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Directorate D — Equality and Non-Discrimination
Unit D1: Non Discrimination: LGBTIQ, Age, Horizontal Matters
Unit D2: Non Discrimination: Anti-Racism and Roma Coordination
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Introduction on the state of play

The *European equality law review* is produced by the European network of legal experts in gender equality and non-discrimination (EELN/the network). The aim of the EELN is, and has been since 2015,[1] 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. From 2015 to 2022, the network produced two issues of the European equality law review each year. As of 2023, the network produces one issue per year, providing an overview of one full year of legal and policy developments in European and national gender equality and non-discrimination law. The current issue reflects, as far as possible, the state of affairs from 1 July 2023 to 30 June 2024.

In this issue

This issue opens with four in-depth articles. The first article, by the German non-discrimination expert for the network, Professor Matthias Mahlmann, provides a comprehensive analysis of the complaint in the *Egenberger* case, decided by the Court of Justice of the EU in 2018, which is currently pending before the German Constitutional Court. The second article, by the Bulgarian non-discrimination expert Dilyana Giteva, explores the regulation and implementation of positive action measures related to racial or ethnic origin in Austria, Bulgaria, Hungary and France. The third article, by Nozizwe Dube from Maastricht University, explores the EU Pay Transparency Directive's intersectional approach, the problems its practical implementation may entail, and how to address these. The fourth article, by Alara Efsun Yazıcıoğlu from Kadir Has University, explores the phenomena of the 'pink tax' and the 'tampon tax' and sets out to identify the underlying causes of these forms of sex discrimination and how to address them from an EU legal perspective.

As in previous issues of this publication, the following section provides an overview of the relevant case law of the CJEU 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

In May 2024, highly anticipated binding standards on national equality bodies were adopted, establishing common minimum requirements to improve the effectiveness of equality bodies across the EU and ensure their

[1] Until 2014, these aims were pursued by two separate networks: the European network of legal experts in the non-discrimination field and the European network of legal experts in the field of gender equality.

independence.[2] Directives 2024/1499[3] and 2024/1500,[4] proposed by the Commission in December 2022, aim to strengthen the independence, resources and powers of equality bodies. While the directives have different legal bases, they create legal clarity by imposing the same requirements on all equality bodies irrespective of the grounds and fields covered. Some of these important standards include: (1) an extended mandate to cover all EU grounds in the area of employment and to cover discrimination based on sex in the area of social security; (2) a requirement of independence and freedom from external influence (equality bodies cannot take instructions and must be able to manage their own resources and make decisions on their internal structure); and (3) sufficient human, technical, and financial resources to exercise all powers effectively. In addition, there are further requirements regarding the accessibility of equality body services, and on certain types of powers to be included in their mandate, such as consultation on law and policy making, awareness raising and prevention as well as enhanced litigation powers. Finally, equality bodies are required to produce regular reports on the state of equal treatment and discrimination and be able to make recommendations. These highly welcome standards confirm the conclusions drawn by the network in recent years regarding the wide disparity between equality bodies across the EU, notably with regard to mandates, resources and independence.[5] The EU Member States are required to make the necessary legislative and regulatory amendments to comply with the new standards by 19 June 2026.

Other developments during the reporting period include the Council of Europe's adoption, on 6 March 2024, of its new gender equality strategy for 2024-2029.[6] The new strategy will guide the Council's work in addressing existing and emerging challenges in gender equality. The strategy is structured around six strategic objectives: preventing and combating gender stereotypes and sexism; preventing and combating violence against women and girls and domestic violence; ensuring equal access to justice for women and girls; achieving balanced participation of women and men in political, public, social and economic life; ensuring women's empowerment and gender equality in relation to global and geopolitical challenges and achieving gender mainstreaming; and including an intersectional approach in all policies and measures.

In addition, the Istanbul Convention,[7] on combating violence against women and domestic violence, entered into force for the European Union on 1 October 2023. The European Union signed the Convention on 13 June 2017, but the process of approval was not concluded until 28 June 2023. Although this development has been long anticipated, the Convention's entry into force nevertheless marks a significant milestone in the EU's commitment to protecting women's rights.

2 Council of the EU (2024), 'Strengthening the role of equality bodies across the EU: Council adopts two directives', press release, 7 May 2024.

3 Council Directive (EU) 2024/1499 of 7 May 2024 on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters 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 amending Directives 2000/43/EC and 2004/113/EC.

4 Directive (EU) 2024/1500 of the European Parliament and of the Council of 14 May 2024 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 amending Directives 2006/54/EC and 2010/41/EU.

5 See, notably, Chopin, I. and Germaine, C. (2024), *A comparative analysis of non-discrimination law in Europe 2023*, European Commission, Luxembourg; and Crowley, N. (2018), *Equality bodies making a difference*, European Commission, Luxembourg.

6 Council of Europe (2024), Council of Europe Gender Equality Strategy 2024-2029, adopted 6 March 2024.

7 Council of Europe, The Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS 210), Istanbul, 01.08.2014.

Finally, the results of the most recent Eurobarometer survey on discrimination were published in December 2023.[8] More than half of respondents say that there is widespread discrimination in their country on several grounds, including being Roma (65 %), skin colour (61 %,) ethnic origin (60 %), gender identity (being transgender, 57 %) and sexual orientation (54 %). Furthermore, around one in five respondents (21 %) say they have personally felt discriminated against or experienced harassment in the past 12 months. While the most mentioned forms of discrimination or harassment are based on age and gender, many respondents mention grounds that are not covered by EU law, such as 'political opinions', 'socio-economic situation' and 'general physical appearance'. Public spaces and work are the primary locations where discrimination or harassment happens.

Network publications and activities

During the reporting period, the network published four thematic reports. The first report, by Lisa Waddington and Andrea Broderick from the University of Maastricht, examined jurisprudence from the CJEU, the practice of the UN Committee on the Rights of Persons with Disabilities and case law from national courts and quasi-judicial bodies relating to the prohibition of disability discrimination and the duty of reasonable accommodation.[9] The second report, written by Miguel de la Corte-Rodríguez, discussed Directive 2019/1158 on work-life balance for parents and carers, analysing the most important aspects of its implementation in the EU Member States, and concluding that there is still considerable work to be done at national level to achieve full implementation.[10] The third thematic report, by András Kádár, the Hungarian non-discrimination expert for the network, provided a comparative overview of compliance with legal instruments prohibiting antisemitism in relation to non-discrimination, hate crimes and hate speech in the 27 EU Member States.[11] Finally, the fourth thematic report, by Pieter Cannoot and Cathérine Van de Graaf from the University of Ghent, provided a detailed overview of the state of implementation in EU Member States of (national) action plans and strategies for LGBTIQ equality.[12]

The network also produced and published the *European equality law review 2023*[13] as well as the 2023 update of the country reports on gender equality and on non-discrimination for all countries covered by the network. We produced two comparative analyses, one of gender equality law and the other of non-discrimination law in Europe 2023, making comparisons and drawing conclusions from the updated country reports.[14] Finally, we continue to publish flash reports on breaking legal developments across the countries covered by the network.

In addition to these publications, the annual legal seminar, which was held in Brussels on 1 December

8 European Commission, 'Discrimination in the European Union', December 2023.
9 Waddington, L. and Broderick, A. (2024), *Court practices regarding disability discrimination, including reasonable accommodation, at EU and Member State level and in light of the UN CRPD*, European Commission, Luxembourg.
10 de la Corte-Rodríguez, M. (2024), *The transposition of the Work-Life Balance Directive in EU Member States (II): Considerable work still to be done*, European Commission, Luxembourg.
11 Kádár, A. (2024), *The legal framework to combat antisemitism in the European Union*, European Commission, Luxembourg.
12 Cannoot, P. and Van de Graaf, C. (2024), *Charting progress: A comparative analysis of national LGBTIQ equality action plans in the EU*, European Commission, Luxembourg.
13 European network of legal experts in gender equality and non-discrimination (2024), *European equality law 2023*, European Commission, Luxembourg.
14 Chopin, I. and Germaine, C. (2024), *A comparative analysis of non-discrimination law in Europe 2023*; and Böök, B., Burri, S., Timmer, A. and Xenidis, R. (2024), *A comparative analysis of gender equality law in Europe 2023*, both for the European network of legal experts in gender equality and non-discrimination, European Commission, Luxembourg.

2023, was a great success, attracting more than 230 participants representing the European Commission, EU Member State Governments, equality bodies, EU umbrella organisations, academics from across Europe and members of the network itself.

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

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* Please note that the previous gender expert for Portugal, Maria do Rosário Palma Ramalho, contributed to this issue.

Freedom of religion and EU anti-discrimination law

Matthias Mahlmann*

1. A central problem

Religions are among the most important driving forces of human history. They touch humans in the innermost elements of their existence, determine their interpretation of the world, direct their pursuit of sense and meaning as mortal beings, and offer ethical orientation and often guidelines for the legitimate organisation of societies. Religious beliefs have led to powerful social and legal institutions, inspired some of the great works of art, but also suppressed intellectual freedom, limited creative expression and scientific insight and caused deadly conflicts.

Accordingly, the question of how to regulate religious belief in a national, supranational or international legal order is one of the most important, difficult and controversial challenges faced by legal systems and the theory of law. The question has lost nothing of its importance in the process of secularisation seen in modern times. Recent decades have shown no sign of a diminishing importance of religious perspectives. On the contrary, religiously motivated politics have gained influence, often driven by radical new interpretations of religious doctrines and texts.

Against this background, the following remarks will address an important element of the wider problem of the legal regulation of religious freedom by the law, more precisely the relationship between religious freedom on the one hand and the protection of equality and the prohibitions of discrimination that are a consequence of the legal guarantees of equality on the other.

The relationship between freedom and equality in law is complex and perhaps particularly so when religious freedom is at stake.[1] There is an ongoing international debate about this relationship which is loaded with fundamental political and theoretical questions about the role religions are allowed to or even must play in a modern society and its public sphere.[2]

These debates are often influenced by the idea that religions are an indispensable source of those social values which are the precondition for a stable and resilient culture of democracy, human rights and the rule of law. Limiting the rights of religious communities is therefore not only understood by influential actors as a matter of interest for a particular religion and its rights but for the culture in

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1 Cf. Mahlmann, M. (2014), 'Vielfalt der Religionen, Einheit der Gleichheit' (Diversity of religions, unity of equality) in: Kokott J. and Mager U. (eds.), Religionsfreiheit und die Gleichheit der Geschlechter (Religious freedom and gender equality), Tübingen, Mohr Siebeck, pp. 3 ff.; Mahlmann, M. (2024), 'Religion im Verfassungsrecht' (Religion in constitutional law), in: Festschrift für Horst Dreier (forthcoming); '(R)eligious discrimination is a good deal more complex than other grounds', Fredman, S. (2023), Discrimination law, 3rd ed., Oxford University Press, p. 114.

2 Cf. e.g., Rawls, J. (1999), 'The idea of public reason revisited,' in: Freeman, S. (ed.), John Rawls: Collected papers, Cambridge, MA, Harvard University Press, pp. 573 ff.; Habermas, J. (2008), 'Religion in the public sphere: Cognitive presuppositions for the "public use of reason" by religious and secular citizens,' in: Habermas, J., Between naturalism and religion: Philosophical essays, Malden, MA, Polity Press, pp. 114 ff.

general that underpins indispensable institutions of the law. The degree to which ethical convictions and legal values are dependent on religion is a long-standing philosophical question. Major authors such as Grotius and Kant have argued in different theoretical frameworks for the independence of ethics and law from religious beliefs.[3] Irrespective of one's opinions on this matter, it is very important to remain aware of these background parameters when engaging with detailed and often technical discussions of law relating to religious beliefs, be it guarantees of religious freedom or prohibitions of discrimination. If one misunderstands these debates as concerning only technical questions of legal interpretation there is a danger of missing the real driving forces of these debates and the potential power of their impact.

A central example of the problem of the relationship between freedom and equality are exceptions for certain religiously motivated actions from general equality guarantees and from prohibitions of discrimination on the ground of religion and other characteristics. EU anti-discrimination law, too, contains provisions where this problem is concretely regulated leading to landmark judgements by the Court of Justice of the EU (CJEU). The CJEU's case law on the matter has led to intense discussions and to fundamental challenges, not least in a constitutional complaint to the German Federal Constitutional Court by an organisation affiliated to the Protestant Church of Germany that questions not only the interpretation of EU anti-discrimination law by the CJEU but the supremacy of EU law itself.[4] The case is of major importance at a time when the standards of the rule of law, including the supremacy of EU law, need to be strengthened not undermined.

To understand what this problem is about, we will first reconstruct the EU law and its interpretation by the CJEU. We will then turn to the content of the constitutional complaint and outline a critique of its arguments. We will finally draw some conclusions about the meaning and importance of the jurisprudence of the CJEU on freedom of faith and the equality of human beings for the European legal order and its underlying pluralist and human-rights-based culture.

2. Parameters of European Union anti-discrimination law

2.1. Two paradigmatic cases

The facts underlying two leading decisions of the CJEU illustrate the problem and its political relevance. The case at issue in CJEU, Egenberger,[5] which ultimately caused the constitutional complaint, concerns a denial of employment because of the applicant's religion and beliefs. The post in question was part-time (60 %) on a two-year fixed-term contract. The purpose of the employment was to produce a shadow report on Germany's country report on its implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), commissioned by an organisation affiliated to the Protestant Church of Germany, the Diakonie. The Diakonie made it a precondition for employment that the applicant was a member of a Christian church. The applicant has no religious

3 Grotius, H. (1646), 'In tres libros de iure belli ac pacis prolegomena', in: Grotius, H., De iure belli ac pacis libri tres, Ed. nova, Vol. I, reproduction of the 1646 edn. by Brown Scott, J. (1913), para. 11; Kant, I. (1793), 'Die Religion innerhalb der Grenzen der bloßen Vernunft' (Religion within the bounds of bare reason), in: Kant, I, Kant's gesammelte Schriften, Königlich Preußische Akademie der Wissenschaften (eds.), Vol. VI, 1914, p. 3.

4 The author wrote the legal assessment that the government of the Land Berlin submitted to the German Federal Constitutional Court, thus becoming formally party to the proceedings.

5 CJEU, C-414/16, Egenberger, judgment of 17 April 2018, ECLI:EU:C:2018:257.

affiliation, was consequently ultimately not considered for the job and claimed to have been a victim of discrimination.

The case kept German courts busy until the Federal Labour Court decided to formulate a preliminary reference to the CJEU, which led to the decision of the CJEU in Egenberger, which the Federal Labour Court then implemented in a subsequent decision.[6] This decision of the Federal Labour Court forms the direct object of the complaint, but as the Federal Labour Court's decision is determined by the CJEU's legal analysis in Egenberger, the legal merits of the latter decision are at the core of the complaint.

The second case, which led to the CJEU judgment in IR v JQ,[7] concerns a senior medical doctor who was dismissed because he remarried his long-term partner under civil law after having divorced his first wife. This divorce, despite his efforts to obtain an approval from Church authorities, was not licensed by the Catholic Church because it regarded it as not abiding by the conditions of cannon law and thus as invalid. His employer, a hospital ultimately affiliated to the Catholic Church of Germany, concluded from this that his second marriage violated mandatory religious law and the religious ethos of the institution and consequently formed a reason for dismissal.

The CJEU regarded both these cases as violations of the prohibition of discrimination on the ground of religion. The Catholic Church accepted the decision implementing the decision of the CJEU, the Protestant Church, however, did not and filed a constitutional complaint.

2.2. A complex legal matrix

The CJEU's decisions in these cases rest on the interpretation of Article 4(2) Directive 2000/78/EC, which provides, as we will see, in rather ambiguous terms for a special justification of direct discrimination on the grounds of religion and belief for communities and organisations with an ethos based on religion or belief and their affiliated organisations. Article 17 of the Treaty on the Functioning of the EU (TFEU), which regulates the relationship between Union Law and the law of Member States on religious communities, is also important: according to Article 17(1) TFEU, 'the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States'. Moreover, the protection of the freedom of religion of religious communities as a fundamental right is one of the decisive legal yardsticks the CJEU considers.[8] As the protection of the religious practices of a community is of great importance for individuals who belong to that community and who may wish to exercise their belief with others, the protection of individuals' freedom of religion and belief could also be affected.

At the same time, the CJEU underlines in its consistent case law that the EU secondary law providing for prohibitions of discrimination like Directive 2000/78/EC is simply a concretisation of the underlying

6 Federal Labour Court (Bundesarbeitsgericht), judgment of 25 October 2018, 8 AZR 501/14, ECLI:DE:BAG: 2018:251018.U.8AZR501.14.0.

7 CJEU, C-68/17, IR v JQ, judgment of 11 September 2018, ECLI:EU:C:2018:696.

8 CJEU, C-414/16, Egenberger, judgment of 17 April 2018, EU:C:2018:257, para. 50: 'While Directive 2000/78 thus aims to protect the fundamental right of workers not to be discriminated against on grounds of their religion or belief, the fact remains that, by means of Article 4(2), that directive also aims to take into account the right of autonomy of churches and other public or private organisations whose ethos is based on religion or belief, as recognised by Article 17 TFEU and Article 10 of the Charter, which corresponds to Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950.'

principle of non-discrimination guaranteed as a fundamental right by Article 21 Charter of Fundamental Rights of the European Union (CFR).[9] The prohibition of discrimination as a fundamental right has no lesser normative weight than freedom of religion and belief.

To determine what this complex legal matrix means is not an easy task and it is complicated by the additional necessary attention to the overarching framework of the European Convention on Human Rights (ECHR) and the legal traditions of the Member States insofar as EU law regards them as legally relevant. An example of the latter is the interpretation of Article 8(1) Directive 2000/78/EC by the CJEU in Wabe and Müller.[10] The CJEU held in this decision that Article 2(2)(b) Directive 2000/78/EC must be interpreted as meaning that national provisions protecting the freedom of religion may be taken into account as more favourable provisions, within the meaning of Article 8(1) Directive 2000/78/EC, in examining the appropriateness of a difference of treatment indirectly based on religion and belief. Thus, the guarantee of freedom of religion in German constitutional law, Article 4 Basic Law, can serve not only to limit equal treatment but to actually increase the protection against discrimination on the ground of religion. Furthermore, the prohibition of discrimination on the ground of religion and belief serves also to protect freedom of religion and belief,[11] a point which is quite relevant in assessing the doctrinal merits of the CJEU in Egenberger, as we will see.

Any simple dichotomies between freedom of religion and the prohibition of discrimination are – given these normative complexities – beside the point.

2.3. Interpreting an opaque exception

The normative starting point for the legal questions that arise in this context is Article 4(2) Directive 2000/78/EC.[12] This norm is highly opaque,[13] which is hardly surprising as it is the product of a complex political compromise influenced by different institutional, political and social actors, including the

9 Cf. CJEU, C-414/16, Egenberger, judgment of 17 April 2018, EU:C:2018:257, para. 48; CJEU, joined cases C-804/18 and C-341/19, Wabe e.V. and MH Müller Handels GmbH, Judgment of 15 Juli 2021, ECLI:EU:C:2021:594, para. 44: '(I)n accordance with Article 1 of Directive 2000/78, the purpose of that directive is to establish a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. Under Article 2(1) of that directive, "the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1" thereof.'

10 CJEU, joined cases C-804/18 and C-341/19, Wabe e.V. and MH Müller Handels GmbH, Judgment of 15 Juli 2021, ECLI:EU:C;2021:594, para. 89.

11 Accordingly, the CJEU, in case C-148/22, OP v Commune d'Ans, judgement of 28 November 2023, ECLI:EU:C:2023:924, para. 40, stated that the prohibition of any discrimination based on religion enshrined in Article 21 CFR is the 'corollary' of the right to freedom of thought, conscience and religion guaranteed by Article 10 CFR.

12 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive), OJ L 303, pp. 16-22, Art. 4(2), reads: 'Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.'

13 O'Cinneide, C. and Liu, K. (2015), '2000/78/EC: Framework Equality Directive,' in: Schlachter, M. (ed.), EU labour law: A commentary, Alphen aan den Rijn, Wolters Kluwer, p. 95; Ellis, E. and Watson, P. (2012), EU anti-discrimination law, Second Edition, Oxford, Oxford University Press, p. 394: 'The Article (…) is possibly one of the most opaque to be found on any statute book'.

Christian Churches. The special exception it creates for discrimination on the ground of religion and belief serves to account for the legitimate interest of 'public or private organisations the ethos of which is based on religion or belief' to express their belief in practices determined by their ethos. A simple paradigm case to illustrate why this is a legitimate concern is the right to limit the exercise of core spiritual functions to adherents of the respective system of religion or belief. No legitimate anti-discrimination law will demand, for instance, that Protestants can apply to become Catholic priests.

The wording of the norm suggests that the required proportionality analysis depends on the 'kind of work' and 'the context of its performance' that is at issue as standards independent of the ethos of the organisation, although the wording is not unequivocal. It is grammatically possible to read the formulation 'having regard to the organisation's ethos' as stipulating that the organisation's ethos determines the role played by the criteria 'nature of activities or context in which they are carried out' in ascertaining the justification of the discrimination on the ground of religion. According to this reading, the ethos is key to determining which kind of activities and which kind of context in which they are carried out are sufficient to justify different treatment on the basis of religion because it forms a 'genuine, legitimate and justified occupational requirement'. The kind of activities and their context would cease to be an independent yardstick for the justification of the unequal treatment and become entirely dependent on the respective ethos of the organisation. If, for instance, for a religious community, it was part of the ethos of the organisation to keep the garden of a religious institution neat and tidy, employing only gardeners with this kind of religious belief would then be justified.

This interpretation of the norm is not just a theoretical possibility, but one of the core arguments relevant in the constitutional complaint mentioned above. Moreover, it is no accident that the German implementation of Article 4(2) Directive 2000/78/EC contains a regulation exactly to this effect, incorporating its normative consequence (controversially) into German law[14] until the CJEU in Egenberger demanded a different reading.

However, this interpretation clearly misses the meaning of Article 4(2) Directive 2000/78/EC. Understanding the norm as implying that the justification of unequal treatment could depend only on the ethos of the religion, the formulation 'by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement' becomes redundant, as ultimately only the ethos of the organisation would be decisive for the justification of unequal treatment. Such an interpretation would violate a very basic principle of legal interpretation, namely, to take the elements of a norm seriously and not to deprive them of any aspect of their meaning.

The history of the drafting of the norm confirms this analysis – the aim was clearly to make the test of religion or belief, as 'a genuine, legitimate and justified occupational requirement' for reasons of 'the nature of these activities or of the context in which they are carried out', a decisive yardstick for the justification of unequal treatment on the grounds of religion or belief, independent of the ethos of

[14] General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, AGG), 14 August 2006, Sec. 8.1, reads: 'a difference of treatment on the ground of religion or belief of employees of a religious community, facilities affiliated to it, regardless of their legal form, or organisations which have undertaken conjointly to practice a religion or belief does not constitute discrimination where such grounds constitute a justified occupational requirement for a particular religion or belief, having regard to the ethos of the religious community or organisation in question and by reason of its right to self-determination or by the nature of the particular activity'. The ethos of the organisation can, according to the wording (and intentions) of this norm, be the ultimate yardstick for the justification of unequal treatment.

the organisation, and not to create a blanket permission for religious or belief-based communities to engage in such unequal treatment, depending only on a (self-defined) ethos that is – as some argue – even uncontrollable by courts.[15]

Moreover, the teleological structure of EU discrimination law speaks strongly in favour of this interpretation. Article 4(2) Directive 2000/78/EC is not an insular norm but is normatively nested in a regime of prohibitions of discrimination and of justifications of different treatment. The justification of direct discrimination in European anti-discrimination law across the board is limited to functionally necessary or at least functionally well-justified differential treatment.[16] The very purpose of the kind of employment must render different treatment if not essential, then at least well-justified according to the specific criteria of the relevant legal provision.[17]

That means in concrete terms that Article 4(2) Directive 2000/78/EC must be understood as demanding that the specific requirements based on the religious ethos are proportional in light of the kind of employment in question and the context in which it is performed. Thus, prima facie, the standards for permissible unequal treatment on the ground of religion are legally not the same for the gardener of a Christian hospital and a priest. In the European discussion, many commentators understood the norm accordingly without much ado and, within Germany, many have held the same views for many years.[18] Unsurprisingly, the CJEU confirmed this view in Egenberger and IR v JQ.[19]

2.4. The relationship between state and religious cummunities

Article 17 TFEU is another difficult legal norm, because it, too, embodies political compromise about the regulation of the relationship between the state and churches and other organisations with an ethos based on religion or belief.[20] The CJEU included an assessment of the meaning of this norm and its impact on the interpretation of Article 4(2) Directive 2000/78/EC in its line of argument, albeit in its usual sparse mode of argumentation.[21] It followed an understanding of the norm widely shared in

15 Cf. on the drafting process, CJEU Case C-414/16, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V., opinion of Advocate General Tanchev, 9 November 2017, ECLI:EU:C:2017:851, paras 85 ff.; Reichegger, H. (2005), Die Auswirkungen der Richtlinie 2000/78/EG auf das kirchliche Arbeitsrecht unter Berücksichtigung von Gemeinschaftsgrundrechten als Auslegungsmaxime (The effects of Directive 2000/78/EC on ecclesiastical labour law taking into account fundamental community rights as a maxim of interpretation), Lausanne, Peter Lang, pp. 192 ff.

16 Cf. for instance Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive), OJ L 180, pp. 22-26, Art. 4; 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) (Gender Recast Directive), OJ L 204, pp. 23-36, Art. 14(2).

17 Art. 4(2) lowers the standards of justification slightly in comparison to Art. 4(1) Directive 2000/78/EC, as it lacks the criterion 'determining'.

18 Cf. on the discussion Ellis, E. and Watson, P. (2012), EU Anti-discrimination law, Second Edition, Oxford, Oxford University Press, p. 394; Barnard, C. (2012), EU employment law, Fourth Edition, Oxford, Oxford University Press, pp. 367 f.; O'Cinneide, C. and Liu, K. (2015), '2000/78/EC: Framework Equality Directive,' in: Schlachter, M. (ed.), EU labour law: A commentary, Alphen aan den Rijn, Wolters Kluwer, pp. 94 f.; Classen in: Grabitz/Hilf/Nettesheim/Classen (2024), AEUV (Commentary on the TFEU) Art. 17, para 60 ff.; Mahlmann, M. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), Handbuch Gleichbehandlungsrecht (Handbook on equal treatment law), Baden-Baden, Nomos, § 3 para 110 ff., with further references.

19 CJEU, C-414/16, Egenberger, judgment of 17 April 2018, ECLI:EU:C:2018:257; CJEU, C-68/17, IR v JQ, judgment of 11 September 2018, ECLI:EU:C:2018:696.

20 Cf. on the travaux préparatoires: CJEU, Case C-414/16, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V., opinion of Advocate General Tanchev, 9 November 2017, ECLI:EU:C:2017:851, para. 97; from the perspective of the Christian churches: Schnabel, P. R. (2011), 'Die Entstehung eines „europäischen Religionsrechts" – Kirchliche Interessen und kirchlicher Beitrag' (The emergence of a 'European religious law' – church interests and church contribution), in: Schmoeckel, M., Thier A. and de Wall, H. (eds.), Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung, Berlin, De Gruyter, p. 441.

21 CJEU, C-414/16, Egenberger, judgment of 17 April 2018, ECLI:EU:C:2018:257, paras 50, 58.

legal doctrine by the European Commission[22] and also developed by the Advocate General.[23] According to this standard interpretation (which is also predominant, it seems, in German scholarship), the norm guarantees the basic structure of state-church relations in Member States and bars the EU from interfering with these structural decisions. However, it does not prohibit any application of EU law to the affairs of religious communities.[24] It cannot be otherwise because EU law, given its scope, naturally touches upon various questions that affect religious communities and their organisations too, especially if they have the size and reach of activities that, for example, Christian churches enjoy in Europe.

One good example is data protection. The General Data Protection Regulation includes a special rule on the use of data in religious contexts by religious organisations.[25] The norm applies to activities of religious communities, and evidently entirely legitimately so and without infringing religious communities' freedom of self-determination, as the CJEU rightly underlined:

> 'That finding cannot be called into question by the principle of organisational autonomy of religious communities which derives from Article 17 TFEU. The obligation for every person to comply with the rules of EU law on the protection of personal data cannot be regarded as an interference in the organisational autonomy of those communities.'[26]

It cannot be that religious communities are free to include their data protection standards in their ethos-driven religious mission, the content of which nobody but they themselves is allowed to determine with the effect that the data protection law is inapplicable.[27]

Is anything in the interpretation of Article 4(2) Directive 2000/78/EC by the CJEU in Egenberger or IR v JQ contrary to Article 17 TFEU understood in this sense? Does it infringe upon the important right of Member States to determine the fundamental structure of the relationship between religious communities and the state?

The limitations mandated by Article 4(2) Directive 2000/78/EC on the freedom of religious or belief-based organisations to shape their employment relationships according to their ethos are rather narrowly circumscribed in scope. Religious or belief-based communities' freedom of self-determination appears entirely undiminished in many areas, from organisational decisions to substantial policy decisions, not least because the limitations at issue only affect labour law in the first

22 The European Commission's submission in the Egenberger case had already discussed this issue, cf. European Commission, 7 November 2016, sj.d(2016)6875869, paras 28 ff.

23 CJEU, Case C-414/16, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V., opinion of Advocate General Tanchev, 9 November 2017, ECLI:EU:C:2017:851, paras 91 ff.

24 Cf. Waldhoff, in: Calliess/Ruffert,(2022), AEUV (Commentary on the TFEU), Sixth Edition, Art. 17 para. 10; Ehlers in: Sachs (2021), GG (Commentary on the Basic Law), Ninth Edition, Art. 140 para. 11; Kotzur in: Geiger/Khan/Kotzur (2023), European Union Treaties, Art. 17 TFEU paras 4, 5; Streinz (2018), EUV/AEUV (Commentary on the European Union Treaties), Third Edition, Art. 17 para. 10; similar results can be found in: Classen in: Grabitz/Hilf/Nettesheim (2024), AEUV (Commentary TFEU), Art. 17 para 3.

25 Cf. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 1-88, Art. 9(1), Art. 9(2)(d).

26 CJEU, C-25/17, Tietosuojavaltuutettu, judgment of 10 July 2018, ECLI:EU:C:2018:551, para. 74.

27 It is noteworthy in this context to consider CJEU, C-372/21, Freikirche der Siebenten-Tags-Adventisten in Deutschland KdöR v. Bildungsdirektion für Vorarlberg, judgement of 2 February 2023, ECLI:EU:C:2023:59. Para 19 underlines that Article 17(1) TFEU expresses the neutrality of the European Union towards the organisation by the Member States of their relations with churches and religious associations and communities, but does not exclude from the scope of EU law altogether (here freedom of establishment, Art. 49 TFEU) the activity of churches or religious associations and communities where that activity consists of the provision of services for remuneration in a given market.

instance. But even in the area of labour law, it is not only religious offices (and their belief-based equivalents) in the specific sense of being concerned with the core spiritual message of the community that can be made dependent on religion or belief and particular duties of loyalty, but also others, as long as the proportionality standards as concretised by CJEU Egenberger are respected in relation to the kind of work concerned.

The scope of discretion enjoyed by religious communities is something that the case law of the CJEU has yet to determine. However, nothing in the CJEU Egenberger or IR v JQ cases precludes a narrow interpretation of Article 4(2) Directive 2000/78/EC that at the same time protects a substantial freedom of religious communities in their employment policies beyond the uncontroversial core areas of holders of spiritual office.[28] Article 4(2) subsection 2 Directive 2000/78/EC protects the right of religious or belief-based organisations to demand from their employees that they abide by duties of loyalty defined by the ethos of these organisations, within the framework set by EU law. It creates no wider exception beyond the criteria discussed.

Given this, it seems hard to maintain that the interpretation of Article 4(2) Directive 2000/78/EC redraws the relationships between religious communities and the state so substantially that Article 17 TFEU is violated. Nothing in this interpretation brings into question the neutrality of the EU towards the organisation by the Member States of their relations with churches and religious associations and communities. There is thus a strong argument that the CJEU would, in fact, have decided contra legem if it had decided other than it did concerning the interpretation of Article 4(2) Directive of 2000/78/EC in light of Article 17 TFEU.

2.5. A multi-polar fundamental rights conflict

The CJEU Egenberger and IR v JQ cases are examples of a multi-polar fundamental rights conflict. On the one hand, there is the corporate religious freedom of the Protestant and Catholic Churches, including their autonomy to determine the standards and forms of expression of their system of belief in their organisational practices, centred on Article 10 CFR and Article 9 ECHR (the latter forming a baseline for the determination of the legal content of Article 10 CFR according to Articles 53, 52(3) second sentence CFR) and potentially individual rights to freedom of religion which might (indirectly) also be affected. On the other hand, Article 21(1) CFR enshrines the prohibition of discrimination on

[28] Here are some examples of the kind of questions that arise. In 2022 the Lower Saxony Regional Labour Court (Landesarbeitsgericht Niedersachsen, LAG Niedersachsen) in its ruling of 12 January 2022, decided that the rejection of an application for employment with the Protestant Church in Germany as the head of the department of human and fundamental rights and European law was justified according to Section 9 AGG, since the applicant was not a member of the Protestant Church. In light of the jurisprudence of the CJEU in Egenberger and given that the employment concerned not only technical legal matters but demanded specific tasks including the drafting of documents of strategic importance for the Protestant Church, the court came to the conclusion that the post required not only legal expertise but also an active identification with the theological beliefs of the Protestant Church. Therefore, the court argued that, given the particular kind of work concerned, the requirement to be a member of the Protestant Church was proportionate, cf. Lower Saxony Regional Labour Court (Landesarbeitsgericht Niedersachsen, LAG Niedersachsen), 12 January 2022, 8 Sa 599/19 (an appeal to the Federal Labour Court was not successful). Another case concerned a complaint against the dismissal of an employee working in an organisation providing advice for pregnant women. The association is affiliated to the Catholic Church. The complainant left the Catholic Church while she was on maternal leave. The complainant was dismissed even though she continued to support the ethical evaluation of abortion by the Catholic Church. The court held that this dismissal could not stand, Hesse Regional Labour Court (Hessisches Landesarbeitsgericht), 1 March 2022, 8 Sa 1092/20. The latter case led to a preliminary reference to the CJEU by the Federal Labour Court (Bundesarbeitsgericht) to clarify the framework of justification of direct discrimination on the ground of religion in EU law, Federal Labour Court (Bundesarbeitsgericht), 1 February 2024, 2 AZR 196/22 (A), available (in German) at: https://www.bundesarbeitsgericht.de/sitzungsergebnis/2-azr-196-22-a/.

the ground of religion, but also on the basis of other grounds,[29] which is mirrored in Article 4(2) 2000/78/EC which also incorporates the prohibition of unequal treatment on grounds other than religion and belief.

The CJEU has acknowledged this complex normative situation and argued that its interpretation of Article 4(2) Directive 2000/78/EC balances these normative positions appropriately, including the case law of the European Court of Human Rights:[30]

> 'While Directive 2000/78 thus aims to protect the fundamental right of workers not to be discriminated against on grounds of their religion or belief, the fact remains that, by means of Article 4(2), that directive also aims to take into account the right of autonomy of churches and other public or private organisations whose ethos is based on religion or belief, as recognised by Article 17 TFEU and Article 10 of the Charter, which corresponds to Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950. The objective of Article 4(2) of Directive 2000/78 is thus to ensure a fair balance between the right of autonomy of churches and other organisations whose ethos is based on religion or belief, on the one hand, and, on the other hand, the right of workers, inter alia when they are being recruited, not to be discriminated against on grounds of religion or belief, in situations where those rights may clash. To that end, that provision sets out the criteria to be taken into account in the balancing exercise which must be performed in order to ensure a fair balance between those competing fundamental rights.'[31]

Given what has been said about the differentiated standards at work in Article 4(2) Directive 2000/78/EC, compelling reasons speak for this conclusion. The CJEU could even have strengthened its argument by highlighting how non-discrimination is not only a central fundamental right in itself but also secures the freedom of religion of employees, guaranteed by Article 10 CFR. After all, the CJEU in Egenberger allows, for example, persons without membership of a Christian church, Jews, Muslims, Buddhists or Atheists at least to be considered for certain jobs irrespective of their religion or belief – for instance, writing shadow reports on the ICERD – which is certainly relevant to being (and feeling)

29 Art. 21(1) reads: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.'

30 Cf. in particular European Court of Human Rights (ECtHR), Fernández Martínez v. Spain [GC], No. 56030/07, judgement of 12 June 2014, CE:ECHR:2014:0612JUD005603007, paras 131-132: 'The Court acknowledges that as a consequence of their autonomy religious communities can demand a certain degree of loyalty from those working for them or representing them. In this context, the Court has already considered that the nature of the post occupied by those persons is an important element to be taken into account when assessing the proportionality of a restrictive measure taken by the State or the religious organisation concerned. In particular, the specific mission assigned to the person concerned in a religious organisation is a relevant consideration in determining whether that person should be subject to a heightened duty of loyalty.
'That being said, a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights to respect for their private or family life compatible with Article 8 of the Convention. In addition, the religious community in question must also show, in the light of the circumstances of the individual case, that the risk alleged is probable and substantial and that the impugned interference with the right to respect for private life does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. Neither should it affect the substance of the right to private and family life. The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake.'

31 CJEU, C-414/16, Egenberger, judgment of 17 April 2018, ECLI:EU:C:2018:257, paras 51-53.

truly free to live according to one's own belief. Moreover, and importantly, this kind of protection may also turn out to be an asset for religious communities, including the Christian churches, in new religious conflicts that may emerge in the future.[32]

These reflections show that nothing in the CJEU Egenberger and IR v JQ cases is hostile to religious freedom.[33] On the contrary, the effect is a deepened protection of religious freedom by ensuring that nobody is discriminated against because of their religion or belief.

2.6. The control by courts

Moreover, it is hardly very surprising that the Court maintained that there must be state control by an independent court of the way a religious ethos is used to determine certain kinds of treatment of employees. The Court took recourse to Article 9 Directive 2000/78/EC and read it in the light of Recital 29 of that directive. This recital requires the Member States to provide procedures, including judicial procedures, for enforcement of the obligations under the directive. It pointed out that Article 10 of the directive requires the Member States to take the necessary measures, 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 is for the respondent to prove that there has been no breach of that principle.[34] The Court took this evidently as documenting the intention of Directive 2000/78/EC to create an effective system of enforcement of the principle of non-discrimination.

These norms speak indeed against the creation of lacunae free from judicial control by granting religious or belief-based organisations the right to determine themselves, without judicial oversight, which kind of unequal treatment on the ground of religion or belief in their employment is permissible, given their specific ethos.

This does not mean that EU law does not respect the autonomy of religious and belief-based institutions to determine the content of their ethos themselves and usually without control by state authorities or courts. It only means that the respect for this autonomy has limits defined by the prohibition of discrimination on all the protected grounds:

> 'In this respect, it is true that in the balancing exercise provided for in Article 4(2) of Directive 2000/78… the Member States and their authorities, including judicial authorities, must, except in very exceptional cases, refrain from assessing whether the actual ethos of the church or organisation concerned is legitimate (see, to that effect, ECtHR, 12 June 2014, Fernández Martínez v. Spain… § 129). They must nonetheless ensure that there is no infringement of the right of workers not to be discriminated against on grounds inter alia of religion or belief. Thus, by virtue of Article 4(2), the purpose of the examination is to ascertain whether the occupational requirement imposed by the church or organisation, by reason of the nature of

[32] One should not overlook the politicisation of religion by political movements and illiberal forces, some with considerable influence on state policy, including in European countries.

[33] Therefore, CJEU, Egenberger rightly emphasises that freedom of religion as guaranteed in Art. 10 CFR and Art. 9 ECHR is a central concern in the weighing and balancing exercise, cf. above Fn 8.

[34] CJEU, C-414/16, Egenberger, judgment of 17 April 2018, ECLI:EU:C:2018:257, para. 48.

> the activities concerned or the context in which they are carried out, is genuine, legitimate and justified, having regard to that ethos.'[35]

This finding is buttressed by the reference to Article 47 CFR, guaranteeing the right of individuals to effective judicial protection of their rights under EU law.[36]

3. A 'theocracy of judges'? The content of the complaint

The Diakonie mounted a rather fundamental legal critique against these interpretations of EU law. The main argument of the Diakonie runs as follows.[37] Religious communities' constitutionally guaranteed right to self-determination encompasses the power to authoritatively define the religious mission of the religious community, its content and scope. This includes conditions for access to employment, working conditions and reasons for dismissal. According to the Protestant Church's current understanding of the Dienstgemeinschaft (community of service), all activities in the social sector, including charitable activities, are part of their Christian mission. Therefore, employees must abide by certain duties of loyalty. It is equally permissible to make membership of a Christian church a precondition of employment. Importantly, it is argued, this condition is legitimate irrespective of the kind of work performed and the context in which it is carried out. The gardener of a Christian hospital, for instance, is as much part of the Christian mission as a priest. These standards can be relaxed, as in the current internal regulations (and many practices) of the Protestant Church, but there is no legal obligation to do so. This understanding of permissible rules in employment has very significant practical effects determining the working conditions of very many people because of the importance of the Christian Churches as actors in social work and institutions in Germany – the Diakonie currently employs 620 000 people, its Catholic counterpart, Caritas, 690 000 people.

These constitutional claims are based on standing case law of the Federal Constitutional Court, formulated in its current form in 1985,[38] overturning earlier decisions of the Federal Labour Court that moved roughly along the lines of the legal principles implied in the CJEU Egenberger case.[39] The German Federal Constitutional Court confirmed this standing case law only a few years ago in rather strong terms.[40] The Diakonie therefore argues that the decision of the CJEU in Egenberger constitutes an ultra vires act as follows.

First, it implies an evident, fundamental structural shift of the distribution of competences between the Member State Germany and the EU. The complaint holds that the CJEU in the Egenberger decision interprets Article 4(2) 2000/78/EC in a way that takes the competence to regulate state-church relations away from Germany and allocates it to the EU level. Article 17 TFEU, however, establishes the regulation of state-church relations as a prerogative of Member States. The principle of conferral is thus violated by the CJEU in Egenberger. The complaint asserts that the shift of competences is so

35 CJEU, C-414/16, Egenberger, judgment of 17 April 2018, ECLI:EU:C:2018:257, para. 61. Therefore, concerns in this respect seem to be unjustified, cf. Bell, M. (2023) Catholic social teaching and labour law: An ethical perspective on work, 8.3.3.2.

36 CJEU, C-414/16, Egenberger, judgment of 17 April 2018, ECLI:EU:C:2018:257, para. 49.

37 Cf. 'Diakonie zieht wegen Einstellungspraxis vor Bundesverfassungsgericht' (Diakonie goes to the Federal Constitutional Court over recruitment practices), Evangelische Kirche in Deutschland, 19 March 2019, https://www.ekd.de/diakonie-klagt-vor-bundesarbeitsgericht-44274.htm 'Das erste Karlsruher Nein?' (The first No from Karlsruhe [the Federal Constitutional Court]?), Frankfurter Allgemeine Zeitung FAZ, 2 May 2019.

38 Federal Constitutional Court (Bundesverfassungsgericht), Judgement of 4 June 1985, BVerfGE 70, 138.

39 Cf. e.g. Federal Labour Court (Bundesarbeitsgericht), Judgement of 31. Oktober 1984 – 7 AZR 232/83 –Decisions of the Federal Labour Court, BAGE 47, 144-160 with further references to the case law.

40 Federal Constitutional Court (Bundesverfassungsgericht), Judgement of 22 October 2014, BVerfGE 137, 273.

substantial that the high threshold for assuming an ultra vires act established by the case law of the German Federal Constitutional Court is met.

Second, the CJEU Egenberger case represents nothing less than a violation of Germany's constitutional identity. The complaint argues that religious communities' right to self-determination is part of this constitutional identity. Importantly, it follows from the argumentation that the right to self-determination forms part of Germany's constitutional identity not only as a right as such, the details of which can be rendered concrete in different forms that leave the substance of this right intact. Rather, the right to self-determination of religious communities is part of the constitutional identity of Germany precisely in the interpretation of its scope and content developed by the Federal German Constitutional Court in the case law of recent decades, in particular in its leading decision of 1985.[41] Therefore, not only is the abrogation or the limitation of a religious community's right to self-determination in its defining core regarded as a violation of the constitutional identity; the limited modifications of labour law that are applicable to religious communities in particular sub-fields of their employment relations, such as the one in question in the constitutional complaint, are already impermissible. Furthermore, it is even impermissible for state courts to determine the legitimate content of religious communities' right to self-determination.

The Diakonie argues that if judges were to engage in such a determination of the scope of this right, they would be taking a stand on religious issues and thus would no longer be making law, but instead engaging in theology. The content of the religious mission of the Protestant Church and the kind of occupation it includes is a theological question that state courts are not entitled to control. Otherwise, it is argued, a 'theocracy of judges' would be the consequence, as courts would decide on theological issues when defining what is legally protected by religious communities' right to self-determination and what is not.

4. Defending CJEU Egenberger

What are the merits of these arguments? Importantly, the German Federal Constitutional Court also holds that the autonomy of religious communities is not unlimited and subject to control by the courts. It underlines in its case law that the freedom to self-determination is circumscribed not least by fundamental rights.[42] This implies that state courts are the legitimate and ultimate interpreters of where these legal limits are to be drawn. This, obviously, does not mean to establish a 'theocracy of judges'. To maintain this is a category error. The determination of the content of state law is something categorically different from taking a stand on theological questions. If a state court determines the content of the law, this does not mean that it is formulating a verdict on the theological merits of the respective religious doctrine.

The German Federal Constitutional Court constantly engages in this kind of jurisprudence without establishing a 'theocracy of judges'. When the Court determines the standards for the admissibility of an Islamic headscarf in schools, for example, it is simply fulfilling its judicial role. It determines whether a religious belief that demands the wearing of a headscarf is allowed to determine the action of individual teachers or whether the state can legitimately limit this display of a religious belief. The

41 That is since Federal Constitutional Court (Bundesverfassungsgericht), Judgement of 4 June 1985, BVerfGE 70, 138.
42 Federal Constitutional Court (Bundesverfassungsgericht), judgement of 22 October 2014, BVerfGE 137, 273, pp. 314 ff.

German Federal Constitutional Court did not engage in any kind of judicial theology when it permitted the wearing of headscarves by teachers in schools[43] and allowed for its prohibition in the case of court officials in court proceedings[44] – it renders concrete the content of the law of a secular state, no more, no less. What the religious merits are of wearing or not wearing a headscarf (a kippa, a turban or a monk's habit) is an entirely different question for the individual religious communities to decide.

The difference between the jurisprudence of the CJEU and the German Federal Constitutional Court is thus not one of principle, as both agree on the necessary control of the permissible scope of religious self-determination. It is about concrete questions of complex norm interpretation that determine where these limits are actually to be drawn. The claim that this difference challenges the fundamental distribution of competences between the EU and Germany is hard to understand.

The constitutional complaint concerns an ultra vires claim. The Federal German Constitutional Court has clarified in its case law that, for an ultra vires act to be assumed, a substantially qualified violation of competences has to have occurred, forming a 'structurally significant shift in the division of competences to the detriment of the Member States'.[45] Concerning decisions of the CJEU, it presupposes, roughly speaking, an arbitrary misinterpretation of the law that is objectively untenable given common standards of legal interpretation. Only in this case can a misapplication of the law constitute a violation of the order of competences of EU law, in particular Article 5(1) and (2) TEU. Consequently, simple misinterpretations of EU law do not suffice to cross this threshold. Given this, it seems difficult to avoid the following conclusion: even if one thinks that the CJEU's interpretation of Article 4(2) Directive 2000/78/EC in conjunction with Article 17 TFEU and Article 10, 21 (1) CFR is not compelling – and, as indicated, there is a strong case that the CJEU's interpretation is in fact entirely convincing – it is nevertheless utterly unconvincing to assert that its interpretation is so outlandish that it constitutes an ultra vires act according to the German Federal Constitutional Court's own high standards.

There is also no good reason to assert that the constitutional identity of Germany is violated.[46] Article 4(2) Directive 2000/78/EC, convincingly interpreted by the CJEU in Egenberger and IR v JQ, demands at most a modification of the current jurisprudence on the scope of the autonomy of religious communities, it does not abolish this autonomy but explicitly endorses it within the framework of the Court's balancing exercise. The Federal Labour Court has adjudicated in the past according to standards that are enshrined in Article 4(2) Directive 2000/78/EC[47] and many legal scholars hold the view that this is in fact a better understanding of the provisions of the Basic Law. There is also a diverse tradition of interpreting the respective terms of the German Basic Law, and the norms of the Constitution of Weimar,[48] which are incorporated into the Basic Law.

43 Federal Constitutional Court (Bundesverfassungsgericht), judgement of 27 January 2015, BVerfGE 138, 296.
44 Federal Constitutional Court (Bundesverfassungsgericht), judgement of 14 January 2020, BVerfGE 153, 1.
45 Federal Constitutional Court (Bundesverfassungsgericht), judgement of 5 May 2020, BVerfGE 154, 17, para. 110.
46 The concept of 'constitutional identity' is not an explicit part of the Basic Law but has been recently developed by the Federal Constitutional Court in the context of the limits of the legal integration of Germany into the EU, cf. Federal Constitutional Court (Bundesverfassungsgericht), judgement of 30 June 2009, BVerfGE 123, 267.
47 Cf. Federal Labour Court (Bundesarbeitsgericht), judgement of 31 October 1984, 7 AZR 232/83. Decisions of the Federal Labour Court, BAGE 47, 144-160 with further references to the case law.
48 A good example is the statement by Anschütz, the most influential commentator on the Constitution of Weimar, who in his commentary on the norms of the Constitution of Weimar which are incorporated into the Basic Law and are the foundation of the right to autonomy of religious communities, highlighted that the interpretation of the scope of the

Any tenable interpretation of the constitutional identity of Germany must, moreover, be anchored in the central norms of human dignity, which is the very axiological core of guarantees of equality and prohibitions of discrimination, democracy, the separation of powers and the rule of law of a federal and social state, constitutionally entrenched in Article 79(3) Basic Law. It seems rather implausible to claim that anything in the normative content of Article 4(2) Directive 2000/78/EC and the interpretation in the CJEU Egenberger and IR v JQ cases of these norms in the context of EU primary law, fundamental rights guaranteed by the CFR and ECHR provisions violates these principles that form the true constitutional identity of the Basic Law.

5. Prospects for reconciliation

The constitutional complaint in Germany underlines the importance and the still politically and legally controversial nature of the role of EU anti-discrimination law. The constitutional complaint goes to great lengths to challenge the interpretation of Article 4(2) Directive 2000/78/EC by the CJEU. It asks, after all, nothing less of the internationally hugely influential German Federal Constitutional Court than to deny the supremacy of EU law in this case. At a time when EU law is being challenged by other national courts,[49] not least in the context of the attempts by EU institutions to enforce standards of the rule of law throughout the Union, this is a challenge to be taken very seriously.

One reason in the background of the debates and legal opinions that lead to this radical step of challenging the supremacy of EU law is the perception of influential political actors and legal scholars that defending the autonomy of religious organisations, in particular Christian Churches because of their cultural relevance in Europe, is not a simple organisational interest policy but serves an important common good. From this point of view, religion seems indispensable to strengthening the values and their underlying lifeworld that forms the precondition of constitutional states, the rule of law, human rights and the project of European integration with the means of law – pre-legal and even pre-political values that these legal orders cannot generate themselves.[50]

One can grant the point that the strengthening of these values is an important contemporary task and that religious and belief-based organisations – among other actors – have a crucial role to play in this respect, given their influence on the values of a great many people. It is unclear, however, why the concretisations by the CJEU of the rights and obligations derived from the reconstructed complex matrix of norms on religious freedom, relationships between state and religious communities and prohibitions of discrimination with their intricate regime of exceptions is not regarded as contributing precisely to this very task.

autonomy of religious communities has always been and continues to be controversial, cf. Anschütz, G. (1933), Die Verfassung des Deutschen Reiches vom 11. August 1919: Ein Kommentar für Wissenschaft und Praxis (The Constitution of the German Reich of 11 August 1919: A commentary for scholarship and practice), Fourteenth Edition, Berlin, Scientia Verlag Aalen, p. 635.

49 Cf. the argumentation relying on the constitutional identity of Hungary, Hungarian Constitutional Court, Decision 22/2016 (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law, para 67. Examples of national courts declaring CJEU decision ultra vires: Ústvani soud, Judgement of 31 January 2012, Pl. ÚS 5/12 on CJEU, Judgement of 22 June 2011, Landtová, C-399/09, EU:C:2011:415 (Czech Republic); or Supreme Court, Judgement of 6 December 2016, Case 15/2014, Ajos (Denmark) on CJEU, Judgement of 19 April 2016, Rs. C-441/14, Dansk Industri (DI).

50 This thought is highly influential and primarily associated not only in the German language debates with Böckenförde, E.-W. (1976), 'Die Entstehung des Staates als Vorgang der Säkularisation' (The emergence of the state as a process of secularisation), in: Böckenförde, E.-W., Staat, Gesellschaft, Freiheit, Frankfurt am Main, Suhrkamp, p. 60; for comments, Dreier, H. (2018), Staat ohne Gott: Religion in der Säkularen Moderne (State without God: Religion in the secular modern ages), Munich, C.H. Beck, pp. 189 ff.

The message of EU law in this area seems clear enough: religious freedom in its individual and collective dimensions needs to be guaranteed robustly and individuals must at the same time be protected against discrimination on the ground of their religion and belief and any other unjustified ground, not least for the purpose of creating a legal system of guaranteed freedom of religion that deserves its name. This liberal and inclusive concept of freedom of religion and equality demands concretely that a physician can marry the person he loves without being dismissed (as clarified in CJEU IR v JQ) and that a person can work on a part-time, fixed-term contract with a Christian organisation on a secular task even if she is of no Christian denomination (as decided in CJEU Egenberger).

The question of whether this is not entirely in accordance with the Christian message of inclusion of everyone is one that goes beyond the scope of legal reflection. The impression that this may be so is, however, strengthened not only by theological comments[51] but also by reforms undertaken by the Christian Churches in Germany. These have liberalised their practice in recent years, including the Protestant Church which has now created rules on employment that increasingly resemble even in concrete detail the principles contained in Article 4(2) Directive 2000/78/EC and made explicit in the CJEU Egenberger and IR v JQ cases.[52]

Thus, there is hope that the legal framework of inclusion, justified space for autonomous decision-making according to the ethos of organisations based on religion or belief and secured prevention of discrimination set out in EU law has the potential to create common ground for the co-existence, cooperation and perhaps even community of the many religious faiths and secular systems of belief that enrich human culture in Europe and beyond.

51 Cf. e.g. from the point of view of Catholic theology, Kirchschläger, P. (2016), Menschenrechte und Religionen: Nichtstaatliche Akteure und ihr Verhältnis zu den Menschenrechten (Human rights: Non-state actors and their relationship to human rights), Seventh Edition, Paderborn, Ferdinand Schöningh.

52 According to the recently reformed guidelines of the Protestant Church on employment relations, being a member of a Christian denomination is explicitly made dependent on the kind of work or the context in which a job is carried out, thus incorporating the proportionality analysis implied in Art. 4(2) Directive 2000/78/EC in the legal regulations of the Protestant Church. Cf. Council Directive on Requirements for Professional Collaboration in the Protestant Church in Germany and its Diakonie (Collaboration Directive) (Richtlinie des Rates über Anforderungen an die berufliche Mitarbeit in der Evangelischen Kirche in Deutschland und ihrer Diakonie (Mitarbeitsrichtlinie)), 20 January 2024, ABl. EKD p. 30, Art. 4. According to the amended Basic Regulations on Service in the Church 2022 (Grundordnung des kirchlichen Dienstes 2022, GrO 2022), 22 November 2022, all employees regardless of their 'origin, religion, age, disability, sex, sexual identity and way of life' can be representatives of a church meant to serve people (Sec. 3(2) GrO 2022). Both Churches have recently underlined in an exchange with a very influential trade union that they are deeply committed to diversity, cf. the press release, 'Kirchliches Arbeitsrecht führt zu guten Ergebnissen: Die Kirchen überprüfen ihr Arbeitsrecht stetig. Die letzten Reformen führen zu weiteren Verbesserungen' (Church labour law leads to good results: The churches are constantly reviewing their labour laws. The latest reforms lead to further improvements), Evangelische Kirche in Deutschland, 5 March 2024, https://www.ekd.de/kirchliches-arbeitsrecht-fuehrt-zu-guten-ergebnissen-83164.htm.

POSITIVE ACTION ON THE GROUNDS OF RACIAL OR ETHNIC ORIGIN WITHIN THE EU WITH A FOCUS ON BULGARIA, GREECE AND HUNGARY

Dilyana Giteva*

1. The concept of positive action according to the EU legislation and practice

Overview

The term 'positive action' encompasses a range of measures involving differences in treatment (in particular, favourable or more favourable treatment) that states can undertake with respect to disadvantaged groups in order to ensure substantive (*de facto*) equality. At the outset, it should be pointed out that this concept is recognised in international law, particularly in the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, Articles 1(4) and 2(2)) and the UN International Covenant on Civil and Political Rights (ICCPR, Article 27).

Article 19 of the Treaty on the Functioning of the European Union is the legal basis for taking appropriate action, including positive action, to combat discrimination. On that legal basis, Article 5 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (referred to as 'the Racial Equality Directive' or 'Directive 2000/43/EC') outlines positive action as specific measures that can be taken by Member States to prevent or compensate for disadvantages linked to racial or ethnic origin. The concept is grounded in the recognition that mere formal equality – treating everyone the same regardless of their circumstances – may not be sufficient to achieve substantive equality. Thus, positive action aims to create conditions in which disadvantaged groups can participate on a more equal footing with other

A) Purpose

As mentioned, positive action measures aim to promote equal opportunities in practice, addressing disadvantages related to protected grounds, in particular where such measures do not amount to specific acts of discrimination or where discrimination in the past has resulted in a current situation of disadvantage. Although the present article focuses only on positive action related to racial or ethnic origin, EU law in the field of employment and vocational training provides for positive action for the grounds of sex, religion or belief, disability, age and sexual orientation as well.[1]

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1 Positive action relating to sex is even stipulated in the treaties (Article 157(4) TFEU).

B) Scope

As to their scope, positive action measures can be provided for in any of the fields covered by the Racial Equality Directive.[2] These measures can take various forms, including but not limited to targeted recruitment and training programmes, scholarships and support services. These measures are temporary, and are intended to level the playing field until equal opportunities are naturally achieved.

C) Legal framework

According to Recital 17 of the Racial Equality Directive, '[t]he prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin, and such measures may permit organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons.'

Article 5 of the Racial Equality Directive states that '[w]ith a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.'

1. Court of Justice of the European Union (CJEU) case law

The CJEU has provided interpretative guidance on positive action,[3] which, although developed primarily in the field of gender equality, should be considered to define this concept as uniformly applicable to all protected grounds, including racial and ethnic origin. Some of the main relevant aspects of positive action, as interpreted by the CJEU, can be outlined as follows:

- Positive action measures constitute an exception to the general principle of non-discrimination and thus should be narrowly construed. They 'must be reconciled as far as possible with the requirements of the principle of equal treatment'.[4]

- The goal of positive action measures should be the achievement of equal opportunities rather than equal results.

- Such measures must be proportionate;[5] that is, they must pursue a legitimate aim and must be effective and necessary for the achievement thereof.

2 As outlined in Article 3(1) thereof, namely: conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; employment and working conditions, including dismissals and pay; membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations; social protection, including social security and healthcare; social advantages; education; access to and supply of goods and services which are available to the public, including housing.

3 See, notably, judgments in cases C-450/93, *Eckhard Kalanke v. Freie Hansestadt Bremen*, ECR I-03051; C-409/95, *Hellmut Marschall v. Land Nordrhein-Westfalen*, ECR I-06363; C-158/97, *Georg Badeck and Others*, ECR I-01875; C-407/98, *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist*, ECR I-05539; C-476/99, *H. Lommers v. Minister van Landbouw, Natuurbeheer en Visserij*, I-02891; C-559/07, *Commission v. Greece*, among others.

4 See the Opinion of Advocate General Kokott in Case C-499/08, *Ingeniørforeningen i Danmark*.

5 A notable example of what the principle of proportionality entails can be found in the CJEU's judgment in *Cresco Investigation GmbH* (C-193/17, EU:C:2019:43).

- As a rule, positive action measures are temporary and aim to address proven inequalities in specific fields such as employment, education, social security, healthcare, and access to goods and services.

- Bodies adopting these measures are required to monitor, evaluate, and publish information about them to ensure they are still necessary and effective.

2. EU Anti-racism Action Plan 2020-2025

In September 2020, the European Commission issued the EU Anti-racism Action Plan 2020-2025.[6] In it, the Commission states that positive action aims to address the lack of substantive equality in society by offsetting disadvantages faced by minority racial or ethnic groups.

Public authorities are encouraged to integrate equality considerations into their day-to-day operations through statutory equality duties. These duties ensure that public policies systematically promote equality and prevent discrimination.

The Commission commits to facilitate the sharing of good practices among Member States regarding the implementation of statutory equality duties. This exchange of information aims to enhance the effectiveness of anti-discrimination measures.

3. Implementation of positive action across Member States

The regulation and implementation of positive action varies significantly across EU Member States, reflecting different legal traditions, social contexts and political landscapes. Some Member States have enshrined positive action in their constitutions, providing a strong legal basis for such measures. For instance, in certain countries, such as Spain[7] and Greece,[8] the Constitution explicitly recognises the need for positive action to promote substantive equality.

However, most of the EU Member States, including Bulgaria, Hungary and France, regulate positive action through anti-discrimination laws that provide the frameworks for such measures. These laws may specify the conditions under which positive action is permissible and outline the types of measures that can be adopted.

In addition to legal provisions, several Member States develop national action plans, strategies and policies that promote positive action. These documents often include specific goals, targets and actions to address racial and ethnic disparities.

Positive action measures in Bulgaria, Greece, and Hungary

At the outset, it should be noted that while the term 'positive action' is sometimes used to describe in more general terms any measure or initiative that aims at increasing equal treatment for disadvantaged groups, including general policies, 'soft measures', etc., the present article examines

6 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: EU anti-racism action plan 2020-2025*, Brussels, 18.9.2020 COM(2020) 565 final.
7 Article 9(2) of the Spanish Constitution.
8 Article 116(2) of the revised Greek Constitution.

solely the specific legal term of positive action measures as defined by EU law, and notably by the CJEU case law (as outlined in I.1. and I.2. above).

Bulgaria

A) Legal framework

Under the Bulgarian Protection against Discrimination Act (hereinafter, the 'PADA')[9], positive action is permitted in national law in the areas covered by the Equality Directives[10] and in respect of the grounds they cover (racial or ethnic origin, religion or belief, disability, age or sexual orientation) and beyond.

Several specific legal bases for positive action related to racial or ethnic origin exist:

- special measures for the benefit of disadvantaged people or groups aimed at equalising their opportunities, as far as and as long as such measures are necessary;[11]
- measures aimed at protecting the distinctive identity of people belonging to ethnic, religious and linguistic minorities and their rights, alone or with other members of their groups, to preserve and develop their culture, to profess and exercise their religion and to use their language;[12]
- measures in training or education aimed at guaranteeing the participation of people belonging to ethnic minorities, as far as and as long as such measures are necessary.[13]

In addition to these legal bases, the PADA also imposes several duties on public authorities to adopt positive measures to equalise opportunities for disadvantaged groups. Under Article 10 of the PADA, state and local government authorities, when carrying out their powers, are under a duty to take all measures necessary for the attainment of the aims of the PADA. Furthermore, the PADA obliges the relevant authorities to guarantee participation by ethnic minorities in education, whenever necessary to accomplish the objectives of equality law.[14] In practice, the latter provision serves as the legal basis for the Bulgarian Ministry of Education's efforts in educational desegregation. Under Article 11, the PADA requires authorities to take such measures as a priority for the benefit of victims of multiple discrimination.[15] However, no such measures are on record with regard to the latter.

Finally, the PADA also imposes duties on private as well as public employers, under certain circumstances, to promote job applications from less-represented ethnic groups where necessary to achieve the aims of the PADA.[16] Furthermore, when other conditions are equal, employers are under a duty to promote the career development and participation of employees from less-represented ethnic groups.[17]

9 Protection Against Discrimination Act (PADA), adopted September 2003, entered into force January 2004, last amended October 2023.
10 More specifically, the Racial Equality Directive and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Employment Equality Directive).
11 Bulgaria, PADA, Article 7(1.14).
12 Bulgaria, PADA, Article 7(1.16).
13 Bulgaria, PADA, Article 7(1.17). The law does not specify the measures allowed. Any measure falling into this category is accepted.
14 Bulgaria, PADA, Article 11(1).
15 Bulgaria, PADA, Article 11(2).
16 Bulgaria, PADA, Article 24(1).
17 Bulgaria, PADA, Article 24(2).

B) Case law

The case law has been ambivalent with respect to positive action. In one case, the Bulgarian Supreme Administrative Court (hereinafter, the 'SAC') ruled that a positive action measure ensuring advantaged access to education for Roma students through targeted scholarships was unlawful as it amounted to unjustified discrimination with respect to students from the Bulgarian ethnicity (See Example 3 below).[18]

This judgment's compliance with Racial Equality Directive could reasonably be questioned, as it overlooks the fact of disproportionate Roma exclusion and marginalisation in schooling, among other relevant facts, such as overwhelming Roma poverty and social disadvantage, not comparable to the economic and educational opportunities generally enjoyed by majority families and children. In particular, the judgment does not take into consideration Article 5 of the Racial Equality Directive. In contravention of Article 5 of the Directive, the Court used the principle of equal treatment as a reason to invalidate positive action. The Court did not, in its reasoning, refer to the limitations to positive action drawn up by the CJEU in its judgment of 22 January 2019 in Case C-193/17 (the *Cresco* judgment). It did not discuss the ICERD provision on positive action measures.

This is, as yet, an isolated case, with no similar legal challenges to positive action on record.

C) Examples of positive action

At the very outset, it is worth noting that practically all initiatives for the implementation of positive action originate from the NGO sector. The analysis shows that the track record of the competent state authorities mostly falls short in terms of the implementation of such measures and support thereof. Such measures are aimed at tackling Roma discrimination and the lack of Roma integration. More specifically, the examples below showcase the efforts to achieve equality for Roma in education.

Example 1: Support for Roma students pursuing a medical career

In 2023, the Ethnic Minorities Health Problems Foundation, with the financial support of the Trust for Social Achievement, started carrying out courses for application to medical universities targeted at Roma youth and high school students wishing to join the competition for admission to the university programmes in medicine, pharmacy and dentistry.[19] Furthermore, the scholarship selection committee for the Trust for Social Achievement reviewed and evaluated the applications received from students willing to participate in the Scholarship Support for Roma Students Enrolled in Medical Studies programme, implemented within the Active Citizens Fund Bulgaria under the European Economic Area (EEA) Financial Mechanism 2014-2021.[20]

Example 2: Intercultural education to tackle school dropouts among Roma

Between 2018 and 2020, the Amalipe Center (Bulgaria) achieved governmental approval of a total of 13 programmes aimed at improving the qualifications of pedagogical specialists on Roma folklore, intercultural education as a means of preventing school dropout, interaction with the educational

18 Bulgaria, Supreme Administrative Court, Decision No. 458 of 13 January 2020 in Case No. 5375/2019, by which it upholds the findings of the lower court.
19 More information about the initiative can be found here.
20 More information about that initiative can be found here.

mediator and other programmes.[21] Due to ongoing educational reforms, there is a constant effort by the Bulgarian Ministry of Education to defend the funding and accreditation of such programmes.

The initiatives in Examples 1 and 2, although not carried out by a public body, are relevant, in so far as they technically implement the provision under Article 7(1), point 17 of the PADA, which states that '[m]easures in the field of education and training to ensure the participation of persons belonging to ethnic minorities shall not constitute discrimination as long as and to the extent that such measures are necessary […]'.

Example 3: Supporting Roma students for successful completion of secondary education

A notable example of an attempted but unsuccessful positive action was a scholarship programme targeted at Roma students. Between 2016 and 2018, a project entitled 'Supporting Roma students for successful completion of secondary education' was to be implemented by the Centre for Educational Integration of Children and Students from Ethnic Minorities (a directorate of the Bulgarian Ministry of Education). The main objective of the project was to retain Roma students in secondary education, increase their academic performance and increase the number of Roma applicants for secondary education through the provision of scholarships, mentoring and tutoring. The total number of students to be covered by the project had to be 1 200 (600 girls and 600 boys). In the first year of the project, scholarships of EUR 30 per month would be provided to 200 9th and 10th graders, and to 100 11th and 12th graders, for 10 months, with the condition that the students had a grade of at least 3.50 (on a 2-6 grading scale) and adhered to the school attendance requirements. In the second year, a differentiation would be made in the amount of money provided under the scholarship in view of the academic performance of the students. It should be noted that the success requirements under this scholarship were lower than those for the state-funded scholarships applicable to all pupils in Bulgaria.

An NGO filed a complaint with the Protection against Discrimination Commission (PADC) alleging that the programme was discriminatory towards pupils of Bulgarian ethnicity. The PADC held that the particular case fell within the scope of Article 7(1), point 17 of the PADA. However, the PADC decision was annulled by the Sofia City Administrative Court (SCAC), and the decision of the latter in 2020 was upheld on cassation by the Supreme Administrative Court (SAC). The Court held that the scholarship programme at issue did not fulfil the positive action[22] requirements of Article 7(1), point 17 of the PADA in terms of the nature and objectives of measures to ensure the participation of pupils in education. In relying on the CJEU's judgment in Chez (C-83/14, EU:C:2015:480), it went on to provide the following, arguably far-fetched, reasoning: 'In view of the free of charge [primary and secondary][23] education, this measure does not really achieve the objective of keeping pupils in school and improving their educational performance, is not necessary and appropriate, is not the only way of achieving those objectives and goes beyond what is necessary. In this connection, it is rightly submitted that the reasons for non-attendance are complex and not related solely to lack of resources, but that the measures referred to amount to an essentially unequal treatment when compared with pupils who are not of Roma origin but are in a similar material situation and who have to make considerably more effort to achieve very good or excellent grades in order to receive a scholarship in accordance with the

21 More information on the various projects and their implementation can be found here.
22 Perhaps it is worth noting that no reference was made to either the term 'positive action' or to Article 5 of the Racial Equality Directive.
23 Editorial note.

conditions applicable to all pupils, at a significantly lower level than pupils of Roma origin. […] It is during the period of schooling that knowledge is acquired and the relevant value system of pupils is further developed, and the relevant measures should not be such as to create grounds for unequal treatment of pupils on ethnic grounds and for the formation of a perception that one section of pupils is treated more favourably and has more rights, or may make less effort in fulfilling their schooling obligations and be treated more favourably than all others.'

In these findings, the Court clearly disregarded the various specific challenges and disadvantages that the Roma community is faced with, limiting its assessment solely to the socio-economic criterion. Thus, this positive measure was not implemented, as it was rendered discriminatory by the Bulgarian courts.

Example 4: Supporting Municipalities for Educational Desegregation

Since 2019, the Ministry of Education and Science (MES) annually implements the national programme 'Supporting Municipalities for Educational Desegregation'.[24] In the implementation of this programme, the MES provides targeted additional support for the process of educational integration of children and students from ethnic groups with a focus on ensuring equal access to quality education. Eligible activities under the programme include the provision of free transport; the provision of educational supplies and materials; activities to inform, motivate and prepare children and pupils for joint educational development in foster educational institutions; activities for psychological, pedagogical and socio-communicative inclusion of all parents, etc. In terms of results, a total of 29 projects in 16 municipalities have been funded over the past four school years, involving over 4 000 children and pupils, who have been provided with teaching materials and supplies.

Greece

A) Legal framework

In Greece, the adoption of positive measures for promoting equality is an obligation imposed upon the state under Article 116(2) of the Constitution. This provision, in conjunction notably with Article 21(3),[25] is perceived as guaranteeing the principle of 'proportional equality' and assisting in the 'elimination of existing inequalities'. Even though the main preoccupation of the Constitution is clearly the promotion and protection of women's rights, the wording of Article 116(2) is all-inclusive, laying down an obligation on the state to act through positive measures for the elimination of all kinds of 'inequalities', a term that undoubtedly pertains to discrimination on all grounds covered by Council Directives 2000/78/EC and 2000/43/EC, given that they have been transposed into the Greek legal system.

Moreover, Article 7 of Equal Treatment Law 4443/2016 enshrines Article 5 of the Racial Equality Directive, as well as Article 7 of the Employment Equality Directive. It stipulates that any measures adopted for promoting and ensuring equal treatment on grounds of race, colour, national or ethnic origin, ancestry, religious or other beliefs, disability or chronic condition, age, familial or social status, sexual orientation, gender identity or characteristics are not considered to be discrimination. No specific areas of life are mentioned in the Law, which means that the provision concerns all areas of life. The text of Law 4443/2016 does not include any requirements, e.g. regarding necessity or proportionality,

24 See: https://www.mon.bg/nfs/2024/04/np24-11_podpomagane-obshtini_250424.pdf.

25 Which reads as follows: 'The State shall care for the health of citizens and shall adopt special measures for the protection of youth, old age, disability and for the relief of the needy.'

that must be met in order for positive action to be implemented. It does not clarify which entities can adopt positive action measures; therefore, the legal interpretation is that both private and/or public entities can do so.

B) Case law

Although not specifically related to the grounds of racial or ethnic origin, Greek case law, especially that of the Council of State, accepted and established the legitimacy of legislative or administrative positive action measures aimed at the advancement of equality even before the above provision of the Constitution. In 1998, the Council of State explicitly recognised that there may be cases which show that, in practice, a certain category of individuals has been discriminated against 'due to social prejudice', leading to only nominal equality.[26] Concomitantly, the court stated that, in principle, the spirit of the relevant provisions of the Constitution allowed the state to take appropriate and necessary 'positive action' for a certain period of time, until the existing situation of inequality had ceased. The Council of State concluded that, in principle, it would certainly be legitimate for the Greek state to adopt 'positive measures' for women, in so far as these measures were aimed at 'accelerating the restoration of de facto equality between men and women'.

This jurisprudence was further affirmed when the same court concluded that 'positive action' by the state in favour of women was justified and founded not only on the Constitution, but also on EU law[27] as well as on the UN Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (ratified by Greece).[28] The wording of these judgments is almost identical to that of the UN Convention provision. This significant case law, along with the constitutional provision of Article 116(2), should certainly be regarded as a basis for the establishment of positive action by Greece in favour of racial and ethnic groups, as well as other grounds on which discrimination occurs de facto and/or de jure. Greek courts have still applied this case law in more recent judgments.[29] These two court decisions concern equal treatment based on gender and age (retirement age limits). However, it is considered that Article 116(2), to which the decisions refer, can be used as a legal basis for positive action on racial/ethnic origin as well, since para 2 of the Article stipulates that 'the State ensures the removal of the inequalities that exist in practice, *especially* at the expense of women', which means that positive action is not restricted to gender issues.

C) Examples

Throughout the past five years, there have been several examples that demonstrate the concrete implementation of national provisions on positive action in Greece. As highlighted by the examples listed below, most positive action measures either target Roma specifically, or benefit them in practice to a larger extent than other groups.

[26] Greece, Council of State Judgment No. 1917/1998 (Plenary). Review of public and administrative law (*Επιθεωρήσεις δημοσίου δικαίου και διοικητικού δικαίου*), 1998, vol. 42, p. 577. Article 6 of Law 2839/2000 also established in principle a quota of one third in favour of women with regard to posts on boards of public and private organisations.

[27] Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, Article 2(4).

[28] Greece, Review of public and administrative law, 1998, vol. 42, p. 585. On the right to equality, see also Greek Council of State Judgments Nos. 1156/2000 and 2096/2000, To Syntagma, 2000, vol. 26, pp. 927 and 1 288 respectively (in Greek).

[29] Namely, Greece, Court of Auditors Decision No. 115/2021 and Plenary of the Court of Auditors Decisions Nos. 319-322/2020.

Example 1: Education of Roma students (Inclusive schools for Roma)

Between 2020 and 2022, Greece participated in the Erasmus+ project 'Inclusive schools for Roma'.[30] The Institute of Educational Policy under the Ministry of Education prepared a guide for mediators in the education of Roma children, in the framework of the European 'Inclusive Schools for Roma' project. Encompassing capacity-building activities and education mediation, the project involved 200 teachers, 50 Roma education mediators and 20 schools. The goal of the project was the development of training and support guides[31] for the educational community, as well as supporting material, in which the mediators and the schools participating in the pilot application were trained. This project constituted the very first attempt of the Greek educational system – represented by the Ministry of Education – to undertake a whole-school approach to the social inclusion of Roma.

Example 2: Psychological support services for Roma

Since 2019, by ministerial decision,[32] social workers have been appointed at 47 school units, and primary education school unit groups were established, in which psychologists offered their services, mainly psychological support to Roma children and parents. These school units were located in areas with a mainly Roma population. Therefore, schools that provide such services are considered to contribute to better inclusion of Roma children, since this vulnerable population is usually deprived of such services. While other groups may, in practice, benefit from this positive measure, the fact that it concerns areas with a mainly Roma population shows that the priority was to provide assistance to Roma children.

Example 3: Local educational authorities combating Roma school drop-out

The Ministry of Education and Religious Affairs has established Educational Priority Zones (ZEP) in public primary, secondary, general and vocational high schools for the educational support of vulnerable social groups, such as Roma, with the aim of providing and ensuring equal opportunities and conditions for all students in the country. These zones are established through circulars issued before the start of each school year, instructing local educational authorities to take measures for school integration of children from groups such as refugees and migrants, as well as Roma. For instance, the circulars request that school directors cooperate with the Ministry to confront the problem of early school leaving before the completion of compulsory education (drop-out), which is prevalent among Roma children and students in Greece. Moreover, according to the circulars, the management of diversity in the school classroom and the cultivation of a learning environment that enhances participation in the learning process need to be based on flexible educational approaches involving differentiated teaching, in order to ensure equal inclusion in the educational system as far as Roma students are concerned.[33] While there is no publicly available data on the exact number of Roma

30 European Commission, 'Education and Training Monitor 2022: Greece'.

31 Greece, Institute of Educational Policy of the Ministry of Education, 'Guide for Mediators in the Education of Roma Children', deliverable of the 'Inclusive Schools for Roma' project (Grant Agreement number: 881953 - Inclusive Schools RECAG-2019 / REC-RDIS-DISC-AG-2019).

32 Greece, Ministerial Decision of Minister of Education No. 126988/D1/2019 (OJ B 3246/23.08.2019).

33 For further information, see notably Circular No. 82842/ΓΔ4 of 24 July 2023, *Instructions and directions for the establishment and operation of Reception Classes in Zones of Educational Priority (ZEP) for the school year 2023-2024 in Public High Schools, General and Vocational High Schools of the country.*

children enrolled in schools each year, it is clear that the measures adopted under these circulars principally benefit children and students of Roma origin.

One example of how local authorities have implemented these circulars specifically with regard to Roma is the Local Integration Action Plan of the Roma branch of the community centre in a municipality in northern Greece. In total, 1 258 students and parents were beneficiaries of the action plan through 2021 and 2022; it included a wide array of measures aimed at preventing Roma from dropping out of school, which included the presentation of educational and employment options after high school; information and awareness-raising in matters such as school bullying and the rights of young girls; the promotion of Roma culture and traditions; targeted information and support actions for Roma regarding the prevention of drug use; and the implementation of actions to empower Roma teenagers, notably girls, through the development of a peer support model from Roma to Roma in relation to nutrition and health.[34]

Example 4: Education of Roma students

In the context of the National Roma Integration Strategy 2021-2030,[35] and under the supervision of the Ministry of Education, actions to stop the wave of dropouts of Roma students were implemented by the Laboratory of Intercultural Education of the Faculty of Philosophy of the National Kapodistrian University of Athens, in cooperation with several other universities. The programme is being implemented in 11 regions of Greece through 23 prefectures, and intervenes in 60 camps/settlements, reaching a total of 7 103 Roma students in 180 schools.

Example 5: Positive measures of the municipality of Chalandri for the housing of Roma

In its Equal Treatment Report 2019,[36] the Ombudsman identified the actions of the municipality of Chalandri in Athens as an example of good practice. For at least six years, the municipality had been actively involved in relocation, employment and urban planning for the relatively small group of Roma living in informal settlements within the municipality. It took five years of intensive efforts to relocate about a quarter of the population to homes and to integrate some Roma individuals into the formal labour market. In several non-binding opinions issued in relation to the housing situation of Roma in Chalandri,[37] the Ombudsman convinced the municipality to clearly indicate a specific location, meeting at least the basic standards of dignity and security, for the relocation and legal residence of the specific group of Roma.

Hungary

A) Legislation

In Hungary, positive action in respect of racial or ethnic origin is permitted under national law. National law does not differentiate between protected grounds, nor is it limited to employment, when providing for preferential treatment. Pursuant to Article 11(1) of Act CXXV of 2003 on Equal Treatment and the

[34] For further information, see Local Integration Action Plan of the Roma Branch of the Community Center of the Municipality of Ampelokipi – Menemeni (Τοπικό Σχέδιο Δράσης Δήμου Αμπελοκήπων – Μενεμένης).
[35] Greece, Ministry of Employment and Social Affairs, National Strategy and Action Plan for the Social Integration of Roma 2021-2030 (Εθνική Στρατηγική και Σχέδιο Δράσης για την Κοινωνική Ένταξη των Ρομά 2021-2030).
[36] Greek Ombudsman, Equal Treatment Report 2019 (*Έκθεση Ίσης Μεταχείρισης 2019*), April 2020.
[37] Greek Ombudsman, Non-binding opinions Nos 193004, 228363.

Promotion of Equal Opportunities (ETA),[38] 'a measure aimed at the elimination of an expressly identified social group's objectively substantiated inequality of opportunities is not considered a breach of the principle of equal treatment if a) it is based on an act of Parliament, on a Government decree based on an act or on a collective contract, effective for a definite term or until a specific condition is met, and/or b) the election of a party's executive and representative organ and the setting up of a candidate at the elections defined under the Election Procedure Act is executed in line with the party's fundamental rules'.

Paragraph (2) provides that 'a measure adopted in compliance with Paragraph (1) shall not violate a fundamental right, shall not provide an unconditional advantage to anyone, and shall not exclude the consideration of individual circumstances'.

There are two approaches to positive action in Hungary linked to racial or ethnic origin. One expressly targets Roma people, and the other uses the status of 'disadvantaged' (*hátrányos helyzetű*) and 'multiply disadvantaged' (*halmozottan hátrányos helyzetű*) children as a type of proxy for affiliation with the Roma minority.

The legislation defines when a child shall be regarded as 'disadvantaged' or 'multiply disadvantaged'.[39] In terms of the provision, a child is 'disadvantaged' if one of three different conditions are in place regarding them (these include the low level of education of the parents or guardians; the unemployed status of the parents or guardians or the fact that they face difficulties in the labour market; and the conditions of the child's accommodation, e.g. living in a segregated neighbourhood, or at premises where the conditions of healthy development are not given, e.g. where there is no bathroom). A child is 'multiply disadvantaged' if at least two out of these three conditions pertain to them or they are entitled to certain forms of state care listed in the law. Since the Roma are highly overrepresented among socially disadvantaged persons, measures aimed at preventing or compensating for disadvantages linked to the 'disadvantaged' or 'multiply disadvantaged' status are almost inevitably targeting them in larger proportions than the majority population.

Positive action measures directly targeting the Roma can be quoted from the field of education, vocational training and employment. There is no relevant case law in Hungary.

B) Examples

Example 1: 'For the Road Stipend Programme'

A mixture of the two approaches is applied in the stipend programme operated by the Government for 'disadvantaged' and/or Roma primary and high school pupils/students. According to Article 6 Paragraph (2a) of Decree 152/2005 of the Government on the 'For the Road Stipend Programme',[40] at least 50 % of the children receiving support shall be of Roma origin (if not all the places reserved for Roma can be filled due to a lack of applications, non-Roma children can also be admitted at the expense of the quota for Roma). Pupils/students and mentors shall apply jointly to the programme. Mentors shall –

38 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, (2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról), 28 December 2003.

39 Hungary, Act XXXI of 1997 on the Protection of Children and the Administration of Guardianship (1997. évi XXXI. törvény - a gyermekek védelméről és a gyámügyi igazgatásról), 8 May 1997, Article 67/A.

40 Hungary, Decree No. 152/2005 of the Government on the 'For the Road Stipend Programme' (Korm. rendelet az Útravaló Ösztöndíjprogramról), 2 August 2005.

among others – prepare a development plan for the child, evaluate the child's progress regularly, spend at least two hours per week on mentoring the child and maintain regular contacts with the child's teachers. Participants in the programme receive a monthly stipend.

Example 2: Vocational training and employment of Roma women

This project was implemented with the financial support of the European Social Fund and was aimed at facilitating the training and employment of Roma women in certain caring professions (such as kindergarten nurse, nursing assistant, nurse, social worker and youth supervisor). The programme was open to unemployed women willing to declare their Roma origins. During the training, they received mentoring and financial support, while their job search was facilitated by a grant provided by the Government to employers undertaking to employ the beneficiaries for at least 15 months. Eligible costs – in the region of HUF 2 million to HUF 20 million (EUR 5 200 to EUR 52 000) – included salary and tax costs relating to the employment of the beneficiaries, medical checks, costs relating to the management of the project, small-value equipment, work clothing, etc.[41] According to the Government, under the framework of the programme (it closed in May 2023), 1 134 beneficiaries received certification in their respective professional fields, and 80 % of the participants continued to work for the employers supported by the programme, even after that support had come to an end.[42]

Example 3: Positive measures in university admissions for disadvantaged groups

An example of a type of (indirect) positive action was provided by Article 24(1) of Government Decree 423/2012 on the Admission Procedures of Universities,[43] which was in force between January 2013 and 1 September 2023. Under this provision, 40 points had to be added to the number of points achieved by 'disadvantaged' applicants, applicants with disabilities and applicants with caring responsibilities relating to children (in a system in which the maximum number of points was 500, and admission was based on the number of points). As the result of an amendment to the Decree, it currently falls within the competence of the universities to decide how many additional points they grant to such applicants: this number cannot be less than 1 or more than 10, in terms of the new Article 34 of the Decree.

Example 4: Stipends for Roma students in secondary education

Under Decree 24/2019 of the Minister of Interior on the Roma Nationality Educational Stipend,[44] students of those institutions of secondary education that provide certain forms of minority education can apply for a stipend of HUF 30 000 (EUR 80) per month, paid for a maximum of two academic years. The students must make a statement that they belong to the Roma minority and must authorise the Ministry to process this information (which otherwise falls under the scope of particularly sensitive personal data).

41 See: https://docplayer.hu/2330778-No-az-esely-programismerteto-a-tamop-5-3-1-b-1-11-1-projektrol.html.
42 See: https://kormany.hu/hirek/a-roma-noket-felzarkoztato-program-sikeres-zarasa.
43 Hungary, Government Decree No. 423/2012 on the Admission Procedures of Universities (423/2012. (XII. 29.) Korm. rendelet a felsőoktatási felvételi eljárásról), 29 December 2012.
44 Hungary, Decree No. 24/2019 of the Minister of Interior on the Roma Nationality Educational Stipend (24/2019. (VI. 7.) BM rendelet a Roma Nemzetiség Tanulmányi Ösztöndíjáról), 7 June 2019.

France: A contrasting approach to positive action

Overview

France provides a noteworthy contrast to the regulation and implementation of positive action in countries such as Bulgaria, Greece and Hungary. Unlike these countries, France does not adopt explicit positive action measures based on racial or ethnic origin due to its unique legal and philosophical approach to equality and non-discrimination. It does recognise de facto ethnic and racial discrimination, and enforces the legal framework of the directives very actively. It focuses on the reasoning, behaviour and attitude of the discriminator and acts on the basis of the assumed characteristics as perceived by them based on 'supposed race and ethnicity'. However, racial and ethnic legal categories aimed at the recognition of ethnicity and race as enforceable concepts by the state and by public and private actors are prohibited.

The French Constitution promotes equality before the law without distinction of origin, race, or religion. The principle of *égalité* (equality) is a cornerstone of the French Republic, emphasising equal treatment of all individuals as citizens without recognising any ethnic or racial categories. Furthermore, French law explicitly prohibits the collection of data on racial or ethnic origins. Religion, sexual orientation, opinions and convictions are not subjected to the same restrictions as race and ethnicity. These categories are recognised by the state but are sensitive data, subject to an extensive interpretation of the General Data Protection Regulation (GDPR)[45].

Despite the absence of explicit positive action measures, France employs various alternative strategies to address issues of inequality and discrimination.

1. Legal framework

The French legal framework does not integrate a general derogatory provision authorising unilateral implementation of positive action measures. Positive action measures per se have not been implemented by the legislature in relation to race, ethnicity, origin, religion, sexual orientation and opinions and convictions, as such characteristics are not reflected in legal categories recognised by law. The legislature has structured its intervention around talent search and integration programmes for foreign nationals, and by using proxies based on neutral factors such as territorial links to designated geographical, underprivileged social groups, or socioeconomic considerations or a travelling way of life.

2. Case law

The French Constitutional Council has held that any approach relating to (racial or ethnic) origin must be based on objective indications, such as the nationality of parents and grandparents, to allow the construction of 'objectively' comparative categories. French courts would thus never examine whether a person has or does not have a certain race or ethnic origin, as such categories are not recognised by law. Instead, with regard to alleged discrimination, courts examine the behaviour of the allegedly

[45] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

discriminating party or the impact of alleged indirect discrimination based on indications that lead to presumptions.

3. Policy measures

Policy initiatives are aimed at supporting underprivileged social groups by promoting equal opportunities as well as diversity in employment and integration programmes for foreign nationals. Such initiatives use proxies based on neutral factors, such as territorial links to designated geographical areas or intervention programmes based on socioeconomic considerations.

Example 1: Access to housing

The Traveller population is not defined by law other than by its travelling way of life. It benefits from a nationwide specific accommodation scheme, as municipalities of more than 5 000 inhabitants have an obligation to accommodate populations with a travelling way of life by providing settlement areas as stipulated by law.[46]. When a group of municipalities fails to meet this obligation, it can be challenged for this failure before the administrative courts. Moreover, the municipalities are then barred from seeking the removal of Travellers' trailers and from prohibiting parking. However, in practice, Travellers are concentrated in areas that have satisfied their legal obligations, while – as is recognised by Government – the number of spaces is insufficient for the needs of the Traveller population in these areas. As a consequence, the insufficiency of settlements in these specific areas continues to generate illegal parking, monitoring by the police and criminalisation of the travelling way of life by the large-scale issuance of fines.

Example 2: Education

The education system provides for special classes to integrate newly arrived foreign migrant children and Traveller children. Legislation provides for the accommodation of Travellers with the objective of integration in ordinary schools.

Legislation also provides for centres for the promotion of school attendance by non-French-speaking children who have recently arrived in France and Traveller children. In order to facilitate integration, children can register for school attendance directly with the centres, which accommodate, in the same structure, newly arrived migrant and Traveller children.

Comparison

Although France's refusal to validate the concepts of racial or ethnic origin has already been made clear, some similarities across all four countries can still be identified.

A) Similarities

The approaches of Bulgaria, Greece and Hungary on one side, and France on the other, are similar in that:

[46] France, Law No. 2000-614 of 5 July 2000 and technical requirements provided by Decree No. 2019-1478 of 26 December 2019, reviewing Law No. 90 449 of 31 May 1990.

- All four countries recognise the importance of positive action to address inequalities and have frameworks that permit or mandate such measures.
- A focus on the efforts to achieve substantive equality in education is shared across all four countries.
- All four countries share a strategic approach towards the socio-economic inclusion of their respective Roma communities.

B) Differences

The following differences could be noted:

- Bulgaria and Greece explicitly incorporate racial or ethnic categories into their legislation on positive action, whereas Hungary does not differentiate between the various protected grounds. However, all three countries have a track record on measures directly targeting minority groups such as the Roma.
- Out of the four countries, Greece is the only one that recognises positive action measures at the constitutional level.
- Unlike the rest, France relies on a universalist approach that does not recognise racial or ethnic categories, but uses only socio-economic criteria instead.
- Greece's case law has had the opportunity to justify positive action measures in the context of such measures having been challenged, whereas in Bulgaria, the only such case on record resulted in the measure at issue being deemed discriminatory by the courts. Hungary does not seem to have similar cases on record.
- As per the available data, France and Greece have a track record on positive action measures in the field of housing, whereas Bulgaria does not.

Overall, while Bulgaria, Greece and Hungary adopt direct positive action measures based on racial or ethnic origin and are influenced by the Racial Equality Directive in a way that promotes comparability and a relative consistency in such measures, France's unique model leads it to implement alternative strategies focusing on socio-economic disparities.

Conclusion and recommendations

As this article has illustrated, the European Union's approach to positive action, as guided by Article 5 of the Racial Equality Directive, varies across Member States. Bulgaria, Greece and Hungary each offer unique perspectives on how positive action can be legislated for and implemented, while France provides a contrasting approach that relies on universalist principles. This diversity highlights both the strengths and challenges of positive action within the EU framework. To foster a more inclusive society, stakeholders across the EU are called upon to consider several ways forward:

Strengthening legal frameworks and enforcement

While respecting national sovereignty, the EU can encourage Member States to harmonise their positive action legislation to ensure a more consistent and effective approach to combating racial and ethnic discrimination. This could involve developing EU-wide guidelines that provide a clear framework for implementing positive action measures.

Strengthening the enforcement of existing anti-discrimination laws is also crucial. This includes providing adequate resources to national equality bodies to ensure they can effectively monitor, report and act on instances of discrimination. The recently adopted Directives on Standards for Equality Bodies[47], upon their transposition in national legislations, provide at least some minimum binding standards to that end.

Promoting data collection and research

Despite the sensitivities around data collection on racial and ethnic origins, it is essential for identifying and addressing disparities. To that end, the Subgroup on Equality Data of the EU High Level Group on Non-discrimination, Equality and Diversity has issued a guidance note on the collection and use of equality data based on racial or ethnic origin.[48] Furthermore, binding standards on data collection and access to equality data are provided for in the newly adopted Directives on Standards for Equality bodies.

Exchanges of best practices

The EU can further the efforts of, inter alia, the European Network of Equality Bodies (Equinet)[49] and the European network of legal experts in gender equality and non-discrimination, as well as other expert contributors, in facilitating research on the effectiveness of various positive action measures and promoting the sharing of best practices among Member States. This will further, and necessarily, help countries to learn from each other's experiences and tailor their approaches to local contexts.

Increasing public awareness and engagement

Public awareness campaigns can educate citizens and stakeholders about the importance of positive action and dispel myths surrounding it. These campaigns can highlight the benefits of positive action for fostering social cohesion and economic prosperity.

Inclusive dialogue involving a broad range of stakeholders, including government bodies, civil society organisations, and the private sector, is essential. Creating platforms for these stakeholders to discuss challenges and solutions can lead to more innovative and effective positive action policies.

Accompanying positive action with socio-economic measures

47 Council Directive (EU) 2024/1499 of 7 May 2024 on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters 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 amending Directives 2000/43/EC and 2004/113/EC and Directive (EU) 2024/1500 of the European Parliament and of the Council of 14 May 2024 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 amending Directives 2006/54/EC and 2010/41/EU.

48 High Level Group on Non-discrimination, Equality and Diversity, Subgroup on equality data (2021), Guidance note on the collection and use of equality data based on racial or ethnic origin, Luxembourg.

49 See, *inter alia*, Equinet (2014), Positive Action Measures. The Experience of Equality Bodies, and Equinet (2021), Exploring positive action as a means to fight structural discrimination in Europe.

While interventions targeting racial/ethnic origin directly are essential, complementing them with socio-economic measures can broaden access to resources for all disadvantaged groups, including Roma and other minorities, who often face intersecting socio-economic and ethnic challenges.

Political commitment and leadership

Political leaders at both the EU and national levels must demonstrate a strong commitment to equality and anti-discrimination. Clear and consistent messaging from leadership can help to build public support for positive action measures. Developing and implementing comprehensive national action plans that align with EU directives can ensure a coordinated and sustained effort to address racial and ethnic disparities.

The journey towards a more inclusive and equitable European Union requires a multifaceted approach to positive action. By strengthening legal frameworks, promoting data collection, increasing public awareness, integrating socio-economic criteria and demonstrating political commitment, the EU and its Member States can make significant strides in combating racial and ethnic discrimination. These efforts will not only enhance equality, but also foster a more cohesive and prosperous European society. As stakeholders continue to engage in this ongoing discourse, the lessons learned and best practices shared will be instrumental in shaping a more inclusive future for all EU citizens.

Taking Stock of the EU Pay Transparency Directive's Intersectional Approach

Nozizwe Dube*

1. Introduction

Pay inequality entrenches insidious patterns of disadvantage within society. While the EU has historically viewed pay inequality as an issue of gender discrimination, pay inequalities are informed by more than sexism alone.[1] Pay inequalities between white women and black and other women from ethnic minority backgrounds, or between women with disabilities and non-disabled women, show that discrimination grounds such as gender, race, religion and disability are intersecting factors that create intersectional disadvantage.[2] Until the recent adoption of the 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 (hereinafter also referred to as the Pay Transparency Directive), the EU was yet to address this issue within its equal pay legislation.[3] Though the Pay Transparency Directive is a gender equality instrument adopted pursuant Article 157(3) TFEU, a closer look at some provisions reveals that it also regulates intersectional pay inequality.[4]

Intersectional discrimination is the result of the interaction of two or more discrimination grounds, causing unique disadvantage.[5] In intersectional discrimination, the discrimination grounds merge inseparably, so that it is impossible to attribute the disadvantage to a single ground. For example, women with disabilities can experience intersectional discrimination from the interlocking effects of practices that discriminate based on their gender and disability simultaneously. When the presence of disability discrimination is examined separately from that of gender discrimination, the intersectional discrimination is obfuscated and rendered invisible. To visualise intersectional discrimination, the constituent grounds must therefore be considered together

The Pay Transparency Directive's substantive recognition of intersectional discrimination is the first of its kind within EU equality legislation. Prior to this, recitals of the Framework Employment Directive and the Racial Equality Directive mentioned multiple discrimination or discrimination based on multiple

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1 Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law* (Oxford University Press 2012) p.14.

2 Emily Grabham, 'Decertifying Gender: The Challenge of Equal Pay' (2023) 31 Feminist Legal Studies 67, p.70.

3 See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32023L0970.

4 Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 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, OJ L132. Article 157 TFEU (former Article 119 TEC) enunciates the principle of equal pay for equal work irrespective of sex.

5 Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] University of Chicago Legal Forum 139, p.149.

grounds.[6] According to these recitals, women are often the victims of multiple discrimination. Multiple discrimination is the overarching term that covers all types of discrimination based on two or more grounds such as additive and intersectional discrimination.[7] Absent their justiciability, these recitals have not facilitated the acknowledgment of intersectional discrimination in the Court of Justice of the European Union's (hereinafter CJEU) case law thus far. There are numerous cases where intersectional discrimination has been raised (both explicitly and implicitly) before the CJEU, including *Parris*, *Z v Government Department*, and *OP v Commune d'Ans*.[8] Although these cases go beyond the scope of equal pay, their existence demonstrates the prevalence of intersectional discrimination across the EU. Consequently, the Pay Transparency Directive's regulation of intersectional discrimination broadens the principle of equal pay between women and men, so that it also covers pay inequalities experienced because of the interaction between gender and other discrimination grounds within EU equality law.[9]

This article explores the Pay Transparency Directive's intersectional approach, the problems its practical implementation may entail, and how to address these. The Pay Transparency Directive's regulation of intersectional discrimination is also discussed considering its tone-setting importance for EU equality law generally. Section 2 explains intersectionality and its main tenets. The third section identifies four points where potential challenges may arise when implementing an intersectional approach in cases brought forward in the context of the Pay Transparency Directive. The first challenge lies in correctly interpreting the Directive's definition of intersectional discrimination. Section 3.1 therefore commences with a discussion of the Directive's definition of intersectional discrimination considering the tenets of intersectionality. Additionally, potential challenges when attempting to acknowledge intersectional discrimination considering the CJEU's stance on this issue in prior case law are identified. Comparators, another feature in discrimination analysis, form the second challenge in intersectional claims. The difficulty in selecting an appropriate comparator in intersectional claims where two or more grounds conjoin is addressed in section 3.2. The next challenge, which is identified in section 3.3, is how the burden of proof, which requires the claimant to establish a *prima facie* case of discrimination before the burden of rebutting discrimination is shifted to the defendant, should be tailored to the reality of intersectional discrimination whereby multiple grounds underpin the disadvantage. Section 3.4 dissects how intersectional discrimination can be considered as an aggravating factor when sanctioning employers, and when it is relevant for awarding higher compensation to applicants on the receiving end of intersectional discrimination. The fourth section contains concluding remarks.

6 Recital 3 Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L303/16 (Framework Employment Directive); Recital 14 Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L180/22 (Race Equality Directive).

7 Susanne Burri and Dagmar Schiek, *Multiple Discrimination in EU Law. Opportunities for Legal Responses to Intersectional Gender Discrimination?* (European network of legal experts in the field of gender equality 2009) p.4.

8 CJEU, judgment of 24 November 2016,*Case C-443/15 Parris v Trinity College Dublin, EU:C:2016:897* concerned the intersection of discrimination based on sexual orientation and age; *Case C-363/12, Z v A Government Department, The Board of management of a community school, EU:C:2014:159* concerned the intersection of discrimination based on disability and gender; *Case C-148/22 OP v Commune d'Ans, EU:C:2023:378* concerned the intersection of religious and gender discrimination. On how the CJEU overlooked intersectionality in these cases, see Mathias Möschel, 'If and When Age and Sexual Orientation Discrimination Intersect: *Parris*' (2017) 54 Common Market Law Review 1835, p.1848; Dagmar Schiek, 'Intersectionality and the Notion of Disability in EU Discrimination Law' (2016) 53 Common Market Law Review 35, p.55; Nozizwe Dube, 'OP v. Commune d'Ans: When Equality, Intersectionality and State Neutrality Collide' [2024] Maastricht Journal of European and Comparative Law p.1.

9 On how international law has historically recognised the right to equal pay on grounds other than sex, see Laura Carlson, 'The EU Pay Transparency Proposed Directive – General Overview and Some Comments on the Rules on Enforcement and Sanctions' [2022] European Equality Law Review 1, p.6.

2. The main tenets of intersectionality: multiple, inseparable grounds and synergy

The term 'intersectionality' was coined following the analysis of discrimination cases initiated by black women whereby their race and gender interacted inseparably to give effect to a distinct disadvantage that could only be captured by looking at the interlocking vectors of sexism and racism.[10] The novelty of intersectionality was the articulation of the point that equality frameworks err by taking a single-issue approach to all forms of discrimination. A single-issue approach insists that everyone experiences discrimination based on a single discrimination ground at a time. The fragmented EU equality legislative framework, consisting of separate equality directives that cover different social areas and discrimination grounds, embodies this single-issue approach.[11] However, discrimination can also be the result of two or more discrimination grounds interacting inseparably and synergistically. As the current impasse in respect of intersectional discrimination in EU equality law that is discussed below shows, intersectional harm is obscured when courts take a single-issue or additive approach.

Alongside constituting of multiple discrimination grounds, synergy is another central tenet of intersectionality.[12] Synergy is the co-determination and interdependence of components such as discrimination grounds, whereby their interaction creates a new product that is larger than the sum of its parts.[13] Synergy therefore distinguishes intersectional discrimination from additive discrimination. With an additive approach, the discrimination occurs based on multiple grounds, but it is aggregative and not synergistic.[14] For example, a case involving a woman with a disability is approached additively when the gender discrimination and the disability discrimination are analysed separately, which implies that the role of the different grounds is distinguishable. While there is the recognition that multiple grounds are constitutive of the discrimination, synergy is lacking as the grounds are analysed separately. In other words, the claimant's identity is approached in a fragmented manner: she goes through the world as a woman and a person with a disability separately, as opposed to a woman with a disability simultaneously. An additive approach, because it lacks synergy, does not suffice in the face of intersectional discrimination.

3. Challenges to implementing the Pay Transparency Directive's intersectional approach

While intersectional discrimination is now recognised with the Pay Transparency Directive, this comes with its own set of challenges as the EU equality framework functions from a single-issue approach. This section discusses four potential challenges that the CJEU, national courts, equality bodies and legislatures may face when implementing and transposing the Pay Transparency Directive: appreciating the synergistic nature of intersectional discrimination, selecting an appropriate comparator, establishing the burden of proof, and awarding compensation and sanctions. Addressing

10 Kimberlé Williams Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' [1991] Stanford Law Review 1241, p.1244.
11 Raphaële Xenidis, 'Transforming EU Equality Law? On Disruptive Narratives and False Dichotomies' (2019) 38 Yearbook of European Law e2, p.e38.
12 Iyiola Solanke, 'Intersectionality in the UK: Between the American Paradigm and the European Paradox' (2016) 2 Sociologia del diritto 107, p.112.
13 Iyiola Solanke, 'The EU Approach to Intersectional Discrimination in Law' in Gabriele Abels and others (eds), *The Routledge Handbook of Gender and EU Politics* (Routledge 2021) p.95.
14 Shreya Atrey, *Intersectional Discrimination* (Oxford University Press 2019) p.85.

these challenges is important for EU equality law in general because the intersectional approach developed in pay transparency cases can be transferred to intersectional claims in the context of employment, access to goods and services, social protection, and education.

3.1. Appreciating the synergistic nature of intersectional discrimination

The principle of equal pay between women and men for equal work or work of equal value dates back to the EU founding treaties. Among several innovative aspects, one element of the Pay Transparency Directive's innovation lies in how it recognises that 'gender-based pay discrimination may involve an intersection of various axes of discrimination: on the basis of sex on the one hand, and racial or ethnic origin, religion or belief, disability, age or sexual orientation (…) on the other hand'.[15] The Pay Transparency Directive defines intersectional discrimination as discrimination based on a combination of sex and the grounds of disability, religion or belief, race and ethnicity, sexual orientation, and age.[16]

One of intersectionality's central tenets is the synergistic fusing of grounds. The Pay Transparency Directive's definition of intersectional discrimination acknowledges that the ground of sex *combines* with another ground or other grounds.[17] This definition leaves room for courts to construe the combination as one that is synergistic or additive. To acknowledge intersectionality, it is imperative for courts to understand the combination as synergistic. An additive approach, whereby the constituent discrimination grounds are viewed separately and remain distinguishable, is antithetical to the synergy underpinning intersectionality. It is noteworthy that the European Parliament's definition of intersectional discrimination in the amendments that did not make it to the adopted text was more accurate. The European Parliament defined intersectional discrimination as 'a situation in which (sex) 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 be inseparable, producing distinct and specific forms of discrimination'.[18] Here, the synergistic nature of intersectional discrimination is unambiguous. Courts should therefore interpret the Pay Transparency Directive's definition of intersectional discrimination in line with the European Parliament's approach. Additional support for this synergistic understanding of intersectionality can be found in the Pay Transparency Directive's recital 25 which clarifies that this combination should 'remove any doubt that may exist under the existing legal framework' and enables the relevant authorities 'to take due account of any situation of disadvantage arising from intersectional discrimination' for substantive and procedural purposes.[19] It can be argued that this inherently implies that the combination is synergistic, as an additive combination would not require a change to the previous legal framework.

It is particularly important to interpret the definition of intersectional discrimination appropriately because CJEU case law shows that the Court struggled to effectuate a synergistic approach. In *Parris*, a case about discrimination based on sexual orientation and age, the CJEU was unable to acknowledge

15 European Commission (2021) 'Explanatory Memorandum of 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, {SEC(2021) 101 Final} - {SWD(2021) 41 Final} - {SWD(2021) 42 Final}' p.10 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0093> accessed 31 May 2024.

16 Article 3(2)(e) Pay Transparency Directive.

17 Emphasis added.

18 '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' p. 49, amendment 67 https://www.europarl.europa.eu/doceo/document/A-9-2022-0056_EN.html> accessed 31 May 2024.

19 Recital 25 Pay Transparency Directive.

the intersectional discrimination because it disregarded the synergy of the grounds. *Parris* concerned a homosexual man who wanted to have a survivor's pension paid to his same-sex partner. The survivor's pension was only payable if the employee married or entered a civil partnership before reaching the age of 60. As Ireland had recognised same-sex civil partnerships after Parris's 60th birthday, his request to have his civil partner receive the survivor's pension was rejected. Parris argued that this constituted discrimination based on sexual orientation and age.[20]

In its analysis, the CJEU determined whether there was discrimination based on sexual orientation and age separately before assessing the possibility of discrimination based on the combined grounds. The CJEU held that there was no direct discrimination based on sexual orientation because homosexual partners were not treated less favourably than heterosexual partners, as the latter were also excluded from receiving a survivor's pension if they were not married or had not entered a civil partnership before the age of 60.[21] In addition, the CJEU held that because EU law did not require Ireland to provide for marriage or a form of civil partnership for homosexual couples, there was no indirect discrimination based on sexual orientation.[22] As for age discrimination, the CJEU held that the pension scheme's fixed age for entitlement to an old-age benefit was covered by Article 6(2) of the Framework Employment Directive, which allows for justifications of differential treatment on grounds of age.[23] In relation to intersectional discrimination, the CJEU held that where a rule does not result in discrimination based on sexual orientation or age, that rule does not produce discrimination based on the combination of those two grounds.[24]

As a result of *Parris*, the CJEU closed the door for acknowledging intersectional discrimination in EU equality law. The CJEU erred by construing intersectional discrimination as a sum of the constitutive grounds. After finding no discrimination based on sexual orientation and age separately, the conclusion was that there was no discrimination based on sexual orientation and age when they were added together. This additive approach is at odds with the synergy central to the concept of intersectionality. An approach conducive to intersectionality would have recognised that there was discrimination at play: intersectional discrimination whereby the grounds synergised to cause discrimination uniquely experienced by homosexual men of Parris's age.

As *Parris* demonstrates, without the recognition of synergy, the Pay Transparency Directive's intersectional discrimination provision risks remaining dormant and not effectuating the recognition of intersectionality. The CJEU must therefore change its *Parris* course. Simultaneously, national courts must correctly interpret the Pay Transparency Directive's intersectional discrimination definition considering its ambiguous nature. Legislators tasked with transposing the Pay Transparency Directive into national law therefore play a pivotal role as they can ensure that the inseparable nature of grounds and their synergy is emphasised when defining intersectional discrimination in national legislation. Centring the tenets of intersectionality when transposing the Pay Transparency Directive is imperative as the Directive's ambiguity could potentially lead to some Member States having national legislation

20 *Parris v Trinity College Dublin,* C-443/15, EU:C:2016:897, paras. 15-27.
21 *Parris v Trinity College Dublin,* C-443/15, EU:C:2016:897, paras. 49-50.
22 *Parris v Trinity College Dublin,* C-443/15, EU:C:2016:897, paras. 60-61.
23 *Parris v Trinity College Dublin,* C-443/15, EU:C:2016:897, paras. 75-76.
24 *Parris v Trinity College Dublin,* C-443/15, EU:C:2016:897, para. 81.

that defines intersectional discrimination synergistically, while other Member States' legislation encourages an additive approach.[25]

3.2. Comparison and comparators

The importance of understanding intersectionality as centring synergy and inseparability goes beyond definitional purposes. A sound understanding of intersectionality's tenets also ensures that the overall equality analysis is adjusted so that it is conducive to acknowledging intersectional discrimination. As discussed above, traditionally, equality law has prioritised a single-issue approach. The existence of intersectional discrimination accordingly requires an adjustment of equality analysis in its entirety. If courts fail to attune their equality analysis to intersectionality, it will inevitably negatively impact case outcomes.

A central feature of equality law analysis that must be adjusted in order to encompass intersectionality is the use of comparators. A comparator is a person in a comparable situation to the claimant but who does not possess the same personal characteristic the claimant argues is the reason for discrimination. In direct discrimination, the claimant traditionally argues that they are treated less favourably than the comparator because of a personal characteristic (such as gender, religion, or disability) they do not have in common. In indirect discrimination, the claimant traditionally compares the impact of an apparently neutral practice on the group they belong to (such as women, people with disabilities, religious people), to the impact of the apparently neutral practice on a group that does not share the claimant's personal characteristic (such as men, non-disabled people, non-religious people).[26]

In relation to the subject matter covered by the Directive, comparison plays a significant role in proving that male and female workers are carrying out the same work or work of equal value, which requires equal pay. The Directive states that comparing is not limited to situations where female and male workers work for the same employer, but can be extended to a single source establishing the pay conditions.[27] Examples of this latter scenario are when pay conditions are regulated by statutory provisions or collective agreements applicable to several employers, or when pay conditions are laid down centrally for multiple organisations or a business within a holding company or conglomerate.[28] Additionally, the comparison does not need be made between workers employed at the same time.[29] Furthermore, hypothetical comparators are possible, as they alleviate the problem of finding a 'real' comparator in highly gender-segregated employment markets.[30]

Comparison comes with challenges that become more apparent in intersectional claims. In single-ground claims, one comparator can suffice to substantiate discrimination. For example, a woman arguing that she is receiving lower pay than her male colleague who does the same work will use him as a single comparator. However, in intersectional claims with two or more grounds, the question as to how the comparison must be made arises. The case *Meister*, though not an equal pay case, illustrates

25 Currently, not all Member States have legislation covering intersectional discrimination, see Birte Böök, Alexandra Timmer and Raphaële Xenidis, *A Comparative Analysis of Gender Equality Law in Europe: The 27 EU Member States, Iceland, Liechtenstein, Norway, and the United Kingdom Compared* (European network of legal experts in gender equality and non-discrimination 2024) p.18–19.

26 Panos Kapotas, 'Comparators and Comparisons in EU Gender Equality Law' [2023] European Equality Law Review 21, p.21.

27 Pay Transparency Directive, Article 19(1) .

28 Recital 29 Pay Transparency Directive.

29 Article 19(2) Pay Transparency Directive.

30 Pay Transparency Directive, Article 19(3) and Recital 28 Pay Transparency Directive.

how complicated comparison becomes in intersectional claims.[31] Meister was a Russian national with a Russian degree in systems engineering that was declared equivalent to a similar German degree. Meister responded to Speech Design's software developer vacancy. Although Meister fulfilled the criteria, her application was rejected twice without an interview. Meister argued that she was discriminated against based on her sex, age, and ethnic origin.[32] The question relevant for the purposes of the analysis here was whether Speech Design was required to disclose information about the successful candidate so that Meister could know the suitable comparator to establish a *prima facie* case of discrimination. The CJEU held that although Meister was not entitled to have access to such information, courts can consider the defendant's refusal to grant access to such information as a factor raising a presumption of direct or indirect discrimination.[33]

Setting aside the CJEU's judgment, which comparator could Meister have used to substantiate the gender, age, and ethnic discrimination? A possible single comparator was a young man of non-Russian origin. This comparator is different from Meister on the three relevant fronts (gender, age, and ethnicity) and thus could expose the intersectional discrimination by highlighting how Meister was treated differently because of her gender, age, and ethnicity. However, problems with this single comparator can arise in intersectional claims. First, it is possible that a singular comparator for such an intersectional claim is not physically present. While the Pay Transparency Directive allows for hypothetical comparators for this very reason, the CJEU has not used hypothetical comparators thus far. Additionally, the difference between equal pay for equal work and equal value claims impacts the selection of a comparator significantly. Finding a comparator for equal work is relatively straightforward as there are the same work processes, working environments and working materials. Equal pay for work of equal value, however, concerns work that might appear different but is of equal value, nonetheless. Here, attention is paid to work criteria such as professional and training requirements, knowledge or skills, effort and stress, responsibility, tasks, and labour market conditions to determine comparability.[34] Such claims can require comparisons between midwives and clinical technicians for example, provided their pay conditions are attributable to the same employer or a single source establishing those conditions as the Pay Transparency Directive and EU equality law generally requires.[35] These types of comparisons in equal value claims can be better facilitated by the establishment of job evaluation systems that can aid courts in determining comparable professions.[36]

Secondly, while a single comparator in an intersectional claim can highlight a unique disadvantage, courts tend to argue that the absence of discrimination against people who share one or more personal characteristics with the claimant is a reason to conclude that there is no discrimination. For example, a court could use the absence of racial discrimination against black men as a reason to conclude that a black woman alleging intersectional gender and racial discrimination is not being racially discriminated against. Simultaneously, the absence of gender discrimination against non-black women could also be used as a rebuttal against gender discrimination experienced by black women. Such

31 *Case C-415/10, Galina Meister v Speech Design Carrier Systems GmbH, EU:C:2012:217.*
32 *Case C-415/10, Galina Meister v Speech Design Carrier Systems GmbH, EU:C:2012:217*, para. 29.
33 *Case C-415/10, Galina Meister v Speech Design Carrier Systems GmbH, EU:C:2012:217*, paras. 42-47.
34 Noreen Burrows, 'Equal Pay for Work of Equal Value' (*ERA*, 2010) p.2 <http://www.era-comm.eu/oldoku/SNLLaw/05_Equal_Pay/2010_09_Burrows_EN.pdf> accessed 27 September 2024.
35 *Case C-236/98, Jämställdhetsombudsmannen and Örebro läns Landsting, EU:C:2000:173*; *Case C-624/19 K v Tesco Stores Ltd, EU:C:2021:429*, para. 36-37.
36 Jane Pillinger, 'The Pay Transparency Directive: The Role of Hypothetical Comparators in Determining Equal Pay for Work of Equal Value' [2023] ETUI Policy Brief 3.

rebuttals are erroneous because they do not appreciate the synergy central to intersectionality. These comparisons, because they are regarded in isolation from each other, chop up the identity of the claimant into disconnected parts instead of appreciating their identity holistically.[37] Thus, even when making a comparison, the CJEU, national courts and legislators must be cognisant of synergy's importance. It is not because there is no gender discrimination against non-black women and no racial discrimination against black men that there is therefore no intersectional racial and gender discrimination against black women. Rather, black women, because they are at the epicentre of gender and racial discrimination, are uniquely harmed in a way that is not experienced by even those with whom they share one of the relevant personal characteristics (gender or race). Therefore, it is only when the comparisons with black men and non-black women are analysed together, that the particularity of the intersectional harm for black women becomes visible.

Comparisons such as those between black women and non-black women, and black women and black men respectively demonstrate that the CJEU must clarify its approach to using comparators in relation to intersectional claims. First, as explained below, such comparisons are intra-group comparisons and thus differ from the CJEU's traditional inter--group comparisons such as that made in *Parris* as demonstrated above. Secondly, such comparisons imply that multiple comparisons are possible in a single intersectional claim. While the former development has taken effect in EU equality law, the latter is awaiting clarification from the CJEU.

In equality cases, the CJEU has traditionally conducted inter-group comparison. Inter-group comparison occurs between a comparator that does not share the claimant's personal characteristic causing the discrimination.[38] Examples of inter-group comparison are comparisons between men and women, between people with disabilities and non-disabled people, and between religious and non-religious people. Recently, the CJEU has added a layer to its comparator approach and endorsed intra-group comparison. Intra-group comparison occurs between a claimant and a comparator who share at least one personal characteristic in common. Examples of intra-group comparison are those between women from racialised minorities and white women, or between Muslim women and Muslim men. The CJEU has endorsed such intra-group comparison in several cases,[39] including the headscarf case, *LF v SCRL*.

Although *LF v SCRL* was an employment discrimination case, it is relevant here because the claimant alluded to intersectional religious and gender discrimination.[40] The CJEU held that it is possible to compare people of different religions for the purpose of substantiating that neutrality regulations can have a disproportionate impact on religions with mandated headwear. While the CJEU endorsed the intra-group comparison between different religions, it did not engage with the other comparators offered that, when analysed together, highlighted the religious and gender discrimination at play.[41] For example, one of the multiple comparisons offered by the referring court was between Muslim women and Muslim men, thus requiring the CJEU to consider the differentiated impact of neutrality regulations on people who belong to the same religion yet experience the regulations differently depending on

37 Shreya Atrey, 'Comparison in Intersectional Discrimination' (2018) 38 Legal Studies 379, p.387.
38 Nozizwe Dube, 'LF v SCRL and the Court of Justice of the European Union's Intersectionality Problem' (2024) 49 European Law Review 200, p.208.
39 *Case C-193/17, Cresco Investigation GmbH v Markus Achatzi, EU:C:2019:43* with a comparison between different religions; *Case C-16/19, VL v Szpital Kliniczny im dra J Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie, EU:C:2021:64* with a comparison between people with disabilities who had submitted disability certificates on different dates.
40 *Case C-344/20 LF v SCRL, EU:C:2022:774*, para. 59.
41 *LF v SCRL*, C-344/20, EU:C:2022:774, para. 23.

their gender. However, the CJEU did not engage with these multiple comparators and did not go beyond endorsing the single intra-group comparison between different religions. As a single comparator sometimes does not suffice to depict intersectional discrimination, multiple comparators can be instrumental in establishing the intersectional religious and gender discrimination in such headscarf cases.

For the purposes of advancing intersectional claims, the CJEU must clearly endorse multiple comparators as part of its analytical apparatus. The combination of inter-group and intra-group comparators, or multiple intra-group comparators in an intersectional claim is advantageous for claimants aiming to portray the multi-dimensionality of their intersectional disadvantage. Additionally, multiple comparators are important for intersectional claims because it is when multiple comparators are analysed together that courts develop a synergistic interpretation of equality law which, in turn, enables the recognition of intersectional discrimination. To ensure that the CJEU's endorsement of intra-group comparison as well as the unleashed potential of multiple comparators in intersectional claims reach national courts, the European Commission can offer guidance to national legislatures tasked with transposing the Directive throughout the transposition period by specifically noting these developments within CJEU case law and linking them to the Pay Transparency Directive.

3.3. Burden of proof

Besides interpreting intersectional discrimination as synergistic disadvantage and embracing both inter-group and intra-group comparators, clarification as to how claimants of intersectional discrimination can establish a *prima facie* case of discrimination is needed. The CJEU has held that the substantive and procedural conditions for the enforcement of EU law must be framed in a way that enables the principle of equality to offer effective judicial protection.[42] In equal pay claims, this means that a claimant must first establish a *prima facie* discrimination claim, upon which the burden of proof is shifted to the employer to prove that there is no discrimination.[43] A claimant therefore needs evidence to substantiate their discrimination claim first.

In discrimination claims based on a single ground, the burden of proof is already a significant procedural and evidential hurdle for claimants. In such cases, claimants posit that they were discriminated against because they possess one personal characteristic that caused their disadvantage (direct discrimination), or that certain treatment had a disproportionately harmful effect on people with a certain personal characteristic (indirect discrimination).[44] Establishing a *prima facie* case of discrimination is already a significant challenge as it is difficult for claimants to gain access to discrimination evidence that is often in the hands of the employer.[45] This hurdle is magnified in intersectional claims where there are two or more discrimination grounds.

42 *Case C-109/88 Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss EU:C:1989:383*, paras. 13-14.

43 *Case C-127/92 Dr Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health, EU:C:1993:859,* para. 13; The provision that sets out the shift of the burden of proof is Article 18 Pay Transparency Directive.

44 In the *Bilka* case on indirect sex discrimination in equal pay, the CJEU held that a department store that excludes part-time employees from its occupational pension scheme, where that exclusion mostly affects women and there is no objective justification to do so, discriminates on the ground of sex. See*Case 170/84 Bilka-Kaufhaus GmbH v Karin Weber von Hartz EU:C:1986:204*, para. 31.

45 Panos Kapotas, 'Reversing the Burden of Proof in Discrimination Cases: A Losing Battle?' (2017) 3 International Labor Rights Case Law 442, p.443.

The Pay Transparency Directive, as its name suggests, sets certain obligations on employers to provide claimants with the necessary information to evidence their claims.[46] The Directive's second chapter contains several provisions aimed at remedying the information asymmetry between employers and employees in equal pay claims by requiring employers to offer certain information upon request from employees.[47] A closer look at these provisions reveals inconsistencies raising challenges that will mostly be encountered by claimants of intersectional discrimination.

For example, information about individual and average pay levels are useful for claimants to substantiate *prima facie* discrimination in equal pay cases. Articles 5 to 7 of the Pay Transparency Directive therefore allow applicants and employees to request pay information. However, while this information must be broken down by sex, the Directive does not require employers to gather data broken down according to grounds other than sex.[48] The hope that the inclusion of intersectional discrimination offered is subsequently dashed by the limited data disaggregation obligation that the Directive imposes on employers. Additionally, while Member States are required to provide gender pay gap data disaggregated according to age, this obligation was not extended to employers.[49]

An example that illustrates the challenge this contradiction in the Directive raises for claimants of intersectional discrimination in the context of equal pay would be black women who claim that they are awarded lower pay as compared to their white (both male and female) and black male colleagues with similar positions in the same company. In such a scenario, the black women can request information about pay disaggregated according to sex. However, they apparently will not receive information disaggregated according to race as the Directive does not require such data to be collected. This constitutes an obstacle for establishing a *prima facie* intersectional sex and race discrimination claim. The challenge with establishing *prima facie* intersectional claims can be more pronounced when it occurs at a collective level. For example, cleaners (predominantly women from ethnic minority backgrounds) who argue that their pay difference in comparison with janitors (predominantly men) in the same company constitutes intersectional gender and racial discrimination can initiate an equal pay case. While Article 15 of the Pay Transparency Directive allows *actio popularis* in the context of equal pay where such an action already exists in the Member State (it does not oblige other Member States who do not regulate collective action to provide this), the potential of collective action to achieve intersectional redress can be hampered in a context where data disaggregated according to some grounds is limited or absent.

The Pay Transparency Directive's centring of sex comes from the fact that it is a gender equality instrument that finds its legal basis in Article 157(3) TFEU, which provides for the European Union to adopt measures to ensure the application of the principle of 'equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value'. However, this is not the sole factor explaining why there is no requirement to collect data about pay differences disaggregated on other grounds. Another potential

46 Victoria E Hooton and Henry Pearce, 'As Clear as Mud: Assessing the Relationship between Proposed Pay Transparency Mechanisms and Data Protection Obligations in EU Law' (2023) 14 European Labour Law Journal 628, p.629.

47 Pay Transparency Directive, Articles 5-13.

48 Article 7(1) of the Pay Transparency Directive obliges employers to offer information on individual and average pay levels broken down by sex for workers performing the same work or work of equal value when they request this. Recital 25 and Article 3(3) do not require employers to collect data on grounds other than sex.

49 Article 31 of the Pay Transparency Directive requires Member States to provide gender pay gap data broken down by sex and age.

reason for not requiring the collection of data about grounds such as race goes back to concerns about the potential legal conflict that may arise between equality law and privacy and data protection concerns, as well as apprehensions and objections to the idea of classifying people along racial and ethnic lines.[50] Another consideration that possibly weighed against requiring the collection of data disaggregated according to other grounds is the financial cost of the task, considering that Member States are already required to provide support in the form of technical assistance and training to employers with fewer than 250 workers to facilitate their compliance with the Directive's obligations.[51]

Where such statistical data about other discrimination grounds is collected and used in equal pay cases, courts will have to apply an intersectional approach to the reading of this data. While the CJEU has used statistics to acknowledge gender discrimination,[52] intersectional claims will require courts to be attentive to the plight of sub-groups of women such as women with disabilities or women from ethnic minority backgrounds as opposed to statistics solely focusing on all women compared to men. Intersectional discrimination thus requires attention to intra-group disparities. Monitoring bodies, which the Pay Transparency Directive tasks with raising awareness on and addressing intersectional discrimination in relation to equal pay for equal work or work of equal value, also have an important role to play in highlighting both inter-group and intra-group disparities.[53] This responsibility is reiterated in the Equality Bodies Standards Directives, as they are tasked with considering intersectional discrimination when raising awareness, preventing discrimination, assisting victims, and promoting positive action and equality mainstreaming.[54]

Beyond statistics and (hypothetical) comparators, the Pay Transparency Directive states that any other evidence may be used to prove alleged pay discrimination.[55] The Commission can play a role here by studying and setting out this further possible evidence. This is an important aspect to clarify in general because proving intersectional discrimination is a challenge for claimants in equality cases beyond the realm of equal pay as well. One such alternative way of proving societal patterns of discrimination in other areas where discrimination occurs beyond equal pay is situation testing. Situation testing is a controlled experimental method aimed at showing discriminatory patterns in sectors,[56] which could be particularly important where data collection about certain grounds remains sensitive in some Member States.

Situation testing is a controlled experimental method aimed at showing discriminatory patterns in

50 Julie Ringelheim, 'Ethnic Categories and European Human Rights Law' (2011) 34 Ethnic and Racial Studies 1682, p.1684.
51 Article 11 Pay Transparency Directive.
52 For example, the CJEU relied on statistics to hold that the exclusion of domestic workers from protection against unemployment constitutes indirect sex discrimination. See: *Case C-389/20, CJ v Tesorería General de la Seguridad Social (TGSS), EU:C:2022:120*, paras. 45-46.
53 Article 29(3)(a) Pay Transparency Directive.
54 Article 5(2) and recital 16 Directive (EU) 2024/1500 of the European Parliament and of the Council of 14 May 2024 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 Amending Directives 2006/54/EC and 2010/41/EU, OJ L, 2024/1500; Council Directive (EU) 2024/1499 of 7 May 2024 on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters 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 amending Directives 2000/43/EC and 2004/113/EC, OJ L, 2024/1499.
55 Article 19(3) Pay Transparency Directive.
56 Rorive, I. and Centre for Equal Rights (CFER) (2009), *Proving Discrimination Cases: The Role of Situation Testing* (CFER/MPG) p.42.

sectors.[57] Situation testing involves setting up situations where fictional candidates with personal characteristics that may incite discrimination (such as people with disabilities and women) are presented to employers and other people instrumental in enabling access to goods or services without the latter knowing that they are being observed. Simultaneously, other fictional candidates without the same personal characteristics but in a comparable situation are also presented. The reactions to the two categories are compared, revealing statistical patterns of discrimination where present. Such statistical evidence of societal patterns of discrimination helps claimants to support their individual discrimination claims and thus establish a *prima facie* case of discrimination so that the burden of proof is shifted to the defendant. Although in some Member States situation testing is carried out and its results accepted as evidence in some court cases, other Member States remain apprehensive due to lack of awareness and guidance about situation testing.[58] The main drawback of situation testing is that it cannot be used in the context of pay inequality because examining this issue first requires the conclusion of an employment contract. Thus, situation testing cannot be conducted in the context of equal pay.[59] Notwithstanding this drawback, the Pay Transparency Directive's recognition of intersectional discrimination is likely to encourage intersectional claims in the context of other equality directives that pertain to social areas such as employment and access to goods and services (including housing) where situation testing is possible. It is therefore imperative that situation testing is conducted in an intersectional manner.[60] National legislatures can play a pivotal role by providing in law for the use of intersectional situation testing beyond the realm of equal pay, as its availability will substantively aid claimants to establish *prima facie* cases of intersectional discrimination in areas such as employment and access to goods and services such as housing.

3.4. Compensation and penalties

Within EU equality law, remedies must be effective, proportionate and dissuasive.[61] The principle of effectiveness requires that Member States must adopt measures that are sufficiently effective to achieve the objective of the legislation and to ensure that those measures may in fact be relied on before the national courts.[62] Dissuasive sanctions are those that have a real deterrent effect on the employer.[63] In that vein, when the breach of the prohibition of discrimination results in the awarding of compensation, that compensation must be adequate in relation to the damage sustained. This implies that the compensation must be proportionate. The Pay Transparency Directive reiterates that compensation or reparation must constitute real and effective compensation or reparation for the loss and damage sustained in a dissuasive and proportionate manner.[64] Article 23(1) on penalties also requires Member States to lay down rules on effective, proportionate and dissuasive penalties.

57 Isabelle Rorive and Centre for Equal Rights (CFER), *Proving Discrimination Cases: The Role of Situation Testing* (CFER/MPG 2009) p.42.

58 For examples of discrimination cases where situation testing was relied on in some Member States, see: Rorive, I. and Centre for Equal Rights (CFER) (2009), *Proving Discrimination Cases: The Role of Situation Testing* (CFER/MPG) pp.56-78.

59 Timo Makkonen, *Measuring Discrimination: Data Collection and EU Equality Law* (European Network of Legal Experts in the non-discrimination field 2007) p.47.

60 For Belgian examples, see Dounia Bourabain and Pieter-Paul Verhaeghe, 'Could You Help Me, Please? Intersectional Field Experiments on Everyday Discrimination in Clothing Stores' (2019) 45 Journal of Ethnic and Migration Studies p.2026; Abel Ghekiere, Billie Martiniello and Pieter-Paul Verhaeghe, 'Identifying Rental Discrimination on the Flemish Housing Market: An Intersectional Approach' (2023) 46 Ethnic and Racial Studies p.2654.

61 Christa Tobler, *Remedies and Sanctions in EC Non-Discrimination Law* (European Network of Legal Experts in the non-discrimination field 2005) p.9.

62 *Case 14/83, Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, EU:C:1984:153*, para. 18.

63 *Case 14/83, Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, EU:C:1984:153*, para. 23.

64 Article 16(2) Pay Transparency Directive.

The Pay Transparency Directive's consideration of intersectionality extends to remedies and sanctions. Intersectionality should be considered both when it comes to the claimant (for their compensation) and the employer (as it pertains to sanctions and penalties). Article 16(3) states that compensation or reparation must include, among other aspects, other relevant factors such as intersectional discrimination. Article 23(3) on penalties states that these 'shall take into account any relevant aggravating or mitigating factor applicable to the circumstances of the infringement, which may include intersectional discrimination'.[65]

This consideration of intersectionality in remedies and sanctions is a noteworthy development. The question that arises is what constitutes effective, proportionate and dissuasive compensation and penalties in intersectional claims specifically? To answer this question, the Pay Transparency Directive's definition of intersectional discrimination regains relevance. The Directive defines intersectional discrimination as discrimination based on a combination of sex and any other ground or grounds of discrimination protected under EU equality law. As noted, the acknowledgment of intersectional discrimination depends entirely on whether the CJEU will change its additive approach established in *Parris,* and instead take a synergistic approach. Moreover, recital 50 clarifies that where appropriate, compensation should consider damage caused by intersectional pay inequality and that Member States should not fix a prior upper limit for such compensation.

Here too, the reasoning for considering higher compensation and sanctions for employers must be done with cognisance of synergy. The reasoning for higher sanctions in intersectional discrimination cases can be approached in different ways. For example, in a case of intersectional gender and disability discrimination, a court can reason that because there is gender and disability discrimination separately, the employer's sanction should be doubled. Another reasoning for higher sanctions can be that because intersectional discrimination is the result of overlapping systems of oppression, it therefore disproportionately occurs in marginalised communities that are multiply burdened. Women with disabilities and women from ethnic minority backgrounds exemplify the marginalised communities that are located at the nexus of multiple systems of oppression, thereby impacting the lives of such women when it comes to accessing housing, employment, equal pay, education, and other key social areas. Additionally, due to its synergistic character, intersectional discrimination is more than the sum of its parts. Intersectional discrimination, which is the result of complex synergistic systems of discrimination that have built up over time, is therefore often insidious and difficult for courts to perceive.[66] The former reasoning is distinctively additive, while the latter demonstrates a synergistic understanding of intersectional discrimination.

Intersectional discrimination's insidious nature, its disproportionate occurrence among marginalised communities, as well as the fact that it is larger than the sum of its constituent parts can therefore justify labelling it as possessing an aggravating character that allows for higher sanctions. Similarly, the reasoning for awarding higher compensation to the applicant can also be approached in an additive or synergistic manner. Cognisant of how central synergy is to intersectionality, it is important that appropriate reasoning is extended to justifying elevated sanctions and compensation for intersectional discrimination.

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65 In recital 55, the Pay Transparency Directive reiterates that 'any other aggravating or mitigating factors that may apply in the circumstances of the case, for instance, where pay discrimination based on sex is combined with other protected grounds of discrimination should be taken into account'.

66 Atrey, S. (2019) *Intersectional Discrimination* (Oxford University Press) p.160.

4. Conclusion

The Pay Transparency Directive, with its intersectional discrimination provision, has the potential to facilitate the acknowledgment of intersectional aspects of pay inequality in future EU equal pay cases. This is a welcome development due to the prevalence of intersectional pay disparities across the EU. The Pay Transparency Directive's consideration of intersectionality goes beyond merely defining it for the purposes of this instrument. Intersectionality is considered when it comes to the selection of relevant comparators, the right to compensation and the awarding of sanctions, and for the awareness raising carried out by monitoring bodies across Member States.

While the Pay Transparency Directive takes the first legislative steps towards developing an intersectional EU equality framework in the context of equal pay, some practical challenges exist. First, to remain true to the tenets of intersectionality, the CJEU will have to amend the approach it took in *Parris*, where it viewed the constituent discrimination grounds in isolation from each other. Intersectional discrimination requires courts to be appreciative of synergy, which means that discrimination grounds fuse to create a unique experience of discrimination that cannot be acknowledged by approaching each ground separately. Secondly, courts must develop a way of conducting comparisons so that they visualise synergistic intersectional harm. The CJEU will have to clarify whether it is possible to use multiple comparators that include intra-group comparison in intersectional claims. Additionally, Member States can better facilitate equal value claims by establishing job evaluation systems that can aid courts in determining comparable professions. Thirdly, although the Pay Transparency Directive requires collected data to be disaggregated according to sex, data disaggregation according to other grounds is not an obligation. This means that claimants of intersectional discrimination, especially in cases where statistics can be useful to establish a *prima facie* case of discrimination before shifting the burden of proof to the employer, will face significant challenges in courts. This will not necessarily be a challenge in all Member States, as jurisdictions that already allow for data collection on grounds other than sex are permitted to do so because the Directive implies minimum harmonisation. To overcome the difficulties about data collection in other Member States, awareness needs to be raised about alternative ways of proving patterns of discrimination both in equal pay claims and in other general equality claims beyond the realm of equal pay. Finally, the justification for higher sanctions and compensation in intersectional claims must also be made in a way that emphasises that intersectional discrimination, because of its synergistic nature, is greater than the sum of its constituent parts and therefore not merely an additive exercise.

When the Pay Transparency Directive's intersectional discrimination provision is examined in the light of other EU equality directives, it becomes apparent that it focuses on intersectional claims exclusively in the context of equal pay and where sex is the main concern. However, intersectional harm also occurs both beyond equal pay and in cases in which sex is not a constitutive ground. *Parris*, involving the intersection of sexual orientation and age, illustrates this. As noted, the EU has a fragmented equality legislative framework with several equality directives covering different social areas and discrimination grounds. Consequently, the sex-centred definition of intersectional discrimination initiated in the Pay Transparency Directive has far-reaching consequences for EU equality law. More specifically, it means that every EU equality directive will require its own tailored definition of intersectionality.

On a positive note, when faced with intersectional claims beyond the context of equal pay, the CJEU could transfer its analytical approach developed through the Pay Transparency Directive to intersectional cases emerging from other EU equality instruments. The Pay Transparency Directive's regulation of intersectionality has already had an impact on other EU legislative instruments, including the Gender-Based Violence Directive and the Equality Bodies Standards Directive.[67] This demonstrates that the intersectional approach that will be developed by the CJEU within the context of the Pay Transparency Directive will set the tone for future intersectional claims in EU equality law in its entirety going forward. This strengthens the argument for guidance from the Commission to national legislators tasked with transposing the Pay Transparency Directive into national legislation. This guidance can play a role in ensuring that intersectionality is defined in a synergistic – not additive – manner. As this article has illustrated, a synergistic understanding of intersectionality can have a direct impact on the outcome of cases as it ensures that the approach to comparators, the burden of proof, and sanctions and remedies will be conducive to revealing and eradicating intersectional discrimination.

[67] Articles 16(4), 21(g), 33, 36(10) Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on Combating Violence against Women and Domestic Violence, OJ L, 2024/1385.

‘Pink tax’ and ‘tampon tax’: two persistent cases of sex discrimination

Alara Efsun Yazıcıoğlu*

1 Introduction

In the past 20 years, there has been widespread public debate on the issue of the ‘pink tax’ and the ‘tampon tax’. The very idea behind the popularisation of the two terms was to bring about meaningful change. Although the situation in respect of tampon tax has improved in several countries, there has been little progress in relation to pink tax.

Both pink tax and tampon tax refer to an additional amount paid by women. In everyday language, the term ‘pink tax’ is typically used to denote an additional amount charged for goods and services commercialised for women; and the term ‘tampon tax’ refers to an additional amount charged on women’s sanitary protection products. In more technical terms, ‘pink tax’ corresponds to ‘gender-based pricing’, which can be defined as ‘(…) the practice of providers or suppliers to offer the same or very similar products or services at prices which are different for women and men’,[1] while the additional amount denoted by ‘tampon tax’ is none other than value added tax (VAT). Although both terms relate to the imposition of additional charges on women, pink tax and tampon tax differ from each other to a significant extent. One is a practice employed by private companies, whereas the other results from the applicable VAT legislation and the tax policy followed by a country.

This article will analyse pink tax (gender-based pricing) and tampon tax from an EU law perspective. For the sake of simplicity, the two practices are examined in separate, similarly structured sections – Section 2, on gender-based pricing and Section 3, on tampon tax. First, the practices are briefly described and their approximate economic impact on the average consumer is highlighted. Then, the legal problem behind them is identified. Finally, the legal remedies currently available at EU level are set out, followed by suggestions of additional measures that may alleviate the problem. While the legal analysis as well as the potential solutions suggested are primarily based on EU law, similar remedies can be implemented in non-EU jurisdictions, with minor adjustments.[2]

2 Gender-based pricing

2.1 Gender-based pricing in numbers

Gender-based pricing has been the subject of several studies conducted by governmental organisations and academics. Initially, the research focused exclusively on services; later, it was

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1 An der Heiden, I., Wersig, M. (2017), *Gender Pricing in Germany*, German Federal Anti-Discrimination Agency, https://www.antidiskriminierungsstelle.de/SharedDocs/forschungsprojekte/EN/Studie_Preisdifferenzierung_n_Geschlecht_en.html.

2 The author of this article wrote a book relating to the same subject (Yazıcıoğlu, A. E. (2018), *Pink tax and the law: Discriminating against women consumers*, Routledge), which will be referred to where relevant.

extended to products. Regardless of their scope, many studies demonstrated that women are being charged more than men for substantially similar products and services.[3]

While a significant number of comprehensive studies indicate an overall negative economic impact of gender-based pricing on women, an exact amount per woman cannot be calculated. As a matter of fact, the actual economic repercussions of the phenomenon depend on a variety of factors, one of the most important of which is the country a woman lives in. For instance, gender-based pricing seems to be less pronounced in Europe than it is in the United States (US).[4] On this point, it must be underlined that when compared to studies conducted in the US, European studies are rather small-scaled.[5] The most comprehensive study identified by the author is the one conducted by Germany's Federal Anti-Discrimination Agency in 2017,[6] which reported that while services show gender-specific price differences, gender-based pricing of products is almost non-existent.[7] Consequently, a woman living in Berlin does not seem to be affected as significantly by gender-based pricing as a woman living in New York.[8]

2.2 Is gender-based pricing a genuine problem?

Whether we realise it or not, all individuals, and not only women, perform and signal their gender on a continuous basis,[9] since it is their natural state of being.[10] Gender stereotypes deeply embedded in our societies allow marketers and producers to easily convince consumers that they need products and services specifically engineered for their gender[11] (e.g. products that are more adapted to pH levels, hormones, personal care, etc).[12] Most consumers literally 'buy into' this essentialist-based marketing,[13] to the point where gender-neutral products often do not exist on the market and most consumers, not just women, opt for items that 'match' their gender, regardless of their price.[14] This general tendency forms the core of the problem: both sexes purchase gendered products, but women pay more for the

3 One of the most cited studies in the field is New York City Department of Consumer Affairs (2015), *From Cradle to Cane: the cost of being a female consumer*, December 2015. For an overview of different studies, see, for example, Berliner, M. R. (2020), 'Tackling the Pink Tax: A call to Congress to end gender-based price discrimination', *Women's Rights Law Reporter*, Vol. 42, No. 1/2, pp. 69-74 and Yazıcıoğlu, A. E. (2018), *Pink tax and the law: Discriminating against women consumers,* Routledge, pp. 24-27.

4 See New York City Department of Consumer Affairs (2015) *From Cradle to Cane: the cost of being a female consumer*, December 2015.

5 As far as identified by the author. See, for example, the research conducted by Matilda Kardetoft on gender-based pricing in the Swedish market for personal hygiene products: Kardetoft, M. (2022) 'The Pink Tax: An investigation of gender-based price discrimination in the Swedish market for personal hygiene products', master's thesis, Jönköping University, http://hj.diva-portal.org/smash/record.jsf?pid=diva2%3A1668432&dswid=5193.

6 An der Heiden, I., Wersig, M. (2017), *Gender Pricing in Germany*, German Federal Anti-Discrimination Agency.

7 An der Heiden, I., Wersig, M. (2017), *Gender Pricing in Germany*, German Federal Anti-Discrimination Agency.

8 See New York City Department of Consumer Affairs (2015) *From Cradle to Cane: the cost of being a female consumer*, December 2015.

9 Referred to as 'doing gender' in the literature.

10 For more information on this point, see, for example, Kramer, L. (2005), *The sociology of gender: A brief introduction*, 2nd edition, Roxbury Publishing Company.

11 Clearly, in some cases, products and services marketed to different genders may contain unfrivolous differences bringing actual value to consumers. These cases, however, remain beyond the scope of this contribution, since such price premiums cannot be analysed through the lens of gender-based pricing, which refers to the practice of charging different prices for 'the same or substantially similar' products or services on the basis of sex.

12 Duesterhaus, M., Grauerholz, L., Weichsel, R., Guittar, N. A. (2011), 'The cost of doing femininity: Gendered disparities in pricing of personal care products and services', *Gender Issues*, Issue 28, Springer, p. 187.

13 Duesterhaus, M., Grauerholz, L., Weichsel, R., Guittar, N. A. (2011), 'The cost of doing femininity: Gendered disparities in pricing of personal care products and services', *Gender Issues*, Issue 28, Springer, p. 187.

14 Duesterhaus, M., Grauerholz, L., Weichsel, R., Guittar, N. A. (2011), 'The cost of doing femininity: Gendered disparities in pricing of personal care products and services', *Gender Issues*, Issue 28, Springer, p. 187; Van Tilburg, M., Lieven, T., Herrmann, A., Townsend, C. (2011), 'Beyond "Pink It and Shrink It": Perceived product gender, aesthetics, and product evaluation', *Psychology and Marketing*, Vol. 32, No. 4, p. 435.

products concerned while men do not have to.[15] If men can purchase gendered products without paying an additional amount, why cannot women do the same? Why is the flower-scented deodorant marketed to women considered a more expensive deviation from the mountain-scented baseline product that is 'naturally' sold at a lower price?[16]

In countries where it exists, gender-based pricing tends to affect products and services designed for women across all price ranges, from the luxurious to the most ordinary, including the discounted ones. Women individually cannot escape such a widespread practice, regardless of the degree of diligence they employ and the amount of time they allocate to it.

Yet, even in countries where the existence of gender-based pricing remains almost unchallenged, like the US, whether the practice amounts to an actual problem has been subject to debate. Several arguments have been put forward to assert that gender-based pricing is merely a natural component of a well-functioning free market. Paradoxically, both the research and the real-life facts tend to indicate the absence of the three most commonly employed arguments to this end, namely: differentiation costs, women's willingness to pay more and higher consumer demand for goods and services commercialised for women.[17]

Such a lack of scientific proof points to a severe oversimplification of the phenomenon. An issue potentially impacting 51.1 % of the population in Europe and 49.7 % of the overall global population[18] certainly deserves to be analysed in the light of scientific evidence rather than on the basis of mere assumptions. This section briefly examines the three factors concerned in view of the scientific evidence. Since the last two factors are largely intertwined, they are examined together.

2.2.1 Non-existent differentiation costs

Studies conducted in the field by a significant number of different researchers and organisations have concluded that pink tax cannot be justified Studies conducted in the field by a significant number of different researchers and organisations have concluded that pink tax cannot be justified either by the use value[19] or the symbolic value[20] of the products and services concerned. All such surveys took into consideration branding, ingredients, appearance, materials, construction, efforts put into production, marketing and other potential differences between women's products and men's products, as well as between services rendered to women and services rendered to men.

15 For the same opinion, see Essary, D. A. (2022), 'Hitting the Wall: The next step in addressing the pink tax', *Arkansas Law Review*, Vol. 75, No. 4, p. 908.

16 Inspired by the example given by Berliner, M. R. (2020), 'Tackling the Pink Tax: A call to Congress to end gender-based price discrimination', *Women's Rights Law Reporter*, Vol. 42, No. 1/2, p. 87.

17 Country-specific economic justifications may also be put forward. For instance, Berliner mentions higher import taxes imposed on women's products by the Federal Government that get passed onto consumers in market prices as a commonly used justification for gender-based pricing. See, Berliner, M. R. (2020), 'Tackling the Pink Tax: A call to Congress to end gender-based price discrimination', *Women's Rights Law Reporter*, Vol. 42, No. 1/2, p. 74.

18 According to the World Bank's Gender Data Portal, https://genderdata.worldbank.org/en/indicator/sp-pop-totl-fe-zs?view=trend&geos=WLD.

19 Use value refers to the value determined in accordance with objective criteria, including the amount of labour necessary for the production, the quality of the materials used, as well as the usefulness of the product.

20 The value of a product or a service also depends on how much it is valued by potential consumers, for one reason or another, such as the perceived prestige of the establishment rendering the service and the fact that a product is offered exclusively on a limited-edition basis. On this point, see, for example, Southerton, D. (2011), 'Consumer Culture and Personal Life' in May, V. (ed), *Sociology of Personal Life*, Palgrave Macmillan, pp. 135-137 and Chang, H. J. (2014), *Economics: The User's Guide*, Pelican Books, pp. 121-122.

For instance, in the study it conducted in 2015, the New York City Department of Consumer Affairs reached the conclusion that women's products cost 7 % more than similar products for men, based on a selection of nearly 800 products from more than 90 brands with similar male and female versions and which were close in branding, ingredients, appearance, textile, construction and/or marketing.[21] In a similar vein, a study from Liston-Heyes and Neokleous[22] demonstrated that women were charged higher prices for haircuts even when they specifically asked for hairstyles identical to men. An analogous conclusion was reached by the German Federal Anti-Discrimination Agency's survey, which found that 89 % of hairdressers offer different rates for the same short haircuts for women and men, and that women pay on average an extra EUR 12.50.[23] On a similar note, the State of Vermont's inquiry into price disparities in dry-cleaning services established that women were charged up to EUR 4.65[24] (USD 5.20) more than men per shirt. The price difference was not based on the specificities of the shirts, since the service providers indicated their prices over the phone, without inquiring about the intrinsic characteristics of the shirts concerned.[25]

On this point, it is also important to underline that a variety of products and services commercialised for women may incur higher production costs due to androcentrism, i.e. the fact that masculine is taken as the standard and feminine as specific and different.[26] In sectors where the standard production process is designed to match men's needs, the relevant process to produce women's goods and services inevitably becomes a costly deviation.[27] For instance, dry cleaners in the US tend to justify the higher prices for women's services on the grounds that the machines are designed for men's dress shirts.[28] Similar arguments are also put forward by some product manufacturers.[29] Higher production costs incurred due to androcentrism cannot be interpreted as a valid reason for charging a price premium to women, who for a higher price are getting either the same or a substantially similar product or service obtained by men. For differentiation costs to constitute a justification for a price premium, the product or service should contain a feature that provides real value to consumers, such as dry-cleaning an embellished shirt compared to a plain white shirt.

21 New York City Department of Consumer Affairs (2015), *From Cradle to Cane: the cost of being a female consumer*, December 2015, p. 5.

22 Listen-Heyes, C., Neokleous, E. (2000), 'Gender-based pricing in the hairdressing industry', *Journal of Consumer Policy*, Vol. 23, No. 2, Springer, pp. 107-126.

23 An der Heiden, I., Wersig, M. (2017), *Gender Pricing in Germany*, German Federal Anti-Discrimination Agency, https://www.antidiskriminierungsstelle.de/SharedDocs/forschungsprojekte/EN/Studie_Preisdifferenzierung_n_Geschlecht_en.html.

24 As per the exchange rate in June 2016, calculated via the 'historical currency converter' of the Association of German Banks (Bankenverband), https://bankenverband.de/en/service/waehrungsrechner/historicalcurrencies/.

25 State of Vermont, the Office of the Attorney General and the Human Rights Commission (2016), 'Guidance on the Use of Gender in Pricing of Goods and Services', June 2016, http://hrc.vermont.gov/sites/hrc/files/gender-based%20pricing%20guidance.pdf (last accessed on 23 May 2024), p. 7.

26 The explanation of androcentrism as given by Berliner, M. R. (2020), 'Tackling the Pink Tax: A call to Congress to end gender-based price discrimination', *Women's Rights Law Reporter*, Vol. 42, No. 1/2, p. 86.

27 Berliner, M. R. (2020), 'Tackling the Pink Tax: a call to Congress to end gender-based price discrimination', *Women's Rights Law Reporter*, Vol. 42, No. 1/2, p. 87.

28 Berliner, M. R. (2020), 'Tackling the Pink Tax: A call to Congress to end gender-based price discrimination', *Women's Rights Law Reporter*, Vol. 42, No. 1/2, p. 87.

29 Berliner, M. R. (2020), 'Tackling the Pink Tax: A call to Congress to end gender-based price discrimination', *Women's Rights Law Reporter*, Vol. 42, No. 1/2, pp. 87-88.

2.2.2 Non-existent willingness to pay more

Willingness to pay can be defined as the maximum amount that a person is willing to pay to acquire a specified good or service.[30] By its very definition, willingness to pay is personal and may depend on several factors, including but not limited to a consumer's personal preferences and income. For a collective willingness to pay to exist, a certain group of individuals should share a variety of common characteristics and preferences. Establishing the exact nature of such characteristics and preferences, as well as their existence or absence, in the context of gender-based pricing is beyond the scope of this article. With this caveat in mind, a priori, women's shopping patterns and income seem to form the factors most likely to exert an influence on women's collective willingness to pay. The same observation holds true for the argument that women are purchasing more goods and services when compared to men.

Accordingly, for gender-based pricing to systematically result in higher prices for women consumers and for such a surcharge to be entirely accounted for by the basic dynamics of the market, women collectively should either have less controlled and rational shopping preferences and/or a larger income when compared to men.

2.2.2.1 Compulsive shopping? A hard pass for women

Given that individuals' self-control and willpower constitute highly important subjects, they have been analysed extensively through a variety of experiments, surveys and studies. One of the most pre-eminent studies in the field is the 'marshmallow test',[31] created by the psychologist Walter Mischel. Although the effect of sex differences on the marshmallow test is not always apparent and research on the matter is ongoing, in the population and age groups studied thus far, girls seemed to have an overall advantage in the cognitive self-control skills and motivations that enable the delay of gratification.[32] This outcome is consistent with the finding that throughout the school years, at least in the US, girls are generally rated higher on self-discipline measures than boys by their teachers, their parents and themselves.[33]

In other words, following from the findings of one of the most prominent studies in the field, women are far from being 'irrational consumers' who purchase gendered products without giving due consideration to the price tag.

2.2.2.2 Who earns less spends more?

The absence of irrational shopping patterns does not necessarily mean that gender-based pricing cannot be accounted for from a purely economic perspective. Gender-based pricing could still be a by-product of simple economic mechanisms if we accept the argument that women are ready to pay more for products and services adapted to their needs (which are more 'sophisticated' when compared

30 Hashimzade, N., Myles, G., Black, J. (2017), *A Dictionary of Economics*, 5th edition, Oxford University Press (e-publication version). Please note that the contributors refer to 'an economic agent', instead of 'a person'. The term was modified by the author for the sake of simplicity.

31 The marshmallow test was specifically designed to measure individuals' willpower, i.e. the ability to delay gratification and resist temptation. It was first conducted in the 1960s with pre-schoolers at Stanford University's Bing Nursery School. One of the key aspects making the conclusions reached by the test noteworthy is the periodic monitoring of the participants. For detailed information, see Mischel, W. (2014), *The Marshmallow Test*, Bantam Press.

32 Mischel, W. (2014), *The Marshmallow Test*, Bantam Press, p. 48.

33 Mischel, W. (2014), *The Marshmallow Test*, Bantam Press, p. 48.

to those for men) and that men simply do not attach that much importance to the products and services they purchase given that their needs are 'less elaborate' than those of women.

To be able to pay more for products and services, women would need to have a larger income at their disposal compared to men. As is well known, women almost systematically earn less than men due to different factors. Even in cases where factors such as unequal access to education and occupational segregation are removed and consideration is limited to men and women of similar background and education levels, a gender wage gap still exists. In 2022, it amounted to an average of 10.8 % in Europe and 12.1 % in the Organisation for Economic Co-operation and Development (OECD) countries.[34]

Clearly, expressing the gender wage gap as a static figure amounts to a simplification of the issue. The gap fluctuates based on a variety of factors, including different life circumstances, like marriage, the birth of a child[35] and geographical relocation.[36] In other words, the significance of the gender wage gap depends on the individual concerned. According to the research conducted by Goldin,[37] the most advantaged group of women seem to be those who graduated from a university, have never had a child and have never taken a leave of absence for more than six months.[38] However, even this particular group of women are prone to earn less in comparison with men.[39] Therefore, it can be concluded that women as a group do not have a larger disposable income when compared to men.

As per the basic mechanics of economics, a lower income normally translates into a higher price sensitivity. The gender wage gap should, thus, result in a lower price sensitivity of men when compared to women, and not vice versa.[40] In other words, men should be willing to spend more than women on the products or services of their choice, and not the other way round.

2.2.2.3 Algorithm, algorithm show us the trend, which sex is most willing to spend?

Carrying out research on shopping and spending patterns, both on a collective and on an individual basis, has been simplified to a great extent given the fact that the relevant information is already being collected by a number of big data aggregators.[41] Large data sets allow the platforms to label their users with an outstanding level of detail and precision. An individual's preferences, level of income, willingness to pay and other characteristics can be predicted quite accurately by algorithms and employed for different purposes, such as price determination. The algorithm known to be employed

34 According to the OECD data on the gender wage gap, https://data.oecd.org/earnwage/gender-wage-gap.htm.

35 In high-income countries, birth of a child accounts for up to 80 % of the difference between male and female labour-force participation. This phenomenon is commonly referred to as the 'motherhood penalty'. For more information on the issue, see, for example, *The Economist* (2024) 'Where is the "motherhood penalty" greatest?', 7 March 2024, https://www.economist.com/graphic-detail/2024/03/07/where-is-the-motherhood-penalty-greatest.

36 Goldin, C. (2021), *Career & Family: Women's century-long journey toward equity*, Princeton University Press, p. 162.

37 Professor Claudia Goldin was awarded the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel in October 2023 'for having advanced our understanding of women's labour and market outcomes', https://www.nobelprize.org/prizes/economic-sciences/2023/summary.

38 Goldin, C. (2021), *Career & Family: Women's century-long journey toward equity*, Princeton University Press, p. 163.

39 Goldin, C. (2021), *Career & Family: Women's century-long journey toward equity*, Princeton University Press, p. 163.

40 See also Rahmani, V., Kordrostami, E., Ford, J. (2019), 'Pink Tax Versus Blue Tax: Insights generated by the direct measurement of price elasticity of demand', *NA - Advances in Consumer Research*, Volume 47, Bagchi, R., Block, L., Lee, L. (eds), Duluth, MN: Association for Consumer Research, pp. 819-820.

41 The most notable big data aggregators on a worldwide basis, which are commonly referred to as the GAFA or The Four, consist of Google (Alphabet Inc.), Amazon.com, Facebook (Meta Platforms, Inc.) and Apple.

by Amazon.com is a key example in the field; it is known to change prices in real time based on the measured price elasticity[42] of demand.

In a study they conducted in 2019 in relation to shoes sold on Amazon.com, Rahmani, Kordrostami and Ford focused on measuring the impact of gender on price elasticity. The researchers measured the price elasticity of demand through the collection and examination of information for 45 consecutive days, creating a sample of 360 000 product/day observations.[43] They observed a difference in price elasticity resulting in a 44.6 % 'blue tax' on men's products.[44] In a further study, Rahmani, Kordrostami and Ford found strong evidence that Amazon.com charges men price premiums across 12 product categories spanning 5 industries.[45] These findings support the assumption that women are more price sensitive than men and show that a product sold under the same brand name and with similar online review information on Amazon.com tends to be priced higher if it is sold to men rather than to women.[46] As the researchers put it, '(...) a pricing algorithm devoid of human biases would indeed price men's products higher than women's products'.[47]

It is indisputable that findings of studies concentrating on prices offered by e-commerce platforms to consumers on the basis of their sex may vary from time to time, country to country and product to product. They may also shed some light on different aspects of gender-based pricing. For instance, in a study they conducted around the same time and on the same platform as Rahmani, Kordrostami and Ford, Brand and Gross found that clothing item recommendations, i.e. recommendations made by the algorithm after the selection of an item, display an average price premium of 28 %, i.e. the price of the recommended clothing item is, on average, 28 % higher than the price of the item being viewed by the consumer.[48] This price premium is 5 % higher for product recommendations targeted at women.[49] The researchers stress that their study shows the potential of fashion recommendation systems to reproduce 'sexist pricing strategies'.[50] While there is still room for research in this particular area, women's lower price sensitivity has yet to be demonstrated, while men's lower price sensitivity (at a rate of 44.6 %) has already been evidenced by a study in the field.

42 Price elasticity can be defined as the responsiveness of quantity demanded to a change in price. Price elasticity is measured as the ratio of the percentage change in quantity demanded to the percentage change in price. See, Rutherford D. (2012), *Routledge Dictionary of Economics*, Taylor & Francis Group, p. 469.

43 Rahmani, V., Kordrostami, E., Ford, J. (2019), 'Pink Tax Versus Blue Tax: Insights generated by the direct measurement of price elasticity of demand', *NA - Advances in Consumer Research*, Volume 47, Bagchi, R., Block, L., Lee, L. (eds), Duluth, MN: Association for Consumer Research, p. 819.

44 Rahmani, V., Kordrostami, E., Ford, J. (2019), 'Pink Tax Versus Blue Tax: Insights generated by the direct measurement of price elasticity of demand', *NA - Advances in Consumer Research*, Volume 47, Bagchi, R., Block, L., Lee, L. (eds), Duluth, MN: Association for Consumer Research, p. 819.

45 Rahmani, V., Kordrostami, E., Ford, J. (2019), 'Pink Tax Versus Blue Tax: Insights generated by the direct measurement of price elasticity of demand', *NA - Advances in Consumer Research*, Volume 47, Bagchi, R., Block, L., Lee, L. (eds), Duluth, MN: Association for Consumer Research, p. 819.

46 Rahmani, V., Kordrostami, E., Ford, J. (2019), 'Pink Tax Versus Blue Tax: Insights generated by the direct measurement of price elasticity of demand', *NA - Advances in Consumer Research*, Volume 47, Bagchi, R., Block, L., Lee, L. (eds), Duluth, MN: Association for Consumer Research, p. 819.

47 Rahmani, V., Kordrostami, E., Ford, J. (2019), 'Pink Tax Versus Blue Tax: Insights generated by the direct measurement of price elasticity of demand', *NA - Advances in Consumer Research*, Volume 47, Bagchi, R., Block, L., Lee, L. (eds), Duluth, MN: Association for Consumer Research, p. 819.

48 Brand, A., Gross, T. (2020), 'Paying the Pink Tax on a Blue Dress-Exploring Gender-Based Price-Premiums in Fashion Recommendations' in Bernhaupt, R., Ardito, C., Sauer, S. (eds), *Human-Centered Software Engineering, HCSE 2020, Lecture Notes in Computer Science*, Vol. 12481, Springer, p. 193.

49 Brand, A., Gross, T. (2020), 'Paying the Pink Tax on a Blue Dress-Exploring Gender-Based Price-Premiums in Fashion Recommendations' in Bernhaupt, R., Ardito, C., Sauer, S. (eds), *Human-Centered Software Engineering, HCSE 2020, Lecture Notes in Computer Science*, Vol. 12481, Springer, p. 190.

50 Brand, A., Gross, T. (2020), 'Paying the Pink Tax on a Blue Dress-Exploring Gender-Based Price-Premiums in Fashion Recommendations' in Bernhaupt, R., Ardito, C., Sauer, S. (eds), *Human-Centered Software Engineering, HCSE 2020, Lecture Notes in Computer Science*, Vol. 12481, Springer, p. 196.

On the basis of the explanations provided in this section, it can be stated that the sex with the actual ability and the will to spend more is the male. What is more relevant from the perspective of our analysis is the fact that women's willingness to pay more or tendency to purchase more products and services has yet to be established by scientific studies. Accordingly, for the purposes of the analysis conducted in this contribution, it can be concluded that the practice of pink tax cannot be justified by mere economic factors.

2.3 Gender-based pricing constitutes unlawful sex discrimination

Sex discrimination may be defined as any distinction, exclusion or restriction made on the basis of sex, which is not reasonably and objectively justified as a proportionate means to achieve a legitimate aim, and which has the effect or purpose of impairing or nullifying the exercise or enjoyment of internationally protected human rights, fundamental freedoms in the political, economic, social, cultural fields or any other field, and rights under national laws.[51]

Discrimination may take two forms: direct and indirect. Direct sex discrimination is different treatment explicitly based on grounds of sex differences, whereas indirect sex discrimination occurs '(...) when a law, policy, programme or practice appears to be neutral as it relates to men and women but has a discriminatory effect in practice (...)'[52] on members of one sex (whether that is men or women).

Gender-based pricing is the practice of charging a different price for the same or substantially similar consumer goods or services on the basis of sex, which usually results in overpricing of goods and services manufactured for or rendered to women. Since in the majority of cases women are expressly targeted on the sole basis of their sex, it can be concluded that overall gender-based pricing constitutes a practice that gives rise to direct sex discrimination.[53]

2.4 Potential legal remedies

Research on gender-based pricing should be further advanced in Europe since the implementation of effective legal remedies is dependent on the establishment of the extent as well as the economic impact of the practice. For instance, the severity of gender-based pricing is likely to vary from Member State to Member State, which may justify implementation of different measures. In this section, the phenomenon is examined from a broad perspective.

Most constitutions provide for a specific clause relating to equality between men and women and/or a non-discrimination clause enumerating prohibited grounds,[54] which generally include sex. Equal treatment on the basis of sex and non-discrimination are also guaranteed by EU law. For instance, under Article 8 of the TFEU, the Union should aim to eliminate inequalities and promote equality between men and women in all its activities; under Article 21(1) of the Charter of Fundamental Rights

51 The same definition was previously used by the author. See Yazıcıoğlu, A. E. (2018), *Pink tax and the law: Discriminating against women consumers,* Routledge, p. 80.

52 Byrnes, A. (2012), 'Article 1' in Freeman, M. A., Chinkin, C., Rudolf, B. (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women, A Commentary,* Oxford University Press, p. 65.

53 For a similar opinion, see Berliner, M. R. (2020), 'Tackling the Pink Tax: A call to Congress to end gender-based price discrimination', *Women's Rights Law Reporter,* Vol. 42, No. 1/2, pp. 88-89 and Essary, who refers to gender-based pricing as a form of 'routine discrimination' in Essary, D. A. (2022), 'Hitting the Wall: The next step in addressing the pink tax', *Arkansas Law Review,* Vol. 75, No. 4, p. 887.

54 For an overview of different clauses, see UN Women 'Global Gender Equality Constitutional Database', https://constitutions.unwomen.org/en/search?f%5B0%5D=provisioncategory%3A682.

of the European Union (CFREU), any discrimination based on the ground of sex is prohibited; and under Article 23(1) of the CFREU, equality between women and men in all areas is guaranteed.

Since gender-based pricing amounts to direct sex discrimination, it can, in theory, be prohibited on the sole basis of the principle of non-discrimination. In practice, however, abolishing gender-based pricing through non-discrimination clauses seems challenging, especially due to a general lack of understanding of the issue even by the competent courts. For instance, in its decision in *Schulte vs. Conopco Inc. and others* relating to gender-based pricing of antiperspirants, the US Court of Appeals for the Eighth Circuit held: 'Schulte mistakes gender-based marketing for gender discrimination. She ignores that different scents, packaging, and labels make the products potentially attractive to different customers with different preferences'[55] and: 'If Schulte's primary concern is price, she is free to purchase the Men+ Care antiperspirant. (…) She just does not want to pay extra for her preference (…)'.[56] In a similar vein, in relation to the same case, the lower instance court held: 'Women are able to purchase any of the Dove antiperspirants for the same price as men regardless of scent or variety'.[57]

An efficient way to prevent gender-based pricing would be the enactment of a specific law or regulation. In EU law, a directive applicable in the context of gender-based pricing already exists: Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. It is important to recall that the Directive provides a framework for national laws and is not directly applicable to individual cases.

Directive 2004/113/EC does not specifically refer to gender-based pricing but covers access to and supply of goods and services in broad terms. It requires Member States to ensure that judicial and/or administrative procedures are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment on the basis of sex[58] with regard to access to goods and services, and that real and effective compensation or reparation is provided for loss and damage sustained by a person as a result of discrimination, in a way that is dissuasive and proportionate to the damage suffered.[59] The Directive also underlines that when persons who consider themselves wronged because the principle of equal treatment has not been applied to them with regard to access to goods and services establish 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.[60] In addition, the Directive contains a provision on penalties to be applied in cases of infringements.[61]

As demonstrated in the field of insurance, the Directive may prove to be an efficient instrument in counteracting gender-based pricing, insofar as it contains specific and clear rules. Amongst the provisions of the Directive dedicated to the field of insurance,[62] a particularly notable one is the provision contained in Article 5(1), which expressly indicates: 'Member States shall ensure that in all

55 United States Court of Appeals for the Eighth Circuit, No. 20-2696, *Karen Schulte vs. Conopco, Inc, and others*, 18 May 2021, p. 4.
56 United States Court of Appeals for the Eighth Circuit, No. 20-2696, *Karen Schulte vs. Conopco, Inc, and others*, 18 May 2021, p. 5.
57 United States District Court, Eastern District of Missouri, Eastern Division, *Schulte v. Conopco, Inc.*, Case No. 4:19 CV 2546 RWS, 17 July 2020, para. 14.
58 Article 8(1) of Directive 2004/113/EC.
59 Article 8(2) of Directive 2004/113/EC.
60 Article 9(1) of Directive 2004/113/EC.
61 Article 14 of Directive 2004/113/EC.
62 See, in particular, Preambles 18 and 20, as well as Article 5 of Directive 2004/113/EC.

new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.' The provision provides for a tangible identification of gender-based pricing in the context of insurance and imposes a concrete obligation.

It is important to note that the Directive granted a certain level of discretion to Member States in Article 5(2), according to which Member States could decide to permit proportionate differences in individuals' premiums and benefits where the use of sex was deemed to form a determinant factor in the assessment of risk based on relevant and accurate actuarial and statistical data. This provision was declared invalid by the Court of Justice of the European Union (CJEU) in its decision rendered on 1 March 2011.[63] After indicating that the purpose of Directive/2004/113/EC in the insurance services sector is the application of unisex rules on premiums and benefits and that in accordance with the provisions of the Directive, the use of sex as an actuarial factor must not result in differences in premiums and benefits for insured individuals,[64] the Court held that the provision contained in Article 5(2) enabled Member States to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits and that such a possibility worked against the achievement of the objective of equal treatment between men and women.[65] Following this judgment, and despite the fact that sex is one of the most frequently used pricing factors in health insurance markets, insurance companies in Europe ceased to use sex as a pricing variable and began to offer new 'unisex' health plans.[66]

It can be concluded that the provisions contained in the Directive, together with the intervention of the CJEU, ensured the efficient prevention of gender-based pricing in the field of insurance. Other fields tainted by gender-based pricing could certainly benefit from a similar approach. To this end, an additional set of rules would need to be introduced into the Directive. To ensure a maximum level of efficiency, such additional rules should relate to both services and products. Regarding the former, service providers should be held liable to adopt transparent pricing policies and to charge additional amounts exclusively on the basis of objective criteria, such as the duration of the service and the specific materials used to render the service. All pre-established prices based on sex must be explicitly prohibited. Concerning the latter, price disparities established on the basis of the targeted consumer group's sex should be proscribed, provided that the products can be deemed 'substantially similar'.[67] The criteria used in the proposed 2016 amendment[68] of the Gender Tax Repeal Act of the State of California[69] are particularly suitable to establish substantially similar products. The proposed amendment defined goods of a substantially similar or like kind on the basis of the following criteria: (i) they share the same brand; (ii) they share the same functional components; and (iii) they share

63 Judgment of 1 March 2011, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, C-236/09, ECLI:EU:C:2011:100, 2011 I-00773.

64 Judgment of 1 March 2011, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, C-236/09, ECLI:EU:C:2011:100, 2011 I-00773, para. 30.

65 Judgment of 1 March 2011, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, C-236/09, ECLI:EU:C:2011:100, 2011 I-00773, para. 32.

66 For the impact of unisex health plans on the German health insurance market, see Huang, S., Salm, M. (2020), 'The effect of a ban on gender-based pricing on risk selection in the German health insurance market', *Health Economics*, Vol. 29, pp. 3-17.

67 As mentioned above (2.3), gender-based pricing is the practice of charging a different price for *the same* or *substantially similar* consumer goods or services on the basis of sex. In relation to goods, establishing criteria to determine 'substantially similar' products would be sufficient, since the threshold is set lower in the context of 'substantially similar' goods when compared to 'same goods'.

68 SB-899, Gender discrimination: pricing, 2015-2016.

69 Assembly Bill No. 1088, Civil rights: Gender discrimination, State of California, 1995.

90 % of the same materials or ingredients.[70] The scope of the term 'goods' should not extend to goods that are clearly not targeted at a particular sex, such as foodstuffs. Such goods should, however, be exhaustively enumerated so as not to give rise to uncertainties in practice.[71]

Laying out clear rules would establish legal certainty in the field and benefit both goods/services providers and consumers. While the obligation to follow the general framework provided by the applicable law may *prima facie* seem to form an additional burden on goods/services providers, a clear legal recognition of the phenomenon would enable them to refrain from practices giving rise to direct sex discrimination and thereby avoid any potential legal problems as well as reputational damage. Such restraint would also result in more equal pricing for consumers. Moreover, a legal framework would allow consumers to pinpoint the cases of gender-based pricing in their daily lives; to distinguish genuine cases of harmful gender-based pricing from legitimate price differences; and to understand the relevant implications of the phenomenon. In other words, with clear rules in place, consumers would become better equipped to recognise an actual case of sex discrimination when and to the extent where it occurs.

For the rules to effectively curb the practice of gender-based pricing, their enforcement should be as efficient as possible. Given the involvement of consumers, practicability would play a significant role in this particular field. Having a facilitated procedure and not bearing an unreasonable and substantial burden to prove the very existence of gender-based pricing, especially regarding products, would play a pivotal role from a consumer perspective. In fact, placing the main responsibility for enforcing equal pricing on the competent authorities and considering requests made by consumers only as a secondary means would be a more suitable strategy. On this point, the provisions of Council Directive (EU) 2024/1499 on standards for equality bodies[72] are of great relevance. By granting national equality bodies[73] (among other competences) the ability to receive complaints of discrimination directly from the victims;[74] the ability to offer the parties involved an alternative dispute resolution mechanism;[75] the power to conduct an inquiry into whether a breach of the principle of equal treatment laid down in Directive 2004/113/EC[76] has occurred;[77] the authority to issue non-binding opinions or binding decisions;[78] and the right to take part in the court proceedings,[79] the Council Directive facilitates the legal procedure to a significant extent. By the time the transposition stage of the Directive is completed

70 Section 1, 51.6(e)(1) of the Amendment.

71 A similar suggestion has already been made by the author. See Yazıcıoğlu, A. E. (2018), *Pink tax and the law: Discriminating against women consumers*, Routledge, pp. 84-86. For an overview of different legal instruments already adopted in the US, see Berliner, M. R. (2020), 'Tackling the Pink Tax: A call to Congress to end gender-based price discrimination', *Women's Rights Law Reporter*, Vol. 42, No. 1/2, pp. 93-104. For potential shortcomings of a legal instrument on the issue, see Essary, D. A. (2022), 'Hitting the Wall: The next step in addressing the pink tax', *Arkansas Law Review*, Vol. 75, No. 4, pp. 914-919.

72 Council Directive (EU) 2024/1499 of 7 May 2024 on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters 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 amending Directives 2000/43/EC and 2004/113/EC.

73 For a list of national equality bodies, see the website of European Directory of Equality Bodies, https://equineteurope.org/european-directory-of-equality-bodies/.

74 Article 6(2) of Council Directive (EU) 2024/1499.

75 Article 7 of Council Directive (EU) 2024/1499.

76 It is to be noted that the same power applies to other directives as well. See Article 8(1) of Council Directive (EU) 2024/1499.

77 Article 8 of Council Directive (EU) 2024/1499.

78 Article 9 of Council Directive (EU) 2024/1499.

79 Article 10 of Council Directive (EU) 2024/1499.

in June 2026,[80] the enforcement of any potential future rules on gender-based pricing would already have been facilitated to a large degree.

In addition to efficient protection of consumers' rights, the preservation of goods/services providers' interests should also be considered. For instance, determining the modalities of the investigation that may be conducted by the competent authorities, as far as possible and relevant, would have the merit of allowing goods/services providers to organise their businesses accordingly. As a final remark, it is important to mention that the amount(s) of the fines imposed would prove crucial. Such amount(s) should be high enough to effectively discourage businesses from employing gender-based pricing techniques.[81]

Incorporating specific rules and regulations on gender-based pricing into Directive/2004/113/EC would also serve another significant purpose: making a statement. By expressly prohibiting the practice and qualifying it as sex discrimination in a piece of legislation, the competent authorities would take a step towards shifting the social norms and send out a strong message against the arguments put forward to justify gender-based pricing discussed in the previous section. As a matter of fact, the expressive function of law is especially relevant in cases of discrimination, which is why anti-discrimination law is often designed to change norms so as to ensure people are treated with the kind of dignity and respect that discriminatory behaviour denies.[82]

3 Tampon tax

3.1 Tampon tax in numbers

The economic impact of tampon tax on the average woman can be calculated in a quite straightforward manner. First, the average number of sanitary protection products used by an average woman through her lifetime should be identified; second, the approximate price of the products concerned should be established; and third, the VAT levied upon the purchase of the products should be calculated.

The author made such a calculation in 2018,[83] in the light of which it is possible to state that the economic impact of tampon tax on the average woman is quite modest, even when the highest VAT rate is applied to the products concerned. The total approximate cost of the tax tends to remain lower than EUR 7 per woman per year and lower than EUR 300 over an average woman's lifetime.

While the economic impact of tampon tax remains rather inconsequential on an individual level, funds collected by Governments through the tax concerned are meaningful. For instance, tampon taxes were reported to raise an annual amount of EUR 55 million in France in 2015,[84] EUR 20.8 million[85] (GBP 15

[80] Article 24(1) of Council Directive (EU) 2024/1499.

[81] For a similar opinion on both points, see Berliner, M. R. (2020), 'Tackling the Pink Tax: A call to Congress to end gender-based price discrimination', *Women's Rights Law Reporter*, Vol. 42, No. 1/2, p. 107.

[82] Sunstein, C. R. (1996), 'On the Expressive Function of Law', *University of Pennsylvania Law Review*, Vol. 144, pp. 2043-2044.

[83] For more information, see Yazıcıoğlu, A. E. (2018), *Pink tax and the law: Discriminating against women consumers,* Routledge, pp. 69-71.

[84] Randall, M. (2015), 'The "Tampon Tax": a UK and EU Standstill', EU Law Analysis, http://eulawanalysis.blogspot.com/2015/10/the-tampon-tax-uk-and-eu-standstill.html.

[85] As per the exchange rate in June 2015, calculated via the 'historical currency converter' of the Association of German Banks (Bankenverband), https://bankenverband.de/en/service/waehrungsrechner/historicalcurrencies/.

million) in the UK in 2015,[86] EUR 17.8 million[87] (USD 20 million) in California in 2016,[88] and EUR 24.6 million[89] (CAD 36.4 million) in Canada in 2014.[90]

3.2 General information on the VAT system

3.2.1 General explanations on VAT rates

As a general consumption tax, VAT is levied on the majority of the goods and services available on the market. In a typical VAT system, most goods and services are subject to tax at an equal rate (commonly referred to as the standard rate[91]), and a number of goods and services are subject to (a) reduced rate(s), zero rate or are exempt.

Reduced rates consist of applying a lower rate than the standard rate to certain goods and services, which are considered to be either 'essential' or significant for other purposes (such as encouragement of culture and sports). For instance, some of the goods and services that may be submitted to reduced rates by the EU Member States are foodstuffs, supply of water, pharmaceutical products, books, admission to cultural events and the use of sporting facilities.[92]

The practices of zero rate and exemption demonstrate a certain level of similarity. Under both mechanisms, consumers do not officially pay VAT on the goods or services concerned. The difference resides in the deductibility of the input VAT, i.e. the VAT incurred by the supplier during the production of its services and/or goods. While the zero rate system allows the supplier to credit the input VAT, the exemption mechanism does not. Accordingly, zero rated transactions are free of VAT, whereas exempt transactions may give rise to a VAT charge for the supplier. This additional cost incurred by the supplier is highly likely to be reflected in the prices it charges and thereby constitute an 'invisible' (i.e. hidden) tax charge for consumers.

The main purpose of applying (a) reduced rate(s), zero rate or an exemption to certain goods and services is to alleviate the VAT burden on low-income households. As a matter of fact, since VAT is applied on consumption without taking into consideration an individual's overall ability to pay, the lower an individual's income, the heavier the VAT burden for the individual concerned. Given the fact that low-income households generally spend their entire income on basic necessities, which can be described as essential goods and services that must be purchased in order to sustain a dignified life (in some cases merely for preserving life) regardless of the budget available, goods and services that are deemed essential are usually not subject to the standard rate. The most typical examples of basic necessities are staple food and pharmaceutical products.

86 Seely, A. (2016), *VAT on sanitary protection*, Briefing Paper, Number 01128, House of Commons Library, p. 15.
87 As per the exchange rate in June 2016, calculated via the 'historical currency converter' of the Association of German Banks (Bankenverband), https://bankenverband.de/en/service/waehrungsrechner/historicalcurrencies/.
88 McGreevy, P., *Los Angeles Times* (2016), 'Tax-free tampons measure passes California Assembly', 2 June 2016, http://www.latimes.com/politics/essential/la-pol-sac-essential-politics-california-tax-free-tampons-htmlstory.html.
89 As per the exchange rate in June 2014, calculated via the 'historical currency converter' of the Association of German Banks (Bankenverband), https://bankenverband.de/en/service/waehrungsrechner/historicalcurrencies/.
90 *Toronto Sun* (2015), 'Feds scrap tampon tax', Postmedia Network, 28 May 2015, http://www.torontosun.com/2015/05/28/feds-scrap-tampon-tax.
91 In the EU, the standard rates vary between 17 % (Luxembourg) and 27 % (Hungary). The list of VAT rates used by EU Member States is available online at the following link: https://taxation-customs.ec.europa.eu/document/download/82a38bdb-d724-472d-8e02-325b271e0d88_en?filename=vat_rates_en.pdf.
92 The list of goods and services that may be subject to reduced rates is provided in Annex III of Directive 2006/112.

It is often argued in the literature that the positive impact produced by multiple VAT rates and exemptions on low-income households remains quite limited. The prevailing view is that while reduced rates and exemptions give rise to substantial tax expenditures, their impact primarily benefits high-income households.[93] This phenomenon is deemed to be due to several factors. The most commonly invoked argument is the fact that high-income households are likely to spend more on goods and services in absolute terms, and thereby most of the revenue foregone by either exempting or taxing certain goods and services at a reduced or zero rate effectively accrues to high-income households rather than low-income households.[94] Another argument is that where there is a choice between private and public services, such as medical services and education, a reduced rate or an exemption applied to the private services would mostly benefit high-income households making use of such private services.[95] Yet another argument is that where reduced rates and exemptions apply to meritorious items, such as books and cultural events, high-income households benefit more, since such items are principally consumed by them.[96]

It is important to note that including exceptions in VAT systems is not effectuated with the sole purpose of alleviating the VAT burden. Another relevant, and significant, motive is to satisfy 'the deep, widespread feelings of the people as to what is fair'.[97] Collecting a consumption tax on items deemed to be essential by the general public is not a policy that can easily find public support, as famously evidenced by the fall of the Irish Government attributed to modifications made in the VAT system, and particularly to the imposition of standard rate VAT on children's shoes.[98] Public reaction may be particularly strong when the debate focuses on essential items, such as women's sanitary protection products. Reduced rates, zero rate and exemptions effectively provide the public with ease of mind.

3.2.2 Reduced rates and zero rate in the European Union

With a view to standardising the main features of VAT, the European Council has issued several VAT directives over the years. The directive currently applicable to VAT is Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereafter the VAT Directive).[99] Considering that the VAT Directive does not fully harmonise the Member States' laws on VAT, VAT in the EU is subject to two levels of legislation: the one established by the VAT Directive and the one established by the Member States' national laws. The VAT Directive allows some variation from country to country, but these differences remain rather insubstantial. Consequently, a largely uniform VAT system exists within the EU.

While goods and services that are exempt, submitted to a reduced or a zero rate are determined by Member States, their discretion is subject to certain limitations. The VAT Directive regulates the number

93 See, for example, De la Feria, R., Walpole, M. (2020), 'The impact of public perceptions on general consumption taxes', *British Tax Review*, No. 5, pp. 641-645.
94 Keen, M. (2015), 'Targeting and indirect tax design' in Clements, B., De Mooij, R., Gupta S., Keen, M. (eds), *Inequality and Fiscal Policy*, International Monetary Fund, p. 224.
95 De la Feria, R., Walpole, M. (2020), 'The impact of public perceptions on general consumption taxes', *British Tax Review*, No. 5, p. 644.
96 De la Feria, R., Walpole, M. (2020), 'The impact of public perceptions on general consumption taxes', *British Tax Review*, No. 5, p. 645.
97 Schenk, A., Oldman, O. (2001), *Value Added Tax: A comparative approach in theory and practice*, Transnational Publishers, p. 74.
98 De la Feria, R., Walpole, M. (2020), 'The impact of public perceptions on general consumption taxes', *British Tax Review*, No. 5, p. 652.
99 OJ No. L 347, 11.12.2006, p. 1.

of reduced rates that can be applied by Member States; the goods and services that may be subject to a reduced rate or a zero rate respectively; and the goods and services that may be tax exempt. Exemptions are regulated in Title IX of the Directive. Regarding reduced and zero rates, in a nutshell, Member States may apply a maximum of two reduced rates, which cannot be less than 5 % and can apply only to 24 categories of the supply of goods and services listed in Annex III of the VAT Directive, which includes female sanitary protection products.[100] In addition, Member States may apply a reduced rate lower than 5 % and a zero rate to a maximum of seven categories of supplies of goods and services listed in Annex III.[101] The supplies of goods and services concerned are considered to cover basic needs and include products used for female sanitary protection.[102]

3.3 Tampon tax causes indirect sex discrimination

3.3.1 Treating sanitary protection products as 'standard' items

The crux of the tampon tax debate lies in making women's sanitary protection products subject to the same rate of VAT as the one applied to other basic necessities. The issue is, therefore, quite straightforward: sanitary protection products should be treated in an identical manner to goods and services considered to be 'essential' to human life. This is due to the simple fact that they are as essential as foodstuffs for women's lives.

It is indisputable that sanitary protection products are the key to healthy menstrual periods. A woman's body is most vulnerable to infections during this timeframe. Poor hygiene due to a lack of adequate products causes the risk of infection to soar. The medical consequences of not having access to suitable sanitary products include skin rashes, urinary tract infection, genital infection, tubal obstructions, infertility and worsening of certain existent diseases.[103] These health problems may be further aggravated by non-adequate sterilisation of items used to replace sanitary protection products. For instance, drying the sanitary protection in dark places (to avoid its exposure to other persons) enhances the growth of bacteria and microbes on the protection items concerned.[104]

The classification of women's sanitary protection products as non-essential items cannot be justified by any objective criterion. In cases where the applicable VAT system makes a distinction between 'essential' and 'non-essential' products and subjects them to different tax rates, women's sanitary protection products must be considered essential items and taxed accordingly. If more than one reduced rate and a zero rate are available, the rate applied to the products concerned should be equal to the rate applied to other basic necessities, such as foodstuffs.

3.3.2 Tampon tax constitutes a case of indirect discrimination

As put forward by Stotsky, in the context of consumption taxes, indirect sex discrimination[105] may result from differential consumption patterns of men and women or may be inherent to a decision made

100 Article 98(1) of the VAT Directive.
101 Article 98(2) of the VAT Directive.
102 Article 98(2) of the VAT Directive and Annex III List of Supplies of Goods and Services to which the Reduced Rates and the Exemption with Deductibility of VAT Referred to in Article 98 May Be Applied, No 3.
103 WSSCC and UN Women (2015), *Menstrual Hygiene Management: Behaviour and Practices in the Kedougou Region, Senegal*, p. 56.
104 WSSCC and UN Women (2015), *Menstrual Hygiene Management: Behaviour and Practices in the Kedougou Region, Senegal*, p. 56.
105 The term used in the context of consumption taxes to indicate indirect discrimination is 'implicit bias'.

within the organisational structure of the tax itself.[106] From a VAT perspective, a bias within the organisational structure of the tax itself can result from the lists of goods and services that may benefit from an exemption, a reduced rate or a zero rate.[107] Insofar as the lists concerned are established in a non-discriminating manner, existence of indirect discrimination should, in principle, not be admitted. This is due to the fact that once the distinction is made in a correct and fair manner, inequality in tax incidence between those who consume luxury goods that attract higher rates and those who consume basic necessities that attract less tax cannot in itself be considered as amounting to indirect discrimination.[108] Nevertheless, indirect discrimination should be deemed to exist in cases where a good or service most commonly used by one sex is taxed at a higher rate.

Opting to submit women's sanitary protection products to a higher rate than the one applied to other basic necessities gives rise to a case of indirect discrimination inherent to the organisational structure of the tax. As essential items, women's sanitary protection products must be subject to the rate made available to other basic life necessities. Submitting sanitary protection products exclusively used by women to higher tax rates suggests that one sex (female) is being taxed at a higher rate on purpose.

It may be argued that since men do not necessitate an equivalent essential product,[109] the existence of discrimination cannot be established. Such an approach is erroneous, as the relevant criterion to establish the presence of indirect discrimination in the context of consumption taxes is the fact that one product or service that is typically used by one sex is subject to a higher tax rate without any reasonable and objective ground. Submitting products essential for women's health at a higher rate than the one applied to other basic necessities, like foodstuffs, cannot be justified by any reasonable and objective ground.[110]

3.4 Potential legal remedies

The first legal remedy would be to submit women's sanitary protection products to the same VAT treatment applied to other basic life necessities, to the extent where the VAT system concerned contains such a specific regime. Applying the standard rate to as many goods and services as possible ('broadening the VAT base') may be important for the functioning of the tax as well as the revenues generated by it,[111] but such broadening should not start with women's sanitary protection products. Unless all goods and services, including essential goods and services, are subject to the same standard rate and the tax base is effectively broadened, women's sanitary protection products should continue to 'narrow' the VAT base. Otherwise, the VAT system would contain a government-induced violation of women's right to non-discrimination.

As already mentioned, Member States may apply a reduced rate either higher or lower than 5 % or a zero rate to women's sanitary protection products, in accordance with Article 98(1) and (2) in

106 Stotsky, J. G. (1996), *Gender bias in tax systems*, Working Paper, International Monetary Fund, p. 13.
107 Stotsky, J. G. (1996), *Gender bias in tax systems*, Working Paper, International Monetary Fund, p. 13.
108 Grown, C. (2010), 'Taxation and gender equality' in Grown, C., Valodia, I. (eds), *Taxation and gender equity*, Routledge, p. 16.
109 Since women's sanitary protection products have often been compared with hygiene products for men (i.e. razors and shaving creams) during the debate on tampon tax, stating the obvious reveals to be necessary: the lack of shaving creams and razors does not have comparable consequences on men's health to the ones caused by the lack of sanitary protection products on women's health.
110 For a similar opinion, see Crawford, B. J., Spivack, C. (2017), 'Tampon taxes, discrimination, and human rights', *Wisconsin Law Review*, No. 3, p. 516.
111 On this point, see, for example, De la Feria, R., Walpole, M. (2020), 'The impact of public perceptions on general consumption taxes', *British Tax Review*, No. 5, pp. 639-649.

conjunction with Annex III No. 3 of the VAT Directive. Member States are, however, under no obligation to opt for the application of a reduced or a zero rate to women's sanitary protection products. Accordingly, it is possible for a Member State to tax women's sanitary protection products at a standard rate and other essential goods and services at a reduced or a zero rate. To ensure that indirect discrimination does not occur in any of the Member States, the VAT Directive could be amended so as to specify in Article 98(2), which aims to cover basic needs, that should a Member State opt for applying a reduced or a zero rate to any of the points of Annex III mentioned in the paragraph concerned, it should apply the same rate to products used for female sanitary protection. Should such an approach be followed, a similar provision would need to be added in Article 98(1) as well, to cover the eventuality that a Member State does not choose to apply a reduced rate lower than 5 % or a zero rate as provided for by Paragraph 2 but opts for applying (a) reduced rate(s) in accordance with Paragraph 1.

The VAT Directive does not contain any specific provisions for any goods or services such as the one suggested by the author for women's sanitary protection products. A special provision for women's sanitary protection products is, however, justified, given the fact that other goods and services are not susceptible to cause indirect sex discrimination and, therefore, the rate they are subject to does not, a priori, give rise to such discrimination. An alternative suggestion would be the inclusion of a list of goods and services that should be considered as basic necessities and be subject to the same rate. Preparing such a list, however, would cause not-insignificant issues and could substantially hinder Member States' discretion. Moreover, it is not necessary to establish a list of essential items in order to eliminate the bias caused by tampon tax.

A second means of intervention would be to tax sanitary protection products at a higher rate than other basic necessities, with a view to providing public subsidies or services to women in need. Such a tax policy would be reasonable, since the financial burden created by tampon tax on an individual basis is quite limited (approximately EUR 7 per year) but the funds that can be collected by Governments via the tax concerned are meaningful (approximately EUR 18.5 million per year). Tampon tax can provide Governments with the necessary funds to supply free sanitary protection products to women who cannot afford them. This specific allocation of funds may 'justify' tampon tax from a social welfare perspective. A key component – and challenge – of such a policy would be to provide free sanitary protection products to the majority of women in need, and not to a number of chosen groups. Insofar as the great majority of women in need cannot be targeted, such a policy option should not be entertained. On this point, it must be underlined that women who cannot afford sanitary protection products are not a rarity, even in developed countries. For low-income households, especially where most members of the family are women, sanitary protection can constitute a non-negligible part of the family budget.[112] Faced with the need to choose between sanitary protection products and other essential items, some women may opt for taking their contraceptive pills throughout the month to avoid 'the cost of having a period'.[113]

Finally, a third potential solution would be the implementation of a digital mechanism that would allow payment of VAT compensation subsidies in real time, as suggested by De la Feria and Swistak.[114] In the event that a broad-base VAT with one rate and no exemptions can be implemented and real-time

[112] Seely, A. (2016), *VAT on sanitary protection*, Briefing Paper, Number 01128, House of Commons Library, p.11.
[113] Seely, A. (2016), *VAT on sanitary* protection, Briefing Paper, Number 01128, House of Commons Library, p.11.
[114] De la Feria, R., Swistak, A. (2024), *Designing a Progressive VAT*, Working Paper, WP/24/78, International Monetary Fund, pp. 15-21.

compensation can be provided to low-income individuals or households for the VAT they pay at the moment of payment through digital technology,[115] the problem of tampon tax would be resolved, both from a legal and from an economic perspective. However, if effective targeting of low-income households remains unattainable and a universal subsidy is granted to all consumers, the problem of tampon tax would only be eliminated from a legal perspective (assuming that the VAT system effectively provides for one single rate). While such a universal subsidy would alleviate the economic burden of VAT, it would do so for all goods and services, and not specifically for women's sanitary protection products.

4 Conclusion

'A society can best be evaluated by examining who is taxed, what is taxed, and how taxes are assessed, collected and spent.'[116] In the 21st century, men and women pay different amounts to purchase substantially similar products and services. The former pay less, the latter pay more (pink tax). Moreover, for consumption tax purposes, women's sanitary protection products are not considered basic life necessities (tampon tax). Both practices amount to sex discrimination and should therefore be eliminated.

For the purposes of pink tax, Directive 2004/113/EC provides a promising starting point to enable efficient protection against the practice, as demonstrated by the implementation of 'unisex' insurance premiums. However, gender-based pricing continues to give rise to direct sex discrimination in fields other than insurance. Inclusion of specific rules and regulations in the Directive, identifying when the practice amounts to a case of sex discrimination in a tangible manner and pointing out the measures to be taken to eliminate such discrimination, could go a long way to solving the problem.

Regarding tampon tax, to ensure that indirect discrimination does not occur in any of the Member States, the VAT Directive could be amended to specify in Article 98(2) that should a Member State opt for applying a reduced or a zero rate to any of the points of Annex III mentioned in the paragraph concerned, it should apply the same rate to products used for female sanitary protection. Should such an approach be followed, a similar provision would need to be added in Article 98(1) too. Alternatively, tampon tax may continue to be levied with a view to providing public subsidies or services to women in need. A third potential solution may become available in the near future through the implementation of a digital mechanism that would allow real-time payment of VAT compensation subsidies.It is high time to make meaningful legal progress in the field of both pink tax and tampon tax and put the 20-year-old public debate to a peaceful rest!

[115] De la Feria, R., Swistak, A. (2024), *Designing a Progressive VAT*, Working Paper, WP/24/78, International Monetary Fund, p. 15.

[116] Adams, C. (2000), *For Good and Evil: The impact of taxes on the course of civilization*, Madison Books, p. 448.

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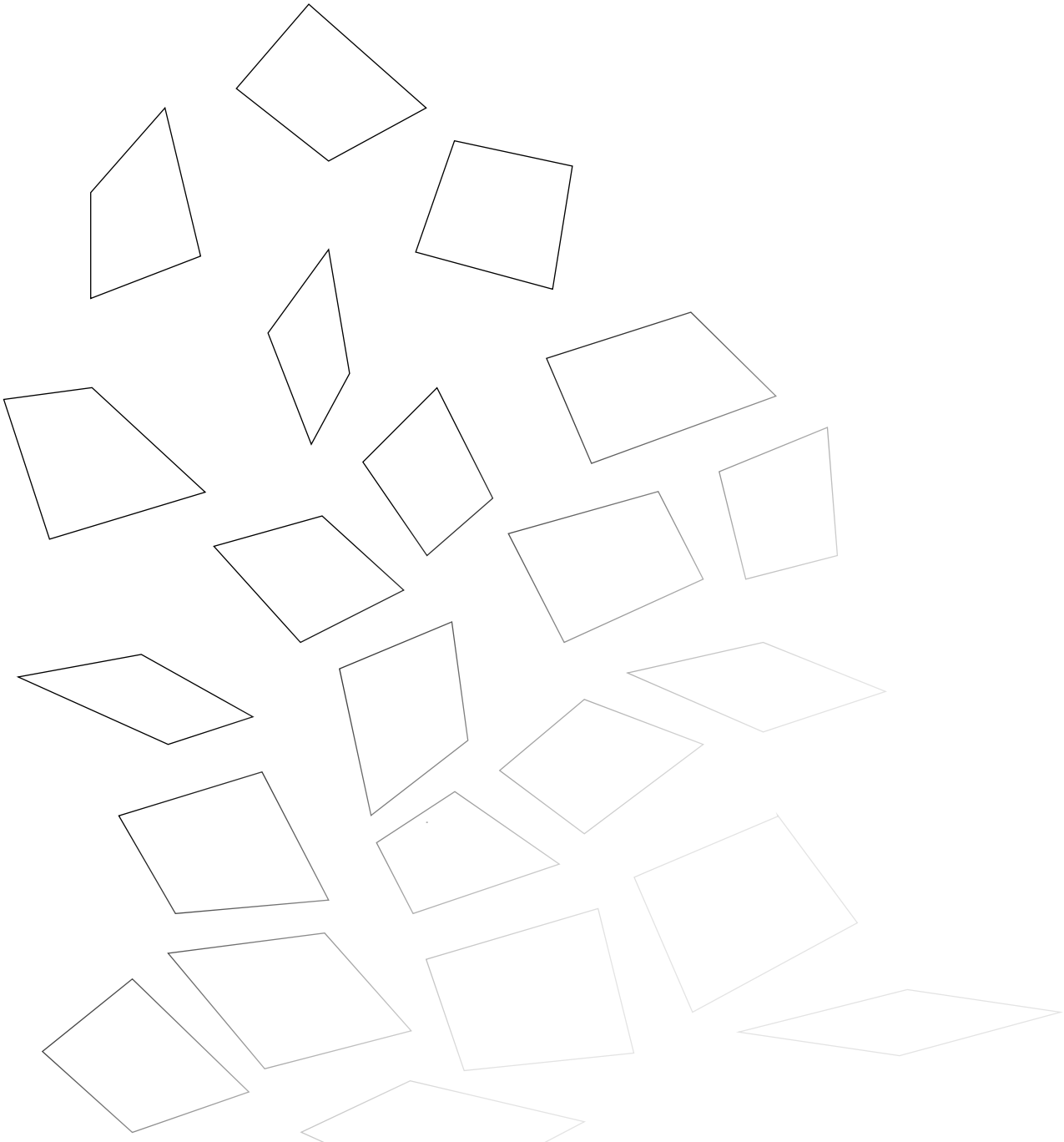


European case law update

This section provides summaries of selected cases pending or decided by the Court of Justice of the EU and the European Court of Human Rights, as well as the references of other relevant cases, from 1 July 2023 to 30 June 2024.

Summaries of selected cases

Court of Justice of the European Union

C-113/22, DX v Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS), judgment of 14 September 2023, ECLI:EU:C:2023:665

This request for a preliminary ruling concerns the interpretation of Directive 79/7, which aims to progressively implement the principle of equal treatment for men and women in matters of social security. The case involves DX, a father of two children, who sought a pension supplement from the Instituto Nacional de la Seguridad Social (INSS) in Spain. However, this supplement, referred to as a 'maternity supplement' under Article 60(1) of the General Law on Social Security (LGSS), is exclusively available under Spanish law to women who have at least two biological or adopted children. The supplement is intended to recognise women's demographic contribution to social security and applies to contributory pensions, such as retirement pension, widow's pension, and permanent invalidity pension. DX, who was awarded a permanent total invalidity benefit, was neither automatically granted nor eligible to apply for the supplement, which would provide a 5 % increase for having two children. The legal question thus concerns whether this supplement, currently reserved for women, should also be extended to men, such as DX, who meet the same criteria.

Following a ruling from the Court regarding gender discrimination (Instituto Nacional de la Seguridad Social, C-450/18[1]), which explicitly found that the exclusion of men from the pension supplement violated EU law, the INSS maintained that the pension supplement would only be granted to women until the relevant legislation was amended. Consequently, DX's request for the supplement was denied, compelling him to pursue his claim in court. This led the Spanish court to question whether the INSS's administrative practice constituted gender discrimination as prohibited by Directive 79/7. The court was particularly concerned about the implications of this practice, which appears to place a disproportionate burden on men seeking to assert their rights.

The Court determined that the administrative practice of the Instituto Nacional de la Seguridad Social (INSS) constitutes direct gender discrimination prohibited by Directive 79/7. This discrimination arises from a procedural conditions for accessing a pension supplement that is available only to women with children. Consequently, only men are compelled to pursue their claims through the courts, exposing them to longer waiting periods and potential additional costs. This creates a distinct type of discrimination that differs from the existing Spanish legislation that was under dispute in the *Instituto Nacional de la Seguridad Social* case.

The Court also addressed the right to compensation. Article 6 of Directive 79/9 obliges Member States to establish provisions that allow individuals who feel disadvantaged by non-compliance with the principle of equal treatment to assert their rights in court after exhausting other competent authorities. The Court referenced its established case law, including the *Marshall II* ruling, which indicates that national regulations must effectively promote genuine equality of opportunity.

[1] For a summary of this case see: European Equality Law Review 2020/1, pp. 67-68.

Thus, when a Member State opts for financial compensation as a means to restore effective equality, the compensation must adequately cover the actual damages suffered due to discrimination. The Court asserted that simply granting individuals like DX retroactive rights to the pension supplement is insufficient. They must also be entitled to reimbursement for costs incurred, including legal fees, as a result of having to navigate discriminatory procedural requirements. The fact that Spanish procedural law does not allow claims for these costs against the discriminating authority does not diminish this requirement. Legal and attorney fees are integral to the comprehensive compensation mandated by EU law.

C-148/22, *OP v Commune d'Ans*, Grand Chamber judgment of 28 November 2023, EU:C:2023:924

This request for a preliminary ruling concerns a municipal employee who performed mainly 'back-office' functions without encountering members of the public. When she asked to start wearing a hijab at work, the employer rejected her request, provisionally banned her from wearing religious signs and, one month later, inserted a general requirement of 'exclusive neutrality' in the workplace in its terms of employment. This clause effectively banned all municipal workers from wearing any visible sign that might reveal their religious or philosophical beliefs, whether or not they were in contact with the public.

The referring court (Labour Court of Liège, Belgium) requested a preliminary ruling on, first, the compatibility of the neutrality clause with the prohibition of direct and indirect discrimination under the Employment Equality Directive and, secondly, whether the clause could amount to indirect discrimination on the ground of sex.

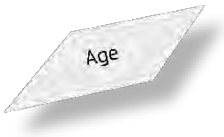
First, the Court swiftly concluded that unless the referring court found that the claimant had been treated differently from other workers despite the general and undifferentiated wording of the employer's neutrality clause, no direct discrimination was at hand.

With regard to indirect discrimination on the ground of religion or belief, the Court recalled its standing case law and noted that the legitimate aim pursued by the municipality was to put into effect the principle of neutrality of the public service. Considering the margin of discretion which must be afforded to the Member States (or their infra-state bodies) in designing this neutrality, the Court found that the principle of 'exclusive neutrality' put in place by the municipality in question may be regarded as objectively justified. It also noted however that other states or infra-state bodies may adopt different neutrality policies that may be equally justified, depending on their own specific contexts.

To determine whether the neutrality clause was appropriate for the purpose of ensuring that the aim pursued by the employer was properly applied, the Court then noted that the objective of 'exclusive neutrality' must be 'genuinely pursued in a consistent and systematic manner', and that the prohibition on wearing any visible sign of beliefs must be limited to what is strictly necessary. The Court left this final examination to the referring court.

Finally, the CJEU also refrained from examining the potential indirect discrimination on the ground of sex referred to in the referring court's second question, due to the fact that the question was framed within the scope of the Employment Equality Directive rather than Directive 2006/54/EC, which prohibits indirect sex discrimination.

C-518/22, *J.M.P. v AP Assistenzprofis GmbH*, judgment of 7 December 2023, EU:C:2023:956[2]



This request for a preliminary ruling was made by the Bundesarbeitsgericht (Federal Labour Court, Germany) and concerned the interpretation of several provisions of the Employment Equality Directive, read in the light of the EU Charter of Fundamental Rights and the UN Convention on the Rights of Persons with Disabilities (CRPD). The initial claimant argued that she had been discriminated against on the ground of age in the context of a recruitment procedure for a position of personal assistant for a person with a disability.

Considering that the job advertisement at hand indicated specifically that candidates were to be 'preferably between 18 and 30 years old', it appeared that the rejection of the job application submitted by the claimant (who was older than 30) amounted to direct age discrimination. The Court thus went on to determine whether the discrimination could be justified. First, with regard to Article 2(5) which aims to ensure the protection of public order, security and health, the prevention of criminal offences and the protection of individual rights and freedoms, the Court noted that national law authorises, or even requires, providers of personal assistance services to respect the personal wishes of the person with a disability ('client') with regard to the age of the candidates for the personal assistant position. It is apparent that this provision pursues the objective of protecting the right of persons with disabilities to self-determination and independence, thus falling within the scope of Article 26 of the EU Charter of Fundamental Rights and of Article 19 of the UN CRPD. To determine finally that the age limit requested by the client in this case was necessary to ensure their right to self-determination and independence, the Court noted that it appears reasonable to expect that a person within the same age range as the client will fit more easily in their personal, social and university circle. Finding thus that the age discrimination was justified under Article 2(5) of the Directive, it did not examine the other possible justifications invoked by the referring court, namely Articles 4(1), 6(1) and 7 of the Directive.

C-631/22, J.M.A.R. v Ca Na Negreta SA, other party: Ministerio Fiscal, judgment of 18 January 2024, EU:C:2024:53

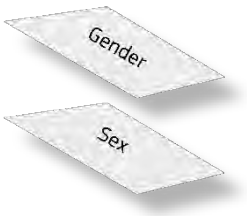
The case concerned a waste collection driver who suffered a workplace accident that left him permanently unable to continue in his previous position. He was reassigned to another, less physically demanding position within the company, and received a lump sum social security benefit for 'permanent injury'. However, he challenged before the courts the social security institute's refusal to recognise his 'permanent incapacity for work', and thus its denial of awarding him a monthly allowance. The courts found in favour of the claimant, whose 'total permanent incapacity to perform his normal occupation' was thus recognised. On this basis, however, the employer terminated his employment contract, and the claimant challenged this termination before the courts.

In this context, the referring court asked, in essence, whether Article 5 of the Employment Equality Directive precludes national legislation allowing an employer to terminate the employment contract due to the worker's permanent inability to perform their tasks, caused by a disability occurring during

[2] See also Opinion of Advocate General De La Tour, delivered on 13 July 2023, EU:C:2023:587.

the employment relationship, without first being required to make or maintain reasonable accommodation.

The Court first recalled that reassignment to another post can constitute a reasonable accommodation, where it does not impose a disproportionate burden on the employer, and then noted that the claimant had effectively occupied another post for over a year after the work accident. It further noted that to be granted a disability allowance, the national legislation at issue in practice forces the worker to risk losing their job by requesting the recognition of their permanent incapacity to work, as this provides the employer with a possibility of terminating the contract without providing reasonable accommodation or demonstrating that accommodation would impose a disproportionate burden. As such, the legislation undermines the effectiveness of Article 5 of the Directive and runs counter to the objective of the integration of persons with disabilities, set out in Article 26 of the Charter. Finally, the Court underlined that Member States, when organising their social security systems and determining the conditions for granting social security benefits, must comply with EU law and therefore, national legislation on social security cannot infringe Article 5 of the Directive read in the light of Articles 21 and 26 of the Charter. The Court thus concluded that the Directive precludes legislation such as that at issue in the case.



C-284/23, *TC v Firma Haus Jacobus Alten- und Altenpflegeheim gGmbH*, judgment of 27 June 2024, ECLI:EU:C:2024:558

This request for a preliminary ruling was submitted by the Arbeitsgericht Mainz (Labour Court, Mainz, Germany) and concerns the dismissal of a worker who discovered her pregnancy after the deadline to challenge her dismissal had passed. The court questioned whether German provisions, which mandate that a pregnant worker must challenge her dismissal within three weeks and submit a request for leave to bring an action out of time within two weeks, align with Directive 92/85, aimed at protecting pregnant workers. The court expressed concern that these strict deadlines could significantly hinder a pregnant worker's ability to access legal protections, referencing the earlier Pontin case (C-63/08).

Article 10 of Directive 92/85 mandates Member States to prohibit dismissals from the start of pregnancy to the end of maternity leave, with exceptions only in specific cases. Article 12 requires that workers who believe their rights under the directive have been violated must be able to pursue claims through judicial processes.

The court emphasised that while Member States are not bound to adopt specific measures, any measures taken must ensure effective legal protection and not make it excessively difficult for individuals to exercise their rights under EU law. Procedural rules must align with the principles of equivalence and effectiveness.

The two-week time limit for requesting leave to challenge a dismissal is notably shorter than the standard three-week period. A worker aware of her pregnancy at the time of dismissal has three weeks to contest the dismissal, whereas a worker who is unaware of her pregnancy has only two weeks to seek judicial review. This shorter time frame poses significant challenges, limiting the worker's ability to obtain legal advice and prepare her case. Furthermore, the requirement to simultaneously submit both the request and the action complicates the legal process.

Ultimately, the court concluded that Articles 10 and 12 of Directive 92/85 must be interpreted as precluding national legislation under which a pregnant worker who did not become aware of her pregnancy until after the expiry of the time limit prescribed for bringing an action against her dismissal is required, in order to be able to bring such an action, to submit a request for leave to bring an action out of time within a period of two weeks, where the procedural rules surrounding that request, in so far as they give rise to problems liable to render excessively difficult the implementation of the rights which pregnant workers derive from Article 10 of that directive, do not comply with the requirements of the principle of effectiveness.

European Court of Human Rights

***Pajak and others v Poland*, Application Nos 25226/18, 25805/18, 8378/19, 43949/19, judgment of 24 October 2023, ECLI:CE:ECHR:2023:1024JUD002522618**

Between 2017 and 2018, Poland enacted legislation reducing the retirement age for judges from 67 to 60 for women and 65 for men. The European Court of Justice (CJEU) had previously ruled in 2019 that this legislation constituted age discrimination. The European Court of Human Rights (the Court) upheld this decision, noting that there is no objective justification for assuming that 60-year-old women lack the intellectual capacity required for judicial roles. Additionally, the Court identified a violation of Article 6(1) of the European Convention on Human Rights (ECHR) due to inadequate legal protection against this legislation.

The applicants, all aged 60 or older at the time the law was enacted, had intended to continue working until age 70. They sought exemptions from the new legal provisions but were unsuccessful, as were their various appeals.

Before the Court, the applicants argued that they lacked effective means to challenge the new legislation, which violated Article 6(1) ECHR. The Court acknowledged that judges require special protection against arbitrary decisions from the legislative and executive branches, which can only be ensured by an independent judicial body. When a judicial mandate is prematurely terminated – whether due to disciplinary actions or new laws – access to a court must be guaranteed. The CJEU had already indicated in its 2019 ruling that decisions regarding whether judges could retain their positions lacked sufficient judicial oversight. The Court found that the examples of judicial review provided by the Polish Government were unconvincing as evidence of a functioning system of oversight. In this case, the applicants had no opportunity to appeal to a court; their terms of office were simply cut short by the new law. This forced retirement did not meet any standards of procedural fairness, particularly since no reasons were given for denying the applicants' requests for exceptions. The national legal framework failed to protect them from arbitrary removal from office, which could indeed occur here. There was no justification for the lack of judicial oversight in these specific circumstances, leading the Court to conclude that Article 6(1) ECHR had been evidently violated.

Some applicants further contended that the pension scheme discriminated based on sex, as different retirement ages were established for men and women. The Court highlighted that the work of judges is primarily intellectual, and any differences in societal roles between men and women are irrelevant to this type of work. There was also no evidence to suggest that female judges over the age of 60 are less capable than their male counterparts of the same age. Additionally, the requirement that female judges prove their intellectual capacity through a medical certificate to qualify for an exemption was

seen as problematic, indicating direct discrimination based on sex. The CJEU had already ruled in its 2019 judgment that the relevant provisions violated EU gender equality legislation. Despite this, nothing had changed for the applicants. Given the consequences of this unequal treatment, particularly regarding their income and professional development, the Court determined that Article 8 in conjunction with Article 14 ECHR had also been violated.

Executief Van De Moslims Van België and others v. Belgium, Application Nos 16760/22 and 10 others, judgment of 13 February 2024

The applicants are Belgian nationals of Muslim and Jewish faith as well as organisations representing the Muslim communities in Belgium. They alleged that legislation from 2017, which imposes an obligation to stun animals before slaughter, including ritual slaughter, amounts to a violation of Article 9 (freedom of religion), alone and in conjunction with Article 14 (prohibition of discrimination). They challenged the relevant provisions before the Constitutional Court, which referred the case to the Court of Justice of the EU for a preliminary ruling. The CJEU issued its ruling in December 2020 and concluded, contrary to the conclusions of the Advocate General,[3] that the national provisions at hand did not amount to a violation of Article 13 of the Treaty on the Functioning of the EU and Article 10 of the EU Charter of Fundamental Rights.[4] Following the decision of the Constitutional Court, which concluded in accordance with the CJEU, the applicants lodged a case before the European Court of Human Rights.

The Court was thus called upon to decide, for the first time, whether the protection of animal welfare can fall under one of the legitimate aims listed in Article 9(2) of the Convention, i.e. the protection of public safety, public order, health or morals, or the rights and freedoms of others. In this regard, the Court noted that public morals are not limited to human dignity in intra-personal relations, as argued by the applicants. It also noted that the Convention as a whole, including permitted limitations, is a living instrument to be interpreted in the light of current conditions of life in society, and that the protection of animal welfare is a moral conviction of a large proportion of Belgian society and of other State parties to the Convention that have adopted similar legislation. It thus concluded that the protection of animal welfare can fall under the protection of public morals as a legitimate aim limiting the right to freedom of religion.

While the Convention, contrary to EU law, does not explicitly protect animal welfare as such, the Court found that the national provisions at hand had been well prepared during the adoption process involving notably scientific research and extensive consultation of relevant stakeholders. In addition, the provisions had been extensively examined by both the CJEU and the Constitutional Court, notably with regard to Article 9 of the Convention. The Court thus found no reason to question the conclusions of these two courts that stunning animals before slaughter is the optimal way of reducing animal suffering and that allowing reversible stunning in the context of ritual slaughter is a proportionate means of ensuring the right of persons of Muslim and Jewish faith to manifest their religious beliefs. The Court concluded that there was no violation of Article 9 taken alone. With regard to the different arguments raised by the applicants in relation to Article 14, the Court swiftly found that (1) the situation of farm animals is not comparable to that of wild animals, and that slaughter can thus not be

[3] CJEU, Opinion of Advocate General Hogan of 10 September 2020, C-336/19, EU:C:2020:695.
[4] CJEU, judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and others*, C-336/19, EU:C:2020:1031.

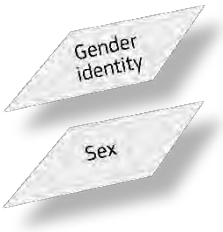
compared to hunting and fishing; (2) persons of Muslim and Jewish faith are not in the same situation as the rest of the population and thus they are treated differently, contrary to what was argued by the applicants, i.e., through the specific provision regarding ritual as opposed to all other forms of slaughter; and (3) the potential differences between the religious requirements for the Jewish as opposed to the Muslim communities are not sufficient to conclude that persons of the former faith are in a situation that is fundamentally different from that of the latter. The Court thus concluded that there was no violation of Article 14 in conjunction with Article 9.

Other relevant cases

Court of Justice of the European Union

References for preliminary rulings – Advocate General Opinions

C-4/23, *M.-A.A. v Direcția de Evidență a Persoanelor Cluj and other parties*, Opinion of Advocate General De La Tour delivered on 7 May 2024, ECLI:EU:C:2024:385



Citizenship of the Union – Article 21(1) TFEU – Right to move and reside freely in the Member States – National residing in the United Kingdom holding the nationality of that State and of a Member State – Refusal by the authorities of the latter State to record in his birth certificate changes of first name and gender lawfully obtained in the former State – National legislation permitting the amendment of a civil status document only on the basis of a final judicial decision – Impact of the withdrawal of the United Kingdom from the European Union.

C-314/23, *Sindicato de Tripulantes Auxiliares de Vuelo de Líneas Aéreas (STAVLA), Ministerio Fiscal v Air Nostrum, Líneas Aéreas del Mediterráneo SA and other parties*, Opinion of Advocate General Szpunar delivered on 6 June 2024, ECLI:EU:C:2024:475

Equal treatment in employment and occupation – Directive 2006/54/EC – Article 14 – Prohibition of any indirect discrimination on grounds of sex – Prohibition of any indirect discrimination on grounds of sex – Collective agreements establishing different amounts of daily subsistence allowances to be granted to pilots and cabin crew as a meal allowance while travelling.

European Court of Human Rights

Valiullina and others v. Latvia, Applications Nos. 56928/19, 306/20 and 11937/20, judgment of 14 September 2023

Article 14 (and Article 2 of Protocol 1) • Discrimination • Right to education • Non-discriminatory legislative amendments increasing the proportion of subjects taught in public schools in the only State language, Latvian, and thus reducing the use of Russian as the language of instruction • Russian-speaking and Latvian-speaking pupils in a relevantly similar situation • Impugned difference in treatment justified by the legitimate aims of protecting and strengthening the Latvian language - one of the State's fundamental constitutional values - and ensuring the unity of the education system • Importance of specific historical context of unlawful occupation and annexation significantly restricting use of Latvian for more than 50 years as well as difficult choices following restoration of independence • Legislative amendments implemented gradually and flexibly, with sufficient scope for adaptation to

the needs of those affected • Wide State margin of appreciation not overstepped • Education system in place ensured the use of minority languages in varying proportions • Objective and reasonable justification • Difference in treatment on grounds of language consistent with legitimate aims pursued and proportionate.

Article 2 of Protocol 1 • Ratione materiae • Application of conclusions drawn in the 'Belgian linguistic case' • Article 2 of Protocol 1 does not include the right to access education in a particular language but only guarantees the right to education in one of the national or official languages of the country concerned • Latvian being the only official language, applicants could not complain about decreased use of Russian as the language of instruction in Latvian public schools per se.

***Memedova and others v. North Macedonia*, Applications Nos. 42429/16, 8934/18 and 9886/18, judgment of 24 October 2023**

Article 34 • Victim • Finding of a violation of the right to liberty of movement without monetary compensation for non-pecuniary damage, in case circumstances, insufficient redress.

Article 2 of Protocol 4 • Freedom to leave country • Refusal of permission to persons of Roma ethnicity to leave Respondent State's territory • Jurisprudential inconsistency as to whether Schengen Borders Code part of the domestic legal order and ambiguity as to its applicability in the applicants' case • No regard to applicants' individual circumstances • Interference not in accordance with domestic law and not justified.

Article 14 (and Article 2 of Protocol 4) • Discrimination of applicants based on their Roma origin • Way in which relevant domestic border control instructions applied in practice by border officers resulting in disproportionate number of Roma being prevented from travelling abroad • Convincing *prima facie* case of indirect discrimination • Lack of objective and reasonable justification.

***Džibuti and others v. Latvia*, Applications nos. 225/20 and 2 others, judgment of 16 November 2023**

Article 14 (and Article 2 of Protocol 1) • Discrimination • Right to education • Non-discriminatory legislative amendments increasing the proportion of subjects taught in private schools in the only State language, Latvian, and thus reducing the use of Russian as the language of instruction • Russian-speaking and Latvian-speaking pupils in a relevantly similar situation • Legitimate aims of protecting and strengthening the Latvian language and ensuring the unity of the education system • Private schools considered to be part of the State educational system • General education standards applied to both private and public schools that issued graduation certificates • State's rigorous approach in regulating private education sector justified • Legislative amendments implemented gradually and flexibly, with sufficient scope for adaptation to the needs of those affected • Private schools received public funding • Objective and reasonable justification • Conclusions reached in *Valiullina and Others v. Latvia* in respect of public schools fully relevant to Court's analysis on private schools • Difference in treatment on grounds of language consistent with legitimate aims pursued and proportionate.

Article 14 (and Article 2 of Protocol 1) • Discrimination • Right to education • Non-discriminatory treatment of Russian-speaking pupils vis-à-vis pupils whose mother tongue was one of the official EU languages • Both groups of pupils in a relevantly similar situation • Objective and reasonable

justification • Difference in treatment on grounds of language consistent with pursued legitimate aim of facilitating the learning of EU languages and proportionate.

Article 14 (and Article 2 of Protocol 1) • Discrimination • Right to education • No evidence of difference in treatment between Russian-speaking pupils and pupils whose mother tongue was an official language of a country with which Latvia had concluded an international agreement.

Article 2 of Protocol 1 • *Ratione materiae* • Application of conclusions drawn in *Valiullina and Others v. Latvia* • Article 2 of Protocol 1 does not include the right to access education in a particular language • Latvian being the only official language, applicants could not complain about decreased use of Russian as the language of instruction in Latvian public schools per se • Constitutional Court's findings that impugned legislative amendments in respect of private schools interfered with the right to education taken in conjunction with the rights of minorities under the Constitution did not expand scope of Article 2 of Protocol 1 • Broader interpretation entailing stronger protection in the domestic legal system than the Convention consistent with Article 53.

***Vučković v. Croatia,* Application No. 15798/20, judgment of 12 December 2023, ECLI:CE:ECHR:2023:1212JUD001579820**

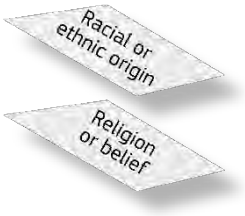
Articles 3 and 8 • Positive obligations • Commutation of a 10-month prison sentence imposed on applicant's co-worker to community service, after he had been convicted of sexual violence against her • Domestic court's commutation of sentence without careful scrutiny of all relevant considerations • Failure to give adequate reasons or consider interests of the victim • Context of specific social danger of violence against women and the need to combat it with efficient and deterrent actions • State's failure to sufficiently discharge procedural obligation to ensure sexual violence applicant had suffered was dealt with appropriately

***X v. Greece*, Application No. 38588/21, judgment of 13 February 2024, ECLI:CE:ECHR:2024:0213JUD003858821**

Articles 3 and Art 8 • Positive obligations • Failure of investigative and judicial authorities to adequately respond to rape allegations and submit the case to the careful scrutiny required • Adequate legal and regulatory domestic framework not applied in practice as investigation ineffective • Investigating authorities' failure to take measures to prevent the applicant's further traumatisation, take sufficient account of her needs and inform her of her rights as a victim, in the light of relevant international standards and recommendations • No analysis by the prosecution and criminal court of the circumstances of the case from the perspective of gender-based violence.

Allouche v. France, Application No. 81249/17, judgment of 11 April 2024

Article 8 (and Article 14) • Positive duties • Private life • Discrimination • Authorities' failure to consider the antisemitic dimension of the case preventing them from providing an effective and adequate criminal protection from discriminatory speech by the respondent against the applicant.



Zăicescu and Fălticineanu v. Romania, Application No. 42917/16, judgment of 23 April 2024

Article 8 (and Article 14) • Private life • Discrimination • Acquittal of two high-ranking military officials previously convicted of crimes connected with the Holocaust, in extraordinary appeal proceedings not disclosed to the applicants, as Holocaust victims, or to the public • Results and surrounding context of proceedings capable of having a sufficient impact on applicants' sense of identity and self-worth • Emotional suffering reaching the 'certain level' or the 'threshold of severity' required • Article 8 (and Article 14) applicable • Principles developed in case law involving antisemitic statements or Holocaust denial applicable in the present case • Significance of international-law background and of common international or domestic legal standards of European States • Retrials concerned a matter of utmost public interest • Retention of files relating to initial convictions and retrial proceedings kept by the secret services • Initial refusal to allow applicants access to the files without reasonable justification • Failure to bring acquittals to the public's attention or make judgments accessible and findings and reasoning of acquittal decisions, could have legitimately provoked in the applicants feelings of humiliation and vulnerability and caused them psychological trauma • Failure to adduce relevant and sufficient reasons for actions leading to revision of historical convictions, in absence of new evidence, by reinterpreting historically established facts and denying the responsibility of State officials for the Holocaust, contrary to international law principles • Authorities' actions excessive and could not be justified as 'necessary in a democratic society'.

Article 34 • Victim • Not necessary to establish a direct connection between acts committed by the two military officials and the applicants, as crimes at issue directed against a whole group of people and given applicants' personal fate • Applicants could claim to have personally suffered from an emotional distress when they found out about the reopening of the criminal proceedings and acquittals • Applicants could be seen as having personal interest in proceedings aimed at establishing the responsibility of high-ranking members of the military of the Holocaust in Romania.

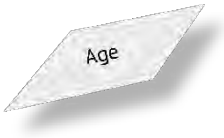
Dániel Karsai v. Hungary, Application No. 32312/23, judgment of 13 June 2024

Article 8 • Private life • Impossibility for terminally ill patient, suffering from uncurable progressive neurodegenerative disease, to be assisted in dying, by virtue of blanket and extraterritorial ban • Article 8 applicable • Criminal law prohibition on assisted suicide, in Hungary and abroad, constituting restriction on enjoyment of right to self-determined death • Complaint engaging both negative and positive obligations • States afforded considerable margin of appreciation • Majority of member States continued to prohibit and prosecute assistance in suicide, including physician-assisted dying (PAD), despite emerging trend towards decriminalisation • No basis in relevant international instruments for concluding that member States were thereby advised or required to provide access to PAD • Legalisation of PAD entailed important social implications and risks of abuse and error • High-quality palliative care, including access to effective pain management, essential to ensuring dignified end of life • Applicant did not argue that the palliative care available to him was inadequate or that he would not be able to receive palliative sedation to relieve refractory suffering • Refusal to receive sedation constituting legitimate personal choice which could not in itself require authorities to provide alternative solutions or legalise PAD • Existential suffering related essentially to personal experience susceptible to change and not lending itself to straightforward objective assessment; could not be accepted as an argument militating for an obligation under Article 8 to legalise PAD • Domestic

authorities had not fallen foul of any positive obligation that might arise from Article 8 in regard to palliative care • Criminal ban on assisted suicide, including its application to any person assisting the applicant to have recourse to PAD abroad, not disproportionate • Respondent State's margin of appreciation not overstepped • Need for appropriate legal measures to be kept under review, having regard to developments in European societies and relevant international standards on medical ethics.

Article 14 (and Article 8) • Alleged discrimination between patients dependent on life-sustaining treatment and those patients who were not, and consequently could not hasten their death by refusing such treatment • Right to refuse or request discontinuation of unwanted medical treatment inherently connected to the right to free and informed consent to medical intervention, widely recognised and endorsed by the medical profession and recognised in the Council of Europe's Oviedo Convention • Majority of Member States allowed refusal by the patient or withdrawal at the patient's request of life-sustaining or life-saving interventions • Alleged difference objectively and reasonably justified.

***Spišák v. The Czech Republic*, Application No. 13968/22, judgment of 20 June 2024**



Article 14 (and Article 5) • Discrimination • Review of lawfulness of detention • Pre-trial detention of a juvenile prosecuted for serious offence subject to an automatic judicial review every six months and not every three months as adult persons prosecuted for the same category of offences • Age-based difference in treatment contrary to aim pursued by juvenile detention regime and underlying intention of domestic rules to provide more favourable treatment for juveniles • Lack of objective and reasonable justification for less favourable periodicity of automatic judicial control of detention.

***Bechi v. Romania*, Application No. 45709/20, judgment of 25 June 2024**

Article 3 (substantive) • Degrading treatment • Applicant's material conditions of detention, under semi-open and open regime, not exceeding the unavoidable level of suffering inherent in detention.

Article 3 (substantive) • Article 14 • Degrading treatment • Discrimination • Placement of HIV positive applicant in prison hospitals necessitated by the particular circumstances characterising Romanian prisons • Any differential treatment implemented vis-à-vis ordinary detainees meant to provide applicant with better conditions tailored to his medical needs and well-being • Objective and reasonable justification.

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

This section provides an overview of the latest main developments in gender equality and non-discrimination law (including case law) and policy at the national level in the 27 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, Serbia, Turkey and the United Kingdom, from 1 July 2023 to 30 June 2024.

Albania AL

LEGISLATIVE DEVELOPMENT

Criteria and procedures for the opening, closing and operation of special education institutions in resource centres

Disability

Resource centres are public institutions that offer special pre-university education for deaf and blind pupils and those with severe disabilities who require support in specialised centres to be included in the ordinary education system. Resource centres also provide special support and rehabilitative services for children with disabilities who study in ordinary schools, as well as training for educational staff.

In March 2024, the Council of Ministers amended the procedure and criteria for opening a resource centre and for reorganising a special education institution into a resource centre.[1] For the opening of a resource centre, the building must meet the required infrastructural conditions; environments must meet the criteria to provide special education and reasonable accommodation for students with special diagnoses and those with severe disabilities; facilities must support pupils with disabilities learning in regular schools; recreational environments must provide for socialisation, motivation, support and development of tendencies of children with disabilities; and leaders, specialised teaching staff and support staff must meet the relevant professional criteria.

In addition to the above standards, for the reorganisation of an existing institution, it must provide special education and specialised educational services for no less than five school years, for a special group of children with disabilities, deaf and blind pupils, and those with severe disabilities and multiple diagnoses.

Local self-government units and the National Agency of Pre-University Education can propose the opening of resource centres.

The financing and administration of the resource centres is carried out through:

- public funds from the state budget; income of local self-government units, donations and sponsorships, income received from the educational institutions themselves, as well as other legal income; and
- funds from the state budget planned under the 'for student' formula.

CASE LAW

Discrimination on the ground of racial origin due to refusal to legalise the construction of a house

Racial or ethnic origin

In 2017, the complainant applied for the legalisation of a house built without a permit. The State Cadastre Agency (SCA) failed to take any action to examine her application until after 2020, when new

[1] Albania, Council of Ministers, Decision No.148/2024 of 13 March 2024, for the criteria and procedures for the opening, closing and reorganisation of special education institutions in resource centres, as well as for the way of their organisation and operation.

legislation was adopted, imposing additional requirements on the legalisation process.[2] The complainant was thus requested by the SCA to repeat the process according to the new requirements. She subsequently submitted a complaint to the national equality body, the Commissioner for Protection from Discrimination (CPD), claiming that the SCA had discriminated against her on the ground of her race by failing to examine her request and by obliging her to repeat the procedure.

The CPD issued its decision in February 2024, concluding that the SCA had treated the complainant in an unfair and unfavourable manner due to her race, resulting in structural discrimination in the field of goods and services.[3]

The SCA had indeed failed to prove that the unequal treatment had a reasonable and objective justification. Furthermore, the institution overlooked that members of Roma and Egyptian national minorities have encountered various problems and difficulties over the years regarding the initiation or completion of the procedures for the recognition of the titles of ownership for their informal houses.

The CPD took into consideration the definitions of structural discrimination used by the Council of Europe,[4] and contained in the Law on Protection from Discrimination.

The CPD requested that the SCA take the necessary measures to examine the application of the complainant.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Gender equality in the Albanian national strategies approved by the Council of Ministers

In May and June 2024, the Albanian Council of Ministers approved three national strategies in their decisions (Decisions of Council of Ministers, hereafter: DCM) containing provisions relevant for gender equality:

1. Migration strategy

The Albanian Strategy on Migration 2024-2030[5] has a special focus on the gender perspective, emphasising the need to include data disaggregated by gender. The intention is to create a complete profile of migration in the country, identifying the key points related to the support, reintegration and empowerment of migrant women. This strategy includes measures to determine the impact of migration on the population using gender disaggregated data taken from INSTAT (the Albanian Institute of Statistics) reports.

2 Albania, Law No. 20/2020, on the completion of the transitory processes of ownership in the Republic of Albania and Council of Ministers Decision No. 1178/2020, on the determination of the documentation and the detailed rules for the identification of construction without a permit.

3 Albania, Commissioner for Protection from Discrimination, Decision No. 48 of 14 February 2024.

4 Council of Europe: 'Systemic discrimination involves the procedures, routines and organisational culture of any organisation that, often without intent, contribute to less favourable outcomes for minority groups than for the majority of the population, from the organisation's policies, programmes, employment, and services.' Council of Europe, Intercultural cities programme.

5 Albania, Decision of Council of Ministers (DCM) No. 271, dated 2.5.2024 on the approval of the national strategy on migration 2024-2030 and its action plan 2024-2026 (*Për miratimin e Strategjisë Kombëtare për Migracionin 2024-2030 dhe të planit të saj të veprimit 2024-2026*), Official Journal (OJ) No. 81 of 10 May 2024.

2. Consumer protection strategy

The Consumer Protection Strategy 2024-2030[6] focuses on empowering consumers by enhancing their ability to make informed decisions and assert their rights in the marketplace, ensuring they have the knowledge and tools to make well-informed choices when purchasing goods and services. However, it lacks emphasis on gender equality in the provision of goods and services – a key area protected under Albanian anti-discrimination law. The exclusion of gender equality represents a missed opportunity, especially given the unresolved legal issues in the Albanian legislation, such as the fact that the burden of proof is not shifted in civil court hearings in discrimination claims related to goods and services.[7]

3. Inclusion of gender and climate responsive budgeting in public finance management

The Strategy on the Management of Public Finances 2023-2030[8] is structured around six pillars. The second pillar – focusing on integrated strategic and budget planning, monitoring, and transparent reporting – provides measures for the further development and introduction of gender-responsive budgeting and climate-responsive budgeting. Key activities include:

- Incorporating gender analysis into both the planning and evaluation stages of budgeting. This means that when new policies are proposed, their potential impacts on different genders are assessed both before and after implementation.
- Capacity building within these ministries and institutions to perform such analyses.
- Developing a methodology for green/gender responsive budgeting and testing this methodology in selected sectors/budgetary institutions to evaluate its effectiveness.

LGBTI+ and women's rights in the most recent guidelines on the rule of law in Albania

The guidelines on the rule of law in Albania were approved by the Council of Ministers on 13 December 2023 and published in the Official Journal on 19 December 2023. These guidelines were approved as a national policy document within the context of negotiations for EU membership, specifically related to Chapter 23 on judiciary and fundamental rights.
The Ministries of Justice and Internal Affairs are responsible for coordinating and monitoring the implementation of these guidelines, as outlined in the decision. Two strategic frameworks relevant to gender equality were part of these guidelines on the rule of law.

The strategic framework for LGBTI+ rights includes planned amendments to two laws by 2028:

- The Albanian Family Code[9] – focusing on recognising cohabitation and civil marriage (including same-sex unions);
- The Law on international private law[10] – addressing cross-border recognition of family relationships.

6 Albania, DCM No. 271, dated 2.5.2024 on the approval of the intersectoral strategy on consumers protection and market surveillance 2024-2030 (*Për miratimin e Strategjisë Ndërsektoriale për Mbrojtjen e Konsumatorëve dhe Mbikëqyrjen e Tregut 2024-2030*), Official Journal No. 99 of 13 June 2024.

7 For more info on this regard, please see: European Commission, Directorate-General for Justice and Consumers, Baci, E. (2021), *Country report, gender equality: how are EU rules transposed into national law? Albania 2021*, Publications Office, 2021, pp. 109-110.

8 Albania, DCM No. 390, dated 12.6.2024 on the approval of the sectoral strategy on the management of public finances 2023-2030 (*Për miratimin e Strategjisë Sektoriale për Menaxhimin e Financave Publike 2023-2030*), Official Journal No. 105 of 26 June 2024.

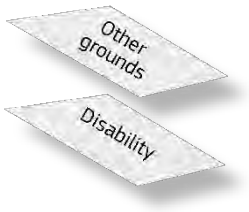
9 Albania, Law No. 9062, 8.5.2003 , the Family Code (*Kodi i familjes*), as amended by Law No. 134/2015.

10 Albania, Law No. 10428, 2.6.2011 on international private law (*Për të drejtën ndërkombëtare private*).

The strategic framework for gender equality and women's rights is built on three key pillars:

- Strengthening institutional capacities and aligning the legal framework with the EU *acquis* on gender equality by:
    - further revisions to the Gender Equality Law
    - amendments to the Domestic Violence Law for full alignment with the Istanbul Convention by 2030
    - changes to the Criminal Code by 2026 to redefine rape based on lack of consent (ensuring that non-consensual intercourse is recognised as rape)
- Ensuring proper protection for victims of gender-based violence;
- Promoting women's social rights.

Whilst the guidelines outline specific timelines for the introduction of the legislative amendments in the upcoming years, their successful implementation requires not only strong political will but also sufficient human and financial resources.



National Social Protection Strategy 2024-2030 and the action plan for its implementation

On 2 March 2024, the Government adopted a new National Social Protection Strategy 2024–2030 and the action plan for its implementation.[11] The draft of the strategy and the action plan had gone through an extensive public consultation process with international organisations in Albania, governmental institutions, independent bodies and NGOs.

The new strategy contains the following two policy objectives, detailed in six strategic objectives, that aim to ensure social protection enabling and empowering every individual in need, guaranteeing dignified living throughout the life cycle:

A. To reduce poverty for every individual in need and improve the lives of persons with disabilities through financial schemes and benefits that are appropriate, gender responsive, transparent and capable of coping with crisis risks. Through three strategic objectives, the strategy aims to improve the performance, adaptability and response to crises related to financial benefits and the financial scheme of individual economic assistance as well as to consolidate the bio-psychosocial assessment of disability and to create a sustainable system for the person with disabilities.

B. To expand integrated, accessible, qualitative and gender-responsive social services and advance the deinstitutionalisation of residential care in partnership with local government and other actors. Three strategic objectives have been set for this purpose: consolidation of the process of decentralisation of social care services; implementation of standards and strengthening of the human capacities of the personnel that offer social care services for qualitative and gender-responsive services; deinstitutionalisation of residential care services and transformation towards family, community and day services respecting the principle of human rights and gender perspectives.

[11] Albania, Council of Ministers, Decision No. 152 of 13 March 2024, on the adoption of the National Social Protection Strategy 2024–2030 and the action plan for its implementation.

The strategy and action plan will be financed mainly through the state budget, and the Ministry of Health and Social Protection is responsible for the strategy's implementation. The main mechanism for coordinating and monitoring its implementation is the Thematic Group for Social Protection.

Austria AT

LEGISLATIVE DEVELOPMENT

Transposition of the Work-life Balance Directive 2019/1158/EU

On 1 November 2023, a law reform was passed to transpose the Work-life Balance Directive into national law.[12]

The main points of the reform are as follows:

Parental leave

If both parents take leave, they can take leave up to the child's second birthday. If just one parent takes leave, it is only possible to take the leave up to 22 months after birth (unless they are a single parent, in which case they have the option to take 24 months of leave). According to the legislature, this is meant to fulfil the requirement that two months of leave are non-transferrable. However, it is still not possible for both parents to take leave at the same time (not even for the two months of non-transferrable leave), except for the first time that the parent who is taking the leave switches. In this case, it is possible to have an 'overlap' of one month (as was previously the case). It is therefore questionable whether this fulfils the requirement of the Directive in relation to two months of non-transferrable leave. One of the main points of contention that was defined by the EELN – namely, that additional requirements, such as the 'common household' requirement – still persists.[13]

It has now been clarified that expiry and limitation periods are suspended until two weeks after the end of the leave.

In respect of refusals of requests for flexible use of parental care leave (aufgeschobene karenz), the employer must now issue in writing their reasons for not agreeing to it. The requirement that the employer has to get the court's consent to deny the leave remains, so the impact of this part of the reform is likely to be modest.

Likewise, the employer has to provide reasons in writing for dismissing an employee in connection with their taking flexible parental leave – but only if the employee demands such a statement within five days of their dismissal. If an employee is dismissed based on their taking flexible parental leave, this can be challenged in court. However, it is arguable that this was challengeable in court before, anyway. What is new is that the relevant paragraph now points to another provision that holds, in no uncertain terms, that it is up to the claimant to prove unlawful dismissal. What remains somewhat unclear is how this relates to the requirement of the reversal of proof in discrimination cases – especially if a

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

13 De la Corte-Rodríguez, M. (2022), *The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead - EU Commission/EELN 2022*.

sex discrimination case is brought alongside a case for unlawful dismissal under the new law. The incomplete reversal of the burden of proof has been a point of critique for many years (see also below), and this has not been addressed by this reform.

The right to parental part-time work can now be exercised up to the child's eighth birthday (instead of the child's seventh birthday). However, the legislature has introduced a limit of seven years as the number of years that parental part-time work can be taken for. One main point of critique – namely that an employee had to work for the same employer for three years before having an absolute entitlement to parental part-time work – has not been addressed.

If the employer does not agree to (voluntary) parental part-time work, they have to provide their reasons in writing.

Heightened protection against dismissals during parental part-time work lasts (as it did previously) until shortly after the child's fourth birthday. If the employee is dismissed after this, the employer now has to issue in writing reasons for the dismissal – again, only if the employee demands such a statement within five days of their dismissal. As before, if the employee thinks they have been dismissed due to their taking parental leave, they can challenge it in court as unlawful dismissal (but, just as before, without a reversal of the burden of proof).

The family time bonus (remuneration for fathers who take paternity leave after a child is born) has been doubled (EUR 44.82 per day instead of EUR 22.60 per day). Moreover, fathers can also claim the family time bonus if the requirement for them to be in a 'common household' with the other parent cannot be met due to a hospitalisation of either parent. Nonetheless, the 'common household' requirement remains in place, which might not be compatible with the Directive.[14] The deadline for applying for the family time bonus has been extended to 121 days after birth (instead of 91 days), and there is now more flexibility in when the bonus can be taken up.

Care leave

The category of individuals for whom care leave can be taken has been significantly expanded. Leave can now be taken for any individual living in one's household and requiring care, as well as for close relatives, no matter whether they live in the same household or not. This is a considerable expansion, and in the opinion of the national expert, is in line with EU law.

As with parental leave, it has been clarified that expiry and limitation periods are suspended until two weeks after the end of the leave.

While it had been considered unlawful to dismiss an employee based on their taking care leave, this is now explicitly defined in law. The employer has to issue in writing reasons for dismissing an employee during their leave – but only if the employee demands this within five days of their dismissal.

It is also possible to apply for part-time work due to care obligations. If the employer does not agree to this, they must now issue their reasons in writing.

[14] De la Corte-Rodríguez, M. (2022), *The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead - EU Commission/EELN 2022*.

Equality body

The jurisdiction of the equality body for the matters outlined above has been expressly defined by law.

Belgium BE

LEGISLATIVE DEVELOPMENTS

Reform of the three federal anti-discrimination acts

Belgian federal anti-discrimination law provides that its application and effectiveness is to be regularly assessed. For this purpose, a committee of experts has produced two reports containing various recommendations to strengthen the fight against discrimination, hate speech and hate crime. The recommendations have inspired a major reform of the three federal anti-discrimination acts, adopted on 28 June 2023 and entering into force on 30 July 2023.[15]

The main strategic measures of the reform are:[16]

- A significant increase in the amounts of lump sum compensation available to victims of discrimination beyond employment;[17]
- Explicit protection against multiple discrimination, including 'cumulative' as well as 'intersectional' discrimination, and provision for the combination of lump-sum compensation amounts in such cases, to be decided by the court;
- Explicit prohibition of discrimination 'by association' and 'by assumption';
- Mandate for courts adjudicating discrimination cases to order respondents to adopt positive measures to prevent the recurrence of similar discriminatory acts, such as a diversity policy;
- Relaxation of the rules related to the requirement of the victim's consent in collective action.

New Brussels Code on equality, non-discrimination and the promotion of diversity

In Belgium, the fight against discrimination is not a 'matter' in itself, which would fall within the exclusive competence of the Federal State, the communities or the regions, but is a shared competence: it is exclusively up to the Federal State, the communities or the regions to adopt the measures necessary to prevent and punish discrimination in their areas of competence.
In Brussels, this division of powers led to the adoption of a particularly complex legislative package which, for a long time, contained some significant gaps. In April 2024, however, this body of legislation was the subject of a very welcome codification, through the adoption by the various competent authorities (Brussels-Capital Region, Joint Community Commission, French Community Commission) of a joint decree and ordinance establishing the Brussels Code on equality, non-discrimination and the promotion of diversity.[18]

15 General Anti-discrimination Federal Act of 10 May 2007; Racial Equality Federal Act of 30 July 1981; Federal Act pertaining to fighting discrimination between women and men of 10 May 2007.
16 Belgium, Act of 28 June 2023 amending the Act of 30 July 1981 to fight against certain acts inspired by racism or xenophobia, the Act of 10 May 2007 to fight against certain forms of discrimination and the Act of 10 May 2007 to fight against discrimination between women and men, Official Journal 20 July 2023.
17 Belgian law gives the victim the choice of claiming full compensation for the damage (subject to proving the actual extent of the loss) or claiming lump-sum damages. The lump-sum amounts were relatively low and had remained unchanged since 2007. They have now been tripled and will also be indexed on an annual basis.
18 Belgium, Joint decree and ordinance of 4 April 2024 of the Brussels-Capital Region, the Joint Community Commission and the French Community Commission establishing the Brussels Code on equality, non-discrimination and the promotion of diversity, Official Journal of 16 April 2024.

In addition to a simple codification of existing pieces of legislation, this new instrument unifies concepts and fills in gaps. It also makes substantial advances in a number of areas, including the following:

- addition of new protected grounds (notably family responsibilities, social condition);
- further clarification of the criteria for 'sex' which now includes the term 'medical and social transition' in place of 'gender reassignment';
- increased sanctions for discrimination, notably higher lump-sum damages, a diversification of criminal sanctions, and a possibility to impose positive injunctions;
- explicit prohibition of discrimination by assumption and by association;
- introduction of the prohibition of intersectional discrimination.

It is reasonable to expect that, thanks to its greater clarity, anti-discrimination law in Brussels will become more effective.

Maternity protection and maternity leave: infertility

On 18 April 2024, a legislative amendment introduced a prohibition of dismissal into the Labour Act of 16 March 1971 with respect to employees who are absent for reasons related to infertility treatment or a programme of medically assisted reproduction.[19] In addition, in the legislative amendment, 'absence due to infertility treatment or a programme of medically assisted reproduction' is regarded as a prohibited ground of discrimination for the purposes of the Gender Act (Act of 10 May 2007 to combat discrimination between women and men).

1. Prohibition of dismissal

Male and female employees will be protected against dismissal for a (renewable) duration of two months starting from the date their employer is informed of the fertility treatment by means of a medical certificate. If the treatment lasts longer than two months, the employee must submit a new medical certificate to start another two-month protection period (there is no limit to the number of protection periods)

The employer will not be allowed to terminate the employee's employment contract for reasons that are related to the fertility treatment. Terminations of employment will, however, still be allowed on other grounds, but the employer will bear the burden of proving that these are unrelated to the fertility treatment. In the event of violation of this protection against dismissal, the employer will have to pay

compensation equal to six months' remuneration (in addition to any notice period or indemnity in lieu of notice).

While maternity protection applies from the moment the employer is informed of the pregnancy until one month after the end of the post-natal rest period, this new protection against dismissal applies

[19] Act of 20 March 2024 amending the Employment Act of 16 March 1971 and the act of 10 May 2007 to combat discrimination between women and men and to establish protection for workers and employees absent from work for the purpose of diagnosing and treating infertility, *Moniteur belge/Belgisch Staatsblad,* 18 April 2024.

only from the moment the employer is informed through a medical certificate until the expiry of the two-month term. Unlike maternity protection, preparation for dismissal during the period of protection is not explicitly assimilated to an actual dismissal, and no sanction is provided for the non-renewal of a fixed-term employment contract. However, this could still be considered as a form of discrimination.

2. Discrimination

While the scope of the Gender Act, according to existing European case law, e.g. *Mayr*,[1] will be broad enough to include certain situations, such as IVF procedures, the amendment to the Gender Act of 10 May 2007 strengthens the protection by officially introducing infertility or medically assisted reproduction treatments as protected criteria in the Act and giving such a right to men. This means that employees will be granted protection against any adverse measures concerning infertility or medically assisted reproduction treatments.

Absences for the purposes of medical examinations are treated as ordinary absences, covered by a day's leave or by guaranteed pay in the event of illness. No specific days are granted by the amended Act.

Social status for magistrates

The Act on the social status of magistrates, which mainly concerns the introduction of different forms of leave for magistrates, was adopted on 12 May 2024.[2] It aims to enhance the wellbeing of magistrates, while taking into account the independence of the judiciary and the need to maintain the public service.

The act introduces:

- a 20-day birth leave;
- an exceptional leave of 5 days per year to provide personal assistance to a member of the household or family;
- a 4-month parental leave which, as in the private sector, can be taken full-time, 1/2 time, 1/5 time or 1/10 time, and can be split until the child reaches the age of 12;
- 9 weeks' adoption leave, foster parental leave and care leave, this leave is extended to 10 weeks as of 1 January 2025 and 12 weeks as of 1 January 2027; and
- a caregiver leave for palliative assistance, assistance to a member of the household or family suffering from a serious illness, or assistance or care to a minor child during or just after the child's hospitalisation as a result of a serious illness. This one-month leave can be extended twice and can be taken on a full-time or part-time basis.

Lastly, the provisions relating to maternity protection have been adapted to provide the same protection as that afforded by Article 39 of the Labour Act of 16 March 1971. This includes breastfeeding breaks, the transfer of maternity leave to the co-parent in the event of the mother's

1 CJEU, judgment of 26 February 2008, *Mayr*, C-506/06, ECLI:EU:C:2008:119.
2 Belgium, Act of 12 May 2024 on the social status of magistrates, Official Journal, 24 May 2024.

death or hospitalisation, the prohibition of being 'on call' during the eight months prior to the probable date of childbirth, and the extension of prenatal leave until the actual date of childbirth.

This legislation is based on leave options in the federal public service and for the personnel of the judiciary, while taking the specific situation of the judiciary into account. This act was eagerly awaited, as it enables magistrates to benefit from leave rights set out in the Work-life Balance Directive and, as such, ensures a more thorough implementation of the Directive in the federal public sector.

In terms of coverage, birth and adoption leave are available to co-parents in the same way as in the private sector (legal cohabitation). Some types of leave still reflect a quite traditional view of the family and take little account of the needs of separated and/or blended families. For example, exceptional leave to provide personal care or assistance is only available if it involves caring for a member of the household or family. Household members are defined as cohabiting persons, i.e. those sharing the same home, or family members, i.e. the spouse or cohabiting person and first-degree relatives. This excludes, for example, care or assistance to an ex-spouse, or to a cohabiting person (without legal status) or a member of their family.

Gender

Maternity protection and maternity leave: special leave in the event of a miscarriage

On 9 June 2024,[3] the Act amending the Royal Decree of 19 November 1998 regarding leave and absences granted to members of the personnel of the federal state administrations (civil servants and contractual agents) was adopted introducing a two-day leave in the event of miscarriage. This new leave in the federal public service will fill a gap by covering the first 180 days of a pregnancy, after which period specific measures already exist. The leave is intended not only for the pregnant woman but also for her partner. A worker who has informed her employer of her pregnancy and who suffers the loss of a pregnancy before the 181st day of the perinatal period may request two days of special leave. During these two days, to be taken directly after the loss, remuneration is maintained, and the worker does not need to provide a medical justification for her absence.

Two days of special leave are also granted to the partner of the pregnant woman.

This act only applies to members of the federal civil service (public servants and contractual agents). However, a similar form of leave exists for members of the Flemish administrations.

BG Bulgaria

CASE LAW

Racial or ethnic origin

Supreme Administrative Court ruling that recommendations in non-binding opinions issued by the equality body are not subject to judicial review

The case concerns a TV programme entitled 'Can Gypsies Feed Bulgarians?!', aired in 2020, and later

[3] Belgium, Royal Decree of 9 of June, amending the Royal Decree of 19 November 1998 on leave and absences granted to members of the personnel of State administrations concerning compassionate leave in the event of loss of pregnancy, Official Journal, 28 June 2024.

uploaded on social media. The complainant claimed that the content of the programme undermined the dignity of Roma people, perpetuated stereotypes, and constituted hate speech and discrimination.

The Bulgarian equality body, the Commission for Protection against Discrimination (CPD) found that the respondent, a politician who was hosting the TV programme, violated the Protection Against Discrimination Act (PADA) by committing acts of harassment and inciting discrimination based on ethnicity, personal status, and property status. The body issued a non-binding opinion, ordering the respondent to pay a fine and recommended that he refrain from making statements that violate others' dignity or create a hostile, offensive, or threatening environment.[4]

On appeal, the administrative court annulled the decision of the CPD, finding that the body had failed to adequately address the question of whether the programme as a whole or specific phrases thereof constituted harassment. The court further found that the CPD's finding of intentional harassment based on ethnicity, personal status, and property status was not sufficiently supported by evidence.

The CPD appealed against the judgment before the Supreme Administrative Court (SAC), arguing that its non-binding recommendations were not an enforceable administrative act but rather advisory. It further objected that harassment does not require intent to humiliate, but that only the occurrence of such an effect is sufficient.

The SAC ruled on the case in June 2024, repealing the judgment and clarifying that the CPD's recommendations contained in non-binding opinions are advisory and not subject to judicial challenge as they do not constitute enforceable administrative acts.[5] The SAC further found that neither the CPD nor the lower court had justified their reasoning on whether the violation could be qualified as 'harassment' and 'incitement to discrimination' and whether each of the grounds – 'ethnicity', 'personal status' and 'property status' - were present.

In view of the above, the SAC held that the judgment under appeal was rendered in breach of the rules of court procedure and in violation of the substantive law, which requires its annulment in its part concerning the non-binding recommendations and the return of the case for a new examination with regards to the finding of discrimination per se.

Supreme Administrative Court confirms that a former Government minister committed anti-Roma discriminatory harassment

In January 2019, the then Minister of Defence and Deputy Prime Minister made strong public statements against Roma.[6] In January 2020, the national equality body (Commission for Protection June 2021 the Supreme Administrative Court held that the statements did amount to discrimination, but in and returned the case for a new ruling.[7]

In September 2023, the CPD decided again that the respondent had not discriminated on the ground of ethnicity, repeating its reasoning from 2020 that the statement would have to have been directed

4 Bulgaria, Commission for Protection against Discrimination, decision No. 272 of 19 July 2023 in case No. 88/2021.
5 Bulgaria, Supreme Administrative Court, Decision No. 7873 of 25 June 2024 in Case No. 12307/2023.
6 The respondent stated as follows: 'Gypsies in Bulgaria have become extremely insolent. A few years ago, they beat up a policeman, two days ago they beat up a soldier... The tolerance of Bulgarian society is running out.'
7 Bulgaria, Supreme Administrative Court, Decision No. 6976 of 9 June 2021 in Case No. 11591/2020.

at a specific person or persons of Roma origin, although in the prior judgment of the SAC it is explicitly stated that this opinion is contrary to the legislature's legal definition of 'harassment' as an independent manifestation of discrimination, according to which the realisation of the violation requires *alternatively* the presence of purpose *or* result. This decision was declared null and void by the Sofia City Administrative Court in December 2023 due to a direct contradiction with the reasoning of the SAC from 2021. After an appeal of this ruling by the respondent, the case was referred to the SAC once more.

In June 2024, the SAC[8] reiterated the irrelevance of the specific intention of the respondent to direct his statement to an individual person or to all representatives of the Roma ethnic group, as long as the statement was of a nature to cause the prohibited result as stipulated in the Protection Against Discrimination Act. The SAC thus confirmed that the respondent's statement contained negative comments against the Roma in general, i.e. against the Roma ethnic minority, and it had been evident that one of the objectives of the complainant organisation was the protection of the social interests, reputation and dignity of its members.

Supreme Administrative Court confirms that appeals under the Protection Against Discrimination Act are exempt from state fees

In June 2024, the Bulgarian Supreme Administrative Court (SAC) issued an interpretative decision in response to a request initiated by the Ombudsman in 2021 concerning inconsistencies in case law regarding the applicability of state fees in proceedings under the Protection Against Discrimination Act (PADA).[9] The decision examined whether state fees are payable in discrimination cases, considering that the PADA, on the one hand, ensures free court access without fees, while the Administrative Procedure Code (APC), on the other hand, stipulates that state fees are payable for cassation and private appeals in administrative proceedings.[10]

The General Assembly of the Chambers of the SAC reviewed conflicting decisions and legal opinions from various administrative courts and legal bodies. Relying on the principle of *lex specialis derogat legi generali*, the SAC held that the PADA is a special law focusing specifically on anti-discrimination measures, while the APC is a general procedural law, thus the PADA takes precedence over the APC when addressing the same subject matter. The SAC recalled that the relevant PADA provision, effective since 2004, explicitly states that no state fees are to be charged for court proceedings under this law. It held that the APC amendments introduced in 2018 did not amend or repeal the fee exemption provision in the PADA.

The SAC further held that in light of the fundamental rights protection powers of the Bulgarian equality body, the Commission for Protection against Discrimination, the state fee exemption under the PADA ensures free access to court for persons who are victims of discrimination, thus guaranteeing them an effective remedy for violations of a fundamental right. In their written submissions, the Prosecutor General, multiple administrative courts, and the Ministry of Justice provided varying perspectives, with a majority supporting the interpretation that the fee exemption provided for under the PADA remains valid.

8 Bulgaria, Supreme Administrative Court, Decision No. 8085 of 28 June 2024 in Case No. 2122/2024.
9 Bulgaria, Supreme Administrative Court, Interpretative decision No. 5 of 25 June 2024 in case No. 5/2021.
10 See Articles 68 and 75(2) of the PADA and Articles 227a and Article 235a of the APC, respectively.

Croatia

LEGISLATIVE DEVELOPMENT

Amendments to the criminal law framework to strengthen the protection of women

On 14 March 2024,[11] the Croatian Parliament adopted a package of legislative amendments (amendments to the Criminal Act,[12] the Act on Protection against Domestic Violence[13] and the Criminal Procedure Act[14]) intended to strengthen the criminal protection of female victims of violence and domestic violence. All amendments entered into force on 2 April 2024.

The most important amendments to the Criminal Act include:

- Introduction of the definition of gender-based violence (Article 87(32), Criminal Act): 'Gender-based violence against women is violence that is directed against a woman because she is a woman or that affects women disproportionately. This is considered as an aggravating circumstance unless the specific offence prescribes stricter punishment.'

- Introduction of the criminal offence of femicide (Article 111.a, Criminal Act): there is no mention of the word 'femicide', the title of the offence is 'Aggravated murder of a female person' and is described in Paragraph 1: 'Whoever commits a gender-based murder of a female person will be punished by imprisonment of at least 10 years or long-term imprisonment'.[15] When determining whether this criminal offence has been committed, circumstances such as the fact that the victim is a 'close person',[16] a person who was previously harassed by the perpetrator, a vulnerable person, a person in a subordinate or dependent position in relation to the perpetrator, or the fact that the act was committed in the context of sexual violence, or a relation that puts women in unequal position, or that there are other circumstances pointing to the occurrence of gender-based violence will be taken into account (Paragraph 2).

- Amended definition of the criminal offence of sexual harassment (Article 156, Criminal Act): the criminal offence of sexual harassment has been amended to differentiate between a basic and a qualified form of this offence, depending on the relation between the victim and the perpetrator. More severe punishment is provided for the qualified offence. The basic offence concerns sexual harassment or harsh harassment[17] of a subordinated person or a person who

11 The last session before the dissolution of the Croatian Parliament in view of the next parliamentary elections.
12 Croatia, Act on Amendments to the Criminal Act (*Zakon o izmjenama i dopunama Kaznenog zakona*), NN No. 36/2024.
13 Croatia, Act on Amendments to the Act on Protection against Domestic Violence (*Zakon o izmjenama i dopunama Zakona o zaštiti od nasilja u obitelji*) NN No. 36/2024.
14 Croatia, Act on Amendments to the Criminal Procedure Act (*Zakon o izmjenama i dopunama Zakona o kaznenom postupku*), NN No. 36/2024.
15 'Long-term imprisonment' is a specific sanction for the most severe criminal offences, whose duration cannot be shorter than 20 years, nor longer than 40 years (or 50 years in exceptional circumstances) and is pronounced in full years (Article 46, Criminal Act (*Kazneni zakon*) NN Nos. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019, 84/2021, 114/2022, 114/2023, and 36/2024. The 'normal' prison sentence is between three months and 20 years.
16 The definition of 'close persons' includes family members and other persons in a close personal relationship with or sharing a household with the perpetrator, expressly enumerated in Article 83(9), Criminal Act.
17 'Whoever sexually harasses or *harshly harasses* …' (emphasis added) (HR: '*Tko seksualno uznemirava ili grubo uznemiri*…'). The term 'harshly harasses' was added apparently to make sure that even one occurrence of harassment, in

is dependent on the perpetrator (punishable by imprisonment up to two years; Paragraph 1), whereas the qualified offence is committed against a 'close person', a person who is especially vulnerable due to age, illness, disability, addiction, pregnancy, or a severe bodily or mental impairment (punishable by imprisonment up to three years; Paragraph 2). This amendment also takes into account the fact that sexual harassment is deleted as a specific form of a misdemeanour offence of domestic violence under the Act on Protection against Domestic Violence, i.e. it is transferred into the sphere of criminal law. The definition of sexual harassment has remained the same ('Sexual harassment is any verbal, non-verbal or physical unwanted conduct of a sexual nature with the aim or consequence of violation of dignity, and causing fear, hostile, degrading or offensive environment' (Paragraph 3)).

- Amended definition of the criminal offence of domestic violence (Article 179.a, Criminal Act): the wording of the criminal offence of domestic violence has been reformulated in order to make a clearer distinction between the blanket criminal offence of domestic violence (which refers to the violation of rules regulating the protection against domestic violence, and is applied subsidiarily, only where another more serious criminal offence is committed) and domestic violence as a misdemeanour offence under the Act on Protection against Domestic Violence. The words 'harshly, frequently or in any other manner' have been inserted in the description of the criminal offence of domestic violence, which now reads:

'Whoever harshly, frequently or in any other manner severely violates the rules on protection against domestic violence, and thus causes a family member or other close person to fear for their safety or safety of their close persons, or brings them into a degrading position, without thereby committing another more serious criminal offence, will be punished by imprisonment from one to three years.'
This reformulation is supposed to bring more clarity in the practical enforcement of this provision.

The most important amendments to the Act on Protection against Domestic Violence include:

- Deletion of 'sexual harassment' as one of the forms of domestic violence as a misdemeanour offence under that Act (deletion of Article 10(4), Act on Protection against Domestic Violence): the protection against sexual harassment has been moved into the sphere of criminal law, to ensure criminal liability for all cases of sexual harassment committed against 'close persons', which elevates the degree of protection against this type of offence.[18]

- Amended definition of victims' rights (Article 6(1), Act on Protection against Domestic Violence): the amendment of the catalogue of victims' rights was necessary to bring it in line with the simultaneous amendments of victims' rights under the Criminal Procedure Act.

The most important amendments to the Criminal Procedure Act include:

- Amended definition of and clarification of the rights of victims of criminal offences, with special attention to the rights of victims of violence against women, domestic violence, and

view of the intensity of its criminal content, suffices to establish the existence of this criminal offence. This incorporates the concern raised by GREVIO in view of inconsistent case law and judicial interpretation of this offence, caused by the wording used, where repeated action of harassment was required. See Final Draft of the Act on Amendments of the Criminal Act, P.Z.E. 615, p. 21, and GREVIO (2023) *Baseline Evaluation Report Croatia*, Council of Europe, p. 60.

[18] See Final Draft of the Act on Amendments to the Act on Protection against Domestic Violence, P.Z.E. 617.

violence against close persons (amendments to Articles 43, 43.a, and 44, Criminal Procedure Act).

POLICY AND OTHER RELEVANT DEVELOPMENTS

Gender

National campaign to promote positive and equal parenthood

The Central State Office for Demography and Youth (Središnji državni ured za demografiju i mlade (SDUDM)) has initiated a national campaign to promote positive and equal parenthood under the slogan, 'It is a big mistake, leave not to take'[19] ('Veliki je propust ne uzeti dopust'). The Croatian Employers' Association (Hrvatska udruga poslodavaca (HUP)) is the campaign partner. The campaign was officially launched at the press conference on 13 March 2024.[20] Its aim is to raise public awareness about the importance of equal parenthood, to motivate fathers to use paternity and parental leave, and to promote the active inclusion and participation of fathers in caring for children. The campaign activities include: the presentation of a survey on the uptake of paternity and parental leave; a film broadcast on national and regional TV networks at primetime and available online on social networks;[21] and interviews, lectures and other public activities in cooperation with various state bodies.[22] The activities also include the distribution of a promotion package[23] to fathers who have taken paternity leave. A survey on paternity and parental leave was conducted during 2023, on a sample of 600 persons aged 20 to 50 and residing in Croatia.[24] The survey's aims were to examine the perception of the importance of the father's role in a child's upbringing, to determine familiarity with and use of paternity and parental leave, to identify barriers to using paternity and parental leave, and to examine the perception of the attitudes of employers and colleagues to the use of parental leave by fathers. The main findings of the survey include:

- Respondents showed a relatively high level of basic familiarity with different forms of leave after the birth of a child. Obligatory maternity leave is the most recognised type of leave (73 %). However, only about half of respondents had heard about additional maternity leave, which is transferrable to the father (53 %) and about parental leave (46 %), whereas a higher share of respondents (61 %) were familiar with paternity leave (while the first two types of leave have existed for decades, paternity leave was only introduced in the second half of 2022). However, 8 % of respondents had not heard of any type of leave.

- The role of fathers in the upbringing of children is considered important, especially after the third year of the child's life, when it is perceived as equal to the role of the mother.

19 There is no official English translation, this is the translation of the Croatian gender equality expert for the network.
20 See SDUDM News (2024) *Predstavljena nacionalna kampanja za promicanje pozitivnog i ravnopravnog roditeljstva* (The national campaign for the promotion of positive and equal parenthood), 13 March 2024.
21 The video's main message is that fathers can take any parenting role, and it represents fathers in various everyday activities with their children.
22 The campaign's official website is maintained by SDUDM.
23 Around 200 promotion packages containing newborn accessories with signs saying 'dad on leave' (e.g. baby blanket, baby cap) and other promotional materials were prepared for fathers who have taken paternity leave. See SDUDM, Information about the promotion package for fathers.
24 Only a PowerPoint presentation of the survey's main results is publicly available; see SDUDM, Presentation of the results of survey on parental and paternity leave.

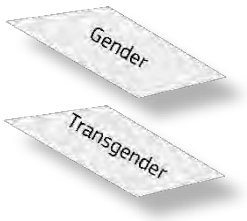
- Equal parenting is considered extremely important, primarily due to the emotional development of the child and the development of the relationship of each parent with the child.

- Unlike paternity leave, parental leave is relatively rarely used by fathers, though many express a high interest in taking it if more favourable conditions were available. However, they are not necessarily looking to take it for the same duration as mothers. The main barrier to taking parental leave remains the financial loss caused by the cap on parental benefits.[25]

- Fathers who had experience in taking up parental leave indicated that they mostly had positive reactions from their colleagues, but it is generally believed that fathers who use parental leave have problems with employers, to a greater extent than mothers do.

CZ Czechia

CASE LAW



Constitutional Court ruled in a case of gender-based violence against a hospitalised transgender girl

On 11 July 2023, the Constitutional Court published a decision[26] regarding a case of the rape of a transgender girl with Asperger's Syndrome, which the Constitutional Court already dealt with two years ago. When the girl was 12 years old, she was hospitalised in a public psychiatric hospital on grounds of a judicial decision. She was placed in a department for boys (which was also her gender assigned at birth). Here, she was repeatedly raped by other hospitalised patients.

The crime was dealt with by a criminal court, and the girl demanded compensation of non-pecuniary damages of approximately EUR 20 990 (CZK 500 000). The first and second-instance courts granted her only EUR 3 150 (CZK 75 000) and referred her to civil proceedings with regard to the remaining sum. After appealing, the case eventually reached the Constitutional Court. The Constitutional Court annulled the second-instance decision.

The court of second instance, following the Constitutional Court's ruling, ordered the defendant to compensate the victim with a further EUR 3 150 (CZK 75 000) – in conjunction with the original ruling, a total of EUR 6 300 (CZK 150 000), and referred her to civil proceedings with regard to the remaining sum. The Constitutional Court again annulled the second-instance decision.

According to its opinion, even the newly determined total amount of compensation does not correspond to the gravity of the violation of the right to inviolability of the person and privacy of the complainant as a particularly vulnerable victim. Due to the severity of rape, its compensation must be seen as a part of the right to the integrity and privacy of the person. In the current case, the amount awarded

[25] Parental benefits (allowance or salary compensation) are paid for the entire duration of parental leave. They are paid at the expense of the state budget and amount to 100 % of the monthly earnings (average earning in the six months preceding the start of the use of parental leave) but cannot exceed a maximum of 225.5 % of the budget calculation base (EUR 995.40). See Article 33(3), Act on Maternity and Parental Benefits (*Zakon o rodiljnim i roditeljskim potporama*), NN No. 152/2022.

[26] Czechia, Constitutional Court, Decision of 27 June 2023, No. I. ÚS 1222/22.

seemed disproportionately low and did not align with the compensation amounts typically seen in similar cases reviewed by the Constitutional Court. Thus, it declared a violation of the right of integrity of a person and their privacy as enshrined in Article 7 of the Charter of Fundamental Rights and Freedoms.

In summary, the Constitutional Court again annulled a lower court's decision in a case of a disproportionately low amount of non-pecuniary compensation of a transgender victim of rape committed in a public hospital. The Court particularly took into account the gravity of the crime and vulnerability of the victim. This judgment should lead to adjudication of more adequate compensation in similar cases.

Right of persons with disability to represent themselves in judicial proceedings

On 8 August 2023, the Constitutional Court decided on a case concerning access to justice for persons with disabilities, specifically their representation in judicial proceedings.

The claimant initiated civil proceedings against his former employer who had terminated his employment. Due to the claimant's unconventional behaviour during the proceedings, including frequent disruptions of court sessions, verbal attacks against the respondent and the presiding judge, the court sought a forensic evaluation of his mental health. Two expert assessments confirmed that the claimant had a mental illness, the more recent report also suggesting that he was incapable of representing his own interests before the court. The court thus appointed a legal guardian for the claimant against his wishes. The claimant appealed against this decision, arguing that he was both willing and capable of representing himself legally and that the decision had infringed his right to a fair trial.

The Constitutional Court affirmed his complaint, highlighting that persons with disabilities should not be automatically or entirely precluded from representing themselves in court. The Court underlined however that ensuring equal participation in proceedings for persons with disabilities may necessitate specific support or assistance. The Court emphasised that in line with the UN Convention on the Rights of Persons with Disabilities, it is essential to account for the unique nature of an individual's disability and introduce appropriate supportive measures. Instead of adopting a 'one-size-fits-all' approach when dealing with persons with disabilities, courts should thus evaluate each person's circumstances individually. If an individual can effectively represent themself and declines assistance such as legal guardianship, imposing such measures is not justifiable. Moreover, any court decisions in these situations must be thoroughly justified. In the present case, the claimant would be treated unequally if he was deprived of his right to represent himself before the court.[27]

Constitutional Court decision on reasonable accommodation for a pupil with a disability

The case concerned a minor student with autism and a mild intellectual impairment, who required and was entitled to special educational measures as provided for in the Schools Act. His school recommended personal assistance, prompting a request to the Regional Office for the creation and funding of such a position. As the Regional Office only covered parts of the funding, the family contributed to the assistance (approximately EUR 245 per month). When this became untenable for

[27] Czechia, Constitutional Court, judgment No. II. ÚS 82/23 of 8 August 2023.

the family, they brought a claim before the courts, invoking the rights to free education and to reasonable accommodation. The complainant sought a written apology from the school and compensation for pecuniary and non-pecuniary damage. When the claim was rejected by the first and second instance courts as well as the Supreme Court, the complainant filed a constitutional complaint.

In December 2023, the Constitutional Court upheld the complaint, quashing the previous decisions.[28] First, the Court underlined the significance of the right to free education and drew on the UN Convention on the Rights of Persons with Disabilities, emphasising the obligation of state parties to adopt relevant measures and reasonable accommodation for the education of children with disabilities. The Court noted that the previous courts neglected to assess whether the provision of a partially covered personal assistant adequately addressed the individual needs of the complainant. It stressed that the school must demonstrate its efforts to adopt reasonable accommodation measures for the inclusion of all students with special needs. Exemption from this obligation is only possible if a specific measure poses an unreasonable burden for the school. Consequently, the courts needed to establish whether the school failed to adopt reasonable accommodation and only subsequently evaluate whether such a step would have been excessively burdensome. In any case, the Court established that the right to free education implies that parents cannot be required to bear the costs of assistance necessary for their child's education.

Secondly, the Court found that the complainant was unlawfully denied his right to be heard by the courts in proportion to his circumstances, due to his age and disability.

The lower courts will reexamine the case in light of the Constitutional Court's reasoning.

Supreme Court ruling on reasonable accommodation in relation to face mask requirements during the Covid-19 pandemic

During the Covid-19 pandemic, the Ministry of Health prohibited access to all buildings for persons without respiratory protective equipment (notably face masks). The prohibition did not apply in certain situations, but these exceptions did not include asthmatics.[29]

The claimant provided her employer with a medical certificate stating that she had asthma and therefore couldn't work the entire shift with covered respiratory passages. However, the employer compelled her to either wear a face mask or take vacation, unpaid leave or sick leave. Subsequently, the employer did not pay the claimant's salary for the period when she could not comply with the face mask requirement. The claimant brought the case before the civil courts, requesting payment of her overdue salary and an apology from the employer. The lower courts did not grant her claim, and the claimant thus appealed before the Supreme Court.

In February 2024, the Supreme Court granted the appeal, overturning the judgments of the lower courts due to their failure to examine properly whether the treatment of the employee amounted to discrimination based on disability and/or health condition, or not.[30] The first instance court will now examine the existence of such discrimination and the possibility of providing reasonable

28 Czechia, Constitutional Court, judgment No. III. ÚS 1068/22 of 15 November 2023 (published on 5 December 2023).
29 The Ministry of Health later added an exemption for asthmatics after a series of extraordinary measures were revoked by national courts.
30 Czechia, Constitutional Court, judgment No. 21 Cdo 1577/2022-180 of 19 February 2024.

accommodation allowing the employee to work despite her health constraints, without amounting to a disproportionate burden for the employer.

The Supreme Court further affirmed that the employee had the right to refuse to comply with the employer's instructions if they posed an immediate and significant risk to her life or health, even where the instruction aligned with measures of a general nature.

Denmark DK

LEGISLATIVE DEVELOPMENT

Government ends Danish National Church's exception from the Equal Treatment Act

The Danish National Church, like other religious organisations, previously benefited from an exception to the Equal Treatment Act,[31] allowing it to consider gender when selecting a new pastor.[32] On 13 November 2023, the Government announced the removal of this exception.[33] The Minister for Ecclesiastical Affairs issued a new executive order[34] repealing the exception regarding priest positions in the National Church. As a result, it will no longer be legal for the Danish National Church to nominate, hire, or reject candidates based on their gender.

CASE LAW

Case of alleged ethnic discrimination reopened by the Board of Equal Treatment due to change in practice regarding complainants acting 'passively'

According to a general principle of Danish law, which is also applicable in discrimination cases, claimants who act 'passively' can lose their claims before the statutory period of limitation. In March 2023, the Board of Equal Treatment changed this approach by arguing that the relevant legislation does not contain any appeal deadline preventing the Board from examining a discrimination complaint due to the time that has elapsed between the alleged discrimination and the filing of the complaint.[35] Since then, complainants have not lost their claims before the Board by acting passively, and the Board has resumed cases that had previously been decided on the basis of the claimant being 'passive'.

One of the resumed cases concerned a refusal to grant access to a nightclub due to the complainant's lack of knowledge of Danish and English. The respondent nightclub stated that the company responsible for security at the nightclub had emphasised that language barriers could create a safety and security problem in the event of the need for evacuation.

31 Denmark, Promulgation of the Act on equal treatment of men and women with regard to employment etc. (*Bekendtgørelse af lov om ligebehandling af mænd og kvinder med hensyn til beskæftigelse m.v.)*, 8 June 2011.

32 Denmark, Proclamation on derogation from the Act on equal treatment of men and women with regard to employment etc. as far as clerical positions are concerned (*Bekendtgørelse om fravigelse af lov om ligebehandling af mænd og kvinder med hensyn til beskæftigelse m.v. for så vidt angår præstestillinger*), 10 July 1978.

33 Denmark, Guidance on repealing the exception from the Equal Treatment Act for priest positions in the folk church (*Orientering om ophævelse af undtagelsen fra ligebehandlingsloven for præstestillinger i folkekirken*), 13 November 2023.

34 Denmark, Annex to the Proclamation on derogation from the Act on equal treatment of men and women with regard to employment etc. as far as clerical positions are concerned (*Bekendtgørelse om fravigelse af lov om ligebehandling af mænd og kvinder med hensyn til beskæftigelse m.v. for så vidt angår præstestillinger*), 10 July 1978.

35 Denmark, Board of Equal Treatment, decision No. 9258 of 1 March 2023.

The Board had previously decided on the case in February 2019, determining that the complainant had acted passively and thus lost the right to make a claim.[36] On the basis of the change in practice regarding passivity, the Board reopened the case and decided on the merits of alleged ethnic discrimination in September 2023.

The Board then concluded that a requirement for specific language skills may constitute indirect discrimination on the grounds of ethnic origin if it places persons of a particular ethnic origin at a particular disadvantage compared to others. It found, however, that no factual circumstances had been demonstrated to indicate that indirect discrimination had occurred on the basis of ethnic origin in the present case, as a requirement to know English, which - in the words of the Board - is a 'world language', could not be considered to constitute indirect discrimination against persons of a particular ethnic origin.[37] In conclusion, the complainant was not successful in the complaint.

Supreme Court ruling on the calculation of compensation for disability discrimination

Under the Danish flex-job scheme, persons with disabilities are employed part time but receive, in addition to the wages paid by the employer, a subsidy from the local municipality. The Eastern High Court ruled on a case of disability discrimination of a shop assistant in a flex-job position, ordering the employer to pay compensation to the claimant. The court held that the amount of compensation should be calculated based on the actual salary expenditure by the employer, without the addition of the public wage subsidy.[38] In a similar case, the Western High Court reached the opposite conclusion and ruled that compensation for disability discrimination should be determined based on the employee's total wage income during employment, meaning that both the pay from the employer and wage subsidy from the municipality should be taken into account.[39] The Western High Court found the employer liable for the whole amount. The Eastern High Court ruling was appealed to the Supreme Court.

In March 2024, the Supreme Court ruled on the case. It concluded that the amount of compensation for disability discrimination to be paid by the employer should be based on the actual salary expenditure by the employer, without the addition of the public sector wage subsidy and without taking into consideration the typical collective wage for a full-time employee.[40]

Equality body decision on the allegedly discriminatory nature of a retirement age imposed for persons with flex-job positions[41]

The complainant was employed in a flex-job position and complained to the Board of Equal Treatment that the municipality's refusal to allow her to continue in the flex-job position once she reached the retirement age amounted to discrimination on the grounds of age and disability.

The Board first considered whether the part of the complaint that concerned age fell within the scope of the Act on the Prohibition of Discrimination in the Labour Market etc., interpreted in accordance with

36 Denmark, Board of Equal Treatment, decision No. 9190 if 28 February 2019.
37 Denmark, Board of Equal Treatment, decision No. 9845 of 20 September 2023.
38 Denmark, Eastern High Court, judgment of 14 December 2022, case No. BS-47157/2020-OLR. Printed in U2023.1434Ø.
39 Denmark, Western High Court, judgment of 29 March 2023, case No. BS-14998/2022-VLR. Printed in U2023.2831V.
40 Denmark, Supreme Court, judgment of 12 March 2024, case No. BS-49177/2023-HJR.
41 Under the flex-job scheme, persons with disabilities are employed part time but receive, in addition to the wages paid by the employer, a subsidy from the local municipality.

the Employment Equality Directive. The Directive does not cover payments from public or similar schemes, including public social security and social protection schemes or similar arrangements. On that basis, the Board assessed that the flexible job scheme had the character of a public scheme with payments from the state, where the purpose is access to or retention of employment. Thus, according to the Board, the complaint fell outside the scope of the Directive and thereby the Danish Act as well. The Board therefore dismissed the part of the complaint concerning discrimination on the ground of age.

With regard to the part of the complaint that concerned disability discrimination, the Board found that it concerned the application and interpretation of the legislation regulating flex-job positions rather than discrimination as such. This part of the complaint therefore fell outside the scope of the Disability Discrimination Act and was dismissed as well.[42]

The decision illustrates the problem of the difference between a public authority's discriminatory acts and a public authority's applications and interpretations of legislation.

Allegedly discriminatory job advertisement stating that applicants with flex-job status will not be accepted

A company placed a job advertisement for a mystery shopper whose role is to visit a particular store pretending to be a customer and then evaluate the service to provide feedback to staff and improve customer satisfaction. On the company's website it appeared that the job was not open to persons in the flex-job scheme. When the complainant, who was awarded a flex-job, approached the company via email to ask why the mystery shopper position was not open to flex-job candidates, the company replied that their set-up was not compatible with the use of flex-job employees.

The complainant argued that she had been discriminated against because of her disability and that she was entitled to compensation.

The Supreme Court stated that a violation of the Act on the Prohibition of Discrimination in the Labour Market etc. and an award of compensation for discrimination due to disability, basically require that the complainant had applied for a job with the employer. Since this was not the case, the Supreme Court found that the complainant had not experienced discrimination and could not be awarded compensation.[43]

The judgment may illustrate a potential breach of EU law in the light of the *Feryn* judgment[44] in particular.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Report of the Pay Structure Committee

The Pay Structure Committee published its report after completing its work in June 2023.[45] The committee was set up in September 2021 as a follow-up to a parliamentary intervention ending a

42 Denmark, Board of Equal Treatment, decision No. 9405 of 22 April 2024.
43 Denmark, Supreme Court, judgment of 12 June 2024, case No. BS-62875/2023-HJR.
44 Court of Justice of the EU, judgment of 10 July 2008, C 54/07,.
45 Denmark, Pay Structure Committee, *Report*, June 2023.

conflict on a collective agreement in the nursing sector. The tripartite committee of employer organisations, labour organisations and the Government was set up to:

- analyse salary structures and salary development in the public sector;
- explain the effects and consequences of changed pay structures in the public sector, including the significance for the private sector;
- elucidate opportunities for developing wage formation in the public sector within the framework of the Danish agreement model in the public sector.

It was outside the scope and purpose of the committee to assess what constitutes a 'correct' or 'fair' wage for specific professions in the public sector. Rather, the three parties on the committee wanted to form a common basis, which could be used as a starting point for their further discussions.

The committee's statistical analysis indicates that, for example, there is a tendency for employees in certain professions with a high proportion of female employees, and of employees working part time, to have a lower actual salary then a statistically calculated salary when factors of education, experience and management are taken into account.

The report also indicates that employees in specific sectors, largely in the private sector and mostly working full time, have a higher actual salary on average than a statistically calculated salary when their education and experience level and management responsibility are taken into account.

The statistical analyses must also be seen in the light of the gender-segregated labour market. The gender division is seen both between the private and public sectors and internally within the public sector: 7 out of 10 public employees are women, and while 8 out of 10 employees in municipalities and regions are women, the distribution in the state is closer to 5 out of 10.

The committee's report points out that the salary structures in the public sector today reflect the three parties' choices, compromises and priorities through many decades of negotiations. The committee did not find it possible to point to a single standing impact point as the determinant of the current salary structures. The current salary structures therefore cannot be said to be politically determined, for example as a result of different civil service reforms in the post-war period.

This is in contrast to a much-publicised analysis of the Civil Service Reform of 1969.[46] According to this analysis, the reform created a salary hierarchy in the public sector, where the female-dominated professions generally ranked lower in terms of pay than the male-dominated professions, seen in relation to their level of education, responsibility etc. The study of the 1969 reform concluded that the salary hierarchy for public servants has not changed much since.

The much-debated issues of pay in female-dominated professions ranking lower than the male-dominated professions has not been settled by the report of the Pay Structure Committee. The next step would be for the Government to invite the social partners to the tripartite negotiations on the implementation of a promise to set aside an extraordinary framework of EUR 134 091 388 (DKK 1

[46] Danish Institute for Human Rights (2020), *Kvindefag i historisk skruetvinge* (Women's employment in a historical screw clamp).

billion) in 2024 increasing to EUR 402 274 164 (DKK 3 billion) in 2030 for wages and working conditions in public welfare.[47]

Danish Institute for Human Rights criticises the national Roma strategy for not living up to EU standards

In August 2023, the equality body in Denmark, the Danish Institute for Human Rights (DIHR), published an analysis of the current Danish Roma strategy, which had been submitted to the EU in December 2021.[48]

The analysis notes that the current Roma population in Denmark is estimated to be around 5 500 people. The majority of Roma people came to Denmark during the 1970s, as migrant workers from the former Yugoslavia, and during the 1990s, as refugees from the Balkans.

The DIHR concludes that the Danish national strategy for the inclusion of Roma is among the most unambitious Roma strategies in the EU, and that it does not live up to the minimum obligations to which Denmark has committed in the EU Framework for National Roma integration strategies. Efforts in Denmark lack, among other things, concrete targets for Roma equality, as well as the active involvement of Roma people in the development of measures.

Based on its analysis, the DIHR issued the following recommendations for the Ministry of Immigration and Integration:

- revise the Roma strategy to ensure that it meets the minimum obligations in the EU Framework;
- gather information on the situation of Roma people in Denmark to set concrete equality targets.

The DIHR report finds that there is no information about the extent of discrimination against the Roma population in Denmark in the Roma strategy, which only refers to existing and general legislation on equality and integration instead of specifically targeting the situation of the Roma population in Denmark.

Comprehensive equality body study on racism and racial discrimination in Denmark

In November 2023, the Danish Institute for Human Rights (DIHR) published a report on experiences of ethnic discrimination in Denmark. To date, the report is the most comprehensive study of racism in Denmark based on perceived discrimination and prejudice.[49]

47 Denmark, Ministry of State, *Government Platform 2022: Responsibility for Denmark*, 14 December 2022.
48 Danish Institute for Human Rights (2023), *Danmarks Romastrategi lever ikke op til europæiske forpligtelser* (Denmark's Roma strategy does not live up to European obligations), August 2023. See also DIHR news article 'Denmark's bottom score in the EU: Roma are not protected well enough' (*Danmark scorer bundkarakter i EU: Romaer beskyttes ikke godt nok*), 17 August 2023.
49 Danish Institute for Human Rights (2023), *Oplevet etnisk diskrimination i Danmark* (Experience of ethnic discrimination in Denmark), November 2023.

The survey targeted adult minority-ethnic persons who grew up in Denmark, i.e. persons who were born in Denmark or came here as children. Overall, the survey responses show that more than 8 out of 10 minority-ethnic persons state that they have experienced discrimination or prejudice in the past year. More than 6 out of 10 minority-ethnic persons state that they have experiences that can be characterised as illegal discrimination. For many, discrimination was not a single incident but repeated negative experiences across the labour market, public spaces, and in contact with public authorities.

Discrimination and prejudice can have far-reaching consequences for those affected. The study shows that one half of the surveyed minority-ethnic persons have adapted their behaviour when out in the public sphere. Meanwhile, being subject to discrimination feels so harsh that it has caused about one in three to consider leaving Denmark.

Based on the analysis, DIHR issued a recommendation that the Ministry of Immigration and Integration should present an action plan against racism.

While the individual experiences presented in the report cannot provide an accurate picture of the actual extent of discrimination and prejudice, the report highlights that there are indeed issues of racism that need to be addressed in Denmark. The first step is for the Government to recognise that racism exists and to adopt a national action plan against racism.-

EE Estonia

LEGISLATIVE DEVELOPMENT

A new equality act proposed by the Government

The current anti-discrimination and equality legal framework in Estonia is composed of two acts: the Gender Equality Act and the Equal Treatment Act. In May 2024, the Ministry of Social Affairs submitted the draft bill for a new gender equality and equal opportunities act, which would merge the two existing acts, to the Government ministries and other stakeholders for public consultation.[50]

The aim of the bill is to improve the protection against discrimination in all areas of social life, to expand the scope of protection by introducing new protected grounds, and to support the promotion of gender equality and equal opportunities. One of the aims of the new draft law is to improve law enforcement and clarity.
First, if adopted, the law would extend the scope of protection against discrimination. While the existing framework covers the grounds of gender and gender-related circumstances (e.g. parenting), nationality (ethnicity), race, colour, religion and belief, age, disability, and sexual orientation, the new law would add grounds such as origin, gender identity, gender expression, property, social status and health status to the list. The list of grounds has been left open in the bill with the provision that the legal protection can also be used for other features that may lead to social prejudices, exclusion or stigma. In addition, the bill would extend protection against discrimination to the area of access to goods and services for all grounds covered.

[50] Estonia, Draft Gender Equality and Equal Opportunities Act (*Soolise võrdsuse ja võrdsete võimaluste seadus*), submitted 23 May 2024.

Secondly, the draft pays particular attention to persons with disabilities. Public and local authorities, schools and research institutions, providers of goods and services as well as employers would have a responsibility to do everything they can to prevent discrimination against persons with disabilities, notably to provide reasonable accommodation.

Thirdly, the draft includes important amendments concerning the role of the Gender Equality and Equal Treatment Commissioner (the national equality body). The Commissioner's mandate would be extended to ensure that victims receive better assistance in the event of discrimination. The Commissioner could act as the representative of the complainant in an administrative or judicial proceeding either as a participant in proceedings or as an adviser who possesses active legal capacity in support of the complainant. The promotional role of the Commissioner would also be strengthened, to include, for example, having powers to make propositions to legislative drafts and strategies.

Furthermore, following criticism regarding lack of transparency in the recruitment and appointment procedures of the Commissioner, the bill sets out procedural amendments as well. The draft law provides that the appointment of the Commissioner would be the task of the Government, and also stipulates that a person would need to be an expert in equality policies or human rights in order to be appointed as the Commissioner. Finally, the draft contains a set of provisions on the collegiate Gender Equality Council, which is an advisory body to the Government, created by the Gender Equality Act. In the bill, the name of the body is changed to the 'Equality Council', and its mandate has been clarified and extended to encompass all the protected grounds. Among other things, the Council would be tasked with providing the Government with regular reviews of how the principle of equality is promoted by the ministries. The Council would also have powers to propose amendments to sectoral development plans and programmes.

Direct sex discrimination: analysis of the handling of harassment at Estonia's leading university

The director of the Viljandi Culture Academy[51] systematically observed a female subordinate throughout her employment, documenting her expressions of thoughts, her interactions outside of work, and even her appearance and clothing on various occasions. On 11 June 2024, the director handed the employee a sealed envelope containing a memory stick with the previously mentioned documentation of his surveillance of her, along with his sexual fantasies. He suggested that she open the envelope only when she was alone. When she followed his advice, she discovered that the director had hired her in the summer of 2023 not for professional reasons, but because he hoped to establish an intimate relationship with her. The contents of the memory stick revealed that she had been observed for an entire year. She was advised to report incidents of sexual harassment to the police, but she was uncertain whether her situation met the criteria for sexual harassment. She followed the University of Tartu's guidelines on equal treatment, which outline the principles of fairness and address workplace bullying.[52] These guidelines provide detailed instructions for employees and students on reporting breaches of equal treatment principles and describe the procedures for addressing cases of discrimination and bullying.

[51] The Viljandi Culture Academy is part of the University of Tartu, within the Faculty of Arts and Humanities.
[52] University of Tartu (2023), Guidelines for Equal Treatment, April 2023.

On 19 June 2024, the rector of the University of Tartu was notified about the incident by the Dean of the Faculty of Arts and Humanities. The Senate discussed the 'incident' and noted that this was the director's first management error. While his behaviour was deemed unacceptable, the university decided to issue only a warning because he acknowledged his mistake, understood its impact, expressed regret, and apologised multiple times. As the university decided that the director should receive only a warning and would continue as the head of the institution, the victim felt she had no other choice but to resign. The employer failed to ensure a psychologically and socially safe environment.

The case was exposed by a weekly newspaper,[53] leading to public pressure that prompted the Rector of the University to issue a public statement explaining why the disciplinary action was limited to an official warning to the director.[54] In response, the director of the Viljandi Culture Academy resigned from his position, even though the university did not require it. Subsequently, the adviser to the Gender Equality and Equal Treatment Commissioner explained on the radio how to recognise harassment in the workplace, using the Viljandi harassment case as an example.[55]

Under Estonian law, sexual harassment is defined as any conduct that is 1) sexual in nature, 2) the purpose or effect of which is to violate a person's dignity, and 3) is unwanted. Article 3(1)(5) of the Gender Equality Act provides that sexual harassment occurs where any form of unwanted verbal, non-verbal or physical conduct or activity of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating a disturbing, intimidating, hostile, degrading, humiliating or offensive environment. The Gender Equality Act is clear in defining both harassment and sexual harassment on the grounds of sex as discrimination.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Gender pay gap decreased in 2023

For years, Estonia has had the highest gender pay gap (GPG) in Europe. Reducing the GPG has been one of the key objectives in national strategies aimed at promoting gender equality.[56] In 2023, according to Statistics Estonia, women's gross hourly wage was 13.1 % lower than men's. The GPG decreased by 4.6 percentage points in the past year.[57]

Between 2013 and 2023, the GPG in Estonia decreased by 11.7 percentage points. From 2013, there was a steady decrease every year, with the exception of 2022 when the GPG increased. The causes for this have not yet been studied, but some assumptions have been drawn. For example, the head of

53 Vainküla, K. and Vedler, S. (2024), 'Viljandi kultuuriakadeemia direktor jälgis pikalt ja salaja naisalluvat. Lõpuks jahmatas ta teda oma seksuaalfantaasiatega' (The Director of the Viljandi Culture Academy secretly and for a long time observed a female subordinate. Eventually, he shocked her with his sexual fantasies), *Eesti Ekspress,* 06.07.2024.

54 Asser, T. (2024), 'Rector's address to university members regarding the case of improper behaviour by director of Viljandi Culture Academy', 06.07.2024.

55 Estonia, Gender Equality and Equal Treatment Commissioner (2024), *Ahistamisjuhtum Viljandi kultuuriakadeemias* (Gender harassment at the Viljandi Culture Academy), 9 July 2024. In response, several opinion articles were published, sparking public outrage over the downplaying of the incident's seriousness. At the end of July 2024 (after the information cut-off date of this edition of the *European equality law review*), alumni and staff of the University of Tartu submitted written appeals to the Rector, highlighting the inadequate response from the university's leadership to the harassment case and urging the Rectorate, Senate, and Council to take appropriate action.

56 See, for instance, Estonia 2035; Welfare Development Plan 2023-2030; Annex to the Welfare Development Plan 2023-2030; Gender Equality and Equal Treatment Programme 2024-2027 (rolling programme that is updated every year).

57 Statistics Estonia (2024), 'Gender pay gap has narrowed in a year'; Statistics Estonia, PA5335: Gender Pay Gap by Economic Activity (EMTAK 2008), October.

the research division at Eesti Pank (the Bank of Estonia) noted that, in 2022, the very rapid wage growth of an average of almost 10 % and a high inflation rate of 20 % inevitably led to an increase in overall wage disparities and also contributed to the widening of the gender pay gap.[58]

According to the Organisation for Economic Co-operation and Development (OECD) report from 2022, the GPG in Estonia consists of three main components. Approximately a quarter of it arises from women being paid less for their work in vital sectors such as healthcare and education, another quarter stems from women occupying lower positions within organisations, while the remaining half of the GPG is unexplained.[59]

In 2023, compared with 2022, the GPG decreased the most in the category of 'other service activities' and increased the most in administrative and support service activities. The basis of the statistics is the 'Structure of Earnings' survey. Statistics Estonia has been conducting this survey based on international methodology since 2005. The wage survey is conducted in October each year, revealing the average hourly wages of men and women.

GPG has been systematically studied since 2009 when the Ministry of Social Affairs commissioned a comprehensive study.[60] Many researchers agree that a significant portion of the GPG Estonia is unexplained.[61] The GPG reflects structural inequalities in society. It has decreased due to increases in the minimum wage, greater knowledge and awareness, and efforts by some enterprises to address the GPG.[62]

Statistics Estonia and Eurostat use different methodologies to calculate the GPG. The GPG published by Eurostat does not consider the indicators of enterprises and institutions with fewer than 10 employees; it also excludes the earnings of employees in agriculture, forestry and fishing, and in public administration and defence.

France FR

CASE LAW

Legality of ministerial instruction forbidding abayas and qamis in public school as constituting ostensible religious signs

In France, ostensible manifestation of religious obedience by students in public schools is prohibited. In August 2023, the Minister of Education instructed school authorities that wearing abayas (long gowns worn mainly as part of an Islamic religious costume by women notably together with the Islamic

58 ERR (2023) 'Statistics Estonia: 'The gender pay gap has worsened over the years', 13 November 2023.
59 OECD (2022), *The Economic Case for More Gender Equality in Estonia*, Gender Equality at Work, OECD Publishing, Paris.
60 Anspal, S. and Rõõm, T. (2011) *Gender pay gap in Estonia: Empirical analysis*, report for the Estonian Ministry of Social Affairs, Tallinn.
61 Rõõm, T. and Kallaste, E. (2004) 'Men and women in the Estonian labour market: An assessment of the gender wage gap', *PRAXIS Policy Analysis* No. 8, Tallinn, PRAXIS Centre for Policy Studies; Anspal, S. (2015) 'Gender wage gap in Estonia: a non-parametric decomposition' *Baltic Journal of Economics*, 15 (1), pp.1–15. DOI: 10.1080/1406099X.2015.1022436.
62 Täht, K., Roosalu, T., Unt, M., Aavik, K., Pilvre, B., Kääramees, M. (2022) *Sooline palgalõhe Eestis: kujunemise tagamaad ja vähendamise võimalused. Programmi RITA tegevuse 1 projekti „Soolise palgalõhe vähendamine (REGE)" lõpparuanne* (The gender wage gap in Estonia: background of its formation and possibilities of reducing it, (REGE) final report), pp. 1–91; Aavik, K., Ubakivi-Hadachi, P., Raudsepp, M., Rootalu, T. (2020), 'Soolise palgalõhe vähendamine: mitmetasandiline kvalitatiivuuring' (Reducing the gender pay gap: Multilevel qualitative research), *RASI toimetised*, No. 11, Tallinn: Tallinna Ülikool.

veil) and qamis (long gowns worn as part of an Islamic religious costume by men), constitutes such a manifestation of religious obedience, and would no longer be tolerated on school premises.[63]

An NGO challenged the ministerial instruction by injunctive relief before the Conseil d'État (Supreme Administrative Court), alleging violations of freedom of worship, the right to education, the superior interest of children and the principle of non-discrimination.

In September 2023, the Conseil d'État dismissed the claims of the NGO, holding that the minister had demonstrated a significant increase in conflicts resulting from the wearing of abayas and qamis in schools during the school year 2022-2023. As reports related to those conflicts showed that the students were often invoking religious arguments in relation to these types of clothing, it was established that the wearing of them amounted to a prohibited manifestation of religious obedience.[64]

In a context where school directions had various interpretations of the notion of 'manifestations of religious obedience', including undistinctive long dresses, the ministerial instruction does not refer to the length of skirts or sleeves, but clearly uses the terms abaya and qamis to stress the specificity of the religious component of the forbidden garments and to prevent extensive interpretation. The ministerial instruction reiterated the necessity to train all school personnel by 2025, in order to develop their capacity to explain the requirements and purpose of secularity and pursue dialogue on the subject. For the first days of school in September 2023, the Minister of Education delegated 2 000 referees in schools where problems had been noticed previously, to assist the school staff.

Group action requesting measures putting an end to racial profiling in police identity checks

Seven NGOs initiated a group action alleging racial discrimination in police identity checks,[65] requesting that the state take the following measures to put an end to the alleged practice of discriminatory identity checks on the ground of race and origin:

- modify the code of penal procedure allowing administrative police identity checks;
- create a specific regime of identity checks for persons under 18 years of age;
- establish a procedure of documenting each check by delivering a voucher to each person subjected to the check specifying the context and identifying the police agent;
- improve the training of police forces on the prohibition of discrimination.

The National Bar Council, the Magistrates' Union and the national equality body, the Defender of Rights, presented observations in support of the position of the claimant NGOs.

The Ministry of Interior and the Ministry of Justice opposed the claim of the claimant NGOs by denying the existence of discriminatory practices in police checks and alleging that the claimants' recourse did

63 Ministerial Instruction NOR: MENG2323654N of 31 August 2023 prohibiting the wearing of abayas and qamis in the premises of public schools.
64 France, Conseil d'État (Council of State), decision No. 487891 of 7 September 2023.
65 In France, there are two types of police identity checks, 'administrative police checks' and those resulting from public prosecutor demands. The collective action concerned both types.

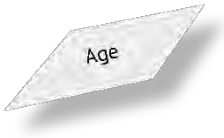
not meet the requirements for a group action because the cases presented were insufficient and the liability of the state for police checks was subject to the jurisdiction of the judicial judge.

The Conseil d'État held that, when undertaking police checks, police officers are bound by the prohibition of discrimination and that the state is responsible, in application of Directive 2000/43, the Law of 27 May 2008 and the police code of ethics, when its organisational deficiencies create the conditions for such discriminatory checks to develop and prosper. It further referred to studies, reports and affidavits to establish that there is a widespread practice of racial profiling, that it is not limited to isolated cases, and that it is engaging the liability of the state.

However, the court dismissed the group action, concluding that the measures requested by the claimants exceeded its jurisdiction by seeking the adoption of legal provisions and an explicit redefinition of policy orientations.[66]

The decision of the court established an important precedent for future actions related to discriminatory police identity checks. It is also noteworthy that the court issued a second decision, on the same day, ordering the Ministry of the Interior to take, within 12 months, all necessary measures to guarantee that all police officers wear identification tags of such a size as to be legible by citizens and allow identification in all circumstances.[67]

Possibility to postpone mandatory retirement age in public employment



The claimant is an inspector of the Ministry of Education who was to reach the age of public service mandatory retirement age (67) in November 2023. In April 2023, the claimant invoked a newly adopted regulation allowing public servants to request an extension of service until the age of 70.[68] The claimant's request was denied by the head of service due to the management necessity of renewing the staff, lowering the number of inspectors of higher rank and recruiting younger inspectors of less seniority.

The claimant challenged the denial of his request before the administrative court, on the basis that it amounted to age discrimination. The court granted his motion, and the Ministry of Education appealed the decision before the Conseil d'État.

In April 2024, the Conseil d'État upheld the appeal, concluding that the new regulation does not give public servants a right to stay at work until the age of 70, nor does it impose an obligation on public employers to maintain them in service until that age. Instead, the new provision creates a possibility to extend employment, while providing heads of service with a great degree of managerial discretion to be exercised with consideration to the best interest of the service. The head of service can therefore pursue the objective of renewing the team in the interest of the service and give priority to the integration of younger public servants of less seniority to justify the denial of a request of extension of service without committing discrimination on the ground of age.[69]

66 France, Conseil d'État (Council of State), Plenary Assembly, *Amnesty International and others,* decision No. 454836 of 11 October 2023.
67 France, Conseil d'État (Council of State), decision No. 467771 of 11 October 2023.
68 France, Law No 2023-270 of 14 April 2023, Article 10 VIII, introducing Article L 566-1 of the General Code of Public Service (GCPS).
69 France, Council of State (*Conseil d'État*), decision of 11 April 2024, No. 489202. See also the Conclusions of the Council of State public reporter.

The relevant provision stipulates that a public servant 'can be' maintained, as opposed to 'is maintained', which is used in some of the similar texts applicable to other categories of civil servants, such as magistrates of the Auditor General.

POLICY AND OTHER RELEVANT DEVELOPMENTS

National plan for equality and against LGBT+ hatred and discrimination 2023-2026

Sexual orientation
Gender identity

In July 2023, the delegate minister in charge of equality between women and men, diversity and equal opportunities presented the National action plan to fight LGBT+ hatred and discrimination 2023-2026.[70] The plan is the result of a vast consultation by the Interministerial delegation against racism, antisemitism, discrimination and LGBT hate (DILCRAH) of over 100 stakeholders representing civil society, public institutions, media, employers, etc. It is also based on a 2022 study on stereotypes and prejudices towards LGBTIQ people, commissioned by the National Commission for Human Rights (CNCDH).[71] The plan proposes measures to be implemented in a wide range of areas, including the professional training of all economic actors, employers and policemen, as well as the improvement of enforcement, data collection and the fight against hate speech on the internet.

The Government plans to implement in 2024 the geographical mapping of LGBT+phobic aggressions in order to improve the relevance of targeted protection of persons and their property. It also intends to improve the criminal complaints mechanism and enforcement of penal actions, including a systematic prosecution policy against homophobic acts at sports events. It will also provide training for 100 % of police forces before the end of 2024. The plan further aims to improve LGBT+ equality in education, targeting notably the level of tolerance within school administrations,

the prevention of anti-LBGBT+ violence and harassment in education, as well as improved training of educators working with youths in extracurricular activities. The plan will be enforced throughout the country under the supervision and control of the DILCRAH and will be subject to evaluation by the CNCDH, as is the case for the national plan against racism, antisemitism and discrimination.

Evaluation of the National LGBT+ 2020-2023 action plan

Transgender
Sexual orientation
Gender identity

The National LGBT+ action plan 2020-2023[72] was produced, adopted and implemented by the Interministerial delegation against racism, antisemitism and homophobia (DILCRAH). This plan, as well as its predecessor and successor, provides that the French consultative human rights commission under the authority of the Prime Minister (CNCDH), which fosters permanent consultation with NGOs and public institutions, is competent to evaluate its implementation.

In November 2023, after the publication of the 2023-2026 action plan, the CNCDH published its evaluation of the implementation of the previous action plan for 2020-2023. The report highlighted that the plan was too lenient and inadequately implemented, with insufficient input from civil society. The CNCDH noted a number of structural flaws in the plan such as insufficient funding, confusion between objectives, promotion of rights and concrete measures, and a lack of mandatory targets. In

70 France, *National Plan for equality, and against LGBT+ hatred and discrimination (2023-2026)*, presented on 10 July 2023.
71 France, National Commission for Human Rights (CNCDH) (2022), *Sexual orientation, gender identity and intersex, from equality to the effectivity of rights*, June 2022.
72 France, Interministerial delegation against racism, antisemitism and homophobia (2023), National Action plan for equal rights and against anti-LGBT+ hatred and discrimination 2020-2023.

addition, the implementation indicators only focus on quantifying actions taken without addressing issues relating to their content or quality.

The evaluation report further highlights the following issues:

- The training and nomination of referees in the police and national education system is massively insufficient and inadequate.
- Insufficient targeting and involvement of the sporting community, notably with regard to preparations for the 2024 Olympic Games.
- The lack of measures targeting homophobic acts in prison and the prison system.
- Damaged and insufficient relations between public authorities and civil society.

The report also noted the following progress under the 2020-2023 action plan:

- Consideration of LGBT+ issues in relation to the situation of asylum seekers.
- The adoption of legislation prohibiting conversion therapies.
- Opening access to medically assisted procreation to single women and female same-sex couples.
- Development and financing of targeted data collection by public authorities.

Finally, the evaluation report also made some criticisms of the new 2023-2026 action plan published in July 2023. This included:

- The inadequate conditions of its development, notably DILCRAH's failure to await the evaluation of the 2020-2023 plan before producing the 2023-2026 plan.
- The unilateral approach of Government and the exclusion of many NGOs from the process; insufficient or even fictitious civil society consultations.
- The reiteration of proposals and measures already included in previous action plans, without questioning their lack of implementation.
- The absence of a dedicated budget which qualifies the action plan as an invitation to act rather than mandatory concrete objectives.

The report demanded a review of the current action plan, but DILCRAH has not formally reacted to the report in any way.

New parental leave

On 16 January 2024, during a national press conference where he introduced his new Prime Minister, the French President announced the creation of a new form of parental leave called 'birth leave'. This initiative aims to boost the birth rate, which is currently at its lowest since the second world war. The new leave is designed to enhance financial support for parents who wish to reduce or pause their work

to care for their child. The proposal had been previously announced by the former Minister for Solidarity and Family in July 2023 and detailed in November, prior to the appointment of the new cabinet.

The new birth leave supports the effective implementation of the Work-life Balance (WLB) Directive by increasing 'incentives for men to assume an equal share of caring responsibilities', as highlighted in the Directive's preamble. This leave, which begins at the child's birth, aims to foster 'the early creation of a bond between fathers and children', in line with WLB Directive's recommendations. The planned increase in the allowance during this leave, set at a higher rate than the current one (at least 50 % of wages), is expected to boost uptake by fathers and encourage more employment among mothers, as advocated by the Directive. Furthermore, while the new parental leave will reduce the current entitlement from three years to six months, it still complies with Article 5 of the Directive, which guarantees an individual right to at least four months of parental leave.

Content of new leave

The specifics of the new leave have not yet been finalised, as no bill or decree has been issued. However, the President and the current Minister for Gender Equality have shared some preliminary details with the press. This new 'birth leave' will enable parents to reduce or pause their work to care for their child while receiving financial support. Both parents will have the option to take the leave either simultaneously or sequentially.

This leave differs from existing maternity leave (16 weeks) and paternity leave (28 days). It will replace the current parental leave, which has been criticised for being too lengthy and inadequately subsidised. Established in 1977 and revised several times since, the current parental leave allowance is only EUR 429 per month. According to recent research by OFCE (SciencesPo), the number of parents receiving this leave decreased from 500 000 in 2013 to 246 000 in 2020, with fewer than 1 % of fathers utilising it.[73]

Timing

The new leave can be activated by both parents either immediately after the child's birth or at a later time. Unlike maternity and paternity leave, which require a minimum duration (currently eight weeks for maternity leave and four days for paternity leave), this new parental leave will be entirely optional.

Length of leave

This new parental leave will be shorter than the current parental leave, which can extend up to three years and, according to the French President, has contributed to women being sidelined from the workforce. During the press conference, the President proposed a birth leave of six months. This period would encompass the existing 16 weeks of maternity leave and 28 days of paternity leave. According to the Minister for Gender Equality, combining maternity or paternity leave with this new leave could provide up to six months per parent. While the French President did not specify when the bill would be introduced, the Minister for Gender Equality indicated that it might be presented in 2025.

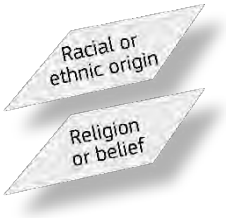
[73] H. Périvier, G. Verdugo, *Cinq ans après la réforme du congé parental (PreParE), les objectifs sont-ils atteints?* OFCE Policy Brief n°88, 6 April 2021.

Allowance

At this stage, no official allowance level has been set or communicated, as discussions with social partners are still pending. However, both the President and the Minister for Gender Equality have indicated that the new allowance will exceed the current prestation partagée d'éducation (PREparE), which amounts to a maximum of EUR 429 per month. The Minister for Gender Equality noted that the existing parental leave is primarily utilised by couples with either significant savings or low wages that match or fall below the EUR 429 limit. This means that the current leave does not appeal to the middle class.

Several financial options are being considered: the Government might opt to increase the current flat-rate allowance, potentially doubling it, or alternatively, the Government could establish an allowance based on a percentage of the parent's wages, up to a certain cap. The latter appears to be the more viable option. This allowance would not cover 100 % of the salary, but rather around 50 %.

Survey on antisemitism in France 2024



Between February and March 2024, the French Institute of Public Opinion (IFOP) conducted an online survey on the situation of antisemitism in France.[74] The survey was completed by 500 persons of Jewish origin, 527 persons of Muslim origin and 2 300 persons of neither Jewish nor Muslim origin. The previous survey had been conducted in 2022.

The results of the survey include:

- 92 % of Jews feel that antisemitism is widespread (an increase of 7 % since 2022)
- 44 % of the general population do not show any signs of antisemitism, 22 % are not antisemitic generally but may hold a few prejudices, while 34 % present antisemitic tendencies, including 10 % who combine strong prejudices with a tolerance towards violence against Jews.
- For 57 % of the general population and 73 % of Jews, antisemitism is the result of 'hatred' for the state of Israel.
- 35 % of persons aged 18-25 find it to be legitimate to 'go after the Jews because of their supposed support for Israel';[75] 21% of the overall population agrees.
- A substantial progression of antisemitic prejudices among the Muslim population, in a context where they have not progressed in the overall population.
- During their lifetime, 75 % of Jews have faced diverse forms of violence: 87 % of persons who wear a religious sign and 65 % of persons who do not or only rarely.
- Since 7 October 2023, 25 % of Jewish persons have faced diverse forms of violence (36 % for persons wearing a religious sign). 62 % of antisemitic acts targeted children in a schooling environment.

74 French Institute of Public Opinion (Institut Français de l'Opinion Publique, IFOP) (2024), Radiography of antisemitism in 2024, May 2024.

75 The expression used in French in the poll is: '*Justifié de s'en prendre aux juifs en raison de leur soutien supposé à Israël*'.

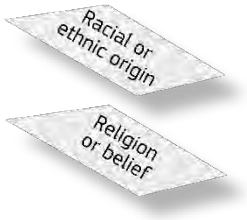
- The Jewish population feel the need to hide their Jewish identity in different ways and have changed their behaviour/habits.

Although there are no official statistics on the religious or ethnic identity of the population in France, the general estimates are that France has the biggest Jewish and Muslim communities in Europe. The survey is based on self-identification.

Education at all levels is an area where members of the Jewish community feel particularly vulnerable and unsafe. Approximately six months after 7 October 2023, 61 % of children of Jewish origin were registered in private school (compared to 18 % of the general population), and 69 % of parents indicated that this choice was based on security reasons.

More generally, data from the Ministry of the Interior indicates that since 7 October 2023, reported acts of antisemitic violence had increased by 1 000 %.

Report of the Defender of Rights on racism, antisemitism and xenophobia in 2023



In March 2024, the Defender of Rights presented a report contributing to the annual report of the National Consultative Human Rights Commission (CNCDH) on racism, xenophobia and antisemitism.[76]

First, the Defender of Rights presented some data regarding the claims received in 2023. The data confirms the persistence of discrimination on the ground of origin in France, as 13 % of the discrimination claims received in 2023 concerned this ground. In addition, 5 % of the claims concerned nationality, 3 % religion, 2 % place of residence, 2 % physical appearance and 0.4 % surname. The largest number of complaints concerned private employment (33 %), followed by public employment (15 %), access to goods and services (14 %) and education/training (8 %). In addition, the Defender of Rights received a number of claims related to the ban on wearing abayas and qamis in schools.[77] The Defender of Rights also noted that only 2 % of victims of alleged discrimination on the ground of origin file a complaint.

The platform www.antidiscrimination.fr was launched in February 2020 to facilitate access to rights. It has contributed to an increase of 65 % in the level of inquiries addressed to the Defender of Rights alleging discrimination. Some 23 % of the calls concerned alleged discrimination on the ground of origin.

Secondly, the Defender of Rights presented some general observations related to racism in France. The latest national survey on 'trajectories and origins' from 2022,[78] showed that 22 % of legal foreign residents, 20 % of persons of foreign origin and 26 % of people from overseas French territories consider that they have been subjected to unequal treatment on the ground of origin. In addition, all studies indicate that religious factors amplify discrimination.

[76] Defender of Rights, *Contribution du Défenseur des droits au rapport 2023 de la CNCDH* (Contribution of the Defender of Rights to the 2023 report of the National Consultative Human Rights Commission), May 2024. For further information about the CNCDH report, see below, p. 127-128.
[77] For further information, see above, pp 118-119.
[78] National demographic Institute (INED) (2022), Survey on the diversity of population in France.

The Defender of Rights considers that the National action plan to fight racism, antisemitism and discriminations published in February 2023[79] does not constitute a true public policy addressing racial discrimination in that it does not: address the systemic dimension of discrimination on the ground of race and origin in France; recommend data collection to improve the governmental evaluation of the impact of public policy on certain populations; does not address the conditions of access to private and social housing and emergency accommodation of populations that are discriminated against; address access to health; sufficiently take civil society and NGOs into account; and address discrimination on the ground of origin in identity checks by the police.

The Defender of Rights reiterated the recommendations presented in its 2020 report on discrimination and origin,[80] finding that until the conditions of access to legal redress are reformed, racial profiling addressed, the treatment of non-accompanied foreign minors substantially improved, and a true public policy is adopted, the situation will not improve.

Interministerial conference on disability

The 9th Interministerial conference on disability took place on 16 May 2024 to report on the implementation of the policy undertakings announced at last year's national conference on disability.[81] The conference was chaired by the Prime Minister, assisted by all relevant members of the Government. During the conference, the Government announced the implementation of 50 000 individual measures to facilitate the integration and daily life of persons with disabilities, with a budget of EUR 1.5 billion, in the areas listed below.

- Education, including training for all teachers; support teachers in all pedagogical teams; pedagogical support units; projects to improve access to education for children attending special medico-social education; and improved employment conditions and status for support assistants in mainstream schools.

- Higher Education, including specific services and scholarships for students with disabilities.

- Access to health, including a plan to improve the (early) detection of disabilities; practices to actively meet the needs of persons with disabilities for health services; improved reimbursement of equipment; and facilitated access to human support at home.

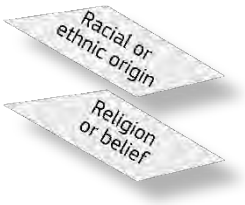
- Employment, including special support and financing for persons with disabilities, notably for reasonable accommodation; increased pay for persons with disabilities in assisted professional environments; promotion of integration of persons with disabilities in the public service, etc.

- Improved accessibility, including of political campaigns, voting bureaus, facilities of the 2024 Olympic Games, public local infrastructures, public buildings, tourist attractions, all means of transport, cultural premises, extracurricular activities for children, and online public services.

79 For further information, see *European equality law review 2023*, p. 112.
80 Defender of Rights (2020), *Discrimination et Origine : l'urgence d'agir*, June 2020. See also *European equality law review*, Issue 2020/2, p. 105.
81 Inter-ministerial Committee on Disability of 16 May 2024.

- Housing, including financing renovations to adapt personal housing;[82] a special label to promote accessible housing; improved identification and monitoring of accessible social housing; promoting accessibility and inclusive housing projects; control of implementation of accessibility requirements by businesses in private buildings and infrastructures to be followed-up in October 2024.

Since 2017, successive Governments have increased financing and investments in all aspects of life to improve the integration of persons with disabilities. However, the private sector still resists making the necessary changes to take the full measure of what is required to reach the complete integration of persons with disabilities.



CNCDH annual report on racism, antisemitism and xenophobia in 2023

The National Consultative Commission on Human Rights (*Commission nationale consultative des droits de l'homme* - CNCDH) presents an annual report to the Prime Minister on racism, antisemitism and xenophobia in France, outlining data gathered by NGOs, governmental services, an online crime reporting platform, the *Discrimination Barometer* of the Defender of Rights, and the National Observatory of Crime and Criminal Justice (ONDRP). The CNCDH's 35th report was published on 27 June 2024.[83]

The report presents the results of a study on the level of tolerance, on a scale of 100, among the population towards various communities. In 2023, the overall level of tolerance towards minorities had decreased by 3 points since the previous year, reaching 62/100. Meanwhile, the hierarchy of tolerance /intolerance has not changed in recent years, with the levels of tolerance being highest for black people (77) and Jews (68) and lowest for Muslims (57) and Roma/Travellers (42).

The report further noted a significant rise in the overall number of racist acts (+32 % since last year), although only 4 % of victims file complaints with the police. In addition, the data indicates a significant increase in complaints regarding racist and/or antisemitic hate speech online (+20 %).

Other data contained in the report include the following survey results:

- 60 % of respondents think that migrants come to France for social benefits only
- 43 % of respondents think that children of immigrants are not really French
- 43 % of respondents think that immigration is the main cause of insecurity.

With regard to reported acts of violence, the report shows an increase in racist acts in general (+21 % compared to last year) and anti-Muslim acts (+29 %). The most significant increase is related to antisemitic acts however, with 284 % more acts than last year. Such antisemitic acts have occurred all over the country with a particular increase following 7 October 2023. This increase reflects the general climate of political discourse, demonstrations, and violence over the Israeli-Palestinian situation.

82 MaPrimeADAPT is a scheme implemented through a request to finance renovation works to adapt individual housing to the needs of a person's disability, with a maximum contribution of EUR 15 400 per person.

83 National Consultative Commission on Human Rights (CNCDH) (2024), The fight against racism, antisemitism and xenophobia 2023, published 27 June 2024. For a summary of the contribution to this report of the Defender of Rights, see above p.125-126.

According to the CNCDH public survey, the number of victims of racist acts reached 1 million persons in 2023. The share of complaints that are not prosecuted is much higher than in all other areas of law enforcement, which is deemed to nurture a feeling of impunity: 55 % of complaints filed do not give rise to prosecution (17 % less than last year).

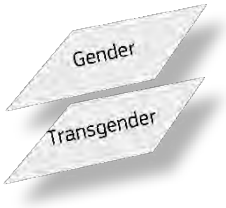
In the 2024 report, the CNCDH focuses on discrimination on the ground of origin in the field of employment. Findings are characterised by prejudice and stereotypes at the time of hiring and throughout the career, as regards both tasks and career development.

Finally, the report highlighted the passivity and lack of mobilisation of the Government since the publication of the National action plan against racism in January 2023 and throughout the year. The report also underlined that, for the first time since 1990, the CNCDH was not invited to officially present its report to the Prime Minister. In conclusion, the CNCDH stressed the need to improve the professionalism of enforcement, to increase financial and institutional means dedicated to the fight against discrimination, to invest in efficient non-discriminatory AI resources, and the development of targeted management processes.

Germany DE

LEGISLATIVE DEVELOPMENT

Draft law on self-determination in relation to gender entry (Self-Determination Act, SBGG)



On 23 August 2023, the Federal Government adopted the long-awaited draft law on self-determination with regard to gender entry (known as the Self-Determination Act).[84] The Self-Determination Act concerns the procedure by which transgender, intersex and non-binary people can change their gender entry (legal gender) and their first names. The law is not intended to regulate medical measures related to gender reassignment.

In a nutshell, the Act introduces the following rules:

- Changing legal sex and first name can be done by submitting a 'declaration with insurance for one's own account or self-insurance' ('*Erklärung mit Eigenversicherung*') to the registry office (*Standesamt*). Trans, intersex, and non-binary individuals no longer need to undergo a judicial process to make such changes in the civil status register (birth, marriage, etc). A psychological assessment is also no longer required. In the declaration to the registry office, the individual must confirm that the changes align with their gender identity and that they are aware of the implications of the declaration.

- The change of gender entry and first name must be registered with the registry office at least three months before the declaration.

- Once the gender registration has been changed, the person must wait one year before they can change it again.

[84] Germany, *Gesetz über die Selbstbestimmung in Bezug auf den Geschlechtseintrag* (SBGG) (Self-Determination Act), 23 August 2023.

- Minors up to the age of 14 years are unable to change their gender entry and submit the declaration by themselves. Guardians can submit the declaration instead. Minors older than 14 years can submit the declaration themselves. However, the guardian will have to consent. The guardian's consent can be replaced by a decision of the family court. The guiding principle for the court will be wellbeing of the child (*Kinderwohl*).

- Parents may enter 'parent' instead of 'father' or 'mother' on the birth certificate of their children.

- In order to protect people from being forcibly outed, it will continue to be prohibited to investigate and disclose previous gender entries or first names (*Offenbarungsverbot*). Intentional harm can be punished via a fine. This does not include a general prohibition of 'misgendering' or 'deadnaming'. There are also exceptions to the prohibition of disclosure, for example within the context of criminal prosecution.

- According to the draft, the Self-Determination Act will not affect private domiciliary rights and freedom of contract. This is clarified in the text of the law. The General Equal Treatment Act (AGG) will also not be affected by the Self-Determination Act. Regarding access to protected spaces, the Self-Determination Act will not change anything. What is permissible today in legal transactions will continue to be permissible in the future and what is prohibited today will remain prohibited. The autonomy of sport will also not be affected by the law.

The Labour/Green/Liberal Government agreed to the reform in their coalition agreement.

The Self-Determination Act will replace the Transsexuals Act (*Transsexuellengesetz*) from 1980 that allowed transgender people to change their legal sex following several legal and medical procedures. The reform of the act was long overdue. Many of the decisions do not correspond to the broader legal framework anymore, e.g. the divorce requirement aimed at preventing same-sex marriages seems unnecessary given that same-sex civil partnerships and (subsequently) same-sex marriage have been introduced. Unsurprisingly, the Act has been subject to various successful constitutional challenges in the last 20 years. Consequently, many of its provisions relating to the medical and divorce requirements are no longer applicable, although the previous Conservative Government could not agree to any substantial or comprehensive reform of the Act.

The Constitutional Court's decision on the third gender further provides constitutional support for a legal framework that is conceived broadly and includes transgender, intersex, and non-binary people. In the case, the Constitutional Court acknowledged the right of an intersex person to be registered as something other than male or female and that the possibility at the time to leave the registration blank was not a valid alternative, given the negative consequences of someone's legal sex not being registered.[85] Subsequently, the Government reformed the Civil Status Act. Currently Section 45b enables persons with 'variations of sex development' to declare to the registry office that the gender entry in the birth register should be replaced by the recognised possibility of the entry of 'diverse' or no entry at all. However, following the intent of the legislature, this is only possible for intersex people. The legal position of transgender or non-binary people thus remains uncertain. This has been strongly criticised by activists and academics alike, given that the Constitutional Court's decision did not

[85] Germany, Constitutional Court 10 October 2017, 1 BvR 2019/16.

distinguish between these groups, but conceived a general right to recognition of gender identity under the scope of personal autonomy (Article 2 German Constitution) and subsumed gender identity irrespective of biological sex under the scope of gender discrimination explicitly banned under Article 3(3) of the Constitution. The Federal Supreme Court (BGH) recognised the constitutional requirements regarding trans and non-binary people (described as 'perceived intersexuality') but considered the Transsexuals Act to be applicable in analogy to the Civil Status Act in their case.[86] In practice, the current Transsexuals Act still requires a medical/psychological assessment and a court's decision prior to any legal sex change/gender registration. These procedures have been criticised for being highly burdensome, degrading and unnecessary. The draft Self-Determination Act abolishes them.

The public and political discussions on the Self-Determination Act revealed a significant degree of transphobia. Most prominently, it was discussed in relation to access to female-only saunas (and other perceived threats to women-only spaces), even though most saunas in Germany are not single-sex spaces. Considering this, the explicit reference to domicile rights and freedom of contract may be understandable, but might also potentially confirm transphobic prejudice. Indeed, the Independent Federal Anti-Discrimination Commissioner (*Antidiskriminierungsbeauftragten*) of the Federal Anti-Discrimination Agency has criticised these provisions as being unnecessary and likely to potentially reinforce harmful stereotypes and foster discrimination.[87] She has also criticised the new provisions concerning the data transfer obligations to security authorities that currently do not exist under the Transsexuals Act. There are other provisions that can be considered shortcomings of the Act, such as the three months' registration prior to the declaration, which is not required under Section 45b of the Civil Status Act and imposes a waiting or reflection period, the limited rights of immigrants without permanent or longer-term residence rights, and the lack of hardship rules regarding the one-year waiting period after successful change of registration. The Commissioner further pointed out that the Act entitles persons only to the reissue of documents (such as degrees, driving licences, and bank cards) if they can demonstrate a legitimate interest, which does not correspond with the current legal right to change, for example, academic and work references.

CASE LAW

School records and disability

In November 2023, the Federal Constitutional Court decided under which circumstances it can be mentioned in a school report, that part of a student's performance in a school examination was excluded from the criteria for awarding a grade in order to account fairly for their disability.[88] The case at hand concerned complainants with dyslexia whose final school reports, which form the basis for admission to university education, indicated that the complainants' abilities in orthography were excluded from evaluation. The possibility to disregard orthographic capabilities creates the opportunity for the pupils to achieve a good grade solely on the basis of other abilities, despite the lack of available reasonable accommodation measures.

86 Germany, BGH 22 April 2020, XII ZB 383/19; judgment of 10 September 2020, XII ZB 451/19.

87 Federal Anti-Discrimination Agency (2023), 'Statement of the Independent Federal Commissioner for Anti-Discrimination on the draft law on self-determination with regard to gender entry to amend further provisions' (*Stellungnahme der Unabhängigen Bundesbeauftragten für Antidiskriminierung zum Entwurf eines Gesetzes über die Selbstbestimmung in Bezug auf den Geschlechtseintrag zur Änderung weiterer Vorschriften*), 23 August 2023.

88 Germany, Federal Constitutional Court, judgment of the first senate of 22 November 2023, 1 BvR 2577/15, Rn. 1-125.

The Court held that such circumstances can be mentioned in school records but only if specific conditions are met. As these conditions were not fulfilled in the particular case, the Court decided that the prohibition of discrimination on the ground of disability was violated. It ordered the school to provide the complainants with new school records not mentioning dyslexia and the exclusion of orthographic abilities from the criteria of grading.

The Court clarified that less favourable treatment of one person with a disability in comparison with other persons with disability amounted to discrimination on the ground of disability. It noted the important role of education in compensating for social disadvantages and creating a differentiated educational system that fosters individual interests and talents. The aim of the final school record is to enable pupils to equally access further education and professions according to their achievements in school. To reach this purpose, the legislature has to ensure that pupils are examined under equal conditions and that the results are documented in a precise, informative and comparative way.

Applying these standards, the Court held that school records may mention modifications of the preconditions for achieving a grade, because of a specific disability that cannot be accommodated by appropriate measures, such as dyslexia. Due to the prohibition of discrimination, however, the relevant regulations must include all potentially relevant disabilities, and not only some. The relevant legal regulation at hand only concerned dyslexia, which thus amounted to a violation of the prohibition of discrimination. In the meantime, Bavaria has amended the relevant regulation accordingly.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Federal Anti-Discrimination Agency proposals for the reform of the General Act on Equal Treatment

In its coalition agreement, the Federal Government announced its intention to reform the General Act on Equal Treatment, notably to improve the legal protection as well as enforcement, and to expand the scope of application of the law. In July 2023, in the context of this planned reform, the Federal Commissioner for Anti-Discrimination and Head of the Federal Anti-discrimination Agency submitted a set of 19 proposals to the Federal Minister of Justice, pointing out shortcomings in the law.[89]

The proposals are as follows:

1. To expand the list of protected grounds by adding 'nationality', 'social status' and 'family care responsibilities'; to substitute the term 'race' by 'racialised attributes', and to include for the purpose of clarifying the existing grounds, 'language', 'chronic illness', 'sexual/gender identity' and 'biological age' instead of age.
2. To expand the material scope of anti-discrimination protection to public institutions.
3. To strengthen the protection against sexual harassment, including in the context of contracts covered by civil law.
4. To include protection against discrimination by automated decision-making systems and artificial intelligence.

[89] Germany, Federal Commissioner for Anti-Discrimination (2024), *Vielfalt, Respekt, Antidiskriminierung: Grundlagenpapier zur Reform des Allgemeinen Gleichbehandlungsgesetzes* (*Diversity, Respect, Anti-Discrimination: Framework Paper on the Reform of the General Act on Equal Treatment),* November 2024.

5. To improve the protection of persons with disabilities by recognising the denial of reasonable accommodation as a form of discrimination within the meaning of the law and by regarding a breach of an obligation to provide accessibility as a *prima facie* indication of discrimination.

6. To expand the protection against discrimination to cover all types of work including that carried out by freelancers and volunteers.

7. To reformulate the occupational requirement exception on the ground of religion in conformity with EU law.

8. To strengthen protection against discrimination on the ground of age by eliminating the possibility of setting minimum and maximum age requirements for employees.

9. To create a legal framework for the establishment of minimum standards for company internal discrimination complaint procedures as well as for specific powers for complaint bodies.

10. To create a duty of federal public bodies to promote diversity and prevent discrimination, including in recruitment, training, and further development.

11. To strengthen protection against discrimination by deleting the existing 'bulk business' clause.

12. To introduce a legal ban on discriminatory housing advertisements and by deleting the existing exceptions in the area of housing ('socially stable resident structures' and special relationships of proximity or trust).

13. To improve the protection against discrimination in insurance contracts.

14. To extend the deadline for making discrimination claims from 2 to 12 months.

15. To ease the burden of proof for persons alleging discrimination by reducing the requirement to prove discrimination to a preponderance of probability that a prohibited ground caused unequal treatment.

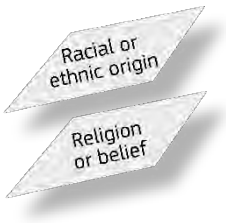
16. To establish effective, proportionate, and dissuasive sanctions in cases of discrimination.

17. To introduce a right of associations to initiate *actio popularis* and to act in the name and on behalf of persons claiming discrimination.

18. To grant the Federal Anti-discrimination Agency the power to take legal action on behalf of the affected parties.

19. To grant the Federal Anti-Discrimination Agency the power to provide mandatory mediation if the affected persons desire such a procedure.

Rise of antisemitism and Islamophobia in relation to the war between Israel and Hamas



According to data from the Federal Criminal Police Office, more than 2 000 crimes with a direct link to the war in Israel were reported in Germany in the month following the Hamas attacks on Israel on 7 October 2023.[90] The alarming rise of antisemitic incidents was also reported by the Federal Association of Departments for Research and Information on Antisemitism, the umbrella organisation of civil society reporting offices for antisemitic incidents. Its monitoring report documented 994 verified antisemitic incidents in Germany with a connection to the Hamas attacks and the war in Gaza in the

[90] Das Erste (2023), Press statement 2.000 Straftaten mit Bezug zu Nahost-Konflikt (*'2 000 Crimes Related to the Middle East Conflict'),* 31 October 2023.

period 7 October – 9 November, an increase of at least 320 % compared with the same period in the previous year.[91]

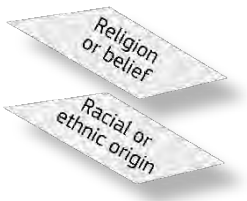
The Hamas attacks also led to an alarming increase in anti-Muslim hatred in Germany as the CLAIM-Alliance Against Islamophobia and Anti-Muslim Hate reported in early December 2023.[92] Despite severe underreporting, significant numbers of violent anti-Muslim attacks, insults, threats and discrimination were reported in the period following the attacks, including a high number of desecrations of Muslim tombs and attacks on mosques.

The significant rise of antisemitism and islamophobia in Germany unfortunately reflects ongoing racist practices in Germany. Experiences of discrimination and racism are still widespread, as shown by a survey conducted by the new National Discrimination and Racism Monitor and published by the German Centre for Integration and Migration Research in November 2023, involving 21 000 respondents.[93]

The Federal Anti-Discrimination Agency launches anti-discrimination awareness campaign highlighting German anti-discrimination law

Despite the fact that the General Act on Equal Treatment has provided protection against discrimination in Germany since 2006, only 34 % of the population are aware of its existence and significance, according to the Independent Commissioner for Anti-Discrimination and Head of the Federal Anti-Discrimination Agency. In this context and with the aim of informing more people about their rights, in October 2023 the Commissioner launched the agency's new comprehensive, nationwide and long-term anti-discrimination awareness campaign with the motto 'I am against this! The Anti-Discrimination law'.[94] The campaign highlights the General Act on Equal Treatment and includes for instance a music video clip that depicts seven real cases reported to the legal advisory team of the Federal Anti-Discrimination Agency, which address discrimination on the grounds of age, disability, gender, sexual identity, religion, and race/ethnic origin.

The campaign website includes detailed information helping persons potentially affected to identify discriminatory behaviours and to assess available options for action against discrimination. The campaign is supplemented by an advisory guide to navigating the regulations of the law and by additional practical help, such as an online tool to assess whether discrimination may have occurred using a step-by-step process, and assistance in searching for advice centres.



Report on Islamophobia in Germany withdrawn due to controversial statements

In June 2023, a report on Islamophobia in Germany authored by an independent Expert Group on Hostility towards Muslims was published by the Federal Ministry of the Interior and Community.[95] In

91 Germany, Federal Association of Departments for Research and Information on Antisemitism (2023), 'Antisemitische Reaktionen auf den 07. Oktober' (*'Anti-semitic Reactions to 7 October'*), November 2023.

92 Germany, CLAIM Alliance against Islamophobia and Anti-Muslim Hate (2023), 'Gewaltvolle Übergriffe, Drohungen, Diskriminierungen: Zahl antimuslimischer Vorfälle bundesweit erneut gestiegen' *('Violent Attacks, Threats, Discrimination: Number of anti-Muslim incidents has risen again nationwide')*, December 2023.

93 Germany, Centre for Integration and Migration Research (2023), *Rassismus und seine Symptome: Bericht des Nationalen Diskriminierungs- und Rassismusmonitors mit dem Schwerpunkt Gesundheit* (*Racism and its symptoms: Report of the National Monitoring of Discrimination and Racism with a focus on health)*, November 2023.

94 For further information, see the campaign website and the statement of the Federal Anti-Discrimination Agency of 16 October 2023.

95 For further information, see *European equality law review 2023*, p. 118.

March 2024 however, the ministry announced that the report had been withdrawn and that a revised version will be published at a later date.[96]

The revision of the report was ordered by the Berlin-Brandenburg Higher Administrative Court following claims made by a journalist that certain passages of the report referring to the claimant's writings as 'demonising' Muslims, might create the assumption that they represented an official statement of the ministry, thus damaging his professional reputation.[97] The ministry removed the report from its website and disposed of printed copies. It announced that a revised version will be published, avoiding creating the assumption that it represents the official position of the ministry.

Greece GL

LEGISLATIVE DEVELOPMENTS

First-ever institution of a probationary period in breach of EU law

A new Act[98] transposed the Work-life Balance Directive[99] on transparent and predictable working conditions in the European Union into the national legal order.

The Directive does not impose on Member States the adoption of a probationary period. It only regulates, if any, its maximum duration (up to six months) (Article 8) and the employer's obligation to provide information on its duration and conditions (Article 4(2)(g)). Nonetheless, Article 4 of the new Act, by adding Article 1A to the Code of Individual Labour Law (CILL),[100] has instituted for the first time in Greek labour law the probationary period as a distinct employment period with a downgraded protection status. This is in breach of the gender equality and non-discrimination *acquis*.

According to Article 1A(3) CILL,[101] if, during the probationary period or at its end, the employer considers that the 'service of the employee is not successful', for whatever reason (i.e. not only for reasons connected with the capacity or conduct of the employee but also for economic reasons), the probationary employment relationship is 'automatically dissolved', i.e. no termination by the employer is required. The employer has only to submit a notification of the automatic dissolution to the electronic employment platform, ERGANI.[102]

Moreover, according to Article 1A(6) CILL, full protection against unlawful dismissal applies only during the probationary period, but not at its end or after its end. This is in blatant breach of the EU *acquis* on

96 Media reporting, *Tagesschau*, (2024) 'Bericht zur Muslimfeindlichkeit wird wieder veröffentlicht', (Report on Anti-Muslim Hatred will be published again), 13 March 2024.
97 Germany, Berlin-Brandenburg Higher Administrative Court 9 S 20/23, 31 January 2024, ECLI:DE:OVGBEBB:2024:0131.9S20.23.00.
98 Greece, Act 5053/2023 to strengthen the work. Integration of Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, Official Journal A 158/26.09.2023.
99 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.
100 The Code of Individual Labour Law (CILL) was adopted by presidential decree 80/2022, Official Journal A 222/4.12.2022.
101 Article 1A(3) CILL: 'If, during or at the end of the period of time in paragraph 1, the employer considers that the probationary service of the employee is not successful, the probationary contract is automatically dissolved and the time spent is counted as working time for all rights produced up to the point of its solution'.
102 Article 3 Act 5053/2023 & Part C, 1st Article, para. 15 of the Ministerial Decision 113169/2023, Official Journal B 7421/28.12.2023.

gender equality, which prohibit any less favourable treatment, including dismissal, of workers on the grounds of sex and the other protected grounds, during pregnancy and maternity leave and on the ground that they have applied for, or have taken, family-related leave or that they have exercised their rights to flexible working arrangements under the WLB Directive:

- during the whole employment relationship (including the probationary period);
- at its end (e.g. the non-renewal of a fixed-term contract upon its expiry due to the employee's pregnancy constitutes a prohibited direct discrimination on the grounds of gender[103]); and
- even after its end (workers should continue to enjoy protection against discrimination even after the end of the employment relationship, as in the event of the employer's refusal to provide references – see also point 41 of the Recital of Directive 2019/1152).[104]

The above regression in relation to the EU *acquis* was strongly deplored by the National Commission for Human Rights (NCHR) in its report[105] on the draft law before its adoption by the Greek Parliament, albeit to no avail. The NCHR also noted that according to the jurisprudence of the European Committee of Social Rights of the Council of Europe on Article 24 (the right to protection in cases of termination of employment) of the European Social Charter, the exclusion of workers from protection against dismissal up to six months during the probationary period is not reasonable if it is applied irrespective

of the capacity or conduct of the employee.[106] According to the NCHR, given that the 'automatic dissolution' is not considered and registered as a termination of the employment contract by the employer, a worker whose employment contract is automatically dissolved will not be entitled to unemployment benefit, even if the required insurance days record is satisfied.

The President of the Greek Association for Labour Law and Social Security[107] also warned that the restriction of the protection against unlawful dismissal only during the probationary period is of purely theoretical value, given that at the end of the probationary period (or even before it) the employer can unilaterally 'judge' that the service was not successful for any reason.

Gender

Introduction of six-day work week raises concerns over work-life balance

The Act transposing the WLB Directive on transparent and predictable working conditions[108] into national law[109] introduces several new provisions (among other innovations),[110] notably Articles 25 and 26, which establish for the first time a six-day working week in certain circumstances. Specifically, this applies to: (i) enterprises of continuous operation (using a rotating shift system) that typically have a five-day working week, and (ii) enterprises not inherently continuous in operation but only in

103 CJEU, judgment of 4 October 2001, *Tele Danmark*, C-109/00, ECLI:EU:C:2001:513; CJEU, judgment of 4 October 2001, *Jiménez Melgar*, C-438/99, ECLI:EU:C:2001:509.
104 CJEU, judgment of 22 September 1998, *Coote*, C-185/97, ECLI:EU:C:1998:424.
105 National Commission of Human Rights (2023), Observations on the Draft law (Act 5053/2023), September 2023, pp. 30-35.
106 European Committee of Social Rights, (Art. 24) termination of employment, Conclusions 2012, Ireland; Conclusions 2012, Cyprus; Conclusions 2003, Italy.
107 Zerdelis, D. (2023), 'The regulation of the probationary period for employees', news article in *Kathimerini*, 14.9.2023.
108 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.
109 Greece, Act 5053/2023 'To strengthen the work. Integration of Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union', Official Journal A 158/26.09.2023.
110 EELN, flash report (Greece) of 25 March 2024, 'First-ever institution of a probationary period in breach of EU law'.

exceptional circumstances facing an unforeseeable increase in workload.[111] The law lacks provisions for a reasonable notice period or the right of workers to refuse employment on the sixth day. The National Commission on Human Rights (NCHR) criticised the bill for, among other things, inadequate public participation before its adoption.[112]

At the time of its adoption, the compatibility of Greece's six-day work week with EU regulations, particularly regarding gender equality, was questioned in the European Parliament.[113] Moreover, upon its entry into force on 1 July 2024,[114] international media criticised the measure as contrary to the global trend toward a four-day working week[115] and work-life balance.[116] In the wake of this negative publicity and without any amendment to the law, Greek officials claimed that refusal to work on the sixth day would be considered abusive as contrary to 'good morals' if repeated, but this stance was later revised by the Greek Prime Minister to indicate that such employment is only permissible with mutual agreement.[117]

From a gender and work-life balance perspective, Act 5053/2023 conflicts with EU regulations:

- Article 33(2) of the EU Charter of Fundamental Rights: the fundamental right to reconcile work and family life, linked to gender equality (Article 23 of the Charter), which has been recognised by the CJEU as a natural corollary to gender equality (Article 23 of the Charter);[118]
- Article 4(3) TEU: the principle of sincere cooperation, requiring Member States to avoid measures that obstruct EU goals. Directive 2019/1152: the general principle of non-regression (Article 20 and paragraph 47 of the preamble).
- Article 8 TFEU: The obligation of gender mainstreaming.[119]

It is widely acknowledged that extended working hours and unpredictable schedules have a negative

111 Articles 25 and 26 Act 5053/2023 added Articles 182C and 182B respectively to the Code of Individual Labour Law (presidential decree 80/2022, Official Journal A 222/4.12.2022).

112 The NCHR was not consulted by the Executive on the draft bill despite its area of expertise. Moreover, the period of public debate (25.8.2023-11.9.2023) coincided with extended wildfires and floods in Thessaly due to which a state of emergency had been declared and the country was practically cut into two parts, rendering problematic the participation of stakeholders. See NCHR (2023), Observations on the Draft law, September 2023. The issue of effective and timely consultation of stakeholders has been also addressed by the European Commission in the 2024 Rule of Law Report (Country Chapter on the rule of law situation in Greece), SWD(2024) 808 final.

113 Urtasun, E. (Verts/ALE), 5.10.2023, Question for written answer E-002956/2023 to the Commission, 'Increase of working hours in Greece',. Answer given by Mr Schmit on behalf of the European Commission E-002956/2023(ASW), 27.11.2023.

114 Decision of the Minister of Employment No 24595/28-3-2024, Official Journal B 1966/29-03-2024.

115 The Guardian, 1 July 2024, 'Greece introduces 'growth-oriented' six-day working week',; CNBC, 2 July 2024, 'Greece becomes first EU country to introduce a six-day working week',; The New York Times, 6 July 2024, 'Some countries are trying a 4-day workweek. Greece wants a 6-day one',; The Washington Post, 4 July 2024 'Why work four days a week when you can work six? Greece gives it a shot',.

116 Koujianou Goldberg, P., 19 July 2024, 'Is Greece's Six-Day Work Week a Harbinger?', Project Syndicate,. Pinelopi Koujianou Goldberg is the Elihu Professor of Economics and Global Affairs and an Affiliate of the Economic Growth Center at Yale University. From 2018 to 2020, she was the Chief Economist of the World Bank Group.

117 See declarations of the Minister of Labour Niki Kerameos and of the Deputy Minister of Labour Kostas Karagkounis, inter alia, in: The Press Project, 5 July 2024, '«Ο εργαζόμενος δεν μπορεί συνεχώς να αρνείται την εργασία» λέει ο υφυπουργός Εργασίας στηρίζοντας την 6ήμερη εργασία' ('"The employee cannot constantly refuse the 6-day work", says the Deputy Minister of Labour'),; 'Κεραμέως για 6ημερη εργασία: "Δε μπορείς να λες συνέχεια όχι στο αφεντικό για 6ημερο"' ('Kerameos: for a 6-day job: "You can't keep saying no to the boss for six-day work"'.

118 CJEU, 17 June 1998, C-243/95 *Hill*, para. 42, CJEU, 2 October 1997, C-1/95 *Gerster*, para. 38; CJEU, 16 September 2010, C-149/10 *Chatzi*, para. 63.

119 Petroglou, P. (2024), 'Ο εργασιακός ν. 5053/2023 υπό την οπτική του φύλου και του συνδυασμού εργασιακής και οικογενειακής ζωής - Ελλάδα, quo vadis?' (Labour Act 5053/2023 from the perspective of gender and work-life balance – Greece, quo vadis?), *Επιθεώρησις Εργατικού Δικαίου* (Labour Law Review) vol. 6-7/2024 (to be published), in memoriam Sophia Koukoulis-Spiliotopoulos.

impact on women's employment.[120] The CJEU in *Danfoss*[121] noted that variable hours disproportionately affect women, who often bear household and family responsibilities and are therefore not in the same position as men to organise their working time flexibly. Therefore, employees under a five-day regime should be able to refuse to work on the sixth day based on their fundamental right to work-life balance, without needing to justify their refusal under national law on additional work.[122] Individual agreements for a six-day work week should undergo strict judicial scrutiny, given that workers are typically 'the weaker party in employment relationships, so that it is necessary to prevent the employer from being in a position to impose a restriction of his or her rights on him or her'.[123]

For as long as the six-day work week is applied, gender monitoring is required on the basis of robust statistical data disaggregated by sex and made available to the public.

In the given national context,[124] the new measure is expected to further disrupt work-life balance, to the detriment of female workers in particular. Most importantly, Greece's six-day work week should not be a 'harbinger': measures to deal with the acute labour force shortage should ensure both work-life balance and sustainability, as has been very pertinently stressed by Professor Pinelopi Koujianou Goldberg, Yale University.[125]

Disability

Statutory exception to the right of persons with disabilities to access public transport

In December 2023, the Ministry of Infrastructure and Transport amended its legally binding Regulation on the rights of passengers on public transport (buses, metro etc).[126] The amendment increased the levels of fines and compensation available in cases of discrimination against persons with disabilities in access to public transport, but also established a noteworthy exception. The amended Regulation states that the refusal to issue tickets or to allow boarding due to disability or reduced mobility is exceptionally permitted, where it would not be safe or 'operationally possible' to allow access, where it would be necessary to comply with applicable safety requirements set by international, EU or national law and health and safety requirements, or where it would be required by 'the design of the vehicle or the infrastructure, including bus stops and terminals or departure areas'.

120 See, among others, para 10 of the preamble to Directive 2019/1158.

121 CJEU, 17 October 1989, *Danfoss*, C-109/88, ECLI:EU:C:1989:383, paras. 21, 25.

122 Article 659 Civil Code on the obligation of workers to provide additional work reads: 'If there is a need for work beyond the agreed or usual, the employee has an obligation to provide it, if he/she is able to do so and his/her refusal would be contrary to good faith. The employee has a right to this additional work in additional remuneration, which is arranged according to the agreed salary and the special circumstances'.

123 CJEU, 12 October 2023, C-57/22 *Ředitelství silnic a dálnic*, para. 44; 2 March 2023, C-477/21 *MÁV-START*, para. 36; 12 January 2023, C-356/21 *TP (Monteur audiovisuel pour la télévision publique)*, para. 43; 22 September 2022, C-120/21 *LB (Prescription du droit au congé annuel payé)*, para. 44; 28 October 2021, C-909/2019 *Unitatea Administrativ Teritorială D*, para. 47; 17 March 2021, C-585/19 *Academia de Studii Economice din București*, para. 51; 14 May 2019, C-55/18 *CCOO*, para. 44; 5 October 2004, C-397/01 to C-403/01 *Pfeiffer and Others*, para. 82; 25 November 2010, C-429/09 *Fuß*, para. 80; 6 November 2018, C-684/16 *Max-Planck-Gesellschaft*, para. 41. In the same vein, judgment No 830/2024 of the Greek Supreme Civil Court.

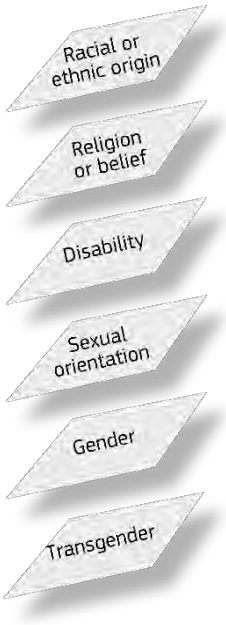
124 A decade of austerity measures and the subsequent Covid-19 crisis have had cumulative harmful effects on women, women's rights and gender equality in Greece, which since 2010 has ranked the last or among the last (in 2023 the 24th) of the EU Member States according to the gender equality index of EIGE. The CEDAW has also noted with concern the large number of women engaged in unpaid care work, EELN flash report (Greece), 7.6.2024, 'CEDAW's concluding observations on Greece'.

125 Koujianou Goldberg, P. (2024), 'Is Greece's Six-Day Work Week a Harbinger?', Project Syndicate, 19 July 2024.

126 Greece, Decision No. 362897/2023 of the Ministry of Infrastructure and Transport on amendment of the Regulation of passenger rights on regular and special lines by means of road transport (buses, trolleys) and means of fixed track (metro, tram), Official Journal B 7483/29.12.2023. See also Athens transport statement of 3 January 2024.

The new exception encountered strong criticism from opposition parties and civil society organisations, arguing that despite statements by the Deputy Minister classifying the amended Regulation as an important initiative to strengthen the rights of persons with disabilities in access to transport services, it includes an unprecedented barrier to the adaptations of transport infrastructure that are needed to ensure accessibility for persons with disabilities. Civil society organisations further noted that the 2011 EU Regulation on the rights of bus and coach passengers has still not been transposed in a satisfactory manner in Greece with regard to accessibility for persons with disabilities.

Extension of the material scope of prohibition of discrimination on all grounds (except age) in all fields



In February 2024, same-sex marriage was established in Greece through the adoption of Law No. 5089/2024.[127] While this significant legislative improvement was the focus of the debate surrounding the adoption of this law, it also introduced another important change which received far less public attention, i.e. a significant extension of the scope of the national prohibition of discrimination. With the stated aim of implementing the national strategy for LGBTQI equality, the law thus extends the material scope of protection against discrimination for the grounds of sexual orientation, gender identity, gender expression and gender characteristics as well as religious or other beliefs beyond the scope covered by existing legislation.[128]

Specifically, the principle of equal treatment regardless of race, colour, national or ethnic origin, genealogical descent, disability or chronic illness, religious or other beliefs, sexual orientation, gender identity, gender characteristics or gender expression now applies to all persons, in the public and private sectors, and in terms of: a) social protection, including social security and healthcare, b) social benefits and tax facilities or advantages, c) education, and d) access to the availability and provision of goods and services that are (commercially) available to the public, including housing. For the second time, the legislature used the concept of 'gender expression',[129] by adding it to the already existing concepts of gender identity and gender characteristics. The full material scope of the Racial Equality Directive is thus covered with regard to all the grounds covered by EU law, with the notable exception of age. The National Commission for Human Rights (NCHR) welcomed the adoption of this law as an important step for the respect of fundamental rights, dignity and equality before the law, and will monitor its implementation.[130]

The Ombudsman[131] presented observations on the legislative bill, deploring the unjustified omission of the grounds of age and 'family and social status', which are covered by Law No. 4443/2016, and noting that the equal treatment and anti-discrimination legislation should be revised and codified for reasons

127 Greece, Law No. 5089/2024, on equality in civil marriage, amendment of the Civil Code and other provisions, Official Journal 27 A /16.02.2024.

128 Greece, Law No. 4443/2016, Official Journal A 232/9.12.2016, and Law No. 5023/2023, Official Journal A 34/17.2.2023, which extended the material scope of protection against discrimination on the grounds of disability or chronic illness. For further information, see *European equality law review 2023*, pp. 122-123.

129 Greece, Law No. 4808/2021, Official Journal A 101/19.06.2021, ratifying ILO Convention 190 on Violence and Harassment, in its definition of 'harassment related to sex', and including the term 'gender expression', in addition to gender identity and gender characteristics.

130 Greece, National Commission for Human Rights (2024), 'NCHR welcomes the passing, by a large majority, of the draft law on equality in civil marriage', 16 February 2024.

131 Greece, Ombudsman (2024), Observations on the Bill, 7 February 2024.

of rationalisation, coherence and clarity. that the equal treatment and anti-discrimination legislation should be revised and codified for reasons of rationalisation, coherence and clarity.

Civil society organisations[132] welcomed this crucial step towards marriage equality for LGBTIQ+ persons, while also pointing out important omissions and proposing further reforms that would ensure real equality for LGBTIQ+ persons. For instance, the new law does not provide the same rights and recognition to the non-biological parent in a same-sex marriage as those of the man in a heterosexual marriage. Furthermore, married same-sex couples as well as single men, transgender and intersex persons will not be able to access fertility treatment such as donor assisted reproductive technology or surrogacy. Finally, most civil society organisations highlighted that the law does not amend the provision preventing parents from changing the name and gender on their children's birth certificates.

Extension of family-related leave to same-sex spouses in the case of a joint child

Law 5089/2024 on equality in civil marriage, amendment of the Civil Code and other provisions (the Act)[133] aims to strengthen protection against discrimination, in implementing the national strategy for LGBTQI equality (Article 1), and by establishing, among other things, same-sex marriage for the first time in Greece (Article 3).

In addition, Article 4 of the Act eliminated discrimination based on gender in the legislative definition of a child's surname in the event of non-selection by the parents. Under the new provision, if the parents omit to state the child's surname, the child does not acquire the surname of the father, as used to be provided by the anachronistic and unconstitutional provision of Article 1505(3) of the Civil Code; a compound surname is formed from the surnames of the parents in alphabetical order.
Moreover, in the field of family-related leave, Article 6 of the Act extended eligibility to same-sex spouses in the case of a joint child, regarding:

- the nine-months' paid 'special leave of maternity protection'[134] (seven out of the nine months can be shared with the father) applying to (i) private sector workers (Article 6(1) of the Act[135]) and (ii) liberal professionals, the self-employed and farmers (Article 6(2) of the Act);[136]
- the 14 working days' paid paternity leave in both the private sector (Article 6(3) of the Act)[137] and the public sector (Article 6(5) of the Act);[138]
- the 17 weeks' maternity leave in the private sector (Article 6(4) of the Act);[139]

132 See, for instance, Amnesty International - Greek section (2024), Press release issued on 2 February 2024.
133 Greece, Law 5089/2024, on equality in civil marriage, amendment of the Civil Code and other provisions (*Νόμος 5089 για την «ισότητα στον πολιτικό γάμο, τροποποίηση του αστικού κώδικα και άλλες διατάξεις*'), Official Journal 27 A /16.02.2024.
134 EELN flash report (Greece), 25 March 2024, 'Extension of the 9-months paid 'special leave of maternity protection' to new categories'.
135 Article 6(1) Act 5089/2024 added a new Article 228A following Article 228 of the Code of Individual Labour Law (corresponding to Article 150 Act 5078/2023).
136 Article 6(2) Act 5089/2024 added a new paragraph 3A to Article 151 Act 5078/2023, Official Journal A 211/20.12.2023.
137 Article 6(3) Act 5089/2024 added a new paragraph 4 to Article 220 of the Code of Individual Labour Law (corresponding to Article 27 Act 4808/2021, transferring Articles 4 and 8 Work-Life Balance Directive 2019/1158).
138 Paternity leave in the public sector is governed by Article 50(1)(4) of the Civil Servants Code (Act 3528/2007).
139 Article 6(4) Act 5089/2024 added a new paragraph 3 to Article 226 of the Code of Individual Labour Law (corresponding to Article 44(2) Act 4488/2017, Official Journal A 137/13.9.2017 and Article 8 Presidential Decree 176/1997, Official Journal A 150/15.07.1997, transferring Article 8 Directive 92/85).

- the 3 months' fully paid leave in the case of adoption or fostering in the public sector (Article 6(5) of the Act);[140]

- the protection of fathers against dismissal for a six-month period following the birth of the child; and

- the protection of mothers against dismissal during pregnancy and for an 18-month period following the birth of the child (or even longer in the event of sickness due to pregnancy or birth) applies only to working mothers who are pregnant and give birth to the child (Article 7 of the Act).[141]

The beneficiary of the above forms of leave and protection is defined by a declaration to the employer.

Finally, pursuant to Article 8 of the Act, provisions of the existing legislation concerning claims, benefits and privileges of spouses and parents against third parties or against the state are applied, directly or proportionally, in the case of persons of the same sex who have married or have a joint child, unless differently provided by Articles 6 and 7 of the Act or by another legal provision.[142]

In its position on the new law, the Greek Ombudsman[143] pointed out the existing discrimination on the grounds of sex against adoptive fathers who do not enjoy the 6 months' protection against dismissal, which is granted only to natural fathers following the birth of the child whereas the 18 months' protection against dismissal granted to natural mothers also applies to adoptive mothers, commissioning mothers (following the birth of the child) and surrogate mothers.[144]

The General Confederation of Workers (GSEE)[145] criticised the heading of Article 6 of the Act, 'Extension of benefits and privileges to same-sex spouses and parents'. It pointed out that the equal treatment of working same-sex spouses and parents concerns their equal access not to 'benefits and privileges', but to fundamental labour rights, which have historically been won and improved as minimum standards of labour protection through national general collective agreements (NGCAs). The latter have historically played a leading regulatory role in this field,[146] responding to the demands of society and respecting the personal life of workers with universal coverage, irrespective of sex.

Last but not least, there is an issue of bad lawmaking: by extending family-related leave to same-sex spouses, Articles 6 and 7 of the Act amended the corresponding provisions of the Code of Individual Labour Law (CILL),[147] instead of amending the provisions of the corresponding national laws that transposed the Pregnant Workers Directive and the Work-life Balance Directive. In this way, the thread

140 The adoptive and foster leave in the public sector is governed by Article 53(9) second paragraph of the Civil Servants Code (Act 3528/2007).

141 Article 7 Act 5089/2024 added a new paragraph 4 to Article 281 of the Code of Individual Labour Law (corresponding to Article 15 Act 1483/1984, Official Journal A 153/8.10.1984).

142 According to the provisions of Article 12(2) Act 5089/2024, by presidential decree, issued following a proposal by the Minister of Labour and Social Security, the provisions of labour law and social security law in force may be adapted, where necessary, to the requirements of Article 8 Act 5089/2024.

143 Ombudsman (2024), Observations on the Bill, 7 February 2024.

144 Article 281(3) Code of Individual Labour Law (p.d. 80/2022), corresponding to Article 15 Act 1483/1984, Official Journal A 153/8.10.1984.

145 General Confederation of Workers, press release of 8 February 2024 'The equal treatment of working same-sex spouses and parents at work is not a "benefit and privilege", but a fundamental right, which rightly needs to be restored'.

146 Marriage leave (NGCA 1993,2000), parental leave (NGCA 1993), extension of family related leaves to natural, adoptive and foster parents (NGCA 2000, 2008), extension of marriage allowance to all workers, irrespective of sex (NGCA 1988, 2013).

147 Greece, Presidential decree 80/2022, Official Journal A 222/4.12.2022.

of amendments of the employment legislation is lost and there is a significant risk of legal uncertainty for all interested stakeholders. In legal information banks, the new provisions on family-related leave appear only as an amendment to the CILL but not as an amendment to the transposing laws. Nonetheless, Article 20(3) of the Work-life Balance Directive and Article 14(2) of the Pregnant Workers Directive expressly provide that the transferring national provisions should contain a reference to the relevant EU directive or should be accompanied by such a reference on the occasion of their official publication.

New provisions on domestic violence following Greece's evaluation by GREVIO

A new Act[148] amended the previous act on domestic violence[149] with effect from 1 May 2024 following Greece's evaluation by GREVIO[150] and the CEDAW,[151] both of which deplored the rise of domestic violence incidents in the country. The new Act brought several other amendments to the existing legal framework on domesticviolence.[152] An important innovation is that the reception services for domestic violence victims[153] upon the victim's prior information and consent should proceed to risk assessment and risk management,[154] taking into account specific factors.[155] The police and the prosecuting and judicial authorities, before whom a domestic violence case is pending, whenever it is deemed necessary, must provide information and refer the victim, upon her request, to social services or to health services or to specialised support structures for domestic violence victims, in particular women, for an individual assessment in order to determine the appropriate measures for the victim's immediate protection. The individual assessment is updated throughout pending criminal proceedings, if the relevant circumstances change materially.

148 Greece, Act 5090/2024, Official Journal A 30/23.02.2024.
149 Greece, Act 3500/2006, Official Journal A 232/24.10.2006.
150 EELN flash report (Greece) of 12 February 2024 'Implementation of the Istanbul Convention by Greece'.
151 Committee on the Elimination of Discrimination against Women, Concluding observations on the combined eighth and ninth periodic reports of Greece, [CEDAW/C/GRC/CO/8-9].
152 Domestic violence was expanded to include the commission of a criminal act against a person who receives the services of a social care provider where the perpetrator works (Article 117 Act 5090/2024, amending Article 1(1) Act 3500/2006); a perpetrator of domestic violence can be any ex permanent partner (not only just the former one) (Article 117 Act 5090/2024, amending Article 2(c) Act 3500/2006); a 'victim of domestic violence' is also considered a family member in whose family the offenses of rape and abuse of a person unable to resist a sexual act were committed (Article 117 Act 5090/2024, amending Article 3 Act 3500/2006); in case of psychological (in addition to physical) violence against a minor, the court may order any appropriate measure regarding visitation rights according to Article 1532 Civil Code (Article 118 Act 5090/2024, amending Article 4 Act 3500/2006); the minimum amount for moral damages adjudicated to a domestic violence victim cannot be lower than the amount of EUR 2 000 (previously EUR 1 000) (Article 119 Act 5090/2024, amending Article 5 Act 3500/2006); stricter punishment is provided for domestic bodily harm, committed in front of a minor family member; domestic unlawful violence and threat and domestic attack of sexual dignity are also punished if committed in front of a minor family member (Articles 120, 121 and Act 5090/2024, amending Articles 6, 7 and 9 Act 3500/2006 respectively); amendments in the procedure of penal mediation (Articles 123, 124 and 125 Act 5090/2024, amending Articles 11, 12 and 14 Act 3500/2006 respectively); victims of domestic violence are entitled to social (moral and material) support without any requirement for the victim's prior request whereas the police officers should inform without delay the victim and the competent entities so that the necessary assistance is provided immediately (Article 129 Act 5090/2024, amending Article 21 Act 3500/2006).
153 I.e. police authorities, social services, health services, specialised structures for the support of domestic violence victims, especially women etc.
154 Article 131 added to Act 3500/2006 a new Article 23A entitled 'Individual assessment of victims and risk management of the risk of the recurrence of violence and secondary victimisation'.
155 The personal characteristics of the victim, such as age, race, religion, nationality or ethnic origin, sexual orientation, gender identity or gender characteristics, disability, the status of stay or residence, the relationship of kinship and the degree of financial or other dependence with the perpetrator, the precedent of victimization; the degree of damage to the victim, the type, the seriousness and the frequency of violence; risk factors or recurrence of violence regarding the perpetrator, such as, in particular, threats to the life or physical integrity of the victim, the possession of a firearm, prior domestic violence convictions, stalking, addiction to alcohol or other substances, display of violence or threats in front of a minor; other special circumstances regarding the victim or the perpetrator.

Moreover, the new Act extended the existing reporting obligation regarding minor domestic violence victims to all professionals (not only teachers) and introduced for the first time the reporting obligation of doctors regarding adult domestic violence victims. It also provided for the first time that reporting professionals cannot be sued, disciplined, fired, submitted to any kind of sanctions or adverse treatment, for the incident they reported, except if they made a knowingly false report; they will not be invited to be examined as witnesses during the proceedings in the audience, unless the crime of domestic violence cannot be proven by any proof.[156]

Furthermore, protection orders include the participation of the perpetrator in therapeutic, counselling and addiction treatment programmes. To this end, in particular, the seriousness and frequency of the act, the perpetrator's dangerousness and the risk of recidivism will be taken into account. Protection orders are submitted to the public prosecutor on the very same day and are forwarded to the police for execution without delay. The infringement of a protection order will be punished.[157]

Regarding penal mediation, it is now provided that if both the victim and the perpetrator are manifestly financially weak and the latter is not able to compensate the former and her children, who need to be relocated to a safe environment and to have their basic needs covered, upon the victim's request a lump sum in compensation is paid without delay by the Greek Compensation Authority.[158] In her circular[159] on the provisions of the new Act, the Attorney General of the Supreme Civil Court, Maria Gane, in view of the rise of domestic violence crimes,[160] mainly against women and children, called on all public prosecutors to take action so that abused victims, burdened by feelings of guilt and shame, do not keep silent about the acts of violence they experience. According to the Attorney General, covering up this pathogenicity traps victims in problematic no-way-out situations with severe consequences for their children, whether they experience violence in the family as direct victims or as witnesses. The Attorney General welcomed the individual risk assessment and risk management introduced by Act 5090/2024 that will protect the victims through appropriate preventive measures, in order to avoid the recurrence of violence, their secondary victimisation and the risk of femicide or any new incident of gender-based violence. She stressed that following Greece's first evaluation by GREVIO, it is of primary importance and urgency to ensure the support and protection of survivors of gender-based violence and the respect of procedural guarantees.

CASE LAW

Ombudsman report of cases of alleged discrimination of children with disabilities in private schools

In November 2023, the Ombudsman issued a report regarding several cases of alleged discrimination against children with disabilities or special educational needs in access to private schools, despite express statutory prohibition of such discrimination.[161] During the investigation, the Ombudsman

156 Article 130 Act 5090/2024, amending Article 23 Act 3500/2006.
157 Article 127 Act 5090/2024, amending Article 18 Act 3500/2006.
158 By proportional application of Act 3811/2009, Official Journal A 231/18.12.2009, transposing Directive 2004/80/EC relating to compensation to crime victims.
159 Greece, Circular No 6/1.4.2024.
160 EELN, flash report (Greece) of 25 November 2021, 'New directives on the management of domestic violence complaints by the Police and the Prosecutors'; EELN flash report (Greece) of 15 October 2021 'Alarming rise of 'intimate' femicides in Greece'; On the alarming rising of domestic violence and femicides, see also the Supreme Civil Court AG's V. Pliotas Circular No. 12/3.11.2021.
161 Greece, Ombudsman (2023), 2022 Special Report of the Greek Ombudsman on rights of persons with disabilities, November 2023.

attempted to mediate between the Ministry of Education and the schools concerned, referring to various practices of rejecting or refusing access for children with low scores, disabilities and learning difficulties, often invoking internal regulations. In this regard, the Ombudsman referred to relevant court rulings, according to which a) internal regulations do not prevail over legislation and b) students should be enrolled based on the priority of the application and not selection procedures.

After the investigation and the failed mediation attempt, the Ombudsman issued its report, concluding that the reported practices amount to a violation of relevant national legislation as well as binding international law such as the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. Indeed, national law notably stipulates that children and students with disabilities have a right to be enrolled and to study in private schools under the same conditions and with the same adjustments as in public schools. The aim is to guarantee equal opportunities and conditions of equal access for students with disabilities and/or special educational needs in the education system, as well as the elimination of discrimination and exclusion. The Ombudsman further noted that such violations amount to disciplinary offences incurring specific disciplinary sanctions, such as a significant fine and temporary or permanent withdrawal of the school's operating licence.

The report finally noted that the Ministry of Education has committed to issuing a circular highlighting the responsibility for supervision, control and sanctioning by the Directorates of Education, the re-examination of the internal operating regulations of all private and foreign schools and their abolition in the event of violation of any legal provision, in order to prevent further instances of discrimination of children with disabilities in private schools.

Although this is a rather general report with non-binding recommendations, it could be helpful for complainants bringing a similar case of alleged discrimination to the courts.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Ombudsman's *Special report on equal treatment 2022*

The Ombudsman's *Special report on equal treatment 2022*, published in November 2023, presents detailed data on the complaints received and examined by the Ombudsman under its equality body mandate, covering the full spectrum of discrimination grounds protected by national law.[162]

The report presents the following data regarding the grounds of new complaints received in 2022: 59 % on gender, 21 % on disability or chronic illness, 6 % on family status, and 5 % on age, while only 3 % of the complaints concerned religious or other conviction, 2 % national or ethnic identity, 2 % race or skin colour, and 2 % social status, sexual orientation and gender identity or characteristics. With regard to the grounds that represent only 2-3 % of the total number of complaints, the report notes that the numbers are not representative of the amount of discrimination experienced in society, thus indicating severe underreporting.

The report does not contain detailed data on the outcome of the complaints, but simply mentions that 979 opinions were issued in 2022, out of which 555 concerned complaints received in 2022 and 424

[162] Greece, Ombudsman (2023), *Special report on equal treatment 2022*, November 2023.

concerned cases pending from previous years. It also describes some 'representative' cases of discrimination, how they have been handled and their outcome.

The report also provides some analysis of specific issues of importance from the past year, notably with regard to:

- violence and harassment in employment, following the ratification of ILO Convention 190 on Violence and Harassment, with a focus on the deficits of the investigation of complaints of harassment in the public sector, the difficulties of proof, the importance of timely presentation of the available evidence, and the new right of the victim to abstain from work;[163]

- issues of work-life balance, including deficits of entitlement to special maternity leave and parental leave of specific groups of employees (educational personnel, medical personnel, scientific advisers of MPs);

- the first case of victimisation against a father who asked for paternity leave.

Moreover, a special subchapter on gender-based violence and domestic violence concludes that information on the victim's rights continues to be fragmentary or incomplete, that victims continue to face problems during the procedure for reporting incidents of domestic violence to the competent authorities, and that there are difficulties of access to the provision of free legal aid.

The report further describes issues concerning the promotion of measures and facilities that directly or indirectly contribute to empowerment of the legislative framework for equal treatment, such as teleworking, the digital reform and neutrality policies. It also presents the Ombudsman's systematic interventions aiming to remove widespread stereotypes or prejudices that hinder the achievement of real equality, including (i) the publication of job offers under the traditional masculine-feminine denominations or addressed to one sex, (ii) discrimination against transgender persons in prison, and (iii) the blanket exclusion of transgender persons from the police. The report also presents the Ombudsman's legislative proposals submitted in 2022 to the relevant ministries, as well as the proposals from previous years that were adopted in 2022.

Finally, the report welcomed and underlined the importance of the two pending proposals for binding standards for national equality bodies. It also welcomed recent legislative developments notably in matters concerning violence and harassment at work, the extension of the material scope of protection against disability discrimination, as well as work-life balance, but also noted serious deficiencies with regard to their effective implementation and the achievement of tangible progress.

Implementation of the Istanbul Convention by Greece

The first *Baseline Evaluation Report on the implementation of the Istanbul Convention*[164] (IC) by Greece[165] was adopted by the Group of Experts on Action against Violence against Women and

[163] Article 12(3) of Act 4808/2021 stipulates that the victim of violence and harassment can make use of the right to leave the workplace without loss of salary, in the case of a serious and imminent risk to health and safety caused by an incident of violence and harassment, especially when the perpetrator is the employer, or when the employer does not take appropriate measures in order to restore the peace at the workplace or when these measures are not capable of stopping the violent behaviour and harassment.

[164] The Convention on Preventing and Combating Violence against Women and Domestic Violence of the Council of Europe.

[165] Council of Europe (2023), *GREVIO's (Baseline) evaluation report: Greece*, Strasbourg, November 2023.

Domestic Violence (GREVIO)[166] at its 31st meeting (23-26 October 2023). On 5 December 2023, the Committee of the Parties to the Istanbul Convention, acting under the terms of Article 68(12) IC, adopted the following recommendations on the implementation of the IC by Greece identified in GREVIO's baseline evaluation report.

The Government of Greece is called on for immediate action to:

- Step up action to prevent and combat violence against women exposed to intersectional discrimination by taking measures to eliminate any discrimination against these women, raise their awareness about their rights, improve their access to protection and support services, and support research into the forms of violence they experience;

- Ensure sustainable funding levels for women's rights NGOs that provide support services for women victims of violence (paragraph 38), and step up consultation with a range of women's rights organisations in order to include their opinions and experiences in the design of laws, policies and measures to prevent and combat all forms of violence against women;

- Ensure independent monitoring and evaluation of policies on a regular basis;

- Collect data on decisions on the custody/visitation/residence of children that have expressly taken into account incidents of domestic violence;

- Ensure that all professionals working with victims or perpetrators of all forms of violence, in particular the judiciary, receive systematic and mandatory initial and in-service training to identify and respond to violence against women;

- Expand the number and the capacity of shelters for women victims of violence, address the lack of resources allocated to them and remove any obstacles which hamper victims' access to such shelters; ensure that accommodation is available to women in emergency situations;

- Set up rape crisis centres and/or sexual violence referral centres in line with Article 25 of the Istanbul Convention; introduce standardised protocols for all health professionals on the treatment of women victims of rape/sexual violence; ensure that a victim's access to different support services is not conditional on her willingness to lodge a complaint; ensure timely access to forensic examinations across the country;

- Ensure that children exposed to domestic violence receive counselling and support, and that children of women victims of violence residing in shelters do not face obstacles to receiving education, healthcare services and psychological support;

- Ensure that courts are under the obligation to consider all issues relating to violence against women and domestic violence when taking any decision related to custody and visitation rights; incorporate risk-assessment and risk-management procedures in the determination of custody and visitation rights, and restrict these rights when this is necessary to guarantee the

[166] GREVIO is the independent expert body responsible for monitoring the implementation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) by the Parties.

safety of the mother and the child; end the practice of removing children from or limiting parental rights of non-abusive parents on grounds of 'parental alienation syndrome'; provide appropriate training to judges about the requirements of the Istanbul Convention on custody and visitation rights (paragraphs 200 and 201);[167]

- Implement systematic, gender-sensitive, risk assessments and safety management in all cases of violence against women, repeated at all the relevant stages of criminal proceedings and based on an effective multi-agency approach, including specialist services and NGOs;

- Ensure safe and adequate accommodation for all asylum-seeking women and girls as well as sufficient support to meet their basic needs; set up an effective system of screening of vulnerabilities of asylum seekers upon arrival with a view to detecting reception and procedural needs that arise from experiences of gender-based violence; establish effective referral pathways for women and girls who are victims of gender-based violence and set up dedicated focal points for sexual and gender-based violence within all reception and identification centres; develop and comprehensively implement standard operating procedures or guidelines on gender-sensitive reception of asylum seekers and on the prevention of gender-based violence in asylum accommodation; remove the barriers currently experienced by women victims of violence to accessing specialist support services and provide all asylum-seeking women with relevant information on their rights and existing remedies in case of gender-based violence;

- Uphold their obligation to respect the principle of *non-refoulement* of women victims of violence, including as regards asylum-seeking women and girls arriving by sea; take resolute measures to prevent acts of gender-based violence against women and girls seeking international protection in Greece and investigate any such allegations.

Adoption of a national strategy for the rights of persons with disabilities 2024-2030

In April 2024, the Government presented the new national strategy for the rights of persons with disabilities 2024-2030, entitled 'A Greece for All'.[168] The aim of the strategy is to improve the lives of persons with disabilities in all fields and to strengthen their inclusion in society, mainly through increased visibility and awareness raising.

The strategy sets the following goals: aligning the quality of life of persons with disabilities with that of the general population, in terms of living and work conditions, and bringing the relevant numbers in Greece related to employment rates etc. closer to the European averages. All ministries, regions and municipalities will be bound by the strategy, the implementation of which will be funded through a budget of more than EUR 600 million.

[167] See EELN (2023) Flash report, Greece, 26 April 2023, 'AFEM's shadow report to GREVIO on mandatory shared custody for all children in breach of the Istanbul Convention'. AFEM's shadow report in memoriam of the ex-EELN member for Greece, the late Sophia Spiliotopoulos, was repeatedly cited by GREVIO in its first evaluation report (see footnotes 80, 142, 145, 150).

[168] Greece, National Strategy for the Rights of Persons with Disabilities 2024-2030.

The strategy contains 170 targeted measures, combined with monitoring indicators, in the following six areas: accessibility, education, employment, health, deinstitutionalisation, and visibility of persons with disabilities.

While recognising the importance of horizontal coordination across all different public authorities, the strategy also promotes synergies with representatives of civil society and disability organisations, notably by opening it for public consultation for one month.

When presenting the new strategy, the Government also noted the main achievements of the national action plan for the rights of persons with disabilities 2020-2023, which will serve as a guide and starting point for the strategy in the coming years:

- the establishment and formation of the National Accessibility Authority, an advisory body under the Prime Minister, with the aim of promoting the access of persons with disabilities to all areas of human activity
- the creation of the fully accessible national disability portal and a digital hub which displays all actions, policies and legislation on disability
- the appointment of 6 300 specialised teachers and other educational staff
- the development of business grant programmes for the employment of 3 000 unemployed people from vulnerable groups, including persons with disabilities
- the pilot implementation of the personal assistant service within the Attica Region.

Ministry of Education circular addressing the educational needs of students with disabilities

On 20 May 2024 the Ministry of Education issued a circular[169] as a reaction to the suggestions of the Ombudsman's special report from September 2022 on the education of students with disabilities and/or special educational needs attending the private and foreign schools of Greece, which had been drawn up within the context of the Ombudsman's role in monitoring the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD). The Ombudsman's report highlighted the obstacles that students with disabilities and/or special educational needs face in their attempts to access inclusive education, such as the rates of requests and of approvals for parallel support etc.[170]

The circular, which attempts to address the problematic issues that were highlighted in the Ombudsman's report, notes the following:

- the Directorates of Education are liable for the supervision, control and imposition of sanctions as stipulated by law, in all the schools under their jurisdiction, and
- they should re-examine the internal operating regulations of all private and foreign schools.

169 Greece, Circular No. ΨΦΠΤ46ΝΚΠΔ-ΔΘ6 of the Directorate of Private Education of the Ministry of Education, with Protocol No. 51484/N1 -20.05.2024.

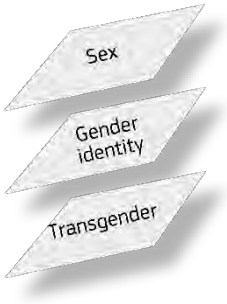
170 For further information, see *European equality law review 2023*, p. 128.

It is also clearly underlined that particular emphasis must be placed on the implementation of special private education legislation, special education legislation, the International Convention on the Rights of the Child and the UN CRPD, to prevent discrimination against children with disabilities and/or special educational needs in private education.

Hungary HU

LEGISLATIVE DEVELOPMENT

Proposed amendment to the 'Women 40' early retirement scheme withdrawn



On 13 July 2023, two members of coalition parties jointly submitted a bill to amend the State Pensions Act.[171] The proposal was about the modification of the rules of an early retirement scheme that is available only to women, known as the 'Women 40' (Nők 40) scheme. The bill aimed to introduce a requirement that when considering eligibility, only those periods of time spent either in work or childcare, which had been spent by the applicant 'as a woman' should be recognised.

According to the general reasoning of the bill:

> 'The amendment makes clear what has never been in doubt, considering the original intention of the legislature and common sense: the 'Women 40' special pension entitlement applies to those who have worked as women for 40 years (or have utilised social security entitlements provided by the Hungarian state for women in case they have children). The Fundamental Law unequivocally states that Hungary registers sex at birth, so to begin with, it is not possible to consider any changes that contradict biological determination. Even in countries that are more lenient with gender changes, it is inconceivable for an entitlement that acknowledges the outstanding role of women in society to be abused by those who suddenly feel as women after being employed for 39 years as men.'

Moreover, the detailed reasoning of the bill claimed:

> 'The amendment clarifies that the special pension entitlement is based exclusively on the eligibility time served by the applicants as women. It is important to emphasise that a Fundamental Law-based interpretation of the rule has always been like this, however, we know about jurisprudence that has questioned this [legal interpretation]. Hence, it became necessary to provide further clarity on the legislative intent.'

On 17 October 2023, the bill was withdrawn by its proposers,[172] who did not provide an explanation for the withdrawal in their submission.

The reasoning behind the bill referred to the provisions of the Fundamental Law (Hungary's constitution). Notably, the Ninth Amendment of the Fundamental Law, in December 2020, addressed the issue of gender identity by stipulating that 'the mother shall be a woman, and the father shall be a man', and that 'Hungary shall protect the right of children to a self-identity corresponding to their

[171] Hungary, Bill No. T/4659 on the Amendment of the Act LXXXI of 1997 on State Pensions (*T/4659. törvényjavaslat a társadalombiztosítási nyugellátásról szóló 1997. évi LXXXI. törvény módosításáról*).
[172] See dynamic page of the bill at the website of the Hungarian Parliament.

sex at birth'.[173] Earlier that year, in May 2020, the amendment of the Registry Act made the legal recognition of gender change impossible in Hungary, by introducing the concept of 'birth sex'.[174]

The reasoning behind the bill also referenced certain jurisprudence and appeared to be triggered by a decision from a Hungarian regional court that was published a few days earlier.[175] In this case, the court found that the claimant, who was born male and who had been living as a man for decades before successfully seeking legal gender transition in 2013, was eligible for the 'Women 40' early retirement option. The claimant was provided with legal aid by a Hungarian LGBT rights NGO, Háttér Society (Háttér Társaság).[176] The court reasoning referred to the relevant domestic legislation, and the *Goodwin v. U.K* case of the ECtHR[177] and the EU norms set by Directive 79/7.[178]

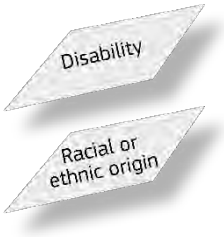
With regard to the particular issue at stake, the 'Women 40' pension scheme itself may be considered as controversial in the light of Directive 79/7.[179] This old-age retirement option is available for women with at least 40 years of 'eligibility period', the latter being somewhat different from the concept of 'contribution period' or 'service period': in this context, it refers to time spent in gainful activity and it may include time spent caring for children (different forms of maternity or parental leave).[180] In 2015, the regulation was challenged by a trade union leader as a private individual (a man) who initiated a referendum in order to allow men to retire under the same conditions as women; this initiative ended in a Constitutional Court decision prohibiting the referendum,[181] referring to a provision of the Fundamental Law that explicitly allows for 'stronger protection' of women in the statutory pension system.[182]

The 'Women 40' scheme is not only controversial because it recognises care work in the family as service only in the case of women (thus does not encourage men to take a larger share), but also because it encourages women, implicitly, to perform even more unpaid care work (grandparental care, care for senior family members). In 2019, the Secretary of the Ministry of Human Capacities claimed that the 'Women 40' scheme 'reflects the basic value of the Government of providing the greatest support for those who combine work and raising children'. He further added that the scheme is 'meant to be a measure of support for families rather than a pension policy provision, because it helps families, for example, by allowing grandmothers to participate in taking care of grandchildren'.[183] The 'Women

[173] See EELN (2021) Flash report (Hungary), 16 February 2021, 'The issue of gender identity in the Ninth Amendment of the Fundamental Law'.
[174] See EELN (2020) Flash report (Hungary), 30 June 2020, 'Amendment of the provisions on legal recognition of gender'.
[175] Hungary, Veszprém Regional Court, Decision No. 101.K.701.331/2022/7.
[176] See the press communication (only in Hungarian) on the website of Háttér Society: 'Transz nőknek is jár a kedvezményes nyugdíj' (Trans women are also eligible for the preferential pension scheme), 6 July 2023.
[177] Notably, the names of the parties (the applicant and the country) involved in this ECtHR case are deleted from the anonymised version of the court decision. Court decisions in Hungary are made available to the public via the Register of Court Decisions (*Bírósági Határozatok Gyűjteménye*), but high profile international case law should not be fully anonymised, obviously, and the basic data from the ECtHR case was deleted by mistake, supposedly. However, representatives of Háttér Society, who have access to the full version of the decision, confirmed that the reasoning refers to the following case: European Court of Human Rights, *Christine Goodwin v. The United Kingdom*, Application No. 28957/95, judgment of 11 July 2002.
[178] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.
[179] See more details about the issues relating to the 'Women 40' scheme: Balogh, L.H. (2024) *Country report. Gender equality. How are EU rules transposed into national law? Hungary: Reporting period 1 January 2023 – 01 January 2024*, EELN.
[180] Hungary, Act LXXXI of 1997 on State Pensions (*1997. évi LXXXI. törvény a társadalombiztosítási nyugellátásról*), 25 July 2007, Article 18(2a)–(2d).
[181] Hungary, Constitutional Court Decision No. 28/2015. (IX. 24.), 22 September 2015.
[182] Fundamental Law of Hungary (*Magyarország Alaptörvénye*), 25 April 2011, Article XIX(4).
[183] See the website of the Hungarian Government: 'Több mint 240 ezren vették igénybe a Nők40 programot 2011 óta' (More than 240 000 have made use of the Women 40 scheme since 2011), 12 January 2019.

40' scheme's basic concept is unprecedented in other countries, i.e. that a pension scheme is aimed at encouraging the fertility of younger generations by facilitating grandmothers' unpaid childcare work.[184] Moreover, the 'Women 40' scheme may be seen as problematic because it provides a lower pension for women (compared to the pension they could have if they did not make use of the early retirement option).[185]

Abolition of positive action measures and reasonable accommodation in access to higher education



Before 1 September 2023, the relevant regulation contained several provisions aimed at offsetting the disadvantages suffered by certain groups, including persons with disabilities and 'disadvantaged' applicants, in access to higher education.[186] In this regard, a child is considered to be 'disadvantaged' if one of three conditions is fulfilled: the low level of education of the parents or guardians; the unemployed status or labour market difficulties of the parents or guardians, and; the child's accommodation conditions, e.g. in a segregated neighbourhood, or without sufficient hygiene installations.[187] Since the Roma are highly overrepresented among socially disadvantaged persons, positive measures targeting these groups almost inevitably apply to Roma in larger proportions than the majority population.

The relevant provisions stipulated that when applying for higher education, applicants with disabilities and 'disadvantaged' applicants were to be granted additional points in a system where admission points are granted mainly based on high school grades and the final high school exam, but also on 'other factors' such as language proficiency and extracurricular activities. Furthermore, higher education institutions were obliged to provide reasonable accommodation for applicants with disabilities in the admission procedure.

However, due to a reform of the admission system, the relevant provisions were removed, and institutions of higher education now have full discretion to determine the criteria for granting the points based on 'other factors', although 'equal opportunities' points are included in the list of possible criteria which the institutions can choose.[188] After the amendment, although a few institutions grant a higher level of 'equal opportunities' points than the previous mandatory level, most of them grant a (much) lower level. Furthermore, there is no longer any express statutory reasonable accommodation duty with regard to admission procedures. These amendments have created a situation whereby certain institutions of higher education become almost unavailable for most applicants from these groups due to the original disadvantages they suffer in the educational system (because of factors such as segregation, the lack of accessibility, etc).

184 Szikra, D. (2017) 'A magyar nyugdíjrendszer a rendszerváltás óta' (The Hungarian pension system since the political change) in: Ferge, Zs. (ed.) *Társadalom - és szociálpolitika, Magyarország, 1990-2015* (Social politics and social policies, Hungary, 1990-2015) (Budapest: Osiris) pp. 305-306.

185 Gerencsér, L. (2018) 'Nyugdíjvita: A „Nők 40" hibás nyugdíjtermék' (Debate on Pensions: The 'Women40' is a flawed pension product), *Új Egyenlőség,* 9 December.

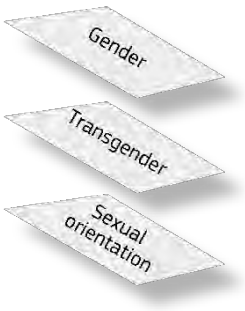
186 Hungary, Government Decree 423/2012 on the Admission Procedures of Higher Education (423/2012. (XII. 29.) *Korm. rendelet a felsőoktatási felvételi eljárásról*), 29 December 2012, Article 24.

187 Hungary, Act XXXI of 1997 on the Protection of Children and the Administration of Guardianship, 8 May 1997, Article 67/A. A child is 'multiply disadvantaged' if at least two out of the three conditions are fulfilled or if they are entitled to certain forms of state care listed in the law.

188 Article 19 of Government Decree 423/2012 on the Admission Procedures of Higher Education.

CASE LAW

Two judgments on the distribution of LGBTIQ-themed books for youth leading to a legislative amendment



In June 2021, the Act on harsher action against paedophile criminal perpetrators was passed by the Hungarian legislature.[189] It introduced strict limitations on the portrayal of homosexuality and any 'deviation' from gender identity aligning with sex at birth in several areas, including advertising, media contents and education. Consequently, the relevant Decree from 2009 was amended to prescribe, in Article 20/A, specific conditions for the sale of children's products depicting deviation from gender identity aligning with sex at birth, gender reassignment or portraying or promoting homosexuality.[190] The provision was dormant until July 2023, when the Government Offices acting as consumer protection authorities started to apply it, imposing fines of different severity on bookstores selling LGBTIQ-themed books without protective packaging and without separating these books from youth and children's books not containing such content. Some bookstores challenged these fines before the administrative courts, and two such lawsuits were decided during the spring of 2024. The cases concerned were the following:

1. In July 2023, the Budapest Government Office imposed a consumer protection fine of approximately EUR 30 300 (HUF 12 million) on the operator of one of the country's biggest bookstore networks, due to copies of a popular LGBTIQ-themed graphic novel for youth being placed in a bookstore's section of children and youth literature without closed packaging.

2. In October 2023, another Government Office imposed a fine of approximately EUR 255 (HUF 100 000) on the same network for putting on sale (albeit in closed packaging) in the children and youth section of a bookstore, a book containing the stories of 100 courageous girls and women, including that of a transgender girl, who fought in court to be allowed to use the girls' bathroom in school. When determining the amount of the fine, the Office took into account that copies of the book were later moved from the children and youth section to a separate section behind the counter.

The first case was adjudicated by the Metropolitan Regional Court in February 2024.[191] The claimant first argued that it had not violated Article 20/A of the Decree, as the respondent authority had misinterpreted its text. In addition, the claimant raised a number of other arguments related notably to breaches of EU law, including the EU Charter of Fundamental Rights.

However, the court found that the case could be decided solely based on the claimant's first claim, and therefore, it did not have to address the other arguments. The issue is of purely linguistic nature and concerns a very slight but substantial difference in wording between the regulations concerning the sale of 'sexual products' (to be sold in closed packaging *and* separately from other products) and of 'products depicting deviation from gender identity' etc. (to be sold in closed packaging only if distributed separately from other products). Although the respondent argued that the intention of the

[189] Hungary, Act LXXIX of 2021 on Harsher Action Against Paedophile Criminal Perpetrators and the Amendment of Certain Laws with a View to Protecting Children, 23 June 2021. See also *European equality law review 2021/2*, pp 103-104.
[190] Hungary, Decree 210/2009. (IX. 29.) on the conditions of performing commercial activities, 29 September 2009.
[191] Hungary, Metropolitan Regional Court, judgment No. 105.K.702.795/2023/15 of 8 February 2024.

legislature was clear, the court held that the teleological interpretation of laws is only applicable if the grammatical analysis of the legal text may lead to different interpretations, which was not the case of Article 20/A of the Decree. Therefore, the claimant did not violate the law, since it did not offer for sale the relevant product separately from other products, and consequently, it was also not under the obligation to offer them in closed packaging. The decision imposing the fine was quashed.

The second case was adjudicated by the Győr Regional Court in March 2024.[192] As opposed to the Metropolitan Regional Court in the previous case, the Győr Regional Court addressed all the arguments of the claimant. Its main conclusion is that first, on the basis of the grammatical interpretation of the text of the law, only the portrayal or promotion of homosexuality triggers the special requirements for distribution, whereas in the case of the depiction of 'deviation from gender identity aligning with sex at birth, gender reassignment or sexuality', the special requirements only apply when that depiction takes place 'in a self-serving manner', therefore, the mere portrayal or even the promotion of 'deviation from gender identity' etc. does not impose special requirements on the distributor. As the relevant chapter of the book concerned could not be regarded as self-serving in any way, the claimant had not violated Article 20/A of the Decree.

The court rejected the claimant's additional arguments on different bases. Regarding the question of whether the requirement on closed packaging only pertains if a product is offered for sale separately, the Győr Court concluded that the finding of the Metropolitan Court in the previous case was clearly contrary to the legislature's intention. As far as the breach of the EU *acquis* is concerned, the court concluded that since the formulation of the legislation with regard to which an infringement procedure had been launched by the European Commission was somewhat different from that of the Decree, the infringement procedure bears no relevance to the Decree and thus the case. Furthermore, the fact that the Decree serves the transposition of the Goods and Services Directive (and other directives as well) does not mean that it is to be regarded as the 'implementation of Union law' in the sense of Article 51 of the Charter. Therefore, the Charter cannot be applied in the case at hand. Even if the Charter was applicable, the provisions of the Charter quoted by the claimant could not be regarded as having been breached for different reasons. For instance, the court was of the view that Article 20/A of the Decree does not constitute discrimination against homosexual and transgender persons, as it has a detrimental impact on all people who wish to buy books dealing with these subjects, irrespective of their sexual orientation or gender identity.

Subsequent legislative amendments

After the court decisions were handed down, on 23 April 2024, the Government adopted Decree 93/2024, which amended Article 20/A of the Decree as of 8 May 2024. The new text of the Decree addresses all the grammatical and other ambiguities based on which the Government Offices lost the cases discussed above. The law now clearly states that special requirements pertain to the sale of children's products that contain as a definitive (or conspicuously visible) element the portrayal or promotion of deviation from gender identity aligning with sex at birth, gender reassignment or homosexuality. These special requirements include the following: such products must not be placed in the shopwindow or in a place where they are easily spotted by the public; they may not be put on sale at all within a 200-metre perimeter of educational or denominational institutions; they must be put on

[192] Hungary, Győr Regional Court, judgment No. 10.K.701.527/2023/13 of 4 March 2024.

sale separately from other children's products and in closed packaging. The law now also makes it clear that the issue whether something is depicted in a self-serving (and naturalistic) manner is relevant only regarding sexuality. Finally, the amendment obliges book publishers to inform booksellers if a book falls under the above outlined limitations, and obliges booksellers to allow the inspection of books by opening the closed packaging if the person acting on behalf of the Government Offices so requires.

Timing of raising defence against claim of discrimination

The complainant, who has a severe locomotor disability, was employed on the basis of an indeterminate contract by the respondent as a government servant. In October 2018, the respondent dismissed the complainant in the context of a group layoff. The complainant initiated the procedure of the Public Service Arbitration Board, claiming that his dismissal had been made with a view to his disability and was therefore discriminatory. The Board found that the respondent had failed to prove that it had complied with the requirement of equal treatment, and ordered the complainant's continued employment.

The respondent challenged the Board's decision before the court, claiming notably that the Board had called on it to make a statement with respect to compliance with the requirement of equal treatment without setting a deadline or providing a warning about the consequences of failing to make such a statement. The respondent also requested the court to hear one of its deputy directors as a witness about the reasons for dismissal. In its first instance judgment, the regional court rejected the respondent's claim on the basis that the Board repeatedly called on the respondent to submit its evidence, and also set deadlines in this respect. The respondent appealed.

Acting upon the respondent's appeal, the Budapest Appeals Court upheld the first instance judgment.[193] The court concluded first that the complainant had indicated, in accordance with the Equal Treatment Act, that he had suffered a disadvantage (dismissal), that he had a protected ground (disability), and that there had been a causal link between the two. Therefore, the burden of proof had shifted, and it would have been the respondent's task to prove that the requirement of equal treatment had not been breached. A simple claim that there had been no discrimination, without any evidence, was not sufficient. Under national law, in court proceedings aimed at the review of the decisions of the Public Service Arbitration Board, the parties may not invoke facts, circumstances or evidence that they did not raise before the Board. Therefore, the evidence presented before the court regarding the dismissal could not be taken into account to exempt the respondent from its liability for the violation of the requirement of equal treatment.

Responsibility for providing accessibility of public health services and potential exculpating factors

In 2023, the Ombudsman (Hungary's equality body) launched a comprehensive *ex officio* investigation into the accessibility for persons with disabilities of the offices of general medical practitioners (GPs) in six larger towns. Accessibility issues were found with regard to some of the GP offices in five of the six towns. The municipalities invoked a number of reasons for their failure to ensure the accessibility

[193] Hungary, Court of Appeal of Budapest, judgment No. Kf.700083/2023/5 of 14 June 2023, published several months later. The judgment is available through a targeted search in the national database of judicial decisions.

of all the GP offices within their respective territories, mainly related to either the ownership status of the premises where the GP offices were located, or a lack of funding. Several municipalities claimed that they had planned to make GP offices accessible in the near future.

In October 2023, the Ombudsman handed down identical decisions in all the cases,[194] recalling that municipalities have a statutory obligation to ensure equal access to general medical care for persons with disabilities. Because of the failure of the municipalities concerned to ensure equal access, persons with disabilities suffered a disadvantage compared to persons in a comparable situation. The Ombudsman then held that this obligation applies irrespective of the ownership status of the premises, and that no future plans to ensure accessibility could exempt the municipalities from their liability, as the deadline for making public services accessible for persons with disabilities expired on 1 January 2014.

Hence, the equality body found that the five municipalities had breached the requirement of equal treatment in the form of direct discrimination against persons with disabilities. As a sanction, the Ombudsman issued a warning to the municipalities, and ordered them to put an end to the infringement and to ensure the accessibility of the GP offices by a set deadline.

The decisions further confirm that a failure to comply with a statutory obligation to take a measure aimed at the offsetting of existing inequalities amounts to direct discrimination. Furthermore, they confirm that if a municipality cannot reach an agreement with a landlord regarding the alteration of a premise to ensure its accessibility, it has a responsibility to move the services to an accessible building. Finally, the Ombudsman used its prerogative to oblige the respondent municipalities to take specifically prescribed actions instead of handing down a general obligation to put an end to the violation, which is a welcome development with a view to the effectiveness of the sanctions system.

Constitutional Court decision regarding state bodies' lack of liability for failure to provide supported housing for persons with disabilities despite statutory obligation

In 2017, six mothers and their adult children with severe accumulated disabilities and under guardianship, sued the Ministry of Human Capacities (later legally succeeded by the Ministry of the Interior) and the Directorate-General for Social Affairs and Child Protection for their failure to provide supported housing in or in the proximity of Budapest, despite their statutory obligation to do so. In April 2023, the Supreme Court (Kúria) recognised the existence of a statutory obligation as well as the respondents' failure to comply with this obligation. It concluded, however, that 'a civil court may not oblige the [...] respondents to take measures that belong to the sphere of public law.'[195]

The claimants filed a constitutional complaint against the Kúria's judgment based on the following arguments. First, it was a question of constitutional relevance whether inherent personality rights (such as the right to dignity, the right to family life, the right to non-discrimination, etc.) could be invoked and a civil lawsuit could be launched when a municipal or state authority's inaction caused or maintained systemic discrimination or the violation of any other fundamental right. If so, the Kúria's

[194] Hungary, Ombudsman, decision Nos. EBF-AJBH-244/2023, EBF-AJBH-245/2023, EBF-AJBH-246/2023, and EBF-AJBH-249/2023.

[195] Hungary, Supreme Court (Kúria), judgment No. Pfv.IV.21.186/2022/10 of 5 April 2023. See also *European equality law review 2023*, pp 134-135.

judgment is unconstitutional. If not, there is no effective remedy against such omissions, providing bodies with public power with a privileged position compared to everyone else, which would amount to a breach of the claimants' right to an effective remedy. Furthermore, the Kúria's judgment failed to remedy the discrimination suffered by the claimants on the ground of disability.

In May 2024, the Constitutional Court rejected the complaint.[196] Regarding the first issue, the court concluded that since the claimants did have the right to turn to a higher judicial forum in the civil lawsuit launched into the violation of their inherent personality rights (appeal against the first instance judgment to the court of second instance and requesting an extraordinary review of the second instance judgment), and these judicial forums, including the Kúria, carried out a substantive assessment of the parties' arguments and gave sufficiently detailed reasons for their decisions, the claimants' right to an effective remedy had not been breached. Thus, the court did not examine the essential core problem of the case, namely that statutory state obligations (regarding which the failure to comply results in violations of fundamental rights) will become unenforceable.

On the other hand, the court rejected the discrimination claim by finding that the Kúria did recognise that under the pertaining legislation the claimants would have had the right to supported housing (i.e. it did not deny that their disability gave rise to certain rights), but held that a civil lawsuit into the violation of inherent personality rights cannot be used to enforce public law obligations. In the court's view (regarding the discrimination claim), this is thus a procedural question regarding which the disability that the claimants rely on as a protected ground has no relevance at all.

The Constitutional Court thus failed to correct the Kúria's decision, which had overturned previous consistent jurisprudence which found inherent personality rights invokable when a municipal or state authority's inaction caused or maintained systemic discrimination (such as segregation in education). In practice, lawsuits aimed at addressing systemic problems stemming from the authorities' failure to take action against inequalities will thus become impossible, and state obligations in this area will become unenforceable.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Minorities Ombudsman publishes conclusions on segregation of Roma pupils based on performance assessment tests

A mother belonging to the Roma minority submitted a complaint about segregated parallel classes, with almost exclusively Roma children, in certain grades at an elementary school. In these classes, the children received a lower standard of education, and their results were markedly worse than those of their peers in other classes.

Following the complaint, the Deputy Ombudsman Responsible for the Rights of National Minorities Living in Hungary (the Minorities Ombudsman) conducted an investigation and found that the standard practice at the school in question has for many years been to carry out a skills assessment test at the end of the fourth grade, and to place the children into two separate classes on the basis of the results. In each grade, the end-of-year results of the two classes showed a significant discrepancy. Data

[196] Hungary, Constitutional Court, decision No. 3141/2024. (V. 3.) AB of 3 May 2024.

analysis of the children's names and place of residence led to the conclusion that the proportion of Roma children was significantly higher in the classes where the educational results were lower.

According to the school, the separation of children by ability is beneficial for all the pupils, as it allows each group to progress at its own pace, with the relevant adaptations. Moreover, the school argued that if it did not separate the children on the basis of their performance, the more mobile, middle-class, typically non-Roma parents would move their children to a denominational school nearby (which would also mean a loss of funding).

In her conclusions, the Minorities Ombudsman criticised the separation of pupils based on performance, recalling that it perpetuates the performance differences and stigmatises the children in the lower-performing group. She noted that the results of the relevant classes confirmed these conclusions.

The Minorities Ombudsman further concluded that it could not be established that the school had the intention to segregate Roma pupils (notably because in the course of extracurricular activities, e.g. during field trips or in the canteen, they were not separated), but the apparently neutral measure of dividing classes on the basis of performance created disproportionate results putting Roma pupils in a disadvantageous situation amounting to indirect discrimination (in the form of segregation). The separation also had a negative impact on their sense of self-worth and deprived them of the chance to study in a motivating environment.

Finally, the Ombudsman made several recommendations, including that the school should revise its practice of performance-based separation of classes, and inform the teachers about inclusive education methods. She also recommended certain measures to prevent burn out among teachers and to resolve the existing conflicts between the school and the parents.[197]

Minorities Ombudsman publishes conclusions on segregation of Roma children and pupils based on extracurricular activities

In 2021, the Ombudsman's Office received a complaint claiming that Roma pupils and students were segregated in the town of Létavértes, in kindergarten and in primary school. After an extensive investigation, the Deputy Ombudsman Responsible for the Rights of National Minorities Living in Hungary (the Minorities Ombudsman) concluded that since 2014, the only kindergarten in the town assigns children to different groups based on whether or not they take part in extracurricular English courses provided by a company in the premises of the kindergarten during school hours, for a fee. The Minorities Ombudsman found that Roma children were heavily overrepresented (between 90 and 100 %) in the groups that did not participate in the extracurricular English courses. In the town's elementary school, the Minorities Ombudsman found that, in principle, the children who did not participate in the extracurricular English courses during kindergarten were not excluded from the possibility of being admitted to the specialised English class of the elementary school. In practice, however, Roma and/or disadvantaged children were overrepresented in the non-specialised classes of the school, and most of the pupils in the specialised English class were chosen among those who had participated in the English courses in kindergarten. Many parents and teachers share the conviction

[197] Deputy Ombudsman Responsible for the Rights of National Minorities Living in Hungary (2023), *Position Paper no. 3/2023 on the connection between the assignment into classes based on ability and the segregation of Roma children and on the need of inclusion on education*, 30 December 2023.

that only children who have participated in the extracurricular courses can be admitted to the specialised English class, the information provided about admission criteria is not sufficiently clear, and the school does not take steps to actively recruit the Roma and/or disadvantaged children into the specialised English class.

The Minorities Ombudsman concluded that the practice of forming educational groups within the institution on the basis of participation in a fee-based language course leads to direct discrimination based on financial status, and (due to the overrepresentation of Roma children among the poorest residents) indirect discrimination based on belonging to a nationality (in the sense of racial and ethnic origin).[198] The kindergarten could lawfully offer the language courses as part of its pedagogical programme if it was available to all the children for free, or alternatively, if the courses were held outside the school hours and if the educational groups within the kindergarten were not formed on the basis of participation in them. The practice was thus in breach of both the Act on National Public Education and the Equal Treatment Act.

With regard to the elementary school, the Minorities Ombudsman noted that segregation does not have to be intentional but can be committed through omission, not only through active behaviours. By not taking action to put an end to the segregation of Roma children, the school had contributed to sustaining the segregation of Roma pupils/students. The Ombudsman made several recommendations, notably that the municipality should provide financial support so that indigent children can also participate in the English language courses. If this is not possible due to a lack of resources, the kindergarten should change its practice of assigning children into educational groups. Finally, the elementary schools should make active efforts to recruit Roma and/or indigent children into the specialised English class.

IE Ireland

LEGISLATIVE DEVELOPMENT

Completion of transposition of the Work-life Balance Directive

A Code of practice for employers and employees in respect of the right to request flexible working and the right to request remote working was approved on 6 March 2024.[199] This is to give effect to the provisions of the Work-life Balance and Miscellaneous Provisions Act 2023[200] in respect of the right to request flexible working arrangements for caring purposes and the right to request a remote working arrangement. The statutory provisions are provided for in the 2023 Act, which transposed the provisions of Directive 2019/1158. The code of practice is an agreed code between employer and employee bodies.

198 Deputy Ombudsman Responsible for the Rights of National Minorities Living in Hungary (2024), *Position Paper No. 1/2024 on the connection between the skills-based assignment of pupils into classes and the educational segregation of Roma children, and on the necessity of integration in education*, 31 May 2024.

199 Ireland, S.I. No. 92/2024 – Work-life Balance and Miscellaneous Provisions Act 2023 (Workplace Relations Commission Code of Practice on the Right to Request Flexible Working and the Right to Request Remote Working) Order 2024.

200 Work Life Balance and Miscellaneous Provisions Act 2023.

These are the final provisions to transpose the Directive and provide for broader entitlements as there is provision to make a request for flexible work arrangements in respect of a child up to the age of 12 years (eight years in the Directive) and that all employees (where feasible) may request remote working arrangements.

Flexible working arrangements

Flexible working arrangements can comprise part-time work, term-time work, job sharing, flexitime, compressed working hours and remote working. The right to request flexible working is available to an employee who is the parent of or is acting in loco parentis to a child under 12 years of age or under 16 years if the child has a disability or illness and who is or will be providing care to the child or where an employee is providing or will provide personal care or support to a specified person, namely the employee's child, spouse or civil partner, cohabitant, parents or grandparents, sibling or a person other than one in the categories already specified who lives in the same household as the employee. The person must also be in need of significant care or support for a serious medical condition.

An employee can request flexible working from the first day of employment, but they must complete a minimum of six months continuous employment with their employer before an approved arrangement can commence. A gap in service of less than 26 weeks with the relevant employer will be discounted for the purpose of assessing whether the employee has the required six months continuous service before such a flexible arrangement can be made. An employee must submit their request to the employer as soon as is reasonably practicable, but not later than eight weeks before the proposed starting date. The request must be in writing. The application must include the nature of flexible working being requested, the proposed starting date and proposed duration. In brief, the agreement to the arrangement must be in writing. The employer may refuse the request but must set out the reasons for the refusal, e.g., due to seasonal variations in work, unavailability of staff etc. The parties can give written notice to terminate the arrangement and return to the original working arrangements. If the employer wishes to terminate the arrangement, such a termination may only be on objective grounds.

The Act provides for the prevention of abuse and the protection of employees against penalisation for seeking such work arrangements.

Remote working arrangements

All employees have the right to request remote working from the date of commencement of their employment but they must complete six months' service before the commencement can start. The employee must be able to carry out their ordinary duties and in their request set out the reason for the request to include for example – reducing the daily commute and carbon footprint, optimising quality of life outside normal working hours, personal or domestic circumstances or where there are special medical needs. The details of the proposed remote working location, e.g. home, a work hub (provided in many country towns), information on the suitability of the proposed location, internet facilities, protection of data, an agreement to comply with health and safety legislation, etc.

The employer should consider the request and take into account their own needs. The employer and employee may agree to changes in the remote working arrangement and may terminate the arrangement if it is having a substantial adverse effect on the business. An employee may request a return to the previous working arrangements.

The Act provides for the prevention of abuse and the protection of employees against penalisation for seeking such work arrangements.

The code of practice provides a template for the development of a work-life balance policy and templates for the various applications.

CASE LAW

Irish Supreme Court upholds mandatory retirement age

This was an appeal from a 2022 decision of the High Court, which found that a mandatory retirement age of 70 for public office holders called sheriffs was objectively justified.[201] The position of sheriff was held by 14 individuals at the time of the Supreme Court hearing, who are not covered by an occupational pension scheme. The applicant turned 70 in 2022 and was obliged to retire. He argued that the legal provision establishing the retirement age was incompatible with the Employment Equality Directive, comparing his position to that of coroners, who are also not covered by an occupational pension scheme, and whose retirement age was raised from 70 to 72 in 2019. In May 2024, the Supreme Court dismissed the appeal and upheld the mandatory retirement age.[202] Applying an extensive range of CJEU judgments, it determined that the provision was objectively justified in accordance with Article 6(1) of the Employment Equality Directive. In essence, the Supreme Court agreed with the High Court's analysis. However, it further clarified the law on one point of contention between the parties, namely whether a blanket retirement age is justifiable where individual assessment of persons affected is possible.

In a 2008 judgment, the Irish High Court had suggested that the application of a blanket retirement age may not be proportionate where the low number of people impacted would enable individual capacity assessment.[203] However, the Supreme Court considered that subsequent CJEU case law does not support that position. Rather, the avoidance of individual capacity assessment had been recognised as a legitimate aim capable of justifying a general retirement age due to the scope for disputes such assessment necessarily involves and because of its potential impact on the dignity of employees. The Supreme Court held that the absence of flexibility on a case-by-case or role-by-role basis does not, on its own, render a measure disproportionate. On the contrary, it concluded that 'the CJEU has recognised that it is reasonable for Member States to adopt generally applicable mandatory retirement rules, without any requirement for individual capacity assessment, and that the "consistent and systematic" and "coherent" application of such rules is not simply permissible but is in fact an important element of the proportionality analysis under Article 6(1) of the Directive'. The Supreme Court noted that different considerations might apply in the context of 'lower than normal' retirement ages specific to a particular occupation (such as airline pilots) which are sought to be justified by reference to Article 4 of the Directive.

The Court further considered whether the state's policy of mandatory retirement at 70 has been applied in a 'consistent and systemic manner', and whether any exceptions to the regime give rise to such inconsistency. The Court found that the Directive does not require a mandatory retirement regime

201 Ireland, High Court, *Mallon v. Minister for Justice & Anor* [2022] IEHC 54, 5 October 2022.
202 Ireland, Supreme Court, *Mallon v. The Minister for Justice, Ireland, and the Attorney General*, [2024] IESC 20, 15 May 2024.
203 Ireland, *Donnellan v. The Minister for Justice, Equality and Law Reform* [2008] IEHC 467, 25 July 2008, para. 104.

that applies a uniform retirement age across the public service. The state may provide for a different retirement age for a specific category of public servant where there is a rational and objective basis for doing so. Given changes in the complexity and scope of the role of coroner, the Court was satisfied that the state had a rational basis for the distinct treatment of coroners' retirement age as opposed to that of sheriffs.

Italy IT

LEGISLATIVE DEVELOPMENT

Gender equality provisions in the Budget Act for 2024

The Budget Act 2024[204] includes some provisions aimed at promoting women's participation in the labour market, supporting families and counteracting gender-based violence. The bonus for nursery or babysitting costs for children aged up to three years with serious illness or disability has been slightly

increased on the condition that there is another child under the age of ten in the family and that the annual income is lower than EUR 40 000 (Article 1(177)).

An exception has been made for working mothers regarding their employee's share of social security contributions (Article 1(180)-(182)). From 2024 until 2026 the employee's share of contribution is cut to zero for working mothers with three or more children until the younger child is aged up 18 years. As an experimental measure for 2024, working mothers of two children are entitled to the same cut until the younger child is ten years old. This benefit does not apply to fixed-term employees or domestic workers and cannot exceed EUR 3 000 a year, recalculated on a monthly basis.

Some improvements regard the regulations concerning parental leave.[205] Until the child is aged 12, parents are also entitled to three months of leave, and this leave cannot be transferred. During this period, parents are entitled to receive an allowance equivalent to 30 % of their last monthly remuneration. However, until the child reaches the age of six, parents may, alternately, choose to receive a higher allowance of 80 % of their last monthly remuneration for one out of these three months. Article 1(179) of Act No. 113/2023 provides an increase of the allowance from 30 % to 60 % (and to 80 % only for 2024) for the second month of this leave, too.

Other measures are directed towards addressing the significant issue of gender-based violence. Article 1(191)-(193), provides a cut to zero in contribution for the period 2024-2026 for employers hiring victims of gender-based violence who are unemployed and receiving what is known as 'freedom

[204] Italy, Act No. 213 of 30 December 2023, Budget Act for 2024, published in Official Journal No. 303 of 30 December 2023, ordinary supplement No. 40, last accessed 12 January 2024.

[205] Under Article 32 of Decree No. 151/2001 each parent is entitled to an autonomous, non-transferable, right to three months remunerated parental leave and further three months can be used by the parents as an alternative to each other. As a consequence in the event that both parents take up non-transferrable parental leave and one of them takes up the alternative parental leave as well, the period covered by the allowance is nine months. The maximum length of parental leave which can be taken for the same child is in any case 10 months, extended to a total of 11 months when the father takes up at least 3 months of leave. Single parents are entitled to a maximum of 11 months of parental leave and 9 months are covered by the allowance.

income'.[206] This cut has a maximum limit of EUR 8 000 per year, and applies for a duration of 24 months (indefinite contracts), 12 months (fixed-term contracts) or 18 months (for the conversion of fixed-term contracts into permanent ones).

Furthermore, there has been a remarkable increase in the Fund for policies relating to families, youth and equal opportunities rights for the period 2024-2026. This increase aims to support measures combating gender-based violence, particularly by promoting pathways to autonomy and economic independence for the victims, providing professional training, enhancing the freedom income programme, and acquiring and constructing shelter facilities for victims of gender-based violence (Article 1(187)-(189)).

Some amendments, such as the cut in contribution for working mothers, align with the objective of increasing women's involvement in the workplace, an area that remains insufficient. However, once again, there are no initiatives aimed at fostering a more equal distribution of responsibilities within the family, which is crucial for promoting equal opportunities in the workplace.

Similarly to the previous year, the increases in the Equal Opportunities Fund allocated by the Budget Act are primarily intended to financially support initiatives to combat the critical issue of gender-based violence.

CASE LAW

A controversial judgment on violence against women

A janitor of a secondary school was accused of sexual assault by a young student. She reported the man for putting his hands in her pants and groping her buttocks as she was climbing the stairs with her schoolmates. The defendant admitted he touched the student, but also stated that he merely grabbed her by the loops of her pants and lifted her slightly off the ground.

Article 609*bis*(1) states that 'whoever by violence or threat or abuse of authority, compels someone to perform or undergo sexual acts shall be punished with imprisonment from six to twelve years'.[207] This crime is qualified by an objective element, which includes any act detrimental to the victim's freedom of self-determination in his sexual sphere, and by a subjective element, for which the so-called generic intent is sufficient, which is the awareness and will to carry out the act just described.

The Tribunal of Rome in its judgment of 6 July 2023,[208] acquitted the janitor of the crime of sexual assault pursuant to Article 609*bis* of the Criminal Code because of the uncertainty of the subjective element of the offence.

According to the court's judgment, the preliminary hearing proved the conduct described by the student satisfies the objective requirement of the offence. In fact, the reasoning on this point focuses on well-established guidelines of the Court of Cassation stating that: acts carried out suddenly or unexpectedly

[206] The so-called 'Freedom Income' programme (Article 1(3), Decree of the Prime Minister of 17 December 2020 and Article 105*bis* of Decree No. 34 of 19 May 2020) aims to support victims of gender-based violence who seek assistance from anti-violence centres. This initiative provides financial support up to EUR 400 per month for a maximum duration of 12 months, facilitating their journey towards autonomy.

[207] Italy, Article 609*bis* of the Criminal Code on sexual assault.

[208] Italy, Tribunal of Rome, decision of 6 July 2023.

are conceived as a form of violence that affects the sexual freedom of the victim, as it prevents them from maturing or expressing an opinion on the matter; the duration of the touching is irrelevant for the purposes of assessing an act such as sexual assault; the victim's consent is relevant only in where it is a positive manifestation expressed through clear and unequivocal signs.

However, the judgment came to the opposite conclusion as regards the existence of the subjective element. In fact, judges deemed the circumstances in which the event took place proved the playful intent of the defendant, for which awareness and will of the unlawful conduct was not proven. In the specific case, the real course of the action gives rise to many doubts about the awareness and intent of the defendant to violate the girl's sexual freedom.

Following this judgment, it seems likely that the brushing of the buttocks was caused by a clumsy manoeuvre of the defendant who, considering that the subjects were moving and were on different height levels from each other, could have accidentally activated a further movement that was not initially intended.

The judgment caused an uproar on the basis of a misleading description provided by the press and social networks according to which the judges had affirmed the principle that 'a touch of less than ten seconds is not a crime'.

Actually, as described above, the existence of the crime requires both that the conduct meets the objective elements as described by the criminal offence, and that it has been voluntary realised by the person.

Since the Court decided to acquit the defendant based on the subjective element, this is the only aspect that could be discussed and was probably included in the appeal brought by the public prosecutor.

From a more general point of view, the judgment reminds us of the difficulties in framing such cases caused by the lack of a specific crime of sexual harassment in the Italian legal system. In fact case law must relate these offences to other crimes, such as sexual violence or other less serious offences, such as 'domestic violence' under Article 610 of the Criminal Code[209] or 'harassment and disturbance to people' under Article 660 of the Criminal Code[210] or may not pursue them.

To date three bills concerning sexual harassment and mobbing at work (A.S. No. 89, A.S. No. 257 and A.S. No. 671) are being analysed in the Senate Committee with the aim of implementing ILO Convention No. 190 and filling the gap in the Italian law.[211]

Supreme Court referral to the CJEU to clarify the scope of application of the prohibition of discrimination by association

Disability

The case concerned a worker who argued that her employer's failure to provide reasonable accommodation to allow her to care for her son with a severe disability amounted to discrimination by association. Her claim was rejected at first and second instance, notably due to the lack of an explicit obligation to provide accommodation in such situations. The claimant challenged the court of appeal

209 Italy, Article 610 of the Criminal Code on domestic violence.
210 Italy, Article 660 of the Criminal Code on harassment and disturbance to people.
211 Italy, Draft Decree No DDL 89, No. A.S. 257, A.S. 671 on Sexual Harassment, gathered in Dossier, as Nota Breve No. 30 of July 2023.

decision before the Supreme Court, which decided to refer three questions to the Court of Justice of the EU for preliminary ruling.[212]

In its referral, the Supreme Court noted that the CJEU has established the prohibition of discrimination by association in relation to direct discrimination, but it doubted whether the same principle can also be applied to cases of indirect discrimination and to the duty of reasonable accommodation for persons with disability. The Court expressed however that such an extensive interpretation could be drawn by considering the UN CRPD and the principles affirmed by the UN Committee. Thus, the Supreme Court referred the following questions:

1. Whether EU law can be interpreted as meaning that the family caregiver of a child with a severe disability is entitled to rely on the same anti-discrimination protection stemming from Directive 2000/78/EC that would be afforded to the person with a disability, if they were the employee;

2. Whether in such a case the employer is also obligated to ensure reasonable accommodation for the caregiver;

3. What the applicable notion of caregiver is according to EU law.

Work-family balance and temporary workplace transfers of civil servants

Gender

The issue focuses on the right of civil servants to request a temporary transfer to a different workplace for the purpose of balancing work and family life, specifically to be closer to their family when they have a child under three years old.
Summary of the issue:

1. Background: under Article 42*bis* of Decree No. 151/2001, civil servants with children up to three years old were entitled to request a temporary transfer to a different workplace.[213] However, this right was limited in scope.

2. Limitation: previously, the right to transfer was only applicable within the same province or region where the other parent worked. This limitation did not cover transfers to a location closer to the family residence if the family had moved or if the other parent's workplace was in a different region.

3. Constitutional Challenge: the Constitutional Court found that this limitation was inconsistent with several constitutional provisions:

    - Article 3: Equality before the law.
    - Article 29: Protection of the family.
    - Article 30: Protection of motherhood and fatherhood.

[212] Italy, Supreme Court, Order No. 1788 of 17 January 2024.
[213] Italy, Article 42*bis* of Decree No. 151 of 2001 on the protection and support of motherhood and fatherhood, Official Journal No. 96 of 26 April 2001, last accessed 8 July 2024.

4. Article 31: Support for the family and protection of maternity, childhood, and youth.

5. Court's Decision: the Court ruled that the existing law did not sufficiently align with constitutional protections related to family life and parental rights. Specifically, it failed to ensure that civil servants could transfer to a workplace closer to their family residence, which would be essential for balancing work and family responsibilities, particularly for those with young children.[214]

6. Impact: the ruling highlights the need for legal provisions that better accommodate the needs of working parents by allowing them to move closer to their family when necessary, thus supporting better work-life balance.

Latvia LG

CASE LAW

Rare court decision regarding a denial of service due to instructions to discriminate on the ground of ethnic origin

The case concerned a Ukrainian citizen who sought service for her (Ukrainian) car at a car wash. After being initially asked to wait, she was refused service by the staff who informed her, after noticing the Ukrainian registration number, that the owner had instructed them not to serve Ukrainians. When the claimant returned to ask for clarification and an apology, the staff confirmed their previous statement, which the claimant recorded. She then contacted both the police and the NGO Latvian Centre for Human Rights, which provided legal representation. Before the court, the car wash owner denied having instructed his staff to refuse service to cars with Ukrainian number plates. He claimed instead he had instructed them not to provide free services to such cars, or without waiting for their turn.

The Riga City Court ruled on the case in November 2023, establishing that the respondent had committed direct discrimination on the ground of ethnic origin in denying the service to the claimant. The court referred to the constitutional non-discrimination clause, Article 21 of the EU Charter of Fundamental Rights and the non-discrimination clause of the Consumer Rights Protection Law. The court refuted the respondent's argument that his absence when the facts occurred had excluded his liability. In this regard, the court referred to the prohibition of instructions to discriminate.

The court confirmed that discrimination is an essential violation of the fundamental rights of an individual and that compensation is awarded to prevent and minimise the negative effects of this violation. It thus evaluated the type, duration and gravity of the violation to conclude that compensation for non-pecuniary damage in the amount of EUR 1 000 was just and proportionate.[215]

[214] Italy, Constitutional Court, decision No. 99 of 16 April 2024, Official Journal No. 23 of 05/06/2024.

[215] Latvia, Riga City Court, judgment of 28 November 2023, Case No. C29353322, case archive No. C–02188–23/8, not yet publicly available. Media reporting for instance Latvian Public Media (2023), 'Ukrainian woman wins Rīga car wash discrimination case', 4 December 2023.

LS Liechtenstein

LEGISLATIVE DEVELOPMENTS

State recognition of religious communities other than the state church

In February 2024, the Government submitted a proposal to Parliament concerning an amendment of the Constitution and the adoption of a Religious Community Act as well as the amendment of other laws.[216] The aim of the bill is to reorganise the current system of state-church law in Liechtenstein and transform it into a modern religious constitutional law. This is intended to establish equal legal treatment among the religious communities represented in Liechtenstein.

In addition to the Roman Catholic national church, which is currently recognised under public law, the Protestant and Evangelical-Lutheran churches are also to be considered state-recognised churches in future. In addition, the bill provides for an open recognition procedure for churches or religious communities that become active in Liechtenstein in the future, which can subsequently obtain state recognition if certain requirements are met. This includes notably existence as a religious community in the country for more than 20 years or, alternatively, for more than 10 years in the case of religious communities that are integrated into an internationally active religious community that has existed for more than 100 years. It also includes having at least 200 members residing in the country and a stable organisational structure with written statutes.

State recognition entails special rights. These relate to religious education in state schools, pastoral care in public institutions and facilities and, the ability to enter into contracts under public law and access to personal data recorded by the state. Furthermore, state recognition results in financial support from the state.

MT Malta

CASE LAW

Inciting hatred and mocking persons with disabilities through computer and telecommunication equipment

In 2020, the respondent posted a meme in a social media group called 'Uncensored Jokes Malta' of an unidentifiable person with Down syndrome in an office environment with the caption '"Website is Down"... Oooh me too!"'

The prosecution argued that the intention behind the meme was to insult and mock persons with disabilities, in particular persons with Down syndrome, and to imply that they are inferior or have no place in society. Their case was based on two claims: misuse of electronic communications, and incitement to hatred. Moreover, they argued that the public nature of the social media post clearly established the respondent's intention.

[216] Liechtenstein, Report and motion to Religious Communities Act (BuA No. 3/2024), 6 February 2024.

With regard to the claim of misuse of electronic communications, the respondent invoked an exception for artistic expression, satire, humour or cultural commentary. This defence was rejected by the court, as the meme was considered to pose a threat to individuals with Down syndrome by denigrating them. The claim of incitement to hatred was rejected however, as the act was committed before the entry into force of the extension of the relevant provision to cover disability. The respondent was ordered to pay a fine of EUR 10 000.[217]

Montenegro ME

LEGISLATIVE DEVELOPMENT

Montenegro establishes unified retirement age after Constitutional Court ruling on gender discrimination

On 31 December 2023, the Parliament of Montenegro adopted amendments to the Law on Pension and Disability Insurance, establishing a unified retirement age of 65 years for both men and women. This legislative change follows a decision by the Constitutional Court of 24 October 2023,[218] which invalidated Article 17(1) of the previous version of the law. This article had set different retirement ages: 64 for women and 66 for men.

The Constitutional Court's decision declared that the previous age distinction violated the Constitution by disadvantaging men in terms of pension rights. As part of the ruling, the Government of Montenegro was instructed to draft a new law, aligned with the Constitutional Court's legal positions, and submit it to the Parliament within one month of the decision's publication in the *Official Gazette of Montenegro*.

In Montenegro, the retirement age was initially set at 65 years starting in 2010. However, in July 2020, changes to the law introduced more favourable conditions for women, allowing them to retire at 64 years, while men faced a less favourable condition, having to retire at 66 years. The Constitutional Court found that these provisions violated constitutional principles of non-discrimination, equality before the law, and gender equality, as outlined in various articles of the Constitution of Montenegro and European conventions.

Amendments to the Law on Pension and Disability Insurance from 2020 made distinct age requirements for acquiring the right to an old-age pension based solely on personal characteristics, specifically biological gender. This approach created an unequal situation for insured persons by imposing different conditions for cis-men and cis-women, leading to direct gender discrimination. The Constitutional Court emphasised that there was no public interest or reasonable justification for establishing different retirement ages based on gender, as the criterion of age should not be influenced by personal characteristics.

The Constitutional Court also considered that the right to an old-age pension is earned through work and contributions to pension and disability insurance, with the same requirements applied to all insured persons, regardless of gender. In this case, however, the contested provision of Article 17(1) of the Law set different age requirements for men and women based on gender rather than addressing issues

[217] Malta, Court of Magistrates (Criminal Judicature), *Il-Pulizija v Luke Mihalic*, 28 September 2023, Magistrate Yana Micallef Stafrace.
[218] Montenegro, Constitutional Court 24 October 2023, case numbers UI no.30/20, 43/21, 10/22, and 11/22.

related to enhancing women's professional status. Consequently, this provision cannot be justified as a form of 'positive discrimination' for women. This assessment aligns with Directive 2006/54/EC of the European Parliament and the Council of the European Union, which identifies differing pension age limits based on gender as an example of gender-based discrimination in Article 9.

Other grounds

CASE LAW

Alleged age discrimination due to salary increase based on date of university diploma

Three individual complainants addressed the Protector of Human Rights claiming that the exclusion from a salary increase of employees who obtained their master's degree after the entry into force of the Law on Amendments to the Law on Higher Education from 2017, amounted to discrimination.[219] The salary increase was stipulated in the branch collective agreement for the administration of justice reached between the relevant trade union and the Government.[220]

During the proceedings before the Protector, the Government failed to submit a statement and thus did not prove that the contested unequal treatment was based on an objective and reasonable justification. On the other hand, the respondent trade union recognised the shortcomings of the current regulation and stated that during the negotiation process it advocated that the salary increase based on the scientific title Master of Science/Master should apply to all those who have obtained the said title, without restrictions.In October 2023, the Protector found that the contested provision is not in accordance with the principle of prohibition of discrimination contained in the Constitution, the Law on Prohibition of Discrimination and in Article 1 of Protocol No. 12 to the European Convention on Human Rights. It issued a recommendation to the Government and the respondent trade union to amend the respective collective agreement in such a way that the exercise of the right to increase the basic salary based on the scientific title Master of Science/Master is not limited by the date of obtaining the title.[221]

NL Netherlands

LEGISLATIVE DEVELOPMENTS

Gender

Act on marital captivity entered into force

In July 2023, the Marital Captivity Act took effect.[222] This Act allows the judge in a case on divorce to order a spouse to cooperate in the dissolution of a religious marriage. Marital captivity is defined as a situation where someone remains in a (religious) marriage against her or his will, because it is not possible to get a dissolution of that marriage.[223] A civil divorce does not always put an end to a religious marriage. This is why a specific regulation was introduced, enabling the judge in family cases to force the unwilling spouse to cooperate in ending the religious marriage. The judge can impose a penalty or even require that a person is taken into custody in the event that he/she does not want to cooperate

219 Neither the complainants nor the Protector indicated the specific ground of discrimination concerned.
220 Article 13 para 1 indent 1 of the Branch collective agreement for the area of administration and justice.
221 Montenegro, Protector of Human Rights, Opinion Nos. 141/23; 160/23 and 180/23 of 10 October 2023.
222 See *Parliamentary Papers II*, file 35 348, and more information on the law making process on the website of the Dutch Senate.
223 See information in Dutch on the website of the Dutch Government.

in ending the religious marriage. The judge cannot end the religious marriage himself, as often specific steps are necessary, such as offering a divorce letter in a Jewish marriage (the *get*) or outcasting a wife under Islamic law (the *talaq*).

Marital captivity is already punishable under criminal law as a form of coercion. The present law is a civil law and is part of the regulations on divorce.

Women in particular are victims of marital imprisonment. Many of them have a migrant background and were married in another country. When the woman wants to enter into a new relationship, this can be seen as adultery within her community and a disgrace to the honour of the family. In the country of origin, she can be prosecuted for adultery or bigamy. In addition, in some countries, women cannot travel without their husband's permission. That is why it is important for these women to be able to end both their civil and their religious marriage.

The Marital Captivity Act improves the position of many women, as it makes it easier for them to escape from marital imprisonment. It was already considered unlawful to keep a woman imprisoned in a marriage, but the new law makes it easier to terminate such a situation. The law may also have a preventive effect, as unwilling spouses know they will risk high penalties when they do not cooperate, which may cause them to no longer resist the divorce.

Senate rejects act on positive duties to prevent labour market discrimination

On 26 March 2024 the Dutch Senate rejected the legislative proposal for an Act on the promotion of equal opportunities in recruitment and selection.[224] The legislative proposal was introduced in the Parliament in December 2020 as part of a set of measures to combat discrimination in the labour market, which remains widespread in the Netherlands especially for people with a migration background and older people.[225] If adopted, the proposal would have imposed an obligation on all employers with 25 or more employees to adopt positive measures ensuring that recruitment and selection procedures are based on relevant job requirements, and are transparent, monitorable and systematic. Such measures had to be effective and based on current scientific and professional standards. Importantly, the proposal also included an obligation for employers who made use of intermediaries or automated decision-making systems to ensure – to the extent that it is reasonably possible – that those intermediaries or systems would not operate in a discriminatory way. Finally, the Labour Inspectorate would have been given the task of monitoring compliance with the new obligations.

The legislative proposal was adopted by the Second Chamber of Parliament in March 2023. During the debate in the Senate, however, several Senators expressed concern regarding the effectiveness of the proposed Act, the administrative burden that it would impose on employers and its enforceability. These concerns eventually resulted in the proposal being rejected, notwithstanding several concessions made by the Government (including a proposed amendment to limit the scope of the Act to employers with 50 or more employees).

224 Netherlands, Legislative proposal for an Act on the promotion of equal opportunities in recruitment and selection, EK 2022-2023, 35 673, No. A.
225 See the explanatory memorandum, TK 2020-2021, 35 673, No. 3.

Dutch anti-discrimination law currently in force, including the General Equal Treatment Act, does not impose positive duties on employers to prevent discrimination from occurring. The relevance of the proposed Act lay in its recognition of (employment) discrimination as a structural phenomenon and in the introduction of positive duties in addition to the existing duties to refrain from discriminatory acts.

The rejection of the proposal by the Senate came rather unexpectedly as the liberal VVD party, which had supported the Act in the Second Chamber, withdrew its support in the Senate, resulting in a majority voting against it. The decision was further remarkable as the Senate recently adopted recommendations aimed at making anti-discrimination legislation more effective. The underlying report, which included the results of an investigation into *inter alia* labour market discrimination, mentioned 'organisational cultures' and a lack of clear responsibility structures as mechanisms causing persisting discrimination.[226]

Bill to amend the Dutch Civil Code (the 2014 Transgender Act) to be withdrawn

In May 2021, the Minister for Justice introduced a bill to amend Article 28 of Book 1 of the Dutch Civil Code (generally referred to as the Transgender Act).[227] The current Transgender Act dates back to 2014 and makes it possible to change the gender assigned at birth without the original requirement of sterilisation, the requirement for the person to have physically transitioned to the desired gender, or the requirement to obtain a judicial assessment. Following the adoption of the 2014 Transgender Act, an individual who wishes to change their gender registration must be 16 years of age or older, have been informed about the legal consequences of the change, and must possess an expert statement by a medical doctor or psychologist demonstrating a persistent conviction of belonging to the other gender.

The bill of 2021 removes this requirement for an expert statement and makes it possible for children under the age of 16 to change their gender registration through a request to the court. The House of Representatives discussed the bill in September 2022. The continuation of the parliamentary debate was subsequently postponed several times and in September 2023 the bill was declared 'controversial' and further discussion was postponed until a new cabinet was in office.

Although a new cabinet was not yet in office, the House of Representatives adopted a motion (with 73 votes in favour and 70 against) on 23 April 2024 to withdraw the bill within one month. Three days later, via an official letter, the Minister for Justice and the Minister for Education, Culture and Science stated on behalf of the outgoing cabinet that they would not give effect to the motion. The reason for this, they said, was the fact that the parliamentary discussion on the bill had not been concluded and a new cabinet was not yet in office. The parliamentary debate on the bill that was scheduled for 22 May 2024 did not take place. The Commission on Justice and Security of the House of Representatives is expected to discuss the cabinet's follow up to the motion. In the meantime, an agreement to form a Government was reached among four right-wing political parties and a cabinet has been formed.[228] Considering that this new cabinet is composed of members of the same parties that proposed and supported the motion it is expected that the cabinet will carry out the motion and withdraw the bill in the foreseeable future.

226 For further information, see *European equality law review 2023*, pp. 149-150.
227 Netherlands, Transgender Act, May 2021.
228 See: https://www.kabinetsformatie2023.nl/kabinetsformaties/kabinetsformatie-2023.

Three critical observations can be made about the handling of the bill and its (expected) withdrawal. First of all, the bill follows the self-determination-based approach to legal gender recognition (LGR) that is currently applied in 12 European states.[229] In doing so it adheres to present-day standards of international human rights law and aligns with a European trend to (fully) depathologise legal recognition procedures.[230] States have an obligation to provide access to gender recognition in a manner consistent with the rights to freedom from discrimination, equal protection of the law, privacy, identity and freedom of expression. UN human rights bodies as well as bodies of the Council of Europe have in this regard called upon states to remove the requirement of 'expert statements' and adopt a self-determination-based approach to LGR.[231] They have, moreover, highlighted that states should take the best interests of the child as a primary consideration, which includes an obligation to respect the child's right to express views in accordance with the age and maturity of the child.[232] States have also been called upon to facilitate quick, transparent and accessible gender recognition without abusive conditions for young trans people.[233] From this point of view it is to be regretted that the bill, which echoes these principles, will (in all likelihood) be withdrawn.

Another point of concern is the fact that the bill is to be withdrawn without the regular procedure for the handling of legislative proposals having been completed. The parliamentary questions that were raised during the last debate in September 2022 remain unanswered due to the multiple postponements of plenary debates and the subsequent motion to withdraw the bill. As a result, the bill will be withdrawn without there having been a free exchange of ideas.

Finally, the motion of 23 April 2024 is closely related to the anti-transgender discourse, (coordinated anti-transgender narratives), that is spreading throughout Europe. This is exemplified by the comments that were made by several parliamentarians during the public debate as well as by the organised media campaign that followed the introduction of the bill. As the Parliamentary Assembly of the Council of Europe noted in its 2021 report on combating rising hate crimes against LGBTI persons in Europe, the rising hatred is not simply 'an expression of individual prejudice, but the result of sustained and often well-organised attacks on the human rights of LGBTI people throughout the European continent', resulting in the perpetuation of gender inequalities and gender-based violence.[234] As such, the withdrawal of the bill is a deeply worrying illustration of the current climate of discrimination against and stigmatisation of transgender persons.

229 Germany, Belgium, Denmark, Iceland, Ireland, Luxembourg, Malta, Norway, Portugal and Switzerland all apply a self-determination-based LGR model. There are, moreover, a number of autonomous communities of Spain that apply this approach to LGR. France and Greece do not have a compulsory medical diagnosis but do require a court permission. Steering Committee on Anti-Discrimination, Diversity and Inclusion (CDADI) (2022), *Thematic Report on Legal Gender Recognition in Europe*, Council of Europe. Available at: https://rm.coe.int/thematic-report-on-legal-gender-recognition-in-europe-2022/1680a729b3.

230 See in this regard also FRA (2020), *A long way to go for LGBTI equality*, Publications Office of the European Union, p. 20.

231 For example UN Special Rapporteur on Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity (2018), *Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity*, UN doc. A/73/152; Commissioner for Human Rights (2024), *Human Rights and Gender Identity and Expression*, Council of Europe; Parliamentary Assembly (2015), *Discrimination Against Transgender People in Europe*, Resolution 2048, Council of Europe.

232 For example UN Special Rapporteur on Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity (2018), *Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity*, UN doc. A/73/152; Commissioner for Human Rights (2024), *Human Rights and Gender Identity and Expression*, Council of Europe.

233 Joint statement of UN and Independent Human Rights Experts (2017), *Embrace diversity and protect trans and gender diverse children and adolescents*.

234 Steering Committee on Anti-Discrimination, Diversity and Inclusion (CDADI) (2022), *Thematic Report on Legal Gender Recognition in Europe*, Council of Europe.

LS North Macedonia

CASE LAW

Confirmed discrimination in access to voting rights for persons with disabilities

Disability

In October 2023, the Court of Second Instance of Skopje fully confirmed the judgment of the court of first instance from February 2022, finding that the Government and the State Election Commission had directly discriminated against persons with disabilities by failing to provide reasonable accommodation and access to infrastructure, goods and services.[235]

The case was the first *actio popularis* case pertaining to disability rights in which the courts moved away from a medical understanding of disability towards a social one. It was also the first case where the national equality body, the Commission for Prevention and Protection against Discrimination, used its competence to submit an *amicus curiae* brief to the court. Finally, the court confirmed the specific measures ordered at first instance for the respondents, including to ensure the accessibility of the surroundings and environment where the voting station is placed, and of the station itself. Some of the specific standards that the court instructed the respondents to respect include marked parking spaces, signs and numbers in visible and contrast makeup, sound signalisation, accessible ramps, wider entrances, accessible lifts, equal lighting of the places, ordering of furniture in the rooms in a manner that will enable greater mobility, and adjusted height of the voting booths.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Problematic process of electing four new members of the equality body

Gender

Following a round of public interviews, the parliamentary body charged with elections and appointments shortlisted four members for the Commission for Prevention and Protection against Discrimination (CPPD) – the national equality body.[236] Two positions at the CPPD became available following the resignations of a commissioner at the CPPD in February 2021 (with four years, eleven months and one week of her mandate remaining) and of the President of the CPPD, in November 2022 (with one year and two months of his mandate remaining). The other two seats are filled by two of the current equality body members, both of whom served as presidents of the CPPD (in 2023 and 2021 respectively) and whose mandates expire in January 2024. This process comes after several failed attempts since 2021 to find new candidates for the available positions. The shortlist is proposed to the Parliament, which was set to vote on it on 22 December 2023, however the process was delayed due to a state budget discussion that extended until the last working day of 2023. There have been public reactions, including by the largest network of CSOs working on equality and non-discrimination issues, due to the fact that highly qualified candidates, including the two current equality body members, were not selected. Moreover, the shortest mandate was awarded to the most qualified candidate and well-known public activist for equality and non-discrimination. She announced at a press

235 North Macedonia, Court of Second Instance of Skopje, decision of 30 October 2023. For further information about the first instance court decision, see *European equality law review 2023*, pp. 153-154.

236 Parliament of the Republic of North Macedonia, *Proposed Decision for Election of Members of the Commission for Prevention and Protection against Discrimination* (*Предлог на одлука за избор на членови на Комисијата за спречување и заштита од дискриминација*) (22 December 2023).

conference the day following her shortlisting that she will not accept the mandate and objected to the process and the choice of candidates made by the Parliament.

The CPPD is a new institution, which was steadily gaining the trust of the public with its independent work. Public opinion polls have shown an increase in trust in this institution. Additionally, there has been an exponential growth in the number of cases, reaching over 500 cases in 2023 – an unprecedented number for such an institution in the country (in comparison the Ombudsperson, who has a much wider general human rights protection mandate, only has 3 000 cases per year). The image of the CPPD was based on its visibility and independent work, to which the two members who stood for re-election contributed significantly when serving as presidents in 2021 and 2023.

Concerns have been raised in relation to several issues with this election. First, it was long overdue. One seat has been empty since February 2021. The vacancy was posted three times and there have been many attempts by the Parliament to complete the election. But, despite the fact that there have been many highly qualified candidates, Parliament was unable to complete the process until now. Secondly, the fact that the process is being completed now, when the current Government is to be replaced with a caretaker Government and with the upcoming elections, raises doubts as to the motivation of the Parliament for this election. Thirdly, Parliament published the vacancy notice for three mandates for five years and one mandate for one year and two months, which does not match the prescribed process in Articles 16 and 20(4) of the Law on Prevention and Protection against Discrimination[237] (Anti-discrimination Act, ADA). Moreover, the two mandates that were ended early do not seem to have been approached in the same manner when doing the calculations for the purposes of preparing the vacancy advertisements. Fourthly, the commission conducting the election invited all applicants to the public interviews and, like the election for the first composition, did not conduct a prior administrative check of who fulfilled the conditions for the positions. Fifthly, the commission establishing the list of proposed candidates for election did not conduct a check of whether the persons it proposed to the Parliament for election fulfilled the conditions for the positions, nor carried out any other check. Finally, the criteria on the basis of which the Parliament decided who gets the shortest mandate, were not stated. The vacancy was not published in a way that would enable applicants to apply for either a five-year or a one-year mandate.

National equality body ethical code

In January 2024, the national equality body, the Commission for Prevention and Protection against Discrimination (CPPD), adopted its first Ethical Code.[238] The Code applies to the work of the members of the equality body as well as its employees, interns and volunteers and any external collaborators. Its aim is to establish ethical norms and good practices that will 'guide the behaviour and decision-making of the members and of the employees while exercising the competences of the Commission arising from the Law on Prevention and Protection against Discrimination'.

The Code proclaims the following institutional values: equality and non-discrimination, independence, economy and effectiveness, transparency and accountability, and being result-oriented. It further defines professionalism, responsibility, public relations ethics, ethics in contacts with clients, ethics

237 North-Macedonia, Law on the Prevention of and Protection against Discrimination (*Закон за спречување и заштита од дискриминација*), *Official Gazette of the Republic of North Macedonia*, No. 258/2020.
238 North Macedonia, Commission for Prevention and Protection against Discrimination, Ethical Code, 3 January 2024.

while undertaking procedural actions, confidentiality, reward and growth, and collegiality. The Code further prescribes the procedure for processing violations of the ethical code.

The Code does not elaborate specific standards regarding challenges that might arise in relation to harassment and sexual harassment. It only states that the working environment of the CPPD is

harassment free (Article 17). In this sense, the Code fails to anticipate the complexity and specific regulation needed for these types of unethical behaviour.

NO Norway

LEGISLATIVE DEVELOPMENT

Enhanced protection for victims: expanded use of reverse violence alarms after Criminal Procedure Act revisions

In Norway, emergency barring orders (bans on visits) are regarded as an interim measure regulated by Section 222a of the Criminal Procedure Act and may be imposed by prosecution authorities upon the request of the victim or *ex officio* and can be brought before courts for review.

Protection (restraining) orders exist only as a criminal sanction imposable by courts and are regulated by Section 57 of the Penal Code. Such orders may prevent a perpetrator from being present in certain areas or stalking, visiting or otherwise contacting a victim for a maximum duration of five years; however, they may also be imposed indefinitely under special conditions.

Another protection measure is that the victim is equipped with a violence alarm that is an electronic device with GPS, which a victim of violence or abuse/threats can use to notify the police.

However, according to research, several women have been killed in recent years even though they were equipped with a violence alarm.[239] In the first months of 2024, two women were killed by their former partner in Norway despite being equipped with or having asked for a violence alarm.[240]

To protect a victim against violence or abuse there is also a possibility to use protection orders that require the perpetrator to use electronic bracelets, which are called 'reverse violence alarms'. The electronic bracelet ensures that a visiting or contact ban is not violated. A reverse violence alarm restricts the perpetrators movements based on a geographic zone for when the alarm is triggered. In some cases, the prohibition zone can include entire counties.

The measure was introduced in 2013. However, until now, only the courts have had the power to impose the measure. According to information provided by the authorities, the Director of Public Prosecutions and the National Police Directorate issued an instruction to increase the use of electronic bracelets. However, research indicates that reverse violence alarms have been used rarely since 2013.[241]

239 See: Juridisk rådgivning for kvinner (Legal aid for women), Norske kvinners sanitetsforening (The Norwegian Women's Public Health Association) and Krisesentersekreteriatet (The Crisis Centre Service) (2020) Report on the Istanbul Convention of 2020, p. 38.

240 See Verdens Gang (VG) (2024) 'Minst 25 partnerdrapsofre hadde eller ba om voldsalarm eller besøksforbud', news article of 15 January 2024

241 See the Report on the Istanbul Convention of 2020, p. 38.

As of 8 April 2024, the rules on reverse violence alarms in Section 222g of the Criminal Procedure Act have been changed. The prosecution authority can now impose a reverse violence alarm in connection with the breach of a barring order or a protection order without presenting it before the courts first. The conditions for imposing a barring order according to Section 222a of the Criminal Procedure Act and protection orders after Section 57 of the Penal Code has not been changed.

The condition for imposing a reversed violence alarm also still requires a reasonable suspicion of breach of the ban from the perpetrator, and that electronic control is considered necessary. After the prosecution authority has imposed a reverse violence alarm as a measure it will have to bring it before courts for a review within five days.

The purpose of the new provisions is to ensure effective compliance with barring bans and contact bans, and to strengthen the protection of victims at risk of being exposed to violence, threats and other unwanted contact.

The changes in the Criminal Procedure Act were adopted by the Parliament 20 December 2023.[242] The Government decided that the rules should enter into force by 8 April 2024. One of the reasons for the rapid entry into force is that there have been several partner homicides in Norway, especially towards women, during the winter of 2024. The Government regards the use of reverse violence alarms as one of several important protective measures to prevent partner homicides and violence against women in the future.[243]

With a reverse violence alarm, it is the perpetrator, and not the victim of violence, who wears the electronic bracelet. The changes in the Criminal Procedure Act make it easier – at least on paper – for the prosecution authority to use this measure in more cases and at an earlier point in procedures. This might strengthen the protection for victims who risk being exposed to more violence and threats, or even homicide.

After the change to the Act, the Attorney General issued a new instruction on when reverse violence alarms should be considered and used by the prosecution authority in line with the changes to the Act.[244]

The recent changes on reverse violence alarms in the Criminal Procedure Act, makes the system more in line with Articles 52 and 53 of the Istanbul Convention as it will make it easier for the police and prosecutors to use this measure in cases. In its report to Norway, GREVIO welcomed the increased use of reverse violence alarms.[245]

Legislation ensuring fair and equal treatment of Sami languages

On 1 May 2024, amendments to the Act on the Sami Parliament and other Sami legal issues entered into force, aiming to ensure a fair and equal treatment of Sami languages adapted to local

242 Norway, Legislative Decree 18 (2023-2024) on Changes in the Criminal Procedure Act, etc. (electronic control of restraining orders) https://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/?p=94760.
243 Norway, Government, Press statement No. 28 – 2024 of 22 March 2024, *Nye regler om omvendt voldsalarm trer i kraft 8. april 2024* (New rules on reverse violence alarms enter into force on 8 April 2024).
244 See guidelines from the Attorney General of 20 December 2023.
245 Council of Europe (2023), GREVIO (Baseline) evaluation report for Norway, 13 October 2022, p. 65.

conditions.[246]

Section 1-5 now states that the Sami languages have the same status as Norwegian. Municipalities and regions using Sami languages are categorised as municipalities/regions of either language development, language vitalisation or language stimulation. Language development and vitalisation implies that Sami languages are actively spoken, while language stimulation implies that Sami languages are spoken mostly by persons moving there, or that very few persons speak Sami languages due to previous Norwegianisation/oppression.

The changes include a right to communicate with the public sector in Sami languages in language development and vitalisation municipalities/regions, and a duty for local authorities there to put the use of Sami languages on the agenda. This right includes Government agencies which operate within these same areas, but not nationwide Government agencies. Local courts and other parts of the judiciary operating within these same areas have corresponding duties to communicate in Sami languages.

CASE LAW

Prohibition against employers asking potential employees about their religion

The complainant is a Sikh, and thus wears a turban and has a beard. When he applied for a position as a physiotherapist, he was asked whether he was willing to shave, on the basis of the requirements of 'some customers'.

In Norway, Section 30 of the General Equality and Anti-Discrimination Act prohibits (prospective) employers from asking employees and candidates about their religious beliefs. In February 2024, the Discrimination Tribunal thus found that the employer had breached this provision. They did not find, however, that the complainant had been discriminated against when not being awarded the position, since the person who was offered the position had more education and experience.[247]

The duty of the employer to establish the unreasonableness of accommodation requested by the employee with a disability

The claimant was employed by a municipality. Due to her disability, she had been granted reasonable accommodation in the form of working from home, but the employer wanted to withdraw the accommodation, and argued that the claimant had refused to try other solutions.

In April 2024, the Tribunal stated that the claimant had provided medical documentation explaining why other options were not suitable to accommodate her needs. They further stated that it was then up to the employer to prove that the accommodation was unreasonably burdensome for them, which they had not done. The Tribunal concluded that the claimant had a right to individual accommodation in the form of working from home, and that the employer had not fulfilled their duty to provide

246 Norway, Law on amendments to the Sami Law (amendments to language regulations), LOV-2023-06-09-28, 16 June 2023, entry into force 1 May 2024.
247 Norway, Discrimination Tribunal, Decision No. DIN-2022-1129 of 14 February 2024.

reasonable accommodation according to Sections 22 and 12 of the General Equality and Anti-Discrimination Act.[248]

POLICY AND OTHER RELEVANT DEVELOPMENTS

Publication of a report on algorithms, artificial intelligence and discrimination

All grounds

In May 2024, a professor in equality and anti-discrimination law at the University of Oslo published a report on algorithms, artificial intelligence and discrimination commissioned by the Equality and Anti-Discrimination Ombud.[249] The report proposes the following measures to provide better protection against algorithmic discrimination:

- Application of the same approach as in Directive 2023/970/EU (Article 18(1) and (2)) on the reversal of the burden of proof. It further suggests that the authorities explore methods of AI auditing and transparency for assessing whether algorithms and AI are discriminatory
- Consideration of definitions of direct and indirect algorithmic discrimination, including differential treatment on the basis of characteristics intrinsically linked to protected characteristics, since this is often overlooked in practice.
- Including an open category of protected grounds of discrimination.
- Assessing the level of protection offered by the prohibition against instructions to discriminate in the General Equality and Anti-Discrimination Act, Section 15.
- Ensuring effective sanctions also outside employment, where the Tribunal often has no available sanctions at its disposal.

Poland PL

LEGISLATIVE DEVELOPMENT

Introduction of legislation penalising female genital mutilation

Gender

On 15 August 2023, the Anti-Violence Act 2.0 entered into force.[250] The law, which is a continuation of the introduction into the Polish legal system of instruments for the protection of persons experiencing domestic violence, was initiated by the Anti-Violence Act of 30 April 2020, and focuses on civil law solutions but also introduces a significant change in criminal provisions. Provisions penalising permanent and substantial female genital mutilation have been introduced into the Criminal Code (CC). According to the new phrasing of Article 156(1) Section 3 of the CC, 'whoever causes grievous bodily harm - or persuades others to do so - in the form of excision, infibulation, or other permanent and substantial mutilation of the female genital organ, shall be punished with imprisonment for a term of not less than 3 years'. Persuasion in respect of such acts is also punishable.

248 Norway, Discrimination Tribunal, Decision No. DIN-2023-626 of 10 April 2024.
249 Blaker Strand, V. (2024), *Algorithms, artificial intelligence and discrimination: An analysis of the possibilities and limitations of the Equality and Anti-Discrimination Law*, 7 May 2024.
250 Poland, Act of 13 January 2023 amending the Act - Code of Civil Procedure and certain other acts. Draft of the law with reasoning, Sejm print No 2615.

The amendment to the Criminal Code, which came into force on 15 August 2023, was intended to implement the provisions of the Istanbul Convention, which aims to protect women from violence, including in the form of circumcision. However, experts and activists from non-governmental organisations supporting the protection of women's reproductive rights point out that the provision included in the amendment, under the guise of implementing the Istanbul Convention, restricts women's rights by introducing an explicit ban on contraceptive sterilisation. They also point out that the provisions in question violate the principles of gender equality by restricting women's ability to decide on their fertility, while vasectomy, the contraceptive sterilisation of men, remains permitted.[251]

This approach is disagreed upon by the authorities responsible for shaping the law. A statement issued by the Ministry of Justice emphasises that sterilisation (ovarian ligation) was already prohibited under Article 156 of the Criminal Code as a procedure leading to the deprivation of the permanent capacity to procreate, so the amendment did not make any changes in this respect.

The Istanbul Convention uses the following wording in relation to female circumcision: 'excision, infibulation or any other mutilation of all or part of the labia majora, labia minora or clitoris of a woman'. In contrast, the amendment to the Criminal Code under discussion uses the phrase 'excision, infibulation or any other permanent and substantial mutilation of the female genital organ'. Thus, the provision contained in the amendment to the Criminal Code is broader than the content of the Istanbul Convention and covers the prohibition of contraceptive sterilisation of women.

Until now, there were no specific legal regulations in Poland specifying the conditions of admissibility of sterilisation performed for contraceptive purposes. In criminal law, the prevailing view, which was also promoted by the Ministry of Justice, was that sterilisation performed for contraceptive purposes constituted a crime of grievous bodily harm (provided for in Article 156 of the Criminal Code). However, views were expressed by some lawyers that the provision of the Criminal Code can be interpreted so as not to cover contraceptive sterilisation on demand, assuming the basic condition that the sterilisation is voluntary.[252] The new provisions prohibit contraceptive sterilisation of women without addressing the issue of contraceptive sterilisation of men, which raises doubts about the violation of the principle of equality of women and men before the law.

Expanded legal protections for victims of domestic violence

Gender

The above mentioned Anti-Violence Act 2.0 also made changes regarding victims of domestic violence.[253] The regulations are a continuation of the introduction into the Polish legal system of instruments for the protection of persons experiencing domestic violence, initiated by the Anti-

[251] Pakuła, D. (2023), 'Government banned contraceptive sterilisation. Gynaecologist: it's a litmus test of how the government treats women' (*Rząd zakazał sterylizacji antykoncepcyjnej. Ginekolog: to papierek lakmusowy tego, jak władza traktuje kobiety*), *Kobieta.Onet portal*, 30 August 2023 (updated 31 August 2023); Januszewska, P. (2023), 'Government criminalises contraceptive sterilisation. What does it actually mean?' (*Rząd kryminalizuje sterylizację antykoncepcyjną. Co to właściwie oznacza?*), *Krytyka Polityczna*, August 2023.

[252] Wąsek, A. (1988), 'Is voluntary sterilisation a crime?' (*Czy dobrowolna sterylizacja jest przestępstwem?*), *Państwo i Prawo* 1988, 8.; Zielińska, E. (1985), 'Conditions of admissibility of sterilisation procedures' (*Warunki dopuszczalności zabiegów sterylizacji*), *Państwo i Prawo*, 1985, 9, Kowalewska-Łaguna, M. (2014), 'Voluntary sterilisation in Polish law against a comparative legal background' (*Dobrowolna sterylizacja w prawie polskim na tle prawnoporównawczym*), *Państwo i Prawo* 2014, 1.

[253] Poland, Anti-Violence Act 2.0, Draft Law with reasoning, Sejm Print no. 2615, data from the official website of the Sejm of the Republic of Poland, Anti-Violence Act 2.0 data from the official website of the Sejm of the Republic of Poland, accessed 02.09.2024.

Violence Act of 30 April 2020.[254] The Anti-Violence Act 2.0 introduces changes whereby a person experiencing domestic violence can obtain protection from the perpetrator of violence not only at the place of residence but also outside of it.[255]

In addition to the existing regulations covering an order to leave jointly occupied premises and a restraining order, solutions have been introduced that will make it possible to additionally isolate perpetrators of domestic violence from persons experiencing violence outside their place of residence. Under the new provisions, the court may issue a restraining order against the perpetrator of domestic violence, an order prohibiting an individual from contacting the person suffering violence, an order prohibiting an individual from entering the premises of a school, educational, care or artistic institution or sports facility attended by the person suffering violence, a place of work or any other place where the person suffers violence usually or regularly visits.

The police and military police have been granted broader powers against offenders. These include prohibiting the offender from approaching the victim within a set distance, banning contact through digital means (e.g. email, phone, messaging), and restricting access to specific locations such as workplaces, schools, childcare, arts facilities, or sports venues where the victim or their children visit regularly. These prohibitions can be renewed by a civil court, analogous to the existing restraining order. Breach of the sanctions may result in a fine, restriction of liberty, or even arrest.

The competence of the civil court has also been extended in terms of protection against stalking. The court may issue a prohibition of contact if the perpetrator of domestic violence harasses his victim by means of electronic communication, inducing a feeling of threat, humiliation or anguish that is justified by the circumstances, or violates the victim's privacy in another significant way. The court has 30 days to decide on this matter. The perpetrator may appeal to the family court.

The extension of the powers of the court, police, and military police in the field of countering domestic violence can be seen as a positive development. The changes introduced in 2020 proved to provide effective tools in the fight against domestic violence.[256] The missing element of the solutions introduced at that time was the possibility of extending the restraining order not only to the home, but also to other areas where the perpetrator might try to approach the victim (e.g. in the workplace, on the street, or attacking him/her by phone, text messages or email). The changes seem to fill the gap in response to the demands made by experts and feminist NGOs engaged in combating violence. The Anti-Violence Act 2.0 therefore has the potential to effectively strengthen the protection system for those affected by domestic violence, who are, according to statistics, primarily women.

254 See EELN (2020) Flash Report (Poland), 'New legal provisions aimed at enforcing civil law protection of victims of family violence', 8 June 2020.

255 The most important amendments were made to the following laws: Code of Civil Law (*Kodeks Prawa Cywilnego*), 17 November 1964 (Code of Civil Procedure or CCP); Law on the Police (*Ustawa o Policji*), 6 April 1990; Law on the Military Gendarmerie, 24 August 2001, the Criminal Code (*Kodeks Karny*), 6 June 1997; the Code of Contraventions (*Kodeks wykroczeń*), 20 May 1971.

256 Rojek-Socha, P. (2023), Deputy Minister Romanowski, M., 'Natychmiastowa izolacja sprawcy przemocy domowej przynosi efekty' (Immediate isolation of perpetrators of domestic violence brings results), *LEX.pl*, section: Prawnicy i Sądy. Information collected by the Ministry of Justice shows that from the beginning of the law, i.e. from 30 November 2020 to the end of 2022, 8 723 orders or prohibitions were issued against perpetrators of domestic violence: 3 531 in 2021 and nearly 4 960 in 2022. Notifications are increasingly being received from women, who are the most vulnerable to violence, according to statistics.

PT Portugal

LEGISLATIVE DEVELOPMENTS

Gender

New amendments in Portuguese law: enhancing work-life balance and social protection

The Work-life Balance Directive has been transposed into national legislation,[257] amending the Portuguese Labour Code (PLC). However, the complete implementation demanded a complementary regulation regarding social protection. This law came into force on 6 July 2023.[258]

1. General framing

A law of 2009[259] enshrines protection under the general social security scheme,[260] establishing the foundational framework for social security regarding parenthood protection in Portugal. The new law, transposing the Work-life Balance Directive, aims to further align the social security system with the EU's standards on work-life balance. However, adjustments in the scope of the social security system were lacking; these were later addressed through another law.[261] In some matters, this law goes beyond the Directive's requirements, further enhancing the reconciliation of professional and family life. Nevertheless, questions remain about the complete transposition of the Directive in other areas.

2. Initial parental leave allowance

According to Article 40(1) of the Portuguese Labour Code (PLC), parents are jointly entitled, upon the birth of a child, to an initial parental leave of 120 or 150 consecutive days, which they can share. The difference between the option for 120 or 150 days is, specifically, the amount of the social benefits to which they are entitled. For the 120-day leave, Article 30(1)(a) of Decree-Law No. 91/2009 provides for a 100 % replacement rate. Choosing a leave of 150 days implies a reduction in the rate to 80 % (Article 30(1)(b) of Decree-Law No. 91/2009). However, if each parent takes at least 30 consecutive days, or two consecutive periods of 15 days of leave (using 120 days + 30 additional days provided for in Article 40(3) PLC), the rate remains at 100 % (Article 30(1)(c) of Decree-Law No. 91/2009). In the event that parents opt for the 150-day leave (Article 40(1) PLC) with an additional period of 30 days (provided for in Article 40(3) PLC), the leave will last 180 days, with the rate depending on the extent of the sharing: in situations where each parent enjoys at least 30 consecutive days, or two consecutive periods of 15 days, the rate will be 83 %; in situations where the father takes at least one period of 60 consecutive days, or two periods of 30 consecutive days of the total of 180 days of initial parental leave, in addition to the father's exclusive parental leave, the rate rises to 90 % (Article 30(1)(d) and (e) of Decree-Law No. 91/2009). This last possibility was established by Decree-Law No. 53/2023, representing a growing incentive for fathers (and their equivalents) to share the leave.

Law No. 13/2023 allowed for this initial parental leave to be taken on a part-time basis. Under Article 40(4) PLC, in some cases where the leave exceeds 120 days, the parents may, from then on, cumulate, each day, the remaining days of leave with part-time work, under the terms defined in Article 40(5):

257 Portugal, Law No. 13/2023, of 3 April 2023.
258 Portugal, Decree-Law No. 53/2023 of 5 July 2023.
259 Portugal, Decree-Law No. 91/2009 of 9 April 2009.
260 Most of the workers with a public employment relationship prior to 1 January 2006 benefit from the regime provided for in Decree-Law No. 89/2009 of 9 April 2009.
261 Portugal, Decree-Law No. 53/2023, dated 5 July 2023.

half a day of leave is taken each day, and these periods are added together to determine the maximum period of leave. This means that for every two calendar days, one day of leave is used. Part-time work corresponds to a half workday (half of full-time work in a comparable situation). The leave can be taken in this form by both parents, simultaneously or sequentially. Using this option, the parent(s) will accumulate the remuneration received (from part-time work) with the social benefits. Decree-Law No. 53/2023 determines that the daily amount of this social benefit will be equivalent to 50 % of the value corresponding to full-time working.

3. Additional parental allowance

Before the introduction of the new law, the Portuguese Labour Code (PLC) provided four options for additional parental leave:

1. Extended parental leave for three months.
2. Part-time work for 12 months, with daily working hours reduced to half of a full-time schedule.
3. A combination of extended parental leave and part-time work, where the total absence and reduced working hours equal three months of full-time work.
4. Intermittent absences from work, equivalent to three months of full-time work, provided these are covered by collective labour agreements.

These options were (and remain) personal and non-transferable and could (and can) be taken consecutively or in up to three intermittent periods (Article 51(2) PLC).

Until the entry into force of the new law, the additional parental allowance[262] was only recognised in situations of extended parental leave, and even then, only if the leave was taken immediately after the initial parental leave or the other's parent additional parental leave. Those who did not take leave during the specified timeframes or who opted for a part-time work leave were barred from accessing social benefit. However, the allowance rate would have only been 25 %.

Law No. 13/2023 introduced a new type of additional parental leave: 'part-time work for three months, with working hours equal to half of a full-time schedule, provided that the leave is fully taken by each parent' (Article 51 PLC). This new arrangement only fully makes sense when considered alongside the social protection scheme introduced by Decree-Law No. 53/2023. Under this framework, beneficiaries of this leave are entitled to social benefits at a 20 % replacement rate, as specified in the revised Article 33(3) of Decree-Law No. 91/2009. This is a key distinction from the 12-month part-time leave, which does not come with any social benefits. By linking part-time additional parental leave to social benefits, this provision encourages a more balanced sharing of parental responsibilities and promotes work-life balance, especially since this type of leave must be fully utilised by both parents.

Furthermore, for cases of extended parental leave, a variable rate now applies depending on the extent to which both parents take the leave. The rate is set at 30 % if only one parent takes the leave or if both parents take it but not in full (i.e. one of them does not take the full leave) – Article 33(1) of

[262] Portugal, Article 16 of Decree-Law No. 91/2009.

Decree-Law No. 91/2009. The rate increases to 40 % if each parent takes the entire extended parental leave (Article 33(2) of the same Decree-Law).

In addition, parents opting for interspersed periods of extended parental leave and part-time work are also entitled to a social benefit, with a replacement rate of 30 %.

As a result of this legal amendment, the additional parental allowance can now be granted regardless of when each parent takes their parental leave and also applies to arrangements involving part-time work. Additionally, the allowance rate has been increased, particularly in cases where both parents fully utilise the extended parental leave. However, there are serious concerns that this increase (from 25 % to 30 % or 40 %) may still be insufficient to make the uptake of additional parental leave a practical reality.

Articles 5 and 8(3) of Directive 2019/1158 stipulate that each employee is entitled to four months of parental leave, with at least two of these months being non-transferable to the other parent. The payment or allowance for this non-transferable period must be set to encourage both parents to take parental leave. There are concerns that the rates of 30 % or even 40 % in Portugal may not be sufficient to meet this objective, potentially raising issues of compliance with the Directive.

Age discrimination and pardon of penalties and amnesty for offences

On World Youth Day in August 2023, the Portuguese Parliament established a pardon of minor penalties and an amnesty for some minor offences committed until midnight on 19 June 2023, by people aged between 16 and 30 at the time of the offence.[263]

The limited scope of application of this legislation attracted significant attention, notably from the Superior Council of the Public Prosecutor's Office, which considered that the age limit might have been adopted in violation of the non-discrimination principle on the ground of age. Prominent scholars and politicians have debated the same issue in the press and while some consider that this is a discriminatory measure on the ground of age, others consider it to be justified considering the nature of World Youth Day and the political nature of this measure.

The President of the Republic noted that he would promulgate the law 'without prejudice to further evaluation of the issue of respect for the principle of equality, with the aim of being able to extend its scope without age restrictions'.[264] Both the Appeal Court of Évora[265] and the Constitutional Court[266] have subsequently ruled that the amnesty law did not amount to any age discrimination.

Separation of the Commission for Equality and Against Racial Discrimination from the High Commission for Migration

In November 2023, the Portuguese Parliament adopted legislation effectively establishing the Commission for Equality and Against Racial Discrimination (CEARD) as an independent administrative authority adjoined to Parliament.[267] Previously, CEARD existed as an entity within the High Commission

263 Portugal, Law No. 38-A/2023 of 2 August, Official Journal No. 149/2023.
264 Promulgation by the President of the Portuguese Republic of Law No. 38-A/2023.
265 Portugal, Appeal Court of Évora, decision of 18 December 2023 in case No. 401/12.1TAFAR-E.E1.
266 Portugal, Constitutional Court, decision No. 471/2024 of 19 June 2024.
267 Portugal, Law No. 3/2024, of 15 January, adopted in November 2023.

for Migration (HCM), which was formally designated as the national equality body under Article 13 of the Racial Equality Directive. The pre-existing structure caused confusion, notably due to a difference in the specific grounds covered by CEARD as opposed to the HCM itself. Furthermore, the equality body's independence was put into question due to its close institutional link with the Prime Minister.

The new legislation appears to have addressed these concerns by separating CEARD from both HCM and the Prime Minister, and by stipulating that CEARD acts with independence in the pursuit of its attributions and within the powers conferred on it by law. On the other hand, most of the competencies of the HCM were integrated into the newly created Agency for Integration, Migrations and Asylum.

According to the amended legislation, CEARD will no longer be composed of the High Commissioner for Migration as its president and of Government representatives. Instead, Parliament will elect the president of CEARD, and the Commission itself will be composed of persons appointed by the Government. In addition, its financing will be defined within the budget of the Parliament itself, which could mean an increase of its resources.

While most of CEARD's responsibilities remain the same, some have been abolished, such as promoting human rights and non-discrimination education, awareness raising and training, and issuing codes of good practice. Furthermore, it is regrettable that the power to provide assistance to victims remains limited to the provision of information. The main innovation in this regard is that CEARD will, at the request of the parties, provide in-house mediation and not only refer to external mediators.

The new legislation does not formally determine which body will exercise the mandate of national equality body under the Racial Equality Directive, although it stipulates that CEARD 'applies the legal framework for preventing, prohibiting and combating discrimination on the grounds of racial and ethnic origin, colour, nationality, language, ancestry and territory of origin'.

Although the legislation was published and entered into force in January 2024, for six months, the new CEARD remained dormant without exercising any functions.[268] On 28 June 2024, however, a lawyer and former Secretary of State for Equality and Migration was elected by Parliament as the president of the new body.[269]

Amendments to the criminal prohibitions of discrimination and incitement to hatred and violence

In January 2024, several amendments to the Criminal Code entered into force, notably revising Article 240, which establishes the crimes of discrimination as well as incitement to hatred and violence. The Government had already committed to amending this provision when adopting the National Plan to Combat Racism and Discrimination 2021-2025, with the aim of respecting all binding international instruments.

The amendment has added language, gender expression and sexual characteristics to the list of grounds covered by the following criminal prohibitions: (1) establishing or organising an entity or

[268] See, for instance, Publico (2024), 'Comissão que analisa queixas de racismo parada há seis meses', 4 May 2024 and CNN Portugal (2024), 'Racismo: "Se a CICDR já funcionava mal agora está mesmo ausente. Temos de passar da comoção para ação mais consequente"', 4 May 2024.

[269] Portugal, Resolution of the Assembly of the Republic No. 39/2024, of 28 June.

engaging in activities of propaganda that incite or endorse discrimination, hatred, or violence; (2) provoking acts of violence against an individual or a group in a public meeting, in writing intended for dissemination or by any other means of social communication, or, in the same context, defamation, insults or threats; (3) inciting hatred, violence or discrimination.[270] The new list thus includes ethnic-racial origin (formerly 'race'), national or religious background, colour, nationality, ancestry, place of origin, religion, language, sex, sexual orientation, gender identity or expression, sexual characteristics, and physical or mental disability. The amendment also changed the wording from 'race' to 'racial-ethnic origin' and eliminated the previous requirement for prohibited propaganda activities to be 'organised'.

Finally, a new paragraph 3 has been added to Article 240 specifying that if the offences listed in the preceding paragraphs are committed through an information system, the court may issue an order for the deletion of the relevant data or content, which was previously not possible in criminal procedures.

The amendments entered into force on 14 February 2024.[271]

Reconciliation of professional and family life; Transposition of Directive 2019/1158 into national legislation – definition of 'carer'

Directive 2019/1158 of 20 June 2019 was transposed into national legislation by Law No. 13/2023 of 3 April 2023.[272] However, the notion of 'carer', provided for in the Portuguese Informal Caregiver Statute was not adjusted to match the content of Article 3(1)(d)(e) of the Directive. The new Law No. 20/2004 of 8 February 2024 intends to complete the Directive's implementation in this regard.

Directive 2019/1158 defines 'carer' as a

> 'worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined by each Member State' (Article 3(1)(d)).

To this end, 'relative' means a worker's son, daughter, mother, father, spouse or, where such partnerships are recognised by national law, partner in civil partnership (Article 3(1)(e)).

In its original wording, the Portuguese Informal Caregiver Statute (approved by Law No. 100/2019 of 6 September 2019)[273] included two types of carers: 1) the 'primary informal caregiver', defined as 'the spouse or partner, relative or similar up to the 4th degree of the straight line or collateral line of the person being cared for, who accompanies and cares for them on a permanent basis, who lives in the same household and who does not receive any remuneration from professional activity or the care provided to the person being cared for'; and 2) the 'non-primary informal caregiver', defined as 'the spouse or partner, relative or similar up to the 4th degree of the straight line or collateral line of the person cared for, who accompanies and cares for this person on a regular, but not permanent, basis, and may or may not receive remuneration for professional activity or for care provided to the person being cared for'.

270 Before the 2024 amendments, only incitement to hatred and violence were covered.
271 Portugal, Law No. 4/2023 of 15 January, Official Journal No. 10/2024.
272 Portugal, Law No. 13/2023 of 3 April 2023.
273 Portugal, Law No. 100/2019 of 6 September 2019.

Within the scope of these two categories, the one that is relevant for the purposes of Directive 2019/1158 is the 'non-primary informal caregiver', since the primary informal caregiver does not work.

Law No. 20/2024 expanded the notion of 'non-primary informal caregiver' in order to include those who do not have a family relationship with the person cared for but live in the same household. With the new wording, a non-primary informal caregiver can be 'the spouse or partner, relative or similar up to the 4th degree of the straight line or collateral line of the person being cared for, *or whoever, without having family ties with them, live in the same household as the person being cared for*, monitoring and caring for them on a regular but not permanent basis, and may or may not receive remuneration for professional activity or for the care provided to the person being cared for' (Article 2(2) of Law No. 100/2019, emphasis added).

CASE LAW

Discrimination on grounds of pregnancy and maternity

Court of Appeal of Coimbra, Process 1689/2023, ruling of 12 January 2024: the Court of Appeal of Coimbra recognised that different treatment of employees on the ground of the exercise of maternity rights is qualified as discrimination based on sex.

Portuguese legislation has never established that discrimination on grounds of pregnancy and maternity constitutes a case of sex or gender discrimination, which could be pointed out as an incorrect transposition of Directive 2006/54/EC (Article 2(2)(c)), following the case law of the CJEU.

However, this gap was significantly addressed with the introduction of Article 35-A to the Portuguese Labour Code (PLC) through Law No. 90/2019 of 4 September 2019. This article prohibits any form of discrimination related to the exercise of maternity and paternity rights. It also explicitly recognises as discriminatory any differences in remuneration linked to attendance and productivity bonuses, as well as adverse effects on career progression.

Regarding the burden of proof, Article 25(6) and (7) of the PLC, amended by Law No. 13/2023 of 3 April 2023, establishes that discrimination grounds include the exercise of parental rights, work-life balance rights, and caregiving status. It also considers discriminatory practices to include pay disparities related to attendance and productivity bonuses, as well as negative impacts on performance evaluations and career progression.

In this context, it is worth noting that the decision of the Court of Appeal of Coimbra recognised that different treatment of employees based on the exercise of rights relating to maternity is qualified as discrimination based on sex, since a reference to sex as the discrimination ground is not expressly mentioned in the Portuguese legislation.

Protection against dismissal of a breastfeeding employee

The following case concerns a breastfeeding employee who was dismissed.[274] The employer failed to follow the mandatory special procedure for dismissing pregnant, puerperal, and breastfeeding employees, which requires obtaining a prior written opinion from the entity responsible for promoting

[274] Portugal, Court of Appeal of Lisbon, Process 6670/23.4T8LRS-A.L1-4, ruling of 21 February 2024.

gender equality (CITE, the Commission for Equality in Labour and Employment). The employer argued that the employee was not recognised as breastfeeding since she had not provided written notice or a medical report confirming her breastfeeding status, as required by Article 36 of the Portuguese Labour Code (PLC).

The Court of Appeal of Lisbon decided that the employee is entitled to the protection against dismissal given by Article 63 PLC. Even though she had not presented a medical report confirming that she was breastfeeding, she had sent an email to her employer asking for time off for breastfeeding, which was considered enough. Consequently, the dismissal was deemed unlawful (Article 381(d) PLC).[275]

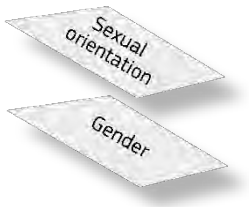
According to Article 36(1) PLC, which mirrors Article 2 of the Pregnant Workers Directive[276] of 10 October, a breastfeeding employee is one who is breastfeeding a child and informs the employer of this fact in writing accompanied by a medical report. So, the Portuguese legislature has established an obligation for the employee to formally inform the employer of her state and to present a medical report confirming it in order to be considered a breastfeeding employee, and thus benefit from the legal protection conferred to them.

Nevertheless, the 2009 PLC added a new section (2) to Article 36, according to which the employee benefits from legal protection if the employer is aware of her situation even without being informed in writing and/or without presenting the medical report.

This was crucial for the Court's decision, as it considered that an email requesting time off for breastfeeding was sufficient to grant the employee protection against dismissal. According to Article 63 PLC, the dismissal of a pregnant, puerperal, or breastfeeding employee, as well as of any employee enjoying an initial parental leave (which may include the father) requires the prior written opinion of the entity responsible for promoting equal opportunities among men and women, the Commission for Equality in Labour and Employment (CITE). If the employer did not request this opinion before the dismissal, the dismissal is deemed invalid (Article 381(d) PLC).

POLICY AND OTHER RELEVANT DEVELOPMENTS

National strategy for equality and non-discrimination



Resolution of the Council of Ministers No. 61/2018, of 21 May 2018[277] approved the national strategy for equality and non-discrimination – *Portugal + Igual* (ENIND) establishing the main goals to be achieved by 2030.

ENIND integrates three action plans that define the strategic and specific objectives up to 2030, as well as the specific measures to be pursued within the scope of these objectives, during the four-year implementation period. Resolution of the Council of Ministers No. 61/2018 approved action plans between 2018 and 2021. Resolution of the Council of Ministers No. 92/2023 of 14 August 2023 reformulated the previous

[275] Portugal, Court of Appeal of Lisbon, Process 6670/23.4T8LRS-A.L1-4, ruling of 21 February 2024.
[276] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).
[277] Portugal, Resolution of the Council of Ministers No. 61/2018, 21.05.2018.

strategy and approved the action plans for the period of 2023-2026.[278]

ENIND has four themes, covering the main goals of global and structural action until 2030: a) integration of the dimensions of combating discrimination based on sex and promoting equality between women and men, and combating discrimination based on sexual orientation, gender identity and expression, and sexual characteristics in governance at all levels and in all domains; b) full and equal participation in the public and private sphere; c) equitable, inclusive and future-oriented scientific and technological development; d) elimination of all forms of violence against women, gender-based violence and domestic violence, and violence against LGBTI+ people.

ENIND has three action plans: a) action plan for equality between women and men (PAIMH); b) action plan to prevent and combat violence against women and domestic violence (PAVMVD); and c) action plan to combat discrimination based on sexual orientation, gender identity and expression, and sexual characteristics (PAOIEC).

First national survey on living conditions, origins, and trajectories of resident population in Portugal 2023

In December 2023, the National Statistics Institute published the first national statistics regarding the ethnic/racial origin of the population of Portugal. The survey on living conditions, origins and trajectories of the resident population in Portugal, carried out in 2023, measures the ethnic groups with which the population identifies to clarify how the population reports and interprets their origins as well as their experience of discrimination in various fields (such as access to and quality of employment, health, education, housing, mobility and social networks).[279]

The survey was developed by the National Statistics Institute as an alternative to including a question on ethnic origins in the 2021 census, as recommended by a working group established by ministerial order. The survey, which was preceded by a small-scale pilot survey in 2021/22, was considered to have better analytical potential than a simple question in the census.

The sample of approximately 35 000 households across the country is the largest ever covered in Portugal. The results were calculated with reference to the estimates of the resident population on 31 December 2022.

The results show that people aged 18 to 74 self-identified with different ethnic groups as follows: 6.4 million 'white'; 169 200 'black'; 56 600 'Asian'; 47 500 'Romani'; and 262 300 reported having a mixed origin or belonging. Furthermore, 1.4 million people reported having an immigrant background (defined as persons with links to the country of origin of the respective family), of whom 947 500 are first-generation immigrants. People who identify with the black, Asian and mixed ethnic groups have the highest proportions of population from an immigrant background (90.3 %, 83.7 % and 69.2 %, respectively).

The survey also contains detailed data on feelings of attachment to Portugal as well as Europe and, in the case of persons with an immigrant background and first-generation immigrants, to their (family's)

278 Portugal, Resolution of the Council of Ministers No. 92/2023 of 14 August 2023.
279 Portugal, National Statistics Institute (2023), Survey on Living Conditions, Origins and Trajectories of the Resident Population in Portugal, published 22 December 2023.

country of origin. It also contains data on employment rates among the different ethnic groups and on languages spoken at home.

Finally, the survey covered perceptions and experiences of discrimination, with approximately 65 % of respondents believing that there is discrimination in Portugal. Some 16 % reported having experienced discrimination themselves, most commonly people identifying as Romani (51 %), black (44 %) or of mixed origin or belonging (40 %), as well as women (17.5 %) and younger people (19 %).

RO Romania

LEGISLATIVE DEVELOPMENT

Adoption of legal framework regulating pre-university and higher education

In July 2023, the President announced two laws to replace the previous Education Law. Both laws list equity, diversity and inclusion as the fundamental values of education.

Law 198/2023 regulating pre-university education[280]

Law 198 on pre-university education stipulates that 'access to and participation in quality education is achieved without discrimination, including through the prohibition of school segregation.' It aims to guarantee the rights of national minorities to 'maintain, develop and express their ethnic, cultural, linguistic and religious identity', to eliminate ethnic, religious, disability limitations/barriers, and to personalise educational trajectories based on specific needs. It also defines inclusion as 'full acceptance into the education system of all beneficiaries, combating exclusion and supporting active participation in education.'

Access to all levels and forms of education should be equitable and non-discriminatory. The law also lists the sanctions available in cases of discrimination by educational and/or management staff, including (a) a written warning; (b) a temporary salary reduction of up to 15 %; (c) a temporary suspension of the right to compete for a merit-based grading, a management, supervisory or senior teaching post; d) a temporary suspension of the right to sit on the committees organising and conducting national examinations; e) disciplinary termination of the individual employment contract.

Law 198 prohibits segregation based on ethnicity, disability or special educational needs, socioeconomic status, membership of a disadvantaged group, residential background or school performance. It specifies that the following do not constitute segregation:

- special educational establishments, under the conditions provided by law;
- groups for a national minority taught in their mother tongue (or bilingual);
- groups for Romanian pupils returning after long periods of time abroad.

[280] Romania, Law No. 198/2023 of 4 July 2023, Official Journal No. 613 of 5 July 2023.

It further spells out that 'segregation is a serious form of discrimination that restricts or denies equal recognition, use or exercise of the right to education, human rights and fundamental freedoms, as well as the rights recognised by law in the field of education, resulting in unequal access of children to quality education and violation of human dignity.' The law also defines school segregation, referring to 'physical separation' of pupils resulting in a percentage of minority pupils in a class[281] that is disproportionate to the share of the minority group in the relevant age group in the territorial unit. The law further provides that, where there are several classes per age group, the classes will be formed by random distribution of pupils, through a procedure to be established by order of the Minister of Education.

Finally, inclusive education is guaranteed and defined, targeting in particular children at risk of 'stigmatisation, discrimination, disregard of their cultural identity, segregation, dropping out and educational failure due to their belonging to one or more categories' such as social, economic or cultural status, national minority, children with special educational needs or disabilities, and children and young people from vulnerable Roma communities.

Law 199/2023 regulating higher education[282]

Law 199 on higher education spells out the duty of the state to ensure equitable and non-discriminatory access for all to higher education, and lists the following principles: equity, respect for rights and freedoms, recognition and guarantee of the rights of persons belonging to national minorities, equal opportunities and non-discrimination.

Admission to higher education programmes should be granted without any discrimination and taking into consideration support measures to ensure access for groups at risk. The law also recalls the prohibition of discrimination against students as well as the duty for universities to adopt a strategy for combating discrimination. Discriminatory assessment of students is an infringement of the ethics and professional deontology obligations leading to civil, administrative, professional or disciplinary liability.

The law further provides that students with disabilities have a right to adapted access to university premises, to a sign language interpreter, and to adequate access to academic, social, cultural and administrative activities in higher education institutions. Harassment, other than sexual harassment, is not mentioned in the law.

New internal procedure adopted as order of the president of the national equality body

In February 2024, a new internal procedure for the national equality body (National Council for Combating Discrimination, NCCD) to resolve petitions was published in the Official Gazette as an Order of the President of the NCCD.[283] The draft procedure had been published on the website of the NCCD at the end of December 2023 for public discussion. The adoption procedure as well as a part of the contents were criticised by civil society organisations working with victims, by some of the members of the steering board of the NCCD and by some of the staff. After a round table requested by NGOs in

[281] The provision refers to segregated 'groups/classes/classrooms/buildings/facilities/tables'.
[282] Romania, Law No. 199/2023 of 4 July 2023, Official Journal No. 614 of 5 July 2023.
[283] Romania, Order of the National Council for Combating Discrimination, No. 27 of 7 February 2024.

January, the document was adopted in February, without any publicity. The text is still not available on the NCCD's website.

Some of the positive changes contained in the new procedure include:

- Facilitated means of submitting petitions, including additional support for persons with (some) disabilities.
- Increased flexibility regarding procedures for summoning the parties to proceedings.

Changes that are arguably problematic include:

- Increased onus on the complainant, notably regarding the required information to be contained in the petition, the number of copies of the petition that need to be submitted and the costs of interpretation, if required.
- Significantly reduced possibilities for the initiation of *ex officio* investigations, as the majority of the members of the steering board of the NCCD need to endorse the investigation. This amendment was criticised for reducing independent voices in the NCCD and adding a political filter to *ex officio* cases.
- Significantly reduced role of the members of the steering board, due to a transfer of responsibilities to civil servants (the head of the assistance department and the legal advisers appointed).
- Formalisation of the NCCD's long-standing practice of issuing non-binding recommendations with a view to preventing violations of the principle of non-discrimination.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Guidelines for interaction with transgender persons in the electoral context

On 24 May 2024, the Central Electoral Bureau (Biroul Electoral Central), the authority leading the electoral process for the round of elections taking place on 9 June 2024 (elections for the European Parliament and local elections), forwarded to local electoral commissions and the Permanent Electoral Authority (Autoritatea Electorală Permanentă) *Guidelines for interaction with transgender persons in the electoral context*, put together by Accept Association and supported by the People's Advocate (Office of the Ombudsman).[284]

The Central Electoral Bureau recommended the use of the guide during the training programmes of the presidents of electoral bureaux and their deputies, as well as those for computer operators designated to work in the electoral process. The guidelines raise awareness of possible situations that transgender persons might find themselves in when exercising their right to vote, due to a disparity between their appearance and the gender markers in their IDs. The guidelines ask for delicacy in the treatment of such cases with the aim of protecting the private life of trans persons, avoiding discomfort

[284] Romania, Central Electoral Bureau, Notification no.1786C/BEC 2024 of 24.05.2024.

and other behaviours that could incite hatred or hate crimes, or harassment and verbal or physical aggression. Accept Association is providing an emergency phone number that will be active on the day of the vote for guidance on how to respect fundamental rights of trans persons who want to vote.[285]

This is the first time in Romania that a public authority has recognised in a public policy that trans persons exist and that they may have difficulties exercising their fundamental rights. The guidelines explain that as a result of medical and social transition the appearance of trans persons may not correspond to the gender markers in their ID. The guidelines also stress that these difficulties of identification arise from the lack of an accessible, predictable and clear legal gender recognition procedure in Romania, as decided by the European Court of Human Rights in the case of *X and Y v. Romania*, 19 January 2021.

The measure is particularly important since trans persons are looked at with suspicion in the public sphere and there are a lot of anti-gender narratives. For example, this very measure was met with such criticism that six days after its introduction, the Central Electoral Bureau felt the need to issue a press release to explain itself.[286]

Nevertheless, in this press release the Bureau correctly pointed out the role of democratic elections in exercising and celebrating fundamental rights, and the respect for non-discrimination and ensuring equal treatment of all citizens, including minority groups irrespective of gender.[287] The Bureau declared that the existing rules of identifying a person and of contesting the identity of a person remain applicable according to Article 1(11)-(12) of the Decision of the Central Electoral Bureau No. 169H/28.05.2024.[288] According to the Bureau, the guidelines do not add to the law, only raise awareness on the fundamental rights that need to be ensured to all during the electoral process and the duties of treating all voters with respect, without intimidation or any form of violence, aggression or administrative interference in the right to vote and in the right to private life of transgender persons.

Serbia RS

LEGISLATIVE DEVELOPMENT

Prohibition of incitement to discrimination and hatred in electronic media

In October 2023, the Law on Electronic Media was adopted, replacing the previous law regulating electronic media.[289] It provides that the publication of programme content is always considered a particularly serious violation if it contains information that incites, overtly or covertly, discrimination, hatred or violence against a person or a group of persons because of race, skin colour, ancestry, citizenship, national affiliation, language, religious or political beliefs, sex, gender identity, sexual orientation, property status, birth, genetic characteristics, health status, disability, marital and family

285 Accept Association, Facebook post of 31.05.2024.
286 Romania, Central Electoral Bureau, Press release no.44CP/BEC 2024 of 30.05.2024.
287 Romania, Central Electoral Bureau, Press release no.44CP/BEC 2024 of 30.05.2024.
288 Romania, Central Electoral Bureau, Decision No.169H/28.05.2024 on some measures for exercising the right to vote in the polling stations organized in the country in the elections of 9 June 2024 (*Hotărâre privind unele măsuri pentru exercitarea dreptului de vot în secțiile de votare organizate în țară la alegerile din data de 9 iunie 2024*).
289 Serbia, Law on Electronic Media of 27 October 2023, Official Gazette No. 92/2023.

status, criminal record, age, appearance, membership in political, trade union or other organisations and other real or assumed personal characteristics. In addition, the content regulator has a duty to ensure that the programme content of the media service provider does not contain information that incites, directly or indirectly, discrimination, hatred or violence because of the same grounds. Finally, providers of video sharing platform services are obliged to take appropriate measures to protect the public from programme content, video content generated by users or audiovisual commercial communications, the publication of which constitutes the criminal offence of public incitement to racial or other discrimination.

CASE LAW

Unconstitutionality of the Gender Equality Act (GEA)

The Gender Equality Act (GEA) was adopted in 2021, replacing the 2009 Law on Sex Equality. From 1 June 2021 to 24 January 2023, the Constitutional Court received eight proposals to initiate the assessment of the GEA's constitutionality. These proposals represent a diverse range of opinions on the GEA, and the Constitutional Court decided to initiate proceedings to determine the (un)constitutionality of the GEA.[290]

The first proposal insists that the GEA uses imprecise terms, such as 'gender' and 'gender-sensitive language', leading to violations of the rule of law, legal certainty, and predictability of regulations. The second proposal opposes what it considers the unconstitutional and scientifically unjustified use of the terms 'gender', 'gender identity', 'gender characteristics', 'gender discrimination,' and 'gender stereotypes.' The third proposal contests that special measures for achieving and improving 'gender' equality are unknown to the Serbian language, change the Serbian language and violate the dignity of every person in Serbia. The fourth proposal insists that 'gender-sensitive language' as a means of 'influencing consciousness' to achieve changes in 'thinking, attitudes and behaviour,' goes beyond the competence of the legislature. The fifth proposal disputes the duty of public authorities to continuously monitor the use of gender-sensitive language in the names of jobs, positions, and professions and the duty of media to use gender-sensitive language, as the Constitution recognises only the term 'sex'. The sixth proposal argues that the GEA introduces 'gender equality,' contrary to sex equality, as used in Article 15 of the Constitution and other constitutional provisions, such as the right to marriage (Article 62). The seventh proposal challenges several provisions of the GEA that require educational materials and programmes to align with gender equality principles, arguing that these provisions impose certain restrictions, particularly on universities that have autonomous decision-making authority. Also, using gender-sensitive language is claimed to be against the freedom of expression and should not be imposed by the use of fines. Finally, the eighth proposal challenges the GEA's prescription of different funding sources and varying deadlines for the implementation of legal provisions concerning programmes and services for both perpetrators and victims of violence, arguing that this approach contradicts the principles of the rule of law and equality. On 18 April 2024, the National Ombudsman submitted an initiative to assess the constitutionality of the GEA, arguing that the Constitution protects the standardised Serbian language but does not mandate gender-sensitive language, and that the GEA cannot alter the standardised forms of minority languages.

[290] Serbia, Constitutional Court, IUz -85/2021, decision from 27 June 2024.

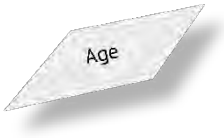
The Constitutional Court reviewed the relevant provisions of the GEA, other laws, and the Istanbul Convention. The Court noted that the legislature chose to introduce and define the concept of 'gender' in line with the Istanbul Convention. However, the Court emphasised that while equality between sexes is a constitutional principle, the term 'gender' is not explicitly recognised in the Serbian Constitution. The Court also observed that Article 21 of the Constitution prohibits discrimination based on 'sex', but does not restrict protection only to the grounds explicitly mentioned. Additionally, the Court questioned whether it is appropriate for legislation to impose binding rules on language and whether such imperative provisions on language can be the subject of legislation.

The Institute for the Serbian Language of the Serbian Academy of Sciences and Arts has a committee dedicated to the standardisation of the Serbian language. Concurrently, the Government has established the Council for the Serbian Language. The Court questions who holds the responsibility for implementing gender-sensitive language and how to reconcile terms and expressions related to gender sensitivity. Additionally, the requirement for gender-sensitive language extends to minority languages, raising the issue of whether this law can alter the standardised languages of minority groups.

Furthermore, the Court questions whether mandating gender-sensitive language infringes individuals' freedom of thought, expression, autonomy and dignity. The Court also references judgments from the European Court of Human Rights that emphasise the need for clear and precise legal norms. Given that some provisions of the GEA could impact the rule of law and legal certainty, and considering that violations may result in fines potentially leading to irreversible harm, the Court has decided to suspend the implementation of individual measures based on the GEA until a final decision is made.

It is essential to underline that this decision was reached several weeks after the provisions on gender-sensitive language entered into force (1 June 2024). The consequences of the Court's decision, as it will review the entire GEA, remain to be clarified. The GEA has faced criticism from various stakeholders, including individuals (primarily intellectuals), organisations, institutions (including the oldest Serbian language independent, non-profit, non-governmental and cultural-scientific Serbian national institution), and the Serbian Orthodox Church. Similar debates are also occurring in other countries in the region, such as Bulgaria and Romania, which can be perceived as a backsliding of gender equality and standards that had already been achieved.

Supreme Court confirmed that age-specific measures to prevent the spread of Covid-19 did not amount to age discrimination



In March 2020, a state of emergency was declared in the context of the spread of the Covid-19 pandemic, followed by ministerial orders restricting free movement. The state of emergency was abolished by the Decision on the abolition of the state of emergency, on 6 May 2020. After the state of emergency was ended, in May 2020, the Constitutional Court issued a decision declining to examine the constitutionality and legality of the state of emergency, thus also rejecting requests for the suspension of execution of individual acts taken based on the contested decision.

A person born in 1951 argued that the restrictions on free movement specifically imposed on persons of a certain age amounted to age discrimination. The first and second instance courts rejected his claim, concluding that the respondent authorities had, by determining the measure of movement restriction on persons over 65 years of age, justifiably taken into consideration the difference in situations of persons in this age group compared to other persons, notably with regard to vulnerability

to health risks. In February 2024, the Supreme Court confirmed the judgments of the first and second instance courts. [291]

POLICY AND OTHER RELEVANT DEVELOPMENTS

Action Plan for the improvement of the position of persons with disabilities for 2023-2024

Disability

In July 2023, the Action plan for the improvement of the position of persons with disabilities for 2023 to 2024 was adopted. The action plan is divided into one general and three specific aims. The general aim is to equalise the opportunities of persons with disabilities to enjoy all human rights, with full respect for their dignity and individual autonomy, ensuring independence, freedom of choice, and full and effective participation in all areas of life. The three specific aims are to: 1) increase social inclusion of persons with disabilities in all areas of social life; 2) ensure the enjoyment of the rights of persons, including legal capacity, protection of family life and effective protection against discrimination, violence, and abuse; and 3) systemic introduction of the disability perspective in the adoption, implementation and monitoring of public policies.

The adoption of the action plan was preceded by the public consultation process involving stakeholders such as independent institutions and the National Organisation of Persons with Disabilities. The action plan notes an increase in the participation of persons with disabilities in all areas of social life. Its aim is to increase the number of accessible buildings and public institutions by the end of 2024 as well as increasing the numbers of persons with disabilities in public services and increasing support services for independent living. The action plan also insists on measures of active employment and implies more active engagement of the National Employment Service, support to companies for professional rehabilitation and employment of persons with disabilities, design of programmes and measures of the active employment policy, and measures to encourage the employment of persons with disabilities.[292]

Annual report of the Commissioner for the Protection of Equality 2023

All grounds

In March 2023, the Commissioner for the Protection of Equality (CPE) published its annual activity report covering 2023.[293] During this year, the CPE acted on 600 complaints, issued 660 recommendations for measures to achieve equality, and submitted 20 initiatives to change regulations and 32 opinions on draft laws. In addition, one proposal was submitted to the Constitutional Court for the assessment of constitutionality and legality, one mediation was conducted, one misdemeanour and two criminal charges were filed, and twelve public warnings were issued. Finally, the proceedings in two strategic litigation cases are ongoing, and the Commissioner has intervener status in one litigation.

Most complaints were filed due to discrimination based on age (135), then health condition (131), disability (93), national affiliation or ethnic origin (74), gender (57), and marital and family status (41). With regard to the fields of application, complaints concerned recruitment or employment, procedures

291 Serbia, Supreme Court, Decision No. Rev 13281/22 of 29 February 2024.
292 Serbia, Action Plan for the improvement of the position of persons with disabilities for 2023-2024, 19 July 2023, Official Gazette 59/2023.
293 Serbia, Commissioner for the Protection of Equality (2024), Annual report 2023, 15 March 2024.

before public authorities, education or professional training, provision of public services, facilities and areas, and so on.

This year, 53 opinions were issued. Some 32 complaints led to an opinion finding a violation of the provisions of the Law on Prohibition of Discrimination and recommending measures. In 9 cases, no violation was found, but a recommendation for measures to achieve equality was made, while in 12 cases, no violation of rights was established.

Due to the importance of inclusive education as well as investing in the early development of children, many recommendations were sent to all preschool institutions, notably to improve both the enrolment procedures and internal regulations to adapt activities to the needs of children with rare, neurotransmitter disorders or chronic non-communicable diseases. Other recommendations issued concerned existing Roma settlements, equal treatment in the award of scholarships and one-time grants to students, and the removal of discriminatory job advertisements. Finally, recommendations were addressed to the Ministry of Internal Affairs to provide positive action measures for members of national minorities when announcing a public competition for training and employment within the ministry.

The recommendations contained in opinions were acted upon in 84 % of cases, while recommendations for measures for the promotion of equality sent to public authorities were acted upon in 88 % of cases.

Report on citizens' perception of discrimination in Serbia

In December 2023, the Commissioner for the Protection of Equality (CPE) conducted a survey on the perception of discrimination in Serbia, resulting in a report published in April 2024.[294] The survey follows previous surveys of a similar nature and the results show that certain tendencies remain largely constant. Thus, the majority of respondents (70 %) perceive that discrimination is present in Serbia, and that the most common ground is sexual orientation (59 %), followed by political opinion (55 %), financial status and disability (both 54 %). When it comes to areas of life, respondents declared that discrimination is most prevalent in work and employment, education, health and social protection. For example, in the field of work and employment, respondents cited women (68 %), Roma (67 %), persons with disabilities (62 %) and poor people (57 %) as the most discriminated against, while in the field of education, the Roma were cited as the most discriminated against (49 %), followed by poor people (45 %) and persons with disabilities (35 %). Social distance is still very high in relation to many groups, notably migrants and refugees, towards whom almost half of respondents (48 %) have a negative attitude, which represents a significant increase compared to 2019. Many respondents also believe that the media should devote much more attention to the topic of discrimination. Based on the results of the research, the CPE made recommendations relating to the strengthening of institutional mechanisms, the continuous monitoring and research of discrimination,

its frequency in the areas where it occurs and groups that are at increased risk of discrimination. The

294 Serbia, Report on citizens' perception of discrimination in Serbia, 25 April 2024.

CPE further noted that it is particularly important to organise training for the media on non-discriminatory reporting, consistent application of ethical codes and the prohibition of hate speech, etc.

SK Slovakia

CASE LAW

Appeal court confirmation of discrimination due to forced evictions of Roma by municipal authorities

Racial or ethnic origin

In 2014, nine Roma complainants filed a lawsuit claiming that their forced evictions from their homes, under the pretext of waste removal by the city authorities, amounted to a violation of their right to dwelling, human dignity and non-discrimination. They were offered no alternative accommodation after the destruction of their homes, described by the authorities as the disposal of an illegal landfill where 'inadaptable people' had built their dwellings. They consequently became homeless.

In January 2022, the first instance court upheld the lawsuit, ruling that the City of Košice had (1) unjustifiably interfered with the human dignity and the right to privacy of the complainants and (2) committed illegal discrimination due to the ethnicity of the complainants.[295] In line with the lawsuit, the court specifically concluded that the forced evictions amounted to harassment in the provision of public services. The respondent appealed the judgment of the first instance court.

In June 2023, the regional court dismissed the respondent's appeal and fully upheld the reasoning of the first instance court.[296] In addition, the appeal court further noted that:

- As the respondent did not obtain any lawful basis for removing the complainants' dwellings, which they simply considered to be rubbish, it is not possible to examine the proportionality of their intervention which does not meet the requirements of legitimacy and legality.
- The respondent's choice of method in removing the complainants' dwellings undoubtedly interfered with their human dignity by lowering their self-esteem, accentuating their feelings of inferiority and helplessness.
- It was irrelevant whether the complainants were present at the place of residence during the demolition, as it was made clear that they had been satisfying their right of habitation at that place for a long period of time.

The appeal court confirmed the compensation of EUR 1 000 awarded to each complainant. The decision is final.

Supreme Court confirmation that educating Roma children in a segregated primary school constitutes discrimination

Racial or ethnic origin

In 2015, a human rights NGO filed an *actio popularis* lawsuit against the state represented by the Ministry of Education concerning segregation of Roma children in a primary school in a village with a

295 Slovakia, District Court of Košice II, decision No. 15C/190/2014-650 of 21 January 2022.
296 Slovakia, Regional Court of Košice, decision No. 9Co/21/2022 of 28 June 2023.

relatively small, marginalised Roma community. All non-Roma children from the village commuted to bigger schools in other towns, while the Roma children attended a small ethnically homogenous school in the village. Furthermore, to meet the demand of increased capacity in the village school, the municipality built a new building made of metal containers, located very close to the segregated Roma community. The claimant NGO argued that education of Roma children in the new low-cost building constituted segregation and that the Ministry of Education did not take effective measures to prevent it. It requested that the court order the Ministry to produce, and implement, a desegregation plan containing effective measures to remove and prevent segregation.

The district court dismissed the lawsuit in 2020, essentially concluding that the claimant did not prove that the education of Roma children in the school was carried out on the ground of their ethnic origin and failed to establish a *prima facie* case of discrimination.[297] On appeal from the claimant, the regional court fully upheld the judgment of the first instance court.[298]

In July 2023, the Supreme Court reversed the judgments of the lower courts.[299] It ruled that the state, represented by the Ministry of Education, violated the principle of equal treatment by failing to take sufficient preventive measures to protect against and eliminate discrimination. The Supreme Court held that the education of Roma children in a primary school attended solely by Roma children, built near the marginalised Roma community, resulted in their segregation. This conclusion is not affected by the absence of a motive to purposefully discriminate against Roma children, nor by the existence of a legitimate aim to ensure access to education for children closest to their place of residence. According to the Supreme Court, the construction of a modular school close to the local Roma community constituted a disproportionate and inappropriate means of disadvantaging Roma children by *de facto* segregating them. It concluded that neither the lack of space, capacities, nor the legal right of parents to choose a school outside the designated school district for their child, were relevant factors. In addition, the Court emphasised the overall importance of school desegregation efforts for Slovak society. The Court dismissed the claimant's request to submit the case to the Court of Justice of the European Union, finding it redundant.

With regard to the request ordering the respondents to produce and implement a desegregation plan, the Supreme Court returned the case back to the district court for further proceeding. In May 2024, the Municipality Court Bratislava IV issued a first instance ruling on this aspect, fully dismissing this part of the lawsuit.[300] It considered the measure proposed by the claimant, seeking to remove and prevent the segregation at the school in question, to be imprecise, vague and unintelligible, rendering the decision unenforceable. The judgment is not final, and the claimant has lodged an appeal against it. The factual circumstances of this case, as well as the findings of the court, are generally analogous with another case.[301]

297 Slovakia, District Court of Prešov, decision No. 21C/698/2015 of 6 February 2020.
298 Slovakia, Regional Court of Bratislava, decision of 27 October 2021, No. 10Co/84/2020.
299 Slovakia, Supreme Court, judgment No. 5Cdo/220/2022 of 12 July 2023.
300 Slovakia, Municipality Court Bratislava IV, decision of 21 May 2024, No. 35C/28/2023-561.
301 Slovakia, Municipality Court Bratislava IV, decision of 7 May 2024, No. B3- 11C/9/2023 -48. See also, regarding the landmark Supreme Court decision of 15 December 2022, No. 5Cdo/102/2020, *European equality law review 2023*, p. 173.

Racial or ethnic origin

Court ruling on discrimination of Romani child in access to education during the Covid-19 pandemic

The claimant, a Roma girl living in a marginalised Roma community, filed a lawsuit against the state represented by the Ministry of Education. She argued that distance learning, introduced by the Government during the Covid-19 pandemic, was conditioned upon having access to the internet and digital technologies, ownership of computer equipment and computer skills. However, she and her family did not have these, and the Government did not provide them in any way. While it was closed, her school only distributed weekly worksheets with homework to Romani children but provided no support or evaluation of their work. The claimant also pointed to research confirming that many Romani children in Slovakia faced the same disadvantages in access to education.

In November 2023, the district court fully upheld the lawsuit, finding that the respondent had discriminated against the claimant in access to education on the grounds of her ethnic origin, social origin and property, and had also violated her right to access to information.[302] Further, it held that the respondent had failed to take appropriate measures, including the provision of access to the internet and digital technologies, to ensure equal access to education during the interruption of full-time in-person education during the Covid-19 pandemic. The Court ordered the respondent to pay compensation to the claimant in the amount of EUR 3 000.

The Court stated that when taking measures to protect the health and life of the population during the pandemic, the respondent had a duty to mitigate their effects by addressing the inequality of children from marginalised Roma communities. It reproached the respondent for not having taken any temporary compensatory measures to overcome this inequality, even though the legislation allowed it to do so.

This is the first court decision in Slovakia addressing the disadvantages of marginalised Roma communities due to the 'digital divide'. The respondent has lodged an appeal against the decision.

Racial or ethnic origin

Final court ruling on the responsibility of state institutions for segregation of Roma children in education, ordering them to remedy the situation

In 2015, a human rights NGO filed an *actio popularis* lawsuit against the Ministry of Education and the District office in Prešov (since 2023 the Regional Office of School Administration) concerning segregation of Roma children in separate classes in a primary school. The claimant NGO argued that Roma children at the school faced segregation due to the failures of the state authorities to consider the capacities of the school when defining the school catchment areas, and to prevent existing segregation.

In February 2019, the district court dismissed the lawsuit, concluding that the claimant had failed to establish that the disputed decisions on the school catchment areas had violated the principle of equal treatment and disadvantaged Roma children in comparison with majority children.[303] When the first instance decision was upheld on appeal,[304] the claimant filed an extraordinary appeal with the Supreme

302 Slovakia, District Court of Prešov, decision No. 18C 96/2022-254 of 6 November 2023.
303 Slovakia, District Court of Prešov, case No. 29C/14/2016-411, decision of 27 February 2019.
304 Slovakia, Regional Court of Prešov, case No. 16Co/21/2019-483, decision of 20 August 2020.

Court. In March 2023, the Supreme Court quashed the lower instance decisions and remanded the case back to the District Court of Prešov for further proceedings.[305]

The district court, bound by the legal position of the Supreme Court, decided on the case in November 2023 and upheld the lawsuit.[306] It ruled that the respondent state institutions had failed to take into sufficient consideration the capacities of the school itself and of surrounding schools when defining the school catchment areas. The authorities had further failed to create the conditions for the school concerned to provide inclusive education for all children, thus failing to prevent and eliminate existing segregation. The court also found that the solution for desegregation could not be the construction of a new school in a nearby village, as it was assumed that it would lead to further segregation.

The district court ordered the respondents to develop, within six months of the judgment becoming final, a plan of measures leading to the effective elimination and prevention of segregation and to implement that plan within two years. This was the first national court decision ordering the adoption and implementation of a desegregation plan.

The respondents appealed the decision, and in April 2024, the Regional Court in Prešov dismissed the appeal and fully upheld the judgment of the district court.[307] The regional court specifically noted that the Ministry of Education, in the context of the current educational reforms, had announced a commitment to taking measures to promote school desegregation. However, directly in the present court proceedings, it denied responsibility for the unlawful situation and refused to take any measures to prevent the segregation of Roma children in education. In conclusion, the regional court upheld the respondents' obligation to develop, within six months of the judgment becoming final, a plan of measures leading to the effective elimination and prevention of segregation, and their obligation to implement that desegregation plan within two years. The judgment is final and cannot be appealed.

Constitutionality complaint on alleged court misconduct in assessing discriminatory impact of legal provision on Roma women and children

National law stipulates that new mothers who leave the hospital after childbirth without the doctor's approval are not entitled to a birth allowance. In 2010, a human rights NGO filed an *actio popularis* lawsuit against the state, claiming that the disparate impact of the relevant provision on Roma women and children from marginalised communities amounted to indirect discrimination in violation of the Anti-discrimination Act. Based on field research, it pointed out that Roma women tend to leave hospitals after childbirth without the doctor's approval mainly due to different forms of institutional racism in maternity wards. The claimant essentially argued that the relevant provision cannot be objectively justified by the legitimate aim.

The first and second instance courts dismissed the lawsuit[308] and the Supreme Court dismissed the extraordinary appeal of the claimant, specifically noting that 'no custom of any community can override

305 Slovakia, Supreme Court, file No. 4Cdo/112/2021, decision of 28 March 2023.
306 Slovakia, District Court of Prešov, case No. 29C/34/2023-42, decision of 6 November 2023.
307 Slovakia, Regional court of Prešov, decision of 22 April 2024 in case No. 16Co/4/2024-90.
308 Slovakia, District Court Bratislava I, decision of 16 May 2014 in file No. 12C/231/2010–132; and Regional Court of Prešov, decision of 26 September 2017 in file No. 14Co/552/2014–180.

the best interests of the minor child, which is paramount.'[309] Contrary to the lower courts, however, the Supreme Court accepted the possibility of considering this case within the framework of the *actio popularis* claim submitted by the NGO. The claimant filed a constitutional complaint, pointing out deficiencies in the decision making of the general courts and invoking a violation of their right to a fair trial.

The Constitutional Court issued its ruling in April 2024, dismissing the complaint.[310] It ruled that the conclusions of the general courts, i.e. that the measure introduced by the provision in question does not constitute indirect discrimination, are in compliance with the Constitution. The court concluded that the provision pursues the legitimate aim of protecting the health of the mother and child, even more so in the case of mothers from a marginalised environment with low accessibility to health care.

The court noted that eliminating the causes that push marginalised Roma mothers to leave the hospital early, e.g. through community work in Roma communities, would undoubtedly contribute to reducing the prevalence of this practice, but given the urgency of addressing the issue, it found the provision to be necessary.

On a procedural point, the court held that the Supreme Court had lacked jurisdiction to decide on the compatibility of one piece of legislation with another, the Constitution and international law, as the Constitutional Court itself has exclusive jurisdiction in this regard.

First instance court ruling that unjustified use of force by police against Roma amounts to ethnic discrimination

In 2016, six Roma residents from a marginalised community filed a lawsuit under the Anti-Discrimination Act concerning alleged police brutality and verbal attacks with racist undertones during a search operation carried out by police forces in the marginalised community. The Slovak Public Defender of Rights had previously concluded that the police forces used excessive violence during the operation and violated the fundamental rights of the Roma residents. Essentially, the claimants argued that their right to equal treatment was violated as the police operation was conducted based on their Roma ethnicity. In a broader context, the claimants argued that police actions of this nature were also carried out in other localities with a high Roma population.

In April 2024, the Municipal Court Bratislava IV upheld the lawsuit in its key substantive parts, ruling that the state, represented by the Ministry of the Interior, had violated 1) the personal rights of the claimants and 2) the principle of equal treatment, in the form of direct discrimination as well as harassment, based on the claimants' ethnic origin.[311] The court also ruled that the overall practice of police searches at the relevant time was indirectly discriminatory in relation to persons of Roma ethnicity. Based on its facts assessment, the court considered it established that the police officers had used unjustified force in relation to the Roma residents. Reversing the burden of proof, the court essentially concluded that the state produced no relevant evidence to demonstrate that no discrimination had occurred and e.g. only highlighted a general principle of 'zero tolerance' to police brutality.

309 Slovakia, Supreme Court, resolution of 27 October 2022 in file no. 29C/14/2016-411.
310 Slovakia, Constitutional Court, resolution of 22 April 2024 in file no. IV. ÚS 197/2024-19.
311 Slovakia, Municipal Court Bratislava IV, decision of 19 April 2024, No. B1-16C/87/2016-394.

The court also referred to the case *T.K. and others v. Slovakia*,[312] in which the European Court of Human Rights in March 2024 took note of an out-of-court settlement between the Slovak Government and three applicants from the same Roma community who allegedly faced police brutality during the operation in question. The municipal court highlighted that the mere signing of the settlement and the agreement to pay a relatively high amount of non-pecuniary damage, indicated that there is reason to suspect that the police search was not carried out in full compliance with the law.

The court ordered the respondent to pay compensation for non-pecuniary damage in the fully requested amount of EUR 2 000 to each of the six Roma complainants, and to publish an apology to the claimants on its website for a period of one month. The judgment is not final and can be appealed.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Ministry of Education initiates a pilot ethnic primary school with Romani as a teaching language

On 24 June 2024, the Ministry of Education, Research, Development and Youth, the municipality of the village Rakúsy, the University of Prešov and the Association of Schools Teaching the Roma Language signed a memorandum of cooperation on the creation of a pilot Roma ethnic school in the village.[313] The ministry considers the initiative, which is planned to last six years, to be a significant step towards the improvement of Roma ethnic education in Slovakia.[314]

The ministry highlighted that there are approximately 450 000 people of Roma origin in Slovakia, 60 % of whom primarily use the Romani mother tongue at home. However, there are only a few schools in the country where Romani language can be learned and no schools where it is a teaching language. According to the ministry, the pilot project represents a step towards the establishment of the Roma minority as a standard national minority in Slovakia and to contribute to the preservation and development of Roma identity, language, culture and traditions.

Importantly, the ministry particularly stressed that the pilot school will not only enable Roma children to be educated in their mother tongue but will also contribute to the fight against segregation of Roma children in primary education, particularly in territories with high percentages of Roma children. Furthermore, the missing material and staff capacities for the school will be provided as a positive action measure.

Slovenia SI

LEGISLATIVE DEVELOPMENT

Amendments to the electoral rights of persons with disabilities

In February 2024, the National Assembly Elections Act was amended, deleting provisions stipulating that 'the right to vote and to stand for election shall not pertain to a citizen of the Republic of Slovenia who has reached the age of 18 but who, due to mental illness, retardation or disability, has been fully

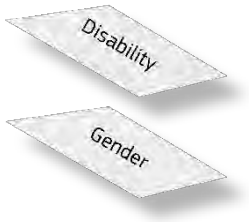
312 European Court of Human Rights, *T.K. and others v. Slovakia,* No. 57085/18, 28 March 2024.
313 The memorandum is available on the website of the Ministry of Education, Research, Development and Youth.
314 Slovakia, Ministry of Education, Press release dated 24 June 2024: 'The Ministry of Education signed a memorandum of cooperation on the creation of a pilot Roma national school in the village of Rakúsy.

deprived of his or her legal capacity or for whom the parental rights of his or her parents or another person have been extended past the age of majority, and is not able to understand the significance, purpose and effects of the elections', and that 'In the procedure for the deprivation of legal capacity or the extension of parental rights past the age of majority, the court shall separately decide on the deprivation of the right to vote and to stand for election'.[315]

Furthermore, the act was also amended so that persons with 'long-term physical, mental, intellectual or sensory impairment' and 'illiterate persons' who are 'unable to vote in the manner provided for in this Act', 'may bring a person of [their] choice to the polling station to assist [them] to do so'.

The amendments have thus restored the right to vote of persons under guardianship who have been deprived of their right to vote by a court. The amendment was enacted so that the persons concerned were able to vote in the 2024 elections to the European Parliament.

CASE LAW



National equality body finds the rules on the evaluation of civil servants to be discriminatory

Article 1 of the Regulation on the promotion of civil servants to salary grades establishes the manner and procedure for verifying the fulfilment of the conditions for promotion of civil servants to a higher salary grade. Civil servants are evaluated once per year, and if they fulfil the prescribed conditions, they are promoted every three years. Article 4(3) of the Regulation specifies that civil servants who have been in service for at least six months in the previous calendar year are to be evaluated. Civil servants who have been absent for more than six months as a result of secondment by their employer or as a result of an occupational injury, occupational disease or parental care (maternity leave) are exempted from the six months requirement. Other civil servants who do not meet this requirement are not evaluated in that year and may therefore be promoted to a higher grade with a delay of at least one year.

In June 2024, the Advocate of the Principle of Equality examined the compliance of the limited set of exemptions from the six months requirement, based on an anonymous petition. In particular, the petition argued that the failure to consider medical conditions or illnesses other than occupational diseases as personal circumstances preventing public servants from meeting the specific requirement, amounted to indirect discrimination. The petition notably compared this situation with that of female civil servants who, although they did not work for more than six months due to maternity leave, were nevertheless evaluated in accordance with the Regulation.

Article 38 of the Protection against Discrimination Act stipulates that the Advocate may submit a legal instrument to the Constitutional Court for constitutional review, but only after having carried out an assessment procedure itself.

For this purpose, the Advocate carried out the relevant investigation, finding notably that the Ministry of Public Administration did not clearly present the specific legitimate aim of the relevant provision, thus failing to justify a possible exception to the prohibition of discrimination. The discrimination was

[315] Slovenia, Act Amending the National Assembly Elections Act - ZVDZ-E, 16 February 2024.

both direct in the sense of excluding civil servants with certain personal circumstances from the exemptions from the condition of having worked for at least six months, as well as indirect, in the sense of maintaining those civil servants at a disadvantage compared with all others because they are unable, by reason of their personal circumstances, to fulfil the condition of having worked for at least six months. In conclusion, therefore, the Advocate considered that the existing provision amounted to direct and indirect discrimination against all civil servants who have been absent from work for more than six months during the year in respect of which they could otherwise have been assessed, as a result of their non-occupational disease or injury, or a disability and a related medical condition, or as a result of parenthood other than caring for a newborn child, or other family care.[316]

The Advocate assessed the Regulation in accordance with the following method developed by the Constitutional Court: if (1) the alleged difference in treatment relates to the provision or exercise of a human right or fundamental freedom, another right, a legal interest or a benefit; and (2) there is a difference in treatment between the petitioner and the person with whom the petitioner is being compared; and (3) the factual situations which the petitioner is comparing are substantially identical, it must be determined whether (4) the distinction constitutes an interference with the right to non-discriminatory treatment which is constitutionally permissible.[317]

Spain

ES

CASE LAW

Spanish Constitutional Court's rulings on violence against women

In April and May 2024, the Spanish Constitutional Court issued rulings related to violence against women.

The first case reached the Constitutional Court through an appeal for protection (*recurso de amparo*) involving workplace sexual harassment.[318] The dean of a faculty had abused three young contract lecturers under his authority for three years. Although initially convicted of three counts of continuous sexual abuse and one of causing injury, his sentence was significantly reduced on appeal. The Court of Appeal (Audiencia Provincial) applied an undue delay mitigation, calculating the delay from the first instance of harassment rather than from the start of legal proceedings. Additionally, the delay in the victims reporting the abuse was used against them.

The Constitutional Court partially accepted the request for protection,[319] considering that the Audiencia Provincial had ignored the gender perspective that Article 49(2) of the Istanbul Convention requires be taken into account in cases of gender violence in order to guarantee an effective procedure. The Constitutional Court criticised the appeal court for neglecting the victims' vulnerable situation and for blaming them for the delay in reporting. It ruled that this approach was not only unreasonable in light

316 Slovenia, Advocate of the Principle of Equality, decision No. 050-2/2023/7 of 27 June 2024.
317 Slovenia, Constitutional Court, Decision No U-I-425/06 of 2 July 2009.
318 Spain, Judgment of the Constitutional Court 48/2024, 8 April 2024, ECLI:ES:TC:2024:48,
319 With solely declaratory effects, since the sentence imposed on appeal, being extremely reduced by the application of the highly qualified mitigating circumstance, had been replaced by a fine and training courses in sexual education, all of which had already been carried out. This sentence, although important from the point of view of arguing the gender perspective in sexual harassment at work, falls short of establishing effective reparation for the victims (which was very much at the centre of the argument).

of Article 24(1) of the Spanish Constitution (right to effective protection), but also violated the prohibition of sex discrimination enshrined in Article 14.

Moreover, the Constitutional Court found that the appeal ruling failed to adequately link the sexual abuses in question with gender violence and the prohibition of discrimination. By neglecting this connection, the ruling overlooked the legal obligations stemming from this prohibition. Citing the European Court of Human Rights' decision in *Vučković v. Croatia*, the Constitutional Court specified the obligation of national courts to adapt criminal consequences to the nature and severity of the abuse, including not allowing sanctions to be excessively lenient. The Constitutional Court concluded that the Audiencia Provincial had incorrectly applied a mitigating circumstance, unjustly attributing delays in the case to the victims' conduct. A dissenting opinion in the ruling explicitly highlighted this approach as reflecting a 'gender bias' in the interpretation and application of the law. Consequently, the Constitutional Court ruled that the decision violated the right to effective judicial protection in relation to the right not to be discriminated against on the basis of sex.

In the second case, the Court resolved an appeal of unconstitutionality by more than 50 parliamentarians from the far-right VOX Party against Organic Law 4/2022, which amends the Criminal Code to penalise the harassment of women accessing clinics for voluntary termination of pregnancy (VTP).[320] In April 2022, the Parliament approved this amendment of the Criminal Code to counter the harassment faced by women and workers entering clinics where VTP is practiced. The harassment generally involves groups gathering outside these clinics to pray,[321] while some members approach women with brochures featuring graphic images, anti-abortion slogans, or plastic dolls that represent foetus models, offering 'advice' against abortion. According to a report from the association of accredited VTP centres,[322] 88 % of the women interviewed reported feeling harassed by these groups, and 66 % felt threatened. There have also been documented cases of women experiencing anxiety attacks due to the images or expressions used by anti-choice individuals, or being physically obstructed from entering the clinic. A 2020 Ombudsman report[323] called for preventive measures to ensure that women can access these clinics without facing violence and harassment.

The 2022 reform has proven to be ineffective in stopping the activities of these increasingly organised groups. Although the harassment is now classified as a crime that can be prosecuted *ex officio* – meaning victims do not need to file a complaint – police and prosecutors rarely take action, and their responses vary widely across regions. This lack of intervention has allowed gatherings and harassment to continue largely unchecked. Additionally, while the reform criminalises 'harassing a woman through annoying, offensive, intimidating, or coercive acts',[324] legal debates often focus on whether specific actions, such as groups praying outside clinics, fit these definitions. The discussion tends to focus on whether the act of praying itself can be seen as 'annoying, offensive, intimidating, or coercive', rather

320 Spain, Judgment of the Constitutional Court 75/2024, 8 May 2024, ECLI:ES:TC:2024:75,

321 Much of this situation is due to the fact that the majority of abortions (up to 84 %) are not performed in public hospitals, but in private clinics dedicated to VTP, where women are easily identifiable.

322 ACAI (Association of Clinics Accredited for VTP) (2018), *Estudio: Percepciones de las mujeres que interrumpen su embarazo frente al hostigamiento de los grupos anti derechos/anti elección en las puertas de los centros acreditados para la IVE* (Report: Perceptions of women who interrupt their pregnancies faced with harassment by anti-rights/anti-choice groups at the doors of accredited centres).

323 Ombudsman (2020), *El Defensor pide a Interior medidas concretas para garantizar la intimidad y la libre circulación de las mujeres que acuden a clínicas IVE* (The Ombudsman requires the Ministry of Home Affairs concrete measures to guarantee the privacy and freedom of movement of women who access clinics VTP), 24 February 2020.

324 Article 172*quater*, para. 1 Criminal Code. Article 172*quater*, para. 2 imposes the same penalties on anyone who harasses the health workers and the staff of the centres.

than assessing whether the overall presence and behaviour of such groups constitute harassment of women and clinic workers.

The Constitutional Court upheld the reform, dismissing the claimants' claims that the definition of harassment is too vague and that prosecuting these acts infringes on the fundamental rights of expression, association, and religious freedom. However, concerns remain about the practical effectiveness of the criminal provision.

Constitutional Court rejects an appeal of unconstitutionality brought against the Comprehensive Law for Equal Treatment and Non-Discrimination

In June 2024, the Constitutional Court ruled on a constitutionality complaint brought by 50 members of Parliament representing the Vox group against Law 15/2022 on equal treatment and non-discrimination.[325]

In addition to some procedural claims, the complaint argued that by imposing a statutory obligation of gender mainstreaming in anti-discrimination policies, Article 4(4) of the law adopts an ideological approach that compromises the neutrality of the state. In this regard, the Constitutional Court found that 'gender mainstreaming' is devoid of any ideological orientation beyond respect for constitutional values such as political pluralism as well as the principle of equal treatment and non-discrimination.

The complaint also challenged Article 9(1) of the law, which regulates that no limitations, segregation or exclusions may be established on the grounds provided for by law (sex, ethnic origin, religion, etc.), for access to public or private employment, in training for employment, professional promotion, working conditions, as well as in the suspension, dismissal or other causes for termination of the employment contract. The complaint also challenged Article 20(2) of the law, which stipulates that providers of real estate services and any other person making an offer available to the public are obliged to respect the right to equal treatment and non-discrimination in their commercial operations. The complaint argued that the former provision as well as the application of the latter provision to private individuals who directly or through specialised websites offer a property for sale or rent, violate the freedom of contract between private individuals.

The Constitutional Court also dismissed these allegations, noting that fundamental rights (including the principle of non-discrimination) are binding not only on public authorities, but also on individuals, insofar as they are made compatible with other values originating ultimately in the principle of free will, manifested through the rights and duties arising from the contractual relationship created by the parties or from the corresponding legal situation. Consequently, the court stated that Articles 2(2) and 4(2) of Law 15/2002, which do not consider as discrimination, differences in treatment derived from a provision, conduct, act, criterion, or practice that can be objectively justified by a legitimate aim and as an appropriate, necessary, and proportionate means to achieve it, ensure such compatibility with regard to private relations.

Finally, the appeal argued that Article 13(2) of the law, which prevents schools from accessing public funding if they exclude groups or individuals on any of the grounds set out in the law, violates the

[325] Spain, Constitutional Court, decision of 5 June 2024, No. 89/2024.

Constitution by infringing the right of parents to choose their children's education, and by discriminating against certain schools (e.g. those that separate pupils by their sex) on ideological grounds. The court also rejected this allegation, establishing that the difference in treatment of the schools that do separate their students by sex is legitimate and 'inspired by constitutional values'. The court insisted that, even if the Constitution allows a pluralist educative model and does not prohibit sex-segregating schools, this does not imply that all educative models should receive public funding.

SE Sweden

Burden of proof, indirect discrimination, and a neutrality policy banning the use of a religious headscarf

The claimant, a Muslim woman, worked as a security host[326] for some time with a company ensuring the security of the Stockholm public transport system. When she informed the company that she had started wearing a headscarf, she was told visible religious symbols were forbidden during working hours due to the company's neutrality policy. She was consequently dismissed and filed a case of alleged discrimination on the grounds of religion or belief and sex.

In 2022, the district court rejected her claims and ordered her to pay the employer's legal costs. The claimant appealed to the Labour Court, requesting that a reference be made to the CJEU for a preliminary ruling.

The employer argued that the aim of the neutrality policy was to ensure the safety of the security hosts, due to daily occurrences of violence, threats and racist remarks. The claimant argued that the protections in place (alarms, mobile phones, etc.) were sufficient to ensure the safety of the hosts, and that there was no research showing that the wearing of visible religious signs leads to an increased risk.

The Labour Court determined that the policy at hand may particularly disadvantage Muslim women who choose to wear a headscarf. It thus went on to examine the proportionality of the policy, considering notably its main purpose of decreasing the risk that workers be subjected to threats and violence in their work environment. The Court noted that, while ensuring a safe working environment constitutes a legitimate purpose, the employer must also demonstrate a 'genuine need' for the policy at hand. In this regard, the Court noted that 'no more can be required' from the employer than to demonstrate that a risk assessment has been based on 'serious considerations, which do not appear to be unjustified, arbitrary or based on undue consideration.' Thus, the Court held that the policy was appropriate and necessary and did not amount to indirect discrimination. The Court did not examine the issues of sex discrimination or intersectional discrimination, nor the issue of freedom of religion. Finally, the Court rejected the request to refer the case to the CJEU as there was, according to the Court, no uncertainty concerning EU law raised by the case.[327]

In a dissenting opinion, one judge concluded that the claimant had been subjected to indirect discrimination, stating notably that the employer was not able to demonstrate that the ban on wearing

326 Security hosts perform certain tasks to ensure the security and general positive atmosphere in public transport. Their tasks imply less conflictual/threatening situations than those of security guards.
327 Sweden, Labour Court, judgment No. 71/23 of 13 December 2023 in case No. B 50/22.

the veil was justified by any such 'concrete risk of threats and violence in the work environment' that may outweigh her interests

Türkiye TR

CASE LAW

Constitutional Court fails to address potential discrimination by association on the ground of disability

The case was initiated by an applicant whose father has a disability and who claims that her employer had infringed upon her right to the preservation of family life and to equality by disregarding her request to remain at her current place of employment or be reassigned to a nearby location for the purpose of caring for her father. She further alleged that the requests of other employees with similar justifications had been granted.

The Constitutional Court conducted a brief and superficial examination of the case, focusing solely on the right to respect for family life. In this regard, it noted that the employer (the customs authority) had failed to evaluate the available staffing opportunities and service requirements at the applicant's current workplace or in the neighbouring administrations, as required by the law, without providing any explanation. Thus, the applicant was unfairly burdened without having her request evaluated in accordance with the legislation. The Court further noted that the Court of Appeal failed to ensure a fair balance between the public interest served by the assignment and the applicant's right to respect for family life. It was thus determined that the employer had failed to meet the positive requirements associated with the right to respect for family life in the disputed matter.
Thus, the Court missed the opportunity to assess the case in the context of equality in general and with regard to potential discrimination by association in particular.[328]

Landmark ruling: systematic domestic violence may now be recognised as torment similar to torture

A Turkish woman, X, endured severe physical and psychological abuse from her husband for 20 months, starting from their marriage on 15 August 2009, until 19 March 2010. After suffering through this mistreatment, X divorced her husband in 2012. That same year, X's lawyer filed a criminal complaint in Istanbul, seeking to charge her ex-husband with the crime of 'torment' under Article 96 of the Turkish Penal Code. The case file included statements from seven witnesses and photographs of the claimant. A forensic report dated 26 April 2012, noted multiple scar tissue on both of the claimant's arms, possibly caused by contact with a hot object. In 2014 and 2015, forensic reports revealed DNA profiles of both parties on items such as belts, chains, and bracelets, which the claimant said were used by the defendant to tie up and torture her. Additional old scars around both ankles were observed, which might have been caused by a belt or adhesive tape, though other causes were also considered. The report also mentioned old scars with smooth edges on the left arm and one on the lower lip. Moreover, a health board report dated 11 May 2012, from the Istanbul Erenkoy Mental and Neurological Diseases Training and Research Hospital diagnosed the claimant with post-traumatic stress disorder due to the

[328] Türkiye, Constitutional Court, judgment of 10 January 2024, *Fatma Deniz Uzuncukoğlu*, B. No. 2021/59520.

events she experienced, resulting in a deterioration of her mental health. Despite this evidence, during the trial in 2016 at the Anatolian 36th Criminal Court of First Instance, the defendant was prosecuted but acquitted on the grounds of insufficient evidence to support the charge of torment. X's lawyers have since appealed the decision.

The Court of Cassation unanimously overturned the decision of the Anatolian 36th Criminal Court of First Instance on 18 January 2024.[329] The appeal court directed that the case be reopened and that a conviction be issued. The ruling emphasised that Article 96 of the Turkish Penal Code stipulates that 'any person who performs any act which results in the torment of another person …'. However, the Code does not provide a specific definition of what constitutes torment. The preamble to the article clarifies that

> 'torment involves acts that are incompatible with human dignity and cause physical or mental pain or humiliation to a person. These acts may also be considered intentional injury, insult, threat, or sexual harassment. However, they are not committed suddenly, but systematically over a period of time. The characteristic of torment, which is carried out continuously over a process, is that it has destructive effects on the person's psychological state and mental health, similar to torture. The fact that these effects may last for a long time, or even a lifetime, has led to the imposition of more severe penalties for such acts of torture'.

After evaluating all the evidence, it was determined that the actions against the claimant – who bears numerous old scars and has experienced a deterioration in mental health due to these events – constitute the crime of torment against a spouse, systematically perpetrated over a period of time. Therefore, the decision to acquit the defendant, rather than convicting him of the charged crime, was deemed unlawful.

Although many crimes in the Turkish Penal Code – such as intentional injury, ill-treatment, offences against sexual integrity, offences against liberty, disturbing an individual's peace and harmony, offences against dignity, and offences against privacy and confidentiality – have been applied to domestic violence, Article 96, which addresses the crime of torment, enacted in 2005, had not been applied by the judiciary in domestic violence cases. According to Article 96, tormenting another person is punishable by imprisonment for two to five years. If the torment is committed against a child, a person physically or mentally incapable of self-defence, a pregnant woman, a direct ascendant, a direct descendant, an adoptive parent, or a spouse, the term of imprisonment increases to three to eight years. The decision by the Court of Cassation represents the first significant application of Article 96 in the context of domestic violence. The women's movement has long advocated for recognising the crime of 'torment' under Article 96 because it defines acts of violence that are systematic and continuous, aligning closely with domestic violence crimes and attracting harsher penalties. Recognising domestic violence that meets a certain severity threshold as torment would acknowledge it as one of the most serious human rights violations, elevating it to a critical issue on the national agenda and demanding urgent action from the state.

While this decision sets a significant precedent for recognising domestic violence as a serious human rights violation, criminal court rulings in Türkiye, such as the one from the Anatolian 36th Criminal

[329] Türkiye, Court of Cassation 8th Chamber 2021/8812 E., 2024/504 K., 18 January 2024 T.

Court of First Instance, have so far disappointed survivors of domestic violence. Additionally, undue delays in court decisions in Türkiye undermine the right to a fair trial, guaranteed under the Turkish Constitution and international instruments.

Allegedly discriminatory rules on exemption from mandatory religious education

The applicant is an elementary school student whose request for an exemption from the Religious Culture and Ethics (RCE) course, was denied. The applicant claimed that the content of the course focuses intensely on the views of one denomination of a particular religion, and that it would be impossible to cover all religious and philosophical beliefs with the same intensity. The course should thus be removed from the compulsory curriculum and organised as an elective course, or otherwise appropriate exemption procedures should be introduced instead of the current procedure which only grants an exemption to persons following the religions of either Christianity or Judaism. The applicant further argued that the current exemption procedure was contrary to the right not to be forced to declare religious beliefs, and that they had been subjected to discrimination.

The Human Rights and Equality Institution examined the case but disregarded the principles set out in relevant ECtHR judgments and stated that both the compulsory nature of the course and the exemption procedure in place are in accordance with the Constitution. The Institution thus concluded that it was not possible to exempt the applicant from the course, regardless of the content of the curriculum, in accordance with the Constitution, and therefore there was no violation of the prohibition of discrimination in terms of the applicant's equal enjoyment of the right to education on the basis of their religion and belief compared to other persons.[330]

POLICY AND OTHER RELEVANT DEVELOPMENTS

Lack of anti-discrimination measures in the 12th Development Plan

On 31 October 2023, the Grand National Assembly adopted the 12th Development Plan, which will cover the period 2024 to 2028.[331]

The following are the guiding principles of the plan:

- Strengthening the rule of law, democracy, fundamental rights and freedoms
- Reinforcing and institutionalising the understanding of good governance
- Strengthening the family, human and social structure
- Disaster-resilient habitats and civilization-based, smart, sustainable cities
- Stability and sustainability in the macro economy
- Green and digital transformation-oriented competitiveness in all areas
- Productivity-based, industry and export-oriented qualitative growth

[330] Türkiye, Human Rights and Equality Institution of Türkiye, Decision No. 2022/1825 of 19 April 2024.
[331] Türkiye, Twelfth Development Plan (2024-2028), Official Gazette of 1 November 2023.

- Active industrial policies, technology-oriented structural transformation in manufacturing industry, sectoral prioritisation
- Security of supply and self-sufficiency in energy and food
- Strengthening international cooperation and strategic partnerships.

While the plan claims to focus on enhancing the rule of law, democracy, and fundamental rights and freedoms, it pays only minimal attention to human rights in general, and to non-discrimination and equality in particular. It only mentions briefly that 'the fight against discrimination and hatred will be strengthened. Monitoring and audit mechanisms in the field of combating discrimination and hatred will be reinforced.' While the plan focuses specifically on discrimination in the context of 'Turks living abroad', it does not raise the issue of disadvantaged groups who have historically faced discrimination in Türkiye, except for general, vague references to women and older persons. Despite the existence of a distinct section dedicated to persons with disabilities, the plan focuses only on services available to them and fails to consider the broader concept of discrimination. Considering the outputs of the previous development plans, it is not likely that the new document will lead to a change in the current situation of discrimination in Türkiye and contribute to the elimination of discriminatory practices.

GB United Kingdom

LEGISLATIVE DEVELOPMENTS

Carers leave

The Carer's Leave Act 2023[332] received royal assent in May 2023. It creates a new right for employees to take unpaid leave to provide or arrange care for a dependant with a long-term care need. The leave entitlement will be at least 1 week every 12 months. Secondary legislation is required to set out how the entitlement will work and there is not yet a clear timetable for this.

Prior to this legislation, employees had only a limited right to take unpaid time off to arrange care for a dependent in an emergency ('dependents leave.') Under the Carer's Leave Act, employees will have a new and additional right to take unpaid leave to arrange or provide care for dependents with long-term care needs ('long-term care need' is yet to be defined.) It will be a day one right. The length of leave and the form in which it can be taken will be set out in secondary legislation but the Act provides that the entitlement should be to no less than 1 week in every 12 month period.

Protection from redundancy

The Protection from Redundancy (Pregnancy and Family Leave Act) 2023 came into force in July 2023.[333] It extends protections from redundancy for those who are pregnant or are returning from maternity, adoption or shared parental leave. It will require secondary legislation to set out the detail of the entitlement. There is currently no clear timetable for this.

[332] United Kingdom, Carer's Leave Act 2023.
[333] United Kingdom, Protection from Redundancy (Pregnancy and Family Leave) Act 2023.

Existing legislation provides that those on maternity leave, shared parental leave or adoption leave have a right to be offered a suitable alternative vacancy, if one exists, before being made redundant in priority to other redundant employees. The Act extends this protection to employees who are pregnant and in a 'protected period' of pregnancy, employees who have recently miscarried, and employees who have recently returned from maternity, shared parental or adoption leave. The Act does not specify the detail of the right – it will be for the secondary legislation to set out important detail including the length of protection on return from leave and when the 'protected period' of pregnancy will begin and end.

Changes to the statutory right to request flexible working

The Employment Relations (Flexible Working) Act 2023[334] received royal assent in August 2023 and has made some changes to the existing right to request flexible working, which are likely to come into effect in 2024.[335]

The key changes introduced by the legislation are as follows:

- employees will be able to make two requests to work flexibly within a twelve-month period: previously they had been entitled to make only one request each year;
- employers will be required to respond to requests within two months (it was previously three);
- employers will be required to consult with the requesting employee before rejecting a request to work flexibly; and
- employees will no longer be obliged to explain, when making a request, the likely impact of granting their request on the business.

The Government has also indicated that it intends to make the right to request flexible working a day one right in 2024, but as there is no provision for it to do so in the Act this will require new legislation.

Changes to law on sexual harassment in the workplace

The Worker Protection (Amendment of Equality Act 2010) Act 2023[336] has received royal assent and will come into force in 2024.[337] It makes a number of amendments to the Equality Act 2010 in relation to sexual harassment in the workplace.[338]

The Act introduces a statutory duty on employers to take reasonable steps to prevent sexual harassment of employees in the workplace.[339] Under the Equality Act 2010, it is already the case that employers can avoid liability for individual claims of sexual harassment, perpetrated against one employee by another in the course of their employment, but only if they can show that they took all

334 United Kingdom, Employment Relations (Flexible Working) Act 2023.
335 United Kingdom, Employment Relations (Flexible Working) Act 2023.
336 United Kingdom, Worker Protection (Amendment of Equality Act 2010) Act 2023.
337 United Kingdom, Worker Protection (Amendment of Equality Act 2010) Act 2023.
338 United Kingdom, Equality Act 2010.
339 United Kingdom, Worker Protection (Amendment of Equality Act 2010) Act, 31 October 2023, new Section 40A.

reasonable steps to prevent it.[340] However, the addition of this new statutory duty strengthens protection from sexual harassment in two important respects:

- The new statutory duty is enforceable by the Equality and Human Rights Commission.
- Employment Tribunals will now have the power to uplift compensation by 25 % for individual litigants who are successful in claims of sexual harassment in the employment tribunal, where employers have failed to comply with the new statutory duty.

Amendments to the Equality Act to retain the interpretive effects of EU law

In December 2023, amendments were made to the Equality Act 2010, with the aim of reproducing in UK law certain interpretive effects of retained EU equality law that would otherwise be lost due to the Retained EU Law (Revocation and Reform) Act 2023.[341]

The relevant amendments include the following:

- *Definition of disability:*
  A new provision is added, stipulating that, in relation to specified provisions of the Act relating to employment and occupation, provisions of the Act defining disability by reference to a person's ability to carry out normal day-to-day activities must be read as including a person's ability to participate fully and effectively in working life on an equal basis with other workers.[342] The provision reproduces the effect of relevant case law of the Court of Justice of the EU, notably the cases of *Chacón Navas* (C-13/05) and *HK Danmark (Ring and Skouboe Werge)* (C-355/11).

- *Discriminatory statements about recruitment:*
  Another new provision is added, stipulating that a general discriminatory statement made in connection with a relevant recruitment decision may constitute direct discrimination, even if there is no active recruitment exercise and no identifiable victim. This provision (Section 60A) reproduces the principle deriving notably from the CJEU case law in the case of *Associazione Avvocatura per i diritti LGBTI* (C-507/18).

- *Indirect associative discrimination:*
  A new provision is also added to reproduce the principle established in the case of *CHEZ Razpredelenie Bulgaria* (C-83/14) that a person without a relevant protected characteristic is indirectly discriminated against where they suffer alongside persons with a relevant protected characteristic from a particular disadvantage arising from a discriminatory provision, criterion or practice (Section 19A, Equality Act 2010).

Other provisions of these Regulations relate to aspects of sex discrimination and equal pay.

340 United Kingdom, Equality Act 2010, Section 109.
341 United Kingdom, Equality Act 2010 (Amendment) Regulations 2023, of 19 December 2023, entry into force 1 January 2024.
342 United Kingdom, Equality Act 2010, Schedule 1 (5A).

CASE LAW

No requirement of formal diagnosis to benefit from protection against disability discrimination

Disability

The claimant argued claimed that he was discriminated against on the basis of mental health conditions of generalised anxiety disorder and obsessive-compulsive disorder, although he had not received any formal medical diagnosis confirming such disorders. The Court of Appeal (Northern Ireland) found, however, that the claimant was to be considered as having a disability for the purposes of the Disability Discrimination Act 1995, concluding that consideration should be given to the actual impairment of the employee and its effect, rather than whether there was a formal medical diagnosis. Considering the complexity and length of the process of obtaining a medical diagnosis, the case provides clarity that the duty to provide reasonable accommodation arises once there is a relevant impairment in the ability to carry out day-to-day activities, without the need to provide a formal medical diagnosis.[343]

Alleged religious discrimination by a theatre against an actor regarding a role

Religion or belief

The claimant was cast in a theatre production of a play which is in part about a physical lesbian relationship involving the character to be played by the claimant. The claimant is a Christian who had, in 2014, posted homophobic comments on social media. After it was announced that the claimant had been cast in the role, her old comments were shared again, leading to a social media storm, including criticism of the claimant and the theatre with regard to the casting. As a result, the theatre and the claimant's agent both terminated their respective contracts with the claimant, although she was told that she would be paid in full. The claimant brought claims of discrimination and harassment on the ground of religion and belief, as well as breach of contract. Shortly before the Employment Tribunal hearing, at which stage she had read the playscript, the claimant said she would never in fact have played the part and would have resigned from the role in due course.

The claimant's discrimination claims were rejected on the basis that the contract was not terminated because of religion or belief, but because of the adverse publicity and its effect on the commercial success of the production. This decision was upheld on appeal by the Employment Appeal Tribunal. In relation to the harassment claim, the claimant argued that any infringement of the ECHR would violate her dignity and so meet the Equality Act definition of harassment as it refers to 'violating' dignity. The Employment Appeal Tribunal did not accept the claim. For behaviour to 'violate' dignity, it must involve a significant infringement of dignity. Being dropped from playing a role that the claimant accepted she did not want to play did not amount to a 'violation' of dignity.[344]

Legislation criminalising residence in vehicles is found to discriminate against Roma and Travellers

Racial or ethnic origin

The Police Crime Sentencing and Courts Act 2022 created a new criminal offence of residing on land in or with a vehicle, without the consent of the occupier of the land. The police can seize and remove

[343] United Kingdom, Court of Appeal (Northern Ireland), judgment of 20 December 2023, *Peter Kelly v. 1. Department for communities 2. Department of finance*, TRE12372.

[344] United Kingdom, Employment Appeals Tribunal, judgment of 6 March 2024, *Seyi Omooba v Global artists and Leicester Theatre Trust ltd* [2024] EAT 30.

property that appears to belong to a person suspected of having committed the new offence and can ban them from an area for up to 12 months.

In May 2024, the High Court ruled on the compatibility of the relevant provision with the European Convention of Human Rights, finding it to be incompatible with Article 14 read in conjunction with Article 8. The High Court held that the possibility of banning persons from an area for 12 months placed a disproportionate burden on Gypsies and Travellers. Other claims related to alleged forms of race discrimination were not upheld.[345]

[345] United Kingdom, High Court of England and Wales, judgment of 14 May 2024, *Smith v Secretary of State for the Home Department* [2024] EWHC 1137 (Admin).

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