming a court's failure to fully (recognize and) acknowledge judicial gender-based revictimisation' in *Strasbourg Observers*, 6 September 2021.

1.3.2 Actions of victimisation

As far as the actions of potential victimisers are concerned, the jurisdictions under scrutiny do not seem restrictive: all types of actions with adverse impacts on complainants seem to fall under the concept, at least implicitly or depending on judicial interpretation, including:

- omissions and statements (threats), as well as actual actions;
- psychological, as well as practical disadvantages;
- harassment targeting the identity of the alleged discrimination victim (for example, racist, ableist, or transphobic expression meant to punish the target for having sought to defend their equality);
- defamation proceedings launched by the alleged discriminator against the alleged discrimination victim and/or their supporters;
- other acts or omissions that would otherwise qualify as lawful, were it not for their retaliatory or dissuasive (pre-emptive) nature as regards the seeking of equality redress (for example, the bringing of justified disciplinary proceedings that would not have been brought were it not for the target's pursuit of equality).

With regard to the latter category, reference may be made to the Polish case described above, where the employee's violation regarding data protection rules in order to substantiate the existence of the pay gap was not regarded by the Supreme Court as sufficient in itself for the employer to exercise its right to terminate the labour contract on the basis of the employee's violation.

Another example comes from Bulgaria, where in 2020, the Sofia City Administrative Court handed down a judgment that may give ground to a restrictive interpretation in this regard. The court found that a disciplinary sanction imposed by the employer cannot be considered victimisation due to a complaint to the PADC, as 'that would be to deny the employer's right to conclude a disciplinary proceeding against an employee who complains against him to the PADC under threat that continuing [such disciplinary proceedings] would be considered a form of victimisation under the PADA. This is not the aim of the [relevant] provisions. Their aim [...] is to protect an employee from actions by the employer taken after the complaint was lodged, on novel grounds'.[53] It must be added that in this case the disciplinary action was launched before the person concerned submitted the complaint to the PADC, but there is risk that the judgment may be applied restrictively by other courts to exempt seemingly lawful adverse actions from the scope of victimisation without taking into account their potential retaliatory aspects.

2 The burden of proof in victimisation cases

As victimisation constitutes a specific form of discrimination, the shift in the burden of proof applies to it in all four jurisdictions.

In Italy, under the general rules, when the claimant establishes facts on which a presumption of discrimination can be based, it is up to the defendant to prove that there has been no discrimination.[54]

In Poland, the provisions regulating the shifting of the burden of proof[55] are augmented by case law that – in relation to employment cases – states that although the relevant rule of the Labour Code is formulated in a manner that appears to fully relieve the employee from the obligation to prove the claims of discrimination, in fact, the employee must indicate facts making the allegation of unequal treatment in employment plausible and only then does the burden of proof shift to the employer to prove that it had objective reasons to differentiate.[56]

53 Sofia City Administrative Court, Decision No. 370 in Case No. 5586/2019, 17 January 2020.
54 Article 28(4) of Legislative Decree 150/2011.
55 Article 18(3b)(1) of the Labour Code and Article 14 of the ETA.
56 Court of Appeal in Szczecin, judgment no. III APa 4/16, 27 September 2017.

In Bulgaria, the shift of the burden of proof applies implicitly to victimisation, as the relevant provisions pertain to all 'proceedings for protection against discrimination'.[57]

In these jurisdictions, it is unclear (and has not been clarified by case law) whether the requirement that the complainant is obliged to present a plausible case of victimisation for the burden of proof to shift extends to an obligation on their part to prove (or present a plausible case of) the existence of causality between the discrimination complaint and the retaliatory action, i.e. that the discriminator reacted to the underlying discrimination complaint by imposing adverse consequences on the protected persons.

In this regard, the otherwise rather restrictive Belgian federal legislation is the most favourable to the victims, as it sets up a presumption of retaliation: a 'detrimental' action (*acte préjudiciable*) taken against a person who has made a discrimination complaint, or for whom a complaint has been made is, for a certain period of time, presumed, unless proven otherwise, to be retaliation for that complaint. If the person against whom the ensuing victimisation complaint is directed does not reverse this presumption, they are subject to a sanction provided for by law (compensation and, specifically in the field of employment, the possibility of requesting reinstatement in the context of a dismissal).[58] Thus, in this system, a person seeking remedy for victimisation must only prove the existence of a complaint and of a detrimental measure for the burden of proof to shift. Accordingly, the victimised party is not tasked with establishing that detrimental equals retaliatory in their case. This extension of the core shifting burden of proof principle in equality law is a fine example of legislators being genuine about protection.

This is also the approach taken by the Hungarian Equal Treatment Advisory Board, which concluded in its guideline regarding the shifted burden of proof that although the Hungarian legislation does not expressly regulate this issue, for the burden of proof to shift in cases of alleged victimisation, the complainant must only substantiate the existence of an underlying complaint triggering the retaliation and the adverse action (or the threat thereof).[59]

The authors are of the view that it is worth considering the introduction of a norm into the *acquis* that clarifies how the burden of proof should be distributed in victimisation cases specifically. It would be advisable to shape this normative framework in line with the Belgian legislation in this regard, which relieves the complainant from having to prove intent/causality if the retaliatory action follows the action aimed at enforcing the principle of non-discrimination within a certain period of time. In the absence of an express norm to that effect, the jurisprudence will hopefully consolidate a similar approach.

3 Sanctions in victimisation cases

The sanctions for victimisation are the same as those that can be imposed in relation to other instances of discrimination, which means that the issues arising with regard to their proportionality, effectiveness and dissuasiveness also pertain to the issue of victimisation.

Damages can be claimed by the victims in all four jurisdictions, and there is no cap on the amount that can be granted. Certain problems are traceable at the level of the legislative framework in relation to the issue of non-pecuniary damages, which can have a very important role in victimisation cases due to their very nature. In Bulgaria and Italy, courts can award both pecuniary and non-pecuniary damages, while in Poland and Belgium the situation regarding non-material compensation is more complex.

In Poland, the ETA does not unambiguously provide for the possibility of granting non-material damages, as it 'refers to "compensation", using a term which is generally interpreted as covering only compensation for material damage […], although civil law in general differentiates between compensation for material

57 PADA, Article 9.
58 Response of Sébastien van Drooghenbroeck, country expert in the non-discrimination field for Belgium.
59 Hungarian Equal Treatment Advisory Board (2008), Guideline 384/4/2008. (III.28.) TT. on the Shared Burden of Proof, p. 3.

damage and for non-material damage [...] and regulates the two separately'.[60] Although there is jurisprudence interpreting the ETA as also covering non-material damages (on the basis that this is the interpretation that is compliant with the purpose of the directives implemented by the ETA and with the relevant case law of the CJEU),[61] it would be advisable to amend the legislation in order to resolve the ambiguity – a view also shared by the Polish Ombudsperson.[62]

In Belgium, the victim is entitled to choose between damages calculated on the basis of the actual loss and the fixed sums defined in the law. The fixed sum in general discrimination cases is EUR 1 300, which can be reduced to EUR 650 in certain circumstances. In the field of employment, the fixed sum is six months' salary, which can be reduced to three months' salary under certain conditions.[63] It is likely that fixed sums are opted for frequently when the decisive element of the damage suffered is of a non-material nature. Therefore, it is noteworthy that in its 2017 report assessing the Belgian non-discrimination legislation, the Expert Commission for the Assessment of the 2007 Anti-Discrimination Federal Acts, suggested that the fixed sums in cases of discrimination outside the field of labour relations should be raised and subjected to regular indexation.[64]

In the area of compensation, the use of public purpose damages could have particular relevance in dissuading potential victimisers from trying to retaliate against actions aimed at enforcing the principle of equal treatment. In this regard, Poland offers a good example, where in addition to the damages that are due to the aggrieved party, the court may order that an appropriate sum 'be paid to a designated social cause (the court may decide, for instance, that a particular sum should be paid to an anti-discrimination CSO; claimants often request such a measure, naming a concrete cause or organisation)'.[65]

In Italy, while this does not stem unambiguously from the legal framework, there is case law indicating that courts are willing to impose punitive damages in cases that are regarded as having outstanding societal importance, which can also be characteristic of victimisation cases. For instance, in a judgment from 2018, the Tribunal of Bergamo, having found that an extinction clause included in collective and individual Ryanair contracts was of a discriminatory nature, ordered not only the publication of its judgment in two national newspapers, but also sentenced the company to pay EUR 50 000 in non-pecuniary damages that the court expressly labelled as punitive. In its judgment, the Tribunal substantiated the imposition of the damages through reference to the Directive and the CJEU's *ACCEPT* ruling,[66] requiring that sanctions must be effective, proportionate and dissuasive.[67]

A similar function to that of punitive damages is filled by fines that equality bodies and other administrative authorities may impose in some jurisdictions on discriminators. For instance, in Bulgaria, the PADC can

60 Bojarski, Ł. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Poland*, p. 86.
61 Bojarski, Ł. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Poland*, p. 87.
62 Bojarski, Ł. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Poland*, p. 86.
63 Bribosia, E. and Rorive, I. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Belgium*, p. 97.
64 Bribosia, E. and Rorive, I. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Belgium*, p. 97. See also: Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (2022), *Rapport final: Combattre la discrimination, les discours de haine et les crimes de haine: une responsabilité partagée*, (Final report: combating discrimination, hate speech and hate crime: a shared responsibility), p. 180.
65 Bojarski, Ł. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Poland*, p. 84.
66 CJEU, judgment of 25 April 2013, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, C81/12, ECLI:EU:C:2013:275.
67 Favilli, C. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Italy*, pp. 54-55.

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.[68]

The possibility of asking for reinstatement after a retaliatory dismissal exists in all jurisdictions,[69] however, this may not be enough to provide sufficient protection against an employer resorting to retaliatory measures against persons trying to enforce the principle of equal treatment. For that reason, the availability of imposing injunctive measures – i.e. measures addressing structural problems resulting in unlawful practices or recurring violations – can be of crucial importance.

In Bulgaria, the PADC can order discriminators to take particular remedial actions. For instance, in a 2018 hate speech case brought against a media company, in addition to the fine imposed, the PADC issued an injunction to introduce internal prevention mechanisms to filter discriminatory material. However, according to a 2019 ruling of the Supreme Administrative Court, the PADC has no authority to issue injunctions to public bodies, only to private entities.[70] With regard to public bodies, the PADC is only authorised to formulate recommendations. The Bulgarian courts may also issue injunctive measures. For instance, in the case of the victimisation of an activist by a television show host (see section 1.1.2 above), the court ordered the victimiser (in addition to paying compensation for moral damages) to publish the decision in a daily newspaper chosen by the claimant and to abstain from victimising him further in any manner. However, specific, detailed injunctions are not part of the legal tradition of the national courts.

Injunctive measures are available both in Poland and Belgium. In Italy, while there is no legal provision requiring employers or other key actors to introduce internal preventive measures and redress mechanisms for victimisation, judges enjoy a wide discretion as to the legal consequences of establishing that discrimination has taken place: under the pertaining legislation,[71] 'the judge may order the termination of the discriminatory behaviour, conduct or act and the removal of its effects, including by means of a plan aiming to rectify the discrimination identified'.[72]

Interim relief is available in all four jurisdictions, which is important, since retaliatory measures taken while the underlying discrimination complaint is still in progress may prevent from going through with their complaints even those few victims who decide to come forward against all the obstacles that the aggrieved parties must face throughout the enforcement procedure.[73] In Belgium, for instance, federal legislation provides for the possibility, for the victim, for an association or the equality body to seek from the judge an order imposing the immediate cessation of an unlawful 'act' ('*acte constituant un manquement aux exigences de la loi*'), under the threat of financial sanctions.[74] The generality of the terms used does not preclude that the term 'act' is interpreted to include acts of victimisation.

In summary, it seems that the system of sanctions in all four jurisdictions allows for effective action against victimisation, with sanctions that have the potential of being both dissuasive and proportionate, depending on their actual application by the courts and other authorities. However, due to the scarcity of the related case law it is difficult to give an accurate assessment of how these possibilities are used in practice (with certain exceptions, such as the PADC in Bulgaria, the sanctioning practice of which seems to lack true dissuasiveness for medium-sized and larger businesses). However, the sheer scarcity of case law in itself indicates that factors other than the applicable sanctions have an important role in

68 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.
69 Responses by the respective country experts.
70 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.
71 Legislative Decree 150/2011, Article 28(5).
72 Favilli, C. (2021), *Country report. Non-discrimination. Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Italy*, p. 54.
73 Responses by the respective country experts.
74 General Anti-discrimination Federal Act, Articles 19 and 20.

determining the willingness of concerned persons to come forward with their complaints and to support victims in pursuing their complaints.

Conclusions

Empirical research shows that the fear of retaliation plays a significant role in underreporting and underlitigating discrimination.[75] People are not sufficiently enabled and empowered to seek redress in discrimination cases. Therefore, effective protection against the adverse treatment of those who attempt to enforce the principle of equal treatment either as complainants or supporters of complainants can contribute significantly to combating discrimination.

Due to the EFD's focus on employment, its victimisation regulation is rather restricted in its scope (not only because it only extends to employers and employees, but also because the types of protected actions are limited to complaints within the given undertaking and legal procedures), but the RED is formulated in much more general manner that does not restrict the circle of either the persons having victim status, or the potential victimisers (it does not even mention the victimiser in the definition, enabling any party to be established as such, as long as they are responsible for an adverse reaction to enforcing equality). Also, as it speaks about complaints in general and proceedings without specifying their legal or other nature, the RED is open to a wide variety of interpretations, making it possible to significantly extend protection against victimisation related to discrimination based on racial or ethnic origin.

The scrutiny of four jurisdictions shows that in the course of the implementation of the directives, legislators tended to avail of this possibility and adopt regulations that do not expressly narrow down the possibilities inherent in this wide formulation of the RED.

The analysis has revealed only few instances regarding which it can be clearly said that, in the authors' opinion, the domestic regulation is not in line with the *acquis*, such as the Belgian legislation limiting the scope of those supporters of discrimination victims who are eligible for protection against retaliation, or the Bulgarian provision that protection from victimisation requires the identification of a comparator.

At the same time, these two jurisdictions can also be quoted as good examples regarding the notion of protection from victimisation related to planned (or presumed) future action aimed at the enforcement of equal treatment (in Bulgaria), and the presumption of retaliation, relieving the victim from the burden of proving intent and causality if an adverse action follows a discrimination complaint within a certain period of time (in Belgium).

The scrutiny has also identified some issues where it awaits – domestic or CJEU – jurisprudence to clarify important issues related to victimisation, such as the question whether the *bona* or *mala fide* nature of the complainant's original anti-discrimination action or the outcome of the original complaint (i.e. whether the underlying discrimination complaint is upheld or not before the court or other authority) has any bearing on the availability of the protection, or whether protection exists against a formally lawful reaction to an unlawful act by the complainant (e.g. a disciplinary action or dismissal reacting to a breach aimed at substantiating the suspicion that discrimination is being perpetrated, such as the unauthorised collection of data about the salaries of other employees in order to prove a discriminatory pay gap).

Clarification of these issues could encourage people who have been wronged for trying to protect the right to non-discrimination to avail themselves of this important form of protection offered by the *acquis*, which in turn can contribute to decreasing the number of discrimination instances that remain unsanctioned.

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

Formal and informal mediation of discrimination complaints: A comparison of the legal framework and practice of Austria, Belgium, Ireland and Portugal in discrimination cases

Cathérine Van de Graaf*

1 Introduction

A study conducted in 2012 across eight EU Member States by the European Union Fundamental Rights Agency demonstrated that more than 50 % of discrimination victims had considered alternative dispute resolution.[1] The idea that litigation is the only road to the resolution of conflicts continues to be eroded. Instead, alternative dispute resolution (ADR) is increasingly being institutionalised, at both the national and the international level and in both the agreement-based and the adjudicative sense.[2] The most prevalent example of the latter is arbitration, while the former includes examples such as conciliation and mediation.

There are many advantages to a dispute resolution process that takes place outside of the courts. The most frequently recurring reasons for the promotion of alternatives seem to be that the process is speedier, lower in cost and 'less confrontational'.[3] In addition, it contributes to a significant reduction in the case load of the courts.[4] Yet scholars have also pointed out the pitfalls of settling conflicts out of court. One of the main objections is the diminished procedural guarantees for the parties, exposing them to 'power imbalances' and 'inequality of arms'.[5] Additionally, public value that goes beyond the bounds of the dispute at hand and contributes to the general development of the law remains mostly absent.[6] Instead, issues that might function as triggers for such development stay confined to the realms of 'seemingly private disputes'.[7]

* Dr. Cathérine Van de Graaf is a post-doctoral researcher at the Academy of European Human Rights Protection (University of Cologne) and a visiting professor at the Human Rights Centre (Ghent University).

1 European Union Agency for Fundamental Rights (2012), *Access to justice in cases of discrimination in the EU*.

2 McGregor, L. (2015), 'Alternative dispute resolution and human rights: developing a rights-based approach through the ECHR', *European Journal of International Law* 26.3: 607-634, p. 608.

3 Gaull Silberman, R., Murphy, S. E. and Adams, S. P. (1993), 'Alternative dispute resolution of employment discrimination claims', *La. L. Rev.* 54: 1533.

4 Edwards, H. T. (1985), 'Alternative dispute resolution: Panacea or anathema', *Harv. L. Rev.* 99: 668.

5 McGregor, L. (2015), 'Alternative dispute resolution and human rights: developing a rights-based approach through the ECHR', p. 608.

6 Fiss, O. M. (1983), 'Against settlement', *Yale LJ* 93: 1073.

7 Edwards, H. T. (1985), 'Alternative dispute resolution: Panacea or anathema', 679.

When studying the different forms of alternative dispute resolution in practice, one quickly realises that there are many hybrid models that combine characteristics of the traditional forms of ADR as well as multiple variants within a specific traditional model.[8] So, for any study focusing on any traditional form it is necessary to have a clear understanding of the characteristics of the procedure concerned. The aim of the present article is exactly that: to provide a window on the different mediation procedures that are open to victims of discrimination. By identifying and comparing their principal characteristics, we are better able to understand what good practice entails in the context of mediation, on both the individual and the general level.

This article contains three main parts and a conclusion. It begins with a brief overview of the availability of mediation procedures in discrimination cases across the four Member States studied. Next, the common characteristics that could be defined across the different procedures in all four countries are discussed. Finally, before concluding, there is a discussion of the available data on the incidence of mediation proceedings and the extent to which they are successful.

2 Mediation of discrimination cases

As discussed in the introduction, mediation is only one possible form of alternative dispute resolution.[9] The question can be posed of whether it is in fact the best form for victims of discrimination. A discrimination case cannot be approached as just any other dispute nor can a victim of discrimination be approached as just any other party to a dispute.[10] It is precisely the exceptional nature of discriminatory treatment that could disqualify mediation as an appropriate procedure for dispute resolution. It is recommended that all procedures (whether administrative, judicial or conciliatory) designed with the goal of enforcing respect for equal treatment should be placed under sufficient scrutiny.

It has previously been argued that persons who have experienced discrimination are in need of a safe environment.[11] It is unclear whether a configuration with a neutral third party and interaction with the person responsible for the discriminatory treatment will manage to meet this need.[12] Often, existing power imbalances impede the establishment of such an environment.[13] As such, depending on the gravity of the discrimination, the victim might not be willing to enter into a mediation process. Yet, at the same time, mediation procedures can be a really empowering process as they offer victims the possibility of recounting their experiences in their own words. Mijha Butcher phrases this eloquently as follows: 'It strengthens weaker parties by giving them the opportunity to tell their own stories in their own voices, bringing in whatever ancillary events they feel are important to fully round out the narrative, whether or not the events are legally relevant.'[14]

8 McGregor, L. (2015), 'Alternative dispute resolution and human rights: developing a rights-based approach through the ECHR', p. 615.

9 Nowadays, the terms 'appropriate' or 'proportionate' dispute resolution (abbreviated as ADR or PDR) are often used to capture more accurately the idea of a proportional relation between the means and the costs of solving a certain dispute and the nature and importance of the issue that is at stake in this dispute (Blake, S., Browne, J. and Sime, S., (2012), *A practical approach to alternative dispute resolution*, at 5).

10 European Parliamentary Research Service (2018), *Equality and the fight against racism and xenophobia. Cost of non-Europe report*. Available at: https://equineteurope.org/equality-and-the-fight-against-racism-and-xenophobia-cost-of-non-europe-report/.

11 Kádár, T. (2018), 'Equality bodies – a European phenomenon', *International Journal of Discrimination and the Law* 18(2–3): 148.

12 For instance, a study on perceptions of procedural fairness by the Belgian national equality body (NEB) demonstrated that one of the main reasons for dissatisfaction with the procedure at the NEB was their attempt to reach a 'compromise between individual assistance to the person who reported discrimination and mediation with the institution or third party involved'. Van de Graaf, C. (2020), 'Procedural justice perceptions in the mediation of discrimination reports by a national equality body', *International Journal of Discrimination and the Law* 20.1: 58-59. Available at: https://journals.sagepub.com/doi/full/10.1177/1358229120927921.

13 Boon, A., Urwin, P. and Karuk, V. (2011), 'What difference does it make – Facilitative judicial mediation of discrimination cases in employment tribunals, 40 *Indus. L.J.* 45, 80.

14 Butcher, M. (2002), 'Using mediation to remedy civil rights violations when the defendant is not an intentional perpetrator: The problems of unconscious disparate treatment and unjustified disparate impacts', *Hamline J. Pub. L. & Pol'y* 24: 290.

One final consideration is that, when a discrimination case is taken to court, it often serves a purpose beyond the case at hand. As discriminatory treatment is often rooted in longstanding stereotypes that are persistent in society, the absence of any public condemnation of such treatment can slow down societal development. This has been identified as a main critique of the settlement of disputes 'in private'.[15] For certain discrimination victims a more private dispute settlement might be the preferred option (for instance, if they are interested in maintaining a professional relationship[16]). Others might be more militant and strive for change from which other persons in the same situation could also benefit. This existing tension between the public and private objectives of anti-discrimination law will always be present and makes it challenging to select the perfect dispute resolution procedure.[17]

For this, large-scale studies that compare factually comparable adjudicated and mediated cases are necessary to assess the impact of the procedure on protection against discrimination in society overall.[18] Yet the confidentiality of the process makes it a difficult subject to study empirically. Thus, in what follows, an exploratory study will be conducted of the mediation procedures available to victims of discrimination.

3 Mediation procedures

The EU Member States whose mediation practices were investigated are Austria, Belgium, Ireland and Portugal. As the range of mediation procedures in place is quite broad and varied, this contribution will first briefly explain the existing procedures before providing a detailed discussion of characteristics across procedure. The majority of mediation procedures are not solely open or specifically tailored to victims of discrimination. Instead, almost all parties in civil, criminal or administrative proceedings have access to the mediation procedures that are discussed in what follows.

3.1 Mediation in civil and administrative cases

3.1.1 In civil proceedings

In Austria, like with certain other disputes, discrimination cases can be resolved by a mediation procedure.[19] The Federal Law on Mediation in Civil Cases states that it 'can be used in conflicts that fall under the jurisdiction of civil law courts'.[20] In practice, this form of mediation is rarely used as the parties have to bear the cost of the procedure themselves. In Portugal, there is a possibility for the court or the parties to refer a matter to mediation within procedures before both civil and administrative courts.[21]

In Belgium, any dispute of a patrimonial nature, whether or not it is cross-border, including disputes involving a legal person governed by public law, may be the subject of mediation.[22] This broad scope also includes civil disputes concerning discrimination. Two forms are identified in the Belgian Judicial Code. First, extra-judicial mediation refers to the following process: 'Any party may, without prejudice to any judicial or arbitral proceeding, before, during or after a court proceeding, propose to the other parties to

15 Fiss, O. M. (1983), 'Against settlement', 1073; Edwards, H. T. (1985), 'Alternative dispute resolution: Panacea or anathema', 679.
16 Boon, A., Urwin, P. and Karuk, V. (2011), 'What difference does it make – Facilitative judicial mediation of discrimination cases in employment tribunals', 80.
17 Sternlight, J. R. (2004), 'In search of the best procedure for enforcing employment discrimination laws: A comparative analysis', 78 *TUL. L. REV.* 1401, 1409.
18 Bingham, L. B. (2004), 'Employment dispute resolution: The case for mediation', *Conflict Resol. Q.* 22: 166.
19 Federal Law on Mediation in Civil Cases (*Bundesgesetz über Mediation in Zivilrechtssachen (Zivilrechts-Mediations-Gesetz)*, BGBl. I Nr 29/2003. Available (in German) at: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20002753.
20 Section 1 (2) Federal Law on Mediation in Civil Cases.
21 Article 273, Law no. 41/2013, of 26 June (*Lei n.º 41/2013 de 26 de junho*) and Law No. 15/2002, of 22 February (*Lei n.º 15/2002, de 22 de Fevereiro*).
22 The same applies to disputes of an extra-patrimonial nature that can be resolved by settlement (*transaction (French)* or *dading (Dutch)*).

invoke the mediation proceeding. The parties, by mutual agreement, designate the mediator or entrust a third party with that designation.'[23] On the second form, judicial mediation, we find the following: 'At any stage of the proceedings… the judge before whom a case is pending, at the joint request of the parties or on their own initiative but with the consent of the parties, may order mediation as long as the matter has not been considered'.[24] The judge must consider that 'conciliation between the parties is possible'.[25]

3.1.2 Claims of discrimination based on disability in Austria

Before a victim of discrimination based on disability can address the court or the relevant administrative entity, they must attempt to mediate the conflict for both civil and administrative proceedings.[26] The reconciliation attempt starts with the application by the alleged victim of discrimination to the Federal Social Service (orally or in writing) and is fulfilled by either an agreement or by notification from the Federal Social Service that no mutual agreement could be reached.[27]

3.1.3 Mandatory mediation for claims of discrimination against certain public institutions in Vienna

Before a discrimination claim can be raised against the Province of Vienna, its fiscal entities or private entities acting directly on assignment by the province or its municipalities, legislation demands that an attempt is made to mediate the conflict before the Viennese Office to Combat Discrimination.[28] This compulsory mediation attempt is required for all protected grounds and not just disability for which it exists in the country as a whole. Only a written declaration that such an attempt has failed allows the claim to be brought to the civil courts.[29]

3.2 Mediation in criminal law cases

In Belgium, mediation within criminal cases is a very minor phenomenon. In accordance with Article 216ter of the Code of Criminal Procedure, if damage has been caused to a known victim as a result of criminal offences against anti-discrimination laws, 'the Public Prosecutor can request the victim and the suspect to agree to mediation regarding the compensation or the recovery and the arrangement thereof'.[30] In Portugal, in criminal cases of discrimination, it is possible to mediate.[31] The prosecutor can propose or refer a case to mediation, but this is only initiated if the parties agree to it, are present at a pre-mediation session and sign a mediation protocol.[32]

23 Article 1730 Judicial Code (*Code judiciaire / Gerechtelijk Wetboek*).
24 Article 1730, Section 1 Judicial Code.
25 Article 1734, Section 1 Judicial Code.
26 Sections 14 ff of the Federal Disability Equality Act (*Bundes-Behindertengleichstellungsgesetz*), BGBl. I Nr. 82/2005, as last amended by BGBl. I Nr. 32/2018 and Section 7k of the Act on the Employment of People with Disabilities (*Behinderteneinstellungsgesetz*), BGBl. Nr. 22/1970, as last amended by BGBl. I Nr. 78/2021. Claims of public servants against their public employer are in many cases dealt with by administrative procedures. This is how administrative procedures are included in this form of 'mediation'.
27 Section 14/2-3 Federal Disability Equality Act (*Bundes-Behindertengleichstellungsgesetz*).
28 *Stelle zur Bekämpfung von Diskriminierungen*. See the website of the Viennese Office to Combat Discrimination: https://www.wien.gv.at/verwaltung/antidiskriminierung/.
29 Section 4a of the Viennese Anti-Discrimination Act (*Gesetz zur Bekämpfung von Diskriminierung (Wiener Antidiskriminierungsgesetz)*), LGBl. Nr. 35/2004.
30 Article 216ter Section 1 Code of Criminal Procedure (*Wetboek van Strafvordering / Code d'Instruction Criminelle*).
31 Law No. 21/2007, of 12 June (*Lei n.º 21/2007, de 12 de Junho*), see notably Articles 1 and 2.
32 Article 4 of Law No. 29/2013, of 19 April (*Lei n.º 29/2013 de 19 de abril*). In criminal law, victims under the age of 16 years and victims of crimes against freedom or sexual self-determination cannot resort to mediation.

3.3 Mediation at a quasi-judicial body in Ireland

In Ireland, mediation of discrimination complaints mostly takes place within the operations of the quasi-juridical body, the Workplace Relations Commission (WRC). Although the name of the body suggests otherwise, its mandate is wider than just complaints about discrimination in the context of employment. Instead, anyone who refers discrimination complaints under Irish anti-discrimination law, that is the Employment Equality Acts 19982021 (employment, vocational training and occupation) and the Equal Status Acts 2000-2018 (goods, services, housing and education), has access to the WRC adjudication procedure and thus the option of mediation.[33]

3.4 Reconciliation through national equality bodies

In this section, the focus is on a specific kind of informal mediation procedure that is only found in Austria and Belgium. In both countries, a procedure exists during which the national equality body (NEB) attempts to reconcile the victim and the alleged discriminator. In both Member States, this procedure is not formally labelled as mediation but closely resembles it.

Reconciliation efforts at the Austrian Ombud for Equal Treatment (*Gleichbehandlungswanwaltschaft – GAW*) and at Unia in Belgium (formerly, the Belgian Interfederal Centre for Equal Opportunities and Opposition to Racism) are independent of any other civil, criminal or administrative proceedings. In Austria, no specific legal basis exists for this reconciliation effort. Instead, it is seen as part of the GAW's remit to advise and support persons who feel they have been discriminated against.[34] As such, the procedure is open to the victims of discrimination based on the grounds for which the mentioned institutions are competent. For the GAW, these grounds are gender, ethnic origin, religion, belief, age and sexual orientation in the context of the workplace.[35] Outside of the workplace, it is competent for ethnic affiliation and gender only. A legal basis for the reconciliation work of Unia does exist, although the procedure is not formalised in a legislative text but merely in internal guidelines.[36] For Unia, these grounds are the five 'racial' criteria (alleged race, skin colour, descent, national or ethnic origin and nationality), disability, philosophical or religious beliefs, sexual orientation, age, property ('*fortune*', in French), civil status, political opinion, trade union opinion, current or future state of health, physical or genetic features, birth, social origin and civil status.[37]

Both NEBs report on the successes of these reconciliation efforts which can take various forms. In its 2018/19 report, the GAW mentions 82 successful negotiated settlements (*Vergleichsverhandlungen*).[38] A successful settlement can range from explicit apologies to financial compensation or adaptation of

33 Section 24 of Equal Status Acts 2000-2018 (accessible at https://revisedacts.lawreform.ie/eli/2000/act/8/revised/en/html#SEC24); Section 78 of Employment Equality Acts 1998-2021 (accessible at https://revisedacts.lawreform.ie/eli/1998/act/21/revised/en/html#SEC78); Sections 38 and 39 Workplace Relations Act 2015 (accessible at https://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/index.html).

34 Federal Law on the Commission for Equal Treatment and the Ombud for Equal Treatment (*Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft*), BGBl I Nr. 66/2004, as last amended by BGBl. I Nr. 107/2013.

35 Here, disability is not included.

36 See, for an unofficial English translation: https://www.unia.be/files/Z_ARCHIEF/cooperation_agreement_0.pdf. According to Article 6, Section 2, of the cooperation agreement: 'Within the limits of its missions defined in Article 3 of the present agreement, the Centre is authorised to receive reports, process them and accomplish any conciliation or mediation missions it considers necessary, without prejudice to the competence of the mediation services whose competence is defined by or in accordance with a law, decree or an order and without prejudice to the competence of the mediators designated by the parties concerned.'

37 Unia is competent to deal with all 'grounds' covered by the anti-discrimination legislation (federal or federated), except the ground of 'language'. There is currently no designated equality body for this ground of discrimination. Gender-based criteria come under the competence of the Institute for Equality of Women and Men (more information can be found here: https://igvm-iefh.belgium.be/en/organisatie).

38 Gleichbehandlungsanwaltschaft (2020), *Gleichbehandlungsbericht für die Privatwirtschaft 2018 und 2019* (Equal treatment report for the private sector 2018 and 2019), p. 17, available here: https://www.gleichbehandlungsanwaltschaft.gv.at/wir-ueber-uns/taetigkeitsbericht.html.

working conditions. For Unia, such successful negotiated solutions (*onderhandelde oplossingen)* are included in its annual activity report. This includes an indication of the number of cases that were 'closed' and, within these, an indication of the number of cases that resulted in an 'out-of-court' solution when, in UNIA's opinion, discrimination was proven to exist. In 2020, this proportion was 32.7 % or 287 cases and, in 2021, it was 37.4 % or 515 cases.[39] The solutions Unia reaches are quite diverse.[40] Unia explains in its evaluation report on anti-discrimination laws that, ideally, an agreement is reached on the following aspects: acknowledgement of the discrimination or fault, redress or satisfaction for the victim, formal commitment to non-discrimination in the future, structural and/or preventive measures (if necessary) and the communication of the result (possibly in an anonymised form) for awareness-raising purposes.[41]

Regarding its neutral role, Unia notes the following: '[Unia] intervenes independently but does not limit itself to facilitating negotiations between the parties concerned, given its legal mandate to combat discrimination. If the facts permit, [Unia] takes a position on the ground of the issue of discrimination and will side with the victim where appropriate.'[42]

In Portugal, the Commission for Equality and Against Racial Discrimination (CEARD) does not have the competence to mediate. However, the importance of mediation in discrimination cases is confirmed in that the CEARD may 'refer the parties, once they have given their consent, to mediation processes, without prejudice to extrajudicial means of conflict resolution that are mandatory under the terms of the law'.[43]

4 Characteristics of the mediation procedures

4.1 Definition

In some of the legislation investigated, an explicit definition of mediation is included. In other cases, what we find is a description of the nature and the course of the process.[44] In the Belgian Judicial Code, mediation is defined as follows: 'Mediation is a confidential and structured process of voluntary concertation between parties in conflict which takes place with the assistance of an independent, neutral and impartial third party who facilitates communication and attempts to lead the parties to develop a solution themselves'.[45] The Belgian Code of Criminal Procedure does not include a definition. Portuguese Law No. 29/2013, of 19 April, defines mediation as 'the form of alternative dispute resolution, conducted by public or private entities, whereby two or more parties to a dispute voluntarily seek to reach an agreement with the assistance of a dispute mediator'.[46]

The Austrian Federal Disability Equality Act refers to an 'attempt to achieve a mutual agreement between the parties on how to balance their conflicting interests'.[47] The Viennese Anti-Discrimination Act

39 Unia, statistics for 2020: https://www.unia.be/nl/publicaties-statistieken/publicaties/cijferverslag-2020. The database is only available in French and Dutch (available at: https://www.unia.be/en/jurisprudence-alternatives/negotiated-solutions). The 2021 report is available here: https://www.unia.be/files/Documenten/Publicaties_docs/Rapport_chiffres_2021_Unia_FR_def.pdf.

40 Some examples are the adaptation of recruitment requirements, adjustments to make buildings accessible and the adoption of action plans to raise awareness in the work environment about specific topics (available in Dutch at: https://www.unia.be/nl/rechtspraak-alternatieven/onderhandelde-oplossingen/P30?keywords).

41 Unia (2017), *Evaluatie* (Evaluation of the Act of 10 May 2007 amending the Act of 30 July 1981 to punish certain acts motivated by racism or xenophobia (B.S. 30 May 2007) (Antiracism Act); Act of 10 May 2007 to combat certain forms of discrimination (Belgian Official Gazette 30 May 2007) (Anti-Discrimination Act)), p. 106, report available in Dutch at: https://www.unia.be/files/Documenten/Publicaties_docs/Evaluatie_Antidiscriminatie-_en_Antiracismewet_2017.pdf.

42 Ibid.

43 Article 8(2)(h) of Law No. 93/2017, of 23 August (*Lei n.º 93/2017 de 23 de agosto*).

44 For Ireland's WRC procedure: Section 39 of the Workplace Relations Act 2015 and Section 24 of the Equal Status Acts 2000-2018 describe the process but do not define mediation.

45 Article 1723/1 Judicial Code.

46 Article 2(a) of Law No. 29/2013, of 19 April.

47 Section 15/1 Federal Disability Equality Act.

just refers to 'reconciliation procedures'.[48] The Federal Law on Mediation in Civil Cases defines it as follows: 'Mediation is an activity through which, based on a voluntary decision of the parties, a specifically educated, neutral mediator systematically facilitates the communication between the parties with the aim to enable them to find a solution to their dispute within their own authority. This can be used in conflicts that fall under the jurisdiction of civil law courts.'[49] For the non-formalised procedure in Belgium, we can find that Unia 'will first try to reach an agreement through dialogue that is acceptable to all parties concerned. It is therefore primarily a process of conciliation or negotiation (informal or formal, depending on the nature of the case and the attitude of the parties), rather than mediation in the strict sense'.[50] For the Austrian NEB, no such description of their activities can be found.

4.2 Access to the mediation procedure

Some mediation procedures are only accessible to certain victims of discrimination and only in certain contexts. As such, the mediation procedure at the Irish WRC is open to victims of discrimination based on age, civil status, disability, family status, gender, housing assistance, race, religion, sexual orientation, or membership of the Traveller community. The procedure at the Belgian NEB is open to victims of discrimination on all grounds covered by (federal or federated[51]) anti-discrimination legislation, except for language and gender-based criteria (as gender-based criteria are the responsibility of the Institute for Equality between Women and Men). The Portuguese Commission for Equality and Against Racial Discrimination (CEARD) can refer the parties to mediation processes only when discrimination has occurred on the grounds of race or ethnic origin, skin colour, nationality, ancestry or place of origin. The procedure at the Viennese Office to Combat Discrimination is open to victims of discrimination based on all grounds covered by the Viennese Anti-Discrimination Act (ethnic affiliation, religion, belief, disability, age, sexual orientation, gender identity and sex, pregnancy and parenthood). The mandate of the Austrian NEB comprises all grounds (gender, ethnic origin, religion, belief, age and sexual orientation) except disability in the workplace. When it comes to discrimination outside the workplace, only victims of discrimination based on ethnic affiliation and gender have access.[52]

When mediation occurs as part of civil, criminal or administrative procedures and thus through bodies not solely responsible for discrimination cases, we do not find such a criterion-based competence. Instead, parties in civil, criminal or administrative disputes on discrimination have access to mediation when they align with the requirements that are set in the laws governing access to mediation in these procedures in general. In Belgium for instance, for mediation in civil cases, this is phrased as follows: 'any dispute of a patrimonial nature' and 'disputes of an extra-patrimonial nature that can be resolved by settlement'.[53] Thus, *de facto* this will mean that mediation is possible for discrimination based on all prohibited criteria.

4.3 Actors in the mediation procedure

4.3.1 Initiator of the mediation procedure

In the Irish procedure, the director of the WRC assesses whether the received discrimination complaint is 'suitable for resolution by mediation' as a first step before enquiring whether the complainant and the respondent would be willing to enter such a procedure.[54] The parties are then notified of this decision.

48 Section 7a/1 Viennese Anti-Discrimination Act.
49 Paragraph 1 of the Federal Law on Mediation in Civil Cases.
50 Unia (2017), *Evaluatie*, p. 100, available at: https://www.unia.be/files/Documenten/Publicaties_docs/Evaluation_2e_version_LAR_LAD_Unia_PDF_(Francophone).pdf.
51 In the future, however, Unia will no longer be responsible for matters falling under the jurisdiction of the Flemish Region and the Flemish Community.
52 EU Directive 2000/43/EC.
53 Article 1724, Judicial Code.
54 Section 24, Equal Status Acts 2000-2018; Section 78, Employment Equality Acts 1998-2021; Section 39, Workplace Relations Act 2015.

In Belgium, civil mediation may also be ordered by a judge who considers that 'conciliation between the parties is possible'.[55] In Belgium, the suggestion of mediation in criminal matters can come on the initiative of the Public Prosecutor[56] but also from 'anyone with a direct interest at any stage of the criminal proceedings and during the execution of the sentence'.[57] In Belgium, in almost all cases of non-formalised mediation by Unia, its staff members propose mediation to the complainant.

4.3.2 Representation during the mediation procedure

In Ireland, victims can be represented in the procedure before the WRC 'by any individual or body authorised by the party in that behalf'.[58] According to the 2020 WRC reports, a variety of third-party representation was used by both complainants and respondents. This includes: barrister, solicitor, trade union, external human resources, citizens information, lay representative, consultant, internal human resources, free legal advice centres, Threshold Ireland and the Irish Business and Employers Confederation.[59]

When claiming rights under the Viennese Anti-Discrimination Act, it is stipulated that victims can be represented by NGOs.[60] For the mandatory mediation attempt, victims of discrimination based on disability can be accompanied by a 'person of trust' (usually a member of an NGO or the Federal Disability Ombudsman).[61] Representation by an attorney is not foreseen and respective costs are not refunded so it rarely occurs.

Before the Austrian NEB, representation of the victim is not possible. However, in procedures before the Belgian NEB, it is possible. Representation is not forbidden by law. The victim can be assisted by a lawyer or any person of their choice.

In Portugal, representation of the parties is possible during the mediation process. This includes legal representation (in the case of minors or those who lack capacity), organic representation (if one or both parties in the mediation are legal persons) and voluntary representation (a representative performing legal acts on behalf of another within the limits of the powers conferred).[62] Additionally, the mediating parties can be accompanied by lawyers, trainee lawyers or solicitors, even if the other party does not do this or does not agree with the participation of these professionals in the mediation procedure (in this case, they can always discontinue the mediation procedure).[63] In Austria, when a discrimination case is the object of mediation within a civil procedure, representation by professional lawyers is not forbidden.[64] The parties are in full control of the procedure, so they can use professional representation if they agree

55 Article 1734, Section 1, Judicial Code.

56 'If damage has been caused to a known victim as a result of the crime, the Public Prosecutor can request the victim and the suspect to agree to mediation regarding the compensation or the recovery and the arrangement thereof. He is assisted in this by the competent service of the communities.' Article 216ter Section 1, Code of Criminal Procedure.

57 Article 553, Code of Criminal Procedure. This concerns 'restorative mediation' (Articles 553 and following of the Code of Criminal Procedure), which can be organised in parallel with the criminal trial, and which is not directly intended to terminate the public prosecution (contrary to the mediation organised by Article 216ter Code of Criminal Procedure).

58 This applies to any proceedings under the Irish anti-discrimination laws. Read the WRC report here: https://www.workplacerelations.ie/en/complaints_disputes/adjudication/review-of-wrc-adjudication-decisions-recommendations/wrc-report-review-of-wrc-adjudication-decisions-and-recommendations-jan-dec-2020-.pdf.

59 This is in addition to a significant proportion of people who represent themselves. WRC (2020), *Workplace Relations Commission report*, p. 14. Available at : https://www.workplacerelations.ie/en/complaints_disputes/adjudication/review-of-wrc-adjudication-decisions-recommendations/wrc-report-review-of-wrc-adjudication-decisions-and-recommendations-jan-dec-2020-.pdf.

60 Section 4/2 Viennese Anti-Discrimination Act.

61 Section 14/4, Federal Disability Equality Act.

62 Article 18(1) of Law No. 29/2013.

63 Paragraph 1 of Article 18 of Law No. 29/2013. Regarding public mediation systems, Article 36 of Law No. 29/2013 establishes that, 'The constitutive or regulatory acts of public mediation systems may determine the obligation of the parties to appear in person at the mediation sessions, representation not being possible'. In essence, it is established that the presence of the parties will only be compulsory when this is established by the respective institutional acts. Currently, such a determination exists for mediation in Courts of Peace and in the criminal mediation system, where the law imposes the compulsory personal attendance of the parties, but not for other public mediation systems.

64 It is not foreseen explicitly so the costs are with the party which is using professional representation services.

on this. In Belgium, when mediation occurs in the framework of civil proceedings, the victim can be assisted (by a lawyer or any person of their choice).[65] During mediation in criminal matters in Belgium, the victim can be assisted (by a lawyer). For the perpetrator, such representation is forbidden.[66]

4.3.3 The mediator's qualifications

In literature, the importance of the role of the mediator has been stressed: a role that is becoming increasingly complex as different mediation models surface that are 'facilitative, evaluative, transformative, narrative, and "understanding"'.[67] These different models all put a specific kind of responsibility on the shoulders of the mediator for which a different kind of preparation is needed. As the mediation practices studied are quite distinct, you would expect the same for the training and qualifications of the persons taking up the role of mediator.

In Ireland's WRC mediation, no statutory requirements exist as to a mediation officer's qualifications. It is merely stated that they need to be independent in the exercise of their function.[68] In Belgium, for staff members of Unia, no specific qualification is needed for 'accredited mediators' within the meaning of Articles 1726-1727 of the Judicial Code. This qualification of accreditation is needed when mediation occurs within the framework of civil proceedings.[69] Judicial mediation must at least always be entrusted to a specially accredited mediator and for extrajudicial mediation the same applies if the parties wish it to be homologated by the Court. The following conditions are specified: the mediator must have undergone theory-based training (including a legal component) and practical training, relating to the aptitude for mediation and the process, covering general and specific knowledge and skills in a particular field of mediation practice within the meaning of the Judicial Code, and must have passed the related assessment tests. Additionally, the mediator must also present the guarantees of independence, neutrality and impartiality necessary for the practice of the profession of accredited mediator.[70] This condition is not present during mediation within criminal proceedings which takes place on the initiative and under the direction of the Public Prosecutor. As the Prosecutor can in the end initiate prosecution it is not possible to consider them as 'neutral' in the dispute.[71] This neutrality requirement is not fulfilled in the mediation procedure at Unia either as, 'if the facts permit, [Unia] takes a position on the ground of the issue of discrimination and will side with the victim where appropriate'.[72]

In Austria, for the mandatory reconciliation attempt for discrimination based on disability, the mediators used come from the ranks of those accredited in the official list, administered by the Minister of Justice. To be entered on the list of mediators, the individual must be able to prove they are at least 28 years old, professionally qualified, trustworthy and have taken out liability insurance.[73] Their main qualifications include: history and guiding principles of mediation, procedure, methodology and phases of mediation; communication and negotiation skills; conflict analysis; theories of personalities and psychosocial interventions; ethics; legal and procedural knowledge; self-awareness and simulations; peer-group work and practice under supervision.[74]

65 There is no specific text that explicitly allows this.
66 Article 216ter, Section 7 Code of Criminal Procedure.
67 Menkel-Meadow, C. J. (2012), 'Dispute resolution', in Cane, P. and Kritzer, H. (eds), *The Oxford handbook of empirical legal research*, OUP Oxford, p. 609.
68 Sections 38 of the Workplace Relations Act.
69 Article 1426 Judicial Code, mediation carried out by the Federal Mediation Commission (*Commission fédérale de médiation*).
70 Article 1427 Judicial Code.
71 CIRCULAR COL 01/2021 issued by the Ministre de la Justice, les Ministres des entités fédérées et le Collège des Procureurs généraux près les Cours d'appel.
72 Unia (2017), *Evaluatie,* p. 100. Available at: https://www.unia.be/files/Documenten/Publicaties_docs/Evaluation_2e_version_LAR_LAD_Unia_PDF_(Francophone).pdf.
73 Section 9 Bundesgesetz über Mediation in Zivilrechtssachen.
74 They are detailed in decrees from the Minister of Justice and in Section 29 Federal Law on Mediation in Civil Cases.

In Portugal, for a mediation settlement to be enforceable, the mediator needs to be included in the list of registered mediators.[75] Generally, to be a mediator in a public mediation system the following requirements apply: being over 25 years old, being in full possession of civil and political rights, having a higher degree, having successfully completed a mediation training course approved by the Ministry of Justice, not having received a conviction for a crime with intent and knowing the Portuguese language.[76] Additional requirements apply – on top of those mentioned above – when mediation takes place within criminal proceedings: a higher degree or adequate professional experience, having finished a course in criminal mediation and that the mediator be 'an adequate person'.[77]

In any case, it is possible for the parties to choose a person who is not included in the list of registered mediators. The main qualification of the mediator would then be the confidence both parties have in the personal and professional abilities of that person. However, if a mediation procedure is concluded by a person not included in this list, it will not be directly enforceable.[78] In the case of mediation within a sanctioning procedure under Law No. 93/2017, the mediator should be accredited with a mediation course in the criminal area.[79]

4.4 The mediation procedure and its procedural safeguards

Besides the informal procedures which take place in the Belgian and Austrian NEBs, the process of most mediation procedures is described in detail in relevant legislation and sometimes in additional relevant (internal) documents. Often, the procedure is quite flexible and only certain basic elements are included in the law. For instance, while the procedure for setting up civil mediation in Belgium is precisely regulated by the Judicial Code, the course of the mediation itself is left to the initiative of the parties in agreement with the mediator and will be included in a 'mediation protocol'.[80] The three main safeguards in mediation procedures across the four Member States are confidentiality, voluntariness and suspension of time limits.

4.4.1 Confidential nature

Confidentiality is an important element of the mediation procedure. Regarding the Irish procedure at the WRC, it is stipulated that, 'when parties participate in the mediation process they do so on a without prejudice and strictly confidential basis'.[81] Neither the mediation officer nor the parties shall disclose the terms of resolution in any proceedings before a court, unless these proceedings deal with a breach of the terms of the mediation agreement. The same obligation of confidentiality applies to all communications (including those during a mediation conference), all records and all notes.[82]

In the Portuguese procedure, the confidentiality principle is central.[83] It is one of the main safeguards: all persons who participate in the mediation procedure are bound by it.[84] The mediator or mediators are also subject to this principle and cannot act as 'a witness, expert or lawyer in any cause, directly and indirectly,

75 Law No. 29/2013 defines the qualifications and register requirement in a list of available mediators.
76 Article 31 of Law No. 78/2001 (*Lei n.º 78/2001, de 13 de Julho*); Regulations on selection of Mediators approved by Decree of Ministry of Justice No. 283/2018, 19 October.
77 Article 12 of Law No. 21/2007 (*Lei n.º 21/2007, de 12 de Junho*).
78 Article 9(1)(e) of Law No. 29/2013.
79 Art. 11(2) of Law No. 93/2017.
80 Article 1731 Section 1 Judicial Code.
81 Workplace Relations Commission, *2020 Annual Report*, p. 11. Available at: https://www.workplacerelations.ie/en/publications_forms/corporate_matters/annual_reports_reviews/annual-report-2020.pdf.
82 Section 39, Workplace Relations Act 2015.
83 Article 5 Law No. 29/2013 of 19 April.
84 Article 18(3) of No. 29/2013.

related to the mediation'.[85] Thus, generally, the content of mediation sessions cannot be evaluated in court.[86]

In Belgium, for mediation within both civil or criminal proceedings, confidentiality is one of the central procedural safeguards.[87] This safeguard of confidentiality applies to all 'documents drawn up and communications made in the context of the mediator's intervention' and for both the parties and the mediator.[88] Violation of this safeguard will result in the exclusion of these documents and communications from the procedure.[89]

The mediator in civil proceedings in Austria is also bound to confidentiality and 'secrecy' (*Verschwiegenheit*). Section 18 of the Federal Law on Mediation in Civil Cases states: 'The mediator is sworn to secrecy about the facts that were entrusted to him or otherwise known to him during the mediation. He must treat the documents created or handed over to him as part of the mediation as confidential. The same applies to the mediator's assistants and to people who work for a mediator under his guidance as part of practical training.'

4.4.2 Voluntary nature versus mandatory mediation attempt

The Viennese Anti-Discrimination Act demands a mandatory (cost-free) mediation attempt with the Viennese Office to Combat Discrimination. It is mandatory in that only with the written declaration that such an attempt has failed can a claim be brought before a civil court.[90] A similar mandatory attempt to mediate needs to be made in claims of discrimination on the ground of disability, across Austria.[91]

The mandatory mediation attempt is completely contrary to the idea that mediation should occur voluntarily. For instance, in Portugal, one of the major principles that guides mediation is the voluntary principle. Mandatory mediation would not be allowed under Article 4 of Law No. 29/2013 of 19 April 2013. For some cases of intra-judicial mediation, the judge or the prosecutor can propose or refer a case to mediation. However, the mediation procedure can only be initiated if the parties so agree, are present in a pre-mediation session and sign a mediation protocol. In the specific context of discrimination, the CEARD can also refer parties to mediation but this referral must be accepted by them.

In Belgium, although 'judicial mediation' can be ordered by a judge in civil proceedings, this does not affect the voluntary nature of the mediation[92] as it does not have to be successful and may be terminated by either party at any time.[93] Extra-judicial mediation is always fully voluntary as it is based on a proposal from one of the parties to the other.[94]

85 Article 5(2) (3) of Law No. 29/2013 and Art. 28 of Law No. 29/2013.
86 Article 5(4) of Law No. 29/2013.
87 Article 1728 Judicial Code and Article 555 Code of Criminal Procedure. For mediation in civil proceedings, the obligation of confidentiality may be waived with the written consent of the parties and within the limits that they determine. Article 555 of the Code of Criminal Procedure concerns 'restorative mediation' (under the supervision of a true mediator (not the Public Prosecutor) as is the case for the 'mediation' set up on the basis of Article 216ter Code of Criminal Procedure).
88 'Documents drawn up and communications made in the context of the mediator's intervention are confidential, except for what the parties agree to bring to the attention of the judicial authorities. They cannot be used in any criminal, civil, administrative, arbitration or any other dispute resolution proceeding and are not admissible as evidence, even as an out-of-court confession. Section 2. Confidential documents that have nevertheless been communicated or on which a party relies in violation of the obligation of confidentiality, are officially excluded from the proceedings.' (author's own translation) (Article 555 Code of Criminal Procedure).
89 Article 555 Section 2 Code of Criminal Procedure.
90 Section 4a of the Viennese Anti-Discrimination Act.
91 Sections 14 ff of the Federal Disability Equality Act and Section 7k of the Act on the Employment of People with Disabilities.
92 Article 1730 Judicial Code.
93 Article 1729 Judicial Code.
94 Article 1730 Section 1 Judicial Code.

As mentioned above, in Ireland, when the Director of the WRC receives a discrimination complaint, they decide whether the matter is suitable for resolution by mediation. However, the complaint is only referred to a mediation officer if neither the complainant nor the respondent object to mediation.[95] If one of the parties does object, the complaint will be referred to an adjudication officer for investigation.

One could of course argue that this mandatory/non-mandatory nature is just based on a difference in perspective and even wording: that what is called a mandatory attempt does not actually force the parties to go through this process. Since one of the essential characteristics or even necessary elements of successful mediation is that people want to participate in it of their free will, it would be odd to have any kind of mandatory mediation in the strict sense of the word.

4.4.3 Suspension of time limits

In the Viennese mediation procedure, the only procedural guarantee is that the mediation suspends all the procedural time limits.[96] During the mandatory reconciliation attempt for discrimination based on disability across Austria, all time limits for bringing the claims before a court or respective administrative authority are suspended.[97] In addition, in accordance with the Federal Law on Mediation in Civil Cases, 'the start and the proper continuation of a mediation process through an accredited mediator suspend the beginning and the continuation of the period of limitation (i.e. suspension of the period of limitation) and other deadlines to claim the rights and entitlements included in the mediation'.[98] During civil proceedings in Portugal, after the Court or the parties refer a matter to mediation, a subsequent suspension of judicial proceedings takes place.[99]

In Ireland, if a mediation officer concludes that a case cannot be resolved through mediation, they issue a notice to that effect to the parties. Within 42 days of that notice being issued, the complainant can still apply to have the case dealt with through the WRC adjudication process.

There is no information on the effect of the reconciliation effort at Unia on other procedures. However, the negotiation process is sometimes (mis)used by parties accused of discrimination 'to test the solidity of the case of the person who claims to be a victim, or even, as a delaying tactic, to defer (...) the introduction of legal action'.[100] In a recent report this finding was confirmed and it was added that in some cases those responsible for the discrimination do not always execute the measures they commit themselves to. As such, it was recommended that the time limits for judicial proceedings should be suspended when a process is started.[101]

4.5 Outcome of the procedure: mediation agreement or other possible outcomes?

When a case is resolved by mediation, it is common for a mediation agreement to be signed by the parties involved. Yet in the less formalised proceedings that take place independently of a civil or criminal adjudicative procedure, such an agreement will often not be concluded.

95 Section 24, Equal Status Acts 2000-2018 and Section 78, Employment Equality Acts 1998-2021; Section 39, Workplace Relations Act 2015.
96 Section 4a/4 Viennese Anti-Discrimination Act.
97 Sections 10/4 Federal Disability Equality Act and Sections 7k/4 and 7l/5 Act on the Employment of People with Disabilities.
98 Section 22/1 Federal Law on Mediation in Civil Cases.
99 Article 273 of the new Civil Procedure Code, Law No. 41/2013, 26 June 2013, Diário da República, Série I-A, No. 121.
100 Commission for the Evaluation of Federal Legislation on the Fight against discrimination (2017), *Premier rapport d'évaluation* (First evaluation report), paragraphs 224 ff. https://www.unia.be/files/Documenten/Aanbevelingen-advies/Commission_dévaluation_de_la_législation_fédérale_relative_à_la_lutte_contre_les_discriminations.pdf.
101 Commission for the Evaluation of Federal Legislation on the Fight against discrimination (2022), *Rapport final: Combattre la discrimination, les discours de haine et les crimes de haine : une responsabilité partagée* (Final report: combating discrimination, hate speech and hate crimes: a shared responsibility), pp. 109-110. https://equal.belgium.be/sites/default/files/Commission%20Evaluation%20Lois%20Antidiscrimination%20-%20Rapport.pdf.

In the Irish procedure at the WRC, the mediation officer prepares a written record of the terms of the settlement which is then signed by the complainant and the respondent.[102] These agreements 'are reflective of the particular/specific circumstances and issues associated with each individual case'.[103] During 2020, when agreements were reached using the pre-adjudication mediation process, the settlement terms varied from an apology to financial settlements ranging typically from €100s to €1 000s.[104] A mediated agreement under Section 39 of the Workplace Relations Act 2015 is confidential and legally binding on the parties.

In the context of the mandatory mediation process as stipulated in the Viennese Anti-Discrimination Act, the term 'mutual agreement' is used without a definition of its legal nature. Only the failure to arrive at such a 'mutual agreement' is regulated as an official notice by the Viennese Office to Combat Discrimination.[105] This is similar in the Austrian disability legislation: only the term 'result' is mentioned, without defining its legal nature.[106]

In the context of the Austrian NEB, 'successful reconciliation negotiations' (*Vergleichsverhandlungen*) are reached with results ranging from explicit apologies to financial compensation or adaptations regarding working conditions.[107] No formal regulation is in place that requires the result achieved to take a specific form. Similarly, the mediation at the Belgian NEB does not end in a formal mediation agreement either. However, the elements on which they try to reach an agreement are mentioned: acknowledgement of the discrimination or fault, redress or satisfaction for the victim (such as an apology, 'new chance' or compensation, formal commitment to non-discrimination in the future, structural and/or preventive measures, if necessary (such as the adaptation of a policy or provision of training) and communication of the result (possibly in an anonymised form) for awareness-raising purposes.[108]

When successful, civil mediation in Belgium results in a written agreement, which the parties may ask the judge to homologate.[109] After homologation, the mediation agreement is enforceable. It is not subject to appeal by the parties.[110] In Belgium, when criminal mediation occurs under the aegis of the Public Prosecutor, the agreement that is reached must be executed under the supervision of one of the *maisons de justice/justitiehuizen* (houses of justice).[111] If the contract into which the agreement is translated is not respected,[112] the Public Prosecutor will refer the matter to a criminal court anyway.

In Portugal, with the conclusion of a mediation agreement, a new set of rights and duties is established between the parties that changes the terms in which the dispute was presented. They must respect this agreement in accordance with the *pacta sunt servanda* principle. The possibility of recognition of direct

102 Section 24, Equal Status Acts 2000-2018; Section 78, Employment Equality Acts 1998-2021; Section 39, Workplace Relations Act 2015.
103 Workplace Relations Commission, *2020 Annual Report*, p. 11. Available at: https://www.workplacerelations.ie/en/publications_forms/corporate_matters/annual_reports_reviews/annual-report-2020.pdf. Ibid, p. 13.
104 Workplace Relations Commission, *2020 Annual Report*, p. 11. Available at: https://www.workplacerelations.ie/en/publications_forms/corporate_matters/annual_reports_reviews/annual-report-2020.pdf.
105 Section 4a/2 Viennese Anti-Discrimination Act.
106 Only the failure to achieve a mutual agreement is regulated as an official notice that opens up the possibility to address the matter before a court or administrative body and ends the suspension of procedural time limits.
107 Gleichbehandlungsanwaltschaft (2020), *Gleichbehandlungsbericht für die Privatwirtschaft 2018 und 2019,* p. 17, available here: https://www.gleichbehandlungsanwaltschaft.gv.at/wir-ueber-uns/taetigkeitsbericht.html.
108 These elements are included in its 2016-2017 evaluation report on anti-discrimination laws. Unia (2017), *Evaluatie*, available at: https://www.unia.be/files/Documenten/Publicaties_docs/Evaluation_2e_version_LAR_LAD_Unia_PDF_(Francophone).pdf.
109 The judge is obliged to do so, unless the agreement is contrary to public order or the agreement reached in family mediation is contrary to the interests of the minor children (Article 1733, al.2, Judicial Code).
110 When an agreement reached between two parties is homologated, an appeal against this concluded agreement is not possible by the parties. (Art. 1043 Judicial Code).
111 This service comes under the competence of the Belgian Communities.
112 Article 216ter, Section 2 Code of Criminal Procedure.

enforceability[113] or homologation of the mediation agreements[114] only aims to promote its effectiveness without adding to the rights and obligations assumed *sponte sua* by the parties.

5 Number of (successful) mediation proceedings in discrimination cases

Overall, it appears that in all four Member States investigated there is very little data available that could provide a clear picture of how often mediation in discrimination cases is attempted or undertaken, how often it is successful as well as what a success story would entail. It appears that the main reason for this lack of information is the confidential nature of the procedure. This challenge was explicitly mentioned by Carrie J. MenkelMeadow. She argued that acquiring data about processes that occur mostly in private is difficult and thus empirical studies are a challenging undertaking.[115] Another difficulty is that when mediation occurs within the realm of civil or criminal proceedings, often no record is kept of the topic of the dispute and whether this involved a violation of anti-discrimination law. I will now briefly discuss by country the data we do possess on mediation procedures and their chance of success.

In Ireland, there is a yearly record of the total number of complaints to the WRC that were dealt with through mediation across the body's entire mandate. However, the number also includes a broad range of employment rights laws, and separate figures for discrimination cases are not provided.[116] In total, about 1 609 complaints advanced to a mediation process during 2020 and, of these, 582 progressed to full mediation. Over 40 % of all cases that were before the Mediation Services in 2020 did not require an adjudication hearing at the conclusion of the process. In 2021, there was a 52 % success rate.[117]

In Austria, for the mandatory attempt to mediate/start a reconciliation procedure in discrimination cases, we know that, in 2018, 115 out of 309 procedures ended in an agreement. In 150 procedures, no agreement was concluded, and 44 procedures were withdrawn by the victims.[118, 119] The division between the different areas of action is as follows: 56 % of the procedures in 2018 concerned claims under the Act on the Employment of People with Disabilities (relating to the workplace) and 44 % were claims under the Federal Disability Equality Act (goods and services). For the mediation procedure at the Austrian National Equality Body, it is publicly known that there were 82 successful reconciliation negotiations in 2018 and 2019.[120] There are no statistics available on the number of mediation procedures for discrimination cases under the jurisdiction of civil law courts.

In Belgium, there is no data on the number of mediation procedures within civil discrimination proceedings. For criminal proceedings, the annual statistics of the Public Prosecutor's Office tell us that the closure of criminal cases through mediation is a very rare phenomenon, with only 0.38 % of cases in 2020.[121] No separate count is conducted as regards the number of these cases including violations of anti-

113 Article 9 of Law 29/2013.
114 Article 14 of Law 29/2013.
115 Menkel-Meadow, C. J. (2012), 'Dispute resolution', p. 603.
116 Workplace Relations Commission, *2020 annual report*, available here: https://www.workplacerelations.ie/en/publications_forms/corporate_matters/annual_reports_reviews/annual-report-2020.pdf. *2021 annual report*, available here: https://www.workplacerelations.ie/en/publications_forms/corporate_matters/annual_reports_reviews/annual-report-2021.pdf.
117 Workplace Relations Commission, *2021 annual report*, available here: https://www.workplacerelations.ie/en/publications_forms/corporate_matters/annual_reports_reviews/annual-report-2021.pdf.
118 This is based on the latest published figures from the Federal Social Service from 2018. See webpage of Federal social Service: https://www.sozialministeriumservice.at/Ueber_uns/Sozialministeriumservice/Zahlen__Daten__Fakten/Kennzahlen_und_Infos_zu_Finanzierung_und_Foerderung.de.html (in German), *Kennzahlen 2018* (XLS, 0.4 MB).
119 There is a list of reconciliation attempts published by the NGO BIZEPS, containing 174 concrete examples with a short description of the issue at stake and the results of the procedure. See: BIZEPS, Data bank on reconciliation (*Schlichtungsdatenbank*) https://www.bizeps.or.at/schlichtungen/ (in German).
120 For more nuanced information on the ratio of different actions by the NEB, including reconciliation attempts, see: Bi-annual report by the National Equality Body 2018/2019, p. 17, available at: https://www.gleichbehandlungsanwaltschaft.gv.at/wir-ueber-uns/taetigkeitsbericht.html.
121 Statistique annuelle des parquets correctionnels et du parquet fédéral Recherche et poursuite des affaires pénales par les parquets près les tribunaux de première instance, available here: https://www.om-mp.be/stat/corr/start/f/home.html.

discrimination law. In its 2017 report, the Commission for the Evaluation of Federal Anti-Discrimination Legislation[122] gave a generally positive assessment[123] of the use of this type of 'mediation'.

A recent qualitative study, for which interviews were conducted with victims of hate crimes, showed that several among them indicated that they would have liked the opportunity to talk to the perpetrator of acts in question.[124] However, it noted that little use was made of this in practice.[125] Three hypotheses were put forward to explain this situation: 1. the unwillingness of the perpetrators of this type of offence to acknowledge their responsibility; 2. the unwillingness of the victims in some cases to take part in this process and 3. the difficulty for the 'houses of justice' to find training programmes adapted to this type of offence.

For Unia, an indication of the number of cases that were 'closed' is included in its 2020 annual activity report. This discloses that, among the 287 closed cases, 32.7 % resulted in an 'out-of-court' solution when, in UNIA's opinion, discrimination was proven to exist.[126] In 2021, this number went up to 37.4 % of the closed cases.[127] Overall, a small-scale qualitative study into the fairness perceptions of victims of discrimination shows that the procedure at Unia is evaluated quite positively.[128]

On the prevalence of mediation procedures in discrimination cases in Portugal, no data can be found. This is due to the fact that the procedure itself is confidential and the CEARD does not provide any information on the number of discrimination claims they refer to mediation.

6 Conclusion

This article set out to explore the different mediation procedures and practices victims of discrimination can or are required to make use of. Their principal characteristics were compared to allow us to better understand what constitutes good practise, on both the individual and the general levels.

It was established that, in the countries studied, mediation in civil proceedings is usually also open to victims of discrimination. Yet since no special conditions apply in order to further accessibility (for instance, financial) or protection of the victims, it does not appear that it is an option that is often used. However, the lack of data on the ratio of discrimination cases within the totality of cases and on their success rate makes drawing definite conclusions impossible. Similarly, in criminal cases, it remains a

122 Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations, 'Premier rapport d'évaluation" (February 2017), available here: https://www.unia.be/files/Documenten/Aanbevelingen-advies/Commission_dévaluation_de_la_législation_fédérale_relative_à_la_lutte_contre_les_discriminations.pdf (t§§ 224 and following).

123 Ibid, § 460. See also Centre pour l'égalité des chances et la lutte contre le racisme, 'Vers des mesures alternatives dans la lutte contre les discriminations et les délits de haine' (September 2012). https://www.unia.be/files/Documenten/Publicaties_docs/rapport_Mediation_FR_DEF.pdf. The report was based on an older, more restrictive version of Article 216 ter Code of Criminal Procedure.

124 De Potter, V. and Van Dorsselaer, I. (2020), *Sloten en sleutels. Slachtoffers van haatmisdrijven en haatincidenten. Over wat helpt na de haat* (Locks and keys. Victims of hate crimes and incidents of hatred. What helps after the hate), Koning Boudewijnstichting, p. 31, available at: https://www.kbs-frb.be/nl/sloten-en-sleutels-wat-slachtoffers-van-haatmisdrijven-en-haatincidenten-helpt-na-de-haat or https://media.kbs-frb.be/nl/media/7704/20201118NT1.pdf In this study, the protected grounds on which the discrimination occurred did not play a role in the selection of interviewees. As such, there will have been instances of discrimination based on gender-based criteria that were included in the interviews.

125 Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations, 'Premier rapport d'évaluation' (February 2017), available here: https://www.unia.be/files/Documenten/Aanbevelingen-advies/Commission_dévaluation_de_la_législation_fédérale_relative_à_la_lutte_contre_les_discriminations.pdf, nn°46 ff.

126 Unia (2021), *Cijferverslag* (Report in figures), available at: https://www.unia.be/nl/publicaties-statistieken/publicaties/cijferverslag-2020. The database is only available in French and Dutch (available at: https://www.unia.be/en/jurisprudence-alternatives/negotiated-solutions).

127 Ibid. The 2021 report is available here: https://www.unia.be/files/Documenten/Publicaties_docs/Rapport_chiffres_2021_Unia_FR_def.pdf.

128 Van de Graaf, C. (2020), 'Procedural justice perceptions in the mediation of discrimination reports by a national equality body', 45-61. Available at https://journals.sagepub.com/doi/full/10.1177/1358229120927921.

marginal phenomenon. Overall, it seems that the more tailored the process is to deal with a case of discrimination, the more it will be used.

For the mediation that occurs within the Irish WRC procedure and the mandatory attempts specifically targeting (certain) discrimination victims, there seems to be better availability of data which overall paints a positive picture of the number of cases that are successful. Of course, the sole benchmark for a 'successful' case is whether an agreement is reached.

While the reconciliation procedures at the NEBs appear to be a promising alternative to adjudication, they do not fully fit the characteristics of a mediation procedure in the strict sense. In particular, regarding neutrality, it appears that the dynamics in the victim/NEB and NEB/alleged perpetrator relationship ought to be clarified. If not, this could create false expectations on the side of victims or alleged perpetrators who enter into the process.

In general, the outcome of the mediation process is limited to the parties involved. Only for the reconciliation procedures at the NEB does there seem to be the possibility to include future-oriented measures that would transcend the dispute at hand, such as training, policy commitments or general changes in working conditions. As such, the public impact of discrimination cases that are settled through mediation remains limited.

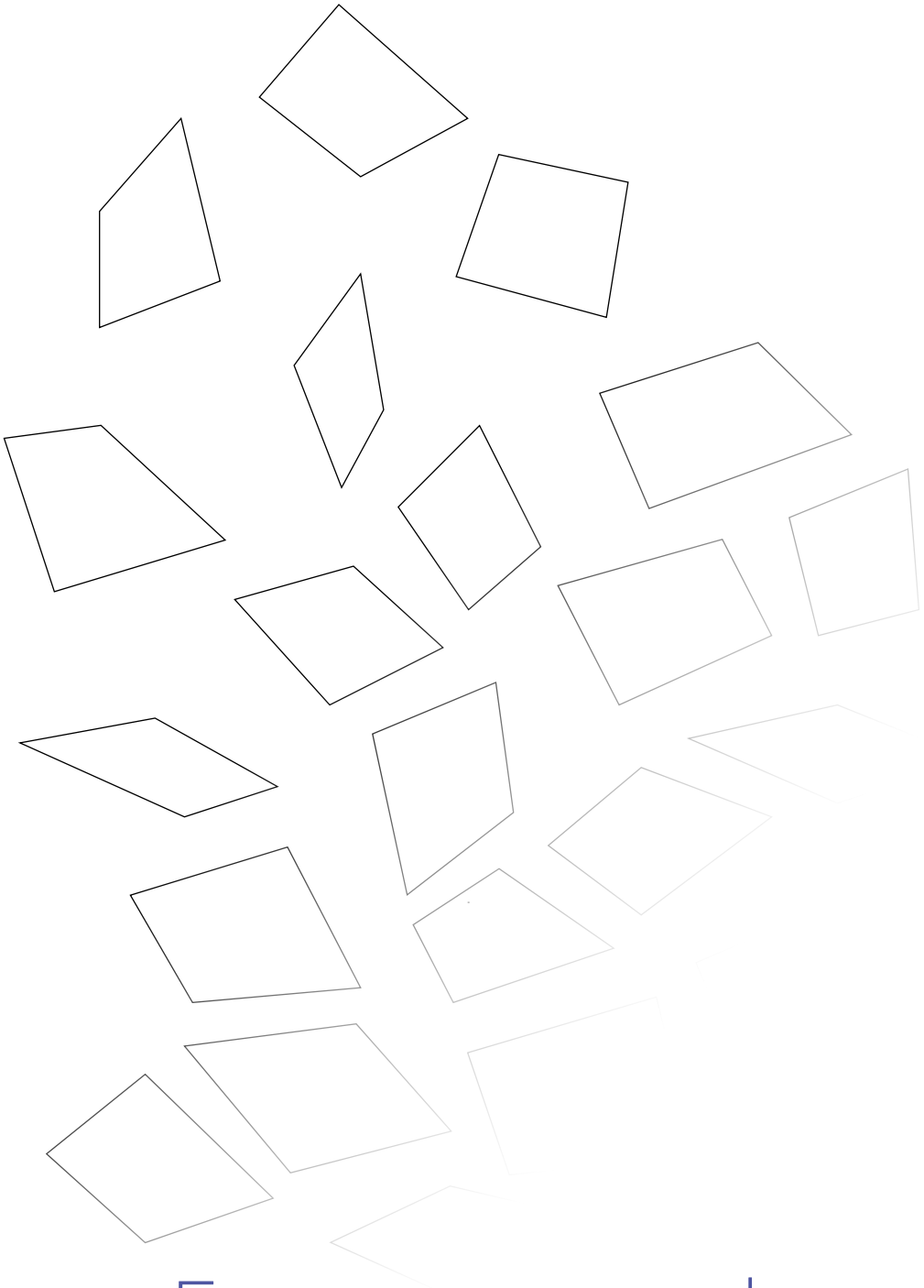
The study included in this article was merely exploratory and demonstrated a clear need to obtain more evidence-based data about which practices work from the perspective of the individual as well as the perspective of the persons who take up the role of mediator.

ANNEX 1

	Ireland (WRC)	Belgium (NEB)	Belgium (Criminal proceedings)	Belgium (Civil proceedings)		Portugal (reference by CEARD)	Austria (Vienna)	Austria (NEB)	Austria (disability)
				Judicial	Extra-judicial				
Body	Quasi-judicial specialised body (WRC)	Belgian Interfederal Centre for Equal Opportunities and Opposition to Racism (UNIA)[1]	Public Prosecutor	Accreditated Mediator	Accreditated Mediator (if the parties wish it to be homologated by the Court)	Accredited Mediator (in the criminal area)	Viennese Office to Combat Discrimination	National Equality Body (Ombuds for Equal Treatment)	Federal Social Service
Grounds covered	Age, civil status, disability, family status, gender, housing assistance, race, religion, sexual orientation, membership of the Traveller community	Alleged race, colour, descent, national or ethnic origin, nationality, disability, philosophical or religious beliefs, sexual orientation, age, property (‘*fortune*’, in French), civil status, political opinion, trade union opinion, actual or state of health, physical of genetic features, birth, social origin and civil status	Alleged race, colour, descent, national or ethnic origin, nationality, disability, philosophical or religious beliefs, sexual orientation, age, property (‘*fortune*’, in French), civil status, political opinion, trade union opinion, actual or state of health, physical of genetic features, birth, social origin and civil status, language, Gender-based criteria.	Alleged race, colour, descent, national or ethnic origin, nationality, disability, philosophical or religious beliefs, sexual orientation, age, property (‘*fortune*’, in French), civil status, political opinion, trade union opinion, actual or state of health, physical of genetic features, birth, social origin and civil status, language, Gender-based criteria.	Alleged race, colour, descent, national or ethnic origin, nationality, disability, philosophical or religious beliefs, sexual orientation, age, property (‘*fortune*’, in French), civil status, political opinion, trade union opinion, actual or state of health, physical of genetic features, birth, social origin and civil status, language, Gender-based criteria.	race or ethnic origin, colour, nationality, ancestry, place of origin	Ethnic affiliation, Age, disability, gender identity and gender, pregnancy or parenthood, religion, belief, sexual orientation	Age, gender, ethnic affiliation, religion, belief, sexual orientation	Disability

1 Gender-based criteria are under the competence of the Institute for Equality of Women and Men. More information can be found on https://igvm-iefh.belgium.be/en/organisatie.

	Ireland (WRC)	Belgium (NEB)	Belgium (Criminal proceedings)	Belgium (Civil proceedings)		Portugal (reference by CEARD)	Austria (Vienna)	Austria (NEB)	Austria (disability)
				Judicial	Extra-judicial				
Field of law (civil, criminal, admin.)	Civil law	All fields	Criminal Law	Non-Criminal Matters	Civil Law	All fields	Civil Administrative Law	Civil Administrative Law	Civil Administrative Law
Type of procedure	Voluntary	Voluntary	Voluntary (on initiative of the Public prosecutor)	Voluntary (eventually on initiative of the judge)	Voluntary	Voluntary	Mandatory	Voluntary, informal	Mandatory
Outcome	Mediation agreement	Negociated solution (eventually formalized in a written agreement)	Mediation agreement	Mediation agreement (eventually homologated by the judge)	Mediation agreement (eventually homologated by the judge)	Mediation agreement (eventually homologated by the judge)	Agreement. Lack of agreement opens the possibility of court proceedings	Agreement (informal)	Agreement. Lack of agreement opens the possibility of court proceedings



European case law update

This section provides an overview of the latest main developments in gender equality and non-discrimination cases pending or decided by the Court of Justice of the EU and the European Court of Human Rights, from 1 January to 30 June 2022.

Court of Justice of the European Union

REFERENCES FOR PRELIMINARY RULINGS – ADVOCATE GENERAL OPINIONS

Age

C-587/20, *Ligebehandlingsnævnet, acting on behalf of A v HK/Danmark, HK/Privat, Intervener: Fagbevægelsens Hovedorganisation*, Opinion of Advocate General Richard de la Tour on 13 January 2022, ECLI:EU:C:2022:29

This request for a preliminary ruling was submitted by the Østre Landsret (High Court of Eastern Denmark) and concerned the interpretation of Article 3(1)(a) of the Employment Equality Directive and whether an age limit laid down in the statutes of an organisation of workers for eligibility to stand as sector convenor of that organisation falls within the substantive scope of the Directive.

First, the Advocate General noted that the very wording of Article 3(1)(a) attests to the EU legislature's intention to give a broad definition to the scope of the Directive, which covers all rules laying down conditions for access to any occupational activity, whatever the nature and characteristics of that activity. As a result, election to the post of sector convener of an organisation of workers results in the exercise of an occupational activity. In the AG's view, the simultaneous reference, in Article 3(1)(a) to the concepts of 'employment', 'self-employment' and 'occupation', demonstrates that the scope of the Directive is not limited to positions and rules that mainly seek to protect workers as the weaker party in an employment relationship. Instead, the Directive aims to eliminate, on grounds relating to social and public interests, all discriminatory obstacles to access to livelihoods and to the capacity to contribute to society through work, irrespective of the legal form in which it is provided. The AG observed that Article 3(1)(a) of the Directive refers to 'selection criteria and recruitment conditions', which can include access to an occupational activity organised by means of an election. The Directive also does not consider the means by which access to employment occurs and the method of recruitment to a post. All these factors led the AG to conclude that an age limit established by the statutes of an organisation of workers for eligibility to stand as sector convener of that organisation falls within the scope of Article 3(1)(a) of the Directive.

Finally, the AG made some remarks on the interpretation suggested by the organisation of workers that freedom of association prevails over the prohibition of discrimination in employment and occupation. The AG pointed out that according to Article 52(1) of the Charter of Fundamental Rights of the European Union, freedom of association is not an absolute right, and its exercise may be subject to limitations, that are provided for by law and respect the essence of that right and the principle of proportionality. Those limitations thus respect the essence of freedom of association since they apply solely for the purpose of safeguarding the principle of equal treatment in employment and occupation and the attainment of a high level of employment and social protection. The AG considered that such limitations of the exercise of freedom of association arising from the Employment Equality Directive are necessary to ensure the protection of the rights in the areas of employment and occupation of persons belonging to groups characterised by one of the grounds listed in Article 1.

Religion or belief

C-344/20, *LF v SCRL*, Opinion of Advocate General Medina delivered on 28 April 2022, ECLI:EU:C:2022:328

This request for a preliminary ruling was submitted by the Tribunal du travail francophone de Bruxelles (Brussels Labour Court, French-speaking) and questions whether Article 1 of the Employment Equality Directive is to be interpreted as meaning that religion and belief are two sides of the same protected

criterion. It also calls for an examination of the discretion afforded to Member States, pursuant to Article 8 of the Directive, to adopt more favourable provisions than those laid down in that Directive, in particular by treating religion and religious beliefs as an autonomous ground of discrimination.

The claimant before the referring court was a Muslim woman, wearing the Islamic headscarf, who was refused an internship because of the employer's policy of prohibiting any type of head covering on its premises. The claimant challenged the refusal, which she considered to be based directly or indirectly on her religious beliefs, in violation of the General anti-discrimination law.

As regards the interpretation of Article 8, the AG recalled that the Directive, by setting out minimum requirements, was only adopted to provide a partial harmonisation of the rules on equal treatment in the fields of employment and occupation, as established previously in the judgment in *WABE*. It thus leaves room for different approaches at national level on how to properly and legitimately address discrimination. However, whether the margin of discretion afforded to Member States specifically allows for the protection of religion and religious beliefs as an autonomous ground of discrimination in national law is yet to be decided. This consideration would also impact the type of comparison employed for the assessment of discrimination. The AG noted that 'intragroup' comparison requires an assessment of discrimination *within* a group composed of individuals that share the same protected characteristic and ensures increased sensitivity to less visible disadvantages within a particular group. Nevertheless, this protection is highly dependent on the 'circle of persons' delineated for the purposes of that comparison. It follows that, if 'religion and religious beliefs' are protected together with 'philosophical and spiritual beliefs', then the reference person for comparability purposes is reduced because of the broadening of the circle of persons belonging to the group of comparison concerned. By contrast, if 'religion and religious beliefs' are protected as an autonomous ground of discrimination, the comparison will be only carried out among individuals affected by reason of their religion and religious beliefs.

The AG then emphasised that the Court has never established a distinction between 'religion and religious beliefs', on the one hand, and 'philosophical and spiritual beliefs', on the other. Instead it appears from the judgment in *WABE* that national law implementing the Employment Equality Directive may opt to recognise autonomous protection through wording, such as 'religion and religious belief, philosophical belief', in the list of the grounds of discrimination. In addition, the AG underlined that religion and religious beliefs might be viewed as an inseparable characteristic from a person's being and therefore Member States are allowed to afford direct protection to employees concerned by religious clothing obligations by recognising the protection of religion and religious beliefs as an autonomous ground of discrimination.

In the light of the above, the AG found that national legislation is to be considered as more favourable to the protection of the Directive when it concerns not only the analysis of a justification applicable to indirect discrimination, but also the assessment of the existence of discrimination and, consequently, the finding of direct or indirect discrimination in a specific case. That encompasses national legislation which establishes autonomous protection of religion and religious beliefs as a single ground of discrimination. The AG concluded that Article 8 of the Employment Equality Directive must be interpreted as permitting Member States to protect religion and religious beliefs as an autonomous ground of discrimination, but it precludes the interpretation of a provision that refers to 'religious or philosophical belief' in the list of grounds of discrimination under national law as being a more favourable provision than the EU protection of the principle of equal treatment.

REFERENCES FOR PRELIMINARY RULINGS - JUDGMENTS

Disability

C-485/20, *XXXX v HR Rail SA*, judgment of 10 February 2022, ECLI:EU:C:2022:85

This request for a preliminary ruling was submitted by the Conseil d'État (Council of State, Belgium) and concerned the lawfulness of the dismissal of a worker with a disability. During a long-term internship, the claimant in the main proceedings was diagnosed with a heart condition that made him incapable of performing his duties. As a result, the employer temporarily reassigned the claimant to another position, before terminating his traineeship. The claimant sought the annulment of the dismissal, claiming that the employer had failed to meet its duty to provide reasonable accommodation, notably by reassigning the claimant to a position for which he was capable.[1]

First, the Court clarified the personal scope of the Employment Equality Directive and pointed out that it applies to both the public and private sectors, including public bodies, and also covers the situation of a worker undertaking a traineeship following recruitment by the employer. The Court went on to recall the defining elements of the concept of 'disability', in accordance with its previous decisions, concluding that the claimant was considered as falling within the scope of the Directive.

Regarding the key issue at stake, the Court recalled that Article 5 of the Employment Equality Directive requires the employer to take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. Moreover, the Court emphasised that recital 20 of the Directive provides a 'non-exhaustive' list of appropriate measures, and that they may be physical, organisational and/or educational, since Article 5 of the Directive, read in the light of Article 2, fourth paragraph of the UN Convention on the Rights of Persons with Disabilities, prescribes a broad definition of the concept of reasonable accommodation. In this regard, these measures may include the implementation by the employer of measures that make it possible for persons with disabilities to remain in employment, such as reassignment to another position. This interpretation is in line with the goal of eliminating the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers.

The Court thereby concluded that Article 5 of the Employment Equality Directive must be interpreted as meaning that the concept of reasonable accommodation requires that a worker with disability, including someone undertaking a traineeship, who has been declared incapable of performing the essential functions of their post, should be assigned to another position for which they possess the necessary competence, capability and availability, unless that measure imposes a disproportionate burden on the employer.

Gender

C-389/20, *CJ v Tesorería General de la Seguridad Social (TGSS)* (Chômage des employés de maison), judgment of 24 February 2022, ECLI:EU:C:2022:120

This request for a preliminary ruling was submitted in the context of a dispute between CJ, the applicant, and the Tesorería General de la Seguridad Social (General Treasury of Social Security (TGSS), Spain). 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 question of discrimination based on sex arises because the provision at issue seems to exclude an entire category of workers, overwhelmingly consisting of women, from unemployment benefits.

1 For a summary of the facts, the questions referred and the Opinion of Advocate General Rantos, see *European equality law review* Issue 2022/1, p. 77.

The Juzgado de lo Contencioso-Administrativo No. 2 de Vigo (administrative court, Vigo, Spain) submitted a request for a preliminary ruling to the CJEU, asking whether the Spanish provision at hand constitutes indirect discrimination based on sex contrary to Article 4(1) of Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, and Article 5(b) of Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

The national provision at issue applies without distinction to male and female workers affiliated to the special system of domestic workers and, thus, it does not directly discriminate against women. However, according to Article 2(1)(b) of Directive 2006/54 indirect discrimination on grounds of sex constitutes a situation in which an apparently neutral provision, criterion or practice places persons of one sex at a particular disadvantage in relation to persons of the other sex. According to the statistical data presented in the specific case, the proportion of female workers subject to the general Spanish social security scheme who are affected by the difference in treatment resulting from the national provision at issue is significantly higher than that of male workers. In fact, women represent almost 100 % of the workers covered by the special scheme for domestic workers. Therefore, the CJEU concluded that the national provision at issue places female workers at a particular disadvantage compared to male workers and constitutes indirect discrimination based on sex contrary to Article 4(1) of Directive 79/7, unless it is objectively justified by a legitimate aim unrelated to any discrimination based on sex.

The Spanish Government and the TGSS argue that the national provision at issue has the objective of safeguarding employment levels and combating illegal employment for the purposes of the social protection of workers. In fact, those parties claim that the increase in labour charges and wage costs resulting from an increase in contributions in the domestic workers' sector to cover the risk of unemployment could result in a drop in employment levels in this field of work, in the form of terminations and a reduction in new hires, as well as increases in illegal work and social fraud, and would thus be likely to lead to a reduction in the protection of domestic workers.

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 Court held that the objectives pursued in Article 251(d) of the LGSS are, in principle, legitimate objectives of social policy, capable of justifying indirect discrimination. However, for the national provision at issue in the main proceedings to be implemented in a coherent and systematic manner regarding the objectives referred to, it must be established that the category of workers which it excludes from protection against unemployment distinguishes itself in a relevant way from other categories of workers who are not excluded from it. However, in the present case, the national provision does not appear to be implemented in a coherent and systematic way compared to other categories of workers who benefit from the same benefits while presenting similar characteristics and working conditions to those of domestic workers and, therefore, present similar risks in terms of reduced employment levels, social fraud and recourse to illegal work. Since this exclusion would lead to a greater lack of social protection for domestic workers compared to the other categories of workers, the national provision at issue in the main proceedings does not appear necessary to achieve the stated social policy objectives.

Having regard to all the foregoing considerations, the Court concluded that Article 4(1) of Directive 79/7 must be interpreted as precluding a national provision that excludes unemployment benefits from the social security benefits granted to domestic workers by a statutory social security scheme, since this provision places female workers at a particular disadvantage compared to male workers and is not justified by objective factors unrelated to any discrimination based on sex.

C-405/20, *EB v BVAEB*, judgment of 5 May 2022, ECLI:EU:C:2022:347

Gender

This request for a preliminary ruling concerns the interpretation of Article 157 TFEU, of Protocol No. 33 on Article 157 TFEU and of Articles 5 and 12 of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment for men and women in matters of employment and work. The request was submitted in the context of three separate disputes with the Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB) (sickness fund for civil servants and agents of the public authorities, railway and mining sector, Austria) on the annual adjustment of retirement pensions.

The applicants in the main proceedings, EB, JS and DP, are three males born before 1955 who worked as federal civil servants in Austria and were admitted to retirement in the years 2000, 2013 and 2006, respectively. When the applicants asked the BVAEB for a revaluation of the amount of their retirement pension from 1 January 2018, the organisation found that the pensions of EB and DP were not eligible for a revaluation, given that they exceeded the ceiling of EUR 4 980 per month referred to in Article 711 of the Austrian General law on Social Security (ASVG). The applicants then brought an action before the Bundesverwaltungsgericht (Federal Administrative Court, Austria) claiming the Austrian law at issue constituted indirect discrimination based on sex because the great majority of pensioners affected were in fact men.

The Bundesverwaltungsgericht (Federal Administrative Court) dismissed the appeals brought by the applicants in the main proceedings, taking the view that there were grounds for justifying the discrimination based on sex. The applicants brought an appeal for review against this decision before the referring court. The Verwaltungsgerichtshof (Supreme Administrative Court, Austria) in turn referred to the ECJ with two questions for a preliminary ruling. The first question concerns whether the principle of equal pay is applicable due to its limited temporal effect ruled in the *Barber* judgment, now codified in Protocol No. 33 and Article 12(1) of Directive 2006/54. The second question the referring court asked, is whether Article 157 TFEU and Article 5 of Directive 2006/54 must be interpreted as precluding national legislation which provides for an annual adjustment on a reducing scale of the amount of the retirement pensions of national civil servants depending on that amount, with no adjustment at all above a certain pension amount.

Answering the first question, the Court gives a negative response. More specifically, the Court notes that in the *Ten Oever* judgment, by virtue of the *Barber* judgment of 17 May 1990, it ruled that the direct effect of Article 119 (now 157 TFEU) can only be invoked for payment in relation to periods of employment arising after the date of that judgment. For Member States that joined the EU after the date of the *Barber* judgment, the relevant date to consider is the date of membership. For Austria, the relevant date is 1 January 1994. The Court concludes that the principle of equal pay enshrined in Article 157 TFEU can be invoked, since Protocol No. 33 and Article 12 of Directive 2006/54 on the limitation of the temporal effect of the principle of equal pay between men and women does not apply to the Austrian law at issue.

Regarding the second question, the Court reminds us that Article 5(c) of Directive 2006754/EC prohibits any direct or indirect discrimination based on sex in occupational social security schemes as regards the calculation of benefits. In the present case, the applicants demonstrated that the great majority of pensioners affected by the Austrian law were in fact men. The referring court claims that it is logical that more men are impacted by such measures that affect higher pensions because more men hold higher-paying positions. However, the CJEU ruled that this argument does not deny that a greater proportion of men are more affected than women by the Austrian law at issue and, thus, there is indirect discrimination unless the measure is justified by objective factors unrelated to the discrimination. The Court ruled that the objectives pursued by the Austrian measure of ensuring the long-term funding of retirement benefits and of closing the gap between the levels of pensions were legitimate social policy objectives. In conclusion, the Court ruled that the national provisions at issue constitute indirect discrimination

on grounds of sex that is justified by the objective to ensure the sustainable financing of retirement pensions and of reducing the gap between the levels of state-funded pensions.

C-587/20, *Ligebehandlingsnævnet, acting on behalf of A v HK/Danmark, HK/Privat, Intervener: Fagbevægelsens Hovedorganisation*, judgment of 2 June 2022, ECLI:EU:C:2022:419

Age

This request for a preliminary ruling was submitted by the Østre Landsret (High Court of Eastern Denmark) and concerned a provision of the statutes of an organisation of workers establishing an age limit for election as its sector convenor. The question asked, in substance, whether Article 3(1)(a) of the Employment Equality Directive must be interpreted as meaning that a politically elected sector convenor of a trade union falls within the scope of the Directive.[2]

The Court noted the observations of the Advocate General, which emphasised that the terms 'employment', 'self-employment' and 'occupation' of Article 3(1)(a) cover a wide range of conditions for access to any occupational activity, whatever the nature and characteristics of such activity. The Court noted that the EU legislature did not intend to strictly limit the scope of the Employment Equality Directive to those 'workers' who, within the meaning of Article 45 TFEU and the settled case law of the Court, perform services for and under the direction of another person in return for which they receives remuneration, for a certain period of time. In this regard, the Directive does not only seek to protect workers as the weaker party in an employment relationship, but aims to remove all discriminatory obstacles to access to livelihoods and to the capacity to contribute to society through work, irrespective of the legal form in which it is provided. The Court therefore found that the Directive does not exclude from its scope political posts, but on the contrary, it applies to both the private and the public sectors and 'whatever the branch of activity'. Moreover, the freedom of trade unions to elect their representatives must comply with the prohibition of discrimination in employment and occupation, which is the purpose of the Directive.

The Court went on to examine whether Article 3(1)(d) of the Directive applies to, *inter alia*, involvement in an organisation of workers. As also argued by the AG, the Court clarified that standing for election as sector convenor of an organisation of workers or holding such a role once elected, represents a means of 'involvement' in such an organisation. Such an interpretation is in line with the objective of the Directive to lay down a general framework to combat discrimination, including on the grounds of age, in employment and occupation. On this basis, the Court finally concluded that Article 3(1)(a) and (d) of the Employment Equality Directive must be interpreted as meaning that an age limit laid down in the statutes of an organisation of workers for eligibility to stand as sector convenor of that organisation falls within the scope of that directive.

C-625/20 *KM v Instituto Nacional de la Seguridad Social (INSS)*, judgment of 30 June 2022, ECLI:EU:C:2022:58

Gender

The request for a preliminary ruling relates to equal treatment in social security, and was submitted by Social Court No. 26, Barcelona, Spain. The case concerns the Spanish national legislation prohibiting the combination of multiple total occupational invalidity pensions when they are granted under the *same* social security scheme. The national legislation does, however, allow for combination of total occupational invalidity pensions if they are granted under *different* schemes. The applicant in the proceedings was entitled to two, separate total occupational invalidity pensions under the same general social security scheme (RGSS) after suffering two different and unrelated non-occupational injuries. Each of the non-occupational injuries occurred during different periods and occupational activities. The applicant was, however, refused the payment of both pensions on the basis of the relevant national legislation prohibiting combination of pensions granted under the same scheme.

2 For a summary of the facts, the questions referred and the opinion of Advocate General Richard de la Tour, see above p. 74.

The question submitted to the Court was whether the relevant Spanish national legislation is compatible with Article 4(1) of Directive 79/7, requiring that there is no discrimination (direct or indirect) on the calculation of benefits. According to the referring court, the national legislation does not make an explicit distinction on the basis of sex, but although it appears neutral, it can nevertheless have a greater impact on women. Statistical data shows that the distribution of men and women that are part of the general social security scheme (RGSS) is balanced. However, the disparities are greater when considering other schemes. For instance, the referring court noted that women represent only 36 % of those in the social security scheme for self-employed persons (RETA).

The Court began by stating that there would be indirect discrimination in the current case if the national legislation has the consequence of depriving a significantly greater proportion of female workers, as compared to male workers, of the possibility of combining two or more total occupational invalidity pensions.

With regards to the relevance of the statistical data as presented by the referring court, the Court noted that the national legislation at issue does not apply to all workers affiliated to a social security scheme. Rather, the legislation only applies to those who have satisfied the conditions for the grant of at least two total occupational invalidity pensions. Currently, workers who do not fulfill the conditions to be entitled to multiple pensions are also part of the statistical data presented by the referring court. The statistical data on the affiliation to schemes *only* cannot therefore be relied on to compare proportions and establish indirect discrimination. Instead, it is necessary first, to take into consideration all workers who have obtained the right to more than one total occupational invalidity pension and secondly, to compare the proportion of workers who are and are not affected by the alleged difference in treatment among the women in the workforce who come within the scope of the legislation, with the same proportion of men in the workforce coming within the scope.

At the request of the Court, additional statistical data was provided by the Spanish Social Security Institute (INSS). The statistical data provides the total number of male and female workers who respectively suffer from at least two incapacities to work and were entitled to total occupation invalidity pensions under two schemes or the general scheme. According to the Court, such data alone cannot make it possible to establish the proportions of male and female workers that are *disadvantaged* by the legislation. However, the Court noted that considering the large number of persons affiliated with the scheme for self-employed persons (RETA), it cannot be ruled out that by taking into account the figures for workers who have become entitled to two invalidity pensions under the same scheme alone may have an impact on the calculation of the respective proportions of male and female workers that are adversely affected. The Court concluded that it is for the referring court in question to carry out all the necessary checks to assess whether the difference in proportions are significant. At the same time, the Court also stated that a lesser, but persistent and relatively constant disparity between male and female workers might also reveal apparent indirect discrimination on the grounds of sex.

The Court then regarded the possible justifications. If the national court establishes that there is indirect discrimination, the national legislation can still be objectively justified by a legitimate social policy objective, where the means of achieving that aim are appropriate and necessary. The means can only be considered appropriate to achieve the stated aim if they genuinely reflect a concern to attain that aim and it is pursued in a consistent and systematic manner.

The INSS and the Spanish Government held that the national legislation is justified in light of the objective of preserving the viability of the social security system. If combining total occupational invalidity pensions was allowed, there would be significant consequences for the funding of that scheme. Furthermore, they held that allowing for a combination under different schemes has a reduced budgetary effect as they cover different risks.

The Court found that although budgetary considerations cannot justify discrimination against one of the sexes, the objective of ensuring long-term funding of occupational pensions may be considered to be a legitimate social policy objective wholly unrelated to discrimination related to sex. The Court further noted that the suitability of the national legislation to attain the objective might be appropriate. However, the Court held that irrespective of whether the worker receives pensions that come under one single scheme or different schemes, expenditure related to that pension continues to be borne by the social security budget. A combination of schemes, and the budgetary consequences of that, do not appear to differ appreciably depending on whether granted under the same or different scheme. The Court therefore concluded that the national legislation is not applied in a consistent and systematic matter, and that it therefore cannot be regarded as being appropriate to attain the objective and that Article 4(1) of Directive 79/7 must be interpreted as precluding the national legislation at hand.

European Court of Human Rights

Y and others v Bulgaria, Application No. 9077/18, judgment of 22 March 2022

Gender

The application concerns a case of violence against women in Bulgaria. In particular, the applicants are the relatives of a woman killed by her husband, who had been harassing her for several months prior to her murder. The victim complained to the authorities on several occasions about the threats posed to her safety by her husband but this did not prevent her murder. Her relatives decided to file a case in front of the European Court of Human Rights by asking the Court whether the Bulgarian authorities had complied with the duty to take operational measures to protect the victim's life (issues under Article 2 of the Convention) and whether the authorities' alleged failure to take effective measures had been a manifestation of their general complacency towards violence against women, and hence discriminatory (Article 14 of the Convention, read in conjunction with Article 2).

More specifically on the first question, the applicants complain under Article 2 of the Convention that the authorities had not effectively protected the victim's life, despite the serious threat to her life that emerged from her several allegations of domestic violence. The Bulgarian Government denies that the data available to them was indicative of a real risk to the victim's life, as the incidents in the previous years had been minor and had not involved violence against her. The Court ruled that it was not the victim's role to say what measures should have been taken by the Bulgarian authorities to protect her from the risk posed to her life. However, the Court also ruled that, at least after the victim's last emergency call and her ensuing complaint to the police, the authorities had failed to take the appropriate measures that might have avoided the risk of losing her life. Given that the Bulgarian authorities had sufficient tools to take operational measures designed to counter the risk to the victim's life, but did not use those tools consistent with the need to protect her right to life, the Court held that there had been a violation of Article 2 of the Convention.

Regarding the second question, the applicants further complained under Article 14 of the Convention read in conjunction with Article 2 that the failure of the authorities to take effective measures with a view to averting the risk to the victim's life had not simply been an isolated occurrence, which could be explained by factors specific to her case, but were due to her being a woman and illustrate the authorities' general failure to evaluate and tackle domestic violence properly in Bulgaria. According to the applicants, the authorities' behaviour in the case reflects their insufficient commitment to combating domestic violence and their discriminatory attitude towards its victims. The Government denied that its authorities practice such discriminatory behaviour towards women, and rather they have made serious efforts to enhance the mechanisms for preventing, investigating, prosecuting and punishing gender-based violence and for supporting its victims, including in the specific case. The Court ruled that the fact that the police carried out an internal investigation after the victim's death and that disciplinary action was then taken against officers found to have neglected their duties in her case likewise tends to suggest that the Bulgarian authorities did not look upon the matter with indifference. Therefore, the Court concluded that there had been no violation of Article 14 of the Convention read in conjunction with Article 2.

Gender

Landi v Italy, Application No. 10929/19, judgment of 7 April 2022

On 7 April 2022 the Court delivered a judgment against Italy for failing to take action to protect the applicant and her two children from the domestic violence inflicted by her partner. The Court ruled that Italy has violated its positive obligations under Article 2 ECHR (right to life). However, the Court did

not consider the violation of Italy's positive obligations to be discriminatory and therefore rejected the complaint under Article 14.

The applicant entered into a relationship with her partner in 2010 without knowing he had suffered from mental health issues. They had two children. Between November 2015 and September 2018, the applicant sustained four attacks by her partner. The police intervened after each attack. The applicant has lodged and withdrawn several complaints, and proceedings had also been commenced against the partner on charges of domestic violence. However, no orders had been issued by the national courts or the public prosecutor for the protection of the applicant and her children during the investigation. One of the experts involved in the investigation procedure had pointed out that the partner posed a danger to society on account of his mental health issues. The fourth attack occurred in September 2015. The partner seized his daughter by the hair and threw her against a wall, stabbed the applicant with a knife in the face and body, in addition to which he stabbed his son several times, causing his death. In October 2019, the partner was sentenced to 20 years' imprisonment and ordered to pay compensation to the applicant and her daughter.

The applicant alleged that Italy had violated Article 2 ECHR (right to life) by failing to take all the necessary actions to protect her and her children's lives. She also alleged that Italy had violated Article 14 ECHR (prohibition of discrimination) due to the lack of legal protection and of an adequate response from the authorities to her allegations of domestic violence.

With regards to the allegation on the basis of Article 2 ECHR, the Court established that the national authorities had failed in their duty to conduct an immediate and proactive assessment of the risk of the recurrence of the violent acts committed against the applicant, and that they also failed to adopt operational and preventative measure to mitigate the risk and to protect those concerned. The Court held that the authorities had enough information to conclude that there was a real and imminent risk of further violence against the applicant and her children, both in light of the allegations of escalating domestic violence submitted by the applicant and the partner's mental health issues. The authorities also failed to conduct a lethality risk assessment specifically designed for domestic violence – an assessment of the situation would have justified practical preventative measures to protect the woman and her children from the risks. Instead, the national authorities remained passive and did not implement any of the wide range of protective measures directly available to them, such as alerting the social and psychological services and placing the applicant and her children in a women's shelter. The authorities could have adopted such measures under the Italian legislation whether or not there had been a complaint or any change in the victim's perception of the risk. In conclusion, the national authorities showed little diligence in preventing violence against the applicant and her children, which led to the murder of her son. The Court ruled that the authorities could not be deemed to have shown the required diligence in the current case, and that they therefore had violated their positive obligations under Article 2 ECHR to protect the applicant and her son's life.

With regards to the claims under Article 14 ECHR, the Court concluded that there is nothing in the case to suggest that the public authorities or prosecutors had acted in a discriminatory matter. The Court emphasised that there is a breach of Article 14 ECHR only where there are general shortcomings deriving from a clear and systematic failure of the national authorities to assess and address the seriousness and extent of the problem of domestic violence and its discriminatory effect on women. The complaint on Article 14 ECHR was therefore rejected by the Court.

Racial or ethnic origin

X and others v Albania, Applications Nos 73548/17 and 45521/19, judgment of 31 May 2022

The case concerned the alleged discrimination of the applicants because of the Albanian Government's failure to implement desegregation measures in an elementary school mainly attended by children of the Roma and Egyptian minorities.

Between 2012 and 2019, the Roma and Egyptian pupils in the Naim Frashëri elementary school accounted for 89 to 100 % of the school's pupils. In 2014, the Commissioner for Protection from Discrimination (CPD) recommended that the Ministry of Education and Sport take measures to avoid creating schools attended only by pupils of the said communities. In 2015, following similar complaints by NGOs, the CPD delivered a binding decision finding that the Roma and Egyptian pupils of the school were suffering indirect discrimination on account of their over-representation in the school and ordered the ministry to take 'immediate measures to improve the situation and change the ratio'. As a result, the ministry informed the Prosecutor General that the percentage of Roma/Egyptian pupils at the school was reduced to 60 %. However, the applicants submitted that many non-Roma/Egyptian pupils had only been administratively registered in the school, but in practice were attending other nearby schools. The applicants complained of a violation of Article 1 of Protocol No. 12 to the Convention, claiming that they were discriminated against in their right to inclusive education.

The Court noted that the school concerned was not created exclusively for Roma/Egyptian children, but as already stated in previous judgments, discrimination contrary to the Convention may result from a de facto situation and does not necessarily require discriminatory intent. The main issue for the Court was to assess whether the Government had complied with its positive obligation to take steps to address the applicants' factual inequality and tackle the perpetuation of the discrimination.

The Court held that the Government had not provided any objective reason for failing to implement two fundamental measures, namely the extension of a food support programme to four additional schools in the area and the merger of the Naim Frashëri school with three other schools, which were likely to benefit the Roma/Egyptian children and to improve the ratio of other pupils.

The Court finally concluded that the delays and the lack of desegregating measures could not be considered as having an objective and reasonable justification. Therefore, it found a violation of Article 1 of Protocol No. 12 to the Convention.

Disability

Arnar Helgi Lárusson v Iceland, Application No. 23077/19, judgment of 31 May 2022

The application concerned the lack of access for the applicant, who uses a wheelchair, to public buildings. The applicant complained of a violation of his right under Article 14 of the European Convention on Human Rights (Convention), in conjunction with Article 8.

In the domestic proceedings, the applicant argued that two buildings run by the municipality, housing arts and cultural centres, were not in compliance with the applicable building regulations and that the lack of access prevented the applicant, and other wheelchair users, from enjoying their private life on an equal basis with others, in violation of the Constitution, the Convention and the UN Convention on the Rights of Persons with Disabilities (CRPD). The national courts found that the buildings concerned were built before the building regulations entered into force, and that the claimant could not rely directly on the CRPD as it had not been incorporated into national law.

The Court emphasised that, in the context of accessibility, Article 8 of the Convention applies only in exceptional cases, where the applicant's lack of access to public buildings affects their life in such a way as to interfere with their right to personal development and to establish and develop relationships with other human beings and the outside world. The Court recognised the importance of enabling persons

with disabilities to fully integrate into society and participate in the life of the community. Without access to the physical environment and to other facilities and services open or provided to the public, persons with disabilities would not have equal opportunities for participation in their respective societies. The Court found that the matter at issue affected the applicant's right to personal development and right to establish relationships and therefore fell within the ambit of 'private life' within the meaning of Article 8 of the Convention.

The Court then assessed whether the respondent State had fulfilled its duty to accommodate the applicant, in order to correct factual inequalities, and examined whether the State made 'necessary and appropriate modifications and adjustments' to accommodate and facilitate persons with disabilities, which did not represent 'a disproportionate or undue burden'. The Court pointed out that the lack of access to the buildings did not amount to a discriminatory failure by the respondent State to take sufficient measures to correct factual inequalities, noting that the municipality made considerable efforts to improve accessibility of public buildings and buildings with public functions. Examining the positive obligations of the State to reasonably accommodate the applicant, the Court recognised that imposing a requirement under the Convention to put in place further measures would have amounted to imposing a 'disproportionate or undue burden' on the respondent State.

On this basis, the Court concluded that the applicant was not discriminated against in the enjoyment of his right to respect for private life and there was no violation of Article 14 read in conjunction with Article 8 of the Convention.

Nationality

Savickis and others v Latvia, Application No. 49270/11, judgment of 9 June 2022

The case concerns the difference in treatment between citizens and 'permanently resident non-citizens' of Latvia regarding the calculation of their retirement pensions.

The applicants were born in different territories of the Soviet Union and moved to Latvia while its territory was incorporated in the Soviet Union. Following the restoration of Latvian independence, the applicants did not become Latvian nationals but were granted the status of 'permanently resident non-citizens'. After working in Latvia until their retirement, they were granted retirement pensions. However, in contrast to Latvian citizens, their employment and equivalent periods accrued outside the territory of Latvia, in other parts of the former USSR, were not taken into account in calculating their pensions. The applicants therefore claimed a violation of Article 14 of the Convention, taken together with Article 1 of Protocol No. 1.

First, the Court found that, with regard to the calculation of their retirement pensions, the applicants can be considered to be in a situation similar to that of Latvian citizens with the same employment history. As a result, the Court proceeded with an assessment of whether the difference in treatment pursued one or more legitimate aims and whether it was proportional in the light of those aims.

The Court observed that, when setting up the system of retirement pensions following the restoration of Latvia's independence, the aim was to avoid retrospective approbation of the consequences of the immigration policy implemented during the occupation of the country. In this specific historical context, the aim pursued by the Latvian Government was legitimate and consistent with the efforts to rebuild the nation's life after the independence. The second legitimate aim, as recognised by the Court, was the protection of the country's economic system.

The Court then examined whether there was a reasonable relationship of proportionality between these aims and the means employed by the Latvian authorities. The Court noted that the difference in treatment depended on the possession, or rather the lack, of Latvian citizenship, a legal status distinct from the national origin of the applicants. The status of 'permanently resident non-citizen' was established as

a temporary instrument to allow individuals to obtain Latvian citizenship or choose another State with which to establish legal ties. In this respect, the Court recognised that in the context of difference in treatment based on nationality there may be certain situations where the element of personal choice, linked with the legal status in question, may affect the margin of appreciation left to the domestic authorities.

Furthermore, the Court held that the difference in treatment only concerned past periods of employment, completed prior to the introduction of the pension scheme in question. The choices made by the Latvian legislature when determining the criteria for entitlements in the employment-based retirement pension system were directly linked to the specific historical, economic and demographic circumstances of the country.

Finally, the Court concluded that the impugned difference in treatment was consistent with the legitimate aims pursued and the arguments put forward by the Latvian authorities to justify it amounted to very weighty reasons. There had accordingly been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

Gender

Paparrigopoulos v Greece, Application No. 61657/16, judgment of 30 June 2022

On 30 June 2022 the Court delivered a judgment against Greece for denying the applicant the opportunity to voluntarily acknowledge his paternity, which consequently limited his parental responsibility for his daughter. The Court ruled that Greece had violated Article 14 ECHR on the prohibition on discrimination read in conjunction with Article 8 ECHR on the right to respect for private and family life.

In 2007, the mother of the applicant's child brought a paternity claim alleging that he was the father of his daughter who had been born five years earlier in 2002. The applicant wanted to take a DNA test, and if confirmed, to acknowledge his paternity of the child. However, he wanted to do so before a notary without involving the courts. Under the relevant domestic law at the material time, parental responsibility is conferred on the mother alone for children born out of marriage. However, paternity can still be voluntarily acknowledged. In fact, parental responsibility could only be 'full' where paternity was voluntarily acknowledged. If paternity is confirmed through judicial determination, the father will not be able to exercise any parental responsibilities unless both parents agree.

A year later in 2008, the Athens Court of First Instance ordered a DNA test, which confirmed the parentage of the child. Four months later, the applicant invited the mother to go before a notary to execute the acknowledgement of paternity. The mother did not attend. In 2010, the Athens Court of First Instance ruled that the applicant was the child's father. The applicant appealed, stating that he had made known to his child's mother his intention to acknowledge his paternity on a voluntary basis without intervention of the courts. In 2016 the appeal was dismissed on the ground that his interests were not adversely affected by the court's decision. According to relevant domestic law, he could not have obtained a court order to overcome the mother's withholding of consent to shared parental responsibility, even though she had not denied his parentage of the child.

The applicant claimed that Greece had violated Article 14 ECHR (prohibition on discrimination) read in conjunction with Article 8 ECHR (right to respect for private and family life) by not giving him the opportunity to acknowledge his paternity voluntarily, and for discriminating against him vis-à-vis the child's mother. He also claimed violation of Articles 6 (right to a fair trial), 8 (right to respect for private and family life), and 13 ECHR (right to an effective remedy) for the duration of proceedings, which lasted for over nine years. The Court examined the second allegation under Article 8 EHCR.

With regards to the allegation that Greece had violated Article 14 read in conjunction with Article 8 ECHR, the Greek Government stated that the aim of the legislation was to protect the best interest of a child

born outside wedlock, and that the mother-child relationship is different to the father-child relationship. The Court was, however, not convinced by this argument and stated that it could not be used to deprive the applicant automatically of the exercise of parental responsibility. According to the Court, the Greek Government did not adequately explain why it had been necessary for domestic law at the time to prescribe such a difference in treatment between the fathers and mothers of children born out of wedlock, and of children born in wedlock. Although the Court recognised that the Member States enjoy a wide margin of appreciation with regards to parental responsibility, it did not find that there was a reasonable relationship of proportionality between the preclusion of the applicant's exercise of parental responsibility and the aim of protecting the best interests of children born outside wedlock. The Court therefore ruled that there had been a violation of Article 14 read in conjunction with Article 8 ECHR.

With regards to length of the proceedings, the Court stated that in cases concerning a person's relationship with their child, there is a duty to exercise exceptional diligence in view of the risk that the passage of time might result in a *de facto* determination of the matter. The current proceedings have taken over nine years, which according to the Court could not be accounted for by the arguments put forward by the Greek Government. The Court concluded that the lapse of time could not be regarded as reasonable and that it therefore had been a violation of Article 8 ECHR.

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

This section provides an overview of the main latest developments in gender equality and non-discrimination law (including case law) and policy at the national level in the 27 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, Serbia, Türkiye and the United Kingdom, from 1 January to 30 June 2022.

AL Albania

LEGISLATIVE DEVELOPMENT

Gender

Albania ratifies ILO Convention No. 190 on violence and harassment in employment

The Council of Ministers proposed the ratification of ILO Convention No. 190 on violence and harassment in employment to the Parliament on 22 November 2021.[1] The ratification of ILO Convention No. 190 by the Albanian Parliament was concluded by Law no. 13/2022 on 3 February 2022.[2] The registration of the formal ratifications of this Convention by Albania was communicated to the Director-General of the International Labour Office on 6 May 2022 and will enter into force for Albania on 6 May 2023.[3]

ILO Convention No. 190 applies to all working sectors, whether private or public, both in the formal and informal economy, and whether in urban or rural areas.[4] The subjects protected against violence and harassment by the Convention are workers and other persons in the world of work. According to Article 2(1) the concept of 'other persons in the world of work' is wide, and includes:

- employees as defined by national law and practice;
- persons working irrespective of their contractual status;
- persons in training, including interns and apprentices;
- workers whose employment has been terminated;
- volunteers;
- jobseekers and job applicants;
- individuals exercising the authority, duties or responsibilities of an employer.

With the ratification of the Convention, a wider range of subjects are protected against discrimination in the field of employment then the protection afforded by Article 12(2) of the Albanian Law for the Protection from Discrimination (LPD).[5] Previously, only jobseekers and job applicants were included in the definition of 'other persons in the world of work'. However, even prior to the ratification, people falling within the other categories could present claims to the Commissioner for Protection from Discrimination (CPD), because, according to Article 32(1) of the LPD, anyone claiming to be discriminated against can present complaints to the CPD.

Online source:
https://qbz.gov.al/eli/fz/2022/30/38f028cc-c3bc-4956-96cf-dc221db20efe

1 Albanian Parliament, 22.11.2021, available at: https://www.parlament.al/ProjektLigje/ProjektLigjeDetails/55669.
2 Albania, Law No. 13/2022 on the ratification of ILO Convention 190 on Violence and Harassment (*Për ratifikimin e konventës 190 'Konventa për dhunën dhe ngacmimin' të Organizatës Ndërkombëtare të Punës, 1986), Official Journal* No. 30 of 23 February 2022, pp. 3553-3561, available at: https://qbz.gov.al/eli/fz/2022/30/38f028cc-c3bc-4956-96cf-dc221db20efe.
3 ILO, 'Ratifications of C190', https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:3999810:NO.
4 Article 2(2) of ILO Convention 190, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190.
5 Albania, Law No. 10 221, 4.2.2010, as amended by Law No. 124/2020, 15.10.2020. Available in English, without the 2020 revision, at: https://kmd.al/wp-content/uploads/2019/06/law-brochure-english.pdf.

Belgium

BE

CASE LAW

Sex

Using an audio recording to prove maternity discrimination

A worker was employed on a fixed-term full-time contract which had been renewed three times. During the third contract, she told her employer that she was pregnant. Her employer called her in for an interview and offered her a part-time rather than a full-time permanent contract. The reason given was that she was going to be a mother. The employee recorded this interview and presented it in court to enable her to prove that she was directly discriminated against on the basis of pregnancy and maternity.

On the law of evidence, the court found that this recording, made without the employer's knowledge, was admissible. The court stated that without this audio recording, made in the context of a professional meeting where only the employer and the worker were present, the worker would never have been able to denounce the employer's actions.

In its judgment on 15 February 2022, the Labour Court of Liège noted that: 'the question of evidence is a major difficulty for victims of discrimination because the authors do not generally act openly. The fact that recordings can be recognised as a form of evidence by the courts will strengthen the effectiveness of the rights of victims of discrimination.' In assessing the propriety of the evidence, the court carried out a proportionality analysis. The court balanced the interests at stake and decided whether the purpose of producing such a recording allowed interference in the private life of the interlocutor.

In this respect, the professional nature of the conversation played a role in the assessment of the infringement of the privacy of the person recorded. As soon as the recorded conversation is about a professional subject, it becomes difficult for the person recorded to invoke invasion of privacy.

Online source:
https://news.belgium.be/fr/discrimination-liee-la-maternite-lenregistrement-audio-une-preuve-decisive

Sex

Reimbursement of vaccination expenses for girls only

On 18 March 2022,[6] the Dutch-speaking Labour Court of Brussels ruled that the reimbursement scheme for HPV vaccination was in breach of the Gender Act and the Anti-Discrimination Act. The decision followed legal action by the parents of a minor boy who, with the support of the Federal Gender Institute, denounced the fact that, unlike girls of his age, he was not entitled to reimbursement for his HPV vaccination.

Therefore, the judgment declared that the refusal of the defendant (the National Healthcare Insurance Institute) to meet the cost of the HPV vaccine in favour of boys constituted prohibited direct discrimination within the meaning of Article 19 of the Gender Act in conjunction with Article 14 of the Anti-Discrimination Act (in the case of homosexual boys).

Following this decision, several associations wrote an open letter to the Federal Minister of Health. A file was submitted to the Committee for the Reimbursement of Medications to request the same reimbursement of treatment for boys as for girls. The relevant regulation was then amended and, as of 1 August 2022, boys as well as girls now have access to reimbursement of HPV vaccination up to and including the age of 18. Thus, both girls and boys are entitled to vaccination at a low cost; this

6 Belgium, decision of the Dutch-speaking Labour Court of Brussels, Room 9, 18 March 2022, unpublished, No. 20/1537/A.

will reinforce protection against cancer both for heterosexual and gay men, and for female partners of heterosexual men.

Scientists initially thought that HPV mainly affected women. However, it has now emerged that a quarter of HPV-related cancers occur in men, and these cancers are often diagnosed at an advanced stage. According to the Higher Health Council, vaccination is therefore essential for both boys and girls (aged 9 to 14). The institution also recommends catch-up vaccination for women and men aged 15 to 26. Such recommendations were also made by the Gender Institute in collaboration with the Cancer Foundation.

The recent amendment only responds partly to these recommendations as women and men aged 19 to 26 will not benefit from such a reimbursement.

Online source:
https://news.belgium.be/fr/les-garcons-discrimines-dans-le-cadre-de-la-vaccination-contre-le-hpv

Sexist comments on television condemned

Gender

In 2018, during a television programme on the municipal elections, the founder of the Islam Party made sexist comments and refused to talk to or look at one of the programme's reporters, on the grounds that she was a woman. The journalist and the Institute for the Equality of Women and Men brought the case before the criminal court based on Article 2 of the Anti-Sexism Act of 22 May 2014. On 2 February 2022, the Court of Appeal of Brussels sentenced the author to a four-month suspended prison sentence and to pay EUR 1 000 in compensation to the victim and a symbolic fine of one euro to the Institute. It based its decision on Article 2 of the Anti-Sexism Act. The author appealed the decision before the Court of Cassation (*Cour de Cassation).*

On 8 June 2022, the Court of Cassation held that the Court of Appeal had legally justified its decision, without in any way infringing on the freedoms of thought, conscience and religion. It also stated that no specific intent was required to recognise the offence of sexism. The judgment of the Brussels Court of Appeal is therefore final.

The Court of Cassation noted that the violation of dignity is not left to the subjective appreciation of the victim and it is not up to an individual to determine alone what he or she considers as constituting sexist behaviour that seriously violates his or her dignity. The criterion is the respect for the sense of human dignity as perceived, at a given moment, by the collective conscience of a given society at a given time.

Moreover, the Court specified that, contrary to what the applicant claims, there is no requirement to establish an intention to harm (specific intent – *dol spécial*)) in order to establish an offence of sexism. The moral element of the offence of sexism is defined by the intention to express contempt for a person or to consider him or her inferior in the knowledge that the act or behaviour is likely to cause serious harm to the dignity of that person (general intent – *dol général*).

As for the claimant's argument that his behaviour was based on his personal convictions, in particular his religious convictions, which were an expression of his freedom of thought, conscience and religion, the Court's decision confirms that freedom of expression is not absolute, and that it implies obligations and responsibilities, in particular not to cross certain limits; compelling social needs, including the principle of equality of men and women, justify certain restrictions on freedom of expression.

Online source:
https://igvm-iefh.belgium.be/fr/actualite/condamnation_du_co_fondateur_du_parti_islam_pour_sexisme_la_cour_de_cassation_confirme_la

POLICY AND OTHER RELEVANT DEVELOPMENTS

Federal Plan 'For an LGBTQI+ friendly Belgium'

Sexual orientation

Gender

On 13 May 2022, the Belgian Federal Government adopted the third federal plan concerning the rights of LGBTQI+ persons, developed in collaboration with civil society and 10 ministers and secretaries of state. It includes 133 measures, divided into four strategic axes: knowledge and information; inclusion policy, wellbeing and health; security and anti-discrimination. The plan is to be implemented by the ministries and secretariats of Justice, Home Affairs, Foreign Affairs, Development Cooperation, Civil Service, Asylum and Migration, Equal Opportunities, Mobility, Health and Labour.

The key measures include:

- a ban on conversion therapies, i.e. various practices based on the assumption that homosexuality and trans-identity are diseases that should be cured; and
- support given to legislative initiatives at the EU level to close the gaps in EU anti-discrimination legislation with regard to protection on the grounds of sexual orientation, gender identity and expression, and sex characteristics in the field of access to goods and services.

This action plan focuses solely on the competences of the Federal State and will be complementary to the action plans and initiatives that already exist at the level of the Regions and Communities. It refers to potential cooperation with the federated entities for the purpose of reaching the objectives of the plan.

Online source:
https://sarahschlitz.be/wp-content/uploads/sites/300/2022/05/Pour-une-Belgique-LGBTQI-frienldy.pdf

Final report of the Commission for the Evaluation of Federal Anti-Discrimination Legislation

All grounds

Article 52 of the General Anti-Discrimination Federal Act of 10 May 2007 states that the application and effectiveness of the federal anti-discrimination laws must be assessed by the legislative chambers. This evaluation is based on the reports of a committee of experts, which published its first report in 2017 and the final report in June 2022. The new report contains 73 recommendations to strengthen the fight against discrimination, hate speech and hate crime in various areas.

The report is divided into seven chapters.[7] Chapter 1 outlines the anti-discrimination law reform of 2007, sets out the scope of the Evaluation Commission's mission and describes the progress of its work. It also presents some key data on the extent of discrimination, hate speech and hate crime in Belgium today, the evolution of these phenomena and their impact on the victims as well as on society as a whole.

Chapter 2 reviews and evaluates the data currently available in Belgium to document discrimination, hate speech and hate crimes, on the one hand, and the police and judicial treatment of such behaviour, on the other hand. It highlights the significant gaps existing in this area.

Chapter 3 focuses on the accessibility, coherence and clarity of the legal framework, recommending notably that the three anti-discrimination federal laws of 2007 be combined into one single piece of legislation. In addition, the report recommends some amendments to the legislation, to ensure compliance with EU law as well as Belgian law, or to adapt it to certain social realities. In particular, the Evaluation

7 Commission d'évaluation des lois fédérales tendant à lutter contre la discrimination (Evaluation Commission of the anti-discrimination legislation) (2022), 'Rapport final. Combattre la discrimination, les discours de haine et les crimes de haine : une responsabilité partagée' (Final report. Combating discrimination, hate speech and hate crime: A shared responsibility), available at: https://equal.belgium.be/sites/default/files/Commission%20e%CC%81val%20lois%20antidiscrimination_Rapport_Synthe%CC%80se.pdf.

Commission invites the legislature to legislate for the possibility of finding multiple discrimination as well as discrimination by assumption and by association.

The Evaluation Commission further notes that the existence of multiple equality bodies in Belgium reduces their accessibility to the public. This plurality is likely to increase with the planned withdrawal of the Flemish Region and Community from Unia (the federal equality body) and the subsequent creation of a new body at Flemish regional level. The Evaluation Commission recommends that the different authorities work towards establishing adequate cooperation.

Chapter 4 focuses on access to civil justice for victims of discrimination, highlighting the value of negotiated out-of-court solutions, particularly when facilitated by an equality body, but insists on the importance of ensuring adequate safeguards. The Evaluation Commission also calls for the adaptation of the safeguards against victimisation in order to ensure conformity with the requirements of EU law (*Hakelbracht* case law), to introduce a form of 'collective action', and to increase the amount of financial civil sanctions associated with acts of discrimination

Chapter 5 explores the actual and potential role of certain institutions in the detection and sanctioning of discrimination. The report notes that no institution comparable to the Labour Inspectorate has been designated to monitor compliance with anti-discrimination laws outside the employment field and that the Economic Inspectorate of the Federal Public Service in charge of Economy, SMEs, Self-employed and Energy would be well placed to take on such a role in access to and supply of goods and services available to the public.

Chapter 6 examines the challenges of implementing the criminal law system to combat certain forms of discrimination, hate speech and hate crime. This includes a proposal to reform Article 150 of the Constitution, which currently creates a situation of de facto impunity for hate speech on grounds other than racial or ethnic origin.

Finally, Chapter 7 calls for the adoption of prevention and promotion measures, for example through the use of positive action.

Online source:
https://equal.belgium.be/sites/default/files/Commission%20e%CC%81val%20lois%20antidiscrimination_Rapport_Synthe%CC%80se.pdf

Racial or ethnic origin
Religion or belief
Disability
Age
Sexual orientation

Publication of the equality body Unia's Annual Report for 2021

On 23 June 2022, the Interfederal Centre for Equal Opportunities and Opposition to Racism and Discrimination (Unia), which is one of the Belgian equality bodies, presented its annual report for the year 2021. Entitled 'Another world is possible', the report is accompanied by a 'figures report' which presents all the figures and graphs relating to Unia's reports and cases in 2021.

The themes addressed by the 2021 report are particularly varied, highlighting the impact of the COVID-19 pandemic on human rights and on the situation of vulnerable people, as well as different issues related to the rights of persons with disabilities, human rights in nursing homes, accessibility of the rental market, inclusivity in education, the wearing of signs and symbols of convictions and belief at school and at work, and hate speech and its effective repression. In relation to each of the themes, the report contains an overview of important case law as well as testimonies.

The 2021 report also reiterated Unia's expectations regarding the adoption of a National Action Plan Against Racism, and its concerns regarding the Flemish Community's decision to withdraw from Unia and

to create its own equality body. Also included is an overview of Unia's opinions and recommendations on key issues in the fields of hate speech, discrimination and inclusion.

In 2021, Unia received 10 610 reports (*signalements*) of alleged discrimination, hate speech or acts. This is an increase of 12 % compared to 2020. Of these reports, 35 % concerned measures related to the COVID-19 pandemic. This proportion is significantly higher than in 2020 (16 %). Unia opened 2 379 individual cases, which represents an increase of almost 9 % compared to the previous year. The areas most affected by the cases were goods and services (698), employment (603), and 'life in society' (298). Across all areas, the grounds most affected were so-called 'racial criteria' (897), disability (538), health status (391, compared to 162 in 2020), and religious or philosophical beliefs (243).

Unia closed 2 584 individual cases in 2021. Approximately half of these were considered to be founded on the basis of anti-discrimination legislation. Unia issued 186 opinions and recommendations to help victims defend themselves against discrimination. An out-of-court solution was found in more than a third of the cases, while 18 cases were brought before the courts by Unia in 2021.

Online source:
https://www.unia.be/fr/publications-et-statistiques/publications/rapport-annuel-2021

Croatia HR

POLICY AND OTHER RELEVANT DEVELOPMENTS

Croatia submits the first (baseline) evaluation report since the ratification of the Istanbul Convention

Gender

The Istanbul Convention entered into force in Croatia on 1 October 2018. As part of the monitoring and evaluation process under the Convention, the Government submitted the first (baseline) evaluation report in February 2022. The baseline report submitted by the Government, as well as three shadow reports submitted by women NGOs were published on the Istanbul Convention website.

In accordance with the methodology and the standard questionnaire developed by GREVIO,[8] the baseline report provides information on legislative and other measures adopted to give effect to the obligations arising under the Istanbul Convention, under six main headings: integrated policies and data collection; prevention; protection and support; substantive law; investigation, prosecution and procedural law and protective measures; as well as migration and asylum.[9] The shadow reports will be especially valuable in the evaluation process.[10] They recognise that the Croatian legal framework is generally adequate and adopts the standards of protection of women from the Istanbul Convention, but their effective implementation in practice is still problematic. Several issues are identified as the most problematic: victimisation and discrimination of women in custody proceedings before social welfare centres; mild

8 Group of Experts on Action against Violence Against Women and Domestic Violence (GREVIO) (2016), *Questionnaire on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)*, 11 Mach 2016, available at: https://rm.coe.int/grevio-inf-2016-1-eng-first-baseline-questionnaire/1680a60a4b.

9 Information under these headings covers the four main pillars of the Istanbul Convention: policies, prevention, protection and prosecution.

10 Shadow report by B.a.B.e. (Be active Be emancipated), available at: https://rm.coe.int/2022-grevio-b-a-b-e-report-shadow-report-croatia/1680a595a3; shadow report by Autonomous Women's House Zagreb and the Centre for Women War Victims – ROSA and Women's Network of Croatia, available at: https://rm.coe.int/grevio-contribution-3-ngos-croatia/1680a5b42e; joint report by S.O.S. Rijeka – centar za nenasilje i ljudska prava, and endorsed by nine additional organisations/individuals, available at: https://rm.coe.int/joint-shadow-report-croatia-2022/1680a5b42d.

sanctioning of perpetrators, especially in misdemeanour courts, which in the long run discourages the victims from reporting violence until it escalates into the criminal law sphere; lack of sufficient focus on prevention policies and education; low and inefficient use of protective, precautionary and security measures; inadequate mechanisms for funding of shelters and other specific services exclusively for women victims of violence; lack of coordination, harmonisation, comparability and disaggregation of data, which makes tracking cases at all stages of the law enforcement and judicial proceedings impossible; and lack of mandatory professional training specifically on gender-based violence issues. The submission of the State report is the first step in the evaluation procedure under the Istanbul Convention.

Online source:
https://www.coe.int/en/web/istanbul-convention/croatia

CZ Czechia

CASE LAW

Supreme Court ruling regarding the illegality of segregation of Roma pupils in education

Racial or ethnic origin

On 13 May 2022, the Supreme Court concluded that the separation of pupils of different racial and/or ethnic origin in education constitutes discrimination. This conclusion also applies when the education provided to the minority is of the same quality as that provided to the majority. Thus, the segregation itself represents a disadvantage. Furthermore, this conclusion applies even if the segregation is not explained or motivated by racial factors, unless a legitimate goal for such segregation can be proven.

The applicants, of Roma origin, attended a school where only Roma pupils were enrolled until 2010, when the school was divided into two programmes. All the Roma pupils were enrolled in the programme with lower quality education. The applicants directed the lawsuit against the school and against the municipality of Ostrava. The first and second-instance courts rejected their claim.[11]

However, in May 2022, the Supreme Court cancelled the previous decisions and returned the case to the first-instance court.[12] The Court found that the previous decisions were incomplete and insufficient in terms of justification and of knowledge of anti-discrimination law. The case concerned the term 'segregation' and its conditions and the burden of proof.

There is no legal definition of segregation. Thus, the Court stated that the essence of racial segregation 'lies [in] the very fact of separation of individuals belonging to [a] certain race or ethnic group as such treatment is offensive and stigmatising in itself and brings feelings of exclusion and inferiority'. Furthermore, it continued, 'racial segregation in education cannot be justified by stating that segregated pupils receive the same quality of education; even if that were true, it would mean subscribing to the doctrine of "separate but equal", which has been strongly rejected in the past and must be rejected even now' and that 'segregation on the basis of race or ethnic origin *usually as such* leads to a conclusion about unequal treatment'.

The Court stated that in cases of segregation in education, the claimant needs to state that they feel discriminated against and must provide a clear statement of facts that justify such a perception. For example, the claimant may provide statistical data about the prevalence of a certain minority in a certain

11 Czechia, Municipal Court in Ostrava, judgment of 14 August 2019, No. 54 C 192/2016-251; and Regional Court in Ostrava, judgment of 30 June 2020, No. 57 Co 433/2019-301.

12 Czechia, Supreme Court, judgment of 13 May 2022, No. 25 Cdo 473/2021-337, available at: https://nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/2A32AD763CFC9A92C125889000161213?openDocument.

school or certain classes. Based on this (and without the need to provide any further evidence), the burden of proof shifts to the respondent, who has to prove that there was no segregation.

In the judgment, the Court elaborated on several concepts and issues that have not been addressed in case law before (i.e. the term 'segregation', conditions of illegal segregation, and burden of proof in cases of segregation). The decision is relevant for the *D.H. v Czech Republic* judgment of the European Court of Human Rights case *D. H. v Czech Republic,*[13] which has still not been implemented.

Denmark

DK

LEGISLATIVE DEVELOPMENT

New legislation prohibiting employers from requesting information about age from prospective employees

Age

On 28 March 2022, a legislative bill was adopted by Parliament, amending the Act on the Prohibition of Discrimination in the Labour Market etc. by introducing a ban on employers obtaining information about the age of job applicants.[14] Although Section 5(1) of the previous act contained a prohibition of age discrimination in job advertising, employers were not prevented from asking applicants to state their age in connection with recruitment. The newly adopted Section 5(2) now prohibits an employer from requesting information about the age of applicants when they are submitting, uploading, and entering job applications – whether in a job application procedure or through electronic recruitment systems. The new rules thus require the removal of boxes on age and date of birth in recruitment systems.

The Act on the Prohibition of Discrimination in the Labour Market etc. contains a number of exceptions to the principle of prohibition of discrimination on the grounds of age, which will also apply after this amendment. For the purpose of these exceptions, notably regarding special rules on the remuneration of minors, it will still be possible to request information about an applicant's age.

Online source:
https://www.retsinformation.dk/eli/lta/2022/372

CASE LAW

Eastern High Court ruling on 'ghetto' legislation

Racial or ethnic origin

In 2018, the public housing area Nøjsomhed was put on the national 'ghetto' list.[15] In order to avoid the status as a 'hard ghetto', the housing association adopted a comprehensive plan, which included remodeling some stairways to make apartments accessible for persons with disabilities. On that basis, in January 2020, the association terminated 96 tenancies in the area in order to proceed with the remodeling.

13 ECtHR, Grand Chamber, judgment of 13 November 2007 in *D.H. v the Czech Republic*, No. 57325/00.
14 Denmark, Act No. 372 of 28 March 2022, available at: https://www.retsinformation.dk/eli/lta/2022/372.
15 Based on the previous Government's strategy 'A Denmark without Parallel Societies – No Ghettos by 2030', legislation on 'ghettos' was adopted in 2018 (https://www.regeringen.dk/nyheder/2018/ghettoudspil/), defining areas meeting at least two of the following criteria as 'marginalised residential areas': low level of income, high number of individuals with criminal convictions, low level of education and high unemployment rate. A 'hard ghetto' was furthermore defined as a 'marginalised residential area' where the percentage of immigrants and descendants from third countries exceeded 50 %. In areas categorised as 'hard ghettos', apartment buildings have been torn down and residents have been offered alternative accommodation.

Two out of three residents holding tenancies that were terminated were immigrants or descendants of immigrants from non-Western countries. A number of them challenged the terminations, claiming that they constituted discrimination based on ethnic origin and should be deemed invalid. They recalled that one of the criteria for getting on the 'hard ghetto' list was that more than half of the residents were immigrants or descendants of immigrants from non-Western countries, and that the terminations secured a percentage below that limit. The housing association argued that it was fully legal to adopt and implement a plan to change the demography of the whole housing area in order to avoid the 'hard ghetto' status.

The Eastern High Court found that it was not proven that the specific selection of stairways for renovation was based on the origins of the residents, rather than the assessment of where to build elevators etc. Therefore, no direct discrimination was found.[16]

With regard to indirect discrimination, the Court noted that the criterion 'immigrants and descendants of immigrants from non-Western countries' did not 'in itself refer to a population group of the same ethnic origin'. Therefore, (indirect) differential treatment based on non-Western origin did not constitute (indirect) discrimination based on ethnic origin. Since there was no information about the (specific) ethnic origin of either those whose tenancies had been terminated or the remaining residents, the Court found that circumstances had not been established to give rise to the presumption that indirect discrimination on grounds of ethnic origin had taken place. The burden of proof was thus not shifted to the respondent, and the court concluded that it had not been proven that indirect discrimination had taken place.

In conclusion, the High Court found that the terminations constituted neither direct nor indirect discrimination because of ethnic origin and that the housing association legally terminated the tenancies. The case is pending appeal before the Supreme Court.

POLICY DEVELOPMENTS

Racial or ethnic origin

Religion or belief

National Action Plans against racism and antisemitism

In November 2021, the Danish Institute for Human Rights reported that Denmark is among the few Western European countries without a national action plan against racism.[17]

On 24 January 2022, the Danish Government issued a press release stating that it agrees with a majority of the Parliament that some of the funds from the 2022 national budget should be used for a national action plan against racism.[18] According to the Government, the action plan must combat racism broadly in society and initiatives must range from the labour market and education to cultural life and hate crimes. Before adopting an action plan, the extent and nature of racism will be mapped out. The press release did not contain a timeframe for the mapping exercise or for the preparation of the action plan against racism.

16 Denmark, Eastern High Court Case No. BS-47813/2020-OLR of 27 June 2022.

17 Danish Institute for Human Rights (2021), 'De fleste lande i Vesteuropa har en handlingsplan mod had og diskrimination' (Most Western European countries have action plans against hate and discrimination), news report, available at: https://menneskeret.dk/nyheder/fleste-lande-vesteuropa-handlingsplan-had-diskrimination.

18 Ministry of Justice of Denmark (2022), 'The government agrees with SF, Radikale Venstre, Enhedslisten, Alternativet and the Christian Democrats to draw up an action plan against racism', press release, 24 January 2022, available at: https://www.justitsministeriet.dk/pressemeddelelse/regeringen-er-enig-med-sf-radikale-venstre-enhedslisten-alternativet-og-kristendemokraterne-om-at-lave-en-handlingsplan-mod-racisme/.

In addition to these plans, the Danish Government launched a National Action Plan against Anti-Semitism on 25 January 2022.[19] The action plan contains 15 initiatives that aim to take a broad stand against antisemitism, including funds for compulsory teaching of the Holocaust in schools, dissemination of Danish-Jewish cultural history, further education of police officers in the prevention of radicalisation, more targeted research into antisemitism and increased focus on environments where antisemitism is particularly prevalent.

Online sources:
https://www.justitsministeriet.dk/pressemeddelelse/regeringen-er-enig-med-sf-radikale-venstre-enhedslisten-alternativet-og-kristendemokraterne-om-at-lave-en-handlingsplan-mod-racisme/
https://www.justitsministeriet.dk/wp-content/uploads/2022/01/Antisemitisme-handlingsplan.pdf

Finland

FI

LEGISLATIVE DEVELOPMENT

Working group proposal on renewal of the Non-Discrimination Act

All grounds

The current Prime Minister's Government plan includes a partial reform of the Non-Discrimination Act. In March 2022, a working group set up by the Ministry of Justice published proposals for the reform, including:

- allowing the National Non-Discrimination and Equality Tribunal to decide on financial compensation to the victim of discrimination when the discrimination has occurred outside employment;
- allowing the Non-Discrimination Ombudsman to take cases without an identified victim to the Non-Discrimination and Equality Tribunal for processing as a case of discrimination;
- clarifying the concept of harassment to also cover harassment that is directed not at an individual but at a group of people;
- extending the duty to draft equality plans to cover early childhood education and strengthening the responsibility of those arranging early childhood and other education to react to harassment;
- altering the concept of reasonable accommodation to better reflect the UN CRPD and prioritising the needs of the person with disabilities.

The working group that prepared the proposal was divided and could not reach an agreement on the following issues:

- whether the mandate of the Non-Discrimination and Equality Tribunal and the Non-Discrimination Ombudsman should be extended to cover cases of potential discrimination in employment, and if so,
- whether the Non-Discrimination and Equality Tribunal should be able to decide on compensation in employment, too.[20]

The Government's proposal is to be submitted to the Parliament in autumn 2022.

19 Government of Denmark (2022), Action Plan against Anti-Semitism (*Handlingsplan mod antisemitisme*), 25 January 2022, available at: https://www.justitsministeriet.dk/wp-content/uploads/2022/01/Antisemitisme-handlingsplan.pdf. See also Ministry of Justice (2022), press release, 25 January 2022, available at: https://www.justitsministeriet.dk/pressemeddelelse/regeringen-lancerer-handlingsplan-mod-antisemitisme/.

20 Currently, the Non-Discrimination and Equality Tribunal and the Non-Discrimination Ombudsman do not have a mandate to investigate and handle employment discrimination according to the Non-Discrimination Act, as this task is reserved for the Occupational Health and Safety Authorities. In the working group, the Ministry of Justice, the Non-Discrimination Ombudsman and two employee trade union confederations issued a dissenting opinion on the proposal in this regard.

The objective of the reform is to strengthen access to justice for victims of discrimination. The proposals respond to problems in this regard reported by NGOs, the Non-Discrimination Ombudsman and a study commissioned by the Prime Minister's Office on the application of the Non-Discrimination Act.[21] Currently, only the district court has the capacity to award compensation, and the tribunal does not. Before the district court, the risk of having to pay the legal costs of the respondent greatly affects the real possibilities of claimants seeking remedies against discrimination.

Online source:
https://oikeusministerio.fi/-/yhdenvertaisuuslain-osittaisuudistus-lausunnolle

FR France

CASE LAW

Employers' duty to provide reasonable accommodation in relation to religious freedom

Religion or belief

The case concerned a cleaner who was assigned to two different buildings: one in the early afternoon and another in the evening. The employer informed the claimant that the afternoon assignment was transferred to another site. The cleaner immediately refused the assignment due to the distance between the two sites where he would be working. All substantial modifications of the working contract can be refused by the employee, obliging the employer to find another solution or demonstrate that there is no alternative, in which case the employee is dismissed with compensation.

Following this refusal, the employer proposed to assign the claimant to a cemetery located close to his other assignment. The claimant refused this reassignment as well, invoking an incompatibility of schedule with his other assignments. The employer then adapted the proposed assignment at the cemetery to respect the claimant's schedule. He refused again, claiming that being assigned to a cemetery was contrary to his Hindu religion.

Following this refusal, the claimant received a disciplinary transfer assigning him to yet another site. A disciplinary transfer is a unilateral transfer that is not subject to the consent of the employee. Refusal of this assignment allows the employer to dismiss the employee for cause, without compensation. The claimant refused this disciplinary transfer and was dismissed. The claimant challenged the disciplinary transfer and his dismissal, alleging discrimination on the ground of his religion.

In 2019, the Court of Appeal of Paris had concluded in favour of the claimant, finding that the employer had a duty to find an assignment that was compatible with the employee's religious beliefs and therefore it was subject to the general regime of transfer by consent.[22] This decision was challenged before the Court of Cassation.

In January 2022, the Court of Cassation quashed the decision of the Court of Appeal.[23] The Court first agreed with the Court of Appeal that employers have a duty to take all necessary steps to accommodate the religious beliefs of their employees and to justify all restrictions to their freedom of religion by the nature of the particular occupational activities concerned and the context in which they are carried out. The employer must thus establish that the activities constitute a genuine and determining occupational

21 Nieminen, K., Jauhola, L., Lepola, O., Rantala, K., Karinen, R., Luukkonen, T. (2020), *Aidosti yhdenvertaiset, Yhdenvertaisuuslain arviointi* (Study commissioned by the Prime Minister's Office on the implementation of the Non-Discrimination Act). Available at: https://julkaisut.valtioneuvosto.fi/handle/10024/162552.
22 France, Paris Court of Appeal, division 6, chamber 5, 17 October 2019, No. 17-000124.
23 France, Court of Cassation, social chamber, 19 January 2022, No. 20-14014.

requirement pursuing a legitimate objective to which they are proportionate. The Court concluded however that, in this case, the employer had fulfilled its duty by proposing an assignment conforming to the claimant's religious beliefs. In this regard, the Court held that the solution proposed was reasonable and proportionate and that, therefore, the claimant did not have a right to refuse it and request another solution. Thus, the unilateral disciplinary transfer was not discriminatory and the claimant's refusal to accept this assignment justified his dismissal.

This is the first case discussing employers' measures to accommodate employees' religious beliefs.

Online source:
https://www.courdecassation.fr/decision/61e7b7dda41da869de68a27d

Right of bar association to impose dress codes on lawyers limiting freedom of expression and freedom of religion

Religion or belief

The claimant is a trainee barrister at the Lille law school. The President of the local bar association refused to allow her to take the articling student oath before the court wearing a discreet hair cover and the traditional lawyer's cap in substitution of her Islamic veil. This oath is mandatory to pursue an internship in a law firm, which is a legal requirement to qualify as a lawyer.

During the claimant's negotiations with the bar association, it adopted an internal regulation imposing a neutral dress code, prohibiting lawyers from wearing with the robe, before the courts and in all official functions, any political, institutional, philosophical or religious external signs. This regulation was challenged before the courts by the claimant and by the member of the bar association with whom the claimant was to pursue her internship, who alleged that the bar association was incompetent to adopt such a regulation.

In 2020, the Court of Appeal dismissed their claims on the ground that the claimant had no standing to challenge the internal regulation as she was not yet a lawyer, while the second claimant's claim was unfounded as the bar association was competent to regulate lawyers' dress code and adopt such an internal regulation. This decision was challenged before the Court of Cassation.

With regard to the first claimant, the Court of Cassation confirmed the finding of the Court of Appeal.[24] With regard to the second claimant, the Court of Cassation also confirmed the competence of the local bar association to adopt an internal regulation restricting the dress code of lawyers, due to the absence of a national regulation on the subject adopted by the National Bar Council.

Finally, with regard to the legality of the regulation, the Court of Cassation noted that lawyers execute a role concurring to the public service of the justice system, and that the aim of the internal regulation was to ensure equality between lawyers and, therefore, between the parties, so contributing to ensuring their right to an equitable trial. Furthermore, the Court also noted that the internal regulation constituted a necessary and proportionate restriction in accordance with Articles 9 and 10 of the Declaration of the Rights of Man and of the Citizen of 1789, Articles 9 and 10 of the European Convention on Human Rights, and Articles 18, 19 and 26 of the International Covenant on Civil and Political Rights.

Finally, the Court concluded that there was no need to examine the claim of discrimination on the ground of religion or belief, as the first claimant did not have legal standing and the second claimant was not personally impacted on religious grounds by the prohibition.

24 France, Court of Cassation, First Civil Chamber, *Asmeta and Ziatt v Bar of Lille*, 2 March 2022, No. 2020185.

Online source:
https://www.courdecassation.fr/decision/621f1707459bcb7900c39e7d

Illegality of allowing alternative bathing clothes in municipal swimming pools for religious reasons

Religion or belief

In May 2022, the City of Grenoble amended the in-house regulations of its four municipal swimming pools, making an exception to the dress code for bathers who wish to be more covered for religious reasons. In France, there is a strict dress code in public pools, requiring for reasons of hygiene and safety that bathers wear tight and short bathing clothes. The exception concerned loose and long bathing garments of the 'burkini type'.

On the basis of Article 5 of the Law of 24 August 2021 relating to the respect of the principles of the Republic, the Prefect challenged the bylaw before the Administrative Court of Grenoble. The court quashed the bylaw, concluding that it violated the principle of neutrality of the public service and the principle of secularity to which the City of Grenoble is bound when authorising derogations to rules of public order on the ground of religion.[25] The City of Grenoble appealed the decision before the Supreme Administrative Court (Conseil d'État).

The Conseil d'État recalled that users of public services can avail themselves of freedom of expression and demonstrate their religious faith freely in public, while public service providers can take measures to facilitate access to public services including by taking into account the religious beliefs of users. However, freedom of religion does not allow a person not to abide by general rules due to religious considerations. Accommodating religious believers must not create an exception to a rule relating to public order or the good functioning of the public service.[26]

According to the Court, the specific religious accommodation at hand disproportionately affected the good functioning of the public service by (1) allowing disrespect for rules relating to hygiene and safety and (2) creating conditions that will make the enforcement of the rule toward other users very difficult as it would cause unequal treatment between users on the basis of religion.

This is the first decision enforcing the new provision of the Law of 24 August 2021 relating to the respect of the principles of the Republic, allowing the Prefect to seek emergency injunctive relief and challenge regulatory provisions on the ground that they represent a serious violation of the principle of neutrality of the public service and secularity.

The Conseil d'État has decided repeatedly that burkinis cannot as such be forbidden on public beaches where all dress codes are authorised[27] and it does not say that users of public pools have to abide by a principle of secularity or neutrality. The Court simply considers that derogating safety and hygiene measures only for a group identified by religious considerations is not proportionate given that the rule is one of public order, that it constitutes a breach of equality and does not respect the principle of neutrality of the public service.

Online source:
https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2022-06-21/464648

25 France, Administrative Court of Grenoble, decision of 25 May 2022, available at: http://grenoble.tribunal-administratif.fr/content/download/190797/1820331/version/1/file/2203163.pdf.
26 France, Council of State, decision of 21 June 2022 in case No. 464648, available at: https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2022-06-21/464648.
27 For further information, see: https://www.equalitylaw.eu/downloads/3886-france-conseil-d-etat-26-august-2016-nos-402742-402777-pdf-143-kb.

POLICY AND OTHER RELEVANT DEVELOPMENTS

National Roma Strategy 2020-2030

Racial or ethnic origin

In January 2022, the Inter-ministerial Delegation on Emergency Accommodation and Access to Housing (DIHAL) adopted a French strategy in response to the Council of the European Union recommendation on Roma equality, inclusion, and participation of March 2021.[28] The strategy was adopted at the delegation's last meeting for 'the elimination of slums'.

The strategy follows the national policy adopted by the Ministerial instruction of 25 January 2018, for the reduction of illegal occupation of land and slums,[29] underlining its universalist approach to access to rights of Travellers, Roma and populations living in slums. It thus fails to address issues such as structural discrimination and does not adopt an intersectional approach or engage with the concept of positive action in any way.

Instead, the strategy confirms the 'impossibility' of basing public policy on ethnic considerations and follows the five main axes of public policy that have been in place since the adoption of the 2018 Ministerial instruction:

- reinforcing repression of anti-Roma and anti-Gypsy discourse and acts;
- maintaining dialogue between public authorities and stakeholders through the national consultative commission of Travellers.
- supporting the travelling way of life of Travellers through dialogue between Travellers and local authorities, social mediation, access to social rights, access to school, access to healthcare, and by improving the ongoing implementation of specific parking areas and family plots. In addition, specific efforts are being made for the support of cultural initiatives and the recognition of the national memory of Travellers.
- accelerating the reduction of slums by the coordination of a web platform monitoring social support for evicted persons to enable their long-term integration through access to public services, employment, housing and registration in school of all children, including a dedicated budget of EUR 8 million and specific support.
- improving the living conditions in slums.

The DIHAL announced that 2 500 people evicted from illegally occupied land and slums were provided with long-term housing and integration between 2019 and 2020.

The national equality body, the Defender of Rights had presented recommendations raising issues relating to: the violation of rights and police abuse during the implementation of eviction measures; the systematic eviction policy; access to education and healthcare; conditions of daily life of evicted persons; residence rights of European Roma; access to social protection; sanitary conditions of living spaces; and access to water.[30] These issues were taken into consideration by the strategy in measures relating to living conditions in the slums and specific needs that must be addressed, such as the presence of interpreters, in order to ensure access to rights.

28 Government of France (2022), 'Stratégie française 2020-2030 en réponse à la recommandation du Conseil de l'Union européenne du 12 mars 2021 pour « l'égalité, l'inclusion et la participation des Roms »', January 2022, available at: https://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2022/03/strategie_francaise_2020-2030_.pdf.

29 France, Ministerial Instruction for the reduction of illegal camps and slums of 25 January 2018 No. NOR:TERL1736127J, available at: https://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2018/06/circulaire_du_25_janvier_2018.pdf.

30 Defender of Rights (Défenseur des droits) (2021), *Pour une protection effective des droits des personnes Roms : contribution à la stratégie nationale* (Effective protection of the rights of Roma persons: contribution to the national strategy), available at: https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=21135.

Online source:
https://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2022/03/strategie_francaise_2020-2030_.pdf

DE Germany

POLICY AND OTHER RELEVANT DEVELOPMENTS

National Roma Strategy

Racial or ethnic origin

In February 2022, the Federal Government adopted the national Roma strategy 'Fight anti-Gypsyism, ensure participation!', implementing the EU Roma strategic framework for equality, inclusion and participation for 2020-2030 at national level.[31] The national strategy builds on previous systematic efforts to promote the integration of Sinti and Roma in Germany. Equal access to education, employment, health and housing, combating anti-Gypsyism and promoting equal participation remain key issues of the strategy.

Within the context of strategy, the appointed Federal Government Commissioner for Anti-Gypsyism is responsible not only for the coordination of various activities concerning the fight against anti-Gypsyism but also for the implementation and further development of the strategy on the basis of proposals by the Independent Commission on Anti-Gypsyism, established by the Government to advise it. A national Roma contact point to implement the EU Roma strategic framework, as well as civil society monitoring and an information office for the documentation of anti-Gypsy incidents beyond the scope of criminal law constitute important pillars of the strategy.

There are two additional points are of interest. First, the current Roma strategy does not mention positive action although it refers to measures like the Berlin action plan on incorporating foreign Roma, which consolidates positive measures in providing Roma migrants in uncertain living conditions access to governmental services. Secondly, it highlights the importance of promoting and ensuring Sinti and Roma social participation as a political priority for the Government, including in relation to the European Social Fund Plus (ESF+) for Skills 2021-2027. According to the national strategy, combating discrimination by means of a cross-sectoral approach will be a key concern throughout the whole process of designing, implementing, monitoring and evaluating the ESF+ Federal funding programmes.

The national Roma strategy coordinates existing activities against anti-Gypsyism and develops new perspectives. The fight against discrimination is highlighted as a special concern. The measures to collect more empirical data on discrimination are crucial to getting a better understanding of the many facets of discrimination in social reality.

Online source:
https://www.bmi.bund.de/SharedDocs/downloads/EN/publikationen/2022/2022-eu-roma-strategic-framework.html

31 Germany, Federal Ministry of the Interior and Community (2022), *National Strategy 'Fight anti-Gypsyism, ensure participation!'*, 23 February 2022, available at: https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/heimat-integration/minderheiten/eu-roma-strategie-2030.html.

Appointment of the first Federal Commissioner on Anti-Gypsyism

Racial or ethnic origin

Following the adoption of the national Roma strategy (see above), the Federal Government appointed the first Federal Commissioner on Anti-Gypsyism in March 2022. The office of the new Commissioner comes under the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, and his specific role will be to coordinate the measures of the Federal Government to combat Anti-Gypsyism. In addition to implementing the strategy, one of the Commissioner's tasks is to set up a national coordination office to implement the EU Roma Strategy 2030 and a civil society monitoring and information office for the investigation and documentation of anti-Gypsy attacks. The Commissioner will act as the Federal Government's central contact with the communities of Sinti and Roma. Furthermore, the Commissioner has announced his plan to establish a federal commission to investigate the injustices that the Sinti and Roma communities suffered in post-war Germany.

The appointment of the Federal Commissioner against Anti-Gypsyism was one of the specific recommendations of the Independent Commission on Anti-Gypsyism as elaborated in a report published in June 2021.[32] In their coalition agreement, the parties forming the Government elected in 2021 committed to meeting the recommendations of the Commission.[33]

Online source:
https://www.bmfsfj.de/bmfsfj/aktuelles/presse/pressemitteilungen/bundesregierung-beruft-erstmals-antiziganismus-beauftragten-193920

Greece EL

LEGISLATIVE DEVELOPMENT

Revenge pornography formally criminalised

Gender

With the adoption of Article 38 of Act 4947/2022 a new Article 346 was introduced into the Penal Code (PC), which criminalises revenge pornography (εκδικητική προνογραφία). Revenge pornography is now criminalised as a separate crime against sexual freedom in Chapter 19 ('Crimes against sexual freedom and crimes of financial exploitation') of the PC.[34] The new Article 346 PC stipulates:

> '1. Whoever, without having the right to, divulges to a third person or posts in public view a picture, be it real, corrupted or designed, or a visual or audio-visual material, in which a non-public act of a person related to his/her sexual life is imprinted, is punished with imprisonment of at least three years and a pecuniary sanction.
> 2. Whoever threatens another person to commit the acts of paragraph 1 is punished with imprisonment of at least one year. If the perpetrator of the threat forces another person to perform an act or an omission or to tolerate an act which otherwise the victim would not be obliged to perform or tolerate, is punished with imprisonment of at least two years.
> 3. The act of paragraph 1 is punished with imprisonment of up to eight years and a fine in case it is committed: (a) by posting on the internet or on social media with an unidentifiable number of receivers; (b) by an adult against a minor; (c) against a spouse or a partner or a former

32 Independent Commission on Anti-Gypsyism (2021), 'Change of Perspective. Justice that is catching up. Participation', available at: https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/PDF/UKA/Bericht_UKA_Perspektivwechsel_Nachholende_Gerechtigkeit_Partizipation.pdf.

33 Coalition Agreement 2021-2025, 'Daring more Progress. Alliance for Liberty, Justice and Sustainability', p. 120, available at: https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag/Koalitionsvertrag_2021-2025.pdf.

34 Greece, Act 4947/2022, OJ A 124/23.06.2022, Article 38.

> spouse or former partner or against a person who lives in the same household as the perpetrator or is connected to the perpetrator with an employment or service relationship or is under the perpetrator's custody or protection or who cannot defend him/herself; (d) with the aim to confer to the perpetrator or a third person a material benefit.
> 4. If any of the acts of the previous paragraphs has led the victim to a suicide attempt, it is punished with imprisonment [*katheirxi*][35] and a pecuniary sanction. If the act of the previous subparagraph has led to the death it is punished with imprisonment [*katheirxi*] of at least 10 years and a pecuniary sanction'.

Before the adoption of the new Article 346 PC, the non-consensual use of intimate/private images used to be punished under the criminal provision on the protection of personal data,[36] in combination with other general criminal provisions as appropriate to the case, including extortion (Article 385 PC), fraud (Article 386 PC), defamation (Article 362 PC), and abuse (Article 361 PC).

In view of the big rise of such cases during and after the COVID-19 lockdowns, using the protection of personal data as the legal basis for prosecution was criticised as insufficient by women's NGOs and legal activists, who required the formal criminalisation of the phenomenon.[37] The new criminal provision was adopted in the wake of recent 'revenge pornography' cases, in which persons well known to the media were involved either as perpetrators or as victims, and the big public outcry caused by them.

The women's NGO Diotima welcomed the introduction of the new Article 346 PC as a positive development.[38] However, it deplored that its introduction in an irrelevant legal text[39] is in breach of the principle of right and effective law-making. Moreover, the NGO has argued that the wording of the beginning of the first paragraph of Article 346 PC ('Whoever, without having the right to, divulges to a third person … audio-visual material') should be replaced by the phrase, 'Whoever without the consent of the depicted person' as in most cases the victim has shared the divulged material with the perpetrator (and thus the latter has a right to possess it) but has not consented to its exposure. Furthermore, the crime of child pornography has been already provided for and punished by Article 348A PC, which is more analytical and complete and makes the use of computers or internet an aggravating circumstance. As a result, the new provision's paragraph on minors has no added value except for toughening the punishment up to eight years of imprisonment. Finally, Diotima deplored the use of the term 'revenge pornography', which is limiting compared to the term 'image-based sexual abuse' used by the proposed violence against women (VAW) directive.[40]

As stressed in the EELN thematic report on VAW:

> 'the concept of "revenge porn" is problematic, because not all perpetrators are necessarily motivated by revenge, and not all content may be understood popularly as pornographic. The term "pornography" does not emphasise the non-consensual nature of the practices, and "revenge" only

35 According to Article 52(2) PC, imprisonment (*katheirxi*) extends from 5 to 15 years.

36 Greece, Act 4624/2019, OJ A 137/29.08.2019, Article 38. Depending on the case, under this specific criminal provision, the perpetrator was punished with imprisonment for ten days to five years (Supreme Penal Court judgment No. 505/2020) or a pecuniary sanction. In cases where the perpetrator aimed to confer to him/herself or to a third person a material benefit that exceeded the sum of EUR 120 000 or intended to harm the victim (Supreme Penal Court judgment No. 686/2021), an imprisonment of at least one year and up to six years was imposed (Articles 463(3) and 83(c) Penal Code).

37 Voukelatou, M. (2021), 'Εκδικητική πορνογραφία: Πώς θα έπρεπε να αντιμετωπίζεται ποινικά' (Revenge porn: How it should be treated criminally), *Kathimerini*, 15 December 2021, https://www.kathimerini.gr/society/561631444/ekdikitiki-pornografia-i-poiniki-antimetopisi/; 'Revenge pornography: a worrying increase in incidents in Greece', *Voria*, 29 August 2020, https://www.voria.gr/article/entinete-to-fenomeno-ekdikitikis-pornografias--ellipsi-nomothesias.

38 Diotima (2022), 'Νέο άρθρο στον ΠΚ για την «εκδικητική πορνογραφία»' (A new Article in the Penal Code on 'revenge porn'), press release, 22 June 2022, https://diotima.org.gr/neo-arthro-ston-pk-gia-tin-ekdikitiki-pornografia/.

39 Greece, Act 4947/2022 implementing Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA.

40 European Commission, Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, COM/2022/105 final.

focuses on a specific motive of the perpetrator, which might be predominant but not the only one. Furthermore, the concept does not grasp the complexity of behaviours'.[41]

To date there have been no specific guidelines for the criminal prosecution of abuse of sexual images.

Online source:
https://collab.lawspot.gr/sites/default/files/mashup/feka/2022/fek-124-2022.pdf

POLICY AND OTHER RELEVANT DEVELOPMENTS

Ombudsman's mediation in a case of discrimination in the workplace on the basis of age

Age

In January 2022, the Ombudsman (national equality body) issued an opinion in relation to a case of discriminatory dismissal that had received a lot of media attention. The case concerned a cleaner employed by a municipality, at the age of 68, on a fixed-term contract for the school year 2021-2022. The municipality terminated the contract prematurely, on the grounds that the employee was older than the maximum employment age (67) for school cleaning staff. The employee appealed to the Labour Inspectorate, arguing that the termination of the contract amounted to age discrimination. She also invoked, by analogy, a Presidential Decree that stipulates that public employees (with contracts of indefinite duration) may remain in service until they have acquired the right to an old-age pension or until the age of 70.[42] Before the Labour Inspectorate, the municipality claimed that the employment contract had been signed inadvertently and had been terminated when the municipality realised that the employee did not meet the age criteria established by law.

In its Opinion, the Ombudsman recommended that the Presidential Decree invoked by the employee be applied by analogy and that the dismissal be overturned.[43] The Ombudsman also noted that any form of discrimination based (among other things) on age, either direct or indirect, is prohibited, in principle, with regards to all persons in the field of employment and recalled that national law allows for positive action measures. The Ombudsman further noted that the recruitment in question concerned a fixed-term contract to perform tasks that the employee has performed effectively in previous years. Therefore, the Ombudsman concluded that it would be extremely strict and non-lenient to consider that the employee's biological abilities have been reduced in such a short period of time, to the extent that it justifies any questioning of her actual ability to continue in the profession until she reaches the age of 70, were she to be re-employed. Following the issuing of the Opinion, the Ombudsman organised a meeting with the municipal council to attempt to mediate between the parties. The attempt failed however, as the municipality rejected the employee's request and confirmed the termination of the contract.

Online source:
https://gsee.gr/?p=37585

41 De Vido, S., Sosa, L. (2021), 'Criminalisation of gender-based violence against women in European States, including ICT-facilitated violence', European network of legal experts in gender equality and non-discrimination, p. 135, available at, https://www.equalitylaw.eu/downloads/5535-criminalisation-of-gender-based-violence-against-women-in-european-states-including-ict-facilitated-violence-1-97-mb.

42 Greece, Presidential Decree No. 410/1988 on codification in a single text of the provisions of the current legislation, which concern the personnel with employment relationship under private law of the State, of the Local Self-Government Organisations and of the other Legal Entities of Public Law, OJ A 191/30.08.1988.

43 Greece, Ombudsman, Opinion No. 308473/3182/2022 of 20 January 2022.

New directives on the identification of trans persons in the framework of the COVID-19 emergency control measures

Gender

A detailed memorandum submitted to the Government by the Greek Transgender Support Association[44] focused on the challenges that arose in the midst of the COVID-19 pandemic, regarding the identification of public documents of trans persons due to the emergency control measures. This was done due to the fact that since November 2021, identification checks have been carried out not only by the police authorities, but also by citizens on other citizens.

As a result, the Joint Ministerial Decision[45] (JMD) on COVID-19 emergency measures for the period from 31 January 2022 to 7 February 2022, in its Article 9(7)[46] for the first time provided that for the identification of trans persons during the process resulting from the emergency controls by the competent authorities, the trans person's statement of their gender identity (i.e. the verbal confirmation by them that they are exactly the same person identified by their documents) should be accepted, regardless of the fact that their documents have not been submitted as part of the process of the legal recognition of gender identity.

The same provision has been repeated in all successive periodical JMDs on COVID-19 emergency measures.

This new JMD is in full alignment with the Order of the Greek Police on the identification of trans/transgender persons in accordance with the emergency measures to protect public health from the risk of further spread of the coronavirus of November 2021 (1244/21/2674724),[47] which has the same content.[48]

In its press release dated 1 February 2022, the Greek Transgender Support Association expressed its satisfaction with this positive development that is in full compliance with Article 1(1) of Act 4491/2017 (legal recognition of gender identity),[49] which ensures recognition and respect based on the gender identity of each person. On this occasion, the Association also highlighted once again the need to amend the current legislation on the legal recognition of gender identity, so that the process becomes extrajudicial, fast and accessible, in accordance with the standards set by the Council of Europe.

Online source:
https://tgender.gr/press-release-the-gtsa-expresses-its-particular-satisfaction-with-the-inclusion-of-trans-persons-in-the-new-joint-ministerial-decision-on-emergency-measures-to-control-and-protect-public-health/

44 The Greek Transgender Support Association is a voluntary non-governmental organisation that promotes the rights and freedoms of trans, gender-diverse, and LGBTI persons in general, as well as sex workers.

45 Greece, Joint Ministerial Decision No Δια/Γ.Π.οικ. 4761/2022, OJ B 290/29.01.2022 Joint Ministerial Decisions on emergency measures to protect public health from the risk of further spread of the coronavirus COVID-19 in the whole territory are jointly issued by 16 ministers each week, adapting the measures according to the given epidemiological data.

46 Greece, Article 9(7) of the Joint Ministerial Decision No Δια/Γ.Π.οικ. 4761/2022, OJ B 290/29.01.2022, provides that: 'During the application of the present, if the identification documents of the audited person have the gender and the name given at birth and do not have the data that attribute the gender identity based on par. 1 of Article 2 of Law 4491/2017 (A '152), the competent authorities and the audit bodies must fully accept the verbal confirmation of the person that is the same person identified with the document, regardless of whether the audited person has been subjected to the process of legal recognition of gender identity, according to Article 4 of Law 4491/2017 […]'.

47 See: Transgender Support Association (2020), press release, 3 April 2020, https://tgender.gr/deltio-typoy-thetiki-antapokrisi-toy-yfypoyrgoy-prostasias-toy-politi-oste-oi-astynomikes-arches-na-deixoyn-prosochi-stoys-elegchoys-logo-perioristikon-metron-sta-trans-prosopa/.

48 In April 2020 the same issue had been raised in a letter from the Deputy Minister for the Protection of Citizens to the Chief of the Police.

49 Greece, Article 1(1) of Act 4491/2017, OJ A 152/13.10.2017.

First ever 50-50 gender quota in the statutes of a political party

In April 2022, the main opposition political party Syriza (Coalition of the Radical Left) adopted a binding 50-50 gender quota for elections to its governing bodies by amending its internal rules and statutes. This is the first such quota in the history of Greek politics.

The 50-50 gender quota was applied in the elections of the party's 300-member central committee on 18 May 2022 during its 3rd Congress, ensuring a true gender balance of 150 male and 150 female members. The quota was also applied during the elections of the 40-member political secretariat on 29 May 2022, where 20 male and 20 female members were elected. The new rules also require that the political secretary and the deputy political secretary are of the opposite sex (actually a woman PS and a man deputy PS were elected). In the future the 50-50 quota will apply to the above party's candidates for both the national and the EU parliamentary elections.[50] Local and regional schemes supported by the Syriza political party will be encouraged to adopt this quota in local and regional elections as well.

The policy is in line with Resolution 404 (2016) on women's political participation and representation at local and regional levels of the Congress of Local and Regional Authorities of the Council of Europe,[51] which proclaims that 'achieving equality in political representation between men and women – who represent 50 % of the world's population – is vital for the functioning and quality of representative democracy and a prerequisite of fair and equitable political participation' and with the 2003 Recommendation of the Committee of Ministers of the Council of Europe, which states that 'the representation of either women or men in any decision-making body in political or public life should not fall below 40 %'.[52]

Although a legislative 40 % gender quota was applied for the first time in the 2019 national elections,[53] municipal/regional elections[54] and EU Parliamentary elections,[55] its impact was limited: the percentage of elected women was 18.7 % in the Parliament, 5.7 % in elected mayors, 19.2 % in municipal councilors, 7.7 % in regional governors and 21.4 % in regional councilors.[56] As noted by the Organization for Security and Co-operation in Europe/Office for Democratic Institutions and Human Rights (OSCE/ODIHR), gender equality was a marginal campaign topic during the 2019 parliamentary elections. ODIHR Election Assessment Mission (EAM) interlocutors remarked that women candidates were not actively promoted by political parties and received less media attention than male candidates.[57] This reconfirms the presence of gender stereotypes and persistence of traditional gender roles in the political domain.

According to the *World Economic Forum Global Gender Gap Report* (2021),[58] that tracks progress on relative gaps between women and men in health, education, economy and politics, in 2020, Greece was ranked 98th among the 156 countries – it should be noted that in 2006, when the report was first launched, Greece was 69th out of 115 countries.[59] In addition, in 2020 Greece ranked 115th in terms of

50 Tsipras, A. (2022), '50/50 everywhere – The message for the equal representation of the sexes', *AVGI*, 28 June 2022, https://www.avgi.gr/politiki/412513_50/50-pantoy-minyma-gia-tin-isarithmi-antiprosopeysi-ton-fylon.

51 Council of Europe, Resolution No. 404 (2016) on Women's Political Participation and Representation at Local and Regional Levels, 20.09.2016, available at: https://rm.coe.int/1680767272.

52 Committee of Ministers of the Council of Europe, Recommendation Rec(2003)3 of the Committee of Ministers to member states on balanced participation of women and men in political and public decision making (2003), Strasbourg, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e0848.

53 Greece, Article 15(1) of Act 4604/2019, OJ A 50/26.3.2019; Article 31 of Act 4648/2019, OJ A 205/16.12.2019.

54 Greece, Articles 52 and 71 of Act 4604/2019, OJ A 50/26.3.2019; Articles 15 and 52 of Act 4804/2021, OJ A 90/5.6.2021.

55 Greece, Article 15(2) of Act 4604/2019, OJ A 50/26.3.2019.

56 Verbole, A., Sioula-Georgoulea, I. (2021), *Participation of Women in Political Life at the Local Level in Greece Study and Policy Advice*, Council of Europe, Centre of Expertise for Good Governance, Strasbourg, CEGGPAD(2021)5, https://rm.coe.int/final-study-and-policy-advice-participation-of-women-in-political-life/1680a29e07.

57 Verbole, A., Sioula-Georgoulea, I. (2021), *Participation of Women in Political Life at the Local Level in Greece Study and Policy Advice*.

58 World Economic Forum (2021), *Global Gender Gap Report 2021*, https://www.weforum.org/reports/global-gender-gap-report-2021/.

59 World Economic Forum (2006), *Global Gender Gap Report 2006,* https://www.weforum.org/reports/global-gender-gap-report-2006.

women's political empowerment (in 2006 it ranked 87th). In 2019, with 52.5 out of 100 points, Greece ranked last in the EU in the *Gender Equality Index*.[60] Gender inequalities are most pronounced in the domain of power, even though the score in this domain has improved since 2010 (data reflected in the first edition of the index of 2013). In this context, Syriza's 50-50 gender quota is innovative and paves the way for other political parties as well. After all, political parties are one of the key gatekeepers of women's participation in politics.[61]

Equal participation of women in decision-making structures is one of the four central axes of the new Greek National Action Plan for Gender Equality 2021-2025.[62] It includes: legislative measures for the adoption of gender quotas in political bodies; rewards for exceeding the obligatory gender quota; promotion of the work of elected women; campaigns for the encouragement of women to become candidates; campaigns for the election of women at central, regional and municipal level; update of the website nosexism.gr and of the information material for women candidates, elected women and journalists; observation of the 40 % gender quota in national, regional and municipal elections, recording of elected women and yearly update and drafting of an informative note following each election procedure; support of networks of elected women; guidelines for facing sexism in public debates; and seminars for the empowerment of elected women and/or women candidates. It remains to be seen whether these commitments will materialise in time, in view of the upcoming national parliamentary elections (2023), the municipal and regional elections (October 2023) and the EU Parliament elections (2024).

Online source:
https://www.avgi.gr/politiki/412513_50/50-pantoy-minyma-gia-tin-isarithmi-antiprosopeysi-ton-fylon

HU Hungary

CASE LAW

Court decision on LGBTIQ-themed commercial

Sexual orientation

In December 2020, Hungary's largest commercial television channel broadcast a public-interest commercial on rainbow families 11 times during the daytime based on a contract with the LGBTIQ organisation Háttér Society. The commercial depicted experts such as psychologists, sociologists and nursery teachers responding to online comments that were hostile to the idea of rainbow families. They explained that the sexual orientation of the parents is irrelevant as long as the child is raised in a loving environment, and that children living in rainbow families need equal treatment and not differentiation from others.

In February 2022, the Media Council of the National Media and Telecommunications Authority concluded that the TV channel had violated national law on media services and mass communication as the commercial should have been aired in the time slot between 9pm and 5am (for media content with a 16+ age rating).[63] The Council stated that the purpose of age rating is to protect children from content that support world views and values that are contrary to socially accepted norms, in particular fundamental constitutional values. It concluded that the message of the commercial, i.e. the combination of homosexuality with child rearing, may have had a sensitive impact on children, generated a lack of

60 EIGE (2021), *Gender Equality Index 2019*, available at: https://eige.europa.eu/gender-equality-index/2021/EL.
61 European Commission for Democracy through Law (Venice Commission) (2021), *Compilation of Venice Commission opinions and reports concerning gender equality*, CDL-PI(2021)002, Strasbourg.
62 https://247newsbulletin.com/economy/45444.html.
63 Hungary, Media Council of the National Media and Telecommunications Authority, decision No. 104/2022. (II.1.) of 1 February 2022.

understanding, tension and uncertainty, and therefore, it should not have been broadcast during the daytime. The TV channel and Háttér Society requested a judicial review of the Council's decision.

In April 2022, the Budapest Regional Court quashed the Media Council's decision.[64] The Court referred to the jurisprudence of the European Court of Human Rights according to which 'there is no scientific evidence or sociological data [...] suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or "vulnerable adults". On the contrary, it is only through fair and public debate that society may address such complex issues as the one raised in the present case.'[65] The regional court emphasised that the Media Council had not identified the fundamental constitutional value that it regarded as having been breached. In this respect, the court pointed out that the values of the Fundamental Law must be interpreted in compliance with the case law of the ECtHR, which 'unquestionably substantiates that the content in question is constitutionally compliant'. Furthermore, the court emphasised that the commercial provided fair information to young people, in a time slot that made it possible for the message to reach its target audience.

The court thus concluded that the Media Council had failed to find a proper balance between freedom of information and the obligation to protect children. The Council appealed against the judgment, but on 30 June 2022, the Budapest Court of Appeal fully upheld the first instance decision.[66]

Online sources:
https://hatter.hu/sites/default/files/dokumentum/konyvlap/rtlcsalad-ftorv-itelet.pdf
https://hatter.hu/sites/default/files/dokumentum/konyvlap/rtlcsalad-fitelo-masodfok.pdf

POLICY AND OTHER RELEVANT DEVELOPMENTS

Ombudsman's Human Rights Institution status is downgraded due to lack of functional independence

All grounds

In 2021, the previous national equality body, the Equal Treatment Authority, was abolished by legislation adopted by Parliament on 1 December 2020, and its mandate was transferred to the Commissioner for Fundamental Rights (Hungary's Ombudsman). The law was passed without any meaningful public consultation and was met with sweeping criticism from several bodies, including numerous national NGOs representing protected groups. Their main point of concern related to serious doubts as to the Ombudsman's willingness to confront the Government on politically sensitive matters.[67]

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, which set out the internationally agreed minimum standards that NHRIs must meet to be considered credible.[68] They require NHRIs to be independent in law, membership, operations, policy and control of resources. NHRIs that comply with the principles are accredited with A status, while those that partially comply are accredited with B status.

In June 2021, the SCA expressed the view that the Ombudsman 'is operating in a way that has seriously compromised its compliance with the Paris Principles,' and made an initial recommendation that the

64 Hungary, Regional Court of Budapest, judgment No. 109.K.701.081/2022/14 of 19 April 2022.
65 ECtHR, *Alekseyev v Russia*, judgment of 21 October 2010, Applications Nos 4916/07, 25924/08 and 14599/09.
66 Hungary, Budapest Court of Appeal, judgment No. 1.Kf.700.069/2022/7 of 30 June 2022.
67 For further information, see *European equality law review,* Issue 2021/1, pp. 94-96.
68 Resolution 48/134 of the UN General Assembly Principles adopted on 20 December 1993 relating to the Status of National Institutions.

Ombudsman's status be downgraded to 'B' but providing the institution with the possibility to take measures to address the identified shortcomings and present evidence of these measures to GANHRI.[69]

However, in April 2022, following the failure of the Ombudsman to provide any such evidence, the SCA confirmed the institution's B status due to a lack of sufficient independence.

Online sources:
https://www.ohchr.org/sites/default/files/2022-04/SCA-Report-March-2022_E.pdf
https://ganhri.org/wp-content/uploads/2022/04/StatusAccreditationChartNHRIs_27April2022.pdf

IS Iceland

LEGISLATIVE DEVELOPMENT

Revision of the Racial Equality Act to include additional discrimination grounds

All grounds

On 15 June 2022, the Act on Equal Treatment irrespective of Race or Ethnic Origin was amended to cover the following additional discrimination grounds: religion or belief, disability, reduced capacity to work, age, sexual orientation, gender identity, gender expression and sex characteristics. The title of the law was also amended and is now the Act on Equal Treatment outside the Labour Market No. 85/2018.

Main principles and definitions
The definitions set out in the legislation are in line with the directives, and gender identity, gender expression, sex characteristics and multiple discrimination are also defined. Direct and indirect discrimination, harassment, victimisation and instruction to discriminate are prohibited on all the listed grounds and defined in accordance with the directives. Companies, institutions, NGOs and public bodies have a duty to provide reasonable accommodation for persons with disabilities to enable them to enjoy society on an equal footing with others but neither 'reasonable accommodation' nor 'disproportionate burden' is defined. Explicit provisions prohibiting discrimination by assumption and association are still lacking, as are provisions on dissemination of information.

Material scope
The Act prohibits discrimination in relation to social protection, including social security and healthcare, education, access to and supply of goods and services that are available to the public and housing. Discrimination in social advantages, as formulated in the Racial Equality Directive, is not explicitly prohibited, but this may be an oversight, as the explanatory notes to the original bill explain what social advantages are within the meaning of the legislation, so one may assume that the general anti-discrimination provision in Article 1, stipulating that the Act applies to discrimination in all spheres of life except the labour market in relation to the Labour Equality Act, applies to social advantages. The Act does not apply in the sphere of private and family life.

The Act sets out a specific exception for direct discrimination on the ground of age, if reasonable and justified. It should also be noted that the entry into force of the provisions in respect of age is deferred to 1 July 2024, as time is needed to examine and adapt age-related provisions in other legislation, in accordance with the new equality legislation.

69 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. For further information, see *European equality law review*, Issue 2022/1, pp. 114-115.

Online source:
85/2018: Lög um jafna meðferð óháð kynþætti og þjóðernisuppruna | Lög | Alþingi (althingi.is)

Ireland

IE

CASE LAW

Requirement to pay by credit card amounts to indirect discrimination on the Traveller community ground

Racial or ethnic origin

This case concerned three members of the Traveller community who were refused access to a hotel the complainant had pre-booked online. Upon arrival at the hotel, the complainant was informed that payment could only be made by a credit card, as indicated in the terms and conditions set out on the website used to book the stay. Because neither the complainant nor her companions owned a credit card, the booking was cancelled. The complainant argued that the policy was applied selectively to her, giving rise to direct discrimination on the Traveller community ground. In the alternative, she argued that a requirement to transact by credit card was indirectly discriminatory on that ground.

The Workplace Relations Commission (WRC) decided that the requirement did not amount to direct discrimination. According to the respondent, the policy had been applied on several other occasions and the WRC concluded that its use in this case was not related to the complainant's ethnicity. However, census data on Travellers' economic status and workforce participation revealed an 80 % unemployment rate, compared with a 10 % rate across the entire population. Since eligibility for credit cards is linked to income thresholds, the WRC concluded that the neutral provision of requiring payment exclusively by credit card would place Travellers at a particular disadvantage. The provision could not be objectively justified. The aim of the policy to enable the hotel to charge customers who did not pay bills or caused damage during their stay was legitimate. However, it was not appropriate or necessary, as the respondent did not establish that recovery of sums due could only be taken from credit cards as opposed to debit cards, and whether this was possible with all credit cards. Alternative means of protecting its economic interests were available such as requiring deposits or advance payment for given items.[70]

Consequently, the WRC found that the hotel's policy of requiring payment by credit card amounted to indirect discrimination on the Traveller community ground. It directed the respondent to pay the complainant EUR 3 500 in compensation.

This decision is the first finding of indirect discrimination under the Equal Status Acts 2000-2018 on the Traveller community ground since 2004. It could have implications beyond that ground for members of all groups protected by anti-discrimination law who experience relatively high levels of economic disadvantage. The review of Ireland's equality legislation, commenced by the Government in July 2021, will consider the introduction of 'socio-economic disadvantage' as a discriminatory ground. Should that ground be included in the legal framework, policies such as those at issue here could also be challenged as direct discrimination depending on how that ground is defined.

Online source:
https://www.workplacerelations.ie/en/cases/2022/january/adj-00026060.html

70 Ireland, Workplace Relations Commission, *Power v Atlantic Troy Limited Charleville Park Hotel & Leisure Club,* ADJ-00026060, decision of 19 January 2022, available at: https://www.workplacerelations.ie/en/cases/2022/january/adj-00026060.html.

POLICY AND OTHER RELEVANT DEVELOPMENTS

National equality body publishes submission to review of equality legislation

All grounds

On 10 January 2022, Ireland's national equality body, the Irish Human Rights and Equality Commission (IHREC) published its submission to a Government-initiated review of equality legislation.[71] The review was launched in July 2021 with a public consultation process, which closed in early December 2021. IHREC's submission to that consultation outlines its views on reform of the domestic laws that implement the Equality Directives, the Employment Equality Acts 1998-2021 (EEA), and the Equal Status Acts 2000-2018 (ESA).

The overall aim of the review is to examine the functioning of the Acts and their effectiveness in combating discrimination and promoting equality. Reflecting the broad scope of the review, IHREC's submission contains over 60 recommendations spanning substantive legal provisions, enforcement mechanisms and redress for violations of the law. In terms of compliance with the EU Equality Directives, the Commission highlights, among other things, the failure to provide for discrimination based on 'belief', the exemption for measures required by law under ESA, the exclusion of domestic workers from the definition of employee under EEA, an EEA provision that permits different rates of remuneration for workers with disabilities, compensation ceilings, and an ESA provision that requires people to notify prospective respondents in advance of submitting a complaint.

At the time of writing, it is not clear what form the Government's review will take following analysis of the submissions received, including that of IHREC.

Online source:
https://www.ihrec.ie/app/uploads/2022/01/IHREC-Submission-on-the-Review-of-the-Equality-Acts.pdf

Redress system undermines EU law according to Ireland's national equality body

All grounds

Ireland's national equality body, the Irish Human Rights and Equality Commission (IHREC), published its review of a controversial legislative provision on 14 February 2022. The provision in question, Section 19 of the Intoxicating Liquor Act 2003, requires discrimination complaints concerning licensed premises to be lodged before the regular courts, while all other complaints about discrimination in access to goods and services are heard by the specialised redress forum, the Workplace Relations Commission (WRC). International human rights bodies have consistently raised concerns about the impact of the provision on access to justice, particularly for the Traveller community.[72]

The review marks the first use of the IHREC's statutory power to assess the working or effect of equality legislation.[73] It consulted with a range of stakeholders, as it is obliged to do when engaging in a review. Civil society organisations that represent groups affected by discrimination universally supported transferring jurisdiction to the WRC, while industry representatives favoured the status quo. IHREC's analysis draws on those submissions, complaints data, international human rights principles, and an assessment of relevant EU law. It notes that Section 19 does not provide for a shift in the burden of proof, as mandated by the Racial Equality Directive and the Goods and Services Directive. IHREC also highlights potential compliance issues with the principle of effectiveness.

71 For further information, see *European equality law review*, Issue 2022/1, p. 119.
72 See, for example, European Commission against Racism and Intolerance (2019), *ECRI report on Ireland (fifth monitoring cycle)*, CRI(2019)18, https://rm.coe.int/fifth-report-on-ireland/168094c575.
73 Ireland, Irish Human Rights and Equality Commission Act 2014, Section 30, https://www.irishstatutebook.ie/eli/2014/act/25/section/30/enacted/en/html#sec30.

IHREC considers that there are no objective reasons for requiring discrimination claims regarding licensed premises to be pursued outside the primary forum for redress. Court proceedings impose significant additional burdens on individuals, including procedural complexity and formality, and the risk of an adverse costs order. Data on complaints revealed that a small number of claims were pursued before courts compared to the WRC, and that very few of those claims resulted in an order in favour of the complainant.

IHREC concludes that Section 19 undermines EU equality law provisions on the reversal of the burden of proof, as well as international human rights principles. IHREC has called on the Government to take urgent steps to bring claims about licensed premises within the jurisdiction of the WRC.

Online source:
https://www.ihrec.ie/app/uploads/2022/08/Review-of-the-Intoxicating-Liquor-Act-pursuant-to-section-30-of-the-IHREC-Act-Final.pdf

Important publications related to gender equality: code of practice on sexual harassment and harassment at work, and a report on the use of non-disclosure agreements (NDAs)

A code of practice on sexual harassment and harassment at work was published in February 2022 by the Irish Human Rights and Equality Commission (IHREC).[74] The code of practice provides a summary of the application of the Employment Equality Act 1998[75] (as amended) in relation to sexual harassment and harassment in the workplace. The text assists employers in the drafting of procedures to handle such complaints in the workplace.

Gender

The Minister for Children, Equality, Integration, Disability and Youth published a report on 7 March 2022 on the use of non-disclosure agreements (NDAs).[76] The report on non-disclosure agreements was written in the context of growing public awareness of the potentially unethical use of such agreements and the ongoing review of Ireland's equality legislation. The research was also undertaken in the context of the introduction of a Private Member's Bill designed to regulate the use of NDAs: the Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021. The objective of the report is to draw together what is known about NDAs in order to provide a resource to policy makers in their deliberations about any future regulation of the use of NDAs in the Irish context. The report examines experiences of NDA use, with a specific focus on cases of alleged sexual harassment or discrimination, in Ireland and a number of other jurisdictions. The report, the first of its kind in an Irish context, presents a review of the literature, and a thematic overview. In summary, the report indicates that there is a lack of information on such agreements and that more work has to be done.

Online sources:
https://www.ihrec.ie/app/uploads/2022/08/Codes-of-Practice-Sexual-Harassment-FA_Digital.pdf
https://www.gov.ie/pdf/?file=https://assets.gov.ie/217724/f2b97bb1-dac8-4e06-9fdf-315362366dcf.pdf#page=null

74 Irish Human Rights and Equality Commission (2022), 'Code of practice on sexual harassment and harassment at work', Dublin, February 2022, available at: https://www.ihrec.ie/app/uploads/2022/08/Codes-of-Practice-Sexual-Harassment-FA_Digital.pdf.

75 Ireland, Employment Equality Act 1998 revised, See s.14A of the Act. Available at: http://revisedacts.lawreform.ie/eli/1998/act/21/front/revised/en/html.

76 Ireland, Ministry for Children, Equality, Integration, Disability and Youth (2022), *The prevalence and use of Non-Disclosure Agreements (NDAs) in discrimination and sexual harassment disputes*, available at: https://www.gov.ie/pdf/?file=https://assets.gov.ie/217724/f2b97bb1-dac8-4e06-9fdf-315362366dcf.pdf#page=null.

IT Italy

LEGISLATIVE DEVELOPMENT

The new Act on the collection of data and information on gender-based violence

Gender

A new Act on statistics on gender-based violence (Act No53/2022) of 5 May 2022 entered into force on 8 June 2022.[77] The Act regulates, widens and systematises the collection of data and information on gender-based violence in order to monitor it and develop policies aimed at preventing and fighting it.

Under Article 2 of the new Act, the Minister for Equal Opportunities will issue directives on the identification of statistical survey focus areas in this field. Every three years the National Statistical System will conduct a sample survey which estimates the occurrence of different types of violence, such as physical, sexual and psychological violence, economic, as well as acts of persecution in relation to behaviour that constitutes or contributes to a crime. The surveys will be published and addressed to the Department for Equal Opportunities.

With regard to data collection obligations in general, public and private entities participating in the national statistical programme will provide the data ensuring the disaggregation and equal visibility of data relating to women and men as well as the use of gender-sensitive indicators.

The annual report of the Minister for Equal Opportunities to Parliament on the use of the Equal Opportunities Fund regarding policies fighting gender-based violence, will include the information of the survey on gender-based violence as well as the survey on anti-violence centres and shelters.[78]

Under Article 3 of the new Act, the annual report of the Prime Minister to Parliament on the activity of the National Statistical System will be integrated in a report on the enforcement of Article 2.

Article 4 obliges all public health facilities to provide data and news related to violence against women, in particular updating the information system for monitoring emergency and urgent healthcare.

Article 5 establishes an integrated data collection system for the Ministries of the Interior and Justice as regards crimes that would fall under violence against women (a list of 28 crimes), with particular regard to data that can be used to establish the relationship between the author and the victim of the crime. Information on complaints, preventive measures applied by the head of the police or by the judicial authority, precautionary measures, orders of protection and security measures, as well as closure measures and judgments will be gathered by this system. This survey will regard every victim of violence and every level of the judicial process.

Moreover, under Article 6, for the list mentioned above, the register of news of crimes will include information on the relationship between the offender and the victim, the age and gender of both, the presence at the scene of crime of a child of the offender and/or the victim, the place where the crime occurred, and the type of any weapon used.

Online source:
https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2022;53#:~:text=La%20presente%20legge%20e'%20volta,un%20effettivo%20monitoraggio%20del%20fenomeno.

77 Italy, Act No. 53 of 5 May 2022 on statistics on gender-based violence, OJ No 120, 24 May 2022, LEGGE 5 maggio 2022, n. 53 - Normattiva.
78 Italy, Act No. 53/2022 on statistics on gender-based violence, Article 7, OJ No 120, 24 May 2022, LEGGE 5 maggio 2022, n. 53 - Normattiva.

Family Act 2022

The Family Act[79] on the reorganisation and improvement of different measures aimed at supporting families, and especially women, in achieving a healthy work-life balance was finally introduced on 7 April 2022, four years after its first proposal.

An important step of the reform had already been taken by Act No. 46 of 1 April 2021,[80] which delegated the Government to reorganise, simplify and strengthen different forms of economic support for families by providing for a single and general allowance to be made available for each dependent child. The remaining provisions of the delegation Act further expanded the early proposal, referring for instance to disabled persons as well, and in particular to the support of young people.

The reform mainly aims to promote gender equality within the family, supporting women's participation in the labour market, also through more flexible scheduling, and by providing incentives for the second earner in the family (which is more often the woman).

Article 3 of the Family Act delegates the Government to issue different decrees to reform the regulation of parental leave, and maternity and paternity leave in order to strengthen and harmonise these decrees within two years after the Delegation Act enters into force. The proposals for these decrees may be issued by the Minister for Equal Opportunities and Family and by the Minister of Labour, together with the Minister for Economic Affairs and Finance, the Minister of the Public Administration, and the Delegated Political Authority for European Affairs.

The framework of the new decrees will have to respect the following criteria (set by the Decree on the implementation of EU Directive No. 2019/1158 on work-life balance for parents and carers):[81]

- The extension of the right to take up parental leave will be limited to 14 years of age of the child. More flexible use of parental leave, compatibility with the respective provisions of collective agreements, and considering the specific needs of single parents as well, will have to be provided.
- Parents will be entitled to five hours remunerated time off to talk with the child's teachers during the school year. The father or a close relative will be entitled to time off from work to assist the mother in case of specialist medical service for maternity protection. At least two months of parental leave will be assured to each parent as non-transferrable, including incentives when the leave is equally distributed among the parents.
- Further measures to favour the extension of this ruling to self-employed and professionals will have to be provided.

Other provisions towards a better balance of care duties within the family regard changes to the paternity leave regulations. In particular, the duration of compulsory paternity leave (currently 10 days) to be taken in the first five months from the birth will be extended. It will be made available to all fathers, irrespective of the length of service of the father and his marital status. This applies to employees of both the private and public sector, under the same conditions, assuring a reasonable notice period to the employer following collective agreement provisions. Further measures to favour the extension of this regulation to self-employed and professionals will have to be provided.

As regards maternity leave, a new paragraph of Article 3 expressly states that the decrees will have to ensure an increase of the maternity allowance. Article 4 delegates the Government to issue decrees within two years, in order to reorganise and strengthen different measures aimed at promoting working

79 Italy, Act No 32 of 7 April 2022, OJ No. 97, 27.04.2022, available at: LEGGE 7 aprile 2022, n. 32 - Normattiva.
80 Italy, Act No 46 of 1 April 2021, published in OJ No. 82, 6.04.2021.
81 The Decree was approved by the Council of Minister on 31 March 2022 and was under consideration in Parliament at the time of preparation of this edition of the European equality law review.

mothers' participation in the labour market, sharing of care duties and a better balance of working and private life.

No further funds have been allocated to finance the majority of the measures envisaged by the Act such as: incentives for employers who offer reversible flexible working conditions to working parents according to national collective agreements; facilitated tools for the regulation of housework services, babysitting, and care activities for the elderly; cuts in taxes or contributions for employers to facilitate the substitution of working mothers, their return to work or professional training.

A gradual change to the remuneration for workers taking up time off in the event of a child's illness will need to be provided. Further incentives to be introduced relate to the promotion of female entrepreneurship, including financial and digitalisation training. Additionally, in the domestic sector, which mainly employs women, further incentives will have to be provided to encourage the transition of undeclared workers to declared work.

The Family Act is an important first step in an ambitious project of strengthening and re-orienting policies to support families with children, sustaining both the cost of children and the reconciliation of family and work with a view to gender equality. Nevertheless, it still has some shortcomings, which have not been overcome in its long parliamentary process.

CASE LAW

Constitutional Court ruling regarding the double surname of the child

Gender

Judgment No. 131 of 27 April 2022 declared the rules that automatically attribute the paternal surname to the child to be unlawful.[82] Article 262, paragraph 1, of the Civil Code provides that, in case of recognition of a child by both parents, the child assumes the father's surname. Following this judgment, the child must assume the surname of both parents, in the order agreed by them, without prejudice to their possible choice to attribute exclusively the mother's or the father's surname.

The Court deemed the provisions that automatically attribute the paternal surname to the child to be inconsistent with Article 2 (affirming fundamental human rights both as an individual and as a member of society) and Article 3 of the Constitution (on the principle of equality), as well as with Article 117 paragraph 1 of the Constitution (stating that the legislative power must be exercised in compliance with the Constitution and EU and international obligations) in relation to Articles 8 and 14 of the European Convention on Human Rights.

This judgment is finally a decisive step in the long-running debate on the opportunity to attribute to the child the mother's surname as well. After many drafts and some case law on this issue, judgment No. 286/2016 of the Constitutional Court already allowed parents to choose to attribute both surnames to the child, but the father's surname was still the automatic choice.

The reasoning of the Court in this this judgment underlined that the automatic attribution of only the father's surname, implying the invisibility of the mother, bears the seal of inequality between parents, which is imprinted on the child. This rule cannot be justified by the purpose of safeguarding the family unit. In fact, 'unity and equality cannot coexist if one denies the other, if the unit operates as a limit that offers a veil of apparent legitimacy to sacrifices imposed in a unilateral direction'. These rules are the

82 Italy, Constitutional, Court, Judgment No. 131 of 27 April 2022, Official Journal No. 22 of 1 June 2022, 1 special series, Constitutional Court, available at: https://www.gazzettaufficiale.it/atto/corte_costituzionale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2022-06-01&atto.codiceRedazionale=T-220131.

result of a patriarchal and discriminatory vision that reverberates in the identity of each person through their surname.

The Constitutional Court ruled that it would be in contradiction with constitutional principles not to allow parents to agree in an equal contest on the surname of their child. After judgment No. 131/2022, if parents cannot agree on the choice of the surname of their child, intervention by a judge will be necessary, at least until a new law is approved on this issue.

There are several aspects that require new laws regarding the issue of surnames. The Constitutional Court already produced some guidelines in its judgment for the legislature, including the request to intervene quickly to avoid a situation in which the attribution of the surname of both parents develops into a 'name multiplier mechanism' within several generations, which would actually be detrimental to the identifying function of the surname. Taking into account the latter function, the Court suggested that the parent with a double surname chooses the one that is more representative of his family bond to be given to the child. This rule would not apply in cases where parents choose only the mother's or the father's surname or double surname.

The legislature will also have to protect the interest of the child in having the same surname as their brothers and sisters. Therefore, the Court suggested that the attribution of the surname should be binding for the choice regarding the next children of the same couple.

Online source:
https://www.gazzettaufficiale.it/atto/corte_costituzionale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2022-06-01&atto.codiceRedazionale=T-220131

POLICY AND OTHER RELEVANT DEVELOPMENTS

Survey on discrimination against LGBT+ people in the field of employment

Sexual orientation

Transgender

In March 2022, the Italian statistics office Istat and the national equality body UNAR unveiled the results of a survey conducted in 2020-2021 on employment discrimination against LGBT+ people in a civil union.[83]

In Italy, 95 % of people who are or have been in a civil union (more than 20 000 people) identify as homosexual or bisexual. Within this group, the survey focused on those who are or have been employed, some 26 % of whom state that their orientation has represented a disadvantage in relation to career and professional growth, recognition and appreciation, and/or income and pay. Some 40 % of the respondents reported having avoided talking about their private lives with colleagues to keep their sexual orientation hidden. About 60 % have experienced at least one micro-aggression[84] in their current or last job. Within this focus group of the survey, one in three respondents claimed to have suffered at least one event of discrimination while looking for work. About 20 % claimed to have experienced at least one event related to a hostile climate or an aggression in their work environment.

Nearly half (46.9 %) of respondents identifying as homosexual or bisexual reported having experienced at least one event of discrimination at school/university on grounds of sexual orientation. Some 38 % of the respondents who identify as homosexual or bisexual stated that they have suffered, for reasons

83 Istat, UNAR (2022), *L'indagine Istat-Unar sulle discriminazioni lavorative nei confronti delle persone LGBT+ (in unione civile o già in unione). Anni 2020-2021*, (Istat-UNAR survey on employment discrimination against LGBT+ people (who are or have been in a civil union). Years 2020-2021), 24 March 2022.

84 Micro-aggression is defined as brief repeated exchanges that send disparaging messages to some individuals as part of a group, subtle insults directed at people often automatically or unconsciously. The most common is using the word 'fag' or similar expressions.

linked to their sexual orientation, at least one event of discrimination in other spheres of life (finding a home, relations with neighbours, use of social-health services, access to goods and services, etc).

More than 68 % stated that they have avoided holding hands in public with a same-sex partner for fear of being assaulted, threatened or harassed. With reference to the last three years, some 3.9 % of respondents stated having been threatened for reasons related to sexual orientation, excluding episodes that occurred in the workplace. Offences linked to sexual orientation online are reported by 13 % of homosexual and bisexual respondents.

Online source:
https://www.istat.it/it/archivio/268470

LT Lithuania

LEGISLATIVE DEVELOPMENT

Protection against harassment and victimisation is expanded in relation to access to goods and services

All grounds

In May 2022, the Parliament adopted amendments[85] to the Law on Equal Treatment,[86] expanding the material scope of the protection against harassment and victimisation, thus increasing compliance with EU law. First, the material scope of the prohibition of harassment was extended to include the field of access to goods and services as well as membership of and involvement in workers' or employers' organisations, filling the previous gap in Lithuanian law. Secondly, the material scope of the prohibition of victimisation was expanded to include education and the provision of goods and services. The amendments apply to all grounds of discrimination prohibited by Lithuanian law, and entered into force on 2 June 2022.

Online sources:
https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/652fea40c13111ec9f0095b4d96fd400
https://lygybe.lt/lt/svarbus-pakeitimai-lygiu-galimybiu-istatyme-pleciama-apsauga-nuo-priekabiavimo-ir-persekiojimo

Strengthening protection against discrimination

Disability

Age

In June 2022, the Parliament adopted amendments to the Law on Equal Treatment, expanding further the protection against discrimination.[87] The amendments entered into force on 1 August 2022.

First, the duty of employers to provide reasonable accommodation for potential and existing employees with disabilities is extended to cover the provision of suitable working conditions, meaning that employers are no longer only required to ensure the physical accessibility of the workplace, but also to consider what changes to the usual working conditions would enable persons with disabilities to work equally

85 Lithuania, Law amending the Law on Equal Treatment No. IX-1826, Articles 2, 4, 6, 7, 8, 9 and the Annex, adopted 19 May 2022, entered into force 2 June 2022, available at: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/fb2ccb22db3111ecb1b39d276e924a5d.

86 Lithuania, Law on Equal Treatment, 2003, No. 114-5115, entered into force 1 January 2005; available at: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.222522/asr.

87 Lithuania, Law amending the Law on Equal Treatment No. XIV-1192, Articles 2, 7 and the Annex, adopted 28 June 2022, entered into force 1 August 2022, available at:: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/36c56052f88011ecbfe9c72e552dd5bd?jfwid=-t0zro30m1r.

with everyone. Until now, both the Law on Equal Treatment and the Labour Code included the duty to adapt premises, but not the duty to provide other forms of 'reasonable accommodation', which can differ depending on each person and the type of work.

Secondly, exceptions to allow for certain benefits for persons with disabilities, persons in certain age groups or those in certain financial situations were established, if justified by a legitimate aim pursued by appropriate and necessary means. This amendment followed repeated recommendations in this regard by the Equal Opportunities Ombudsperson.

Finally, a new ground of discrimination – family status – was also introduced, covering persons who have faced discrimination due to having or not having children, relationship status, etc.

Online source:
https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/36c56052f88011ecbfe9c72e552dd5bd?jfwid=-3e0lf1mid

Luxembourg LU

POLICY AND OTHER RELEVANT DEVELOPMENTS

Final report on the impact of COVID-19 and gender equality in Luxembourg

Gender

In March 2022, the Luxembourg Institute for Socio-Economic Research (LISER) issued the final report on the social consequences of the COVID-19 pandemic on gender equality entitled 'COVID-19 and Gender Equality in Luxembourg' under the coordination of Eugenio Peluso, the director of the Living Conditions Department. The report was issued in the context of a collaboration agreement, signed in January 2021 between LISER and the Ministry for Gender Equality (MEGA), and was a specific action in MEGA's National Action Plan for Gender Equality 2019-2022.

The aim of the project was to assess the impact of the COVID-19 crisis on gender equality, and to analyse the main effects of the crisis and of the subsequent policy responses on several aspects of individual wellbeing, such as health, income, living conditions, employment, time use and social activities.

LISER used original data from Luxemburg's COVID-19 socioeconomic survey (SEI). A pool of persons residing in Luxembourg and cross-border workers were interviewed in two waves: one between the end of May and early July 2020, and the other between March and May 2021.

The report is divided into three chapters. Chapter 1 covers the health effects of the COVID19 pandemic by analysing the gender gradient of infections, severe illness and death during the first 18 months of the pandemic in Luxembourg. Chapter 2 explores how individual circumstances affect gender differences in complying with the policies implemented during the COVID-19 crisis in Luxembourg. Chapter 3 focuses on gender differences of COVID-19 impacts in three main areas: the labour market and time use, economic insecurity and social interactions.

The report shows that the virus has infected women and men in similar proportions (13.89 % vs 13.70 %). But the results show that contamination rates varied by gender regarding age, employment status and household configuration. Women were more infected than men under the age of 50. Contamination rates have been substantially higher among women in the 'HoResCa' (hotels, restaurants and catering services) and the cleaning sectors, whereas the male contamination rates have been higher in transport and security services. The presence of children in the household is an important factor driving contamination risks among adults, as the infection rates for both men and women are higher in households with

children. Among single adults with children, infection rates are much higher among women than men. Moreover, men have been much more adversely hit by severe forms of the COVID-19.

Attitudes towards social distancing measures, testing and vaccination are generally similar between women and men. They depend on socioeconomic factors, on deep personality traits such as risk aversion as well as beliefs and the type of media consumption. The perception of the danger of COVID-19 and risk aversion are more pronounced among women. Women appear to be more compliant than men with most measures combating the COVID-19 pandemic. A notable exception pertains to vaccination intentions, which are slightly lower among women due to greater concerns about side effects.

Regarding employment, the report shows that women lost their job more often than men at the beginning of the pandemic and they were also more likely than men to be on temporary unemployment or on leave for family reasons, especially in male-dominated sectors. Those who were still employed during the pandemic and did not take any form of temporary leave due to COVID-19 saw a sharp increase in the time spent on unpaid work activities. There is some evidence that the larger demand of family-provided childcare due to school closures and confinement measures was unequally shared by women and men. As a consequence, the gender gap in housework and childcare did not decrease.

Online source:
https://liser.elsevierpure.com/ws/portalfiles/portal/34454935/Mega_report_Final_07_03_22.pdf

MT Malta

POLICY AND OTHER RELEVANT DEVELOPMENTS

The application of gender quotas in Parliament

Gender

Following constitutional amendments introducing a gender corrective mechanism to address the under-representation of women in Parliament, the law was applied for the first time following general elections on 26 March 2022.

Only four women were elected directly in the general elections. More women were subsequently elected through by-elections, while 12 women were elected through the gender corrective mechanism. The amendments to the law needed a more pronounced education campaign since many decided not to give their preference to female candidates since they relied on the mechanism to make sure that women would be elected anyway. However, the results could also be attributed to the low number of women candidates that were fielded by the two main political parties.

Online sources:
https://newsbook.com.mt/en/the-6-pl-female-candidates-to-be-elected-through-the-gender-quota/
https://www.pressreader.com/malta/malta-independent/20220421/281621013888075

Netherlands NL

CASE LAW

Gender-neutral registration

Gender

On 8 April 2022, the Gelderland District Court ruled that applicant Ryan R has the right to register an 'X' on their birth certificate and in their passport instead of the male or female gender.[88] The district court pointed out that Ryan informed the court in a personal letter and during the court hearing about the psychological and social consequences of the discrepancy between the way he experiences his gender and the official documents. In view of this, the recognition in society of non-binary persons and the (trend towards) legal recognition, the view of the legislature and the fact that the Supreme Court leaves it to lower courts to decide in each individual case on the merits of the case, the interest of Ryan in a gender-neutral registration outweighs the fact that there is as yet no legal basis for such registration.

The judgment is important given that a month earlier, on 4 March 2022, the Supreme Court of the Netherlands decided that it cannot rule that a non-binary person has the right to request a gender-neutral registration in official documents, as this is a decision which needs to be taken by the legislature.[89] According to the Supreme Court, as long as there is no legal provision, it is up to the court in question to decide in each specific case on the basis of the nature and content of the request and the further circumstances of the case, including the possibility of holding the decision on the request.

The judgment by the Gelderland court is the first judgment after the refusal by the Supreme Court to create a right for non-binary persons to have a gender-neutral registration in their passport and birth certificate. The Gelderland court has taken the step to accept such a right, where the Supreme Court did not do so. It is to be expected that more court cases will follow. In the meantime, a proposal has been submitted to Parliament to give non-binary persons the right to have a gender-neutral registration in official documents without having to go through a court procedure.[90]

In view of these developments, it is likely that in the Netherlands it will become possible in the near future to request a gender-neutral registration.

North Macedonia MK

Overview of discrimination cases from the annual reports of the national human rights institutions

All grounds

The two national human rights institutions with equality mandates have published their annual reports for 2021.

In its first year of work, the new national equality body, the Commission for Prevention and Protection against Discrimination (CPPD), processed 167 cases, out of which 77 were part of the backlog from

88 Netherlands, Gelderland District Court, judgment of 08.04.2022, available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBGEL:2022:1824.

89 Netherlands, Supreme Court, judgment of 04.03.2022, available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2022:336.

90 Netherlands, Proposal of Amendment to the law to change sex registration in official documents to 'X', 20.11.2021, currently still pending before the Parliament, available at: https://www.tweedekamer.nl/kamerstukken/amendementen/detail?id=2021Z22052&did=2021D47017.

the former equality body (the Commission for Protection Against Discrimination, CPAD), and 90 were received in 2021. The majority of the cases (approximately 60 %) were filed by natural persons, about 33 % by legal persons, 5 % by a group of citizens, and 1 % of cases were initiated *ex officio* by the CPPD itself. The majority of applicants did not state an ethnic affiliation (42), followed by Macedonians (41), Roma (7), Albanians (6), Bosniaks, Vlachs, Serbs, Turks and Bulgarians (1 each). Almost 60 % of applications from natural persons were submitted by men.

Out of the 167 cases processed by the CPPD in 2021, in 84 cases (about 50 %) applicants listed one discrimination ground, in 55 cases (about 33 %) applicants listed more than one ground, and 28 cases (about 17 %) did not list any ground. The highest number of cases were on grounds of personal or other social status (43), followed by national or ethnic belonging (38), sex (23), political belief (20), belonging to a marginalised group (19), education (17), colour of skin (16), race (15), social origin (14), sexual orientation (14), gender identity (14), property status (11), disability (7), age (7), gender (6), family or marital status (5), health status (3), citizenship (3), religion or religious belief (2), language (2), other belief (2), origin (1), and other ground (20). According to the report, most of the cases submitted by women concerned alleged discrimination on grounds of education, personal or other social status, political belief, and only four on the basis of sex, whereas most of the cases submitted by men concerned alleged discrimination on grounds of national or ethnic belonging, political affiliation, personal or other social status and eight cases on grounds of sex.[91]

The CPPD found discrimination in 40 cases, no discrimination in 39 cases, decided not to act with regards to 10 cases (applications withdrawn by the applicant or for different procedural reasons) and rejected 41 applications (notably due to a lack of competence in 26 cases). Some 37 cases were still being processed by the end of 2021. In the 40 cases where discrimination was found, the discriminator was predominantly from the public sector (24). With regards to the material scope, discrimination was mostly found in relation to employment (15) and access to goods and services (11). Out of the forms of discrimination, direct discrimination was established in a total of 26 cases, sometimes in combination with other forms of discrimination. Out of the 55 cases where two or more grounds of discrimination were claimed, the CPPD found discrimination on more than two grounds in 16 cases, including three cases of intersectional discrimination concerning Roma claimants.

The Ombudsperson – the other forum for public sector discrimination cases – received 43 cases filed as 'non-discrimination and equitable representation' cases in 2021, which represents 1.6 % of the total number of cases filed to this institution (2 686). The percentage of discrimination cases has thus decreased significantly compared to the previous year when it was approx. 2.5 %.

Of the 43 cases of alleged discrimination reported in 2021, 22 were in the area of employment and labour relations, 6 in access to goods and services, 4 in the judiciary and administration, 4 in housing, 3 in education, science and sports, 1 in social protection, 1 in public information and media, and 2 in other unspecified fields. In 11 cases the discrimination ground was national or ethnic origin, in 6 it was education, in 3 health status, in 2 language, and the rest remain unspecified in the report.[92]

Online sources:
https://kszd.mk/wp-content/uploads/2022/03/Godisen-izvestaj-2021.pdf
http://ombudsman.mk/CMS/Upload/NarodenPravobranitel/upload/Godisni%20izvestai/GI-2021/GI-2021.pdf

91 The different sets of data regarding the total number of cases and the disaggregation per discrimination grounds etc. do not fully add up. Commission for Prevention and Protection against Discrimination (2022), *Annual report for 2021*, available at: https://kszd.mk/wp-content/uploads/2022/03/Godisen-izvestaj-2021.pdf, pp 20-22.

92 North Macedonia Ombudsperson (2022), *Annual report on the degree of ensuring, respecting, advancing and protecting human rights and freedoms 2021*, pp. 84-85.

Norway

NO

CASE LAW

Age

Finding of discrimination on the basis of age and clarification of rules on compensation

The complainant was employed by a chain of florists that had a wage system based on age, the consequence of which was that the complainant was paid EUR 5 (NOK 50) less per hour than colleagues who were five years older than her. The nature of the tasks performed or years of experience or of seniority with the employer were not taken into account. The case was assessed by the grand chamber of the Anti-Discrimination Tribunal, as mandated when special circumstances apply.[93]

Crucial to this case was the limits of the tribunal's competence to award compensation, which has been a contested issue since the 2018 reorganisation. According to the preparatory works, the Government assumed that the sums in questions would be very low, and that the tribunal's authority was limited to NOK 10 000 (EUR 1 000).[94] However, such a limit is not in line with the wording of the Equality and Anti-Discrimination Ombud Act, which limits the tribunal's competence to cases where the respondent has no objections, or obviously unfounded objections, as long as the tribunal is unanimous.

According to the Working Environment Act (WEA), a person who has been discriminated against may claim compensation whether the employer is to blame for the discrimination or not. There are no limits to what they may claim, other than it being compensation for proven economic losses that are caused directly by the incident in question, in accordance with general tort law. The Ministry for Culture has also made a statement in the preparatory works to a proposed change in the WEA[95] that the Government never intended to set a strict limit for the amounts of compensation that may be awarded by the tribunal.

On this basis, the grand chamber of the tribunal concluded that its authority to award compensation is not limited to specific sums. The tribunal found that the respondent's wage system constituted direct differential treatment on the basis of age. They further concluded that the complainant had been treated less favourably compared to her colleagues, on the basis of her age alone. The employer could not provide any reasonable explanations behind the age-based rules, and the tribunal concluded that unjustified differential treatment had taken place. The complainant was awarded approximately EUR 2 000 (NOK 20 000) for damages of a non-pecuniary character and EUR 5 780 (NOK 57 836) in compensation for economic losses.[96]

Online source:
https://www.diskrimineringsnemnda.no/media/3251/offentlig-versjon-av-vedtak-sak-21-544.pdf

93 Norway, Regulations relating to the Organisation, Tasks and Procedures of the Anti-Discrimination Tribunal, FOR-2017-12-20-2260, Section 6(5).
94 Norway, Prop. 80 L (2016-2017) p. 106.
95 Norway, Prop. 154 L (2020-2021) p. 34.
96 Norway, Anti-Discrimination Tribunal, case No. DIN-2021-544, *A v Mester Grønn*, decision of 7 March 2022.

POLICY AND OTHER RELEVANT DEVELOPMENTS

All grounds

Consistent misinterpretation of the rule on the shift of the burden of proof in discrimination cases

In May 2022, a research report was published indicating that the rule on the shift of the burden of proof has not been interpreted in line with EU law since it was transposed into Norwegian law, even though the wording in the Equality and Anti-Discrimination Act is correct.[97]

In civil cases, the most probable facts after an overall assessment should be taken as the basis for the legal assessment. The relationship between this general rule and the rule on the shift of the burden of proof in discrimination cases was never assessed in detail by the preparatory works of any anti-discrimination legislation.[98] The report demonstrates that legal practitioners in Norway, including the equality bodies and the courts, have adopted the position that a presumption of discrimination requires more under Norwegian law than under EU law. Thus, the requirements for establishing such a presumption have been too strict. For example, the Supreme Court stated in December 2020 that:

> 'the rule regarding the burden of proof (...) does not constitute any exception from the general rule regarding the required level of proof in civil law cases. The required proof is, here as elsewhere, that the most probable facts – after an overall assessment of the evidence presented (...) – shall provide the basis for the court's further assessment of the case. Common rules concerning the assessment of the evidence, such as evidence that came into being at a time close to the events in question, apply in the same manner as in other civil cases. Another matter is that the rule [regarding the shared burden of proof] creates a duty for both parties to present all the evidence available to them.
>
> If, after an overall assessment of all evidence, there remains a definite doubt regarding which facts are more likely, i.e. that one set of facts is as likely as the other, the rule sets forth that this doubt should lead to a conclusion to the disfavour of the "responsible party"(...). In practice such situations regarding the proof are rare, however.'[99]

In practice, the Equality Tribunal uses, at least to some degree, the correct procedure of establishing a presumption before shifting the burden of proof to the respondent. However, a lack of proof indicating a causal link between the differential treatment and a protected ground is often the reason for dismissals by the Equality Tribunal.

The too strict practice for establishing a presumption of discrimination also plays an important role in the high number of cases where the courts and the tribunal find that the differential treatment was justified.[100] The Equality Tribunal assesses the vast majority of complaints regarding discrimination in Norway, and it does not always distinguish consistently between direct and indirect discrimination.

97 Hellum, A. and Strand, V.B. (2022), *Likestillings- og diskrimineringsrett* (Equality and Anti-Discrimination Law), Oslo, Gyldendal. See chapter 9 regarding the burden of proof, especially, pp. 371-373.
98 For example Norway, Proposition to Parliament, Ot.prp no. 77 (2000-2001) *Om lov om endringer i likestillingsloven mv.*
99 Norway, Supreme Court, case No. HR-2020-2476-A, paragraph 75.
100 Bauge, M. and Løvdal, L. (2022), 'Access to justice in discrimination cases in Norway' in *Scandinavian Studies in Law*, Vol. 68 pp. 373-402.

Portugal

PL

LEGISLATIVE DEVELOPMENT

Criminal conviction for racial, sexual orientation and religious discrimination

Racial or ethnic origin

Religion or belief

Sexual orientation

The case concerned several crimes committed between 2013 and 2017 that were motivated by racial, ideological and homophobic hatred. In 2020, 27 persons linked to the Portuguese Hammerskins movement[101] were formally charged with the crimes, including several instances of racial, sexual orientation and religious discrimination as prohibited by Article 240 of the Criminal Code and other offences, notably in the context of violent attacks. Many of the offences occurred online, through social media, such as hate speech.

The criminal trial started in February 2022 and the sentence was delivered on 27 June 2022. Some 21 of the defendants were convicted of racial, sexual orientation and religious discrimination and sentenced to imprisonment between six months and nine years. Within these criminal proceedings, one of the victims had lodged a civil claim for compensation for non-pecuniary damage and legal costs. The Court allowed his claims and awarded him EUR 25 000.[102]

POLICY AND OTHER RELEVANT DEVELOPMENTS

National study on the needs of LGBTI people

Sexual orientation

Transgender

In May 2022, the Commission for Citizenship and Gender Equality (CIG) published a 'National study on the needs of LGBTI people and on discrimination based on sexual orientation, gender identity and expression and sexual characteristics'. The study aims to increase the understanding and knowledge regarding sexual orientation, gender identity and expression and sexual characteristics in Portugal, through three general goals: 1) to provide an overview of legal and policy developments or measures involving equality and anti-discrimination of LGBTI+ people in Portugal; 2) to identify the needs of lesbian, gay, bisexual, transgender, intersex and other non-cisgender and non-heterosexual (LGBTI+) people and the reasons for discrimination; 3) to analyse the national legal framework under the recommendations of the Council of Europe, the EU Fundamental Rights Agency and the Organization for Security and Cooperation in Europe on crimes and hate speech.

According to the study, the past two decades have seen significant advances in legal and policy developments, placing Portugal at the top of the ranking of non-discrimination legislation for LGBTI+ people across Europe. However, the current social context is increasingly hostile to sexual and gender diversity, with reported incidents of homophobic and transphobic hate crimes, as well as the expansion of conservative campaigns against the inclusion of sexual and gender diversity in the school curricula, for instance. Despite legal advances, discrimination based on sexual orientation, gender identity and expression thus continues to be a harsh reality in Portugal.

The study includes several recommendations to the Portuguese Government such as:

– to establish a specialised service for the LGBTI+ population in all districts, in collaboration notably with municipalities and LGBTI+ associations;

101 A neo-Nazi group.
102 Portugal, Criminal Court of Lisbon, judgment of 27 June 2022, No. 953/15.4PELSB.

- to study the possibility of introducing indicators on sexual orientation, gender identity and expression, and sexual characteristics in the next general population census (2031), in collaboration with organisations representing LGBTI+ people;
- to reinforce the inclusion of equality issues based on sexual orientation, gender identity and expression in education and vocational training;
- to promote the visibility and representativeness of LGBTI+ people in the media in collaboration with LGBTI+ persons and associations;
- to encourage and facilitate crime reporting, providing police authorities with training and education for better assistance and support to LGBTI+ persons and creating an anonymous reporting system for victims who are unwilling or unable to report crimes directly;
- to improve the system for registration of criminal complaints in order to enable the collection, production and publication of official high quality data on crimes and hate incidents, and to facilitate the presentation of statistics on gender, age, etc.

Online source:
https://www.cig.gov.pt/wp-content/uploads/2022/05/Estudo_necessidades_pessoas_LGBTI_discrimina_orienta_sexual_id_express_genero_caractrstcs_sexuais.pdf

RO Romania

LEGISLATIVE DEVELOPMENT

Anti-discrimination Law amended to increase the membership of the steering board of the NCCD

All grounds

On 28 June 2022 a law amending Article 23(2) of the Government Ordinance 137/2000 was adopted increasing the number of members of the National Council for Combating Discrimination from 9 to 11.[103] The members of the group of national minorities represented in the Chamber of Deputies had called for this increase. Their intention of ensuring that they are entitled to appoint a member of the steering board was criticised by civil society, and the Economic and Social Council issued a negative advisory opinion on the proposal. Even before this provision was adopted, representatives of the national minorities were always present on the steering board.

The increase in the number of members of the steering board of the NCCD does not respond to key challenges faced by the national equality body and fails to secure the independence and the need of professionalisation of the institution.

Online source:
http://www.cdep.ro/pls/legis/legis_pck.frame

POLICY AND OTHER RELEVANT DEVELOPMENTS

All grounds

Report analysing discriminatory criteria in social housing

The NGO Legal Resources Centre published an analysis entitled 'The Identification of Discriminatory Criteria in Granting Social Housing' supported by grants from the Active Citizens Fund. The research looked into the scores awarded in calculating access to social housing and built on prior analysis by the

103 Romania, Law No. 193 adopted 28 June 2022 amending Government Ordinance No. 137/2000.

same authors.[104] The period of research was July – October 2021 and the geographical scope covered 318 localities (215 cities and 103 municipalities).

The criteria identified and analysed are: housing situation, educational status, income, civil status, employment or residence. The research found that not all localities have criteria adopted by the local councils, and that some of them do not offer any social housing. The analysis of the criteria and of the documents required revealed that in many cases the wording leads to discrimination on multiple grounds or fails to take into consideration the risk of indirect discrimination (for example by awarding a higher score to those with university studies and a lower score to those with no education, indirectly discriminating against Roma). The analysis examines the impact of the failure to take into consideration the specific situation of Roma or persons with disabilities when deciding the criteria and the documentation needed in order to qualify for social housing.

Online source:
https://www.crj.ro/wp-content/uploads/2022/05/Final-Identificarea-criteriilor-discriminatorii-%C3%AEn-acordarea-locuin%C8%9Bel....pdf

Serbia RS

POLICY AND OTHER RELEVANT DEVELOPMENTS

All grounds

Regular annual report of the equality body 2021

In April 2022, the annual report of the equality body the Commissioner for the Protection of Equality (CPE) was published, reporting on its activity and statistics for the year 2021. More than 3 200 citizens addressed the Commissioner in 2021, and 686 complaints were submitted (some 52 % of which were submitted by men). The largest number of complaints were filed against public authorities, followed by complaints against legal entities (mostly employers).

The Commissioner issued opinions in 82 cases, finding discrimination in 58 cases. In most cases, recommendations issued where discrimination was found were fulfilled (88.4 %). Those cases where recommendations were not followed primarily concerned discriminatory speech based on gender, sexual orientation, and gender identity as personal characteristics. The Commissioner notes that this indicates a high level of tolerance for this type of speech, lack of awareness that such speech is inadmissible, and a deliberate violation of the prohibition of discrimination.

Most of the complaints referred to discrimination based on health status (15.0 %), sex (13.1 %), age (13.0 %), ethnic origin (12.7 %), disability (11.4 %), marital and family status (7.0 %), membership of political and trade unions (4.8 %), property status (4.0 %), and religious or political beliefs (3.3%). Discrimination on the ground of gender and marital and family status are most often invoked in employment, in connection with pregnancy and motherhood. The majority of complaints referred to discrimination in employment (24.6 %), by public authorities (23.0 %), in the public sphere (11.7 %), in access to public services and facilities (9.9 %), healthcare (7.0 %), education and vocational training (6.4 %), or in social protection (2.9 %). It is noticeable that the number of complaints filed in the public sphere/general public due to discriminatory speech both on social networks and in public space has significantly increased, as well as in the field of public information and media.

104 Centrul de Resurse Juridice (2021), 'Access to social housing and non-discrimination' (*Accesul la locuințe sociale și nediscriminarea*), available at: https://www.crj.ro/wpcontent/uploads/2021/09/Policy-social-housing_RO.pdf.

During 2021, several studies were carried out in Serbia regarding discrimination on different grounds, notably by the CPE on work-life balance. Additionally, the CPE was the main partner to the Council of Europe on conducting qualitative and quantitative analysis of hate speech in the media in Serbia. The report focuses on the two most vulnerable groups when it comes to hate speech in Serbia – LGBT+ people and Roma – but also covers other groups, such as women, migrants and national/ethnic minorities. In addition, an analysis of women's participation in public and political life concluded that Serbia has very good results in terms of women's participation in high political positions.

The CPE also produced 11 initiatives for amendments of acts, provided 53 opinions on draft laws and general acts, initiated one misdemeanour charge and one strategic litigation, issued 18 warnings, published 59 press releases, and made 312 general recommendations. The CPE also conducted situation testing showing that insurance companies apply a maximum age limit for providing travel health insurance and, similarly, that banks apply a maximum age limit for raising a cash loan.

The CPE listed the main challenges in 2021:

- the inspection bodies need to be empowered in terms of number, capacities and further training;
- laws need to be adopted in a transparent process, securing meaningful participation of all relevant actors, including the Commissioner;
- strategic documents need to be adopted on time and on a continuous basis;
- further measures need to target poor citizens who are at particular risk of social exclusion and discrimination, particularly young persons aged 16-24;
- as a consequence of general trends and the health crisis, the position of workers has become more difficult, particularly in certain areas of work (primarily healthcare, social protection and tourism-related areas);
- violence against women and domestic violence continue to be a particular problem;
- discrimination of women is present in almost all areas, among which the field of work and employment stands out;
- Roma more often live in poverty, and encounter particular problems in various areas of social life, education, health and social protection, housing and employment;
- people with disabilities face numerous and diverse problems in various areas of social life;
- despite some progress, the problem of accessibility is evident, which relates to persons with disabilities and the elderly, but also others who have limited unhindered access to facilities, services, and transportation;
- the practice indicates a slight decrease in hate speech in the media targeting the LGBT+ population, but there is still stigmatising and discriminatory speech in social media and in public, as well as attacks on members of this population and incidents motivated by homophobia and transphobia (hate crimes).

The report also addresses problems faced by other social groups, such as those convicted or serving prison sentences, internally displaced persons, migrants and refugees, and others.

Online source:
http://ravnopravnost.gov.rs/wp-content/uploads/2022/04/Poverenik-za-zastitu-ravnopravnosti-Godisnji-izvestaj-za-2021-compressed.pdf

Slovakia

SK

CASE LAW

First instance court ruling on discrimination of Roma who were forcibly evicted from their homes by municipal authorities

Racial or ethnic origin

In 2014, nine Roma complainants filed a lawsuit claiming that they had been forcibly evicted from their homes in 2012 under the pretext of waste removal by the city authorities. They claimed the violation of their right to dwelling, interference with their human dignity and discrimination. The complainants were offered no alternative accommodation and therefore became homeless. Representatives of the respondent city authorities described the eviction as the disposal of an illegal landfill where 'inadaptable people' had built their dwellings. In 2013, the Public Defender of Rights found that there had been a breach of the complainants' constitutional right to the inviolability of their dwellings.

In January 2022, the district court as a first instance court upheld the lawsuit, ruling that, by forcibly evicting the complainants, the respondent city authorities had (1) unjustifiably interfered with their human dignity and the right to privacy and (2) committed illegal discrimination on the basis of their ethnicity. The court specifically ruled that the complainants experienced discrimination in the form of harassment in the provision of public services as covered by the national Anti-discrimination Act.[105] The court reasoned that (1) the essence of harassment is a certain behaviour that is capable of creating an undesirable environment for the person(s) belonging to a group of persons, for which the Anti-discrimination Act provides protection and (2) for the evaluation of the undesirable behaviour, an objective criterion is applied to determine whether there is a reasonable presumption that under the given circumstances, an ordinary person in a position of victim would feel a certain behaviour as undesirable. Following this legal reasoning, the court concluded that the conduct of the respondent could be considered to be behaviour that resulted in the interference with the individual rights of the complainants (human dignity, right to privacy), loss of their residence and exposed them unexpectedly to homelessness (thus falling within the given framework of harassment). Furthermore, the court noted that harassment is a particularly harmful form of discriminatory treatment, which by definition does not require any comparator and is in appropriate in itself because of the form it takes and the potential impact it may have.

Referring to the jurisprudence of the European Court of Human Rights, the court found that the illegality of the dwellings (built on land owned jointly by the State and the respondent) had no legal relevance and underlined the specific position of the Roma as a disadvantaged and vulnerable minority, therefore requiring special protection.

The court ordered the respondent to pay each of the nine complainants financial compensation of EUR 1 000. The decision is not final and can be appealed.

Appeal court confirmation that State authorities had no obligation to eliminate segregation of Roma children in a primary school

Racial or ethnic origin

In 2015, a human rights NGO filed an *actio popularis* lawsuit under the Anti-discrimination Act against the State represented by the Ministry of Education concerning documented segregation of Roma children at a village primary school. The village had a relatively small marginalised Roma community that was residentially segregated. Before September 2015 all children from the community (approximately 70) attended a small ethnically homogenous Roma-only school located in the village until 4th grade and then moved to the other bigger schools in nearby villages and towns. All non-Roma children from the village

105 Slovakia, District Court Košice II, decision of 21 January 2022, No. 15C/190/2014-650.

commuted to the other schools in nearby villages and towns from 1st grade. Due to a lack of space in the village school, the municipality made an agreement in 2014 with the Ministry of Education to build a new low-cost school building made up of metal containers, located outside the main village area, in very close proximity to the segregated Roma community. The new building was funded from the State budget. The claimant argued that education of Roma children in the new low-cost school amounts to segregation and that the Ministry of Education did not take effective measures to prevent segregation. It asked the court to order the Ministry of Education to develop and implement a desegregation plan.

In February 2020, the lawsuit was dismissed by the district court,[106] and the claimant filed an appeal. In a decision delivered in April 2022, the regional court fully upheld the judgment of the district court.[107] According to the appeal court, the first instance court had correctly concluded that the claimant had not demonstrated a breach of the principle of equal treatment as the respondent's actions did not constitute segregation due to the lack of any intention to separate Roma children from non-Roma children. Therefore, the respondent was not obliged to prove that that principle was not infringed. In particular, the regional court agreed that the Roma children attended the Roma-only school because it was located within the school catchment area, to which both Roma and non-Roma children from the village belong, but non-Roma parents chose to enroll their children in other nearby schools, which the Roma parents did not.

The Court disregarded the legal argumentation of the claimant that the first instance court had ignored relevant decisions of the European Court of Human Rights concerning segregation of Roma children in education, particularly *Lavida and Others v Greece*, in which the ECtHR explicitly stated that even in the absence of any discriminatory intent, perpetuating the education of Roma children in a public school attended exclusively by Roma, and failing to take effective anti-segregation measures cannot be considered as objectively justified by a legitimate aim. The appeal court concluded that the *Lavida* judgment could not be applied to the present case, since it was not established that the education in the Roma-only school was of lower quality, the Roma children were not denied enrolment in the other nearby schools and they attended the Roma-only school on the request of their parents as this school was the most accessible for them.

Online source:
https://bit.ly/37vAxLM

POLICY AND OTHER RELEVANT DEVELOPMENTS

Adoption of action plans for the implementation of the Roma equality, inclusion and participation strategy

Racial or ethnic origin

In April 2022, the Government adopted the action plans for the Strategy of equality, inclusion and participation of Roma up to 2030,[108] setting out a wide range of measures in order to implement the strategy in the period 2022–2024.[109] The action plans focus on each of the priority areas of the strategy: education, housing, employment, healthcare, the fight against anti-Roma racism and support for Roma participation. They define a wide range of measures and activities in order to pursue the goals of the strategy, as well as measurable indicators to monitor their implementation. They also identify the entities responsible for their implementation. In addition, they contain reportedly realistic budget calculations and

106 Slovakia, District Court of Prešov, decision No. 21C/698/2015 of 6 February 2020. Available at https://bit.ly/3vZdxxZ.
107 Slovakia, Regional Court of Bratislava, decision No. 10Co/84/2020 of 27 October 2021, delivered on 4 April 2022, available at: https://bit.ly/37vAxLM.
108 Strategy of equality, inclusion and participation of Roma till 2030, adopted on 7 April 2021. For further information, see European network of legal experts in equality and non-discrimination (2021), Flash report: Slovakia, 29 April 2021, 039-SK-ND-2021-Strategy for equality inclusion and participation of Roma till 2030 (equalitylaw.eu).
109 Slovakia, Government Resolution No. 256/2022, Action plans to the Strategy of equality, inclusion and participation of Roma up to 2030, adopted on 6 April 2022, available at: https://rokovania.gov.sk/RVL/Material/27106/1.

identify appropriate resources to cover the financial needs, including from the state budget, European structural and investment funds as well as financial sources from the Slovak recovery and resilience plan.

The draft action plans were reportedly prepared through a participatory process by thematic working groups and negotiations with representatives of the Government ministries that are responsible for the implementation of the proposed measures. Representatives of the European Commission were also consulted on the proposal of the action plans. The preparation of the action plans was coordinated by the Office of the Plenipotentiary of the Government for Roma Communities, which is also the national contact point for the implementation of the strategy.

Online source:
https://rokovania.gov.sk/RVL/Material/27106/1

Spain

ES

LEGISLATIVE DEVELOPMENT

Spain ratifies ILO Convention No. 189

Gender

On 24 February 2022, the CJEU issued a ruling in the case *CJ v TGSS*[110] regarding the exclusion of domestic workers in Spain from the unemployment contribution system, which leads not only to the exclusion from unemployment benefits but also to all the non-contributory social benefits to which one has access only once unemployment benefits have been exhausted.

The ruling considered that the Spanish regulation of the Special Social Security Scheme for Domestic Workers, which does not allow domestic workers to make those contributions, constituted indirect discrimination based on sex.

The sentence was quickly considered to be a historic victory in the struggle of domestic workers to put an end to a regulation of their employment relationship that presents multiple protection gaps and discrimination issues with respect to other workers. It also gave strength to the continued demands of domestic workers for Spain to ratify the ILO Convention No. 189,[111] which was finally voted on in the Congress of Deputies on 9 June 2022.

Domestic employment is a highly feminised and precarious labour sector in Spain. According to the statistical data on the workforce before the pandemic, there were approximately 617 000 domestic workers in Spain, of whom 89 % were women and most of them of migrant origin. Comparison with the data of registration with the Special Social Security Scheme for Domestic Workers (approximately 410 000 in 2019) shows that more than a third of domestic workers work irregularly, without registered contracts or social security protection. The data therefore reveals not only a highly feminised employment sector, but also a very vulnerable segment of female population.

A recent study[112] has also shown that domestic work is the sector of economic activity where salaries are the lowest, reaching 44 % of the average salary, which explains the high rates of poverty and social exclusion in this group of workers. Also contribution-based retirement pensions of domestic workers are

110 CJEU, judgment of 24 February 2022, Case C-389/20, *CJ v Tesorería General de la Seguridad Social*, ECLI:EU:C:2022:120. See page 76-77 for a summary of the Court's ruling.
111 International Labour Organisation (ILO), C189 - Domestic Workers Convention, 2011 (No. 189).
112 Zaguirre Altuna, A. (2019), *Empleadas de hogar: un caso evidente de discriminación indirecta* (Domestic workers. An evident case of indirect discrimination), Fundación Alternativas.

very low: less than half of the average pension and clearly inferior to the minimum retirement pension, causing 65 % of retired domestic workers to receive the complement to reach the minimum pension.

The current regulation of the employment relationship of domestic workers and their social protection of 2012[113] was intended to modernise the previous legal regime of 'domestic service' and protect domestic workers in a manner more similar to labour relationships: obligation to issue the contract in writing; temporary contracts had to have a cause explained; 'on call' time had to be remunerated or compensated with resting time; obligation of paying in cash, at least, the minimum inter-professional salary; obligatory weekly rest period of 36 uninterrupted hours; temporary incapacity benefit for non-labour sickness or accident to be paid after 9 days (instead of 29, under the previous law); contributions to be paid from the first worked hour, a contribution system based on salary scales and each employer had to confirm the registration in the social security system and pay contributions for the hours effectively worked.

However, the reform let some important differences survive in comparison to other workers (including those workers contributing to other special schemes of social security, such as agriculture workers or maritime workers). Some important differences are: the exclusion from unemployment protection; the possibility for the employer to end the contract by *desistimiento* (letting go), which in fact meant they are allowed to dismiss without a cause; the fact that contributions are based on salary scales and not on real wages; the lack of possibility to integrate the contribution gaps when retirement or incapacity pensions are calculated (which leads to very low pensions), and the lack of protection for pregnant workers.

The ratification of Convention No. 189 has been discussed on several occasions in the last 10 years, without any Government taking the step of putting it to a vote in Parliament. The February judgment of the CJEU surely pushed in that direction, by accelerating the times of the regulation of unemployment for domestic workers. The ILO Convention requires measures to be taken to eliminate discrimination in terms of employment and occupation, and to equalise the conditions of social security protection with the general workers' regime. Convention No. 189 also establishes a limit of one year to adapt national legislation (unlike the CJEU ruling, which did not establish a deadline for compliance).

The Minister of Labour has already announced a Royal Decree that will reform the unemployment system, but will also include other aspects that affect the labour rights of domestic workers, such as the reform of dismissal, eliminating the possibility of 'letting go' and the lower amount of compensation. It should be noted, however, that compliance with international regulations is not without problems. For example, a high percentage of migrant workers in an irregular situation within this group of workers will not be able to benefit from this reform (unless regularisation initiatives are also taken) and there are likely to be tensions between the Labour Inspectorate's activity in private homes and the fundamental rights to privacy and inviolability of the home.

CASE LAW

Age

Court ruling regarding a salary reduction exemption for employees close to retirement age

The case concerned a worker who was nearing retirement age. When faced with an unsustainable economic situation, the worker's employer had, as provided by national law, consulted the workers' representatives to reach an agreement on a salary reduction for all employees. As no agreement could be reached, the employer made the decision to reduce the salaries of all workers anyway, in which case each worker has a statutory right to choose to terminate their employment contract with a severance

113 Spain, Royal Decree 1620/2011 Regulating the special labour relationship of employment in a family home, (*Real Decreto 1620/2011, por el que se regula la relación laboral de carácter especial del servicio del hogar familiar*), 14 .11.2011, https://www.boe.es/buscar/act.php?id=BOE-A-2011-17975.

payment of 20 days' salary per year of service with a maximum of nine months' salary. The workers' representatives then stated that the entire workforce would choose this option.

The employer then decided to reduce the salaries of the entire workforce except those workers who were close to the retirement age, whose salaries were maintained at their initial level. According to the employer, the aim of the exemption for this category of workers was to avoid adverse effects on the social security contributions of the concerned workers potentially putting their future retirement pensions at risk. The employer also stated that it would be more favourable financially to maintain the salaries of these workers than to pay them compensation for the termination of their employment contracts.

There were four employees nearing the age of retirement. One of them contested the employer's decision to exclude him from the wage adjustment, thus depriving him of the right to opt for the termination of his contract with the severance pay. The worker claimed that his right to non-discrimination on grounds of age under Article 14 of the Spanish Constitution had been violated.

In February 2022, the High Court of Justice of Andalusia dismissed the claimant's claim, finding that there was no age discrimination at hand.[114] The Court held that the employer's decision to exempt workers close to retirement age from the salary reduction scheme was an appropriate and proportionate criterion, since it was aimed at avoiding prejudice to the workers concerned. The Court further stated that the age-related criterion was objectively justified and did not entail a disproportionate sacrifice for older workers, as it prevented them from becoming unemployed at an age when their employment prospects were worse than those of younger workers. Moreover, the Court added that the inclusion of this category of workers in the salary reduction scheme would be more burdensome for the company if these workers were to use the option of having their contracts terminated.

Online source:
https://www.poderjudicial.es/search/AN/openDocument/5f230732cde27298/20220325

Supreme Court annuls age limits for army personnel to be promoted to officer ranks

The case concerned age requirements established by Royal Decree for participation in training courses for army personnel to be promoted to officer ranks.[115] The general age limit for non-commissioned officers without a university degree is 34 years while it is 38 for personnel with such a degree.[116]

The Professional Association of Non-Commissioned Officers of the Armed Forces (the Association) challenged the validity of the relevant age limits, alleging that they were illegal, discriminatory and lacking objective and scientific justification. On this point, the Association referred to the case law of the Court of Justice of the EU,[117] requiring scientific justification to justify age limits. The Association also argued that establishing such age limits is contrary, among other rules, to the principles of equality, merit and ability, which govern access to the military career and which are protected by Articles 14, 23.2 and 103.3 of the Constitution.[118] Finally, the Association noted that the age limits contradict several previous rulings of Spanish courts, and that they amount to direct age discrimination prohibited by the Employment Equality Directive.

The respondent, the General State Administration (Ministry of Defence), argued that the age limits responded to the personnel needs of the armed forces and to the requirements that its personnel must

114 Spain, High Court of Justice of Andalusia (Labour Chamber), decision No. 307/2022 of 3 February 2022.
115 Spain, Royal Decree 309/2021, of 4 May, approving the Regulations for entry and promotion in the Armed Forces.
116 For the basic specialisation of the air force flight corps, the age limit is set at 24 years of age.
117 In particular, judgment of 12 January 2010, *Wolf*, Case C-229/08, ECLI:EU:C:2010:3, and judgment of 13 November 2014, *Vital Pérez*, Case C-416/13, ECLI:EU:C:2014:2371.
118 These provisions regulate in general the principles of equality and non-discrimination, as well as their application to access to the civil service.

meet to fulfil the tasks assigned to them. The respondent stressed that the age limits were necessary for the military organisation to achieve the greatest possible efficiency in the available resources, for which the necessary skills and experience must be acquired over the years in order to become officers.

In March 2022, the Supreme Court ruled in the case, confirming that neither the Royal Decree establishing the age limits nor the documents or files relating to its adoption contained any objective or scientific data justifying the establishment of upper age limits, nor any attempt at justifying the need for such age limits.[119] It stressed that no direct link between age and physical condition had been detected, and that no factors other than physical fitness were indicated or justified for the setting of maximum age limits, such as the functions to be performed or organisational needs. Furthermore, the Court noted that the age limits did not result from a genuine and determining occupational requirement.

As a result, the Supreme Court annulled the relevant Royal Decree provision establishing the specific age requirements for promotion by non-commissioned officers to the officer ranks.

Online source:
https://www.poderjudicial.es/search/TS/openDocument/a2496ee7a2c7270c/20220314

Failure of the public administration to adapt the workplace of a teacher with a disability amounted to discrimination

Disability

The case concerned a Basque Country primary school teacher whose mobility-impairing physical disability was formally recognised in 2001. In 2004, she requested the removal of architectural barriers from the school where she was working and in 2005 she underwent a medical examination resulting in a certificate stating that any architectural barriers to school access should be removed, and that the teacher should not perform tasks involving heavy lifting (e.g. carrying small children), or tasks requiring her to run, move or walk around for long periods of time (e.g. supervising playgrounds). The teacher made another request for the removal of architectural barriers, also requesting to be transferred to other schools temporarily until the situation was remedied. The teacher was granted some temporary transfers but returned to her initial workplace in 2008, although no work had been carried out.

In 2009, and later in 2014, the principal of the school asked the Basque Government to asphalt the access to the school and also to install a lift, as classes were held on the first and second floors, making it difficult for the teacher to work. In the meantime, the teacher continued to apply to the Basque Government's Department of Education for the works to be carried out. In 2015, the school management alone decided that the teacher could park her car within the school grounds, and she was excused from supervising the playground. Finally, in 2019, the teacher was granted official retirement due to her inability to perform her duties. In 2021, work was carried out to remove architectural barriers and a lift was installed.

The teacher claimed that the Department of Education of the Basque Government failed to comply with its legal obligations in terms of occupational risk prevention. In addition, it violated her fundamental rights to dignity, physical and moral integrity, equal treatment and non-discrimination, honour, and safety at work. She therefore requested that the Department of Education be ordered to pay her EUR 168 000 in compensation and to formally apologise.

In June 2022, the Labour Court of Bilbao delivered its ruling, stating notably that the failure of the Basque Department of Education to act in response to the repeated requests by the teachers, various school principals, prevention services and other schools, amounted to indirect discrimination on grounds of disability.[120] The court did not accept the various arguments put forward by the Basque Department of Education; for example, that the work could not be carried out due to the economic crisis in 2009 (as the

119 Spain, Supreme Court, ruling No. 269/2022 of 3 March 2022.
120 Spain, Bilbao Labour Court, decision No. 266/2022 of 20 June 2022.

works had already been requested in 2004); or that the school should have moved classes to the ground floor (as this floor was only adapted for common areas such as the library, etc). The court also concluded that the teacher's right to physical and moral integrity had been violated.

The court decided in favour of the claim, but only awarded compensation of EUR 40 000 for the financial, personal and non-pecuniary damage caused to the teacher.

Online source:
https://www.poderjudicial.es/stfls/TRIBUNALES%20SUPERIORES%20DE%20JUSTICIA/TSJ%20Pais%20Vasco/JURISPRUDENCIA/Jdo%20Social%205%20Bilbao%2020%20junio%202022.pdf

Türkiye

TR

CASE LAW

The Turkish Council of State upheld the President's decision to withdraw Türkiye from the Istanbul Convention

Gender

Türkiye was the first country to sign (11 May 2011) and ratify (14 March 2012) the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention). Ironically, Türkiye has also become the first country to withdraw from the Convention, 10 years after its ratification. According to the Constitution of Türkiye, withdrawing from an international convention is a matter for the legislative jurisdiction (Articles 7, 90 and 104). However, Türkiye withdrew from the Convention by the President's Decision without any parliamentary debate on 20 March 2021.[121] The withdrawal process was completed on 1 July 2021.[122]

This decision led to the question whether the President had the authority to withdraw the country from an international convention. Accordingly, more than 220 invalidity actions by women's rights groups, bar associations, political parties and individuals were brought to the Council of State (the highest administrative court of Türkiye) against the President's Decision. They claimed that Presidential Decree No. 9,[123] on which the President's Decision was based, was unconstitutional on the grounds that withdrawal from a convention requires preapproval from the legislature, and is not to be decided solely by the executive power, but also by the legislature. The claimants had requested the Council of State to invalidate the President's Decision, issue a preliminary injunction to stop the execution of the Decision, and to refer the case to the Constitutional Court of Türkiye with the aim of having it invalidated. The Council of State refused to make an interim decision to halt the execution of the President's Decision on 28 June 2021.[124] The Council of State ruled three against two to uphold the President's Decision. Women's rights groups and political parties expressed their outrage at the court's ruling and have appealed against it.[125]

121 Türkiye, Presidential Decision No. 3718, OJ No. 31429, 20.03.2021, available at: https://www.resmigazete.gov.tr/eskiler/2021/03/20210320-49.pdf.
122 Council of Europe (2021), 'Council of Europe leaders react to Türkiye's announced withdrawal from the Istanbul Convention', press release, 21.03.2021, available at: https://pace.coe.int/en/news/8228/council-of-europe-leaders-react-to-turkey-s-announced-withdrawal-from-the-istanbul-convention.
123 Türkiye, Presidential Decree No. 9, OJ No. 30479, 15.07.2018, Cumhurbaskanligi Kararnamesi.
124 Türkiye, Council of State 10th Division, decision No. 2021/1747, 28.06.2021.
125 The decision of the Council of State is not final. On 30 August 2022, the Medical Association of Türkiye appealed against the decision before the Council of State Administrative Litigation Chambers. This has been followed by other appeals by the opposition parties and women's rights groups. The Administrative Litigation Chambers is expected to reveal its decision by the end of 2022.

The Council of State held four hearings in total, with its prosecutors demanding the annulment of the decree. A top prosecutor of the Council of State claimed on 20 January 2022, that the President's decision on the withdrawal from the Convention was unlawful and should still be annulled.[126] She argued, among other things, that since provisions of duly ratified international conventions have the force of law (enacted by the legislature) under the Constitution (Article 90), they could not be withdrawn by a president's decision on the basis of a presidential decree, and a presidential decree that authorises the president to issue such a decision would be unconstitutional. Around 1,000 women lawyers and representatives of NGOs attended the hearings.

Online source:
https://balkaninsight.com/2022/01/21/erdogans-withdrawal-from-istanbul-convention-illegal-top-prosecutor-says/

UK United Kingdom

CASE LAW

All grounds

Legal standing of organisations and groups to challenge Government policy

The Good Law Project (a not-for-profit campaign organisation, using litigation to protect the interests of the public) and the Runnymede Trust (a racial equality think tank) brought legal proceedings to challenge the Government's decision to appoint the heads of two Covid-related projects, including the interim chair of the National Institute for Health Protection, and the national Test and Trace programme. These unpaid appointments were made without open competition, such that candidates with a relevant personal or political connection to the decision maker were appointed. The claimants claimed, amongst other things, that this gave rise to indirect discrimination on grounds of race and/or disability, and that the appointment process did not accord with the public sector equality duty. The respondents disputed the claims on a number of grounds including that the claimants lacked standing to bring the claims. They also claimed that the issues were not amenable to judicial review as they were effectively employment decisions, which are not usually challengeable by application for judicial review. On the issue of standing, the claimants pointed to recent trends towards liberalisation of the test for standing in practice, with claims accepted even though claimants have not been directly affected by a decision. For example, pressure groups as well as public-spirited individuals have been recognised as having standing in appropriate cases. But in these cases, NGOs have brought claims within their fields of interest.[127]

The court decided that neither of the claimants had standing to bring the discrimination claim. As regards the judicial review claim, in relation to the Good Law Project the court stated that no individual, even with a sincere interest in public law issues, would be regarded as having standing in all cases, and that the same must apply to a limited company which brings the claim. Moreover, an organisation cannot confer standing upon itself by drafting its objects clause so widely that any public law error by any public authority falls within its remit. In contrast the Runnymede Trust, which exists specifically to promote the cause of racial equality, had standing to challenge the two appointments that were made without compliance to the public sector equality duty. On the merits of the claims, the Court ruled that there was no evidence of indirect discrimination in relation to the appointment processes, but that there was a breach of the public sector equality duty with regard to the appointment of the interim chair of the National Institute for Health Protection.

126 Balkan Insight (2022), 'Erdogan's withdrawal from Istanbul Convention "illegal", top prosecutor says', 21.01.2022, available at: https://balkaninsight.com/2022/01/21/erdogans-withdrawal-from-istanbul-convention-illegal-top-prosecutor-says/.

127 See for example, England and Wales, Court of Appeal, *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542, Decision of 21 April 2020.

The use of judicial review has developed significantly over recent years, with the public sector equality duty under Section 149 of the Equality Act 2010 proving an effective mechanism to challenge Government policy, such as a challenge to the decision to allow universities to significantly increase fees, or a challenge of the Government's changes to the benefits system. However, this case shows that there are limits to the extent to which campaigning groups can use the public sector equality duty to make generalised challenges to Government policy.

Online source:
https://www.bailii.org/ew/cases/EWHC/Admin/2022/298.html

Protection against discrimination on the ground of gender critical beliefs

Religion or belief

The claimant is a Christian doctor whose beliefs/lack of beliefs include: that a person cannot change their sex/gender at will and that it would be pointless, self-destructive and sinful to attempt to; that 'impersonating' the opposite sex may be detrimental to a person's welfare, and society should not accommodate/encourage such 'impersonation'; and that it would be irresponsible and dishonest for a health professional to accommodate/encourage a patient's 'impersonation' of the opposite sex.

The claimant was employed as a health and disabilities assessor, carrying out assessments on behalf of the Department for Work and Pensions in relation to disability-related benefits. The claimant stated during his induction that as a result of his beliefs he would not agree to use the preferred pronouns of transgender service users. This conflicted with the respondents' policies. Attempts were made to see whether his beliefs could be accommodated, but ultimately the claimant left his employment and brought proceedings in the Employment Tribunal relying on the protected characteristic of religion or belief and claiming direct discrimination, harassment and indirect discrimination.

The Employment Tribunal accepted that Christianity was a protected characteristic, but found that the claimant's particular beliefs did not meet the criteria for a protected belief. Even if the beliefs did amount to a protected characteristic, the Tribunal held that no direct discrimination or harassment had occurred. In addition, with regard to any potential indirect discrimination, the Tribunal held that any provisions, criteria and practices applied (involving use of service users' preferred pronouns and confirmation of a willingness to adhere to that policy) were necessary and proportionate means of achieving the respondents' legitimate aims of ensuring that transgender service users were treated with respect and in accordance with their rights under the Equality Act, and to provide a service that promoted equal opportunities. The claimant appealed.

It was not in dispute that the claimant's Christianity was a protected characteristic under the Equality Act 2010. On the other issues the Employment Appeal Tribunal considered the first instance findings regarding whether the claimant's specific beliefs met the criteria for protection. It upheld the Tribunal's reasoning that the belief that it would be irresponsible and dishonest for a health professional to accommodate a patient's 'impersonation' of the opposite sex is a matter of opinion and not a protected belief. By contrast, following *Forstater v CGD Europe*,[128] the beliefs regarding whether a person can change sex/gender at will were capable of protection. However, the Employment Appeal Tribunal upheld the additional findings of the Employment Tribunal regarding the absence of direct discrimination or harassment and upheld the acceptance that any potential indirect discrimination was justified as a necessary and proportionate means to meet a legitimate focus on the needs of potentially vulnerable service users and on the risks to those individuals.[129]

128 United Kingdom, Employment Appeal Tribunal, *Maya Forstater v CGD Europe and Others*, decision of 10 June 2021, UKEAT/0105/20/JOJ. For further information, see *European equality law review*, Issue 2021/2, p. 144.
129 United Kingdom, Employment Appeal Tribunal, *Mackereth v Department for Work and Pensions & Anor*, decision of 29 June 2022, [2022] EAT 99.

Online source:
https://www.bailii.org/uk/cases/UKEAT/2022/99.html

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