

ISSN: 2212-5914

EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

European Gender Equality Law Review

No. 2 / 2012

IN THIS ISSUE

Francesca Bettio

Women, Men and the Financial Crisis. Seven Lessons from Europe

Hazel Conley

Economic Crisis, Austerity and Gender Equality – The UK Case

María Amparo Ballester-Pastor

Legal Effects of the Economic Crisis on Gender Equality in Spain:

Effects on the Right to Reconciliate Work and Family after the 2012 Labour Law Reform



EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

European Gender Equality Law Review

2012 - 2

This report was financed by and prepared for the use of the European Commission. It does not necessarily represent the Commission's official position.

This publication was commissioned by the European Commission under the framework programme PROGRESS (Decision 1672/2006/EC of the European Parliament and the Council, OJ L 315/1 of 15.11.2006). For more information on PROGRESS see: <http://ec.europa.eu/social/main.jsp?catId=327&langId=en>

Manuscript completed in November 2012.

The information contained in this report reflects, as far as possible, the state of affairs on 10 September 2012.

Editorial Board

Susanne Burri
Hanneke van Eijken
Hélène Masse-Dessen
Christopher McCrudden
Linda Senden

Production

Susanne Burri
Hanneke van Eijken
Klaartje Hoeberechts
Alison Morley
Simone van der Post

© European Union, 2012



European Commission
Directorate-General for Justice
Unit JUST/D1
Equal Treatment Legislation

Table of Contents

Members of the European Network of Legal Experts in the Field of Gender Equality		iii
Editorial		
Gender Equality in Times of Economic Crisis: a Poor Relation or a Ray of Light in Dark Times?		1
<i>Simone van der Post</i>		
Women, Men and the Financial Crisis. Seven Lessons from Europe		4
<i>Francesca Bettio</i>		
Economic Crisis, Austerity and Gender Equality – The UK Case		14
<i>Hazel Conley</i>		
Legal Effects of the Economic Crisis on Gender Equality in Spain: Effects on the Right to Reconciliate Work and Family after the 2012 Labour Law Reform	20	20
<i>María Amparo Ballester-Pastor</i>		
EU Policy and Legislative Process Update		30
<i>Hanneke van Eijken</i>		
Court of Justice of the European Union Case Law Update		33
<i>Hanneke van Eijken</i>		
European Court of Human Rights Case Law Update		37
<i>Hanneke van Eijken</i>		
News from the Member States, EEA Countries, Croatia, FYR of Macedonia and Turkey		
AUSTRIA	<i>Neda Bei</i>	43
BELGIUM	<i>Jean Jacqmain</i>	46
BULGARIA	<i>Genoveva Tisheva</i>	49
CROATIA	<i>Nada Bodiroga-Vukobrat</i>	52
CYPRUS	<i>Lia Efstratiou-Georgiades</i>	55
CZECH REPUBLIC	<i>Kristina Koldinská</i>	58
DENMARK	<i>Ruth Nielsen</i>	59
ESTONIA	<i>Anu Laas</i>	60
FINLAND	<i>Kevät Nousiainen</i>	65
FRANCE	<i>Sylvaine Laulom</i>	69
GERMANY	<i>Ulrike Lembke</i>	73
GREECE	<i>Sophia Koukoulis-Spiliotopoulos</i>	79
HUNGARY	<i>Beáta Nacsá</i>	85
ICELAND	<i>Herdís Thorgeirsdóttir</i>	90
IRELAND	<i>Frances Meenan</i>	92
ITALY	<i>Simonetta Renga</i>	95
LATVIA	<i>Kristine Dupate</i>	98
LIECHTENSTEIN	<i>Nicole Mathé</i>	101
LITHUANIA	<i>Tomas Davulis</i>	103
LUXEMBOURG	<i>Anik Raskin</i>	105
FYR of MACEDONIA	<i>Mirjana Najcevska</i>	107

MALTA	<i>Peter G. Xuereb</i>	112
THE NETHERLANDS	<i>Rikki Holtmaat</i>	117
NORWAY	<i>Helga Aune</i>	121
POLAND	<i>Eleonora Zielińska</i>	123
PORTUGAL	<i>Maria do Rosário Palma Ramalho</i>	130
ROMANIA	<i>Roxana Teșiu</i>	131
SLOVAKIA	<i>Zuzana Magurová</i>	134
SLOVENIA	<i>Tanja Koderman Sever</i>	137
SPAIN	<i>Berta Valdés de la Vega</i>	139
SWEDEN	<i>Ann Numhauser-Henning</i>	141
TURKEY	<i>Nurhan Süral</i>	142
UNITED KINGDOM	<i>Aileen McColgan</i>	144

Members of the European Network of Legal Experts in the Field of Gender Equality

Co-ordinator:

Susanne Burri, Utrecht University, the Netherlands

Assistant co-ordinator

Hanneke van Eijken, Utrecht University, the Netherlands

Executive Committee:

Hélène Masse-Dessen, Barrister at the Conseil d'Etat and Cour de Cassation, France

Christopher McCrudden, Queen's University Belfast, the United Kingdom

Linda Senden, Utrecht University, the Netherlands

Susanne Burri, Utrecht University, the Netherlands

National experts:

Neda Bei (Austria), Legal expert in the Vienna Chamber of Labour, Management of Social Affairs

Jean Jacquain (Belgium), Free University of Brussels, Faculty of Law

Genoveva Tisheva (Bulgaria), Bulgarian Gender Research Foundation

Nada Bodiroga-Vukobrat (Croatia), Professor, Head of Jean Monnet Department of European Public Law / University of Rijeka, Faculty of Law

Evangelia Lia Efstratiou-Georgiades (Cyprus), Advocate

Kristina Koldinská (Czech Republic), Charles University, Faculty of Law

Ruth Nielsen (Denmark), Copenhagen Business School, Law Department

Anu Laas (Estonia), Institute of Sociology and Social Policy, University of Tartu

Kevät Nousiainen (Finland) Helsinki University, Faculty of Law

Sylvaine Laulom (France), University Jean Monnet, Saint-Etienne, Faculty of Law

Mirjana Najcevska (FYR of Macedonia), Professor of Human Rights, American College – Skopje and University 'Ss. Cyril and Methodius', Institute for Sociological, Political and Juridical Research

Ulrike Lembke (Germany), University of Hamburg, Faculty of Law

Sophia Koukoulis-Spiliotopoulos (Greece), Attorney at Law

Beáta Nacsá (Hungary), Eötvös Loránd University, Department of Labour and Social Law

Herdís Thorgeirsdóttir (Iceland), Bifrost University, Faculty of Law

Frances Meenan (Ireland), Barrister, Four Courts, Law Library, Dublin

Simonetta Renga (Italy), Ferrara University, Faculty of Economics

Kristīne Dupate (Latvia), University of Latvia, Faculty of Law

Nicole Mathé (Liechtenstein), University of Vienna, Faculty of Law

Tomas Davulis (Lithuania), Vilnius University, Faculty of Law

Anik Raskin (Luxembourg), National Women's Council of Luxembourg

Peter G. Xuereb (Malta), University of Malta, Faculty of Law

Rikki Holtmaat (the Netherlands), Independent Legal Consultant Expert

Helga Aune (Norway), University of Oslo, Faculty of Law

Eleonora Zielinska (Poland), University of Warsaw, Faculty of Law and Administration

Maria do Rosário Palma Ramalho (Portugal), University of Lisbon, Faculty of Law

Roxana Teşiu (Romania), Independent Legal Advisor

Zuzana Magurová (Slovakia), Slovak Academy of Sciences, Institute of State and Law

Tanja Koderman Sever (Slovenia), Independent Legal Advisor

Berta Valdés (Spain) University Castilla-La Mancha, Faculty of Law

Ann Numhauser-Henning (Sweden), Lund University, Faculty of Law

Nurhan Süral (Turkey), Middle East Technical University, Faculty of Economics and Administrative Sciences

Aileen McColgan (the United Kingdom), King's College London

Editorial

Gender Equality in Times of Economic Crisis: a Poor Relation or a Ray of Light in Dark Times?

*Simone van der Post**

During the past four years the European Union has been struggling to fight the economic and financial crisis that started in 2008 with the fall of the Lehman Brothers Bank and evolved into the Euro crisis, with the near bankruptcy of Greece and large problems in many other countries (in particular Spain, Italy, Ireland and Portugal).¹ This has led to widespread austerity measures, in the Euro zone and outside it.² Not all European citizens agree with these measures; the streets of (mostly) southern European states were ablaze with protests and strikes against the tough austerity measures.³ These circumstances generally do not leave much room for a discussion on gender equality. As mentioned in Francesca Bettio's article in this Review, the European Economic Recovery Plan does not mention 'gender', 'women', or 'equality'. This, however, does not mean that the economic crisis does not have an impact on gender equality issues. In this thematic edition of the European Gender Equality Law Review, specific attention is paid to the impact of the economic crisis on gender equality issues. The three articles in this edition deal with different aspects of the economic crisis seen from a gender perspective. Also, the reports from the Member States, EEA Countries, Croatia, FYR of Macedonia and Turkey pay special attention to the legal effects of the economic crisis on gender equality issues in the respective countries.

In Francesca Bettio's article, the actual effects of the economic and financial crisis on gender equality issues in Europe are analysed through seven lessons. Objectively, it seems that men are hit harder by the economic crisis, but in the end women are not better off. First of all, women are still at a disadvantage compared with men, economically and in labour situations, so every step back is not helping to realise gender equality goals. Also, the austerity measures implemented in order to finance the financial injection in the European banks and the European Stability Mechanism will now have greater effect on the public sector, in which women are over-represented.

Hazel Conley's article gives an impression of the effects of the British austerity measures on the social position of women in the United Kingdom. She argues that the measures taken by the British Government have a greater impact on women than on men. Most of the cutbacks are in the public sector, entailing that more women will lose their jobs and that

* Junior lecturer in European Law at Utrecht University and project assistant of the European Network of Legal Experts in the Field of Gender Equality.

¹ For a pictographic overview of the evolution of the Euro crisis, see 'It's all Connected: A Spectator's Guide to the Euro Crisis' in the New York Times, 22 October 2011, available at: http://www.nytimes.com/imagepages/2011/10/22/opinion/20111023_DATAPOINTS.html?ref=sunday-review, accessed 16 November 2012.

² See for example 'Spain budget imposes further austerity measures' at BBC News, 27 September 2012, available at: <http://www.bbc.co.uk/news/business-19733995>; 'European partners welcome new Greek cuts' in Deutsche Welle, 8 November 2012, available at: <http://www.dw.de/european-partners-welcome-new-greek-cuts/a-16366209>; and 'Dutch Liberals, Labour vow austerity in coalition deal' at Reuters, 29 October 2012, available at: <http://www.reuters.com/article/2012/10/29/us-dutch-politics-idUSBRE89S0Y520121029>, all accessed 16 November 2012.

³ See for example 'European strikes: who is protesting and why?' in The Guardian on 14 November 2012, available at <http://www.guardian.co.uk/business/2012/nov/14/european-strikes-who-protesting-why>; 'Anti-Austerity Strikes: Protests Grip Europe' in Sky News, 14 November 2012, available at: <http://www.guardian.co.uk/business/2012/nov/14/european-strikes-who-protesting-why>; and 'Strikes a barometer of Europe's austerity tolerance' in BBC News, 14 November 2012, available at <http://www.bbc.co.uk/news/world-europe-20322096>, all accessed 16 November 2012.

women can no longer make use of the public services, on which they are often dependent to be able to participate in public life. This will especially affect poor and vulnerable women.

The effects of the economic crisis are diverse throughout the different EU countries. This is underlined by María Amparo Ballester-Pastor's article, which shows how the reform of labour law in Spain has an effect on the right to reconcile work and family life. She highlights three changes to reconciliation provisions in the labour law that seem minor at first glance, but have a large impact on the possibilities to effectively make use of the right to reconcile work and private life. As well as the changes to these reconciliation provisions, general measures to increase flexibility in labour law also have an effect on the possibilities of the reconciliation of responsibilities. In general the Spanish situation can be described as a context that is specifically difficult for workers with family responsibilities.

Fortunately, the area of gender equality in Europe is also more than just a poor relation in times of widespread austerity measures: on 14 November 2012, the European Commission presented a proposal for a directive to improve the gender balance among non-executive directors of companies listed on the stock exchanges.⁴ The proposed directive establishes a mandatory 40 % objective for the under-represented sex among non-executive directors of companies listed on stock exchanges, excluding SMEs (small and medium enterprises), to be reached by 2020 (2018 for those which are public undertakings). These companies would also be obliged to set their own targets in relation to executive directors. This proposal is a first step in recognising that gender equality needs a push in the right direction. The proposal was applauded, amongst others, by women's organisations, praising it as a step towards substantive equality.⁵

The proposal is meant to be a step towards substantive equality, introducing the first positive action measure at EU level. In the explanatory memorandum to the proposal, the Commission points out that in past years the presence of women on company boards only increased by 0.6 %, whereby the countries that adopted binding measures showed the most significant progress.⁶ In the analysis of the consistency of the proposal with other policies and objectives of the Union and with the Charter of Fundamental Rights of the European Union, the principle of positive action is mentioned, referring to Article 23 of the Charter and Article 157(4) TFEU.⁷ The Commission refers to the 'promot[ion of] gender equality in economic decision-making and [...] fully exploit[ing] the existing talent pool of candidates for more equal gender representation on company boards'⁸ as the purpose of the proposal.

The current proposal is a logical step in view of the earlier acknowledgements of the need for positive action to ensure equality in practice. In 1984 the Council of the European Union issued a recommendation on the promotion of positive action for women, which calls for policy measures 'designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment'.⁹

⁴ Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM(2012) 614/5 final, available at: http://ec.europa.eu/justice/gender-equality/files/womenonboards/directive_quotas_en.pdf, accessed 19 November 2012. For an overview of its contents, see *EU Policy and Legislative Process Update* in this Review.

⁵ Press release 15 November 2012 'The European Women Lawyers' Association supports quota legislation at EU level', available at: <http://www.ewla.org/News/15717/>; 'Women on boards: a first step towards meritocracy' European Women's Lobby, 15 November 2012, available at <http://www.womenlobby.org/spip.php?article4244&lang=en>, both accessed 20 November 2012.

⁶ Proposal COM(2012) 614/5 final (above footnote 5), page 2 with reference to the Progress report: Women in economic decision-making in the EU, March 2012, available at: http://ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf, accessed November 19, 2012.

⁷ Proposal COM(2012) 614/5 final (above footnote 4), p. 6.

⁸ Proposal Com(2012) 614/5 final (above footnote 4), p. 5.

⁹ Council Recommendation 84/635/EEC of 13 December 1984, Article 1.

The CJEU has developed a line of case law on the issue of positive action measures, interpreting Article 2(4) of Directive 76/207/EEC.¹⁰ In the *Marschall* case,¹¹ the Court made it clear that positive action measures may only be taken if there is an objective assessment of each individual's situation, providing a 'saving clause' for an exception to the positive action in favour of women, if necessary. In the *Badeck* case,¹² the CJEU added that the measures may only be taken in sectors in which women are under-represented. The current proposal is probably in line with this case law; Article 4(3) of the proposal reads as follows:

[...] priority shall be given to the candidate of the under-represented sex if that candidate is equally qualified as a candidate of the other sex in terms of suitability, competence and professional performance, unless an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex.

This provision incorporates the criteria for positive action as they stand in case law at the moment, not providing a more stringent or a more flexible regime for positive action.¹³ To this extent, the Commission has been careful not to mention 'women' in the operative clauses of the proposal, prudently referring to 'the under-represented sex' throughout.

If adopted, the proposal would add a new instrument to the area of gender equality of the EU: the instrument of binding, smart quotas. Quotas are generally seen as an important instrument in reaching substantive equality between men and women. In the EU, quotas have never before been used in legally binding instruments, such as directives. The obligatory character of this type of positive action measures gives the opportunity to show that quotas are not something to be afraid of, but an instrument to achieve a more balanced representation of women and men in different aspects of public life. As the enforcement possibilities provided for in the proposal¹⁴ contribute to the probability that the 40 % representation of the under-represented sex will be met, it will be possible to show that such measures have a positive effect on society. This could open the door to other types of measures aimed at furthering substantial equality in the future.

The current economic crisis is a threat to the advances made in previous years towards more gender equality throughout Europe. Austerity measures are starting to affect the possibilities of women to participate in the labour market and more generally in public life. The proposed quotas directive is a step forward in these dark days, but it is only a small ray of light. There is much more to be done to reach substantive gender equality throughout the European Union. Recently, a cross-party coalition of MEPs, together with the European Women's Lobby, started an initiative to achieve 50/50 gender balance in the European institutions after the 2014 elections.¹⁵ Hopefully there will be more room for these, and other, types of gender equality measures and initiatives to be employed in the future.

¹⁰ Directive 76/207/EEC, OJ L 39/41 of 9 February 1976. Article 2(4) reads: *This Directive shall e without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1).*

¹¹ Case C-409/95 *Helmut Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363.

¹² Case C-158/97 *Georg Badeck and others, Intervers: Hessische Ministerpräsident and Landsamwalt beim Staatsferichtshof des Landes Hessen* [2000] ECR I-1875.

¹³ See also Proposal Com(2012) 614/5 final (above footnote 4), p. 6.

¹⁴ See Article 6 of the Proposal, Proposal Com(2012) 614/5 final (above footnote 4), p. 25.

¹⁵ See <http://womenlobby.org/spip.php?rubrique9&lang=en>, accessed 22 November 2012. The 50/50 declaration is available at: http://womenlobby.org/spip.php?action=acceder_document&arg=2057&cle=05e32159c913fc7b0a7dbf035ada28e224199bb9&file=pdf%2Fjoint%20declaration%20of%205050%20coalition%20final%202012%20en.pdf&lang=en, accessed 22 November 2012.

Women, Men and the Financial Crisis. Seven Lessons from Europe

Francesca Bettio *

More than four years after its inception, the great European recession is still a work in progress. While this makes any stock-taking exercise a tentative affair, four full years are enough to draw some lessons from how women, men and gender equality fared in this crisis and on what may lie ahead. Seven such lessons are set out below focusing primarily on work – paid or unpaid – and welfare. The source material is the joint report on women, men and the crisis that the EGGE and EGGSI networks of experts began in 2011 and have recently completed.¹

Lesson number one: misleading gender scoreboards

The gender dimension of economic crises is a thin but not an entirely new subject.² Arguably, however, this is the first long and deep economic crisis witnessed by generations of scholars for whom gender is a legitimate and fairly familiar constituent of social or economic analysis. This has inspired the kind of semantic innovations that the media love to amplify. Early on in the recession the subprime mortgage fiasco led in rapid succession to the collapse of the housing market, of some financial organisations, and of parts of industry and constructions, all male employment strongholds. Newly coined terms like ‘heCession’ or ‘manCession’ thus gained popularity in some American academic quarters and in the media to indicate that men were *the* losers of this crisis.³ With the crisis unfolding, the discourse veered towards a ‘she-Cession’ as the diet imposed on public budgets after deficits had soared, on account of massive bank rescue and economic recovery packages, gave rise to fears that female dominated welfare and public administration organisations would be severely downsized. Amplified by the media, the he- versus she-Cession controversy helped turn a genuine concern with gender equality into an emotionally charged gender scoreboard where women and men compete to bear the smallest losses. Such a match-like vision of gender equality during the crisis comes in area-specific variants. In the USA, for example, the version that prevails sees men as losers; in some European countries such as Italy the opposite version is more common.

* This article draws heavily on the joint EGGE–EGGSI report: F. Bettio, M. Corsi, M. Samek, C. D’Ippoliti, A. Liberaky & A. Verashchagina ‘The Impact of the Economic Crisis on the Situation of Women and Men and on Gender Equality Policies’, Luxembourg, European Union Publishing Office 2012. The report exploits the contributions from the national experts of the two networks and is available at http://ec.europa.eu/justice/gender-equality/files/documents/enege_crisis_report_dec_2012_final_en.pdf, accessed 28 January 2013.

The author of this article, Francesca Bettio, is professor of Economics at the University of Siena and has published widely about women’s work, fertility, the economics of the family and of care work. She has a long track record of collaboration with the European Commission. Recently, she served as Lead Coordinator of the networks EGGE (2007-2011), and ENEGE (2011 to this date). While the contributions by the co-authors and the experts are gratefully acknowledged, the author takes full responsibility for the opinions expressed here as well as for any mistakes.

¹ EGGE stands for ‘European Network of Experts on Employment and Gender Equality Issues’; EGGSI for ‘European Network of Experts on Gender Equality and Social Inclusion’. Both networks served the Gender Equality Unit which is now part of the EC DG Justice. In 2011 the two networks were merged into ENEGE, the ‘European Network of Experts on Gender Equality’.

² One of the best known contributions on this subject is J. Rubery (ed.) *Women and Recession* London & New York, Routledge and Kegan Paul 1997.

³ See, among others, E. Sierminska & E. Takhtamanova ‘Job Flows, Demographics, and the Great Recession’ in H. Immervoll, A. Peichl & K. Tatsiramos (eds.) *Who Loses in the Downturn? Economic Crisis, Employment and Income Distribution* Emerald Group Publishing Limited 2011.

Scoreboard views of the crisis can be highly misleading. A less emotionally charged assessment of what happened in Europe needs a much more nuanced approach and a sober look at the facts. The headline facts are as follows:⁴

- In Europe as a whole (EU27) male employment dropped earlier in the recession and faster. In the few cases where recovery is taking place, male employment has also picked up faster, but the lost ground has not yet been fully regained. Between 2008 and 2012 (2nd and 1st quarter, respectively) men's employment rate went down from 72.9 % to 69.1 %.⁵ The fall in female employment was more contained, which is only partly explained by the fact that fewer women than men work. In the period under examination the female employment rate decreased from 58.9 % to 58.2 %.
- Female unemployment was much higher to start with and it increased as the recession deepened, but not as much as male unemployment. On several occasions the male rate was higher than the female, including in the latest available quarter (2012, 1st quarter) when the respective figures reached 10.8 % and 10.6 %.
- Earnings decreased for men and women, because jobs were lost, hours were reduced (often as a job-preserving measure), bonuses were cut or, more generally, because wage competition sharpened. In relative terms however, female earnings decreased less sharply.⁶ In 2010 the gender pay gap in unadjusted form stood at 16.4 % in the EU as a whole, down from 17.6 % in 2007. A decline was observed in the majority of Member States.⁷
- Many more women than men were inactive before the crisis, and the disproportion remains to date, but the gender inactivity gap is currently lower. As a combined result of employment and unemployment patterns, inactivity has risen among men on the back of the crisis and declined (slightly) among women. In early 2012 men had not yet regained their pre-recession rate of economic activity, while a slight increase had taken place for women.
- In the EU as a whole the proportion of young women neither in education, employment nor in training (the so-called NEETS aged 15-24) was higher than the corresponding proportion among men in the depth of the crisis (2010). Due to the rise in male inactivity, however, the opposite was true in 10 member countries.
- Unpaid work is likely to have gone up and women are likely to have shouldered the largest increase, with a consequent widening of the gender gap. In the absence of an adequate statistical basis, however, the evidence is slim in both respects.⁸
- Income poverty is, and remains, more widespread among women, but in the two initial years of the recession (2008-2009, the latest available) the increase was higher for men.
- The crisis also appears to have adversely affected health behaviour. Drug addiction, smoking, and heavy drinking appear to be on the rise in more than one European country, especially among men.

⁴ The main sources for the facts and figures listed below are Labour Force and SILC surveys data published online: http://epp.eurostat.ec.europa.eu/portal/page/portal/statistics/search_database?_piref458_1209540_458_211810_211810node_code=tsisc100 (accessed 16 November 2012). Some of the figures were elaborated by the authors of the quoted EGGE–EGGSI report and are reported therein (Bettio et al., footnote 1 above, chapters 1-3 and 5, passim). Additional sources are explicitly mentioned in the text or footnotes below.

⁵ Throughout this article the employment rate refers to 15 to 64-year-olds.

⁶ At least 20 % of male respondents to the European Social Survey (ESS) in the majority of the 17 countries surveyed reported having to take a reduction in pay in the period 2008-2010; for women, this happened in less than half of the countries surveyed (ESS data, round 5, year 2010, first release: 26 October 2011; <http://www.europeansocialsurvey.org/>, accessed 16 November 2012).

⁷ The 2010 value is the latest available. (Eurostat online series, see footnote 4 for the website.)

⁸ In the absence of yearly time use surveys – typically time use surveys are conducted every 5 or 10 years – the joint EGGE–EGGSI report inferred the surge of unpaid work from the decline of consumption items such as restaurant meals or paid social services. Gender differences in participation in unpaid work before and during the crisis could be gauged directly only for those few countries where the latest time use survey was conducted after 2008. See Bettio et al., footnote * above, chapter 3.

If we disregard unpaid work, these headline economic indicators tell a clear story of employment and income losses for both men and women but more severe among the former. As in previous recessions, over-representation of women in sectors that were comparatively shielded from the crises – occupational and sectoral segregation – has afforded some significant protection to female employment and wages in most if not all of the member countries.

However, the extent and significance of this protection should be qualified on a number of counts. Firstly, women were slowly catching up in employment with men before the recession set in, and still need to do so. Thus any loss for them entails the additional risk of forestalling the catching-up process. Moreover, the protection afforded by segregation worked overall, but not for all countries or employment segments.

For example, manufacturing has suffered severe job losses, but in this male dominated activity women lost proportionately more employment than men in Europe as a whole and in the countries with a sizeable manufacturing workforce such as Germany and Italy.⁹

Moreover, the average European worker with tertiary education was comparatively shielded from dismissals in this as in previous crises, but this was not the case for women in some Baltic and Mediterranean countries. In Estonia and Latvia, as well as in Italy and France, it was less-educated women who suffered lower employment losses, overall.

If we go back to unemployment, furthermore, the gender gap repeatedly reversed at European level, as noted, but this obscures the fact there are still 15 countries where unemployment remains higher for women. The number of these countries is likely to increase with the first signs of a consistent recovery, since female unemployment has always been relatively ‘sticky’.

Above all, the crisis is still evolving and the final account of the toll it is taking on the labour market position of men and women cannot yet be drawn.

Lesson number two: the gaps trap

In the employment domain, and elsewhere, we are accustomed to measuring progress in gender equality with the shrinking of gender gaps. The hallmark of this crisis is that practically all the principal gender gaps levelled downward – the employment and unemployment rate gaps, the pay gap, the inactivity gap, the poverty gap. Labour market outcomes are more similar for men and women now than they were before the crisis, but this is largely because everybody has become worse off, men a bit more than women.

The issue is whether such levelling downward conforms to our idea of progress in equality. In order to gauge what is actually entailed, take the case of employment. The gender gap in the employment rate (15 to 64-year-olds) went down from the 14.1 points at the pre-recession employment peak to 10.9 points in the first quarter of 2012. Prior to the recession, however, 10 Member States were above the 65 % employment rate mark for women (15 to 64-year-olds) while the number was down to six in the most recent quarter as Estonia, Latvia, the UK and Slovenia slipped below. In the vast majority of Member States, moreover, the target employment rate set by the Europe 2020 Strategy looks further away now than it did four years ago, particularly among women. And this is unlikely to advance gender equality!

Clearly, there is a problem with equating narrower gaps with more equality, which stems from the fact that gender gaps do not measure women’s disparities in some absolute sense but only relative to men. The experience of this crisis suggests that gap indicators ought to be flanked by some other indicators if we wish to assess actual progress in gender equality over time. For example, we could think of the difference between the actual female employment rate and a target value (e.g. the 2020 target of 75 % for the 20-64 years-old?) or between the actual poverty rate and a ‘tolerable’ value.

⁹ In the EU27 percentage employment losses between 2008, 2nd quarter and 2012, 1st quarter amount to -14.9 % for women and -11.6 % for men (Eurostat online database accessed October 2012; see footnote 4 for the website).

Lesson number three: women are no longer the employment buffer

For a long time female labour has been likened to a ‘buffer’, a labour reserve cushioning the cyclicity of employment demand because readily called out in times of boom and easily expelled in times of crisis. In earlier recessionary episodes (as well as earlier theorising), occupational and sectoral segregation was believed, in fact, to be all the more important for women because it countered the tendency for them to behave as employment buffers.

Another lesson to be drawn from this crisis is, in fact, that the idea of women playing the role of buffers has been conclusively refuted in Europe and elsewhere. The ‘buffers’ of this crisis are young workers on temporary and other atypical employment contracts – men and women – as well as migrant workers, the men more than the women.

Temporary employment proved disproportionately volatile as its share of total employment went up and down with the employment swings. However, the ‘downs’ were quite similar for men and women in the EU as a whole.¹⁰ Migrants also suffered disproportionately from the employment fallout, but with important differences among groups of migrants as well as between men and women. Third country migrant workers recorded the worst fallout, again men more than women, while outcomes varied across countries for mobile EU workers, i.e. European nationals working in a member country different from their own. Female mobile workers, in particular, were largely shielded from employment losses. This is an instance where occupational segregation mattered: an important component of the ‘protected’ segment of female migrants consists of workers who have migrated from Eastern to Western countries to care for the elderly, a highly feminised activity where progressive ageing has sustained demand for social care workers.

Women as a whole were spared the role of buffers not only thanks to a comparatively favourable distribution across sectors and occupations, but also because they resisted exiting the labour market or decided to enter it afresh despite adverse demand conditions.

Over the past decades women have consolidated their income role within the family to a point of no-return: dual earner couples currently account for the overwhelming majority of all European couples with at least one earning member (69 % in 2009, the latest figure available). A notable development of this crisis is that dual earner couples lost considerable ground (-5.1 % share) early on in the recession (2008 and 2009), but this was almost entirely compensated for by the increase in female breadwinner couples.

It is still unclear how much of this shift in favour of female breadwinner couples was due to partnered women entering the labour market in order to offset the loss of employment of their male companion, or, more simply to the fact that several men lost their jobs while their female partners did not. What matters is that either possibility tells a story in no uncertain terms, namely that women’s income role is in transition from the traditional condition of being secondary or marginal to the more recent condition when women are co-primary earners, and the crisis has accelerated this transition.

Women’s attachment to the labour market in this crisis is also signalled by the behaviour of so-called ‘discouraged workers’ and ‘involuntary part-timers’. Discouraged workers are those who quit the labour market out of the conviction that they cannot find suitable employment. Women continue to make up the majority of all discouraged workers at EU level, but in percentage terms the share of discouraged workers over the inactive population has gone up somewhat more among male workers between 2008 and 2011 (+2.0 % against +1.2 %).

Involuntary part-timers are those who accept shorter hours because no full-time job is available or because cutting hours is the only option to preserve their job. Involuntary part-time shot up among both men and women as a result of the crisis. Again, the percentage increase was higher for men, although the absolute increase was much larger among women (almost twice the size) given the current gender imbalance in part-time work.

¹⁰ Among men the share of temporary contracts went down from 13.7 % at the employment peak to 12.5 %; among women the recorded decrease was from 15.2 % to 14.1 % (note that a declining share implies a higher fallout for temporary workers in comparison to the average worker).

Lesson number four: entitlements in need of revision

In times of crises, workers' rights are more easily restricted. The specific warning that this crisis issues, however, is that entitlement to certain rights is becoming increasingly problematic for all young employees, and for young women in particular.

Working conditions have reportedly deteriorated in many respects for men and women alike. The list includes delays in wage payments, occupational downgrading, violations of health and safety regulations or (normal) working schedules and trade union rights, pressure and harassment at work, and downright discrimination.

Overall, there is no conclusive, objective evidence showing which of male or female workers were the most frequent targets of such restrictions, although such evidence may be available for individual countries or for specific allegations. Some systematic evidence only exists for subjective complaints about four broad aspects of working conditions: reduced hours, increased job insecurity, cuts in pay and having to accept less interesting work. According to the results of the recent European Social Survey on working conditions, men voiced complaints more frequently in all but one respect, viz. reduced hours,¹¹ which may reflect a higher incidence of employment losses on their part rather than indicating more frequent exposure to rights infringements.

Specific instances of infringements concern pregnant women and mothers of young children. Restrictions on the right of pregnant women to maternity leave or benefits or to resume their job after maternity, are documented (or believed) to have risen in the wake of the crisis in at least four countries (Greece, Portugal, Italy and the Czech Republic). These instances are worrying not only *per se*, but also for the repercussions they are likely to have on fertility.¹²

While reduction or infringement of acquired parental rights is serious, young women in atypical employment (and some young men) are being faced with limited or no entitlement to maternity and parental rights from the start. Take maternity leave and benefits. For wage earners, eligibility is typically conditional on a minimum number of days or months spent in employment or on a minimum level of contributions, e.g. 200 working days during the previous two years in Greece. In some countries failure to meet standard requirements leads to considerably lower benefits. Depending on the country, moreover, the self-employed may not be eligible at all to maternity benefits, e.g. in Germany, and the same holds for the *stagiaires* in Italy where the *stage* is not considered a labour-type contract. In fact, even a cursory look at the annual review of leave arrangements in Europe reveals an amazing variety of eligibility requirements across labour contracts and European countries.¹³ This was perhaps tolerable when non-standard forms of employment were fewer and spread out across the entire employment population, but it has grown into a major issue as a result of the sizeable concentration of non-standard employment among young men and women in their family formation years. While the issue pre-dates the crisis, it has been amplified by the use of workers on non-standard contracts as recession buffers, temporary workers in particular. In Italy, for example, only 9 % of women on compulsory maternity leave benefits were on temporary contracts in 2010 against 91 % on standard contracts; yet the share of temporary employees in total wage employment was over 25 % for women aged 15-34.¹⁴

With firms driven to resorting to spurious or irregular employment contracts (such as *stages*), with heightened risks of longer spells of inactivity between one temporary contract and the next, with the increase of self-employment as a temporary survival option, the probability for a young woman not to meet the minimum requirements for eligibility to full

¹¹ See Bettio et al., footnote * above, box 1.4.

¹² T. Sobotka, V. Skirbekk & D. Philipov 'Economic Recession and Fertility in the Developed World. A Literature Review', report prepared for Directorate-General 'Employment, Social Affairs and Equal Opportunities', Unit E1 – Social and Demographic Analysis, European Commission 2010.

¹³ P. Moss (ed.) *International Review of Leave Policies and Related Research 2012*, International Network on Leave Policies and Research, University of Bristol 2012.

¹⁴ Based on Istat figures, online data base: <http://www.istat.it/it/lavoro> (accessed October 2012).

maternity benefits has greatly increased during this recession. The same holds for young men on non-standard contracts with respect to parental or paternity leave benefits.

The crisis has revealed the urgency of this problem rather than offering solutions, but there are several policy options to be considered. A promising one is universal maternity and parental benefits (where they are not enforced yet), though an important shortcoming is the amount of resources this option demands. An additional and less costly remedy is more flexibility in access to and use of maternal and parental rights. What we cannot afford any longer is to ignore the problem altogether.

Lesson number five: risks of a two-tier gender equality regime for Europe – the unintended consequences of fiscal consolidation

In the first two years of the crisis, European Governments intervened on an unprecedented scale in order first to salvage banks, then to stimulate the economy.¹⁵ The flip side of this massive injection of public resources into European economies is the introduction of fiscal consolidation measures of equally unprecedented proportions geared towards reducing Government debts and deficits. Such measures have primarily targeted expenditure on public employment (number of employees and wages), pensions and welfare benefits and services. The downsizing of benefits and services is expected to have an adverse, though indirect, impact on female employment by limiting options for reconciliation of work and family life. Retrenchment of public administration and welfare activities is expected to have a direct negative effect on female employment given disproportionate representation in these areas.

What we've learnt so far about fiscal consolidation is that fears of a strong and generalised adverse impact on female employment or gender equality may have been partially misplaced, but austerity measures threaten to consolidate a two-tiered gender equality regime in Europe along a traditional North–South divide.

On the one hand, awareness of the negative welfare implications of fiscal consolidation may have helped in keeping public attention focused on such a threat, with the results that retrenchment in welfare provisions in the first years of the crisis was contained, albeit uneven. As the crisis progressed, however, fiscal consolidation took on different proportions in different countries, with the so-called PIIGS countries (Portugal, Ireland, Italy, Greece and Spain) enforcing cuts in current public expenditure of unprecedented proportions while also considerably restricting future access to benefits, e.g. via pension reforms. Most of these countries are still lagging behind in terms of female employment and gender equality indicators.

In particular and according to the reports from the national experts of the EGGSI network, up until 2010 the general trend has been for countries to preserve the provision of services relatively more than cash benefit schemes, though this is a broad generalisation that does not consistently reflect developments in all countries.¹⁶

Education and training appear to have been less affected by budget cuts, in line with the objective of exiting the crisis by means of a smarter growth trajectory that prioritises knowledge and information. National strategies during the crisis have also focused on extending pre-school and out-of-school programmes. These schemes are especially advantageous for children but they are no less important for the parents caring for them.

Hard evidence on these early trends in welfare provisions and services is not readily available except for childcare services for toddlers (up to three years old) and for pre-school children (three to five/six years old). The latest available information does not go beyond 2010 and indicates that the share of children *not* covered by any formal childcare arrangements in both age groups has hardly changed since 2008 in the EU as a whole. For the

¹⁵ The financial aid that was actually used from the onset of the crisis until 2010 amounted to between 4 % and 13.1 % of GDP, depending on whether financial guarantees are included. But even if we confine our attention solely to capital injections, relief of impaired assets, liquidity and bank funding, aid actually disbursed reached about 4 % of GDP. As to the European Economic Recovery Plan, it was initially estimated to amount to some 2 % of GDP on average in the EU for the period 2009–2010.

¹⁶ See Bettio et al., footnote * above, chapters 5 and 6 for details.

youngest age group, however, coverage worsened in several countries in the two years of the deepest recession (2009-2010) compared with the two preceding years (2007-2008). Belgium, Bulgaria, Greece, Italy, Lithuania, Romania and Spain are part of this group, suggesting that either the severity of the recession (Lithuania, Romania) or the severity of budget cuts, or both (Greece, Italy, Spain) played some role in the erosion of coverage.¹⁷

We know much less about developments after 2010. Some evidence was gathered by national experts of the EGGE network about the very latest developments in six countries where the process of fiscal consolidation started sufficiently early or is sufficiently pronounced to have already shown up in some statistics (or where the process is being better monitored): Greece, Ireland, Latvia, the Netherlands, Finland and Spain.¹⁸

Evidence from the countries with relatively limited fiscal consolidation programmes (the Netherlands and Finland) or those where the most severe contraction of public finances occurred early on (Latvia) assuages some of our worst fears. In Finland, the austerity policy did not foreclose the introduction of a guaranteed pension threshold to safeguard the livelihood of those living on the smallest pension incomes, and there has been a consistent effort not to widen income inequality. The long-term impact remains uncertain, however, and also hides specific risks for (older) women, due, for example, to higher prices for medicines and health insurance. In Latvia, the scale of the consolidation packages is impressive, and despite a continuing recovery since late 2009, pre-recession income and employment levels have not been regained yet. According to a recent simulation exercise, however, the distributional effects of the rise in direct taxation and cuts in social transfers were quite progressive, which bodes well for gender fairness. At the same time rises in indirect taxation (VAT) are not included in the simulation exercise, nor are many other consolidation measures. One clear outcome in Latvia has been a new wave of migration out of the country, which might be affecting women as much as men. In the Netherlands, some of the planned consolidation measures have been repealed. Also, the Government estimates a modest fall in the use of childcare facilities despite rising fees, while female labour market participation has continued to grow. Moreover, the short-run loss of purchasing power on the back of austerity measures is expected to be modest, with likely mixed gender effects, for example with double-income households being relatively spared but sole breadwinners (mostly male) being among the worst hit. Nothing is known, however, about the medium and long-term consequences, which may be more severe.

The developments in Ireland, Spain and Greece stand in contrast to this picture. In Ireland, for example, where the rise in poverty is arguably the most dramatic social concern, a survey carried out by the think tank Social Change has revealed that single parents and children have experienced the most adverse effects in term of loss of gross income. In both these cases, women may be especially affected, though for different reasons. In Greece, austerity carried with it an allegedly limited *direct* effect on poverty and income distribution, reflecting the progressive design of the first wave of measures. However, poverty statistics reportedly underestimate gender differences, and the crisis may be widening pay and pension gaps. In a country where the average pension income for elderly women (in receipt of a pension) exceeded the poverty line by a mere 20 % in 2009,¹⁹ pensions were subjected to cuts on *nine* separate occasions, while a tenth was discussed in the summer of 2012. In Spain, female employment fell both in terms of quantity and quality, the equality machinery was downsized and downgraded, and family carers (a highly feminised group) as well as the elderly as a whole (again quite feminised) are likely to be the major losers from the overhaul

¹⁷ Eurostat online database (series *ilc_ca*; accessed October 2012, see footnote 4 for the website). It should be noted that the share of children not covered by any arrangement is not a very stable indicator at single country level. This is why two years average figures are used to gauge developments during the crisis in each country. Malta, Poland and the UK are not included among the countries witnessing a worsening of the situation for a similar reason: the average share of children not covered increased in these countries too between 2007/8 and 2009/10, but this could be due to measurement errors rather than actual developments.

¹⁸ For sources and further details see Bettio et al., footnote * above, chapter 4.

¹⁹ Ongoing research by the ENEGE on behalf of the Gender Equality Unit, EC Justice Division.

of the long-term care system. However, there are no clear statistics or studies that can disentangle the specific part that fiscal consolidation has had in all this.

These findings for the six countries surveyed – and in particular the evidence of a divide between Finland, the Netherlands and Latvia on the one hand and Ireland, Spain and Greece on the other – point to a larger divide in the Eurozone with, for example, Italy or Portugal belonging in the second group and Austria, Germany and some other countries belonging in the first group. The problem with such a divide is that the countries where the prospects of gender equality being rolled back are more concrete are also those where gender disparities are larger. To put it bluntly, is fiscal consolidation making gender equality ‘affordable’ only in the North of Europe?

Lesson number six: gender mainstreaming or diversity management?

In recent discussions about how to approach the gender question within the European policy agenda, ‘gender mainstreaming’ increasingly features alongside ‘diversity management’ or is even subsumed under the latter. What happened during the crisis may seem to justify taking a diversity approach to policy rather than a narrower gender perspective: some groups of women paid the highest price but so did many men and many migrant workers. The strength of diversity management, however, is human resource management within organisations. Gender mainstreaming offers the advantage of relying on tools that are particularly geared to public policy interventions, with the added benefit that these tools can easily incorporate diversity. Mainstreaming should therefore have been the approach of choice in this crisis, but the opportunity was largely missed at EU central level as well as in the vast majority of European countries.

Ex-ante impact assessment in the context of the European Economic Recovery Plan (EERP) is a case in point. The EERP was a clear example of an attempt to coordinate a macroeconomic response to the crisis while relying heavily on Member States for funding, development and implementation.²⁰ Although existing guidelines require policies coordinated at the EU level to be gender mainstreamed, the EERP makes no mention of ‘gender’, ‘women’, or ‘equality’.²¹ The Commission’s Advisory Committee on Equal Opportunities for Women and Men clearly exposed the low visibility of gender in these European-level responses, as well as the need to take the gender dimension into account in current and future initiatives to tackle the crisis. But the ‘urgency’ of a response to the crisis seems to have pushed gender mainstreaming further down the priority list. For example, the prerequisite of any *ex-ante* impact assessment is to present gender-disaggregated statistics, yet many analyses and documents at European level have failed to do so.²²

The implementation of fiscal consolidation tells a not too dissimilar story, this time at country level. Two instances where some action was expected are Austria and the UK. In Austria, gender budgeting is now enshrined in the Constitution, and yet the fiscal consolidation measures announced for 2011-2014 have not benefited fully from an institutional implementation of gender budgeting, including a transparent and consistent description of their likely gender effects. The UK Government has a legal obligation to give ‘due regard’ to the gender (and other) impact of its main policies, but no gender equality impact assessment of the 2010 Emergency Budget was initially conducted. We only know of

²⁰ European Foundation for the Improvement of Living and Working Conditions ‘Global Recession – Europe’s way out’ Background paper to the 4th Foundation Forum, Dublin: European Foundation for the Improvement of Living and Working Conditions 2009.

²¹ See P. Villa & M. Smith ‘Gender Equality, Employment Policies and the Crisis in EU Member States’, EGGE Report for the European Commission, DG Employment, Social Affairs, and Equal Opportunities, Brussels 2010. Available at: <http://ec.europa.eu/social/BlobServlet?docId=5630&langId=en>, accessed 16 November 2012.

²² See, for example, J. Bradshaw & E. Mayhew ‘The Measurement of Extreme Poverty in the European Union’, report for the European Commission, DG Employment, Social Affairs, and Equal Opportunities, Brussels 2011. Available at: <http://ec.europa.eu/social/BlobServlet?docId=6462&langId=en>, accessed 16 November 2012.

a few positive examples. Gender was taken into account in the design of fiscal consolidation policy, and in assessing its impact *ex ante* in Finland where maternity, home care and childcare benefits were indexed and social benefits were increased. The Netherlands went some way towards an *ex-post* gender impact assessment by evaluating the repercussions of budget cuts on different kinds of households and activity statuses.

Perhaps the most inspiring example comes from Iceland where the crisis has been turned into an opportunity to make gender mainstreaming an integral part of 'normal' policy-making process. For the Government which took office in Iceland in May 2007, gender equality policies acquired priority in the hands of a female Minister of Social Affairs who became Prime Minister in 2009. She embedded mainstreaming into policy implementation and moved the coordination of gender equality policies from the Ministry of Social Affairs to the Prime Minister's office. The gender equality agenda is now independent of Government responses to the economic crisis, but the fact that gender equality policy had been prominent on the agenda prior to the financial collapse did indeed affect the response, in the sense that decision-makers gave gender issues more attention than before. Academic experts on gender equality were, for instance, asked to contribute to the Special Investigation Committee's report to Parliament on the causes of the 2008 banking crisis. In the follow-up, the Minister of Social Affairs and Social Security appointed a specific task force on gender equality, the Gender Equality Watch, to monitor the impact of the crisis on the situation of men and women. The Welfare Watch has also commissioned surveys and reports on the development of child protection in the period 2005-2009,²³ on local government services for children and families with children,²⁴ on children's experience and ideas about the crisis, on food donations by charity organisations,²⁵ and on issues concerning women and the crisis.²⁶

Lesson number seven: investing in social infrastructure and in women scientists

It is never too late for mainstreaming. Not only would a systematic, *ex-post* gender impact assessment of fiscal consolidation (some key areas) be very timely, but there is now a pressing need to view recovery in a gender perspective. The concluding lesson that can be drawn from the experience of the crisis is that investment in social infrastructure and in women scientists should be given priority.

Let us start from investment in social infrastructure. This is a broad term covering economic activities in sectors ranging from health care to education to social care (for the elderly, the disabled and children). Employment in social infrastructure has withstood the crisis rather well, despite the fact that many of its constituent activities are targets of fiscal consolidation. Within the broad composite sector that includes public administration, defence, health and social activities, EU27 employment (for men and women) continued to grow from the inception of the crisis up until mid 2011. It is only since then that a decrease has set in, presumably as a result of fiscal consolidation. Nevertheless, employment remains higher in 2012 than it was in 2008.²⁷

²³ H.S. Guðmundsson *Fjölgun barnaverndartilkyninga 2005-2009*. (The development of the number of recorded Child Protection Cases), Centre for Research on Child and Family Protection, University of Iceland 2009. Reykjavík, available at: http://www.velferdarraduneyti.is/media/acrobat-skjol/Fjolgun_barnaverndartilkynninga_2005-2009081209.pdf, accessed 12 November 2012.

²⁴ Ministry of Social Affairs and Social Security *Könnun velferðarvaktarinnar: Afleiðingar efnahagskreppunnar á félagsþjónustu sveitarfélaga. Samantekt úr svörum sveitarfélaganna* (Welfare Watch Survey: The impact of the crisis on social services within local governments. Summary of responses), Reykjavík, May 2009, available at <http://www.velferdarraduneyti.is/media/velferðarvakt09/11082009KonnunVelferðarvaktar.pdf>, accessed 12 November 2012.

²⁵ Social Science Research Institute 'Food donations by aid and charity organisations: A Survey into the group of recipients of food donations', University of Iceland, Reykjavík 2010.

²⁶ E. Bjarnadóttir & E. Árnadóttir *Konur í Kreppu? Samantekt á opinberum tölulegum gögnum á áhrifum efnahagshrunsins á velferð kvenna* (Women in Crisis? Summary of official statistical data on the impact of the economic collapse on the welfare of women). February 2011, available at: http://www.velferdarraduneyti.is/media/ritogskyslur2011/Konur_i_kreppu_22032011.pdf, accessed 12 November 2012.

²⁷ Eurostat online data base (series namq_nace10_e, accessed October 2012; see footnote 4 for the website).

Social infrastructure activities proved resilient during the crisis because for some of them demand cannot be easily compressed – health care – or because demand is growing and will continue to grow after the recession – social care, but also education if the challenge of a knowledge society is to be met. We know from simulations carried out at the Levy Institute that more jobs are created by public investment in social care than in the green economy or in physical infrastructure. The specific estimate for the USA is that USD 1 million spent in social care creates 23.5 social jobs against 16.7 green jobs and 11.1 physical infrastructure jobs.²⁸ In addition to creating more jobs, investment in social care favours female employment by easing and increasing options of reconciliation of work and family life.

The strategy launched by the EU at the recent ‘Jobs for Europe’ Conference²⁹ acknowledges the employment creating potential of investment in social infrastructure. Health and social care (part of) are included in the list of the three sectors that should be prioritised as drivers of employment growth in the future. Two other sectors complete the list, respectively information and communication technology (ICT) and the green economy. In both these instances many of the new jobs to be created are expected to accrue to scientists, engineers and managers.

The problems is that, owing to persisting segregation in higher education as well as in employment,³⁰ women are under-represented in both ICT and the green economy, and may therefore miss out on the future growth of good job opportunities in these areas. Some rebalancing of the presence of men and women in all the sectors with the highest employment potential should therefore be part of Europe’s employment strategy. More men should be attracted to social care or teaching, which might also improve pay and working conditions in those sectors.³¹ At the same time more women should be encouraged to enter male dominated scientific disciplines. We all know that desegregation of college curricula cannot bear fruit immediately. In the meantime we need to think of ways to prevent female employment from being largely excluded from the expansion of highly qualified jobs in science intensive and managerial areas.

Conclusion

After four years of nearly uninterrupted recession and with no firm recovery in sight, the old and repeatedly heard adage that crises are times of challenges but also of opportunities may no longer sound inspiring. The seven lessons that have been learned here from the experience of this crisis are more about risks which have materialised than about opportunities which have been seized. Yet important opportunities can still be reaped. For their part, women have already seized the opportunity to signal that they are increasingly ‘core’ workers and main breadwinners despite overall employment retrenchment. This calls for revision of those fiscal and welfare provisions that are functional to the male breadwinner or the one-and-a-half breadwinner models. Young women (and men) are paying a high price in this crisis but their experience has highlighted the opportunity to redesign work and parenting rights in order to fit a much more ‘fluid’ labour market. Gender mainstreaming of public spending was often an empty concept in this crisis but the very resilience of the social infrastructure sector has shown that investing in social infrastructure can drive growth while also enhancing gender equality. Now it is up to European policy and the European Member States to seize these opportunities.

²⁸ R. Antonopoulos, K. Kim, T. Masterson & A. Zacharias ‘Why President Obama Should Care about “Care”’, *Public Policy Brief* No. 108A, Bard College, Levy Institute 2010 (Figure 1).

²⁹ http://ec.europa.eu/commission_2010-2014/andor/headlines/news/2012/09/20120906_en.htm, accessed 12 November 2012.

³⁰ F. Bettio & A. Verashchagina ‘Gender Segregation in the Labour Market: Root Causes, Implications and Policy Responses in the EU’, Luxembourg, Publications Office of the European Union 2009. Available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-2, accessed 12 November 2012.

³¹ C. Fagan & E. Norman ‘Men and Gender Equality: Tackling Gender Segregation in Family Roles and in Social Care Jobs’ in F. Bettio, J. Plantenga & M. Smith *Equality Within Reach? Updating Women’s Labour Market Position in The EU*, Routledge Economics 2012.

Economic Crisis, Austerity and Gender Equality – The UK Case

*Hazel Conley**

Introduction

This article examines how global economic crises impact on gender equality and what role equality legislation has in reducing disproportionate impact. An understanding of these issues can only be reached by analysing the relationship between the political response to crisis and how far it is influenced by legislation at the national level. A detailed analysis of the UK case is used to illustrate this point. The UK case offers a particularly sharp reminder of the relationship between politics and equality law, not least because of the timing of the passage of the Equality Act (EqA) 2010 in April of that year and the change of Government less than a month afterwards. The outgoing Labour administration was responsible for drafting the EqA whilst the incoming Conservative-led coalition Government had opposed much of the Act on its passage through Parliament. All of this happened as the enormity of the global economic crisis was beginning to unfold, forming the backdrop against which both economic policy and the implementation of the EqA has proceeded.

It could be argued that the UK is not a good European example because its position outside the Eurozone has meant that the experience of economic crisis is somewhat different from those Member States that are members of the Eurozone. However the UK response, one that largely rests on massive cuts to public expenditure, is an exemplar of the IMF position on the response to economic crisis followed by the leading EU Member States within the Eurozone. In this respect the UK case still offers a useful indicator of the likely impact on gender equality to other EU Member States embarking upon public spending austerity measures.

The article firstly examines how the UK coalition Government has positioned its response to the economic crisis in a way that has justified its contention that drastic cuts to public spending are austerity measures necessary to secure economic recovery. Secondly, the article reports on evidence that identifies how women, particularly vulnerable and low income women, have been disproportionately affected by the Government's austerity measures. Lastly the article examines provisions in the EqA that could have offered women in the UK protection and why the Government's treatment of the Act means that this protection is substantially weakened.

The UK coalition Government response to the economic crisis

The general election in May 2010 resulted in the formation of a coalition Government after no single party gained sufficient seats to form a majority Government. In the aftermath of the banking crisis, the new Conservative/Liberal Democrat coalition developed a political zeal for economic austerity that has been unrelenting since it took office. Most of the austerity measures have involved cuts to public spending but these have been accompanied by measures to further liberalise labour markets and by changes to the taxation system. The requirement to make these cuts has largely been framed in terms of the profligacy of the previous Labour Government rather than as a result of massive Government spending required to essentially nationalise three of the nation's high street banks following the 2008 economic crisis. This position, whether one supports it or not, means that the response to the crisis is logically viewed as the need to drastically and permanently reduce the public sector

* Dr. Hazel Conley works at the Centre for Research in Equality and Diversity, Queen Mary, University of London.

net cash requirement.¹ The UK Government is not alone in this stance. It is the default position of the IMF for all Nation States facing economic crisis and seeking IMF support.

Although not seeking IMF support, the new coalition Government acted quickly in this direction. Ninety days into the administration of the new Government, the Treasury produced an emergency budget that included average cuts of 25 % to the budgets of Government departments. Cuts of this magnitude could only be met by cuts to public services and the subsequent loss of jobs in the public sector. In November 2011 the newly created Office for Budget Responsibility (OBR) upwardly revised the figure for job losses by 77 % to 710 000 by 2017. In March 2012 it increased this by a further 30 000.²

The Government position is that growth in the private sector will compensate for the loss of public sector jobs. For those who remain employed in the public sector the 2010 emergency budget included a two-year public sector pay freeze for workers earning more than GBP 21 000 (EUR 26 000) with a flat rate pay increase of GBP 250 (EUR 300) for those earning less than GBP 21 000 (EUR 26 000) in each of the two years. There have also been changes to most public sector pension schemes meaning that the majority of public sector workers will have to pay more and work for longer before drawing their pensions. In addition to the direct impact of these measures on public sector employees reductions have been made to benefit payments; in particular, child welfare benefits were frozen, Sure Start maternity grants³ limited to one child, and child tax credits significantly reduced. There are also plans to change the way in which the state pension is calculated and an increase in the age at which it will be paid.

Further measures were announced in the 2011 Budget and the accompanying ‘Plan for Growth’⁴ policy document. The Government’s position is that economic recovery and competitiveness can only be achieved by having a lower tax and regulatory burden on business. The budgetary measures largely focussed on tax reform for businesses whilst the ‘Plan for Growth’, amongst other things, announced changes to the EqA that would scrap provisions for dual discrimination and third party harassment that it claimed would cost businesses over GBP 350 million (EUR 437 million) per year.⁵ Further changes are also planned to the EqA under the Government’s ‘Red Tape Challenge’, the name given to the review of regulation thought to increase burdens on business. In particular the Government has brought forward its plans to review the Public Sector Equality Duty and continue with its programme of retrenchment of the size, role and budget of the Equalities and Human Rights Commission (EHRC).

Since the 2011 budget the pay increases for public sector workers have been limited to 1 %, well below the level of inflation, for another two years. Given the prominence of the public sector for women’s employment in the UK, these measures make it likely that the gender pay gap will begin to open further. In relation to the provision of social benefit payments, there are controversial new plans to overhaul welfare payments in the Welfare Reform Act which, it has been argued, are further cuts to public spending disguised as progressive social policy reforms.

¹ ‘The public sector net cash requirement (PSNCR)... represents the public sector’s need to raise cash through e.g. issuing gilts or running down liquid assets. Before 1998, this cash based-measure had been called the Public Sector Borrowing Requirement (PSBR) but was renamed as the Public Sector Net Cash Requirement (PSNCR) in 1998 to avoid confusion with public sector net borrowing (PSNB).’ Office for National Statistics *Monthly Statistics on Public Sector Finances: a Methodological Guide* August 2012 p. 4. Available at: <http://www.ons.gov.uk/ons/guide-method/method-quality/specific/economy/public-sector-finances/monthly-statistics-on-public-sector-finances--a-methodological-guide.pdf> accessed 6 November 2012.

² Office for Budget Responsibility ‘Economic and Fiscal Outlook’ March 2012 available at: <http://budgetresponsibility.independent.gov.uk/category/publications/>, accessed 6 November 2012.

³ A one-off payment of EUR 624 (GBP 500) for expectant mothers in receipt of specific welfare benefits.

⁴ HM Treasury (2011) ‘Plan for Growth’ available at: http://cdn.hm-treasury.gov.uk/2011budget_growth.pdf, accessed 6 November 2012.

⁵ Ibid. p.7.

Why does this response have a particular impact on women?

The measures above are not an exhaustive list of the economic and social policy response of the coalition Government to the economic crisis. They have been selected as the main examples of the Government's response to the crisis that have a particular gender impact. Individually, they may not seem to have a major impact on the lives of women in the UK but collectively they form a 'pincer movement' that hits at the core of improvements in gender equality developed since the post-war settlement and the modern welfare state in the UK.

A key plank of second wave feminism is the central position of the state both in terms of women's subjugation in the home, the private sphere, and to their access to the public sphere. Much of the fight for improvements in women's lives during this period took place within and around the role of the state and the provision of public services. Women's equality depends on the provision of Government-funded public services that not only provide a major source of work for women but crucially allow them to engage in the public sphere more broadly. State-funded public services are important to changing gender relations because they free women from unpaid care in the family, provide substantial opportunities for paid caring work and provide safer environments for women to work and live in. However, the state as legislator and even as the provider of welfare can reinforce social and institutional structures that discriminate against women, if a commitment to equality is missing, is lost or is conceptualised in superficial ways that do not acknowledge the historical compromise between women's unpaid labour in the home and their often undervalued labour in the public sphere. For these reasons a gender sensitive analysis is critical when changes are planned to public services or welfare provision.

Ideally, one would hope that the 21st Century state apparatus in one of the most developed economies in the world would reflect on the impact of its policies on a group that makes up half of its citizens i.e. women. Indeed, in the UK, there exists a statutory requirement for it to do so, in the form of the Gender Equality Duty introduced prior to the EqA and the Public Sector Equality Duty which replaced it. Despite this, the most thorough gender analyses of the budget proposal have come from external bodies. The Women's Budget Group (WBG), an independent organisation of feminist academics and activists, have provided the most consistent and detailed gender analysis of the effects of the Government's austerity measures.⁶ Their findings are that much of the economic and social policy put in place to deal with the crisis is having a disproportionate impact on women and in particular the poorest women in the UK. Following their gender impact analysis of the 2010 emergency budget they concluded:

We have examined these and other budget measures and our verdict is that while the budget has a few individual measures that help to offset gender inequality, such as the exemption of low income workers from the public sector pay freeze, the budget taken as a whole is unfair in its impact on women as compared to men. The budget, together with likely changes in the welfare system, seems more supportive of an out-dated 'male breadwinner, dependent female carer' model of relations between women and men, than an egalitarian 'dual earner, dual carer' model. It runs the risk of fostering, in the long run, a fall in women's participation in the labour market, and the loss of the talents of many women to the economy. If the amount women get from earnings falls, this will trigger increases in the cost of tax relief and/or means-tested tax credits and benefits, increasing the budget deficit. Low income mothers, who are the managers and shock-absorbers of poverty, will be among the main losers. Women from black and minority ethnic groups will be particularly hard hit, as 40 per cent of them live in poor households. Despite a valuable increase in child tax credits for families on low incomes, the fall in the real value of child benefit, abolition of the health in pregnancy grant, and restriction of Sure Start maternity grant to the first child, the cuts in housing benefit, the fall in the real value of

⁶ Full details can be found at: <http://www.wbg.org.uk/>, accessed 12 November 2012.

benefits due the change in the basis on which they are uprated, and the forthcoming cuts in public services will hit these women hard for the foreseeable future. All this will also be harmful to their children.

They have made similar criticisms of the 2011 budget and the raft of measures to reduce public spending that have been introduced outside the annual budget announcements. Following their analysis of the 2011 autumn statement by HM Treasury, the WBG found that women's unemployment in the UK was at its highest level for 23 years, standing at 7.5 %. They argue that jobs being created in the private sector are likely to be taken by men whilst the jobs lost in the public sector are likely to be women's. This is supported by research conducted by the GMB union, which has identified that in 20 local authorities 100 % of the jobs lost since 2010 belonged to women.⁷ Many of these are likely to be as a result of redundancies following budget cuts passed down to local government. However, the WBG also note that the pay freeze in the public sector coupled with the rising costs of childcare in the UK, already the most expensive in the world, will mean that work will simply not pay for many low income mothers with young children, some of whom will be forced to leave paid work. They also note that women pensioners often provide unpaid childcare to their working daughters. Therefore any increases in pension ages are also likely to have knock-on effects as grandmothers will be less available to provide childcare.

Cuts to public services also have a disproportionate effect on women as users of public services wherever they work and sometimes particularly if they don't work. Worryingly, the evidence is that the UK is becoming less safe for women. Towers and Walby (2012)⁸ and the False Economy Project⁹ have collected data on which public services are being affected by cuts to public spending. They estimate that 31 % of the funding to services dealing with domestic violence and sexual abuse has been lost between 2010 and 2012. This has inevitably meant that there are fewer refuge places available and there has been a loss of expert help available to women suffering the effects of gender related violence. Women's Aid, one of the largest UK agencies providing refuge for women in abusive relationships, have warned that planned changes in the Welfare Reform Act will have serious implications for their ability to provide support.¹⁰

The cumulative effect of the austerity programme and its disproportionate impact on women means that the UK has seen a deterioration in women's equality that the Fawcett Society, an organisation which has campaigned for women's rights since 1866 and the women's suffrage movement, claims is turning back the clock for women in the UK.¹¹ In a comprehensive overview of the impact of the UK Government's austerity measures on women, the Society argues that the gaps created in public service provision are reverting to being met by women's unpaid labour in the home at the same time as their financial independence is being reduced by pension and welfare reforms.

Can the Equality Act 2010 protect women?

The growing research evidence of the disproportionate impact of austerity measures on women is particularly disappointing following the recent advances that have been made in gender equality legislation in the UK. In 2007 the introduction of the Gender Equality Duty was hailed by the Equality Opportunities Commission as the biggest advance in women's

⁷ http://www.gmb.org.uk/newsroom/other_news/women_hit_by_job_cuts.aspx, accessed 6 November 2012.

⁸ J. Towers & S. Walby. 'Measuring the impact of cuts in public expenditure on the provision of services to prevent violence against women and girls' Report for the Northern Rock Foundation and Trust for London 2012 available at: <http://www.nr-foundation.org.uk/resources/publications/domestic-abuse-research-reports/>, accessed 6 November 2012.

⁹ <http://falseeconomy.org.uk/>, accessed 6 November 2012.

¹⁰ <http://www.womensaid.org.uk/domestic-violence-articles.asp?itemid=2864&itemTitle=Urgent+call+to+action+-+due+to+proposed+changes+to+housing+benefit+and+universal+credit§ion=00010001002200210002§ionTitle=Articles%3A+refuges>, accessed 6 November 2012.

¹¹ Fawcett Society *The Impact of Austerity on Women* 2012 available at: <http://fawcettsociety.org.uk/index.asp?PageID=1208>, accessed 6 November 2012.

equality since the 1970s.¹² The Gender Equality Duty placed a statutory duty on all public authorities, when carrying out their functions, to have due regard to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity between women and men. The Duty applied to policy-making, service provision, employment matters, and in relation to enforcement or any statutory discretion and decision-making. It also applied to a public authority in relation to services and functions which were contracted out and to private and voluntary bodies which carried out public functions, but only in respect of those functions.

The Gender Equality Duty was the third of three public sector equality duties enacted in the UK between 2001 and 2007, the other two covering race and disability. These three duties have been merged and extended to cover age, sexual orientation, religion and belief and pregnancy/maternity and now form section 149 of the EqA. The equality duties and the single equality duty that replaces them are proactive measures requiring institutional change rather than providing individual restitution.¹³ Because they cover both the service provision and employment role of public authorities, they cover women and men both as public employees and as public service users. The EqA was itself intended to be a consolidation and rationalisation of the UK equality legislation, which also contained a number of innovations.¹⁴ Some of these innovations, for example provision to introduce protection from combined discrimination (s.14) and the requirement to publish gender pay gap information (s.78) were intended to broaden and strengthen the gender equality legislation. Unfortunately both of these innovations, along with others in the EqA, required secondary legislation that the coalition Government has decided not to proceed with.

Prior to its incorporation into a generic public sector equality duty in the EqA, the Gender Equality Duty gave us a tantalising glimpse of how equality legislation could provide a powerful restraint on disproportionate gender impact of Government austerity measures. Six weeks after the coalition Government announced its 2010 emergency budget the Fawcett Society launched a legal challenge using the gender equality duty.¹⁵ Its claim was that the Government had failed to conduct a gender equality impact assessment on the measures contained in the emergency budget and had failed to demonstrate ‘due regard’ required by the legislation. It therefore sought a judicial review. The Fawcett Society was eventually given a permission hearing in December 2010 but was unsuccessful in taking its claim to full judicial review. The decision not to allow the case to proceed was particularly frustrating because, although the judge agreed that the Government’s budgetary powers were subject to the gender equality duty and that it had failed to demonstrate due regard to gender impact in some of its decisions, the emergency budget was implemented unchanged.¹⁶ The Government did appear to heed the serious nature of the Fawcett challenge and conducted a limited gender equality impact assessment of the comprehensive spending review that followed the emergency budget. However, the Women’s Budget Group research indicates that the Government’s diligence in conducting gender equality impact assessments on austerity measures since then is questionable.¹⁷

¹² EOC *Gender Equality Duty Code of Practice for England and Wales* Equal Opportunities Commission: Manchester 2006.

¹³ See S. Fredman ‘Making Equality Effective: Proactive Measures and Substantive Equality for Men and Women in the EU’, *EGELR* 2/2010 pp. 7-16, available at http://ec.europa.eu/justice/gender-equality/files/dgjustice_egelr_2010-2_final_commission_24february2011_en.pdf, accessed 6 November 2012.

¹⁴ *Discrimination Law Review A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* London, Women and Equality Unit 2007. See also C. Barnard, ‘The Equality Act 2010’ *EGELR* 1/2011 pp. 13-22, available at http://ec.europa.eu/justice/gender-equality/files/egelr_2011-1_en.pdf, accessed 6 November 2012.

¹⁵ Section 30 of the Equality Act 2006 provided that one method of enforcement of the Gender Equality Duty was to allow an interested person or group of people who believed that a public authority had not complied with the general duty to apply to the High Court for a judicial review. The Fawcett Society took its legal challenge under section 30 in its role as a voluntary sector feminist organisation

¹⁶ See H. Conley ‘Using Equality to Challenge Austerity: New Actors, Old Problems’ *Work, Employment and Society* 26 (2) (2012) pp. 353-363 for an in-depth critique.

¹⁷ See for example their report on the gender impact of the 2011 budget available at: http://www.wbg.org.uk/RRB_Reports.htm, accessed 6 November 2012.

In April 2011 the Gender Equality Duty was replaced by section 149 of the EqA. However, the legislation contains a general duty, which came into effect in April 2011 and specific duties, which contain the more precise procedural elements that require secondary legislation. The Government postponed enacting the secondary legislation required to bring the specific duties into force for England¹⁸ until April 2012 and their eventual form was much weaker than in the previous separate duties. Notably, the requirement to conduct equality impact assessments is much less evident as is the requirement to consult stakeholders, making further legal challenges to austerity measures even less likely to succeed. Even more worrying is the Government's decision to bring forward to October 2012 its review of the public sector equality duty under the 'Red Tape Challenge'. It is difficult to see how the performance of the legislation can be adequately assessed when the specific duties have been in place for less than a year. The worry is that, having successively weakened the duty and the EHRC as its main enforcement body, the Government will decide that the legislation is no longer fit for purpose.

Conclusions

The UK Government's response to the global economic crisis has been to implement austerity measures that drastically reduce public spending at a number of different levels. This has inevitably led to a loss of public services, public service employment and welfare benefits. In formulating economic and social policy in response to economic crisis there has been a failure to consider the difference between men and women's lives and the disproportionate impact public spending cuts will have as a result of these differences. There is growing evidence, only a small proportion of which is considered in this article, that women, particularly poor and vulnerable women, are bearing the brunt of austerity measures in the UK. In addition to increasing poverty amongst women, and therefore their families, it will weaken their economic independence in the future. At the same time as public services are being cut, the tax burden on business has been lightened.

The equality legislation put in place just before the full effects of the crisis were realised should have offered women protection from disproportionate impact of austerity measures. However, the UK Government has not met its responsibilities under the legislation and has then systematically dismantled many of the legislative protections that might stand between it and the implementation of its plans for austerity. Indeed, had the Gender Equality Duty still been in place, it is difficult to see how 20 local authorities could make only women employees carry the burden of job cuts. This is particularly worrying because the proactive legislation in the UK was stimulated by the realisation that institutional discrimination was endemic at senior levels in public authorities. Dismantling this legislation without a plan for replacement measures might be considered itself an act of institutional discrimination.

¹⁸ The responsibility for drafting specific duties is devolved to the Scottish Parliament and Welsh Assembly. The specific duties for Wales and Scotland differ substantially and are more far-reaching than for England.

Legal Effects of the Economic Crisis on Gender Equality in Spain: Effects on the Right to Reconciliate Work and Family after the 2012 Labour Law Reform

*María Amparo Ballester-Pastor**

The main objective of this article is to analyse the way in which the recent modifications of labour law in Spain have affected the right to reconcile work and the family life of working parents. Given that the 2012 legal reform is the point of reference for the current analysis, a summary of its contents will be presented first. A detailed analysis of the treatment of the reconciliation rights in this legal reform will then be presented.

The general scope of the 2012 Spanish legal reform in relation to gender equality

The 2012 labour law reform¹ has been considered by many to represent a reduction in the standards of Spanish labour law² and, consequently, an increase in the employer's prerogatives. The main content of the 2012 legal reform could be summarised as follows:

1. the new legislation has decreased the amount that the employer has to pay for unfair dismissal, from 45 days of salary per year of work, with a maximum of 42 months of payment, to 33 days of salary per year of work, with a maximum of 24 months of payment;³
2. the procedure for collective lay offs has been simplified since the administrative authorisation that was required before has been eliminated. Thus, the employer can lay off workers in the company after a consultation period with the employees' representatives. In other words, the administrative intervention in the procedure is reduced to the case of fraud or abuse of law or when required for both parties.⁴ The reasons that an employer can use to lay off workers have also been increased in the 2012 legal reform, since, in addition to the reasons previously permitted (for economical,

* María Amparo Ballester-Pastor is Senior Professor of Labour Law at the Faculty of Law in the University of Valencia (Spain).

¹ Law 3/2012, 6 July 2012, of Urgent Measures for the Reform of the Labour Market (*Ley 3/2012 de 6 de Julio de medidas urgentes para la reforma del Mercado de trabajo*), (the text of the reform can be found in <http://www.boe.es/boe/dias/2012/07/07/pdfs/BOE-A-2012-9110.pdf> accessed 11 November 2012). The international press has reflected the relevance of the 2012 Labour Law reform in Spain. For instance, 'Labour reform in Spain. Spanish practices. A change that is maybe more radical than it seems at first', *The Economist*, 28 July 2012; or Sarah Morris, 'Hire-and-fire Labour law changes won't ease Spain's employment crisis', *The Guardian*, 14 March 2012. In Spanish legal doctrine there have been many studies on the 2012 legal reform. Law 3/2012 is the Parliamentary validation of the Royal Decree 3/2012, of 20 February 2012, which is considered the starting point of the reform. Some changes were made in Law 3/2012 in relation to RD 3/2012, although they were of minor relevance. Law 3/2012 has been the object of an appeal directed to the Spanish Constitutional Tribunal (*recurso de inconstitucionalidad*) that has been presented by several Parliamentary parties on 4 October 2012 (the text of the appeal is in <http://www.laboral-social.com/files-laboral/recurso-inconst-ley%203-2012.pdf> accessed 11 November 2012). As well, there have been several objections (*cuestiones de inconstitucionalidad*) brought up by various judges concerning law 3/2012, asking the Constitutional Tribunal to confirm that the legal reform is within the bounds of the Spanish Constitution (the first of them can be found in http://www.laboral-social.com/files-laboral/auto-cuest-inconst_0.pdf, accessed 11 November 2012). Thus the validity of the legal reform is dependent on confirmation by the Constitutional Tribunal, whose average time for resolving objections and appeals is six years. In the meantime, the 2012 legal reform will be fully applicable.

² Palomeque López, 'La versión política 2012 de la reforma laboral permanente. La afectación del equilibrio del modelo laboral', García-Perrote Escartin & Mercader Uguina (eds), *Reforma Laboral 2012*, Ed. Lex Nova, 2012, p. 31. Falguera Baró, 'El RD Ley 3/2012: más ideología que empleo', *Jurisdicción Social*, 117, 2012, p. 5.

³ Article 56 Statute of Rights for Spanish Workers, approved by the Royal Legislative Decree 1/1995 (*Estatuto de los Trabajadores*) wording given by Law 3/2012. Complete and updated text of the Statute of Rights for Spanish Workers in http://noticias.juridicas.com/base_datos/Laboral/l3-2012.html#a4, accessed 11 November 2012.

⁴ Article 51.2 Statute of Rights for Spanish Workers.

- technical and organisational reasons), it is now possible to lay off workers when the company has had a reduction of income or of sales during the preceding quarter of the year as compared with the same quarter of the year before;⁵
3. a new type of labour contract has been introduced, called the *contrato de emprendedores* (literally, the contract for entrepreneurs), whose main feature is its one year probationary period. This contract is directed to companies with fewer than 50 workers. There are certain requirements but if the employer fulfils them, a diminution in the employer's contribution to social security payments and a tax reduction can be obtained;⁶
 4. the 2012 legal reform has given preference to the company level over the activity sector collective agreements and it has introduced the possibility that certain aspects of a specific-sector collective agreement (including working time and salaries) might not be applied at company level if the employer alleges economical, technical or organisational reasons. When the change asked for by the employer is not accepted by the employees' representative in the company, a compulsory arbitration procedure will take place;⁷
 5. the ordinary organisational employers' prerogatives have been increased, basically in terms of internal flexibility⁸ in situations of company crisis (e.g. the temporary suspension of a contract does not require administrative authorisation anymore).⁹ The ordinary employers' prerogatives have increased as well (e.g. there is a greater possibility of irregular distribution of working time at the employer's request after the 2012 legal reform¹⁰ – see *infra*).

The 2012 labour law reform has been the subject of intense debate in Spain. The need for a structural reform of the labour market was strongly demanded by the EU institutions but the way in which the Spanish Government decided to implement it has been considered by some to be barely effective.¹¹ It has been argued that the new law will not decrease the amount of temporary work,¹² given that the sanction for illegal temporary contracts is the same as for unfair dismissal and the cost of this has decreased after the 2012 legal reform. Besides this, the new law has created new forms of unstable labour relations, given that the yearly probationary period allowed for in the contract for entrepreneurs will probably favour the termination of one worker's contract without any compensation, in order to have him or her replaced by another worker in the same workplace.¹³ It has been said as well that there is a serious risk of increasing the unemployment rate, since the 2012 legal reform favours contract termination without cause (because it reduces the cost of unfair dismissal).¹⁴ In fact, the unemployment rate has kept increasing in Spain since the legal reform was passed.¹⁵ It is

⁵ Article 51.1 Statute of Rights for Spanish Workers.

⁶ Article 4 Law 3/2012. http://noticias.juridicas.com/base_datos/Laboral/13-2012.html#a4, accessed 11 November 2012.

⁷ Article 82.3 Statute of Rights for Spanish Workers.

⁸ See Ballester-Pastor, Lecture on 'Internal flexibility in the framework of labour relations', presented in the *National Congress of the Spanish Association of Labour Law and Social Security*, (San Sebastian, 17 and 18 May 2012), http://fundacion.usal.es/aedtss/images/stories/Ponencia_Amparo_Ballester.pdf, accessed 11 November 2012.

⁹ Article 47 Statute of Rights for Spanish Workers.

¹⁰ Article 34.2 Statute of Rights for Spanish Workers.

¹¹ Many authors have warned about the possibility that the 2012 legal reform in Spain could have counterproductive effects on the amount and quality of employment. For example, Casas Baamonde, Rodríguez Piñero y Bravo Ferrer & Valdes dal Re, 'La nueva reforma laboral', *Relaciones Laborales*, 5, 2012, p. 3.

¹² Guerrero Vizuete, 'Estabilidad en el empleo y reforma laboral: la debilitación de un principio', Communication to the *XXIII Jornades Catalanes de Dret Social*, Barcelona, 2012, p. 17 (<http://www.iuslabor.org/jornades-i-seminaris/comunicacions/any-2012/>, accessed 11 November 2012).

¹³ Falguera Baró, 'El RD Ley 3/2012: más ideología que empleo', *Jurisdicción Social*, 117, 2012, p.6; Casas Baamonde, Rodríguez Piñero y Bravo Ferrer & Valdes dal Re, 'La nueva reforma laboral', *Relaciones Laborales*, 5, 2012, p. 5

¹⁴ Preciado Domenech, 'Comentarios el RD Ley 3/2012 de 10 de Febrero de medidas urgentes para la reforma del mercado laboral', *Jurisdicción Social*, 117, 2012, p. 4.

¹⁵ The unemployment rate in Spain in October 2012 was 25.02 %, in July 2012 it was 24.63 % and in April 2012 it was 24.44 %. Data about development of employment and unemployment from first, second and third

debatable whether, after the 2012 legal reform, the quality of labour, and consequently the quality of the Spanish economy, will improve in the way that some international institutions are demanding.¹⁶ It has also been argued that the 2012 Spanish reform could be contrary to fundamental labour rights recognised by the ILO.¹⁷ For example, in relation to the new contract for entrepreneurs, by establishing a probationary period of a year it basically reproduces the abrogated French *nouvelles embauches* contract, that was considered to be contrary to ILO Convention No. 158 on termination of working contracts.¹⁸ Considering that the most precarious jobs in Spain are mostly occupied by women¹⁹ and that their salary is, on average, 21 % lower than that of men,²⁰ (which makes women more prone to be laid off, since in Spain the termination cost is calculated in relation to previous salary) it could be expected that women will be more affected by the risk of instability.

The current situation is definitely different from the one in which the Spanish Law on Effective Equality between men and women (*Ley 3/2007 para la igualdad efectiva de mujeres y hombres*) was passed on March 2007.²¹ This law brought Spanish legislation into line with European Union regulation and, by defining old concepts (e.g. direct discrimination, indirect discrimination, sexual harassment, affirmative action, etc) and introducing new strategies (e.g. equality plans by collective agreements), it established a more reliable framework for equality of rights between men and women.²² However, the legal reform of 2012 has brought a new perspective to the treatment that the Spanish legislator accords to gender discrimination; first, because the existence of gender discrimination has suddenly become invisible; and, second, because some of the classic reconciliation rights have been diminished (*infra*). Gender equality has become invisible in Spain because it no longer occupies a privileged place that requires permanent and close attention in order to provide real equality between men and women. As a consequence, concepts like *mainstreaming* are at risk of becoming ineffective. According to some indicators, the situation of Spain in relation to gender has moved backwards from 2011 to 2012.²³ Considering that the most decisive steps for correcting gender discrimination in Spain were taken very recently (the law of 2007) and that Spanish

quarters of 2012 elaborated by the National Institute of Statistics of Spain:

<http://www.ine.es/daco/daco42/daco4211/epa0312.pdf>, accessed 11 November 2012.

- ¹⁶ ILO, *World of work report 2012. Better jobs for a better economy*: http://www.ilo.org/global/research/global-reports/world-of-work/WCMS_179453/lang--nl/index.htm, accessed 6 November 2012. This ILO report refers to the relevance of maintaining the stability of the workplace and labour rights in order to ensure the conditions for a stronger economy.
- ¹⁷ Baylos Grau, 'El Estado español incumple las normas fundamentales de la OIT con la reforma laboral', <http://baylos.blogspot.com.es/2012/05/el-estado-espanol-incumple-las-normas.html>, accessed 5 August 2012.
- ¹⁸ ILO reported that the French *nouvelles embauches* contract could be contrary to Convention 158 because the long probationary period established did not guarantee that terminations would always be made with just cause in these kinds of contracts. The detailed reasons can be found in *Rapport du Directeur general. Sixième rapport supplémentaire: Rapport du comité chargé d'examiner la réclamation alléguant l'inexécution par la France des conventions (no 87) sur la liberté syndicale et la protection du droit syndical, 1948, (no 98) sur le droit d'organisation et de négociation collective, 1949, (no 111) concernant la discrimination (emploi et profession), 1958, et (no 158) sur le licenciement, 1982, présentée en vertu de l'article 24 de la Constitution de l'OIT par la Confédération générale du travail-Force ouvrière. Vingtième question à l'ordre du jour. Bureau international du travail. 300 session. Genève, Novembre 2007*: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_087583.pdf, accessed 6 November 2012.
- ¹⁹ In 2011, 8 of every 10 temporary contracts were signed by women in Spain. Data from Franco & Velilla, 'Crisis se escribe en femenino', *Con la A*, March 2011, <http://numero1.conlaa.com/archivos/1003>, accessed 5 August 2012.
- ²⁰ Trade Union *Union General de Trabajadores*, *Informe sobre la Situación laboral de las mujeres*, 2011.
- ²¹ See e.g. Valdés De la Vega, 'Gender equality in private enterprises in Spain: the new equality plans', *European Gender Equality Law Review*, 2, 2010, available at http://ec.europa.eu/justice/gender-equality/files/dgjustice_egelr_2010-2_final_commission_24february2011_en.pdf, accessed 13 November 2012.
- ²² See Ballester-Pastor, 'Questions de genre: développements et perspectives en droit du travail espagnol', Auvergnon (Ed), *Genre et droit social*, Presses universitaires de Bordeaux, 2008, pp. 173-188.
- ²³ Greig, Hausmann, Tyson and Zahidi, 'The Global Gender Gap Index', report presented by World Economic Forum's (first *Global Gender Gap Report in 2006*). The report shows that the position of Spain in the ranking of states in relation to the gender gap has dropped from number 12 in 2011 to number 26 in 2012. http://www3.weforum.org/docs/GGGR12/MainChapter_GGGR12.pdf, accessed 11 November 2012.

society is far from a situation of having real equality, the new scenario created by the legal reform could be worrying generally.²⁴

However, the theme in which the 2012 labour law reform could have more pernicious effects in relation to gender equality is the one particularly related to the reconciliation of responsibilities. The recent legislation creates a new context which could be particularly hostile to workers with family responsibilities and that could mean a big step back in the situation of female workers in Spain. This is the issue to which we now turn.

The 2012 labour law reform in relation to reconciliation of responsibilities

The 2012 labour law reform introduced a new form of legislation on the subject of reconciliation of responsibilities. All the laws that were passed before on this subject had advanced, with more or less success, the recognition of rights for workers. However, the new 2012 legislation seems a step backwards. It is particularly interesting as well to note the way in which these changes have taken place, since the legislator sometimes uses contradictory concepts. For instance, the title of the chapter where most of the changes with respect to this could be found seemed to have as its objective the reconciliation of responsibilities.²⁵ However, the effect of the provisions could be exactly the opposite since they don't establish new rights for employees but basically increase employers' prerogatives, as will be described later in relation to the new Article 37.5 of the Statute of Rights for Spanish Workers (*Estatuto de los Trabajadores*). Another example can be found in the new wording given to Article 34.8 of the Statute of Rights for Spanish Workers. The general recognition of the right to reconciliation of labour and family responsibilities seems wider after the 2012 legal reform carried out in the current Article 34.8 of the Statute of Rights for Spanish Workers, although in reality the article doesn't contain any new obligation but simply a declaration of intentions in relation to the adjustment of working time for workers with family responsibilities (*infra*).

The reduction of parental rights that will be described below could have the effect of expelling people from the labour market who cannot make their various work and family responsibilities compatible with each other, depriving them of the right to require the employer to make the necessary adjustments. This would force them to leave their job, in which case the cost of the termination for the employer would be zero. Besides that, the crisis has already started to affect the birth rate in Spain,²⁶ and a social policy without sensitivity to parental needs could increase the problem. The birth rate is not currently considered a priority, but this perspective could have serious consequences in the long run for the Spanish social security system,²⁷ since the expected increase in the amount of retired people will not be able to be economically supported by a decreased work force with fewer young people to replace them in coming decades.

It should be noted as well that the new provisions about reconciliation of responsibilities established in the 2012 labour law reform have been introduced without taking into consideration the nature of the *fundamental right* that the Spanish Constitutional Tribunal had

²⁴ As to the effects of the crisis on the feminine collective, see Gill, Stephen and Roberts, 'Macroeconomics governance, gendered inequality and global crisis', in Young, Bakker and Elson (eds), *Questioning financial governance from a feminist perspective* Routledge, 2011, p. 155.

²⁵ The First Final Disposition of the Law 3/2012 (*Disposición Final Primera Ley 3/2012*) was entitled *Modifications in the matter of reconciliation of work and family life*.

²⁶ The birth rate in Spain, which is one of the lowest in the world, has been decreasing during the last decade. In 2011 it was 10.5 births per 1000 inhabitants, the lowest birth rate since 2003. The amount of newborns was 509 137 in 2009; 497 365 in 2010; and 479 676 in 2011 (Data from the National Institute of Statistics corresponding to the Natural Movement of Population, July 2012). (*Instituto Nacional de Estadística. Movimiento natural de la Población.*)

²⁷ See the effects on gender of Spanish legal reforms in labour law and social security in Ballester-Pastor 'Co-responsibility in labour reform and social security: the invisible policy', in Cabeza-Pereiro & Fernandez-Prieto (eds), *Reconciliation, Co-responsibility and Employment: Internal Experiences*, p.153 Thomson Reuters-Aranzadi, 2011

recognised previously concerning the right to reconciliation of labour and family life.²⁸ This recognition was particularly important because it meant that every time a worker alleges his/her right to reconciliation, the judge should respond to the plea by taking into consideration the various rights in conflict (basically, the employee's right to reconciliation and the employer's right to organise the labour force in the company). This interpretation of the Constitution by the Constitutional Tribunal did not mean that the right to reconciliation prevailed over the employer's right;²⁹ it only meant that both rights had to be taken into account. Certainly this is a subtle way to recognise the fundamental right to reconciliation but at least this interpretation requires the employer to give some justification for denying the employee's request for the adjustment of working time for reconciliation purposes. In this way, the doctrine of the Constitutional Tribunal implicitly recognises two kinds of rights that reconcile labour and family life:

1. the rights explicitly recognised by ordinary law, which make concrete the right to reconciliation and that serve the purpose of solving the conflict that could emerge with other rights (for example, breastfeeding leave established in Article 37.4 Statute of Rights for Spanish Workers (ET); or the right to reduced working time for parental reasons established in Article 37.5 ET);
2. and the fundamental constitutional right to reconciliation that has to be determined every time there is a conflict with the employer's right to organise the labour force of his/her company.

The 2012 labour law reform has, first, reduced the reach of the rights contained in Articles 37.4 ET and 37.5 ET, and, second, increased the employers' prerogatives without mentioning that their powers must always be subject to being balanced with the fundamental right to reconciliation. The new regulation has created an expectation for employers, who may believe that their organisational powers in the company have no limit, not even the one related to the fundamental right to reconciliation in the sense established by the Constitutional Tribunal. This gives a wrong impression to employees as well, in that they might underestimate the reach of their legal rights with respect to reconciliation.

In the following sections, the 2012 legislative changes in relation to reconciliation will be specifically described. First, an analysis of the direct repercussions of the reform in the reconciliation of responsibilities will be presented. The aim of this first part will be to describe the new provisions expressly referred to on this subject. Second, a study of the indirect repercussions of the reform in relation to reconciliation of responsibilities will be presented. It will attempt to analyse the new articles that, even though they are not directed at working parents, could have repercussions for workers with dependent family members. This section will deal with the legal changes that have increased the internal flexibility prerogatives of the employer.

Direct repercussions of the 2012 labour law reform in the reconciliation of responsibilities

The specific references that the 2012 legal reform makes to the reconciliation of responsibilities emerge in relation to the following topics: breastfeeding leave (Article 37.4 ET); the right to reduced working hours for parental reasons (Articles 37.5 and 37.6 ET); the right to keep different types of leave which take place at the same time, except for when employees are on holiday (Article 38.3 ET).

²⁸ Constitutional Tribunal Sentences 3/2007, 15 January 2007; and 26/2011, 14 March 2011. Both of them linked the right to reconcile work and family life with the right to not be discriminated against (Article 14 of Spanish Constitution); and with the right to preserve family life (Article 39 of Spanish Constitution).

²⁹ Constitutional Tribunal Sentence 24/2011, 14 March 2011.

Breastfeeding leave

In 2010, the CJEU established in the *Roca Alvarez* Case³⁰ that the so-called Spanish leave for breastfeeding was contrary to Directive 2006/54/EC, OJ L 204/23, of 5 July 2006, because, by establishing a parental leave which is preferentially for mothers, the Spanish legislation could have discriminatory effects against women. The premise for the decision was a finding that the real nature of the leave, contrary to what seemed to be the case, wasn't really working to favour breastfeeding. In fact, this leave is simply an ordinary parental leave. As is well known, in *Roca Alvarez*, the CJEU didn't consider the Spanish provision discriminatory for being against men but for being against women, given that the fact of reserving parental benefits for them could have the effect of perpetuating a traditional distribution of the roles between men and women.³¹ The 2012 labour law reform applied the *Roca Alvarez* doctrine and modified Article 37.4 ET so that now breastfeeding leave can be enjoyed under equal conditions by men and women. However, the change is not as radical as it might seem. Now, the permission for breastfeeding time still continues to be parental leave and not a causal permission to facilitate breastfeeding (as it was originally, when it was first introduced in Spanish legislation almost one century ago). It can be anticipated as well that most of those who will be applying for it will be women and not men (as happened before the 2012 legal reform). Clearly, Spanish legislation continues to avoid facing the parental leave issue with realism, which would be to substitute the outdated breastfeeding leave with more efficient parental leave that is able to facilitate real reconciliation of responsibilities through an adequate coverage of ordinary and extraordinary family situations. Certainly, it was necessary to change the Spanish legislation to accommodate it to the *Roca Alvarez* doctrine,³² but by not facing the general regeneration of the parental rights system, at the moment it has the same spirit that informed the first version of the leave. Spanish parental legislation is becoming an inefficient benefit for the employee and an expensive cost for the employer. A more reflective look at the *Roca Alvarez* doctrine should have led to Spanish legislative change that promotes the sharing of responsibilities, but instead of that, the legislative measures taken to deal with the crisis have eliminated the measures designed to promote this sharing.³³

The right to reduce working hours for parental reasons

The 2012 law reform has only very slightly altered the appearance of Article 37.5 ET that regulates the right to reduced working hours for parental reasons,³⁴ because the new article simply adds a new word 'daily' (*diario*) to the old wording. However, the change has been very important. After the reform, the unremunerated reduction of working time that can be asked for based on parental reasons has to be taken on a daily basis, which means that the article no longer allows the reduction to be made when related to longer periods of time. That means that the worker will not have the right to accumulate the daily reduction of time over a week, and apply it all to only one day of that week. The normative change gives more security to the employer since, from now on, he/she will know in advance the way in which the

³⁰ Case C-104/09 *Roca Alvarez*, [2010] ECR I-08661.

³¹ Literally, the following could be read in the sentence: 'However, to hold, as the Spanish Government submits, that only a mother whose status is that of an employed person is the holder of the right to qualify for the leave at issue in the main proceedings, whereas a father with the same status can only enjoy this right but not be the holder of it, is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.'

³² In fact, the lack of action by the last Government led to very difficult situations that Spanish jurisprudence had to solve by recognising the right to breastfeeding leave for fathers according to the doctrine established by the CJEU. For example, in the Sentence of the Superior Court of Justice of the Basque Country 4 October 2011 (*Rec 2005/2011*).

³³ The current parental leave, for instance, lasts only 13 days, which is clearly insufficient to promote the sharing of responsibilities. The increase of its duration to one month, which was planned for 2011, has been indefinitely postponed.

³⁴ A detailed analysis of the Spanish regulation on working time reduction for parental reasons in Sala Franco and Ballester Pastor, *El derecho a la reducción y a la adaptación de la jornada por conciliación de responsabilidades* Ed. Tirant lo Blanch 2009.

working reduction will take place.³⁵ However, in this way, the legislation has limited the usefulness that the mechanism could have to act as a reconciliation instrument because the situation of each family requires a different solution. In fact, the efficiency of these measurements is in direct relation to their ability to adapt to every situation.

There is another change in the ET that stands out with particular intensity because it drastically alters the way in which the right to working time reduction was designed at the beginning. The newly created Article 37.6 ET has introduced, for the first time, the possibility that collective agreements can establish the criteria for the concrete determination of working time reduction. Before the 2012 reform there was a wide and almost absolute right for employees to establish the concrete time in which they wanted to take these reductions. In this way, Spanish legislation was attempting to insure that the time reduction was fulfilling its purpose. The new legislation means that the negotiators can decide the timing in which the reduction of work time has to take effect. The effects that this new approach will probably have, over all, are likely to be serious for women, considering the traditional lack of interest that trade unions have shown in reconciliation matters. This lack of interest will probably be even more serious if they have to fight for the maintenance of older labour rights that have been progressively eroded with each of the reforms of recent years. It is clear that this change has also introduced a new perspective in the scope of the right to reconciliation: the reform intends to give the impression that the right to reconciliation is just a simple labour law provision that can be changed and directed by the action of the collective actors. However, this perspective doesn't take into account that it could be giving a false sense of security to the employers (once again), since the fundamental right to reconciliation, in the sense that has been interpreted by the Spanish Constitutional Tribunal, cannot be suppressed by collective agreements.

The maintenance of the right to holidays when it clashes with certain types of permission for leave of absence

The *Merino Gomez*³⁶ case forced a change in Spanish legislation in 2007 that, from then on, guaranteed the right of workers on maternity leave to maintain their right to yearly holidays if both of the rights happened at the same time (Article 38.3 E). As is well known, the *Merino Gomez* doctrine spread its effects to situations where sickness leave coincided with holidays, requiring the Member States to maintain both of these rights as well.³⁷ The way in which the CJEU's decision on this matter has been implemented in the 2012 legal reform is particularly interesting. On the one hand, the current Article 38.3 ET recognises the right to holidays when they clash with maternity leave (*permiso de maternidad*), paternity leave (*permiso de paternidad*) and leave due to incompatibility with pregnancy or breastfeeding (*incapacidad temporal por riesgo durante el embarazo o la lactancia*), in which case the right to holidays is maintained without any time limit. The legal reform of 2012 has added some adjustments, but basically it has left this matter the same as it was before. However, on the other hand, in relation to the coincidence of holidays and ordinary sick leave, the 2012 reform has almost exactly reproduced the terms of Case *KHG AG* that was submitted to the CJEU in 2011.³⁸ In fact, the current Article 38.3 ET establishes that the right to holidays is kept only for a period of 18 months after the end of the year in which the right arose. This was exactly the legal provision that was submitted to the CJEU in the *KHG AG* case. There are several elements that need to be highlighted in relation to this new clause. The first thing that stands out is the

³⁵ Until the 2012 labour law reform, Spanish jurisprudence had not clarified the scope of the working time reduction established in Article 37.5 ET. The Supreme Court had stated that the reduction of working time couldn't be interpreted as the right to a change of shift (Sentence of the Supreme Court 13 June 2008), but there was not a clear doctrine about the possibility of being applied in weekly terms. It was admitted by the Superior Court of Justice of the Valencian Community (Sentence of 27 September 2000, 3781/2000), but it was not accepted by the Superior Court of Justice of Andalucía in Málaga (Sentence of 22 March 2002, 582/2002).

³⁶ Case C-342/01 *Merino Gomez* [2004] ECR I-02605.

³⁷ Cases C- 350/06 and 520/06 *Schultz Hoff* [2009] ECR I-00179; Case C-277/08 *Vicente Pereda* [2009] ECR I-08045; Case C-78/11 *Anged* 21 June 2012 (not published yet).

³⁸ Case C-214/10 *KHS* 22 November 2011 (not published yet).

fact that this new law appears in the chapter of the reform dedicated to the reconciliation of labour and family responsibilities, when it is obvious that the coincidence between holidays and sick leave is not of this nature. The new legislation has decided to treat all situations in which there is a coincidence of holidays and leave to take a leave of absence together, independently of their nature, which is a legitimate and understandable legislative option. However, it has forgotten to deal with the doctrine established in the *Zentralbetriebsrat* case,³⁹ whose implementation is particularly complex since it could be required to take into account wider periods of time. In this case, the CJEU established the right of employees on parental leave to keep any time before the leave that did not originate from holidays, in order to generate the right to holidays once they returned. The lack of reference to this situation in Article 38.3 ET could have only one of the two following explanations: either the Spanish legislator did not know the CJEU doctrine established in the *Zentral* case, or, knowing it, decided to hide its repercussions in the Spanish legislation. Either of these possibilities is particularly worrying.

Indirect repercussions of the 2012 labour law reform in the reconciliation of responsibilities

The general increase in employers' prerogatives that the 2012 Spanish legal reform has produced has given rise to a series of indirect consequences on the reconciliation of responsibilities. Some examples of this phenomenon are the following.

1. The 2012 legal reform has introduced the possibility of general overtime for part-time workers even though it was expressly prohibited before. In reality, the effect of this measure will be reduced because much of the part-time work in Spain is undeclared. However, the legal change will not serve to convert the undeclared job into legal part-time work in which the participation of women in charge of dependent family members is particularly high. Spanish regulation establishes a system of overtime for part-timers called supplementary hours (*horas complementarias*), that gives the employer the right to require a part-time worker to perform an amount of extra hours up to a certain limit. There is a maximum number of supplementary hours that, in default of a collective agreement, is fixed by law. In certain conditions the obligation can be eliminated at the employee's request. The post labour law reform regulation maintains the supplementary hours for part-time workers but adds, in favour of the employer, the possibility of requiring part-time workers to do the same amount of overtime that a full-time employee would do. In theory, employees are free to accept or reject the overtime suggested by employers, but in reality, taking into consideration the current situation of the labour market in Spain, the request is usually considered to be an obligation. As a consequence, part-time workers are subjected to a system of work organisation in which they are permanently at the disposal of the employer. This happens because they can be required to do supplementary hours as well as ordinary overtime but also because their working time can be altered at any time through a mechanism called *distribución irregular de la jornada* (irregular distribution of the work day), an employer's prerogative that has been strengthened in the 2012 legal reform (*infra*).

Part-time work, instead of being an instrument for workers with family responsibilities, has developed into a contract that requires an intense dedication of time, given that these workers are susceptible to having their working hours increased or rearranged at any time. This treatment partly explains why the part-time contract is barely used in Spain.⁴⁰ In fact, the need for time flexibility that workers with compatibility problems have leads them to consent to taking undeclared jobs. Instead of correcting this situation so that undeclared work can

³⁹ Case C-486/08 *Zentralbetriebsrat* [2010] ECR I-03527.

⁴⁰ In 2011 the amount of part-time contracts in relation to total labour contracts was 13.8 %. Separated into the two genders, 6 % of total employment was part-time work done by men and 23.5 % of total employment was part-time work done by women. Data from Eurostat: <http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tps00159&language=en>, accessed 7 November 2012.

emerge, legislation in Spain has long considered that the scarce use of the part-time contract is due to the lack of flexibility that it gives to employers. For that reason, legislation has progressively increased the time prerogatives for employers offering part-time jobs until the point at which the contract has mutated into a totally different one which is unable to be used to create any kind of reconciliation of work and family life. The lack of an efficient and flexible regulation for both sides when dealing with part-time contracts leads to a marginal situation for people with family responsibilities that will probably have consequences in their professional careers, increasing their dependency on other members of the family unit. Aside from that, the mere existence of undeclared jobs is obviously able to cause damage to the whole economy, which should be seriously taken into account, given the situation that Spain is currently going through.

2. The 2012 legal reform has increased the percentage of working time that can be freely rearranged by the employer if the collective agreement does not establish any limit. This system, which is called *distribución irregular de la jornada*, was first introduced in 2011, during the Socialist Government's period in power. It is supposed to give a clear increase to employers' organisational prerogatives and it has not been filtered to protect the interest of workers who do not have time flexibility. The *distribución irregular de la jornada* established in 2011 allowed employers to rearrange 5% of each individual's working time. The 2012 legal reform has doubled the percentage, allowing employers to change 10 % of the working hours, establishing that any new change to a schedule only has to be communicated five days in advance. Such a short period of time may not be adequate for workers with family responsibilities. However, the most disturbing aspect of this new regulation is the lack of any reference to the specific groups that could have serious problems maintaining a job that is permanently subjected to the possibility of a sudden timing reorganisation.

3. The post labour law reform regulation gives a new definition of the circumstances that could justify a modification of working conditions (Article 41 ET), including the ones that could justify a permanent geographical change of workplace that would require a change of residence (Article 40 ET). The lack of reference in this regulation to those workers who are in particular circumstances is not new because Spanish legislation has ignored the serious consequences that these kinds of employers' prerogatives have for workers in charge of dependants. The legal reform of 2012 has increased the circumstances in which these changes can take place, which also increases the workers' vulnerability. Certainly, the nature of a fundamental right that the Spanish Constitutional Tribunal has attributed to the reconciliation of responsibilities (*supra*) cannot be forgotten. However, by establishing provisions in which the employers' prerogatives seem to be unlimited, Spanish legislation is creating a situation that is barely respectful to the rights of people with family responsibilities, thus forcing them to initiate judicial processes to demand a generic fundamental right whose recognition depends on the balance it shares with the employers' rights.

4. The new legislation of 2012 mentions the possibility of collective agreements that establish specific rights of permanence in the original place of work, for the benefit of certain groups, expressly referring to workers with family responsibilities, older employees or handicapped workers (Article 40.5 ET). By making this reference, the new legislation tries to be sensitive to the particular situation of these groups of workers. However, the real effect could be the opposite, because it gives the wrong impression that the right of permanence only exists if it is recognised by collective agreements (which do not always do it), ignoring the fact that the right to reconciliation always has to be taken into account in the sense recognised until now by the Spanish Constitutional Tribunal.

Conclusion

The economic crisis has brought a new perspective to the treatment that the Spanish legislator is giving to equality of rights. These rights no longer occupy a privileged place that requires

employers to give them permanent and close attention in order to provide real equality between men and women. On the contrary, now it seems that these rights are as susceptible to cuts as are budgets or wages. However, the 2012 Spanish legal reform has not directly altered the rights established in the past to fight against gender discrimination. Using a different strategy, the recent legislation creates a new context which is particularly hostile to workers with family responsibilities and is one that could mean a big step back in the situation of female workers in Spain. Besides that, the 2012 labour law reform has been undertaken without taking into consideration the nature of the *fundamental right* to reconciliation of labour and family life that the Spanish Constitutional Tribunal had recognised. Certainly there are several apparent signs of respect for reconciliation rights in the 2012 Spanish legal reform, but they are mostly declarations of intent that cannot compensate for the damage that the new provisions could have in producing an effective reconciliation of responsibilities.

One of the most relevant changes has to do with part-time contracts. The 2012 legal reform has introduced the possibility of general overtime for part-time workers even though it was expressly prohibited before. This possibility is added to the employers other prerogatives of time adjustment that existed before for part-timers so, as a consequence, they are subjected to a system of work organisation in which they are permanently at the disposal of the employer. The lack of an efficient regulation for part-time contracts leads to a marginal situation for people with family responsibilities that could have consequences in their professional careers and also in their future pensions, increasing their dependency on other members of the family unit. Besides this, the 2012 legal reform has increased the percentage of working time that can be freely rearranged by the employer if the collective agreement does not establish any limit (from 5 % to 10 % of the ordinary working time) and has given a new definition of the circumstances that could justify a modification of working conditions, including the ones that could justify a permanent geographical change of workplace that would require a change of residence.

Another important change that has happened with the 2012 legal reform refers to the right to reduce working hours for reconciliation reasons. After the reform, the unremunerated reduction of working time that can be asked for based on parental reasons has to be taken on a daily basis, which means that the law no longer allows the reduction to be made when related to longer periods of time. In this way, the legislation has suppressed the utility that the mechanism could have to work effectively as a reconciliation instrument. Besides that, the legal reform has introduced the possibility that collective agreements could establish criteria for the concrete determination of working time reduction, which increases the risk that the agreed reconciliation instrument in a collective agreement is unable to adapt to every worker's circumstances.

The reduction of parental rights that has taken place with the 2012 Spanish legal reform could have the effect of expelling people from the labour market who cannot make their various responsibilities compatible with each other, depriving them of the right to require the employer to make the necessary adjustments, and thus promoting hostile working conditions where only the strongest can survive.

EU Policy and Legislative Process Update

May 2012 – October 2012

1. On 14 November 2012 the European Commission proposed legislation with the aim of attaining an objective of 40 % membership of the under-represented sex in non-executive board-member positions in publicly listed companies, with the exception of small and medium enterprises. Companies which have a lower share (less than 40 %) of the under-represented sex among non-executive directors will be required to make appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate, by applying clear, gender-neutral and unambiguous criteria. Given equal qualification, priority is to be given to the under-represented sex. The objective of attaining at least 40 % membership of the under-represented sex for non-executive positions should thus be met by 2020 while public undertakings – over which public authorities exercise a dominant influence – will have two years less, until 2018. It does not apply to small and medium-sized enterprises (companies with fewer than 250 employees and an annual worldwide turnover not exceeding 50 million EUR) or non-listed companies.

The proposal:

http://ec.europa.eu/justice/gender-equality/files/womenonboards/directive_quotas_en.pdf

Press release:

http://europa.eu/rapid/press-release_IP-12-1205_en.htm

2. On 17 October 2012 the European Commission and UN Women launched ‘Spring Forward for Women’, a new joint regional programme for the South Mediterranean Region. The programme aims to support national and regional stakeholders to empower women economically and politically in the context of the progress that has followed the Arab Spring.

http://europa.eu/rapid/press-release_IP-12-1107_en.pdf

3. On 17 October the European SME Week Summit was held in Brussels focusing on encouraging women to consider setting up and running their own business, usually a small or medium-sized enterprise (SME).

<http://ec.europa.eu/enterprise/initiatives/sme-week/>

http://europa.eu/rapid/press-release_IP-12-1108_en.pdf

4. On 3 October European Commissioner Viviane Reding addressed the European Parliament in a speech entitled ‘Turning Gender Equality into Reality: from the Treaty of Rome to the Quota Debate’. In this speech she discussed the future EU legal instrument which the European Commission intends to propose on the balanced representation of women and men on corporate boards. The instrument will contain six basic principles. It will (1) address only the share of female non-executive directors on boards, which share should increase to 40 % within a reasonable time frame. It should (2) only cover companies listed on the stock exchange and SMEs should be exempt. (3) Qualification must be the decisive criterion for the selection of board members and the best candidates must be chosen. (4) If no equally qualified candidate from the under-represented sex is available, the possibility of a ‘flexibility clause’ is envisaged. (5) Any quota legislation should be temporary, until the objective has been achieved and (6) Member States should themselves choose the sanctions for companies failing to comply with the legislation. The proposal is expected to be tabled in November 2012.

http://europa.eu/rapid/press-release_SPEECH-12-678_en.htm?locale=en

5. On 8 October 2012 European Commissioner Viviane Reding gave a speech entitled ‘Mapping EU action on Gender Equality: from the Treaty of Rome to Quotas’ at the Harvard Club Belgium. In this speech she addressed her aim to propose a legislative instrument for quotas on company boards.
http://europa.eu/rapid/press-release_SPEECH-12-702_en.htm?locale=en
6. In October 2012 ‘The Commission Staff working document comprehensive monitoring report on Croatia accompanying the document communication from the Commission to the European Parliament and the Council Comprehensive Monitoring Report on Croatia’s state of preparedness for EU membership’ was published. One of the monitored areas is gender equality. According to the report, ‘Croatia has largely aligned its legislation in the field of equal opportunities. Legal alignment of the Occupational Safety and Health Act with Directive 92/85/EEC, on the introduction of measures to improve safety and health of pregnant workers and workers who have recently given birth or are breastfeeding in the workplace, still needs to be completed. Follow-up and evaluation of measures envisaged under the National Policy for the Promotion of Gender Equality 2011–2015 need to continue. Employment rates for women remain much lower than those for men.’
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2012:0338:FIN:EN:HTML>
7. In October 2012 the Commission also published a monitoring report on Turkey (‘Commission Staff working document Turkey 2012 Progress Report accompanying the document Communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2012-2013’). It concludes ‘There has been little progress in the field of equal opportunities between women and men. The Turkish labour law is not applicable to situations prior to the labour contract, increasing the risk of discrimination during recruitment, coupled with the lack of a complaint mechanism. There is a remarkable difference between the figures for men and women with regard to employment as an unpaid family worker, which is mostly prevalent in the agriculture sector. The female employment target in the draft national employment strategy (35 %) is less than ambitious. Measures on improving the work-life balance are not fully in place, and the existing ones mainly focus on women rather than a gender mainstreaming approach. Full enforcement of the principle of equal pay for equal value of work needs to be stepped up, also in those sectors not covered by the labour law. The gender gap in trade union activity and in economic and political decision-making persists. More efforts are needed to combat honour killings, domestic violence and forced marriages. A full gender mainstreaming approach in policy and law-making has yet to be developed across the public administration. The equality body required by the *acquis* has not been created. Preparations in this area are at an early stage.’
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2012:0336:FIN:EN:HTML>
8. In October a monitoring report was published regarding Iceland (‘Commission Staff Working Document Iceland 2012 Progress Report accompanying the document Communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2012-2013’). With regard to compliance with the gender equality rules of the EU, the report states ‘No further development can be reported in the field of equal opportunities, where Iceland’s standards continue to be high. The Plan of Action on Gender Equality for the period 2011-2014 continues to be implemented with gender mainstreaming and gender budgeting playing a central role. Full alignment with the *acquis* has yet to be achieved, namely as regards alignment with the *acquis* on equal treatment of men and women in matters of employment and occupation.’
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2012:0337:FIN:EN:HTML>

9. In October the ‘Commission Staff Working Document The Former Yugoslav Republic of Macedonia 2012 Progress Report accompanying the document Communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2012-2013’ was also published. The report states that ‘Moderate progress was made on women’s rights and gender equality. A new Law on Equal Opportunities was enacted. The Sector for Equal Opportunities Policy in the Ministry of Labour and Social Affairs still lacks adequate expertise, personnel and budget. Local commissions on equal opportunities also face a lack of expertise. There is confusion in practice between the concepts of equal opportunities and anti-discrimination, which is a matter of concern. Some efforts were made to address women’s health needs; however, due to financial constraints only a limited number of women can benefit from improvements. Insufficient support to the National Action Plan for Roma Women renders its implementation almost impossible. Women’s participation in decision-making in society remains low, especially at local level.’
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2012:0332:FIN:EN:HTML>
10. In September 2012 the European Commission announced that the European Union will conduct targeted campaigns on the political and economic participation of women with specific focus on countries in transition. Violence against women and reconciliation of private and professional life are, inter alia, important issues in order to empower the political and economic participation of women.
http://europa.eu/rapid/press-release_MEMO-12-709_en.htm?locale=en
11. In August 2012 the European Commission launched the programme ‘Equality Pays Off’. The aim of the campaign is to support companies in better accessing the skills of female employees and to offer decision-makers in business a platform for the exchange of good practice in attracting, retaining and developing top talent and reducing the gender pay gap.
http://ec.europa.eu/justice/gender-equality/equality-pays-off/index_en.htm
12. In July EU Development Commissioner Andris Piebalgs announced new support to provide additional life-saving, affordable, contraceptive information, services and supplies to women and girls in the world’s poorest countries.
http://europa.eu/rapid/press-release_IP-12-759_en.pdf

Court of Justice of the European Union Case Law Update

May 2012 – October 2012

▪ **Case C-522/10 of 19 July 2012**

Doris Reichel-Albert v Deutsche Rentenversicherung Nordbayern

Article 21 TFEU

Facts

Mrs Reichel-Albert, a German national, pursued an activity as an employed person in Germany and lived there until 30 June 1980. From July 1980 she resided in Belgium for six years, after which period she moved back to Germany. In Belgium her spouse was employed. The couple have two children, who were born in Belgium.

By decisions of 12 August and 28 October 2008, the *Deutsche Rentenversicherung Nordbayern* (DRN) rejected Mrs Reichel-Albert's request to have the child-raising periods completed during her stay in Belgium taken into account and credited, on the ground that, during that period, the child-raising took place abroad. Only periods after 1 July 1986, the date on which the family was officially resident again in Germany, were credited as periods to be taken into consideration for child-raising purposes. Mrs Reichel-Albert lodged a complaint, which the DRN rejected. In this context the *Sozialgericht Würzburg* referred two questions to the European Court of Justice, asking whether child-raising periods must be taken into account according to Regulation No. 987/2009 in these circumstances. Although the case is not decided on gender specifically, the calculation of these periods of child-raising has effect on and is related to gender issues.

Judgment of the European Court of Justice

In a situation such as that at issue in the main proceedings, Article 21 TFEU must be interpreted as meaning that it requires the competent institution of a first Member State, for the purposes of granting an old-age pension, to take account of child-raising periods completed in a second Member State as though those periods had been completed on its national territory by a person who pursued employed or self-employed activity only in that first Member State and who, at the time of the birth of his or her child, had temporarily stopped working and had, solely on family-related grounds, established his or her place of residence in the territory of the second Member State.

▪ **Case F-54/11 of 17 July 2012**

B.G. v European Ombudsman

Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

Facts

A decision to apply the disciplinary measure of dismissal without loss of pension rights was taken against B.G. In the grounds for annulment of this decision B.G. argued, inter alia, that her pregnancy should have prevented her dismissal for disciplinary reasons.

Judgment of the Civil Service Tribunal

The Tribunal referred to Article 10 of Directive 92/85/EEC, which provides that a dismissal during pregnancy may be allowed in exceptional cases not connected with pregnancy, on condition that justified reasons for the dismissal are given in writing by the employer and that the dismissal is permitted under national legislation and/or practice. The fact that B.G. had been dismissed was in no way related to her pregnancy, according to the information provided

to the tribunal. Moreover, the applicant had never claimed, either in writing or at the hearing, that the dismissal decision was taken for reasons of her pregnancy. The tribunal dismissed the argument that the dismissal should be annulled because of a breach of Directive 92/85/EEC.

OPINIONS OF ADVOCATES-GENERAL

▪ **Case C-401/11, Opinion of Advocate General Jääskinen delivered on 23 October 2012**

Blanka Soukupová v Ministerstvo Zemědělství

Regulation (EC) No. 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF)

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

Facts

Ms. Soukupová was denied early retirement support because she had already reached the retirement age applicable to women under Czech law, which is lower than that applicable to men. As a consequence of her challenge to this decision, the Supreme Administrative Court of the Czech Republic referred a series of questions to the Court of Justice concerning the interpretation of Regulation No. 1257/1999. In essence the national referring court asked whether European Union law equal treatment principles preclude denial of early retirement support to a woman in circumstances in which it would have been paid to a man.

The Advocate-General advises the Court of Justice

1. The concept of ‘normal retirement age’ at the time of transfer of a farm under Article 11 of Regulation (EC) No. 1257/1999 may be interpreted as ‘the age required for entitlement to a retirement pension’ by a particular applicant under national legislation.
2. It is not in accordance with European Union law for ‘normal retirement age’ at the time of transfer of a farm for the purposes of European Union early retirement support to be determined differently for individual applicants depending on their sex.
3. In applying the concept of ‘normal retirement age’ at the time of transfer of a farm under Article 11 of Regulation No. 1257/1999, the condition of a higher retirement age applicable to male farmers must also be applied to female farmers.

PENDING CASES BEFORE THE COURT OF JUSTICE

▪ **Case C-363/12, Reference for a preliminary ruling from the Equality Tribunal (Ireland) made on 30 July 2012**

Z v A Government Department and the Board of Management of a Community School

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

Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303, p.13

Referred questions

1. Having regard to the following provisions of the primary law of the European Union:
 - (i) Article 3 of the Treaty on European Union,
 - (ii) Articles 8 and 157 of the Treaty on the Functioning of the European Union, and/or
 - (iii) Articles 21, 23, 33 and 34 of the Charter of Fundamental Rights of the European Union

- Is Directive 2006/54/EC, and in particular Articles 4 and 14 thereof, to be interpreted as meaning that there is discrimination on the ground of sex where a woman – whose genetic child has been born through a surrogacy arrangement, and who is responsible for the care of her genetic child from birth – is refused paid leave from employment equivalent to maternity leave and/or adoptive leave?
2. If the answer to the first question is in the negative, is Directive 2006/54/EC compatible with the above provisions of the primary law of the European Union?
 3. Having regard to the following provisions of the primary law of the European Union:
 - (i) Article 10 of the Treaty on the Functioning of the European Union, and/or
 - (ii) Articles 21, 26 and 34 of the Charter of Fundamental Rights of the European Union
 Is Directive 2000/78/EC, and in particular Articles 3(1) and 5 thereof, to be interpreted as meaning that there is discrimination on the ground of disability where a woman – who suffers from a disability which prevents her from giving birth, whose genetic child has been born through a surrogacy arrangement, and who is responsible for the care of her genetic child from birth – is refused paid leave from employment equivalent to maternity leave and/or adoptive leave?
 4. If the answer to the third question is in the negative, is Directive 2000/78/EC compatible with the above provisions of the primary law of the European Union?
 5. Is the United Nations Convention on the Rights of Persons with Disabilities capable of being relied on for the purposes of interpreting, and/or of challenging the validity, of Directive 2000/78/EC?
 6. If the answer to the fifth question is in the affirmative, is Directive 2000/78/EC, and in particular Articles 3 and 5 thereof, compatible with Articles 5, 6, 27(1)(b) and 28(2)(b) of the United Nations Convention on the Rights of Persons with Disabilities?

- **Case C-216/12 and Case C-217/12, Reference for a preliminary ruling from the Cour de cassation du Grand-Duché de Luxembourg lodged on 8 May 2012**
Caisse nationale des prestations familiales v Fjola Hliddal and Caisse nationale des prestations familiales v Bornand, Pierre-Louis
Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community

Referred question

Does a benefit such as the parental leave allowance provided for by Articles 306 to 308 of the Luxembourg Code de la Sécurité Sociale constitute a family benefit within the meaning of Article 1(u)(i) and Article 4(1)(h) of Regulation (EEC) No. 1408/71?

- **Case C-167/12, Reference for a preliminary ruling from Employment Tribunal Newcastle upon Tyne (United Kingdom) made on 3 April 2012**
C.D v D.S
Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding
Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204, p.23

Referred questions

In each of the following questions:

- (a) The phrase ‘an intended mother who has a baby through a surrogacy arrangement’ shall refer to circumstances where the intended mother in question is a worker and has not herself, at any material time, been pregnant, or given birth to the child in question.

(b) The phrase ‘surrogate mother’ shall refer to circumstances where a woman has been pregnant and given birth to a child on behalf of an intended mother.

1. Do Article 1(1) and/or Article 2(c) and/or Article 8(1) and/or Article 11(2)(b) of Directive 92/85/EEC provide a right to receive maternity leave to an intended mother who has a baby through a surrogacy arrangement?
2. Does Directive 92/85/EEC provide a right to receive maternity leave to an intended mother who has a baby through a surrogacy arrangement, in circumstances where she: may breastfeed following birth and/or does breastfeed following birth?
3. Is it a breach of Article 14, taken with Article 2(1)(a) and/or (b) and/or 2(2)(c) of Directive 2006/54/EC for an employer to refuse to provide maternity leave to an intended mother who has a baby through a surrogacy arrangement?
4. Is it by reason of the employee's association with the surrogate mother of the baby a potential breach of Article 14, taken with Article 2(1)(a) and/or (b) and/or 2(2)(c) of Directive 2006/54/EC to refuse to provide maternity leave to an intended mother who has a baby through a surrogacy arrangement?
5. Is it by reason of the intended mother's association with the surrogate mother of the baby a potential breach of Article 14, taken with Article 2(1)(a) and/or (b) and/or 2(2)(c) of Directive 2006/54/EC to subject an intended mother who has a baby through a surrogacy arrangement to less favourable treatment?
6. If the answer to question 4 is 'yes', is the intended mother's status as intended mother sufficient to entitle her to maternity leave on the basis of her association with the surrogate mother of the baby?
7. If the answer to any of questions 1, 2, 3 and 4 is ‘yes’:
 - 7.1 Is Directive 92/85/EEC, in the relevant respects, directly effective; and
 - 7.2 Is Directive 2006/54/EC, in the relevant respects, directly effective.

European Court of Human Rights Case Law Update

May 2012 – October 2012

▪ **Case of Irene Wilson v. the United Kingdom (Application no. 10601/09) of 23 October 2012**

Facts

On 20 October 2007, the applicant was assaulted by her husband at their home, after they had been out drinking. She suffered a severed artery on the right side of her head, which required eight stitches. She also suffered multiple bruising and sustained a blow to her head when she fell against a banister.

Relying in particular on Articles 8 (right to respect for private and family life and the home) and 13 (right to an effective remedy), the applicant alleged that the criminal proceedings against her husband had not been conducted with sufficient regard for her rights as a victim. She also complained that the suspended sentence had been unduly lenient and was much lower than would have been given had the offence occurred outside of marriage.

The Court

With regard to Article 8 of the Convention, the Court held that there had not been a violation. The applicant only brought one complaint to the attention of the authorities: that incident was then promptly investigated, her husband arrested and charged and the ensuing criminal proceedings conducted with due expedition. She had not made any other specific allegations of violence to the Court. Therefore, the Court concluded that the Northern Irish authorities had not failed in their duty to protect the applicant's rights under Article 8 of the Convention and rejected that part of her complaint as inadmissible.

With regard to Article 13 of the Convention, the Court found that no issue arose under Article 13 because the applicant had had at her disposal, and had in part actually made use of, criminal law and civil law remedies. There was no reason to alter that conclusion simply because those remedies had not included the power of the Attorney-General to refer the case to the Court of Appeal for review (which could have been the case if her husband had been charged under another procedure). The Court therefore also rejected the applicant's complaint under Article 13 as inadmissible.

Judgment

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114397>

▪ **Case of P. and S. v. Poland (Application No. 57375/08) of 30 October 2012**

Facts

The applicants of the case are the teenage girl and her mother. The case concerned the difficulties encountered by a teenage girl, who had become pregnant as a result of rape, in obtaining access to an abortion, in particular due to the lack of a clear legal framework, procrastination by medical staff and also as a result of harassment. In the hospital in her place of residence the medical staff refused to perform an abortion and according to the first applicant was forced to talk with a priest. In the first applicant's attempt to have an abortion in another hospital in Warsaw, the priest came to speak to her and various anti-abortion activists gathered outside the hospital. By decision of the Lublin Family Court, the parental rights of the mother (the second applicant) were limited and the court ordered the first applicant to be placed in a juvenile shelter immediately. Different national proceedings followed.

The Court

The Court held that there had been two violations of Article 8 (right to respect for private and family life) of the European Convention on Human Rights, as regards the determination of access to lawful abortion in respect of both applicants (by six votes to one) and as regards the disclosure of the applicants' personal data (unanimously).

It further held, unanimously, that there had been: a violation of Article 5 § 1 (right to liberty and security) in respect of P., and a violation of Article 3 (prohibition of inhuman or degrading treatment) in respect of P.

The Court held in particular that: the applicants had been given misleading and contradictory information and had not received objective medical counselling; and the fact that access to abortion was a subject of heated debate in Poland did not absolve the medical staff from their professional obligations regarding medical secrecy.

Judgment

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114098>

Press release

<http://hudoc.echr.coe.int/webservices/content/pdf/003-4140612-4882633>

▪ Case of Hulea v. Romania (Application No. 33411/05) of 2 October 2012

Facts

The applicant is a Romanian national who was born in 1969 and lives in Bacau (Romania). He was an electrician in the Romanian army. His second son was born on 17 December 2001 and for the first ten months his wife, a teacher, enjoyed parental leave. On 9 September 2002 the applicant lodged a request for parental leave with his superior, arguing that his wife had to go back to work so as not to lose the benefit of her permanent teacher status. This request was made on several occasions. The Defence Ministry refused to grant him parental leave on the ground that by law such leave was granted only to female personnel. The applicant brought proceedings before a court, which dismissed his claim. The Constitutional Court, which also heard the case, found that the law in question infringed the principle of equality before the law and that of discrimination on grounds of sex, both enshrined in the Constitution. However, on 16 March 2005 the Court of Appeal dismissed the applicant's appeal on points of law with final effect. The applicant argued that the refusal to grant him parental leave constituted discrimination on grounds of sex. He relied in particular on Article 14 (prohibition of discrimination) taken together with Article 8 (right to respect for private and family life) in respect of the proceedings that had led to the rejection of his claims in this connection.

The Court

The Court held that the refusal to grant parental leave constituted a violation of Article 14 taken together with Article 8 of the Convention. The justification invoked, that the applicant did not pay contributions to the social security system, was not held to justify this violation. The Court ordered a satisfaction of EUR 8 000 (non-pecuniary damage).

Judgment

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113546> (in French only)

Press release

<http://hudoc.echr.coe.int/webservices/content/pdf/003-4102145-4819275>

▪ **Case of Knecht v. Romania (Application no. 10048/10) of 2 October 2012**

Facts

The applicant is a German and American national who was born in 1967. The case concerned her complaint that she had been prevented from becoming a mother by in vitro fertilisation due to the State's refusal to transfer embryos she had deposited with a private clinic and which, when the clinic came under criminal investigation, had been seized and deposited at the Institute of Forensic Medicine, which had not been authorised to function as a genetic bank. She relied on Article 8 (right to respect for private and family life).

The Court

The Court held that the case constituted an interference with the applicant's right to a private life, since she was in fact prevented from using her embryos by the State authorities which, in their turn, relied on the legal provisions applicable in the matter and established specific and strict requirements that were not met in the applicant's case. However, the legitimate aims of prevention of crime, the protection of health or morals and the protection of the rights and freedom of others in the context of a clinic operating without the required licence necessary in such a sensitive field as assisted reproduction procedures, justified the interference with the applicant's right to a private life. Having regard to the developments of the applicant's situation, the Court found that it had not been shown that the State failed to strike a fair balance between the competing interests. Accordingly, there was no appearance of a failure to respect the applicant's right to a private life. The Court held that there had been no violation of Article 8 of the Convention.

Judgment

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113291>

Press release

<http://hudoc.echr.coe.int/webservices/content/pdf/003-4102145-4819275>

▪ **Case of Tyagunova v. Russia (Application No. 19433/07) of 31 July 2012**

Facts

The applicant is a Russian national who was born in 1975 and lives in Chelyabinsk (Russia). The case concerned her complaint that the authorities had failed to properly investigate her allegation that she had been raped by a group of men in June 2005 on her way back home from a party at a lake. She relied on Article 3 (prohibition of inhuman or degrading treatment) and Article 8 (right to private and family life).

The Court

Declares the complaint concerning the respondent State's compliance with its positive obligations under Articles 3 and 8 of the Convention admissible and the remainder of the application inadmissible;

Holds that there has been a violation of Articles 3 and 8 of the Convention. The Court observes that the authorities did respond to the applicant's allegations of rape. They conducted an initial inquiry to verify her allegations and then opened a criminal case and instituted official investigation. The Court is not convinced, however, that the measures taken by the authorities met the requirements of Articles 3 and 8. The Court concludes that the respondent State has failed to meet its positive obligations to conduct an effective investigation and to ensure adequate protection of the applicant's private life. There has accordingly been a violation of Articles 3 and 8 of the Convention.

Holds

(a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 12 500, plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable on the date of settlement;

Dismisses the remainder of the applicant's claim for just satisfaction.

Judgment

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112534>

Press release

<http://hudoc.echr.coe.int/webservices/content/pdf/003-4034759-4709732>

▪ **Case of B.S. v. Spain (application No. 47159/08) of 24 July 2012**

Facts

The applicant, of Nigerian origin, was born in 1977 and has been lawfully resident in Spain since 2003. On 15 July 2005 the applicant was on a street near Palma de Mallorca, where she worked as a prostitute. Two police officers asked her to provide her identity and to leave, which she did immediately. Shortly afterwards, having returned to the same location, she noticed the same police officers approaching her and attempted to run away. She alleged that the officers caught up with her, hit her on the left thigh and the wrists with a truncheon and again asked for her identity papers, and that one of the officers racially abused her.

A couple of days later the same police officers again stopped and questioned her and one of them hit her on the left hand with a truncheon. The applicant lodged a complaint with the Palma de Mallorca investigating judge and went to hospital to have her injuries treated. The doctors observed inflammation and a slight swelling on the left hand.

The investigating judge made a provisional discharge order and discontinued the proceedings on the ground that there was insufficient evidence of a criminal offence. The applicant applied for a review of that decision. That and her subsequent appeal were unsuccessful.

Relying on Article 3 of the Convention, the applicant complained that the national police officers had verbally and physically abused her when stopping her for questioning. She alleged that she had been discriminated against because of her profession as a prostitute, her skin colour and her gender. She objected to the language used by the investigating judge who had referred to the 'shameful spectacle of prostitution on the public highway'. Lastly, she argued that the court's investigation of the events had been inadequate.

The Court

The Court considered that, when investigating violent incidents, State authorities had a duty to take all possible steps to unmask any racist motive and to establish whether ethnic hatred or prejudice might have played a role in the events.

The Court noted that in her complaints the applicant had mentioned racist comments allegedly made by the police officers. She had also accused them of not stopping women with a 'European phenotype' who pursued the same activity as she did. The courts dealing with her case had not investigated these allegedly racist attitudes.

The Court considered that the domestic courts had not taken into account the applicant's special vulnerability inherent in her situation as an African woman working as a prostitute. The authorities had not taken all possible measures to ascertain whether or not a discriminatory attitude might have played a role in the events. The Court therefore concluded that there had been a violation of Article 14 in conjunction with Article 3.

Judgment

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112456> (only in French)

Press release

<http://hudoc.echr.coe.int/webservices/content/pdf/003-4029409-4701569>

▪ **Case of D.J. v. Croatia (Application No. 42418/10) of 24 July 2012**

Facts

The applicant took a job working on the boat E. On the night of 22 August 2007, whilst the boat was berthed in M. harbour, the applicant called the police, telling them that she had been raped by D.Š. in the boat's lounge area. The applicant complained that the investigation into her allegations of rape had not been thorough, effective and independent and that she had no effective remedy in that respect. She relied on Articles 3, 8 and 13 of the Convention

The Court

In this context, the Court notes that the applicant made complaints as to the effectiveness of the investigation, arguing that the authorities had not complied with their obligation to take all reasonable steps available to them to secure the evidence concerning the incident at issue. The Court finds that in the present case there has been a violation of the procedural aspects of both Article 3 and Article 8 of the Convention and dismisses the Government's objections as to the applicant's victim status. It also holds that no separate issue arises under Article 13 of the Convention.

Holds that there has been a violation of Articles 3 and 8 of the Convention in relation to the lack of an effective investigation;

Holds that there is no need to examine the complaints under Articles 13 and 14 of the Convention.

Judgment

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112321>

Press release

<http://hudoc.echr.coe.int/webservices/content/pdf/003-4029410-4701570>

▪ **Case of Staatkundig Gereformeerde Partij against the Netherlands (Application No. 58369/10) of 10 July 2012**

Facts

The applicant body, the Reformed Protestant Party (*Staatkundig Gereformeerde Partij, SGP*), is an association under Netherlands law. The SGP is a confessional political party firmly rooted in historical Dutch Reformed Protestantism. According to the principles of the SGP, women are not inferior to men as human beings but, unlike men, women should not be eligible for public office. A group of NGOs and other private associations lodged a pair of actions under Netherlands civil law, one against the SGP, the other against the State, claiming that, owing to the differential treatment according to gender laid down in its articles of association, the SGP violated fundamental rights of equal treatment of men and women and fundamental rights in terms of the right of women to political participation. In the national procedure against the State, the Regional Court found that the State had violated Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women by having granted subsidies to the SGP pursuant to the Political Parties Subsidies Act. Based on that judgment the application of the SGP for a subsidy pursuant to the Political Parties Subsidies Act was rejected. On appeal, the Administrative Jurisdiction Division granted the appeal lodged by the SGP and ordered the Minister to make a fresh decision based on the freedoms of political parties. However, the Supreme Court took another point of view and decided that

the State was under a duty to take measures to ensure that the SGP grants the right to stand for election to women.

The SGP submitted a complaint to the ECHR under Articles 9, 10 and 11 of the Convention that the Supreme Court, in finding as it did, deprived it and its individual members of their right to freedom of religion, their right to freedom of expression and their right to freedom of assembly and association.

The Court

The Dutch Supreme Court concluded from Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women and from Articles 2 and 25 of the International Covenant on Civil and Political Rights taken together, that the SGP's position is unacceptable regardless of the deeply held religious conviction on which it is based. For its part, and having regard to the Preamble to the Convention and the case law, the Court (ECHR) takes the view that in terms of the Convention the same conclusion flows naturally from Article 3 of Protocol No. 1 taken together with Article 14.

That said, the Court (ECHR) must refrain from stating any view as to what, if anything, the respondent Government should do to put a stop to the present situation.

Judgment

<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-112340>

News from the Member States, EEA Countries, Croatia, FYR of Macedonia and Turkey

April 2012 – October 2012

AUSTRIA – Neda Bei

Legal effects of the economic crisis on gender equality issues

This question implies several methodological challenges between law, economics and sociology. Thus it might be answered best by a sophisticated interdisciplinary approach. This said, it may be stated safely that the EU and the Member States responded to the crisis by measures unequivocally pertaining to the legal system and that some of these measures imply, likewise unequivocally, austerity. As to Austria, theoretically it should be not too difficult to reconstruct which of the legislative drafts proposed by the Government (*Regierungsvorlagen*) are supposed to have a gender impact; it would suffice to check the results of the so-called gender impact assessment, were not this preparatory legislative procedure handled in a minimalist way.¹ So the gender impact of important recent legislation has been assessed in the negative. For instance, the draft budget 2012 and the draft accompanying legislation ('austerity package', *Sparpaket*) indicated 'no gender impact'.² In June 2012, the Ministers' Council, implementing the 'austerity package', decided on a freeze of the Federal State's personnel.³ It is not clear how this will affect positive action in the public sector, with affirmative action plans defining exact target quotas for the different levels of organisation for a planning period of six years, especially whether or not, for instance, the affirmative action plans will be overruled in practice by austerity considerations. Gender-related effects of austerity on the legal system might be seen in the freezing of transfer payments; for instance, the basic amount (*Grundbetrag*) of the child care allowance (*Kinderbetreuungsgeld*) has remained the same since 2001, namely EUR 14.53 daily. Similarly, the basic amount of the family allowance (*Familienbeihilfe*), namely EUR 105.40 per month, has not been raised since 2002.⁴ Both transfers matter especially to single parent families where the parent responsible for the child is the mother (*Alleinerzieherinnen*).

Policy developments

The Federal Minister for Women and the Civil Service has kept the gender pay gap and wage transparency in the private as well as in the public sector a focus of her activities. In September, she launched a pilot project featuring anonymised job applications in cooperation with two major enterprises.⁵ Austria engaged in Equal Pay Day on 6 October 2012. On this

¹ It is sufficient that the drafting ministry indicates a simple yes or no. The gender impact assessment is derived from the constitutional principle of *de facto equality* and also inspired by the gender mainstreaming of legislation, cf. Article 8 TFEU, replacing Article 3.2 TEC.

² *Bundesfinanzgesetz 2012*, OJ No. I 110/2011; First Stability Act 2012 (taxes), OJ 31 March 2012 No. I 22/2012; Second Stability Act 2012, OJ 24 April 2012 No. I 35/2012 gender impact assessment in http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01680/fname_245675.pdf accessed 3 October 2012.

³ Human Resource Plan 2012 as amended by the first adaptation 2012, Federal Ministers' Council, 147th resolution 12 June 2012, <http://www.bka.gv.at/DocView.axd?CobId=47953> accessed 18 September 2012. According to Point 2 paragraph 1a posts are allowed to be assigned only within the budget's terms of reference; exceptions apply to substitutions of vacancies caused by parental leave. The media reported plans to reduce 4 147 posts of federal employees until 2016, Austrian Press Agency 6 March 2012.

⁴ Catholic Family Association, press release 24 August 2007 OTS 20080724 0124. Moreover, in 2011 the Constitutional Court had confirmed the legislation of 2010 restricting access to the family allowance, VfGH 16.6. 2011 G 6/11-6.

⁵ *DER STANDARD* 14 September 2012.

occasion, the head of the Women's Department of the Austrian Federal Trade Congress (*ÖGB*) called for a minimum wage of EUR 1 500 in full-time jobs. She substantiated this *inter alia* by referring to the crisis and inflation. Furthermore, she pointed out that the pension reform of 2005, which had introduced individual 'pension accounts' (*Pensionskonto*) based on lifelong calculation (*Durchrechnung*), would put women, especially those working part-time or interrupting employment, even more at risk of poverty and at a disadvantage than the previous system.⁶ Along with others, she pointed out the lack of adequate child care. In order to further pay transparency, the Minister for Women again proposed to include enterprises employing between 25 and 250 persons into the legal obligation to establish anonymous income reports. The Federal Minister for Economic Affairs, Family and Youth as well as employers' organisations reacted to this proposal promptly and in the negative.⁷

Legislative developments

The Treaty on the European Stability Mechanism (ESM) was ratified by Parliament and the Federal President in July.⁸ The so-called Fiscal Pact was ratified simultaneously, but has not been promulgated yet.⁹ The Fiscal Pact is controversial as to its conformity with the Austrian Constitution and, as regards its Articles 3(2) and 7, with the Treaty of Lisbon.¹⁰ The Government did not attribute, by the way, a gender impact either to the ESM or to the Fiscal Pact.

The consultation on the draft amendments to the Equal Treatment Act (private sector) ended on 26 September 2012, discussion in Parliament being scheduled for 6 November.¹¹

Administrative law

The Audit Court (*Rechnungshof*) issued an Affirmative Action Plan in accordance with the Federal Equal Treatment Act.¹²

Case law of national courts

Supreme Court

The Court, referring to Case 149/77 *Defrenne III*, found that the provisions of the collective agreement of Austrian Airlines and Lauda Air (cabin crew) do not discriminate against a stewardess as regards pay, insofar as they do not include periods of parental leave in the seniority regime.¹³

A personnel leasing firm employed a woman (contract work) as assistant to the department in an operating theatre (*Abteilungshelferin im Operationssaal*). She had a child, went on parental leave (*Karenz*) and declared her intention to take parental part-time work after her parental leave ended, namely to work 30 hours weekly from 8:00 until 14:00. The firm answered more than two months later, indicating that this was not possible for operational reasons and offering two alternatives which were not acceptable to the worker. After that, the firm applied to the Labour Court to agree to the worker's dismissal

⁶ For 2010, she mentioned average women's pensions of EUR 786 to be compared with average men's pensions of EUR 1 288, *DER STANDARD* 5 October 2012.

⁷ *DER STANDARD* 5 October 2012; *DER STANDARD* with Austrian Press Agency 8 October 2012.

⁸ OJ No. III 138/2012 <http://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40142741/NOR40142741.pdf>, accessed 11 October 2012. Entry into force: 27 September 2012.

⁹ 1725 BlgNR 24. GP, http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01725/index.shtml, accessed 20 October 2012.

¹⁰ S. Griller 'Zur verfassungsrechtlichen Beurteilung des Vertrags über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion ("Fiskalpakt")' JRP 2012, pp. 177 ss.; L. Oberndorfer 'Vom neuen zum autoritären Konstitutionalismus' kurswechsel 2/2012 pp.62-67.

¹¹ 407ME, 24. GP, http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00407/index.shtml, accessed 24 October 2012.

¹² Administrative regulation (*Verordnung*) 27 February 2012 OJ No. II 49/2012 complete with two annexes A and B, Federal Legal Information System RIS, <http://www.ris.bka.gv.at/>, accessed 4 April 2012.

¹³ OGH 29.3.2012, 9 ObA 58/11m, to be found with further references at www.ris.bka.gv.at/; cf. *Tyrolean Airways Tiroler Luftfahrt GmbH*, ECJ judgment 7 June 2012, C-132/11.

(*Kündigung*). The Labour Courts of the first and second instance rejected the employer's action, because the firm had tried neither to enter into negotiations nor to reach an agreement on part-time work before the courts. The Supreme Court confirmed these decisions, pointing out that the special procedure provided for by paragraph 15k of the Maternity Protection Act in cases of conflict about parental part-time work, required more detailed proposals and negotiations than the employer's flat statement that the working time proposed by the worker was not feasible.¹⁴

Constitutional Court

The Constitutional Court repealed the provision of the Civil Code which granted exclusive care (*Obsorge*) for a child born out of wedlock to the child's mother. The repeal will become effective on 31 January 2013.¹⁵ Until then, the Federal Minister of Justice has to find a legislative compromise providing for some kind of common care including the involvement of fathers.¹⁶

The Constitutional Court repealed a decision of the Labour Market Service, which had rejected an application for damages due to discrimination as regards career advancement. The Court's decision points out important general principles on non-material damages for discrimination in career advancement and on the right to apply for a job in a non-discriminatory procedure. The Labour Market Service had appointed one of the other three, male, applicants to a qualified position. The Court found that the one female applicant's right to equality according to the constitution had been infringed by arbitrary application and disregard of the Federal Equal Treatment Act which, including the provisions on affirmative action plans, applies to the Labour Market Service. The Labour Market Service had disregarded not only the requirements concerning job descriptions by mentioning only formal qualifications without taking the actual experience in a leading position into account, thus infringing the principle of assessing qualifications of equal value, but had furthermore failed to react to discriminatory remarks during the hearing of the complainant such as the question why women did not find fulfilment by raising children.¹⁷

Miscellaneous

Reports and studies

In June, the Commissioner for Human Rights of the Council of Europe visited Austria. He reported on his visit in September and, inter alia, identified the lack of adequate child care and the impact of gender stereotypes as major obstacles to achieving equal pay.¹⁸

In October, the Minister for Women's Affairs and Public Service presented the 9th Federal Report on Equal Treatment, dealing comprehensively with equal treatment and positive action in the federal public service including the practice of the Federal Equal Treatment Commission. The Minister reported inter alia an overall slight increase in the number of women employed by the federal State and a gender pay gap of around 15 %.¹⁹

Gender role stereotypes

The most recent finding of a skeleton discovered by archaeologists, who are working in Geitzendorf (Lower Austria) and investigating graves of the Bronze Age, highlights gender

¹⁴ OGH 22.8.2012, 9 ObA 91/12s.

¹⁵ VfGH 28.6.2012, G 114/11-12, to be found at www.vfgh.gv.at accessed 16 November 2012.

¹⁶ As previously reported in the EGELR, discussion of this complex and important issue has been going on for some time. In particular, on the one hand legal and other practitioners such as female attorneys specialising in divorce and social workers concerned with mothers, and fathers' organisations on the other hand, have conflicting views. For the discussion in Parliament cf. http://www.parlament.gv.at/PAKT/VHG/XXIV/M/M_00155/index.shtml and http://www.parlament.gv.at/PAKT/VHG/XXIV/NRSITZ/NRSITZ_00161/SEITE_0025.html, both accessed 14 November 2012.

¹⁷ VfGH 27.6.2012, B 1186/11y.

¹⁸ Strasbourg, 11 September 2012, CommDH(2012)28 (English only). Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, following his visit to Austria from 4 to 6 June 2012.

¹⁹ <http://www.frauen.bka.gv.at/DoeView.axd?CobId=48952>; accessed 19 October 2012.

role stereotypes. The skeleton has been identified as that of a woman, who was buried with tools (anvil, hammer) and jewellery. These burial objects identify her as a smith or metal worker, an activity traditionally considered male by archaeologists.²⁰

BELGIUM – Jean Jacquain

Legal effects of the economic crisis on gender equality issues

Under the ‘gendermainstreaming Act’ of 12 January 2007,²¹ the federal Government is supposed to assess the possible impact of any proposed measure on gender equality. Such an assessment has remained conspicuously absent from the budgetary austerity programme which the new coalition Cabinet started implementing as soon as it was put together in December 2011.

Moreover, the only set of reforms which can be clearly identified as decisively unfavourable for women (because of the statistical distribution of persons concerned) is the brake which was imposed on the use of career breaks in the public services.²²

In contrast, predicting the gender impact of the reform of the statutory retirement pension schemes for paid workers and civil servants²³ is extremely difficult. As to paid workers: since 2009, for both sexes the legal age of retirement has been 65 and the length of a full career is 45 years; however, since 1991 it has been possible to retire at any time between 60 and 65. Postponing the minimum age of retirement from 60 to 62 unless an effective career of 42 years has been completed by the age of 60 seems to favour men, given the imbalance in the sharing of family duties. However, women have not yet recovered from the trauma of the previous major reform, initiated in 1997 and finished in 2009, which gradually raised their legal age of retirement from 60 to 65 and the length of a full career from 40 to 45 years. Moreover, pension benefits remain a function of the average remunerations which were paid during the whole career, and thus a direct function of the pay gap. For about 65 % of paid workers the modest statutory benefit is supplemented by an occupational pension scheme, but due to horizontal and vertical segregation in the private sector, a large majority of women are excluded from such benefits. In conclusion, for a female paid worker the negative impact of the postponement of the minimum age of retirement from 60 to 62 seems to be more abstract than real. As to tenured staff members in the public services, where the statutory age of retirement has always been 65 for both sexes, the postponement of the minimum age from 60 to 62, imposed by the same Act of 28 December 2011, should not have any gender impact; however, the minimum age remains 60 if by that age a staff member has been serving for 42 years, and this possibility of exception is limited by the radical restriction of the periods of career break which can be taken into account as effective service (see above). The other spectacular modification of the pension scheme for tenured staff members consists in basing the calculation of the benefit on the average remuneration of the last 10 years instead of the last 5; the expert is not aware of any statistical investigation on a possible gender impact of this measure.

The second important reform aimed at cutting down expenses in employment matters is being implemented through successive amendments of the statutory Unemployment Insurance scheme.²⁴ The philosophy of the reform consists in encouraging unemployed persons to make

²⁰ David Beard ‘Cavewoman jeweller rewrites gender history’ http://archaeology-in-europe.blogspot.co.at/2012_10_01_archive.html#5491652062005746713, accessed 6 October 2012.

²¹ *Moniteur belge/Belgisch Staatsblad*, 13 February 2007, available (in French and Dutch) on <http://www.juridat.be>, accessed on 22 August 2012.

²² See EGELR 2012/1.

²³ Multi-purpose Act of 28 December 2011, *Moniteur belge/Belgisch Staatsblad*, 30 December 2011 (4th ed.), available (in French and Dutch) on <http://www.juridat.be>, accessed on 22 August 2012.

²⁴ Royal Decree of 25 November 1991, *Moniteur belge/Belgisch Staatsblad* of 31 December 1991, available (in French and Dutch) on <http://www.juridat.be>, accessed on 22 August 2012.

more strenuous efforts to find a job. Thus, in order to avoid being suspended from entitlement a beneficiary will have to produce more evidence of failed job applications.

Moreover, although the initial amount of unemployment benefits were increased and the right to entitlement remains theoretically unlimited in time, the previous period of employment, which is required as a condition of access, was lengthened and the progressive reduction of the amount of the benefits, correlative to the duration of unemployment, was increased for certain categories, especially ‘cohabitants’.

Globally, and given the federal Government’s discourse on the necessity to increase employment and preserve the financing of the Unemployment Insurance scheme, it is difficult to criticise the reform as gender-biased without appearing to advocate the most traditional distribution of family roles. Moreover, the ECJ’s decision in Case C-229/89,²⁵ delivered more than 20 years ago, made it nearly impossible to challenge any fresh unfavourable development in the situation of the category of ‘cohabitants’, still mainly composed of women (a cohabitant is an unemployed person sharing the household of another person who draws income from employment or self-employment or who is entitled to a social security benefit; children or close relatives are not taken into consideration), as the Court decided that the use of that category served a legitimate objective of social policy and was not conducive of indirect discrimination against women.

Policy developments

The federal Minister of Equal Opportunities broadcast her intention to have various Royal Decrees, ancillary to the Gender Act of 10 May 2007,²⁶ finally adopted: on positive action and on sex as an indispensable requirement for the fulfilment of a particular job, both under Directive 2006/54/EC as well as Directive 2004/113/EC.

Legislative developments

Act aimed at fighting the pay gap between men and women

Although adopted by the House of Representatives on 8 March 2012, left unamended by the Senate²⁷ and promulgated on 22 April, the Act was not published in the *Moniteur belge/Belgisch Staatsblad* until 28 August as – somewhat belatedly – the federal Ministry of Employment discovered that should the new Act have come into force too soon, private enterprises would have been confronted with needless administrative difficulties.

Parental leave

Belatedly, and inexcusably, Belgium finally complied with the requirements of the second framework agreement on parental leave, enforced by Directive 2010/18/EU. The Royal Decree (RD) of 31 May 2012²⁸ amended the RD of 29 October 1997, which had instituted parental leave as a variant of the career break scheme. However, this RD is only applicable to all employees in the private sector and to all staff members of local councils; consequently, similar amendments of the various regulations applicable to other public services were inserted by another RD, of 20 July 2012.²⁹

Under the amended RD of 29 October 1997, as from 8 March 2012, the individual and non-transferable right to a 3-month parental leave was increased to 4 months full-time (or 8 months half-time, or 20 months one-fifth time). The leave is unpaid, but a monthly benefit (of EUR 771.33 as from 1 February 2012, for full-time leave) is provided by the statutory

²⁵ *Commission v. Belgium* [1991] ECR I-2205.

²⁶ *Moniteur belge/Belgisch Staatsblad*, 30 May 2005, available (in French and Dutch) on <http://www.juridat.be>, accessed on 22 August 2012.

²⁷ See EGELR 2012/1.

²⁸ *Moniteur belge/Belgisch Staatsblad*, 1 June 2012, available (in French and Dutch) on <http://www.juridat.be>, accessed on 22 August 2012.

²⁹ *Moniteur belge/Belgisch Staatsblad*, 1 August 2012, available (in French and Dutch) on <http://www.juridat.be>, accessed on 22 August 2012.

Unemployment Insurance scheme. However, for budgetary reasons and after long disputes within the federal Government, the benefit attached to the fourth month is only available if the child has not been born or adopted before 8 March 2012.

Finally, the other novelty of the second framework agreement, Clause 6, concerning an employee's right to apply for adapted working hours or patterns when returning from parental leave, was simply repeated in a new provision inserted in the RD of 29 October 1997.

It should be pointed out that the RD of 31 May 2012 did not come into force until 1 June, the day of its publication in the *Moniteur belge/Belgisch Staatsblad*. Such an absence of retro-active effect to the deadline of Directive 2010/18/EU seems to be an obvious breach of EU law.³⁰

The miserly solution which was adopted concerning the right to a social security benefit for the fourth month induces direct discrimination between parents according to the child's date of birth or adoption. Indeed, since 2009 an employee has been entitled to make use of the leave until the child reaches the age of 12 (and since 2011, the age of 21 if the child is disabled). Given that the directive was promulgated on 8 March 2010, so that Belgium had two years to prepare for the transposition, such a discrimination seems hardly justifiable in the eyes of the general principles of equality and non-discrimination under the law (Articles 10 and 11 of the Constitution). Moreover, considering that the framework agreement aims at guaranteeing that all employees have an equal right to parental leave in identical conditions (even though it does not provide for remuneration or compensation, but see *General Consideration* n°20), the discrimination mentioned above appears to result in an inadequate transposition of Directive 2010/18/EU.³¹

Gender quotas in the federal civil service

A Royal Decree of 2 June 2012³² amended the RD of 2 October 1937 (which regulates the federal civil service) to provide that within Category A (i.e. the positions which require the possession of a university degree), a maximum quota of two-thirds of persons of the same sex shall apply to all positions of middle management as from 1 January 2013 (five-sixths until 31 December 2012).

However, the maximum quota may be set aside on two grounds: (a) after due comparison of all candidates' merits, promoting a person belonging to the under-represented sex appears impossible; (b) in any case, the provisions of the linguistic legislation (which dictate how many Dutch- or French-speaking staff members must be appointed in positions of every rank) have precedence.

Although broadcast rather triumphantly by the federal Ministers in charge of Civil Service and Equal Opportunities, the reform strongly smacks of window dressing. Firstly, there is nothing in the RD of 2 June 2012 to prevent top managers from applying the quota globally, so that women might be confined either to the lesser ranks of Category A or to services considered as less attractive. Secondly, while for many qualifications the numbers of female and male entrants are equal, the quota might well serve as a brake on women's promotion. Thirdly, although the RD provides for 'action plans' and 'progress reports', the reform is supposed to be implemented in a complete vacuum as to raising the collective level of awareness of gender issues and combating stereotypes. And finally, the linguistic legislation, a cynosure of Belgian political life, certainly rests on a Constitutional provision (Article 30), but so does the principle of equality of women and men (Article 10, not to mention EU law), hence the reason for the precedence of the former over the latter is far from self-evident.

³⁰ See the ECJ's decision in Case C-187/98 *Commission v. Greece* [1999] ECR I-7731.

³¹ See J.Jacqmain, 'Congé parental: une transposition indigne', *Statut des administrations locales et provinciales – Actualités en bref*, Kluwer, n°254, June 2012.

³² *Moniteur belge/Belgisch Staatsblad*, 8 June 2012, available (in French and Dutch) on <http://www.juridat.be>, accessed on 22 August 2012.

Case law of national courts

Court of Cassation, 4 June 2012

Up until now, the regulations concerning the statutory Healthcare Insurance scheme (Royal Decree of 21 December 2001) only provide for reimbursement for the medication ‘Actonel’ to postmenopausal women suffering from osteoporosis.³³ On 11 April 2008, the Labour Court in Brussels found that denying reimbursement to a 64-year-old man who had been prescribed the medication was incompatible with Article 4(1) of Directive 79/7/EEC and that the disputed regulation was thus illegal and had to be set aside under Article 159 of the Constitution. On 12 May 2010,³⁴ the Labour Court of Appeal in Brussels rejected the Healthcare and Sickness Insurance Office’s appeal against the judgment; the Labour Court of Appeal adhered to the Labour Court’s reasoning based on EU gender law, and also relied on factual elements such as scientific research which demonstrates that ‘Actonel’ is efficient in the treatment of male osteoporosis as well.

The Office appealed against the second judgment, carefully avoiding any discussion of the gender dimension. On 4 June 2012, the Court of Cassation³⁵ quashed the Labour Court of Appeal’s judgment, considering that it was not properly motivated and it had relied on scientific evidence which was not available at the time when reimbursement was denied. The Court of Cassation forwarded the case to the Labour Court of Appeal in Liège for a new decision.

In this way, the Court of Cassation avoided revisiting its own disastrous judgment of 14 June 2004³⁶ concerning the rival medication ‘Fosamax’, according to which the difference of treatment is not grounded on gender but on the menopause, so that there is no gender discrimination when reimbursement is denied to men (‘Actonel’) or only granted to men under more demanding conditions than to women (now ‘Fosamax’).

The only hope now of having the matter suitably discussed under EU law is that the Labour Court of Appeal in Liège should decide to refer to the ECJ for a preliminary ruling. The Institute for Equality of Women and Men (the ‘gender agency’) is considering how it could intervene in the lawsuit to that effect.

BULGARIA – *Genoveva Tisheva*

Policy developments

In the course of the last six months, the unfavourable trends of high unemployment (10.57 % in August 2012),³⁷ widespread long-term female unemployment, and a persistent gender pay gap continued in Bulgaria. At the same time, the country continues to be at the bottom of EUROSTAT statistics based on the statutory minimum wage for July 2012 – less than EUR 145 (BGN 290). The average wage for the period is less than EUR 380 (BGN 760).

The Yearbook of the National Social Security Institute is the main source of sex-aggregated data on pensions.³⁸ For people with personal pensions (i.e. not survivor’s pensions) for age at 31 December 2010, the distribution by sex shows the stable trend of higher average monthly pensions for men (EUR 171 (BGN 343)) compared with pensions for women (EUR 96 (BGN 192)). Since pensions reflect lower labour and social security incomes of women, lower rates of individual coefficients of women as well as the lower insurance

³³ See EGELR, 2010/2.

³⁴ *Rôle général* N° 2008/AB/50985, unreported, available in French on <http://www.juridat.be>, accessed on 22 August 2012.

³⁵ Judgment S.10.0086.F, unreported, available in French and Dutch on <http://www.juridat.be>, accessed on 22 August 2012.

³⁶ *Chroniques de droit social*, 2004, pg. 5-8 with J.Jacqmain’s case note.

³⁷ According to data from the National Employment Agency.

³⁸ www.nssi.bg, accessed 15 October 2012 (in Bulgarian).

period compared with the same indicators for men, women on average receive lower pensions.

We have to mention the adoption of the ‘Bulgarian Trail on achieving better flexibility and security on the labour market 2009–2011’ which, according to the Government, addresses the issue of equal remuneration through active employment policy measures, measures for lifelong learning, measures introducing flexible forms of employment, and the ‘improvement of the mechanism for negotiating labour remuneration as a result of the actions of the social partners on the analysis of *the price* of labour in branches/sectors and regions’. The ILO Committee of Experts has asked the Government to provide information on any measures taken within this framework to address the gender pay gap, including the process of the determination of remuneration and in particular in economic sectors where it is very pronounced. The Committee reiterated its request for information on any measures taken or envisaged to promote the use and development of methods for the objective evaluation of jobs, free from gender bias, particularly in the private sector, in collaboration with employers’ and workers’ organisations. However the Government did not provide the due report on the ILO Convention 100 on Equal Pay in 2011. There are no publications in 2012 dealing with either the pay gap or the pension gap. The pay and pension gaps are not yet a priority in the policies of the Government.

Some of these issues, as well as other serious problems related to gender equality and women’s rights, were discussed during the presentation of the Consolidated 4th to 7th Bulgarian Governmental Report before the CEDAW Committee and the constructive dialogue between the Government and the Committee at its 52nd session on 12 July 2012 in New York. As a result of that, on 27 July 2012, the Committee issued its concluding observations.³⁹

In the areas covered by the EU standards on equal treatment of men and women, the Committee recommended the following steps to the Bulgarian Government:

- to adopt a gender equality law prohibiting all forms of discrimination on the grounds of sex and gender in all areas covered by the Convention;
- to strengthen its legal complaints mechanisms to ensure that all women have effective access to justice;
- to provide women with effective access to legal aid by strengthening the legal aid facilities in place and ensure that, when pursuing legal remedies, women are sufficiently informed of their rights during proceedings;
- to expeditiously strengthen (within two years from the Committee Recommendations) the national machinery by increasing its authority and visibility, by providing it with adequate human and financial resources to make it more effective and by enhancing its capacity to formulate, coordinate and monitor the elaboration and implementation of legislation and policy measures in the field of gender equality;
- to further strengthen its efforts to put in place a comprehensive policy with proactive and sustained measures, targeted at women, men, girls and boys, to overcome stereotypical attitudes about the roles and responsibilities of women and men in the family and in society;
- to tackle the root causes of trafficking and exploitation of women by increasing its efforts to improve the economic situation of women and girls, in particular Roma women, thereby eliminating their vulnerability to exploitation and traffickers;
- to provide adequate assistance and protection to all women victims of trafficking, increase the number of shelters for victims, expedite efforts to establish compensation mechanisms for victims and strengthen programmes for victims’ reintegration into society;
- to accelerate the full and equal participation of women in public and political life and increase the number of women in top positions, including by implementing temporary special measures;

³⁹ <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-BGR-CO-4-7.pdf>, accessed 15 October 2012.

- to narrow and close the wage gap between women and men by applying job evaluation schemes in the public and private sectors connected with wage increases in female-dominated sectors, and to strengthen the access of women, including Roma women and women belonging to other disadvantaged groups, to formal employment and entrepreneurship;
- to provide information on the enforcement of legal provisions related to labour discrimination based on sex and sexual harassment, and to include such data in its subsequent periodic report; and
- to encourage men to share parental responsibilities on an equal footing with women, including by taking paternity leave.

It can thus be concluded that, in the areas covered by EU standards, there are serious gaps which were identified by the Committee, in particular the absence of a really functioning institutional mechanism for gender equality, the underestimation of gender segregation of labour and the gender pay gap and the lack of results in the field of reconciliation of work and family life for women and men. Another gap identified is the absence of mechanisms for access to justice for women.

Legislative developments

Since 1 August 2012, changes were introduced to the Law on Protection from Discrimination (LPD), as follows:

- it is explicitly required that, in the process of elaboration of drafts of normative acts, the State, public bodies and local authorities comply with the objective of non-discrimination on all protected grounds (Article 6 paragraph 2);
- it is stated that it will not be considered discriminatory to treat people differently in relation to initiatives mainly or exclusively promoting entrepreneurship among women, when they are the under-represented sex, or for avoiding or compensating for disadvantages in a professional career (Article 7 paragraph 19);
- in the definitions of harassment and sexual harassment, it is required that both the terms of ‘humiliating’ and ‘debasing’ are included in the unfavourable environment (Additional provisions, paragraphs 1 and 2).

Furthermore, harmonisation with Directive 2010/41/EU is sought as follows:

- No direct or indirect discrimination is allowed in the public or real (economic) sector in relation to the establishment, equipment or development of an economic activity or any other form of similar activity. Harassment and sexual harassment are explicitly banned in these areas too (Article 37).

From 1 August 2012, in the Social Security Code the following amendments were introduced, by a new paragraph 9 added to Article 4, in order to promote harmonisation with EU law:

‘(9) Spouses of persons under Article 4 paragraph 3, items 1 (persons registered as practitioners of a liberal profession and/or a skilled craft) and 4 (registered agricultural producers and tobacco producers), with their consent when acting in the course of their work may voluntarily pay contributions at their own expense for insurance against disability due to general sickness, old age and death; against general sickness and maternity, if not provided under paragraph 1 and/or paragraph 3, items 1, 2 and 4 and/or Article 4a. Contributions for spouses of persons under paragraph 3, item 1 are based on the minimum insurance income for self-employed persons as defined by the Law on the Budget of the State Social Security, and for the spouses of the persons referred to in paragraph 3, item 4, on the minimum insurance income for registered tobacco farmers as established by the Law on the Budget of the State Social Security.’

During the period under review, the composition of the Commission for Protection from Discrimination was renewed, as the official mandate of the previous Commission had ended in 2010.

Case law of national courts

The review of the legal practice of the Commission for Protection from Discrimination and the courts on cases related to sex discrimination shows that there is not enough gender sensitivity on the part of the Commissioners and of the judges and no proper understanding of the notion of *prima facie* discrimination. We maintain that Article 9 of the Law on Protection from Discrimination, which reads that the alleged victim first has to ‘prove facts from which it may be concluded that there is discrimination’, is in principle a lower standard for protection of victims of discrimination than the minimum standards required by EU law, in particular the burden of proof rules of Directive 2006/54/EC and Directive 2004/113/EC. Applied to cases of sex discrimination, this text often leaves women without protection in cases of harassment based on sex, sexual harassment and unequal pay. This fact, apart from suggesting the need for amendments in the law, requires the elaboration of guidelines and the organising of training for the judges.

A striking example of the lack of proper understanding of *prima facie* discrimination in a case of sexual harassment is the final decision of the Supreme Court of Cassation on 11 May 2012 on case file No. 1007/2011. The case was referred to the Supreme Court of Cassation for judicial review but a review was refused and thus no sexual harassment was found. The applicant party made extensive arguments based on international law, including on European standards, but the Supreme Court did not deem it necessary to examine the case on these arguments, merely stating that the law and the existing case law on *prima facie* discrimination were properly applied at the previous hearings. We note that the case was initiated in 2004, as one of the first cases on sexual harassment after the entry into force of the LPD, and the victim has now been waiting for justice for more than eight years.

Positive developments were observed in relation to the complaint, based on EU law, against the biometrical tables for the supplementary obligatory social security pillar, valid for persons born after 1960. After the first decision of the Supreme Administrative Court, which ruled that the women applicants had no legal interest and therefore the complaint was inadmissible, the applicants appealed against the decision. The Panel of Five Judges of the Supreme Administrative Court (Court Order No. 10534, 17 July, 2012, adm. file 5974/2012) reversed the previous decision on admissibility and recognised the legal interest of the applicants whose application was declared admissible. Examination on the merits will follow, in order for the court to decide whether the biometrical tables are detrimental to the applicants or not.

CROATIA – *Nada Bodiroga-Vukobrat*

Legal effect of the economic crisis on gender equality issues

From 2008 onwards, unfavourable economic trends and recession in the country have affected every sphere of the material and social position of Croatian citizens. The stagnation of economic activities has especially negatively affected the already fragile labour market, thus increasing the number and changing the structure of the unemployed.⁴⁰

Available studies stress that the industrial profile of the current economic crisis in the Republic of Croatia has more seriously affected the activities in which men usually predominate and that it is more probable that the newly unemployed will be a male, skilled

⁴⁰ Currently 331 224, <http://www.hzz.hr/>, accessed 26 October 2012.

blue-collar worker of younger age.⁴¹ The records show that the share of women in the total number of unemployed people in the period between 2006 and 2010 decreased, from 60 % in 2006 to 54.8 % in 2010.⁴² The average number of registered unemployed people increased by 14.9 % in 2010: the average number of unemployed men grew by 27.7 % and the average number of unemployed women grew by 6.1 %.⁴³ Currently, the share of women in the total number of unemployed is at 53.1 %, which is a decrease of 0.7 % compared with the same period in the previous year.⁴⁴ However, the disadvantageous position of women in the Croatian labour market exists regardless of the economic crisis. Even though women make up 51.8 % of the total population in Croatia, their rate of activity in the period from 2005 to 2010 was 42 % on average (the share of employed women among the active labour force in 2010 was 46.1 %)⁴⁵ and it differs significantly among the age cohorts (extremely low in the age cohorts 15-24 and 65+, but comparatively high for women in the age group 25-49 (80 %)).⁴⁶

In the upcoming period, downsizing/rationalising in the public sector is expected. An estimated surplus of 20 000 employees (public servants and other employees in public services; employees in public undertakings) will have to leave the system. The initial idea of a linear downsizing by 10 % in every area of the public sector was abandoned, because it would involve enormous cuts in the education and healthcare sector, for example, areas which traditionally employ a large share of women. The Government's plan is for the majority of excess employees to be retired.⁴⁷ The Act on Amendments to the Civil Servants Act is in preparation, which will enable employees with less than five years of pension service time left before acquiring the full old-age pension to retire with the full pension guaranteed.⁴⁸ In those cases, instead of receiving severance pay, the additional service years will be 'bought' and financed by the special state funds and employees will be able to take an early pension, without a reduction in the amount of pension benefit. The numbers vary depending on the source, but the most realistic estimates are that 14 000 to 15 000 public servants will have to retire in the next year. Among them, around 9 000 are entitled to a full old-age pension, but continue working because they have not reached the age of 65. Out of that number, 7 000 are soldiers and police officers with beneficial service years and 2 000 are women who have reached the age of 60, but are still not legally obligated to retire. This legislative proposition, which is currently under discussion, could have discriminatory effects on female public servants, because they will be practically forced to retire earlier than their male colleagues and denied the possibility to continue their professional careers and keep their level of income until reaching 65 years of age.

⁴¹ P. Bejaković & V. Gotovac 'Aktivnosti na gospodarskom oporavku u Republici Hrvatskoj s naglaskom na tržište rada', *Rev. soc. polit.* 18, No. 3 (2011), pp. 331-355; V. Gotovac 'Supporting Strategies to Recover from the Crisis in South Eastern Europe: country assessment: Croatia', International Labour Organization, Decent Work Technical Support Team and Country Office for Central and Eastern Europe (2011); National Policy for Gender Equality 2011-2015, <http://www.ured-ravnopravnost.hr/site/hr/biblioteka-ureda/787-21-nacionalna-politika-za-ravnopravnost-spolova-za-razdoblje-od-2011-do-2015-godine-na-engleskom-jeziku.html>; accessed 26 October 2012.

⁴² National Policy for Gender Equality 2011-2015, <http://www.ured-ravnopravnost.hr/site/hr/biblioteka-ureda/787-21-nacionalna-politika-za-ravnopravnost-spolova-za-razdoblje-od-2011-do-2015-godine-na-engleskom-jeziku.html>; accessed 26 October 2012.

⁴³ National Policy for Gender Equality 2011-2015, <http://www.ured-ravnopravnost.hr/site/hr/biblioteka-ureda/787-21-nacionalna-politika-za-ravnopravnost-spolova-za-razdoblje-od-2011-do-2015-godine-na-engleskom-jeziku.html>; accessed 26 October 2012.

⁴⁴ Croatian Employment Service, Press Release: Registered unemployment and employment in September 2012, http://www.hzz.hr/docslike/PR_Nezaposlenost-Zaposljavanje_09_2012.pdf, accessed 27 October 2012.

⁴⁵ Croatian Bureau of Statistics, Women and Men in Croatia 2012, http://www.dzs.hr/Hrv_Eng/menandwomen/men_and_women_2012.pdf, accessed 23 October 2012.

⁴⁶ P. Bejaković & V. Gotovac 'Aktivnosti na gospodarskom oporavku u Republici Hrvatskoj s naglaskom na tržište rada', *Rev. soc. polit.* 18, No. 3 (2011), pp. 331-355.

⁴⁷ As of 1 November 2010, the retirement age for both the old-age pension and the early pension is gradually being equalised between men and women, by raising the retirement age for women by three months each year. Full equalisation will be completed by 2030 (65 for old-age pension and 60 for early retirement).

⁴⁸ Early retirement is normally sanctioned with a monthly deduction which varies in accordance with the accrued pension service; from 0.15 % to 0.34 % per month of early retirement (i.e. permanent decrement from 1.8 % to a maximum of 4.08 % per year, the early retirement period is up to five years).

Policy developments

Given that, under the existing Article 39 of the Occupational Safety and Health Act⁴⁹ pregnant women and women who are breastfeeding are *a priori* banned from performing an explicitly enumerated number of jobs, without the assessment of the actual risk involved, further legal alignment with the EU *acquis* is needed. The legislative draft of the new Occupational Safety and Health Act, which regulates this area in line with Articles 4 and 5 of Directive 92/85/EEC, is currently open for public discussion. The initiation of the legislative procedure for the adoption of the Act is scheduled for the second quarter of 2013.

Another initiative, which is beginning to take a more concrete shape, is the redefinition of fixed-term and open-ended employment contracts and the introduction of a completely new, single open-ended contract. This model would probably include transitory and gradual periods to the full protection of workers (i.e. regarding dismissal, severance pay, etc.) as with the current open-ended contracts. Although the share of fixed-term employment contracts in Croatia is rather low (13 %), the trend of using fixed-term contracts is on the rise in recent years and it specifically affects women. Women make up the majority of persons employed on fixed-term contracts (52.9 %). Out of all newly employed women in 2011 (87 747), only 8.4 % signed a contract for an indefinite time (7 450). Given that pregnancy and maternity related circumstances do not prevent the expiration of a fixed-term contract, this opportunity is frequently used by Croatian employers to get rid of unwanted workers, especially women who return from maternity/parental leave.

Legislative developments

After the first new Act on the General Ombudsperson was repealed by the Constitutional Court of the Republic of Croatia for procedural reasons,⁵⁰ another new Act on the General Ombudsperson was adopted and it entered into force on 9 July 2012.⁵¹ It abandons the idea of merging all special ombudsperson offices (for children, gender equality and disability) with the General Ombudsperson, which was justly criticised by all professionals as unfit and detrimental to the performance of the special tasks entrusted to each of them.

The Anti-Discrimination Act⁵² was amended to remove any existing conceptual inconsistencies with the EU *acquis* in the field of gender equality. The amendments are primarily aimed at redefining and specifying the exceptions to the general prohibition of discrimination on particular discriminatory grounds (Article 9). One of the most prominent amendments is made to adapt Croatian legislation to the findings of the Court of Justice of the EU in Case C-236/09 (*Test-Achats*). Before the latest amendments, differences in premiums and benefits where the use of sex was a factor in calculation (former Article 9(2)(6) of the Anti-Discrimination Act) were allowed as an exception to the general prohibition of discrimination. This exception will be abolished as of 30 June 2013, when the amended provision of Article 9(2)(6) enters into force.

Case law of national courts

On 12 July 2012, the Municipal Court in Varaždin reached a first-instance decision in a high-profile case of workplace discrimination based on the sexual orientation of a senior assistant, Dr. Dario Krešić, employed at the University of Zagreb in the Faculty of Organisation and Informatics in Varaždin. The Faculty was condemned for having breached the claimant's right to equal treatment by preventing his promotion on grounds of his sexual orientation, as

⁴⁹ *Zakon o zaštiti na radu*, Official Gazette of the Republic of Croatia *Narodne novine* no. 59/96, 94/96, 114/03, 86/08 and 75/09.

⁵⁰ Decision of the Constitutional Court of the Republic of Croatia, No. U-I/5654/2011 of 15 February 2012 (Official Gazette of the Republic of Croatia *Narodne novine* no. 20/12).

⁵¹ *Zakon o pučkom pravobranitelju*, Official Gazette of the Republic of Croatia *Narodne novine* no. 76/12.

⁵² *Zakon o suzbijanju diskriminacije*, Official Gazette of the Republic of Croatia *Narodne novine* no. 85/08 and 112/12. The amendments entered into force on 19 October 2012.

well as for harassment of the claimant with the purpose of violating his dignity and causing an intimidating, hostile, offensive and degrading environment. The Faculty has publicly displayed records from the previous court hearings in this matter, thereby victimising the claimant for having instituted legal proceedings for the protection of his rights. This is the first court decision in Croatia confirming discrimination based on sexual orientation in an employment relationship. Since the decision has not been published and is subject to appeal, it will be important to monitor future developments. However, it could be a stepping stone for the judicial enforcement of rights of lesbian, gay, bisexual, transgender (LGBT) people in Croatia. It is also one of the cases in which the Ombudsperson for Gender Equality decided to intervene, which could in the future bring more consistency, uniformity and quality to anti-discrimination case law.

Equality body decisions/opinions

The initiative of the Ombudsperson for Gender Equality to amend taxation legislation (e.g. the Income Tax Act, the Property Transfer Tax Act, the Act on Specific Taxes on Passenger Cars, Other Motor Vehicles, Vessels and Aircrafts) because some of the provisions and their application directly discriminate against non-marital spouses and indirectly discriminate against women, has so far had no response from the competent authorities.

CYPRUS – Lia Efstratiou-Georgiades

Legal effects of the economic crisis on gender equality issues

The economic crisis has hit Cyprus and has adversely affected all social classes.

Unemployment in July 2012 reached 10.9 % of the economically active population while in June 2012 it was 10.7 % and is higher than the average rate in the EU. These facts show that the situation in the labour market is worsening. The percentage of unemployed men was 11.4 % in July 2012 against 11.1 % in June 2012 whilst that of unemployed women was 10.4 % in July 2012 against 10.1 % in June 2012.

Unemployed people come mainly from the private sector. A person whose employment is terminated for redundancy reasons is entitled to receive redundancy payment from the Redundancy Fund on the basis of his/her salary and length of service, provided that he/she has worked for at least two years with the same employer. Also he/she is entitled to unemployment benefit for a period of six months on the basis of his/her salary, provided that he/she has paid contributions for at least 26 weeks and had earned the minimum amount of pay provided by law.

By Law No. 112(I)/2011 entitled ‘The Special Contribution of Officers and Pensioners of the Wider Public Service Law’ a percentage ranging from 1.5 % to 3.5 % of salaries and pensions above EUR 1 500 is deducted progressively as from 1 September 2011. According to this Law the deduction will apply for a period of two years.

Law No. 113(I)/2011 entitled ‘The Pension Benefits of Public Officers and of Officers of the Wider Public Sector including Local Authorities (Provisions of General Application) Law’ was enacted for the purpose of limiting expenditure on occupational pension schemes of the wider public sector through the gradual abolition of such schemes, which will be achieved by the closing of these schemes to newcomers in the service as from 1 October 2011.

The occupational pension scheme of public officers has up to now been non-contributory. The above-mentioned Law now provides for the payment of a contribution of 3 % of public officers’ salary.

Furthermore, in order to reduce the size of the public service, the Government has decided that for every four public officers who retire, only one will be hired.

Pensions and benefits granted under the General Social Insurance Scheme, which covers all employed and self-employed persons, both men and women, have not yet been affected.

Also, welfare benefits granted by the Social Welfare Service have not been affected up to now.

The Cyprus Government has asked for the assistance of the Troika (International Monetary Fund, European Commission and European Central Bank) but it is not yet known what measures the Troika will suggest in order to overcome the economic crisis.

Policy developments

The Cyprus Government presides over the Council of the European Union during the second half of 2012. Among other actions and events, the Cyprus Presidency has prepared a Programme on Gender Equality which comprises the following:

1. The Ministry of Justice and Public Order will organize the following events:
 - a. as part of the follow-up to the Beijing Platform for Action, Cyprus will address the critical area ‘Violence against Women’, with particular focus on the issue of domestic violence and specifically on victims’ support services. A report on the situation in the Member States will be prepared by the European Institute for Gender Equality, and draft conclusions will be tabled for adoption by the Employment, Social Policy, Health and Consumer Affairs Council (EPSCO), including a set of indicators for monitoring developments in this area;
 - b. to ensure continued cooperation between the Member States and the Commission, Cyprus hosted a meeting of the High Level Group on Gender Mainstreaming in Nicosia, on 18-19 September 2012;
 - c. a Conference on Violence Against Women, aiming at the review of progress at the EU level and the exchange of good practice between the Member States in this field, will be organised in Nicosia, on 8-9 November 2012, with the participation of all stakeholders.
2. The Ministry of Labour and Social Insurance will organise a tripartite Conference for the exchange of good practice with respect to reducing the gender pay gap. Government officials, trade unions and employers’ organisations will participate. The thematic priority of the Conference will be ‘Challenging gender stereotypes in occupations by eliminating segregation’, and it will take place in Limassol, on 29-30 October 2012.

Legislative developments

The Parental Leave and Time Off on Grounds of Force Majeure Law No. 69(I)/2002, last amended by Law No. 47(I)/2012, transposed Directives 96/34/EC and 2010/18/EC. It applies to all workers, men and women, who have been working for the same employer for a continuous period of six months. Unpaid parental leave is available on demand to either the mother or the father or to both of them, with the employer’s consent. The period of parental leave is 18 weeks for the birth or adoption of a child. In the case of a parent who is a widow or a widower the duration can be up to 23 weeks. Parental leave can be taken: (a) in the case of a natural mother, after the end of maternity leave and before the child’s eighth birthday; (b) in the case of a natural father, upon the child’s birth and before the child’s eight birthday; (c) in the case of adoption, after the end of maternity leave and for a period of eight years from the date of adoption provided that the child will not be above twelve years old; and (d) in the case of a disabled child, up to the child’s 18th birthday subject to the provisions of the Persons with Disabilities Law No. 127(I)/2000.⁵³

The minimum period of parental leave per year is one week and the maximum is four weeks. At the end of parental leave, the worker is entitled to return to work in the same position or in a position similar to the one he or she held before taking parental leave.

The employee’s parental leave shall in no way affect his or her employment rights, including his or her insurable earnings as provided in the Social Insurance Laws (Article 4). Furthermore, the period of absence from work is treated as a working period for the purpose of determining an employee’s entitlement to annual paid holidays under the Annual Paid

⁵³ Laws Nos. 127(I)/2000-146(I)/2009.

Leave Law. The period of absence from work for parental leave does not interrupt the period of employment under the Termination of Employment Law.

A bill entitled 'A Law to provide for the Establishment, Registration, Functioning and Supervision of Occupational Pensions Funds and for relevant matters' is under discussion in the House of Representatives. The purpose of the Law is to harmonise the legislation regulating the above matters with Directives 2003/41/EC and 2010/78/EU.

Case law of national courts

There is no case law to report.

Equality body decisions/opinions

Ombudsman file No. A.K.I 78/2010 dated 3 September 2012

Mrs S.G. had been working for ten years as one of the accounting officers in the Cyprus Athletics Organisation (CAO) on a non-permanent and indefinite period of service basis. By letter dated 24 August 2010 to the Ombudsman she complained that the refusal of her line manager to agree to the sick leave she requested out of the eight days in a calendar year to which she was entitled under the CAO's rules without a doctor's certificate, as well as his decision to deduct the days of sick leave she requested from her annual vacation leave, constituted direct discrimination on the ground of sex.

Since 2008 Mrs S.G. had been suffering from a serious gynaecological problem during the days of her monthly cycle, which rendered her unable to work and she was obliged to make use of her right to sick leave without a doctor's certificate, as provided for in the relevant regulation of the CAO.

The regulation provides that: the submission of a medical certificate is not required when the absence from work because of illness does not exceed two days at any time; the officer has to submit to his or her line manager, immediately upon returning to work, an application for covering approval for the leave of absence; and the line manager has a discretionary power to approve the leave or not.

The Ombudsman, after taking into consideration all the facts of the case, the CAO's regulations and the provisions of the Equal Treatment for Men and Women in Employment and Occupational Training Laws of 2002 to 2009, found that the complainant's line manager used the discretion he had under the regulations without taking into account important facts such as the gynaecological problems Mrs S.G. had every month and concluded that there was direct discrimination against her on the ground of sex, because his decision to deduct the days of her absence from her vacation leave put her in an unfavourable position vis-à-vis her male colleagues, since her health problem was exclusively a female one.

The Ombudsman intends to proceed to consultations with the CAO as well as with the complainant, under the Combating of Race and some other Discriminations (Ombudsman) Law of 2004, after forwarding to them her report and an invitation for consultations. After the consultations the Ombudsman will prepare her recommendation to the parties concerned.

The Ombudsman's report is dated 3 September 2012 and has not yet been published.

Miscellaneous

During the Cyprus Presidency NGOs are planning to organise seminars and lectures on subjects relating to equality issues, such as reconciliation of working and family life, poverty and social exclusion, violence against women and prostitution.

CZECH REPUBLIC – Kristina Koldinská**Legal effects of the economic crisis on gender equality issues**

The Czech Republic has experienced certain consequences of the economic crisis – for example the Government's attempts to reduce social spending and public spending in general. It is however difficult to say whether such effects have a specific gender aspect. Social benefits have been reduced more for people with disabilities, and also for the elderly, but not for women per se. Fortunately, there have been no large lay-offs in sectors that generally employ women (such as the public sector, in particular education and healthcare).

There has been discussion regarding a change in the legal character of nurseries due to the new Act 372/2011 Coll., on health care services. These services are currently provided outside the remit of the Ministry of Health (as general services provided with a special trade permission), which could as a consequence make nurseries more expensive for parents and therefore less accessible. Even if this does not seem to be directly connected to the crisis, it is certainly connected with the tendency to save as much public money as possible, and at the same time force people to pay as much tax as possible (the nursery service will be taxed at a higher level than before).⁵⁴

There is one recent proposal which is maybe worth mentioning, and that is a bill on children's groups. This is a proposal which was recently approved by the Government but has still to go through the legislative process. The idea of the Ministry of Social and Labour Affairs is to allow the establishment of so-called children's groups as an alternative child care service, in order to solve the lack of places at kindergartens and nurseries. Parents would have the possibility to place their children in such groups, which could also be offered by their employer, especially where parents were unable to find a place for their child in another daycare facility. According to the Government, this could help reduce the time spent by parents (especially mothers) at home with children and enable them to return sooner to the labour market, and consequently resume contributing income taxes to the state budget more quickly.

Legislative developments

Current Czech legislation allows the provision of child daycare only within nurseries, kindergartens (which are registered as pre-school educational institutions), or under a special business permission granted in the area of child care. Other types of child care may be provided only under general legislation with no special rules protecting children and their development.

At the same time, it is obvious that parents with children, especially women, often face difficulties in the labour market, and that it is often difficult for them to find a job because of the current lack of official child daycare facilities which would allow them to return to work. The bill on children's groups, which was prepared by the Ministry of Labour and Social Affairs and approved by the government at the end of August 2012, envisages the establishment of alternative daycare for children. This service would be provided on a regular basis in order to enable parents to return to work. In contrast to kindergartens – which not only provide care, but also (or especially) education for children from three to six years of age – children's groups would focus particularly on babysitting and care for children within a small group. In this respect, the conditions for provision of such a service would be easier to fulfil than the conditions for provision of a nursery or kindergarten.

At the same time, employers would have the possibility to reduce their own taxes if they were to establish a children's group for their employees.⁵⁵

⁵⁴ See for example A. Kotková, '*Jesle a jejich nejistá budoucnost*' (Nurseries and their uncertain future), available on <http://www.feminismus.cz/fulltext.shtml?x=2342167>, accessed 20 August 2012.

⁵⁵ Further information can be found in the Czech language at http://www.mpsv.cz/files/clanky/13431/tz_220812b.pdf, accessed 20 August 2012.

Miscellaneous

Government's Council reaction to the Constitutional Court decision

In July 2012 the Government's Council on Equal Opportunities for Men and Women issued a press release in response to the recent decision of the Constitutional Court⁵⁶ regarding the legal position of birth assistants and the possibility for women to freely choose their care provider at the end of pregnancy, especially the possibility to choose the method and place of delivery.⁵⁷ The Czech Constitutional Court heard the case of a woman who wanted to give birth at home but did not feel free to do so, because she was not provided the necessary assistance and because, according to her, public authorities and national legislation discouraged women from giving birth at home. She argued on the basis of both the ECtHR case law and also the CEDAW reports. The Constitutional Court strongly recommended all public authorities, including the Parliament and the Government, to reflect seriously about the problem and also start a serious debate on possible amendments of Czech legislation. In response to the Constitutional Court decision, a working group at the Ministry of Health has been established to find a way of equalising the legal position of midwives so that they can also practise in women's homes. The working group is also expected to work on exploring legal possibilities for Czech women to choose their health care during pregnancy, delivery and following childbirth.⁵⁸

Equality Body's survey on work advertisement and discrimination

In June 2012 the Public Defender of Rights, as the Czech equality body, published an analysis of some 12 000 job advertisements. It was found that 17 % of the advertisements were discriminatory, of which 11 % included discriminatory conditions on the ground of age and 7 % were found to be discriminatory on the ground of sex. Other grounds of discrimination such as citizenship, health condition or family status were found in only 1 % of advertisements. Among the discriminatory advertisements, 61 % were found to be directly discriminatory and 39 % indirectly discriminatory.⁵⁹

DENMARK – Ruth Nielsen

Legal effects of the economic crisis on gender equality issues

Cutbacks in welfare rights related to unemployment have recently been adopted in Denmark. Until 2008 men were affected less by unemployment than women. This changed in 2008 with the global financial crisis which hit men harder because male-dominated sectors of the sex-segregated labour market, like the construction sector, were hit the hardest. In the years since the crisis, Danish men have had an unemployment rate that is about 2 % higher than that of women.⁶⁰

So far, there have been no reductions in child-care facilities or in possibilities for leave. In practice, Danish women take more than 90 % of the pregnancy, maternity, paternity and parental leave and men less than 10 %.⁶¹ There has been a debate on whether three months of the parental leave period should be earmarked for fathers so that only the father and not the mother could use those three months. If the father was unwilling to use this leave, no one

⁵⁶ Pl.ÚS 26/11 from 28 February 2012.

⁵⁷ The decision was reported in the Newsflash 2012-CZ-02.

⁵⁸ Information available in the Czech language at http://www.mpsv.cz/files/clanky/13194/zaznam_290512_v2.pdf, accessed 20 August 2012.

⁵⁹ Výzkum veřejného ochránce práv – projevy diskriminace v pracovní inzerci available on http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Doporuceni/Doporuceni-Inzerce.pdf, accessed 20 August 2012.

⁶⁰ *Kvinder og mænd* 2011, Danmarks Statistik, TemaPubl 2011:7 p. 56, available in Danish at <http://www.dst.dk/pukora/epub/upload/17520/kogm.pdf>, last accessed 8 September 2012. In 2010, men's unemployment rate was 6.8 % against women's 5.2 %.

⁶¹ *Ibid.*, p. 66 et seq.

could use it. It was therefore expected to be cheaper for taxpayers who pay for benefits during parental leave because most fathers were not likely to use the three-month parental leave.⁶² So far, the Government has not put forward such a proposal. In fact it was not so much a reaction to the crisis as a means to promote gender equality by making fathers and mothers share the parental leave more equally and by preventing pregnant women and young mothers from reducing their job qualifications and career opportunities through overlong absences from the paid labour market.

Policy developments

The Danish Government has developed a model for more women in management. The model consists of four elements that are targeting both private companies and public companies.

Firstly, the approximately 1 100 largest Danish companies are required to establish targets for the number of the underrepresented sex on the main governing body (board of directors and the like.). Each company must set concrete targets that are realistic and ambitious for the company itself.

Second, the approximately 1 100 largest Danish companies must have a policy for increasing the number of the underrepresented sex at company management levels generally. Each company must create the proper basis for recruitment of female managers based on the company's specific needs and ideas.

Thirdly, companies must clarify the status of compliance with the set targets in the annual report including, where appropriate, why the company has not reached its objective. In addition, companies must disclose in the annual report how the policy is implemented, and what has been achieved. If they fail to do this, it is possible to impose a fine on them.

Fourth, state enterprises, regardless of size, must set targets and develop a policy for more women in management. Under present law state enterprises must have a balanced gender composition: what is new is that they should draw up targets and develop a recruitment policy. Municipalities and regions are encouraged to develop common guidelines on how to promote women in management at the regional or municipal level.

The Government has drafted a proposal for amendments to the Equality Act and the Company Act in order to include the above model in Danish legislation. The proposal is planned to be presented to Parliament (*Folketinget*) at the beginning of the next parliamentary session which starts in October 2012. The proposal has been circulated for consultation.⁶³

Legislative developments

The proposal for amendments to the Act on the Equality Board, described in the previous edition of EGELR, was adopted on 24 May 2012.⁶⁴

ESTONIA – Anu Laas

Legal effects of the economic crisis on gender equality issues

High social and human cost of economic crisis

During the recent economic crisis, the Estonian Government has managed to keep a conservative budget policy and to support macroeconomic stability. There is a high social and human cost behind the Estonian success story.⁶⁵ Several national and international surveys

⁶² On average, Danish fathers take 36 days of paternity and parental leave, see *ibid.*, p. 67.

⁶³ See <https://bdkv2.borger.dk/Lovgivning/Hoeringsportalen/Sider/Fakta.aspx?hpid=2146003638>, last accessed 10 September 2012.

⁶⁴ European Gender Equality Law Review 2012-1, available at: http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2012-1_final_web_en.pdf.

⁶⁵ L. Randall Wray 'The Financial Crisis Viewed from the Perspective of the "Social Costs" Theory', *Levy Economics Institute of Bard College*, Working Paper No. 662, http://www.levyinstitute.org/pubs/wp_662.pdf.

have pointed out the gap between economic growth in general and increasing social problems (social inequalities, dominance of political parties and weak civil society, poverty and an increasing number of discouraged people, outward mobility). Opposing opinions about coping on national and individual levels are often debated in the media and in public discussions.

Gendered outcomes of social welfare and health care legislation and policies are more serious for women in connection with their role as carers and in old age as care receivers. Care for the disabled and elderly is poorly financed in the public and private sectors, care work is underpaid. Taking care of a family member with a severe disability at home is often accompanied by a loss of job and skills. Local government is expected to provide social services, but many municipalities do not have the human resources and financial capacity to fulfil this legal obligation.⁶⁶ Social services are often not accessible or affordable.

The state retirement pension is on average half the cost of a monthly payment for a care centre for the elderly. Elder care is seen as a family obligation, but due to changed family forms and the increased mobility of the working age population, this legal duty – which is based on an extended family pattern – is out of date.⁶⁷ Articles 96 and 97 of the Family Law Act require that certain adult relatives are required to provide care, and other specified relatives who need assistance are entitled to receive care from these relatives.⁶⁸

Tavits has studied international social security standards and transposition of these standards into Estonian legislation and concludes that ‘Estonia has managed to create a social security system that covers most of the social risks included in the European Code of Social Security and ILO Convention 128. As for the only risk still not covered, Estonia has thus far not managed to create a system for occupational accident insurance and occupational disease insurance.’⁶⁹ There were 13 970 occupational accidents and injuries in 2008-2011, of which 65 % were accidents involving men.⁷⁰

The number of days spent in hospital is higher for men than for women in the 20-64 age group, if we exclude days spent in hospital due to pregnancy and the six-week period after childbirth. Compared with women, self-reported poor or rather poor health is higher among inactive and unemployed men.⁷¹ The gap between women’s and men’s average life expectancy is ten years, which leads to the ‘missing men’.⁷²

The total number of people with a modest to severe incapacity for work has increased rapidly during recent years.⁷³ At the end of 2011 there were 90 354 people claiming incapacity benefit, which is 13 % of the population in the 15-74 age group. Increasing incapacity benefit claimant numbers is an issue of employment and of health.

A structural problem of the Estonian labour market is high gender segregation.⁷⁴ This negatively influences the general situation of men and women in society. Professional and

accessed 8 September 2012. K.W. Kapp’s ‘social costs’ theory is contrasted with the ‘efficient markets’ hypothesis. The term ‘social costs’ refers to all those harmful consequences and damage which third persons or the community sustain as a result of the productive process.

⁶⁶ Article 10 of the Social Welfare Act lists social services which ‘ought to be provided’ by local governments. Social Welfare Act, *RT I*, 30.12.2011, 47.

⁶⁷ Article 27 of the Constitution of the Republic of Estonia stipulates that the family is required to provide for its members who are in need. The Constitution of the Republic of Estonia, *RT 1992*, 26, 349.

⁶⁸ Family Law Act, *RT I 2009*, 60, 395.

⁶⁹ G. Tavits ‘International Standards for Social Security and Their Fulfilment in Estonia: Changes in Pension and Health Insurance and Their Constitutionality’, *Juridica International Law Review, University of Tartu*, No. 18 (2011) pp. 27-44.

⁷⁰ E. Kivimaa ‘Meestega toimub tööõnnetusi ligi poole rohkem kui naistega (Compared with women, incidence rates for accidents at work are two times higher for men)’, http://www.ti.ee/index.php?article_id=2248&page=510&action=article&, accessed 8 September 2012.

⁷¹ Health Statistics and Health Research Database, http://pxweb.tai.ee/esf/pxweb2008/Dialog/Info/TSTUA_en.html, accessed 8 September 2012.

⁷² The concept of ‘missing men’ is derived from the concept of ‘missing women’ developed by Amartya Sen in the late 1980s, it refers to the cumulative impact of gender bias in mortality.

⁷³ Working-age people could apply for incapacity benefit if their permanent incapacity for work is 40 % to 100 %.

⁷⁴ Out of a theoretical maximum of 50 %, Estonia, the highest segregated country, records a value of 32.2% (Source: ‘Gender segregation in the labour market: root causes, implications and policy responses in the EU’. European Commission’s Expert Group on Gender and Employment (EGGE), 2009 p. 32).

vocational segregation is one of the main reasons for the gender-based wage gap. Changes and reforms in some labour market sectors have a gendered outcome due to the split between women's work and men's work in society. For example, Estonia's education strategy up until the year 2020 was released in June 2011. One of the objectives is to treat basic schools and upper secondary schools as different entities. Separation of these schools will bring closure to many upper secondary schools, problems for local government and head teachers, accompanied by numerous teacher dismissals in 2012-2013. This means a job loss for many women. Construction, typically men's work, forces men to go to bigger towns or abroad, where jobs are available, which weakens family ties and results in more children growing up without seeing their father.

Policy developments

The main policy debates on international relations have been connected with the economic crisis and European solidarity. The Chancellor of Justice discussed in a speech in the *Riigikogu* (Parliament) how pan-European trends lead us to conclude that the role of national parliaments has somewhat diminished.⁷⁵

The Government of Estonia has a particular focus on supporting freedom of expression and the media on issues related to the rights of women, children and indigenous peoples. A high importance is placed in foreign policy on close co-operation with organisations working to promote human rights. Conversely, gender equality issues have been debated and portrayed in a negative light on national media channels.⁷⁶ This makes the under-resourced and under-financed work of the Office of the Gender Equality and Equal Treatment Commissioner even harder, and the introduction of legal initiatives in the field of gender equality is also complicated. The EAA and Norway Grants programme is expected to increase the institutional capacity of the Office and to promote gender equality initiatives in 2012-2014.

In 2010-2012, the project 'Diversity Enriches' was managed by the Tallinn Law School at Tallinn University of Technology. The project team has produced awareness-raising material and has carried out an LGBT people survey.⁷⁷

Legislative developments

Tackling human trafficking

In March 2012, the Act on Amendments to the Penal Code was passed in the *Riigikogu*.⁷⁸ New criminal provisions against human trafficking have transposed the requirements of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims. Article 118 on causing serious health damage was amended and an accusation against a legal person was provided for.⁷⁹ A new definition of human trafficking was supplied and other activities of

⁷⁵ The Chancellor of Justice made a speech in the *Riigikogu* on 12 June 2012, when introducing the Annual Report 2011, <http://www.riigikogu.ee/index.php?id=173640>, accessed 11 September 2012.

⁷⁶ See, for example, (1) a daily newspaper *Päevaleht* gave an overview about the statement by the Gender Equality and Equal Treatment Commissioner on bookshops and a journalist stated that a private company is not obliged to promote gender equality, <http://www.ekspress.ee/news/paevauudised/eestiudised/vordoiguslikkuse-volinik-kargas-raamatupoe-turja.d?id=65091838>, accessed 14 November 2012; (2) misleading and ignorant statements by the Minister of Finance are not commented on by the media (Ligi: Women Expect Husbands to Earn a Higher Salary, 17.04.2012, <http://news.err.ee/society/5effea86-db58-4c1b-b151-9ef1c334e6ee>, accessed 14 November 2012; Jürgen Ligi: Sõna ilust vaataja silmades, 12.11.2012, <http://www.epl.ee/news/arvamus/jurgen-ligi-sona-ilust-vaataja-silmades.d?id=65248506>, accessed 14 November 2012).

⁷⁷ <http://www.erinevusrikastab.ee/en>, accessed 10 September 2012.

⁷⁸ http://www.riigikogu.ee/?page=en_vaade&op=ems&eni=140SE&koosseis=12, accessed 8 September 2012.

⁷⁹ Problems with a definition of 'serious health damage' still persist. Broken bones (which could recover within a couple of months) and a loss of one eye (vision loss is 30 %, not 50 %, because eyes as paired organs have a complementary and common function) are not yet 'serious', because the health disorder should last for at least four months and the health loss should be above 50 %. Article 8 of the Victim Support Act defines 'crime of violence' as an act committed against the life or health of a person which is punishable pursuant to criminal

sexual exploitation, like support to human trafficking and prostitution, pimping and keeping a brothel, were clarified.⁸⁰ The law imposes up to seven years' imprisonment for human trafficking, with the prison sentence running up to fifteen years in cases causing serious consequences. A provision was also made to allow compulsory dissolution of legal persons and the extended confiscation of property acquired by criminal means. However, the amendments do not use the words 'victim' and 'sexual exploitation' in connection with human trafficking. Data about human trafficking cases and victims of sexual exploitation is scarce due to the lack of a definition of 'human trafficking' in national legal Acts up to amendments made in the Penal Code in 2012. In 2010, NGOs helped 57 victims of human trafficking.⁸¹

Law amendments

The Act on Amendments to the Funded Pensions Act and the State Pension Insurance Act and other associated Acts was passed in the *Riigikogu* on 6 June 2012.⁸² The Act enters into force on 1 January 2013, but some Articles do not come into force until 1 January 2015. The Act provides a supplementary funded pension contribution related to raising a child and the payment of a pension supplement on the basis of the provisions of the State Pension Insurance Act with the aim of compensating for the potential reduction of the pension of a parent in the future as a result of raising a child.

Transposition of the requirements of the Directive [2010/41/EU](#) of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity⁸³ took place in June 2012 and amendments to the Social Tax Act (STA) and to other related Acts have been made; these amendments entered into force in August 2012.⁸⁴ The Act ensures equal treatment of female and male self-employed workers and an opportunity for equal social protection of spouses participating in the activities of their spouse's business. However, the amendment does not apply to cohabiting partners.

Case law of national courts

The awareness of employment relations and employees' rights is still low and people do not know exactly what should be considered as unequal treatment. In addition, people do not know where to turn to for advice and assistance. Filing a court case is expensive⁸⁵ and time-consuming. A person can file a court case and Article 22 (1.1) of the State Fees Act stipulates that a state fee is not charged for hearing an action or an appeal concerning wages, reinstatement in employment or service, the detection of a void dismissal or an amendment to the written legal basis for the termination of a contract of employment or to release a person from service. For an applicant, an unsuccessful court case means the payment of the full costs of legal aid and procedural expenses. The costs of procedural expenses in legal actions are to be borne by the party against whom the court decides.⁸⁶ As a result, gender equality problems are rare in Estonian court practice.

We can assume that there are a few victimisation cases in the court practice in recent years, but the legal analysis of such cases on the basis of victimisation is lacking. The Supreme Court did not find gender discrimination in the case of job loss by a fired employee

procedure and as a result of which the injured person: (1) dies; (2) sustains serious damage to his or her health; (3) sustains a health disorder lasting for at least six months. Source: Victim Support Act. *RT I 2004, 2, 3.*

⁸⁰ Penal Code. *RT I, 04.04.2012, 3.*

⁸¹ Karistusseadustiku ja sellega seonduvate seaduste muutmise seaduse eelnõu seletuskiri. Explanatory Memorandum (in Estonian).

⁸² *Kogumispensionide seadus, RT I, 02.07.2012, 24; Riikliku pensionikindlustuse seadus, RT I, 02.07.2012, 15.*

⁸³ Directive 2010/41/EU, OJ L 180 of 15.7.2010

⁸⁴ Social Tax Act. *RT I, 02.07.2012, 8.*

⁸⁵ Attempts were made at the beginning of 2012 to make court procedures accessible and affordable. Legal aid is still a problem, and the applicant often has to pay.

⁸⁶ Article 162(1) of the Code of Civil Procedure. *RT I, 28.12.2011, 44.*

in the course of redundancy.⁸⁷ In this case the judgment of the Supreme Court recognised that gender discrimination facts were not gathered for the court procedure, but stated that there was no need for that because the insufficient qualification of the appellant was the main reason for termination of the employment contract. In addition, the Supreme Court pointed to judgment No. 3-3-1-5-05, which clarifies the right of an employer not to offer to a former employee all the vacancies arising after the reorganisation of the company's structure.⁸⁸

Estonia has introduced a special tool – court practice analysis (CPA) – that is an innovative and effective instrument to help to improve the uniform application of law.⁸⁹ The analysis aims to give an overview of the use of the European Court of Human Rights (ECHR) case law in the decisions of the Supreme Court.⁹⁰ The analysis focuses on the last three years' case law of the Supreme Court, covering decisions made in criminal, administrative and civil cases from 2009 to 2011. The ECHR case law has not been used to date by the Supreme Court of Estonia in connection with discrimination and equal treatment.

Equality body decisions/opinions

The Office of the Gender Equality and Equal Treatment Commissioner has only two employees – the Commissioner and the Adviser. It is planned to increase the number of employees and the amended Public Service Act, and Article 15 of the Equal Treatment Act, which enter into force on 1 April 2013, also clarify the position of the Gender Equality and Equal Treatment Commissioner.⁹¹

During the first six months of 2012, 167 communications have been made to the Gender Equality and Equal Treatment Commissioner.⁹² Out of these communications there were 32 claims and allegations, containing 23 discrimination claims. The Commissioner found 10 cases of discrimination. Out of these 10 discrimination claims five were made by women, three by men, and two claims were made by companies. The number of claims sent to the Gender Equality and Equal Treatment Commissioner does not reflect the real number of discrimination complaints, because such complaints could also be sent to the Chancellor of Justice, to the Labour Dispute Committee at the Labour Inspectorate, and to the County Court. The Gender Equality and Equal Treatment Commissioner states that there are several reasons for under-reporting about discrimination. Some people are afraid of victimisation, some people have a low awareness of their rights, and some people think that the response to their complaint will not result in any change.

In 2011, 2 628 complaints were sent by employees to the Labour Dispute Committee, which is 25 % fewer than in 2010 (3 570 complaints). The majority of complaints were in connection with unpaid wages and unpaid compensation after termination of an employment contract; only five cases were in connection with the unlawful dismissal of a pregnant employee. The most problematic industries were trade, construction and transportation.

⁸⁷ Judgment of the Supreme Court of 19 December 2011, No. 3-3-1-50-11. Available in Estonian <http://www.riigikohus.ee/?id=11&tekst=RK/3-3-1-50-11>, accessed 29 August 2012.

⁸⁸ Judgment of the Supreme Court of 7 April 2005, No. 3-3-1-5-05, <http://www.riigikohus.ee/?id=11&tekst=RK/3-3-1-5-05>, accessed 29 August 2012.

⁸⁹ M. L. Lipstok 'An innovative and effective instrument to achieve the uniform application of law – court practice analysis', <http://www.nc.ee/?id=1345>, accessed 10 September 2012.

⁹⁰ E. Rohtmets 'Case-Law of the European Court of Human Rights in Decisions of the Supreme Court of Estonia', *Legal Information Department, The Supreme Court 2012*, <http://www.riigikohus.ee/vfs/1364/Article%20by%20Estonian%20Supreme%20Court.pdf>, accessed 10 September 2012.

⁹¹ *Avaliku teenistuse seadus. RT I, 06.07.2012, 1; Võrdse kohtlemise seadus. RT I, 06.07.2012, 22.* The Commissioner will not be appointed, but elected; a structure of the Office and staff is planned by the Commissioner; the Deputy Commissioner will be appointed from the Office staff.

⁹² <http://www.postimees.ee/911974/vordse-kohtlemise-voliniku-poole-poorduti-poole-aastaga-167-korral> (in Estonian), accessed 27 August 2012.

FINLAND – *Kevät Nousiainen*

Legal effects of the economic crisis on gender equality issues

Finland experienced a deep recession in the 1990s. Then, dismissals in the gender-segregated labour market hit men first, because men work mostly in the private sector, and often in occupations which rely on export. Later, women's unemployment increased, with the retrenchment in the home market and cuts in public spending. Women work mostly in public and private services. The same pattern may be repeated now, as the labour market segregation is unchanged. There are some signs of negative developments that concern women especially. The financial and economic crisis has led to proposals which aim at reducing employers' costs, but which may also endanger gender equality if carried out. Public employers, especially municipalities, have to cut their budgets, which may lead to dismissals and lay-offs. These measures may concentrate on typically female occupations, such as social and health services and education.

The first large mass dismissal of women was announced by the Finnish Army in October 2012.⁹³ In order to cut expenditure, the Defence Forces have informed 735 civilians who work for the Army that they are under threat of dismissal. Two-thirds of the civilians are women, and about 250 of them are over 50 years of age, which means that they will find it difficult to find new jobs. Military personnel, the great majority of whom are men, are not under threat of dismissal. Most civilians work in administration, which is to be concentrated in a new service centre. It is obvious that an apparently neutral criterion here puts women at a disadvantage, as the definition of indirect discrimination under Section 7 of the Finnish Act on Equality between Women and Men states. Under Finnish law, unlike EU law, the disadvantage does not have to be 'particular'. It may be, however, that the Defence Forces could justify the measure by referring to the legitimate aim of keeping up the national defence capability by not dismissing military personnel. It might be more difficult to prove that the means chosen are appropriate and necessary.

Finnish case law is unfortunately not very helpful for people who claim they have been indirectly discriminated against in the context of selective lay-offs. In a case which originates from the 1990s, a township had laid off a considerable part of a department with over 93 % female employees (the department consisted of child care, social welfare, care of the elderly, home care and health care), but not other departments which had many fewer female employees. The Supreme Court considered that the issue of indirect discrimination was in question here, unless the employer could show that the measure was based on acceptable grounds other than sex. Here the Supreme Court followed the wording of the provision on discrimination in employment under the Finnish Act on Equality. The Supreme Court found, however, that it was appropriate in terms of municipal economy for the municipality to save in pay expenditure in a certain department only, for example in order to rectify economic problems in it. The social services department had exceeded its budget. The measure was justified, as the town had objective grounds for acting as it did, and the measure was not unreasonable, as it did not last long.⁹⁴ The reasoning of the Supreme Court in this case does not give a good basis for public employer policies concerning lay-off and dismissal situations. At a time of economic constraint, social services often find it difficult to remain within the budget frame.

⁹³ The dismissals were made public by the biggest Finnish daily newspaper Helsingin Sanomat on 4 October. The internet version of the news item is available at <http://www.hs.fi/digilehti/#kotimaa/Armeijan+potkut+iskev%C3%A4t+naisiin/a1349234407780>, accessed 5 October 2012.

⁹⁴ Supreme Court decision KKO:2004:59.

Policy developments

Draft Government Bill on an amendment of the Act on Equality between Women and Men

The Finnish Government's Gender Equality Programme of 14 June 2012 promises two amendments of the Act on Equality between Women and Men (609/1986). The Act is to contain provisions on sexual minorities. The term refers to 'trans-people' (transsexual, transgender and transvestite people) as well as intersex people, but not to sexual orientation (in the sense of gay or lesbian people). It had been considered that the Act on Equality covered discrimination against sexual minorities, even without an explicit provision on the matter.⁹⁵ Yet, people belonging to these minorities have often been in contact with the Equality Ombudsman, and it has become clear that they are not sufficiently protected against discrimination. As explained in the last number of this Review,⁹⁶ in 2010 the Ministry of Social Affairs and Health started preparatory works for introducing an explicit prohibition on discrimination against sexual minorities, and a positive duty to promote their position. The Equality Ombudsman published in March this year a report on the situation and problems of these people. Now the Ministry of Social Affairs and Health has drafted a Government Bill on the issue. The Draft Bill notes that the Act on Equality between Women and Men was based on the idea of dichotomous sexes, female and male. Not all people fit into this or feel that they belong to the sex they have been assigned to at birth.⁹⁷

The draft amendment would redefine the aim of the Act on Equality (under Section 1 of the amended Act) so that besides aiming at equality between women and men, the Act will also aim at improving the position of sexual minorities in society. A person belonging to a sexual minority is defined as a person whose sex/gender identity does not correspond to the identity she or he has been given at birth, or who expresses that he or she belongs to a different sex from the one to which he or she has been assigned, or who is not unambiguously a woman or a man.⁹⁸ Sexual/gender identity is defined as a person's own experience of his or her sex or gender, and sexual expressions refer to representing gender by clothing, behaviour or other similar aspects (under Section 2(4)-(6) of the proposed Act). A new section, Section (6a) is added to the Act on Equality, under which authorities, educational institutions and employers must promote equality of sexual minorities, and take these minorities into account in equality planning. Further, the definition and prohibition of discrimination under Section 7 of the Act is proposed to be amended by adding a new provision (Section 7 (2)3) which defines differential treatment on the basis of sexual/gender identity or sexual/gender expression as direct discrimination. Similarly, a new provision is proposed to be added to the definition of indirect discrimination. Unwelcome behaviour which refers to the sexual/gender identity or sexual/gender expression is mentioned under the provision on harassment. The scope of the protection of sexual minorities against discrimination will thus be similar to that of the two (majority) sexes, if the draft amendment becomes law.

Another issue to be amended under the Draft Government Bill concerns the positive equality duty of educational institutions. Educational institutions have a duty to undertake equality planning and promote equality between women and men, but the duty has not included basic education. When Parliament in 2010 considered a report on the functioning of the amendments made to the Act on Equality in 2005, the conclusion was that the positive duty should be extended to cover basic education. The Ministry of Social Affairs and Health

⁹⁵ This line was taken by the Parliamentary Standing Committee on Working Life and Equality in 2005 and by the Equality Ombudsman. The Act on Equality has been implemented at least once in a case concerning a person belonging to a sexual minority.

⁹⁶ *European Gender Equality Law Review* 2012-1 pp. 53-54, available at http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2012-1_final_web_en.pdf.

⁹⁷ Draft Bill on an Amendment of the Act on Equality between Women and Men, 28 June 2012.

⁹⁸ The Finnish term *sukupuoli* covers both sex and gender (Finnish as a language does not have genders, which may explain the lack of differentiation). Where a distinction between sex and gender is absolutely necessary, *sukupuoli* may be used to refer to sex, and *sosiaalinen sukupuoli* (literally 'social sex') to refer to gender. The Draft Government Bill uses merely the term *sukupuoli* but it is clear from the definition of sexual minorities that both sex and gender are referred to.

asked for opinions on the draft amendment by the end of August, and the final Government Bill may be modified in accordance with these opinions.

Pay charting revisited by tripartite working group

Pay inequality between men and women remains high in Europe. As Petra Foubert stated in her article in the *European Gender Equality Law Review* on the Gender Pay Gap in 2011,⁹⁹ the impact of the gap causes the financial dependence of women during their working life and lower pensions and poverty during old age. Notwithstanding the European efforts to remedy this situation on the plane, the pay gap has been very persistent. Eurostat statistics show that while the average pay gap was 17 % for the 27 EU Member States in 2009, it was even wider for Finland (21 %).¹⁰⁰ The national statistics show that Finnish employment rates are very similar for men and women. Among the 55-64 age group, the rate for women is even higher than that for men (57 % v. 56 %). However, the rate for men is 12 % higher than that for women in the 25-34 age group, a gender gap caused by unequal child care input by parents. In terms of education and other similar factors that may be used as a legitimate explanation for the unadjusted gender pay gap, there are no differences to the disadvantage of women. However, the Finnish labour market is highly segregated by gender. Women work mainly in the public sector and in occupations related to education, health care and services, while men work mainly in the private sector and dominate in the technical occupations. Therefore, the pay gap is seen as an outcome of women and men working at different tasks. The question about pay discrimination therefore culminates in the question whether these tasks are of equal value, in spite of being different. Under the principle of equal pay, pay must be equal not only for equal (similar) work but for work of equal value.

In 2005, the prohibition against pay discrimination in the Act on Equality between Women and Men (609/1986) was complemented by a positive duty for bigger employers to undertake a 'pay charting' measure as a part of their general positive duty and their duty to equality planning. Pay charting is a duty of the employer to study the pay of women and men employees to be done in cooperation with the employees' representatives. Where unwarranted pay differentials may be detected, a plan must be made to correct them. When Parliament decided on the amendment of the Act on Equality in 2005, it requested a follow-up study on the impact of the new measure. In October 2010, the Government Report to Parliament on gender equality policies during the last ten years was published¹⁰¹ and presented to Parliament.¹⁰² Parliament received an assessment of the impact of the 2005 amendment of the Act on Equality that introduced a detailed positive duty for employers to organise extensive equality planning. The assessment was carried out in 2010, as required by Parliament at the time it passed the amendment. The assessment showed lack of implementation, especially concerning the employers' positive duty to carry out so-called charting as a part of their equality planning. The Parliamentary Employment and Equality Committee proposed that Parliament should call for an amendment of the Act on Equality between Women and Men concerning the positive duty of pay charting. The duty should be more specific, and personnel at the workplace undergoing pay charting should have better access to the charting procedure.¹⁰³ In its reply to the Government, Parliament repeated the main points made by the

⁹⁹ Foubert, P. 'Equal Pay for Men and Women in Europe Anno 2011: The Gender Pay Gap on the Retreat?', *European Gender Equality Law Review* 2011-1 pp. 23-33, available at http://ec.europa.eu/justice/gender-equality/files/egelr_2011-1_en.pdf.

¹⁰⁰ See Eurostat statistics at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Gender_pay_gap_statistics#Further_Eurostat_informatio, accessed 6 September 2012.

¹⁰¹ *Valtioneuvoston selonteko naisten ja miesten välisestä tasa-arvosta. Sisältää tausta-aineiston. Sosiaali- ja terveysministeriön julkaisuja 2010:8*, Helsinki 2010, available on <http://www.stm.fi/julkaisut/nayta/julkaisu/1538250>, accessed 25 May 2011.

¹⁰² Government Report on Gender Equality, Government Report to Parliament 7/2010 (*Valtioneuvoston selonteko naisten ja miesten välisestä tasa-arvosta*, VNS 7/2010 vp).

¹⁰³ Report of the Parliamentary Employment and Equality Committee 18, 2010 vp. dated 25 February 2011.

Employment and Equality Committee, asking for the Government to prepare an amendment of the Act on Equality.¹⁰⁴

The pay gap has been targeted by national gender equality programmes for decades. In 2003, the Ministry of Social Affairs and Health started to prepare cooperation between the Government and Finnish Social Partners on the issue, and in 2006, the Government and the Social Partners launched an Equal Pay Programme which aimed at reducing the pay gap.

Policies concerning pay in Finland are considered very much the prerogative of the Social Partners, and even legislation concerning the gender pay gap is prepared in cooperation between the Government and the labour market organisations. The gender pay gap is thus discussed in the context of labour market policies in general.

The present Government started preparatory works for an amendment of the Act on Equality required by Parliament. The Social Partners wished to continue the tripartite cooperation with the Government on the issue,¹⁰⁵ despite the meagre outcome of the former tripartite Equal Pay Programme. They proposed that the Government should nominate a new tripartite working group, and that a new tripartite assessment be made on the positive duty measures concerning equal pay that are obligatory under the Act on Equality between Women and Men. It would thus seem that the Social Partners disagreed with the results of the assessment that were presented to Parliament in 2010, which was made by independent scholars at the request of the Ministry of Social Affairs and Health. The new tripartite assessment should consider the functions of pay charting, cooperation between employers and employees concerning this issue, and the right of personnel to receive information on pay – in other words, issues concerning the amendment of the Equality Act requested by Parliament. The present Government's Gender Equality Programme states that the functioning of the Act on Equality between Women and Men is to be followed up in cooperation with the Social Partners.

In March 2012, the Ministry of Social Affairs and Health nominated a working group consisting of its own representatives, as well as representatives from all main labour market organisations (The Working Group on Pay Charting). The Working Group prepared a report, published in August 2012.¹⁰⁶ The report contains the results of two types of studies on pay charting, first a set of studies made by major labour market organisations and second the 2010 study by the Ministry of Social Affairs and Health.

The issues covered by the Social Partners' studies concerned:

1. whether a gender equality plan had been made in the workplace;
2. whether a pay charting procedure was a part of the equality plan;
3. which representatives of the employees had participated in the charting;
4. how pay was studied in the charting exercise;
5. whether different parts of pay had been considered;
6. what information people participating in the charting procedure had received;
7. whether pay differentials were detected through the charting procedure;
8. what was done if that was the case;
9. whether gender equality planning had promoted gender equality in the organisation; and
10. how employees in general had been informed about equality planning and pay charting.

The report shows that employers, employees and equality authorities assess the situation differently. Employers tend to see pay charting as an unsuitable tool for promoting gender equality. According to them, unjustified pay differentials are seldom found. Employees' representatives notice more unjustified differentials but, like employers, many employee respondents were unable to say whether such differentials were actually present or not. In

¹⁰⁴ Parliament's Reply to the Government Report on Gender Equality (*Eduskunnan vastaus Valtioneuvoston naisten ja miesten tasa-arvoa koskevaan selontekoon*), Parliamentary Brief 51, 2010 vp.

¹⁰⁵ The Social Partners agreed on the policy as part of a framework agreement made in October 2011, concerning the means to safeguard Finnish competitiveness, employment and purchasing power in an era of global economic uncertainty.

¹⁰⁶ *Palkkakartoitustyöryhmän loppuraportti* Final Report by the Working Group on Pay Charting, Ministry of Social Affairs and Health: Helsinki 2012.

other words, it is unclear to them what differentials are justified and what are not. According to both employers and employees' representatives, pay charting is usually done without comparing pay structures, or all the different components of which the pay consists, including bonuses. Thus, pay charting does not provide information as to what parts of pay may contain unjustified pay differentials. In the relatively few cases where unjustified differentials were found, remedial measures had been undertaken.

The study on pay charting requested by the Ministry of Social Affairs and Health and carried out by independent scholars in 2010 shows that the State as employer has been more active in implementing the positive duty of pay charting than other employers, both public (municipalities) and private. The study also showed that where pay charting was undertaken, it was mostly based on a comparison that did not take pay structures into account. At workplace level, there are difficulties in understanding how pay charting is to be done in practice.

The Final Report by the Working Group on Pay Charting proposes five measures for improving pay charting:

1. clarifying the manner in which such charting is to be done by guidelines and by collecting and disseminating good practices;
2. improving dissemination of information on equality planning in the workplace;
3. improving cooperation with employees' representatives and with employees themselves concerning pay charting;
4. considering the causes and justifications of pay differentials by both the employer and the representatives of the employees, taking into account that differentials may have to be analysed at the level of pay structures, and perhaps with a self-assessment tool of a checklist type for work places; and
5. assessing the equality planning including pay charting regularly, for example every five years.

The Report concludes by stating that preparatory work for any amendment needed in the Act on Equality is to be done in cooperation with Social Partners by a working group to be established in autumn 2012, which is to come up with a proposal in spring 2013. A follow-up study will be made in 2014.¹⁰⁷ It remains open to what extent improvement of pay charting will rely on 'hard' legal regulation through an amendment of the Act on Equality, and how far equality policy will be based on 'softer' means, such as guidelines given by Social Partners. A problem not mentioned in the Report concerning 'hard' law has been the extremely limited resources available for supervision of employers' positive duties by the Equality Ombudsman. Disagreement about the best means to reduce pay differentials will continue. One may also predict that factors other than gender equality policies will have an impact on pay differentials. It seems that pay increases are common during good economic times, and that they fall to people high in the labour market hierarchy. As these people tend to be men, pay differentials increase with growing markets. A worsening economy may help to reduce pay increases, which again may affect the gender pay gap.

FRANCE – Sylvaine Laulom

Legal effects of the economic crisis on gender equality issues

The economic crisis has had important effects in France. Since 2008, the unemployment rate has dramatically increased and it is still increasing. In September 2012, 3 million workers were unemployed. For the first half of 2012, the unemployment rate has reached 10.2 %. At the beginning of the employment crisis, men were more affected by the crisis and male and female unemployment rates converged. However at the end of 2009, the unemployment rate

¹⁰⁷ The policy proposals described here are presented on pp. 27- 29 of the Report.

for males slightly declined while that for women continued to increase and the female unemployment rate is now slightly higher than the male unemployment rate.

Even if this aspect is not well analyzed the economic crisis seems to impact more on women than on men as women are more likely than men to be outside the labour market, to work part-time or under atypical contracts.

The measures taken by the French Government during the crisis do not discriminate between men and women. It is however obvious that some of the austerity measures taken can impact differently on men and women. In the public sector, even though some measures were taken to promote equality between men and women,¹⁰⁸ the replacement-freezing scheme affecting public servants could have more of an impact on women's position in the labour market. Under this replacement scheme, the public sector is not replacing one half of the public servants leaving because they have reached pension age. The consequence of this measure on gender has not been analysed. However, in France, like in many countries, more women than men are working in the public sector, and women could generally find more and better jobs in this sector. The replacement scheme could thus impact differently on women and men.

As in many other countries, a general reform of pensions, aiming to lower the financial burden of pensions, was adopted in 2009.¹⁰⁹ This was done mainly through the lengthening of contribution periods required to qualify for a full pension and by changing the reference for the calculation of benefits from 'best years' to lifetime earnings. The main provision of the reform is the raising of the statutory age for entitlement to a state retirement pension from 60 to 62, a stage that will be reached gradually. The legal age is when one is able to claim a pension, whether all the contributions have been met or not, and it is a legal right. The minimum years of contribution which give the right to a full pension have also been increased from 40.5 years to 41 in 2012 and to 42 thereafter. The age of entitlement to a full pension (that is, a pension without deductions) will also be progressively raised to 67 from 65.

It is obvious that the new law will have negative consequences for women, as women are usually working and contributing less than men because of part-time work and because of interruptions to their careers: thus the increase in the minimum years of contribution will automatically affect women more than men. Because of the economic crisis, inequalities in the labour market between men and women remain and have even increased and this situation will have an impact on the adequacy of women's pensions. Some measures in the law were adopted to take into account the specific situation of women but they are not sufficient to improve the pension situation of women, and the 2009 reform could threaten their already inadequate pension rights.¹¹⁰

Policy developments

A new Socialist President was elected on 6 May 2012. One of the first measures adopted by the President and the Prime Minister was the nomination of a government which respects parity between men and women. 17 of the 34 ministers are women. However, while half the appointed ministers are women, nearly all key ministries, such as Foreign Affairs, Interior, and Economy and Finance, have been given to men; only the Ministry of Justice has been given to a woman, Christiane Taubira. As promised during the campaign, the Government now also includes the new Ministry of Women's Rights which will be run by Najet Vallaud-Belkacem. In addition to this post, Belkacem will be the Government's spokesperson.

¹⁰⁸ Law n° 2012-347 requires that women progressively make up 40 % of the various boards of public enterprises. The Law also requires that women make up 40 % of high level public services workers, see EGELR 2012-1, p. 56, available at http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2012-1_final_web_en.pdf, accessed 17 September 2012.

¹⁰⁹ *Loi No. 2010-1330 du 9 novembre 2010 portant réforme des retraites.*

¹¹⁰ See S. Renga, D. Molnar-Hidassy and G. Tisheva, *Direct and Indirect Gender Discrimination in Old-Age Pensions in 33 European Countries*, Dec. 2010. European Network of legal experts in the field of gender equality, available at: http://ec.europa.eu/justice/gender-equality/files/conference_sept_2011/dgjustice_oldagepensionspublication3march2011_en.pdf, accessed 17 September 2012.

The newly elected National Assembly (June 2012) now counts 155 women amongst its 577 members. Women now represent 26.9 % of the MPs as against 18.5 % before the election. Most of these new MPs came into the National Assembly with the majority Socialist Party and its allies: among the 280 Socialists elected, there are 106 women, including 9 among the 18 Greens. On the other hand, the right-wing UMP party and its allies is only represented by 27 women as against 194 men.

Apart from a new Act on harassment (see below), no new measures have yet been adopted on equality issues as the Government prefers social partners to negotiate first. A ‘Great Social Conference’ was organised by the Government on July 9 and 10. It brought together 300 officials representing the State, the trade unions and employers’ organisations. Seven working groups were organised, among them one on gender equality at work. Collective bargaining with social partners will start in October on this issue.

On 23 August, the Government published two circulars¹¹¹ which highlight the willingness of the Government to act on gender equality. The first one reminds all members of the Government of the need to take into account gender equality in each of their draft texts. The legislative proposals might now systematically include an impact assessment on gender. The second one states that the action of the State should be exemplary on gender issues. An interministerial committee will meet at the beginning of October to ensure that every member of the Government is mobilised to promote equality and combat violence against women. An action plan will also be prepared for 2013-2017.

Legislative developments

New law on sexual harassment

The decision of the French Constitutional Court, dated 4 May 2012,¹¹² came as a bombshell, as it removed the prohibition on sexual harassment from the French criminal code. This decision and, more importantly, its consequences were clearly unexpected as the decision leaves a legal vacuum in the criminal code, given its immediate effect. The French Constitutional Court based its decision on the grounds that the provision of the French criminal code prohibiting sexual harassment was not clear or precise enough. Over the years, the definition of sexual harassment included in the French criminal code has been significantly widened to prohibit increasing types of behaviour, rendering these provisions too vague.

The main consequence of this decision is that as from the date of publication of the decision, no one can be convicted or punished on the ground of sexual harassment, as the offence no longer exists, and alleged offenders will be systematically discharged.

The new French legislature quickly addressed this issue and a new law was adopted in August.¹¹³ The bill was adopted unanimously with the support of both left and right. It gives a new definition of sexual harassment, very similar to the European one and the sanctions have been strengthened. The new law defines harassment as imposing on someone, in a repeated way, words or actions that have a sexual connotation and either affecting the person’s dignity because of their degrading or humiliating nature or putting him or her in an intimidating, hostile or offensive situation. One single act can also lead to prosecution where someone is using any kind of serious pressure, with the real or visible goal of obtaining an act of a sexual nature (Article 222-33 of the Penal Code). Sexual harassment is now punishable by up to two

¹¹¹ *Circulaire du 23 août 2012 relative à la prise en compte dans la préparation des textes législatifs et réglementaires de leur impact en termes d’égalité entre les femmes et les hommes*, JORF n° 0196 du 24 août 2012, p. 13760 et *Circulaire du 23 août 2012, relative à la mise en œuvre de la politique interministérielle en faveur de l’égalité entre les femmes et les hommes*, JORF, n° 0196 du 24 août 2012, p. 13761.

¹¹² QPC 4 mai 2012, n° 2012-240, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2012/2012-240-qpc/decision-n-2012-240-qpc-du-04-mai-2012.105618.html>, accessed 10 September 2012.

¹¹³ *LOI n° 2012-954 du 6 août 2012 relative au harcèlement sexuel*, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026263463&dateTexte=&categorieLien=id>, accessed 10 September 2012. Also see the circular adopted on 7 August 2012 by the Ministry of Justice.

years in jail and a fine of EUR 30 000 (against one year in jail and a fine of EUR 15 000 previously). Offenders can also face up to three years in jail and a EUR 45 000 fine for more serious offences, like sexually harassing a minor under 15 years old or a person who is physically disabled or ill. Like every penal law, it is not retroactive, and the law will only apply to acts committed after 8 August. For the victims of sexual harassment committed before this date, the situation is not satisfactory. All cases being pursued beforehand were dropped. The Law provides that civil actions are still possible and it is also possible to pursue sexual harassment on other grounds such as attempted sexual assault or deliberate violence. However this requalification of the facts won't always be possible, and civil action will take time and obviously does not produce the same results as a criminal action. If the victim can obtain an indemnity, the offender could not be criminally liable.

On a related note, the prohibition of moral harassment has also been challenged by a French court but the *Cour de cassation* refuses to transmit the question to the Constitutional Court considering that the Constitutional Court has already admitted the constitutionality of the definition of moral harassment.¹¹⁴

Case law of national courts

Several cases on indirect discrimination

Even if indirect discrimination is prohibited, there are very few cases in France on this issue. However, this year, the *Cour de cassation* has applied the concept of indirect discrimination in two cases which could show an evolution of the case law of the Court which will now be less reluctant to use this concept than before.¹¹⁵ The first case was about an affiliation to a pension scheme which was refused to certain categories of workers. The *Cour de cassation* first recalled the definition of indirect discrimination and then noticed that the categories of workers affected by this measure were mainly women while other categories employing men were affiliated. As the employer could not justify this difference, the *Cour de cassation* considered that the measure was discriminatory. In the second case, the *Cour de cassation* admitted that a measure based on part-time work, which concerned mainly women and could not be justified, was also discriminatory.

Equality body decisions/opinions

In 2011, the French Equality Body was merged with other specialised bodies into a new constitutional authority called the Defender of Rights, while keeping similar missions and powers in the Defender of Rights. Before the merger, a rise in claims based on pregnancy had been reported and it had been explained by the HALDE (*Haute Autorité de Lutte contre les Discriminations et pour l'Égalité*, the French Equal Opportunities and Anti-Discrimination Commission) as the result of a better knowledge and awareness of their rights by women and also the effect of a communication and information campaign that the HALDE did in 2009. Some cases were also subjected to media attention and contributed to a better awareness by women.

In June 2012, the Defender of Rights published its first annual report.¹¹⁶ The Defender of Rights has been given similar powers and fields of competence to those of the former HALDE on all forms of discrimination forbidden by law. However, the report notices a significant decrease in the claims received by the institution (12 467 in 2010 compared with 8 183 in 2011) certainly due to the replacement of the HALDE by the Defender of Rights which is less well known than the HALDE. Of all the claims on discrimination, 8.4 % are on the ground of gender, and 4.7 % on the ground of pregnancy. According to the report, very often it is after maternity or parental leave that the professional situation of women gets

¹¹⁴ *Cour de cassation*, 11 July 2012, n° 11-88114 and *Conseil Constitutionnel*, *Décision n° 2001-455 DC*, 12 January 2002.

¹¹⁵ *Cass. Soc.* 6 June 2012, n°10-21489 and *Cass. Soc.* 3 July 2012, n°10-23013.

¹¹⁶ Rapport annuel 2011 du défenseur des droits, <http://www.defenseurdesdroits.fr/documentation>, accessed 10 September 2012.

worse, and sometimes leads to harassment or to dismissal.¹¹⁷ These figures clearly show that pregnancy and maternity-related discrimination are still important grounds for women's claims of discrimination.

Miscellaneous

An annual report on collective bargaining in France is published every year in June and gives the general figures on collective agreements concluded in the year before. The last report published in 2012 notes that the number of collective agreements on equality have significantly increased in 2011 at company level. This is a consequence of the new system of sanctions adopted in 2011. The content of the agreements is improving and some good practices are presented (most of them are dealing with the question of wages), among them measures on working time (possibility to pay for a full contribution to a pension when working part-time, development of teleworking).¹¹⁸

GERMANY – Ulrike Lembke

Legal effects of the economic crisis on gender equality issues

Despite active public debate, any significant legal effects of the economic crisis on gender equality issues cannot be validated. The employment rate of men *and* women in Germany has been growing steadily since 2001,¹¹⁹ the unemployment rate of men *and* women has continuously decreased since 2005, except for 2009 when the male unemployment rate was 0.5 % higher than the previous year.¹²⁰ Thus, it was generally considered in Germany in 2009 that men might suffer more deeply from the economic crisis because they work more frequently in sectors dependent on business cycles and economic factors than do women.¹²¹ State measures to counter the effects of the economic crisis have focused on (industrial) sectors that generally employ men.¹²² It was widely ignored that the increasing employment rate of women is mainly based on part-time, marginal, low paid and precarious work.¹²³

In 2010, a study on the effects of the economic crisis on employers was published by the Institute for Economic and Social Research (*Wirtschafts- und Sozialwissenschaftliches Institut, WSI*).¹²⁴ It could not confirm that either men or women were at a particular risk of dismissal compared with employees of the other sex, but male employees were more often subject to decreases in salary in areas such as general bonuses, profit share, Christmas allowances or holiday pay. (One reason might be that a much lower percentage of female than

¹¹⁷ Rapport annuel 2011 du défenseur des droits, <http://www.defenseurdesdroits.fr/documentation>, accessed 10 September 2012.

¹¹⁸ Ministère du travail, *La négociation collective en 2011*, Bilan et Rapport, 2012. http://travail-emploi.gouv.fr/IMG/pdf/Bilans_et_rapports_-_la_negociation_collective_en_2011.pdf, accessed 10 September 2012.

¹¹⁹ See Federal Employment Agency *Arbeitsmarkt 2011* pp. 60-61, Nürnberg 2012, <http://statistik.arbeitsagentur.de/Statischer-Content/Arbeitsmarktberichte/Jahresbericht-Arbeitsmarkt-Deutschland/Generische-Publikationen/Arbeitsmarkt-2011.pdf>, accessed 22 September 2012.

¹²⁰ See Federal Employment Agency *Arbeitsmarkt 2011* pp. 102-103, Nürnberg 2012.

¹²¹ See for example <http://www.spiegel.de/wirtschaft/arbeitslosigkeit-krise-wird-zur-maenner-rezession-a-622263.html>, accessed 22 September 2012. Analysed and criticised by C. Wichterich 'Geschlechteranalysen und -diskurse in der Krise', *Peripherie* No. 118/119 (2010) pp. 164-187 (180 et seq).

¹²² See M. Kuhl *Wem werden Konjunkturprogramme gerecht? Eine budgetorientierte Gender-Analyse* May 2010, <http://library.fes.de/pdf-files/wiso/07230.pdf>; A. Scheele 'Hat die Wirtschaftskrise ein Geschlecht?' *Eurozine* 2009-03-10, <http://www.eurozine.com/pdf/2009-03-10-scheele-de.pdf>, both accessed 22 September 2012, and S. Reiner 'Wem nutzen die Konjunkturpakete?' *WiSo Diskurs* (October 2009) pp. 5-14 (9 et seq).

¹²³ Strongly criticised in: I. Kurz-Scherf & A. Scheele (eds.) *Macht oder ökonomisches Gesetz? Zum Zusammenhang von Krise und Geschlecht*, Münster 2012.

¹²⁴ See http://www.boeckler.de/pdf/p_wsi_report_2_10.pdf, accessed 22 September 2012.

male employees receive such additional payments and bonuses).¹²⁵ On the other hand, female employees were more likely than male employees to suffer from a deterioration in working conditions such as increasing pressure to perform, an increasingly disagreeable working atmosphere and lower promotion prospects.

Generally, Germany has not been gravely affected by the economic crisis until now – especially not in comparison with other Member States. Gender-specific problems in the labour market¹²⁶ concerning gender-segregated sectors, part-time work, marginal employment and in-work poverty, the principle of equal pay, the reconciliation of working and family life, time-outs and career breaks, duration of unemployment and poverty in old age have their origin in political decisions made before the economic crisis.¹²⁷ Starting in the second half of the 1990s, various reforms aimed to make the labour market more flexible and reduce labour standards and welfare benefits. Cost-saving measures, layoffs and outsourcing in the public sector with their effects on gender equality issues began before the economic crisis which will only serve to intensify their effects.¹²⁸ Sectors that generally employ women could be further affected by a future loss of tax revenues and declining domestic demand.¹²⁹

Policy developments

Reconciliation of work and family life

According to the ‘Monitor Family Life 2012’ study,¹³⁰ 60 % of parents with underage children (and 47 % of the population) think that the reconciliation of work and family life is one of the most important political tasks in Germany nowadays. Some 75 % of parents consider both companies and the state to be responsible for reaching this goal.

For a better reconciliation of working and family life, the people surveyed wanted more flexible working times, more possibilities for working from home and part-time work, more childcare offered by companies and an easier involvement of working fathers in childcare. 75 % of those surveyed and 87 % of parents of underage children welcomed the expansion of the infrastructure of public daycare facilities. But 59 % of the people surveyed doubted that this project will succeed and be completed as planned in 2013.

Gender pay gap

The gender pay gap in Germany remains at 23 %.¹³¹ The lack of progress in tackling it raises concerns: a broad alliance of social and political groups as well as single parliamentary groups have demanded statutory provisions on the effective enforcement of equal pay.¹³²

¹²⁵ See <http://www.lohnspiegel.de/main/frauenlohnspiegel/frauengehalter-niedriger>, accessed 22 September 2012.

¹²⁶ For further and detailed information see http://www.boeckler.de/wsi_38957.htm; for some actual data see Federal Employment Agency *Frauen und Männer am Arbeitsmarkt im Jahr 2011*, Nürnberg 2012, <http://statistik.arbeitsagentur.de/Statischer-Content/Arbeitsmarktberichte/Berichte-Broschueren/Arbeitsmarkt/Generische-Publikationen/Frauen-Maenner-Arbeitsmarkt-2012-07.pdf>, both accessed 22 September 2012.

¹²⁷ According to H. M. Nickel ‘Die “große Transformation” als Krise des Arbeits- und Geschlechterregimes’, *Arbeits- und Industriesoziologische Studien* No. 5 (May 2012) pp. 5-16, the fundamental transformation of the labour market started as early as the 1970s.

¹²⁸ See S. Reiner ‘Wem nutzen die Konjunkturpakete?’ *WiSo Diskurs* (October 2009) pp. 5-14; further theoretical approaches will be published in *femina politica* 1/2013, see the call for papers: http://www.gwi-boell.de/downloads/Femina_Politica_CfP_1_2013.pdf, accessed 22 September 2012.

¹²⁹ See G. Schambach *Gender in der Finanz- und Wirtschaftskrise* Berlin 2010, pp. 72-73; A. Scheele ‘Hat die Wirtschaftskrise ein Geschlecht?’ *Eurozine* 2009-03-10, <http://www.eurozine.com/pdf/2009-03-10-scheele-de.pdf>, accessed 22 September 2012.

¹³⁰ Study ‘Monitor Family Life 2012’, ordered by the Ministry for the Family, Senior Citizens, Women and Youth and conducted by the Allensbach Institute, <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung2/Pdf-Anlagen/monitor-familienleben-2012.property=pdf.bereich=bmfsfj.sprache=de.rwb=true.pdf>, accessed 24 September 2012.

¹³¹ See https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2012/03/PD12_101_621.html, accessed 12 September 2012.

¹³² See <http://www.frauenrat.de/deutsch/infopool/informationen/informationdetail/back/11/article/equal-pay-day-recht-auf-mehr-nur-mit-einem-gesetz.html>, accessed 12 September 2012. Moreover, see the request from the parliamentary group of the Greens, Documents of the Federal Parliament (*Bundestags-Drucksache*) 17/8897 of 7 March 2012, <http://dipbt.bundestag.de/dip21/btd/17/088/1708897.pdf>, as well as the request from the State of

But it appears that the German state is part of the problem: The fundamental overhaul of the general collective agreement for white-collar workers in the public services did not include the termination of gender discriminatory job classification systems in those services. The trade union *ver.di* took the opportunity to check the wage groups of public services in a process of gender mainstreaming and unsurprisingly detected a significant over-rating of typical male work compared with typical female work.¹³³ But the reform of hundreds of classification groups which have historically developed over a period of decades totally overstrained the social partners. Therefore, from January 2012, the former gender-discriminatory classification systems apply unchanged under a new title within the federal states.¹³⁴ Thus the states themselves gravely violate the prohibition of pay discrimination and set disastrous precedents.

Moreover, collective agreements with public services and social institutions nowadays contain pay groups for 'simple' and 'most simple' work and thus the regulation of excessively low wages. The downgrading of wages in public services and social institutions is justified by the necessary competitiveness of states and municipalities and the prevention of outsourcing.¹³⁵ Most of this low-paid work (such as cleaning, cooking and laundry activities) is performed by women. At the same time, the governing parties reject the idea of statutory minimum wages although the (mostly female) employees in marginal employment would primarily benefit from them.

Pension schemes for caring family members

The Federal Government and the governing parties are determined to reduce the poverty of women in old age. The problem is mainly caused by the deficient integration of women into the labour market, the gender-specific division of (care/family and professional) work and mostly 'female' family-related time-outs and career breaks.¹³⁶ The Minister for Employment and Social Affairs developed a concept of supplementary pension (*Zuschussrente*) which also takes into account periods of bringing up children and of care work.¹³⁷ But the concept is not supported by other Ministries or political parties.¹³⁸ The Christian Social Union (*Christlich Soziale Union, CSU*) has demanded legal consideration of periods of up to three years for all mothers bringing up children, as well as equal consideration of domestic care.¹³⁹

Legislative developments

Gender quotas on company boards

The question of gender quotas for supervisory and executive boards is still vigorously discussed in Germany.¹⁴⁰ In July 2012, 4 % of executive board members and 15 % of

Baden-Württemberg, Documents of the Federal Council (*Bundesrats-Drucksache*) 129/12 of 7 March 2012, <http://www.bundesrat.de/SharedDocs/Drucksachen/2012/0101-200/129-12.templateId=raw.property=publicationFile.pdf/129-12.pdf>, and especially the draft law presented by the parliamentary group of the Social Democratic Party, Documents of the Federal Parliament (*Bundestags-Drucksache*) 17/9781 of 23 May 2012, <http://dip21.bundestag.de/dip21/btd/17/097/1709781.pdf>, all accessed 14 September 2012.

¹³³ See <http://entgeltgleichheit.verdi.de/>, accessed 18 September 2012.

¹³⁴ See R. Winter in: W. Däubler (ed.) *Tarifvertragsgesetz: mit Arbeitnehmer-Entsendegesetz. Kommentar* Section 1 paragraph 401, 3rd edn, Baden-Baden 2012.

¹³⁵ See R. Winter 'Diskriminierungsfreie(re) Entgeltgestaltung – leider Prinzip ohne Praxis' in: C. Hohmann-Dennhardt et al. (eds.) *Geschlechtergerechtigkeit. Festschrift für Heide Pfarr* pp. 320-333 (328), Baden-Baden 2010.

¹³⁶ For further information see <http://dipbt.bundestag.de/dip21/btd/17/091/1709117.pdf>, accessed 4 October 2012.

¹³⁷ See <http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Pressemitteilungen/rentendialog-zuschussrente.pdf?blob=publicationFile>, accessed 4 October 2012.

¹³⁸ See <http://www.frauenrat.de/deutsch/infopool/informationen/informationdetail/article/altersarmut-von-frauen-union-fokussiert-auf-muetter.html>, accessed 4 October 2012.

¹³⁹ See <http://www.sueddeutsche.de/bayern/rentenkonzept-csu-will-weibliche-altersarmut-bekaempfen-1.1490622>, accessed 8 October 2012

¹⁴⁰ For example, at the German Lawyers' Conference (*Deutscher Juristentag*) in September 2012, see <http://www.djb.de/st-pm/pm/pm12-23/>, accessed 4 October 2012.

supervisory board members were female.¹⁴¹ On Friday, 21 September 2012, the majority of the Federal Council (*Bundesrat*) approved a draft law on promoting equal participation of women and men on company boards, presented by the state of Hamburg.¹⁴² The draft law contains a statutory minimum quota for both sexes on the supervisory boards of listed private companies. A 20 % minimum quota has to be achieved by 2018, followed by a 40 % minimum quota which has to be achieved by 2023. Furthermore, the draft law covers reporting requirements and the publication of statistical information.

To become law, the draft has to be adopted by a majority of the Federal Parliament (*Bundestag*). The strongest opponents of statutory women's quotas are the Minister for the Family, Senior Citizens, Women and Youth (favouring a concept of a non-legally binding 'flexiquota'); the political leaders of the Liberal Party (*Freie Demokratische Partei, FDP*) which is one of the governing parties in a coalition with the Christian Democratic Party; (*Christlich Demokratische Union, CDU*), and the political leaders of the Christian Social Union (*Christlich Soziale Union, CSU*), the sister party of the governing Christian Democratic Union, with which it forms a single faction within the Federal Parliament. But the majority within the Federal Council approving the draft law on 21 September 2012 was established with the help of the Governments of two states which are led by the Christian Democratic Union (Saxony-Anhalt and Saarland). Now the Federal Parliament has to discuss the draft law. The parliamentary majority of the factions of the Christian Democratic Party, the Christian Social Union and the Liberal Party can reject the draft law. But some members of the Christian Democratic Party support statutory gender quotas for supervisory boards, among them the Minister for Employment and Social Affairs.

Now the leader of the female members of the parliamentary group of the governing Christian Democratic Union has demanded a suspension of the faction discipline when voting on the quota draft law. A total of 21 dissenters from the Christian Democratic Union would suffice to pass the draft law on statutory gender quotas. Normally, the faction discipline is only suspended in the case of a decision based on conscience (such as abortion). The leader of the female members of the parliamentary group of the governing Christian Democratic Union has used the term 'policy for women's conscience' (*frauenpolitisches Gewissen*). Because of the constitutional provision of the independent mandate, the faction discipline is not based upon law, but on tradition, politics and coalition agreements. The female members of the Christian Democratic Union have been accused of splitting up the coalition with the Liberal Party and thus supporting the opposition political parties. They have also been reminded that the political consequences for dissenters might be most unpleasant, especially when they put the governing coalition at stake. But generally, the result of the necessary vote in the Federal Parliament on gender quotas remains open.

Childcare benefits

The coalition agreement between the parties in power which makes provision for childcare benefits (*Betreuungsgeld*) will become law within the next few weeks, entering into force on 1 August 2013, although it has been rejected by a broad majority of the population.¹⁴³

Childcare benefits for parents who want to care for their children personally as long as they are less than three years old instead of sending them to a kindergarten,¹⁴⁴ are the subject of huge controversy in Germany. It is feared in particular that such benefits will lead to a decline in female participation in the labour force and thus an increase in female poverty in

¹⁴¹ Documentation and Evaluation of the Women-on-Board-Index of 14 July 2012, http://www.fidar.de/webmedia/documents/wob-index/120714_Studie_WoB-Index_VIII_end.pdf, accessed 24 September 2012.

¹⁴² Draft law on promoting equal participation of women and men on company boards of 29 May 2012, presented by the state of Hamburg, http://www.bundesrat.de/nn_2291536/SharedDocs/Drucksachen/2012/0301-400/330-12_templateId=raw_property=publicationFile.pdf/330-12.pdf, accessed 24 September 2012.

¹⁴³ For further information see <http://www.betreuungsgeld-aktuell.de/>, accessed 24 September 2012.

¹⁴⁴ See the draft law on childcare benefits of 12 June 2012, <http://dipbt.bundestag.de/dip21/btd/17/099/1709917.pdf>, and the hearing before the Federal Parliament on 4 July 2011, http://www.bundestag.de/dokumente/textarchiv/2011/34850518_kw26_pa_familie/index.html, both accessed 24 September 2012.

old age (as well as having negative effects on the skills of toddlers, especially girls).¹⁴⁵ A broad variety of people, parties and institutions agree that childcare benefits are a dangerous backward step regarding employment, family and gender equality policies and are demanding a further expansion of the infrastructure of public daycare facilities instead; among them are employers' associations as well as trade unions, political parties, child protection organisations, anti-discrimination groups, feminist and family organisations, legal and scientific experts and politicians from all parties.¹⁴⁶

On 21 September 2012, politicians and experts from the governing Christian Democratic Union and the Christian Social Union agreed on an amended draft law: parents who wish to care for their children at home will be entitled to choose between cash payment of childcare benefits or a contribution to their pension schemes. Furthermore, the entitlement to childcare benefits will depend upon regular preventive medical examinations of toddlers.

Childcare benefits are a political project of the Christian Social Union, the governing party in the state of Bavaria and the sister party of the governing Christian Democratic Union, with which it forms a single faction within the Federal Parliament. A planned vote on childcare benefits on 18 October 2012 would have been just a day before the CSU party convention in Bavaria was due to begin. The vote had to be postponed due to the concerns and critiques of the Liberal Party, which is one of the governing parties in a coalition with the Christian Democratic Party. In April 2012, the parliamentary group of the Liberal Party had questioned the compatibility of childcare benefits with the German constitution.

On 9 November 2012, the Federal Parliament passed the law on childcare benefits with a narrow majority.¹⁴⁷ The Liberal Party made its consent subject to legal changes in the health sector, especially the termination of the so called practice fee. The Social Democratic Party announced that the childcare benefits will be terminated immediately after an electoral victory in 2013. The Greens and the Left Party consider filing a complaint before the Federal Constitutional Court.

Child custody between unmarried parents

With the objective of putting an end to certain forms of discrimination against unmarried fathers, a comprehensive revision of the German law of child custody between unmarried parents was required by the European Court of Human Rights and the Federal Constitutional Court (*Bundesverfassungsgericht*) in 2009 and 2010. Since then, different regulatory models have been discussed.¹⁴⁸ The latest draft law presented by the Federal Government¹⁴⁹ was thoroughly criticised by the German Women Lawyers' Association (*Deutscher Juristinnenbund, djb*) due to the lack of consideration it gave to the interests of the social family compared with the interests of the biological father.¹⁵⁰ The Federal Council required amendments with the aim of preserving more parental rights for the mother and strengthening the role of the courts which have to act in the best interests of the child.¹⁵¹

¹⁴⁵ See the study on the negative effects of childcare benefits presented by the Institute for the Study of Labour, <http://ftp.iza.org/dp6440.pdf>, accessed 24 September 2012.

¹⁴⁶ See for example the German Trade Union Federation on the negative effects of childcare benefits for the labour market and the reconciliation of work and family life, http://www.dgb.de/search?tab=Artikel&display_page=1&search_text=Betreuungsgeld, the Association of Single Parents, http://www.vamv.de/uploads/media/VAMV-Stellungnahme_Betreuungsgeld_110912.pdf, twelve organisations against childcare benefits, <http://www.djb.de/Kom/K4/pm12-19/>, and the coalition against childcare benefits, <http://neinzumbetreuungsgeld.de/>, all accessed 4 October 2012.

¹⁴⁷ See <http://www.spiegel.de/politik/deutschland/bundestag-schwarz-gelb-drueckt-betreuungsgeld-durch-a-866258.html>, accessed 12 November 2012.

¹⁴⁸ See for example the draft law presented by the parliamentary group of the Social Democratic Party, Documents of the Federal Parliament (*Bundestags-Drucksache*) 17/8601 of 8 February 2012, <http://dipbt.bundestag.de/dip21/btd/17/086/1708601.pdf>, accessed 2 October 2012.

¹⁴⁹ See http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/GE_Elterliche_Sorge.pdf?__blob=publicationFile, accessed 2 October 2012.

¹⁵⁰ See <http://www.djb.de/Kom/K2/st12-7/>, accessed 2 October 2012.

¹⁵¹ See recommendations of the Federal Council, Documents of the Federal Council (*Bundesrats-Drucksache*) 465/12 of 21 September 2012, http://www.bundesrat.de/cln_236/SharedDocs/Drucksachen/2012/0401-500/465-12_28B_29.templateId=raw.property=publicationFile.pdf/465-12%28B%29.pdf, accessed 2 October 2012.

Case law of national courts

Principle of equal pay: grounds of discrimination

The Federal Labour Court had to decide on the remuneration of clinical chemists and medical doctors with relation to a job classification system which separated both groups of employees working in a public hospital.¹⁵² The court decided that neither Article 157 TFEU nor Section 1 or 7 of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*) provide for ‘the same pay for the same work’ but are limited to the prohibition of any discrimination with regard to pay for the same or equivalent work on the grounds of sex.

Principle of equal pay: value of male and female work

Another judgment of the Federal Labour Court dealt with different allowances for (mostly female) secretaries and (mostly male) technicians working for the Federal Armed Forces (*Bundeswehr*).¹⁵³ The allowance for secretaries was not covered by a collective labour agreement and was terminated due to restructuring in 2005. The allowance for technicians was covered by a collective labour agreement with the aim of mitigating the economic effects of this restructuring. The court decided that there was no indirect gender discrimination due to the lack of comparability of the allowances for secretaries and for technicians. According to the court, allowances not covered by collective wage agreements are subject to free contractual arrangements which may not in any way be affected by collective agreements. *Obiter dictum*, the court indicated its opinion that secretarial work itself is not comparable to technical work.

Principle of equal pay: burden of proof

A further judgment of the Federal Labour Court concerned the burden of proof in cases of alleged pay discrimination.¹⁵⁴ The claimant worked as an insurance agent for a private insurance company and was remunerated according to his level of success in concluding insurance contracts. After a restructuring of the company, the claimant suffered significant losses in his high annual income. He claimed for a termination agreement with redundancy payments. The company refused due to the amount of the necessary redundancy payment. The claimant suggested – among many other arguments – that he was discriminated against on the grounds of sex and age because employees in the inside sales team could terminate their labour contracts under better conditions than the field staff and the members of the inside sales team were younger and mostly female. The court decided that the claimant had not presented any evidence of being discriminated against on the grounds of age or sex. It would have been at least necessary to supply concrete information about income, age and sex of comparable employees, i.e. employees who had succeeded in concluding a termination contract.

Tariff classification in private health insurance

The Federal Court of Justice had to decide on the classification of a transsexual member of a private health insurance scheme after her male-to-female gender reassignment.¹⁵⁵ The claimant entered the insurance contract as a male and was insured under the tariff conditions of a male. The claimant had undergone surgical male-to-female gender reassignment but did not file an application for legal recognition of her new sex because she was married. The insurance company classified the claimant as female and thus the claimant had to pay the higher insurance rates for women. The court did explicitly not answer the question whether a gender-based classification system with different tariffs for men and women is compatible with the constitutional gender equality principle. The court decided that the insurance

¹⁵² Federal Labour Court, judgment of 25 January 2012, 4 AZR 147/10.

¹⁵³ Federal Labour Court, judgment of 19 April 2012, 6 AZR 578/10.

¹⁵⁴ Federal Labour Court, judgment of 16 February 2012, 8 AZR 242/11.

¹⁵⁵ Federal Court of Justice, judgment of 9 May 2012, IV ZR 1/11.

company was not entitled to make an amendment to the insurance contract under the applicable law.

GREECE – Sophia Koukoulis-Spiliotopoulos

Legal effects of the economic crisis on gender equality issues

Policy developments

In the last issue of this Review we quoted statements both of independent bodies dealing with human rights and of NGOs regarding the dramatic socio-economic situation in Greece. We will now try to present summarily this situation and its impact on gender equality.

Since May 2010, due to a deep financial crisis, Greece has been under an EU/International Monetary Fund (IMF) assistance programme, which includes pooled bilateral loans by the Euro area Member States in conjunction with IMF funding. The disbursements were made dependent on compliance with austerity measures required by two consecutive Memoranda of Understanding signed by the European Commission, acting on behalf of the Euro area Member States, and the Hellenic Republic. Among these measures were sweeping employment and social security law reforms, coupled with drastic social spending cuts and tax increases. An avalanche of implementing legislation ensued.

The implementing provisions create great legal insecurity. They are included in long and tortuous pieces of legislation, often dealing with subjects unrelated to one another ('omnibus laws'), often with retroactive effect and difficult to combine amongst themselves and with other relevant legislation. They are, moreover, quite often and unpredictably modified. Fundamental social principles, such as the principle of *favourability* (primacy of provisions more favourable to workers) were abolished, as the hierarchy of collective agreements was reversed and they were subjugated, like individual contracts, to statutory provisions. The unilateral prejudicial modification of working conditions by the employer was allowed, while drastic cuts in wages, pensions and social spending were made. Thus, the fundamental right to collective bargaining shrank, essential safety nets disappeared and the welfare state was gradually dismantled.

In its 2012 Report, the ILO Committee of Experts on the Application of Conventions and Recommendations¹⁵⁶ expressed its '*deep concern*'¹⁵⁷ at these 'alterations', which 'go to the heart of labour relations, social dialogue and social peace', 'nullifying the binding nature of collective agreements'. It underlined 'the disproportionate impact of the crisis on women' and called for 'adequate safeguards to protect workers' living standards'. Austerity measures should be assessed and planned with a view to preventing poverty; it was 'the duty of the government, together with all the parties involved with the international support mechanism', to do so. This Report responded to complaints by the Greek General Confederation of Labour (GSEE); it also relied on the findings of an ILO High Level Mission to Greece which investigated these complaints. The Council of Europe Committee of Ministers, in monitoring the application of the European Code of Social Security by Greece, reached similar conclusions.¹⁵⁸ However, these bodies relied on data predating the 2012 austerity measures. They were not aware of subsequent measures, including the annihilation of national general collective agreements (NGCAs) (below section 2). The gravity of the situation, with

¹⁵⁶ International Labour Conference, 101st Session 2012, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Greece, ILO Conventions 98, 100, 102, 111 and 156: <http://www.ilo.org/dyn/normlex/en/f?p=1000:11003:0::NO>, accessed 15 September 2012.

¹⁵⁷ Emphasis added in the observations on the application of ILO Convention 98 (Right to Organise and Collective Bargaining) by Greece. See International Labour Conference, 101st Session 2012, *Report of the Committee of Experts on the Application of Conventions and Recommendations*: <http://www.ilo.org/dyn/normlex/en/f?p=1000:11003:0::NO>, accessed 15 September 2012.

¹⁵⁸ CoE Committee of Ministers, *Resolution CM/ResCSS(2012)8 on the application of the European Code of Social Security and its Protocol by Greece* (Period from 1 July 2010 to 30 June 2011): <https://wcd.coe.int/ViewDoc.jsp?id=1970639&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=ED7D31&BackColorLogged=F5D383>, accessed 15 September 2012.

unemployment, in particular of women and the young, soaring, and 68 % of the whole population living below the 'at risk of poverty' rate, is confirmed by the European Commission which, moreover, deplors that the ensuing social climate is the worst in the EU and the perspectives are bleak.¹⁵⁹

1. The first wave of austerity measures

The first Memorandum, signed in May 2010, included a 'Memorandum of Specific Economic Policy Conditionality', which required, inter alia, deep reforms in employment and social security law affecting workers in both the public and the private sector. The following measures, inter alia, were introduced by a constant flow of legislation.¹⁶⁰

In the 'wider' public sector,¹⁶¹ wage cuts were made, the wage system was revised, recruitments were reduced (one for each ten exits in 2011, one for each five exits until December 2015). Moreover, a 'labour reserve' system was introduced both for employees under a private law contract of indefinite duration and for employees of public entities that were abolished or merged (suspension from work, payment of 60 % of the basic salary (only) for one year, then dismissal with reduced or no redundancy compensation and irrespective of entitlement to a pension,¹⁶² a measure strongly criticised by the ILO Committee (above Policy developments).

The dismantling of collective bargaining and the reversal of the well-established hierarchy of collective agreements started as follows: sectoral agreements (covering a specific economic sector) were downgraded in favour of enterprise agreements, the latter to be negotiated by 'associations of persons' not enjoying the guarantees of independence applying to trade unions; thus the (formerly scarce) enterprise agreements are on the rise. Moreover, the extension of sectoral and professional (covering a specific profession) agreements to those not represented in the collective negotiations was suspended; statutory sub-minima (i.e. minimum wages lower than those set by collective agreements) for the under 25-year-olds were introduced; and minimum wages were frozen.

Furthermore, overtime pay was reduced; flexible forms of employment (temporary, part-time, rotation work) were facilitated; dismissals were also facilitated, in particular by a sharp increase in the minimum work period entitling to redundancy compensation (from 2 months to 12 months) and drastic reduction in statutory notice periods and redundancy compensation amounts. At the same time, unemployment benefits were cut back.

In the social security area, abrupt and highly complex measures were taken. They included immediate or retroactive drastic (20 %-40 %) pension cuts and pension freezing; raising of the pensionable age to 65 and increase in length of service requirements within short and uneven transition periods; increase in minimum contribution periods for retirement; stricter conditions for disability pensions; calculation of old age pensions on the basis of the earnings of the entire working life, instead of those of the last five years. This reform was shortly followed by Act 3896/2010 (OJ A 207 of 8 December 2010) transposing Directive

¹⁵⁹ European Commission *Employment and Social Situation Quarterly Review* June 2012, pp. 45-48, <http://ec.europa.eu/social>, accessed 15 September 2012.

¹⁶⁰ E.g. Act 3845/2010 'measures implementing the mechanism of support of the Greek economy by the Euro area Member States and the IMF', OJ A 65, of 6 May 2010, to which the first Memorandum was annexed; Act 3846/2010 'guarantees of labour security', OJ A 66, of 11 May 2010; Act 3847/2010 're-determination of Christmas, Easter and annual leave pay for state pensioners', OJ A 67, of 11 May 2010; Act 3863/2010 'new social security system, regulation of employment relationships', OJ A 115, of 15 July 2010; Act 3865/2010 'reform of the state pension system', OJ A 120, of 21 July 2010; Act 3871/2010 'fiscal administration and responsibility', OJ A 141, of 17 August 2010; Act 3899/2010 'urgent measures implementing the Greek economy support programme', OJ A 212, of 17 December 2010; Act 3985/2011 'medium-term fiscal strategy framework 2012-2015', OJ A 151, of 1 July 2011; Act 3986/2011 'urgent measures implementing the medium-term fiscal strategy framework 2012-2015', OJ A 152, of 1 July 2011; Act 4002/2011 'amendment of the legislation on state pensions', OJ A 180/22.08.2011; Act 4024/2011 'regulation of pensions, uniform pay-scale and grading system, labour reserve', OJ A 226, of 27 October 2011; Act 4038/2012 urgent measures implementing the medium-term fiscal strategy framework 2012-2015', OJ A 14, of 2 February 2012.

¹⁶¹ I.e. central government, municipalities, public companies, local governments, state agencies and other public institutions (see first Memorandum). Employment in this sector is under public law or private law.

¹⁶² See in particular Acts 3986/2011, OJ A 152, of 1 July 2011, and 4024/2011, OJ A 226, of 27 October 2011.

2006/54/EC. The provisions of this Act regarding occupational social security schemes are unclear and extremely difficult to compare and combine with other relevant legislation. The already existing confusion regarding these schemes was thus intensified.

At the same time, direct and indirect taxes rose, ‘extraordinary’ taxes were levied and the already low tax credits/rebates for low-wage workers¹⁶³ diminished. As incomes shrank and charges rose, the welfare state was gradually dismantled through social budget cuts.

2. The second wave of austerity measures

In February 2012, a draft second Memorandum of Understanding was approved by Act 4046/2012 (OJ A 28 of 14 February 2012) and was annexed to this Act together with draft ‘Financial Assistance Facility Agreements’. This Memorandum includes a ‘Memorandum of Economic and Financial Policies’ and a ‘Memorandum of Understanding on Specific Economic Policy Conditionality’. Certain clauses of these two specific memoranda constitute legal rules of direct effect by virtue of the above Act. Moreover, the flow of complex, often amended, implementing provisions continues.

Thus, employment deregulation and lowering of social security and welfare levels was furthered. For example, ‘tenure’ was abolished, as contracts expiring upon age limit or retirement were converted into contracts of indefinite duration subject to standard lay-off (a ‘serious ground’ for termination is no more required; compensation is lower); wages and pensions were further cut, while the government undertook the obligation to reduce employers’ social security contributions ‘by 5 percentage points’ and to ‘broaden the base for contribution collection’, which implies increases in workers’ contributions.¹⁶⁴

Further interventions in collective bargaining include the limitation of the duration of all collective agreements to a maximum of three years, the automatic expiration of those surpassing this period and the reduction of their ‘after effects’ from six months to three months. Moreover, the above clauses struck a decisive blow to collective bargaining:

1. the minimum wages set by the 2010-2012 NGCA were cut by 22 % for all workers and by 32 % for workers under 25 years old, while automatic wage increases, including those based on seniority, were suspended. Thus, for unmarried workers over 25 years old, the minimum daily salary is EUR 26.18 and the minimum monthly salary EUR 586.08; it is EUR 28.80 and EUR 644.69, respectively, for those who are married. For unmarried workers under 25 years old the minimum daily salary is EUR 22.83 and the minimum monthly salary EUR 510.95; it is EUR 25.11 and EUR 562.05, respectively, for those who are married.¹⁶⁵ It should be noted that in 2011 the average annual minimum pay (EUR 10 110) was already among the lowest in the EU, much lower than even in the other southern countries and Ireland,¹⁶⁶ while the weekly hours’ rate is the highest in the EU (42.2),¹⁶⁷
2. the Government undertook the obligation to replace the NGCA wage rates with a ‘statutory minimum wage rate legislated in consultation with social partners’.

In this way, NGCAs, which set minimum standards for all workers under a private law contract throughout the country – a safety net of last resort – are being annihilated. The very essence of the right to collective bargaining is thus affected, in breach of the EU Charter of Fundamental Rights (the Charter), the European Convention on Human Rights (the ECHR), the European Social Charter and ILO Conventions Nos. 87, 98 and 154.

¹⁶³ European Commission *Employment and Social Situation Quarterly Review* March 2012, p. 84: <http://ec.europa.eu/social>, accessed 15 September 2012.

¹⁶⁴ This method is disapproved of by the ILO and CoE bodies quoted above, under Policy developments.

¹⁶⁵ See Ministry of Labour Circular 4601/304/12.03.2012: www.ypakp.gr accessed 17 September 2012.

¹⁶⁶ See the daily *Kathimerini*, 03.10.2012, p. 18, quoting Eurostat and the Greek Chamber of Industry and Commerce: www.kathimerini.gr, accessed 3 October 2012.

¹⁶⁷ European Commission *Employment and Social Situation Quarterly Review* September 2012, p. 37: <http://ec.europa.eu/social>, accessed 15 September 2012.

Moreover, sharp rises in litigation costs were introduced. Thus, e.g. an amount the payment of which is a condition for the admissibility of a claim and must be paid at every stage of the trial (at first instance, on appeal and on final appeal) was abruptly raised to EUR 300-400 (51 %-68 % of the minimum monthly salary of a worker over 25 years old and 59 %-78 % of the minimum monthly salary of a younger worker), while legal aid is limited. These rises aimed to discourage litigation and thus diminish the heavy caseload of the courts which is leading to great procedural delays – a systemic problem in Greece. The National Commission for Human Rights (NCHR) warned that these rises restricted access to court, thus violating Article 6(1) of the ECHR.¹⁶⁸ There is also a violation of Article 19(2) of the EU Treaty and Article 47 of the Charter.

3. The effects of the socio-economic crisis on gender equality

Greece is the lowest ranking EU country in respect of the social climate, i.e. people's perceptions of the economic situation of households, the country and the welfare state, according to the European Commission,¹⁶⁹ which deplores in particular that 'the continuing austerity and the limited prospects for economic recovery' are 'likely to make homelessness a salient social problem of the coming years'. 'A new class of homeless is on the rise: people with high education, no psychological or addiction problems, formerly with middle-class lifestyles, now unable to make ends meet following job loss or bankruptcy' The demand for food handouts has risen, while a new class of recipients has formed.

The ILO Committee stressed 'the disproportionate impact of the crisis on women' (above, Policy developments). It is a fact that unemployment is decisively determining the conduct of employers and workers. The former take advantage of the workers' fear of being dismissed, while the latter are ready to make compromises. This is increasingly the case with women as they, like the young, are the hardest hit by unemployment.

In August 2012, registered unemployment was 25.4 % (against 9 % in 2009). The female rate was 29 %, the male rate 22.7 % and the youth rate (up to 25-years-old) 58 % (young women 62.1%, young men 46.8 %). The unemployed totalled 1 267 595 (against 450 000 in 2009) in a total population of 9 903 268 (2011 census).¹⁷⁰ GSEE estimates are that the real general rate was much higher, at least 29 %, and is mounting.¹⁷¹ In the first quarter of 2012, about 60 % of unemployment was long-term (of at least twelve months), the highest in the EU; the female long-term unemployment rate was 15 % and the male rate 10.4 %.¹⁷² According to GSEE, in the second quarter of 2012, long-term unemployment was 71 %.¹⁷³ Moreover, as the ILO Committee (above, Policy developments) stressed, 'a large part of women had joined the ranks of the "discouraged" workers who are not accounted for in the statistics'.

Unemployment benefits are 57 % of the NGCA minimum wage (i.e. currently EUR 334.00) and are paid for a maximum of 12 months. They thus do not cover the long-term unemployed and, due to strict conditions, only about 160 000 persons receive them (May 2012 GSEE estimates).¹⁷⁴ Thus, unemployed women are more likely to miss out on this support.

¹⁶⁸ Act 4055/2012 'fair trial and reasonable length thereof' OJ A 51, of 12 March 2012; NCHR *Comments* on the relevant bill: <http://www.nchr.gr>, accessed 12 September 2012.

¹⁶⁹ European Commission *Employment and Social Situation Quarterly Review* September 2012, pp. 16, 45-48; June 2012, pp. 45-47: <http://ec.europa.eu/social>, accessed 15 September 2012.

¹⁷⁰ Hellenic Statistical Authority (ELSTAT) *Labour Force Survey August 2012*: <http://www.statistics.gr>, accessed 1 October 2012.

¹⁷¹ GSEE/ADEDY Employment Institute (INE) *Greek Economy and Employment*. Annual Report 2012, p. 334: <http://www.inegsee.gr/kalwshlthate.html>, accessed 15 September 2012.

¹⁷² ELSTAT *Living Conditions in Greece 2012*, p. 27: <http://www.statistics.gr>, accessed 15 September 2012.

¹⁷³ INE/GSEE monthly bulletin 'Enimerossi', No. 198, October 2012, p. 12: <http://www.inegsee.gr>, accessed 10 October 2012.

¹⁷⁴ European Commission *Employment and Social Situation Quarterly Review* March 2012, p. 83: <http://ec.europa.eu/social>; GSEE/ADEDY Employment Institute (INE) *Greek Economy and Employment*. Annual Report 2012, p. 334: <http://www.inegsee.gr/kalwshlthate.html>, both accessed 17 September 2012.

As the Deputy Ombudsman for Gender Equality deplored ‘austerity measures contributed to a massive loss of employment in the private and public sectors, unprecedented deregulation of labour law and increase in atypical employment. Women’s complaints [to the Ombudsman] increase as they are more exposed to adverse working conditions, particularly during pregnancy and upon return from maternity leave. They are under greater pressure to accept flexible forms of employment which do not ensure adequate living standards and do not allow them to meet their family obligations.’¹⁷⁵ In particular, downgrading¹⁷⁶ and imposed part-time or rotation work are spreading fast. The ILO Committee also strongly deplored this situation. However, the reluctance of women to bring cases to court is also growing, mainly due to: lack of evidence; fear of victimisation or being labelled as troublemakers; length of proceedings; and high litigation costs (see above, section 2).¹⁷⁷

The ILO Committee notes the ‘closing down on a massive scale’ of small and medium-sized enterprises, ‘an important source of female and youth employment’. Manufacturing and retail trades, where female participation is high, are particularly badly hit. As demand is falling and taxes are soaring, one in four shops in the country has closed down (in Athens, one in three),¹⁷⁸ a sad spectacle in the cities’ streets.

Women and families are the main victims of employment deregulation, social budget cuts and social security reform. Bargaining for wages and other working conditions is increasingly laid on individual workers’ shoulders. However, the negotiating power of women (in particular pregnant women, mothers and migrants) is increasingly weak, the more so as they are over-represented in low paid and precarious jobs and sectors heavily hit by the crisis. As a result, a safety net protecting from poverty and social exclusion was removed, while direct, indirect and multiple discrimination against women are growing.¹⁷⁹

Moreover, the downgrading of sectoral agreements and the suspension of their extension (see above, section 1) are particularly affecting the banking and tourist sectors, where female employment is high. As NGCAs and sectoral agreements have greatly contributed to maternity and parental protection by extending the standards and scope of the legislation, protection from poverty and social exclusion will diminish.

The ILO Committee (above, Policy developments) deplored the adverse impact of the reforms on women’s pay and the gender pay gap. It stressed in particular that, as women are the vast majority in the wider public sector, the ‘labour reserve’ system (see above, section 1) was likely to have an impact on the unemployment of women and workers with family responsibilities. This obviously also applies regarding the abolition of tenure (see above, section 2), which post-dated the ILO Committee’s Report and affected the same sector.

Along with unemployment, the in-work poverty rate (as assessed by low earnings, employment status of household members and social benefits) in Greece was the second highest in the EU in 2010. This was, inter alia, due to tax credits/rebates for low-wage workers and their families being less common and often much lower than in other Member States; lone parent (mostly mothers) families in Greece were the worst off in the EU in 2011.¹⁸⁰ The situation in these respects has obviously worsened.

The ILO Committee deplored the inadequacy of public care support for parents and called for it to be made adequate, accessible and affordable. However, budget cuts affected

¹⁷⁵ Greek Ombudsman *Gender and Employment Relationships*, Special Report 2011: www.synigoros.gr accessed 15 September 2012.

¹⁷⁶ See SCPC, Civil Section, 37/2004 condemning it. It was common in the state-owned bank concerned, but only the claimant dared bring an action, which an expert lawyer dealt with as a test case, *pro bono*.

¹⁷⁷ See NCHR Comments on the bill transposing Directive 2006/54 and Letter to the Minister of Labour and Social Security dated 31 October 2010, on the same bill: <http://www.nchr.gr>, accessed 12 September 2012.

¹⁷⁸ National Confederation of Hellenic Commerce, Institute for Commerce and Services (INEMY/ESEE): [http://www.esee.gr/UploadFiles/Documents/Research%20ESEE/Ereyna-KleistisEpixeiriseis\(2\).pdf](http://www.esee.gr/UploadFiles/Documents/Research%20ESEE/Ereyna-KleistisEpixeiriseis(2).pdf), accessed 30 September 2012.

¹⁷⁹ See GSEE Women’s Secretariat *The Economic Downturn, Impact on Female Employment and Trade Union Initiatives* (information included in GSEE’s complaint to the ILO).

¹⁸⁰ European Commission *Employment and Social Situation Quarterly Review*, March 2012, p. 82; September 2012, p. 42: <http://ec.europa.eu/social> accessed 15 September 2012.

care services and benefits for children, the elderly, the sick and the handicapped. Thus, caring lies more heavily on families, particularly women, whose growing material deprivation makes it often a mission impossible, while gender stereotypes are perpetuated.

The inferior position of women in the labour market and the widening gender pay gap are resulting in lower pensions for them and a pension gender gap. Employment deregulation and the neutralisation of collective agreements also reflect on pensions. The situation of women is exacerbated as pension cuts also affect low pensions, e.g. those under EUR 400.¹⁸¹ Moreover, the increase in length of service requirements and minimum contributory periods for retirement and the calculation of old age pensions on the basis of the earnings of the entire working life introduced by the pension reform (see above, section 1) are increasing the probability of women being totally deprived of an old age pension. This is in particular due to shorter and irregular careers on account of family obligations and flexible and precarious forms of employment, which are the *privilegium odiosum* of a significant number of women.¹⁸²

Miscellaneous

The European Committee of Social Rights declares certain austerity measures in Greece incompatible with the European Social Charter

By two decisions of 23 May 2012,¹⁸³ made public on 19 October 2012, the European Committee of Social Rights upheld, in part, two collective complaints by Greek public sector trade unions against Greece regarding the compatibility of austerity measures with the 1961 European Social Charter (ESC). Another five complaints by Greek trade unions regarding such measures are pending before the Committee.

The first decision condemned a provision stipulating that the first year of employment under a contract of indefinite duration is deemed a probationary period, during which the contract may be terminated without notice and redundancy pay.¹⁸⁴ This provision violated Article 4(4) ESC (right to a reasonable period of notice).

The second decision condemned a provision regulating the employment of young persons aged 15 to 18 under ‘special apprenticeship contracts’.¹⁸⁵ These workers were not entitled to at least three weeks’ paid annual holiday, in breach of Article 7(7) ESC; an adequate system of apprenticeship was not provided for them, in breach of Article 10(2) ESC; and their social security coverage was confined to sickness benefits in kind, in breach of Article 12(3) ESC. The last-mentioned, which requires the progressive raising of the social security system to a higher level, does not allow the establishment of a distinct category of workers who are excluded from the general national security protection system, as this constitutes a deterioration of the social security system.

The second decision also condemned a provision cutting the minimum salary for all workers under 25 years of age by 32 % of the national minimum wage,¹⁸⁶ i.e. below the poverty line. This breached Article 4(1) ESC (right to a fair remuneration sufficient for a decent standard of living) as well as Article 4(1) ESC in light of the non-discrimination clause of the Preamble to the ESC (discrimination on grounds of age).

The decisions recalled that ‘the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the [ESC]’. Doing away with the guarantees of such rights ‘would not only force employees to shoulder an excessively large

¹⁸¹ See a Report by the Ombudsman: <http://www.synigoros.gr/resources/277261>, accessed 25 August 2012.

¹⁸² See S. Renga, H. Masse-Dessen & S. Koukoulis-Spiliotopoulos ‘A Gender Perspective on the French, Italian and Greek Old-Age Pension Systems’ *EGELR* 2010-1, pp. 14-32.

¹⁸³ *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v Greece* (Complaints Nos. 65/2011 and 66/2011): http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp, accessed 19 October 2012.

¹⁸⁴ Article 17(5) of Act 3899/2010, OJ A 212, of 17 December 2010.

¹⁸⁵ Article 74(9) of Act 3863/2010, OJ A 115, of 15 July 2010.

¹⁸⁶ Ministerial Council Act 6/2012, OJ A 38, of 28 February 2012 repeating a clause of the second Memorandum (see above, section 2, list item 1).

share of the consequences of the crisis, but also accept pro-cyclical effects liable to make the crisis worse and to increase the burden on welfare systems'. The Recommendation of the Greek National Commission for Human Rights (GNCHR) on 'The imperative need to reverse the sharp decline in civil liberties and social rights', which we presented in the last issue of this Review, was also quoted in the decisions.

These decisions are expected to have a far-reaching impact at national and European level. This is the more so as a third wave of austerity measures is oncoming.

HUNGARY – Beáta Nacsa

Legal effects of the economic crisis on gender equality issues

Economic crisis worsened employment rate of young women

The Commissioner for Improvement of Female Employment (appointed by the Minister of National Economy on 1 April 2012 for six months) warned that the female employment rate had further declined during the economic crisis.¹⁸⁷ The employment rate of women in the 20-24 age group has decreased by 14 % in the last 10 years, while the comparable data on the EU average was only three per cent. The employment rate of women between 30 and 35 years of age is also far below the EU average because women are prevented from re-entering the labour market after giving birth due to the scarcity of places in nurseries and kindergartens.¹⁸⁸ Places in nurseries and kindergartens were considerably reduced by previous Governments in order to reduce public expenditure during recent economic crises. Consequently today only 10 % of children below the age of three can be accommodated in nurseries, therefore those women who would like to return to work despite the stereotype that it is the best for the child to stay at home with the mother up to the age of three,¹⁸⁹ are prevented from doing so by the lack of places in nurseries.

Government policies aim to improve female employment during economic crisis

One of the Government's reactions to the recent economic crisis was to formulate strategies in order to increase the 'number of tax-payers' both in the short and the long run.¹⁹⁰ The Government formulated two policies in this regard which seriously affect women's standing in society. The 'New Baby Boom – the Giving-Birth Revolution of the Middle Classes Programme'¹⁹¹ was formulated in order to encourage an increase in the birth rate in Hungary and the programme helps to combine work and family life through increasing places in nurseries and making the employment relationship more flexible.¹⁹² The 'Action Plan for the

¹⁸⁷ The employment rate of women between the ages of 20 and 24 declined from 45.9 % in 2000 to 30.3 % in 2010. *Nők és férfiak Magyarországon 2009-2010* (Women and Men in Hungary 2009-2010) Central Statistical Office, Budapest 2011 p. 141.

¹⁸⁸ <http://nokanemzetgazdasagban.hu/profession-hu-a-reszmunkaido-szulne-sok-gyereket/>, accessed 27 September 2012.

¹⁸⁹ In line with parental leave policies that allow mothers to stay at home until a child is three years old, the majority of the population tends to agree with the idea that the development of young children is harmed if mothers return to work. Nonetheless, as recent research revealed, the social norm of the 'stay-at-home-mothers for three years' is flexible, and is at least partly maintained by lack of family-friendly workplaces and also by a serious shortage of childcare facilities for children under three years. See Zs. Blaskó 'Három évig a gyermek mellett – de nem minden áron. Közvélemény a kisgyermekes anyák munkába állásáról' (Stay at home for three years – but not at all costs. Social values on employment of mothers of young children in Hungary), *Demográfia*, 2011/1. p. 23-45.

¹⁹⁰ 'We need one to one and half million more employees in the coming years' (*Egy-másfél millióval több munkavállaló kell a következő években*). Speech of Viktor Orbán at the inaugural ceremony of the new Nestlé factory, 24 August 2012, Bük: <http://www.miniszterelnok.hu/cikk/egy-masfel-millioval-tobb-munkavallalo-kell-a-kovetkezo-evekben>, accessed 27 September 2012.

¹⁹¹ <http://www.kormany.hu/download/b/dc/80000/%C3%9Aj%20baby%20boom20120509.pdf>, accessed 27 September 2012.

¹⁹² Nonetheless, academics and union labour lawyers are criticising the new Labour Code for providing a strong possibility to employers to utilise the labour force in a flexible way but with far less possibility for the employee to ensure that his/her working duties would be organised with regard to his/her personal needs.

Protection of Workplaces'¹⁹³ was issued to provide for a reduction in social security contributions for – among other vulnerable groups – mothers of young children returning to work after being on parental leave. Many commentators, especially trade unions and women's associations, pointed out the discrepancy between the aims of the Action Plan and the regulations of the new Labour Code which enables employers to get rid of mothers of young children after they have returned to work or mothers of (temporarily) ill children.¹⁹⁴ The detrimental effects of the new Labour Code's regulations on the extremely widely defined term of 'executive employees', which could affect numerous middle-ranking and senior female managers, are discussed below under the heading of legislative development.

Declining benefits

The Government took the view that an idle, non-working way of life would not be supported by the Hungarian State. This policy affected all kinds of social security, social and employment benefits.¹⁹⁵ Some benefits were cut totally, some were reduced considerably, and some were not increased in line with the inflation rate.¹⁹⁶ People are forced to participate in the new public work programme which provides state-organised working opportunities to which the national minimum wage is not applied;¹⁹⁷ otherwise the right to social assistance would be lost. Consequently, those who are most in need of societal assistance (including women raising disabled children; single mothers with temporarily ill children; the disabled; former housewives without a pension; and the long-term sick) are left without proper or any support.¹⁹⁸

Policy developments

In the first part of the reviewed period (between May 2012 and September 2012) the Conservative Government of the middle-right Fidesz Party (Hungarian Civic Union) and its ally, the small KNDP (Christian-Democratic Party) continued its strained political and legislative activity relying on its two-thirds parliamentary majority. In July it was declared that the revolutionary reorganisation of the State structure and re-regulation of certain major fields of the legal system was finished (including the Fundamental Law, legislation on the judiciary, education, the media, employment and the pensions system) and that a period of consolidation was to come.

Between 16 and 31 July 2012, Prime Minister Orbán held a two-week consultation exercise with the political and societal allies of the Fidesz Party on the evaluation of the first two years of the Fidesz Government in the light of the co-operation agreements concluded in 2010 between the Fidesz Party and these organisations before the parliamentary elections. Among the consultation partners the most critical was Demjén Sándor, the President of the National Association of Entrepreneurs and Employers (VOSZ), who severely criticised the Government for mismanagement of state resources, lack of investment and constantly increasing tax burdens. No consultation was held with any party or NGO belonging to the political opposition. Instead, the Government continued its 'direct consultation with the

¹⁹³ <http://mva.kormany.hu/>, accessed 27 September 2012.

¹⁹⁴ Articles 66(4)-(7) and 68(2) of Act No. 1 of 2012 on the Labour Code.

¹⁹⁵ 'At least 5,5 million people should earn their living from work!' (*Legalább 5,5 millió ember munkából éljen meg az országban!*). Speech of Viktor Orbán in the Hungarian Chamber of Commerce and Industry, 8 March 2012, Budapest:

http://www.miniszterelnok.hu/cikk/legalabb_5_5_millio_ember_munkabol_eljen_meg_az_orzagban_,

accessed 14 November 2012.

¹⁹⁶ Compare the benefits for 2012:

<http://www.kormany.hu/download/f/ff/60000/MI%20MENNYI%202012%20jan%201-tol.doc> with those for 2011: <http://www.kormany.hu/download/f/ff/60000/MI%20MENNYI%202012%20jan%201-tol.doc>, both accessed 23 September 2012.

¹⁹⁷ The national minimum wage in 2012 is EUR 328 (HUF 93 000); the minimum wage for public work programme is EUR 253 (HUF 71 800). (The Hungarian National Bank exchange rate was EUR 1: HUF 283 on 25 September 2012: <http://www.mnb.hu/arfolyamok>.)

¹⁹⁸ For example, the amount of minimum old age pension, GYES, GYET is equal to EUR 100 (HUF 28 500) per month; the amount of sickness benefit has been reduced to 60 % of the daily average salary.

people' whereby the Government sends letters to electors explaining its policies, and/or sends them multiple-choice questionnaires. In the summer such a questionnaire was sent asking questions about employment-related policies, to which a maximum of only 10 % replied out of approximately 8 million addressees.¹⁹⁹ Trade unions seriously criticised such 'direct consultation' as being too expensive, not effective, the results are manipulated by the pre-written answers, and the outcome is not accessible by the public.²⁰⁰

On 4 August 2012, László Sólyom, a centre-right politician, previously the President of the Constitutional Court and President of the State, warned about the endangerment of the rule of law and the unconstitutional governing style of the Government, which causes enormous harm in the societal, economic and political spheres of the country.²⁰¹

The Commissioner for Fundamental Rights filed a petition with the Constitutional Court requesting the suspension of Article 8 of Act No. CCXI of 2011 on the protection of families, because that Article excludes from inheritance the officially registered common-law partner of a legator, albeit the Civil Code provides otherwise. The Constitutional Court suspended the application of the challenged Article 8 because a violation of the rule of law was foreseeable.²⁰²

Clinical use of abortion pill given up due to political pressure

The sole private clinic gave up the use of the abortion pill during the summer of 2012 which it had introduced as an alternative to an operation after the pill was registered by the National Institute of Pharmacology as an official drug in Hungary in May 2012. The College of Gynecologists had been urging for the introduction of the abortion pill for seven years, as an internationally recognised, less invasive form of terminating an unwanted pregnancy. According to international medical practice, pills are usually taken at a very early stage of pregnancy, leading to fewer complications and thus not affecting women's health and fertility as adversely as an operation. Right-wing politicians, especially Christian Democrats, opposed and criticised the registration of the abortion pill, claiming that providing a less traumatic way of getting rid of an unwanted pregnancy would reduce the standard of sexual morals, endanger the life of the foetus,²⁰³ and was against society's demographic needs. Because of such political pressure, the sole private clinic which had introduced the application of the pill has given up its use and since then abortion can only be carried out via an operation in Hungary.

'Rebellion of women' finally succeeded: Government promised to introduce crime of 'domestic violence' into Criminal Code

The criminalisation of domestic violence has been refused by the male-dominated political elite several times in the past two decades despite criminal statistics showing that more women are killed by partners and ex-partners each year than by strangers. In June 2012, during the debate on the new Criminal Code, the criminalisation of domestic violence was again refused by 80 % of MPs. In response, the Foundation of Life-Value (*Élet-Érték Alapítvány*) gathered more than 100 000 signatures in support of including domestic violence in the Criminal Code. Despite the massive support from the population, the Constitutional Committee of Parliament refused again to support such modification of the Criminal Code. MP István Varga said during the debate that 'women should give birth three, four, five times

¹⁹⁹ The first figure was below 400 000 which slowly increased to just below one million by the end of the summer according to a government communication.

²⁰⁰ The Federation of Chemical Workers (VDSZ) started to collect the questionnaires as wastepaper and the income raised by its sale was used for public purposes. The VDSZ sent a National MPs Consultation questionnaire in order to confront MPs with their questionable policies and to try to stop the new consultation campaign of the Government: <http://www.szakszervezetek.hu/hirek/9572--a-vdsz-tl-konzultacios-levelet-kap-a-kormany>, accessed 27 September 2012.

²⁰¹ <http://www.origo.hu/itthon/20120804-solyom-laszlo-kemenyen-biralta-a-kormanypartokat.html>, accessed 15 September 2012.

²⁰² 31/2012. (VI.29.) AB hat.

²⁰³ See Article II of Fundamental Law of 2012 ordering 'the life of the foetus shall be protected from the moment of conception'.

and then the domestic violence would not occur’ and ‘first comes giving birth, afterward emancipation’. As these remarks were blogged on the internet by Ertsey Katalin MP of *Lehet Más a Politika* Party (Politics Can Be Different Party),²⁰⁴ a nationwide condemnatory reaction spread very quickly and the following night spontaneous gatherings occurred in front of Parliament in order to protest against such views and ask for the resignation of MP Varga. In the next few days, female members of Parliament (regardless of their political affiliation) and wives of right-wing politicians raised their voices in support of the criminalisation of domestic violence, and at the same time more formal demonstrations were organised by women’s organisations and political parties, called the ‘Rebellion of women’. Finally, Prime Minister Viktor Orbán, after consulting women MPs from the Fidesz Party, decided that the Fidesz Party would support the introduction of domestic violence into the Criminal Code.²⁰⁵

Legislative development

Employment-at-will for female and male executives in the New Labour Code

The Hungarian Parliament has enacted a new Labour Code (Act No. I of 2012) that came into force on 1 July 2012. The new Code has considerably reduced the legal protection of workers generally against unjust dismissal by the employer, but has put female managers in an especially vulnerable situation. The regulations would possibly be acceptable if they covered only the CEO and his or her deputies. The Hungarian legislation, however, went much further when ordering that any worker could be considered to be an executive employee whose work is directly controlled by the CEO and all those who may replace the CEO fully or partly.²⁰⁶ Partial replacement of the CEO raises further questions, especially in regard to the so-called ‘inner representation’ of the company which is very frequent in employment relationships.²⁰⁷ Foremen partially replace the CEO in regard to the direct supervision of work and therefore theoretically could fall outside any legal protection provided by labour law. Paragraph (2) goes even further when stating that the employee and the employer may agree in the employment contract that the rules on executives will be applied to any employee who has ‘a job of great importance in regard to the employer’s operation’, or who has ‘a job of greater confidentiality’, provided that his/her basic salary is at least seven times the applicable minimum wage. On the basis of recent court practice which considers dismissal to be fair if the employer proves that it lost confidence in the employee, we could expect that the criteria of ‘importance’ and ‘confidentiality’ will not limit de facto the application of paragraph (2) of Article 208, but the single relevant limiting factor will be the seven times the amount of the minimum wage (equal to approximately EUR 2 300 (7 x HUF 93 000²⁰⁸, i.e. HUF 651 000)).²⁰⁹ Taking into account the power structure of the employment relationship, the employer will determine almost at will who would be considered to be an executive employee among those earning enough to fall within the minimum-wage-based category, and consequently they would be employed without any legal protection (in a US type of employment-at-will relationship). In my view, this new regulation violates Article 33 (2) of the EU Charter of Fundamental Rights on Family and professional life.

²⁰⁴ <http://english.lehetmas.hu/>, accessed 15 November 2012.

²⁰⁵ Rogán: *Tisztelettel meghajlok a hölgyek akarata előtt* (Rogán (Floorleader of Fidesz Party): I carry out the will of the ladies respectfully) <http://www.fidesz.hu/index.php?Cikk=184303>; *Megsajnálta a megvert nőket a FIDESZ* (Fidesz party felt sorry for the beaten women) <http://www.origo.hu/itthon/20120914-megis-fontos-a-fidesznek-a-csaladon-beluli-eroszak.html>; accessed 14 November 2012.

²⁰⁶ Article 208(1) of Act No. I of 2012 on the new Labour Code.

²⁰⁷ According to the generally followed practice, where there are more than a few dozen employees, the execution of managerial rights and obligations is shared between different managerial levels from the top executive down to the foremen.

²⁰⁸ The national minimum wage in 2012 is EUR 328 (93.000 HUF, calculated according to the exchange rate as of 25 September). 298/2011. (XII. 22.) Government Decree

²⁰⁹ Such salary is approximately three times the average salary and is paid to a wide range of employees from middle-ranking managers to professionals of university degree standard in the private sector, especially in multinational enterprises.

As far as the effect of Article 208 of the Labour Code is concerned, this new law could have a detrimental effect on the promotion and remuneration of women in the workplace, regardless of their actual employment-related decisions. Women most probably will be aware of the serious legal risk involved by a promotion to a position with a salary higher than seven times the applicable minimum wage and women in vulnerable positions (e.g. older workers, those who plan to have or adopt a child/children) will avoid such promotion, further reducing the number of women in executive positions in Hungary. It is inevitable that there will be some women who will take the risk of such promotion and will lose their job without any legal protection when getting pregnant, adopting a child, or becoming seriously ill, etc.²¹⁰

Case law of national courts

Rules on ‘employment-at-will’ in public service were nullified due to being unconstitutional

Since 2010, labour law regulations have been modified in order to reduce legal, financial and administrative burdens on employers in many areas of employment relations, especially in regard to dismissal. Modifications of employment law were justified in the private sphere by the need to improve the competitiveness of Hungarian companies, and in the public service sphere by the need to reduce public expenditure. As far as the legal reasoning is concerned, the official justification for the modifying Acts stated that the proper balance between the parties to the relationship should be re-established and the law should not treat public servants more favourably than the organs of the state in their capacity as employers in regard to termination of the relationship.²¹¹ As, previously, only employers had been obliged to give reasons for dismissal while no similar obligation was stipulated in the case of resignation by public servants, the obligation of state organs to give reasons for dismissal was abolished in the public service.

The Constitutional Court nullified both Acts which established employment-at-will in the public service; nonetheless, the nullification started three and half months later than the date of decision of the Constitutional Court, leaving a considerable length of time for the Government to continue dismissing ‘Government servants’²¹² under the same regulations.²¹³ Judges of Labour Courts hearing cases of such at-will dismissals petitioned the Constitutional Court to reduce this time frame for individual cases, but this was refused by the Constitutional Court.²¹⁴

The introduction of employment-at-will was extremely detrimental to women (and other vulnerable groups) because the lack of obligation to give reasons for dismissal opened up the way to discriminatory practices (dismissal of pregnant women, and mothers of small children), despite the main (political) targets of the legislation being civil servants who had worked for previous Governments.

Equality body decisions/opinions

The monthly newsletter of Equal Treatment Agency (ETA) in June-July 2012 was dedicated to pregnancy and motherhood discrimination.²¹⁵ In the newsletter the obligation of the employer to employ the mother again at the end of parental leave was discussed in a lengthy

²¹⁰ Hungarian employers are rather intolerant of pregnant employees or female employees with young children. 90 % of Hungarian women, after taking unpaid leave for raising a child until the age of three, are not re-employed by their employers.

²¹¹ General justification for Act LVIII of 2010 on servants of the Government, pp. 1-2. Identical reasoning was included in the justification for Act CLXXIV of 2010 on the modification of Act XXIII of 1992 on public servants. Discussed in 34/2012 (VII.17.) AB hat and 35/2012 (VII.17.) AB hat.

²¹² This new category of public servant was created by the Act LVIII of 2010 covering public servants working in central administration.

²¹³ 8/2011.(II. 18.) AB. hat. which did not nullify the relevant regulations of Act LVIII of 2010 until 31 May thereby leaving in force and applicable the unconstitutional regulations for an additional three and a half months.

²¹⁴ 34/2012 (VII.17.) AB hat and 35/2012 (VII.17.) AB hat.

²¹⁵ http://www.egyenlobanasmod.hu/data/Hirlevel_EBH_2012_JUN-JUL.pdf, accessed 27 September 2012.

article. The other main issue of the periodical was the case law on a special type of discrimination against mothers of small children: it is a wide-spread practice, especially in the countryside, that mothers with small children are prohibited from entering shops and other public places if they have a pram, because they are suspected of stealing goods with the help of the pram, or causing damage to the floor, furniture, or goods stored on shelves. According to the case law of the ETA, prohibiting entry to a person with a pram usually constitutes illegal discrimination against mothers of small children. The ETA considers it to be lawful differentiation if the accused proves that prohibiting entry to a person with a pram is supported by an objective and reasonable argument directly related to the relationship, e.g. there is not enough room to move around in the shop with the pram.²¹⁶ The regulation which makes much room for exceptions under the Act on Equal Treatment is criticised for being too wide and therefore legalising many forms of differentiation which otherwise would (and should) fall into the category of illegal discrimination.

Miscellaneous

In 2012, the Equal Treatment Agency organised several seminars in the countryside in order to shape society's attitude towards discrimination, and to disseminate information about regulations on equal treatment and available best practices.²¹⁷ In the training programme exercises were organised to provide self-experience in discriminatory settings in order to improve an awareness of discriminatory treatment, and also legal training was provided on different methods of combating discrimination. A travelling exhibition composed of children's drawings was also organised to facilitate discussions in small communities on discrimination.

ICELAND – *Herdís Thorgeirsdóttir*

Legal effects of the economic crisis on gender equality issues

During the time since the financial collapse in the autumn of 2008 there have been three reductions in the payments to parents from the Maternity/Paternity Leave Fund (based on the Act on Maternity/Paternity Leave and Parental Leave No. 95/2000) with regard to the maximum total wages on which the monthly payment is calculated. A payment from the Maternity/Paternity Leave Fund to an employee shall, according to the Act on Maternity/Paternity and Parental Leave,²¹⁸ amount to 80 % of her/his average total wages (up to ISK 200 000 (EUR 1 200) and 75 % of the average total wages exceeding that amount).²¹⁹ The 'ceiling' of the wages has been lowered three times and has apparently had an impact on the decision of men (with higher wages) to use their right to take paternity leave.²²⁰ There are two indications that men are not using their right to the same extent as before, payments from the Maternity/Paternity Fund to men have gone down 9 % since the financial collapse in 2008, while payments to women have increased by 4.5 %. There is also a greater gender gap within the group that receives maternity/paternity grants (a small sum of money) which are not related to wage, women are much more numerous in this category. In 2010, 45.7 % of

²¹⁶ The exception is based on the rules indicated in Article 7 of Act CLXXV of 2003 on Equal Treatment.

²¹⁷ For more details see 'Combating Discrimination, Shaping Societal Attitude and Strengthening the Work of the Authority' (TAMOP 5.5.5 – EU co-financed programme) <http://www.egyenlobanasmod.hu/index.php?lang=en>, accessed 14 September 2012.

²¹⁸ Act No. 95/2000.

²¹⁹ http://www.velferdarraduneyti.is/media/Jafnrettisthing2011/6_Ahrif_efnahagskreppu_velferd_kvenna_EB.pdf (accessed 17 September 2012).

²²⁰ Act No. 120/2009 http://www.velferdarraduneyti.is/media/Jafnrettisthing2011/6_Ahrif_efnahagskreppu_velferd_kvenna_EB.pdf (accessed 8 September 2012). See also: http://www.slidefinder.net/%C3%A1/%C3%A1hrif_efnahagskreppunnar_velfer%C3%B0_kvenna/32996269 (accessed 31 October 2012). Lecture at an Equality Conference hosted by the Minister of Welfare and the Equal Rights Council on 31 January 2011 (<http://www.sfr.is/frettir/nr/1610/>). Accessed 17 September 2012.

men earned more than the maximum limit of average wages while the percentage of women who earned more than the maximum limit was 19 %.²²¹

The changes in the labour market since 2008 have undoubtedly also had an impact on men who have decided not to make use of their right to paternity leave. Factors such as reduced purchasing power, insecurity in the labour market and increased debt of families has also had an impact on men not using their right to take paternity leave.²²²

The economic crisis has had a particular impact on single mothers who, on average, have lower wages and in 91.4 % of cases their children have legal residence with them although there is joint custody between the parents. In the wake of the crisis, the burden of debt has increased as well as the inability to pay debts. The proportion of single parents that have problems with the rise of mortgage and other debts has gone from 8.7 % in 2004 to 37.8 % in 2010. The proportion of single parents not able to pay their mortgages or rent has gone from 10.4 % in 2008 to 27.4 % in 2010. Emphasis on job creation has been geared toward men rather than women in the wake of the economic crisis.²²³

It may be added here that, according to new information from the Statistics Bureau (17 October 2012), unemployment among women has increased while it has decreased among men.²²⁴ Participation in the labour market was measured to be 80.6 %; the proportion of those active was 76.6 % and those unemployed, 5 %. Unemployment has decreased by 1 % since the autumn of 2011 when it was measured to be 6 %. Unemployment among men is now 4.3 % compared to 5.5 % in September 2011 and among women unemployment now is 5.7 % compared to 6.4 % in September 2011.²²⁵

Policy developments

The Minister of Welfare has introduced a special gender equality standard as an important tool to reduce the gender pay gap. In a speech on 19 June 2012, he said that this method has not been tried anywhere else and that Icelandic Standards (IST, the national standards body)²²⁶ had introduced a draft for public consultation (IST 85 equal payment – requirements and guidance). It was possible to access the draft on the web by asking for periodical access from June to September without any cost. The Minister of Welfare encouraged employers and managers as well as employees to make use of the gender equality standard to assess the situation within their organisation or enterprise and to improve those situations.²²⁷

Case law of national courts

On 20 June 2012 the Prime Minister, Jóhanna Sigurðardóttir, was found to be in breach of the Gender Equality Act (GEA) by the Reykjavík District Court, following the appointment of an office manager at the Prime Minister's Office two years ago.²²⁸ According to the verdict of

²²¹ http://www.velferdarraduneyti.is/media/Jafnrettisthing2011/6_Ahrif_efnahagskreppu_velferd_kvenna_EB.pdf (accessed 8 September 2012). See also:

http://www.velferdarraduneyti.is/media/ritogskyrslur2011/Faedingar_og_foreldraorlofSept2011_Althingi.pdf (accessed 17 September 2012).

²²² http://www.velferdarraduneyti.is/media/ritogskyrslur2011/Faedingar_og_foreldraorlofSept2011_Althingi.pdf (accessed 17 September 2012). See also:

http://www.slidefinder.net/%C3%A1/%C3%A1hrif_efnahagskreppunnar_velfer%C3%B0_kvenna/32996269 (accessed 31 October 2012). Lecture at an Equality Conference hosted by the Minister of Welfare and the Equal Rights Council on 31 January 2011 (<http://www.sfr.is/frettir/nr/1610/>). Accessed on 17 September 2012.

²²³ http://www.velferdarraduneyti.is/media/Jafnrettisthing2011/6_Ahrif_efnahagskreppu_velferd_kvenna_EB.pdf (accessed 17 September 2012).

²²⁴ <http://www.visir.is/aukid-atvinnuleysi-kvenna-en-minna-hja-korlum/article/2012310179968> (accessed 31 October 2012).

²²⁵ <http://www.visir.is/aukid-atvinnuleysi-kvenna-en-minna-hja-korlum/article/2012310179968> (accessed 31 October 2012).

²²⁶ <http://www.stadlar.is/english/> (accessed 17 September 2012).

²²⁷ <http://www.velferdarraduneyti.is/frettir-vel/nr/33448> (accessed 8 September 2012).

²²⁸ Case No. E-2870/2011:

<http://domstolar.is/domaleit/nanar/?ID=E201102870&Domur=2&type=1&Serial=1&Words=> (accessed

the Reykjavík District Court, the Icelandic State had to pay the woman who was not appointed (Anna Kristín Ólafsdóttir) EUR 3 100 (ISK 500 000) in compensation. Ms Ólafsdóttir was among more than twenty applicants for the position. She was considered to be among the five most qualified applicants, four women and one man, but the man was hired. The Prime Minister tried to reach an agreement with Ms Ólafsdóttir but with no result. Ms Ólafsdóttir took the case to court and demanded EUR 92.177 at today's rate (ISK 15 million) in compensation, which was rejected. She subsequently complained to the Gender Equality Complaints Committee which ruled that the Prime Minister had violated the GEA by appointing a man.²²⁹ The rulings of the Complaints Committee are binding on the parties to the case but the parties may refer the rulings to the courts.

The Reykjavík District Court did not accept the claim that Ms Ólafsdóttir was to be compensated for not being appointed, as there was no indication that she was more qualified than the other applicants. She was, however, to receive non-pecuniary damages due to a statement published on the website of the Ministry of the Prime Minister in the wake of the ruling of the Gender Equality Complaints Committee. The statement, which declared that Ms Ólafsdóttir had not been as qualified as the male applicant for the post as she had ranked number five of the five applicants, was found potentially damaging to the reputation of Ms Ólafsdóttir.

The judgment of the Reykjavík District Court is embarrassing for Prime Minister Johanna Sigurðardóttir who was Minister of Welfare when the present Gender Equality Act was adopted.

Equality body decisions/opinions

The Equality Complaints Committee ruled on 28 August 2012 that the Minister of the Interior, Ógmundur Jonasson, had violated the rules on gender equality following the hiring of a man to the office of the district commissioner of Husavík, Northeast Iceland last year, despite a female candidate being more qualified for the position. The Minister of the Interior disagreed with the findings but has not declared whether he intends to refer the case to a court of law.²³⁰ The case has been covered extensively in the Icelandic media.

This is the second time that a Minister of the present Government has been found to be in breach of the Gender Equality Act.

The ruling of the Gender Equality Complaints Committee that the Minister of the Interior had violated the GEA with the appointment of a man, instead of an at least equally well-qualified woman, to the office of the district commissioner of Husavík, Northeast Iceland last year, is embarrassing for the Minister as he is a member of the Left Green Party that has women's liberation as one of its top priority policies.

IRELAND – Frances Meenan

Legal effects of the economic crisis on gender equality issues

In August 2008, Ireland was the first EU country to declare itself officially in recession. Ireland, since November 2010, has had a structural adjustment programme imposed on it by the International Monetary Fund, the European Central Bank and the European Union, commonly known as 'the Troika'. There has been a major cutback on public spending aligned to an unemployment rate of 14.7 % and significant emigration. There has also been a significant fall in people's incomes. Suffice to say, the economic crisis has had a major effect

8 September 2012). See also: <http://www.visir.is/heradsdomur--johanna-braut-jafnrettislog/article/2012120629936>. (accessed on 8 September 2012).

²²⁹ Case No. 3/2010: <http://www.rettarheimild.is/Felagsmala/KaerunefndJafnrettismala/nr/3724> (accessed 17 September 2012).

²³⁰ Case No.2/2012: <http://www.rettarheimild.is/Felagsmala/KaerunefndJafnrettismala/> (accessed 8 September 2012).

on all sectors of the economy. Inter alia, there have been significant reductions in social services including in community-based childcare services. The Early Childhood Supplement has been abolished and the commitment to a year of pre-school education for all three to four year olds has been spread over two years rather than one. This change undermines the ability of lone parents to take advantage of that promised year of a free pre-school place to seek employment. The cost of childcare in Ireland is very high and obviously has a negative impact on women's income, particularly in low income households and undeniably affects their participation in paid employment.

It has been noted that, up until 2007, Ireland was recognised as having strong and comprehensive equality legislation covering a broad range of grounds in relation to both employment and services. The Equality Authority was essentially the 'guardian' of all equality legislation along with an adjudicating body called the Equality Tribunal. There have since been major changes, which include a waiting time of two years before a case is heard before the Tribunal. In practice, this has a very negative effect on employment cases and may dissuade people from proceeding with their cases. The TASC (Think Tank for Action on Social Change) Report states, 'An entire architecture of public and statutory bodies established or supported to promote equality, monitor progress, enhance awareness and develop innovative practice has been restricted, closed down, subjected to drastic budget cuts or partially absorbed into Departments of Government.'²³¹

In EGELR 2012-1, it was stated that the Minister for Justice and Equality announced that there is to be an amalgamation of the Irish Human Rights Commission and the Equality Authority. The Minister published the Heads of the Irish Human Rights and Equality Commission Bill 2012 on 29 May 2012.²³² To date the actual Bill has not yet been published.

The Industrial Relations (Amendment) Act 2012 was enacted on 22 July 2012.²³³ The main purpose of the Act is to reform certain statutory wage-setting mechanisms for certain groups of workers in the service sectors, e.g. contract cleaning, hairdressing, catering, security, retail. The Act also amends wage-setting mechanisms in the construction and electrical contracting sectors. The Act is also enacted following on from a High Court case that considered that inter alia the wage-setting mechanisms were unconstitutional as there are deficiencies in the current legislation. The Act also has to meet a number of key commitments in the EU/IMF Programme for Financial Support for Ireland aimed at structural reforms in the labour market. The service industries employ mainly women and this proposed legislation may result in pay reduction for a large group of women workers. The Regulatory Impact Analysis for this legislation states that any reduction in income covered by this statutory mechanism could impact more heavily on women workers than men as women tend to be disproportionately represented in lower paid service employment. However, this has to be balanced against the retention of existing jobs in struggling sectors. This potential pay reduction must also be balanced against the increased employment opportunities in tourism and catering. These statutory wage-setting mechanisms also affect the construction and electrical contracting sectors where men are the predominant group; these sectors have been decimated by the recession so any benefit of this proposed legislation will be hard to assess.

It is acknowledged that there had to be amendments in the wage-setting mechanisms due to their legislative defects. Interestingly, the Regulatory Impact Analysis contains a section on the impact of the proposed legislation on equality. However, in due course there could well be a reduction in pay and terms and conditions generally for women in the lower paid service sectors as, essentially, their pay could be reduced to the statutory minimum wage of EUR 8.65 an hour; in addition the benefits that these wage-setting mechanisms provided could be reduced to the statutory minima as provided in other employment legislation (e.g. there will no longer be Sunday premium rates of pay but nonetheless there will still be compensation for Sunday working). The long-serving employee will also be at a disadvantage as there will only

²³¹ U. Barry & P. Conroy *Untold Story of the Crisis – Gender, Equality and Inequalities* TASC p.18. This paragraph substantially refers to this Report. <http://www.tasnet.ie/upload/file/BarryConroyMay12.pdf>, accessed 6 September 2012.

²³² Available at www.justice.ie, accessed 17 September 2012.

²³³ Available at www.oireachtas.ie, accessed 17 September 2012.

be a basic adult rate and two higher increments to reflect longer periods of service. The practicality of this is that there will be lower pay rates in order to retain employment.

Legislative developments

The Electoral (Amendment) (Political Funding) Act 2012²³⁴ was enacted on 28 July 2012. This Act will link state funding to political parties with the quotas of male and female candidates for future general elections.²³⁵

The Protection of Employees (Temporary Agency Work) Act 2012 was brought into law on 16 May 2012 (with certain retrospection to 5 December 2011, being the date that Ireland had to comply with Directive 2008/104/EC). Obviously, this Act will have an impact on temporary agency workers, being mainly women.²³⁶

Case law of national courts

In *Trailer Care Holdings Limited v Healy*,²³⁷ the Labour Court stated '[T]he law recognises that during pregnancy women are physically and emotionally vulnerable and the effects of dismissal can have a particularly deleterious effect on their physical and mental health. It is for that reason that the law provides special protection to pregnant women against dismissal except in exceptional circumstances.' The Court further said in the same case that it was 'abundantly clear' that women were to be afforded 'special protection from adverse treatment' from the commencement of their pregnancy until the end of their maternity leave. Furthermore, this entitlement to that protection is to be regarded as 'a fundamental and inviolable right within the legal order of the European Union which the Courts and Tribunals of the Union must vindicate within the limits of their jurisdiction'.

Another recent case concerned a discriminatory dismissal which involved the selection of the claimant for redundancy at a time when it was known that she was pregnant. The Equality Tribunal stated, 'it is well settled EU Community and national law that such a dismissal on its face is sufficient to establish a prima facie case of discrimination'. The Equality Tribunal acknowledged that the employer was facing real financial difficulties and that there were further redundancies and reduction in working hours in the employment concerned. However, the Tribunal stated that it must be satisfied that the claimant's pregnancy was not in any way a consideration when the decision to terminate her employment was made. The Tribunal noted that the respondent made a decision to cut costs; however, the Tribunal was not satisfied that the decision was transparent and fair. There was no evidence that other options were explored and it was clear that there was work that the claimant could have continued to do. The Tribunal considered that the employer should have explored whether the work could have been restructured and hours reduced, but [the Tribunal noted] that the respondent retained the status quo in relation to her colleague, the non-pregnant employee. The employer also intended to rely on a partner in the firm. In summary, the Tribunal considered that the

²³⁴ Available at www.oireachtas.ie, accessed 17 September 2012.

²³⁵ <http://www.oireachtas.ie/documents/bills28/acts/2012/a3612.pdf>, accessed 13 November 2012.

²³⁶ <http://www.oireachtas.ie/documents/bills28/acts/2012/a1312.pdf>, accessed 13 November 2012.

²³⁷ EDA 8/2012 dated 16 March 2012. In this case, the claimant had difficulties in relation to taking time off for her antenatal visits, she also needed special accommodation as she had mobility problems due to her pregnancy and the grounds for her dismissal arose from an alleged redundancy. In addition, there was a further issue where the claimant was not included in a performance appraisal for the purposes of assessing a pay increase and there was also a failure to pay her a holiday bonus to which she considered that she was entitled. The claimant consulted the Equality Authority and recited this advice to her employer. Whilst the claimant was paid this bonus, the employer was annoyed at her contacting a statutory agency and stopped the bonus for all staff. Arising from this, the claimant asserted that she was subjected to adverse treatment by her work colleagues and that this amounted to victimisation. In holding that the claimant was discriminated against on grounds of gender, that she was victimised and that she was subject to discriminatory dismissal, the Labour Court awarded the claimant EUR 40 000 (plus interest from 24 January 2008, the date she filed her claim) for the effects of discrimination and EUR 10 000 for the victimisation. <http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeRecommendations> accessed 6 September 2012.

decision to dismiss was partly influenced by the knowledge that the claimant would be on maternity leave in the near future.²³⁸ The claimant was awarded EUR 20 000 which figure reflected the seriousness of pregnancy-related dismissals and is based on a round figure reflecting the claimant's losses for a year. The figure was based on approximately six months' salary plus the maternity bonus that the claimant would have been entitled to.

ITALY – *Simonetta Renga*

Legal effects of the economic crisis on gender equality issues

Prime Minister Monti's labour market reform from a perspective of gender equality and the economic crisis

The recent 'Reform of the labour market from a growth perspective', presented by Prime Minister Monti's Government, which was approved through Act No. 92/2012, has tried to tackle the impact of the economic crisis on women. The attempt, however, is very weak as these few rules are far from providing a special method to increase women's employment or rather to stop the fall in women's employment, due both to the economic crisis and to the fact that many women are employed in non-standard working patterns, that is in temporary contracts which are not renewed in a period of economic crisis. Moreover, the reform does not help sufficiently to keep women in the labour market, in a situation where many local authorities are forced to reduce social services for children, for disabled and old people for lack of resources, all categories that rely on women's care within the family.

As regards gender provisions, Act No. 92/2012 tackles, in the first place, the issue of blank resignations (whereby employers force new female workers to sign undated resignation letters which employers use to dismiss women if they become pregnant or are faced with a long-term illness), which recently came to the attention of public opinion and political debate. Indeed, an investigation by a national newspaper, *La Repubblica*, which had a certain echo on many websites, highlighted the remarkable increase of this unlawful practice and its negative impact on women, who are already particularly affected by the effects of the serious economic crisis, including especially the high percentage of unemployment (9.8 % male unemployment; 11.4 % female unemployment; 10.5 % total unemployment).²³⁹ The paper reports that 15 % of workers, that is about two million, may be subject to this form of blackmail. According to the paper published by *La Repubblica*, about 800 000 women a year leave their job before giving birth and the chance that they have been forced into this decision by the employer is very high. Recently, 14 women addressed an appeal to the new Minister of Labour, Elsa Fornero, to tackle this problem.²⁴⁰ In answer to this, Act No. 92/2012 changed Article 55, paragraph 4 of Decree No. 151/2012, extending the period during which mutual termination of the employment contract or resignation of working mothers must be signed in front of an inspector of the Minister of Labour; this period now goes from the beginning of pregnancy to the third year of the child. The same rule applies to the father, as well as to adoptive parents or people who have been given the official custody of a child from birth or from entering the family. The personal scope and the length of the period of protection have undoubtedly been strengthened by the reform. However, some doubts arise as to the

²³⁸ *Ryan v K & A Accountants and Financial Advisors* DEC-E2012-087.
<http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeRecommendations> accessed 6 September 2012.

²³⁹ http://dati.istat.it/Index.aspx?DataSetCode=DCCV_TAXDISOCCU&Lang=, last accessed 13 November 2012.

²⁴⁰ See: <http://www.senonoraquando.eu/?tag=dimissioni-in-bianco>;
<http://www.lettera43.it/economia/aziende/35121/le-donne-contro-le-dimissioni-in-bianco.htm>;
http://www.asca.it/news-Lavoro_Finocchiaro_cancellare_la_vergogna_delle_dimissioni_in_bianco-1115958-FOT.html;
<http://www.basilicatanet.it/basilicatanet/site/Basilicatanet/detail.jsp?sec=1005&otype=1012&id=581125>;
<http://inchieste.repubblica.it/it/repubblica/rep-it/inchiesta-italiana/2012/01/19/news/quella-legge-cancellata-da-berlusconi-che-piega-i-neo-assunti-28433142/>;
<http://www.cgil.it/rassegnastampa/articolo.aspx?ID=7722>; and http://www.lavoro.gov.it/Lavoro/AreaStampa/comunicati/2012_01_03.htm, all accessed 18 September 2012.

consequences of an infringement of this strengthened procedure. Article 55 in fact provides that the efficacy of the resignation is suspended until it is signed in front of the Labour Inspectorate, while previous rulings referred to a 'condition of validity' and case law deemed the non-confirmed resignation to be null and void.

In addition, the reform reintroduced a general mechanism of validation of all workers' resignation or mutual termination of employment contracts, which had existed in the past before being abolished by the centre-right Government just a few months after its coming into force. Now resignations or mutual termination of the employment relationship must be validated by an official of the Minister of Labour or the local public employment services or by the bodies specified by national collective agreements or by the completion of a specific form to be sent to the employment services. If they are not validated, the employer has to request, in writing, the employee to confirm the resignation and the termination of the working relationship is on condition that, within seven days from this written request, the employee does not withdraw the resignation or just does not answer. During this period the employee can withdraw the resignation or consent to mutual termination so as to be reinstated at work. Moreover, after thirty days from resignation or mutual termination, in case the latter were not validated and the employer did not request the employee to confirm them as mentioned above, the resignation or mutual termination has definitely no effect. The employer who uses blank resignation forms will be subject to an administrative sanction.

Furthermore, according to Article 4 of Act No. 92/2012 (temporarily, from 2012 to 2015), fathers are also entitled to three days paternity leave within the first five months following the child's birth; two days of this can be given to the mother, while one day is compulsory for the father. This leave is also granted in the case of national and international adoption or fostering.

Finally, a feeble attempt at making services for children more available has been made through the introduction of paid vouchers for baby-sitting services: these will be made available to mothers from the end of compulsory maternity leave for the following eleven months as an alternative to parental leave; the amount of the voucher will depend on the family income. The fact that the vouchers are not made available for fathers can be regarded as a backwards step in relation to the recognition of the relevance of the role of paternity in the labour market, and this is very difficult to reconcile with the principle of equality.

Women's pensions and the economic crisis

On the subject of social security, Act No. 214/2011, commonly known as the Monti Government's 'Save Italy' Act, which is geared to pensionable age equalisation, also provided for an increase of the minimum contribution condition for pensions from 5 to 20 years: if the claimant has fewer than 20 years' contributions, the pension will be paid at 70 years of age. Moreover, it introduced a new minimum benefit amount condition according to which pensions will be paid at 70 rather than at 66 (67 by 2021) when their amount is less than EUR 643 a month. The same Act, finally, provides for the institution of a fund for the financing of interventions to increase the quality and quantity of employment for women and young people. The financial problems of the pension funds are at the root of these provisions. However, the increase of the contribution conditions and the new minimum amount condition will be particularly difficult to fulfil for atypical workers, that is intermittent, temporary, occasional and part-time workers, who are often women. This means that many women may risk not getting their pension until 70 years of age. Certainly, the deep deterioration in the qualifying conditions for women is not counterbalanced by the fund to promote women's employment, the effect of which will basically depend on both the amount of resources assigned to the fund and the types of interventions envisaged.

Case law of national courts

Principle of equality and gender representation in political bodies

Two judgments of the administrative jurisdiction confirmed a strict interpretation of the principle of equality as regards gender representation in political bodies.

The Council of State's judgment of 21 June 2012 No. 3670,²⁴¹ ruled that the principle of gender balance is not fulfilled where only one person out of 16 members of the governmental body (of the Regione Lombardia) is a woman.

According to this judgment, both associations fighting against discrimination and citizens who could be appointed to government offices can bring the case to court. In fact, as the latter are subjects comparable with those persons who have been elected, they have a right as well as an interest to oppose a choice which is considered to be unlawful.

The Court firmly rejected the plea which deemed the appointment of councillors by the President of the Region to be non-appealable with regard to its political nature. Judges referred to the statement of the Constitutional Court No. 81/2012²⁴² regarding the appointment of councillors. The decision of the constitutional judges, which was keenly anticipated as many suits were still pending on this point,²⁴³ definitely ruled that political discretionary power meets its match in the general principles of the legal system, both at constitutional and legislative level. In so far as such limits are provided, they must be observed on condition of validity, even in the highly discretionary activity of governance, and they can be brought before the courts.

As regards town councils, the same principles have been enforced by the TAR (regional administrative tribunal) Perugia, judgment No. 242 of 20 June 2012²⁴⁴ in a case where the choice of the four councillors of the Municipality of Assisi (all men) was motivated. The mayor explained that the criterion was to appoint those who received the highest number of personal preferences in the administrative elections and the only woman who fulfilled this requirement did not accept the appointment. The TAR deemed the justification of the gender imbalance which arose from the enforcement of this criterion to be unlawful. It underlined that under the statute of the municipality, councillors are not to be chosen exclusively from the elected, and it ruled that the choice of an external councillor must be made when it ensures a gender balance in the governmental body. So, according to the TAR Perugia, the representative criterion mentioned above cannot on its own justify exceptions to the fundamental principle of gender equality.

Finally, a positive note is that majority of the case law clearly and soundly supports the principle of gender equality in the appointment of local governmental bodies. The negative note is that policy is still far from spontaneously accepting this principle, beyond the formal statement of the statutes of local bodies. As reported by newspapers, the unwillingness of politicians to assure a more balanced representation of women is clearly shown by the announced appeal against the judgment of the TAR Perugia and the confirmation of the former town council (after further consultations, including with possible female candidates) grounded both on criteria such as the need for political stability and for experience and effectiveness of management and the criterion for representation already rejected by the first degree judge.

Resignation of working father during the first year of the life of the child

A recent judgment of the Court of Cassation No. 11676 of 9 May 2012,²⁴⁵ admitted the claim against the judgment of the Court of Appeal of Turin of 1 October 2007 which deemed to be null and void the resignation given by a working father within the first year of life of his child and not validated before an official of the Minister of Labour as provided by Article 55 of the Code on the Protection of Motherhood and Fatherhood (Decree No. 151/2001).

²⁴¹ <http://www.neldiritto.it/appgiurisprudenza.asp?id=8224>, last accessed on 7 September 2012.

²⁴² <http://www.giurcost.org/decisioni/index.html>, accessed 7 September 2012.

²⁴³ <http://dirittiregionali.org/2012/01/31/in-attesa-della-corte-i-giudici-amministrativi-insistono-sullequilibrio-di-genere-nelle-giunte/>, accessed 7 September 2012.

²⁴⁴ http://www.ilsole24ore.com/pdf2010/SoleOnLine5/Oggetti_Correlati/Documenti/Norme%20e%20Tributi/2012/07/Tar-Umbria-242-del-2012.pdf?uuid=b1488fd4-d4a3-11e1-9a52-b9cbf40f6520, accessed 7 September 2012.

²⁴⁵ <http://www.diritto24.ilsole24ore.com/content/dam/law24/Gad/Sentenze/2012/Cass%2011676%20gd.pdf>, accessed 7 September 2012.

According to the Court of Cassation this provision must be interpreted taking into account that Decree No. 53/2000 (finally collected in Decree No. 151/2001) extended to the working father many rights of the working mother, such as the ban on dismissal from the beginning of pregnancy until the first year of life of the child, the right to an allowance in case she resigns in that period and the right to return to her job after maternity leave. All these rights are granted to the father who takes up the leave. Hence, according to the Court of Cassation, it appears that the ruling on dismissal is enforceable only for fathers who took up the leave, while in this particular case the employer was not even informed of the fatherhood.

The Court underlines that an opposite interpretation would be inconsistent with the principle of certainty of the legal relationship, as the working father is not obliged to inform the employer of his condition. Thus, his position is totally different from that of the mother, who must inform the employer of the pregnancy so as to take up the mandatory leave. On this point the judges also took into account the claimant's argument which underlined that the protection assured by the procedure of validation must be linked to the knowledge of the worker's family situation, as only the latter can lead to the fear that the employer will attempt to push the worker to resign when he is particularly weak.

Although the reasoning of the Court can be fully agreed with in this specific case, where the employer did not know that the worker had become a father, some problems arise, in more general terms, where judges do not take account at all of the mere event of fatherhood and link the employer's knowledge only to the demand for parental leave. In fact, to ensure the certainty of legal relationships it would be sufficient to adopt an interpretation which makes the enforcement of Article 55 of Decree No. 151/2001 conditional on the information given to the employer by the working father, regardless of whether he asked for the leave or not.

The judgment of the Court, which entitles to the protection of the validation procedure only those fathers who took up the leave, could also be explained by the fact that in Italy at present an exiguous percentage of working fathers benefits from parental leave and, as a consequence, employers tend not to worry about such absences from work which are very unlikely to occur.

The reform of the ruling on resignation recently introduced by Act No. 92/2012²⁴⁶ does not clarify this provision, although the change regarding the consequences of the infringement of the procedure could help to sustain the different interpretation mentioned above. In fact, new Article 55 provides that the efficacy of the resignation is suspended until it is signed in front of the Labour Inspectorate, while previous rulings referred to a 'condition of validity' and case law deemed the non-confirmed resignation to be null and void. As a consequence the problem of certainty in legal relationships is definitely weaker under the new provision.

LATVIA – Kristine Dupate

Legal effects of the economic crisis on gender equality issues

Economic crisis of 2008-2009

The economic crisis in Latvia started in 2008. After rapid growth in Gross Domestic Product (GDP) starting from 2001 until 2008, GDP became negative. A slow recovery started in 2010 after a harsh consolidation of the state budget in the middle of 2009.²⁴⁷ The consolidation envisaged a considerable increase in taxes: VAT up from 18 % to 22 %; income tax up from

²⁴⁶ <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2012-06-28;92>, accessed 13 November 2012.

²⁴⁷ O. Tkačevs (expert of the Bank of Latvia) '2009. gada vidus kā robeža – sākas konsolidācija, atsākas izaugsme' (The middle of 2009 – start of consolidation and economic growth), available in Latvian at the home page of the Bank of Latvia at <http://www.makroekonomika.lv/2009-gada-vidus-ka-robeza-sakas-konsolidacija-atsakas-izaugsme> (accessed on 7 September 2012).

23 % to 25 % for income from employment and from 15 % to 26 % for income from self-employment; and statutory social insurance contributions up from 33.09 % to 35.09 %.²⁴⁸

Political decisions taken and respective law amendments adopted in 2009 also envisaged a considerable consolidation of the cost of the public sector²⁴⁹ which led to a cut in salaries and dismissals from employment in the public services. In 2008, the average salary in the public sector was EUR 950 (LVL 668), while in 2011 it was only EUR 613 (LVL 431). The number of employees in the public sector has diminished by 23.8 % in comparison with the number in 2008.²⁵⁰ Amendments also envisaged were a cut in the finances in the field of social security, including a restriction in the amount of social security allowances.²⁵¹

The unemployment rate started to grow considerably; in 2007 and 2008 it was around 7 % while in 2010 it attained 20.7 %.²⁵²

Effects on gender equality

At the beginning of the economic crisis there was a unique situation where the higher unemployment rate was among males.²⁵³ It was explained by the fact that the private sector responded to the economic crisis more rapidly and the majority of employees in this sector are male. Significant numbers of dismissals in the public sector took place in 2009-2010. Since the majority of employees in the public sector are female, the structure of unemployed people reverted to the usual picture – the majority of unemployed people are female.

Dismissals in the female-dominated public sector caused gender specific problems. In 2007-2008 there was an increase in the birth rate. Newborn children during those years numbered around 22 000 to 24 000.²⁵⁴ This meant that in 2007-2008 many female workers employed in the public sector took maternity and childcare leave and returned to work as the economic crisis and dismissals started. It resulted in a situation where in fact many female workers had no post after their return from leave in 2009-2010. Posts were retained in name during the period of leave, while after the female workers returned to work they were given notice of dismissal on their first working day. Such a problem is evidenced by the *Riežniece* case.²⁵⁵ Nadežda Riežniece was employed as a civil servant in the post of senior officer at the Legal Department of the Ministry of Agriculture. She was on childcare leave from 14 November 2007 to 6 May 2009, in total for 18 months as provided by Article 156 of the Labour Law.²⁵⁶ After returning to work on 6 May 2009, she was notified by order adopted on 5 May 2009 of her transfer to another post – an officer at the Information Department. On 26 May 2009 she was notified of her dismissal from the post at the Information Department on

²⁴⁸ *Likums 'Par valsts budžetu 2009.gadam'* (Law on the State Budget for year 2009), OG No. 189, 4 December 2008; *Likums 'Par valsts budžetu 2010.gadam'* (Law on the State Budget for year 2010), OG No. 2010, 21 December 2009.

²⁴⁹ *Ibid.*

²⁵⁰ *Divdesmit sestais informatīvais ziņojums par atalgojuma izmaiņām sabiedriskajā un privātajā sektorā* (26th Informative Report on changes of remuneration in public and private sector), Ministry of Finance, 7 October 2011, available in Latvian at the home page of the Cabinet of Ministers at <http://polsis.mk.gov.lv/LoadAtt/file17767.doc> (accessed on 7 September 2012).

²⁵¹ The Law on Payment of State Allowances for the Period 2009 – 2014 (*likums "Par valsts pabalstu izmaksu laika periodā no 2009.gada līdz 2014.gadam"*), OG No.100, 30 June 2009.

²⁵² G. Kursiša, 'Pasaules Banka un ES tērēs 218 tūkst. Ls bezdarba pētīšanai', *Dienas Bizness*, 25 May 2012, available in Latvian at <http://www.db.lv/finanses/makroekonomika/pasaules-banka-un-esf-teres-217-tukst-ls-latvijas-bezdarba-petisanai-371886> (accessed on 6 September 2012).

²⁵³ *Latvijā bezdarba līmenis ir sasniedzis 9.5 %* (The Unemployment Rate in Latvia has reached 9.5 %), BNS, 3 March 2009, <http://www.apollo.lv/zinas/latvija-bezdarba-limenis-ir-sasniedzis-9-5/402279> (accessed on 9 September 2012). According to data provided by the Central Statistical Bureau of Latvia, in the first quarter of 2009 there were 104 100 unemployed males and 64 700 females (or 61.6 % and 38.4 % respectively), at <http://data.csb.gov.lv/Dialog/Saveshow.asp> (accessed on 7 November 2012).

²⁵⁴ Central Statistical Bureau of Latvia, <http://data.csb.gov.lv/Dialog/varval.asp?ma=ID0010&ti=IDG01%2E+DZEMD%CEBU+UN+DZIMU%D00+SKAITS&path=../DATABASE/Iedzoc/Ikgad%2E7jie%20statistikas%20dati/Iedz%EEvot%E2ji%20B%20Dzi mst%EEba/&lang=16> (accessed on 9 September 2012).

²⁵⁵ Reference for preliminary ruling in Case C-7/12, OJ C 65, of 3 March 2012, p. 9 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:065:0009:0009:EN:PDF> (accessed on 7 September 2012).

²⁵⁶ *Darba likums*, OG No. 105, 6 July 2001.

account of the abolition of that post. In the light of factual circumstances and EU gender equality law, the Supreme Court of Latvia decided to ask the CJEU if any actions which might result in a female employee on parental leave losing her post after returning to work were permissible, and if the answer would be different if, on account of the economic recession in a Member State, in all the administrations of the State the number of civil servants has been optimised and posts abolished. The answers of the CJEU in the case would be even more useful if it could answer the question as to whether an obligation to provide the same or equivalent post after maternity and childcare leave entails only a formal retention of a post during leave, or an obligation to retain a post for a longer period of time after return from leave.

Another consequence of the economic crisis, as mentioned above, was a considerable cut in salaries in the public sector from which women suffered predominantly since they represent the majority of the employees in the sector. In addition, there occurred one more gender specific problem which may be considered as a breach of the principle of equal pay under EU law. In 2009, Parliament adopted the Law on Remuneration of State Officials and Employees of the State and Municipal Institutions²⁵⁷ with a view to establishing a uniform remuneration system in the public sector. The Law provides not only a system on definition of pay according to objective criteria but also provides for various social benefits, thus in general providing for a more favourable pay system.²⁵⁸ At the same time the Law in substance excludes all school teachers from such favourable system.²⁵⁹ Since the vast majority of school teachers are female, it leads to indirect discrimination on the grounds of sex with regard to equal pay. According to unofficial information, the reason for this was the lack of budget resources to provide the same favourable remuneration system and social guarantees, because there are a considerable number of school teachers in Latvia. In this case the state, in particular Parliament, failed to observe an obligation deriving from Article 157 of TFEU and Directive 2006/54/EC requiring the provision of equal pay not only in the private sector, but also in the public sector, and not only in practice by private employers, but also by the law adopted by the state. Although indirect discrimination under EU law may be justified if there is a legitimate aim and the means used are proportionate, nevertheless, according to the CJEU, the legitimate aim – budgetary considerations – is not acceptable in cases of gender discrimination.²⁶⁰

Parliament also adopted the Law on Payment of State Allowances for the Period 2009 – 2014²⁶¹ envisaging a restriction in the amount of statutory social insurance allowances. In particular, the Law provides that there is a right to sickness, maternity, paternity and childcare allowance in full up to EUR 16.37 (LVL 11.51) per day, but over that amount, only 50 % of the allowance would be permitted. For example, if a person has a gross monthly salary of EUR 1 423 (LVL 1000) he/she would normally be entitled to an allowance in the amount of 70 % of the gross salary, i.e. EUR 996 (LVL 700) or around EUR 34 (LVL 24) per day. In accordance with the restriction, however, a person is entitled to a daily allowance in the amount of EUR 16.37 (LVL 11.51) and to 50 % of the rest, i.e. EUR 18 (LVL 12.49) (12.49/100*50= 6.24) or, in total, a daily allowance of EUR 25 (LVL 17.75) (or monthly EUR 745 (LVL 524) instead of EUR 996 (LVL 700)). Such provisions of course mainly affected females during maternity and parental leave, in addition to the risk of losing a job after return from leave.

Initially, the same Law envisaged a prohibition on working whilst receiving an old-age pension; however the Constitutional Court found such a restriction to be unconstitutional.²⁶²

²⁵⁷ OG No. 199, 18 December 2009.

²⁵⁸ According to transitional provisions of the law, norms of social benefits do not function until 2014 or during a period of crisis and recovery.

²⁵⁹ Article 2(3).

²⁶⁰ Joined Cases C-4/02 and C-5/02 *Hilde Schönheit v Stadt Frankfurt am Main* and *Silvia Becker v Land Hessen* [2003] ECR I-12575.

²⁶¹ Likums 'Par valsts pabalstu izmaksu laika periodā no 2009.gada līdz 2014.gadam', OG No. 100, 30 June 2009.

²⁶² Decision in case No. 2009-43-01, OG No.201, 22 December 2009.

In the light of this it is noteworthy to mention that such a restriction would mainly have affected women, because they are the majority among recipients of the old-age pension on account of the fact that life expectancy in Latvia for females is 11 years longer than for males.²⁶³

Recovery

Starting from 2010, there has been a slow recovery from the economic crisis. In 2012 Latvia has shown a stable economic growth which is higher than expected. The income for the state budget is also higher than expected which allows the consideration of further decisions on easing restraints on spending. In particular, on 28 August 2012 the Cabinet of Ministers accepted a legislative proposal concerning the Law on Payment of State Allowances for the Period 2009 – 2014.²⁶⁴ It envisages payment of maternity, paternity and parental allowances in full up to EUR 32.75 (LVL 23.02) per day, but over that amount, still only 50 %. It means a doubling of the ceiling on the amount of allowances which could be received in full. Since 2009, the Law on Payment of State Allowances for the Period 2009 – 2014 envisages a right to maternity, paternity and parental allowances in full up to EUR 16.37 (LVL 11.51) per day, but over that amount only 50 %. In practice it means that currently only those parents whose income does not exceed EUR 612 (LVL 430) receive maternity, paternity or parental allowances in full, i.e., corresponding to 70 % (parental) or 80 % (maternity and paternity) of their previous earnings. In future, if the proposed amendments are adopted, those parents whose salary is up to EUR 1 224 (LVL 860) will also be entitled to the respective allowances in full.²⁶⁵ According to the Ministry of Welfare, after the adoption of the respective amendments, there will remain 8 % of recipients of parental allowance, 10 % of recipients of maternity allowance and 17 % of recipients of paternity allowance who will not be entitled to the full amount of the respective allowances.

Besides that, politicians are considering doubling statutory social insurance contributions for old-age pensions for parents on childcare leave. Such contributions are provided by the state. Even though their amount is symbolic – the income of parents would be EUR 71 (LVL 50) monthly and after amendments EUR 142 (LVL 100) – it nevertheless helps in tackling the gender pay gap regarding the amount of the old-age pension.

LIECHTENSTEIN – Nicole Mathé

Legal effects of the economic crisis on gender equality issues

To my knowledge, there are no specific legal effects that will reduce the application of gender equality law in Liechtenstein. It must be mentioned that an important structural reform is going on in Liechtenstein's administration including the reduction of thematic offices in the public administration; the Gender Equality Office is also affected by this.²⁶⁶ In the future it will work within another Office, but the structure is not yet clear and is still under discussion at the moment. The Government will decide in the near future about this.

²⁶³ In 2007, life expectancy for women was 76.5 years, but for men it was 65.8. *Women and Men in Latvia 2008* Central Statistical Bureau of Latvia, Rīga 2008.

²⁶⁴ Likums 'Par valsts pabalstu izmaksu laika periodā no 2009.gada līdz 2014.gadam' (the Law on Payment of State Allowances for Period 2009 – 2014), OG No. 100, 30 June 2009; Project No.TA-1948, available at the home page of the Cabinet of Ministers in Latvian at <http://www.mk.gov.lv/lv/mk/tap/?pid=40260264&mode=mk&date=2012-08-28>, (accessed on 5 September 2012).

²⁶⁵ Announcement on the home page of the Ministry of Welfare, available in Latvian at <http://www.lm.gov.lv/news/id/3816> (accessed on 5 September 2012).

²⁶⁶ Report of the Government to Parliament, no. 82/2011, 30 August 2011.

Policy developments

National future day

The national future day²⁶⁷ will take place in Liechtenstein on 8 November 2012 for the first time. The aim will be to countervail stereotypical role models which can have an impact on the choice of profession of young people. Many of them orient themselves on typical female or male roles or activities. The spectrum of possibilities will thereby be unnecessarily restricted from the outset. The Gender Equality Office has organised the so-called Father's Day six times between 2004 and 2010. Young people had the opportunity to visit their father or a male attachment figure at his place of work and afterwards they visited the youngsters at school. In order to open up the field a bit and also to integrate mothers, Liechtenstein has accessed to the Swiss association 'national future day'. By the national future day, girls and boys aged between 11 and 14 will get an insight into unknown fields of work and life. There they can get in touch with a variety of perspectives for their own future. Furthermore, they will be strengthened in their self-confidence to orient themselves on their wishes and talents concerning the choice of a profession.

Legislative developments

Parental leave

On 21 August 2012 the report and proposal of the Government with regard to the amendment of the Civil Code concerning the implementation of Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BusinessEurope, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, was addressed to Parliament.²⁶⁸ The amendment concerns the framework of Directive 2010/18/EU and will implement the innovations of the Directive.

Sexual harassment and mobbing

On 7 February 2012 the Government passed two regulations regarding sexual harassment and mobbing at the workplace.²⁶⁹ The regulations were initiated by the internal governmental group for gender equality and apply to Liechtenstein's public administration. Both regulations are necessary measures for the implementation of the Law on public servants²⁷⁰ and the Gender Equality Act.²⁷¹ By the adoption of these regulations, an important step towards prevention of sexual harassment and mobbing has been taken. It is clearly stated that sexual harassment and mobbing is not tolerated in public administration. Furthermore, the responsibility lies with the manager and the employees. Clear definitions of sexual harassment and mobbing at the workplace will help to classify and to name the problem and then to decide on adequate measures.

Miscellaneous

Family Counsel

On 29 June 2012 the main issue of the workshop of the Family Counsel²⁷² in Vaduz was the resource entitled 'family time'. The international experts of the Family Counsel shed light on the idea of family time from different perspectives, psychological, practical, economical and political. The Family Counsel will come together at least twice a year and will provide advice to the Government's 'Family and Equal Opportunities' department on central questions

²⁶⁷ Press release by the Liechtenstein Information Office, dated 4 September 2012, <http://www.nationalerzukunftstag.ch>, accessed 6 September 2012.

²⁶⁸ Press release by the Liechtenstein Information Office, dated 21 August 2012, <http://bua.gmg.biz/BuA/index.jsp>, not yet available, accessed 10 September 2012.

²⁶⁹ Press release by the Liechtenstein Information Office, dated 7 May 2012.

²⁷⁰ Staatspersonalgesetz, Official Gazette, LGBl. 2011/52, <http://www.gesetze.li>, accessed 10 September 2012.

²⁷¹ Gleichstellungsgesetz, Official Gazette, LGBl. 2011/212, <http://www.gesetze.li>, accessed 10 September 2012.

²⁷² Press release by the Liechtenstein Information Office, dated 29 June 2012.

relating to family politics. The main point concerning gender equality from the meeting on 29 June 2012 was the idea of a family-conscious working environment. The working environment expects high availability of employees and the family world, in its various forms, makes great demands on responsible parents. Some companies are already applying policies regarding the reconciliation of family and work, e.g. job-sharing, part-time work or rights to return to the workplace after a break for family duties. The Family Counsel also focused on the question as to how such models are applicable in both small and medium-sized companies and in very small companies. All members of the Family Counsel agreed about the aim to create more 'time wealth' for families which is only made possible by a better reconciliation of family and work and by involving all concerned stakeholders.

Study on (un)equal pay

The study concerning (un)equal pay in the public administration of Liechtenstein²⁷³ was mandated to the academic author, Wilfried Marxer at the Liechtenstein Institute by the internal governmental group for gender equality and the Gender Equality Office. The study has recently concluded but is not yet publicly accessible. On asking at the Gender Equality Office, I was told that the study will have to be analysed by the Government before its publication.

LITHUANIA – Tomas Davulis

Legal effects of the economic crisis on gender equality issues

The new centre-right Government formed in November 2008 introduced a package of drastic measures with effect from 2009 to regain a balance in public finances in a time of economic and financial crisis. These measures were in particular aimed at (sometimes) temporary reduction of salaries in the public sector as well as reducing the level of the overall generous state social security benefits: state retirement pensions, maternity allowances and parental leave allowances. In essence, the legislature has reduced the level of the benefit or has set lower maximum limits for those benefits or has increased the length of reference periods for calculating the exact amount of those payments.

The reduction of *wages* for the whole public sector has had a general effect as the reduction of the basic salary unit which is used for the calculation of the exact salary of an individual employee affects all employees and public servants in a uniform way. There were only a few excepted categories of employees (e.g. judges, high level officials) in relation to which more severe cuts were made. In practice, the salary level has dropped more steeply since in the Lithuanian public sector a significant part of the employee's income depends on all kinds of non-compulsory supplements paid by the employer. The reduction of the state budget allocations to the salary fund of an individual public institution made the payment of those optional supplements hard to afford which meant, in practice, a significant decrease in the remuneration of the individual employee.

Although the level of *maternity allowances* (100 % of the previous remuneration) was not changed, more strict preconditions were introduced and maximum limits to the payments were reduced. Since 1 July 2009, the reference period for the calculation of the allowance is twelve calendar months of work by the employee before the beginning of maternity leave instead of three months as previously. The cap on maternity allowance was reduced by almost 80 % and the multiplication of allowances in the case of more than one child was abolished.

The legislature has also lowered the maximum limit of *parental leave* allowance by almost 80 % as well as increasing the length of reference periods for calculating the amount of allowance. Before, during parental leave from the end of maternity (paternity) leave until the child reached the age of one, the employee was entitled to an allowance equal to 100 % of previous remuneration, and 85 % until the child reached the age of two, subject to minimum

²⁷³ <http://www.liechtenstein-institut.li/Publikationen>, accessed 10 September 2012.

and maximum limits. Since 1 July 2011, employees may opt for the one-year 100 % allowance or choose the two years' allowance where for the first year the allowance would amount to 70 % of the compensated salary and 40 % for the second year. The second option allows parents to receive salary or other income during the second year of leave which was prohibited before. In addition, the new rules abolish the doubling or tripling of the allowance for parents with two or three children under the age of three.

Traditionally, there have always been differences in the pensionable age for men and women under the Lithuanian state social security scheme: 60 years for women and 62 years and six months for men. This tradition has now been broken and from 2012 the pensionable age for women will be increased by four months annually and for men by two months annually. In 2026 the retirement age for both men and women will be 65 years.

The year 2009 marked the beginning of drastic cutbacks in the budgets of state institutions which have also affected the Office of the Equal Opportunities Ombudsman. Its budget has been decreased from EUR 535 700 in 2008 to EUR 434 100 in 2009, EUR 291 900 in 2010 and EUR 363 700 in 2011. The salary fund of the institution has been decreased from EUR 206 200 in 2008 to EUR 169 000 in 2012. The overall reduction of the state budget allocations does not correspond to the increased responsibilities of the Office. In 2005 the Office was made responsible for the supervision of the implementation of all anti-discrimination law including race, ethnic origin, disability, age, religion and sexual orientation and in 2008 the new grounds of nationality, social origin and language were added. The allocated funds are clearly not enough to fulfil the tasks of the Office properly and to finance other projects.

Legislative developments

Reform of the system of individual labour disputes

Following the proposal of the Ministry of Social Security and Labour, the Labour Code was amended to change the existing procedure of resolution of individual disputes.²⁷⁴ Under the existing Soviet-style procedure, the first stage in the solving of an individual dispute between employee and employer (except when the relationship has been terminated) is the special bipartite commission within an enterprise. However, in the majority of enterprises such commissions do not exist at all and the employees prefer to complain to the State Labour Inspectorate directly.

From 1 January 2013, the enterprise-level bipartite commissions will be replaced by mandatory trilateral commissions under area branches of the State Labour Inspectorate. The commission will consist of one labour inspector, having a university legal education, to chair the commission and two designated representatives of both sides of industry. The commission will have to examine all individual labour disputes, except dismissal and suspension from work. Thus breaches of the principle of equal treatment in employment will also be within the scope of competence of the commissions. An employee will have to apply to the labour disputes commission within three months from the day when he or she found out or ought to have found out about the violation of his or her rights. The maximum length of investigation by the commission is set at one month. The decision of the commission will be subject to appeal to the ordinary court of first instance.

Parental leave

The Lithuanian legislature has elaborated²⁷⁵ the notion of parental leave. The 'Parental Leave before the Child Has Reached the Age of Three' (Section 180 of the Labour Code) has been changed to a more simple 'Parental leave'. Basically, the definition has been amended to cover the situations related to the adoption of children. In the case of adoption of a child, the new Section 180(3) of the Labour Code establishes the right to take parental leave of three

²⁷⁴ Law No. XI-2127 of 26 June 2012. *Valstybės žinios*, 2012, No. 80-4138.

²⁷⁵ Law No. XI-2047 of 5 June 2012. *Valstybės žinios*, 2012, No. 69-3527.

months. The right to take leave before a child reaches the age of three, for mothers, fathers, grandmothers, grandfathers or any other relatives who are actually raising the child, was left unchanged.

LUXEMBOURG – Anik Raskin

Legal effects of the economic crisis on gender equality issues

There are no specific legal effects as of now. However, on a political level, the budget of the Ministry of Equal Opportunities has been cut in recent years which has had an impact on its activities and on the activities of those associations which receive financial support from the Ministry.

Policy developments

Gender quotas in the private sector

On 22 January 2011, the Minister of Equal Opportunities announced that she had not ruled out introducing a legal obligation for quotas in the private sector. At first, she wants employers to put their efforts into establishing gender-mixed teams up until 2014. At present, no precise percentage has been discussed.

In February 2012 an update on figures on the participation of women in decision-making in the private sector was presented by the Ministry of Equal Opportunities. The percentage of women on company boards has increased from 16 % in 2003 to 20 % in 2011. This includes all companies run by a board. In Luxembourg, only eight companies are listed on the stock exchange which probably explains why the discussions on gender quotas are not concentrated on listed companies.

From March 2012 to June 2012, Fedil-Business Federation Luxembourg organised four conferences focussing on gender diversity in business. In July 2012, Fedil and the Ministry of Equal Opportunities presented a report on the topic, including the conclusions of the conferences.²⁷⁶

Equal pay

The Ministry of Equal Opportunities launched an improved version of the online tool LOGIB which can be used by employers to make an evaluation of the pay structure of their employees and to identify any gender pay gap.²⁷⁷ The new version of the tool is said to be easier to handle.

Legislative developments

Goods and services

From 5 July 2012, the content of media and advertising, as well as education, within the scope of the law that implemented Directive 2004/113/EC²⁷⁸ is included in the field of protection.

Thus the previous hierarchy of protection on different grounds of discrimination has been eliminated. In point of fact, the protection against discrimination regarding gender in the field of access to and the supply of goods and services did not include the media, advertising and education. However, protection against discrimination on the other five grounds did.

On 25 July 2012, the Minister in charge of Finance introduced a bill²⁷⁹ in Parliament which will amend the law transposing Directive 2004/113/EC in order to comply with the judgment in Case C-236/09 (*Test-Achats*) from the European Court of Justice.

²⁷⁶ http://www.fedil.lu/fileadmin/user_upload/publications/divers/Fedil_Gender_Diversity_web.pdf, accessed 5 September 2012.

²⁷⁷ <https://logib-lux.personalmarkt.de/>, accessed 5 September 2012.

²⁷⁸ OJ L 373/37 of 21 December 2004.

Domestic violence

Since August 2010²⁸⁰ a bill, which aims to modify the current law on domestic violence, has been pending. The aim of the bill is to increase protection for victims and children in cases of domestic violence. In November 2011, the Government introduced amendments to the bill of August 2010. These amendments have been strongly criticised by civil society as they are aimed at reinforcing the rights of the aggressor. One of the amendments enables the specific service that was created years ago in order to provide therapy for aggressors, to represent the accused in court; this was not part of the initial bill. Moreover, the initial bill of August 2010 included some new powers for the police. The amendments of November 2011 do not include these new powers any more.

Pension reform

A reform of pension rights is under discussion in Parliament. At the present stage, the bill does not include mandatory individualisation of pension rights, but the subject was discussed by women's organisations which asked for the inclusion of a provision on mandatory individualisation in the reforms. Similarly, the *Comité du Travail Féminin* (Women's Labour Committee) adopted an opinion on the bill and also proposed mandatory individualisation.²⁸¹

Parental leave

After having announced a possible reduction in the duration of parental leave from six to four months, the Government decided to undertake a detailed analysis of the results of the measure before any reform takes place. The Government announced that the analysis would be carried out in 2012, which is the year that Directive 2010/18/EU,²⁸² implementing the revised Framework Agreement on parental leave, has to be transposed into national law, but no results have been published up to now. A reduction in the duration of parental leave by the implementing law could risk resulting in a reduction of the protection afforded to workers in the field of parental leave.

The *Comité du Travail Féminin* (Women's Labour Committee) adopted an opinion on Directive 2010/18/EU in March 2011. This advisory body consists of representatives of the National Council of Women, employers' and workers' organisations and ministries. It is responsible for studying, either on its own initiative or at the Government's request, all matters connected with the work, training and professional advancement of women. In its opinion, the Committee does not oppose the reduction of parental leave from six to four months, on condition that the Government considers adapting the allowance for parental leave and introducing more flexibility into the procedures. Regarding the allowance, the Committee suggests making it a percentage of the salary, rather than the current fixed amount. It also suggests allowing workers to take parental leave by dividing the total duration into various shorter periods.

On 17 August 2012, the Minister in charge of Family Affairs introduced a bill²⁸³ in Parliament in order to implement Directive 2010/18/EU. As the social partners did not issue an opinion on the implementation of the Directive, the Government decided to change the current legislation in order to comply with the Directive without such opinion.

The bill extends unpaid parental leave from three to four months. It also implements Clause 6(1) by introducing a right for workers to request changes to their working hours and/or patterns when they return from parental leave. Employers have to give a response

²⁷⁹ http://www.chd.lu/wps/PA_1_084AIVIMRA06I4327I10000000/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/133/165/113624.pdf, accessed 5 September 2012.

²⁸⁰ http://www.chd.lu/wps/PA_1_084AIVIMRA06I4327I10000000/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/024/913/092132.pdf, accessed 5 September 2012.

²⁸¹ http://www.chd.lu/wps/PA_1_084AIVIMRA06I4327I10000000/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/133/114/113123.pdf, accessed 5 September 2012.

²⁸² OJ L 68/13 of 18 March 2010.

²⁸³ http://www.chd.lu/wps/PA_1_084AIVIMRA06I4327I10000000/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/138/171/113770.pdf, accessed 6 September 2012.

taking into account employer's and worker's needs. In the case of a positive reply, the period of the changes is limited to a period of up to one year.

Miscellaneous

Equality body

The *Centre pour l'Égalité de Traitement* or *CET* (Centre for Equal Treatment) is concerned with discrimination based on race and ethnic origin, disability, age, religion or belief, sexual orientation and sex. The *CET* published its annual report covering the period from 1 January to 31 December 2011. During that period it registered 118 new claims; 14 claims concerned gender discrimination. The *CET* did not identify any gender discrimination on any claim.

Since April 2011, the *CET* has carried out a systematic analysis of employment advertisements in newspapers in order to identify discrimination. It identified 94 advertisements which contained illegal references: 89 mentioning gender, 4 providing for an age limit and 1 mentioning both grounds.

FYR of MACEDONIA – Mirjana Najcevska

Legal effects of the economic crisis on gender equality issues

The FYR of Macedonia entered the economic crisis with negative baggage: a very low rate of employment for women (38 %) and a very high rate of inactivity for them (63.6 %).²⁸⁴ In 2011 the employment rate of women reached 39.7 % while their inactivity rate was 63.9%.²⁸⁵ According to the analysis of the State statistical office, 'As regards gender, the labour market situation in 2011 is in favour of women, with unemployment dropping 1.5 % in comparison with the previous year'.²⁸⁶ According to the same analysis, starting from 2003 there is an upward trend in the employment of women (from 34.9 % in 2003 to 38.8 % in 2011)²⁸⁷. Very constant throughout all of this period is the fact that women make up only 25 % of employers, 15 % are self-employed and more than 63 % are unpaid domestic workers. According to the statistical data,²⁸⁸ there is a visible increase in the percentage of women working for a salary below EUR 100 per month.

According to the most recent data from the State statistical office,²⁸⁹ 215 937 women (part of the inactive population) are 'housewives ... who are not working but have some activities in the family'. There is not one single man in this category of the population. The inactivity rate of women rises with the age of women.²⁹⁰

The reasons for the high inactivity rates vary depending on who is doing the explaining. The explanations for the high inactivity rates differ, but there seems to be a sort of an agreement²⁹¹ that the traditional role of women in the FYR of Macedonian family coupled with low education levels are the main causes of the difference in male and female activity rates. However, the NGO 'Reactor' voices disagreement: '[W]e challenge this explanation, providing evidence that neither low education nor adherence to traditional norms and

²⁸⁴ <http://www.stat.gov.mk/Publikacii/Gender2008.pdf> (accessed 8 September 2012).

²⁸⁵ <http://www.stat.gov.mk/Publikacii/Gender2012.pdf> (accessed 8 September 2012).

²⁸⁶ <http://www.stat.gov.mk/Publikacii/OdrzlivRazvoj2012.pdf> (accessed 7 September 2012).

²⁸⁷ The same institution, the Statistical Bureau of the Republic of Macedonia, in different studies refers to different values. In the study on Gender 2012 the employment rate of women is set at 39.7 % while in the study on Sustainable Development it is 38.8 %.

²⁸⁸ <http://www.stat.gov.mk/Publikacii/Gender2012.pdf> (accessed 7 September 2012).

²⁸⁹ <http://www.stat.gov.mk/Publikacii/Gender2012.pdf> (accessed 7 September 2012).

²⁹⁰ From 29.1 % for the under 35 age group, to 37.5 % for the 35–44 age group, and a remarkable 52.7 % for the 45–54 age group. <http://www.reactor.org.mk/CMS/Files/Publications/Documents/FINDING%20THE%20KEY%20TO%20THE%20GLASS%20DOOR%20PDF%20WEB.pdf> (accessed 10 September 2012).

²⁹¹ Strategy for Demographic Development of Republic of Macedonia 2008-2012, Ministry of Labour and Social Policy, p. 5.

expectations are main contributors for women's disadvantaged position on the labour market. We propose that more attention should be paid to direct discrimination on the job market and more measures are needed to ensure that women can better reconcile work and family life. We argue that the current explanations justify inaction on part of the authorities, as they lay the blame on the women (lack of qualifications) or on intra-family relations (traditional gender roles).²⁹² According to this study, 'in ideal circumstances only 10.5 % of women would choose not to work (as opposed to 7.2 % of men, a statistically insignificant difference)'. Furthermore, when asked directly, the majority of employed women stated that they 'work because they want to and an overwhelming majority of inactive women stated that they are inactive because they were forced into inactivity'.²⁹³

Bearing in mind that from 2007 the inactivity rate of women increased as did the number of women working as unpaid workers²⁹⁴ and the wage gap was more or less constant (between 25 % to 28 %),²⁹⁵ it is becoming increasingly important which laws are changed and how. During the period of recession (2006-2012), several laws which directly affect the economic position of women were changed or amended.

The most recent change is the adoption of the Minimum Wage Law.²⁹⁶ However, it will not be implemented until 2014 in those industrial sectors which at the moment have the lowest average salary. In those sectors women are predominantly employed. Thus, it will inevitably increase the current 28 % pay gap compared with men. Previously, there were changes in the Law on Protection of Children.²⁹⁷ Until 2009,²⁹⁸ the amount of child allowance was set as a percentage of the average salary for the previous year (5.5 % for every child below 15 years and 8.5 % for every child in the family between 15 and 18 years). Following the changes, from 2009 there is now a fixed amount (EUR 12 (MKD 740) and EUR 19 (MKD 1 175) respectively) and an upper limit of EUR 35 (MKD 2 145).²⁹⁹ These amounts are less than half the previous amounts. For instance, 5.5 % of the current average salary is approximately EUR 25 (MKD 1 500). The same sort of change has been made concerning the one-off payment for the newborn child. Instead of an amount of 25 % of the average salary from the previous year, it is fixed at EUR 80 (MKD 4 829).³⁰⁰ The only newly established payment is related to the measures for demographic development, according to which an amount of EUR 130 (MKD 8 048) will be allocated monthly for every third child born in the family.³⁰¹ It should also be noted that the situation with child care and kindergartens is constantly unsatisfactory. The gross rate of children in organised child care is 13 %³⁰² which is far below the needs of already employed mothers and is not encouraging for unemployed women.³⁰³

There are some changes in the Law on Pension and Disability Insurance³⁰⁴ related to the age when a widow is eligible to receive family pension. According to this new Law, a widow

²⁹² <http://www.reactor.org.mk/CMS/Files/Publications/Documents/FINDING%20THE%20KEY%20TO%20THE%20GLASS%20DOOR%20PDF%20WEB.pdf> (accessed 10 September 2012).

²⁹³ <http://www.reactor.org.mk/CMS/Files/Publications/Documents/FINDING%20THE%20KEY%20TO%20THE%20GLASS%20DOOR%20PDF%20WEB.pdf> (accessed 10 September 2012).

²⁹⁴ M. Kazandziska, M. Risteska and V Schmidt, *The Gender Pay Gap in the Former Yugoslav Republic of Macedonia*, available at http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-budapest/documents/publication/wcms_180637.pdf (accessed 10 September 2012).

²⁹⁵ <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0837.pdf> (accessed 10 September 2012).

²⁹⁶ Official Gazette of the Republic of Macedonia 11/2012.

²⁹⁷ Official Gazette of the Republic of Macedonia No. 98/2000; last changed in 2011.

²⁹⁸ Official Gazette No.156/2009.

²⁹⁹ Article 23, Law on Protection of Children.

³⁰⁰ Article 29, Law on Protection of Children.

³⁰¹ Article 30-b, Law on Protection of Children.

³⁰² http://www.stat.gov.mk/Publikacii/2_4_12_01.pdf (accessed 2 September 2012).

³⁰³ [http://www.unicef.org/tfyrmacedonia/STUDIJA_ENG_Final\(1\);](http://www.unicef.org/tfyrmacedonia/STUDIJA_ENG_Final(1);) [http://denesen.mk/web/2012/07/16/novi-gradinki-za-decata-od-ruralnite-mesta-na-baranje-na-zenite-farmeri/;](http://denesen.mk/web/2012/07/16/novi-gradinki-za-decata-od-ruralnite-mesta-na-baranje-na-zenite-farmeri/)

<http://www.kumanovonews.com/vesti/dnevni-vesti/gradinkite-prepolni-se-ceka-slobodno-mesto.html> (accessed 10 November 2012).

³⁰⁴ Official Gazette 98/2012.

is entitled to family pension at 50 years of age (instead of 45 according to the previous Law). With 216 000 women who are identified as 'housewife' and without any other income, it should be perceived as a significant problem.

Finally, changes related to the Law on Employment and Insurance in the Case of Unemployment have been made.³⁰⁵

There is a very specific problem related to the principle of equal pay and the existing pay gap between women and men. According to some researchers, the principle of equal pay for equal or similar work and equal pay for work of equal value, has not been completely implemented in the national labour legislation. The ILO supervisory system showed that the country has not properly implemented that part of ILO Convention No. 100 on Equal Remuneration on equal pay for work of equal value, and that that could be perceived as one of the reasons for the significant pay gap between women and men.³⁰⁶

The Government, on the theoretical level, recognises the need for proactive measures to address the negative impact of the recession on women.³⁰⁷ However, in reality it lacks a real awareness of gender issues. As an example: to improve women's access to financial credits, in 2008 the Government, through the Employment Agency, conducted a self-employment project by which it awarded loans under very favourable terms to women to start their own businesses in order to boost self-employment and create new jobs. In the elaboration of this project it was clearly stated that it was designed to address the specific needs of women. However, among the criteria to get a loan the term 'interested unemployed people' is used, and there was no single element that would give an advantage to women or put them in a better position than men. As a result, in 2008 the Project Steering Committee decided positively on 5 599 applications for loan, of which 1 461 are women, or 26 % of the total applications. Regardless of these figures, it remains a fact that there was a gap between the intention of the project expressed in its elaboration and the appropriate criteria in the public announcement.

During this period, a number of strategies and action plans related to employment were developed.³⁰⁸ However, either women were not specifically mentioned in them or there were no reports on the results of the proposed activities. According to some research,³⁰⁹ a clear indication can be seen in the differences between the 2006 and 2011 National Employment Strategies. While the 2006-2010 National Employment Strategy (NES) recognised that one of the key objectives for reducing gender inequalities in the labour market is to provide 'better and more accessible conditions for care and accommodation of children as part of the child care system' (NES, 2010:15), this objective no longer appears in the new strategy. Yet it is a fact that no public investment to achieve this goal was made during 2006-2010 or, for that matter, ever since the FYR of Macedonia became independent in 1991.³¹⁰

The activities undertaken to address the unemployment of women are primarily oriented to training, and much less to active employment measures or affirmative action. Women show willingness to attend organised training. According to the report of the Employment Agency,³¹¹ much larger numbers of women than men (over 63 %) participate in training and retraining courses organised by the Agency. However, this does not result in a large number of employed women or women who have been supported in the opening of a business.

³⁰⁵ http://www.mtsp.gov.mk/WBStorage/Files/izmeni_vrab_oktomvri.pdf (accessed 10 November 2012).

³⁰⁶ http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-budapest/documents/policy/wcms_167539.pdf (accessed 10 September 2012).

³⁰⁷ Fourth and Fifth Periodical Report on the Convention on Elimination of All Forms of Discrimination against Women, Republic of Macedonia, 2011.

³⁰⁸ <http://www.mtsp.gov.mk/?ItemID=BD66FCC3A7FBCB47AB9150CBFECD2C96> (accessed 10 September 2012).

³⁰⁹ <http://www.reactor.org.mk/CMS/Files/Publications/Documents/FINDING%20THE%20KEY%20TO%20THE%20GLASS%20DOOR%20PDF%20WEB.pdf> (accessed 10 September 2012).

³¹⁰ <http://www.reactor.org.mk/CMS/Files/Publications/Documents/FINDING%20THE%20KEY%20TO%20THE%20GLASS%20DOOR%20PDF%20WEB.pdf> (accessed 9 September 2012).

³¹¹ <http://www.avrm.gov.mk/WBStorage/Files/IzvestajnaAVRM2011.pdf> (accessed 26 September 2012).

Financial support directed toward women is usually very modest. For example, the total annual amount for subventions to all businesses run by women is only EUR 25 000.³¹²

Policy developments

A positive move in policy could be perceived in the involvement of the Government in the development of strategies and action plans related to gender equality: National Action Plan for Gender Equality; Operational Plan for Implementation of the National Action Plan for Gender Equality in 2011; Operational Plan for Implementation of the National Action Plan for Gender Equality 2012; and National Strategy for Equality and Non-discrimination on grounds of Ethnic Origin, Age, Mental or Physical Disability and Gender.³¹³

However, sometimes even those programmes which are strongly related to gender equality (like the Social protection programme in 2012) do not specifically mention women.³¹⁴ In the National Strategy for Equality and Non-discrimination on grounds of Ethnic Origin, Age, Mental or Physical Disability and Gender, women are mentioned only in the context of other discriminatory grounds and there are no specific strategic activities related to women.

On one hand, the most common subject of interest for the Government's Cabinet, the Parliamentary Commission on Gender Equality and for women's organizations, is the issue of violence against women.³¹⁵ On the other hand, there are still no reports on the implementation of the Law on Equal Opportunities for Women and Men.

In June 2012, the Ministry of Labour and Social Policy adopted a strategy for the introduction of gender-responsive budgeting in the FYR of Macedonia (2012-2017).³¹⁶ According to the Government, 'The Strategy for gender-responsive budgeting represents a segment of the overall efforts of the FYR of Macedonia for gender mainstreaming. For this reason, the Strategy is for single use, as it will be incorporated or will be included and will be an integral part of the National Strategy on Gender Equality, with its adoption by the end of 2012'.

Legislative developments

The newly proposed draft Amending Law on Employment and Insurance in case of Unemployment of June 2012 (hereafter 'Draft Law') encompasses quite substantial issues, from basic definitions to registers and data bases. Generally speaking, it appears to be a neutral regulation, never mentioning women, pregnancy or mothers and motherhood. Children up to the age of 15 are mentioned only in one context.

The very first problem stems from the definition, alongside 'unemployed person', of 'other person seeking a job ... who does not actively seek a job and/or is not prepared to accept a job' (Article 1 of the Draft Law amending Article 2 of the Law on Employment and Insurance in case of Unemployment).³¹⁷ Apart from the confusion, even contradiction in terms, this definition makes room both for dubious interpretations (for instance, is a 'housewife' unemployed or other person seeking a job but not actively) and for easy deletion

³¹² <http://vlada.mk/node/2162> (accessed 9 September 2012).

³¹³ <http://www.mtsp.gov.mk/?ItemID=BD66FCC3A7FBCB47AB9150CBFECD2C96> (accessed 10 September 2012).

³¹⁴ http://www.mtsp.gov.mk/WBStorage/Files/OP_2012.pdf (accessed 10 September 2012).

³¹⁵ <http://vlada.mk/node/4163>; (accessed 10 September 2012); <http://www.semejnonasilstvo.org.mk/Root/mak/docs/Zivot%20vo%20senka%20-%20broshura.pdf>; http://www.antiko.org.mk/programi_aktivnosti.asp?ID=29&prID=1 (accessed 10 September 2012); http://www.undp.org.mk/content/Publications/MKD_Ekonomsko%20zajaknuvanje%20na%20zenit-%20A6_zrtvi_na_sn.pdf (accessed 10 September 2012).

³¹⁶ <http://www.mtsp.gov.mk/?ItemID=BD66FCC3A7FBCB47AB9150CBFECD2C96> (accessed 10 September 2012).

³¹⁷ Law on Employment and Insurance in case of Unemployment (Official Gazette of the Republic of Macedonia No. 37/97, 25/00, 101/00, 50/01, 25/03, 37/04, 4/05, 50/06, 29/07, 102/08, 161/08, 50/10, 88/10, 51/11 and 11/12).

of these people from unemployment statistics. Furthermore, according to Article 53 of the Draft Law, an unemployed person who had refused training or jobs offered by the Agency twice in two years would be erased from the unemployment statistics. However, it does not specify whether this deletion means that that person would be enrolled on the register of 'other persons seeking a job'. The deletion lasts one year (Article 59[a] of the Draft Law) during which period this person loses his or her health protection.

On another matter, Article 56 of the Draft Law introduces the possibility for the Agency (employment service) to fail to offer an *adequate* job to the unemployed person in the first year and, therefore, in the next year to offer him or her a *convenient* job, meaning a job on a lower level compared with the education and skills of that unemployed person. If the Agency fails again, it can offer the unemployed person yet another job which is neither *adequate* nor *convenient*. This could mean, for example, that the Agency could offer a job of janitor to a university graduate.

A criterion both for adequate and convenient jobs (Articles 57 and 58 of the Draft Law) is that the workplace is not more than two hours away by public transport from the home address of the person to whom the job is offered, unless that person lives 'independently with a child younger than 15 years of age'. In that case, the distance should not exceed one hour by public transport. Most probably, the authors meant a single parent. If that is true, it would mean that a parent of such a child who was living with a spouse would not enjoy the privilege of only one hour by public transport from the workplace.

One should bear in mind that the unemployed are supposed to actively look for jobs, including applying for jobs, doing job interviews etc., and being prepared to accept a job at short notice (Article 55). In addition, there is an obligation of going personally to the Agency every 30 days and proving that he or she had actively been seeking a job in that period (Article 59-a).

One could argue that the Draft Law amounts to indirect sex discrimination, since apparently neutral provisions would create particularly difficult conditions for pregnant women and mothers of young children to acquire a job. In such a case, they might be faced with a practically impossible choice if the workplace is only a bit less than two hours away by public transport (since the FYR of Macedonia is a rather small country, it means that any two places in the country are not more than two hours driving by car from each other). Making no allowance at all, meaning there are no clauses in the Draft Law (or in the Law in force) for women in specific circumstances, and particularly mothers, women are not, or at least not on a large scale, in fact capable of responding to the condition set by these provisions. Such a situation is recognised by the ECJ in the *Danfoss* case, Case C-109/88: 'If it is understood as covering the employee's adaptability to variable hours and varying places of work, the criterion of mobility may also work to the disadvantage of female employees, who, because of household and family duties for which they are frequently responsible, are not as able as men to organize their working time flexibly.' The only difference is that in the *Danfoss* case the condition was about pay supplements, while here this criterion is a precondition for very employment. Yet, according to the initial estimate of the Ministry, the changes set out in the Draft Law 'will not have any impact on gender equality'.³¹⁸

On 24 January 2012, the Law on the Minimum Wage in the FYR of Macedonia was adopted.³¹⁹ According to this Law, all workers will be eligible to receive a minimum wage of an agreed amount. According to the Law on the Minimum Wage (Article 4) the minimum wage is 39.6 % of the average gross salary in the FYR of Macedonia in the previous year, according to data released by the State Statistical Office. Thus, the amount of the minimum wage in 2012 was approximately EUR 130 (MKD 8 050) net (Article 9). However, the implementation of the Law has been postponed for some branches of industry including the textile industry. According to the Law, in departments which in July 2011 were paid an average wage below the level of EUR 250 (MKD 15 600) gross, in the next three years

³¹⁸ <http://www.mtsp.gov.mk/?ItemID=EFF297E3DAE1A84698B89ED7BCA2A0A3> (accessed 10 September 2012).

³¹⁹ Law on the minimum wage, Official Gazette of the Republic of Macedonia No. 11/2012.

adjustment would be made to the amount of the minimum salary determined in accordance with this Law. It means that, actually, the minimum wage law came into effect for all sectors of the economy except for the textile and the leather industries. In the sectors which are not covered by the new Law on the Minimum Wage more than 80 % of workers are employed who receive wages below the specified minimum.³²⁰ In previous years, the textile industry was always at the bottom of the list of amounts of salaries.³²¹ In the textile industry 40 825 employees work, a mostly female labour force.³²²

The relevant association for the textile industry announced an agreement with the Government³²³ according to which, for the textile industry, the minimum wage will be approximately EUR 100 (MKD 6 263) instead of EUR 130 (MKD 8 050) until 2015. That means that these workers will have lower pensions because of these three years.

Equality body decisions/opinions

There is no information on cases of discrimination on the ground of sex identified by the Commission on Protection from Discrimination.³²⁴ However, there is one announcement relating to a speech by the leader of the opposition party³²⁵ in which the Commission identified discrimination on the ground of gender.

According to the Law on equal opportunities for women and men,³²⁶ the legal representative in the sector for gender equality in the Ministry of Labour and social politics should submit a report every year on the cases which were brought in front of this institute. So far, no such report has been submitted or published.

Miscellaneous

The network of mentors for women entrepreneurs has been established.³²⁷

Despite the strategic goals to promote collecting and presenting of disaggregated data on the ground of sex, even some of the ministries responsible for gender equality lack such an approach in the distribution of information and everyday communication with citizens.³²⁸

MALTA – Peter G. Xuereb

Legal effects of the economic crisis on gender equality issues

As was reported in the National Commission for the Promotion of Equality's (henceforth NCPE) Annual Report for 2011 (issued in May 2012),³²⁹ the National Statistics Office (NSO) Labour Force Survey Q2/2011 showed that the employment rate for women saw an increase

³²⁰ D. Tevdovski, *Decent work in the Republic of Macedonia*, Progress Institute for Social Democracy Skopje, 2011.

³²¹ <http://www.ujp.gov.mk/mk/statistika/plati/2011/2> (accessed 14 August 2012).

³²² 37% of employees in manufacturing are employed in the textile industry, or 10 % of the overall number of employees in the country. ([http://www.mchamber.org.mk/\(S\(1dph445pqy2sri32yrhejn2\)\)/default.aspx?lId=2&mId=73&smId=16&cId=0&pId=1](http://www.mchamber.org.mk/(S(1dph445pqy2sri32yrhejn2))/default.aspx?lId=2&mId=73&smId=16&cId=0&pId=1)) (accessed 14 August 2012) <http://www.stat.gov.mk/Publikacii/2.4.12.03.pdf>.

³²³ <http://orm.org.mk/eng/> (accessed 14 August 2012).

³²⁴ <http://www.kzd.mk/mk/> (accessed 10 September 2012).

³²⁵ In promoting the new women candidates for future mayor, Mr. Crvenkovski said: 'This municipality [Negotino], once one of the most beautiful and most tidy in Macedonia, today resembles a big house, a big house that needs general cleaning and general tidying, and for this it is best to have a woman's hand.' <http://www.kzd.mk/mk/novosti/89-apel-od-kzd> (accessed 10 September 2012).

³²⁶ Article 32.

³²⁷ <http://newmentor.mk/mk/details/project-newMENTOR> (accessed 10 September 2012).

³²⁸ <http://www.mtsp.gov.mk/?ItemID=B18F3390FCA6AC46B301792947033615> (accessed 10 September 2012).

³²⁹ NCPE Annual Report for 2011 published 5 May 2012. https://secure3.gov.mk/socialpolicy/SocProt/equal_opp/equality/resources/annual_reports.aspx accessed 3 September 2012.

of 2.9 % to reach 40.6 % in the second quarter of 2011, compared with the same quarter in 2010. It is interesting to note that the main increase was in the 25-54 age group, where the employment rate reached 50.4 % compared with 45.7 % the previous year. The female employment rate continues to rise according to subsequent NSO statistics, hovering somewhere around the 42 % mark.³³⁰ In general this appears to signify that Malta, and its women, have been spared the worst effects of the economic crisis. This comparative economic stability must explain the lack of adverse effects on employment or other legislation relevant to women in employment or self-employment, or on the derivable benefits and so on. This appears to be a privileged position for a Member State to be in at the current time of general crisis, and it is certainly a welcome one from the perspective of employment in general and the position of women and work in particular. Indeed, as the next section indicates, the Government has not had to take major austerity measures that might have impacted negatively on the legal position of women and work and social rights in general. On the other hand, the economic crisis has been cited by the Government as one major reason for opposing even better maternity benefits than have actually been adopted – on the ground that the burden on the employer (the ‘economy’) would be too great. However, while in 2009 it was expected, as was said in one conference in Malta, that ‘women and girls in both developed and developing countries will be particularly affected by job cuts, loss of livelihoods, poverty, increased responsibilities in all spheres of their life, and an increased risk of societal and domestic violence’ and that ‘Historically, economic recessions have placed a disproportionate burden on women. Women are more likely than men to be in vulnerable jobs, to be under-employed or without a job, to lack social protection, and to have limited access to and control over economic and financial resources’,³³¹ we can at least report from Malta that no catastrophe has so far struck, and progress in terms of legislation has been achieved at more or less the expected pace of development, especially in terms of the transposition or implementation of EU measures.

This is not to say that there has been no impact in economic terms. There have been some industrial casualties, with 2008, 2009 and 2010 being the years in which closures, restructurings, four-day weeks and other measures, for example in the tourism industry, hit some workers hard. More emphasis has been laid on flexicurity and facilitating part-time work.³³² In more recent times, focus and possibly progress on such issues as longer periods of paid maternity leave, paid parental leave, female presence on company boards and so on would have been more intense without the crisis. However, it is possible to report that in general the situation has not deteriorated very significantly for women in Malta.

Policy developments

Despite the economic crisis raging across Europe, the relative calm in the Maltese economy has meant that – while major leaps forward are not to be expected – it apparently remains the Government’s intention to continue to provide incentives to women to enter or re-enter the labour market. It is expected that the next national budget, like previous budgets, will continue to provide tax and other incentives, as well as to make further provision for child care facilities for working parents.

Unrelated to the economic crisis, it is possible to report further developments resulting from a major shift in Government policy as highlighted in the last issue of this Review. This

³³⁰ http://www.nso.gov.mt/statdoc/document_view.aspx?id=3324&formAction=init&backUrl=%2fsite%2fpage.aspx accessed 5 September 2012.

³³¹ <http://www.newmalta.com/councilviews?id=35> accessed 6 September 2012. See also European Women’s Lobby, 2009, at <http://www.socialwatch.org/node/11592> accessed 6 September 2012.

³³² See Joint Study of the European Social Partners, *The Implementation of Flexicurity and the role of the Social Partners*, National Fiche MALTA, http://www.google.nl/url?sa=t&rct=j&q=the%20implementation%20of%20flexicurity%20and%20the%20role%20of%20the%20social%20partners%20malta&source=web&cd=1&ved=0CCIOFjAA&url=http%3A%2F%2Fwww.resourcecentre.etuc.org%2Flinked_files%2Fdocuments%2FMalta_Fiche.pdf&ei=Ch9kUOikEait0QWLh4HYDA&usq=AFOjCNGwnyS-IIXqn3BjNI-Om0H-7K8O2A&cad=rja accessed 6 September 2012.

policy shift stemmed from last summer's defeat of the Government's stand against the introduction of divorce, at the polls in a referendum on the subject. A popular vote for the introduction of divorce led to the introduction of the Divorce Law in the summer of 2011. This event resulted in a general policy shift within the governing Nationalist Party that cleared the way for other legislative measures related to family rights, such as a law regulating in vitro fertilisation,³³³ and a Cohabitation Law that promised to regulate the rights of persons in various forms of cohabitation, including the rights of cohabiting same sex couples, as well as the possible adoption of a Gender Identity Law that would give rights to transgender persons, including the right to marry. At the same time a number of attacks on gays had led to calls for stricter hate crime laws to include homophobia.³³⁴ The Gender Identity Bill has not made much headway. Also, gay activists considered that the proposed Cohabitation Law might not go as far as they wish, in particular by stopping short of introducing what is referred to in the debate as 'gay marriage'. The Government recently 'launched' the Draft Cohabitation Bill³³⁵ which will be presented in Parliament after the summer recess and was not published at the time of the launch.³³⁶ The Minister stated that the draft Bill is in two parts. Part One applies to couples – a man and a woman or a couple of the same sex – who have been living together for five years or for two years if there are children. It would provide legal safeguards such as maintenance rights. In Part Two, it provides for 'civil cohabitation partnerships', whereby a couple, heterosexual or homosexual, will be able to register their partnership, in which case the partnership will be recognised as existing from the date of registration; in such a case a contract between the parties would regulate their mutual rights and obligations. In 'launching' the Bill to the public, the Minister for Justice emphasised that it was not the Government's intention to 'equate' such partnerships with 'marriage'. Pending official publication of the Bill and debate in Parliament, it is not yet clear what rights and obligations will flow from the status of civil partnership. Gay rights lobbyists are pushing for parity of treatment with heterosexual marriage. However, it seems that the Government's plans do not go this far, especially in relation to issues such as adoption, inheritance and pension entitlements. The influential Catholic Church in Malta continues to voice dismay at all measures, including those proposed, which can be perceived as diminishing the traditional values of marriage and family.

Legislative developments

Brief of the National Commission for the Promotion of Equality

The Government has widened the brief of the main national equality body, the National Commission for the Promotion of Equality (NCPE). The brief of the NCPE has been broadened by amending the Equality for Men and Women Act,³³⁷ (EMWA), by Act IX of 2012, to take the NCPE's brief beyond the earlier brief of sex equality, and discrimination on grounds of race so that in future it will also cover the grounds of gender identity and sexual orientation, religion or belief and age. These grounds have not been covered by any specific equality body thus far. Disability will remain within the remit of the National Commission for Persons with Disability. The NCPE has also been given a brief to protect the self-employed and the spouse of a self-employed person in accordance with Directive 2010/41/EU, which Directive required implementation by the Member States by 5 August 2012. The protection offered by EMWA has always included discrimination in employment by virtue of Article 4.

³³³ A Bill has now been published for the adoption of an 'Embryo Protection Act'. Legal Notice 118 of 2012.

³³⁴ See Sarah Carabott 'NGOs call for "hate crime" to also cover anti-gay acts', *The Times*, Monday 23 January 2012, <http://www.timesofmalta.com/articles/view/20120123/local/NGOs-call-for-hate-crime-to-also-cover-anti-gay-acts.403447> accessed 28 March 2012. See also <http://www.timesofmalta.com/articles/view/20120213/local/Victims-urged-to-come-forward.406474> accessed 28 March 2012.

³³⁵ A Bill for the Rights and Obligations of Cohabitants Act. Can be downloaded from <http://gov.mt/en/Government/Press%20Releases/Pages/2012/August/28/pr1852.aspx> accessed 10 September 2012.

³³⁶ 'JPO reacts as government launches Cohabitation Bill', *Times of Malta*, Tuesday 28 August 2012.

³³⁷ Chapter 456 of the Laws of Malta.

This means that the brief on employment issues related to racial and ethnic origin has been transferred from the Department of Industrial and Employment Relations within the Ministry for Education, Employment and the Family, to the NCPE.

Implementation of Directive 2010/41/EU

The Government has moved to implement Directive 2010/41/EU by adopting the Equal Treatment in Self-Employment and Occupation (Amendment) Order 2012.³³⁸ This amends Article 4 of the principal order, namely the Equal Treatment in Self-Employment and Occupation Order,³³⁹ to cover the spouses of persons in self-employment or occupation, not being employees or business partners, where they habitually participate in the activities of the self-employed or occupied person and perform the same or ancillary tasks. New Article 4A, added to the principal order, prohibits discrimination against persons in self-employment or occupation in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity or occupation. The prohibition extends to harassment or sexual harassment or if any person is instructed to discriminate against a self-employed or occupied person.

Hate crime

Hate crime appears to be on the increase, with recent attacks on a lesbian couple and another on a Sudanese immigrant, the latter attack proving fatal. Other race attacks have occurred which have led to prosecutions. Racial hatred is not the subject of this report, however. The first mentioned attack involved a gang attack on a lesbian couple.³⁴⁰ The Minister for Justice last year declared that homophobia would be constituted a hate crime by amendment of the relevant provision of the Criminal Code. This has now been done. Previously, the perpetrators of a crime motivated by gender, sexual orientation or gender identity could only be charged with harassment and bodily harm. The promised legislation has now been made, with the law being extended to cover also gender, gender identity and sexual orientation.³⁴¹

'Employment' and 'self-employment'

The recently promulgated Employment Status National Standard Order (Legal Notice 44 of 2012)³⁴² goes some way to setting out the approach to the making of a distinction between employment and self-employment by establishing a presumption in favour of there being a relationship of employment should five out of eight listed criteria occur, with the result that the Employment and Industrial Relations Act 2002 (the EIRA for short) and Regulations made thereunder will apply. This offers an increased measure of protection to vulnerable workers.

Case law of national courts

There are only a couple of cases upon which to comment. Industrial tribunal cases are not adequately reported officially. Searches have been restricted to the Government's judgments reporting service.³⁴³ However, it has been reported that in one recent ruling³⁴⁴ an accounts

³³⁸ Legal Notice 260 of 2012, amending SL 460.16.

³³⁹ SL 460. 16.

³⁴⁰ Claudia Calleja 'Updated: Thugs attack girl on a bench', *The SundayTimes*, 22 January 2012, <http://www.timesofmalta.com/articles/view/20120122/local/Thugs-attack-lesbian-16-on-a-bench.403284> accessed 28 March 2012.

³⁴¹ Article 82A (2) of the Criminal Code (Chapter 9 of the Laws of Malta) was amended by Act No. VIII of 2012 of 26 June 2012. It now reads as follows: '82A. (1). (2) For the purposes of the foregoing subarticle "violence or hatred" means violence or hatred against a person or against a group of persons in Malta defined by reference to gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion.' The Criminal Code is available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574&l=1> accessed 5 September 2012.

³⁴² Legal Notice 44 of 2012, available at <http://www.doi-archived.gov.mt/EN/legalnotices/2012/01/LN%2044.pdf> accessed 6 September 2012.

³⁴³ <http://justiceservices.gov.mt/LOM.aspx?pageid=24>, accessed 14 November 2012.

clerk was awarded EUR 12 000 by the Industrial Tribunal by way of damages for unfair dismissal. Her employment was terminated one month after she informed her employer of her pregnancy. Another interesting and potentially important case (the Psaila Savona case) is pending in connection with alleged unfair dismissal on grounds of pregnancy by a high-flying lawyer. She claims to have been unfairly dismissed on grounds of pregnancy. Her employer has argued that she was not an employee but a 'legal consultant' operating as a self-employed person and was not covered by employment legislation, as well as that she was not dismissed on grounds of pregnancy. The case is before the Industrial Tribunal, where it has been pending for some two and a half years. It might possibly test the limits of the antidiscrimination provisions of the EIRA and the Protection of Employment (Maternity) Regulations by reference to the definitions of 'employer', 'employee', 'contract of service', and 'contract of employment'. The proviso recently added to the definitions of 'contract of service' and 'contract of employment' by Legal Notice 44 of 2012³⁴⁵ might indicate an outcome in favour of the claimant, unless the non-retroactivity clause in the Order is a bar and provided the facts show that the complainant acted under instruction to a high degree. The Legal Notice was meant to 'clarify' certain provisions of the EIRA, and the claimant is likely to be arguing that, irrespective of profession and designation, she was in fact and in law an employee at the time of the occurrence of her dismissal, albeit as a highly qualified professional. The case might possibly give rise to the sort of preliminary reference that the author of this report considers may bring before the European Court of Justice the issue of the personal (and/or relational) scope of EU anti-discrimination employment law.

Equality body decisions/opinions

The relevant Maltese equality body is the National Commission for the Promotion of Equality (NCPE).³⁴⁶ The NCPE is not empowered to make decisions. However, it is empowered to investigate complaints, to mediate, and to support claimants in their claims before any court or tribunal. The NCPE's Annual Report for 2011 was presented at the NCPE's eighth annual conference and is published on the NCPE website.³⁴⁷ It provides, without supplying a full breakdown of cases by subject matter, or providing details, the number, range and broad breakdown into general headings of complaints received during 2011. According to the NCPE's Annual Report for 2011 (page 32) the NCPE received sixteen complaints in 2011. Of these, four were cases of alleged racial discrimination in the supply of goods and services. Six cases concerned alleged gender discrimination in employment and training. There were four cases of alleged gender discrimination in the supply of goods and services. The remaining two cases were deemed to fall outside the NCPE's remit and were referred to 'other relevant entities' (no details are given in the report). That makes a total of fourteen admissible complaints received in 2011.

³⁴⁴ 'Court: Woman who fell pregnant awarded £12000 for unfair dismissal', *The Malta Independent*, 25 May 2012, available at <http://www.independent.com.mt/news.asp?newsitemid=144843> accessed 6 September 2012. Not yet reported.

³⁴⁵ Employment Status National Order, available at <http://www.doi-archived.gov.mt/EN/legalnotices/2012/01/LN%2044.pdf> accessed 13 November 2012.

³⁴⁶ Website at www.equality.gov.mt, accessed 27 September 2012.

³⁴⁷ Annual Report 2011, available at https://secure3.gov.mt/socialpolicy/SocProt/equal_opp/equality/resources/annual_reports.aspx accessed 14 November 2012.

Miscellaneous

NCPE research

This year will see the end of the NCPE's Gender Mainstreaming in Practice Project. This has already produced several studies and toolkits which can be accessed on the NCPE website.³⁴⁸ Several other research studies can also be accessed on the website.

Equality Mark

It was reported at the NCPE annual conference in May 2012 that 22 new organisations were awarded the NCPE's Equality Mark in 2011 in recognition of best practice in gender equality.³⁴⁹

THE NETHERLANDS – Rikki Holtmaat

Legal effects of the economic crisis on gender equality issues

Although severe budget cuts in the area of social benefits and health care spending were agreed by the previous right-wing Government (now interim and awaiting the establishment of a new government after the September 2012 elections) and further measures were agreed in the spring between a majority of five political parties (*Voorjaarsakkoord* or *Kunduzakkoord*), it is hard to say what all that will exactly mean for women. Some measures apparently do have a connection with areas that are of special interest for women's position in social and economic life; e.g. changes in the way that child care and parental leave are financed and the fiscal grants that parents get; the compilation of the set of basic free rights under general health care insurance; and the way financial support for disabled and elderly people is structured. However, a gender impact assessment of any of these measures has not been made. Most of them still await further legislative proposals or still need amendments to existing legislation and budgetary laws. Much depends on the outcome of the formation of a new coalition Government. After the elections, the Liberals and Social Democrats together have a majority in Parliament. It is expected that they will conclude a coalition agreement in the autumn and form a new government together.

Legislative developments

The Government lost the support of Parliament at the end of April. Since then, many of the bills that were pending at that time in Parliament were put on hold until a new Parliament was elected in September and a new Government will be in office (after a coalition agreement will have been reached). This concerns inter alia the proposal to prohibit the burka. The Christian Democrat (CDA) Minister of the Interior, responsible for this bill, announced on 2 May 2012 that she was not supporting the bill anymore.³⁵⁰ It is to be expected that the majority of Liberals and Social Democrats will withdraw the bill once they have formed a new government.

The Government has drafted a bill concerning the legal possibilities to change one's gender on public records (bill on transgender).³⁵¹ In the future it will be made easier to do this.

³⁴⁸ www.equality.gov.mt. See for example, at https://secure3.gov.mt/socialpolicy/SocProt/equal_opp/equality/resources/annual_reports.aspx accessed 14 November 2012.

³⁴⁹ NCPE Annual Report for 2011 published 5 May 2012.

³⁵⁰ See my contribution to EGELR 2012-1.

³⁵¹ The draft bill was published in 2011 on the internet for internet consultation, and sent to the Council of State which gave an Advice on 4 May 2012. See: <http://www.rijksoverheid.nl/ministeries/venj/documenten-en-publicaties/kamerstukken/2012/08/03/antwoorden-kamervragen-over-het-wetsvoorstel-transgender.html#>.

Requirements such as proof of the medical and psychological necessity of a change to the other gender (i.e. other than registered at birth) and proof of infertility no longer have to be met. Also, it is no longer necessary that a judge has to give an opinion on the proposed gender change. On 17 August 2012 the Government agreed on the text of a bill. This bill has now been sent to the Council of State, which needs to give an Advice before it can be submitted to Parliament.

National case law: Opinions of the Equal Treatment Commission (ETC)

Pregnancy discrimination

In the case law of the ETC there are (again) a relatively large number of cases related to pregnancy discrimination.³⁵² Perhaps the media attention given to this issue that arose with the publication in the spring of the Commission's report on pregnancy discrimination will bring about more awareness by women that they should not accept any such discrimination and we will see even more such cases in the future.³⁵³ One case (ETC Opinion 2012-97 of 29 May 2012) in this area concerns a job agency which (illegally) asked a candidate whether she was pregnant and subsequently forwarded her (positive) answer to the company where the woman was applying for a job. She did not get the job as a consequence of that. Although job agencies fall under the scope of the equal treatment legislation, the job agency tried to escape its responsibility by pointing to the employer which wanted to have this information 'for good purposes' (i.e. the agency wanted to know this because it wanted to inform the employer adequately about the availability of the applicant). The ETC stated that the job agency itself was under a duty not to discriminate and that it had violated the law by asking the woman whether she was pregnant and then forwarding this information to the employer.³⁵⁴ In addition, the agency had not dealt seriously with the woman's complaint about this, which in itself is also discriminatory.

Positive action

The Royal Military Police (*Koninklijke Marechaussee*) (the applicant) has asked the ETC for advice about its intention to create a special new women-only function within its Observation unit. This unit is part of the Brigade for Special Security Assignments (*Brigade Speciale Beveiligingsopdrachten*, BSB), that consists of the Observation unit, the Security unit and the (making) Arrests unit. In the current situation, it is only possible to become a member of the Observation unit through an application procedure for the BSB as a whole. In order to become a member of this Brigade one has to successfully complete a 22-week training course and subsequent tests. New BSB employees are first sent to a high security risk area abroad for a period of 5 years. Only after that period has expired can one become a member of the Observation unit. Even then, each member of that unit will be asked to perform 8 to 10 weeks protection tasks in a high security risk area abroad each year. The entry course and admission tests require very advanced physical abilities and strength. The requirements for men and women are slightly different in that regard. However, this has not led to the effect that in practice equal numbers of men and women work in the BSB/the Observation unit.

The current Observation unit consists of 71 men and 5 women. Of these 5 women, only 1 is doing actual operational work as an observer, the others do managerial or administrative work. Observers need to keep an eye on people who are suspected of criminal or terrorist

accessed 27 September 2012. An overview of the current legislation can be found at:

<http://www.geslachtswijziging.nl/geslachtswijziging/-regelgeving>, accessed 30 August 2012.

³⁵² The ETC issued 19 Opinions related to pregnancy in 2012 up until 30 August (out of a total of 144 Opinions).

³⁵³ See my contribution to EGELR 2012-1. For the summary of the ECT report in English, see the PDF file published on the following web page:

http://www.cgb.nl/publicaties/publicatie/225042/hoewel_is_het_beveiligen_onderzoek_naar_discriminatie_van_zwanger_vrouwen_en_moeders_met_jonge_kinderen_op_het_werk, accessed 30 August 2012.

³⁵⁴ For the full text of this Opinion (in Dutch) see:

http://cgb.nl/oordelen/oordeel/225378/cancrinus_groep_b_v_eeen_bemiddelingsbureau_maakt_bij_de_bemiddeling_verboden_onderscheid_op_grond_van_geslacht, accessed 30 August 2012.

activities. It is of great importance for the effectiveness of the work of the unit to be able to form pairs of observers that consist of male and female employees. The Military Police, in order to be able to appoint more women in this unit, intends to create a special function within the Observation unit, which is only available for women. For this function, the requirements that the employee first has to do 5 years of service abroad and a further 8 to 10 weeks service abroad annually are dropped. These requirements appear to be the main reason why so few women are working within the Observation unit.

The ETC found that the Military Police with this (intended) policy discriminated directly on ground of sex, as prohibited under Article 3 of the Equal Treatment Act (ETA) (*Wet Gelijke Behandeling mannen en vrouwen bij de arbeid*). Next it examined whether it was possible to apply the positive action exception of Article 5(1) ETA. The applicant had not supplied any figures about the potential availability in general of women for this kind of function as compared with their actual presence in the unit. Therefore, the under-representation of women could not be established. The ETC did not discuss this point any further, because the policy in itself was not justifiable because it entailed an absolute preference for women for the newly established function. According to the case law of the CJEU (*Kalanke*) this is prohibited, because men should always have an opportunity to apply and only where women appear to be equally qualified for the job can a preference for women candidates be made. In addition, the applicant failed to show that there were no other non-discriminatory means to put an end to the under-representation of women in this unit of the BSB. The obstacle appeared to be the very severe requirements (5 years service abroad followed by 8 to 10 weeks annual service abroad) with which women found it hard to comply. The applicant had no intention of varying these entry requirements for both men and women. The ETC concluded that the policy – if adopted – would be discriminatory on the ground of sex.

Sexual harassment: woman no longer allowed to work because employer could not guarantee her safety

A female fire prevention specialist worked for a firm which had a contract with a shipyard in order to implement fire prevention measures on ships that were under repair. The woman was sent to do some work at this shipyard which had to take place on board a ship. After 1.5 to 2 hours of work a manager of the shipyard told her employer that she had to be removed from the project because her safety could no longer be guaranteed. The reason given was that on the ship several men were working who had been away from home for a long time and the presence of a female worker was creating great ‘unrest’. In fact the shipyard did use some female experts from the same firm, but all of them worked on the shore, not on ships.

The ETC held both the fire prevention firm and the shipyard responsible for discrimination on the ground of sex. The employer was responsible under Article 7:646(1) Civil Code where (inter alia) discrimination in employment conditions is prohibited. Not being sent out to do this particular work in the shipyard was considered to fall under the wide concept of working conditions. The shipyard was held responsible because the announcement that the woman had to be withdrawn from the project fell under the concept of an ‘instruction to discriminate’, as prohibited under Article 1(a) of the General Equal Treatment Act (GETA).

This case is exceptional. It hardly ever happens that an employer openly denies a woman a job opportunity because of the fact that the atmosphere at the workplace is so hostile or threatening that her safety cannot be guaranteed. It is a pity that the ETC did not refer to any of the health and safety at work regulations according to which employers have an explicit duty to guarantee working conditions that are free from any threat of (sexual) harassment: apart from liability because of non-compliance with this legislation, not implementing this duty can also amount to (sex) discrimination in working conditions under the equal treatment legislation. The facts of this case offered the ECT an opportunity to clarify this link between the various legislative provisions concerning sexual harassment at work.

Miscellaneous

*European Court of Human Rights finds complaint of SGP manifestly ill founded/inadmissible*³⁵⁵

In the Netherlands there has existed since 1918 a political party that – on the basis of the Bible – denies women the right to be eligible for public office. This Reformed Protestant Party (*Staatkundig Gereformeerde Partij*, SGP) is of the opinion that although men and women are of equal worth, God has created them differently and has assigned them different tasks and roles in life. Taking part in any form of Government or in people's representation in political bodies is assigned to men who are the 'head of women'. In 2004, court proceedings were started by a coalition of several women's rights and human rights NGOs against the SGP and against the Dutch State. The District Court of The Hague, in 2005, dismissed their claims against the SGP, stating that since no woman had come forward who had actually directly suffered from this policy, these NGOs had no legal standing. This meant that the proceedings then concentrated on the role of the Dutch State which financially supports the SGP and allows it to take part in the democratic process.³⁵⁶ In April 2010, the Dutch Supreme Court gave a final judgment, in which it stated that the Dutch Government, on the basis of Article 7 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), is under a positive obligation to put an end to this form of discrimination against women.³⁵⁷ It is against this Supreme Court judgment that the SGP issued a complaint at the European Court of Human Rights (ECtHR), stating that thereby the Dutch judiciary had interfered with its freedom of religion and freedom of political association.

The ECtHR found that the complaint of the SGP – apart from the fact that it is not (yet) actually a victim because the Dutch Government still has not taken any action against it – was manifestly ill founded and therefore declared the case inadmissible. The Court found that the SGP had indeed discriminated against women in its policy not to put any women on election lists. The right to equal treatment of women, which is fundamental and is expressed not only in CEDAW but in many international documents mentioned by the Court, can only be set aside for very weighty reasons. The SGP's position was unacceptable in the view of the Court and could not be justified by a plea of religious freedom or freedom of association.

With this ECtHR judgment, the end of a long legal debate has been reached concerning the legality of the SGP's policy not to put any female candidates on its election lists (for all levels of Government). Until 2006, it was even impossible for women to become members of this political party. On several occasions the CEDAW Committee, in its Concluding Observation about the Netherlands, has summoned the Dutch Government to put an end to this overt discrimination against women.³⁵⁸ It is remarkable that despite the outcome of all these legal procedures there still exists a strong resistance in the Government to do anything about this situation.³⁵⁹

³⁵⁵ ECtHR, Appl. Nr 58369/10, 10 July 2012 available from: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112340#{"itemid":\["001-112340"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112340#{), accessed 29 August 2012.

³⁵⁶ A complete overview of all these proceedings can be found in the ECtHR judgment, paras. 14-50.

³⁵⁷ HR 9 April 2010, available from: <http://zoeken.rechtspraak.nl/detailpage.aspx?lfn=BK4547>, accessed 29 August 2012.

³⁵⁸ CEDAW, Concluding Observations on the Netherlands (2001), in A/56/38, Report of the Committee on the Elimination of Discrimination Against Women, paras. 219-220 and *idem* (2007), CEDAW/C/NLD/CO/4, paras. 25-26. See also Ineke Boerefijn: 'Women's right to political participation. The case of the Reformed Political Party in The Netherlands', in: Rikki Holtmaat & Ineke Boerefijn (eds) *Women's Human Rights and Culture/Religion/Tradition: International Standards as Guidelines for the Discussion?* Proceedings of the Colloquium in the Peace Palace, The Hague 12 May 2009. Utrecht: SIM Special (2010), nr. 32, pp. 121-139.

³⁵⁹ According to answers to recent questions from Members of Parliament, the Government is still reluctant to take action. It has now asked the board of the SGP what it intends to do about the discrimination and awaits an answer to this question before taking any action itself. See: <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2012/08/17/beantwoording-kamervragen-over-verlies-sgp-van-vrouwenzaak-bij-europees-hof.html>, accessed 29 August 2012.

NORWAY – Helga Aune

Legal effects of the economic crisis on gender equality issues

The global financial crisis has so far not had an impact on the Norwegian economy and has not as such had any effects on gender equality issues.

Policy developments

Gender Equality Committee's report NOU 2012:15 'Politikk for likestilling' – Policies for Equality

The Gender Equality Committee's Report, 'Policies for Equality' (*Politikk for likestilling*) NOU 2012:15, was presented to the Minister for Children, Equality and Social Inclusion, Inga Marte Thorkildsen, on Tuesday 25 September 2012.³⁶⁰ The report is the second report from the Gender Equality Committee chaired by Professor Hege Skjeie. The previous report, 'Structure for Equality' NOU 2011:18, focused on the organizational issues for an effective equality body. The current report provides information on gender equality challenges taking a life-span perspective and considering class and ethnicity. The Committee recommends that the Government should take the initiative on a tripartite agreement with the social partners to enhance gender equality in the labour market. Such an agreement should cover not only the national level but go all the way to the local level and enterprises should be offered financial support for their work on equality in addition to being offered education on gender equality. Other recommendations include:

- gender equality scholarships to stimulate nontraditional choices of education;
- rules in the Election Act requiring gender representation on lists of candidates;
- a division of parental leave into three parts;
- free legal aid in discrimination cases;
- financial support for legal information projects.

From a development perspective nationally, and from a ten-year perspective as well on the local level of work for gender equality, is there in the Gender Equality Committee's view a need for a:

- programme for more representative representation at the political level;
- pedagogical education and training on gender equality;
- programme combating sexual harassment between young people.

Legislative developments

Proposals for amendments to legislation to secure equal pay

The Government has, in its work on equal pay for work of equal value, focused on four issues to amend structures limiting equal pay. The National Insurance Act now states that parental leave is divided into three parts, where one part is reserved for each of the parents. The third part may be divided between the parents as they find best. This is as a result of research showing that women increasingly lag behind on pay after every parental leave period. A division of the leave signals to parents that the leave is not only the mother's leave, but the parents' leave together. Second, amendments in the Gender Equality Act (GEA)³⁶¹ provide parents who have been on parental leave with a right to negotiate pay upon return from leave. Thirdly, there is a proposal that employers should have an obligation to pay for the leave of employees to nurse their children. Fourthly the latest proposal is to have pay statistics in annual company reports and that these statistics should be open to employees. All these measures are about the common goal of creating a platform of equal pay.

³⁶⁰ <http://www.regjeringen.no/nb/dep/bld/aktuelt/nyheter/2012/politikk-for-likestilling.html?id=699702>, accessed on 25 September 2012.

³⁶¹ The Gender Equality Act of 9 June 1978 no. 45.

Pay statistics

The Equal Pay Commission recommended in its report 2008:6 *Kjønn og Lønn*, that, as a legal obligation, information about pay levels and pay statistics should be available at every company. The same recommendation was made by the Gender Equality Commission in its report on the structure of equality bodies, enforcement and legal structures: NOU 2011:18 'Structure for Equality' (*Struktur for likestilling*). The Government has now responded to this in the Equal Pay Report to Parliament in *Likelønnsmeldingen Meld. St. 6 (2010-2011)* and most recently through the proposals from the Ministry for Children, Equality and Social Inclusion on 13 September 2012, that a new fifth paragraph should be added to the activity duty in the GEA Section 1a as follows:³⁶²

'Employers in the private sector who regularly employ more than 50 employees and employers in the public sector shall annually produce gender-segregated pay statistics. The statistics shall show any pay differences between men and women in the various employment categories at the enterprise, and reveal any pay differences between male- and female-dominated jobs. The statistics shall be available to all employees at the enterprise. Public sector employers shall report on the statistics in their annual report.'

The person obtaining pay information must sign a statement of confidentiality to protect personal data. 13 December 2012 is the deadline for comments on the proposal.³⁶³

Parental leave divided in three

The Government presented its proposal for legislative amendments to the provisions on parental leave on 17 February 2012 and the amendments to the National Insurance Act were enacted as from 15 June 2012 and will come into force on 1 July 2013.³⁶⁴ It is proposed to divide parental leave into three parts: one third reserved to each of the parents and the last third to be divided between the parents as they see fit. In the main body of the amendments the mother's quota/right to leave is raised from three weeks before birth and six weeks after birth to three weeks before birth and twelve weeks after birth, while twelve weeks are reserved for the father. Twenty weeks (with 100 % salary) or 30 weeks (with 80 % salary) remain as the third period which the parents may divide between them (or one parent may take all) as they see fit.

The proposal is one of the measures proposed by the Equal Pay Commission (2010) as one of the means of changing traditional gender patterns in families. A clear result of the analysis regarding pay is that women increasingly lag behind in pay after each period of parental leave. In addition, a parental leave (maternity and paternity leave plus a parental leave period) divided into three will be a profound statement to parents that the parental leave period 'belongs' to the parents together and this will force the parents to take an active decision as to how it is shared between them, as the Minister phrased it. However, the Government's proposal did not match the Equal Pay Committee's proposal of four months for each parent and the remaining four months to be divided as the parents see fit. I would like to raise the question of the equality effect for women. The time that is reserved for them is the most energy-draining time after birth when their body needs to recover at the same time as the child needs frequent feeding night and day.

A right to negotiate pay upon return from parental leave

The Government has also proposed amendments to the Gender Equality Act of 9 June 1978 No. 45 with a new Section 4a giving a right to employees who, upon return from parental leave, shall have the right (a) to return to the same or equivalent position as before the leave; (b) to enjoy any improved rights/working conditions that have taken place during the leave;

³⁶² My translation.

³⁶³ <http://www.regjeringen.no/upload/BLD/Notat1.pdf>, accessed on 17.09.2012.

³⁶⁴ Amendment to the National Insurance Act by the Act of 15 June 2012 no. 32, coming into force on 1 July 2013 according to the Royal Decree of 15 June 2012 no. 525.

and (c) to present claims for a pay rise on an equal footing with other employees. The proposal is currently awaiting comments from the Parliamentary Family and Cultural Affairs Committee which has a deadline of 8 November 2012.³⁶⁵

Paid time off to nurse

The Government's proposal is that employers shall be obliged to pay for up to one hour per day for time off for mothers to nurse children below 12 months. The amendment is suggested as a new second paragraph to Section 12-8 in the Working Environment Act.³⁶⁶ The time limit for comments to the proposal was 12 September 2012.

Case law of the national courts

There are no court cases to report during the months of May to September 2012. There is an interesting case from the Gender Equality and Anti-Discrimination Tribunal regarding possible indirect discrimination. The question was whether the consequences of the legislative design regarding pension points awarded during time at home to care for children below the age of (now) six years (previous age for school start was 7 years), following the National Insurance Act Section 3-16, are discriminatory. The Tribunal sent the case back to the Ombud to review the case (Tribunal's case of 21 June 2012, case no. 09/2012).³⁶⁷

The facts were that a woman asked the Ombud to evaluate whether or not the rule in the National Insurance Act which provides that women born before 1954 and who cared at home for their children under the age of 7 years before 1992, discriminated against those women on the grounds of age as they are not entitled to pension points³⁶⁸ for this work. This is in contrast to women born after 1954. The complainant also claimed that the rule is discriminatory on the grounds of gender. She referred to the fact that in the 1970s there were insufficient kindergartens available. In addition, at that time it was in line with traditional gender roles that the mother stayed at home taking care of the children while the father was working and earning his pension points. Because of the stereotypical gender roles, the consequences of the age limit of 1954 are especially harsh for women.

The Ombud stated that the claimant had raised the question as an age discrimination issue only, and that the protection against discrimination on the grounds of age follows the rules in Chapter 13 of the Working Environment Act. As the work performed by the woman had been at home caring for her own children, Chapter 13 was not applicable. On top of this, the Ombud claimed that the pension point rule for care for children below school age mostly benefits women and as such no discrimination is taking place. Based on these two arguments the Ombud asked the Tribunal to reject the case.

The Tribunal did not reject the case at all. Unanimously, the Tribunal sent the case back to the Ombud for a new trial to test the case in line with the protection against indirect discrimination following Section 3, third paragraph, in the Gender Equality Act.

POLAND – Eleonora Zielińska

Legal effects of the economic crisis on gender equality issues

The current legal effects of the economic crisis in Poland cannot be properly presented without making reference to the consequences resulting from preventive actions undertaken by the Government in 2008. The goal of those actions was, on the one hand, to inhibit the

³⁶⁵ <http://www.regjeringen.no/nb/dep/bld/dok/regpubl/prop/2011-2012/prop-126-1-20112012/10.html?id=683965>, accessed on 24 September 2012.

³⁶⁶ <http://www.regjeringen.no/nb/dep/bld/aktuelt/nyheter/2012/ammefri-med-lonn.html?id=685046>, accessed on 27 September 2012.

³⁶⁷ <http://www.diskrimineringsnemnda.no/wips/2094117726/>, accessed on 27 September 2012.

³⁶⁸ Pension points are the factor for counting a person's right to retirement benefits because of age, in accordance with the National Insurance Act of 1997.

bankruptcy of enterprises affected by the financial crisis and, on the other hand, to reduce the effects of the crisis for the poorest people. By the end of 2009 the package of anti-crisis laws had been passed and to a large extent also implemented.³⁶⁹ An exception was the failure to implement the package with regard to help for the poorest affected by the crisis. Although not expressly stated in the policy documents, it was clear that, due to the fact that women suffer a bigger risk of lay-off and in Poland usually bear the brunt of poverty, to a large extent it is women who are the potential beneficiaries of this segment of the anti-crisis package.³⁷⁰

Another reason for criticism, both on the part of entrepreneurs and potential beneficiaries, was that the adopted measures started to take effect after the peak of the crisis, by which time many companies had already been forced to suspend production and thus could not take advantage of the benefits when they were offered.³⁷¹ Moreover employees, including women, did not show much interest in adopting flexible working hours. On the contrary, increasing interest in the Law concerning the possibility of extending fixed-term contracts of employment could be observed. Raising requirements in this area exacerbated the situation of women in particular, because they predominated among the employees performing work on the basis of fixed-term contracts. In addition, very few unemployed people, including women, have benefited from another element of the anti-crisis package, namely the possibility to obtain assistance in the repayment of a mortgage, due to a very narrowly defined group of beneficiaries³⁷² and the fact that the support of the Labour Fund was available only until the end of 2010.

The economic crisis has highlighted gender-based inequality with regard to the distinction between production and non-production workers. While production workers were offered various solutions aimed at stimulating the economy, in the non-production sphere, such as social care or health services, where the majority of employees are women, only privatisation or increase of the costs of such services were proposed. Repeated assertions that

³⁶⁹ Of particular significance was the Law of 1 July 2009 on mitigating the effects of the economic crisis for employees and entrepreneurs (Dziennik Ustaw (Journal of Laws) No. 125, item. 1035, as amended, hereafter Dz.U.), which came into force on 2 August 2009). Inter alia, this law concerned: flexible working hours; reducing the Labour Code's restrictions on use of fixed-term contracts; initiating a company training fund, subsidised from the employment budget as an alternative to redundancies. This Act had a partially temporary nature, and certain provisions, in particular those restricting the use of protective Labour Code provisions, expired on 31 August 2009. Also worth mentioning is the Law of 17 July 2009 (Dz.U. 2009 No. 125, item 1037) on the amendment of the (personal) Income Tax Act (Law of 26 July 1991, Dz.U. 2000, No. 14, item 176, as amended), which abolished the taxation of allowances granted by trade unions and benefits paid from the company fund for social services, as well as exempting from income tax those individuals who were beneficiaries of these services. Another regulation was the Law of 19 November 2009 on the repealing of the Act on shaping the growth of average wages in enterprises by way of negotiations of 16 December 1994 (Dz.U. 1995 No. 1, item 2 as amended), which came into force on 1 January 2010 (Dz.U. 2009 No. 219, item 1707). The repealing of the previous Act of 16 December 1994 meant that entrepreneurs who have representative unions in their companies no longer need to negotiate wage increases with them.

³⁷⁰ Social partners who raised objections in this area were informed about the possibility to use existing legal and social aid tools available for people in difficult material circumstances. See: Status of application of the Law of 1 July 2009 on mitigation of the effects of the economic crisis for employees and entrepreneurs (Journal of Laws No. 125, item 1035) <http://www.mpips.gov.pl/praca/pakiet-antykryzysowy/stan-realizacji-pakietu-dzialan-antykryzysowych>, accessed 8 September 2012. J. Fedak, Minister of Labour and Social Policy at that time, stressed that there were funds provided for in the budget for this purpose and there was no need to create additional legislative solutions. She also said that there was always the possibility to run special programmes where demand actually occurred, due to redundancies. There were, however, no indications that such programmes in fact were initiated.

³⁷¹ Formal requirements (documented decline in turnover, a recovery plan) and the usual bureaucracy resulted in only 139 companies applying for wage subsidies from the Guaranteed Employee Benefits Fund. During the first eight months from the entry into force of the Act only 1.4 % of the funds set aside for this purpose could be distributed. L. Guza, *Pakiet kryzysowy nie pomógł firmom (The anti-crisis package did not help companies)*, *Gazeta Prawna* of 27 April 2010.

³⁷² This offer could not be taken up by people who had lost their jobs, but who were not yet registered in the property as the mortgagor (for example, because it wasn't ready for use), nor by people living in rented flats, whose financial situation had deteriorated significantly after losing their jobs. As a result, only 1.6 % of the scheduled funds could be used. P. Jakubczak, *Z pomocy w spłacie kredytu hipotecznego korzysta niewielu bezrobotnych (Few unemployed benefited from assistance with credit payments)*, *Gazeta Prawna* of 23 April 2010.

the crisis was mainly affecting the financial system additionally resulted in the reduction of preventive measures primarily to those who were stabilising and controlling this system. The broader macroeconomic perspective had not been sufficiently taken into account and not enough attention was drawn to the unfair distribution of income and wealth (property), to low wages (intentionally maintained for the sake of competitiveness), or to the social costs of the current recession. As a result, the overall implementation of the anti-crisis package of 2009 is generally assessed negatively, as are the governmental strategies for the future.³⁷³ It has been emphasised that some of the legal provisions adopted in 2008 only contributed to the intensification of the crisis, which can still be seen today.³⁷⁴

The crisis was a subject of a speech by Prime Minister Tusk which was held in 2011, shortly after winning the elections for the second time. He stressed: ‘We have started out on a path of budgetary consolidation, cutting back and saving, in order to achieve for Poland a safe threshold of deficit and public debt’.³⁷⁵ Although the size of the crisis and the chances of overcoming it were evaluated differently by national and international experts, they all agreed on the necessity to ‘slim the budget’.³⁷⁶ At the same time the Prime Minister assured the nation that ‘the fiscal consolidation will not directly affect the pockets of the people’. He contradicted himself however, admitting at the same time that the hardest decision – with regard to salaries – was the one he had had to make about leaving public administration employees without an increase for another year (with the exception of teachers). He also announced a reduction in the payment on the birth of a child (*becikowe*) and restrictions on family allowances.³⁷⁷ The majority of these announcements were implemented by the Act of 2011 on budget-related issues.³⁷⁸

It is worth noting that the ‘budget slimming’ and the search for opportunities to increase State revenue had already started beforehand. This is evidenced by the budget-related provisions of the laws of 2009³⁷⁹ and 2010,³⁸⁰ but during the pre-election period there was little talk about it publicly.

In analysing the above budget-related laws, it should be noted that the majority of budget slimming measures affected the poorest and most excluded people, the majority of whom are women. This is due to the consistent maintenance of low wages in the economy as a whole, the so-called wage freeze (since 2008) in the public sector where many women are employed, in the face of rising prices, a rising inflation rate, as well as increases in pension and health

³⁷³ The governmental strategic document, ‘Poland 2030 – development challenges’, published in 2009, was criticised for: emphasising the importance of Poland’s rapid economic development based on former conditions; not contesting the current paradigm; favouring unbalanced development; and, pushing social costs onto the poorest households. E. Charkiewicz, *Polska, ale jaka. Feministyczna krytyka strategii Polska 2030* (What kind of Poland? Feminist Criticisms of “Strategy Poland 2030”), Warszawa 2010.

³⁷⁴ Z. Łapniewska, ‘Analiza wpływu kryzysu gospodarczego na sytuację kobiet (Analyses of the influence of the crisis on the situation of women)’ in: A. Czerwińska, Z. Łapniewska, J. Piotrowska (eds.) *Kobiety na ‘zielonej wyspie’*. *Kryzys w Polsce z perspektywy gender (Women on a ‘green island’. Crisis in Poland from a gender perspective)* s. 89-90 Heinrich Böll Stiftung; Warsaw, Fundacja Feminoteka 2010; <http://zielonewiadomosci.pl/publikacje/artykuly/fala-kryzysu-uderzyla-w-kobiety/>, accessed 5 September 2012.

³⁷⁵ http://wiadomosci.gazeta.pl/wiadomosci/1.114884.10668035.Expos%C3%A9_premiera_Donald_Tuska_STENOGRAM.html, accessed 10 September 2011.

³⁷⁶ According to foreign experts the projected per capita income growth will be 2.5 %. The American expert at Saxo Bank, John Hardy, talks with Roman Mańka, http://biznes.interia.pl/raport/kryzys_w_usa/news/2012-konca-swiata-raczej-nie-bedzie.1749306.5429. According to national estimates the figure is closer to 4 %, as was the case in 2011, <http://www.forbes.pl/artykuly/sekcje/wydarzenia/swietny-pkb-wzrost-o-4-3-proc--w-2011.23655.1>, accessed 5 September 2012.

³⁷⁷ http://wiadomosci.gazeta.pl/wiadomosci/1.114884.10668035.Expos%C3%A9_premiera_Donald_Tuska_STENOGRAM.html, accessed 10 September 2011.

³⁷⁸ The Law of 22 December 2011 amending certain acts related to the implementation of the Budget Act (Dz.U. 2011, No. 297, item 1707).

³⁷⁹ The Law of 19 November 2009 amending certain acts relating to the implementation of the Budget Act (Dz.U. 2009 No. 219, item 1706).

³⁸⁰ The Law of 26 November 2010 amending certain acts relating to the implementation of the Budget Act (Dz.U. 2010, No. 238, item 1578).

insurance contributions.³⁸¹ In addition to that, in 2009-2011 the rate of VAT has been raised, e.g. on the collective water supply and sewage disposal, medicine, books, unprocessed food, children's clothing and shoes. Low income households are limiting their expenditure, hence reducing the demand which negatively influences consumption, especially with regard to such items as education and culture or quality food. Such families cease to use e.g. restaurant services, personal care institutions and paid learning help for children. They also reduce investment in household items. This impacts on women especially as it is they who are mainly carrying out household-related family responsibilities.³⁸²

An analysis of budget-related legislation shows that the greatest savings are expected in social welfare spending (in 2011 it was approximately EUR 1.2 billion (PLN 5 billion)). This result was to be achieved by: freezing in 2009 the income ceiling for entitlement to social assistance (until the year 2012),³⁸³ an insignificant increase of the income threshold for entitlement to child benefits (since 2004);³⁸⁴ reducing the death grant (by almost one-third); limiting the one-off payment on the birth of a child (*becikowe*); elimination of subsidies for mortgage loans to young married couples ('family on its own' programme);³⁸⁵ the abolition of tax relief for families with one or two children; the reduction of unemployment benefits; and the reduction of the Labour Fund for motivating the unemployed from which, for example, grants to start a new business, training, and support to companies employing unemployed people,³⁸⁶ is paid. The current level (without valorization) of the monthly subsidy for employers employing disabled people has also been frozen.

At the same time it needs to be noted that taxes for the rich have been reduced (from 40 % to 32 %), and inheritance tax for close family members has been abolished. There was also an attempt (so far unsuccessful) to set aside the so-called Chimney Act, which limits the earnings in state-owned enterprises and companies in which the Treasury has a dominant share, to six times the average salary. Not without significance is the fact that nearly (EUR 25 billion, PLN 100 billion) have been spent on the organisation of Euro 2012, the football championships, of which only a part of the overall permanent infrastructure will remain for future use.³⁸⁷ Employment in public administration has grown to 60 000 people, which costs yearly about EUR 2.1 billion (PLN 9 billion). The plan still remains to build a missile defence shield, the costs of which are enormous.

³⁸¹ http://wyborcza.biz/biznes/1.101562.11311142.Budzet_2012_gotowy_Prezzydent_podpisal_ustawe_budzetowa.html, accessed 8 September 2012.

³⁸² M. Chustecka, 'Kryzys najbardziej widać w domu' (Crisis is the most seen at home) in: A. Czerwińska, Z. Łapniewska, J. Piotrowska (eds.) *Kobiety na 'zielonej wyspie'. Kryzys w Polsce z perspektywy gender s.* 89-90 Heinrich Böll Stiftung; Warsaw, Fundacja Feminoteka 2010; <http://zielonewiadomosci.pl/publikacje/artykuly/fala-kryzysu-uderzyla-w-kobiety/>, accessed 7 September 2012.

³⁸³ The income criterion for a single person household is EUR 110 (PLN 477). The income criterion per family member is EUR 88 (PLN 351). These criteria have not been raised since 2006. It is planned to raise them, <http://pomocspoleczna.ngo.pl/x/72548.jsessionid=AC79C80B7057B3890706DB34DB8FC550>, accessed 7 September 2012.

³⁸⁴ This freeze resulted in a halving of the number of children entitled to benefits. From November 2012 the criterion will increase by EUR 7.5 (PLN 30) and will amount to EUR 135 (PLN 539) per family and EUR 156 (PLN 623) when a family is raising a disabled child. The increase will also affect the amount of the allowance, although the number of beneficiaries will not increase significantly, http://praca.gazetaprawna.pl/artykuly/617903.od_listopada_wyzsze_kryterium_dochodowe_uprawnijace_do_otrzymania_zasilku_rodzinnego.html, accessed 10 September 2012.

³⁸⁵ This programme provided that for eight years the State would pay 50 % of the monthly interest for a young married couple. This programme is to be terminated in 2012. Since 2011 the price ceiling for flats has been lowered to create savings for the State budget. The age limit for debtors has also been lowered. The possibility to qualify for the aid was restricted to new flats and homes. M. Wielgo, *Rodzina na swoim kosztuje dużo Budżet (Families on their own cost the Budget a lot)*. *Gazeta Wyborcza* of 13 June 2010.

³⁸⁶ In 2011 the fund was reduced by nearly a half, compared with 2010. See: *Budżet 2011. Rodziny i bezrobotni stracą. (The Budget 2011; families and unemployed persons will lose)*. *Gazeta Prawna* of 8 September 2010.

³⁸⁷ 4 % of this amount was spent on the construction of stadiums. The account however should include the cost of facilities created solely for the purpose of the championships and intended to be closed afterwards, such as fan zones costing EUR 5.7 million (PLN 24 million), <http://www.polskieradio.pl/10/485/Artykul/630061.Ile-tak-naprawde-kosztuje-nas-Euro-2012>, accessed 8 September 2012.

Demographers' predictions are alarming, showing that the continuation of current trends in fertility and emigration may not only reduce the size of the population but also cause a profound imbalance in the relationship between successive generations. It is recommended therefore, for example, to create conditions conducive to the formation of families.³⁸⁸

In order to enable more women to combine family responsibilities with employment, in 2011 the so-called Nursery Act was adopted.³⁸⁹ It is far too early for any comprehensive evaluation of the implementation of this law, but the first year of its application was not particularly promising.³⁹⁰

In an attempt to increase the number of people remaining in the labour market, hence contributing to pensions for others, a process of gradually raising the retirement age and equalising it for men and women, has been initiated.³⁹¹ Some pension privileges have also been reduced, e.g. by extending the time of service required to qualify for a pension for various uniformed services (e.g. police or armed forces). While the elimination of such privileges deserves full approval, the extension of the retirement age for women eventually by seven years (in the case of men by two), with no guarantee of a higher pension in the future, may be seen as a manifestation of gender discrimination.

Policy developments

During the period covered, no relevant policy development could be identified in the field of gender equality. From the standpoint of egalitarianism, the discussion on the implementation of the principle of equal opportunities in the field of sport (not just equality for women, but also for people with disabilities participating in the Paralympics) was essential.

Worth noting is the Ministry of Justice's policy of refusing to sign the Council of Europe's Convention on preventing and combating violence against women and domestic violence. The Ministry raised concerns, in particular with regard to the Convention's definition of 'gender' and the regulations obliging the State to eliminate stereotypical perceptions of gender roles which, in the opinion of the Ministry, are contradictory to the traditional understanding of the family. In the Ministry's opinion such traditional understanding is protected by the Polish Constitution.

Legislative developments

The Ministry of Labour and Social Policy is currently working on a draft law amending the Labour Code with regard to, inter alia, parental leave; the draft law is still subject to much controversy. It is planned to extract one month from the current 36 months of parental leave, to which the mother is entitled, and to designate this month for the sole use of the father. According to this draft, the parents will have to share the parental leave and, should they not take advantage of this possibility, they will lose one month of the leave. One of the controversies relates to the fact that the leave, shortened by one month, will also apply in the case of single mothers, which raises suspicions of discriminatory treatment of such women. In

³⁸⁸ Predictions of the Polish Population Policy 2012. Project Warsaw 2012, Government Population Council.

³⁸⁹ The law of 4 February 2011 on the care of children under three years of age (Dz.U. 2011, No. 45, item 236), http://orka.sejm.gov.pl/proc6.nsf/ustawy/3377_u.htm, accessed 10 September 2012, provides that such care may be organised by local authorities, other organisations and private persons. The so-called Nursery Act introduced new forms of care for children under three, including crèches, group babysitters, day clubs and legally employed nannies. The law also encourages employers to establish company nurseries in return for a tax allowance and provides for the possibility for the State to cover the social security costs of nannies. See further: EGELR 2012-1, p. 98, available at http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2012-1_final_web_en.pdf, accessed 6 November 2012.

³⁹⁰ The transferring of the task to finance start-up nurseries and kindergartens to local budgets has led to a drastic increase in the cost of stay of a child in these organisations. Most families are not able to bear such costs. This problem has only been partially resolved.

³⁹¹ The Act of 11 May 2012 amending the Law on pensions from the Social Insurance Fund and other laws (Dz.U. 2012, item 637). Following the digitalisation of the Journal of Laws, since 2012 the Dz.U. number is no longer necessary.

defence of this solution, the need to implement EU Directive 2010/18/EU Council was invoked.³⁹²

Case law of national courts

The judgment of the Supreme Administrative Court of 20 March 2012 (II FSK 1704/10) refusing to accept a lesbian partner as a member of the family in the original meaning of the Law on the Taxation of Heritages and Donations, is worth a mention.³⁹³ Pursuant to Article 4a of the Law on Taxation of Heritages and Donations,³⁹⁴ in the case of the acquisition of a movable item from a closed catalogue of close relatives (spouse, ancestor, descendant, stepchild, sibling, step-parent), a person is relieved from taxation if they meet the conditions provided for by the regulation. In the above case the Tax Office refused to recognise cohabitantes as close family, even though B and A had been established as a family for years. B appealed this decision to the Provincial Administrative Court, claiming that the tax bodies had failed to compare the factual and legal situation of cohabiting same-sex partners with those of spouses. In her opinion the goal of the relief from taxation mentioned above, permitted to close family members, is to enable persons remaining in a permanent partnership to transfer property, which is usually acquired in common, without a State-based tax burden. Therefore in her opinion the relief should be extended to all partners remaining in a permanent union and managing a common household. In particular, such relief should be extended to all same-sex cohabitantes, for whom in Poland no legal form of relationship exists. In the opinion of the claimant the tax regulations were discriminatory and arbitrary in character, since they selectively define the family and thereby violate the equality clause of the Constitution.

The Provincial (*Wojewódzki*) Administrative Court³⁹⁵ did not accept the arguments raised by B, explaining that the tax relief constituted an exception from the general obligation to pay taxes, hence should be interpreted strictly. This Decision was upheld by the Supreme Administrative Court in its judgment of 20 March 2012, determining the cassation claim lodged by B. This case exposes an existing gap in the tax law, which leads to the unequal treatment of persons in a same-sex cohabitation, in comparison with family members listed in this law.

Miscellaneous

In recent months, several cases of discriminatory treatment of women have been identified

Discrimination against women in the police

The NGO, Centrum Praw Kobiet, addressed the Commander in Chief of the Police with an inquiry regarding an award for a dangerous intervention granted only to a male officer, and ignoring the female police officer who had also participated in the intervention.

In late May, KW and ŁS, both senior sergeants, received a notification during a joint patrol about a drunk man who had fallen into the river Odra. Both officers jumped into the water and pulled the man from the river. He was acting aggressively, so they had to handcuff him. For saving the man's life the superior officers decided to make an award only to the male officer. He is to receive an increase in the service supplement and a request has been filed to award him the 'Cross of Merit'. The female officer has been completely ignored. Her superiors found that she was less involved in the intervention and she had just returned from a long period of sick leave, so she could not rely on receiving an increase in the service supplement.³⁹⁶

³⁹² <http://www.rp.pl/artykul/861677.html>, accessed 10 September 2012.

³⁹³ <http://orzeczenia.nsa.gov.pl/doc/E1A1014919>, accessed 10 September 2012.

³⁹⁴ Law of 28 July 1983 on Taxation of Heritages and Donations (unified text Dz.U. 2009, No. 93, item 768).

³⁹⁵ Judgment of 27 April 2010 of the Provincial Court in Gdańsk, I SA/Gd99/10,

<http://orzeczenia.nsa.gov.pl/doc/2EF9087094>, accessed 10 September 2012.

³⁹⁶ <http://wiadomosci.gazeta.pl/wiadomosci/51,114883,12366127.html?i=0>, accessed 12 September 2012.

Discrimination against women in sport

The Government Plenipotentiary for Equal Treatment received a complaint about discrimination on the grounds of sex during the Polish Chess Championships, where cash prizes of unequal value were provided for the male and female champions respectively. The best male player received EUR 4 800 (PLN 20 000), while the best female competitor collected only EUR 3 300 (PLN 14 000). The Plenipotentiary found that such action showed the marks of discrimination based on sex and addressed Mrs Joanna Mucha, Minister of Sport and Tourism, asking her to analyse the situation and respond to the problem.³⁹⁷

For the past four years female organisations have campaigned against an unequal distribution of prizes in the ‘Solidarity’ Marathon, held annually in Gdynia and Gdańsk. Initially the prizes were divided into two categories, male and female, although women received half the worth of prizes awarded to men. In reaction to these protests the regulation has been changed and one open category for both sexes has been created. Creating this one open category deprives women of the chance to win. It is a fact of nature that women run slower than men, so reaching highly ranked places under such circumstances is practically impossible for them. Requests for a second change to the regulation have so far remained unanswered.³⁹⁸

The National Broadcasting Council imposed a EUR 48 000 (PLN 200 000) penalty on the TVN station, with regard to the programme ‘Top Model. Become a model’.

The National Council of Radio and Television (KRRiT), the independent authority to oversee compliance with the law and ethics in the media, in its decision of 12 July 2012 concluded that the programme ‘Top Model. Become a model’, broadcast by the TVN station, could have a negative impact on the proper development of children and violated the dignity of the participants. The Council imposed on the private station a penalty amounting to EUR 48 000 (PLN 200 000), the maximum penalty in such a case being EUR 129 000 (PLN 537 000). The complaint to the KRRiT in this matter was lodged by, among others, the Government Plenipotentiary for Equal Treatment, with regard to the suspicion of discriminatory behaviour and sexual harassment by jury members. According to her, the comments directed at the participants by the person in charge and the jury members ‘depreciated the intellectual skills of the participants’ and the ‘touching of private body parts of the models, i.e. grasping their breasts, violated the dignity of the women and were aimed to create for them a degrading and humiliating atmosphere’. The National Council confirmed the infringement of the dignity of the participants, but above all decided that the broadcaster violated the Law on radio and television, by incorrectly classifying the broadcast with regard to the advised age of the audience (12 years), despite the fact that the show could have negatively influenced the proper development of the mental, physical and moral condition of minors. Indirectly the Council also blamed the participants in the programme.³⁹⁹ Considering the sexually abusive treatment of the programme participants as a secondary offence demonstrates the lack of awareness of the members of the Council of various forms of gender discrimination.⁴⁰⁰

³⁹⁷ <http://rownetraktowanie.gov.pl/interwencje/w-sprawie-dyskryminacji-ze-wzgledu-na-plec-podczas-mistrzostw-polski-w-szachach>, accessed 10 September 2012.

³⁹⁸ <http://wiadomosci.ngo.pl/wiadomosci/792799.html>, accessed 10 September 2012.

³⁹⁹ According to the Council, the fact that the young women starring in the show expressed opinions about being ready to do anything for their careers, could have a negative impact on the development of the normal behaviour of minors..

⁴⁰⁰ <http://rownetraktowanie.gov.pl/aktualnosci/krrit-200-tys-zl-kary-dla-tvn-za-program-top-model-zostan-modelka>, accessed 10 September 2012.

PORTUGAL – Maria do Rosário Palma Ramalho

Legal effects of the economic crisis on gender equality issues

Due to the particular situation of Portugal in relation to the current financial crisis, all aspects of the following report deal with the current crisis, highlighting its effects on gender equality issues wherever appropriate.

Legislative developments

Labour law reform (follow-up) and reconciliation of family and working life

In the context of the Financial Assistance Programme to Portugal that is now in place, more structural reforms in the area of employment and labour contracts are being implemented. Although of a general nature, they will have a direct or indirect impact on equality issues.

In June 2012, a new Act (Law No. 23/2012, of 25 June) introduced important changes in the Labour Code in the following areas:

- rules applicable to working students;
- information duties of the employer regarding employees and the labour administration services;
- specific labour contracts, like fixed-term labour contracts of short duration;
- working-time arrangements with the increase of flexible working-time conditions;
- overtime work, including the reduction of monetary compensation and the suspension of compensatory rest;
- abolition of some national holidays;
- abolition of extended annual leave as a reward for lack of absences;
- change in lay-off provisions;⁴⁰¹
- change in the procedure for individual dismissal with just cause;
- reduction of damages compensation in cases of collective dismissal and other forms of dismissal based on objective criteria, in all labour contracts;⁴⁰²
- more flexible conditions for objective dismissal, based on the abolition of the employment post or on the subsequent inability of the worker to perform the job;
- new rules regarding the relationship between collective agreements of different levels, collective agreements promoted by works councils, and the control by the Equality Agency of collective agreements' clauses on equality.

In August, some changes were also introduced into the Labour Code regarding working conditions of minors, by Law No. 47/2012, of 29 August.

Finally, in relation to civil servants (in the broad sense), severe measures restricting new contracts, promotions and salary (including salary reduction and the suspension of Christmas and holiday allowances) were put in place for 2012 by the National Budget Law, and most of these measures as well as new restrictive measures for workers in the private sector (including an increase in the level of contributions for the public social security system) are going to be maintained or imposed in 2013.

Besides the direct or indirect impact that some of the measures described may have on gender equality, one of these measures is of specific interest for gender equality. Article 479 of the Labour Code, with the changes introduced by Law No. 23/2012, now states that if the Public Body for Equality in Employment⁴⁰³ spots a discriminatory clause in a collective

⁴⁰¹ These are legal provisions concerning the reduction of working time or the suspension of labour contracts on the grounds of the difficult financial situation of the company.

⁴⁰² Under the previous Law, already approved during this reform process of the Labour Code (Law No. 53/2011, of 14 October, indicated in our contribution to EGELR 2012/1), these provisions on the calculation of damages compensation for dismissal on objective grounds only applied to new labour contracts. The new legislation has extended the measures to existing contracts, with an adaptation period.

⁴⁰³ CITE – Comissão para a Igualdade no Trabalho e no Emprego.

agreement during the first 30 days after the official publication of the agreement, it has the power to notify the parties to change the clause in the following 60 days. If the clause is not changed during this period, the Agency asks the public prosecutor to bring a legal action before the courts in order to declare that clause null and void and to order its suppression.

This new procedure gives more power to the equality body (which until now was only able to send the process to the public prosecutor who could eventually bring the action before the court) and speeds up the whole process, with the advantage of avoiding judicial litigation, at least in the first stage.

Apart from the reform of the Labour Code, the National Parliament also issued a resolution to promote more measures for the reconciliation of family and working life (Resolution No. 116/2012, of 10 August 2012), such as the encouragement of social responsibility of companies and good practices at company level in the area of reconciling family and professional life, the increase of flexibility of childcare facilities and the promotion of professional reintegration of fathers after taking paternity leave.

Even with no binding effect, this resolution shows that the topic of reconciliation is still a topic to be reckoned with, although for the moment the focus of all concern is on the economic crisis in Portugal and on the ever-growing rate of unemployment which is already over 16 %.

ROMANIA – Roxana Teşiu

Effects of the economic crisis on gender equality issues

According to data revealed by one of the very few studies conducted in Romania on the impact of the economic crisis, ‘in the period of 2009-2010, the international economic crisis has been associated with a major fall in Gross Domestic Product (GDP) in Romania by 8.7 % (compared to [the] previous year), a much higher value than the 27 EU Member States’ average.⁴⁰⁴ The number of employees has continuously contracted with 14.4 %, namely 700 000, a decrease much higher than the EU average.⁴⁰⁵ The private sector has reacted more rapidly than the public sector, the loss of jobs being substantial in manufacturing industries, construction, retail, trade and transportation.’ Apart from retail, these industries have a predominantly male workforce, hence the impact of the economic downturn has been affecting men more than women.

For the years 2011 and 2012 (to date), law practitioners indicate that the number of job restructuring cases has increased dramatically. According to statements by practitioners, the number of cases of job restructuring received for 2012 (to date) is double compared with the same period in 2011. In addition to industries such as construction, retail, trade and transportation, the banking sector this year registered an exponential increase in job restructuring cases, with entire branches of all major banks being closed throughout the country,. As at this level of the banks’ structures the workforce is predominantly female, it is the female workforce which has been drastically hit.

While there is no statistical data available at the macroeconomic level to prove a direct link between the economic crisis and gender equality in terms of the genders sustaining a differentiated impact, the impact of the economic crisis reveals some specific features for Romania. A significant number of children is left with older relatives, due to both parents

⁴⁰⁴ M. Stanculescu & M. Marin, ‘*Impacts of the international economic crisis in Romania 2009-2010*’, UNICEF panel study based on qualitative methods, p. 96.

http://www.unicef.org/romania/Impacts_of_the_international_crisis.pdf accessed 12 September 2012.

⁴⁰⁵ M. Stanculescu & M. Marin, ‘*Impacts of the international economic crisis in Romania 2009-2010*’, UNICEF panel study based on qualitative methods, p. 30.

http://www.unicef.org/romania/Impacts_of_the_international_crisis.pdf accessed 12 September 2012.

going to work abroad.⁴⁰⁶ The number of children who committed suicide in Romania in 2011 due to having been thus ‘abandoned’ by their parents, has increased alarmingly and the mass media very often exposes such cases. The same study indicates that ‘Migration for work abroad is a way to achieve economic security but at the cost of temporarily or permanently abandoning [one’s] own children. As [a] result, a [significant] proportion of children are deprived of growing up in a functional family. The economic crisis has added negative financial effects to the existent damaging effects upon the family environment.’⁴⁰⁷ ‘School attendance and school performance have been negatively affected by the crisis. [The n]umber of school absences [has] increased and school performance [has] worsened, especially for some children with parents working abroad, children from poor households and Roma children. Precisely these three categories are the ones considered with the highest risk of school dropout, according to the school representatives and social workers.’

The study highlights that ‘the economic downturn has had negative spillover effects both in terms of employment and earnings. In the private sector, redundancies and wage cuts or cap have taken place since 2009. The “reform of the public sector” has been translated into reduction (not necessarily into efficiency) of the public expenditure and led to wage cuts and block[ing] of posts. The new reform of the social assistance system has resulted in discontinued or diminished social benefits. Changes of the taxation policies [resulted in] new or increased taxes both for the population and firms. Consequently, all types of incomes [were] eroded considerably and businesses as well as [the] population have become vulnerable.’⁴⁰⁸

According to Romanian National Institute for Statistics’ data for the first two quarters of 2012, although the female unemployment rate is lower compared with the rate for men throughout all age categories, the number of women in the whole population who are active in employment remains very low compared with the number of men. This indicates the reluctance of women to find a job as well as a significant drop-off in the number of jobs.

As a response to the economic crisis, the childcare leave allowance has been decreased by 15 % starting on 1 January 2011. Combined with a lack of job security, difficulties in finding new jobs, post restructuring and wage cuts, such a measure significantly impacted on the family environment and increased the poverty risk for those categories of the population that were vulnerable even before the crisis.

Policy developments

Interestingly enough, the 2012 Governing Programme⁴⁰⁹ adopted by the current Romanian Government seems to have been elaborated with no reference to the economic crisis. The pillars of the Programme are those characteristic of a period of stability for the country, and thus disconnected from what the country is experiencing today. No traces of, nor responses or solutions to the significant impact on social and economic realities triggered by the economic downturn can be found. An exemplification of this is Chapter 14 which is allocated to the field of Labour, Family and Social Protection. Measures envisioned target:

- the development of social dialogue and social peace;
- increasing the take-up of structural funds;
- increasing transparency for tax payers about contributions;
- improving the health and labour security legislation;

⁴⁰⁶ M. Stanculescu & M. Marin, ‘*Impacts of the international economic crisis in Romania 2009-2010*’, UNICEF panel study based on qualitative methods, p. 12.

http://www.unicef.org/romania/Impacts_of_the_international_crisis.pdf accessed 12 September 2012.

⁴⁰⁷ M. Stanculescu & M. Marin, ‘*Impacts of the international economic crisis in Romania 2009-2010*’, UNICEF panel study based on qualitative methods, p. 98.

http://www.unicef.org/romania/Impacts_of_the_international_crisis.pdf accessed 12 September 2012.

⁴⁰⁸ M. Stanculescu & M. Marin, ‘*Impacts of the international economic crisis in Romania 2009-2010*’, UNICEF panel study based on qualitative methods, p. 98.

http://www.unicef.org/romania/Impacts_of_the_international_crisis.pdf accessed 12 September 2012.

⁴⁰⁹ <http://www.gov.ro/upload/articles/117011/programul-de-guvernare-2012.pdf> accessed 14 September 2012.

- the pensions system: creating the legal framework for introducing an occupational pensions system;
- social assistance: creating social services for child care and care of the elderly.

Legislative developments

Legal framework on access to and supply of goods and services

Article 5(2) of Directive 2004/113/EC has been transposed into Romanian legislation through the provisions of Article 7(2) of Emergency Ordinance No. 61 of 2008 on the implementation of the equality of treatment between women and men with regard to access to and supply of goods and services.

By way of exception from the provisions of Article 7(1) of Emergency Ordinance No. 61, Article 7(2) provides that the utilisation of the sex element for calculating premiums and benefits in insurance services is permitted in those situations in which (a) the sex element is a determining factor for risk evaluation, and (b) the calculation method for premiums and benefits is based on actuarial data that is relevant and realistic, being published and updated on a regular basis. A legal proposal is currently open for public debate by the Minister of Labour with regard to modifying Emergency Ordinance No. 61 of 2008, by removing Article 7(2). The draft proposal stipulates that, with effect from 21 December 2012, all new insurance contracts will consider that insurance premiums and benefits are unisex based, without any further differentiation based on sex as is currently possible under Article 7(2).⁴¹⁰

The National Commission on Insurance Monitoring must implement a series of measures aimed at informing insurance companies about the future legal changes, as well as evaluating the impact on these companies of adopting the changes. Insurance companies will need to change the contracts' templates and the currently applicable insurance premium system, as well as the IT system for managing the changes.

Law draft on modifying and completion of the 2002 Equal Opportunities Act

The 2002 Equal Opportunities Act has been through a number of changes since the date of adoption and it was republished in 2005 and 2007. The most drastic change was brought into effect in June 2010 when the National Agency on Equal Opportunities (NAEO), the body appointed for implementing the provisions of the 2002 Equal Opportunities Act, was abolished due to reorganisation measures taken by the Romanian Government in the context of the economic crisis and as a consequence of reductions in the state budget.

The main changes included in the new draft are:

- alignment of the newly set up Directorate for Equal Opportunities (replacing the former NAEO) as a part of the Ministry of Labour structure and clarifying its attributions and responsibilities;
- adequate and full transposition of the provisions of Directive 2010/41/EU⁴¹¹ into Romanian legislation, by extending the law's scope of application to dependent spouses;
- significantly increasing the upper range of fines in the case of violating the law's provisions, by raising the ceiling from current EUR 3 300 (RON 15 000) to EUR 22 222 (RON 100 000).

Case law of national courts

There is no public information available on developments related to the case law on gender equality. Romanian courts do not publish their decisions, hence it is very difficult to assess to what extent the gender equality law is being enforced.

⁴¹⁰ <http://www.mmuncii.ro/ro/articole/2012-06-06/proiectul-legii-pentru-modificarea-art7-din-ordonanta-de-urgenta-a-guvernului-nr-61-2008-modificata-si-aprobata-prin-legea-nr-62-2009-2646-articol.html> accessed 16 September 2012.

⁴¹¹ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self employed capacity and repealing Council Directive 86/613/EEC, published in OJEU 180, 15 July 2010, p. 1-6.

Equality body decisions

No decision by the National Council for Combating Discrimination relating to gender-based cases has been published during the past six months.

SLOVAKIA – Zuzana Magurová

Legal effects of the economic crisis on gender equality issues

As a consequence of the crisis the new Government has taken several savings measures. Due to the amendment of the Social Insurance Act, the most extensive changes for the last ten years will be made in the pension scheme starting from next year. The whole process of the changes will be implemented gradually over five years.

Policy developments

Abolition of the function of Deputy Prime Minister for Human Rights, Minorities and Gender Equality

In June the new Government that was formed after the early parliamentary elections⁴¹² adopted an amendment to the Competence Act⁴¹³ that abolished the function of Deputy Prime Minister for Human Rights, Minorities and Gender Equality. The powers in the area of human rights, national minorities, Roma communities and gender equality, which had been coordinated by the Deputy Prime Minister for Human Rights and Minorities, were assumed by several ministries. Many non-government organisations protested against this change, arguing it was inefficient. The new Government thereby significantly deviated from the comprehensive approach applied by the former Government. The Human Rights Section, which had existed at the Government Office under the responsibility of the former Deputy Prime Minister, employed some of the few experts specialising in human rights and non-discrimination in Slovakia. After the allocation of the functions of the former Deputy Prime Minister for Human Rights and Minorities to other ministries, the institutional coverage of the coordination and formulation of human rights policy ceased to exist.

Creation of the Committee for LGBT community

On the other hand, during August the Deputy Prime Minister and the Chief of Diplomacy, who chairs the Government Council for Human Rights, National Minorities and Gender Equality,⁴¹⁴ submitted a proposal for the establishment of the Committee on Lesbian, Gay, Bisexual, Trans and Intersex Human Rights. The chairman of the committee will be the Minister of Justice and that ministry will fulfil the functions of the secretariat. The former Government rejected the proposal of non-government organisations for the establishment of this committee in May last year, when the motion failed to be passed by a single vote. The Christian Democratic Movement (KDH) ministers and some Slovak Democratic and Christian Union (SDKÚ) ministers voted against it.

⁴¹² The election followed the fall of Prime Minister Iveta Radičová's coalition Government.

⁴¹³ Act No. 575/2001 Coll. on the organisation of Government activities and on the organisation of central state administration (as amended).

⁴¹⁴ The Council is a permanent expert, advisory, coordinating and consultative body of the Government in the area of the protection of fundamental human rights and freedoms, political and civil rights, rights of national minorities and ethnic groups, economic, social and cultural rights, rights for protection of the environment and cultural heritage, as well as in the area of children's rights and furthering of children's best interests and the enforcement of the principle of equal treatment and principle of equality, including gender equality.

Legislative developments

Up to the end of January 2012, women who were not compulsorily insured, and wanted to participate in voluntary sickness insurance (so as to be provided with maternity allowance) or who wanted to participate in parallel in compulsory and voluntary sickness insurance (so as to be provided with higher maternity allowance) had to contribute to an individual sickness insurance scheme 4.4 % of the daily assessment basis. From 1 February 2012, according to the new wording of the Social Insurance Act (*Zákon o sociálnom poistení*),⁴¹⁵ the conditions for participation in voluntary sickness insurance and for parallel participation in compulsory and voluntary sickness insurance have been tightened up. The percentage of such voluntary contributions increases from the current 4.4 % to 35.15 %, because women have to pay for the whole package – voluntary sickness insurance (4.4 %), pension insurance (24 %) and unemployment insurance (6.75 %). NGOs are warning that many women would not be able to participate in voluntary insurance because of these high insurance contributions and consequently will not receive maternity allowance or will receive a lower maternity allowance.

One of the biggest changes will be the decrease in the amount paid into the second private pension pillar, which will drop from its current 9 % to 4 % of gross wages. Apart from the new method of valorisation of pensions, the retirement age in the first pillar will be increased. Savers in the second pillar will be significantly affected by the reforms as well. From 2017 the retirement age will start to rise above the existing limit of 62 years, so that e.g. men at present in their thirties will retire at the age of 66. The retirement age will increase gradually and it is not clear where the increase will stop.

The increase in the retirement age will also concern women with children, for whom it was significantly increased by the large-scale reform in 2004 (by six to nine years). For example, a mother of four children who was born in 1957 could retire at the age of 54 before 2004. At present she is entitled to a state pension after attaining the age of 60, and according to the new Act her entitlement to a state pension will arise when she reaches the age of 60 years and approximately five months.

The sociologist of the Slovak Academy of Sciences, Monika Čambáliková, regards the increase of the retirement age for women as discriminatory. Women bringing up children, keeping house and caring for their aged relatives carry out a lot of work for society, which is very beneficial, but not paid. In her opinion the Government should therefore develop efforts to transfer a part of this work to men or compensate women for this extra work by a lower retirement age.

Equality body decisions/opinions

Report on observance of human rights including observance of principle of equal treatment

During the summer, the Slovak National Centre for Human Rights (Centre) published on its website a report on the observance of human rights including the observance of the principle of equal treatment in the Slovak Republic for the year 2011 (report). A part of this report is devoted to discrimination on the grounds of sex in remuneration, discrimination in job advertisements, protection of pregnant women against discrimination, and temporary compensatory measures. However, the report only contains a summary of legislation in force and very formal recommendations. Weaknesses in the financing of the Centre's activities are proved by the fact that the report has not been made available in English for two years, so the website only contains the Slovak version.⁴¹⁶

Global report on gender equality

The Global report on gender equality in Slovakia for the year 2011, prepared by the Slovak Ministry of Labour, Social Affairs and the Family and approved by the Government, provided

⁴¹⁵ Act No. 461/2003 Coll. Social Insurance Act, as amended.

⁴¹⁶ <http://www.snslp.sk>, accessed 10 September 2012.

an unflattering picture of the observance of human rights in Slovakia. The Ministry's Department of Gender Equality and Equality of Opportunities criticised the situation and stated that, in spite of indisputable progress made in the area of equality of women and men in Slovakia, inequalities persisted in nearly all areas of private and public life. They are caused by several interacting factors such as the traditional division of gender roles, poor knowledge of rights, and a lack of services for the harmonisation of working and family life.

The economic crisis significantly hardened discriminatory practices in the labour market. Some employers use the crisis as an alibi to abuse the labour force, especially women who are more willing to work in uncertain and precarious conditions, for lower wages and without social security. The pressure on safeguarding the income in a household causes especially women to decide to accept a job below their qualification level.⁴¹⁷

Miscellaneous

The ECtHR heard another case of forced sterilisation of a young Roma woman (*NB v Slovakia*, complaint No. 29518/10). The case of NB has several common features with the case of VC in 2011, the only difference being that NB was sterilised against her will before she reached adulthood. NB became a victim of illegal surgery in 2001 when she gave birth to her second child by Caesarean section, exactly ten days before she reached adulthood. The hospital personnel requested her consent to sterilisation after they had administered strong sedatives to the patient to alleviate her birth pains before the planned Caesarean (*Ibid.* paragraph 8). The patient was misinformed that she would die if she did not sign the consent to surgery. The patient was unable to judge what she was signing and they had to hold her hand while she was doing so. A few minutes later her second child was born and NB was sterilised. After the birth she was placed in a room reserved for Roma women. More than two weeks after the surgery the sterilisation commission, *ex post facto*, approved the decision on the surgery on the underage patient, stating that it was done at her request and in the interest of protecting her life in accordance with the sterilisation directive of 1972 (*Ibid.* paragraph 15).

The surgery, about which she had learned more than one year later, has marked her mentally and physically. Because of her sterility she was exposed to ostracism on the part of her husband and the Roma community (*Ibid.* paragraph 18). NB, like VC, unsuccessfully claimed adequate compensation for unlawful surgery, to which neither she nor her legal representative, i.e. mother, had given free consent. She also demanded proper investigation of the surgery by criminal prosecution bodies, but without success.

The ECtHR in its decision stated that, like in the case of VC, the surgery had not been life-saving. The sterilisation was done without the proper informed consent of the complainant and/or her legal representative. The process of obtaining consent to the surgery during labour pains and whilst the cognitive abilities of the patient were impaired, violated her physical integrity and was a gross violation of human dignity (*Ibid.* paragraph 77) contrary to Article 3 of the Convention (prohibition of torture and other inhuman and degrading treatment). The court also ruled that her right to private and family life had been infringed. According to the court the state failed to provide effective legal protection guaranteeing reproduction rights, especially to women of Roma origin. In the complainant's opinion the reason for the surgery was her ethnic origin. Unlike the case of VC, the court also dealt with this part of the complaint and examined more thoroughly the ethnic aspect of the case. On the basis of submitted documents it was, however, unable to 'rule that the doctors had acted in bad faith' and that the sterilisation had been 'a part of organised policy, or that the act of the hospital personnel had been racially motivated'. The court referred to legislative deficiencies which had caused inappropriate intervention in the reproduction rights of Roma women (*Ibid.* paragraph 121). The court granted the complainant compensation in the amount

⁴¹⁷ Global report on gender equality in Slovakia 2011, approved by the Resolution of the Government of SR No. 315/2012 on 27. 06. 2012, pp. 1-2 <http://www.gender.gov.sk>, accessed 10 September 2012.

of EUR 25 000 for non-material damage. All the former Governments have denied the existence of the problem of forced sterilisations of Roma women for a long time.

SLOVENIA – Tanja Koderman Sever

Legal effects of the economic crisis on gender equality issues

Slovenia adopted its first austerity measures in May 2012. The Public Finance Balance Act⁴¹⁸ reduces the salaries and benefits of public sector workers as well as pensions and introduces cuts to public services. Austerity measures will affect women more acutely than men since women form a large proportion of the public sector workforce and are more likely than men to use public services. Lowering the parental benefit, taken up mostly by mothers, will make life harder for many mothers on parental leave, many of whom will already be struggling in the current economic climate. With these measures women's economic security may be reduced, access to health, education and social care will be affected and we risk rolling back women's independence since more women will be forced to rely on their families and financial support from the state. Before the adoption of the austerity measures no gender impact assessments were made. In addition, there are no reports or statistical data available on the effects on gender equality issues of the economic crisis and cuts made by the Government.

Policy developments

Governmental activities

The Government adopted the Report on the Implementation of the Resolution on the National Programme for Equal Opportunities for Women and Men for the period 2010-2011. The report shows that in addition to several special programmes to promote equal opportunities for women and men in the areas of employment, education, science, health and the elimination of violence against women, a great emphasis was put on training on gender equality policy and awareness-raising for professionals and the general public. According to the report, the strategy to achieve gender equality at national level has been implemented and progress has been made in overcoming the inequalities between women and men. Nevertheless, significant challenges still exist. One of the key remaining challenges is to continue with measures to achieve gender equality in times of financial, economic and social crisis. One of the key areas where the need for further commitment and action is needed is to ensure balanced representation and participation of women and men in decision-making in the highest positions in politics and the economy. In addition, the Government adopted the Periodic Plan on the Implementation of the Resolution on the National Programme for Equal Opportunities for Women and Men for the period 2012-2014. The periodic plan stipulates in more detail priority tasks and activities to achieve the objectives in specific areas of the national programme.

Activities of the Parliamentary Commission for Petitions, Human Rights and Equal Opportunities

Members of the Parliamentary Commission for Petitions, Human Rights and Equal Opportunities expressed a concern about the austerity measures adopted by the Slovene Government with the Public Finance Balance Act. In their opinion the austerity measures taken will aggravate the situation of women because women form a large proportion of the public sector workforce and are more likely than men to use public services, from social care to education, daycare facilities and healthcare services, where cuts have been made.

⁴¹⁸ Public Finance Balance Act, Official Gazette of the Republic of Slovenia, No. 40/2012; <http://www.uradni-list.si/1/objava.jsp?urlid=201240&stevilka=1700>, accessed 10 September 2012.

Ombudsman activities

The Human Rights Ombudsman submitted her Annual Report for 2011 to the National Assembly. According to the Ombudsman there was an increase of complaints in 2011 due to harassment and bullying in the workplace. Several initiatives were introduced for employees in the Slovenian Army and the Ministry of Defence. The Ombudsman raised her concern that victims of bullying and harassment rarely file a complaint with the supervisory board or a lawsuit with the court due to the fear of losing their jobs.

Activities of the Service for Equal Opportunities and European Coordination

The Service for Equal Opportunities and European Coordination organised a seminar on family policy from the point of view of equal opportunities for women and men in the scope of the PROGRESS project. At the conference, preliminary results of the survey 'Gender equality in family life and partnerships' were presented. The purpose of the survey was to investigate the status of women and men in different areas of private life in Slovenia (for example in finance management, taking care of children, employment, career development, decision-making etc.). Presentation of the research and analysis was followed by a discussion on how to create a family policy with a view to reducing gender inequalities, particularly in the areas of social security, employment, parenthood and reconciliation of work and family life.

Legislative developments

Within the scope of money-saving measures adopted by the Slovene Government, the Public Finance Balance Act was adopted by the National Assembly in May 2012. The Public Finance Balance Act affects over 40 other acts or other legislation which testifies to the fact that the austerity measures will affect numerous areas, including salaries and other income of public sector workers, pensions, unemployment benefits, kindergarten fees etc. According to the newly adopted act, salaries of public sector workers will be reduced by 8 % and parental benefit will no longer be equal to 100 % of the average salary over the 12 months prior to the date on which the benefit was claimed, but will be reduced to 90 %. In addition, parental benefit may not be higher than twice the average monthly salary in the Republic of Slovenia. Furthermore, kindergarten for the second or third child will no longer be free of charge, but will be charged at 30 % of the fee for the first child. Unemployment benefits will be reduced as well. The unemployed will receive 80 % of the amount based on the current calculation of unemployment benefits for the first three months, 60 % for the following nine months, and 50 % from then on.

Case law of national courts

There is a case⁴¹⁹ from April 2012 which concerns harassment and bullying of a female complainant by her co-worker. Following the extensive assessment of evidence, the High Labour and Social Court decided that, by allowing the improper conduct of its employee, the employer failed to provide the complainant with a working environment in which none of the workers is subjected to bullying and harassment and the employer was therefore liable for the damage caused by bullying and harassment by its employee. The complainant was awarded compensation in the amount of EUR 11 000 for the infringement of personal rights and mental distress suffered due to defamation.

Equality body decisions/opinions

There have been no significant cases decided by the Advocate of the Principle of Equality or opinions issued by the Advocate in the area of gender equality.

⁴¹⁹ Judgment of the High Labour and Social Court, No. Pdp 1078/2011 from 19 April 2012.

SPAIN – Berta Valdés de la Vega

Legal effects of the economic crisis on gender equality issues

In February 2012 the Government drew up the Royal Decree-Law 3/2012 of Urgent Measures for the modification of the Labour Market, which was subsequently sent to Parliament for ratification. Since then social unrest has been unremitting, but the parliamentary majority of the governing political party allowed the Government to get approbation in July 2012 for the Law 3/2012 of Urgent Measures for the modification of the Labour Market in a largely unchanged format. In the development of this law, the effects that its provisions may have on gender equality have not been taken into account. This law, in addition to modifying certain aspects of the right to reconcile work and family life, is a step backwards on the road to real equality between women and men. The amendments affect, for example, the regulation of breastfeeding rights laid down in Article 37(4) of the Workers' Statute (WS). As a result of the amendments breastfeeding leave is now recognised as an individual right of all workers, men and women, but may only be taken by one of the parents if both are working. This regulation limits joint responsibility, as it does not allow the leave to be shared between both parents. The aim of the modifications has been, in general, to strengthen the position of enterprises in a labour relationship. The effect in relation to the rights to reconcile personal, family and working life is significant. Beforehand, the employee was entitled to decide on the moment and period during which these rights were to be exercised, but the new Article 37(6) WS together with the changes in collective agreements will give priority to the productive and organisational needs of the enterprise. The only clear limit to an enterprise's economic needs will now be found in Article 82(3) WS concerning the inapplicability of collective agreements. The inapplicability of collective agreements cannot be performed when that would involve a breach of the obligations relating to the elimination of discrimination based on gender or equality plans applicable to the company.

Policy developments

Removal of institutions, plans and financial grants related to equality between women and men, as a result of the economic crisis

The impact of the economic crisis coupled with the current Government policy in relation to gender equality has resulted in a number of measures that hamper progress on equality. Law 2/2012 of the State Budget for 2012 (BOE 30 June 2012) reduced by 36.5 % the programme of children's education including primary education and thereby eliminated the Educa3 Programme. This programme was aimed at creating childhood centres for those aged from 0 to 3 years and helped to promote the conciliation of work and family life. In the Autonomous Communities the need to reduce public spending has resulted in the reduction or elimination of economic subsidies designed to help families with children or to increase shared responsibility. *Foral* Decree 14/2012 (Official Gazette of Navarre, 23 March 2012) lowers several standards, including *Foral* Decree 242/2000 on regulated financial aid as a complementary measure to reconcile the work and family life of working people. The Basque Autonomous Community has put an end to the work of the Ombudsman for Equality of Women and Men, an office created in 2005. Its contents and functions will be assumed by the Basque Women's Institute which is in charge of the defence of citizens in situations of gender discrimination and with promoting compliance with the principle of equal treatment of women and men in the Basque Autonomous Community. This came into force through Act 3/2012, of 16 February, amending the Act on Equality between Men and Women and the Law on Establishment of Emakunde-Basque Women's Institute (BOE 16 March 2012).

Legislative developments

Law 1/2012, of 12 June, which establishes and regulates a network of support for pregnant women. (BOE 29 June 2012)

The Parliament of the Autonomous Community of La Rioja has approved Law 1/2012 for establishing and regulating a network of support for pregnant women. The objectives of this law are a part of the policies aimed at discouraging abortion regulation as set out in the Law on sexual and reproductive health and voluntary interruption of pregnancy, passed in 2010 (Law 2/2010). The Law of 2010 recognises the right of women to freely decide about maternity and guarantees that women will have the possibility of making such a decision during the first 14 weeks of pregnancy. Law 1/2012 from La Rioja establishes a public policy of information and support to pregnant women who are in situations of vulnerability and/or risk of social exclusion so they can opt for motherhood. For this, support is given to centres of assistance and advice for pregnant women, providing information on the existing social protection resources appropriate to the pregnant women's needs. Health centres will be required to report on the existence of this network of support for pregnant women. Within six months, the Rioja Government should develop a comprehensive plan for the support of pregnant women in situations of vulnerability and/or risk of social exclusion that includes actions and targets to drive an effective support network.

Decree 157/2012, of 5 July 2012, for the establishment of the Galician Observatory on Gender Violence

Decree 157/2012 implements Law 11/2007 of 27 July 2007, of the Autonomous Community of Galicia on the comprehensive treatment of gender violence, with the creation of the Galician Observatory of Gender Violence (for the study, assessment and monitoring of policies against gender violence) and the Interdepartmental Commission for Equality. In addition, regulation is made for the nature, purpose and composition of the Galician Council of Women, an advisory body on equality policies. Among its responsibilities are reporting on the status and prospects of equality between women and men in Galicia and the measures necessary for advancement in these issues, and proposing measures of information and education for the Government of Galicia to educate about and advocate values of equality between women and men. Decree 157/2012 also created the Advisory Commission on Non-Sexist Advertising to provide alternative approaches to eliminating sexism in advertising and the Advisory Commission may, upon application, receive complaints regarding sexist advertising.

Miscellaneous

The Generalization of Gender Equality and Promotion of Reconciliation of Work and Family Life Programme

This programme is covered by the agreement (MOU) signed between Spain, Norway, Iceland and Liechtenstein. Through this agreement, the Secretary of State of Social Services and Equality will receive EUR 10 191 250 from the Financial Mechanism of the European Economic Area (EEA), in the coming years (2013-2015). The purpose of these funds is to promote gender equality in the labour market, female entrepreneurship, gender balance on boards of companies, the reconciliation of work and family life, and the inclusion of Roma and immigrant women and to act against gender violence.

The 'Strengthening the Employment Policies and Economic Recovery with a Gender Perspective' Project

This project was promoted by the Spanish Government in the framework of the European Commission's Progress Programme. The project had as its main objectives the improvement of gender mainstreaming in the design of employment and economic recovery policies, the promotion of the design of specific employment policies for the inclusion of women and the provision of tools for public institutions to predict and measure the impacts of these measures

on women. In June 2012 the project was finished and in its results a ‘Guide to measure the impact of employment policies on women’ (to be found at <http://paralaigualdadenelemplo.mspsi.gob.es/documents/listing/project>) has been elaborated. This Guide aims at assessing the impact, in a context of crisis, of employment policies on women and the definition of indicators in relation to equal opportunities between men and women. The Guide is accompanied by the virtual tool allocated in <http://paralaigualdadenelemplo.mspsi.gob.es>, which has been designed and made available to the public to allow simulations about the impacts of economic and employment policies on women. Finally, the project ends with the Report on ‘Recommendations for the Strengthening of Gender Mainstreaming in Active Employment and Economic Recovery Policies and Measures’. This report aims at disseminating different proposals for the improvement of employment and economic recovery policies and measures, taking into account their impacts on women and especially on those who may be subject to multiple discrimination.

SWEDEN – Ann Numhauser-Henning

Legal effects of the economic crisis on gender equality issues

There is not that much to say on the effects on gender equality issues of the current economic crisis and even less on the *legal* effects on those issues of that crisis from a Swedish perspective. The last global economic crisis hit Sweden in the second part of 2008 but to a lesser extent than it hit many other countries. By 2010 the economy was more or less fully recovered and Sweden is also affected to a lesser extent by the current Eurozone crisis than other Member States.

Generally speaking, the crisis in 2008-2009 meant a loss of about 100 000 jobs on the Swedish labour market. This hit men more than women since the jobs were mostly lost in the manufacturing industries where men dominate. The Swedish labour market is highly segregated and women are over-represented in the service and public sectors, which were less hit by the crisis. However, when the economy grew again, men more rapidly got back into employment than women. In total, during the crisis years of 2008-2009, 100 000 jobs were thus lost but there was no decrease in the number of employed people. Immigration caused an inflow of potential workers which made the percentage of employed people between the ages of 15 and 74 decrease somewhat (from 71.1 % in 2007 to 70.6 % in 2009) but the number of employed persons did not decrease.⁴²⁰ The difference in activity between men and women on the Swedish labour market is about 4-5 % – in 2012 the general activity rate was 66.0 %, 68.3 % among men and 63.5 % among women. The difference had been more or less stable for quite a long time, but has slightly increased in the last few years due to the high numbers of non-EU female immigrants. Unemployment is now 8.3 % in general, 8.4 % among men and 8.2 % among women.⁴²¹

There were basically no legal reforms due to the crisis, although in 2007 and 2008 (prior to the crisis) major reforms were made in the social security schemes of unemployment benefits and sickness benefits in cash. The first one led to significantly higher costs for the individual as regards income-related unemployment benefits. The second one resulted in the introduction of a time limit to the sickness benefit scheme and harsher assessment of the individual’s ability to work. There is no obvious gender bias concerning these reforms. In 2007 there was also a reform of the (1982:80) Employment Protection Act, widening the scope for fixed-term employment. This led to significantly more fixed-term employments and

⁴²⁰ Berndt Öhman, *Två kriser – en analys av den aktuella arbetsmarknaden*, in: *Arbetskraftsundersökningarna (AKU) 50 år, Fyra forskarperspektiv på arbetsmarknaden*, Arbetsmarknads- och utbildningsstatistik 2011:3, SCB 2011.

⁴²¹ AKU second quarter 2012, SCB.

these are known to affect women somewhat more than men. In the second quarter of 2012 women amounted to 56 % of the fixed-term employed in Sweden.⁴²²

TURKEY – Nurhan Süral

Legal effects of the economic crisis on gender equality issues

The recession of 2008-2009 led to a massive collapse in exports and subsequently in Gross Domestic Product (GDP) in Turkey. The collapse of business confidence in Turkey was much larger and more abrupt than in several advanced and emerging OECD economies. This, together with the fall in foreign demand, has possibly contributed to the significant decline in investment (nearly 30 % from peak to trough, which was one of the largest declines in the OECD).⁴²³ Turkey was among the worst hit countries both in terms of contraction of GDP and rise in unemployment. According to *Global Employment Trends 2012*/ILO, the experiences of the Republic of Moldova, the Russian Federation and Turkey exemplify the major shock to growth that occurred in the Central and South-Eastern Europe (non-EU) and CIS (Commonwealth of Independent States) region. Growth in Turkey plummeted to levels below 10 %; however, growth rebounded sharply and turned positive by the last quarter of 2009. Growth in Turkey has since decelerated, but remained around 6 % in the third quarter of 2011. Turkey experienced the sharpest drop in employment in the second quarter of 2009. In Turkey, employment growth turned positive in the third quarter of 2009 and accelerated strongly thereafter.⁴²⁴ While employment participation rates have declined in many countries, participation rates among young people in Turkey rose between 2007 and 2011, leading to more young workers in the labour market.⁴²⁵

In 2011 and 2012, the economic crisis was more manageable for Turkey than the EU. Turkey's strong rebound since 2010 constitutes a success story in terms of both growth and employment creation.

The relative strength and resilience of the Turkish economy will certainly not exclude the big picture: the extent and magnitude of the crisis in Europe will more or less be effective on the dynamism of Turkey's domestic market and future economic developments in Turkey.

As regards gender issues, major developments took place in the 2011-2012 period, inter alia:

1. passing of the:
 - Sack Law (a law making amendments in a large number of laws is called a sack law in Turkey) making improvements in leaves for women workers;⁴²⁶
 - Law on the Approval of the Ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence;⁴²⁷
 - Law on the Protection of the Family and the Prevention of Violence against Women;⁴²⁸
2. issuance of a Prime Ministerial circular on the deterrence of mobbing (psychological harassment) in workplaces;⁴²⁹
3. issuance of a circular on public personnel,⁴³⁰ a follow-up to the Sack Law;

⁴²² Ibid.

⁴²³ OECD, *Economic Survey Turkey 2010*, pp. 20, 22.

⁴²⁴ ILO, *Global Employment Trends 2012*, Geneva, 2012, p. 53.

⁴²⁵ Ibid., p. 35.

⁴²⁶ Official Gazette 25 February 2011, no. 27894.

⁴²⁷ Law no. 6251, Official Gazette 29 November 2011, no. 28127 and Council of Ministers Decision no. 2012/2816, Official Gazette 8 March 2012, no. 28227 bis.

⁴²⁸ Official Gazette 20 March 2012, no. 28239.

⁴²⁹ Official Gazette 19 March 2011, no. 27879.

⁴³⁰ Official Gazette 15 April 2011, no. 27906.

4. issuance of Communiqué no. 57 by the Capital Markets Board (SPK) according to which having at least one female member on the five-member executive committees has become a general principle for companies listed on the Istanbul Stock Exchange;⁴³¹
5. new Obligations Code which became effective on 1 July 2012;
6. State to provide financial aid for widows in poverty starting from April 2012.

Policy developments

Privacy policy under the GEBLIZ system

The Ministry of Health launched GEBLIZ, a healthcare system to monitor pregnant women, in 2008. Under the GEBLIZ system, healthcare providers record the identities and contact details of pregnant women in order to monitor their pregnancy, postpartum period and their newborns. The project was introduced to help pregnant women and paramedics were to visit such women in their homes to make periodic checks. This caused problems for some pregnant women, especially unmarried pregnant women, who wanted to keep the fact of their pregnancy private. The Ministry of Health adopted a privacy policy as part of GEBLIZ, allowing pregnant women to select a level of privacy for their pregnancy, including choosing not to have home visits by paramedics.

Interior Ministry's report: authorities unaware of measures against domestic violence

The Interior Ministry's Inspection Board carried out a study called 'Protection of People under Threat' which revealed that police officers and local authorities are unaware of the measures to be taken to combat domestic violence. The study, based on incidents of domestic violence in 14 different towns concluded that raising awareness to the highest level was essential for the protection of victims and that the lack of communication between local authorities and the judiciary, which causes delays, had to be ended.⁴³²

National Action Programme on Fighting Violence Against Women 2012-2015

The National Action Programme on Fighting Violence Against Women 2012-2015 became effective on 10 July 2012 following the termination of the former Programme covering the period 2007-2010. The new Programme was prepared with the participation of the relevant public bodies, NGOs and universities' gender studies centres.

Legislative developments

New Law on C-section births

The acceptable percentage of C-section births (Caesarean births) according to the World Health Organization (WHO) is between 15 and 18 %. In Turkey, the rate of C-sections in 2009 was 39.3 % of all births in public hospitals, 61.8 % in private hospitals and 63.2 % in university hospitals. In 2010 these rates had increased to 40.2 %, 63.7 % and 65.2 %, respectively. By 2011 the rates stood at 36.8 % of all deliveries in public hospitals, 66.6 % in private hospitals and 65.9 % in university hospitals, still indicating some increase in C-sections. The Ministry of Health launched a media campaign earlier this year to help curb increasing rates of births by C-section, and set a target to reduce the rate to 35 % by 2013.⁴³³ A new law⁴³⁴ was passed in order to reduce the number of births by C-section. The new law allows C-sections only in the case of a 'medical emergency for the pregnant woman or the embryo'. In addition, the Social Security Institution (SGK) reduced state financial support for C-sections from EUR 288 (TRY 675) to EUR 203 (TRY 475) and increased support for natural births from EUR 85 (TRY 200) to EUR 170 (TRY 400).

⁴³¹ Official Gazette 11 February 2012, no. 28201.

⁴³² *Zaman*, daily newspaper, 29 July 2012.

⁴³³ *Zaman*, daily newspaper, 13 July 2012.

⁴³⁴ *Sağlık Bakanlığı ve Bağlı Kuruluşlarının Teşkilat ve Görevleri Hakkında Kanun Hükmünde Kararname ile Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun*, Law no. 6354, Official Gazette 12 July 2012, no. 28351.

UNITED KINGDOM – Aileen McColgan

Prospective legislative developments

In June 2012 the Government announced that it would go ahead with proposals to impose equal pay audits on employers who lose equal pay claims.⁴³⁵

In May 2012 it was announced that the default period of maternity leave would be reduced from 26 to 18 weeks to enable the remaining period of leave to be shared between parents as they choose.

Some of the legislative improvements made by the Equality Act 2010 are under threat, however, as a result of the Government's 'red tape challenge' which has resulted in a review of the public sector equality duty and proposals to repeal provisions imposing employer liability for third party harassment, allowing employment tribunals to make recommendations in discrimination claims which extend beyond the employer's dealing with the individual successful litigant, and providing for statutory questionnaires which allow prospective claimants to gather information from employers relevant to their claims.⁴³⁶ The proposal regarding third party harassment appears to have resulted from the Beecroft review⁴³⁷ which suggested, in a tone more typical (as the *Equal Opportunity Report* pointed out),⁴³⁸ 'of the typical saloon bar bore than an evidence-based assessment', that '[t]he legislation clearly creates a temptation for employees to conspire with each other or with customers to create a harassment situation which might result in substantial financial compensation from their employers'. The Government has not, however, adopted Beecroft's proposal to impose limits on compensation for discrimination.

Case law of national courts

Hawkins v Atex Group Ltd & Ors (13 March 2012), Employment Appeal Tribunal

Dunn v The Institute of Cemetery and Crematorium Management was discussed in the last issue of the European Gender Equality Law Review.⁴³⁹ It has been cast into doubt, however, by the decision of the EAT in the *Hawkins* case in which that court ruled that the prohibition on marital discrimination was breached only where the less favourable treatment was based on the fact of the claimant's *married status*, rather than of his or her close relationship with a particular other. In the *Hawkins* case the claimant was dismissed in pursuit of a prohibition on the employment, in particular roles, of any member of the family of the Chief Executive (her husband). The EAT ruled that her claim was bound to fail, Mr Justice Underhill (then President of the EAT, but subsequently retired) disagreeing with the decision in *Dunn*. The *Hawkins* decision underscores the fact that the prohibition on discrimination against married people is a remnant of historical prohibitions on the employment of married women in many public sector posts in Great Britain, and is of limited current significance.

Merchant v BT plc, Bristol ET 27 February 2012

In this case an employment tribunal found that the failure of a manager to investigate the effects of the menopause on an employee's performance, in a case in which she was dismissed for performance-related reasons having drawn attention to underlying health issues resulting from the menopause, amounted to sex discrimination. The manager had failed to refer the worker to occupational health, in breach of the firm's policies, despite having concluded that it was 'difficult to assess if [the menopause] did impact on [her] performance'. The tribunal found that he would not have adopted a similar approach to a medical condition which was not exclusively female.

⁴³⁵ 'Forced equal pay audits for sexist bosses who lose tribunal claims', *The Telegraph* 24 June 2012.

⁴³⁶ <http://www.redtapechallenge.cabinetoffice.gov.uk/tag/equalities/>, accessed 11 September 2011.

⁴³⁷ <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/12-825-report-on-employment-law-beecroft.pdf>, accessed 11 September 2011.

⁴³⁸ *Diary*, Issue 226, June 2012.

⁴³⁹ www.bailii.org/uk/cases/UKCAT/2011/0531_10_0212.html, accessed 27 September 2012.

Hewage v Grampian Health Board [2011] UKSC 37 (Supreme Court)

In this important case the Supreme Court emphasised that, when a discrimination claimant compared the treatment she had received with that of one or more actual comparators, the fact that there were differences between their material circumstances did not prevent differences in their treatment from shifting the burden of explanation to the employer. The Court went on to assert (*per* Lord Hope, for the Court, §32) that ‘it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other’.⁴⁴⁰

Miscellaneous

As flagged in the last issue of the European Gender Equality Law Review, the Government has announced that, from summer 2012, applicants to employment tribunals will have to pay EUR 315 (GBP 250) to file discrimination or equal pay claims and a further EUR 1 196 (GBP 950) to have such cases heard.⁴⁴¹ The Equality and Human Rights Commission (EHRC) has raised concerns over the compatibility of this move with the EU principle of effectiveness.⁴⁴²

The future effectiveness of the EHRC itself must be in some doubt as a result of the swingeing cuts to its budget which have resulted in the implementation of a huge redundancy exercise at that institution. The Commission had an annual budget of EUR 87 million (GBP 70 million) at its creation in 2007 with over 500 staff, to be reduced to EUR 32 million *per annum* (GBP 26 million) in 2015 with 150 staff,⁴⁴³ fewer than any of the three predecessor commissions. The Northern Ireland Equality Commission, which serves a population of less than 2 million (to Great Britain’s 60 million +), and benefits from a sister Human Rights Commission, has a staff of 125.

In June 2012 the EHRC reported that women were still disadvantaged in the boardroom by appointments of people who ‘fit in’ (i.e., men).⁴⁴⁴ A House of Lords Select Committee launched an inquiry into the gender balance of the boardroom in the same month, but in July the Government responded to the European Commission’s consultation on boardroom equality by stating that quotas were not the answer.⁴⁴⁵ In August 2012 it was reported that the figures for women in boardroom positions had improved somewhat: whereas, in 2010, 12.5 % of board members of FTSE 100 companies and 7.8 % of board members of FTSE 250 companies were women, in 2012 these figures stood at 16.7 % and 10.9 % respectively, with women having accounted for 44 % and 40 % of appointees in the previous few months.⁴⁴⁶

The under-representation of women is not confined to the boardroom. Women constitute the majority of workers in the voluntary sector (70 %) but account for only 43 % of chief executive officers (27 % in charities with over EUR 12 million (GBP 10 million) annual turnover). Women who lead charities are disproportionately likely to do so as unpaid chairs rather than remunerated chief executives, and there is a 16 % pay gap between men and women in charitable chief executive roles (18 % in charities with over EUR 12 million (GBP

⁴⁴⁰ http://www.supremecourt.gov.uk/docs/UKSC_2011_0050_Judgment.pdf, accessed 12 September 2012.

⁴⁴¹ ‘Introducing fees in employment tribunals and Employment Appeal Tribunal - consultation response’, at <https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011>, accessed 11 September 2012.

⁴⁴² Response of the Equality and Human Rights Commission to the Ministry of Justice consultation on charging fees in Employment Tribunals and Employment Appeal Tribunals, at <http://www.equalityhumanrights.com/legal-and-policy/consultation-responses/response-to-consultation-on-charging-fees-in-employment-tribunals-and-employment-appeal-tribunals>, accessed 11 September 2012.

⁴⁴³ ‘The Equality and Human Rights Commission is being destroyed’, *Guardian* 24 August 2012.

⁴⁴⁴ ‘Gender Diversity on Boards’, www.equalityhumanrights.com/uploaded_files/research/r85_final.pdf, accessed 11 September 2012

⁴⁴⁵ <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu---internal-market-sub-committee-b/news/gender-balance-inquiry-launch>, accessed 11 September 2012.

⁴⁴⁶ *Equal Opportunities Review* issue 228.

10 million) annual turnover).⁴⁴⁷ In the political arena, too, the August 2012 Cabinet reshuffle resulted in a reduction in the number of women Ministers (four, down from five), comprising 18 % of Cabinet Ministers and a mere 17 % of those entitled to attend Cabinet.⁴⁴⁸

In August 2012 the Government's Equalities Office published research⁴⁴⁹ which showed that 21 % of people surveyed admitted to feeling prejudiced against women. Of these, two-thirds said that they would not generally disclose such prejudice. While the figure of 21 % was lower than that for those who admitted being prejudiced against Muslims, LGBT and Black people (35 %, 33 % and 25 % respectively), it does suggest that approaching 40 % of men are so prejudiced (it being less likely that women will be among the 21 % who admit to such prejudice).

Gender pay gap update

In the last issue of the European Gender Equality Law Review it was reported that the gender pay gap stood at 9.1 % in April 2011, down from 17 % in 1997 and a full 1 % lower than it was in April 2010. This was the first time that the hourly gender pay gap between full-time men and women workers had fallen below 10 %.⁴⁵⁰ Corrected figures released in March 2012, however, disclosed that the 2011 gap was 10.5 %.⁴⁵¹ As pointed out, the figures for part-time work are very much worse. More recently, *The Price of Motherhood: Women and Part-time Work*,⁴⁵² reported in February 2012 that 42 % of the graduates surveyed reported that they had had to accept work for which they were over-qualified in order to work part-time. The 1 600 women surveyed reported significant (hourly) salary sacrifices associated with the move to part-time work. And in July 2012 a survey published by the Daycare Trust reported that childcare costs had increased by 5.8 % for under twos and 3.9 % for over twos in the previous year, during which wages had increased by only 0.3 %. During the same period the state subsidy available to lower paid workers for childcare had also been reduced.⁴⁵³ 12 % of the 1 000 women surveyed stated that they had had to give up a job because of childcare costs and 20 % that they had declined a job for this reason.

⁴⁴⁷ *Close to Parity: Challenging the Voluntary Sector to Smash the Glass Ceiling*, www.cloresocialleader.org.uk/userfiles/documents/resources/fellows/Rowena_Lewis/Close_to_Parity_Jan_2012.pdf, accessed 12 September 2012.

⁴⁴⁸ The current list is at http://en.wikipedia.org/wiki/Cabinet_of_the_United_Kingdom#Composition, accessed 11 September 2012.

⁴⁴⁹ Changing Attitudes to Equalities: Key Findings, <http://www.homeoffice.gov.uk/publications/equalities/research/changing-attitudes>, accessed 11 September 2012.

⁴⁵⁰ <http://www.ons.gov.uk/ons/rel/mro/news-release/annual-survey-of-hours-and-earnings-2011/ashe-2011-nr.html>, accessed 11 September 2011.

⁴⁵¹ <http://www.ons.gov.uk/ons/rel/ashe/annual-survey-of-hours-and-earnings/2011-provisional-results--soc-2010--stb---ashe-results-2011--soc-2010-.html>, accessed 11 September 2011.

⁴⁵² <http://www.resolutionfoundation.org/publications/price-motherhood-women-and-part-time-work>, accessed 12 September 2012.

⁴⁵³ <http://www.daycaretrust.org.uk/pages/childcare-costs-survey-2012.html>, accessed 11 September 2012.

EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY