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Introduction on the state of play

This is the 10th issue of the biannual European equality law review, produced by the European network of legal experts in gender equality and non-discrimination (EELN). This issue provides an overview of legal and policy developments across Europe and, as far as possible, reflects the state of affairs from 1 July to 31 December 2019. The aim of the EELN is to provide the European Commission and the general public with independent information regarding gender equality and non-discrimination law and, more specifically, the transposition and implementation of the EU equality and non-discrimination directives.

In this issue

This issue opens with four in-depth analytical articles. The first article, by Emma Lantschner, associate professor at the Centre for Southeast European Studies, University of Graz, examines the equality bodies' strategic use of powers to enforce discrimination law, comparing legislation and practice in Belgium, Finland and Sweden. The second article, by the gender equality expert for France, Marie Mercat-Bruns, surveys the state of affairs of the EU collective redress package, focusing on France, Romania and Norway. The third article, by Vera Pavlou, gender equality expert for Cyprus, looks at the legal and practical obstacles faced by domestic workers concerning equality at work. The final article is by Kim Baker from the University of Stirling and Olga Juraz from the Open University law school, and looks at online violence against women as an obstacle to gender equality, providing a critical view from a European perspective.

Recent developments at the European level[1]

From January to April 2019, the European Commission held a public consultation to gather information, views and experiences from a broad range of stakeholders[2] on the functioning and implementation of the 'equal pay' principle. Respondents were invited to provide their opinion on the different aspects of the implementation of the EU legal framework on equal pay, including the Gender Equality Recast Directive and the Commission Pay Transparency Recommendation, and more specifically on pay transparency and enforcement measures, as well as on the protection of victims of gender pay discrimination. In July 2019, a summary report of the findings was published, which showed that 44 % of respondents feel that men and women are not paid equally for the same work or work of equal value in their countries, whilst 23 % of respondents believe that men and women are paid equally. The lack of dissuasive penalties imposed on employers, lack of awareness among employees about equal pay rules and the lack of job evaluation systems and their effective application were identified as the main obstacles to effective implementation of the principle of equal pay for women and men. Most respondents were of the opinion that greater pay transparency contributes to reducing the gender pay gap. The results of this consultation were fed into the European Commission's evaluation of the EU legal framework on equal pay.[3]

1 This section, like the rest of this issue of the European equality law review, covers the period from 1 July to 31 December 2019.

2 Stakeholders included public authorities and administrations, professional and business associations, trade unions and trade union associations, companies, women's associations, national equality bodies, labour inspectorates, other national bodies, citizens, civil society and non-governmental organisations, academics and research funding and performing organisations, including universities.

3 European Commission (2019), 'Evaluation of the EU legal framework on "equal pay for equal work or work of equal value" – public consultation', July 2019, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1839-Evaluation-of-the-provisions-in-the-Directive-2006-54-EC-implementing-the-Treaty-principle-on-equal-pay-/public-consultation.

On 28 October 2019, *Special Eurobarometer 493* on discrimination (including against LGBTI people) in the EU was published. The survey was carried out in May 2019, and shows EU citizens' perceptions, attitudes and opinions of discrimination based on ethnic origin, skin colour, gender, age, disability, religion and belief. The survey shows that in general, fewer EU citizens than in 2015 currently perceive discrimination as being widespread in their country. However, these results vary widely depending on the ground of discrimination and Member State. The respondents identified being Roma as the most common ground for widespread discrimination (61 %), followed by discrimination on the basis of ethnic origin and skin colour (both 59 %), transgender (48 %), religion or belief (47 %), disability (44 %), age (40 %), intersex (39 %), and finally, gender (35 %).[4]

In October 2019, the European Commission exceeded the targeted gender balance in middle and senior management positions, which had been set at 40 % by (former) President Jean-Claude Juncker at the beginning of his mandate in 2014. Female managers at all levels stood at 41 % in October 2019 compared to 30 % in 2014, which is an increase of 37 %. The proportion of female managers at other levels is even higher at 42 %. These figures place the Commission among the public administrations around the world with the highest share of women in leadership positions.[5]

On 27 November 2019, a large majority of members of the European Parliament voted in favour of the new European Commission proposed by Ursula von der Leyen based on the political guidelines for 2019-2024 presented by her earlier that year.[6] For the first time in the EU's history, the new Commission reached near gender balance, consisting of 13 female and 14 male commissioners led by a female president. The political and structural changes brought by the appointment of the new Commission are significant for the work of the European network of legal experts in gender equality and non-discrimination in a number of ways. First, the post of Commissioner for Equality was created, and Helena Dalli was appointed to this role. Reporting to Věra Jourová, vice-president for Values and Transparency, the new Commissioner is supported by an inter-disciplinary task force composed of qualified staff from different relevant Directorate-Generals. In addition, Margaritis Schinas, vice-president for Promoting our European Way of Life, will lead a new team responsible for the fight against antisemitism.

The responsibilities of the new Commissioner for Equality include:
- Strengthening Europe's commitment to inclusion and equality in all its senses, irrespective of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
- Leading the fight against discrimination and developing EU anti-discrimination legislation.
- Leading on the EU implementation of the United Nations Convention on the Rights of Persons with Disabilities. In addition, disability will be mainstreamed in all EU policies.
- Developing a European gender strategy to address barriers for women, including gender mainstreaming and advocating equality at work with binding pay transparency.
- Ensuring the full implementation of the Work-Life Balance Directive.
- Progressing the Women on Boards Directive together with Member States and working to advance the empowerment of women and girls.
- Stepping up the EU's response to gender-based violence and better support and protection for victims, including minimum standards to define certain types of violence and strengthening the Victims Directive.
- Exploring the addition of 'violence against women' to the list of EU crimes, while supporting EU accession to the Istanbul Convention.

4 European Commission (2019) *Discrimination in the European Union, Special Eurobarometer 493*, September 2019, Brussels, available at: https://data.europa.eu/euodp/en/data/dataset/S2251_91_4_493_ENG.

5 European Commission (2019) 'Women in management: Juncker Commission exceeds its 40 % target', 22 October 2019, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6139.

6 Von der Leyen, U. (2019), 'A Union that strives for more: My agenda for Europe – Political guidelines for the next European Commission 2019-2024', available at: https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf.

Other developments at European level during the reporting period include the high level conference on advancing LGBTI equality in the EU, which was held in September 2019 in Brussels.[7] The event brought together more than 400 participants to take stock of achievements so far and to discuss ways of advancing LGBTI equality in the years to come. One of the key outcomes was a general agreement among participants on the need for a European Commission strategy to advance LGBTI equality.

In respect of the currently pending infringement proceedings against different EU Member States in relation to the prohibition of discrimination against Roma in education, the Commission sent a reasoned opinion to Slovakia on 10 October 2019. The Commission noted that a disproportionate number of Roma children are placed in special schools or classes for children with mental disabilities in Slovakia and that there are also different forms of marginalisation in mainstream education, such as placing Roma children in separate Roma-only classes or in Roma-only schools. Although Slovakia has taken a number of measures to tackle this issue since the letter of formal notice was sent in April 2015, the Commission concluded that these measures are not sufficient to resolve the problem. After 'carefully assessing the measures and monitoring the situation on the ground', the Commission found that school discrimination on grounds of ethnic origin remains a serious issue. Slovakia had two months to respond and take relevant action to prevent the Commission from referring the matter to the Court of Justice of the EU.[8]

Last but not least, a number of events marked the 10th anniversary, on 1 December 2019, of the EU Charter of Fundamental Rights becoming legally binding. Thus, the European Commission, together with the Finnish Presidency of the Council of the EU and the Agency for Fundamental Rights (FRA), held a conference on 12 November to explore ways of improving the use and awareness of the Charter, to bring it to life for citizens in the EU.[9] In addition, FRA published a paper on the views of civil society organisations and national human rights institutions on the application of the Charter 10 years after it became legally binding, and on whether its full potential is being realised at national level.[10] The general conclusion is that more can and needs to be done to promote the active use of the Charter.

Network publications and activities

On 29 November 2019, the network held its annual legal seminar in Brussels, including a highly appreciated keynote address delivered by Sacha Prechal, judge at the Court of Justice of the EU. As in previous years, thematic workshops were held on the issues covered by the thematic reports published that year by the network and addressed in selected articles from the European equality law review.

In addition, the network published three thematic reports during the reporting period. The first report, by Susanne Burri, senior expert on gender equality law, provides an updated overview of national cases and good practice on equal pay between women and men in the 28 EU Member States and the EEA countries. Secondly, a thematic report by Colm O'Cinneide and Kimberly Liu, both of University College London, presented and analysed the case law of the Court of Justice of the EU since 2012 in relation to the Racial Equality and Employment Equality Directives. Finally, Christopher McCrudden, senior expert of the European network of legal experts in gender equality and non-discrimination, produced a report focusing on gender-based positive action in employment in Europe by making a comparative analysis of legal and

7 Conference: Advancing LGBTI Equality in the EU: 2020 and beyond, 23-24 September 2019. Conference report available at: https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/final_report_advancing_lgbti_equality_in_the_eu_conference.pdf.

8 European Commission (2019), Infringement package October 2019, Key decisions (INF/19/5950), available at: https://ec.europa.eu/commission/presscorner/detail/en/INF_19_5950.

9 European Commission and EU Agency for Fundamental Rights (2019), 'EU Charter of Fundamental Rights marks its 10th anniversary', press release 11 November 2019, available at: https://fra.europa.eu/sites/default/files/fra_uploads/20191111_ip_10thanniversarycharter_jcj_validated.pdf.

10 EU Agency for Fundamental Rights (2019), 'The EU Charter of Fundamental Rights on its 10th anniversary: Views of civil society and national human rights institutions', available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-eu-charter-use-cso-nhri_en.pdf.

policy approaches in the EU and EEA. Furthermore, Lilla Farkas, the senior expert on racial and ethnic origin for the network, is authoring a thematic report with Dezideriu Gergely, independent researcher and former executive director of the European Roma Rights Centre, exploring the issue of racial discrimination in education with a particular focus on the segregation of Roma children. In addition to these thematic reports, the network also published its annual comparative analyses of non-discrimination law in Europe 2019 and gender equality law in Europe 2019, as well as two issues of the European equality law review.

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

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* Please note that the previous non-discrimination expert for the Netherlands, Titia Loenen, contributed to this issue.

Strategic litigation: equality bodies' strategic use of powers to enforce discrimination law

Emma Lantschner*

Definition/Introduction

Strategic litigation is generally understood as selecting suitable cases and bringing them to court, the outcome of which should have broader impact and go beyond the individual case.[1] As such, it is one of several tools of rights advocacy and a catalyst of social change.[2] It has also been described as a form of political participation.[3] While in general such broader impact is exactly what is aimed for, cases can result in being strategic also in the sense that they change 'the behaviour of defendants (and others like them) in ways those defendants, and often the judges and many others, would not have imagined possible before the case was brought.'[4]

In the context of equality bodies, this can mean, firstly, that, when they have litigation powers, they strategically use these powers before courts or quasi-judicial bodies. Secondly, it can also mean that, where they have the power to take legally binding decisions (so-called tribunal-type equality bodies) and start proceedings before themselves *ex officio*, they use this power in a strategic manner. The present contribution will focus on the first possible meaning (closely examining the examples of the equality bodies of Belgium, Finland and Sweden) because there are only a very few equality bodies that fit the above conditions for the second possible meaning.[5] Furthermore, the power to start *ex officio* proceedings has been used only rarely. An exception to this is probably the Romanian National Council for Combating Discrimination (NCCD) which starts around 10-15 cases per year *ex officio*.[6] The role played by NCCD was also remarkable in the *Coman* case,[7] in which it submitted an *amicus curiae* (as a consequence of

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1 Duffy, H. (2018), *Strategic Human Rights Litigation: Understanding and Maximising Impact*, Hart Publishing, p. 3.

2 Navanethem Pillay, Former UN High Commissioner for Human Rights, in the Foreword to OSJI (2018), *Strategic Litigation Impacts: Insights from Global Experience*, available at: https://www.justiceinitiative.org/uploads/fd7809e2-bd2b-4f5b-964f-522c7c70e747/strategic-litigation-impacts-insights-20181023.pdf.

3 Fuchs, G. (2019), 'Was ist strategische Prozessführung', in A. Graser and C. Helmrich (eds.), *Strategic Litigation. Begriff und Praxis*, Nomos, pp. 43-52, at 43.

4 Weiss, A. (2019), 'The Essence of Strategic Litigation', in A. Graser and C. Helmrich (eds.), *Strategic Litigation. Begriff und Praxis*, Nomos, pp. 27-30, at 27, making the example of *Brown v Board of Education of Topeka,* 347 U.S. 483 (1954).

5 See, for instance, the Bulgarian Commission for Protection against Discrimination; the Hungarian Equal Treatment Authority; the Lithuanian Office of the Equal Opportunity Ombudsperson or the Romanian National Council for Combating Discrimination.

6 One of those cases regarded, for instance, the failure of local authorities to ensure the necessary conditions for persons with mobility disabilities to use local transportation. See Lantschner, E. (2019), *Reflexive Governance in the Enforcement and Promotion of the Right to Equality and Non-Discrimination. Relevance for the EU Enlargement Context and Beyond*, habilitation submitted at Graz University, pp. 355-358.

7 Judgment of 5 June 2018, *Relu Adrian Coman and Others v Ispectoratul General pentru Imigrări and Minsterul Afacerlilor Interne,* C-673/16, EU:C:2018:385. The case can be seen as a strategic litigation case supported by the NGO *Asociația Accept*. See Lantschner (2019), pp. 179-181.

the *amicus curiae* duty set out in imperative terms by Romanian legislation),[8] both before the Romanian Constitutional Court as well as before the European Court of Justice. Its intervention in this case certainly contributed to further develop equality legislation.[9]

Focusing on the use of litigation powers by equality bodies before courts or quasi-judicial bodies therefore means that the possibility to act strategically depends first and foremost on how the individual Member States have transposed the minimum requirements foreseen in the norms of the Racial Equality Directive[10] and the Gender Equality Directives[11] regarding the legal standing of equality bodies. It has been pointed out that EU legislation provides only limited guidance in this respect, as the transposition of the requirement for equality bodies to provide 'independent assistance to victims of discrimination in pursuing their complaints about discrimination' has seen great variation, depending also on the legal traditions and national procedural law.[12] While some Member States have established equality bodies with powers ranging from representing victims of discrimination, to intervening in support of a party or filing an *amicus curiae*, and bringing a claim in the equality body's own name,[13] other bodies have only some of these powers or can only provide general information as to the non-discrimination legal framework and direct victims to other bodies who could support them before the court.[14] The issue of strategic litigation is therefore of relevance only for those equality bodies who have been equipped with litigation competences in the first place.[15] Even where the equality bodies have been assigned such competences by law, they have used them at varying degrees. While some equality bodies have very actively used their powers before courts, others have done so only sparingly or not at all.

Two documents issued in recent years stand out when it comes to specifying what the purpose of strategic litigation in the field of equality is and which procedural means should be taken into consideration by Member States to allow equality bodies to act before courts, generally and strategically. These two documents are ECRI's General Policy Recommendation (GPR) No. 2 on Equality Bodies, revised on 7 December 2017,[16] and the European Commission's Recommendation on standards for equality bodies, of 2018.[17]

While the original version of ECRI's GPR No. 2 did not distinguish between functions that *should* be assigned to equality bodies and functions that *may* be assigned to them, such a differentiation is made by the revised version. In Paragraph 10(b) it lays down that '[t]he function to support people exposed to discrimination and intolerance and to pursue litigation on their behalf (support and litigation function)' *should* be assigned to equality bodies.[18] This is in line with the opinion of the CoE Commissioner for Human Rights, who pointed out that when equality bodies are not given the power to bring cases to court,

8 Iordache, R. (2019), Romania Country Report – Non-Discrimination, European network of legal experts in gender equality and non-discrimination, p. 82.
9 Kádár, T. (2019), 'The legal standing of equality bodies', *European equality law review*, No. 1, pp. 1-15, 10-11.
10 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, Art. 13(2)).
11 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (Gender Goods and Services Directive, Art. 12) and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Gender Recast Directive, Art. 20).
12 Kádár (2019), p. 2.
13 See e.g. the Irish Human Rights and Equality Commission; the Slovak National Centre for Human Rights or the Slovene Advocate of the Principle of Equality.
14 See, for instance, the Federal Anti-Discrimination Agency in Germany. For a commentary on its mandate see, Berghahn, S., Egenberger, V., Klapp, M., Klose, A., Liebscher, D., Supik, L., Tischbirek, A. (2016), *Evaluation des Allgemeinen Gleichbehandlungsgesetzes*, Nomos, pp. 180 ff.
15 It should be mentioned, however, that even if equality bodies do not have a mandate to engage directly in strategic litigation (or any litigation), they can probably promote or support strategic litigation by others (NGOs or individuals) in different ways, for instance, by providing arguments, research and the like.
16 ECRI, General Policy Recommendation No. 2 on Equality Bodies to combat racism and intolerance at national level, revised version adopted on 7 December 2017, CRI(2018)06.
17 European Commission Recommendation of 22.6.2018 on standards for equality bodies, C(2018) 3850 final.
18 According to the revised GPR No. 2, the decision-making function is one that 'may also be assigned' (para. 10(c) GPR No. 2).

this considerably limits their effectiveness.[19] In Paragraph 14, the GPR then sets out which competences the litigation function 'should include' and lists the representation of people exposed to discrimination with their consent before courts, bringing cases of individual and structural discrimination to court in the equality body's own name, and the intervention before the courts as *amicus curiae*, third party or expert. Paragraph 15 then refers explicitly to strategic litigation when it says:

> 'Equality bodies should have the right to choose, based on published criteria established by them, the cases they take up for representation and strategic litigation and the venues in which they seek to secure the rights of people exposed to individual and structural discrimination.'

The GPR No. 2 is thus formulated in quite demanding terms when it comes to equipping the equality bodies with a variety of litigation competences and ECRI recommends their introduction in its reports where they (or some of them) do not exist. Furthermore, the Recommendation is very explicit in calling for a use of these competences in a strategic manner.

The European Commission's Recommendation, in giving guidance on how the independent assistance to victims of discrimination could look, in line with Directive 2000/43/EC uses less demanding wording. It first states that states 'should take into consideration' the representation of complainants in court by an equality body,[20] thus focusing first and foremost on the individual aspect. In the next paragraph it then sets out that Member States

> 'should also take into consideration that independent assistance to victims *can* include granting equality bodies the possibility to engage or assist in litigation, in order to address structural and systematic discrimination in cases selected by the bodies themselves because of their abundance, their seriousness or their need for legal clarification.'[21]

Although not calling it explicitly such, this clearly indicates that the intention of the Commission was to address the possibility of strategic litigation. In this context it further specifies that 'such litigation *could* take place either in the body's own name or in the name of the victims or organisations representing the victims, in accordance with national procedural law.'[22] While all this, by the nature of the document in which it is contained,[23] can only be seen as a recommendation, the Commission has made clear its view on how the Directives can be effectively implemented. Kádár, however, argues in light of the CJEU's reasoning in the *Feryn* case, according to which the objectives of the Directive would be hard to achieve if enforcement was left only to individual complainants,[24] that Member States 'have a duty to provide for public enforcement in the absence of an identifiable complainant and that equality bodies are logical vehicles to do so.'[25] However, it has to be taken into consideration that while the Court confirmed that the Directive did not preclude a national provision allowing to bring legal proceedings 'without acting in the name of a specific complainant or in the absence of an identifiable complainant',[26] it did not say that the Directive requires it.

The explanatory report to Paragraph 15 of ECRI's GPR No. 2 is very useful in defining strategic litigation and its objectives. It underlines that in addition to supporting individual complainants, 'equality bodies should also develop and implement a policy of strategic litigation', which is defined as consisting 'of identifying and carefully selecting cases for litigation in order to clarify, promote and protect the rights

19 Council of Europe, Commissioner for Human Rights, *Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality*, CommDH(2011)2, 21.3.2011, p. 16.
20 Point 1.1.2 (1) of the Commission Recommendation.
21 Point 1.1.2 (2) of the Commission Recommendation, emphasis added.
22 Point 1.1.2 (2) of the Commission Recommendation, emphasis added.
23 Commission Recommendations have no binding force and can just suggest a line of action.
24 Judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV,* C-54/07, EU:C:2008:397, para. 24.
25 Kádár (2019), p. 3.
26 *Feryn*, para. 27.

of a whole group of people who are in a similar situation'. In strategic litigation cases the focus is thus less on getting redress for an individual violation. The aim is to:

(i) 'generate case law that clarifies the interpretation of the equal treatment legislation,
(ii) ensure a critical mass of casework on the different grounds covered,
(iii) develop case law on issues of structural discrimination,
(iv) generate publicity and use this publicity to sensitise individuals and institutions about their obligations under the equal rights legislation and
(v) motivate individuals and institutions to respect these obligations and to bring about societal change.'[27]

An important element of strategic litigation is therefore not only the legal casework before the court but also the dissemination of results through media, information campaigns addressing both potential perpetrators as well as potential victims and the provision of recommendations to law makers with regard to potentially necessary legal adaptations.

An equality body deciding to take a strategic litigation approach has to ponder the potential usefulness of this form of litigation as described above with the possible limitations and risks of it, taking into account the quite considerable input of resources required. As mentioned above, strategic litigation is not only about bringing a case to court but it requires also follow-up activities including dissemination of the case's results at the close of the case. Research about strategic litigation of NGOs relating to equality issues has further shown that close consultation with representatives from the group concerned in building the case, especially when the case is brought in the organisation's own name, is also of utmost importance.[28] In addition to the risk of not achieving the objective sought, there is also the risk that the outcome could have negative effects on the group which the litigation is intended to support. This could be the case not only if the case is lost but also if the case is won. This could happen if the case is controversial and strengthens the opposition to the societal change sought. Based on the experience of its member institutions, Equinet has published a handbook on strategic litigation which discusses these and other risks and recommends the development of contingency plans to mitigate them when considering whether a particular case is suitable for strategic litigation.[29]

Strategic litigation of equality bodies in Europe

As mentioned above, a prerequisite for strategic litigation is that equality bodies are assigned competences in relation to having legal standing to take discrimination cases to courts or to act as *amicus curiae* in the first place. It could be asserted that acting as an *amicus curiae* cannot be considered as strategic litigation, considering that this form of intervention depends on cases already established by others and is in this sense at least partly reactive to what arises, and does not reflect strategy. However, an equality body may also take a strategic approach when selecting cases for intervention as a friend of the court, on the basis of the question whether the solution of this case would deploy effect also beyond the individual case. As such, it seems legitimate to include this form of action in the present article, although it is understood that it should rather be seen as a useful addition to direct strategic litigation.

A study carried out by Niall Crowley in 2018, covering 43 equality bodies in 31 EU Member States and EFTA countries, found that 17 equality bodies in 16 countries either have no litigation competences or they are limited, either to specific circumstances or to the possibility to act only as *amicus curiae*.[30] Another study found that of 33 equality bodies of EU Member States, 11 have the power to represent

27 ECRI, General Policy Recommendation No. 2, para. 80.
28 Lantschner (2019), pp. 199-202.
29 Equinet (2017), *Strategic Litigation. An Equinet Handbook*, pp. 31-32.
30 Crowley, N. (2018), *Equality bodies making a difference,* European network of legal experts in gender equality and non-discrimination, European Commission, p. 105.

victims before courts, 20 can bring cases in their own name, and 16 can intervene before the court, either on the side of the victim or as *amicus curiae*. According to this study, 10 equality bodies have no litigation competence at all.[31] Several studies have revealed that even if such competences are assigned, they are in some cases not – or rarely – used in practice.[32] Against this background it becomes clear that strategic litigation of equality bodies is currently an issue that is receiving limited attention, although – as shown in the introduction – it has the potential to achieve broader changes in legislation, policy, institutional procedure and practice, as well as in the societal perception of the problem of discrimination.

A survey carried out among Equinet members for this article seems to confirm this conclusion. Of the 16 members that responded to the survey, 10 reported that they are active in litigation before courts or quasi-judicial bodies.[33] Of these, seven indicated that they engage in strategic litigation. These were the equality bodies of Belgium, Croatia, Finland, Great Britain, Northern Ireland, Slovenia and Sweden.[34] This suggests that, except for the ex-Yugoslav countries Slovenia and Croatia,[35] so far, strategic litigation is a form of litigation that is predominantly used by northern (former) EU Member States. Other equality bodies show, however, increasing interest in this form of litigation. The Austrian Ombud for Equal Treatment, who can take cases only to the quasi-judicial Equal Treatment Commission but not to courts, is currently working on a strategic litigation strategy. Also, the Commission for the Rights of Persons with Disability, from Malta, which so far has limited experience with litigating cases, is trying to rationalise which cases can be brought before courts and which would realistically be successful from a strategic perspective. The Spanish Council for the Elimination of Racial or Ethnic Discrimination is in a somewhat peculiar situation as the assistance service for victims of ethnic and racial discrimination is outsourced to a group of eight NGOs on the basis of a contract. Until recently, this contract did not include the possibility of undertaking strategic litigation cases before the courts. The new terms and conditions for the victims assistance service negotiated in spring 2020, amongst the duties of the NGOs, will include bringing legal actions and representing victims in 'cases that, according to their circumstances and social impact, are considered as strategic', provided that the General Directorate of the Equality Ministry authorises it, the victims give their consent and the equality body is consulted.[36] While the role of the Equality Ministry in deciding about whether a case can be brought to court puts in question the independence of the equality body and the NGOs involved, this example, as well as the ones from Austria and Malta, shows that there is an increasing interest in carrying out litigation in a strategic manner.

31 Lantschner (2019), pp. 406-407.

32 Kádár (2019), p. 2 and 5; referring to Crowley (2018), p. 107; Jacobsen, B.D. (2010), *Influencing the law through legal proceedings: The powers and practices of equality bodies*, Equinet.

33 These were: Non-Discrimination Ombudsman – Finland; Office of the Ombudswoman – Croatia; National Centre for Human Rights – Slovak Republic; Equality Ombudsman – Sweden; Equality and Human Rights Commission – Great Britain; Netherlands Institute for Human Rights (which responded with a qualified 'yes', in the sense that it only recently attempted to bring a case before civil courts which was, however, withdrawn due to evidential problems); Advocate of the Principle of Equality – Slovenia; Unia – Belgium; Equality Commission for Northern Ireland; Ombud for Equal Treatment – Austria (only before the Equal Treatment Commission).

34 According to the information provided by the Estonian Gender Equality and Equal Treatment Commissioner's Office, this equality body has engaged in eight strategic litigation cases initiated in 2015, which was possible because of external funding. Furthermore, the response suggested that strategic litigation was difficult to practise for an equality body operating under the Estonian legal system (at least on a regular basis), because the Estonian court system is very much directed at reaching an agreement or a settlement wherever possible (in all the levels of court), which could potentially limit the achievement of the strategic litigation goal. The criteria used by the Irish Human Rights and Equality Commission for selecting its cases for legal assistance also show a strategic approach. See Irish Human Rights and Equality Commission (2016), *Guidelines on applications for legal assistance*, https://www.ihrec.ie/app/uploads/2017/06/Guidelines-on-applications-for-legal-assistance-April-2017-3.pdf, in particular para. 14. See on this Lantschner (2019), p. 453.

35 See also the use of strategic litigation by the Commissioner for Protection of Equality from Serbia, in Krstic, I. (2019), Serbia Country Report – Non-Discrimination, European network of legal experts in gender equality and non-discrimination, p. 75, giving information also on the number of cases. This body seems to be among the very few that has separate Guidelines on the topic. See Commissioner for the Protection of Equality, Guidelines for strategic litigation (*Smernice za strateške parnice*), Belgrade, September 2018. Furthermore, the Montenegrin Equality Body, the Protector of Human Rights and Freedoms, can provide independent assistance to victims by engaging 'or assisting in litigation in order to address structural and systematic discrimination in cases selected by the Protector because of their prevalence, seriousness or need for legal clarification (Article 21(4) of the Law on Prohibition of Discrimination).' See Kostic-Mandic, M. (2019), Montenegro Country Report – Non-Discrimination, European network of legal experts in gender equality and non-discrimination, p. 81. There is no information on the number of cases litigated in this manner.

36 Input provided by the Council for the Elimination of Racial or Ethnic Discrimination.

The legal avenues employed by equality bodies when acting strategically depend, of course, on the competences they are provided with. The Finnish Non-Discrimination Ombudsman (NDO), for instance, mainly acts by bringing cases before the Non-Discrimination and Equality Tribunal (eight cases since 2015). Starting procedures without a victim in the equality body's own name is currently not a possibility provided for by law, but legislative changes are on the way and are expected to include also this possibility. A peculiarity of the Finnish case is that the Non-Discrimination Act obliges all prosecutors and courts of law, when applying anti-discrimination law in a case, to ask if the NDO wants to give a reasoned opinion in the matter at hand.[37] Such requests are made in approximately 100 cases per year. The NDO is not obliged to reply but has the freedom to prioritise and to give its opinion where deemed important. The NDO does so in about 20-25 cases per year on the basis of the same criteria as when selecting cases to be brought to the Tribunal. In the eyes of the NDO, this is an ideal addition to its own proactive approach, without overly straining its resources.[38]

The Belgian Unia, which disposes of all the litigation powers recommended by ECRI,[39] has been actively bringing actions in its own name or supporting victims of discrimination by joining them in cases initiated by the victims themselves. While it also intervened in criminal cases, *amici curiae* were rare. Interesting to note is that it provided its opinion in the context of a collective complaint submitted by the Mental Disability Advocacy Centre (MDAC) against Belgium, to the CoE Committee of Social Rights (ECSR).[40] Furthermore, Unia can give advice about cases before the CJEU and the ECtHR that fall within its competence.[41] Altogether, Unia was involved in 96 cases since 2015.

The method mostly used by the Swedish Equality Ombudsman (DO) is to represent the victim through its own lawyers. According to the figures provided, it has done so in 42 cases since 2015. The DO neither has the competence to bring discrimination complaints on behalf of non-identified victims to court, nor to act as *amicus curiae*.[42] Other equality bodies known for their active litigation are the Equality Commission for Northern Ireland, with 111 cases of legal assistance before courts or tribunals over only two years[43] and the British Equality and Human Rights Commission, with 91 cases since 2015 in which it represented a victim either with its own lawyers or financed external lawyers (44 cases of full assistance, 47 cases of preliminary assistance). In 80 cases the British equality body acted as an *amicus curiae*.[44]

While these examples of equality bodies established in northern EU Member States have worked on a respectable number of (strategic litigation) cases, the other equality bodies are just starting to experiment with this approach. The Advocate of the Principle of Equality from Slovenia has so far acted only in one strategic case by representing the victim before the court. The Croatian Ombudswoman has started intervening on the side of the victim.[45] The level of experience of an equality body in using strategic litigation has been one of the criteria when choosing bodies for deeper analysis in this article, as the aim is to determine some good practice as well as common challenges. A further criterion was to cover all possible ways of acting strategically. For the reasons already exposed, it was not possible to have a good geographical coverage.[46] On this basis, the following equality bodies were selected for in-depth study:

37 Article 27 of the Finnish Non-Discrimination Act.
38 In fact, in the Romanian case, there is a legal obligation for the NCCD to reply to such requests, which is putting a lot of strain on its already very limited resources.
39 ECRI, Report on Belgium (sixth monitoring cycle), adopted on 12 December 2019.
40 ECSR, *Mental Disability Advocacy Centre (MDAC) v Belgium*, complaint no. 109/2014, decision of 18 October 2017.
41 The Ministry of External Affairs informs Unia about such pending cases. These are advices of Unia (brought in its own name) and not of the Belgian State. An advice of this kind was, for instance, given by Unia in the Jette Ring case: Judgment of 11 April 2013, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab* and *HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening acting on behalf of Pro Display A/S,* joined cases C-335/11 and C-337/11, EU:C:2013:222.
42 Hiltunen, R. (2019), Finland Country Report – Non-Discrimination, European network of legal experts in gender equality and non-discrimination, p. 89.
43 See Equality Commission for Northern Ireland (2018), Legal Services Report: Review of Legal Services 2017-2018.
44 Input to the article by a staff member of the British EHRC.
45 It was not possible to establish the number of cases in which the Ombudswoman already intervened.
46 The British Equality and Human Rights Commission would be an interesting case but the focus of this study is on equality bodies of EU Member States. For the same reason the Equality Commission for Northern Ireland was excluded.

Unia, the Belgian equality body, has been chosen as an example of an equality body that, if there is no identified victim, can bring cases in its own name. It is also active before European courts and monitoring bodies of CoE human rights institutions. The Non-Discrimination Ombudsman of Finland was selected as an example of an equality body bringing cases mainly before a quasi-judicial body, and for the *amicus curiae* function. The third body selected is the Equality Ombudsman of Sweden that uses strategic litigation by representing victims through its own lawyers, which recently has also led to a case before the CJEU.

The experience of selected equality bodies

In the following sections, the experience with strategic litigation of the selected equality bodies will be analysed, looking at (i) their approaches in sourcing and selecting cases, including the internal management, (ii) the kind of follow-up measures taken and (iii) the impact they manage to achieve. It will further be assessed (iv) which legal or other changes would be required in order for the equality body to be able to make use of strategic litigation more consistently and with a greater impact. Finally (v), the risks encountered by equality bodies and the way they address these risks will be discussed. On the basis of this analysis, conclusions are drawn and recommendations made.

Approaches in sourcing and selecting cases

Potentially strategic cases can reach the equality body through a variety of sources. NGOs that maintain contacts with particular groups and fight for their rights are a particularly useful source of strategic cases. The facts about such cases might reach the equality body also via the media, human rights lawyers and, of course, through complaints directly from individuals.[47] Which of those reported circumstances then lead to a strategic litigation case depends on the strategic and practical selection criteria established within the equality body, which ideally are publicly available and explain the reasons underpinning it.[48]

As a preliminary measure, in recent years, Unia has used the media (in particular social media) to raise awareness about its existence, about what it is doing and for what it can be contacted. This is reflected in increasing figures about the enquiries received.[49] Unia's approach is normally to attempt a negotiated settlement of the case and only when this is not possible or unsatisfactory, it considers approaching the court, provided the case fulfils the criteria established for strategic litigation. It can therefore be said that all cases brought to court by Unia follow a strategic approach. Cases thus mostly stem from complaints addressed to it by individuals, but also from NGOs. While a formal channel of cooperation exists through the support committee regarding the field of disability, contacts with NGOs regarding other grounds are regular but informal. A more structured relationship with such NGOs on the model of the support committee in the field of disability could help to foster a more systematic cooperation in the building of strategic litigation also on other grounds. When it comes to multiple or intersectional discrimination based on gender and another ground, difficulties between Unia and the Federal Institute for Equality between Women and Men in agreeing on which cases to prioritise have created a certain inertia when it comes to litigation. Further complexity could be added by the announcement of the Flemish government that it was to withdraw from Unia and to set up its own equality body. Unia fears that this could be problematic as to the building of strategic litigation because it might confuse citizens as to the role and competences of the various institutions and adds complexity to an already very fragmented landscape.[50]

47 Equinet (2017), pp. 36-37.
48 Equinet (2017), p. 17.
49 According to Bribosia, E. (2019), Belgium Country Report – Non-Discrimination, European network of legal experts in gender equality and non-discrimination, p. 107, '[f]rom 2013 to 2018, the amount of reports and of cases opened has practically doubled.'
50 Input to the article from Emmanuelle Bribosia and Isabelle Rorive, country experts for Belgium in the European Network of Legal Experts in Gender Equality and Non-Discrimination.

Unia's criteria for the selection of cases to be brought to court clearly reflect ECRI's approach in Paragraph 80 of its GPR No. 2 and its concern to achieve an impact beyond the individual case. In civil cases, Unia considers whether the case contributes to the clarification of legislation (for instance, by leading to a preliminary ruling by the CJEU) or whether there is a link with already existing jurisprudence of the CJEU or the ECtHR that allows it to apply this jurisprudence at the national level. If the case relates to a domain, criterion or phenomenon for which only limited jurisprudence exists, it is likely to be litigated with Unia's support. Further criteria relate to whether the case is an illustration of a societal debate; relates to a returning problem which Unia receives lots of questions about and extrajudicial solutions are not sufficient; or is one of structural discrimination. Finally, a criterion for Unia to bring a case to court relates to the question of whether it is regarding one of the domains or criteria prioritised in Unia's work, or whether the expectations of NGOs and partners of Unia are high on the issue brought up by the case. In cases of hate speech, Unia brings the case to court if it is an organised hate phenomenon or when the person behind the hate speech act is a person with responsibilities (such as a teacher, politician, etc.). When a case involves the application of the law on negationism or denialism, it is likely to be brought to court. Unia can also be invited by the public prosecutor to join a case. In cases of hate crime, depending on the severity of the facts, Unia almost always goes to court.[51]

These criteria are currently not publicly available. Unia is currently in a process of refining them and will, once this process is finalised, make them available on the website. For the selection and handling of cases, as well as the follow-up measures to be taken, Unia has created a working group on strategic litigation within the service that deals with individual complaints.[52]

Whereas in Belgium strategic litigation is thus intimately linked to Unia's individual support activities and constitutes an *ultima ratio* following the equality body's attempt to achieve an amicable settlement, in Sweden, the selection of cases for strategic litigation is seen more as an accessory aspect to the Equality Ombudsman's strong supervisory role. Supervision is the chief activity of the DO. Individuals, media and civil society organisations report matters to the DO which then decides to look into them on its own motion, irrespective as to whether this may result in bringing a case to court or not. By focusing on structural shortcomings, the aim of this supervision is to ensure the respect for the Discrimination Act in order to prevent discrimination. Such investigations may, however, also lead to litigation. The main guiding criterion for bringing a case to court is that it must be in the public interest, rather than following the sole interest of securing compensation for the individual victim. In other words, the selection of cases for strategic litigation aims at the production of case law that has an impact for many. These rather wide and abstract criteria are communicated on the equality body's webpage and through its media contacts, without explicitly flagging them as selection criteria for strategic litigation. In the understanding of the Ombudsman, this *why* aspect of what kind of cases are brought to court is the central part of a strategic litigation policy, rather than the *how* aspect, concerning the question of how the assessment – as to whether those criteria are fulfilled – looks. The determination as to whether a case is deemed suitable to be brought to court thus is a discretionary decision of the equality body.[53] This approach in sourcing and selecting cases for strategic litigation is criticised by some, in particular for its lack of dialogue, consultation and cooperation with relevant NGOs that represent discriminated groups, in identifying and establishing priorities and in selecting strategic complaints.[54]

Other means of sourcing cases, such as openly advertising for particular cases, have been deemed inappropriate by the DO. Some cases brought by the Ombudsman were based on situation tests, which

51 Input to the article by a staff member of Unia.
52 Of the 106.7 full-time equivalents working at Unia in 2018, 29 were employed in the department dealing with individual support, thus this department constituting the biggest one in the internal organisation of Unia. Unia (2019), *Annual Report 2018*, p. 102.
53 Input to the article by a staff member of the Swedish Equality Ombudsman.
54 Input to the article from Paul Lappalainen, country expert for Sweden in the European Network of Legal Experts in Gender Equality and Non-Discrimination.

were, however, conducted by media or individuals in an independent fashion, as the equality body is legally barred from initiating or conducting such tests.[55]

Considering that the cases for strategic litigation mostly flow from investigations carried out by the DO in fulfilment of its supervisory function, it is important that the litigation division is functionally and organisationally distinct from the investigative unit. The (legal) person investigated is under a legal duty to respond and provide information and the investigations of the equality body are an exercise of public power. It therefore has to abide by a constitutional duty of impartiality in the investigative phase.

Similarly to the Belgian Unia, in the case of the Finnish Non-Discrimination Ombudsman, the strategic litigation cases come up as a result of its regular work on individual requests addressed to the Office. Yearly, approximately 1 000 such requests reach the Ombudsman. Only a minority of these requests are further investigated and a very limited number are eventually brought to the Non-Discrimination and Equality Tribunal. The whole procedure of screening, counselling and handling of complaints follows a strategic approach from the beginning. Cases are investigated if they are of societal or legal significance, in particular when they come under the priority areas identified by the Ombudsman or a case concerns under-reported discrimination. Cases are brought before the Non-Discrimination and Equality Tribunal or a court of law if an interpretation of the law is needed, where the Ombudsman wants to bring about a change in the law or show that national law is incompatible with EU law, international human rights obligations or the national Constitution. Another reason to bring a case would be if the Ombudsman wants to create a societal debate on an important topic or challenge previous 'bad' case law.[56]

The main sourcing strategy is thus to look out for suitable cases during the screening of individual enquiries. Besides, the Ombudsman becomes aware of certain facts through media reports and can decide to investigate them *ex officio*. However, if the Ombudsman finds that it is a case of strategic importance that should be brought before the Non-Discrimination and Equality Tribunal, a victim is required, on behalf of whom the case can be brought. In the experience of the Ombudsman, this can turn out to be difficult, because persons fear the negative repercussions of being involved in a case before the Tribunal, and victimisation.[57] A revision of the Finnish legislation is currently underway which should make it possible for the Ombudsman to bring a case in its own name without an identified victim.

For the sourcing of cases, other stakeholders, such as NGOs engaging for vulnerable groups or human rights lawyers, do not seem to play a role. In fact, they might not even be aware of the bases on which cases are chosen. In theory, an opportunity for drawing the attention of the Ombudsman to a particular situation would be given during the meetings of the cooperation forum, appointed by the government. In this forum, all relevant actors in the field of human rights and non-discrimination meet, including the Ombudsman, as well as representatives of minority groups. In practice, however, contact with NGOs is used more for informing them about the results of litigation rather than for identifying cases.[58]

Follow-up measures taken by equality bodies

The aim of strategic litigation is to have an impact which goes beyond the individual case. As noted in the Equinet handbook on strategic litigation, 'even unsuccessful litigation can result in positive gains if publicised in the right way. For example, a case which is shocking on its facts but is lost in court, may serve to increase public awareness of a legal problem, or garner support for a change in the law.'[59] It is

55 Input to the article by a staff member of the Swedish Equality Ombudsman.
56 Non-official translation of the case selection criteria used by the Finnish Non-Discrimination Ombudsman.
57 A case in point is that of the suspension of a Nazi flag from a window-opening of an apartment. The Ombudsman became aware of it via a news report and decided to bring the case to the Tribunal. The two victims, who initially agreed that the Ombudsman could bring the case on their behalf, withdrew and the chairman of the Jewish congregation stepped in.
58 Input to the article from Rainer Hiltunen, country expert for Finland in the European Network of Legal Experts in Gender Equality and Non-Discrimination.
59 Equinet (2017), p. 39.

therefore important that the equality body develops a follow-up strategy which is tailored to the case. This includes, as a minimum, the publication of the case outcome on the body's webpage and a press statement. Other possible measures include the use of social media and information provided to the mailing list of stakeholders and cooperating organisations. Academic discussion of the case's outcome can be equally fruitful. To what extent the victim of the case is involved in these activities depends on the willingness of the victim to be exposed to the media and his or her capacity to deal with the psychological burden this can entail. Follow-up work also includes the monitoring of further complaints regarding the same issue and monitoring whether the necessary steps are taken by either the private perpetrator or the legislator.[60]

Unia's follow-up measures focus on the communication about the (positive) results of the case through social media, the press, newsletters and its partners (such as NGOs, trade unions, employers). It also motivates academics to write an article about the case, or its staff members write such articles about an interesting case. If an individual case outcome highlights a need for a change in legislation, Unia writes a recommendation to plead for change.[61]

The Swedish Equality Ombudsman disseminates the rulings to the press and in the social media and organises seminars directed at duty bearers to inform them of the meaning of the case law and how it impacts their work. When the equality body is invited to provide the legal perspective on discrimination-related matters, it uses its cases as pedagogic examples.[62] This approach has been considered as being too passive, as it does not seem to be the result of a communication strategy for each stage of a strategic litigation case, and for not seeking the cooperation with multipliers, such as civil society organisations, to ensure the publicity of the results.[63]

The Finnish Non-Discrimination Ombudsman seems to pay particular attention to carefully plan its media strategy with regard to every individual case. Media might be involved early on or, when the outcome cannot be easily predicted, the NDO might choose to involve media only at the later stage. Furthermore, the Ombudsman addresses its recommendations concerning legislative amendments that it deems necessary as a result of its litigation in its yearly reports to the Government. It reports to Parliament only every four years. The currently ongoing revision of non-discrimination legislation is reportedly the result of recommendations of the NDO.[64]

Impact achieved by equality bodies' strategic litigation

It has been mentioned above what the objectives of strategic litigation are in the understanding of ECRI's GPR 2. Unia is quite successful in achieving these goals, except for – according to its own assessment – the creation of a critical mass of casework on the different grounds. It managed, however, to start the creation of such case law with regard to the use of hate speech on Twitter, when it joined the party in a criminal proceeding by filing a civil suit. For the first time in Belgium, the perpetrator was sentenced for incitement to hatred, discrimination and violence through Twitter, by the Antwerp Criminal Court.[65]

Two of its most famous strategic litigation cases, *Feryn* and *Achbita,*[66] reached the CJEU and clearly contributed to the clarification of the interpretation of equal treatment legislation. In *Achbita*, the CJEU was asked to clarify whether a general ban of religious symbols is direct or indirect discrimination in the

60 Equinet (2017), pp. 38-40.
61 Input to the article by a staff member of Unia.
62 Input to the article by a staff member of the Swedish Equality Ombudsman.
63 Input to the article by Paul Lappalainen, country expert for Sweden in the European Network of Legal Experts in Gender Equality and Non-Discrimination.
64 Input to the article by a staff member of the Finnish Non-Discrimination Ombudsman.
65 See Unia, *Auteur de tweets haineux sous un pseudo condamné*, 5 June 2019, at https://www.unia.be/fr/articles/auteur-de-tweets-haineux-sous-un-pseudo-condamne.
66 Judgment of 14 March 2017, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV,* C-157/15, EU:C:2017:203.

sense of Article 2(2), whether private companies can invoke the neutrality principle to justify this type of ban and how the ground of religion or belief should be interpreted. The reactions to the reasoning of the judgment in *Achbita* were quite controversial and have resulted in an intensive academic debate about these questions.[67] In *Feryn*, the Court clarified that the public statement that persons of a certain racial or ethnic origin are not welcome as applicants for a job, amounts to discrimination even in the absence of an identifiable victim and that such statements are sufficient to shift the burden of proof.[68] This case further clarified that the Directive does not preclude the equality body from reacting against such statements even if there is no actual victim. The publicity generated by *Feryn* sensitised individuals and institutions about their obligations under the equal treatment legislation and motivated them to respect these.

A case before the Labour Court Ghent, decided in 2016 and confirmed in 2017, in which a company was convicted for very openly rejecting a candidate because of his age, had a similar effect.[69] The company had to pay compensation to the victim and a non-compliance penalty per new offence, in addition to posting the ruling for one month in a clearly visible place where the job interviews are held. The case achieved its strategic goals as it generated a lot of media attention which led to an increase in age discrimination claims and increased the awareness among the general public of the thus far underestimated problem of age discrimination, and among employers, awareness that they can be convicted for it.[70]

Similarly to Unia, the Swedish Equality Ombudsman is also of the opinion that the Office is not able to contribute to the establishment of a critical mass of casework on the different grounds. This is explained by the equality body by the fact that it has decided to focus on quality and impact rather than on quantity.[71] There is no uniform view on whether the cases litigated by the DO generate a sufficient amount of publicity and whether this publicity is used to sensitise individuals and institutions about their obligations. While the media and specialised journals, targeting central duty bearers, do report on the cases' outcome, too little seems to be done beyond this, in terms of outreach to sensitise potential perpetrators or to empower potential victims, which can lead to the cases having little long-term impact.[72] It has been assessed that through a stronger cooperation and dialogue with discriminated groups and

67 The Court ruled that the headscarf ban in the concrete case did not constitute direct discrimination. In order not to constitute indirect discrimination, a company's neutrality policy must be applied in a consistent and systematic manner, the wearing of a headscarf can only be prohibited for workers in visual contact with customers and the employer, 'without … being required to take on an additional burden', must investigate whether it would be possible to offer the person wishing to wear a headscarf a different position, not involving visual contact with customers. See, among many, the discussions of the judgment by McCrea, R., 'Faith at work: the CJEU's headscarf rulings', EU Law Analysis (17 March 2017), http://eulawanalysis.blogspot.com/2017/03/faith-at-work-cjeus-headscarf-rulings.html; Brems, E., 'European Court of Justice Allows Bans on Religious Dress in the Workplace', IACL-AIDC Blog (25 March 2017), https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace; Davies, G., 'Achbita v G4S: Religious Equality Squeezed between Profit and Prejudice', European Law Blog (6 April 2017), http://europeanlawblog.eu/2017/04/06/achbita-v-g4s-religious-equality-squeezed-between-profit-and-prejudice/; Weiler, J. H. H. (2017), 'Je Suis Achbita!', *European Journal of International Law*, Vol. 28, No. 4, pp. 989-1008; Cloots, E. (2018), 'Safe harbour or open sea for corporate headscarf bans? Achbita and Bougnaoui', *Common Market Law Review*, Vol. 55, No. 2, pp. 589-624; Hambler, A. (2018), 'Neutrality and Workplace Restrictions on Headscarves and Religious Dress: Lessons from Achbita and Bougnaoui', *Industrial Law Journa*l, Vol. 47, No. 1, pp. 149-164; Marín Aís, J.R. (2018), 'Freedom of Religion in the Workplace v. Freedom to Conduct a Business, the Islamic Veil Before the Court of Justice: Ms. Samira Achbita Case', *European Papers*, Vol. 3, No. 1, pp. 409-417; Adams, Z. and Olusegun Adenitire, J. (2018), 'Ideological Neutrality in the Workplace', *Modern Law Review*, Vol. 81, No. 2, pp. 348-360.

68 On the shift of the burden of proof see also another case brought by Unia and decided by the Labour Court of Antwerp on 16.1.2019, in which the Court confirms that the use during the selection process of negative stereotypes and prejudices due to Moroccan or Arab descent creates a presumption of a discriminatory recruitment policy which shifts the burden of proof.

69 The candidate received a letter of refusal stating: 'Let us say that you have indeed the perfect profile except for your age.' See a case note on Unia's website at https://www.unia.be/fr/articles/la-societe-cuisines-dovy-condamnee-pour-discrimination-a-lemploi-sur-base-de-lage.

70 Input by a staff member of Unia. See also Unia, *Discrimination liée à l'âge sur le marché de l'emploi: hausse sensible des dossiers ouverts par Unia*, 26 September 2016, at https://www.unia.be/fr/articles/discrimination-liee-a-lage-sur-le-marche-de-lemploi-hausse-sensible-des-dossiers-ouverts-par-unia.

71 The Swedish Equality Ombudsman brings between 5 and 25 cases yearly; in the last couple of years the range is rather between 5 and 10 cases. Input provided by a staff member of the Swedish Equality Ombudsman.

72 Input to the article from Paul Lappalainen, country expert for Sweden in the European Network of Legal Experts in Gender Equality and Non-Discrimination.

civil society actors,[73] a more focused accompanying communication strategy and an increasing number of cases brought, the impact of the DO in bringing about societal change and to motivate individuals and institutions to respect the legal obligations could be further enhanced.[74]

The DO considers it as an important aspect of its strategic litigation work to contribute to the clarification of the interpretation of equal treatment legislation and it seems to be successful in this endeavour. Through its strategic casework, the DO has *inter alia* managed to widen the scope of the prohibition of age discrimination,[75] to ensure that the refusal to take certain jobs for religious reasons has no negative repercussions on unemployment benefits,[76] to establish the right to individual assessment in insurance provision,[77] to secure religious accommodation in medical training, and physical accessibility for disabled pupils. One case, although lost, was reportedly instrumental in producing a legislative change eliminating legal rules that, in the view of the Equality Ombudsman, discriminated against same sex couples regarding the right to parenthood.[78]

The DO's strategic litigation work also contributes to a clarification of the relationship between the Swedish Discrimination Act and the EU Equality Directives. Currently, a case that was brought by the DO on behalf of a person who felt they were being exposed to ethnic profiling by an aviation company (Braathens Regional Aviation, BRA), is pending before the CJEU. While BRA agreed to pay the compensation, it did not accept that any discrimination had occurred. The DO claimed that a preliminary ruling should be obtained concerning the question whether the requirement in Article 15 of Directive 2000/43/EC for effective, proportionate and dissuasive sanctions can be regarded as satisfied if a national procedural mechanism allows a defendant to 'bring a dispute to an end by admitting a claim for compensation for discrimination without acknowledging the existence of discrimination and without the applicant being able to obtain an examination or finding of discrimination from a court'.[79] The Court has not yet pronounced itself on the question but the Advocate General is of the opinion that a person who considers himself or herself wronged and seeks compensation for discrimination

> 'has the right, if the alleged perpetrator of the discrimination agrees to pay the compensation but refuses to acknowledge the discrimination, to have a court examine whether, and, where appropriate, find that, that discrimination has occurred. A procedural mechanism for ending proceedings, such as admission, cannot lead to a different result.'[80]

If the Court follows this opinion, that would certainly raise the standing and credibility of the Equality Ombudsman as an actor, apart from being an important clarification of the EU Directives in this regard.

73 In 2019, out of 833 complaints submitted to the DO concerning work life, none led to a lawsuit before the Labour Court, which in light of the results of earlier research has been found disturbing. Input by EELN expert for Sweden, referring to *Det blågula glashuset: strukturell diskriminering i Sverige (The Blue and Yellow Glass House: Structural Discrimination in Sweden*), SOU 2005:56, English summary on p. 41 at https://www.regeringen.se/49bb01/contentassets/0cf1e0d4944d469bb237b6b0945d08fe/det-blagula-glashuset---strukturell-diskriminering-i-sverige-del-1---missiv-t.o.m.-kapitel-4.

74 Input to the article from Paul Lappalainen, country expert for Sweden in the European Network of Legal Experts in Gender Equality and Non-Discrimination.

75 *Swedish Equality Ombudsman v Keolis Sverige AB* (Swedish Labour Court, A 73/15, A 75/15, A 76/15). The court held that the exception to age discrimination provided for in the 67-year rule did not apply to fixed term employment. Case summary in Equinet (2017), p. 13.

76 *Swedish Equality Ombudsman v The State Unemployment Board* (Svea Court of Appeal, T 777-16). The ruling established that 'religious unemployed persons may (within reason) refuse to take certain jobs without negative repercussions for their unemployment benefits. This applies when the nature of the job in question is such that the unemployed persons cannot reasonably be asked to perform it in light of their religion.' Case summary in Equinet (2017), p. 10.

77 *Swedish Equality Ombudsman v IF Skadeförsäkring AB* (Svea Court of Appeal, T 1912-13). An insurance company had directly discriminated against a child with a hearing impairment by denying her the right to the individual risk assessment afforded to children without disabilities. Case summary in Equinet (2017), p. 13.

78 Input to the article by a staff member of the Equality Ombudsman.

79 Opinion of the Advocate General delivered on 14 May 2020, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, C30/19, EU:C:2020:374.

80 Opinion of the Advocate General delivered on 14 May 2020, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, C30/19, EU:C:2020:374, para. 130.

The strategic litigation of the Finnish Non-Discrimination Ombudsman has managed to achieve several of the aims indicated in ECRI's GPR No. 2. The case regarding the suspension of a Nazi flag from a window-opening of an apartment has, for instance, contributed to clarifying the concept of harassment in the Finnish context. The Ombudsman claimed before the Tribunal that the flag infringed the human dignity of Jewish people as the flag symbolises their persecution by the Nazis. It thus constituted harassment on the grounds of religion. The victim stated that the display of the flag without intervention by the authorities had caused the Jewish community fear and concern. The Tribunal unanimously found that this act indeed amounted to harassment prohibited in the Non-Discrimination Act.[81]

Another case brought by the NDO on behalf of a person convicted for refusing both military and civil service led to considerable legislative changes. The Helsinki Court of Appeal, referring to previous case law from the ECtHR and the UN Human Rights Commission, found it discriminatory and unconstitutional that only Jehovah's Witnesses were legally exempted from both military and civil service, while for other conscientious objectors (such as the person concerned in the case) such a refusal entailed a criminal conviction.[82] In a case on ethnic profiling it managed to tackle a form of structural discrimination.[83] As a consequence of a case concerning discrimination against female couples in assisted reproductive treatment provided by public health-care services, the Non-Discrimination Ombudsman managed to achieve a change in the practice of health authorities, although the case was appealed and is still pending before the Supreme Administrative Court.[84]

Through the media strategy accompanying the cases, the NDO appears to manage to reach out to the general public and to be able to sensitise individuals and institutions about their obligations. Notwithstanding all these successes, the cases brought by the NDO to the Tribunal are few in number, so it cannot be said that these ensure a critical mass of casework on different grounds.

Legal and/or practical challenges

Which legal or other changes would be required in order for the equality body to be able to make use of strategic litigation more consistently and with a greater impact?

Unia's strategic litigation approach has been evaluated as good practice.[85] This is related to the fact that it is pursuing a strategy of first providing advice and legal assistance to victims of discrimination by trying to achieve some form of amicable settlement. It therefore goes to court only when strategic goals are at stake, i.e. a case is highly relevant from a social point of view, to clarify a point of law or if the facts are particularly serious (such as flagrant hate crimes).[86] Unia stands out also by the fact that it has a variety of legal avenues at its disposal so that it is able to react in the way most suitable for the particular case. If there is a victim and he or she gives his or her consent, Unia can represent a victim or intervene supporting the victim's case (as it did, for instance, in *Achbita*). It can also act in its own name, if the victim decides not to start a procedure, under the condition that the victim gives his/her consent. Unia mainly intervenes in support of a victim, as in this way it remains independent from the victim's strategy of action before the court. In addition to these legal means, Unia can also bring a claim if there is no

81 Rainer Hiltunen, *Displaying swastika flag in a window-opening found to be harassment prohibited in the Non-Discrimination Act*, EELN Flash Report, 20 March 2019. More recently, a bar owner placed a sign with the inscription 'Arbeit macht frei' at the entrance. The Ombudsman contacted the bar owner who, however, refused to remove the sign. The Ombudsman, on behalf of the chairman of the Jewish congregation, filed another case before the Non-Discrimination and Equality Tribunal.

82 Helsinki Court of Appeal, judgment no. 18/108226, decided on 22 February 2018.

83 For a summary of the case, see Rainer Hiltunen, *Police stop and search found to be discriminatory*, EELN Flash Report, 20 February 2019, at https://www.equalitylaw.eu/downloads/4840-finland-police-stop-and-search-found-to-be-discriminatory-pdf-111-kb.

84 The main decision of the Court, that discrimination occurred by not giving fertility treatment to the couple, was not appealed and is therefore in fact already final. Input to the article by a staff member of the Non-Discrimination Ombudsman.

85 Input to the article from Emmanuelle Bribosia and Isabelle Rorive, country experts for Belgium in the European Network of Legal Experts in Gender Equality and Non-Discrimination.

86 Unia (2018), *Annual report 2017*.

identified victim. Although the concept of *actio popularis* is unknown in the Belgian legal system, Unia may act on its own behalf to challenge a breach of the anti-discrimination legislation.[87] The repertoire of legal avenues is thus among the most wide-ranging among equality bodies in EU Member States. Unia itself considers the possibility to file actions in its own name as essential in order to achieve strategic litigation aims. This competence, however, is only rarely provided to equality bodies. It is worth noting that, in its evaluation report of 2017, Unia recommends the creation of a collective redress mechanism in anti-discrimination law, such as the class action existing in the field of consumer protection.[88]

The Finnish Non-Discrimination Ombudsman does not yet dispose of the competence to act in its own name where there is no identified victim, but it seems that with the upcoming change of legislation this power will be added. Furthermore, the fact that the Ombudsman can only bring cases on behalf of victims to the National Non-Discrimination and Equality Tribunal on issues other than employment limits the field in which the NDO can act strategically. Moreover, the fact that the NDO does not have legal standing to bring discrimination complaints on behalf of identified or non-identified victims to court, but can only act as a legal assistant to the victim for securing his or her rights (including in employment-related cases),[89] is limiting the possible legal avenues for strategic litigation of the Ombudsman. These limitations have also been criticised by ECRI in its most recent report.[90] Considering that in these circumstances the Ombudsman is mainly acting before the Non-Discrimination and Equality Tribunal, it would certainly also add to the impact of the outcome of such cases if the Tribunal was able to award compensation. This would not only contribute to greater sensitisation – in particular, of potential perpetrators – but would also have a more deterrent effect.[91]

The Swedish Equality Ombudsman can only file discrimination lawsuits before the ordinary courts or the Labour Court but not before the administrative courts. The DO files the cases in its own name, but only if it has a power of attorney from the victim. The cases involve claims for discrimination compensation or cancellation of a contract. The fact that the DO has no mandate to challenge administrative rules and decisions on behalf of an individual is perceived as a major obstacle in exercising its litigation function, both generally and strategically. The same is true for the fact that the DO cannot take a case to court in situations of structural and systemic infringements in the absence of a victim willing, capable and suitable to bring an action. The emphasis of the Swedish legal system to achieve a settlement – which can also be found in the legal tradition of other EU Member States – in the view of the DO, precludes the possibility for the court to engage with the more strategic questions e.g. of whether the particular implementation of the EU Directives is correct or whether a practice that may be prevalent across an entire sector is discriminatory. When the accused party agrees to pay the requested amount while denying (and publicly stating) that any discrimination has taken place, this raises the question as to whether such admissions are in conformity with the duty of the state to provide for effective and dissuasive sanctions.[92] Another issue related to sanctions identified by the Swedish Equality Ombudsman as limiting the strategic impact of its litigation stems from the fact that the courts have to proportion the sanction to the actual damage suffered by the individual victim, which often is not sufficient to deter actors from continuing with a structural discrimination.[93] The short statutory time limits for bringing actions in labour law are another factor limiting the litigation capacity of the Equality Ombudsman generally, and even more so its strategic litigation, which normally requires a more sophisticated preparation.

87 Input to the article from Emmanuelle Bribosia and Isabelle Rorive, country experts for Belgium in the European Network of Legal Experts in Gender Equality and Non-Discrimination.

88 Unia (February 2017), *Evaluation of the Anti-Discrimination Federal Acts*, pp. 7 and 58 https://www.unia.be/files/Documenten/Publicaties_docs/Evaluation_2e_version_LAR_LAD_Unia_PDF_(Francophone).pdf.

89 Hiltunen (2019), p. 54.

90 See the recommendations of ECRI regarding these issues in ECRI, Report on Finland (fifth monitoring cycle), CRI(2019)38, paras. 15-16.

91 Input to the article by a staff member of the Non-Discrimination Ombudsman.

92 See the currently ongoing case before the CJEU C30/19, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*.

93 An example is the (comparatively small amount of) damages paid to a Roma woman who is denied buying milk, as compared to the huge structural problem of Roma generally being denied access to goods and services.

Risks encountered by equality bodies

Equinet's Strategic Litigation Handbook identifies a number of risks related to this kind of litigation,[94] some of which have appeared also in the experiences of the equality bodies studied in this article. In Belgium, the question of the costs of strategic litigation is likely to be controversial and should be considered as a potential risk. Unia's budget should, in principle, suffice for the legal procedures started following a mandate given by the Board of Directors. However, there have been parliamentary questions on the costs of the *Achbita* case (considered exorbitant) before the CJEU. Furthermore, Unia has encountered a slight budget deficit for the first time in 2018, which is connected to the increased volume of work and staff due to its different commitments.[95] There are already strategies to overcome these risks by working in partnership with other organisations (e.g. *Ligue des droits humains* / Human Rights League), for example, through a joint intervention.[96] In the case of the Swedish Equality Ombudsman, costs do not appear to be a great risk, while they are a great risk for civil society organisations. It has therefore been suggested that the Equality Ombudsman should not only bring cases that it considers to be 'strategic' but also a larger number of more clear-cut cases to raise awareness of judges and lawyers concerning varying aspects of non-discrimination law.[97]

In Unia's experience, the low – or lack of – awareness of the legal notions of the anti-discrimination legislation among legal professionals, in particular, judges, can indeed be a risk when bringing strategic litigation cases.[98] This is also one of the reasons why the Finnish Non-Discrimination Ombudsman has chosen to mainly approach the Non-Discrimination and Equality Tribunal with its strategic litigation cases. The Tribunal is composed of experts in non-discrimination law, including constitutional and human rights law. Its decisions are usually carefully grounded and knowledgeable.[99] It has happened, however, that when the Tribunal's decisions have been appealed before administrative courts, this resulted in conflicting decisions on a less knowledgeable basis.[100]

While the *Achbita* case contributed to understanding the CJEU's interpretation of direct and indirect discrimination and its approach to religious discrimination, the outcome was presumably not the one hoped for, either by the victim or by Unia. While the case is still ongoing at the national level, it could even be an example of a case where the outcome could have negative effects on the group which the litigation was intended to help. In trying to make the best of the situation, in its first reaction to the judgment, Unia underlined that the judgment made it clear that a general ban on wearing headscarves was not permitted and showed satisfaction that the Court has clarified 'how employers can handle religious diversity'.[101] In its daily work it tries to motivate employers to choose an inclusive approach towards religious diversity. The Swedish Equality Ombudsman has had the experience that losing cases has a strong negative impact on the equality body's credibility inside and outside the court room and thus the equality body's ability to effect change in other areas. It considers it, therefore, of utmost importance to identify 'good' cases, which requires considerable legal, technical and litigation skills, in particular, a solid understanding of courts.[102] On the other hand, it has been underlined that even losing cases, if lost in the

94 Equinet (2017), pp. 31-32.
95 Bribosia (2019), p. 107.
96 Input to the article from Emmanuelle Bribosia and Isabelle Rorive, country experts for Belgium in the European Network of Legal Experts in Gender Equality and Non-Discrimination.
97 For example, there were about 2 500 complaints to the DO in 2018, 4 out of which were deemed sufficiently strategic to be taken to court. Input to the article from Paul Lappalainen, country expert for Sweden in the European Network of Legal Experts in Gender Equality and Non-Discrimination.
98 Input to the article by a staff member form Unia.
99 Other advantages of approaching the Tribunal relate to the fact that it does not cost anything to file a case and even when the case is lost, the loser does not have to pay the legal fees of the other party. The Tribunal is obliged to investigate the case *ex officio*. Although this reduces the workload of the NDO, it is, of course, well advised to properly investigate the cases it brings before bringing them, in order to reduce the risk of losing the case.
100 Input to the article from Rainer Hiltunen, country expert for Finland in the European Network of Legal Experts in Gender Equality and Non-Discrimination.
101 Unia, *The Achbita case: clarity about the headscarf ban in the workplace,* 15 March 2017, https://www.unia.be/en/articles/the-achbita-case-clarity-about-the-headscarf-ban-in-the-workplace.
102 Input to the article by a staff member from the Swedish Equality Ombudsman.

right way, can be useful in achieving social change. However, equality bodies seem to be very cautious in this regard.

The Swedish DO has also experienced strong reactions from various sides, including the media and politics, when it won a case involving a Muslim man who supposedly had failed to get an apprentice post due to his refusal to shake hands with the prospective female employer. Cooperation and collaboration with civil society and the targets of discrimination could help in mitigating such reactions.[103]

As to the risk of disagreements between the equality body and the victim or the victim's lawyer, it has already been mentioned that Unia usually intervenes in support of the victim rather than representing the victim directly. This way, the action of the victim and the action of Unia can differ and Unia remains 'able to define its strategy of action without undermining or being undermined by the victim's strategy before the court.'[104]

Conclusions and recommendations

This article has shown that currently very few equality bodies engage in strategic litigation. It is certainly no coincidence that the ones chosen here for further discussion are also among those that are financially rather stable. A 'general lack of adequate funding for equality bodies to investigate and litigate cases' has already been found elsewhere.[105] This also necessarily affects their ability to engage in strategic litigation, which requires considerable resources to be put into finding suitable cases, investigating them thoroughly, designing an accompanying media strategy and follow-up activities. It is interesting to note that all equality bodies described in this article claim that they actually bring cases to court only if strategic objectives are at stake. While this is an understandable approach considering the cost aspect of litigation, this also leads to a situation in which all three bodies agree in their assessment that they are not able to ensure a critical mass of casework. Attention has to be paid that in such circumstances strategic litigation does not become a cover for withdrawal from or lack of litigation. This is all the more important as an OSJI study has found that 'a strategy of filing mass or iterative cases is often more effective than seeking a single landmark judgment.'[106] In line with the Commission's standards for equality bodies, Member States should therefore grant their equality bodies sufficient financial and human resources to exercise their litigation powers effectively.[107] To increase the quantity and the quality of the case law within the field of non-discrimination, programmes stimulating strategic litigation both from civil society organisations as well as equality bodies should be developed.[108] The Commission could therefore consider extending its activities in the context of the implementation of a preparatory action on a 'Union fund for financial support for litigating cases relating to violations of democracy, rule of law and fundamental rights'[109] from CSOs to equality bodies.[110]

The examples of cases described in this article have further shown that many of them were only possible because the respective national legislation goes beyond the minimum requirements of the EU Directives

103 Lappalainen, P. (2019), Sweden Country Report – Non-Discrimination, European network of legal experts in gender equality and non-discrimination, p. 80 and input to the article from Paul Lappalainen, country expert for Sweden in the European Network of Legal Experts in Gender Equality and Non-Discrimination.
104 Bribosia (2019), pp. 109-110.
105 Kádár (2019), p. 14. This was confirmed also by equality bodies during the research for the present article. A representative of the Estonian Gender Equality and Equal Treatment Commissioner's Office reported, for instance, about having tested strategic litigation at one point as part of a project, when external funding was available for carrying the legal fees.
106 OSJI (2018), pp. 19-20.
107 See point 1.2.2(1) of the Commission's Recommendation.
108 See, for instance, the Court Challenges Program funded by the Canadian Government, at https://www.canada.ca/en/canadian-heritage/services/funding/court-challenges-program.html.
109 European Commission, 2018 Annual Report on the Application of the EU Charter of Fundamental Rights, 5.6.2019, COM(2019) 257 final, p. 2.
110 See already Regulation No. 1381/2013 establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020 and the Commission implementing decision on the financing of the Rights, Equality and Citizenship Programme and the adoption of the work programme for 2020 (C(2019) 7824 final). It includes references to equality bodies.

in terms of the grounds to be covered by equality bodies (thus including also the grounds of religion or belief, age, disability and/or sexual orientation in the equality bodies' mandate, although not required by Directive 2000/78/EC), as well as in terms of scope of application of equality legislation (thus covering for those latter grounds also the fields of access to and supply of goods and services, education, social protection and social advantages, including hate speech related to these grounds). Considering the great variation still existing throughout EU Member States when it comes to these issues, this study is yet another indicator of the necessity of levelling up the EU legal framework in this regard. In this context it is also important to mention that a plurality of bodies promoting equality might make it difficult for persons who feel discriminated against to understand where to turn to. Ideally, there should be a 'one-stop shop' for the filing of complaints or, if different bodies exist, a structure of coordination is in place.

A challenge identified by all three bodies is to find suitable cases for strategic litigation. Considering that all three bodies agree that it is crucial to have a 'good' case, it is all the more interesting to note that none of them has established a practice of proactively looking out for such cases. The cases rather 'happen' to them as a result of other regular work, such as providing individual support (Unia and the Finnish NDO) or are seen as an accessory aspect to its strong supervisory role (as in the case of the Swedish DO). While sometimes cases are brought to their attention by media reports or NGOs, more could be done to establish critical dialogue and cooperation with relevant NGOs or human rights lawyers to identify priorities and cases. NGOs can also serve as multipliers when it comes to disseminating the outcomes of a case and contribute to the long-term potential of cases for social change. Strong cooperation with representatives of the group concerned by a strategic litigation case is also important to make sure the (desired) outcome of the case is not rejected by the group.[111]

The identification of priorities in consultation with representative civil society organisations is all the more important as a failure in this regard can lead to a lack of trust in the equality body, if particular discriminated groups develop the opinion that the equality body seldom or never takes up a case concerning 'their' ground. It has to be underlined, however, that the ground itself can often be less important than the issue involved, if this issue affects all the grounds alike (such as, for instance, the level of compensation or a better understanding of the shift of the burden of proof). However, a lack of trust in turn presumably limits access to potential cases leading to strategic litigation, especially in those cases where the equality body can only file a lawsuit if there is an actual complainant.[112]

This brings us to a central aspect of the whole debate: which are the legal avenues at the disposal of the equality body? While a broad mandate in terms of legal standing, such as Unia's, is important to have the possibility to choose the most suitable avenue for each particular case, the other equality bodies' competences are limited in this respect. The possibility of filing a case without a victim is seen by all three equality bodies as an important legal tool,[113] because strategic litigation is mainly pointing at structural issues, affecting many, and therefore, limiting the litigation to an individual could appear to reduce the size of the problem. Furthermore, sometimes it might be difficult to find someone who is willing to come out as a victim because of fear of victimisation. Also, the sanction imposed on a perpetrator where there is an individual victim must be proportionate to the damage suffered by that victim, which might, however, not give sufficient consideration to the much bigger structural problem behind the individual case. Such sanctions, therefore, might not satisfy the requirement of being dissuasive and societal change might thus be hard to achieve. And finally, if there must be an individual victim, it is also possible that she or he is happy with a settlement, which prevents the court from dealing with the more strategic legal questions. For all these reasons, to provide the equality body with the possibility to bring a case

111 For instance, desegregation of Roma pupils that comes as a result of an *actio popularis* launched by a civil society organisation without involving the affected community might lead to resentment and rejection of the very desegregation process. Lantschner (2019), p. 200, referring to Zimová, A. (2016), *Strategic Litigation Impacts: Roma School Desegregation*, Open Society Foundations, pp. 17-18, 58-59.

112 Input to the article from Paul Lappalainen, country expert for Sweden in the European Network of Legal Experts in Gender Equality and Non-Discrimination.

113 See the recommendations in this direction by ECRI, e.g. in its Report on Finland (2019), paras. 15-16 or on 'the former Yugoslav Republic of Macedonia' CRI(2016)21, paras. 13-14.

to court in its own name, without an identified victim, seems to be important to achieve many of the objectives of strategic litigation.

The equality bodies studied here have, however, shown that they can achieve (at least some of) these objectives also with more limited competences. The story of an individual victim might make a case resonate more easily with the broader public and allow for the media to give it broader attention. Even the power to file an *amicus curiae* – which given its nature is partly reactive to what comes up and, at first sight, does not reflect strategy – can be a useful tool. Obliging all prosecutors and courts of law when applying anti-discrimination law in a case to ask if the equality body wants to give a reasoned opinion, allowing the equality body to prioritise and to give an opinion where it is deemed important, is a useful addition to the proactive strategic litigation without overly straining resources. In any case, equality bodies with limited competences (and even more so, those who do not have a mandate to engage directly in strategic – or any – litigation), should promote or support strategic litigation by others (NGOs or individuals) in different ways, for instance, by providing arguments, research and the like.

To have a strategy at hand on how to deal with lost cases is important not only to ensure that such outcome is not harmful to the acceptance and standing of the equality body. If embedded in a wider strategy, such as strategic legislative advocacy, even these cases can ultimately lead to a desired change.[114] Even amicable settlements, if there is a strategic approach behind them, can lead to societal or legislative change. This might take longer but might be more sustainable.[115] Whatever the avenue pursued and whatever the outcome, a targeted accompanying media strategy and widespread dissemination aimed at empowering potential victims and sensitising potential perpetrators, as well as decision-makers, are necessary conditions to ensure long-term impact of any strategic litigation. Linked to this is to question a binary 'win or lose' understanding of a case's outcome and to shift to a multidimensional impact model, that next to the material impact (such as compensation) and instrumental impact (when a decision prompts direct or indirect changes of policies or laws) considers also 'non-material changes, such as indirect shifts in attitudes, behaviors, discourse, and community empowerment.'[116]

Unia and also, more recently, the DO are engaged in strategic litigation also before European courts and monitoring mechanisms, pursuing the same objectives as with their strategic litigation at national level. An avenue that so far appears unused, could be for equality bodies to inform the European Commission of situations in the national context which they find to be in violation of European legislation, so that the Commission could consider starting infringement proceedings. This could also be a form of strategic litigation at EU level.

Finally, networking and the exchange of experience among equality bodies in Europe, as well as between equality bodies and civil society organisations, appears to be important in building the capacity to engage in strategic litigation. The Fundamental Rights Agency could play a role in this context.[117] Equinet's activities in this context have already shown their effect, as the Strategic Litigation Handbook's contents have already found their way into the daily practice of equality bodies and the trainings provided for opportunities for mutual learning.

114 Lobel, J. (2004), *Success without Victory*, NYU Press.

115 Unia is focusing on achieving an out-of-court settlement before eventually deciding to bring a case to court. While the current DO is reluctant to accept settlements as a possibility for achieving the aims of strategic litigation, the former Swedish Equality Ombudsman engaged in a number of amicable settlements regarding discrimination based on the use of headscarves by Muslims. Those settlements have contributed to today's situation where headscarves have more acceptance in working life. Input to the article from Paul Lappalainen, country expert for Sweden in the European Network of Legal Experts in Gender Equality and Non-Discrimination.

116 OSJI (2018), p. 19.

117 During the Fundamental Rights Forum that took place from 25-27 September 2018, one session was dedicated to the topic: 'Current political conditions for NGOs securing fundamental rights through strategic litigation'. Equality bodies should be included in these kinds of networking activities, to foster also the exchange of experience and the cooperation between NGOs and equality bodies active in the field.

A comparative study on collective redress in France, Norway and Romania: the challenges of strategic litigation

Marie Mercat-Bruns*

Introduction

Beyond individual redress, collective redress mechanisms vary widely in Member States. According to the Commission's Recommendation of 11 June 2013, 'collective redress' means:

> '(i) a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (*injunctive* collective redress); (ii) a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (*compensatory* collective redress).'[1]

The EU has manifested its support of the right to an effective remedy and the need to ensure effective access to justice through its Racial Equality[2] and Employment Equality[3] Directives and Article 47 of the EU Charter of Fundamental Rights.[4] Individual claims are unable to tackle mass harm[5] and recurring discriminatory practices. Generally, there are three principal avenues for collective redress: through *actio popularis* which allows citizens or organisations to litigate in the public interest even if there is no

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1 European Commission, Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member State concerning the violations of rights granted under Union Law, 2013/396/EU, O.J. 2013, L 201/60, 3(a), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN.

2 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–26 (the Racial Equality Directive), Articles 7(1) and 7(2): '7(1) Member States shall ensure that judicial and/or administrative procedures … for the enforcement of obligations under the directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them. 7(2): associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions (…) are complied with, may engage, either on behalf or in support of the complainant, with his or her approval in any judicial and /or administrative procedure provided for the enforcement of the obligations…'

3 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22 (the Employment Equality Directive), Articles 9(1) and 9(2).

4 Article 47: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article…'

5 See Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member State concerning the violations of rights granted under Union Law, 2013/396/EU, O.J. 2013, L 201/60, 3(a), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN; 3(b): 'mass harm situation' means a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons.

identifiable claimant;[6] action on behalf of a group of individuals; and joint actions where individual claims are grouped in an aggregate action or through a class action.

It is in this context that a comparative study of collective redress in France, Norway and Romania[7] is relevant, reflecting a variegated selection of procedural tools to enforce anti-discrimination law and the limits of such tools. The goal of the comparative analysis is to compare the stakes raised by collective redress in the three countries[8] and to evaluate the tools currently used to tackle group disadvantage and recurring unequal treatment in different fields, including housing, employment or access to goods and services.[9]

The justification for this specific selection of countries – France, Norway and Romania – stems from the recent use (2018) of the new class action procedure in France adopted in 2016,[10] and the demonstration of effective mechanisms of collective redress in Norway[11] and in Romania,[12] which foster strategic litigation focused on certain disadvantaged groups, often introduced by NGOs. In this regard, the famous Romanian *Accept* case C-81/12, which reached the CJEU, is emblematic.[13] The strategic litigation served to push legislative reform. Its visibility triggered awareness-raising of LGBTI issues, which had been neglected in the political sphere. *Accept v. Becali*[14] led to three rounds of amendments to the anti-discrimination legislation in 2013, improving the wording of the provisions on the burden of proof, genuine occupational requirements and statutory limitations.

It is essential to take into account that collective redress is path dependent since it follows the procedural constraints of each country and the relative procedural autonomy of the Member State.[15] However, the choice of one mechanism over another and the impetus given by a national organisation can lead either to legislative reform that may be used as a tool to improve the enforcement of equality law or to meaningful case law that sets precedents that can then be extended to other instances of recurring discrimination against disenfranchised groups. It is also remarkable to see that some legal systems, such as the French system,[16] might be less receptive to anti-discrimination law because of their civil law tradition but can still have the capacity to deal with structural inequality uncovered by collective redress.[17] Forms of collective redress contribute to a model of enforcement known as 'dual vigilance', which acknowledges that there are two ways of protecting rights arising under EU law: the 'national-level' control and the 'European-level' infringement procedure under Articles 258 and 259 TFEU.[18]

6 Farkas, Lilla (2010), 'Limited Enforcement possibilities under European anti-discrimination legislation- A case study of procedural novelties: *Actio popularis* action in Hungary', *Erasmus Law Review* No. 3, p. 181.

7 I want to personally thank all three French, Romanian and Norwegian Network Experts in non-discrimination for their precious advice, insights and their resources on collective redress in their respective countries.

8 Chopin I., Germaine C. (2020), *A comparative analysis of non-discrimination law in Europe 2019, the 28 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, Serbia and Turkey*. compared, https://op. europa.eu/en/publication-detail/-/publication/a88ed4a7-7879-11ea-a07e-01aa75ed71a1.

9 This study does not include a study of collective redress with regard to gender equality.

10 Law No. 2016-1547 on the modernisation of justice, Title VII (Article 60 et seq.) *(Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle)*: on the new French class action on discrimination issues (but also on issues of personal data, environmental law and health law); Latraverse, S. (2019), *France Country Report – Non-Discrimination*, European network of legal experts in gender and non-discrimination, p. 93.

11 Lovdal, L. (2019), *Norway Country Report – Non-Discrimination*, European network of legal experts in gender and non-discrimination, p. 60 and seq.

12 Iordache, R. (2019), *Romania Country Report – Non-Discrimination*, European network of legal experts in gender and non-discrimination, p. 69.

13 Court of Justice of the European Union (CJEU), *Accept v. Consiliul Național pentru Combaterea Discriminării*, C-81/12, EU:C:2013:275. Request for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucureşti (Romania), judgment of 25.04.2013, available at: http://curia.europa.eu/juris/liste.jsf?language=fr&num=C-81/12.

14 Belavusau, U. (2015), 'A Penalty for Homophobia from EU Non-Discrimination Law: Asociația ACCEPT', *Columbia Journal of European Law*, No. 21, p. 237; https://www.academia.edu/36794906/A_Penalty_for_Homophobia_from_EU_NonDiscrimination_Law_Asociatia_ACCEPT.

15 Micklitz, W. and De Witte, B. (2012), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, p. 305.

16 Mercat-Bruns, M. (2019), 'Tackling indirect discrimination in employment in France: a relative success?' in Havelkova, B., Möschel M. (eds.) *Anti-discrimination law in civil law jurisdiction*, Oxford University Press, p. 244.

17 Mercat-Bruns, M. (2020), 'Les différentes figures de la discrimination au travail: quelle cohérence?' *RDT* 2020, p. 25.

18 Weatherhill, S. (2016), *Cases and Material in EU Law*, Oxford University Press, p. 84.

Taking this perspective, the goal is to show, through comparison, that the stakes behind collective redress in France, Norway and Romania seem common on certain points (Section 1) but the scope of the collective redress mechanisms in the three countries are linked to the different strategic choices of enforcement and the challenges encountered in each Member State (Section 2).

1 The stakes of collective redress in France, Norway and Romania

Collective redress in equality law is a tool to enforce anti-discrimination norms in a broader fashion than individual redress. However, reflection is required on the stakes at issue in the application of any procedures that go beyond individual action. In Europe, in contrast to Canada[19] and the United States,[20] group violations of anti-discrimination law, as compared to those developing in consumer law[21] or environmental law,[22] do not yet have the same profile in public opinion and state action. Policies in EU Member States have dealt with social equality and inclusion through the welfare state[23] and administrative mediation,[24] often mistrusting robust mass litigation through private enforcement, which is better known in common law countries.[25] In this EU context, there are three sets of reasons that seem to underpin the need to resort to collective redress with regard to discrimination in the three countries: (1) procedural reasons to confront the general barriers limiting access to justice in the context of individual discrimination cases, (2) substantive justifications to uncover systemic forms of discrimination and ensure future compliance, and (3) symbolic signalling to show the value of strategic litigation alongside statutory reform.

1.1 Collective redress to overcome procedural barriers to access justice in individual discrimination claims

Collective redress is often seen as a mechanism to facilitate litigation for an action that would not otherwise have been brought because of procedural 'headwinds' creating de facto indirect discrimination. There are three types of obstacles most often observed in the Member States: cost of litigation in front of civil courts,[26] complexity or overlapping procedures, and time constraints (statute of limitations and enduring litigation).

Regardless of the type of violations – although this is also true for anti-discrimination law – the financial cost and complexity of litigation is a deterrent for individual claims. For example, in Norway, the Equality Ombud and the Equality and Anti-Discrimination Tribunal constitute the administrative independent equality bodies set up to hear individual complaints of possible breaches of the non-discrimination

19 Kalajdzic, J. (2018), Class Actions in Canada: The Promise and Reality of Access to Justice, UBC Press.
20 Fiss, O. (1996), 'The Political Theory of the Class Action', *Wash. & Lee L. Rev.* 21 No. 53, p. 21.
21 Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM/2018/0184 final – 2018/089 (COD); Parliament reaction: European Parliament legislative resolution of 26 March 2019 on the proposal for the directive (COM(2018)0184 – C8-0149/2018 – 2018/0089(COD)), available at: https://www.europarl.europa.eu/doceo/document/TA-8-2019-0222_EN.html; See also Hodges, C. (2014), 'Collective Redress: a breakthrough or a damp squib', *Journal of Consumer Policy* No. 34, p. 67.
22 Ebbesson, J. (2002), *Access to justice in environmental matters in the EU,* Kluwer.
23 On socioeconomic inequality, Cuypers, D., Vrielink, J. (2016), *Equal is not enough*, Intersentia, p. 1.
24 In both France and Norway, there is a strong tradition of mediating violations of rights in an administrative setting; in this regard, the Defender of Rights in France still has a role as a mediator outside of his role in combating discrimination where he does not engage as a party, https://equineteurope.org/author/france-dr/. The Ombud in Norway, as of 2018, no longer has the authority to make decisions regarding individual complaints, which is a matter only for the Equality Tribunal. However, the Ombud continues to advise people regarding discrimination issues, including on an individual basis, Act on the Equality and Anti-Discrimination-Ombud and the Anti-Discrimination Tribunal as of 16 June 2017 no 50, in force as of 1 January 2018 (the Equality and Anti-Discrimination Ombud Act – EAOA), See https://lovdata.no/dokument/NLE/lov/2017-06-16-50 for an English version of the act.
25 Nagy Csongor, I. (2019), *Collective Action Collective Actions in Europe: A Comparative, Economic and Transsystemic Analysis,* Springer.
26 See https://e-justice.europa.eu/content_costs_of_proceedings-37-en.do; https://e-justice.europa.eu/content_legal_aid-37141-en.do.

legislation.[27] Although the Ombud and the Equality Tribunal constitute a 'free, low-threshold complaint system', which is essential for individual interests, and are alternative dispute mechanisms addressing cases of discrimination outside the judicial system, they, too, have certain limitations. In particular, although the Equality Tribunal has the advantage of specialising in anti-discrimination law, it cannot assess any other areas of law.[28] Class action suits, for example, can flesh out more complex issues through the expertise of NGOs, while circumventing the cost of litigation. As discrimination cases are often combined with other questions of law (tort liability, constitutional law), and as case law illustrates in Norway, certain groups, like the Sami reindeer herders, would certainly benefit from more tailored collective action by NGOs.[29]

Secondly, there is a lack of access to legal aid, including in discrimination cases, which can constitute a more significant barrier for disenfranchised groups in obtaining access to justice.[30] The guidance provided by the Equality Ombud is not always sufficient to put forward a case, especially for more complex cases, or where the victim does not have the resources to argue their own case, even simply in front of the Equality Tribunal. According to its annual report, the Ombud 'is now trying to remedy this to some extent by initiating a few cases before the tribunal in 2019'.[31] In addition, the tribunal does not have the power to award effective remedies in all types of cases. This means that some cases must be taken to civil court in order to have access to effective remedies under anti-discrimination law, without benefiting from the free legal aid available in the Equality Tribunal and with the risk of having to pay the costs of the presumed author of the discrimination. This is one of the main reasons why there are so few discrimination cases before the courts in Norway. Collective redress can confront issues of cost and garner knowledge from specialised NGOs.

In Romania, the Anti-discrimination Law creates a dual track for individual claims. The claimant can choose between filing a petition with the NCCD (the national equality body, National Council for Combating Discrimination) on the administrative track and/or lodging a civil complaint for damages with the civil courts. The advantage is that both procedures are exempt from court fees. Victims can also choose to use both options simultaneously. However, according to experts, this creates difficulties in practice by overextending the NCCD, since it is required by law to participate as an expert in all such civil proceedings.[32] Another challenge of the dual tracks is increased complexity, since there is the risk of obtaining conflicting judgments in the administrative and civil courts. Finally, when the NCCD finds that discrimination has taken place, it can issue an administrative sanction (warning or fine). If the victim is an individual, the fine is within the range of approximately EUR 250-7 500 (RON 1 000-30 000), whereas if the victims are a group or a community, the fine is within the range of EUR 500-25 000 (RON 2 000-100 000). This is a disincentive for taking individual claims to the NCCD as compared to seeking collective redress in front of the equality body. Victims seeking to claim compensation for discrimination have to lodge complaints before civil courts. In addition to the less attractive sanctions awarded through the NCCD petition and the various intricacies of the system, the intertwined dual procedural track in Romania has the potential to confuse claimants.[33] However, along with the economic considerations for claimants, in Romania, aggregate petitions ease the bureaucratic burden.

27 According to the new Equality and Anti-discrimination Ombud Act (EAOA), the Equality Tribunal has been given powers to award redress (compensation for non-economic losses or damage) where breaches of the act are found.

28 Input provided by Lene Lovdal, non-discrimination expert of the European network of legal experts in gender equality and non-discrimination, for the purpose of this article.

29 See for example the Supreme Court Judgment regarding Sami reindeer owners, HR-2018-872-A. Lovdal, L. (2019), *Norway Country Report – Non-Discrimination*, European Network of legal experts in gender and non-discrimination, pp. 95 and 98.

30 Lovdal L. (2019), *Norway Country Report – Non-Discrimination*, p. 13.

31 Equality and Anti-Discrimination Ombud (2019), *Annual report for 2018*, (*Årsmelding*), p. 8, available at https://www.ldo.no/en/diskriminert/nyheiter-og-fag/brosjyrar-og-publikasjonar/Arsrapporter/arsmelding-2018/.

32 Iordache R. (2019), *Romania Country Report – Non-Discrimination*, European Network of legal experts in gender and non-discrimination, p. 68.

33 Iordache R., Ionescu, J. (2014), 'Discrimination and its sanctions: symbolic and effective remedies in EU antidiscrimination law' *European Anti-discrimination Law*, No. 19, p. 11.

In France, outside of legal fees, labour claims do not require any legal counsel or expense. Moreover, in France, access to litigation depends on the issue at hand.[34] Legal counsel is not required in front of labour courts,[35] the district courts and the criminal courts that can hear discrimination cases.[36] However legal representation is mandatory before regional courts, commercial courts,[37] administrative courts,[38] the Court of Appeal and the Court of Cassation,[39] which de facto limits access to recourse. Legal aid is available to individuals on very low incomes.[40] Since the Defender of Rights, the equality body, cannot initiate judicial proceedings, victims bear the burden of introducing a legal action and finding resources for their own litigation costs in front of regional, commercial and administrative courts, as well as in front of the Court of Appeal and the Court of Cassation, which hands down the landmark decisions setting 'precedent' in discrimination law.[41] Moreover, claims are subject to a rather complex system of application of the statute of limitations of five years in civil[42] and labour disputes.[43] In French civil law, the principle is to 'remedy the harm, strictly the harm', by awarding compensatory pecuniary damages indemnifying the financial and non-material damages, without further pecuniary sanction or punitive damages, which makes individual litigation unattractive considering the other procedural hurdles. Although anti-discrimination law has been implemented by higher courts and has evolved over the last 15 years, empirical studies on case law and interviews with judges show that claimants still often have to be ready to appeal to higher courts, before obtaining a finding of discrimination.[44] For example, some labour courts with non-professional judges (employee and employer representatives) still resist the application of anti-discrimination law if other labour law provisions are applicable.[45] It is within this context of procedural challenges that group representation by NGOs or the novel class action procedure brought before the regional court or the administrative court, can offer another procedural track for collective redress.[46]

In summary, in most Member States, the first priority of collective redress is to harness mechanisms to promote better access to justice, which, as has been identified above, is limited in the pursuit of isolated discrimination cases.

34 The general protection against discrimination is enforceable against both private and public persons.

35 Latraverse, S. (2019), *France Country Report – Non-Discrimination*, European network of legal experts in gender and non-discrimination, p. 92.

36 But in practice, attorneys are commonplace, Latraverse, S. (2019), *France Country Report – Non-Discrimination*, p. 91; all complaints alleging discrimination against a private party (employer, service provider, landlord etc.) must be brought before the civil courts.

37 Law No. 71-1130 of 31 December 1974.

38 Regulation of 4 May 2000.

39 Article 974 ff. of the New Code of Civil Procedure, NCCP.

40 Law No. 91-647 of July 1991 on legal aid.

41 Latraverse, S. (2019), *France Country Report – Non-Discrimination,* p. 91.

42 The time limits for the prosecution of discrimination through a criminal action are three years (Article 8 CPP).

43 A major reform of all statutes of limitations was adopted by Law No. 2008-561 of 17 June 2008, reducing the time limit for instituting any personal and moveable property actions to five years (Article 2224 Civil Code). Five years for labour disputes as well, Article L1134-5 of the Labour Code 'from the incidence of discrimination becoming known [but] compensation covers the damages in their entirety resulting from the whole duration of the discrimination.'

44 In 2016, the Defender of Rights co-financed three major studies on the effective enforcement of discrimination law: Euillet, S., Halifax, J, Moisset, P. and Severac, N. (2016), *L'accès à la santé des enfants pris en charge au titre de la protection de l'enfance (ASE/PJJ): accès aux soins et sens du soin* (Access to healthcare for children under child protection: access to and attitudes towards healthcare), Université Paris Ouest Nanterre La Défense; available at: http://www.defenseurdesdroits.fr; Perelman, J., Mercat-Bruns, M. (2016), *Les juridictions et les instances publiques dans la mise en oeuvre du principe de nondiscrimination: perspectives pluridisciplinaires et comparées* (Jurisdictions and public bodies and the implementation of non-discrimination: multidisciplinary and compared perspectives), Sciences Po (Ecole de droit/CEVIPOF) et Université Panthéon-Assas-CERSA, available at: http://www.gip-recherche-justice.fr/wp-content/uploads/2016/12/GIP_RapportFinal_LES-JURIDICTIONS-ET-LES-INSTANCES-PUBLIQUES-LA-NON-DISCRIMINATION-FINAL.pdf; Laidie, Y. and Picard, P. (2016), *Le principe de nondiscrimination: l'analyse du discours du juge administratif* (The principle of non-discrimination: analysis of the discourse of the administrative courts), Credespo – Université de Bourgogne, available at: http://www.gip-recherche-justice.fr/wp-content/uploads/2016/10/Note-de-synth%C3%A8se-214.04.03.21-1.pdf.

45 Perelman, J., Mercat-Bruns, M. (2016), *Les juridictions et les instances publiques dans la mise en oeuvre du principe de nondiscrimination: perspectives pluridisciplinaires et comparées* (Jurisdictions and public bodies and the implementation of non-discrimination: multidisciplinary and compared perspectives), Sciences Po (Ecole de droit/CEVIPOF) et Université Panthéon-Assas-CERSA.

46 The Law on the modernisation of the justice system in the 21st century amended the Law of 27 May 2008 and the Labour Code.

1.2 Collective redress to detect and address particularly entrenched systemic discrimination affecting vulnerable groups

Collective redress in France, Norway and Romania is useful in enforcing anti-discrimination law and dealing with both the most egregious and subtler forms of collective discrimination. Detecting and then providing relief for structural forms of discrimination, collective redress can first grasp systemic discrimination,[47] most often a combination of direct and indirect discrimination stemming from 'individual behaviour as well as the unintended and often unconscious consequences of a discriminatory system,'[48] patterns or practices. The discrimination can result from intentional organised forms of subordination, for example against undocumented workers on construction sites, as has been recognised recently in the French labour court[49] or the simple operation of established procedures none of which is necessarily designed to promote discrimination, as is often the case in education. Such discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of 'natural forces'.[50] Sometimes, the procedures perpetuate systemic discrimination simply by masking limited efforts to fight collective discrimination in institutions, organisations or workplace settings.[51]

In other words, in these countries, recurring practices of discrimination can take multiple shapes: they can be broad in scope (namely in certain geographical areas in Roma cases or in certain job sectors in employment); more informal and ingrained exclusionary practices with patterns linked to stereotyping; hate speech in Norway; hostile homophobic environments in the workplace (the Romanian *Accept* case); the historical disadvantages for Roma people in public institutions such as schools that exist in all three countries, in addition to other Member states that have encountered similar challenges; arbitrary conduct in welfare law (disability discrimination) in Norway or exclusionary glass ceiling grading systems for people with foreign names in France.[52]

Claimants in all three countries are unlikely to bring individual discrimination or other type of claims. They are without a support system as members of disadvantaged communities, subject to recurring discrimination and exclusion for reasons linked to their precarious status, fear of retaliation or internalisation of discrimination.[53] Moreover, litigation on certain grounds triggers more hostility in the public eye: religious discrimination around headscarves in France, LGBTI in Romania or the plight of Roma communities in France, Norway and Romania. Other claims require more technical expertise, such as disability discrimination claims in all countries.

Collective redress does not just uncover structural forms of discrimination but can also offer collective solutions in the form of remedies linked to fines by agencies like the NCCD in Romania, the elimination of illegal norms (Equality and Anti-Discrimination Tribunal in Norway) or injunctive relief to cease the discrimination in the future (*cessation du manquement*) in the new class action suit in France. In Romania, the NCCD can establish a duty to take certain relevant measures, such as desegregation measures in

47 See Opinion of Defender of Rights on the first evaluation of the new class action in France, Jan. 2020, p. 3.

48 According to the Supreme Court of Canada, which has integrated the notion in law, *Canadian National Railway v Canada (Human Rights Commission)*, [Action Travail des Femmes] (1987) 1 S.C.R. 1114 at 1139. Chicha-Pontbriand, M-T. (1989), *Discrimination systémique, fondement et méthodologie des programmes d'accès à l'égalité à l'emploi*, Cowansville, Ed. Y. Blais, p. 85.

49 Labour Court Decision, Paris 17 December 2019 n° 17/10051.

50 Quote from the emblematic Canadian Supreme Court case on systemic discrimination, *Canadian National Railway v. Canada (Human Rights Commission)* [Action Travail des Femmes] [1987] I S.C.R. 1114, p. 1139. See Mercat-Bruns, M. (2018), 'Systemic discrimination: rethinking the tools of gender equality', *European Equality Law Review* No. 2, p. 1.

51 See Green, T. (2016), *Discrimination laundering: the rise of organizational innocence and the crisis of equal opportunity law*, Cambridge University Press: in the United States, in employment, a defence is to reduce discrimination solely to individual interaction and biases between a manager and an employee without acknowledging a more widespread phenomenon; CSR mechanisms or unreliable or arbitrary indicators for promotion or pay can conceal rather than reveal forms of systemic discrimination, See First Class action suit in France and Amicus Curiae of Defender of Rights.

52 Systemic discrimination in the *Chibani* case affecting Moroccan immigrant workers in the French railroad company SNCF, Labour Court of Paris, 17 December 2019, N° 17/10051, *Dalloz actualité*, 8 January 2020, obs. M. Peyronnet.

53 Krieger, L. (1995), 'The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity', *Stanford Law Review* No. 47, p. 1161.

schools. Since all three countries provide limited opportunities for generous individual compensation, the injunctive relief or the aggregation of petitions can be a useful deterrent for systemic discrimination in the future. But it also invites further reflection on corrective measures[54] of inclusion, positive action, which is an approach much more familiar in the disability arena.

1.3 Collective redress as a means to value strategic litigation for transformative change alongside or prior to statutory reform

In Norway and Romania, strategic litigation has served to push legislative reform. Its visibility triggers awareness raising on issues that are neglected in the political sphere, often because the groups involved are minorities. For example, *Accept v. Becali* (which gave way to *Accept* C-81/12 before the CJEU),[55] led to three rounds of amendments to the anti-discrimination legislation in 2013, thus further improving the legal framework in relation to the wording of the provisions on the burden of proof, genuine occupational requirements and statutory limitations.

In France, which does not collect racial statistics, strategic litigation is useful both to promote group action and to develop more symbolic litigation in a series of individual cases on focused issues, such as racial profiling,[56] migrants' rights in Calais or Roma education, when there is no political momentum in support of the groups who suffer from repeated denial of rights or barriers to access the same rights than others. In France, strategic litigation has also been used for test cases that can be individual but that can be replicated for other members of the same group subjected to anti-discrimination violations.[57]

In addition, for some grounds, litigation is rare and collective redress might muster the necessary impetus to enforce anti-discrimination law in areas of resistance or inaction from policy makers. For example, it is recognised that rights for transgender groups or people with certain disabilities are ignored or face neglect from public authorities. Valuing strategic litigation empowers marginalised groups to focus on key inconsistencies in the law.

Strategic litigation with media coverage can help shape public opinion and accelerate regulation or legislative reform in countries unfamiliar with private enforcement and uneasy with financial remedies, as the UN has observed.[58]

Strategic litigation exercises a public function and instrumentalises the judicial system as a democratic sounding board. However, it requires the resources to carry out a social mission for a group, finding common ground and collective means of evidence: knowledge on public interest lawyering, legal expertise on systemic discrimination, logistics for administrative paperwork and judicial filings, financial means to acquire strong legal representation.

Clearly there is a need to analyse the variety of collective redress mechanisms in the three countries to find out whether they live up to these stakes and the possible expectations raised to ensure positive means of enforcing anti-discrimination law in the Member States.

54 Defender of Rights (2020) Opinion, *Report on the application of the class action mechanism*, (Avis du Défenseur des droits N° 20-01 du 5 fév. 2020).

55 Belavusau, U. (2015), A Penalty for Homophobia from EU Non-Discrimination Law: Asociata ACCEPT, *Columbia Journal of European Law*, No. 21, p. 237; https://www.academia.edu/36794906/A_Penalty_for_Homophobia_from_EU_Non-Discrimination_Law_Asociatia_ACCEPT.

56 There have been French Court of Cassation cases with the support of NGO Open Society; on racial profiling, Civ. 1 re, 9 November 2016, N° 15-25.872.

57 A case against Airbus: Court of Cassation, 15 December 2011 N° 10-15873.

58 The UN has pinpointed the need to work on test cases for women who suffer from intersectional discrimination, Engage in Strategic Litigation, http://www.endvawnow.org/en/articles/948-engage-in-strategic-litigation.html.

2 Scope of the mechanisms of collective redress in the three countries: strategic choices of enforcement and challenges still encountered in France, Norway and Romania

In the EU search for coherence in developing collective redress,[59] both to cease unlawful conduct and to ensure compensatory relief, France, Norway and Romania offer examples of what might work and what might limit the enforcement of anti-discrimination law in confronting group disadvantage and unequal opportunities on a broad scale and the promotion of more widespread measures of inclusion. The scope of collective redress, which is not mentioned explicitly in the two anti-discrimination directives, can be broken down into class or group action (claims on behalf of an undefined group of claimants or identified claimants and multiple claims) and *actio popularis* in which organisations act in the public interest on their own behalf, without a specific victim. This classification does not disregard the importance in the three countries of test cases that target *individual* cases that can be used for future action as a *model to duplicate* and that can be extended to other members of minority groups in the long run, but we will not include them per se in this study on *collective* redress.

2.1 Collective redress as group action on behalf of victims of discrimination (representing them)

All three countries have a mechanism to represent several victims in litigation on discrimination.[60] Specialised NGO/associations and trade unions have the legal standing to play this role even though, in certain countries, there can be particular issues raised for any claimant (individual or organisation) on 'genuine' interest to have the claim determined against the respondent[61] or inequities between the parties not represented by NGOs that have been resolved.[62] It is undeniable that the sheer number of claimants creates momentum and as such has a greater impact on unlawful conduct and in mustering support for victims: 'the more the merrier' as the saying goes. It also creates the opportunity for coalitions of organisations like the 'Anti-discrimination Coalition' in Romania,[63] which can give strategic litigation even more leverage and clout but can also create procedural difficulties.[64] In Norway, case law has widely accepted associations and cooperatives acting under a common name.[65]

In practice, in Romania, organisations use collective redress as a stepping stone in their advocacy strategy and NGOs working on behalf of various vulnerable groups extensively use the legal possibility of filing a petition before the NCCD. LGBTI groups are well represented, as are children with disabilities in inclusive education cases, supported by the European Centre for the Rights of Children with Disabilities and Roma children in segregation in education cases brought by NGOs that have monitoring projects. This was the

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

60 Romania: Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination, Article 28 (1); Norway: Articles 1-4 of the Dispute Act and Equality and Anti-discrimination Act, Article 40; France: Law of 16 November 2001, Article 2, Code of Penal Procedure; Article R779-9 Code of Administrative Justice, Article 3 New Code of Civil Procedure, Articles L 1134-2 and L 1134-3 Labour Code, Law No. 83-634 of 13 July 1983 in the public sector, Articles 8(1) and (2)).

61 In Norway, genuine need is linked to a total assessment of the relevance of the claim and parties' connection to the claim (Article 1-3(2) of the Dispute Act).

62 In Romania, the Constitutional Court, Decision 285, 1 July 2004 rejected a petition contesting the provision granting the legal standing to NGOs when parties were not themselves under the protection of the NGO.

63 An informal coalition of NGOs working with different victims of discrimination which is supported and coordinated by ACCEPT Romania.

64 The citation of several NGOs in a petition can create procedural challenges, as each NGO has the right to participate in hearings, raise procedural objections, file written submissions and ask for delays, etc.

65 In the Dispute Act of 2005 the former case law on this was summarised in its Section 2-1. An example of what has been accepted is in Supreme Court case HR-2017-1199-U; https://lovdata.no/pro/auth/login#reference/avgjorelse/hr-2017-1199-u, where in relation to an association regarding access to water and drains for a number of owners of summerhouses in the same area, it was clearly stated that the criterion of having their own funds in Section 2-1(2) did not require that they had sufficient funds to cover the legal expenditures of the litigation in question.

case with the NGO Romani CRISS in 2010-2012 and more recently in 2016-2018 with the segregation cases initiated by the Centre for Advocacy and Human Rights. The outcome of the collective redress mechanism was particularly relevant in this last case because it led not just to fines, but to an obligation to act: both defendants were asked to produce a desegregation plan, different to the plan produced by the school each year and which had been presented as being a desegregation plan.[66] In Norway, the Equality Tribunal has the power to uses injunctions as a remedy and has resorted to them[67] and courts rely on this tool even more.[68]

However, in France and Norway, trade unions do not have any legal duty to act, so these professional organisations seldom engage in judicial proceedings connected to anti-discrimination, (outside of union membership and sex discrimination in France). Moreover, in Norway and France, the adversarial dimension of litigation, viewed as creating strife and as threatening social cohesion, is not always preferred if other alternative means of resolution can be used, such as informal negotiations directly with the public sector in Norway and with the help of the Defender of Rights in France. For example, in Norway, the Norwegian Centre against Racism's work on hate speech and hate crime has focused on cooperation with the police. Other NGOs were instrumental in cases concerning refusal to shake hands with women on the basis of religious convictions. In addition NGOs, for example SOS Racisme in France, traditionally prefer criminal prosecution despite it being much less successful due to the requirement to prove criminal intent and the lack of a mechanism for shifting the burden of proof of discrimination that exists in civil and administrative cases.

It is also possible to see the importance of NGOs engaging in strategic litigation on behalf of groups because, in their absence, the rights of some groups are never vindicated. Very few cases exist concerning Roma in Norway, for example.[69]

Litigation on discrimination issues requires detection and an initiative to engage proceedings on behalf of a group. Detection requires awareness about discrimination from all the actors involved in litigation: presumed victims of discrimination, NGOs and judges. For example in Norway, the level of awareness among victims of anti-discrimination law varies from minority group to minority group, depending on a number of factors, such as their level of organisation, financial resources, integration into and knowledge of Norwegian society and its legal system, education level, and how much energy they need just to keep going, for example due to poor health or immigration status. This is why NGOs can play an instrumental role on behalf of more vulnerable victims through the impetus of collective redress.

66 The case was initiated in 2016 by the NGO Centre for Advocacy and Human Rights (Centrul de Advocacy și Drepturile Omului (C.A.D.O.), which during its monitoring work identified a case of school segregation in the city of Iasi and filed a complaint with the national equality body against the school responsible and the Iasi county inspectorate in charge. Based on the complaint and its own investigation work, the National Council for Combating Discrimination issued its decision no. 769 from 7 December 2016 in which it found discrimination of Roma children who were disproportionately placed in one building of the school (building C) for primary education (0-4 classes). In the NCCD decision, the building is described as having reduced educational resources and being in a poor condition (raining through the roofs), with only one qualified teacher and providing an overall poorer educational experience compared to Romanian children who are enrolled in the other buildings of the same school. Outside of the desegregation plan, the NCCD decided based on Article 2(1) – direct discrimination, Article 2(4) – indirect discrimination, Article 11 – general prohibition of discrimination in education and Article 15 – right to dignity of the GO 137/2000. The school was sanctioned with a fine of approximately EUR 667, as well as the Iasi school inspectorate with a fine of approximately EUR 1 111. The High Court of Justice and Cassation had its hearing on 6 February 2020 and on 20 February it issued its decision 1015/2020 in file 1067/45/2016, quashing the judgment of the Court of Appeal Iasi and rejecting the arguments of the school and of the school inspectorate, reinstating the NCCD decision and ordering the defendants to pay the legal costs to C.A.D.O., see https://www.equalitylaw.eu/downloads/5088-romania-high-court-quashes-prior-judgment-and-maintains-decision-finding-segregation-in-education-of-the-nccd-86kb.

67 EAOA, Section 11, available in English at https://lovdata.no/dokument/NLE/lov/2017-06-16-50.

68 Dispute Act, Chapter 34 (and Chapter 33 regarding property), in English at https://lovdata.no/dokument/NLE/lov/2005-06-17-90/KAPITTEL_7#KAPITTEL_7-3.

69 One case in the archives of the Equality Tribunal concerned discrimination against Norwegian Roma, case No. 19/2009; one case concerned a tent camp outside of Oslo (immigrant Roma), another a child custody case (Norwegian Roma), using ECHR and UNCRC, Cases TOBYF-2013-117117 and LB-2006-135824-RG-2007-1012.

There are very specialised NGOs that are proactive, such as on matters of religion in France,[70] but this means that, for other grounds of discrimination in *civil* cases, there is no real support system in civil society on the legal front in France.[71] There is a growing awareness that discrimination law can be an additional tool in some countries. For example, in Norway, NGOs working for persons with disabilities have tended to focus on welfare law, and their litigation has focused mainly on universal design. This has changed significantly in the last few years, and there have been a few recent court cases integrating discrimination law and welfare law (with poor results from the courts so far). One such case made it to the Supreme Court.[72] The case concerned the question of whether a municipality had the right to forcibly move three disabled persons from where they had lived for 30 years to another of the municipality's institutions. Even though both discrimination law and the UN Convention on the Rights of Persons with Disabilities (CRPD) were used in the parties' argumentation, neither the Court of Appeal nor the Supreme Court took this into consideration in their decisions. The Supreme Court sent the case back to the Court of Appeal for a new consideration, as it considered that the court had not been thorough enough in its interpretation of the contract between the parties.

This brings us to the question of judges' reluctance to embrace issues of discrimination. In the three countries, judges are not well trained to detect collective discrimination. This is particularly true in France, where magistrates tend to have a civil and administrative mindset. In Romania, judges can be reluctant to acknowledge the public interest that NGOs might stand for. There have been cases in which the language used by the courts is rather defamatory in relation to NGOs, shutting the door to potential remedies.[73]

However, the Ombud in Norway and the NCCD in Romania are better equipped to understand the systemic nature of discrimination (not to disregard the pedagogical effect of the *amicus curiae* role of the Defender of Rights in France). The question of the Norwegian tribunal's authority has been clarified in the new Act on the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal (Equality and Anti-Discrimination Ombud Act or EAOA) of 16 June 2017 no 50, in force from 1 January 2018.[74]

Finally representing cumulative individual claims or group claims can encourage broadly based proactive solutions in strategic litigation beyond financial remedies. The Equality Tribunal in Norway uses injunctions,[75] as do the courts.[76] Even the current conservative Government has introduced proactive duties for employers to combat discrimination (having previously reduced this duty), as awareness is spreading that this is the only effective way to combat systemic or structural discrimination based on widespread stereotypes.

If mediation or positive action is not preferred, when identifiable victims seek remedies, collective redress through NGOs' acting on their behalf seems the preferable route in that it takes away pressure from the victims. However, since civil remedies and damages awarded remain scarce in all three countries and most administrative procedures result in sanctions that take the form of warnings or fines, other forms of collective redress might foster institutional change, more aligned with the Member States' legal cultures.

70 For example, the *ECJ Bougnaoui* case was supported by a French NGO fighting against islamophobia (Collectif contre l'islamophobie en France/CCIF).
71 Except through foreign NGOs like Open Society that work on a transnational level on these issues with an impact in France, see note 49.
72 HR-2019-1637-U.
73 Iordache, R., Ionescu, I. (2014) 'Discrimination and its sanctions', *European Anti-Discrimination Law Review*, Issue 19, p. 19, https://www.equalitylaw.eu/downloads/2530-law-review-19.
74 English version available at https://lovdata.no/dokument/NLE/lov/2017-06-16-50.
75 EAOA, Section 11.
76 The courts certainly also have such, and to a wider degree, see the Dispute Act, Chapter 34 (and Chapter 33 regarding property), available in English at https://lovdata.no/dokument/NLE/lov/2005-06-17-90/KAPITTEL_7#KAPITTEL_7-3.

2.2 *Actio popularis* in France, Norway and Romania: a means of vigilance and a possible beacon for legislative reform?

As was demonstrated by the impact of the Belgian *Feryn* case before the CJEU,[77] *actio popularis* is a useful form of collective redress where there is no specific victim. The specific nature of the discrimination, such as overt comments in the *Feryn* case, or the need for NGOs to monitor recurring violations in targeted vulnerable communities can lead to legislative reform to improve the enforcement of anti-discrimination law.

The three countries have adopted this mechanism in their legal framework:[78] in Romania, Article 28(1) of the Anti-discrimination Law allows associations with protection of human rights as their mandate to file complaints on their own behalf; likewise in France, Article 31 of the Code of Civil Procedure provides a general principle, completed by Article R7799 of the Code of Administrative Justice, that gives NGOs and trade unions a role to vindicate rights stemming from legislation prohibiting discrimination;[79] in Norway, NGOs and trade unions have a right of action in their own name in relation to matters that fall within their purpose and scope (Article 1-4(1) of the Dispute Act).

More specifically, in Romania, the *ACCEPT v. Becali* case is a perfect illustration of *actio popularis* as an awareness-raising tool to facilitate legislative reform. It gave the opportunity to test the anti-discrimination legislation leading to the European *ACCEPT* case C-81/12 and new ways of understanding sexual orientation discrimination and evidence in the case of an appearance of discrimination and employer inaction facing hostile declarations against LGBTI groups. In turn, it allowed NGOs to identify gaps in order to formulate proposals and push amendments in Romania.[80]

There are no specific provisions regarding remedies sought or special rules, including on the burden of proof concerning *actio popularis* in Romania. However, the remedies obtained in these cases are limited given that, irrespective of the legal standing recognised, a direct, personal and actual interest and effective damages (harm suffered, material damages) must be proved before civil courts. As NGOs have difficulties in providing the courts with evidence regarding quantifiable damages, the NCCD remains the main forum for such cases in Romania.

In France, these actions could be useful to declare null and void public regulations that produce direct or indirect violations against groups with disabilities or when trade unions detect discrimination in collective bargaining agreements. There has already been significant work by NGOs on specific causes: rights of

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

78 In Romania (Article 28(1) of the Anti-discrimination Law allows associations with protection of human rights as their mandate to file complaints on their own behalf; In France, Article 31 Code of Civil Procedure set a general principle; R779-9 Code of Administrative Justice provides NGOs and trade unions in support of recognition of rights provided by legislating prohibiting discrimination, Labour Code allows trade unions to challenge collective bargaining agreements -Articles. L 2251-1 and L2132-3; Defender of Rights (Article 33 Institutional Act) provides that the Defender of Rights can present observations as amicus curiae before any jurisdiction so including in cases of *actio popularis*. Norway allows it: NGOs, trade unions have a right of action in their own name in relation to matters that fall within their purpose and scope (Articles 1-4(1) Dispute Act).

79 Labour Code also allows trade unions to challenge collective bargaining agreements -Articles. L 2251-1 and L2132-3 and the Defender of Rights (Article 33 Institutional Act) can present observations as amicus curiae before any jurisdiction, including in cases of *actio popularis*.

80 There were three rounds of amendments to the ADL in 2013 improving the legal framework: Law 61/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 21 March 2013; Emergency Ordinance 19/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 27 March 2013; and Law 189/2013 for the ratification of Emergency Ordinance 19/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination. 25 June 2013.

immigrants[81] and migrants' rights[82] and NGOs specialised in transgender rights.[83] In Norway, there is no provision for *actio popularis* in anti-discrimination law. However, the mechanism is successful in other fields, such as consumer law.[84] It seems coherent to use this tool of collective redress for disenfranchised groups who would never go to courts to challenge immigration, health (current crisis) or social policy in view of their extremely disadvantaged, intersectional and precarious status, which is the situation for undocumented workers, domestic workers of foreign origin or seasonal workers. In Romania, for example, NGOs could use *actio popularis* for people living with HIV/AIDS or asylum seekers and migrants who benefit from the work of NGOs mainly in the realm of social services rather than in the legal arena. That said, in Norway, it is not that there is no strategic litigation. For example, in the immigration field, some individual cases have a strong and sufficient symbolic impact linked to a specific factual context so it is not always necessary to use any collective mechanism to obtain the desired effect.[85]

A last avenue to advance collective rights through strategic litigation is to develop linked claims arising from the same event.

2.3 Class action or aggregate petitions: a potentially useful tool of collective redress to impose structural forms of inclusion in France, Norway and Romania?

Norway and France explicitly recognise the value of class action as a different route to enable collective challenge, but the mechanisms for doing so need further consideration as, in practice, class action has not yet had a significant impact in either country.

Aggregated action stemming from the same event in Romania and France:

Romania allows aggregated petitions. National law authorises organisations/trade unions to act in the interest of more than one individual victim for claims arising from the same event. Class actions are not allowed under civil procedure in Romanian law nor are they specifically mentioned in the Anti-discrimination Law.[86] However, in the case of the NCCD though not defined as class action, aggregate claims by more than one individual victim arising from the same event would be annexed as one file in hearings both before the NCCD and the courts as provided by Article 66 of the NCCD internal procedures. However, the individual victim may request or oppose such an aggregation of the complaints. If NGOs represent more than one victim, declarations issued by each individual victim must be included and the procedures and remedies they can obtain are the same. The scale of this mode of collective redress should give the opportunity to judges to reflect, like the NCCD, on the importance of calibrating sanctions in accordance with the broad scope of the harm or its systemic nature, leading to better compensation in such cases. The number of complaints should give the NCCD the opportunity to give better publicity to these multi-party decisions in discrimination cases.

France has also been successful in using aggregated petitions, for example in the 'Chibani' case, involving 800 claims of indirect discrimination based on origin, against the SNCF railway company, which had denied sufficient pay, promotion and pension benefits to Moroccan employees who were kept in a

81 See the work of the French NGO Group providing information and support to Immigrants (*Groupe d'information et de soutien des immigrés/GISTI*), http://www.gisti.org/gisti/index.en.html.
82 See the work of the French NGO CIMADE which provides legal support to migrants, refugees and asylum seekers; https://www.lacimade.org/la-cimade-english/.
83 In other fields, there is significant work done by NGOs specialised in violence against women (AVFT, https://www.avft.org/).
84 See for example: Supreme Court judgment HR-2020-475:A, which concerned thousands of bank customers, and was led by the Norwegian Consumer Council (an ombudsman for consumers).
85 For example, for many years, the Norwegian Association for Lawyers ran a strategic litigation group for asylum seekers.
86 Iordache, R. (2019), *Romania Country Report – Non-Discrimination,* p. 70.

temporary working status for many years.[87] In hindsight, as a collective mechanism, class action, which only became applicable in 2016, would have avoided the extreme complexity of aggregated petitions reflected in the 'Chibani' case; from now on, class action will alleviate such administrative hurdles in the court system.

Class action in Norway and France: high hopes but some inherent limits

Class action in Norway and France are formal mechanisms of collective redress but they are both fairly new[88] and there have been just a few cases in Norway and three pending cases in front of the courts in France.[89] In Norway, following the implementation of the new Dispute Act, since 2008 there has been an option to collectively take cases to court, in class actions, with specific procedural rules according to Chapter 35 of the Dispute Act.[90] There are different options to introduce class action suits in Norway. A class action may be brought by any person who fulfils the conditions of class membership or by an organisation, association or public body charged with promoting a specific interest.[91] The Ombud is also able to bring a class action suit concerning discrimination to courts, however she has not made the use of that ability so far.[92] Prior to the introduction of the Dispute Act, discrimination cases were given as an example of the kinds of cases where class action might be suitable.[93]

This type of collective redress in Norway presents a type of procedural flexibility. As a general rule, in both general civil and criminal cases, victims must be identified. This is similar for class actions where a specific victim in penal procedures (hate crime), or named claimant in civil procedure (discrimination cases), must be identified in most instances. The exception may be in the kind of class action where not all members of the class are required to be known by name.[94]

In practice, in Norway**,** there have been few cases because even if cases are similar, the facts tend to differ sufficiently to make it difficult to turn them into a class action instead of individual cases. Moreover, when legislation or practice is seen as discriminatory, the courts are rarely used. The NGO sector will try to solve the issue, with a large scope, broadening its approach through dialogue with the Government or Parliament. Even if litigation is used, there is little motive for having a class action in discrimination cases unless damages are the objective. In order to change rules or practices, it is often enough to have one successful claimant and the changes will have an effect on many others. Most NGOs use the Anti-discrimination Tribunal (formerly the Ombud) in the first instance, but its mandate is limited regarding damages and redress. In other words, in Norway, the potential impact of class action has been circumvented for less adversarial means of conflict resolution in collective forms of discrimination. In addition, one claimant is often enough to be successful and having many claimants

87 Labour Court of Paris, 17 Dec. 2019, n o 17/10051; http://www.leparisien.fr/economie/chibanis-la-sncf-condamnee-en-appel-pour-discrimination-envers-des-cheminots-marocains-31-01-2018-7533189.php. See also Mercat-Bruns, M. (2019), 'Tackling indirect discrimination in employment in France: a relative success?' in Havelkova, B, Möschel M, (eds.) *Anti-discrimination law in civil law jurisdiction*, Oxford University Press, p. 244.

88 Pécaut-Rivolier, L. (2013), *Lutter contre les discriminations au travail: un défi collectif*, Report for the Minister of Justice.

89 Lyon Administrative District Court 29 April 2019 n° 1806281 rejected a claim of indirect wage discrimination by a trade union against women occupying most of the specific subsidised short-term contracts designed for younger workers; the three pending cases: a first class action in the private employment sector was brought by a trade union CGT against Safran Aircraft Engines, https://www.actuel-ce.fr/content/la-cgt-engage-une-action-de-groupe-contre-safran-aircraft-engine), on 23 May 2017; See Defender of Rights amicus curiae, 7 June 2019 https://www.editions-legislatives.fr/actualite/le-defenseur-des-droits-appuie-l-action-de-groupe-contre-les-discriminations-syndicales and in the public sector brought also by a police trade union, Alternative Police CFDT, against the Minister of the Interior, both cases denounce union membership discrimination; another class action case is on sex discrimination and wage disparities in the private sector introduced by a trade union CGT against the company Caisse d'épargne on June 5 2019, https://www.editions-legislatives.fr/actualite/la-cgt-lance-une-action-de-groupe-contre-les-inegalites-f-h-a-la-caisse-d-epargne.

90 Section 35-6 to 35-8, available in English at https://lovdata.no/dokument/NLE/lov/2005-06-17-90/KAPITTEL_8#KAPITTEL_8.

91 Provided that the action falls within the purpose and normal scope of the Dispute Act (Article 1-4 as provided by Article 35-3(1)b.

92 Norwegian Government (2008) *Kjonn og lonn* (Gender and Pay-white paper) NOU 2008:6, p. 114.

93 See Norway, Ot.prp nr 51 (2004-2005) s 322.

94 Article 35-2, Dispute Act.

can be too complicated for most issues. Furthermore, there is little tradition of class action at this point, since it has only recently been introduced.

In France, class action involves authorised associations/NGOs and trade unions acting unilaterally in the interest of more than one individual victim (class action for claims arising from the same event or similar acts). Article 163 of Law No. 2002-73 allows NGOs to act on behalf of a number of claimants in access to housing, and unions can act on behalf of workers. In France, all trade unions are legally constituted with the status of associations. The Law of 16 November 2001 already provided the possibility to all representative trade unions and NGOs that have existed for over five years to act on behalf or in support of victims of discrimination (Article 2, Code of Penal Procedure).

The real change in terms of discrimination law came from Law No. 2016-1547 on the modernisation of the justice system in the 21st century,[95] which amended the Law of 27 May 2008 and the Labour Code to create a legal framework supporting class action that can be brought before the regional court or the administrative court (Articles 62 to 88).[96] However, as the Defender of Rights had warned before the passage of the law instituting class action[97] and has observed in its recent evaluation of the mechanism,[98] it withholds potential opportunities to correct structural inequalities in the future but was designed with inherent limits as to its capacity to represent a broad range of vulnerable groups. It lacks at this point the ballast needed to attract and fund class action initiatives to support NGOs for strategic litigation and does not provide the means for judges to monitor transformative change in the private and public sector.

Inherently narrow scope of the groups authorised to initiate class action proceedings in France

In matters of discrimination in general, such a class action must be instituted by an NGO that has been operating for at least five years in the domain of disability or discrimination[99] in its own name. NGOs are excluded from employment matters, where the action must be initiated by a trade union in its own name, except as regards discrimination in accessing employment or training (Article 87). This limits the possibility of NGOs specialised in discrimination to act in employment cases, when trade unions, in practice, do not represent disenfranchised groups as reflected in the first class action suits on union and sex discrimination. It is difficult to prove discrimination in access to employment, in addition to the fact that there is no possibility to collect racial statistics on a pool of candidates for employment, for example. However, some cases in France on discrimination based on origin in recruitment processes have prevailed, based on the workers' foreign surnames.[100]

People with disabilities, precarious workers, workers with religious beliefs and LGBTI workers cannot depend on trade unions to create common fronts and initiate actions when they are facing systemic

95 Articles 62 to 88 of Law No. 2016-1547 of 18 November 2016, available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033418805&categorieLien=id.

96 See Latraverse, S. (2019), *French Report-Non Discrimination*, p. 93.

97 Opinion No. 15-13 Defender of Rights of 2.06.2015 on the bill introducing class action in matters of discrimination and equality (*Avis 15-13 du 2 juin 2015 relatif à la proposition de loi instaurant une action de groupe en matière de discrimination et de lutte contre les inégalités / Défenseur des Droits (02/06/2015*), available at https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=14854&opac_view=-1; Opinion No. 15-23 Defender of Rights, 28.10.2015 on the new class action (Avis 15-23 du 28 octobre 2015 relatif à l'action de groupe / Défenseur des Droits (28/10/2015), available at https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=16489&opac_view=-1; Opinion No. 16-10 Defender of Rights of 7.04.2016 on the class action and the organisation of the judicial system (Avis 16-10 du 7 avril 2016 relatif à l'action de groupe et à l'organisation judiciaire / Défenseur des Droits (07/04/2016), https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=18270&opac_view=-1.

98 Defender of Rights (2020), Opinion, *Report on the application of the class action mechanism* (Avis du Défenseur des Droits relatif au bilan et aux perspectives des actions de groupe n° 20-01, 5 Feb. 2020), https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=31380&opac_view=-1.

99 Articles 63 and 86, creating a new Article 10 in the Law No. 2008 of 27.05.2008 transposing European law in matters of discrimination (*LOI n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations)*.

100 Labour Court of Paris, 17 December 2019, n° 17/10051, but in this case, it was an aggregated petition of individual actions, which was much harder to handle than a class action suit.

discrimination linked to structural disadvantage and stereotypes and fear of retaliation. Systemic discrimination can be both overt and widespread and subtle in the way in which institutional inaction in the private and public sector facilitates recurring patterns and practices.[101] In the most recent litigation on systemic discrimination against immigrant workers,[102] undocumented construction workers,[103] train cleaning staff experiencing sexual harassment when working for subcontractors,[104] and retired Moroccan immigrant workers in French railroad company,[105] the claimants were not supported in their litigation by trade unions.[106]

The Defender of Rights has strongly suggested on different occasions the need to amend the law to allow more outreach and to authorise NGOs to act on behalf of all groups,[107] even in employment cases, because of the risk that this mode of collective redress will not be used by the most vulnerable groups. This change would not lead to an uncontrollable flood of actions because in civil cases only the Higher District Court (*Tribunal de Grande Instance*) is competent to hear the class action and this requires legal representation. This lack of recourse to class actions for certain groups is amplified by the lack of means to engage legal counsel and expertise for this type of collective redress which compares unfavourably to the systems in place in other legal frameworks. In Quebec, for example, there is a specific fund for class action suits that is funded by statutory court costs based on the global value of the litigation pronounced by the courts.[108]

Limits to canvassing ideas for corrective measures of inclusion and monitoring their implementation

On the bright side, the redeeming feature of this French form of collective redress is its potential as a tool not only to detect forms of systemic discrimination, but also to eliminate or reduce future discrimination through corrective measures.[109] The French class action is instituted to put an end to a discriminatory behaviour (*action en cessation de manquement*). The class action must be preceded by a formal letter of demand requesting the correction of the discrimination within four months before any litigation ensues.[110] The class action can be initiated to request that the discriminatory measure be stopped and/or to initiate an action for liability with a request for damages to the benefit of all members of the group.[111]

In addition, the law on the new class action suit in France is not explicit on how to prove systemic discrimination and how the judge will weigh this collective evidence. The difficulty is knowing how to prove the similar violation of discrimination affecting different individuals in the group, because the law gives no hints and the civil judges and administrative judges that are competent to hear class actions are not very familiar with discrimination in general and even less familiar with more subtle forms of systemic discrimination. A number of queries remain about how the judge will be equipped to tackle

101 Mercat-Bruns, M. (ed.) (2020) *Nouveaux modes de détection et de prévention de la discrimination et accès au droit: action de groupe et discrimination systémique, algorithme et préjugés, harcèlement sexuel et réseaux sociaux*, TEE, Société de législation comparée.
102 Labour Court of Paris, 17 December 2019 n° 17/10051.
103 Labour Court of Paris, 17 December 2019, n° 17/10051, *Dalloz actualité*, 8 January 2020, obs. M. Peyronnet.
104 Labour Court of Paris, 1 November 2017, n° 15/11389, appeal pending.
105 Paris Court of Appeal, 31 January 2018, n° 15/03130.
106 However the Defender of Rights backed this litigation through its investigative powers
107 The general assembly (Assemblée Nationale) has just drafted a report on the 2016 French law pertaining to class actions which also suggests giving more access to NGOs to class litigation, http://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b3085_rapport-information.pdf.
108 See L.R.Q. Law on class action, Chapter R-2.1, mentioned in Defender of Rights (2020), Opinion, *Report on the application of the class action mechanism*, https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=31380&opac_view=-1.
109 Latraverse, S. (2020), 'Réflexions sur l'action de groupe en matière de discrimination en emploi et le rôle du défenseur des droits', Mercat-Bruns, M. (ed.), *Nouveaux modes de détection et de prévention de la discrimination et accès au droit : action de groupe et discrimination systémique ; algorithmes et préjugés ; réseaux sociaux et harcèlement sexuel*, Actes du colloque Trans Europe Expert, Société de législation comparée.
110 Article 64 of Law No. 2016-1547. The General Assembly's report on class action recommends eliminating this time for negotiation before any litigation saying this only delays the process, http://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b3085_rapport-information.pdf.
111 Article 62 of Law No. 2016-1547.

the appreciation of a collective unlawful action, even with the shift of the burden of proof, trade unions and NGOs must bring elements of fact to allow the presumption of discrimination for similarly situated individuals linked to one perpetrator.[112]
Article 65 of the law defines remedies obtained by the action to put an end to discrimination as: 'an injunction to take all necessary measures' to put an end to the discriminatory situation or practice, within a specified period under sanction of a fine. The procedure does not separate judgment on the merits from the decision determining whether the situation is representative of a collective situation allowing for a class action. Except on issues related to employment, Article 10-1 of the Law of 27 May 2008 provides that this action for injunction can be joined by an action for damages to be compensated for the discriminatory behaviour (*action en responsabilité*).

In cases relating to discrimination in employment, however, the legal regime is more restrictive, with the procedure favouring out-of-court discussions to put an end to the discriminatory practice or policy.[113] Unfortunately, this constructive preliminary phase, which could potentially lead to constructive settlements without litigation has, in practice, not yet been fruitful. In the union-led class action against the company Safran, a request to negotiate and correct the practice was rejected.[114]

In labour disputes, compensatory relief can only be sought for damages that arise after introduction of the action before the court (Article L1134-8 of the Labour Code). However, the initiation of the class action does not interrupt the right of complainants to seek individual redress before the labour courts in individual cases (Article 71). Victims can always pursue a separate action if they do not wish to be represented by the group (Article 71). They do not have to wait for the final judgment or opt out of the class action. The procedure is one that allows private parties to opt into the group within a period specified by the judge to enable them to benefit from the findings of the court's decision (Article 72). At the time of the enforcement of the judgment and determination of damages, members of the group can give a mandate to the association or trade union to represent them.

If systemic discrimination is proven, numerous questions are left unanswered. What measures will be retained by the judge when the claim is for an injunction to cease the discrimination? What will be the nature of the institutional and organisational policies and corrective measures implemented by employers, schools, hospitals and other public and private structures to halt further discrimination and what measures will the judge put into place to monitor the proper application of the duties to act? The decree adopted to implement the law on the French class action is vague on this point.[115]

Conclusion

France, Norway,[116] and Romania have a diversified set of tools for collective redress.[117] The idea is not to push litigation at all cost but to ensure better implementation of anti-discrimination law and efficient deterrents to recurring violations of equality law,[118] in view of EU law requirements for proportionate, dissuasive and effective remedies. The study has shown that, in all three countries, in matters of discrimination, access to justice is particularly challenging for individual victims who suffer from ingrained systemic discrimination and that collective redress is both a vehicle for better due process and for

112 Even if the Court of Cassation has said that the elements of proof must be gathered together as a whole to constitute a prima facie case of discrimination, Soc. 28 June 2018, No. 16-28.511, Dr. soc. 2018. 953, obs. J. Mouly; v. Soc. 21 January 2016, No. 14-26.698; 23 October 2019, No. 18-14.886.
113 See Latraverse, S. (2019), *France Country Report – Non-Discrimination*, p. 93.
114 Even though, in other countries such as the United States, the majority of class action suits are settled out of court.
115 Decree No. 2017-888 of 6 May 2017 to implement class action, (*Décret n° 2017-888 du 6 mai 2017 relatif à l'action de groupe et à l'action en reconnaissance de droits prévues aux titres V et VI de la loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle*), https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034635100&categorieLien=id.
116 On Norway, see also Høgetveit Berg, B., Nordby, A., Norge (2012), *Gruppesøksmål: tvistelova kapittel 35 med kommentarar*.
117 Money-Kyrle and Hodges, C. (2012), 'European Collective Action: towards coherence?' in *Maastricht Journal of International and Comparative Law*, p. 277.
118 Hodges C., Stadler, A. (eds.) (2013), *Resolving Mass disputes: ADR and Settlement of Mass Claims*, Edward Elgar.

variegated forms of strategic litigation alongside legislative reform. The goal of this comparative study was to show innovative tools in the different countries. Whether it takes the form of *actio popularis* in Romania, class action in France or group action on behalf of victims in Norway, a common denominator in collective redress is the expertise that NGOs, trade unions and equality bodies need to understand the complexity and inherently contextual nature of discrimination linked to group disadvantage, the persistent procedural hurdles of certain collective mechanisms and the limited resources and awareness of victims of what constitutes group discrimination. The development of strategic litigation[119] and opportunities for coherent measures[120] to fight collective and systemic discrimination on behalf of vulnerable groups is still a work in progress as civil society starts to realise that enforcement of equality law requires changes on both an individual and group level.

119 McIntosh, W., Cates, C. (2019), *Multi-Party Litigation: The Strategic Context,* UBC Press.
120 Mercat-Bruns, M. (2020), 'Les différentes figures de la discrimination au travail: quelle cohérence?' *RDT* 2020, p. 25.

Whose equality? Paid domestic work and EU gender equality law

Vera Pavlou*

Introduction

The proclamation of the European Pillar of Social Rights in 2017 marks a renewed commitment to gender equality in the European Union (EU). Principle 2 of the Pillar reaffirms the centrality of equality between men and women which 'must be ensured and fostered in all areas, including regarding participation in the labour market, terms and conditions of employment and career progression'. Work-life balance features prominently as one of the means of achieving greater gender equality. Principle 9, dedicated exclusively to this theme, reflects the EU's aim of moving away from a model of rights related to care that centre on women towards a model which acknowledges that both men and women have caring responsibilities.[1] In line with delivering on the Pillar, the EU institutions have adopted a new Directive on Work-Life Balance.[2] Similar developments in law and policy have been taking place in several European states, signalling a shift in national welfare and labour law systems towards greater recognition of the need for legal intervention to support work-life balance.[3]

Having access to suitable leave arrangements from work to care for dependants is an important tool towards gender equality for two reasons. First, it allows more women to enter and remain in paid jobs without being penalised for taking up unpaid caring roles. Second, giving caring rights to men nurtures an equalitarian vision of caring, whereby responsibilities are shared between men and women; such a vision can be a first step towards broader societal change concerning gender-based roles.[4]

Yet despite legal and policy developments at both EU and national levels, workers with caring responsibilities, be it in relation to their children or to other dependants, are still confronted with what Nicole Busby refers to as the 'unpaid care/paid work conflict'.[5] An entrenched culture of long working hours, widespread expectations to be flexible and available to work unconstrained by family obligations, as well as the lack of affordable and good-quality care services, put working people under significant strain.[6] To manage this conflict, many families and individuals rely on hiring a domestic worker. For many people, especially women, relying one way or another on the services of a domestic worker is not a luxury but a necessary condition for their participation in the labour market. At the same time, the ageing of

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1 Bell, M. (2018) 'The principle of equal treatment and the European Pillar of Social Rights', *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 160, 783-810.

2 Directive (EU) 2019/1158 of 20 June 2019 on Work-Life Balance for parents and carers.

3 See generally, Burri S., Senden L. and Timmer A. (2020) *Gender equality law in Europe. How are EU rules transposed into national law in 2019?* (forthcoming).

4 Fredman, S. (2014) 'Reversing roles, bringing men into the frame', *International Journal of Law in Context*, 10(4), 442-459; Caracciolo di Torella, E. (2015) 'Men in the work/family reconciliation discourse: the swallows that did not make a summer?', *Journal of Social Welfare and Family Law*, 37(3), 334-344.

5 Busby, N. (2011) *A right to care?*, Oxford University Press.

6 Fudge J., 'A new gender contract? Work/life balance and working-time flexibility', in Conaghan, J. and Rittich, K. (eds.) (2005), *Labour Law, work, and family: Critical and comparative perspectives*, Oxford University Press, 261-288.

Europe's population means that demands for paid domestic work are and will continue to be on the rise, as most people now prefer home-based care to living in institutional homes for the elderly.[7]

Domestic workers therefore play a very important role in the sustainability of families, communities and economies. The nanny who picks up the children after school, the cleaner who comes in once or twice a week to clean the home and do the ironing, the au pair who minds the children in exchange for accommodation and a stipend, the care worker who ensures the elderly or disabled person is clean and safe – these are all paid domestic workers whose work allows so many others to turn up to work every day.[8]

Yet despite this important role, domestic workers are exposed to multiple forms of disadvantage that range from notoriously low wages, long and unregulated working hours and harassment at work, to unfair dismissals and lack of pregnancy and maternity protection.[9] The global COVID-19 health emergency is exacerbating many of the problems domestic workers face. The working conditions of this largely female workforce sit very uneasily with the vision of gender equality the EU and its Member States seek to achieve. Working in and for a private household brings with it challenges with respect to accessing protection against discrimination, not least because of the very structure of legal provisions on non-discrimination. Finding, for instance, a suitable comparator is a common difficulty for domestic workers, as well as other workers in small establishments, when seeking to substantiate a claim of direct discrimination.[10] Similarly, equal pay laws are heavily restricted in their ability to address low pay in segregated occupations where women predominate. That is why, for the purposes of this article, I will use equality in a broad sense and not as a synonym of non-discrimination.

The aim of this article is twofold. First, to draw attention to the legal and practical obstacles domestic workers face when it comes to equality at work. Second, to propose steps that the EU and its institutions could take to address those obstacles. The discussion is structured in three main sections. In the first section, I sketch the profile of domestic workers in Europe with reference to those characteristics that are important from an equality point of view. The second section discusses obstacles to equality with a focus on selected areas, namely: freedom from harassment at the workplace, the combination of paid work with unpaid care and protection from discriminatory dismissals. This is by no means a comprehensive analysis of all issues, but it provides a snapshot of the situation in Europe, drawing on the law and practice of a limited number of European states. Other important aspects of domestic workers' working conditions, such as working time and equal pay, are not covered here.[11] In the second section, I also discuss some of the ramifications of the COVID-19 pandemic on paid domestic work. Finally, the third section discusses the role of the EU and its institutions in promoting a vision of gender equality that includes domestic workers.

7 According to Eurostat, the number of people over 65 in the EU27 was 84.6 million in 2008 and is expected to rise steadily, reaching 151.5 million by 2060. Moreover, the old-age-dependency ratio is projected to double from 25.4 % in 2008 to 53.5 % by 2060. This means that while at the moment there are four people working for every person over 65, by 2060 this share will only be two to one, thus elderly care needs will increase. Eurostat (2008) Ageing characterises the demographic perspectives of the European societies, *Statistics in Focus*, 72/2008.

8 I follow the ILO definition of domestic work under Article 1(a), ILO Convention 189: 'the term domestic work means work performed in or for a household or households'. I therefore use the term 'domestic work' in a broad sense as encompassing both care as well as other household work such as cleaning and cooking. In favour of using 'care work' and 'domestic work' interchangeably, see Adelle Blackett, 'Introduction: Regulating decent work for domestic workers' (2011) 23 *Canadian Journal of Women and the Law*, 1-46.

9 ILO (2010) Decent work for domestic workers, Report IV(1) to the International Labour Conference, 99th Session, Geneva: International Labour Office.

10 Albin, E. (2012) 'From 'domestic servant' to 'domestic worker' in Fudge, J., McCrystal, S. and Sankaran, K. (eds.), *Challenging the legal boundaries of work regulation*, Hart: Oñati International Series in Law and Society, 231-251.

11 For a preliminary discussion, see Pavlou V. (2016) 'Domestic work in EU law: the relevance of EU employment law in challenging domestic workers' vulnerability', *European Law Review* 41(3) 379-398.

The profile of paid domestic workers in Europe and its implications for equality

Paid domestic work is hardly an obsolete occupation. The International Labour Organisation (ILO) estimates that there are 67.1 million domestic workers globally. Women are, as one would expect, overrepresented, as they make up 83 % of the sector.[12] Domestic workers are also very often migrants. Based on official employment statistics, the ILO calculates that there are at least 2.5 million migrants in domestic work in Europe.[13] These statistics reflect only part of the reality, because they do not include irregular migrants and other informal workers. As informality is widespread in domestic work, the actual numbers of those making a living in this sector and the share of migrants should be expected to be much higher.[14]

Domestic workers may be directly recruited by individuals and families or hired through a variety of intermediaries, including increasingly through digital platforms.[15] The expansion of the so-called 'gig economy' during the last few years has renewed old debates concerning the legal characterisation of employment relationships – are Uber drivers employees, independent contractors or somewhere in between? The burgeoning labour law scholarship on this topic has showed little interest in types of work where women tend to be overrepresented, such as care and domestic services, even though there is evidence that digital platforms have expanded in those fields as well.[16] The platform Nannuka, for instance, offers child care, elderly care, domestic work and tutoring services in the UK and Greece, while the company Care.com, established in 2006 in the USA, has expanded to 13 European countries since its inception. Both websites have thousands of registered domestic workers' profiles in each country. This finding is important, not only because it indicates the extent of paid domestic work in Europe, but also because it shows another dimension of the legal characterisation of these employment relationships. While it is highly unlikely that these digital platforms will be considered to constitute the employers of those who register their profiles in search for work, their expansion in care and other domestic work services increases direct recruitment and as a result, informality and casualisation.

The profile of the domestic worker in Europe – predominantly a woman, very often a migrant, who tends to work informally – is highly relevant for the potential of experiencing discrimination at work and the likelihood of accessing effective redress. Thus, researching paid domestic workers' working conditions in Europe has both a quantitative and qualitative dimension; quantitative because of the large numbers of affected workers and qualitative because domestic workers are predominantly women who experience specific obstacles when it comes to enjoying equality at work. I turn to examine some of these obstacles in the next section.

Obstacles to gender equality at work: focus on specific issues

Freedom from harassment at the workplace

Studies show that certain forms of violence at work, including sexual violence and victimisation, disproportionately affect women.[17] Domestic workers are at heightened risk of experiencing violence and harassment at work, not only because they are women, but also due to the specificities of their work.[18] While imbalance of power between a worker and her employer is an intrinsic feature of all employment relationships, in the case of domestic workers, that imbalance tends to be more pronounced, making them vulnerable to abuse. Domestic workers work, and sometimes even live, in their employer's private household. Their work, especially if it involves adult care, requires close proximity with the human body, which might expose them to unwanted sexual advances. Working in a private household, where labour inspection is often barred in view of protecting privacy, as well as being isolated without contact with colleagues, makes it difficult to uncover abuse.

Migrant domestic workers are in a particularly vulnerable situation if they experience any form of abuse, because they may lack a supportive social network to turn to. Non-EU migrant domestic workers are subject to immigration rules which often make them dependent on their employer for both work and residence permits;[19] therefore, they might be wary of losing both the right to work and to stay in the country if they complain against abuse and harassment. In 2019, the Cypriot Equality Body published a report documenting the extent of the phenomenon of harassment against migrant, mostly third-country national, domestic workers in Cyprus.[20] Drawing on complaints filed during the last decade, the Equality Body reports that violence in all its forms against migrant domestic workers is very common in Cyprus. Worryingly, there have been cases of detrimental treatment, including expulsion, of domestic workers who complained to the local authorities against abuse at work.[21]

Because of the stigma associated with being a victim, especially of sexual harassment,[22] coming forward is never easy, let alone bringing a claim to court and receiving redress. Fear of repercussions including dismissal, difficulties in gathering evidence and substantiating a claim, and lack of funds and knowledge of how redress mechanisms work, are all factors contributing to underreporting; as a result, few victims pursue claims judicially.[23]

EU equality law considers sexual harassment, harassment on the grounds of sex and harassment motivated by the person's racial or ethnic origin as forms of prohibited discrimination. While such behaviours could be addressed through Member States' criminal laws, the Recast and Race Equality Directives introduce three innovative provisions that seek to curb the structural problems victims face: the reversal of the burden of proof, protection against victimisation and the creation of equality bodies.[24] Importantly, because of their equality dimension and purpose to safeguard a person's dignity, the measures protecting against different forms of harassment at work apply to all without exceptions; any domestic worker irrespective of migration or employment law status should thus be able to benefit from these provisions.[25]

Combining paid work with unpaid care

Labour law intervenes in the regulation of employment relationships in different ways to allow the combination of paid work with unpaid care. Traditionally, labour law systems focused on granting rights to women, acknowledging their specific role in relation to childrearing and childbirth;[26] the most important of these are the right to a period of maternity leave and protection against pregnancy-related

25 Pavlou, V. (2016) 'Domestic work in EU law: the relevance of EU employment law in challenging domestic workers' vulnerability', *European Law Review*, 41(3) 379-398.

26 This approach is reflected in the work of the ILO which in 1919 adopted one of its very first instruments, the Maternity Protection Convention No 3.

dismissal. These rights have an undisputable equality dimension because they seek to protect women from suffering disadvantages in their labour market participation when they give birth. At EU level, maternity leave and protection against dismissal are guaranteed under the Pregnant Workers Directive.[27] Because in their vast majority domestic workers are women, the area of maternity protection rights is very important for them.

The Court of Justice of the EU (CJEU) has consistently held that the Pregnant Workers Directive has a broad personal scope with an autonomous EU law meaning.[28] Essentially, any woman who provides services for a certain period of time, under the direction or supervision of another and receives remuneration for the services should be able to access maternity leave and protection against pregnancy-related dismissal.[29] From this follows that Member States cannot apply narrower national definitions with the effect of excluding categories of female workers. The European Commission has also been clear that the Pregnant Workers Directive includes all women workers; where Member States excluded categories of workers, the European Commission requested amendments to national legislation. In its first implementing report, the Commission firmly stated that:

> 'The Directive applies to workers who are pregnant, have recently given birth or are breastfeeding in all fields and occupations, with no exceptions. The exclusion of certain groups of women from the Directive's scope is contrary to Community law and infringement proceedings will be commenced.'[30]

Domestic workers in the EU are therefore covered by legal provisions on maternity leave and protected against dismissal in case they become pregnant. However, domestic workers are a group that often suffers from what we call the gap between the law in the books and law in practice – having these rights on paper does not mean that they are able to enjoy them in practice. This is of course true for many women who experience pregnancy-related discrimination, including dismissal, despite the existence of legal protection. Such phenomena are often exacerbated in times of economic turmoil and austerity.[31] In the case of domestic workers, it is not uncommon for employers to terminate their employment when the worker becomes pregnant.[32]
Challenging her dismissal as discriminatory on the basis of gender might be particularly difficult for any woman if such a challenge entails bringing legal proceedings against the employer. In *Porras Guisado* the CJEU held that the protection against pregnancy-related dismissal under Article 10 of the Pregnant Workers Directive should be implemented in a way that is not only reparative (i.e. providing remedies to dismissed workers) but also preventive;[33] this is what the Court refers to as the 'double protection' the Directive requires.[34] In a particularly incisive point of analysis, the CJEU acknowledges the:

> 'harmful effects which the risk of dismissal may have on the physical and mental state of workers who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy.'[35]

27 Council Directive (EC) 92/85 on the introduction of measures to encourage improvements in the safety and health at work for pregnant workers and workers who have recently given birth or are breastfeeding [1992] OJ L348/1.
28 *Kiiski v Tampereen Kaupunki* (C-116/06) [2007]; *Danosa v LKB Lizings SIA* (C-232/09) [2010].
29 This is the definition of 'worker' the CJEU developed initially in free movement law and subsequently applied in some – but not all – areas of social law, notably in the areas of equal pay, working time and pregnant workers' rights.
30 *Report of the Commission on the implementation of Council Directive 92/85, COM(1999) 100 final,* p. 7.
31 Busby, N. and James, G. (2016) 'Regulating work/care relationships in a time of austerity: a legal perspective', in Lewis, S., Anderson, D., Lyonette, C., Payne, N. and Wood, S. (eds.) *Work-life balance in times of recession, austerity and beyond* (Routledge) pp. 78-92.
32 Andall, J. (2000) *Gender, migration and domestic service: The politics of Black women in Italy*, Ashgate; Addati, L., Cheong Lindsay, T. (2013) 'Meeting the needs of my family too': Maternity protection and work-family measures for domestic workers, ILO.
33 *Jessica Porras Guisado v Bankia SA and others* (C-103/2016) [2018].
34 *Jessica Porras Guisado v Bankia SA and others* (C-103/2016) [2018] para 59.
35 *Jessica Porras Guisado v Bankia SA and others* (C-103/2016) [2018] para 62.

Therefore, according to the Court, Article 10 of the Pregnant Workers Directive precludes the very 'taking of a decision to dismiss'.[36] From this follows that that even handing a dismissal notice to a pregnant worker can have the kind of serious detrimental effects the Pregnant Workers Directive seeks to prevent.

It is not clear how Member States are complying with the Directive's preventive aspect. Stating somewhere in their labour legislation that the dismissal of a pregnant woman is prohibited does not seem preventive enough.[37] Employers can still proceed with dismissal relying on the fact that many, especially the most vulnerable workers, will be deterred from challenging such a decision and initiating litigation.

For the prohibition to be truly preventive, alternatives need to be found. The correct implementation of the prohibition implies restricting the employer's managerial prerogative to dismiss a worker who falls under the personal scope of the Pregnant Workers Directive. One approach could be to have in place a system whereby employers must obtain prior authorisation from a labour authority or equivalent body to dismiss a pregnant worker.[38] The employer would need to provide evidence that the dismissal is for reasons unrelated to the worker's pregnancy.[39] Another way could be for Member States to introduce a system of precautionary penalties that employers would need to pay before dismissing a pregnant worker; if the dismissal is deemed fair, employers can recover any sums paid. Preventive measures are important for all working women but for some they are essential in bridging the gap between the law in the books and the law in action. For women in precarious and non-unionised jobs, such as domestic workers, preventive measures might be the only way to guarantee effective protection against pregnancy-related dismissal.

Beyond maternity-related protections and rights, the law can intervene to create entitlements for both women and men that allow the combination of paid work with unpaid caring roles. The most recent EU law instrument in this area is the newly adopted Directive on Work-Life Balance.[40] The Directive provides individual rights to different types of leave from work – paternity, parental, carer's leave and time off work on force majeure grounds – as well as the right to request flexible working arrangements.

To what extent do these entitlements apply to those working in or for a private household? The Directive's personal scope is broad and inclusive, but not unambiguously so. The first indication of inclusiveness is Recital 17 in the Preamble, which explicitly states that the Directive applies to part-time, fixed-term and temporary agency workers. Article 2 defines the personal scope with a formulation that is almost identical to the provision on personal scope previously found in the, now repealed, Parental Leave Directive. It stipulates that:

> 'This Directive applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State, taking into account the case-law of the Court of Justice.'

36 *Jessica Porras Guisado v Bankia SA and others* (C-103/2016) [2018] para 63. According to Article 10(1) of Directive 92/85, Member States shall take the necessary measures to prohibit the dismissal of pregnant workers during the period from the beginning of their pregnancy to the end of the maternity leave, 'save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent'.

37 This seems to be the approach in most Member States. See, Burri, S., Senden, L. and Timmer, A. (2020) *Gender equality law in Europe. How are EU rules transposed into national law in 2019?* (forthcoming).

38 See Article 10(1) of Directive 92/85, which foresees the consent of a competent authority, but only as an option for Member States. According to Article 10(1) of Directive 92/85, Member States shall take the necessary measures to prohibit the dismissal of pregnant workers during the period from the beginning of their pregnancy to the end of the maternity leave, 'save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent'.

39 At the same time, however, we would need broader supportive mechanisms for affected workers to enforce their rights, such as free and simplified extra-judicial procedures to deal with complaints, coupled with administrative fines for unscrupulous employers.

40 Directive (EU) 2019/1158 of 20 June 2019 on work-life balance for parents and carers. For a detailed analysis of this Directive, see Oliveira Á., De La Corte-Rodríguez, M, and Lütz, F. (2020), *The new Directive on Work-Life Balance: towards a new paradigm of family care and equality?* European Law Review 45(3), 295-323.

Tying the personal scope to national law definitions of the concept of worker is a standard technique which we see in other EU directives in the field of social law, notably in the so-called atypical work directives. What is new here is the reference to CJEU jurisprudence on the notion of worker. While there is no single, autonomous EU definition of worker, the Court has shown willingness to apply the broad definition, initially developed in the free movement of workers' case law, to other areas such as equal pay[41] and working time.[42] Even when Member States have discretion in defining the personal scope of an EU directive, such discretion is not unfettered; Member States must have due regard to the directive's objectives and ensure its effectiveness.[43]

There are therefore strong indications that the CJEU will interpret the personal scope broadly to include all those who, for a certain period of time, provide services under the direction or supervision of another in exchange for remuneration. However, to avoid any doubt, especially in the process of transposition, the Directive's drafters could have spared the reference to Member States' national laws and constructed personal scope in unambiguously broad terms, affirming the CJEU's recent jurisprudence in this area. Making it clear that the Directive includes domestic workers would have pre-empted their exclusion in national implementing measures.[44] Besides, the Directive on transparent and predictable working conditions in the EU, adopted on the same day as the Directive on Work-Life Balance, makes an explicit reference – albeit only in the Preamble – to domestic workers being potentially included.[45] One cannot but wonder why domestic workers were not explicitly included in a legislative measure that focuses on equality between men and women.

Discriminatory dismissals

Having legal protection against their employer's arbitrary decision to terminate the employment relationship is very important for workers. This is because dismissal protection can be a vehicle to ascertain other fundamental rights at work, such as the right to join a trade union, the right to privacy or the right to be free from discrimination. The fear of dismissal makes workers vulnerable to accepting violations of their fundamental rights and having no effective legal protection exacerbates such situations.

Domestic workers face various obstacles when it comes to ascertaining their fundamental rights through measures for protection from dismissal. Some of these obstacles are common to most atypical and precarious workers across workplaces, while others are unique to domestic workers. In some jurisdictions, such as the UK, being legally characterised as an employee is a prerequisite for accessing protection against dismissal;[46] workers[47] and the self-employed are not protected. Many atypical workers, who are also in the most precarious position, are excluded from the legislation's protective scope. Such exclusion has knock-on effects on the exercise of fundamental rights at work.[48] Domestic workers often provide their work under arrangements that put their status as employees in question – think for instance of au pairs, platform workers, agency workers or those on zero-hour contracts.[49] Thus, for atypical workers, seeking redress against unfair dismissal entails overcoming this first significant legal hurdle.

41 *Debra Allonby v Accrington & Rossendale College* (C-256/01) [2004].
42 *Union Syndicale Solidaires Isère v Premier Ministre* (C-428/09) [2010]; *Fenoll v Centre d'aide par le travail 'La Jouvene'* (C-316/13) [2016.
43 *O'Brien v Ministry of Justice* (C-393/10) [2012]; *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH* (C-216/15) [2017].
44 Domestic workers are prone to such exclusions. See, for instance, several Member States' exclusion of domestic workers from the Working Time Directive in European Commission (2017) *Report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time*, COM(2017) 254 final.
45 See recital 8 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.
46 Section 94(1), Employment Rights Act 1996.
47 The status of 'worker' is a legal construction in the UK which gives rise to a limited number of employment rights, such as entitlement to the national minimum wage and protection against discrimination.
48 Collins, P. (2018) 'The inadequate protection of human rights in unfair dismissal law', *Industrial Law Journal*, 47(4) 504-530.
49 Lydia Hayes' study reveals that zero-hour contracts are rife in the UK's market for homecare services for the elderly. Hayes, L. J. B. (2017) *Stories of care: a labour of law*, Palgrave.

Lydia Hayes' socio-legal study of homecare workers in the UK shows how the fear of being dismissed on the spot and facing unemployment instigates a 'profound sense of insecurity'.[50] For migrant workers, especially those who have incurred large debts to finance their relocation as well as those without legal residence, the fear of dismissal is coupled with the fear of expulsion. Such a combination can function as a coercive tool in the hands of abusive employers.

Even in jurisdictions that grant protection to atypical workers, it is not uncommon for legal rules on dismissal to treat the employment relationship between a domestic worker and her employer differently from that of other employment relationships. Such differential treatment reflects the societal expectation for a higher level of trust and intimacy in the relationship between a domestic worker and her employer. This expectation is, however, one-sided, as it translates to greater flexibility and discretion for the employer only. In Spain, for instance, the specific piece of labour legislation applicable exclusively to domestic workers introduces divergences from generally applicable rules on the termination of employment.[51] In case of wrongful dismissal,[52] domestic workers are entitled to less compensation than other categories of workers. The employer may also dismiss the domestic worker with a written declaration of withdrawal (*desistimiento*) and without just cause, which is a requirement for the termination of other employment relationships. This form of dismissal is unique to domestic work.

When it comes to remedies against unlawful dismissal[53] – this is the case of discriminatory dismissals such as that of a pregnant woman – Spanish courts have held that domestic workers are not entitled to readmission, which is the standard remedy for other unfairly dismissed workers. This is because courts consider that readmission would constitute an interference with the employer's private sphere. Courts have opted instead to treat domestic workers' discriminatory dismissal as wrongful and grant compensation.[54] The fact that the normal remedy against unlawful dismissal is readmission to work instead of compensation reflects the idea that workers' fundamental rights – such as the right to be free from discrimination – cannot be monetarised; instead of compensation, fundamental rights must be safeguarded with effectively dissuasive remedies.[55] The levelling down of domestic worker's protection against wrongful and unlawful dismissal conveys a message that their fundamental rights are of lesser importance for the legal system.

COVID-19 and domestic work

The unprecedented global health emergency is having a multifaceted impact on domestic workers. Many domestic workers are at the frontline of the COVID-19 crisis, providing essential care for children, the elderly and other people in need. With schools closed, imposed lockdowns and people teleworking in most European countries, there are increased needs for home-based childcare and other types of care and domestic services. As domestic workers have no possibility to telework, those who continue to work during the pandemic do so while exposing themselves and their families to health risks. A survey on the impact of COVID-19 on platform workers reports cases of domestic workers who have had to turn up to work with their children.[56] As private households are often exempted from the application of occupational health and safety legislation,[57] there has been little guidance by governments on what kind of measures

50 Hayes, L. J. B. (2017) *Stories of care: a labour of law*, Palgrave, p. 86.
51 Royal Decree 1620/2011 of 14 November, regulating the special relationship that characterises service within the family household.
52 With this term I refer to termination against procedural rules stipulated in the contract or legislation, or without just cause in those jurisdictions that require it.
53 I use unlawful and unfair dismissal interchangeably; broadly speaking, this is dismissal against the law.
54 For example, TSJ Cataluña, Sala de lo Social, *Sentencia* 286/2013 of 15 January 2013.
55 Baylos, A., Pérez Rey, J. (2009) *El despido o la violencia del poder privado* (Dismissal or the violence of private power), Trotta.
56 Fairwork (2020) *The gig economy and Covid-19: Fairwork report on platform policies*, Oxford, United Kingdom.
57 For instance, Article 3 of Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work excludes domestic workers from its personal scope. Similar exemptions can be found in a number of national health and safety legislations. See for instance, Section 51 of the UK 1974 Health and Safety Act or Article 3(4) of the Spanish Law 31/1995 on the prevention of risks at work.

employers should take to protect their domestic workers. In a recent policy brief, the International Domestic Workers Federation highlights that many domestic workers have suffered pay cuts or had their employment relationships terminated or suspended without pay.[58] While significant loss of income due to the pandemic is not unique to domestic workers, it is unclear to what extent domestic workers could benefit from the different relief measures European governments have adopted to mitigate the impacts of the health crisis on the working population.

There are, however, some notable examples of European countries that have taken measures specifically directed at domestic workers. For instance, Spain has introduced a special subsidy applicable to domestic workers who have lost their income fully or partially due to the virus; this subsidy provides very much needed income support to domestic workers who are not entitled to unemployment benefits.[59] Belgium and France have adopted similar measures.[60] While these are certainly positive steps forward, it is important to state that migrants without legal migration status and those working informally – i.e. without appropriate social security registration and contributions – are not included; thus these groups of domestic workers are exposed to significant hardship.

Towards an inclusive vision of sex equality at work: the role of the EU and its institutions

At the EU level, the concern with the problems paid domestic workers face is not new. In 2000, the European Parliament adopted the Resolution 'Regulating domestic help in the informal sector'.[61] Despite the rather infelicitous title, the Resolution made several valuable recommendations directed both at the Member States and at other EU institutions. The Resolution went beyond measures to fight undeclared work and proposed, inter alia, regular work permits for migrants to work as domestic workers, the promotion of sectoral social dialogue, the consideration of domestic workers' specificities when designing EU social legislation and for national equality bodies to conduct research on domestic workers' conditions.[62] Even though there was no follow-up as to whether the Parliament's recommendations were taken on, the Resolution shows that there was a broad EU political consensus to understand and address domestic workers' problems at work. While the Resolution made no explicit reference to paid domestic work as an issue of gender equality, the idea that domestic workers are predominantly women runs throughout the text.

It was the adoption of ILO Convention 189 on decent work for domestic workers[63] in 2011 that created a much-needed global impetus to put domestic workers' treatment in law and practice under scrutiny. In 2014, the Council adopted Decision 2014/51/EU authorising Member States to ratify ILO Convention 189;[64] to date, seven EU Member States have ratified the Convention.[65] Importantly, the Decision recognises that EU law already offers several of the rights and protections contained in this Convention. In 2016, the European Parliament adopted a new Resolution on domestic workers and carers, this time with a wide-ranging focus and much more pertinent language than 16 years earlier. In this Resolution, domestic workers are not referred to as 'domestic help', while the focus is clearly on improving their

58 International Domestic Workers Federation (2020) *The impacts of COVID-19 on domestic workers and policy responses*, 1 May 2020.
59 Royal Decree 11/2020 of 31 March.
60 International Domestic Workers Federation (2020) *The impacts of COVID-19 on domestic workers and policy responses*, 1 May 2020.
61 European Parliament, Resolution on regulating domestic help in the informal sector (2000/2021(INI)) 30 November 2000.
62 European Parliament, Resolution on regulating domestic help in the informal sector (2000/2021(INI)) 30 November 2000.
63 ILO, Decent work for domestic workers Convention No. 189 (16 June 2011).
64 Council Decision 2014/51/EU of 28 January 2014 authorising Member States to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189), OJ L 32 of 01.02.2014.
65 The list of States that have ratified is available here: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:2551460.

working and living conditions across the EU instead of combatting undeclared work.[66] The Resolution recommends several policy and legislative interventions for the EU and its Member States. There is significant emphasis on the professionalisation of the care and domestic work sector, the lifting of any exclusions of domestic workers from EU and national labour and social security legislation and the enforcement of appropriate health and safety measures, including on maternity protection. The Report explicitly calls on the Commission and other European agencies to conduct comparative work on Member States' law and practice in relation to domestic work, with a view to exchanging good practices and fighting exploitation.[67]

The EU Fundamental Rights Agency (FRA) has done extensive research on domestic workers' challenges in accessing rights and protections. FRA has published three relevant reports to date: one in 2011 on migrant domestic workers in an irregular situation,[68] followed by a second report in 2015 on severe labour exploitation which identified domestic work as an at-risk sector,[69] and a third in 2018 focusing on female migrant domestic workers.[70] The reports yielded valuable insights on the impact of law and policy in a number of Member States. Importantly, there is evidence that national equality bodies are using findings from FRA's research to put the analysis of national problems in a broader European context and to urge national authorities to review domestic law and practice.[71] While FRA's work in this area is undoubtedly important, the research is conducted in selected Member States and only focuses on specific issues – mainly human rights abuses and severe labour exploitation.

Without denying the utility of FRA's work, I believe that a more holistic vision is urgently needed. It is important to broaden the perspective and conduct a comprehensive analysis of domestic workers' working conditions, including in key equality areas, that goes beyond protections against severe labour exploitation.[72] There is an urgent need for updated, specific information on how paid domestic work is regulated in the different Member States, as well as empirical data on how the law is applied in practice. Having this information available and easily accessible is important for several reasons. First, it will allow knowledge exchange on Member States' innovative practices; such information can be a valuable resource for a variety of national actors, including equality bodies, trade unions and domestic workers' associations. Second, it would be an opportunity for EU institutions to clarify which EU social law sources apply to those working in or for private households. Third, a comparative study that includes an EU law dimension can serve to uncover mismatches between national laws and the protection provided by EU law in areas of importance for domestic workers. Fourth, identifying any mismatches would allow advocates for domestic workers' rights at the national level to frame claims for reform more compellingly with the purpose of complying with EU law. Finally, a study on a wide range of issues might also be the first step in identifying areas apt for future regulation, including by the EU.

Conclusion

Paid domestic work, in all its variations, is a large and growing sector in Europe. It is an undeniably feminised type of work that attracts a significant share of migrant women. Domestic workers play a

66 European Parliament, Resolution of 28 April 2016 on women domestic workers and carers in the EU.
67 Point 37, European Parliament, Resolution of 28 April 2016 on women domestic workers and carers in the EU.
68 EU Fundamental Rights Agency (2011) *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States*, Publications Office of the European Union.
69 EU Fundamental Rights Agency (2015) *Severe labour exploitation: workers moving within or into the European Union*, Publications Office of the European Union.
70 EU Fundamental Rights Agency (2018) *Out of sight: migrant women exploited in domestic work*, Publications Office of the European Union.
71 Office of the Commissioner for Administration and the Protection of Human Rights (2019) Αυτεπάγγελτη Τοποθέτηση της Επιτρόπου Διοικήσεως και Προστασίας Ανθρωπίνων Δικαιωμάτων, ως Εθνικής Ανεξάρτητης Αρχής Ανθρωπίνων Δικαιωμάτων, αναφορικά με το θεσμικό πλαίσιο που ρυθμίζει την οικιακή εργασία στην Κύπρο [Ex officio report of the Office of the Commissioner for Administration and the Protection of Human Rights in relation to the regulatory framework on domestic work in Cyprus] (Report N. 15/2019).
72 Pavlou, V. (2018) 'Where to look for change? A critique of the use of modern slavery and trafficking frameworks in the fight against migrant domestic workers' vulnerability' *European Journal of Migration and the Law* 20(1) pp. 83-107.

fundamental role in facilitating others' work-life balance and, consequently, in the promotion of gender equality in Europe. Yet their equality, including their own needs for work-life balance, is rarely considered. This article has offered some examples of how European states' laws and practices in relation to domestic workers can be problematic from an equality point of view. The unprecedented COVID-19 pandemic exposes both the centrality of care work for our societies and the vulnerability of those who make a living providing it. I have therefore argued that for an inclusive gender equality vision, it is imperative to take the issue of paid domestic work seriously. The first step in that direction would be to conduct a comparative analysis that looks closely at a range of work and gender equality issues. The findings of this future research could hopefully become seeds of transformative change.

Online violence against women as an obstacle to gender equality: a critical view from Europe

Kim Barker and Olga Jurasz*

1 Introduction

The use of social media, websites and other online platforms to discuss, debate and participate has resulted in significant upsurges in the abuse that women receive online. These – online – forms of violence against women manifest themselves increasingly as forms of sexist hate speech, online harassment, threats and online text-based abuses.[1] While not a new phenomenon,[2] these issues facing women participating online have become much more prominent and prevalent in recent years.[3] This is particularly the case with online violence against women (OVAW), which poses a growing barrier to women's participatory rights and gender equality online, and which undermines the key principles of equality and non-discrimination embedded in human rights instruments, including the EU Charter of Fundamental Rights[4] and the European Convention on Human Rights.[5]

Revelations concerning abusive, disruptive, and harassing behaviours that subjugate women are not new either, but the increased capacity to share these quickly, digitally and to global audiences has changed the ways in which such things manifest themselves and has impacted on the ways in which they are (not) addressed. OVAW affects in particular those women who seek to actively participate in online spaces, but it is a phenomenon that also affects bystanders too. The harassing and violent responses that women regularly receive online pose a direct challenge not only to equality but also to participation, with the natural consequence of OVAW being the silencing of women and women's voices in – and even their exclusion from – online spaces.

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1 The overarching term used in this paper is 'text-based abuses' (TBA).

2 As understood here, OVAW encompasses sexist hate speech, online harassment, threats and online text-based abuses. For further definition of OVAW, please see Section 2 below.

3 United Nations Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective*, (UN Publication, A/HRC/38/47), 18 June 2018; Amnesty International, *Toxic Twitter – a toxic place for women*, March 2018, available at: https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-1/.

4 In particular, Articles 20, 21, and 23 of the Charter.

5 Specifically, Protocol No. 12 to the ECHR.

The growing problem of OVAW has been acknowledged at the European level, with the Council of Europe (CoE) Gender Equality Strategy, for instance, explicitly recognising the obstacles that online behaviours amounting to sexual and violent threats present to women's participation online.[6] More recently, in February 2020, the European Court of Human Rights (ECtHR) gave explicit recognition to technology-facilitated forms of VAW in *Buturuga v. Romania*,[7] making it the first, albeit somewhat limited,[8] judicial decision at the ECtHR to acknowledge this. Yet, in spite of these declarations, recognising OVAW more universally as an obstacle to gender equality which requires adequate and timely law and policy interventions at national and supranational levels has not been straightforward. The overwhelming perception that 'online is not real';[9] that OVAW is less harmful than offline VAW; or that women need to 'man up' in order to participate online are among some of the common (mis)perceptions surrounding OVAW.[10] Furthermore, as evidenced by a 2017 study published by the European Institute for Gender Equality, the responses of law enforcement agencies across the EU to instances of OVAW reveal deeply concerning inadequacies in approaching such forms of abuse, as well as in the treatment of its victims.[11] Such deficiencies not only highlight the lack of understanding of gender perspectives on online crimes and online violence (exacerbated by the difficulties of investigating online crimes), but also stand in the way of recognising OVAW as an obstacle to gender equality and women's participation and, more broadly, to women's rights.

Alongside these challenges regarding the recognition of OVAW as an obstacle to gender equality, difficulties arise in defining and categorising the behaviours which are capable of amounting to OVAW. Significantly, while definitions of violence against women (VAW) are more established,[12] there is no widely accepted definition of OVAW, despite its prominence. Some of the challenges in developing a commonly used definition amount to the categorisation of 'online' behaviours and what is meant by these, but what is also problematic is the absence, to date, of consideration of text-based abuses as amounting to OVAW. The difficulties in addressing OVAW, online harms and online content arise because of the blurred lines between illegal content (which can and should be removed), and harmful but not illegal content. Harmful but legal content poses problems because of the damage to other fundamental rights that occurs should it be removed. This article does not propose to address those definitions; rather, it positions OVAW as one of the problematic categories of content which is captured not only by illegal content, but also by harmful and legal content, especially given the omission of considerations of gender within hate crime and hate speech frameworks.

6 Council of Europe (CoE), *Gender Equality Strategy 2018-2023*, June 2018, available at: https://rm.coe.int/prems-093618-gbr-gender-equality-strategy-2023-web-a5/16808b47e1. [hereafter: GES].

7 *Buturuga v. Romania*, No. 56867/15, 11 February 2020.

8 The ECtHR in *Buturuga* made the explicit link between cyberviolence (term used by the Court) and domestic violence. As noted in the judgment, domestic violence can include many forms of violence such as 'ICT-related violations of privacy, intrusion into the victim's computer and the taking, sharing and manipulation of data and images, including intimate data' (para. 74). While this recognition is a 'first' for the ECtHR, it is not as novel from the perspective of domestic laws in some European countries. Furthermore, the judgment considers 'cyberviolence' through the lens of Article 8, looking at it primarily as a privacy issue rather than an act of violence underpinned by gender inequality and structural causes. No analysis of cyberviolence under Article 3 is advanced by the Court, which significantly limits the 'transformative' potential of this decision. For further critique of *Buturuga*, see: Van Leeuwen, F., 'Cyberviolence, domestic abuse and lack of a gender-sensitive approach – Reflections on Buturuga versus Romania', 11 March 2020, available at: https://strasbourgobservers.com/2020/03/11/cyberviolence-domestic-abuse-and-lack-of-a-gender-sensitive-approach-reflections-on-buturuga-versus-romania/.

9 Barker, K. and Jurasz, O., (2014) 'Gender, Human Rights and Cybercrime: Are Virtual Worlds really that Different?' in: Asimow, M., Brown, K. and Papke, D., (eds) *Law and Popular Culture: International Perspectives*, Cambridge Scholars Publishing.

10 Barker, K. and Jurasz, O., 'Text-based (sexual) abuse and online violence against women: towards law reform?' in Bailey, J., Flynn, A. and Henry, N. (forthcoming 2021) *Technology-Facilitated Violence and Abuse – International Perspectives and Experiences*, Emerald.

11 European Institute for Gender Equality, 'Cyberviolence against women and girls', 23 June 2017, available at: https://eige.europa.eu/publications/cyber-violence-against-women-and-girls.

12 Council of Europe Convention on preventing and combatting violence against women and domestic violence, 2011, Article 3; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 1994, Aricle 2; UN Committee on Elimination of All Forms of Discrimination Against Women (CEDAW Committee), General Recommendation 19: violence against women, 1992, CEDAW/C/GC/19; CEDAW Committee, General Recommendation 35 on gender-based violence against women, updating General Recommendation No. 19 of 26 July 2017, CEDAW/C/GC/35; UN Declaration on the Elimination of Violence Against Women, proclaimed by General Assembly Resolution 48/104 of 20 December 1993.

Conventionally, from a criminal law perspective, these types of abuses may be captured at least in part by offences of harassment or making threats. Text-based abuse (TBA) – taken here to be defined as: 'Written, electronic communication containing threatening and/or disruptive and/or distressing content, such as, e.g. textual threats to kill, rape, or otherwise inflict harm on the recipient of such messages',[13] and meaning written communications other than text messages – has not been considered as a factor in discussions on OVAW. Significantly, there is also a marker here that not all forms of TBA need to encompass a sexual aspect to be capable of amounting to OVAW, as is often considered to be the case. For instance, sending a direct message to a Member of the European Parliament on Twitter indicating that she will be killed on her way home because she is a stupid woman would still constitute an online text-based threat.[14] It could also amount to OVAW because it constitutes violence directed at a woman, despite there not being a sexual abuse element contained within it. This typology of OVAW has often been overlooked as part of VAW because it encompasses online harassment and because it does not fall within the – more widely established – image-based sexual abuse (IBSA) landscape. Nonetheless, TBA is as harmful as IBSA and requires greater attention and action from agencies, law enforcement bodies, and civil society than it has been granted so far.

This paper therefore advocates for the express recognition of the full spectrum of OVAW as a challenge to gender equality online. It begins with a definition of OVAW (Section 2). After an introduction to the European perspectives on OVAW – from the CoE (Section 3) and European Commission (Section 4) positions – this paper will offer an assessment of the fragmented responses to OVAW (Section 5). The argument here critiques the fragmented institutional and policy approaches which hinder the tackling of OVAW in a holistic and concerted manner. In light of this, and of these failings, this paper offers a number of recommendations for positive action from the perspectives of policy cohesion, legislative benchmarking, and definitional consistency. The paper closes with calls for concerted efforts to tackle all forms of OVAW with 'joined-up thinking' to offer equivalence between VAW and OVAW.

2 Online violence against women

Online violence against women is a growing global problem which affects women and girls across various demographics and geographic locations. OVAW is a form of gender-based violence that includes, but is not limited to, online misogyny, text-based abuse (e.g. on social media platforms such as Twitter or Facebook), upskirting, image-based sexual abuse (also referred to as 'revenge pornography'), rape pornography, doxing, cyberstalking and cyber-harassment.[15] However, OVAW is not a new phenomenon – rather, it exemplifies the long pre-existing forms of VAW taking place in a different (online) environment. As such, the root causes of OVAW are not substantively different to the causes of offline forms of VAW. OVAW is rooted in unequal gender relations, patriarchy and gender stereotypes, as well as the societal normalisation of the 'everyday' nature of VAW.[16] That said, what makes OVAW distinct is the types of spaces in which it takes place – for instance, there is greater anonymity for the perpetrators of OVAW as well as likely higher visibility of the abuse suffered (e.g. a misogynistic tweet can be viewed, liked or retweeted by thousands of users worldwide in a very short period of time).

The precise scale of OVAW in Europe is somewhat difficult to capture due to the lack of a comprehensive and systematic study examining the occurrence of OVAW across all EU Member States and/or CoE Member States. Moreover, any OVAW statistics are likely to be quickly outdated due to the high increase

13 Barker, K. and Jurasz, O. (2019), *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?*, Routledge, xiv.

14 While under EU law, in particular the framework decision on racism and xenophobia, illegal online contents are understood as hate speech, other incitement to violence or hatred, harassment or other criminal activity. As such, this should cover illegal threats, but where there are harmful inferred threats to kill, these may not be covered because they are not illegal per se, and are instead merely harmful. See Council Framework Decision 2008/913/JHA of 28 November 2008 on combatting certain forms and expressions of racism and xenophobia by means of criminal law, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32008F0913.

15 Barker, K. and Jurasz, O. (2019), *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?*, Routledge, xiv.

16 Barker. K. and Jurasz, O. (2019), *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?*, Routledge, Chapter 2.

in the number of such incidents in light of changing socio-political events and developments, such as the rise of the #gamergate, #metoo, and #timesup movements, and the increase in online violence against women politicians in the run-up to a general election.[17] However, one smaller-scale study by Amnesty International examining OVAW in selected states (including EU Member States) demonstrates that as many as 30 % of women aged 18-55 have experienced online abuse once or more than once.[18] Furthermore, according to the EU Fundamental Rights Agency, 'the risk of young women aged between 18 and 29 years becoming a target of threatening and offensive advances on the internet is twice as high as the risk for women aged between 40 and 49 years, and more than three times as high as the risk for women aged between 50 and 59 years'.[19] The growing problem of online violence against women has also been recognised at the European Union level by the European Commission and the EU High Representative Frederica Mogherini, in a statement marking the International Day for the Elimination of Violence against Women:

> 'Violence against women happens anywhere, there is no safe place, not even at home. On the contrary. Woman are targeted at home as well as in their workplace, in schools and universities, on the street, in displacement and migration, and increasingly online through cyber violence and hate speech'.[20]

3 Online violence against women: a CoE perspective

Despite its prevalence, OVAW has only relatively recently been captured in policy and law responses at both international and national levels. For instance, while the 2014 EU-wide survey on violence against women – the largest and most comprehensive study of its kind to date – touched on some forms of OVAW (such as online sexual harassment or revenge pornography/IBSA),[21] it did not do so in a systematic way. Similarly, the Council of Europe Convention on preventing and combatting violence against women and domestic violence 2011[22] (the Istanbul Convention) – the leading treaty in Europe on preventing and combatting violence against women – fails to account for or refer to online forms of gender-based violence in its text,[23] notwithstanding its status as an otherwise progressive and modern legal instrument.[24] Nonetheless, as we argue in the latter part of this article, certain provisions of the Istanbul Convention could provide an avenue for state parties to take practical steps towards addressing OVAW in a comprehensive and cross-sectoral manner.

17 International Foundation for Electoral Systems (2019), *Violence Against Women in Elections Online: A Social Media Analysis Tool*, available at: https://www.ifes.org/sites/default/files/violence_against_women_in_elections_online_a_social_media_analysis_tool.pdf; Dhordia, A., 'Unsocial Media: Tracking Twitter Abuse Against Women MPs', Medium, 3 September 2017, available at: https://medium.com/@AmnestyInsights/unsocial-media-tracking-twitter-abuse-against-women-mps-fc28aeca498a.

18 Amnesty International (2017), online poll of women aged 18-55 in the UK, USA, Spain, Denmark, Italy, Sweden, Poland and New Zealand about their experiences of online abuse or harassment on social media platforms, available at: https://www.amnesty.org/en/latest/news/2017/11/amnesty-reveals-alarming-impact-of-online-abuse-against-women/.

19 European Union Agency for Fundamental Rights (2014), 'Violence against women: an EU-wide survey. Main results', Publications Office of the European Union, p. 96.

20 European Commission, 'Stop violence against women: Statement by the European Commission and the High Representative', 22 November 2019, available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_19_6300.

21 European Union Agency for Fundamental Rights (2014), 'Violence against women: an EU-wide survey. Main results' (Publications Office of the European Union), p. 103.

22 Hereafter, Istanbul Convention.

23 Para. 183 of the Explanatory Report on the Istanbul Convention notes that stalking '(...) may include behaviour as diverse as (...) setting up false identities or spreading untruthful information online'. However, this does not adequately capture the full extent of acts of OVAW nor its typology. Council of Europe (2011), *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d383a.

24 Jurasz,O. (2015), 'The Istanbul Convention: a new chapter in preventing and combating violence against women', *Australian Law Journal,* 89(9), pp 619–627; Barker, K. and Jurasz, O., 'Online Violence Against Women: addressing the responsibility gap?' LSE WPS Blog, August 2019, available at: https://blogs.lse.ac.uk/wps/2019/08/23/online-violence-against-women-addressing-the-responsibility-gap/.

To date, despite the absence of any reference to OVAW in the Istanbul Convention, the CoE has been the most proactive of the European supranational bodies in raising the matter of the abuse of women online and putting this pressing issue on the agenda. However, the CoE approach focuses strongly on a selected few aspects of OVAW – notably the gender stereotypes and sexist hate speech perspectives – and positions the matter in the broader context of tackling gender inequality, rather than approaching it comprehensively and in a way that includes those forms of OVAW which would not necessarily satisfy the threshold for hate speech (as the threshold for illegal online content). For instance, the key areas of focus in resolutions of the Parliamentary Assembly of the CoE (PACE) have been on sexist hate speech (both online and offline),[25] as well as on ending sexual violence and harassment of women in public spaces[26] – the latter presumably includes the online space, although there is no explicit indication of that in the document. Similarly, the CoE Gender Equality Strategy stresses the need to tackle violence against women (both online and offline) through combatting gender stereotypes and sexism – including sexist hate speech and violent and sexualised threats online, especially on social media platforms.[27] This approach is also embedded in the 2019 CoE Recommendation on Preventing and Combating Sexism[28] – the first ever international legal instrument to combat sexism.

Combatting (O)VAW through addressing sexism and gender stereotypes is certainly useful as it allows attention to be drawn to the root causes of (O)VAW and the way in which gender stereotyping reinforces unequal social power relations between men and women.[29] Consequently, positioning OVAW as an issue of sexism as well as one of power relations is strategically useful; it points towards the interrelatedness between the occurrence of specific forms of violence (online and offline) and the need to address sex and gender discrimination, as well as the harmful effects of perpetuating gender stereotypes. Where sex-based harassment is concerned, there exist binding provisions of EU law which, at least in theory, can be drawn upon when dealing with online sex-based harassment,[30] including when it occurs in the work context.[31] However, none of the aforementioned instruments explicitly tackles online forms of VAW, which makes these provisions 'vulnerable' to an interpretation that excludes online forms of harassment.

In addition, the tackling of gender stereotypes is deeply embedded in the language of international and regional treaties such as the UN Convention on the Elimination of All Forms of Discrimination Against Women,[32] the Istanbul Convention[33] and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará);[34] as well as being embedded in the language of the positive human rights obligations of states to take steps to prevent discrimination and violence against women.[35] However, even where online violence is referred to, the CoE Gender Equality Strategy makes explicit references to specific yet narrowly conceptualised forms of OVAW, focusing mostly on sexualised violence such as pornography, rape, and violent and sexualised threats.[36]

25 Parliamentary Assembly of the Council of Europe (PACE), Resolution 2144 on ending cyberdiscrimination and online hate, 25 January 2017.
26 PACE, Resolution 2177 on putting an end to sexual violence and harassment of women in public space, 29 June 2017.
27 CoE, *Gender Equality Strategy 2018-2023*, June 2018, available at: https://rm.coe.int/prems-093618-gbr-gender-equality-strategy-2023-web-a5/16808b47e1, para. 44.
28 CoE, Recommendation on preventing and combating sexism, 27 March 2019, available at: https://rm.coe.int/prems-055519-gbr-2573-cmrec-2019-1-web-a5/168093e08c.
29 For the ECtHR's approach to and reasoning on the issue of gender stereotypes, see: *Markin v. Russia*, No. 30078/06, 22 March 2012, and *Carvalho Pinto de Sousa Morais v. Portugal*, No. 17484/15, 25 July 2017.
30 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, para. 17; 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, paras. 9-11.
31 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).
32 UN Convention on Elimination of All Forms of Discrimination Against Women, 1979, Article 5.
33 Istanbul Convention, Article 12.
34 Belem do Para Convention, Articles 6 and 8.
35 See, e.g. CEDAW Committee GR 28, CEDAW/C/GC/28, on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010.
36 CoE, *Gender Equality Strategy 2018-2023*, June 2018, available at: https://rm.coe.int/prems-093618-gbr-gender-equality-strategy-2023-web-a5/16808b47e1, paras. 40, 44, 45.

Although these are valid concerns that should be addressed in combatting OVAW, they do not fully capture the types of violence and abuse that women and girls experience online, nor the range of harms that arise from other (not always sexualised) forms of OVAW.[37] This narrow approach also promotes a particular and limited view of OVAW as a type of violence that is inherently sexualised or which involves the portrayal of women as submissive sexual subjects and objects.

Likewise, the narrow focus on sexist hate speech online takes away from a comprehensive and well-rounded approach to combatting OVAW. Importantly, CoE Recommendation 2144 notes that:

> 'hate speech is not limited to racism and xenophobia: it may also take the form of sexism, (...), misogyny, (...) and other forms of hate speech directed against specific groups or individuals. Such forms of behaviour, which are not accepted offline, are equally unacceptable online. Just like the face-to-face world, the internet must provide space to be critical, without providing space for hate speech, including incitement to violence.'[38]

It is important to recognise that online misogyny and sexism can, and often does, amount to online hate speech against women. For instance, the CoE defines sexist hate speech as 'expressions which spread, incite, promote or justify hatred based on sex'.[39] However, it is equally crucial to note that not all acts of OVAW are hateful for the purposes of prosecuting them as 'hate crime'.[40] While an act committed online may appear to qualify as hate speech, it does not follow that it will be categorised as such under domestic criminal law. In some instances, hate speech may be criminalised because it would satisfy the legal threshold for an underlying criminal act (e.g. incitement to violence). It is only once this threshold has been satisfied that the 'hate' aspect is considered and the question of whether the crime committed was motivated by hostility or prejudice due to specific features of the victim (e.g. incitement to violence against a certain ethnic or religious group) is asked. As we argue elsewhere,[41] many jurisdictions (e.g. England & Wales) do not recognise gender as a protected characteristic for the purposes of hate crime legislation. In addition, the lack of adequate conceptualisation and legal formulation of acts of online violence (beyond IBSA) within domestic laws contributes to this problem. For instance, online text-based (sexual) abuse (TB(S)A) is not currently captured as an offence under the law of England & Wales. While TB(S)A may in some circumstances satisfy the relevant legal threshold for criminality within the legal system, there is no outright equivalent offence of TB(S)A to mirror that of IBSA. The overwhelming majority of acts of OVAW focus predominantly – almost specifically – on the sexual aspects of images, rather than on text.[42] Consequently, this lack of consistency in criminalisation leads to different outcomes for victims. Given that TB(S)A is not a criminal act, it is difficult to establish what the legal threshold might be for allowing this as an underlying offence in respect of which a hate crime aggravation (e.g. aggravation based on gender as a characteristic) may operate.

Strikingly, CoE documents remain relatively silent regarding the practical and legal steps which would be proposed to tackle OVAW in all its forms, including text-based forms of abuse. Although the CoE uses the notion of 'sexist hate speech', it is unclear what precise legal definition of such behaviours is being proposed. Furthermore, because OVAW is not used or defined as a legal term in any of the CoE instruments (including the Istanbul Convention), the question remains as to how (if at all) instances of

37 Barker, K. and Jurasz, O., 'Text-based (sexual) abuse and online violence against women: towards law reform?' in Bailey, J., Flynn, A. and Henry, N. (forthcoming 2021), *Technology-Facilitated Violence and Abuse – International Perspectives and Experiences*, Emerald.

38 PACE, Resolution 2144 on ending cyberdiscrimination and online hate, 25 January 2017, para. 2.

39 Council of Europe, 'Combatting sexist hate speech', available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680651592.

40 Barker, K. and Jurasz, O. (2019), *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?*, Routledge.

41 Ibid n24, at 84; Barker K. and Jurasz, O., 'Submission of Evidence to Australian Online Safety Charter Consultation Paper', March 2019, available at: https://www.communications.gov.au/sites/default/files/submissions/university_of_stirling.pdf.

42 The acts of OVAW envisaged here do not consider aspects of defamatory content, nor of distributing data. While it is not impossible to consider these issues as falling within the purview of gender equality, they are not the focus of discussions in this piece.

online 'sexist hate speech' would be criminalised and, if so, how the 'hate' aspect would be captured within the hate crime frameworks of the diverse and disparate legal systems of CoE Member States.

Given these shortcomings, the current status quo in relation to tackling OVAW at CoE level appears to operate more as a political declaration of some – vague – willingness to address the problem rather than as a systematic approach towards tackling this modern phenomenon. The predominant focus on the sexualised aspect of some forms of OVAW (e.g. image-based sexual abuse and online pornography) as well as the 'sexist hate speech' aspect sets a rather narrow approach towards developing an effective and comprehensive modern, legal and policy framework that is capable of capturing diverse forms of online abuse and offering meaningful avenues of redress for the victims.[43] Although OVAW is a form of VAW (and, as such, amounts to gender-based violence), different tools are needed for tackling OVAW, despite some similarities between the two categories of violence (i.e. online and offline). This is largely due to the differences in the environments in which these online acts take place, and the specificity required (as well as the relative scarcity) of regulation, especially when it comes to online environments and social media. For instance, online OVAW is routinely overlooked by social media platforms, which are protected from criminal charges through the liability shield[44] (although that area is timetabled for reform through the Digital Services Act,[45] on which consultation is currently ongoing) being introduced as an EU tool, which translates into freedom from prosecution where there is no editorialising of content, and where social media sites act only as mere conduits.[46] Questions and discussions around the difference between illegal content and legal but harmful content persist. Early indications suggest that, even with the Digital Services Act reforms, defining harmful but legal content will continue to be problematic, and it is therefore suggested here that a preferred approach should be to encourage platforms to allow greater user-based moderation so that users can choose what is seen in their respective feeds, rather than relying on platforms to do this for all users across all manner of cultures.

As such, as a direct consequence, the willingness of platforms to address harmful and illegal content has been somewhat limited. These measures do not encourage platform operators such as Twitter and Facebook to act on such content. In recent years, platforms have shown some limited willingness to engage with initiatives from the European Commission and take measures to address selected categories of content on their platforms. These measures have included adopting principles for the removal of content inciting hatred,[47] content on addressing illegal hate speech online[48] and other measures that do not address characteristics such as race or religion.[49] Despite the so-called progress that is hinted at by these indicators of co-operation, there are two points worthy of note. First, none of these measures specifically address issues of OVAW, and even where there are broad mechanisms for addressing – for example – content inciting hatred, they are non-specific. Second, even where there are specific measures designed to tackle specific forms of hatred such as racist hate speech online, there is no specific consideration

43 Although failing to refer specifically to victims of online violence/OVAW specifically, the European Commission's new Victims' Rights Strategy introduces new measures focuses on concrete steps to empower victims of crime: European Commission, 'Questions & Answers – Victims' Rights: New Strategy to empower victims', 24 June 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_1169.

44 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

45 Consultation on the Digital Services Act, June 2020, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers.

46 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Article 12. Other measures introduced include: European Commission, Communication (COM 2017) 555 (final) of 29 September 2017 on Tackling Illegal Content: Towards an enhanced responsibility of online platforms; and European Commission, Recommendation C(2018) 1177 (final) of 1 March 2018 on measures to effectively tackle illegal content online.

47 The European Commission presented guidelines and principles to address removals of online content inciting hatred in September 2017. See EC, 'Tackling Illegal Content Online', 28 September 2017, available at: https://ec.europa.eu/digital-single-market/en/news/tackling-illegal-content-online.

48 European Commission, 'Code of Conduct on Countering Illegal Hate Speech Online', 30 June 2016, available at: https://ec.europa.eu/info/sites/info/files/code_of_conduct_on_countering_illegal_hate_speech_online_en.pdf.

49 For such other measures, see European Commission, 'Code of Practice on Disinformation', 26 September 2018, available at: https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation.

of gender within this. Platforms can therefore act to remove content inciting racial hatred, but not to remove content inciting gendered hatred. Even where there are instances of racial *and* gendered hatred, no consideration of the gendered prejudice will be forthcoming because removal can be considered on the basis of racial hatred alone.

Even where platforms do take some steps to address posts on their platforms, reports of failure to act even where content is reported are not uncommon.[50] This situation is particularly prevalent given that these social platforms are increasingly outsourcing content moderation,[51] and the volume of content is increasing at a rate which makes moderation almost unworkable with only human moderators.[52] Legal responses to OVAW need to take into account the volume of content and the scale of the problem, as well as the role and responsibilities of platform providers and social media companies – something that is seemingly not relevant nor taken into consideration in tackling VAW offline.

4 Combatting OVAW – the fragmentation problem and the European Commission Gender Equality Strategy 2020-2025

The political commitment to combatting violence against women is strong, be it at the CoE, the European Parliament or the European Commission. Most recently, it was reflected in Ursula von der Leyen's political agenda, which set the need to combat gender-based violence – presumably in both its online and offline forms – across the EU as a priority. Von der Leyen focused in particular on the issues surrounding the EU's accession to the Istanbul Convention and suggested adding violence against women to the list of crimes in the EU treaty[53] – now reflected in the EC Gender Equality Strategy for 2020-2025 (EC GES).[54] The strategy makes a number of important points recognising the need to tackle online gender-based violence – including a commitment to clarifying the responsibilities of online platforms in respect of user-disseminated content.[55] However, it is striking that the EC GES does not elaborate on the proposed scope of state obligations concerning positive steps to tackle OVAW (alongside a plan to identify these obligations for platform providers) which, albeit not binding, could provide guidance for future legislative proposals on this pertinent issue. The strategy relies strongly on the notion of gender mainstreaming across EU policies[56] – a concept which is not novel, but which has been criticised by some feminist authors for promoting an 'add women and stir' approach,[57] having little transformative potential beyond political commitments at a supranational level. Furthermore, questions arise as to whether future policies and steps taken by the EC will in fact encompass a truly intersectional approach. Despite a declared commitment to the intersectional approach being present in the EC GES, the strategy itself does not go far enough to explore the multiple and intersecting grounds of discrimination against women across the EU. Nonetheless, it remains to be seen how the EC GES will be operationalised and implemented, and whether the commitment to mainstreaming gender across policy areas will become a reality rather than remaining just another political commitment.

50 Elgot, J., 'Twitter failing to act on graphic images and abusive messages, says MP', *The Guardian*, 22 August 2017, available at: https://www.theguardian.com/technology/2017/aug/22/twitter-failing-to-act-on-graphic-images-and-abusive-messages-says-mp; McGoogan, C., 'EU accuse Facebook and Twitter of failing to remove hate speech', *The Telegraph*, 5 December 2016, available at: https://www.telegraph.co.uk/technology/2016/12/05/eu-accuses-facebook-twitter-failing-remove-hate-speech/.

51 Levy, S. (2020), *Facebook – The Inside Story*, Penguin, p. 444.

52 Roberts, S. T. (2019), *Behind the Screen: Content Moderation in the Shadows of Social Media,* Yale University Press, p. 2.

53 Von der Leyen, U.,'A Europe that strives for more. My agenda for Europe. Political guidelines for the next European Commission 2019-2024 ', available at: 11 https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf.

54 European Commission, *A Union of Equality: Gender Equality Strategy 2020-2025*, 5 March 2020, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152&from=EN.

55 European Commission, 'A Union of Equality: Gender Equality Strategy 2020-2025', 5 March 2020, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152&from=EN, p. 5.

56 European Commission, 'A Union of Equality: Gender Equality Strategy 2020-2025', 5 March 2020, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152&from=EN, p. 15.

57 Chinkin, C., 'Feminist Interventions into International Law' *Adelaide Law Review*, 19(1), 1997, pp. 13, 18; Kouvo, S., 'The United Nations and Gender Mainstreaming: Limits and Possibilities' in Buss, D. and Manji, A. (eds.) (2005) *International Law: Modern Feminist Approaches*, Hart, pp. 237-252.

It is to be hoped that these objectives will be prioritised in the work of the European Commission, with closer attention falling on the overlap between tackling violence against women and gender inequalities on the one hand, and the Commission's principal concern of building a 'Europe fit for the digital age' on the other.[58] As the EC GES indicates, the European Commission perceives these two areas as interlinked and closely related. That said, a closer look at the policy areas of 'A Europe fit for the digital age'[59] reveals a focus on issues surrounding data protection, the digital marketplace, digital networks and services, and economy and society. However, none of these areas address the issues of digital exclusion of women from online public spaces, the impact of OVAW on its victims or the wider issue of (gender) inequalities online. For instance, while the EC GES recognises that OVAW acts as a barrier to women's participation in public life,[60] it fails to acknowledge the wider effects of OVAW in discouraging young women from entering careers which likely involve working in online environments, including boosting 'women's participation in digital'.[61] Interesting examples of fragmentation persist, even across different gender equality portfolios, further indicating that there is a lack of holistic and 'joined up' thinking across the remit of the European Commission despite the extensive coverage the Commission offers in other areas. The attention paid to – for instance – gender equality in the research and development sectors[62] is admirable and potentially encouraging, yet to date the same attention and focus has not been paid to issues of OVAW. Similarly, while the EC GES calls for gender parity in decision-making and in politics, it fails to give explicit recognition to the harmful effects of OVAW on women's participation in political life – for both existing and aspiring women politicians – which include alarming reports of women withdrawing from politics due to harassment and abuse suffered online.[63]

Overall, while the EC GES attempts to address some of the concerns expressed earlier in this article about the treatment of OVAW, this approach still demonstrates what we refer to as a 'fragmented approach' to tackling OVAW, which is relentlessly applied by intergovernmental agencies and bodies and is – sadly – reflected in domestic approaches to tackling online abuses and violence, including OVAW. Ultimately, this fragmentation, which arises from the lack of precisely articulated steps needed to encompass OVAW in policies concerning digital reforms, amounts to a failure at all levels.

Such fragmentation can be observed in a number of contexts and at various levels, including domestic, supranational and international law and policy initiatives. However, gender and platform perspectives within initiatives designed to tackle OVAW are mutually exclusive. For example, when considered from a gender perspective, the initiatives aimed at addressing OVAW thus far focus almost exclusively on the gender equality perspective, without giving due consideration to the broader regulatory environment in which gender-based harms and OVAW take place. Although the DSA initiative (still open for consultation at the time of writing this article) may change this approach to a more comprehensive one – i.e. in which gender equality and platform regulation are considered together – it has up to now been relatively common for such policies to ignore the perspective of platform regulation and the issue of legal obligations on platform providers, especially in relation to gender-based hate, violence, and the abuse of women perpetrated on these platforms. For instance, the German *Netzwerkdurchsetzungsgesetz* legislation[64] – colloquially known as the 'hate speech act' – rightly focuses on speech issues relating to the posting of unlawful content on social media platforms. It was introduced specifically to allow the

58 European Commission, 'A Europe fit for the digital age', available at: https://ec.europa.eu/info/priorities/europe-fit-digital-age_en.

59 European Commission, 'A Europe fit for the digital age', available at: https://ec.europa.eu/info/priorities/europe-fit-digital-age_en.

60 European Commission, 'A Union of Equality: Gender Equality Strategy 2020-2025', 5 March 2020, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152&from=EN, p. 5.

61 European Commission, 'EU countries commit to boost participation of women in digital', 9 April 2019, available at: https://ec.europa.eu/digital-single-market/en/news/eu-countries-commit-boost-participation-women-digital; EC GES (2020), p. 10.

62 European Commission (2017), *Gender Equality Strategy in EU Research & Innovation*, available at: https://graphene-flagship.eu/news/Documents/Gender%20Equality%20Strategy%20in%20EU%20RI_.pdf.

63 Barker, K. and Jurasz, O., 'Violence Against Women in Politics (#VAWP) – The Antithesis of (Online) Equality', Scottish Policy and Research Exchange, 10 May 2019, available at: https://spre.scot/violence-against-women-in-politics-online/.

64 Translated as the Network Enforcement Act, 2017. Hereafter NetzDG.

enforcement of 22 other pieces of legislation that address harms including insults, child pornography, intimate privacy violations and incitement to hatred online.[65] There is, however, no specific consideration within that legislation of sexist hate speech, neither in terms of prohibitions nor in terms of protections. Similarly, the UK Government *Online Harms White Paper* specifically lists 23 categories of online harm[66] that it is envisaged an Online Harms Bill would address, but again there is a significant omission in that no gender protections are listed within this – albeit not exhaustive but still indicative – list.

This continued approach of 'regulation by omission' is a misguided one which reinforces the false perception that (O)VAW is a 'women's only issue' rather than an issue of equality – not only gender equality and freedom from gender-based violence, but also equality of participation in the public sphere. Furthermore, such an approach creates a dichotomy between the realm of gender inequality and VAW, and the realm of technology and internet regulation. Excluding joint consideration of these issues means that OVAW and platform regulation are effectively portrayed as mutually exclusive concepts, resulting in only half-baked responses. For instance, where there is a platforms perspective, there is no gender analysis; on the contrary, when gender perspectives are considered, there is little or nothing on the substantive liability of platform providers – all of which curtails efforts to meaningfully address OVAW.[67]

The gender-platforms dichotomy is further reinforced by the common counterargument that OVAW cannot be legally regulated due to freedom of expression concerns. Internet platforms, and social media platforms in particular, are portrayed as bastions of freedom of expression, and it is argued that any attempts to regulate gender-based abuse and violent behaviours online would encroach on other users' right to freely express themselves online. Paradoxically, freedom of expression concerns – although so prominent in relation to the regulation of online gender-based abuse – somewhat fade away when it comes to attempts to regulate other illegal or otherwise harmful content online, such as content that is deemed 'terrorist'.[68] The juxtaposition of gender equality and freedom of expression creates a hierarchy of democratic values – as well as harms – whereby the value of protecting gender equality and advancing the non-discrimination of women is inferior to freedom of expression, including the freedom to express misogynistic views.[69] The untenability of maintaining such a hierarchy has been recognised by the CoE in its Gender Equality Strategy, which expressly observes that 'freedom of expression is often abused as an excuse to cover unacceptable and offensive behaviour'.[70] However, beyond this important recognition, efforts to tackle OVAW at the European level have shown no signs of incorporating a 'joined-up thinking' approach to bridge the gap between gender equality/VAW issues, and digital technology/internet regulation. Given the current priority reform agendas in these respective areas, this further adds to the notion of fragmentation with an inability to think across, and beyond, strictly confined policy areas.

Another area of fragmentation is the terminology and language used to describe OVAW and – as inherently follows – the way in which offences pursuant to OVAW are defined (or not) in domestic laws and legal documents. The term 'OVAW' is not generally used in the documents examined in this article. Instead, the focus is on 'online sexist hate speech', 'cyberstalking', 'online abuse', 'online sexism', 'online

65 Tworek, H., *An Analysis of Germany's NetzDG Law*, Transatlantic Working Group, 15 April 2019. https://www.ivir.nl/publicaties/download/NetzDG_Tworek_Leerssen_April_2019.pdf.

66 HM Government, *Online Harms White Paper*, April 2019 (CP 57), 31.

67 Barker K. and Jurasz, O. (2019), *Online Harms White Paper Consultation Response*, available at: http://oro.open.ac.uk/69840/.

68 See, for example, European Commission, Recommendation C(2018) 1177 (final) of 1 March 2018 on measures to effectively tackle illegal content online. Although freedom of expression is referred to in the document, it is in the context of the need to consider potential safeguards to freedom of expression rather than negating the need for and/or possibility of regulation altogether. See also: NetzDG.

69 Barker, K. and Jurasz, O., 'Online Misogyny: A Challenge for Global Feminism', *Journal of International Affairs* 72(2), 2019, pp. 95-113, 105.

70 CoE, *Gender Equality Strategy 2018-2023*, June 2018, available at: https://rm.coe.int/prems-093618-gbr-gender-equality-strategy-2023-web-a5/16808b47e1, para. 44. A similar point has been made by the UN Special Rapporteur on violence against women, its causes and consequences and by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression: UN OHCHR, 'UN experts urge States and companies to address online gender-based abuse but warn against censorship', 8 March 2017, available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21317#:~:text="Ensuring%20an%20internet%20free%20from,is%20integral%20to%20women's%20empowerment.".

attacks' and 'sexualised threats online'.[71] While the terms used suggest various forms of online abusive behaviours, there is very little certainty as to exactly which behaviours they describe and how, if at all, these acts are defined or captured within the law at both the supranational and domestic levels. There is a tendency to subsume quite distinct forms of OVAW within other general categories of online abusive behaviours such as cyberbullying or image-based sexual abuse, largely to the exclusion of non-image-based, textual forms of online abuse.[72] The interchangeable and frequently incorrect use of terms attempting to describe specific OVAW offences results in the production of a confusing picture of what OVAW is and which acts amounting to OVAW are defined in law – and if so, how. As we note above, an unintended consequence of such narrow categorisations of OVAW results in the exclusion of other (legal) aspects and categories which equally characterise it.[73]

Furthermore, this linguistic fragmentation is reinforced by the diversity of institutions and bodies (at both governmental and non-government levels) whose work focuses on OVAW or other forms of online abusive behaviours. Different areas of focus, different institutional priorities and varying levels of expertise on the legal aspects of OVAW mean that there is effectively scarcely any attempt to harmonise the use of terminology. Similarly, OVAW is frequently 'co-opted' into other agendas in a manner that diminishes the gender perspective and root causes of this form of abuse, or which favours the regulation of online abusive behaviours where they concern minors rather than adult women or can be captured under a different agenda (e.g. OVAW as a part of domestic violence). This is particularly evident – to note but one example – in the UK Government's recent *Online Harms White Paper*;[74] it lists 23 types of potential 'harm', yet this (albeit non-exhaustive) list fails to include gender-based abuses. Similarly, the absence of gender considerations is also noticeable within the Online Harms proposals, highlighting that the gender perspective is not considered in platform regulation discussions. This persistent omission leads to potentially harmful and unfair outcomes for the victims – for instance, an act of OVAW committed in a domestic violence context would offer an avenue of redress for the victim, while the same act committed outside that context would not. Such an approach inherently leads to the creation of a hierarchy of harms[75] and victims, reinforcing a double inequality: first, the inequality that led to the commitment of OVAW and, secondly, the inequality in the treatment of victims of the same crime in the legal and justice system.

5 OVAW and VAW Recommendations for Resolving Fragmentation?

Given the pressing need to adopt an approach which is not disparate and fragmented, gender equality online should be a principal objective for all institutions with a remit in, or responsibility for, gender equality. The fragmented, disparate, and disjointed approaches to platform regulation, and to internet regulation more broadly, have consistently failed to offer regulatory solutions to the pervasive and increasingly harmful phenomenon of OVAW. This is mirrored in the lack of cohesive mechanisms to address OVAW at CoE and EC levels. That said, there are potential avenues for reform on the horizon when it comes to redressing the balance for women's equality online and tackling OVAW. To that end, and in light of the preceding analysis of consistent failings, this paper now offers four workable recommendations for tackling the current fragmented approach to OVAW.

71 Terms used in the *Gender Equality Strategy* and in CoE, Recommendation on preventing and combatting sexism.
72 Barker, K. and Jurasz, O., 'Text-based (sexual) abuse and online violence against women: towards law reform?' in Bailey, J., Flynn, A. and Henry, N. (2021), *Technology-Facilitated Violence and Abuse – International Perspectives and Experiences*, Emerald.
73 Barker K. and Jurasz, O. (2019), *Online Misogyny as a Hate Crime: a Challenge for Legal Regulation?*, Routledge, xiii.
74 HM Government, *Online Harms White Paper*, April 2019 (CP 57), p. 31.
75 Barker, K. and Jurasz, O., 'Text-based (sexual) abuse and online violence against women: towards law reform?' in Bailey, J., Flynn, A. and Henry, N. (2021), *Technology-Facilitated Violence and Abuse – International Perspectives and Experiences*, Emerald.

(a) An Amended Approach – 'Joined-Up Thinking'

First and foremost, an amended approach to issues of OVAW is required at all levels, but in particular from EU and European institutions – especially those beyond the European Commission and the CoE, including the European Parliament and the European Council. There needs to be a distinct and emphasised approach to addressing and resourcing activities combatting OVAW. This requires institutions, civil society and experts to come together to discuss OVAW *specifically*, and to think about it cohesively. Isolated initiatives can no longer be offered – while undoubtedly beneficial, they have proven to be too sporadic to have a substantive impact on the broader phenomenon of OVAW. In short, fragmented and disjointed or isolated initiatives/agendas must be a thing of the past. Mechanisms of abusing women and spaces in which such abuse occurs have developed to encompass technology and the internet – accordingly, initiatives to tackle these abuses must also evolve. A holistic, collaborative approach to OVAW must become a flagship initiative, with the EU leading the way. This will continue to address VAW but give a new emphasis to OVAW and non-traditional forms of text-based abuses.

(b) Legislative Benchmarking – Gender and Platform Dichotomy

Secondly, there must be renewed efforts to expressly incorporate OVAW within the legal framework at the CoE and EU levels. This should necessitate, at the very least, the amendment of the Convention on Cybercrime (Budapest Convention)[76] to include all forms of OVAW. Moreover, the Budapest Convention should include specific definitions of behaviours capable of amounting to OVAW. The focus of the Budapest Convention has so far fallen on crimes committed via the internet, and while the CoE claims that this convention is the 'first' international treaty dealing with such crimes and the commission of them, there remain – in our view – some significant weaknesses in its provisions. Interestingly, the Budapest Convention is supplemented by an Additional Protocol,[77] which deals with specific forms of hatred manifested through online means. However, the emphasis of this protocol rests on xenophobia and racism, and it does not include provisions relating to gendered abuses or gender equality online. The Budapest Convention itself suffers from further weaknesses in that it is now somewhat outdated; despite discussions concerning the drafting of a second additional protocol in 2019[78] – focussing on data-related aspects of the internet and mutual legal assistance – there are still no provisions offered within this framework to address gender-based abuses online.

The Budapest Convention is, nevertheless, not the only legal mechanism that requires a firmer stance on OVAW – so too does the Istanbul Convention. Given that the Istanbul Convention is potentially applicable to the media sector, this would, for the first time, allow for private platform operators such as Twitter to be required to develop standards and regulatory mechanisms to tackle OVAW on their platforms. There is, after all, very little evidence to date showing private sector actors engaging with mechanisms to offer their users protection from OVAW, even where they have shown willingness to engage with other regulation, such as data protection. More importantly, taking such steps would effectively mean that the dichotomy between platform operators and gender would have to be actively bridged, and women would have to be equally considered alongside platform regulation debates – something which has not previously been considered.

In adding women to considerations in platform regulation debates, there is a pressing need for the digital services reform agenda to encompass perspectives on OVAW. While reforming digital services across the EU is – understandably – a priority in the digital age, it is disappointing to see that no emphasis falls on efforts to ensure that online platforms and spaces are safe spaces for women to engage in. In

76 Convention on Cybercrime of the Council of Europe (CETS No. 185), 23 November 2001 (Hereafter, Budapest Convention).
77 Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189), 28 January 2003.
78 CoE, 'Consultations with civil society, data protection authorities and industry on the 2nd Additional Protocol to the Budapest Convention on Cybercrime', available at: https://www.coe.int/en/web/cybercrime/protocol-consultations.

reforming other elements of the digital realm – including content regulation to protect creative artists – there is a clear appetite to prioritise some interests over others. Given the priority list of areas for reform under the digital services agenda, it is again disappointing to see that there is no gender component present, despite the nature of online harassment and OVAW. As the digital services reform package is still in progress, there is still time for this to be modified to include mechanisms to address OVAW. Given that the European Parliament has been rather silent on the issue of OVAW generally – with the digital services reform agenda resting with the European Commission[79] – it is perhaps time that the issue was moved front and centre; tweaking the digital services reform package would be one way of ensuring a different emphasis on OVAW at the highest legislative levels. By incorporating a specific gender aspect in considerations of digital reform, the dichotomy between platform regulation and gender equality would no longer be an obstacle to *online* gender equality.

(c) Definitional Consistency

Thirdly, in addressing changes to the institutional thinking and legislative frameworks, it is necessary to give credence to one of the – potentially – more challenging aspects of OVAW: definitional consistency. As we have noted both here and elsewhere, terms in the OVAW area are frequently used interchangeably, without precision, and to address 'similar' behaviours that are often not ideal comparators and which do not capture the accuracy of the behaviour, nor its harm. It is therefore imperative that clear and precise definitions and terms are established and – critically – that they are used accurately. Terminology must focus on OVAW as the phenomenon, and attention must be given within this to non-image-based abuses. OVAW that manifests as textual threats to rape or kill, or harassment, must be categorised as text-based abuse and as OVAW. Focusing solely on image-based abuses as OVAW does not offer a full picture and fails to capture much of the harassment that is violently inflicted on women online. Similarly, not including text-based abuses within OVAW does not address the equality challenge for women online. In addressing both text-based and image-based abuses, OVAW as a term will enhance reporting procedures, but also offer some consistency to law enforcement and activist initiatives. In turn, capturing TBA alongside IBSA reflects the ongoing harm suffered by women online.

(d) Momentum rather than Moments

Fourthly, showboating, 'PR' opportunities and 'glossy' campaigns must be recognised as political posturing – usually at politically appropriate moments in the calendar year,[80] such as International Women's Day or the International Day for the Elimination of Violence Against Women. While these days are important, and it is right that they be recognised, there is a careful balance to be struck between recognising them with events and statements, and simply using them for other, more politicised purposes. Using these opportunities for pure posturing does not offer much in terms of tackling OVAW and addressing the significant harms that such behaviours cause for those on the receiving end. Events should be used to highlight or reinforce ongoing work, and should mark the culmination of work to address gender equality and OVAW; they should not simply be press stunts, especially where organisations that have – arguably – fallen short on action to address OVAW and VAW are those repeatedly hosting such 'glossy' events. To continue to host PR activities on strategically important days serves to undermine the severity of the issues being discussed here; a glossy campaign poster and a social media campaign does little to directly tackle OVAW[81] and its impact long-term.

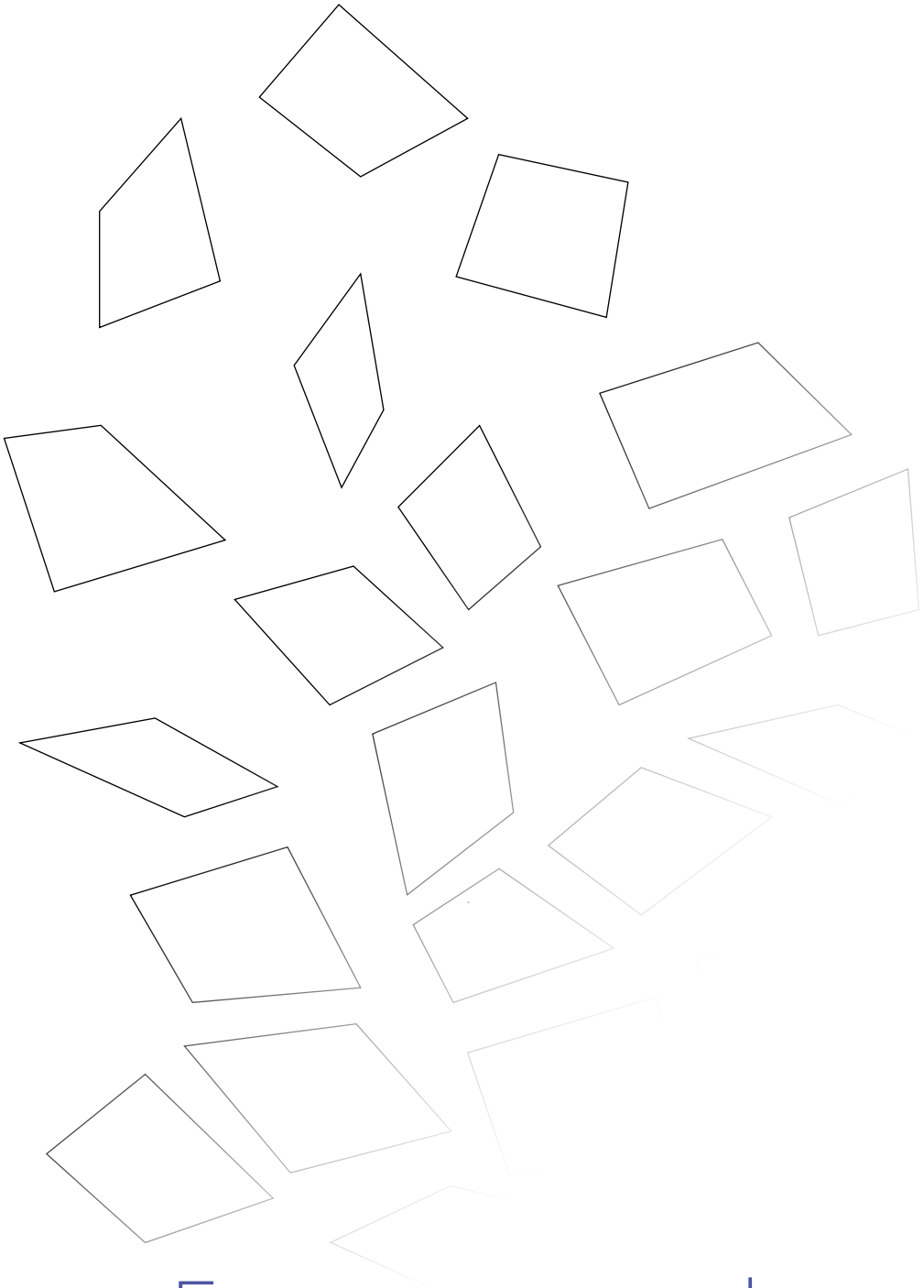
79 European Commission, 'A Europe fit for the digital age', https://ec.europa.eu/info/priorities/europe-fit-digital-age_en.
80 Barker, K. and Jurasz, O., 'Why misogyny and hate crime reforms need more than slick campaigns', *The Conversation*, 23 March 2020, https://theconversation.com/why-misogyny-and-hate-crime-reforms-need-more-than-slick-campaigns-134265#comment_2180791.
81 Barker, K. and Jurasz, O., 'Online Misogyny as a Hate Crime: #TimesUp' in Zempi, I., Smith, J. (2020) *Misogyny as Hate Crime*, Routledge.

6 Conclusions

Small, incremental, and isolated initiatives no longer work in addressing issues of OVAW. The proliferation of digital living, together with the prevalence of OVAW, makes this a very real challenge for contemporary society. This is due – at least in part – to the increased requirement to be active online in order to fully participate in society, yet readily being 'online' means being open to harassment, abuse, and violence. In reality, 'social media platforms belong to the companies that create them and they have almost absolute power over how they are run',[82] and this continues to be a significant regulatory challenge in tackling OVAW. Social media platforms, despite claims of free expression, remain private entities that are increasingly providers of so-called 'public space'. Until this paradox is addressed, regulation will continue to be challenging. OVAW is a distinct threat not only to the rights of women, but also to the existence and business models of online platforms, and a continued failure to address fragmented responses to TBA as a form of OVAW will result in consistent and repeated harms.

There is currently a unique opportunity to tackle the dominance of platforms by moving away from notions of self-regulation and by putting OVAW at the heart of policy agendas. In short, it is our recommendation that legal reform should be introduced to require platforms to address TBA and IBSA on their sites, and in so doing to address all forms of OVAW. In addition, further reforms should be introduced to ensure that TBSA and IBSA are explicitly captured, rather than being treated as a sub-category of sexual harassment provisions. It is essential that concerted efforts are made to tackle the pernicious and widespread phenomenon of OVAW, and to expressly include OVAW in policy, legislative, and enforcement arenas.

82 Suzor, N.P. (2019), *Lawless – The Secret Rules That Govern our Digital Lives*, Cambridge University Press, p. 11.



European case law update

This section provides an overview of the main latest developments in gender equality and non-discrimination cases pending or decided by the Court of Justice of the EU and the European Court of Human Rights, from 1 July to 31 December 2019.

Court of Justice of the European Union

REFERENCES FOR PRELIMINARY RULINGS – ADVOCATE GENERAL OPINION

Gender

Case C-450/18, *WA v Instituto Nacional de la Seguridad Social*, Opinion of Advocate General Bobek delivered on 10 September 2019, ECLI:EU:C:2019:696

This Opinion from Advocate General Bobek (the AG) follows a request for a preliminary ruling submitted by *the Juzgado de lo Social n.º 3 de Gerona* (Social Court No 3 of Gerona, Spain) concerning a supplement to the contributory social security retirement pension, widow's pension, or permanent disability pension for women who have had two or more biological or adopted children. The applicant, a father of two daughters, brought an action before the Social Court, challenging a decision by the national social security authority in which it refused to grant him a similar supplement to his permanent disability pension on the basis that the supplement is only granted to women. The referring court wished to know whether the national provision infringes the EU prohibition of discrimination on the ground of sex.

According to the AG, the benefit at issue does not constitute 'pay' and therefore is not covered by Article 157(2) TFEU, nor Directive 2006/54/EC. Instead, the AG stated that the provision needs to be analysed with regard to its compatibility with Directive 79/7/EEC. The AG considered that it must be established whether the measure can be considered a provision 'relating to the protection of women on the grounds of maternity', which is an exception to the principle of equal treatment and is contained in Article 4(2) of Directive 79/9/EEC. The AG stated that a narrow interpretation of 'grounds of maternity' is needed. The provision is not connected to the specific situations of pregnancy, birth and maternity leave. Indeed, a woman can benefit from the supplement despite not having been pregnant, due to the inclusion of women with adopted children. Moreover, the link with maternity leave is missing, since women with more than two children can benefit, regardless of whether or not they took maternity leave. Therefore, the measure concerned is broader than a narrow objective of protecting women on grounds of maternity, and should not be considered as being covered by the exception contained in Article 4(2) of Directive 79/9/EEC.

The AG noted that the genuine objective of the measure appears to be to reduce the gender gap in pensions, in order to address a structural situation of inequality facing mothers of more than one child with regard to their pension entitlements. However, the AG pointed out that such structural inequality does not automatically imply that women and men are non-comparable in any given situation. On the contrary, the AG concluded that the existence of structural inequalities in pensions does not preclude that female and male workers who are parents of two or more children are in a comparable situation with regard to the supplement to a contributory disability pension. Concerning the question as to whether the national measure is discriminatory, the AG held that because the supplement is exclusively granted to women, the national measure constitutes direct discrimination based on sex. In light of this finding, the AG analysed whether the measure could nevertheless be covered by Article 7(1) of Directive 79/9/EEC, which allows Member States to exclude certain matters from the scope of the Directive. Amongst these matters is 'the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children'. However, the AG pointed out that the national measure is not related to any actual interruption of employment, because the maternity supplement is rewarded regardless of such an interruption, rendering Article 7(1) inapplicable.

Having thus concluded that the measure at issue is precluded by Directive 79/9/EEC, AG Bobek then turned to the remaining question, namely whether the measure may nonetheless be permissible under

Article 157(4) TFEU as a positive action measure. The AG agreed with the statement submitted by the Commission that the concept of 'professional careers' in the Article is very broad and could thus also apply to the field of social security.[1] Indeed, as AG Bobek noted, Article 157(4) TFEU should be interpreted as allowing certain positive action measures that would otherwise be prevented by the principle of equal treatment enshrined in Directive 79/9/EEC. However, regarding the measure at issue, the AG concluded that it does not comply with the proportionality principle as required by Article 157(4) TFEU. The measure should therefore be considered incompatible with EU law, according to the AG.

REFERENCES FOR PRELIMINARY RULINGS – JUDGMENTS

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

Disability

This request for a preliminary ruling was made by the *Juzgado de la Social No. 3 de Barcelona* (Social Court No. 3 of Barcelona, Spain) and concerned the dismissal of the claimant on 'objective grounds'. The claimant had been employed by the respondent since 2004 but was diagnosed with an occupational disease in 2011, causing considerable absences from work until March 2017, when she was dismissed together with nine other employees. The dismissal was based on 'economic, technical, organisational and production grounds' for which four selection criteria were established: being assigned to the specific processes to which the dismissed employees were allocated; having a productivity level of below 95 % during 2016; a low level of multi-skilling in the company's posts; and a high rate of absenteeism. As of December 2011, and until her dismissal, the claimant was categorised as being among 'workers particularly susceptible to occupational risks', a category foreseen by national law and giving rise to specific protective duties for employers.

Firstly, the referring court expressed doubts as to the overlap between this category of workers foreseen by national law and the category of persons with disabilities under the Employment Equality Directive. Secondly, it enquired about the compatibility of three of the four selection criteria for dismissal applied by the employer with the Directive and its prohibition of discrimination on the ground of disability.

With regard to the first question referred, the Court recalled all the central elements of its previous rulings in cases such as *HK Danmark*,[2] *Daouidi*[3] and *Ruiz Conejero*[4] to provide an overview of the concept of 'disability' and the relevant criteria to be considered when that concept is to be applied. The Court then noted that the claimant concerned, 'owing to a medical condition, suffered a limitation of her capacity to work, arising as a result of physical impairments, over a long period of time'. While underlining that the concept of 'workers particularly susceptible to occupational risks' under national law does not correspond fully to that of 'disability' under the Directive, the Court concluded that it was for the national court to determine whether the state of health of the claimant satisfied the conditions of this latter concept.

Questions two to four of the referring court concerned the three selection criteria for dismissal that were related to workers' productivity rate, multi-skilling capacities and level of absenteeism, and notably whether the dismissal of a disabled worker on the basis of such criteria constitutes direct or indirect discrimination on the ground of disability within the meaning of the Directive. Having excluded the possibility of direct discrimination by noting that none of the selection criteria were inseparably linked to disability, the Court went on to examine the potential existence of indirect discrimination. In this regard, the Court noted that, while the three criteria are ostensibly neutral, they are all susceptible to placing disabled workers at a disadvantage, thereby creating a difference in treatment resulting indirectly from

1 See para 85 of the present Opinion.
2 Joint cases C-335/11 and C-337/11, judgment of 11.04.2013, ECLI:EU:C:2013:222.
3 Case C-395/15, judgment of 01.12.2016, ECLI:EU:C:2016:917.
4 Case C-270/16, judgment of 18.01.2018, ECLI:EU:C:2018:17.

disability. To determine whether such unfavourable treatment amounts to discrimination in the meaning of the Directive, the Court then examined the justification test and thereby the duty of employers to provide reasonable accommodation to eliminate the various barriers that hinder the full and effective participation of workers with disabilities in professional life on an equal basis with others. In this regard, the Court noted that it is for the referring court to determine whether the employer's adjustments to the tasks of the claimant were sufficient to constitute reasonable accommodation. If not, the Court concluded that it must be held that the dismissal amounted to indirect discrimination on the ground of disability, recalling that the Convention on the Rights of Persons with Disabilities (CRPD) prohibits all forms of discrimination, 'including denial of reasonable accommodation'. If, however the measures adopted by the employer are to be considered as reasonable accommodation, it cannot be held that the dismissal amounted to discrimination. In this regard the Court cited recital 17 which clarifies that the Directive does not require the recruitment, promotion or maintenance in employment of an individual who is not competent, capable and available to perform the essential functions of the post.

Case C-544/18, *The Commissioners for Her Majesty's Revenue & Customs v Henrika Dakneviciute*, Judgment of 19 September 2019, ECLI:EU:C:2019:761

Gender

This request for a preliminary ruling was submitted by the Upper Tribunal (Administrative Appeals Chamber) (UK) and concerns the interpretation of Article 49 TFEU regarding the question whether a woman who ceases self-employed activity in circumstances where there are physical constraints in the late stages of pregnancy and the aftermath of childbirth retains the status of being self-employed, provided that she returns to the same or another self-employed activity or employment within a reasonable period after the birth of her child.

Ms Dakneviciute ('the Applicant'), a Lithuanian national employed in the UK since 2011, working during the night, decided to work as a self-employed beauty therapist on 25 December 2013, after learning she was pregnant. In preparation for and in the aftermath of the birth, she was inactive between 22 July 2014 and the end of October of that year. After this period, the applicant first returned to working as a self-employed beauty therapist, before ceasing this activity on the basis that her income had become insufficient. From 10 February 2015 she claimed jobseeker's allowance, before taking up employment in April 2015. Her application for child benefit, which she made in August 2014, was rejected because, under national law, she lacked a sufficient right to reside to meet the qualifying conditions for that benefit. This decision was quashed by the First-Tier Tribunal, with the authority administering child benefits appealing the decision.

The Upper Tribunal (Administrative Appeals Chamber), charged with deciding the appeal, referred the question to the CJEU as to whether Article 49 TFEU should be interpreted as meaning that a woman who ceases self-employed activity in circumstances where there are physical constraints in the late stages of pregnancy and the aftermath of childbirth retains the status of being self-employed, within the meaning of that Article, provided she returns to economic activity or seeking work within a reasonable period after the birth of her child.

In answering this question, the Court first considered whether Ms Dakneviciute had the right to reside in the UK during the period from 22 July 2014 to 9 February 2015. Directive 2004/38/EC provides for conditions governing the right to reside in the EU. These conditions, such as being employed or self-employed, do not include a woman who temporarily gives up work because of the late stages of her pregnancy and the aftermath of childbirth. However, the Court held that the said Directive does not contain an exhaustive list of conditions. More specifically, the Court held that the physical constraints mentioned do not, in principle, deprive a woman of her status of 'worker' within the meaning of Article

45 TFEU.[5] Additionally, the Court held that Articles 45 and 49 TFEU afford the same legal protection.[6] Therefore, the Court held that a woman in the situation of Ms Dakneviciute must be able to retain her status as self-employed within the meaning of Article 49 TFEU.

Furthermore, according to the Court, employees and self-employed people are in a comparably vulnerable position (when obliged to stop working) and therefore should be treated the same with regard to their right to reside in a host Member State. Additionally, pregnant women are in a particularly vulnerable situation, whether employed or self-employed. Therefore, a woman who ceases to be self-employed because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth cannot be treated differently, with regard to her right to reside in a host Member State, from a woman in employment in a comparable situation.

Considering the aforementioned, the Court concluded that Article 49 must be interpreted as meaning that a pregnant self-employed EU citizen can retain her self-employed status during pregnancy and maternity if she ceases the self-employed activity in circumstances where there are physical constraints in the late stages of pregnancy and the aftermath of childbirth, so long as she returns to the same or another self-employed activity or employment within a reasonable period after the birth of her child.

Case C-171/18, *Safeway Ltd v Andrew Richard Newton and Safeway Pension Trustees Ltd.*, Grand Chamber judgment of 7 October 2019, ECLI:EU:C:2019:839

Gender

This judgment followed a request for a preliminary ruling submitted by the Court of Appeal (UK), and concerned the effective enforcement of the principle of equal pay for equal work between men and women with regard to pension schemes. More specifically, the question concerned the equalisation method of the pensionable age between men and women and whether EU law prohibits retrospectively introducing equality in retirement ages even if such a change is permissible under national law.

In the case under discussion, the Appellant, Safeway Limited, the principal employer of a pension scheme in the UK, announced the equalisation of the pensionable age under their pension scheme by letter on 1 December 1991 ('Announcement'). The Announcement informed the members of the pension scheme that the retirement age would henceforth be 65 for all members. While this scheme was implemented from the moment of the Announcement, the official amendment was only made through the adoption of a Trust Deed on 2 May 1996, according to which the equalisation was to have retrospective effect as of 1 December 1991. The question arising in this case was whether the retrospective equalisation in respect to the period between 1 December 1991 and 2 Mat 1996, by means of levelling down, was valid, considering that the case law of the Court prohibits retroactive levelling down through equalisation of the retirement age.

In its decision, the Court initially pointed out that the issue in the main proceedings concerned only the pension rights accrued by those members of the pension scheme in the period between 1 December 1991 and 2 May 1996. Therefore, the question had to be examined in light of Article 119 of the EC Treaty (now Article 157 TFEU). First, the Court assessed whether the Announcement of 1991 can be regarded as a measure taken by the pension scheme to reinstate the equal treatment required by Article 119 of the EC Treaty. The Court considered that, due to the direct effect of Article 119 of the EC Treaty, measures to reinstate equal treatment have to be immediate and full, and cannot to subject to conditions which maintain discrimination (not even on a transitional basis). Additionally, a measure which has no binding legal effects with regard to the persons concerned, but rather only introduces a mere practice, does not meet the requirement of the principle of legal certainty. Therefore, the Court found that the Announcement issued in 1991 did not satisfy the legal certainty requirement and was thus contrary

5 See C-507/12, *Jessy Saint Prix v Secretary of State for Work and Pensions*, Judgment of 19.06.2014, *Saint Prix*, EU:C:2014:2007, para 40 and 41.

6 See to that effect C-363/89, *Danielle Roux v Belgian State*, Judgment of 05.02.1991, *Roux*, EU:C:1991:41, para 23.

to Article 119 of the EC Treaty. The pension scheme at issue was not validly amended until the adoption of the Trust Deed on 2 May 1996. The question thus remained as to whether the retroactive equalisation of the retirement age was valid in light of Article 119 of the EC Treaty.

The Court has already held in previous case law that, according to the principle of equality, a pension scheme cannot eliminate discrimination retroactively.[7] However, in the present case, the national court questioned whether this also applies to situations where the pension rights are defeasible.[8] The Court emphasised that there is no support in its case-law for a power of a pension scheme to equalise with retroactive effect the conditions of its members to those applicable to the previously disadvantaged group. Rather, in agreeing with the Advocate General's opinion,[9] the Court stated that to acknowledge such a power would deprive the case-law of its effect, to the extent that it would only be applicable in cases where retroactively equalising was already prohibited under national law. Importantly, the Court made it clear that measures seeking to eliminate discrimination in line with EU law must do so in compliance with EU law requirements, and cannot be used to circumvent them.

The Court noted that it would be contrary to the principle of legal certainty as well as the obligation stemming from Article 119 of the EC Treaty that, pending measures ensuring equal treatment, disadvantaged persons must be granted the same advantages as those in the favoured category, to allow authorities to adopt measures equalising pension schemes by bringing those previously favoured to the same level as the previously disadvantaged group. This would also be contrary to the obligation to eliminate discrimination immediately and in full, unless it could be shown that such measures would be warranted on the basis of public interest, such as for example that there would be a risk of seriously undermining the financial balance of the pension scheme. However, this was not shown to be the case in relation to the case at hand.

In light of this, the Court concluded that the measure, concerning the period between the Announcement and the Trust Deed, which retroactively equalised the retirement age of men and women to that of the previously disadvantaged category is precluded by Article 119 of the EC Treaty. Such a measure is also precluded in the period between the Announcement and the adoption thereof.

C-396/18, *Gennaro Cafaro v DQ*, Judgment of 7 November 2019, ECLI:EU:C:2019:929

Age

This reference for a preliminary ruling was made by the *Corte suprema di cassazione* (Supreme Court of Italy) and concerned the mandatory retirement of the claimant who was working as an aircraft pilot for a company engaged in covert secret service activities. In accordance with national law, the aircraft piloted by the respondent company were considered equivalent to State aircraft and the general provisions of the Navigation Code regarding notably retirement ages were thus not applicable. Instead, specific safety guarantees were required, imposing notably that aircraft pilots were to retire at the age of 60. The claimant challenged the imposed retirement, but his claim was dismissed at first and second instance.

The referring court asked, in essence, whether the Employment Equality Directive and Article 21(1) of the Charter must be interpreted as precluding national legislation such as that at issue in the main proceedings, related to aircraft used for activities associated with protecting the national security of the Member State.[10]

7 See C-408/92, *Constance Christina Ellen Smith and others v Avdel Systems Ltd*., Judgment of 28.09.1994, Avdel Systems, EU:C:1994:349.

8 Prior to the *Barber* window, the benefits of men and women were defeasible as a matter of domestic law because they were at all times subject to retrospective change by a valid exercise of the power of amendment.

9 See Case C-171/18, *Safeway Ltd v Andrew Richard Newton, Safeway Pension Trustees Ltd*, Opinion of Advocate General Tanchev of 28.11.2019, Point 64.

10 For a summary of the Opinion of the Advocate General Szpunar delivered on 26.06.2019, please see *European equality law review*, Issue 2019/2, pp. 67-68.

Having determined that the national legislation at hand created a difference of treatment directly based on age, the Court then examined whether such a difference of treatment could be justified in view of the Directive and notably in view of Article 2(5) which foresees that a measure laid down by national law is not discrimination if it is necessary for inter alia public security. Contrary to the finding of the Advocate General, the Court held in this regard that the relevant national measure must be considered to be laid down by national law, albeit not constituting a law in itself, as it was adopted on the basis of a sufficiently precise authorisation provided in national legislation. Furthermore, the Court cited the Grand Chamber ruling in *Cresco Investigations*[11] to recall that to fall under the Article 2(5) exception, a national measure must be necessary to achieve the aim pursued, and that this exception must be interpreted strictly.

In this regard, the Court cited the judgment in *Prigge*[12] and noted that measures that aim to avoid aeronautical accidents by monitoring pilots' aptitude and physical capabilities are undeniably measures of a nature to ensure public security. The Court then held that the same applies for measures that aim to protect national security. Examining the criterion of necessity, the Court then noted the difference between pilots of commercial aircraft on the one hand, who may not be automatically banned from working when reaching the age of 60, and pilots such as the claimant. In this regard, the Court noted that pilots working for the respondent are often required to work in particularly difficult – or even extreme – conditions, meaning that particularly high requirements for physical aptitude can be necessary. Therefore, in the absence of specific regulations at international or EU level regarding the retirement age of pilots operating aircraft used in the protection of national security, the Court held that it is not founded to apply the retirement age of 65 imposed upon pilots of commercial aircraft upon pilots such as the claimant. It is thus for the referring court to determine whether the retirement age of 60 imposed by national law is indeed necessary for the purpose of protecting public security within the meaning of Article 2(5) of the Employment Equality Directive.

Case C-450/18, *WA v Instituto Nacional de la Seguridad Social*, Judgment of 12 December 2019, ECLI:EU:C:2019:1075

Gender

This request for a preliminary ruling was submitted by *the Juzgado de lo Social No 3 de Gerona* (Social Court No 3, Gerona, Spain) concerning the interpretation of Article 157 TFEU and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. It concerned a supplement to the contributory social security retirement pension, widow's pension, or permanent disability pension for women who have had two or more biological or adopted children. The applicant, a father of two daughters, challenged a decision by the national social security authority refusing to grant him a similar supplement to his permanent disability pension before the Social Court (the referring court). The question posed to the CJEU by the referring court was whether the national provision establishing the pension supplement exclusively for women infringes the EU prohibition of discrimination on grounds of sex.

First, the Court held that pension supplements, such as the one at issue, have the legal nature of a contributory State pension and therefore do not fall under the notion of 'pay' within the meaning of Article 157(1) and (2) TFEU, nor are they covered by Directive 2006/54/EC. Instead, the pension supplement falls within the scope of Directive 79/9/EEC, since it is part of a statutory scheme providing protection against disability (as listed in Article 3(1) Directive 79/9/EEC). Therefore, the Court had to assess whether Directive 79/9/EEC precludes national legislation which provides a pension supplement to women in receipt of contributory permanent incapacity pension who have had at least two biological or adopted children, on the basis of their demographic contribution to social security, but does not afford the same right to men in an identical situation.

11 Case C-193/17, judgment of 22.01.2019, ECLI:EU:C:2019:43. See also *European equality law review*, Issue 2019/2, pp. 68-69.
12 CJEU, Case C-447/09, judgment of 13.09.2011, ECLI:EC:C:2011:573.

According to the Court, the less favourable treatment of men in the national legislation constitutes direct discrimination, as prohibited by Article 4(1) of Directive 79/9/EEC. As discrimination, according to the Court's case law, involves a comparable situation being subject to different rules, or different situations being subject to the same rules, the Court had to ascertain whether the difference in treatment of men and women by the national legislation concerns persons who are in comparable situations. The defendants claimed that the pension supplement is justified because the aim is to reward the demographic contribution of women to social security. However, the Court pointed out that the contribution of men to demography is just as necessary as that of women.

Additionally, the defendants claimed that the pension supplement is justified on grounds of social policy, because it reduces the gap between the pension payments of men and women. They provided statistical data which revealed a difference between the pension payments of men and women as well as a difference between the pension payments of women who had two or more children and women who had not. In this respect, the defendants pointed out that the pension supplement is intended to protect women in their capacity as parents. However, the Court rejected the defendants' claims, stating that the situation of a father and a mother is comparable when it concerns the bringing-up of children. Agreeing with the AG's Opinion, the Court found the existence of statistical data on the difference between pension payments to be insufficient to support the claim that women and men are not in a comparable situation as parents.

The Court held that a derogation from direct discrimination, as prescribed by Article 4(2) Directive 79/9/EEC, is only allowed in the situations exhaustively set out in the provisions of said Directive. While the principle of equal treatment is, according to Article 4(2) of the Directive, without prejudice to provisions relating to the protection of women on the ground of maternity, the Court found that the pension supplement at issue is not exclusively granted to women on the ground of protecting the biological condition of women who have given birth or addressing the disadvantages suffered by a woman in her career as a result of taking maternity leave, but is also granted to women who have adopted children, or those who have not taken any maternity leave. Therefore, the Court found that the pension supplement at issue in the main proceedings did not fall within the scope of the derogation from the prohibition of discrimination laid down in Article 4(2) of Directive 79/7/EEC. Consequently, it concluded that the national legislation in question constituted direct discrimination on grounds of sex and is, therefore, precluded by Directive 79/7/EEC.

European Court of Human Rights

***J.D. and A. v the United Kingdom*, Applications Nos. 32949/17 and 34614/17, judgment of 24 October 2019**

Disability

Gender

This case originated in two applications brought against the United Kingdom (UK) by two British nationals who claimed that the reduction of their benefit payments discriminated against them on the basis of, in the case of the first applicant, their disability, and in the case of the second applicant, their gender. The two applicants in these joint cases challenged the same provision of national law.

The two applicants were tenants of social housing who received housing benefit subsidising their rental costs. Following an amendment of the statutory scheme regulating housing benefits, the applicants' benefits were reduced, on the basis that they were categorised to have one more bedroom than that to which they were each entitled. While both applicants applied for and were (eventually) granted Discretionary Housing Payments (DHPs) to cover the difference, these were awarded on a temporary basis and were subject to the discretion of the local authority.

The applicants each initiated domestic proceedings, arguing that these changes put them in a more precarious position than others affected by the reduction, because of their personal circumstances. The first applicant lived with her disabled child in a flat specifically designed to accommodate their needs, while the second applicant had been included in a national scheme designed to protect those who had experienced and remained at risk of serious domestic violence ('Sanctuary Scheme'), with her flat being modified to ensure her safety. Both claims were eventually dismissed by the UK Supreme Court.

Before the ECtHR, the first applicant complained that she had been discriminated against on the basis of her daughter's disability, while the second applicant complained that she had been discriminated against on the basis of her gender as the victim of gender-based violence. The Court examined the applications jointly, under Article 14 in conjunction with Article 1 of Protocol No. 1. The Court noted that as the treatment at issue in the present case concerned one where the applicants had been treated the same as all other beneficiaries without any consideration of their special circumstances, the issue at hand concerned an alleged indirect discrimination. The Court rejected the UK government's claim that the applicants had the same possibilities to make up for the reduction in Housing Benefit as all other beneficiaries (e.g. moving, taking in tenants or working), stating that the applicants' vulnerable status meant that they were significantly less able to do so, and therefore they were particularly prejudiced by the measure.

Examining whether this amounted to discrimination, the Court held with respect to the first applicant that as the granting of DHP payments was made subject to certain safeguards, ensuring that the local authorities could not refuse them if it resulted in the applicant's need for adapted accommodation not being met, and considering the applicant had indeed been granted the DHP payments, the difference in treatment was sufficiently justified.

With respect to the second applicant, the Court held that the benefits scheme was in conflict with the Sanctuary Scheme, and that the impact of treating those housed in this scheme, such as the second applicant, in the same way as other housing benefit recipients, was disproportionate in the sense of not corresponding to the legitimate aim of the measure. The Court did not find that the UK government had sufficiently justified the prioritisation of the aim of the present scheme over that of enabling victims of domestic violence who benefitted from protection in Sanctuary Schemes to remain in their own homes safely. In light of this, the Court held that there had been no violation of Article 14 in conjunction with

Article 1 Protocol 1 of the Convention in respect to the first applicant, while there had been such a violation with respect to the second applicant.

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

This section provides an overview of the main latest developments in gender equality and non-discrimination law (including case law) and policy at the national level in the (then) 28 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, Serbia and Turkey, from 1 July to 31 December 2019.

AL Albania

POLICY AND OTHER RELEVANT DEVELOPMENTS

Disability

Committee on the Rights of Persons with Disabilities adopted Concluding observations on the initial report of Albania

Albania ratified the UN Convention on the Rights of Persons with Disabilities in 2012 and submitted its initial report to the CRPD Committee in 2015. The Committee published its concluding observations on the report in October 2019.[1]

The Committee welcomed the adoption of several pieces of legislation as well the National Action Plan on Disability 2016-2020, but also expressed concern regarding several issues, including the lack of sufficient efforts to bring existing legislation into full compliance with the Convention. In this regard, the Committee cited legislation that denies or restricts the legal capacity of people with disabilities and permits deprivation of liberty and forced treatments based on a medicalised model of disability. The Committee also noted the lack of comprehensive policies regarding the multiple and intersecting forms of discrimination faced by women and girls with disabilities, and addressing the situation of children with disabilities notably in the area of education. Among other issues, the Committee also cited the absence of disaggregated data about the situation of people with disabilities and of reliable information on the level of implementation of laws, strategies and action plans.

Regarding the respect of the principle of equality and non-discrimination, the Committee strongly recommended Albania to take specific measures aimed to guarantee a high level of protection from discrimination for people with disabilities, such as to:

- Review the legislation in order to incorporate a clear prohibition of disability-based discrimination that explicitly includes all forms of discrimination, including multiple and intersecting discrimination and the denial of reasonable accommodation.
- Develop and apply harmonised and transparent criteria, fair assessment procedures and equal entitlements for people with disabilities regardless of where they live in the State party.
- Adopt a national programme with effective incentives to improve the situation of Roma women and girls with disabilities, in particular regarding their rights to education, healthcare and employment.

Online source:
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fALB%2fCO%2f1&Lang=en

1 Committee on the Rights of Persons with Disabilities (2019), Concluding observations on the initial report of Albania, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fALB%2fCO%2f1&Lang=en.

Austria

LEGISLATIVE DEVELOPMENT

Gender

Improved regulations for parental leave

After the dismissal of the former Government in early June 2019 following the 'Ibiza' scandal,[2] legislative proposals that had been entered into parliamentary proceedings by the opposition but had been voted out of the plenary sessions by the coalition parties were reopened. Two proposals by the Social Democratic Party (*Sozialdemokratische Partei Österreichs, SPÖ*), one concerning a new regulation on an obligatory paternity leave period of one month for all employees and one concerning a new regulation allowing the factoring of complete parental leave periods into mandatory advancements in pay schemes, were among those re-entered into the voting process.

Both proposals achieved a majority of votes during parliamentary session in June 2019 and entered into force on 1 September 2019.

The new regulation, adopted in the Fathers' Parental Leave Act and the Maternity Protection Act, introduced several changes to the existing parental leave provisions. Until 2017, federal civil servants had been granted paternity leave, while social partners agreed to amend several sectoral collective agreements to grant employees paternity leave from 14 days to four weeks. With new legislation adopted in 2017, employees in the private sector gained the right to negotiate an agreement with their employers for voluntary leave of 28 to 31 days within the first three months after the birth of their child. Fathers were also granted the right to collect a benefit of EUR 700 for this period (which will reduce the amount for a possible later Young Children's Allowance (*Kinderbetreuungsgeld)* period).

The new regulation in the Fathers' Parental Leave Act gives employees the right to a mandatory free period of paternity leave of one month after the birth of their child without any requirement for an agreement. The paternity leave runs parallel to the maternity leave period for mothers and is additional to existing parental leave regulations for fathers. It will consequently give young families more free time together. The regulations for the paternity leave benefit were not changed by this legislation.

The new regulation in the Maternity Protection Act requires employers of all sectors to calculate the salary of every employee according to their seniority, taking all periods of parental leave into account. The older regulations only allowed for the factoring of 10 months of parental leave into seniority advancements.

Online sources:
https://www.parlament.gv.at/PAKT/VHG/XXVI/A/A_00576/index.shtml
https://www.parlament.gv.at/PAKT/VHG/XXVI/A/A_00338/index.shtml

2 In 2017, two high-ranking members of the right-wing Freedom Party were filmed during an extensive conversation with two individuals who had pretended to be wealthy Russians with an interest in gaining influence in Austrian politics. The video was published in late May 2019. Both Austrian politicians were forced to resign from their Government and parliamentary functions. The ensuing political developments led to a parliamentary vote of no confidence against the Federal Chancellor, leading to the end of the coalition Government and to a parliamentary vote for early elections in September 2019.

BE Belgium

LEGISLATIVE DEVELOPMENT

New paternity and childbirth leave rights for self-employed workers

Gender

Until the adoption of the new Royal Decree of 15 December 2019, 'birth leave' (previously called paternity leave) was only available for private sector employees and public servants. The new Decree provides these rights for self-employed fathers or co-parents.[3]

The duration of the leave is ten days or 20 half days which may be used as the self-employed father or helper spouse pleases within four months of the birth. Some conditions apply, in particular, that a similar leave has not been granted to the father or co-parent under another scheme (for employees or public servants).

The benefit allowed to the father or co-parent is identical to the daily amount received by a self-employed mother during her maternity leave: EUR 81.63 per day or EUR 40.81 per half-day. An extra allocation of EUR 135 is available to a father or co-parent taking a maximum of eight days of leave.

This law concurs with the European objective of enabling greater involvement of the father in the tasks and responsibilities resulting from the birth of a child. The evolution in civil law which recognises same-sex unions is reflected in this law by giving such rights to the father or co-parent of the mother. This avoids gender discrimination against the female spouse or life partner of the mother. This new birth leave is optional for self-employed workers and helper spouses, as is maternity leave. An extra support payment of EUR 135 is granted for the payment of household services. This extra allocation is open to any father or co-parent using only eight days of leave. This new Act goes beyond the obligation of providing 10 days of 'paternity leave' deriving from Directive 2019/1158/EU, which is only applicable to workers in paid employment.

Online sources:
http://www.ejustice.just.fgov.be/eli/loi/2019/04/07/2019012182/justel
http://www.ejustice.just.fgov.be/eli/arrete/2019/12/15/2019206010/justel

CASE LAW

Constitutional Court judgment regarding damages for direct and indirect discrimination

All grounds

In 2018, the Civil Court of Ghent delivered a finding of indirect discrimination on the basis of the Flemish Framework Decree on Equal Treatment, awarding each of the claimants, who had both been banned from different public swimming pools for wearing a burkini, a lump sum of damages as foreseen by the Decree. The respondents (the managers of the swimming pools) contested the constitutionality of Article 28 of the Decree, as it does not make a distinction between direct and indirect discrimination for the rewarding of lump sum damages. The Civil Court referred the case to the Constitutional Court for a preliminary ruling, which was delivered on 10 July 2019.[4]

3 This includes married partners or legal cohabitants of a self-employed worker who provides effective assistance to this self-employed worker regularly or at least 90 days a year and who does not benefit from personal rights in terms of social security and of personal professional income (less than EUR 3 000/year) or of a replacement income.

4 Belgium, Constitutional Court, judgment No. 110/2019 of 10.07.2019, available (in French) at: https://www.const-court.be/public/f/2019/2019-110f.pdf.

The Constitutional Court considered, following the claimants and the Flemish legislator, that the distinction between direct and indirect discrimination only has relevance regarding the burden of proof and the possible justification of the discrimination. The nature of the discrimination (direct or indirect) has no effect on the damage suffered by the victim. Furthermore, by providing for lump sum damages, the legislator aimed to ensure that all victims of discrimination – for which the damage is often difficult to calculate – are adequately compensated. The Court further recalled the case law of the Court of Justice of the EU that the intent to discriminate is not a constituent element of discrimination.

The Constitutional Court therefore considered that Article 28 was not unconstitutional.

In Belgium, the same system of lump sum damages is foreseen by all the different pieces of anti-discrimination legislation, including at the Federal level.

Online source:
https://www.const-court.be/public/f/2019/2019-110f.pdf

POLICY AND OTHER RELEVANT DEVELOPMENTS

Flemish Government withdraws from national equality body UNIA

Racial or ethnic origin
Religion or belief
Disability
Age
Sexual orientation

On 30 September 2019, the newly formed Flemish Government announced that it will withdraw from the competence of UNIA (the Inter-federal Centre for Equal Opportunities) and will set up its own equality body instead. However, the current Cooperation Agreement between UNIA and the Flemish Government remains in force until March 2023.

The withdrawal is part of the coalition agreement that was reached after several months of negotiations, since the elections in May 2019. It could arguably be explained by the fact that the Nieuw Vlaamse Alliantie (N-VA), a leading right-wing political party in Flanders, had regular conflicts with UNIA during the last legislature.

UNIA fears that the creation of a Flemish equality body will lead to confusion for citizens regarding the roles and competencies of the various institutions combating discrimination in Belgium. Moreover, the Flemish Government is currently responsible for 10 % of the financial resources of UNIA and this loss of income will have harsh consequences for the running of the centre.

Online source:
https://www.unia.be/fr/articles/unia-reagit-a-la-decision-de-la-flandre-darreter-leur-cooperation

Bulgaria BG

POLICY AND OTHER RELEVANT DEVELOPMENTS

New Educational Integration Centre Programme

Racial or ethnic origin

On 28 August 2019, the Government adopted a Programme 2019-2021 for the activities of the Centre for Educational Integration of Ethnic Minority Students (the Programme; the Centre). The Centre was established by the government in 2005 as a separate legal entity within the Ministry of Education and Science (the Ministry), to develop, fund and support projects to promote equal access to quality education and to improve educational outcomes for minority students.

While the content of the new Programme is similar to the previous version (2016-2018), the budget foreseen for its implementation is significantly smaller; EUR 4 497 576 (BGN 8 788 900) compared to EUR 6 583 133 (BGN 12 882 000).

In addition to the continuation of its previous activities, which included the funding of desegregation projects in kindergartens and schools, the Centre will raise funds for the purposes of conducting its own independent monitoring and evaluations of the effect of integrative public policies, other relevant research and promoting an exchange of good practices between educators and the competent authorities.

The Programme is based on recognising ethnic inequality and segregation as issues, and equal access to education for minority students as a priority goal.

Online source:
http://coiduem.mon.bg/2019/09/02/%d0%bf%d1%80%d0%be%d0%b3%d1%80%d0%b0%d0%bc%d0%b0-%d0%b7%d0%b0-%d0%b4%d0%b5%d0%b9%d0%bd%d0%be%d1%81%d1%82%d1%82%d0%b0-%d0%bd%d0%b0-%d1%86%d0%b5%d0%bd%d1%82%d1%8a%d1%80%d0%b0-%d0%b7%d0%b0-%d0%be%d0%b1-3/

Disability

New action plan to implement the National Strategy for People with Disabilities

On 6 November 2019, the Government adopted an action plan to implement the National Strategy for People with Disabilities in 2020. The plan covers various measures within as well as beyond the scope of the Employment Equality Directive.

In the employment field, the plan provides for the establishment and monitoring of a wide array of projects and initiatives, including centres for protected employment for people with multiple disabilities; support for private and public employers to ensure accessibility and reasonable accommodation; support for job seekers and employees with disabilities; oversight of the implementation by employers of their legal duty to meet disability quotas; assisted employment in specialised working environments (separate enterprises for people with disabilities); financial stimuli for specialised employers; and stimuli for entrepreneurs with disabilities.

In the field of higher education, the plan provides for preferential treatment of applicants with disabilities for admission to universities (including fee waivers for students with long-term disabilities) and access to scholarships. In terms of vocational training, the plan provides for training and re-training of employees and job applicants with disabilities, as well as monitoring of such projects.

Online source:
https://www.mlsp.government.bg/strategicheski-dokumenti

HR Croatia

LEGISLATIVE DEVELOPMENTS

Gender

Legislative amendments in the field of domestic violence

The Croatian Parliament adopted a package of legislative amendments on 13 December 2019, including amendments to the Act on Protection from Domestic Violence, the Criminal Code and the Criminal

Procedure Act. These legislative reforms aim to reinforce legal protection in relation to domestic and partner violence, and entered into force on 1 January 2020.

The creation of a Facebook group 'Save me' (#Spasime) triggered a series of protests and civic activism during the course of 2019 around protecting women from violence. The Government acknowledged the groups' demands and invited the initiative's representatives to join the working groups preparing legislative amendments in the field of domestic violence.[5] The protests were provoked by a series of court decisions in unrelated cases of violence against women, which caused public outrage due to the lack of sensitivity shown towards the victims and, in the public's view, mild sanctions imposed on the perpetrators. A package of legislative amendments, including amendments to the Act on Protection from Domestic Violence, the Criminal Code and the Criminal Procedure Act was prepared and adopted in December 2019.

Article 10 of the Act on Protection from Domestic Violence, which describes forms of domestic violence and which previously referred to 'physical violence', has been replaced with the wording, 'application of physical force which does not result in bodily injury'.[6] The aim of this amendment is to avoid overlapping with the criminal offence of bodily injury. However, criminal law experts warn that the legal ne bis in idem principle may be jeopardised under the new legislative framework, because of inherent difficulties in defining and classifying certain acts of domestic violence as criminal offences. The main problem lies in the legal description of domestic violence as a criminal offence, and its delimitation in relation to other criminal offences which prescribe qualified sanctions if committed against family members or persons close to the perpetrator (e.g. qualified bodily injury against a family member).

Another issue is the disaggregation of domestic violence as a criminal offence in relation to domestic violence as a misdemeanour offence. The 2019 amendments to the Criminal Code were directed at reinforcing criminal law protection in relation to domestic violence (amendments to Article 179.a of the Criminal Code on the criminal offence of domestic violence) and prescribing stricter punishment for certain criminal offences committed in relation to persons close to the perpetrator.[7]

Despite the amendments, which were partly aimed at establishing stricter punishments for domestic violence, the criminal and misdemeanour offences in the field of domestic and partner violence remain gender neutral, i.e. they do not recognise this type of criminal behaviour as gender-based violence within the meaning of the Istanbul Convention.[8] Education and awareness-raising of the judiciary and police about violence against women should be carried out in order to ensure that existing guarantees are applied in practice. The protection of women against violence should not be focused solely on the criminal law sphere, but should be promoted in all areas of life, with the development of effective support services for victims of violence, as well as creating the prerequisites for an inclusive and non-violent society.

Online source:
https://www.prs.hr/attachments/article/2894/IZVJESCE_O_RADU_ZA_2019_Pravobraniteljice_za_ravnopravnost_spolova.pdf

5 See tportal.hr, 16 March 2019, available at: https://www.tportal.hr/vijesti/clanak/u-pet-do-12-pocinje-prosvjed-inicijative-spasime-protiv-nasilja-nad-zenama-20190316.

6 Croatia, Act on Amendments to the Act on Protection from Domestic Violence (*Zakon o izmjenama i dopunama Zakona o zaštiti od nasilja u obitelji*), 13 December 2019, Official Gazette *Narodne novine* No. 126/2019.

7 Croatia, Act on Amendments to the Criminal Code (*Zakon o izmjenama i dopunama Kaznenog Zakona*), 13 December 2019, Official Gazette *Narodne novine* No. 126/2019.

8 See, for example, Ombudsperson for Gender Equality (2020), *Annual Report for 2019*, p. 93 available at: https://www.prs.hr/attachments/article/2894/IZVJESCE_O_RADU_ZA_2019_Pravobraniteljice_za_ravnopravnost_spolova.pdf.

Period for gradual equalisation of retirement age for men and women prolonged

Gender

On 18 October 2019, the Croatian Parliament adopted the new Act on Amendments to the Pension Insurance Act.[9] The amendments abandon the planned increase in the retirement age from 65 to 67 and prolong the period for the gradual equalisation of the retirement age for men and women for another three years (until 2030).

The gradual retirement age equalisation in Croatia started in 2007, when the Constitutional Court of the Republic of Croatia ruled that the different retirement age for men and women was contrary to the principle of equality and was unconstitutional.[10] The Constitutional Court has, nevertheless, acknowledged the complexity of the pension system and therefore recognised the necessity of a transition period to equalise the pensionable age. The Court ruled that the disputed provisions of the Pension Insurance Act of 1998 were to go out of force on 31 December 2018. In 2010, the Act on Amendments to the (1998) Pension Insurance Act abolished the difference in pensionable age for women and men, and set the age for receiving the old age pension at 65 and for the early old age pension at 60, regardless of sex.[11] However, the transition period for gradual equalisation was set to expire at the beginning of 2030, which was significantly longer than the period the Constitutional Court had considered to be sufficient.[12]

With the adoption of the entirely new Pension Insurance Act in 2013, the pace of the gradual equalisation of the pensionable age for women and men was not altered and a gradual increase in the age of old age pension entitlement from 65 to 67 years of age, and for the early old age pension from 60 to 62 was introduced, which was supposed to be implemented in the period from 1 January 2031 to 31 December 2037.[13] As of 1 January 2038, the age of entitlement for the old age pension was supposed to be 67, and for the early old age pension 62, regardless of sex. A gradual equalisation of the qualifying age for the old age and early old age pensions for women was foreseen in the period from 2014 to 2029. The Pension Insurance Act of 2013 has been amended eight times since its adoption, most recently in October 2019.[14] The amendments adopted in October 2019 are actually a complete reversal of the amendments which were made in December 2018 and which had been in force since 1 January 2019. The amendments from December 2018 were aimed at shortening the transition periods for increasing the retirement age (from 2038 to 2033) and for a gradual equalisation of the retirement age for men and women (from 2030 to 2027).[15]

The 2019 amendments were adopted to satisfy the trade unions' request to abandon the planned increase of the retirement age to 67. United under the initiative '67 is too much!' (*Cro. '67 je previše!'*), the trade unions collected voters' signatures in support of a referendum on the issue of pensionable age. After twice as many signatures were collected as were needed for the referendum initiative to succeed (i.e. to oblige the Parliament to call a referendum), the Government decided to propose to the Parliament the Act on Amendments to the Pension Insurance Act, which was adopted on 18 October 2019 and

9 Croatia, Act on Amendments to the Pension Insurance Act (*Zakon o izmjenama i dopunama Zakona o mirovinskom osiguranju*), 18 October 2019, Official Gazette *Narodne novine* No. 102/2019.

10 Constitutional Court of the Republic of Croatia, U-I-1152/2000, U-I-1814/2001, U-I-1478/2004, U-I-3137/2004 and U-I-3760/2005, para. 8-15. The disputed provisions of the Pension Insurance Act of 1998 prescribed five years difference in retirement age for the old age pension and early old age pension between men (65, 60) and women (60, 55). See Pension Insurance Act (1998) (*Zakon o mirovinskom osiguranju*), 10 July 1998, Official Gazette *Narodne novine* No. 102/98, Articles 30 and 31.

11 Croatia, Act on Amendments to the Pension Insurance Act (*Zakon o izmjenama i dopunama Zakona o mirovinskom osiguranju*), 22 October 2010, Official Gazette *Narodne novine* No. 121/2010, Articles 8 and 9.

12 Croatia, Act on Amendments to the Pension Insurance Act (*Zakon o izmjenama i dopunama Zakona o mirovinskom osiguranju*), 22 October 2010, Official Gazette *Narodne novine* No. 121/2010, Articles 26 and 27.

13 Croatia, Pension Insurance Act (*Zakon o mirovinskom osiguranju*), 13 December 2013, Official Gazette *Narodne novine* No. 157/2013; Articles 33(1)-(3) and 34(1)-(3).

14 Croatia, Pension Insurance Act (*Zakon o mirovinskom osiguranju*), Official Gazette *Narodne novine* Nos. 157/2013, 151/2014, 33/2015, 93/2015, 120/2016, 18/2018, 62/2018, 115/2018 and 102/2019.

15 Croatia, Act on Amendments to the Pension Insurance Act (*Zakon o izmjenama i dopunama Zakona o mirovinskom osiguranju*), 17 December 2018, Official Gazette *Narodne novine* No. 115/2018.

entered into force on 1 January 2020.[16] The amendments include a reversal of the longer period for the equalisation of the retirement age between men and women, even though this issue was not even part of the '67 is too much!' initiative.

Online source:
https://www.sabor.hr/sites/default/files/uploads/sabor/2019-10-10/153004/PZ_761.pdf

Cyprus CY

POLICY AND OTHER RELEVANT DEVELOPMENTS

Religious clothing in education

Religion or belief

On the first day of the school year 2019/2020, a newly appointed school headmaster asked a female student to remove her headscarf or go home. The headmaster was heard saying that his school was 'not a place for Taliban sympathisers or nuns'. The student had been attending the same school for two years wearing a headscarf, without any problems. The headmaster told the media that he was merely following the rules requiring students' heads to be uncovered and that he had no issues with anybody's religion. The superintendent of secondary education, however, stated that there were no rules against religious dress and that schools were not instructed to discriminate against students based on religious clothing. The student's family informed the press that when they visited the Ministry of Education to file their complaint, they were told to transfer to another school because the headmaster was a difficult person.

Reactions to the incident varied, although most stakeholders positioned themselves against the headmaster's behaviour[17] or called for an investigation by the Attorney General.[18] The Ministry of Education issued a statement that it condemns 'arbitrary policies from heads of schools which are contrary to the Ministry's expressed educational policy, which respects the personality of each student irrespective of specificities, identities or beliefs'.[19] The Ombudsman also stated that it would investigate the incident.

Instead of launching an investigation or reporting the incident to the Attorney General, the Minister of Education visited the school, took photographs of himself and the school headmaster embracing the student in her headscarf and told the press that the problem was resolved. However, following the announcement that the students were mobilising, the Ministry of Education transferred the headmaster to the same position at another (very prestigious) school. The student was able to remain in school wearing her headscarf.

The Ministry of Education later announced that the result of the investigation was that three 'issues' had emerged, in relation to: (1) the headmaster's manner of handling the incident; (2) the legislation and

16 Croatia, Act on Amendments to the Pension Insurance Act (*Zakon o izmjenama i dopunama Zakona o mirovinskom osiguranju*), 18 October 2019, Official Gazette *Narodne novine* No. 102/2019.

17 Cyprus, National Confederation of Parents' Associations of Secondary Education, 'Secondary education parents: The behaviour of the school principal in Nicosia's Lyceum is unacceptable', Press statement, 06.09.2019, available at: https://paideia-news.com/goneis-mesis-genikis/2019/09/06/goneis-mesis-aparadekti-symperifora-dieythynti-se-lykeio-tis-leykosias/?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter&fbclid=IwAR0hA2zDdQkCxitk1RLuiSH4IC4fhrX7_KBDAGkc7GozU_EV0sr99D-ZjWU.

18 *Reporter*, 'Koursoumba calls for the intervention of the Attorney General for the student with the headscarf', 07.09.2019, available at: www.reporter.com.cy/local-news/article/553702/.

19 Cyprus, Ministry of Education, Press release regarding the incident at a Nicosia Lyceum, 06.09.2019, available at: https://www.pio.gov.cy/%CE%B1%CE%BD%CE%B1%CE%BA%CE%BF%CE%B9%CE%BD%CF%89%CE%B8%CE%AD%CE%BD%CF%84%CE%B1-%CE%AC%CF%81%CE%B8%CF%81%CE%BF.html?id=9435&fbclid=IwAR0R6R_eSzY2moK2Fq5C7J9IQs0F8CMThHezIHI6MXdOokXzKZ1pyTjkWgE#flat.

Regulations governing the functioning of schools; and (3) the behaviour of parts of the student body.[20] Without further details, the announcement stated that the issues will be addressed by the Ministry and the result of the investigation will be notified to the interested party, as required by law.

The Nazi party, ELAM, submitted a proposal to Parliament to prohibit Islamic clothing in the public sphere, citing issues of security, the emancipation of women and the preservation of the Greek orthodox character of Cyprus. ELAM alleged that there are ECtHR decisions that support the legitimacy of such measures in other countries.[21]

CZ Czechia

CASE LAW

Supreme Court judgment on discrimination on grounds of religion in education

Religion or belief

The claimant was informed by the headmaster of the high school where she wanted to enrol that she could not attend classes wearing a hijab, due to the school's internal rules prohibiting students from covering their heads. Eventually, the claimant did not enrol in the school and filed a lawsuit demanding an apology for discriminatory treatment and compensation of EUR 2 400 (approx. CZK 60 000). The District Court rejected her claim with the argument that the claimant was not a student of the school at the moment of the incident, therefore the Anti-Discrimination Act would not apply to her. On appeal, the Municipal Court in Prague upheld the decision of the first-instance court.

On 27 November 2019, the Supreme Court overruled the decisions of both lower courts and returned the case to the first-instance court for further proceedings.[22]

The Supreme Court concluded that the school's internal policies contained a neutral rule which affected a religious group, such as Muslims, less favourably than others. As a result, it amounted to indirect discrimination. Examining the issue of potential justification, the Supreme Court held that the freedom of manifestation of one's religion may be limited only by a law and in pursuit of a legitimate aim, such as protection of public security, health, morals, or rights and freedoms of others. It may not be limited by a mere internal rule of a school which did not pursue any legitimate aim.

The Supreme Court asserted that, 'The Czech Republic[23] must accept and tolerate religious pluralism; above all, it must not discriminate or, on the contrary, prefer without reason any of the religious movements'. Moreover, it noted: 'Although Islam and its expression, symbolised e.g. by women wearing hijab, is an unusual religion in Czech conditions and it gives rise to some generalised concerns of some citizens, any personal and non-threatening manifestations of religious beliefs should be tolerated. This should be so especially in the field of education, whose task is, among other things, to encourage students to respect the rights and opinions of others. People without religion or people with different religious beliefs should respect external manifestations of beliefs of others. There is no justifiable reason why these manifestations of a different, albeit unusual, religion in our country, should be restricted.'

20 Cyprus, Ministry of Education, Culture, Sports and Youth, Announcement with regard to the findings of the investigation into the incident at the Apostle Barnabas Lyceum, 17.09.2019, available at: http://enimerosi.moec.gov.cy/archeia/1/ypp9637a.

21 ELAM (2019) 'No to the Islamic dress which refers to women's emancipation', https://elamcy.com/ch-christou-ochi-sti-islamiki-endymasia-pou-parapempei-sti-cheirafetisi-ton-gynaikon/.

22 Czechia, Supreme Court decision No. 25 Cdo 348/2019 of 27.11.2019.

23 While the official name of the country is Czech Republic, this publication follows the EU Interinstitutional style guide which refers to the short name Czechia: https://publications.europa.eu/code/pdf/370000en.htm.

The Supreme Court further ruled that the prohibition of discrimination in the field of education also applied to the claimant in a situation where she was in discussions with the school representatives about her application, even though she was not a student yet.

When ruling on the claim, the lower courts will now be bound by the ruling of the Supreme Court.

Denmark DK

CASE LAW

Disability

Dyslexia and reasonable accommodation

The complainant had dyslexia and was therefore unable to use the computers available at the job centre of a local municipality, as they lacked a dyslexia IT programme. The job centre informed the complainant that he could use the computers at the library. There was, however, no agreement between the job centre and the library on counselling for jobseekers. The complainant brought a case before the Board of Equal Treatment.

The Board found that the complainant's dyslexia constituted a disability covered by the Act on the Prohibition of Discrimination in the Labour Market etc., and noted that individuals with reading difficulties in the municipality did not have access to relevant IT equipment for undertaking job searches. This group of individuals therefore had a disadvantage in comparison with other individuals regarding looking for work. The Board found that by referring the complainant to the library, the local municipality had not lifted the burden of proof that it had fulfilled its obligation to provide reasonable accommodation.

The Board concluded that discrimination because of disability had taken place and the complainant was awarded compensation of EUR 2 675 (DKK 20 000).[24]

Online source:
https://www.retsinformation.dk/Forms/R0710.aspx?id=210649

Estonia EE

POLICY AND OTHER RELEVANT DEVELOPMENTS

Gender

Action plan on intimate partner violence

On 26 July 2019, the Action Plan for Preventing Intimate Partner Violence 2019-2023 was adopted by the Government. It is expected that capacity-building and training for specialists in victim support and protection will be made available. The Action Plan includes promotion of awareness-raising and a multi-sectoral approach to supporting victims of domestic violence. The Social Insurance Board has initiated a campaign #meieajakangelane (the hero of our time) to encourage victims of intimate partner violence to seek help and to report cases.

24 Denmark, Board of Equal Treatment Decision No. 9872 of 25.09.2019.

Additionally, the Government aims to implement at national level the best practices of the Pärnu Pilot Project, a regional project carried out between December 2017 and 31 March 2018.

The Pärnu Pilot Project aimed to provide the best and most effective protection to victims of domestic violence, to end violence and to find ways to remove the offender from the home for 48 hours. The local government reserved vacant accommodation in the municipal housing stock for this purpose, in order to ensure that victims can feel safe for 48 hours and dedicate some time to decision-making. Support services are also made available to the victim. The results of the Pärnu Pilot Project were analysed and it was decided to implement the Project at national level. The following aims were identified:

- improving the skills of specialists working with victims;
- developing coordinated cooperation between specialists from different agencies – police officers, social workers, victim support officers, healthcare specialists, specialists from shelters and others;
- improving case management data quality, developing a new information sheet and keeping a record of cases for the purposes of risk assessment and assessing victims' needs;
- breaking the circle of violence and promoting more effective child protection;
- improving knowledge about the specific needs of diverse groups of victims (people with disabilities or addictions, elderly people etc.).

The project has demonstrated the importance of fast risk assessment in cases of intimate partner violence and the need to remove the offender from the victim's home immediately. A multi-sectoral approach to supporting victims of domestic violence is used and awareness-raising measures are also planned. The Multi-Agency Risk Assessment Conferences (MARAC) method is being used in more serious cases of domestic violence. The two approaches together are intended to provide safety and security for victims of domestic violence and their children.

Online source:
https://www.valitsus.ee/sites/default/files/content-editors/valitsus/RataseIIvalitsus/vabariigi_valitsuse_tegevusprogramm_2019-2023.pdf

FR France

CASE LAW

Court of Cassation upholds expulsion of Roma families in favour of the owners' right to property

Racial or ethnic origin

In 2017, landowners initiated proceedings to obtain the expulsion of 45 Roma families who had been illegally occupying a piece of their land since 2014. For the past 18 months, local authorities and organisations had been implementing measures for the social integration of the occupants but had not taken any measures to find appropriate accommodation for them. In the meantime, the city issued an order to the owners to take the necessary measures to clean and reinstate proper sanitary conditions on the site, while the owners had business propositions to lease the land.

The first instance judge admitted the action and ordered the expulsion of the families, and the appeal of the occupants was dismissed by the Court of Appeal. The Roma families and a number of NGOs brought the case before the Court of Cassation, alleging inadequate assessment of the interference of the expulsion with the right to a home protected by Article 8 of the ECHR.

The Court of Cassation was therefore called upon to strike a fair balance between the right of illegal occupants to a home and the right to property protected by Protocol No. 1 of the ECHR.

The Court found that expulsion was the only measure that could allow the owners to recuperate fully their right to ownership of land that had been illegally occupied since 2014. The interference with the right to a home of the occupying families could thus be deemed disproportionate in the face of the gravity of the violation of the right to property. The court decided that, considering the absolute character of the right to property, all occupation of the property of another without title constitutes a manifestly illicit violation that allows the owner to obtain redress by way of expulsion through injunctive relief.[25]

The Court referred to the decision of the ECtHR in the case *F.J.M. v United Kingdom*,[26] relating to the expulsion of a person after the end of a lease, to take a very strong stand on the absolute requirements of the right to property. This decision appears to contradict the Court's previous position on the imperative necessity to protect the home of underprivileged communities.[27] While the exact interpretation of the ruling varies among commentators, the NGOs involved in the case are challenging the ruling before the UN Committee on Economic, Social and Cultural Rights.[28]

Online source:
https://www.gisti.org/IMG/pdf/jur_cas_2019-07-04.pdf

Refusal to admit mother wearing the Islamic headscarf for activities in the classroom

Religion or belief

With a decision of 2 April 2015, the Rector of the School district of Lyon refused to intervene in order to question the legality of the in-house regulation of a kindergarten requiring the religious neutrality of parents participating in activities in the classroom, thereby denying access to mothers wearing the Islamic headscarf. A group of mothers requested that the Lyon Administrative Court annul the decision of the Rector, but this request was dismissed. The claimants appealed, alleging that they could not be denied access in their capacity as users of a public service.

On 23 July 2019, the Administrative Appeal Court of Lyon dismissed the appeal, deciding that the principle of secularism in public education is a constitutive element of the secularism of the State and of the neutrality of all public services. It requires that teaching be delivered with respect for the principle of neutrality, whether it be by teachers or other people intervening within the classroom. The Court held that a requirement of neutrality could be imposed on activities within the school premises that relate to support for educational tasks that are, as in this case, comparable to those carried out by teachers.[29]

The Supreme Administrative Court (Council of State) had held in its study of 19 December 2013 that parents accompanying children during school trips were not providers of but rather users of the public service and were therefore not bound by the obligation of religious neutrality.

In the present case the Court drew a distinction between in and the situation decided by the Council of State, noting that when parents are engaged in educational activities comparable to those of teachers, the same neutrality requirements apply to them.

25 France, Court of Cassation, third civil chamber, decision No. E 18-17119 of 04.07.2019.
26 ECtHR, Application No. 76202/16, judgment of 06.11.2018, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-188124%22]}.
27 France, Court of Cassation, third civil chamber, decision No. 14-22095 of 17.12.2015, regarding illegal occupation by Traveller families of their own land, and Court of Cassation, third civil chamber, decision No. 16-25470 of 21.12.2017, regarding illegal occupation by refugee families against a social housing corporation.
28 A relatively similar case, where publicly owned land had been illegally occupied by a group of Travellers for two years, was also decided by the Court of Cassation in 2019, with a substantially similar outcome. See Court of Cassation, third civil chamber, decision No. 17-22810 of 28.11.2019. The ruling will be challenged before the ECtHR.
29 France, Administrative Appeal Court of Lyon, decision of 23.07.2019, case No. 17LY04351.

Online source:
https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000038915805

Indirect discrimination upon returning from parental leave

Gender

On 14 November 2019, the Court of Cassation ruled on a case of discrimination based on pregnancy discrimination. The claimant in this case was a female accountant who, upon returning from her parental leave, was not offered the same position of accountant which she had prior to her leave. Instead, the person who replaced her during her leave retained the position and the claimant was given administrative and secretarial work. Subsequently, she refused a job transfer to another location and was laid off for what her employer claimed to be economic reasons. She then brought a claim before the Labour Court for moral harassment. In 2004, the Labour Court of Besançon rejected her claim. Over the following 13 years, the claim was heard and rejected by several Courts of Appeal, and a claim of pregnancy discrimination was added. Despite the fact that the Court of Cassation reversed these decisions on two occasions, in 2012 and 2015, in 2019 the case made its way before the Court of Cassation once again.

In its decision on 14 November 2019, the Court of Cassation confirmed the Court of Appeal of Lyon's rejection of the moral harassment claim, based on insufficient facts, but partially quashed the Court of Appeal's finding that no sufficiently precise and consistent facts were produced to presume pregnancy discrimination. It first cited the framework agreement annexed to Directive 96/34/EC of 3 June 1996, former Article L 122-45 of the Labour Code banning discrimination, and relevant EU case law.[30] According to the Court of Cassation, the Court of Appeal of Lyon should have considered whether, since a considerably higher number of women than men take parental leave, the employer's decision not to provide the claimant with the same position she occupied prior to her parental leave, which is in violation of the Labour Code, constituted indirect discrimination based on sex and, if so, whether it could be objectively justified. Focusing on the sex discrimination claim alone, the Court of Cassation therefore declared the Court of Appeal decision null and void and remanded the case to the Court of Appeal of Nancy, which will have to award extra damages to the claimant in addition to the damages already awarded for contractual breach due to the refusal to re-employ the worker in her initial job.

The Court of Cassation is taking a clear stand to support both EU case law on gender equality and the EU gender equality *acquis*. More specifically, the Court recognises the importance of protecting parental leave as part of work-life balance, as a policy implementing the EU pillars of social rights and a measure promoting equality between men and women. This is a very positive signal for future case law development in France on gender equality.

Online source:
https://www.courdecassation.fr/jurisprudence_2/arrets_publies_2986/chambre_sociale_3168/2019_9139/novembre_9548/1567_14_43913.html

Systemic racial discrimination in employment against undocumented foreign workers on a construction site

Racial or ethnic origin

The claimants were 25 undocumented Malian construction workers who had worked for four months in unprotected and dangerous conditions for a construction company. The employer had failed to implement safety measures on the construction site, refused to provide assistance and call emergency services after two employees were seriously injured and further failed to declare the Malian employees to the employment authorities, to issue pay slips and to pay them salaries owed. Finally, the employer abandoned the construction site, disappeared and eventually filed for bankruptcy.

30 CJEU 22.10.2009, *Meerts*, C-116/08, paras 35 and 37; CJEU 27.02.2014, *Lyreco Belgium*, C-588/12, paras 30 and 32; CJEU 08.05.2019, *Praxair*, C-486/18, para 41.

The Labour Inspectorate found that the employer's treatment of the claimants amounted to a criminal offence of undeclared labour. The managers were personally prosecuted and convicted on this charge before the criminal court.

The claimants brought a separate action against the bankrupt construction company before the Paris Labour Court, claiming back pay, contract interruption indemnities and damages for systemic discrimination on the grounds of origin and nationality.

In light of sociological studies analysing the dynamics at work in the management of construction sites in Paris and the facts of the case, the Defender of Rights concluded that there was evidence of a system of employment and management organised around discriminatory practices, creating an ethnic hierarchy of rights and functions on the construction site. This method of organisation, distributing work on the ground of origin and allocating the most difficult and degrading work to undocumented workers, was at the core of the work organisation and abuse perpetrated against the Malian workers and amounted to systemic discrimination.[31]

In accordance with the decision of the Defender of Rights, the Paris Labour Court concluded on 17 December 2019 that abusive treatment of undocumented workers constituted discrimination and that such practices based on racial distribution of work and racist management in the construction industry was a reflection of systemic discrimination.[32]

Online source:
https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=30907

Germany DE

CASE LAW

Discrimination by statute

Religion or belief

On 7 October 2019, the Regional Administrative Court of North Rhine-Westphalia decided two cases that concern the possibility of claiming damages based on a violation of the prohibition of discrimination *by a statute*. The School Law of North Rhine-Westphalia provided for a prohibition of teachers wearing any visible symbols displaying – among others – religious beliefs that put the neutrality of the state into question. This statutory prohibition continued to be in force until the German Federal Constitutional Court had clarified in 2015 that a general ban on Islamic headscarves worn by teachers violated the guarantee of freedom of religion.[33] The School Law was then abrogated. The claimants, who wore Islamic headscarves at work, had all applied for employment in the public service in schools before the relevant provision of the School Law was abrogated. They were either not employed at all or were not employed as civil servants but only on a contractual basis.

In the first case, the Court decided that there were no indications that the non-recruitment of the claimant was due to her wearing religious symbols, as this was not known to the employer at the time of the application.[34] Determining whether discrimination by statute in this case might give rise to claims of damages, the Court then rejected these claims, finding that the legal prohibition of discrimination as such

31 France, Defender of Rights, Decision No. 2019-108 of 19.04.2019, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=29007&opac_view=-1.
32 France, Labour Court of Paris, decision of 17.12.2019 in case No. 17/10051.
33 Germany, Federal Constitutional Court, decision No. 1 BvR- 471/10 of 27.01.2015.
34 Germany, Regional Administrative Court of North Rhine-Westphalia, decision No. 6 A 2170/16 of 07.10.2019.

is not sufficient to give rise to claims for damages. Damages presuppose that the prohibition is concretely applied to the claimant, which was not the case. Furthermore, the Court found that the legislator did not grossly violate EU law either, as it was only after the decision of the German Federal Constitutional Court of 2015 that the legislator was under a duty to adapt existing law to these legal findings. Before that, the legislator could reasonably conclude that the School Law did not violate either the Basic Law or EU law.

In the second case, where the claimant was employed on a contractual basis rather than as a civil servant, the Court noted that such a difference of treatment does not amount to non-material damage due to a violation of personality rights through degrading treatment. Employment on a contractual basis, the court argued, has no such degrading effects, which are the precondition for assuming non-material damages.[35]

Online sources:
https://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2019/6_A_2170_16_Urteil_20191007.html
https://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2019/6_A_2628_16_Urteil_20191007.html

EL Greece

LEGISLATIVE DEVELOPMENT

New penal provisions on domestic violence and rape in line with Istanbul Convention

Gender

The new Greek Penal Code (hereinafter PC), ratified by Law 4619/2019, entered into force on 1 July 2019, replacing the previous Penal Code of 1950.

Article 312 reformed, inter alia, the legal framework on domestic violence, bringing Greek legislation in line with the Istanbul Convention.[36] Article 312 PC entitled 'Physical harm against vulnerable persons' covers domestic violence by providing more severe punishment for all kinds of physical harm (simple, dangerous, severe and lethal) against a spouse during the marriage or against a partner during the relationship, as well as for causing harm or injury to a minor or dependent person under the perpetrator's custody or protection.[37] Article 312(2)(b) PC provides as an aggravating circumstance the committing of such acts against a pregnant woman.

Prior to the entry into force of the new Penal Code (Act 4619/2019), domestic violence had been regulated by Act 3500/2006 'on domestic violence'.[38] Act 3500/2006 was strongly criticised by legal theorists for creating fundamental problems in its implementation[39] by requiring, inter alia, the ascertainment of continuous violent behaviour by the perpetrator.[40] It has been also criticised as inadequate and ineffective,

35 Germany, Regional Administrative Court of North Rhine-Westphalia, decision No. 6 A 2628 of 07.10.2019.
36 The Convention on preventing and combating violence against women and domestic violence of the Council of Europe (Istanbul Convention), available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008482e.
37 According to the Explanatory Report to the new Act, the protection granted also applies in the case of cohabitation.
38 Greece, Act 3500/2006 'on domestic violence', OJ A 232/24.10.2006.
39 Simenonidou, E. (2006), 'Το νομοσχέδιο για την ενδοοικογενειακή βία' ('The Bill on Domestic Violence'), ΠοινΔικ (Penal justice) 2006, p. 1051; Haralmbaki, A. (2008), Ο ν. 3500/2006 για την αντιμετώπιση της ενδοοικογενειακής βίας (Act 3500/2006 on combating domestic violence), ΠΛογ (Panel Speech) 2008, p. 720.
40 See the Explanatory Report to Act 4619/2019, p. 62, available at: https://www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law_id=053d3a90-ef5a-4d18-a335-aa610111664b.

all the more so given that its provisions had remained outside of the PC (and the other relevant Codes), creating legal uncertainty and difficulties in implementation.[41]

The new PC also reformed the legal framework on rape, bringing Greek legislation in line with Article 36 of the Istanbul Convention. The new Article 336(1) PC covers stricto sensu rape by use of physical violence or psychological violence (threat). This changes the former provision of Article 336(1) PC,[42] which was interpreted in the case law to require a 'serious' and 'direct' threat against a 'substantial right' of the victim; thus, the field of application of the crime of rape was considerably restricted.

Most importantly, Article 336(5) PC acknowledges for the first time in Greek law that the crime of rape is not only committed by the use of physical violence or psychological violence (threat), as provided in the above-mentioned Article 336(1) PC, but also in the absence of the victim's consent, in line with Article 36 of the Istanbul Convention. This constitutes a felony, punishable with imprisonment of up to 10 years. This change was introduced after an early version of the relevant Bill was criticised by women's NGOs and several MPs, as well as Amnesty International Greece. The latter launched a campaign for the amendment of Article 336 of the Bill and the redefinition of the crime of rape on the basis of a lack of consent, in accordance with international human rights standards. As a result, the initial wording of Article 336(5) in the Bill was replaced to include rape in the absence of the victim's consent.

According to the Explanatory Report to Act 4619/2019, consent has to be given, even in respect to personal or legal relations in the context of which acts of a sexual nature are socially expected, and it can never be deemed irrevocable. For this reason, rape exists even if the victim has withdrawn their consent, although they engaged in such acts recently or if the victim was already engaged in such acts but during the course of them withdraws their consent.

The new PC also includes provisions on abuse of persons with mental or physical disabilities or persons who are unable to react for any reason (Article 338). According to clarifications by the Ministry of Justice, this provision covers cases where the victim 'freezes' when confronted by the perpetrator and experiences a temporary inability to resist. According to the Explanatory Report to the new Act, a person is deemed unable to react not only because of illness, sedation etc., but also if they are in such a situation, even temporarily, because of the dominance of the perpetrator or because of the shock suffered from the sexual act itself, either taking place or imminent.

Finally, Article 343 of the new PC regulates sexual abuse where a person takes advantage of the other's employment dependency or urgent need to work, or their position in a prison or other holding cell, in police stations, in universities, educational establishments, hospitals, clinics or any kind of therapeutic facilities or other establishments for the assistance of persons in need of assistance.

The General Secretary for Equality, a governmental body for gender equality and the coordinating body for monitoring the application of the Istanbul Convention, applauded the new Act 4616/2019 as a major legal reform which does credit to the many years of campaigning by women's NGOs for the redefinition of the legal concept of rape on the basis of non-consent.[43]

41 See Koukoulis-Spiliotopoulos, S., updated by Petroglu, P., *Country report, Gender Equality, Greece 2017*, European network of legal experts in gender equality and non-discrimination, available at: https://www.equalitylaw.eu/downloads/4368-greece-country-reportgender-equality-2017-pdf-1-93-mb.

42 The former provision of Article 336(1) PC on rape, adopted by Article 8(1) Act 3500/2006 'on domestic violence', OJ A 232/24.10.2006, read: '1. Anyone who by physical violence or threat of serious and direct danger forces another person to engage in sexual intercourse or to other lascivious act or to tolerate it, is punished by imprisonment.'

43 Greece, General Secretary for Equality, Press Release of 11.06.2019, available at: http://www.isotita.gr/%ce%b4%ce%b5%ce%bb%cf%84%ce%af%ce%bf-%cf%84%cf%8d%cf%80%ce%bf%cf%85-%ce%bf%ce%b9-%ce%b8%ce%ad%cf%83%ce%b5%ce%b9%cf%82-%cf%84%ce%b7%cf%82-%ce%b3%ce%b5%ce%bd%ce%b9%ce%ba%ce%ae%cf%82-%ce%b3%cf%81%ce%b1/.

Online source:
https://www.e-nomothesia.gr/kat-kodikes-nomothesias/nomos-4619-2019-phek-95a-11-6-2019.html

CASE LAW

Gender

Exclusion of male lawyers by social security schemes from reimbursement of childcare fees constitutes direct discrimination based on sex

Article 15 of Presidential Decree (ΠΔ) 162/1998 providing regulation of social insurance for Athens lawyers against the risk of sickness[44] provides an allowance to cover the nursery fees of children between the ages of one and five for insured female lawyers and female trainee lawyers, if they are not already in receipt of such an allowance from another social security scheme.

In 2012, a male lawyer, a father of two children, requested coverage of childcare costs for the sum of EUR 2 930 from the social security scheme 'Unified Insurance Fund for the Self-Employed'.[45] His request was refused based on the argument that the relevant regulation is restricted to female lawyers. In December 2012, the male lawyer brought proceedings against the said Fund to the First Instance Administrative Court of Athens (FIACA). He argued that the refusal was a breach of Greek and EU gender equality law. The case was heard in February 2019. In its judgment of 11 November 2019, the FIACA found that Article 15 of Presidential Decree (ΠΔ) 162/1998 constituted direct discrimination against male lawyers, in breach of the provisions of the Greek Constitution (Article 4(2) on gender equality[46] and Article 21 on family protection)[47] in conjunction with EU law (Article 157 TFEU, Directive 79/7/EEC),[48] Presidential Decree 87/2002,[49] which transposed into the Greek legal order Directives 96/97/EC and 86/378/EEC and Act 3896/2010,[50] which transposed Directive 2006/54/EC. With this finding, the Court proceeded to declare that male lawyers (and trainee lawyers) with children aged one to five years, who are insured with said scheme and who are not beneficiaries of the relevant allowance from another social security fund, must also be considered as beneficiaries under the scheme. Nevertheless, the Court did not award the claimant the due sum of EUR 2 930, finding that it did not have the power to establish whether the other conditions for the payment of the above allowance were met; thus, the case was sent back to the Fund.

The provision in question had already twice been the subject of judgments by the FIACA (FIACA 3210/2017 and 5774/2007), which held each time that there was a breach of the principle of gender equality as proclaimed by Articles 4(2) and 116(2) of the Greek Constitution and EU law. Both judgments obliged the above social security scheme to pay the claimants (male lawyers) the sum of the childcare fees. Additionally, FIACA 5574/2007 awarded the symbolic sum of EUR 100 in moral damages. Moreover, the issue was raised before the Equality Body. Responding to a complaint lodged by a male lawyer, in December 2015, the Ombudsman found that Article 15 of Presidential Decree 162/1998 constituted discrimination based on sex to the detriment of male lawyers insured with this scheme. As a result, the

44 Social insurance for Athens lawyers against the risk of sickness Κανονισμός περίθαλψης Τ.Υ.Π.-Δ.Α, OJ A 122/1998.
45 Ενιαίο Ταμείο Ανεξάρτητα Απασχολούμενων – ETAA as a successor to Τ.Υ.Π.-Δ.Α.
46 Article 4(2) of the Greek Constitution ('Greek men and women have equal rights and obligations') requires (substantive) sex equality in all areas; it implicitly prohibits sex discrimination.
47 Article 21(1) of the Constitution requires the protection of marriage, the family, motherhood and childhood. This requirement seems to be similar to that of Article 33(1) of the EU Charter. Greek case law relies on this provision, alone or in conjunction with Article 4(2) of the Constitution, in order to uphold claims to maternity and parenthood protection.
48 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6, 10.1.1979, pp. 24–25.
49 Greece, Presidential Decree 87/2002 on the application of the principle of equal treatment of men and women in the occupational social security schemes, implementing Directives 96/97/EC and 86/378/EEC, OJ A 66/4.4.2002. It has been repealed by Article 30(5) of Act 3896/2010 transposing Directive 2006/54/EC.
50 Greece, Act 3896/2010, 'Implementation of the Principle of Equal Treatment of Men and Women in Matters of Employment and Occupation. Harmonisation of Existing Legislation with Directive 2006/54/EC of the European Parliament and the Council', OJ A 207/08.12.2010.

complainant was paid the allowance which had initially been refused. Moreover, the scheme committed itself to the payment of the nursery allowance to all male lawyers insured with the scheme henceforth.[51] However, this commitment did not lead the Fund to satisfy the case at issue, which had been pending before the FIACA since 2012.

Online source:
http://www.dsanet.gr/Epikairothta/Nomologia/MonDPrAth%2015908.19.htm

POLICY AND OTHER RELEVANT DEVELOPMENTS

Transfer of the General Secretariat for Gender Equality to the Ministry of Labour

Gender

Pursuant to Article 4(2) of Presidential Decree (PD) 81/2019 OJ A 119 of 8 July 2019, the General Secretariat for Gender Equality (GSGE) and the Research Centre for Gender Equality (KETHI) were transferred from the Ministry of Interior to the Ministry of Labour and Social Affairs. Article 7 of Presidential Decree 84/2019, OJ A 123/17 of 7 July 2019 renamed the General Secretariat for Gender Equality to 'General Secretariat for Family Policy and Gender Equality'.

The GSGE is the competent governmental body for the planning, implementation and evaluation of gender equality policies in all fields. The KETHI is a legal person governed by private law, established in 1989,[52] with a dual aim: to conduct social research on gender equality issues and to use the results of this research to propose and implement specific policies, practices and actions to promote gender equality.

The GSGE is part of the National Mechanism for Gender Equality at central national level,[53] with the following competences: (a) to draft and implement the National Action Plan for Gender Equality, after consulting with women's and feminist NGOs and other public and private sector bodies, and to monitor its implementation; (b) to draft and submit the national report to the UN CEDAW Committee; (c) to support and coordinate actions for the promotion of gender equality by the central and regional administration, legal persons governed by public law and legal persons governed by private law attached to the Central Government; (d) to coordinate, implement, monitor and evaluate policies and measures for preventing and eliminating any form of violence covered by the Istanbul Convention.[54] The GSGE also plays a leading and supervisory role in the implementation of gender mainstreaming in public budgeting[55] and in social media;[56] it collaborates with the competent entities for gender mainstreaming in public health,[57] social solidarity and welfare;[58] and it awards equality marks to companies in the public and private sectors

51 A summary of the case is available at: https://www.synigoros.gr/resources/docs/epidoma-vrefonhpiakoy-sta8moy.pdf.
52 Article 5 Act 1835/1989, OJ A 76/10.3.1989.
53 Together with (KETHI), the Gender Equality Units of all ministries and the Ombudsman (Equality Section), Article 4(1) Act 4604/2019, OJ A 50/26.3.2019.
54 The Istanbul Convention was ratified by Greece by Act 4531/2018, OJ A 62/5.4.2018.
55 According to Article 11 Act 4604/2019, one month after the presentation and approval of its budget and the budgets of the legal persons of public and private law which fall under it, every Ministry must submit to the GSGE a report on the budgets with a gender perspective (gender budgeting) and their plans for the next year.
56 According to Article 24 of Act 4604/2019, social media (including electronic media) should submit to, inter alia, the GSGE annual reports on the adoption of measures aimed at promoting gender equality and eliminating sexism and stereotypes based on gender, gender identity and sexual orientation in their area of activity, in particular through codes of ethics, self-binding and self-governing rules.
57 Article 18 Act 4604/2019.
58 Article 20 Act 4604/2019.

which excel in the implementation of policies for the equal treatment of and equal opportunities for working women and men.[59]

The transfer of the GSGE to the Ministry of Labour has been strongly criticised by the historic women's NGO Greek League for Women's Rights,[60] the NGO Research and Action Centre for Peace[61] and the Trade Union of GSGE employees.[62]

Online source:
https://drive.google.com/file/d/15cTuar5NGqAMYmdflD4PwIL2xCZk7Duf/

Ombudsman's Special Report 2018 on Equal Treatment

All grounds

The Ombudsman's Special Report 2018 on Equal Treatment, which was published on 8 August 2019, illustrates the activity of the Greek Ombudsman as the national equality body. The complaints submitted in 2018 cover the full spectrum of discrimination grounds protected by national law. Some 14 % of the complaints concerned discrimination on the ground of disability or chronic disease, 7 % concerned discrimination on the ground of national or ethnic origin, 5 % concerned age discrimination, 3 % concerned discrimination on the ground of race or colour and another 3 % concerned religious or other beliefs, while only 1 % of the complaints concerned discrimination on the ground of sexual orientation. It is also noteworthy that 70 % of the complaints were against public services and only 30 % against the private sector. A total of 641 cases were concluded in 2018.

The report also mentioned some specific issues raised in complaints in 2018, notably regarding the situation of Roma and refugee children in education, as well as that of refugees and foreigners with regard to access to goods and services. In the area of employment, the Ombudsman highlighted in particular some discriminatory practices in access to occupation and employment, in both the public and the private sectors.

Finally, the Ombudsman presented some of its awareness-raising activities for public agencies, administrative services and civil society organisations. In particular, the Ombudsman continued to provide training on issues of rights and equal treatment to the National School of Public Administration and the Hellenic Police Academies. In 2018 the Ombudsman also continued to monitor racist phenomena and the responsiveness of the competent authorities in combating racist violence.

Online source:
https://www.synigoros.gr/resources/docs/ee_im_2018_el.pdf

59 Article 21 of Act 4604/2019 introduced a new public policy for equality mark awards. Equality marks are awarded by the GSGE to companies in the public and private sectors which excel in the implementation of policies aiming at equal treatment of and equal opportunities for working women and men (Article 2(12) and 21 of Act 4604/2019). Among the non-exhaustive criteria to be taken into account are: equal pay for work of equal value, balanced participation of women and men in managerial posts or on professional and scientific committees within companies, equality in professional promotion, compliance with labour legislation on maternity protection, adoption of equality plans or other innovative measures aimed at promoting substantive gender equality, advertisements for the promotion of the company's products or services in a way which contributes to the prevention of gender-based violence and discourages violence against women and sexism. The procedure, the conditions and the length of the validity of the equality mark are determined by decision of the Minister of Interior following a proposal from the GSGE. The companies to which the equality mark is awarded are obliged to submit an annual report on actions they take to accomplish substantive gender equality. They are monitored and evaluated by the GSGE as to whether they continue to apply gender equality policies; if they fail, the equality mark is withdrawn. Every year the GSGE posts on its website the list of companies which have been awarded the equality mark.

60 See: http://leagueforwomenrights.gr/.

61 See: https://www.reader.gr/news/politiki/299157/entones-antidraseis-gia-tin-metafora-tis-ggif-kai-toy-kethi-sto-ypoyrgeio.

62 See: http://sumvouleutikothivas.blogspot.com/2019/07/blog-post_46.html.

Hungary

CASE LAW

Second instance court decision on damages for segregation in education

Racial or ethnic origin

In March 2015, the Curia (Hungary's Supreme Court) concluded in an *actio popularis* lawsuit launched in 2011 by the Chance for Children Foundation (CFCF) that the Roma pupils in the Nekcsei Demeter elementary school of Gyöngyöspata (Northern Hungary) had been segregated. In each grade there were two classes: one with almost exclusively Roma pupils and one where there were hardly any Roma children. The Roma and non-Roma classes were also separated physically, and the Roma children were provided with lower quality education than their non-Roma peers. Based on the Curia's final and binding decision, 63 former Roma pupils from the school, with the help of CFCF and pro bono lawyers, launched a lawsuit for damages in 2016 against the school, the Municipal Council and the Klebelsberg School Maintenance Centre (KLIK),[63] for the long-term disadvantages they had suffered as a result of their substandard education (e.g. the loss of the real possibility to succeed in the labour market).

The first-instance judgment delivered in October 2018 concluded that the respondents had violated the claimants' right to equal treatment by segregating them and providing them with education of a lower quality than that of their non-Roma peers. The court rejected the claim of two claimants, while fully or partially granting the others' claims. The claimants were each awarded between EUR 605 (HUF 200 000) and EUR 10 605 (HUF 3.5 million).[64] All parties appealed against the judgment.

In September 2019, the Debrecen Appeals Court modified the first instance court decision, increasing the amount of damages for some claimants and reducing it for others. In essence, however, the finding that non-pecuniary damages are to be paid to victims of segregation and discrimination in education was confirmed.[65] In addition, the court concluded:

- The statute of limitations started to run only when the first (*actio popularis*) lawsuit was concluded because that was when the vulnerable (under-age) complainants of a case that is far from obvious came into possession of all the information that they needed to decide whether to try to enforce their claim for damages.
- The often contradictory statements of the complainants and generalised statements by witnesses without individual examination by a forensic expert is not sufficient to substantiate that the level of education provided in the segregated Roma classes was inferior compared to the non-Roma classes. (Consequently, the judgment only accepted that the claimants were both segregated *and* subjected to direct discrimination resulting from substandard education in the time period concerned by the decision of the Curia in the *actio popularis* lawsuit. As of the 2012/13 school year – which was not the subject of the *actio popularis* lawsuit – the Appeals Court only found the respondents responsible for segregation, but not for direct discrimination. This distinction was reflected in the amounts granted to the complainants.)
- It is common knowledge that segregation causes a feeling of humiliation and inferiority and hinders the children concerned in overcoming their socio-cultural disadvantages. In addition, substandard education does not only humiliate those subjected to it, but also puts them at a disadvantage in all areas of life, including higher education and employment. Since this is common knowledge, no

63 The Klebelsberg School Maintenance Centre (KLIK) is the state body which – as of 01.01.2013 – became the municipality's legal successor as a result of the national centralisation of school management.

64 Hungary, Eger Regional Court, decision No. 12.P.20.489/2015/402 of 16.10.2018.

65 Hungary, Debrecen Appeals Court, decision No. Pf.I.20.123/2019/16 of 16.09.2019. For further information, see the press release from the court, available (in Hungarian) at: https://debreceniitelotabla.birosag.hu/sajtokozlemeny/20190918/itelet-gyongyospatai-szegregacios-ugyben.

individualised proof is needed concerning the moral damages each individual complainant suffered as a result of their segregation and the substandard education they received. If the facts of segregation and substandard education are proven, damages based on the general jurisprudence concerning non-pecuniary remedies can be granted without examining the case of each and every complainant. For the same reason, the fact that some complainants managed to succeed in their studies and work (often with extraordinary efforts) cannot be regarded as evidence against the claims of those who did not.

Online source:
https://birosag.hu/birosagi-hatarozatok-gyujtemenye[66]

POLICY AND OTHER RELEVANT DEVELOPMENTS

Budapest Mayor's Office unblocks access to LGBTQI websites

Gender

Sexual orientation

After various media sources reported that access was blocked for staff and local council members of Budapest's Mayors Office (Office) to LGBTQI websites, a complaint was filed with the Equal Treatment Authority in March 2019 by various interest groups.

During the procedure, the Office made conflicting statements about how blocking works, tried to shift liability to the manufacturer and distributor of the firewall hardware and argued that their staff do not need to access these websites for their work. However, other websites not related to the Office's work were not blocked. Moreover, websites of other vulnerable groups, such as Roma, women and people living with disabilities were still accessible, the Mayor's Office was only blocking LGBTQI-themed websites, including the websites of LGBTQI rights organisations.

On 29 May 2019, the Equal Treatment Authority found that the conduct of the Mayor's Office amounted to discrimination based on sexual orientation and gender identity. The Authority pointed out that the conduct also caused harm to the entire LGBTQI community, since it limited the possibility to have their interests represented and was humiliating. Moreover, the Mayor's Office was equating LGBTQI content with harmful, deviant or even illegal content unsuitable for work, thus perpetuating existing social prejudices.

The Authority imposed multiple sanctions: it ordered the Mayor's Office to discontinue its unlawful practice, prohibited such conduct in the future, imposed a EUR 3 000 (HUF 1 million) fine and ordered its decision to be published on its own website, as well as the opening page of the city's website. The Mayor's Office challenged the decision of the Authority by requesting judicial review. Eventually, the lawsuit was terminated in December 2019 by the new Mayor (from an opposition party) who ordered the websites to be unblocked.

The case was an important indication of high-ranking office holders' attitudes to LGBTQI rights. While the previous Mayor of Budapest had made a number of anti-LGBTQI statements, the new Mayor claimed on the very first day in his new office that he will display the rainbow flag on Budapest City Hall during the next annual Budapest Pride event.

Online source:
https://budapest.hu/Lapok/2019/karacsony-nem-folytatja-a-tarlos-altal-inditott-pert-az-egyenlo-banasmod-hatosag-ellen.aspx?fbclid=IwAR0zcYEg0O8BUZeHqw9SZl3XQh3K55sN1SkHne8ehm6KDVxcUw11j-0d40w

66 There is no direct weblink to the judgment, but it is available through the search function of the official collection of court decisions (see link).

Italy

IT

LEGISLATIVE DEVELOPMENT

New bill on gender-based and domestic violence approved

Gender

On 17 July 2019, the Senate approved a bill on the improvement of criminal protection and redress for victims of domestic violence.[67] It is called the 'Red Code', referring to the colour red as a reminder of the bill's necessity in light of the pervasiveness of domestic violence in Italy. The bill is a step further towards full implementation of the Istanbul Convention, as it strengthens and completes numerous laws implementing the Istanbul Convention which have been passed in recent years regarding amendments to the Penal Code and the Code of Criminal Procedure.

This latest reform is targeted at accelerating legal proceedings relating to domestic violence and gender-based violence and consequently the issue of emergency violence prevention orders.

The overall agreement on the urgency and necessity of this law reform is well illustrated by the fact that a large majority of the Government approved it: 194 votes in favour, 47 abstentions and none against. Nevertheless, the vote was accompanied by a sharp split between right and centre-right parties, which voted in favour, and left and centre-left parties, which chose to abstain, confirming the position already taken in the Chamber of Deputies.

Online source:
http://www.senato.it/service/PDF/PDFServer/BGT/01118871.pdf

POLICY AND OTHER RELEVANT DEVELOPMENTS

New equal opportunities policies

Gender

The change of government in September 2019 in Italy has brought a stronger focus on equal opportunities issues, with a Minister for Equal Opportunities and Family being appointed. Moreover, the programme of the new government[68] presented on 9 and 10 September,[69] expressly includes provisions aimed at ensuring gender equality in pay as well as the full implementation of the recent EU Directive on compulsory paternity leave and on the reconciliation of private and working life.

Previously, the development of equal opportunities policies was the responsibility of the Undersecretary of the Prime Minister and various Ministers. With the new Government taking office, the appointment of a dedicated Minister and the concrete objectives outlined by the Government to eliminate the gender pay gap and the proposed reconciliation measures should help to put these issues back on the agenda.

The 2018 results of the *Gender Budget Report*[70] which provides Parliament with data on issues, including gender equality in the labour market, education and health, and evaluates the impact of budgetary policies on gender equality, confirms that levels of gender inequality are still high in Italy. Only 49.5 % of women are in work and more than 40 % of young employed women are overqualified for their jobs.

67 Italy, Bill S.1200 on the improvement of criminal and redress protection for victims of violence, 17 July 2019, available at: http://www.senato.it/service/PDF/PDFServer/BGT/01118871.pdf.
68 The programme was available at http://www.astrid-online.it/static/upload/prog/programma-governo-4-settembre-2019.pdf.
69 The speech of the Prime Minister is available at: https://documenti.camera.it/leg18/resoconti/assemblea/html/sed0222/stenografico.pdf and at: http://www.senato.it/service/PDF/PDFServer/BGT/1123342.pdf.
70 Italy, Art. 38septies of Act No. 196 of 31.12.2009 on the Ruling of Public Accounting and Finance, published in OJ No. 303 of 31.12.2009, o.s.n. 245, http://www.rgs.mef.gov.it/_Documenti/VERSIONE-I/Selezione_normativa/L-/L31-12-2009_196.pdf.

The percentage of low-paid female workers is still 3.3 % higher than for men. The percentage of female entrepreneurs is not increasing, while female employment is mainly concentrated in the service sectors, such as commerce, health and education. In 2017, the risk of poverty affected about 21 % of women compared to 19 % of men. As regards education, the report shows that about 60 % of science graduates are men. Thus, there is evident need for further action to be taken to ensure gender equality.

Online sources:
http://www.rgs.mef.gov.it/_Documenti/VERSIONE-I/Attivit--i/Rendiconto/Bilancio-di-genere/2018/Bilancio-di-genere-2018-Relazione-Parlamento.pdf
http://www.rgs.mef.gov.it/_Documenti/VERSIONE-I/Attivit--i/Rendiconto/Bilancio-di-genere/2018/Summary-and-main-results-.pdf

Recommendations approved by Parliament regarding multiple discrimination on the ground of sex and disability

Gender

Disability

Parliament unanimously approved four Recommendations on 15 October 2019 aimed at tackling multiple discrimination on the ground of gender and disability.[71] The Recommendations are based on the UN Convention on the Rights of Persons with Disabilities (ratified by the European Union on 5 January 2011), and on the European Parliament resolution of 29 November 2018 on the situation of women with disabilities.[72] Moreover, the Recommendations mention several Reports underlining the particularly disadvantageous position of disabled women.[73]

The Recommendations encourage the Government to tackle multiple discrimination on the ground of gender and disability by means of policies aimed at enhancing mainstreaming in all public policies, improving healthcare for disabled women, providing special protection and awareness concerning violence and discrimination against disabled women, enhancing their participation in the labour market, society and sports, and promoting a monitoring system to evaluate both the extent of the multiple discrimination disabled women face and the effectiveness of the measures taken to tackle it.

Although the Recommendation is a soft measure, its approval is very important as it focuses the attention on an issue which is frequently ignored in Italy.

Online source:
http://aic.camera.it/aic/scheda.html?core=aic&numero=1/00243&ramo=CAMERA&leg=18

71 Motion n. I-00243 of 24 September 2019, approved on 15 October 2019, available at: http://aic.camera.it/aic/scheda.html?core=aic&numero=1/00243&ramo=CAMERA&leg=18.

72 European Parliament Resolution of 29 November 2018 on the situation of women with disabilities, Brussels, 29.11.2019, https://www.europarl.europa.eu/doceo/document/TA-8-2018-0484_EN.html.

73 Including; the Report of the National Observatory on Health in Italian Regions for 2015 (showing that the percentage of disabled women who gain access to preventive clinical tests is 15 points lower than the percentage of other women), data from Istat for 2015 (the National Institute for Statistics, showing that the risk of being a victim of gender violence is double for disabled women), and data from the Creating Leaders for the Future project 2018 (showing that the rate of employment for disabled women is 10 % lower than the rate of employment for disabled men).

Liechtenstein LI

POLICY AND OTHER RELEVANT DEVELOPMENTS

Government adopts bill for the amendment of the Disability Equality Act

Disability

In December 2019, the Government of Liechtenstein adopted a bill for the amendment of the Disability Equality Act, for the purpose of meeting its obligations under the UN CRPD regarding accessible web access in the public sector, based on Directive 2016/2102/EU.

The main concerns addressed are the following:

- Public authorities and bodies are increasingly using the internet to obtain or provide information and services of fundamental importance to the public. Their websites and mobile applications therefore have to meet common accessibility requirements.
- 'Accessible access' includes principles and techniques to be followed in the design, creation, and maintenance / updating of websites and mobile applications in order to make them more accessible to users, in particular people with disabilities.

The main amendments concern:

- Concrete accessibility requirements for public authorities' websites and mobile devices, and regulations regarding the related monitoring and reporting.
- Accessibility declarations by public authorities.
- Organisational and competence issues, notably regarding the receipt and examination of complaints, information and advice as well as the coordination of training programmes regarding the accessibility of public authority websites and mobile applications.
- Data protection provisions.

The bill for the amendment of the Disability Equality Act was available for public consultation until 1 March 2020.

Online source:
https://www.llv.li/files/srk/vnb_behindertengleichstellungsgesetz.pdf

Montenegro ME

LEGISLATIVE DEVELOPMENTS

New Labour Law concerning pregnant women, maternity and parental leave

Gender

On 28 November 2019, the Government of Montenegro adopted a Proposal for a new Labour Law. An important innovation in the Proposal relates to the protection of pregnant women, as well as the exercise of the right to maternity leave and parental leave.

The main innovations of the proposal are:

- Article 122: Women are entitled to one day of paid leave per month during pregnancy in order to attend prenatal appointments, unless regulated otherwise by a special regulation and under the condition that the employer shall be informed in writing three days prior and be given evidence of the appointment.
- Article 123(5): In the case of an employee whose fixed term labour contract ends during either maternity leave or parental leave, the period of validity of the fixed term labour contract shall be extended until the end of such leave.
- With respect to the right to maternity leave, an employed woman shall be entitled to a mandatory maternity leave of 98 days, 28 days prior to the expected delivery date and 70 days after childbirth.[74]
- Article 123(3): Fathers are entitled to paternity leave from the date of the child's birth if the mother dies during the delivery, if she is seriously ill, if she abandons the child, if her parental rights are terminated or if she is serving a prison sentence.
- With regard to the right to parental leave, Article 127 provides that parental leave is an entitlement of each parent for the purpose of providing care to a child. Parental leave may be used after maternity leave, up to 365 days after the birth of the child. The right to parental leave shall belong to both parents in equal portions, with one exception. Parental leave that one parent started using may be transferred to the other parent if the former has used 30 days. In that case, the parent who transfers the right to the other parent shall no longer be entitled to the parental leave.
- If one of the parents dies or is prevented for other justified reasons from using the right to parental leave, the right to their share of parental leave shall be transferred to the other parent.

NL Netherlands

LEGISLATIVE DEVELOPMENT

Religion or belief

Entry into force of Act prohibiting face-covering clothing in education, public transport, public buildings and healthcare

In 2018 an act prohibiting face-covering clothing in a number of specific areas was adopted, but its entry into force was envisaged to take place at a later date to allow for consultation with the sectors concerned for its implementation and the communication of the new standards to the people using their services or visiting their facilities. As of 1 August 2019, the act finally took effect.

The law prohibits face-covering clothing in education, public transport, public buildings and healthcare. It provides for exceptions to this prohibition where face-covering clothing is necessary for reasons of health and safety or requirements connected to the performance of a job or sport, or is appropriate in respect of participation in festive and cultural events. In addition, the prohibition does not apply to clients, patients or their visitors in residential parts of care institutions, as these places can be perceived as their private domain. A fine of up to EUR 400 is foreseen in case of violations of the prohibition.

Notwithstanding the neutral formulation in terms of prohibiting all face-covering clothing, the aim of the prohibition is to prohibit niqabs and burqas worn by some Muslim women.

The act was contested from the start and its entry into force caused quite a lot of public debate and received much media attention. Notably, the Netherlands Institute of Human Rights reiterated its criticism of the act, which it considers to be too far-reaching and not necessary to achieve its aims,

74 If a child is born prior to the expected delivery date, mandatory maternity leave shall be extended for the number of days between the expected and the actual delivery date. The maternity leave shall be extended if a child is born prior to the end of 37 weeks of pregnancy, according to the findings of a competent specialised doctor.

as the organisations and institutions covered by the act were already able to prohibit face-covering clothing in specific situations where this is necessary to guarantee good communication or safety. As such it does not consider the very broad and general scope of the act to be in line with freedom of religion or the prohibition of discrimination on grounds of religion as contained in the General Equal Treatment Act, which covers not just employment, but the broad area of goods and services, and other non-discrimination provisions such as Article 1 of the Constitution. Nevertheless, as the act has now entered into force the NIHR will abide by the norms and standards set.[75]

Online sources:
https://zoek.officielebekendmakingen.nl/stb-2018-222.html
https://zoek.officielebekendmakingen.nl/stb-2019-165.html
https://zoek.officielebekendmakingen.nl/dossier/34349

POLICY AND OTHER RELEVANT DEVELOPMENTS

Parliament adopts law on women's quotas for supervisory boards

Gender

The results of the regulation of the Dutch Civil Code (DCC) stipulating that Boards of Directors and Supervisory Boards must aim to comprise at least 30 % women have been poor. By the end of 2018, the percentage of women on Boards of Directors amounted to 12.4 %, thus less than half of the 30 % target. The percentage of women on Supervisory Boards had reached 18.4 % by the end of 2018, thus also far from the required 30 %. A large group of companies (67 %) did not have any women on their Board of Directors and approximately half of all companies did not have a woman on their Supervisory Board.

Because of the poor results, the Socio-Economic Council (SER), an important advisory body to the Government, advised in September 2019 that the Government introduce quotas for the number of women on Supervisory Boards. On 3 December 2019, Parliament decided to follow this advice and to introduce a women's quota. The quota will apply only to Supervisory Boards and only to listed companies. These companies will be obliged to make sure that 30 % of their Supervisory Board members are women. If a man is appointed before this target has been met, the appointment shall be declared null and void, in which case the place on the Supervisory Board will remain empty until a woman is appointed.

The government is drafting a proposal for a law to implement the decision taken by Parliament.

The decision by the Dutch Parliament is important because so far the government has not been willing to require businesses to appoint more women on their boards. Since 2013, attempts have been made to encourage companies to appoint more women, rather than to force them to do so. However, progress is so slow that even the largest employers' organisation in the Netherlands, VNO-NCW, now supports the introduction of a women's quota. Nevertheless, the new regulation will only apply to Supervisory Boards of listed companies, i.e. 88 companies in total. The effect will therefore be small. The idea is that, in addition to the quota, companies will have to take measures to increase the number of women in management positions at all levels in their company. However, it is not yet clear what statutory measures will be taken in this respect.

Online sources:
https://nos.nl/artikel/2313132-meerderheid-kamer-voor-verplicht-vrouwenquotum.html
https://www.ser.nl/nl/actueel/Nieuws/maatregelen-diversiteit-top

75 https://mensenrechten.nl/nl/toegelicht/verbod-gezichtsbedekkende-kleding.

MK North Macedonia

LEGISLATIVE DEVELOPMENT

All grounds

Lack of operational equality body

According to the transitional provisions of the Law on Prevention and Protection against Discrimination adopted in May 2019 ('new ADL'), the existing equality body – the Commission for Protection against Discrimination (CPAD) – would stop operating with the appointment of the members of the new Commission for Prevention and Protection against Discrimination and at the latest three months after the entry into force of the new ADL (Article 48(1)).

The new ADL entered into force on 22 May 2019. An advertisement inviting applications for membership of the new body was published on 11 June.[76] However, due to the low level of interest, the Assembly planned to re-advertise the vacancies. This did not happen during the summer holiday period and therefore no new members were appointed. However, on 23 August, when three months had passed since the entry into force, the old CPAD stopped operating, which meant that the country was left without an operational equality body.

In view of the fact that the previous CPAD did not have administrative staff (and operated with the assistance of volunteers), it is highly probable that there will be no-one to receive discrimination cases in the meantime. It also means that the transition from one body to the next will be additionally burdensome, since there will effectively be no-one from the old body to introduce the members of the new body to the work and to complete the transfer.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Issues with the work of the former equality body highlighted in CSO report

All grounds

With the mandate of the CPAD ending, the largest network of civil society organisations (CSOs) working on discrimination issues published a comprehensive report on the work of this equality body since it was founded in 2011.[77] It draws on both primary data (including interviews with commissioners from both the first and second compositions of the CPAD) and secondary data (research and studies conducted thus far).

The most worrying findings are the result of the case law analysis, showing that the CPAD did not act in a professional and competent manner. Namely, there is evidence of unbalanced practice, deliberate skewing of processes and a particularly pronounced bias in relation to political affiliation. This was also because of the flawed independence of the CPAD. Furthermore, the CPAD did not use its full mandate. It did not use the option of opening a case on its own initiative and also failed to respond, even when it was called upon to act (primarily by CSOs). Only on one occasion did the CPAD initiate a case against a person who did not comply with an opinion it issued, and it failed to use its power to intervene in court.

76 Parliament of the Republic of North Macedonia, Decision to publish a vacancy advertisement for appointment of members of the Commission for Prevention and Protection against Discrimination (11.06.2019), https://www.sobranie.mk/content/Javen%20oglas-diskriminacija%2019/Odluka-Komisija%20za%20sprecuvanje%20i%20zashtita%20od%20diskriminacija.pdf.

77 Jadrovski I., Jovanovska Kanurkova J. and Gelevska M. (2019), *Report on the implementation of the Law on Prevention and Protection against Discrimination*, Network for Protection against Discrimination, available at: http://coalition.org.mk/wp-content/uploads/2019/07/Diskriminacija_web.pdf.

Finally, the report noted the already familiar issues related to the set-up of the CPAD and its (lack of) independence.

Online source:
http://coalition.org.mk/wp-content/uploads/2019/07/Diskriminacija_web.pdf

Norway NO

LEGISLATIVE DEVELOPMENT

The rights of Norwegian residents to export three types of social benefits to other EEA countries has been wrongfully applied in Norway since 2012, possibly from 1994

Disability

On 28 October 2019, the Minister for Labour and Social Affairs informed the public that the rights of Norwegian residents to export three types of social benefits, i.e. sickness benefit, work assessment allowance and care allowance, to other EEA countries had been wrongfully applied in Norway since 2012. The Minister also stated that, to date, they had become aware of some 2 400 decisions concerning Norwegian residents which had been made without taking due account of EEA law. Moreover, there had been 48 cases which resulted in criminal convictions, including 36 cases of imprisonment, the longest being eight months, because of prosecutions regarding social security fraud and reimbursement claims from the Norwegian Labour and Welfare Administration. This means that sick or injured persons, or individuals with care responsibilities for such persons, have had their freedom of movement impeded without any consideration of what is reasonable and proportionate.[78]

An investigation committee was announced by the Minister for Labour and Social Affairs on 8 November[79] but it has already been criticised for being biased, as several members have been outspoken in favour of limiting free movement as much as possible. It has also been criticised for lacking independence, because it has been created by the ministry concerned and not by Parliament. There is also no-one with good knowledge of anti-discrimination law on the committee.

It was the National Insurance Court that was the driving force in discovering the wrongful interpretation of Norwegian law, through a number of decisions in 2017 and 2018.

Online source:
http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=5058

CASE LAW

Sexual harassment in employment

Gender

On 12 December 2019, the Hålogaland Court of appeal held an employer responsible for their failure to prevent or seeking to prevent sexual harassment pursuant to the Equality Acts, and sentenced him to pay damages to a former employee.[80] The case concerned a female mechanic who filed a lawsuit

78 Letter from the National Insurance Court to the Ministry of Labour and Social Affairs, of 28.10.2019 (in Norwegian), available at: https://www.trygderetten.no/Content/108986/cache=1572276178000/Brev_ASD_28_10_19.pdf.
79 Press release from the Government on the investigation committee of 08.11.2019 (in Norwegian): https://www.regjeringen.no/no/aktuelt/granskingsutvalget-i-eos-saken-er-klart/id2677280/.
80 Judgment from Hålogaland Court of appeal of 12.12.2019 in LH-2019-87-696, LH-2019-135298 and LH-2019- 135300 (not available in open link).

against her employer and two customers of the workshop where she was employed. She claimed to have been sexually harassed by the customers and accused her employer of not responding adequately to the sexual harassment incidents which led to her resignation. She demanded compensation and redress from the two customers, as well as from her former employer.

This case was especially interesting because the incidents of harassment had occurred before the Gender Equality and Anti- Discrimination Act (GEADA)[81] had entered into force, and the case was therefore treated in view of both the former Gender Equality Act (GEA)[82] and the GEADA.

The Court of Appeal considered the cases against the customers and the employer separately. The first customer was accused of having sexually harassed the claimant on two occasions but was acquitted by the Court. However, the Court did convict the second customer of sexual harassment, and sentenced him to pay damages for lost income as well as compensation in accordance with GEA Article 28 and GEADA Article 38.

According to GEADA Article 38, in employment relationships and in connection with the employer's selection and treatment of self-employed persons and hired workers, the employer's liability exists irrespective of whether the employer is to blame. In cases concerning harassment and sexual harassment, and in sectors of society other than in employment, liability shall exist if the person in charge is to blame. The wording in GEA Article 28 is similar. The Court of Appeal stated that the employer had acted negligently by not taking further steps to prevent the sexual harassment of his employee, and he was held responsible for his former employee's financial loss, together with the customer who was not acquitted. The Court referred to GEA Article 28 and GEADA Article 38 and stated that the obligation to prevent harassment includes preventive measures such as: internal guidelines, notification routines and clarification of zero tolerance, any concrete measures that are considered relevant or necessary, in proportion to the size of the workplace and the composition of the workforce. The duty to 'prevent' includes addressing the actual incidents of harassment of which the person in charge is aware, investigating what has happened and finding a solution. It is enough that the person in charge (typically the employer) has tried to prevent the harassment. There is no requirement that harassment actually be prevented. In the case at hand, the employer had told one of the customers not to come to the workplace but had not taken any further action beyond that.

The employer was acquitted from paying compensation because the Court did not find his lack of action in relation to the former employee to meet the terms of 'grossly negligent behaviour' or 'behaviour with intent' in the Act on Compensation Article 3-5.

The judgment from the Court of Appeal has been appealed on the basis that one of the customers was acquitted and the employer was acquitted for claims of compensation. It will now be heard by the Supreme Court. The appellant argues that the Court of Appeal was too strict when it comes to interpreting what is considered sexual harassment in Norwegian law. The part of the Court of Appeal's decision which sentenced the second customer is not part of the appeal.

The decision is very important as it is one of the rare cases heard by Norwegian courts where an employer has been held responsible for their failure to prevent or seek to prevent sexual harassment pursuant to the Equality Acts, and sentenced to pay damages to a former employee.

81 Norway, Gender Equality and Anti-Discrimination Act No. 2017-06-16-51.
82 Norway, Gender Equality Act No. 2013-06-21-59.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Government proposal regarding an ombudsman for the elderly

Age

Disability

On 6 September 2019, the Government proposed an Ombud for the Elderly Act, as agreed between the political parties forming the Government in January 2019.[83] This Ombud would be an independent administrative body, but would be placed – similar to the Equality and Anti-Discrimination Ombud – under the administration of the Ministry for Culture and Equality. The Ministry would have no power to instruct the Ombud, except through the creation of regulations. This body should work proactively in order to monitor and promote the rights and living conditions of the elderly but would not make decisions in individual cases or serve as a complaints mechanism.

The body will be located in the North-West of Norway. In order to obtain some synergy and close cooperation, a new centre for an age-friendly Norway will also be established in the same town, under the Ministry for Health. It will mainly serve as a secretariat for an elected council for the rights and living conditions of the elderly, with representatives from NGOs, employer's unions, researchers etc.

It is uncertain when the new Ombud will start operating, but it will not be before 2021.

Under the propose act, the mandate of the Equality and Anti-Discrimination Ombud would remain unaltered, although it is likely that it will receive fewer questions regarding age, and there will be some overlap.

The main advantages are that the formal anti-discrimination approach can be too narrow to address structural discrimination and other challenges that elderly people experience and that a new Ombud would provide more resources and opportunities to drive improvements in the living conditions of the elderly.

The main drawback is that the Ombud for the Elderly is not likely to have much, or any, knowledge of anti-discrimination law, as it will have a very limited field of recruitment due to its location far from any anti-discrimination or research institutions. In addition, there is the danger of overlooking diversity among the elderly, such as various ethnic and religious backgrounds, gender perspectives, sexual orientation, and combinations of these, as well as the very relevant disability aspect, including the CRPD.

Online source:
https://www.regjeringen.no/contentassets/420a23364a294b34924abc30ee21aa0e/horingsnotat-eldreombud.pdf

Government strategy for persons with disabilities

Disability

A new government strategy for persons with all types of disabilities was published on the International Day for Persons with Disabilities on 3 December 2019: *A society for all – government action plan for equal treatment of persons with disabilities 2020-2025*. The action plan focuses on four main areas: education, employment, health and care, and culture and leisure.

The action plan refers to the CRPD and states that it includes a number of responses to the concluding observations by the CRPD committee.[84] However, there is no mention of any incorporation of the CRPD

83 Granavoldplattformen page 50, available (in Norwegian) at https://www.venstre.no/assets/krf-v-h-frp-politisk-plattform-2019.pdf.

84 Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Norway, 07.05.2019, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/NOR/CO/1&Lang=En.

into national legislation or of ratification of the optional protocol. Nor is there any mention of expanding the range of remedies available to complainants in discrimination cases before the Equality and Anti-discrimination Tribunal. The Tribunal cannot award compensation for non-economic losses outside employment, leaving much of the discrimination experienced by people with disabilities without any effective remedies.

Several measures mentioned in the action plan have already been implemented, which also contributed to its not being well received in the NGO sector. One of the few legislative amendments mentioned that would be new concerns a stricter standard for kindergartens regarding the social environment for children, with a special focus on children with disabilities.

Many schools do not yet comply with the principles of universal design and equal access to education remains a major concern for children with disabilities. Regarding this issue, the action plan only includes making guidelines for the municipalities and other education providers, and cooperation between the Directorate for Education and the Directorate for Children and Equality regarding 'other possible measures for the improvement of universal design of kindergartens and school buildings'.[85] There is no mention of any government funding.

Online source:
https://www.regjeringen.no/contentassets/4538c7392f3d417a8d7cc48965a603c9/et-samfunn-for-alle---regjeringens-handlingsplan-for-likestilling-av-personer-med-funksjonsnedsettelse-des-2019.pdf

PL Poland

POLICY AND OTHER RELEVANT DEVELOPMENTS

Low wages for teachers – indirect discrimination against women

Gender

During the Spring of 2019, 50 % to 80 % of teachers (depending on the province) participated in strikes throughout the country, drawing attention to the low wages of teachers in kindergartens and schools. The Government agreed to a proposal from the pro-government trade union, Solidarity, guaranteeing its members, who did not participate in the strike, a small increase in salary, thus breaking the unity of the teacher's community. Ultimately, the Government also did not yield to the wage demands of other trade unions, including the largest Polish Teachers' Union. Due to the approaching secondary school final exams, the strikes were suspended until September.

Women constitute 82 % of the workforce in Polish education. The percentage of female teachers is particularly high in primary education (kindergartens) (about 90 %), but women are also over-represented in secondary schools.[86]

Wages of kindergarten and school teachers at all 'career levels' are sometimes below the net minimum wage of EUR 500 (PLN 2 000) (in the case of trainees), and in the case of certified teachers (including those with more than 20 years of work experience) do not reach the level of the average national salary (which is currently about EUR 1 000 (PLN 4 000)). The so-called glass ceiling results in the fact that, despite the fact that the sector is mainly dominated by women, the positions of school head teachers and superintendents are mainly occupied by men.

85 *A society for all – government action plan for equal treatment of persons with disabilities 2020-2025* p. 38.
86 Rachubka M. *Nauczyciele w roku szkolnym 20145/2015*, ORE Ośrodek Rozwoju Edukacji ('Teachers in the school year 2014/2015', developed by ORE the Centre for Education Development), https://doskonaleniewsieci.pl/Upload/Artykuly/raporty/Raport.%20Nauczyciele%202014-2015.pdf.

The systemic low remuneration of teachers, which is disproportionate to the difficulty of pursuing the profession, the qualifications required and the responsibilities involved, should be seen as discrimination on grounds of sex. This constitutes indirect discrimination because the regulation of wages applies equally to women and men.

However, this aspect of the problem does not appear in the discussions, not only because the idea of indirect discrimination is not yet present in the public consciousness, but also because the media, both pro-government and private, do not invite female teachers and experts on education to partake in debates on the future of education and the principles of teachers' remuneration.

Online source:
https://oko.press/82-proc-uczacych-nauczycielki-tvn24m/

Portugal PT

LEGISLATIVE DEVELOPMENT

System of employment quotas for disabled people in private enterprises

Disability

By approving Law No. 4/2019, the Portuguese Parliament reformed the system of employment quotas for people with disabilities with a degree of incapacity equal to or greater than 60 %, in private companies as well as some public entities that are not covered by specific legislation for the public sector.[87] The new quotas are only imposed on medium-sized and large enterprises. Enterprises with a workforce of more than 75 employees must employ at least 1 % of employees with disabilities, while those with more than 250 employees are required to employ at least 2 %.

Prior to the entry into force of Law No. 4/2019, quotas of up to 2 % for the private sector and up to 5 % for the public sector were in place in accordance with Law No. 38/2004 on the general framework and legal basis for the prevention of the causes of disability and the training, rehabilitation and participation of people with disabilities. No sanctions were foreseen, however, for the failure to meet these quotas.

Under the new Law No. 4/2019, employers who do not meet their quota obligation are subject to a fine, which goes to the Authority for Working Conditions and to the National Institute for Rehabilitation.

The Portuguese labour authorities may exempt employers from the new rules, upon a request from the employer, in two situations; either when Portuguese public authorities recognise that it would be impossible to apply the quota to the specific work post concerned or where the employer can prove the insufficient number of candidates meeting the requirements to occupy the positions offered by the employer in the previous year.

Law No. 4/2019 entered into force on 1 February 2019, although a transitional period of five years is allowed for companies with between 75 and 100 employees and a period of four years for companies with more than 100 employees.

Considering that most Portuguese employers are micro and small enterprises, this legal development – albeit positive – will have little impact in practice on the number of people with disabilities in private sector employment.

87 Portugal, Decree-Law No. 29/2001 of 03.02.2001.

Online source:
https://dre.pt/home/-/dre/117663335/details/maximized

RO Romania

POLICY AND OTHER RELEVANT DEVELOPMENTS

Ministry of Education publishes methodology for piloting the monitoring of school segregation

Racial or ethnic origin

In December 2019, the Ministry of Education and Research published an order approving the Methodology for monitoring school segregation in pre-university education, in force as of 31 December 2019.[88] The Order builds on the prior 2016 Order prohibiting segregation in education and is the first document produced by the National Commission for Desegregation and Inclusive Education established in early 2019. The first piloting phase of the methodology will be limited to a small number of primary and secondary schools in three counties (probably three schools in three counties). The target is segregation of children of Roma ethnicity, children with disabilities and children with special needs as defined in the 2016 Order of the Ministry of Education. Article 4 of the Methodology establishes the obligation of schools to monitor 'the balanced distribution of children/pupils in groups/classes, buildings, last two rows in classrooms, in order to ensure the community's socio-cultural diversity'.

The methodology is based on the *Index for inclusion: A guide to school development led by inclusive values*[89] and was developed with the support of UNICEF. The Order provides that the Methodology will be implemented in the 2019-2020 academic year. The results of the monitoring should be centralised by county school inspectorates and sent to the National Commission for Desegregation and Inclusive Education. This Commission is mandated to propose recommendations on the basis of indicators integrated within the Romanian Education Integrated Information System (SIIR).

Online source:
https://www.edu.ro/sites/default/files/Proiect_metodologie_pilot%20monitorizare%20%20segregare%20scolara.pdf?fbclid=IwAR2C-TkETp9Lz4a5RUs1l5E0lC9sIKs20gktZIIREoZ_o0fjReNLp1vQMs4

RS Serbia

POLICY AND OTHER RELEVANT DEVELOPMENTS

Perceptions of discrimination in Serbia

All grounds

In November 2019, a report was published on the perceptions of discrimination in Serbia. The research was commissioned by the Commissioner for the Protection of Equality (CPE) and was carried out by an

88 Romania, Ministry of Education, Order No. 5633/2019 for approving the Methodology to monitor school segregation in pre-university education, of 23.12.2019, available (in Romanian) at: https://lege5.ro/Gratuit/gm2tmnbqg42q/ordinul-nr-5633-2019-pentru-aprobarea-metodologiei-de-monitorizare-a-segregarii-scolare-in-invatamantul-preuniversitar?fbclid=IwAR3HG_w1fVd5iGVelrs1kSRNce1tUVX2Yhf1TiOt_br6zjrortJhRfqCo3c.

89 Booth, T., Ainscow, M. (2016), *Index for inclusion: A guide to school development led by inclusive values*, Index for Inclusion Network Ltd.

independent research agency in August 2019, using a sample population of 1 200 citizens across the country.[90]

While 62 % of respondents believed that discrimination was very much present or mostly present in 2016, when the latest research of this kind was carried out, in 2019, 69 % of respondents share that view. The great majority of citizens believe that discrimination is very much present in the workforce (74 %), while the perceived levels of discrimination are lower in other areas such as social protection (30 %), healthcare (29 %), education (20 %), the judiciary (17 %) and the media (11 %).

Around 69 % of respondents are aware that discrimination is prohibited by law (67 % in 2016) while 41 % believe that sanctions are effective in cases of discrimination. Some 79 % of respondents believe that discrimination cannot be tolerated (compared to 73 % in 2016) while only 12 % believe that it can be tolerated towards certain groups (15 % in 2016).

A majority of respondents believe that the media (59 %), political parties (54 %) and citizens (53 %) generate discrimination, while 84 % believe that the media can also have an influence in reducing discrimination, together with the family (78 %), school (76 %) and the Commissioner for Protection of Equality (65 %). Some 28 % of respondents believe that discrimination is an extremely significant problem and must be prioritised, while 60 % are of the opinion that it is a significant problem but that there are other, more important problems in Serbia.

In total, 20 % of respondents believe they have been victims of discrimination, although 41 % of them will not report the case (59 % of them due to mistrust in public institutions). Only 22 % said that they will report the case to the CPE. However, there is an increase in awareness of the existence of a specialised institution dealing with discrimination (56 % compared to 51 % in 2016). Among these, 65 % know the exact name of the institution (41 % in 2016) and 24 % know the name of the current Commissioner (18 % in 2016), which demonstrates better visibility of the institution.

Respondents believe that the some of the most discriminated groups in Serbia are Roma (51 %), women (42 %), LGBTQI+ (33 %), people with learning disabilities (33 %) and the poor (31 %). In addition, social distance is still very much in evidence in relation to the same groups, with an increase in social distancing towards migrants.

Positive measures in employment are supported by 46 % of respondents, while 38 % support such measures in secondary education and 34 % at university level. However, citizens from the most multicultural province in Serbia oppose positive measures the most.

The report contains some recommendations for the CPE in shaping future activities.

Online source:
http://ravnopravnost.gov.rs/izvestaji-i-publikacije/istrazivanja/

90 Serbia, Commissioner for Protection of Equality, *Izveštaj o istraživanju javnog mnjenja: Odnos građana i građanki prema diskriminaciji u Srbiji (Report on public perceptions: the attitude of citizens towards discrimination in Serbia)*, Belgrade, November 2019.

HR Slovenia

CASE LAW

Equality body initiates first strategic litigation

Age

The case concerns age discrimination in a private association of cycling commissaires (i.e. authorised judges who oversee the regularity of cycling races). The claimant is 76 years old and in good physical and intellectual health and has been trying to renew his licence for the past six years, without success. The association first relied on the rules of the International Cycling Association and then inserted a provision into its own statutes, stating that the career of cycling commissaires automatically ends when they reach the age of 70.

In 2015, when the claimant was first rejected by the association, he filed a complaint with the Advocate of the Principle of Equality who issued an opinion under the previous law (Implementing the Principle of Equal Treatment Act), finding that the treatment constituted age discrimination. The respondent ignored the opinion and the claimant complained to the Advocate again in 2018. Under the new Protection Against Discrimination Act (PADA) adopted in 2016, the Advocate found again that the provision in the statutes and the refusal to renew the licence constituted age discrimination (issuing a decision in an administrative procedure). The claimant also tried to prevent the association from inserting such a provision into the statutes by filing an appeal to the relevant administrative authority but was also unsuccessful.

In its decision of 2018, the Advocate found that the age limit is too general and applies to all cycling commissaires without distinction, regardless of their individual capabilities. The respondent referred to the International Cycling Association, which has the same rule in its statutes, but did not make further attempts to determine that the age limit was proportionate or that it was pursuing a legitimate aim. The Advocate found that the rules of an international sports association – which is essentially an international non-governmental organisation – do not overrule national legislation and European law and held that the respondent did not meet its burden of proof. The Advocate invoked notably the Employment Equality Directive, although cycling commissaires are not employed.

The Advocate gave the respondent the opportunity to remedy the situation by removing the provision from the statutes and extending the validity of the claimant's licence. However, the association refused to cooperate. The Advocate, which does not have the power to issue sanctions, then proposed to the Inspectorate for Internal Affairs to carry out a minor offence procedure in line with the PADA and impose sanctions. However, the Inspectorate declared itself to be incompetent in this case, due to an incompatibility between the PADA and relevant procedural provisions.

Considering these circumstances, the Advocate lodged a lawsuit before the civil court in October 2019, representing the claimant, claiming the elimination of discrimination, EUR 3 500 of just satisfaction and the publication of the judgment in the media.

This is the first strategic litigation case in which the Advocate of the Principle of Equality has represented a client. The case will allow the civil courts to assess whether such a blanket age limit is discriminatory also from a civil law point of view. The judgment may also clarify a number of other issues that remain unclear in the absence of case law in Slovenia, notably regarding sanctions.

Online source:
http://www.zagovornik.si/zagovornik-nacela-enakosti-na-okrajno-sodisce-v-ljubljani-vlozil-tozbo-zaradi-diskriminacije-zaradi-starosti/

Discrimination based on religion in access to marketing services

Religion or belief

The case concerned a pro-life association which concluded a contract with a marketing agency for an advertising campaign on city buses that should have lasted for two months. The poster showed a family with a baby, slogans such as 'you are not alone' together with the phone number and website of the association. The campaign caused a debate on social media with some users calling upon the city bus company to remove the posters, claiming that they were contrary to the constitutional right to abortion.

Nine days after the beginning of the campaign the city bus company responded to these demands and ordered the marketing agency to remove the posters.

Before the Advocate of the Principle of Equality, the marketing agency stated that they simply followed the instructions of the city bus company and offered the claimant (the pro-life association) a settlement involving other advertising opportunities. However, the city bus company argued that advertisements that incite hatred are not allowed and, since these advertisements caused hatred on social media, they had to be removed. The company also stated that it pursues the goal of providing a neutral environment for city transport users.

The Advocate found that the elimination of advertisements and the termination of the contract amounted to discrimination on the grounds of religion in access to marketing services. The Advocate found that the association's advertising campaign is closely related to the religion of its members, who are catholic and supporters of the pro-life movement. It found that the content of the advertisement was not hateful and that the provision invoked by the city bus company did not apply in this case. The Advocate pointed out that advertising is never neutral and that there are numerous items advertised on city buses that some people are opposed to, but the bus company has not removed these adverts.

The Advocate found that the city bus company was liable for instructions to discriminate, while the parallel procedure against the marketing agency was terminated as a settlement was reached with the complainant. The Advocate also highlighted the fact that legal persons such as associations are protected against discrimination based on the personal characteristics of their members or founders.

Online source:
http://www.zagovornik.si/diskriminacija-na-podlagi-vere-ali-prepricanja-s-strani-izvajalca-javnega-prevoza/

Spain ES

CASE LAW

The Constitutional Court establishes the possibility of name and sex change in the civil registry for children

Transgender

In a judgment of 18 July 2019, the Constitutional Court established the possibility for transsexual children to request a name and sex change in the civil registry.[91] This case was filed in July 2014 by the parents of a minor who had from a young age said that he felt male and used a male name, despite being born female. The parents requested rectification of the child's sex and name in the civil registry, which was denied. The child had previously been examined by a medical team composed of a psychiatrist,

91 Spain, Judgment of the Constitutional Court No. 99/2019, of 18.07.2019, available at: https://hj.tribunalconstitucional.es/docs/BOE/BOE-A-2019-11911.pdf.

an endocrinologist and a psychologist, who issued a report stating that the child met the requirements required by the gender identity law to request the change of name and sex in the registry, as well as in other relevant documents.

The child's parents alleged that denying legitimacy to minors to rectify their sex as it appears in the registry prevents the free development of the personality of the child according to their sexual identity (established by Article 10.1 of the Spanish Constitution) and violates their fundamental rights to moral integrity (established by Article 15 of the Spanish Constitution), to privacy (established by Article 18 of the Spanish Constitution) and respect for private life (Article 8 of the European Convention of Human Rights).

On 16 March 2016, the Supreme Court asked the Constitutional Court if it was contrary to the Spanish Constitution to set an age requirement (of 18 years) to request a change in sex and name in the civil registry in cases of transsexuality as required by Article 1 of the Law 3/2007.[92] The judgment of the Constitutional Court 99/2019, of 18 July 2019, declared Article 1 of Law 3/2007 unconstitutional and established that children with sufficient maturity and who are in a stable situation of transsexuality can request their sex and name be changed in the civil registry. It based its decision on the argument that, although restricting a minor's right to change their name and sex in the civil registry can be justified as safeguarding the child's best interests, considering the importance of the decision for the development of the individual's personality, preventing the change would jeopardise the right to the free development of personality (established in Article 10 of the Spanish Constitution) and the right to privacy (established in Article 18 of the Spanish Constitution). As maturity and stability are requirements of a subjective nature, the Court's decision creates some uncertainty, as a decision will depend on the individual child and the assessment of the registry officials in question. Nevertheless, the solution provided by the Constitutional Court seems proportionate and justified.

Online source:
https://hj.tribunalconstitucional.es/docs/BOE/BOE-A-2019-11911.pdf

The Supreme Court rules in favour of a university policy of affirmative action

Gender

The ruling of the Supreme Court of 16 October 2019, clarifies a question regarding the possible discriminatory effect of an affirmative action measure established by the Autonomous University of Madrid to combat the glass ceiling at the university.[93] Universities in Spain are free to establish the number of senior professor positions (the highest level in an academic career) in each department in accordance with their resources and strategies. Universities usually establish limitations on the number of senior professor positions and aim to share them equally across the departments. The selection for these positions depends on certain objective criteria established by the university itself. At the Autonomous University of Madrid, where the position of senior professor concerns an internal promotion (as in this case) the factors taken into account in the accreditation procedure are research experience, teaching experience and seniority. In 2016, the University added a fourth criterion by which it gives preference to those departments with fewer female than male senior professors to be granted a new position of senior professor. The department with the least female senior professors will be granted the next female senior professor position. This affirmative action measure was declared justified and in accordance with Spanish Law by the Supreme Court in its ruling of 16 October 2019.

The affirmative action of the Autonomous University of Madrid was challenged by a series of claimants who alleged that this measure meant an unjustified difference between women and men which was disproportionate. They argued that the measure would violate Article 14 of the Spanish Constitution

92 Spain, Law No. 3/2007, of 15.03.2007, https://www.boe.es/buscar/doc.php?id=BOE-A-2007-5585.
93 Spain, Judgment of the Supreme Court of 16.10.2019, appeal No. 2013/2018, available at: http://www.poderjudicial.es/search/indexAN.jsp#.

which establishes the principle of non-discrimination between women and men. The claimants also claimed that the measure was contrary to Article 103.3 of the Spanish Constitution, which states that access to the Spanish Public Service must be afforded according to criteria of capacity and merit. The Supreme Court considered the affirmative measure to be in line with the Constitution and established that it was consistent with Spanish law because it was justified and proportionate. The Supreme Court established that the preference was not established for the hiring of women with preference to men, but simply for the creation of new positions in those departments where there were fewer female senior professors. Subsequently, at the time of accessing the specific post, female candidates would not have greater privileges than male candidates, so that only the merits of each would serve to assign the place to one person or another.

Online source:
http://www.poderjudicial.es/search/indexAN.jsp#

The Spanish Constitutional Court applies the ruling of the CJEU issued in Villar Laiz

The CJEU ruled in its judgment of 8 May 2019, Villar Laiz,[94] that the Spanish social security regulations were contrary to Directive 79/7/EEC because they established an unjustified difference between full-time and part-time workers. According to the CJEU, this unjustified difference constituted indirect discrimination based on sex, given that the majority of part-time workers are women. The Spanish precept in question was the current Article 247.b of the General Law on Social Security.[95] It established that, in order to qualify for a retirement pension, part-time workers' contributions to the social security system were corrected according to a system called the 'partiality coefficient'. With the application of this system, the contribution considered for the purpose of the retirement pension was less than the time that was considered if the worker was employed full-time. The Villar Laiz case was not the first in which the CJEU established that the contribution calculation system for part-time workers in Spain was discriminatory on the basis of sex.[96] After a previous ruling on this matter, a modification was made to the Spanish social security system (the current Article 247.b of the General Law on Social Security) so that instead of the previous correction system for part-time workers, a new correction system called the 'partiality coefficient' was established. However, the contribution calculation mechanism still differed for full-time and part-time workers. In the judgment of the Villar Laiz case, the CJEU thus established that this second correction system remained unjustified.

In its ruling of 3 July 2019, the Constitutional Court reached the same conclusion as the CJEU in Villar Laiz, declaring that the partiality coefficient was null because it constituted indirect discrimination on the ground of sex.[97] After this judgment, the system was finally changed to be the same for both types of workers. However, it also established that equal treatment of full-time and part-time workers in this regard would apply only with regard to pensions requested after the judgment of the Constitutional Court itself. Equal treatment would be applied to those pensions that were being processed at the time of the judgment of the Constitutional Court. Thus, the judgment denied those who already received their pensions the possibility of requesting a revision. The Constitutional Court's judgment 91/2019 could therefore be contrary to the CJEU doctrine establishing that a CJEU judgment must be applied to all acts of the Member States (prior to the CJEU's judgment) that were later than the date by which the Member

94 CJEU, Judgment of 08.05.2019, *Villar Laiz*, C-161/18.

95 Spain, Article 247.b of the current General Law on Social Security (Royal Legislative Decree 8/2015, of 30.10.2015, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2015-11724). In 2015, the old General Law on Social Security was amended. Article 247 of the current law of 2015 coincides in content with the previous seventh additional provision of the old General Law on Social Security of 1994 (Royal Legislative Decree 1/1994, of 20.06.1994). The case that gave rise to the judgment of the Constitutional Court occurred when the General Social Security Law of 1994 was still in force, although its conclusions are applicable to Article 247 of the current General Social Security Law, as the Constitutional Court itself establishes.

96 CJEU, Judgment of 02.11.2012, Elbal Moreno, C-385/11.

97 Spain, Judgment of the Constitutional Court No. 91/2019, of 03.07.2019, available at: https://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/25987.

State had to transpose the breached Directive.[98] In the Villar Laiz case, the CJEU did not establish that its judgment would apply only to future matters and neither did the Spanish state request this or justify it during the processing of the preliminary ruling before the CJEU.

Online sources:
https://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/25987
https://www.boe.es/buscar/act.php?id=BOE-A-2015-11724

SE Sweden

CASE LAW

Strategic litigation concerning discrimination against pupils with dyslexia during school exams

Disability

Swedish schools hold national exams for students in the third and sixth grades. During such exams, students with dyslexia are not allowed to use the accessibility devices that they normally use, due to guidelines established by the National Agency for Education. Several civil society organisations[99] decided to bring strategic litigation to challenge this rule. The rule seemed particularly problematic as even some schools disagreed with the guidelines they were compelled to apply. The organisations identified three claimants who each brought their case before the competent district courts (in three different parts of Sweden) at the same time. The cases were filed as small claims cases in order to limit the prohibitive financial risks.

Judgements were issued in the three cases in 2019. The decisions from the Södertörn and Malmö district courts were unfavourable to the claimants. These courts held that the schools (and the local governments) had not violated the prohibitions in the Discrimination Act related to inaccessibility and indirect discrimination, nor the right to an education and non-discrimination in the European Convention on Human Rights. The courts held that, while the procedure put people with dyslexia at a disadvantage, the procedure had a legitimate purpose and the means were appropriate and necessary. Furthermore, the accessibility measures that were allowed, such as additional time, were held to be sufficient to place the claimant in a comparable situation with that of a person without the disability.[100] On the other hand, on essentially the same facts and arguments, the Örebro Court held that the claimant had been subjected to both indirect discrimination, as the means were not appropriate and necessary, and discrimination in the form of inaccessibility due to insufficient reasonable accommodation. The court awarded discrimination compensation of EUR 950 (SEK 10 000). Given this result, the Örebro court found it unnecessary to examine the issue of alleged violations of the European Convention.[101]

All three cases have been appealed by the respective losing parties. As the cases will be taken up by different courts of appeal, there is the potential for a decision by the Supreme Court which could then provide clear guidance through a leading precedent.

98 CJEU, Judgment of 19.10.1995, Richardson, C-137/1994.
99 The organisations were Dyslexiförbundet (Dyslexia association), Föreningen lagen som verktyg (Law as a tool for social change association) and Talerättsfonden (Fund for Discrimination Case Law).
100 Sweden, Malmö District Court judgment of 12.11.2019, case No. FT 7843-18; Södertörn District Court judgment of 27.06.2019, case No. FT 11836-18.
101 Sweden, Örebro District Court judgment of 14.11.2019, case No. FT 4411-18.

A parallel issue is the national government's responsibility for the application of guidelines that lead to discriminatory behaviour for which local governments are liable. According to the civil society organisation involved in the cases, thousands of students with dyslexia throughout Sweden are affected every year.

The cases demonstrate the ability and potential of civil society concerning strategic litigation, as well as the economic and legal risks for individuals and civil society organisations in trying to enforce rights related to equality and non-discrimination.

Online source:
https://lagensomverktyg.se/2019/rattsnyhet-orebro-kommun-diskriminerade-elev-nar-hjalpmedel-vid-nationella-proven-inte-tillats/

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