



Kosovo Women's Network

Serving, Protecting and Promoting the Rights of Women and Girls

POLICY PAPER

Kosovo's Progress in Aligning Its Laws with the European Union Gender Equality Acquis

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For the Kosovo Women's Network

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Acronyms

AGE	Agency for Gender Equality
BPfA	Beijing Platform for Action
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CJEU	Court of Justice of the European Union
CSW	Commission on the Status of Women
GEL	Gender Equality Law
GGP	Gender Gap in Pensions (in the EU)
GPG	Gender Pay Gap
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
EC	European Community
EEC	European Economic Community
EIGE	European Institute for Gender Equality
ERA	European Reform Agenda
EU	European Union
EU GE <i>acquis</i>	European Union Gender Equality <i>Acquis</i>
EWLA	European Women Lawyers Association
KAS	Kosovo Agency of Statistics
KWN	Kosovo Women's Network
LCS	Law of the Civil Service of the Republic of Kosovo
LGE	Kosovo Law on Gender Equality
LPD	Law on Protection from Discrimination
SES	Structure of Earnings Survey
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the EU
UK	United Kingdom
UNSCR	United Nations Security Council Resolution

Executive Summary

The “EU gender equality *acquis*” (“EU GE *acquis*”), including most directives and concepts, have been transposed correctly into Kosovo law, for the most part. Nevertheless, it seems that these laws are not applied in practice. Actual implementation will take time. It remains difficult to evaluate the capacity of the national judiciary to apply gender equality law. Case law in this field is still scarce, despite the fact that furthering gender equality seems to be an important issue for Kosovo civil society.

There is no annual “Gender Pay Gap” Index in order to check the implementation of the concept of “equal pay”. According to Kosovo’s Labour Law, the employment contract for a fixed period can be renewed. Nevertheless, the cumulative period cannot exceed ten years. Women feature predominantly among those working based on such contracts. Often the contracts are of a duration of three or six months. If women become pregnant in the interim, they do not have employment protection as foreseen by the “EU GE *acquis*”.

There is no information regarding how the EU concept of occupational social security schemes or statutory social security schemes are implemented in practice, and there is no case law.

Paternity leave, parental leave and carers’ leave have not been transposed correctly into Kosovo law. Fathers need to be able to claim their rights to at least 10 working days paid leave and to four months parental leave, in accordance with the provisions of the draft work-life balance Directive. Beyond this minimum, the Kosovo Women’s Network (KWN) has proposed that equal maternity and paternity leave would be in line with Kosovo’s Law on Gender Equality. The aforementioned Directive also introduces a new annual right for workers to take a period of leave from work in the event of serious illness or dependency of a relative.

The concept of self-employed capacity is not transposed correctly into Kosovo law. Self-employed women should be registered officially as such. If they work for their husbands or other family members, they should be able to access social protection or maternity benefits based exclusively on this family relationship.

An additional factor is that the concept of “positive action”, although formally transposed into Kosovo law, is not applied in practice. Kosovo’s Civil Service and Employment Agencies should introduce measures directed at ensuring that there are more women in the labour force and in leadership positions. As further explained later in the paper, Kosovo’s legislation does not protect sufficiently against infringements of any EU gender equality law (GEL) directives, and it does not fulfil its duty to provide effective, proportionate and dissuasive sanctions for the effectiveness of EU GEL directives.

The position of Kosovo’s equality body should be strengthened. The Agency for Gender Equality (AGE) does not seem to have sufficient power and adequate resources for its work.

There is a strong need for training for legal actors on the meaning and implementation of EU GEL with special focus on judges, lawyers, and civil society, particularly associations focusing on gender equality and law faculties focusing on labour laws, fundamental rights courses or seminars, and moot courts for law students.

Finally, it is suggested that Kosovo includes the Istanbul Convention in its Constitution under applicable International Conventions. Additional policy reviews should be undertaken to inform amendments to applicable law provisions, towards better addressing the requirements of the Istanbul Convention and its justiciability within Kosovo law.

Introduction

The term “EU GE *acquis*” refers to all relevant Treaty provisions, legislation and case law of the Court of Justice of the European Union (CJEU) in relation to gender equality. This paper intends to assist in assessing the alignment of Kosovo laws with European Union Gender Equality Law (EU GEL), including the *acquis*, also identifying gaps in implementation. To this end, an examination has been carried out to establish areas where Kosovo has yet to meet the standards set by the European Union (EU) with specific reference to gender equality. The paper concludes with concrete recommendations on steps needed to match “EU GE *acquis*” standards stemming from this process. EU law often uses the term “sex equality” when referring to “gender equality”. Both terms are used in this paper, more or less interchangeably.

Written by two external experts,¹ the paper was requested by the Kosovo Women’s Network (KWN), with financial support from the Kvinna till Kvinna Foundation, in order to inform KWN’s Advocacy Strategy related to mainstreaming gender in Kosovo’s EU Accession Process. In addition, this policy paper can inform other key stakeholders regarding still outstanding steps that are needed for Kosovo to meet the “EU GE *acquis*”.

Legal Background

EU law is divided into “primary” and “secondary” legislation. The Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU) (primary legislation) are the basis or ground rules for all EU action. Secondary legislation, which includes regulations, directives and decisions, are derived from the principles and objectives set out in the Treaties. As the EU has explained, “The aims set out in the EU treaties are achieved by several types of legal acts. Some acts are binding, others are not. Some apply to all EU countries, others to just a few.”²

The TFEU provides that a regulation “shall be binding in its entirety and directly applicable in all Member States”.³ Regulations can be regarded as “rigid” and “akin to legislation made by Member States”.⁴ There is no regulation on gender equality.

As defined by the TFEU, “a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”⁵ This means that it depends on the Member States how they implement and transpose the directives, including directives related to the “EU GE *acquis*”. The two Marshall cases⁶ on the interpretation of Council Directive 76/207/EEC of 9 February 1976

¹ The two experts are lawyers and board members of the European Women Lawyers Association (EWLA). Sylvia Cleff le Divellec and Katharina Miller were coordinators for the European Gender Equality Project “European Women Shareholders Demand Gender Equality” for France and Spain. Sylvia is a German-French lawyer, trainer and mediator living close to Paris, being an expert in French and European anti-discrimination law, gender equality and gender based violence. She works for public institutions, ministries and companies all over Europe. Katharina is a Spanish-German lawyer and trainer. She is a gender expert for big corporations worldwide, collaborating with GIZ and ADB.

² EU, ‘Regulations, Directives and other acts’, available at: https://europa.eu/european-union/eu-law/legal-acts_en, last accessed 26.06.2017.

³ Article 288 TFEU.

⁴ Craig and De Búrca, *Eu Law: Text, Cases and Materials* (5th ed. OUP 2011), p. 105.

⁵ Article 288 TFEU.

⁶ Case 152/84 *Marshall v Southampton & SW Hampshire AHA* [1986] ECR 723, 726 and Case C-271/91 (No 2) [1993] ECR I-4388 (same parties).

on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions illustrate the importance of the correct implementation and transposition of directives by the Member States.

As stated by the TFEU, “a decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them”,⁷ and it is directly applicable.⁸ Directly applicable means that no national measure is needed for it to be regarded as a domestic piece of legislation. The technical terminology is that “no transposition” of a regulation or a decision is needed. For example, if the Council issued a decision on preventing and combating violence against women and domestic violence⁹, then this decision is binding for the offending parties.

According to the TFEU, “recommendations and opinions shall have no binding force.”¹⁰ An opinion can be adopted by the EU institutions (the most obvious ones being the Commission or the Parliament). The consultative bodies such as the Committee of the Regions and the European Economic and Social Committee, input into the legislative process laid down in the TFEU by issuing opinions. There is case law confirming that consultation is mandatory, although the opinions are not binding. This is an important procedural point. In addition, both can also respond to voluntary consultation and, where appropriate, offer own-initiative opinions.

Finally, the difference between institutions and bodies should be noted. The seven institutions are listed in Article 13 of the TEU: European Parliament, European Council, Council, European Commission, Court of Justice of the European Union (CJEU), European Central Bank and Court of Auditors. Any other “actor” is a body (or an agency). It is also helpful to point out that there are several Councils, i.e. the European Council (a more recent arrival) comprises heads of state (only one, the French President) or government of the 28 EU Member States, the European Council President and the President of the European Commission. It should be noted that the European Council does not have a legislative role. It defines the EU’s overall political direction and priorities, and issues “conclusions”. The Council (of Ministers) comprises those national Ministers whose national portfolio reflects the subject matter of a Council meeting (to discuss and possibly sign off on a draft legislative act). For example, where labour law is the subject matter one can expect the Council to include Ministers for Labour.

Introduction to Relevant “EU GE *acquis*” Legislation

The relevant gender equality directive, in addition to Article 157 TFEU¹¹, establishing the principle of equal pay for women and men, is Directive 2006/54, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. This so-called Recast Directive has modernised and simplified existing provisions and, with effect from 15 August 2009 onwards, it has repealed the following older directives: the Directive on equal pay for men and women (75/117), the Directive on equal treatment of men and women in employment (76/207 as amended by Directive 2002/73), the Directive on equal treatment of men and women in occupational social security schemes (86/378, as amended by Directive 96/97) and the Directive on the burden of proof (97/80). Equally relevant are the Directive on equal treatment of men and women in statutory

⁷ Article 288 TFEU.

⁸ Article 288 TFEU.

⁹ Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, COM (2016) 109 final.

¹⁰ Article 288 TFEU.

¹¹ Article 157 TFEU, former Article 119 EEC, former Article 141 ECT.

schemes of social security (79/7), the Directive on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity (Directive 86/613, which was repealed by Directive 2010/41), the Pregnant Workers Directive (92/85), the Parental Leave Directive (Directive 96/34, which was repealed by Directive 2010/118) and the Directive on equal treatment of men and women in the access to and the supply of goods and services (2004/113).

When the EECT entered into force in 1958, it had only one provision¹² of direct relevance to gender equality, namely equal pay for men and women.¹³ Article 119 had been included in the EECT because France wanted to prevent distortions in competition between undertakings established in different Member States not required to pay women equally, which could have put France at a competitive disadvantage. Nevertheless, in 1976 the CJEU ruled that Article 119 EECT¹⁴ also had a social aim.¹⁵ Subsequently the CJEU ruled that the principle of equal pay is an expression of a fundamental human right.¹⁶

The CJEU has played a very important role in the field of equal treatment between men and women. It has done so by ensuring that individuals can invoke and enforce their right to gender equality. In this context, it has delivered important judgments interpreting EU equality legislation and relevant Treaty Articles and Member States' compliance with their obligations arising from EU law. The aforementioned *Marshall* cases are important examples of the CJEU's exercise of its interpretative role.

A combination of intrepid plaintiffs,¹⁷ and greater legislative activity fleshing out the sparse wording of Article 119 EECT (as well as growing familiarity with, and willingness to refer cases to the CJEU), contributed to the development of the "EU GE *acquis*". This happened in the face of national reluctance to fulfil these obligations. Such resistance arose in part from insufficient understanding of the "new legal order" created by the European Treaties. Despite the clear wording in Article 119 EECT on the timing¹⁸ for the implementation of equal pay for men and women, this did not happen within the established time frame. Implementation of the principle of equal pay eventually became a priority of the social programme agreed upon in 1974, and Member States decided to adopt a new directive on equal pay between men and women. In addition, from 1975 onwards, cases were brought to the CJEU in which the Court decided that individuals could rely on Article 119 EECT (now 157 TFEU) before national courts, in order to receive equal pay for equal work or work of equal value, without discrimination on grounds of sex.¹⁹ Art I of the 1975 Directive on Equal Pay had extended the material scope (of the EECT Article 119) by providing for equal pay for equal work to include "the same work or

¹² Article 119 EECT

¹³ The Treaty of Amsterdam, which entered into force in 1999, renumbered the original article, which became Article 141 ECT. This is now Article 157 TFEU.

¹⁴ Now Article 157 TFEU

¹⁵ Case C-43/75 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455 (*Defrenne II*);

¹⁶ Case C-50/96 *Deutsche Telekom AG, formerly Deutsche Bundespost Telekom v Lilli Schröder* [2000] ECR I-743.

¹⁷ Women such as Gabrielle Defrenne who took three cases to the CJEU in the 1970s: Case C-80/70 *Gabrielle Defrenne v Belgian State* [1971] ECR 00445 (*Defrenne I*); Case-43/75 (*Defrenne II*); Case C-149/77 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1978] ECR 01365 (*Defrenne III*).

¹⁸ Article 119.1 EECT establishes: "Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers". This means that it should have been implemented before 1 January 1962.

¹⁹ For example: Case C-69/80 *Susan Jane Worringham and Margaret Humphreys v Lloyds Bank Limited* [1981] ECR 767.

work to which equal value is attributed". This was an important development in light of the (continuing) segregated labour market.

While this jurisdiction enabled individuals to bring cases before national courts within the Member States to seek their EU rights, it also made it clear that it is difficult to isolate pay from other aspects of working conditions, special bonuses paid by the employer²⁰ or pension arrangements included.²¹ Together with the social programme from 1974, this provided an important impetus for legislation in the area of the equal treatment of men and women. In the course of time these directives were also interpreted by the CJEU, not least by the reliance of national courts on the preliminary reference (interpretative) role accorded to the CJEU in the Treaty.

With the entry into force of the (amending) Treaty of Amsterdam in 1999, gender equality became mainstreamed through its specific inclusion in the ECT. Both the EC (now EU) and the Member States had obligations in this regard. More specifically, this included the promotion of equality between men and women throughout the (EU) Community. Towards eliminating inequality, the promotion of equality between men and women in all activities listed in Article 3 ECT were given specific mention. This obligation of gender mainstreaming meant that both the (EU) Community and Member States were actively to consider the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities (Article 29 of Directive 2006/54).

Amendments introduced by the Lisbon Treaty emphasised further the importance of principles of non-discrimination and equality as fundamental principles of EU law. Article 2 TEU states that:

the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

According to Article 3.3 TEU, one of the aims of the EU is to "combat social exclusion and discrimination, and (...) promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child." Additionally, Article 8 TFEU stipulates that "in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women". Equality between men and women forms part of the fundamental principles on which the EU is based.²²

Since 1999, the EU has had the competence to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, and age or sexual orientation.²³ The Directive on the principle of equal treatment between men and women in access to and the supply of goods and services, 2004/113, lays down a framework for combating discrimination on the ground of sex.

²⁰ For example: Case C-333/97 *Susanne Lewen v Lothar Denda* [1999] ECR 7243.

²¹ For example: Case C-170/84 *Bilka – Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR I 607 and Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

²² See for example Articles 2 and 3.3 TEU.

²³ See the former Article 13(1) ECT, now Article 19 TFEU.

The European Commission's 2008 proposal to revise Council Directive 92/85/EEC²⁴ was withdrawn. Therefore, the Commission presented a proposal on 26 April 2017 for a Directive of the European Parliament and of the Council on work-life balance for parents and carers, repealing Council Directive 2010/18/EU.²⁵ According to this new proposal, "the package aims at addressing women's under-representation"²⁶ in the work force. A further aim is to "support their career progression through improved conditions"²⁷ for reconciling their work and life balance. The proposal also states that "it builds on the existing rights and policies and does not diminish the level of protection offered" by the²⁸ "EU GE *acquis*" while preserving "the existing rights granted under the existing EU law. It additionally improves existing rights and introduces new ones for both women and men, thereby addressing equal treatment and opportunities in today's labour market, "promoting non-discrimination and fostering gender equality".²⁹

The European Commission links the low employment rate of women aged 20-64³⁰ with:

the Gender Pay Gap (GPG) (amounting to 28 percent in some Member States), which over the working life accumulates into Gender Pension Gap (GGP) (on average 40 percent in the EU) and results in higher risk of female poverty and social exclusion, especially in old age.³¹ The projections on the baseline scenario show that the above challenges will not be sufficiently addressed without EU action. The gender employment gap is expected to still amount to 9 percentage points in 2055.³²

The European Commission considers an inadequate work-life balance policy as one of the main causes of this problem:

Unbalanced design of leave between genders, insufficient incentives for men to take leave to care for children and/or dependent relatives, limited possibilities to make use of

²⁴ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

²⁵ Proposal for a Directive of the European Parliament and of the Council on work life balance for parents and carers and repealing Council Directive 2010/18/EU, COM(2017) 253 final.

²⁶ Proposal for a Directive of the European Parliament and of the Council on work life balance for parents and carers and repealing Council Directive 2010/18/EU, COM(2017) 253 final, page 1 (in the following: work-life balance Directive)

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ During her speech in February 2017 at a lunchtime debate organized by European Women Lawyers Association (EWLA), Marianne Thyssen, EU Commissioner for Employment, Social Affairs, Skills and Labour Mobility said: "In 2015, the employment rate of women aged 20-64 was on average across the EU 11.6 percentage points lower than that of men. A substantially higher proportion of women work part-time (31.3% of women compared to 8.3% of men). Therefore, the gender employment differences in full-time equivalents are even larger, with a gap of 18.1 percentage points for the EU! In the Union today, women carry out every week 17 hours unpaid work more than men and are often trapped in low productivity, low-skilled and low-paid sectors and jobs." At: <https://www.ewla.org/sites/default/files/MThyssen%20Speech%20EWLA%20200217.pdf> (last accessed on 26.06.017)

³¹ Evidence from Kosovo points to a similar trend (see KWN, *Budgeting for Social Welfare*).

³² Work-life balance Directive, page 1.

flexible working arrangements, insufficient formal care services and economic disincentives all exacerbate female employment challenges.³³

The current legal framework at the Union and within Member States provides limited provisions for men to assume an equal share of caring responsibilities with women. Currently, no EU legislation provides:

for paternity leave or leave to take care of an ill or dependant relative, with the exception of absence for *force majeure*. In many Member States, there is a lack of paid leave arrangements for fathers compared to mothers. The imbalance in the design of work-life balance provisions between women and men can thus reinforce gender differences in work and care. Conversely, fathers' use of work-life balance arrangements such as leave has been shown to have a positive impact on their involvement in bringing up children later on, reducing the relative amount of unpaid family work undertaken by women and leaving women more time for paid employment.³⁴

The general objective of the work-life balance Directive is to ensure the implementation of the principle of equality between men and women with regard to labour market opportunities and treatment at work. Through adapting and modernising the EU legal framework, the Directive will allow parents and people with caring responsibilities to reconcile better their work and caring duties. The Directive builds on the existing rights and strengthens them in places or introduces new rights. It does maintain the level of protection already offered by the "EU GE *acquis*". The specific objectives of the proposed Directive are defined as follows:

- to improve access to work-life balance arrangements – such as leave and flexible working arrangements;
- to increase take-up of family-related leaves and flexible working arrangements by men.

I. Transposition of EU GEL into Kosovo Law

This section will examine the extent to which the EU GEL provided for in the aforementioned directives has been transposed into Kosovo legislation.³⁵ This assessment focuses on equal pay for men and women (1); equal treatment of men and women in occupational social security schemes (2); equal treatment of men and women in employment (3); pregnancy and maternity protection; maternity, paternity, parental and adoption leave (4); equal treatment of men and women in statutory social security schemes (5); equal treatment of men and women engaged in an activity in a self-employed capacity (6); and equal treatment of men and women in the access to and the supply of goods and services (7). Within each section, the substantive EU GEL will be explained (a). Second, the transposition of the EU GEL into Kosovo legislation will be assessed (b). Third, an analysis and recommendations will be presented (c).

³³ Ibid.

³⁴ Ibid, p. 2.

³⁵ As mentioned, the relevant gender equality directives, in addition to Article 157 TFEU, are Directives 2006/54 (Recast Directive), 2004/113 (Goods and Services), 79/7 (Statutory Social Security), 2010/41 (Self-Employed Workers), 92/85 (Pregnancy and Maternity) and 2010/18 (Parental Leave).

1. Equal Pay for Men and Women

a. What is “pay” and what is “equal value” in EU law?

“Pay”, according to Article 2.1 (e) of the Recast Directive, is “the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer.”³⁶ The principle of equal pay entails, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. Where a job classification system is used for determining pay, it must be based on the same criteria for both men and women (Article 4 of the Recast Directive). Equal pay not only applies to salary, but to all contractual terms and conditions of employment, such as holiday entitlement, bonuses, pay and reward schemes, pension payments and other benefits. The principle of equal pay is intended to be applied at the workplace, both in public and private sectors. According to Recital 8 of the Recast Directive:

the principle of equal pay for equal work or work of equal value (...) consistently upheld in the case-law of the CJEU constitutes an important aspect of the principle of equal treatment between men and women and an essential and indispensable part of the *acquis communautaire*, including the case-law of the Court concerning sex discrimination.

Some of the most important case law related to equal pay include:

- According to the CJEU in *Defrenne*³⁷ the principle of equality of remuneration of Article 157 TFEU³⁸ can be invoked before national jurisdictions and must be applied to sanction discrimination related to national law but also to collective agreements. It also established that the national legislator does not have exclusive competence to implement equal pay.
- In *Danfoss*³⁹ the EU judges ruled that a remuneration system characterised by a lack of transparency resulting in average inferior remuneration of women is presumed to be discriminatory. The lack of transparency precludes access to evidence. The employer has the burden to prove that this practice is not discriminatory.⁴⁰ The employer has to establish a remuneration system that is objective, non-discriminatory and proportionate. If the employer applies in the evaluation the criteria of supplements, such as mobility, and this corresponds to an evaluation of quality that is not favourable to women, then it is abusive. If it corresponds to adaptability to schedules and workplace, the employer must further establish a particular value to the specific work of the employee. In case the employer applies the criteria of professional training, then this supplement can carry a value if the employer established that a particular training has a particular value for the execution of the employee’s function.⁴¹

³⁶ Article 2.1 (e) of Recast Directive.

³⁷ Case-43/75 *Defrenne II*.

³⁸ Former Article 119 TEEC, former Article 141 TEC.

³⁹ Case-109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, acting on behalf of Danfoss [1989] ECR 03199.

⁴⁰ Paragraphs 10-16 of the judgment.

⁴¹ Paragraphs 17-25 of the judgment.

- *Enderby*⁴² was a case of difference of remuneration between two jobs of comparable value, related to salary levels and classifications in a public health collective agreement, involving a speech therapist (female) and pharmacists (male). There was apparent discrimination on the basis of statistics of the presence of males and females in each job category.⁴³ The European Court ruled that the employer must show that objective reasons justify the difference in remuneration. The fact that they are the result of collective bargaining is not a justification since collective agreements must respect the principle of equal treatment. The fact that each bargaining process did not take into account discriminatory considerations is not a justification either (paragraph 22 of the judgment). The insufficient number of professionals explaining their high value on the market cannot be presumed. The CJEU clarified the role of the national court in assessing the impact of market forces attributable to the pay differential and the relationship to the principle of objective justification (paragraphs 27-28 of the judgment).
- In *Brunnhöfer*⁴⁴ the female plaintiff complained that a male colleague, hired one year after her, received an individual supplement. The monthly amount was approximately Austrian Schilling 2,000 higher than the supplement that she received under her contract with the Bank. She was dismissed after four years because of problems that had occurred before her male colleague was even hired. The employer invoked the quality of the plaintiff's work (to justify its action). The court ruled that the employer cannot invoke the quality of a plaintiff's work or elements related to the performance of the employment, to justify unequal pay fixed at the time of hiring the employee. Being hired at the same level of classification is insufficient to establish that both employees execute comparable work. Elements that are not taken into account by the collective agreement may be taken into consideration if they are objective, non-discriminatory and proportionate. The court defined comparable situation in paragraph 43 of the judgment: "in order to determine whether employees perform the same work or work to which equal value can be attributed, it is necessary to ascertain whether, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation".
- In *Gisela Rummel*⁴⁵ a classification system was based on physical effort, taking into account muscular fatigue and physical strain. The court ruled that factors establishing the value of work related to the average work performance of employees of one sex, outside any general context, is a form of sex discrimination. To evaluate work, a classification system must be constructed in such a way as to take into account factors that reflect qualities that are common to workers of both sexes at every level. Paragraph 25 of the judgment stated:

In particular, it follows from the Directive 75/117 that: (a) the criteria governing pay-rate classification must ensure that work which is objectively the same attracts the same rate of pay whether it is performed by a man or a woman; (b) the use of values reflecting the average performance of workers of one sex as a basis for determining the extent to which work makes demands or requires effort

⁴² Case C-127/92 *Dr. Pamela Mary Enderby v Frenchay Health Authority y Secretary of State for Health* [1993] ECR I-05535.

⁴³ Paragraph 16 of the judgment.

⁴⁴ Case C-381/99 *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* [2001] ECR I-04961.

⁴⁵ Case 237-85 *Gisela Rummel v Dato-Druck GmbH* [1986] ECR 02101.

or whether it is heavy constitutes a form of discrimination on grounds of sex, contrary to the directive; (c) in order for a job classification system not to be discriminatory as a whole, it must, in so far as the nature of the tasks carried out in the undertaking permits, take into account criteria for which workers of each sex may show particular aptitude.

b. Equal Pay in Kosovo legislation

(i) *The notion of ‘pay’ as implemented in Kosovo’s Labour Law*

“Pay” according to Kosovo legislation is defined in Article 3 (1.13) of the Labour Law as “the remuneration or earning of any calculated level in the form of money for the employee.” In addition, Article 3 (1.14) foresees that “the minimum salary proposed by SEC, defined by the Government, according to the criteria determined in compliance with this Law”. Art 3 (1.20.) of the Law on Gender Equality (LGE) copies the Recast Directive’s definition of “pay” identically.

(ii) *The formulation of the equal pay obligation in Kosovo’s legislation*

Article 55.3 of the Labour Law states that: “The employer shall pay men and women an equal remuneration for work of equal value covering base salary and any other allowances.” Articles 5.1 and 5.5 prohibit discrimination:

in employment and occupation in respect of recruitment, training, promotion of employment, terms and conditions of employment, disciplinary measures, cancellation of the contract of employment or other matters arising out of the employment relationship and regulated by Law and other Laws into force.

Article 3 (1.17) defines discrimination as:

any discrimination including exclusion or preference made on the basis of race, colour, sex, religion, age, family status, political opinion, national extraction or social origin, language or trade-union membership which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation capacity building is prohibited.

Further, Article 17, paragraphs 1.11 and 1.12 of the LGE provide that:

employers in all sectors are obligated to: 1.11. in particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of gender. 1.12. To offer equal payment for a work of equal value.

There is no known relevant case law in Kosovo as of yet.

(iii) *Justifications for differences in pay that are accepted under legislation*

There are no justifications for differences in pay that are accepted under legislation.

c. Analysis and proposal

The EU concept of equal pay is transposed correctly into Kosovo law. There are at least three different Kosovo laws that deal with the concept of equal pay; the definitions differ slightly and they are not aligned exactly. This does not affect its transposition into Kosovo law. However, there is no information about how it is implemented in practice, and there is no known case law.

According to the Kosovo Agency of Statistics (KAS), the socio-economic situation is challenging, as only 12.7 percent of women participate in the formal labour market.⁴⁶ No official data exists in Kosovo regarding the Gender Pay Gap (GPG).⁴⁷ Such data would provide a clearer understanding of the difference between the average gross hourly earnings of men and women, expressed as a percentage of average gross hourly earnings of men. However, notably, according to KAS, the average wage of women was €263 in 2016 whereas the average wage of men was €329.⁴⁸ This as well as data from elsewhere in Europe suggests that a GPG likely exists between women and men in Kosovo.

In order to raise awareness about equal pay, the GPG in Kosovo should be calculated and published at least annually as part of the existing Labour Force Survey. Trade unions and judges should be offered appropriate training so that they can assess whether direct or indirect discrimination has occurred. Chapter III below, which addresses EU GEL enforcement, will propose possible responses by national courts in relevant cases.

In Germany, the GPG between women and men is 21 percent. Therefore, the Parliament has passed the “Act on Transparency of Pay”⁴⁹, which came into force on 6 July 2017. It aims at promoting equal pay. To achieve this, it imposes various obligations on companies requiring them to disclose salary information. The scope of these obligations and the consequences of non-compliance remain unclear in several points.⁵⁰ The new rules essentially relate to three aspects: first, individual rights to information on the remuneration paid to colleagues of the other gender and criteria to determine remuneration in the company, which is relevant for companies with regularly more than 200 employees; second, (voluntary) audit of provisions on remuneration and distribution of remuneration regarding discrepancies in pay through companies, which is relevant for companies with regularly more than 500 employees; and finally, reporting obligation regarding certain aspects of equal pay, which is relevant for companies with regularly more than 500 employees. Kosovo also could create such a law in order to guarantee equal pay.

⁴⁶ KAS, *Labour Force Survey*, 2016, p. 10, available at: <http://ask.rks-gov.net/media/3245/lfs-2016-anglisht.pdf> (last accessed 26.07.2017)

⁴⁷ EUROSTAT calculates the GPG using the four-yearly Structure of Earnings Survey (SES); national evaluations of years between the SES years, with the same coverage as SES, as per the formula: $GPG = [(average\ gross\ hourly\ earnings\ of\ paid\ employees\ that\ are\ men - average\ gross\ hourly\ earnings\ of\ paid\ employees\ that\ are\ women) / average\ gross\ hourly\ earnings\ of\ paid\ employees\ that\ are\ men]$. Average earnings of GPG are calculated as arithmetic means (see EUROSTAT, Gender pay gap in unadjusted form - NACE Rev. 2 activity (earn_grpg2), at: http://ec.europa.eu/eurostat/cache/metadata/en/earn_grpg2_esms.htm#stat_pres1488984702568).

⁴⁸ KAS, Askdata, available at: http://askdata.rks-gov.net/PXWeb/pxweb/en/askdata/askdata_00%20Household%20budget%20survey_3%20Private%20income%20in%20Kosovo/hbs08.px/table/tableViewLayout1/?rxid=6e13a71b-eea2-473e-8cd3-dfa126a0f74c (last accessed 12.07.2017).

⁴⁹ Gesetz zur Förderung der Transparenz von Entgeltstrukturen of 30.06.2017, available at: http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl117s2152.pdf (last accessed 26.07.2017).

⁵⁰ See, for example, the legal opinion by the German Women Lawyers Association, available at: https://www.djb.de/Kom-u-AS/KI/st17-05/#_ftn5 (last accessed 26.07.2017).

2. Equal Treatment of Men and Women in Occupational Social Security Schemes

a. Occupational social security schemes according to EU GEL

According to Article 2.1 (f) of the Recast Directive “occupational social security schemes” are:

schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (1) whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to **supplement the benefits provided by statutory social security schemes or to replace them**, whether membership of such schemes is compulsory or optional.

Article 5 of the Recast Directive prohibits both direct and indirect sex discrimination in occupational social security, in particular regarding:

- (a) the scope of such schemes and the conditions of access to them;
- (b) the obligation to contribute and the calculation of contributions;
- (c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.

The categories of persons protected are listed in Article 6 and include:

members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.

The Recast Directive applies to occupational social security schemes “protecting against the risk of sickness, invalidity, old age, including early retirement, industrial accidents, occupational diseases and unemployment.”⁵¹ Social benefits, and in particular survivors’ benefits and family allowances, are covered if such benefits are accorded to employed persons and thus “constitute consideration paid by the employer to the worker by reason of the latter’s employment”.⁵² The second Chapter of the Recast Directive applies, in addition, to pension schemes for a particular category of worker such as public civil servants if the benefits are paid because of the employment relationship with the public employer.⁵³

It is prohibited to determine different retirement ages in such schemes.⁵⁴ The same applies for “suspending the acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer”.⁵⁵

⁵¹ Article 7.1 (a) of the Recast Directive.

⁵² Article 7.1 (b) of the Recast Directive.

⁵³ Article 7.2 of the Recast Directive.

⁵⁴ Article 9.1 (f) of the Recast Directive.

⁵⁵ Article 9.1 (g) of the Recast Directive.

According to Article 8 of the Recast Directive, the equal treatment in occupational social security schemes does not apply to:

individual contracts for self-employed persons, single-member schemes for self-employed persons; insurance contracts to which the employer is not a party; in the case of workers; optional provisions of occupational social security schemes offered to participants individually to guarantee them: (i) either additional benefits, (ii) or a choice of date on which the normal benefits for self-employed persons will start, or a choice between several benefits; occupational social security schemes in so far as benefits are financed by contributions paid by workers on a voluntary basis.

This Chapter does not preclude an employer granting to persons who have already reached the retirement age for the purposes of granting a pension by virtue of an occupational social security scheme, but who have not yet reached the retirement age for the purposes of granting a statutory retirement pension, a pension supplement, the aim of which is to make equal or more nearly equal the overall amount of benefit paid to these persons in relation to the amount paid to persons of the other sex in the same situation who have already reached the statutory retirement age, until the persons benefiting from the supplement reach the statutory retirement age.

b. The Personal and Material Scope of the Relevant Kosovo Legislation

The Kosovo LGE specifically refers to the Recast Directive and Directive 79/7/EEC. LGE is the only Kosovo law that defines occupational social security schemes as:

on the progressive implementation of the principle of equal treatment for men and women in matters of social security whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional [Article 3 (1.21)].

As mentioned, occupational social security schemes also should protect against the risk of unemployment. Assistance to unemployed women and men should be given in the form of training and other services through the Employment Agency. Only a very small share of unemployed women and men benefit from these support schemes.⁵⁶ KWN research shows that although unemployment is higher among women than among men, the number of women who benefit from these services is lower than that of men.⁵⁷

There is no relevant case law as of yet in Kosovo, and there are no exclusions as foreseen by Article 8 of the Recast Directive.

⁵⁶ "The Social Assistance Scheme (SAS) rate has not been set in accordance with economic conditions in Kosovo. It has not met basic human needs and should be increased based on the indexation of the minimum basket of goods. Presently, while men household members tend to receive more assistance transfers (71%), women comprise the majority of household members reliant on this assistance (58%)." For more, see KWN, *Budgeting for Social Welfare: A Rapid Gender Analysis to Inform Gender Responsive Budgeting in the Ministry of Labour and Social Welfare in Kosovo*, Prishtina, 2014, p. 5, available at: <http://www.womensnetwork.org/documents/20140702111942678.pdf> (last accessed 26.07.2017).

⁵⁷ Ibid and KWN, *Budgeting for Social Welfare: A Gender+ Analysis to Inform Gender Responsive Budgeting in the Ministry of Labour and Social Welfare in Kosovo for 2016-2018*, p. 24, Prishtina, 2015, available at: <http://www.womensnetwork.org/documents/20151203094304537.pdf> (last accessed 26.07.2017).

c. Analysis and proposal

The EU concept of occupational social security schemes is formally correctly transposed into Kosovo law. However, no information exists regarding how it is implemented in practice, and there is no known case law.

In order to enable more women to participate in training offered by the Employment Agency, a survey should be carried out in order to establish objective reasons for the “participation gap” between men and women. Women should be guaranteed the same information and opportunities with regard to training. Special training opportunities for women could be established as an affirmative action, as foreseen by the LGE. The Employment Agency could offer such initiatives.

In addition, childcare facilities should be made available for mothers who need this support and who want to take up training opportunities. Quality childcare services was identified as a priority in the Annual Growth Survey,⁵⁸ because women with little children tend to step out of the labour market if there are no quality childcare services. According to the Barcelona objectives:⁵⁹

Member States should remove disincentives to female labour force participation, taking into account the demand for childcare by 2010 to at least 90 per cent of children between 3 years old and the mandatory school age and at least 33 per cent of children under 3 years of age.⁶⁰

Kosovo is far from meeting the Barcelona objectives, as childcare and preschool education are largely unavailable for a significant proportion of the population.⁶¹ While the need for expanded childcare availability has been noted in Kosovo’s National Development Strategy,⁶² substantial investments in expanding the childcare system are still needed, towards providing an enabling environment for women’s labour force participation.

3. Access to Work and Working Conditions

a. Access to work and working conditions according to EU GEL

The Recast Directive also repealed Directive 76/207.⁶³ The main article of the Recast Directive is Article 14, which prohibits both direct and indirect sex discrimination in public and private sectors (including public bodies), related to:

⁵⁸ COM(2012) 750.

⁵⁹ At: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/71025.pdf (last accessed 22.06.2017).

⁶⁰ COM(2010) 2020.

⁶¹ See KWN, *Who Cares? Demand, Supply, and Options for Expanding Childcare Availability in Kosovo*, Prishtina: KWN, 2016, at: <https://www.womensnetwork.org/documents/20161103153827186.pdf>.

⁶² Republic of Kosovo, Government, Office of the Prime Minister, National Development Strategy 2016 – 2021, Prishtina: 2016, p. 11, at: http://www.kryeministri-ks.net/repository/docs/National_Development_Strategy_2016-2021_ENG.pdf.

⁶³ Directive 76/207, as amended by Directive 2002/73, on the implementation of the principle of equal treatment between men and women in employment. The relevant provisions are now included in Title II, Chapter 3 of Directive 2006/54.

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty (ECT – now Article 157 TFEU);
- (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

The Recast Directive allows three exceptions to the principle of equal treatment. First, the Recast Directive stipulates in Article 14.2:

Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

Second, Article 28.1 of the Recast Directive states: “This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity”. The third exception is stipulated in Article 3 of the Recast Directive and relates to positive action (see also, Chapter II below): “Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.”

If a Member State does not transpose these provisions or any provisions established by any directive, the CJEU considers that any directive can produce certain protection of individuals directly, when it has not been transposed into national law or the transposition has not been done correctly, if the directives’ provisions confer specific rights upon an individual⁶⁴ and if they are unconditional and sufficiently clear and precise.⁶⁵

b. Personal and material scope of the relevant Kosovo legislation regarding “Access to work and working conditions”

The Kosovo Law on Protection from Discrimination (LPD) foresees in Article 2 (1.3.) “conditions of employment and working conditions including discharge or termination of the contract and salary”. The Kosovo Labour Law states in Article 10.4 that: “a contract for a fixed period may not be concluded for a cumulative period of more than ten (10) years.” Article 12(1.1) provides for: “Continuity of employment after annual leave, sick leave or maternity leave or any other leave taken in accordance with this Law.” Article 15 (probationary period) does not provide any special protection for mothers, fathers or any carers. Articles 22 and 52 provide for reduced working hours only if the employee is exposed to harmful impacts on health or if there is a child, who “necessarily requires special care due to poor health conditions”, or if there

⁶⁴ Case C-22/02 *Peter Paul et al v Bundesrepublik Deutschland* (2004) ECR I-9425.

⁶⁵ See also, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:114527> (last accessed 23.06.2017).

is a child with permanent disabilities. This arises in the context of the provisions of health insurance, which enables one parent to work part-time, after the expiry of maternity leave, until the child reaches the age of two years.

Exceptions in the Recast Directive also have been adopted in Kosovo law, namely in Article 6 of the LPD and in Articles 4.3 and 5.3 of the Labour Law. According to the Labour Law, Article 5.3, “it is not considered discrimination any distinction, elimination or giving priority, relation to any designated place of work, based on certain criteria required for that job”.

The Law of the Civil Service of the Republic of Kosovo (LCS) states in Article 3.1 that: “the Civil Service is composed of impartial, professional, accountable Civil Servants and reflects multiethnicity and gender equality”. Article 5.1 (1.2) confirms the concept of non-discrimination on the grounds of gender. Article 20.3 may extend the probationary work period in case of maternity leave. Article 36.3 establishes that “pregnant women, mothers with children up to three (3) years old (...) shall not be required to work night shift and more than forty (40) hours per week.” According to Article 40.1 (1.3) civil servants are entitled to parental leave. Article 43 confirms again the civil servants’ right to equal treatment and career development opportunities without regard to their sex. Article 45 foresees the right to remain in a position and retain an equivalent position. Article 87.3 states that “the working relationship of career civil servants may be terminated on grounds of poor performance”.

There is no known relevant case law as of yet.

c. Analysis and proposal

The EU concept of access to work and working conditions is transposed into Kosovo law. Nevertheless, its transposition needs to adapt to the best practices within EU Member States. There is no information about how it is implemented in practice. Due to the way in which courts maintain data, it was not possible as part of this paper to examine any existing case law, if indeed such case law exists.

Some proposals to assist in avoiding or preventing discrimination in a working relationship follow. While the LPD addresses the illegality of gender discriminatory contracts and decisions, it is recommended to align and reflect this in the Kosovo Labour Law as well. The Kosovo Labour Law, Article 4.3, should be amended to: “Internal Employers’ Act and Labour Contract as well as any unilateral decisions of the employer in employment, in pay, working hours, and other employment situations, will be considered null and void in situations of direct or indirect discrimination according to Article 3 (1.17.). Any orders and decisions by the employer involving unfavourable treatment of workers as a reaction to a complaint made in the undertaking or to an administrative or judicial action seeking to enforce the principle of equal treatment and non-discrimination will also be considered null and void.” Also, the following phrase should be included in Article 4.3: “The definition in Collective Contract, Employer’s Internal Act and the Labour contract of any categories and groups shall be based on criteria and systems that aim to ensure the absence of direct or indirect discrimination between women and men.”

Second, the fixed period provided by Article 10.4 of 10 years to become a permanent employee is far too long, and there is no clear protection for mothers, fathers, etc. The following is proposed: “Article 10.4 a fixed period. After a cumulative, consecutive period of three (3) years and one (1) day, the employee shall be eligible for a contract of indefinite duration without the need for interview. Situations of temporary incapacity, risk during pregnancy, maternity, adoption, custody for adoption, foster care, risk during breastfeeding and paternity will interrupt the calculation of the duration of the contract.”

Third, in Article 12.1.1 the wording *maternity leave* should be amended and extended to maternity leave, paternity leave and parental leave.

Fourth, Article 15 should be amended: “Situations of temporary incapacity, risk during pregnancy, maternity, adoption, custody for adoption, foster care, risk during breastfeeding and paternity will interrupt the calculation of the duration of the probation periods. It is direct sex discrimination if the termination of the probation period is linked to pregnancy of the employee. The decision will be declared void, the employee will be reinstated in her position and she will be provided with damages. The employer will incur a legal sanction.” While the LPD and LGE acknowledge discrimination, it is recommended to ensure that this is stated explicitly within the Labour Law as well.

Finally, Articles 22 and 52 should be amended and every parent should be allowed to reduce working hours if she or he has to take care of young children. The “protection of work-life balance responsibilities” according to Directive 2010/18 includes also the right to “time off”, which includes reduced working hours. In addition, the recent proposal for the work-life balance Directive includes, in Article 9, flexible working arrangements in order to encourage working parents with young children (at least until 12 years of age), and carers, to remain in the labour market. To this end, they should be able to adapt their working schedules to their personal needs and preferences.

Regarding the working conditions of civil servants, the civil service as a whole needs training in order to correctly implement the LGE, especially the EU concept of positive action, described below in Chapter II. First, Article 40.1 of the LCS should include maternity leave, paternity leave and carers’ leave.⁶⁶ Second, Article 87.3 of the LCS should be amended as follows: “An evaluation after return from maternity leave cannot justify the termination of the working relationship.”

Finally, and as mentioned in Chapter I 3 c), quality childcare services, especially for children under three years, should be guaranteed. The government of Kosovo has foreseen increasing inclusion of children in pre-school institutions as a priority in its National Development Strategy for 2016 – 2021⁶⁷ and in the European Reform Agenda (ERA).⁶⁸

4. Pregnancy and maternity protection; maternity, paternity, parental and adoption leave

a. Pregnancy and maternity protection; maternity, paternity, parental and adoption leave according to “EU GE acquis”

Currently there are two directives 92/85 (Pregnancy and Maternity) and 2010/18 (Parental Leave) and the proposal for a work-life balance Directive which establish the necessary provisions concerning pregnancy and maternity protection; maternity, paternity, parental and adoption leave.

First, the main aim of the Directive regarding pregnant workers and workers who have recently given birth or are breastfeeding, is to implement measures to encourage improvements in safety and health at work of pregnant workers and workers who have recently given birth or

⁶⁶ According to Art. 6 of the proposed Directive on work-life balance, carer’s leave is a period of time from work in the event of serious illness or dependency of a relative.

⁶⁷ Republic of Kosovo, Government, National Development Strategy for 2016 – 2021 (Nds), 2016.

⁶⁸ Kosovo – EU High Level Dialogue on Key Priorities, European Reform Agenda (ERA), priority 3.5, available at: http://www.mei-ks.net/repository/docs/era_final.pdf.

who are breastfeeding.⁶⁹ Article 8 of this Directive stipulates that Member States have to ensure that women enjoy a period of at least 14 weeks' maternity leave. During this period, their employment rights must be ensured. They have the right to return to the same or an equivalent job, with no less favourable working conditions, and to benefit from any improvement in working conditions to which they would be entitled during their absence.⁷⁰ They are also entitled to the payment of and/or the entitlement to an adequate allowance.⁷¹ According to Article 11.3, this allowance is deemed to be adequate if it guarantees an income at least equivalent to that which the worker concerned would receive in case of illness.

Further, pregnant women enjoy health and safety protection. They cannot be obliged to carry out night work, and they are protected against dismissal from the beginning of their pregnancy until the end of their maternity leave.⁷² According to the CJEU, discrimination on grounds of pregnancy amounts to direct discrimination. The beginning of pregnancy starts with fertility treatment,⁷³ and protection is quite strong also after having given birth.⁷⁴ The latter protection also covers dismissal because of absences due to incapacity to work caused by an illness resulting from pregnancy.

The Parental Leave Directive 2010/18 implements the revised Framework Agreement on parental leave agreed by European social partners in June 2009. The Framework Agreement⁷⁵ lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents.⁷⁶ Member States are free to adopt more favourable measures.⁷⁷ The protection of parental leave, including for fathers, could be improved with the entry into force and implementation of the work-life balance Directive. Currently, there are no minimum standards for paternity leave at the EU level.⁷⁸

The Framework Agreement applies to all workers, women and men, who have an employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each Member State. The Agreement applies to part-time workers, fixed-term contract workers, and temporary agency workers.⁷⁹ They are entitled to an individual right to parental leave on the grounds of the birth or adoption of a child, so as to care for that child until a given age. According to the proposed work-life balance Directive the child's age should be up to 12 years.⁸⁰ Member States and/or social partners should define the age. Parental leave is to be granted for at least a period of four months. To encourage both parents to take leave on a more equal basis, at least one of the four months has to be provided on a non-transferable basis.⁸¹ According to the work-life balance Directive this non-transferable basis will be increased up to four months.⁸² Parental leave may be granted on a full-time or part-time

⁶⁹ Article 1 of Directive 92/85 regarding pregnant workers and workers who have recently given birth or are Breastfeeding.

⁷⁰ See also Article 15 of the Recast Directive.

⁷¹ Article 11.2 (b) of Directive 92/85.

⁷² Article 10 of Directive 92/85.

⁷³ Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR I-01017.

⁷⁴ Case C-460/06 *Nadine Paquay v Société d'architectes Hoet + Minne SPRL* [2007] I-08511.

⁷⁵ Annexed to the Directive.

⁷⁶ Clause 1.1.

⁷⁷ Clause 8.1.

⁷⁸ See also proposal of work-life balance Directive, p. 11.

⁷⁹ Clauses 1.1 and 1.2.

⁸⁰ Article 5.1 of the work-life balance Directive.

⁸¹ Clause 2 of the Framework Agreement.

⁸² Article 5.2 of the work-life balance Directive.

basis, a period of work qualification and/or a length of service qualification, which shall not exceed one year, may be imposed, and the circumstances under which an employer is allowed to postpone the parental leave can be defined by law and/or collective agreements in the Member States.⁸³ However, the minimum requirements of the Directive have to be respected.⁸⁴ Workers who take parental leave have the right to return to the same or equivalent job at the end of the parental leave,⁸⁵ and they must be protected against less favourable treatment and dismissal.⁸⁶ Matters regarding social security are for consideration and determination by Member States and/or social partners. The same is true regarding income in relation to parental leave.⁸⁷

In practice, mothers still take parental leave much more often than fathers.⁸⁸ Member States, until now, are not obliged to introduce (partially) paid parental leave, which would provide a strong incentive for both parents to take such leave. The work-life balance Directive establishes “a payment or an adequate allowance at least equivalent to what the worker concerned would receive in case of sick leave.”⁸⁹ Parents returning from parental leave may request changes to their working hours and/or working patterns for a set period of time.⁹⁰ The employer has to consider and respond to such requests, taking into account both the employer’s and the worker’s needs. Even if this is a rather weak provision, it might offer possibilities in practice to adjust working time and working hours while remaining employed.⁹¹ Member States also must take the necessary measures to entitle workers to time off from work for urgent family reasons in case of sickness or accident making the immediate presence of the worker indispensable.⁹² The work-life Directive establishes the right for parents to request flexible working arrangements for caring purposes until the children are at least 12 years old.⁹³

b. Kosovo legislation

Article 46 of the Labour Law provides for the protection of pregnant or breastfeeding women employees. Article 48 protects motherhood. Article 49 protects maternity leave and Article 50 the rights of the child’s father, including: “two days paid leave at the birth or upon adoption of the child” or “two weeks unpaid leave after the birth” of a child”. In Article 51, protection of maternity leave is regulated in case of the infant’s death. Article 52 provides for time off due to special care for the child, and Article 53 prohibits termination of contract. Article

⁸³ Article 5.5 and 5.6 of the work-life balance Directive.

⁸⁴ Clause 3 of the Framework Agreement.

⁸⁵ Clause 5.1 of the Framework Agreement and Article 10.2 of the work-life balance Directive.

⁸⁶ Clause 5.4 of the Framework Agreement.

⁸⁷ Clause 5.5 of the Framework Agreement.

⁸⁸ Proposed Directive on work-life balance, p. 12.

⁸⁹ Article 8 of the work-life balance Directive.

⁹⁰ Clause 6.1 of the Framework Agreement.

⁹¹ See also Article 21(2) of the Recast Directive 2006/54: “Where consistent with national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to promote equality between men and women, and flexible working arrangements, with the aim of facilitating the reconciliation of work and private life, and to conclude, at the appropriate level, agreements laying down antidiscrimination rules in the fields referred to in Article 1 which fall within the scope of collective bargaining. These agreements shall respect the provisions of this Directive and the relevant national implementing measures.”

⁹² Clause 7.1 of the Framework Agreement.

⁹³ Article 9.1.

17 of the LGE provides that “every person after parental leave shall be entitled, to conditions which are no less favourable to her and to benefit from good working conditions to which she is entitled during her absence including possibilities of advancement”. Law No. 05/L-023 on the Protection of Breastfeeding also exists. There is no known relevant case law as of yet.

c. Analysis and proposal

The EU concept of pregnancy and maternity protection, maternity, paternity, and adoption leave is transposed into Kosovo law. Kosovo law goes beyond EU GEL by offering Protection of Breastfeeding in legislation. Directive 92/85/EEC provides protection for breastfeeding mothers, but the Directive does not establish protection of breastfeeding itself, including, for example, its duration.

Research by KWN has found that current **maternity leave** provisions in Kosovo may be contributing to discrimination against women in hiring, as well as short contracts for women.⁹⁴ The same research shows that very few employers seem to have information regarding the allowed length of maternity leave.⁹⁵ KWN’s research suggests that the right to maternity leave is being violated. However, there is no known case law in relation to the implementation of these provisions.

Article 46 (1) of the Labour Law could exclude women from their working positions. A suggested rephrasing could be: “Pregnant and breastfeeding women shall be prohibited from engaging in work that is classified as harmful for the health of the mother or the child and they shall be offered another task instead.” In Article 46 (3), “harmful for the health” should be added to the current phrasing: “The Ministry shall issue a sub-legal act for the classification of **harmful**, hard and dangerous forms of work that may damage the health of pregnant and breastfeeding women”.

Article 48 could be complemented by a paragraph in Article 48.4, such as: “The employer should offer flexible working arrangements.”

Evidence suggests that the current financial burden (Article 49.3) on the employer during the first six months of maternity leave likely leads to sex discrimination against women in recruitment and hiring.⁹⁶ Further, evidence suggests that the longer women are on maternity leave, the less likely they are to return to work.⁹⁷ Current provisions also arguably discriminate against men and their right to take leave. These provisions may be one of several issues contributing to the very low (12.7 percent) participation of women in paid employment. Balancing work among women and men at home, including childcare, is important for enabling women’s increased participation in the public sphere. Such issues need to be considered and addressed in amendments to Kosovo’s Labour Law.

According to Article 4 of the proposed work-life balance Directive, **paternity leave** should be strengthened from two paid days to at least 10 paid days as in some EU countries (e.g., France). Since January 2017, in Spain fathers have four paid weeks that should be taken following the child’s birth. In Ireland, since 2016 there is a right to two weeks’ paternity leave. However, the employer is not obliged to pay the father; this depends on the terms of the individual employment contract. There is a provision for State benefits, depending on a father’s record of social welfare contributions. In order to avoid any discrimination between married

⁹⁴ KWN, *Striking a Balance*, Prishtina: KWN, 2016 available at: <http://www.womensnetwork.org/documents/20160504154201373.pdf> (last accessed 26.07.2017).

⁹⁵ Ibid, p. 18.

⁹⁶ Ibid, p. 5.

⁹⁷ Ibid.

and unmarried couples, and between heterosexual and homosexual couples, the right to paternity leave should be without prejudice to marital or family status as defined in national law. Arising from this, Article 50.2.1 of the Kosovo Labour Law should be revised: “The father of the child has the right to ten (10) days paid leave at the birth or upon adoption of the child; this right shall be granted irrespective of marital or family status as defined in Kosovo Law.” In addition, fathers should have the possibility to opt for part of the paid and unpaid maternity leave, so that the couple can organize what is best for the child and their careers. A minimum of 14 weeks’ maternity leave must be respected in accordance with EU law.

Paternity leave carries implications for fathers and contributes to a shift in the risk perception of employers. The “maternity risk”, which currently contributes to discriminations exclusively against women, becomes a parental risk instead, extending to both sexes and will hence contribute to diminishing discriminatory practices that currently form one of the reasons for high unemployment rates among women.

This is a key point of EU Directive 2010/18 on **parental leave** and Article 5 of the proposed work-life balance Directive: Parental leave must be granted for at least a period of four months as an individual right of both parents. In principle, workers should be able to take all of their leave. It should therefore not be transferable from one parent to the other. However, such transfers may be authorised under the condition that each parent retains at least one of the four months of leave with a view to encouraging equal uptake of parental leave by both parents. The Kosovo Labour Law should include a new Article 50 a, which should establish the following: “Employed parents have an individual right to parental leave of at least four months to be taken before the child turns 12 years old. The four months are not transferable from one parent to the other. The parent who is on parental leave has a right to payment or an adequate allowance to what the worker concerned would receive in case of sick leave”.

This can contribute to gender equality because families will have a financial incentive to share childcare responsibilities. In turn, this can contribute to changing traditional gender norms with regard to family and work, and contribute to an increase in women’s employment rates. In line with the LGE and LPD, it moreover would address the current discrimination that is prevalent against fathers with regard to their right to care for their children. It would facilitate implementing legal requirements for gender responsive budgeting by creating opportunities for state resources related to maternity and paternity leave to be distributed more fairly among women and men. The proposal also can contribute to decreasing gender discrimination in hiring because both women and men will have equal leave rights; thus, they could cost the employer the same amount if they were to take leave. At the socio-cultural level, this scheme can have a positive effect on perceptions of childcare and gender responsibilities.⁹⁸

5. Statutory Social Security Schemes

a. Statutory social security schemes according to EU GEL

In December 1978, Directive 79/7 was adopted, addressing equal treatment between men and women in the field of statutory (public) social security. The Directive prohibits both direct and indirect sex discrimination.⁹⁹ The persons protected are defined in Article 2:

⁹⁸ Ibid, p. 29 and 30.

⁹⁹ Article 4.1.

The Directive shall apply to the working population – including self-employed persons,¹⁰⁰ workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment – and to retired or invalidated workers and self-employed persons.

The Directive applies to statutory schemes that provide protection against the following risks: sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment.¹⁰¹ It also applies to social assistance, but only in so far as it is intended to supplement or replace the statutory schemes covering the above-mentioned risks.¹⁰² Provisions concerning survivors' and family benefits are excluded, except in the case of family benefits granted by way of increases in benefits due in respect of the risks mentioned above.¹⁰³ The Directive contains an exception for provisions relating to the protection of women on the ground of maternity.¹⁰⁴ Other exceptions are listed in Article 7:

- the determination of different pensionable ages for men and women in old-age pensions and retirement pensions;
- certain advantages related to the fact that the persons concerned had brought up children and may have interrupted employment for that purpose.

The GGP within the 28 Member States is one of the many manifestations of inequality between men and women. In 2012, the GGP, the gap between the average pre-tax income received as a pension by women and that received by men, stood at 38 percent in the 65 and over age group.¹⁰⁵ According to Miller:

The principal causes of that gap are discrimination, segregation – resulting in the over-representation of women in sectors where pay is lower than in sectors dominated by men – and career breaks. The social, marital and/or family status of women pensioners also has an influence on the GGP, with widows being the worst off in this respect. What is more, there is a positive correlation between the GGP and the number of children a woman has brought up: those who play a leading role in the upbringing of children inside a household are obliged to take repeated career breaks and, in many cases, to work on a part-time basis. By way of example, women whose careers spanned a period of less than 14 years are subject to a GGP that is twice as high (at 64%) as that faced by women with longer careers (32%). All of these factors drive down women's pensions and must therefore be addressed.¹⁰⁶

¹⁰⁰ Self-employed persons include only persons who are registered.

¹⁰¹ Article 3.1 (a).

¹⁰² Article 3.1 (b).

¹⁰³ Article 3.2.

¹⁰⁴ Article 4.2.

¹⁰⁵ The Gender Pension Gap in Pensions in the EU:

https://www.ewla.org/sites/default/files/EC_the%20gender%20pension%20gap.pdf last accessed 21.0.2017).

¹⁰⁶ Miller, Katharina: Gender Pension Gap, available at: <http://legal-dialogue.org/gender-pension-gap> (last accessed 23.06.2017).

There is a Draft Report on the need for an EU strategy to end and prevent the gender pension gap (2016/2061 (INI)). However, as of yet, there is no specific EU legislation to end the GGP.

b. Personal and material scope of the relevant Kosovo legislation

Article 16 of the LGE prohibits gender discrimination related to occupational social security, but does not prohibit discrimination in public social security schemes related to work. There is no known case law. According to the KWN report, *Budgeting for Social Welfare*, men tend to receive higher pensions than women because of their prior, paid work experience.¹⁰⁷

c. Analysis and proposal

While the LGE prohibits gender discrimination related to occupational social security, it does not explicitly prohibit discrimination in public social security schemes at work. It is strongly recommended that the LGE extends its protection against discrimination to public social security schemes. Further, there is no annual GGP in order to see how the legislation is implemented in practice. Due to the way in which information is maintained by courts, it is unclear whether any case law exists. Some proposals for amendments in the existing law will be made (see for example, Chapter III I) c).

6. Self-employed Capacity

a. Self-employed capacity according to EU GEL

Directive 2010/41 was adopted (repealing Directive 86/613), with an implementation date of 5 August 2012. It covers issues related to the application of the principle of equal treatment between men and women who are self-employed,¹⁰⁸ and issues unaddressed by the Recast Directive and the Statutory Social Security Directive.¹⁰⁹ Under conditions laid down by national law,¹¹⁰ the Directive applies to self-employed workers, meaning all persons pursuing a gainful activity for their own benefit, and to the spouses of self-employed workers. The Directive also applies to the life partners of self-employed workers, when and insofar as recognised by national law, where they habitually participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks.¹¹¹ They do not have to be employees or business partners.

The principle of equal treatment on the grounds of sex applies for instance, in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.¹¹² The definitions of direct and indirect discrimination, harassment, sexual harassment, and positive action are similar to the definitions in the non-discrimination and gender equality directives adopted since 2000.¹¹³ An instruction to

¹⁰⁷ KWN, *Budgeting for Social Welfare*, 2015, p. 14.

¹⁰⁸ Article 4.

¹⁰⁹ Article 1.1.

¹¹⁰ Article 2 (a).

¹¹¹ Article 2.b.

¹¹² Article 4.1.

¹¹³ Articles 3, 4.2 and 5.

discriminate amounts to discrimination.¹¹⁴ The Directive does not extend rights to the social protection of the self-employed, but requires that where a system for social protection for self-employed workers exists in a Member State, that Member State must take the necessary measures to ensure that spouses and life partners can benefit from social protection in accordance with national law.¹¹⁵ This is particularly because the Member State may decide whether the social protection is implemented on a mandatory or voluntary basis.¹¹⁶

The Directive also contains a provision on maternity benefits.¹¹⁷ Member States must take the measures necessary to ensure that female self-employed workers and female spouses and life partners may, in accordance with national law, be granted a sufficient maternity allowance enabling interruptions to their occupational activity owing to pregnancy or motherhood for at least 14 weeks (on a mandatory or voluntary basis). The allowance is deemed to be sufficient if it guarantees an income at least equivalent to the allowance which a person would receive in case of a break in her activities connected with her state of health. The same is true if it is equivalent to the average loss of income in relation to a comparable preceding period; this can be subject to any ceiling laid down under national law. The allowance is also deemed to be sufficient if it is equivalent to any other family related benefit.

Member States also have to take measures to ensure access to any existing temporary replacements or social services.

Equality bodies should provide, *inter alia*, independent assistance to victims of discrimination and should conduct independent surveys.¹¹⁸

b. The personal and material scope of Kosovo law

Self-employed capacity is mentioned in LGE Article 3.1.21 within the occupational social security schemes:

on the progressive implementation of the principle of equal treatment for men and women in matters of social security whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.

c. Analysis and proposal

The EU concept of self-employed capacity is not transposed correctly into Kosovo law. Again, it was not possible to determine whether any relevant case law exists.

The status of self-employed parents regarding maternity and parental rights should be equal to that of parents who are employees (see Article 49 of the Kosovo Labour Law). Kosovo's compulsory health insurance still is being worked out and is not yet finalized or implemented in practice. In the future, self-employed parents must have the status of insured persons in the compulsory health and pension insurance system. Self-employed parents, within the meaning of the Labour Law, should include persons who themselves perform certain

¹¹⁴ Article 4.3.

¹¹⁵ Article 7.1.

¹¹⁶ Article 7.2.

¹¹⁷ Article 8.

¹¹⁸ Article 11.

activities. Consequently, the position of female spouses of self-employed workers (including non-marital spouses) is determined according to their own employment, self-employment, unemployment or other status, within the meaning of Article 49 of the Labour Law.

Under Article 4.4 of the Law on Craft Trades, members of the tradesman's family are entitled to help the tradesman with the performance of his or her activities (without having to be employed by him or her). However, there is no provision granting the spouses of self-employed workers social protection or maternity benefits based exclusively on this family relationship. These entitlements should be provided in the Law on Craft Trades in accordance with their personal status in the statutory insurance system (i.e. pension, sickness, unemployment).

Apart from this, provisions should be made to encourage the inclusion of both spouses working in the same family business, in Kosovo's social security system.

7. Goods and Services

a. Goods and services according to EU GEL

Directive 2004/113 applies to all persons who provide goods and services, which are available to the public both in the public and private sectors, combating discrimination based on sex in access to and supply of goods and services.¹¹⁹ This includes public bodies. This applies to the provision of goods and services offered outside the area of private and family life and the transactions carried out in this context.¹²⁰ The Directive does not cover media content, advertising content or education.¹²¹

b. Implementation of Directive 2004/113 in Kosovo

Article 19 of the LGE prohibits gender discrimination in access to and supply of goods and services.

c. Analysis and proposal

The EU concept of goods and services is formally transposed into Kosovo law. There is no information as to how the legislation is implemented in practice, nor is there any known case law. Some proposals for amendments to the existing law will be offered.

Kosovo law does not refer specifically to cases of insurance contracts. While no known research exists regarding whether contracts differ for women and men in Kosovo, discussions with private insurance companies suggest that health insurance premiums, at least, seem to be the same for women and men.¹²² In other countries, insurance contracts often are offered on different terms to men and women, both as regards the premiums and the benefits, particularly in private pension schemes. These differences are based on the fact that, on average, women live longer than men and that the insurance companies therefore run a higher financial risk in insuring women than in insuring men. Further research could examine this issue in Kosovo. Article 5.1 of the Directive therefore stipulates that:

¹¹⁹ Article 1.

¹²⁰ Article 3.1.

¹²¹ Article 3.3.

¹²² KWN conversations with five main insurance companies, 28 July 2017.

Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.

This often is referred to as the “unisex” rule. A provision allowing proportionate differences in individual premium and benefits, where the use of sex is a determining factor in risk assessment,¹²³ was invalidated by the CJEU.¹²⁴

In any event, costs related to pregnancy and maternity may not result in differences in individual premiums and benefits.¹²⁵ Insurance contracts in Kosovo should be analysed with regard to these aspects.

Other areas where gender-based discrimination could occur in accessing goods and services include: financial services; access to gyms, hotels, and restaurants; sexual harassment in healthcare; for transpeople in the transition period or trying to access healthcare for transition; taxation; housing; employment-related insurance schemes; access to public transport; equal access to pension; and self-employed workers' access to private insurance. Kosovo does not address these potential areas of discrimination clearly enough in existing law. It could be addressed in the LGE.

¹²³ Article 5.2.

¹²⁴ Case C-236/09 *Test-Achats*.

¹²⁵ Article 5.3.

II. Central Concepts of EU Gender Discrimination Law

The central concepts of EU GEL are laid down in most gender equality directives and are often the subject of further interpretation by the CJEU. The five concepts are direct and indirect discrimination, positive action, instruction to discriminate, harassment on grounds of a person's sex, and sexual harassment.

1. Direct Discrimination

a. Direct discrimination according to EU GEL

According to the Recast Directive,¹²⁶ direct discrimination occurs “where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.” As a rule, direct discrimination is prohibited, unless a specific written exception applies, such as that the sex of the person concerned is a determining factor for the job. For example, a male character in a film has to be a man.

b. Direct discrimination in Kosovo law

Prohibition of direct discrimination is established in Art 3 (1.5) of the LGE; Article 4.1.1. of the LPD 2015; and Art 5.2 of the Labour Law.

c. Analysis and proposal

The concept of direct discrimination is correctly implemented. Further, Kosovo law goes beyond EU law. It foresees also the case of severe and multiple discrimination (LPD, articles 4 and 5), as well as implements the Case Law concept of discrimination by association.¹²⁷ Kosovo can consider issuing an explanatory guidance, based on EU GEL case law,¹²⁸ of the concrete application and meaning of anti-discrimination, distributing it to government officials, companies, stakeholders, and civil society. This could facilitate broader understanding of the concept of direct discrimination, towards improved implementation of these legal provisions. While AGE has recently launched a commentary on the LGE,¹²⁹ additional guidance including examples of EU GEL case law would be useful for officials in addressing discrimination claims in the future.

¹²⁶ Article 2.1. (a).

¹²⁷ Case C-303/06, *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-05603. Discrimination by association occurs when someone is discriminated against by virtue of his/her Association with someone who possesses one of the protected characteristics, without having the characteristic him/herself. For example, in the Coleman case, Ms. Coleman claimed she was subjected to discrimination because she was the mother of a child with a disability. As such, she suffered discrimination by Association with respect to disability.

¹²⁸ For example, Case C-79/99, *Julia Schnorbus v Land Hessen* [2000] ECR I-10997; Case -73/08, *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française* [2010] ECR I-02735; C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* ECR [1990] I-03941; Case C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault* [1998] ECR I-02011; C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)* [2001] ECR I-06993; C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-05187.

¹²⁹ Republic of Kosovo, Government, Agency for Gender Equality, Commentary on the Law on Gender Equality, 2017, at: <http://abgj.rks-gov.net/Portals/0/ZKM%20Komentari%20%20LBJ%20-%20AL.pdf>.

2. Indirect Discrimination

a. Indirect discrimination according to EU GEL

According to the Recast Directive,¹³⁰ indirect discrimination occurs:

where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

Indirect discrimination is very much concerned with the effects of a certain treatment and takes into account everyday social realities. For instance, less favourable treatment of part-time workers will often amount to indirect discrimination against women as long as women tend to work on part-time terms more than men. Different from direct discrimination, possibilities for justification are much broader. There is a borderline between direct and indirect discrimination, which sometimes can be difficult to work out. Discrimination can be the application of different rules to comparable situations and the application of the same rule to different situations, as described in EU case law.¹³¹

b. Indirect discrimination in Kosovo law

Prohibition of indirect discrimination is established in Art 3 (1.6) of the LGE; Article 4.1.2. of the LPD 2015; and Art 5.2 of the Labour Law.

c. Analysis and proposal

The concept of indirect discrimination is correctly implemented. Kosovo law goes beyond EU law. It foresees also the case of severe and multiple discrimination and implements the Case Law concept of discrimination by association.¹³² While the legal provisions are clear, there is no known case law. Therefore, insufficient information exists regarding how provisions relating to indirect discrimination have been applied in practice.

In order to facilitate application in practice, the government of Kosovo can issue guidance based on EU GEL case law,¹³³ regarding the concrete application and meaning of anti-

¹³⁰ Article 2.1. (b).

¹³¹ Case C-394-96, *Mary Brown v Rentokil Ltd* [1998] ECR I-04185 or Case C-83/14 *CHEZ Razpredelenie Bulgaria* AD v *Komisia za zashtita ot diskriminatsia* [2015] ECR, at: https://curia.europa.eu/jcms/jcms/P_106320/en/?rec=RG&jur=C&anchor=201507C0202 (last accessed 22.05.2017): PCP puts a group xy at a particular disadvantage. That disadvantage is shared. The burden of proof shifts. It is direct discrimination if meters are high because it is a majority Roma area. It is indirect discrimination if the meter is high because of incidence of meter tampering. It should be considered the effect of indissociability of the reason and gender.

¹³² LPD, Article 5 and Article 4, para. 1.10, respectively. Case C-303/06, *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-05603.

¹³³ For example: Case C-79/99, *Julia Schnorbus v Land Hessen* [2000] ECR I-10997; Case C-73/08, *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française* [2010] ECR I-02735; Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jonge Volwassenen (VJV-Centrum) Plus* [1990] ECR I-03941; Case C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault* [1998] ECR I-02011; Case C-109/00 *Tele Danmark A/S v Handels- og*

discrimination. This should be distributed to government officials, companies, stakeholders, and civil society.

3. Instruction to Discriminate

a. Instruction to discriminate according to EU GEL

EU law¹³⁴ considers instruction to discriminate on grounds of a person's sex as a form of discrimination. Thus, where an agency is requested by an employer to supply workers of one sex only, in the absence of permitted justification (sex as determining factor, e.g., actor or model), both the employer and the agency would be liable for a breach of the equal treatment provisions.

b. Instruction to discriminate according to Kosovo law

The LGE addresses instruction to discriminate as a form of discrimination (Article 4.5). The LPD prohibits "incitement" to discriminate in Article 4.1.4.

c. Analysis and proposal

The concept of instruction to discriminate is correctly incorporated in the LGE. However, while the LPD contains the word "incitement", it does not contain the term "instruction", and these differ. Therefore, it is proposed to amend the LPD to add an article on "instruction" in addition to "incitement" in Article 4.1.4. Insufficient information exists regarding the correct implementation of the instruction to discriminate, in practice.

4. Positive Action

a. Positive action according to EU GEL

The concept of positive action is defined in the TFEU as follows:

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or prevent or compensate for disadvantages in professional careers.¹³⁵

The Recast Directive states that: "Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life."¹³⁶ Further, the Charter of Fundamental Rights establishes: "The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex".¹³⁷ Like indirect discrimination, positive action also considers everyday social realities. However, it goes much further by

Kontorfunktionærernes Forbund i Danmark (HK) [2001] ECR I-06993; Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-05187.

¹³⁴ Article 2.2. (b) Recast Directive.

¹³⁵ Article 157.4.

¹³⁶ Article 3.

¹³⁷ Article 123.

requiring additional steps to be taken in order to realise true, genuine equality in social conditions. The provisions permitted as positive action measures aim at eliminating or counteracting detrimental effects on women in employment or in seeking employment. These effects arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women. Similarly, positive measures should help fight stereotypes. For example, a positive action would be the preferential treatment of female employees in the allocation of nursery places when the number of places, due to financial constraints, is rather limited. An even more far-reaching and controversial example is female quotas in recruitment and promotion.

b. Positive action in Kosovo law

Positive action is legislated under Article 3 (I.13.), 5 of the LGE; Article 3 (I.14.), 6 of the LGE; and Article 7.1. of the LPD (2015).

c. Analysis and proposal

The Kosovo LPD of 2015 goes beyond EU law since it authorizes positive actions for all 30 criteria mentioned in Article 1. The catalogue of criteria is not exhaustive since “any other ground” may be taken into account. France, for example, only authorizes positive actions relating to a few criteria (e.g., sex, age, domiciliation). The extent to which positive action is understood and implemented in Kosovo requires further study.

It should be defined in Kosovo law that companies, universities, schools, and the public administration may adopt gender equality action plans with positive actions, and submit them for review to AGE, prior to final approval by the given institution. Such plans should aim to promote access and promotion of women to jobs where they are underrepresented, as allowable measures foreseen by the current LGE. The conditions set out by EU case law and mentioned in Article 7 must be respected in those plans: proportionality, temporality and automatic preference.

The Employment Agency, education institutions, and Kosovo’s civil service should set up measures to stimulate women’s entrepreneurship and make better use of their economic potential by: encouraging girls and women to choose areas of education that are traditionally dominated by men and promoting the achievements of women in the sciences, education and IT.

5. Harassment

a. Harassment according to EU GEL

According to Article 2.1 (c) of the Recast Directive, **harassment** occurs “where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.”

b. Harassment as defined by Kosovo law

Kosovo Law defines harassment as “a situation where an unwanted conduct related to the gender, sex and gender identity, with the purpose or effect or violating the dignity of a

person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment” (Article 3(1.1.1) LGE). Article 4(1.1.3) of the Kosovo LPD also states that harassment:

shall be deemed to be discrimination, when an unwanted conduct (including but not limited to unwanted conduct of sexual and/or psychological nature), which has the purpose or effect of violating the dignity of the person and of creating an intimidating, hostile, degrading, humiliating or offensive environment based on the grounds set out in Article 1 of this Law.

Further, harassment is a criminal offence according to Article 186 of the Kosovo Criminal Code.

c. Analysis and proposal

Article 186 of the Kosovo Criminal Code goes beyond EU law since it provides a criminal offence. The EU Directive does not oblige implementation of the concept of harassment in criminal law. For example, France did so, but Germany only implemented it in civil anti-discrimination law. The extent to which these provisions have been implemented in practice remains unknown.

6. Sexual harassment

a. Sexual harassment according to EU GEL

According to Article 2.1(d) of the Recast Directive and Article 2(d) of the Goods and Services Directive sexual harassment occurs: “where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.” The main difference between “harassment” and “sexual harassment” is that in the case of harassment on the grounds of a person’s sex, the person is ill-treated because he or she is a man or a woman. Sexual harassment, rather, involves a person being subject to unwelcome sexual advances or, for instance, that the behaviour of the perpetrator aims at obtaining sexual favours. In concrete situations, the distinction between the two may be very unclear.

b. Sexual harassment in Kosovo law

Sexual harassment is not defined within Kosovo’s criminal law. However, within civil law, Article 3 (1.1.1) of the LGE defines sexual harassment, in that it:

shall mean any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

c. Analysis and proposal

Either the LGE or Art. 4 of the LPD should be extended with the following sentence: “Sex discrimination includes harassment and sexual harassment, as well as any less favourable treatment based on a person’s rejection of or submission to such conduct (Article 2.2(a) of the Recast Directive).” The Recast Directive obliges Member States to integrate in the definition of

sexual harassment “any less favourable treatment based on a person’s rejection of or submission to such conduct”.¹³⁸ Also, “sexual harassment cannot be objectively justified” should be added to LGE.

Since harassment is integrated in Kosovo Criminal law, it should be the same for sexual harassment. There is no reason not to do so; the status quo establishes an unjustified hierarchy between the concepts regarding the need for protection, sanctions and importance of both forms for the legislator. For example, Article 184 of the Spanish Criminal Code establishes: “A person will be punished as guilty of sexual harassment when asking for favours of a sexual nature, for oneself or a third party, in the scope of a labour relation, educational relation or of services, and with such behaviour creating for the victim an objective and serious intimidating, hostile or humiliating situation.” This could serve as an example for Kosovo Criminal law.

The LGE does not explicitly define the addressee of the provisions prohibiting sexual harassment. The provision in Article 3 (1.11) defines the act of sexual harassment itself. It should be made clear that sexual harassment also applies in labour relationships. Therefore, in the Kosovo Labour Law there should be introduced an obligation for the employers “to define and implement rules and procedures to be followed in cases involving sexual harassment complaints”, as provided by Article 130 of the Croatia Labour Code.¹³⁹ The Croatia Labour Code establishes further:

Employers employing more than 20 employees are obliged to appoint a specific person who is authorized to examine and respond to sexual harassment complaints in addition to the company owner or executive director. The employer needs to examine and respond to any sexual harassment complaint within 8 days. The response must include all appropriate measures preventing the persistence of sexual harassment. If the employer fails to take appropriate preventive measures or takes evidently ineffective measures, the harassed employee has the right to withdraw from work until she is provided with the appropriate protection. If she uses that right she is obliged to file the harassment lawsuit within 8 days from her decision to withdraw. During the period of withdrawal, the employee is entitled to all employment benefits including her full salary.¹⁴⁰

The United Kingdom (UK), France and Germany have taken initiatives aimed at raising awareness and preventing incidences of sexual harassment in public transportation services:

For example, the UK’s Project Guardian aimed to reduce sexual assault and unwanted sexual behaviours on public transport in London. In addition, Transport for London launched a sexual harassment campaign in 2015 which aimed to increase reporting of unwanted sexual behaviours on public transport. Similarly, France launched its awareness-raising campaign “Stop - ça suffit” in July 2015; a 12-point action plan designed to tackle sexual harassment on public transport.¹⁴¹

¹³⁸ Article 2.2.a.

¹³⁹ Selanec, G., *Croatia, in Harassment related to Sex and Sexual Harassment Law in 33 European Countries*, 2011, p. 61, available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=52696 (last accessed 27.07.2017).

¹⁴⁰ Ibid, p. 61.

¹⁴¹ EPRS: Gender Equal Access to Goods and Services Directive 2004/113/EC, Study, January 2017, p. 1-17, available at

In 2016 and 2017, public transport in Berlin undertook a similar campaign called “Nein heißt nein”, which included the distribution of 80,000 postcards and a 39-second movie within the German underground (U-Bahn).¹⁴²

III. How can EU GEL be enforced in Kosovo?

According to the “EU GE acquis”, there are seven elements to enforcing EU GEL within Member States and future Member States. These elements include invoking GEL at national courts; burden of proof; defending rights; sanctions; victimisation; equality bodies; and social dialogue. This chapter discusses each element.

1) Invoking gender equality law in national courts

a. According to EU GEL

Whenever EU GEL is relied upon in national courts, they are able (and courts of last instance are *obliged*) to request preliminary rulings from the CJEU.¹⁴³ One of the most important judgments in the field of the “EU GE acquis” was the already mentioned judgment in *Defrenne II*. Here the CJEU decided that Article 157 of TFEU¹⁴⁴ has horizontal direct effect. This means that it can be relied on by individuals before national courts, not only against the state, but also against individuals, such as private employers. As discussed previously, the CJEU has played a very important role in improving the ability of women and men to enforce their equality rights.

b. According to Kosovo law

While court decisions recently have been made available online,¹⁴⁵ they are not yet fully searchable by theme, which makes finding relevant case law fairly difficult. Therefore, it is nearly impossible to obtain information on how courts have interpreted anti-discrimination law. Further research is needed on discrimination cases brought to courts and how these have been treated.

Limited information is available as to whether people have been punished for sexual harassment as a criminal offence because while harassment is defined as a crime, “sexual harassment” is not. When KWN contacted the Kosovo Judicial Council in 2015, the Council stated that it does not track such cases because “sexual harassment” is not enlisted as a separate criminal offense. As civil cases involve several different potential methods of being reported and treated, it was difficult to find any consolidated information pertaining to these cases either.

http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU%282017%29593787_EN.pdf (last accessed 27.07.2017).

¹⁴² BVG zeigt in der U-Bahn "Nein heißt nein"-Film, available in <http://www.tagesspiegel.de/berlin/berliner-kampagne-gegen-sexuelle-uebergreife-bvg-zeigt-in-der-u-bahn-nein-heisst-nein-film/19697218.html> (last accessed 27.07.2017).

¹⁴³ Article 267 of the TFEU.

¹⁴⁴ Then Article 119 EEC.

¹⁴⁵ See the website operated by FOL Movement: <http://www.egykata.org/> (last accessed 26.07.2017).

c. Analysis and proposal

This concept does not seem to be implemented correctly, as the law seems not to be applied correctly. The fact that invoking GEL in national courts is not applied correctly cannot be changed by the introduction of new laws or amendments of existing laws. It does not seem to be a problem of law, but rather a problem of applying the existing law. Therefore, the following actions are suggested:

- Training for legal actors on the meaning and implementation of EU GEL with special focus on:
 - Judges
 - Lawyers
 - Prosecutors
 - Civil society, particularly associations focusing on gender equality
 - Law faculties focusing on labour laws, fundamental rights courses or seminars, and moot courts for law students
- The Kosovo Justice Academy should establish a database on (EU) and Kosovo case law
- Organize a large information campaign on parents' rights, particularly fathers' rights, especially related to pregnancy and maternity, in media, public spaces, maternity wards, and hospitals and parental leave.
- Identify lawyers willing to bring cases to court (pro bono).

2) Burden of Proof

a. According to EU GEL

The Recast Directive states:

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.¹⁴⁶

In cases of discrimination, the burden of proof would shift to the employer to establish that there was no discrimination or that it was justified.¹⁴⁷

b. According to Kosovo Law

Burden of proof is regulated by Article 20 of the LPD.

¹⁴⁶ Article 19.

¹⁴⁷ Case C-127/92 *Dr. Pamela Mary Enderby v Frenchay Health Authority y Secretary of State for Health* [1993] ECR I-05535.

c. Analysis and proposal

The concept of burden of proof is correctly implemented in Kosovo law. Nevertheless, Article 20 of the LPD should be amended by the following: “1. Direct discrimination is presumed if there are (a) elements which show some recurrence of unfavourable treatment towards a given sex or (b) elements that reveal a situation where the victim is treated worse compared with the situation of a comparable person. 2. Indirect discrimination is presumed if there is (a) general statistics concerning the situation of the group of which the victim is a member, or generally known facts; or (b) the application of an intrinsically suspicious criterion; or (c) basic statistical information revealing unfavourable treatment”.¹⁴⁸

In any case, judges, prosecutors, and lawyers should be trained on the application of burden of proof, based on case law and examples. This could be supplemented with better monitoring of the justice system, towards encouraging accountability in implementing the law.

There is no known case law on burden of proof.

3) Defending Rights

a. According to EU GEL

According to the Recast Directive, Member States have the obligation to:

ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial procedures for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.¹⁴⁹

Further, “Associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions”¹⁵⁰ of equal treatment directives are complied with, have *locus standi*. Such associations, like women lawyers’ associations, may engage, either on behalf or in support of the complainant, with his/her approval, in any judicial or administrative procedure provided, for the enforcement of the obligations under the “EU GE acquis”.

b. According to Kosovo law

The LPD foresees five different types of procedures that victims of discrimination can pursue depending on their case. The right to bring a court case concerning a discrimination claim is extended to and concerns civil, administrative and criminal procedures with regard to discrimination and harassment on the grounds of sex and gender.

Article 13.2 of the LPD foresees “Associations, organizations or other legal entities may initiate or support legal procedures on behalf of the claimants, with their consent, for the development of administrative or judicial procedures foreseen for the implementation of obligations set in this law.”

¹⁴⁸ See Article 33 of the Belgian Law of 10 May 2007 on the fight against discrimination between women and men.

¹⁴⁹ Article 17.1 of the Recast Directive.

¹⁵⁰ Article 17.2 of the Recast Directive.

Article 14.3 of the LPD states: “The subjects may submit lawsuits on discrimination pursuant to this law, not later than five (5) years from the day the damaged party becomes aware of this violation.”

c. Analysis and proposal

The concept of defending rights does seem to be formally transposed. Nevertheless, it does not seem to be applied in practice. It is recommended to create a list of existing associations and organizations, and then to train lawyers who can work for or in these organizations.

Article 14.3 of the LPD goes beyond EU law as the latter does not impose five years of existence so far; in order to limit abuse, an existence of at least two years can be suggested.

Consider supporting class actions. These should be introduced for several women in a comparable situation related to discrimination in labour law proceedings. These could be filed by trade unions or associations. They also could be introduced in order to tackle systematic discrimination with regard to sex.

4) Sanctions, Compensation and Reparation

a. According to EU GEL

The CJEU stated: “It is impossible to establish real equality of opportunity without an appropriate system of sanctions”.¹⁵¹ The two main duties of Member States under EU GEL are to protect against infringements, which is the general duty to provide effective, proportionate and dissuasive sanctions for the effectiveness of EU-law (the EU GEL directives), and to provide relief for victims, which is the general duty to secure adequate reparation and compensation to victims of discrimination. Also, according to the EU Charter of Fundamental Rights¹⁵²: “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article”.¹⁵³ According to the Recast Directive, Member States have the obligation to ensure damages to victims:

Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered.¹⁵⁴

The Recast Directive further states: “The penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.”¹⁵⁵ It also provides:

¹⁵¹ Case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* ECR [1984] 01891, p. 22.

¹⁵² Article 47.1.

¹⁵³ See further: Article 17 of Recast Directive and Article 8 of Goods and Services Directive, which also establishes the obligation to provide a remedy for victims.

¹⁵⁴ Article 18.

¹⁵⁵ Article 25.

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. The penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.¹⁵⁶

A sanction cannot be purely symbolic in nature: “The severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect (...) while still respecting the principle of proportionality.”¹⁵⁷ Damages can constitute a dissuasive sanction:

Article 18 of the Recast Directive requires Member States which choose the financial form of compensation to introduce in their national legal systems, in accordance with detailed arrangements which they determine, measures providing for payment to the person injured of compensation which covers in full the loss and damage sustained, but does not provide for the payment of punitive damages.¹⁵⁸

It is not enough for Member States only to provide for damages as sanctions, since there is a duty to provide sanctions in cases where there is no identifiable victim.¹⁵⁹ Since in many cases the amount of damages awarded will not be dissuasive, most victims cannot or will not bring a discrimination claim for damages. Further, in many cases, there will be private settlements, which may run counter to the preventive interest (contingent on the amounts and absence of publicity). The best way would be to mix the logic of sanctions and damages.

b. According to Kosovo Law

Sanctions are transposed into Kosovo law in Article 23 (Punitive Provisions) of the LGE and Article 92 of the Labour Law. The LPD also sets offence provisions related to different forms of discrimination (Article 23).

In KWN’s view, the punitive provisions in LGE are insufficient for preventing individuals or companies from engaging in gender-based discrimination. The Law No. 2004/2 on Gender Equality foresaw higher fines than the 2015 LGE, currently in force. The reasoning given for lowering fines was that since not one case was known to have involved fines under the old LGE, lower fines might encourage courts to give more fines.¹⁶⁰

c. Analysis and proposal

The concept of sanctions is implemented formally. Nevertheless, the aforementioned argument made for decreasing fines in the 2015 LGE as compared to the prior LGE is unconvincing. Nor does lowering fines resolve the challenge of bringing cases to court. It is up to judges to define the appropriate sanction in each individual case, depending on the facts provided and the gravity of the act. Kosovo law provides damages for victims of GEL related

¹⁵⁶ Article 25.

¹⁵⁷ Case C-81/12 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării* [2012], p. 64.

¹⁵⁸ Case C-407/14, *Camacho* [2014] p. 37.

¹⁵⁹ C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* ECR [2008] I-05187.

¹⁶⁰ KWN conversations with members of the legal working group.

issues in Art. 16 of the Law on Protection from Discrimination. Nevertheless, in this context it should be made clear that damages should cover full loss and damages (and thus be dissuasive in some cases). They must be proportionate to the damages suffered and equivalent (to national damages in analogous situations). Finally, they have to be accessible to victims. It is strongly recommended to reconsider the concept of sanctions and damages.

5) Victimization

a. According to EU GEL

The Recast Directive¹⁶¹ states that:

Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.¹⁶²

b. According to Kosovo law

Article 3 (1.19) and Article 4.6 of the LGE state that:

Victimization - occur[s] when a person suffers an adverse or negative consequence in response to a complaint (started procedures) or actions in order to apply the principle of equal treatment, as defined in Article 1 of this law, and/or when such person provides information, evidence or assistance in relation to the complaint procedure in case of discrimination (...).

c. Analysis and proposal

The concept of victimization is implemented formally in Kosovo law.

6) Equality Bodies

a. According to EU GEL

The "EU GE acquis" obliges Member States to designate equality bodies. The tasks of these bodies are the promotion, analysis, monitoring and support of equal treatment.¹⁶³ They may form part of agencies with responsibilities at the national level for defending human rights or safeguarding individual rights.¹⁶⁴ These bodies have the competence to provide independent assistance to victims of discrimination, to conduct independent surveys concerning discrimination and to publish independent reports and make recommendations. The Recast Directive provides that:

¹⁶¹ Article 24.

¹⁶² Case C-185/97 *Belinda Jane Coote v Granada Hospitality Ltd.*, [1998] ECR I-5199.

¹⁶³ Article 20.1 of the Recast Directive.

¹⁶⁴ Article 20.1 of the Recast Directive.

Member States shall ensure that the competences of these bodies include: (a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 17(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination; (b) conducting independent surveys concerning discrimination; (c) publishing independent reports and making recommendations on any issue relating to such discrimination; (d) at the appropriate level exchanging available information with corresponding European bodies such as any future European Institute for Gender Equality.¹⁶⁵

However, directives only provide minimum standards for the competences and limited functional independence of equality bodies; they do not guarantee complete independence, effectiveness, sufficient powers and adequate resources for equality bodies.¹⁶⁶ A Working Paper¹⁶⁷ elaborated by Equinet has suggested including minimum basic standards alongside standards that would ensure that the full potential of an equality body is achieved. It does so to ensure that standards recognise and: “Enable the particular role, capabilities, and potential of equality bodies, respond to the wider institutional architecture in which equality bodies are located and address the changed context for equality bodies and new trends and evolution in their establishment, mandates, and operation.”

All EU Member States have ratified the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). This provides, inter alia, for “National Women’s Machinery”. The periodic reports responding to the issues or questions raised by the CEDAW Committee usually include material relation to the National Women’s Machinery of the relevant States Parties. In addition, the Beijing Platform for Action (BPfA) (accepted by all EU Member States) emphasises that the national machinery for the advancement of women is the central policy-coordinating unit inside the government.¹⁶⁸ At the annual sessions of the Commission on the Status of Women (CSW), EU input is presented by one Member State.

b. According to Kosovo law

Article 7 of the LGE establishes the Agency for Gender Equality as “an Executive Agency (hereinafter the AGE), which acts within the Office of the Prime Minister (OPM).”

AGE does not have the competence to support a victim in court or to recommend any lawyer, as such services are provided by other institutions, including free legal aid if relevant, as regulated by law. Nor is providing independent assistance to victims of discrimination part of AGE’s mandate because this is executed by the Ombudsperson, as part of its mandate. However, according to Article 8 of the LGE, AGE has the right to be heard in every legislative process.

AGE collaborates with the European Institute for Gender Equality (EIGE) and has submitted official reports to the CSW, though Kosovo is not yet a member of the UN.

According to Article 9 of the LGE “the Agency is led by Chief Executive who is responsible for the administration, operation and management of the Agency” and “the

¹⁶⁵ Article 20.2 of the Recast Directive.

¹⁶⁶ Available at: <http://www.equineteurope.org/Equinet-Working-Paper-on-Developing-Standards-for-Equality-Bodies> (last accessed 23.05.2017).

¹⁶⁷ Ibid.

¹⁶⁸ See inter alia, <http://www.un.org.womenwatch> (last accessed 23.05.2017) and http://www1.uneca.org/Portals/ngm/CrossArticle/1/Documents/national_machinery.pdf from the Council of Europe (last accessed 23.05.2017).

appointment, discharge, functions and responsibilities of the Chief Executive shall be accomplished in accordance with the relevant provisions in force [in] the Republic of Kosovo.” Article 12 of the LGE also requires ministries and municipalities to appoint gender equality officials to coordinate implementation of the LGE.

c. Analysis and proposal

The concept of equality body is implemented correctly in Kosovo law. AGE and the Ombudsperson could conduct together independent surveys concerning discrimination, publish additional independent reports specifically related to discrimination and make recommendations on any issues relating to such discrimination. Further, AGE and the Ombudsperson should become members of Equinet European Network of Equality Bodies,¹⁶⁹ in order to exchange case law and best practices.

Based on best practices from other European countries, the AGE should have the right to be heard not only in every legislative process but also before courts. It is suggested to include Article 8.1.14 of the LGE: “should have the right to be heard before courts”. Also, a new Article 8.1.15 should be introduced: “The Agency should have the competence to point out unlawful, discriminatory practices; and to be heard by the Parliament at least once a year on the situation of gender and sexual discrimination in Kosovo.”

The independence of AGE must be guaranteed. There is no definition according to EU GEL for the independence of equality bodies, and it is up to Member States to develop their own systems. One important pillar of independence is an available annual budget. Article 10.1 of the LGE should be amended: “Funds for operation of the Agency on Gender Equality shall be provided from the annual budget of the Republic of Kosovo. The Agency may also accept funds from other local and international sources in accordance with its competencies.”

7) Social Dialogue

a. According to the EU GEL

Within EU law, unions and other representative bodies are often referred to as “social partners”. They can have an important role in furthering implementation of the GEL. The Recast Directive states that:

Where consistent with national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to promote equality between men and women, and flexible working arrangements, with the aim of facilitating the reconciliation of work and private life, [...] and to conclude, at the appropriate level, agreements laying down anti-discrimination rules [...].¹⁷⁰

b. According to Kosovo law

According to LGE, AGE should take adequate “measures to promote equal gender treatment in cooperation with the social partners, through the development of social dialogue

¹⁶⁹ Network of Specialised Equality Bodies, contact: info@equineteurope.org.

¹⁷⁰ Article 21.2.

for employees and employers on issues of particular importance which relate to the realization of their rights arising from employment, social wellbeing and other professional issues.”¹⁷¹

c. Analysis and proposal

The concept of social dialogue is correctly implemented in Kosovo law. According to Article 8 of the LGE, there is a general obligation for social partners to negotiate in collective agreements, measures promoting the equality of treatment and opportunities for women and men or equality plans in those companies required to implement them.

Consider training social partners on the issue, especially about the obligations in Article 157 of the TFEU; Recast Directive; directives on Goods and Services; Statutory Social Security; Self-Employed Workers; Pregnancy; Maternity and Parental Leave (and the new proposal for work-life balance directive); and initiate dialogues. Point out best practices and train social partners on the possibilities they have to support victims in court.

IV. Different Sectors

Specific sectors such as environment, agriculture, competitiveness (including labour rights, trade, and vocational training), human capital, education, public administration reform, decision-making, infrastructure, energy, rule of law and human rights do not have any direct obligations concerning EU GEL. Nevertheless, gender mainstreaming as the public policy concept of assessing the different implications for women and men of any planned policy action, including legislation and programmes, in all areas and levels, is the engine for promoting gender equality in all the aforementioned sectors. According to EIGE:

gender mainstreaming is not a policy goal in itself, but a means to achieve gender equality. Equality between women and men is recognised by the EU as a fundamental right, a common value of the EU, and a necessary condition for the achievement of the EU objectives of growth, employment and social cohesion.¹⁷²

Therefore, all programs and policies related to these particular sectors should seek to mainstream gender, also in accordance with the Kosovo LGE, Article 5.

V. EU Law on Gender-based Violence

Unfortunately, to date, no definition, legislation or strategy on violence against women in all its forms has been adopted by the EU. Nevertheless, on 11 May 2017, the Council¹⁷³ adopted two decisions on the signing of the Council of Europe Convention (Istanbul Convention) on preventing and combating violence against women and domestic violence. The

¹⁷¹ Article 8.

¹⁷² EIGE, at: <http://eige.europa.eu/gender-mainstreaming/what-is-gender-mainstreaming> (last accessed 23.05.2017).

¹⁷³ See: <http://www.consilium.europa.eu/en/press/press-releases/2017/05/11-violence-against-women/> (last accessed 23.05.2017).

Istanbul Convention of the Council of Europe is the most comprehensive international treaty on combatting violence against women and domestic violence. The Convention was presented in 2011 and entered into force in August 2014. The Istanbul Convention recognises violence against women as a human rights violation. It addresses violence against women through measures aimed at preventing violence, protecting victims, and prosecuting perpetrators.

By deciding to sign the Istanbul Convention, the EU confirms its commitment to combating violence against women within its territory and globally, strengthens the existing legal framework and its capacity to act. All EU Member States have signed the Istanbul Convention, but only 14 have ratified it. Having the EU join the Convention as well will ensure complementarity between the national and EU level. It will enable the EU to play a more effective role in international fora such as the Council of Europe Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). The decision on signing is the first step in the process of the EU ratifying the Convention. Following the official signing, accession requires the adoption of decisions on the conclusion of the Convention.¹⁷⁴ These decisions will need the consent of the Parliament.

In addition, several directives legally oblige Member States to take certain actions in response to violence against women. These include: Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime; Directive 2011/99/EU on the European protection order; the Self-Employed Capacity Directive; and Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, replacing the Council Framework Decision 2002/629/JHA (30). The last establishes minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings. It also introduces common provisions, considering a gender perspective, to strengthen the prevention of this crime and the protection of victims (Article 1). Regulation (EU) No. 606/2013 of 12 June 2013 addresses mutual recognition of protection measures in civil matters. Further, the European Parliament provides a mandate¹⁷⁵ to take action to end violence against women. The regulation, which is not binding and only suggests a political desire to act in a given area, mentions that:

situations of war and armed conflict, post-conflict reconstruction and economic, social and/or financial crises increase the vulnerability of women individually and collectively to male violence against them and should not be considered as an excuse to tolerate male violence.

Further, albeit with no legal obligation, it “urges the Member States to investigate without delay the extreme human rights abuses against Roma women, penalise the perpetrators and provide adequate compensation to victims of forced sterilisation”.

No EU law exists in reference to gender-based violence as a war crime. Nevertheless, prosecuting gender-based crimes is one of the main objectives of United Nations Security Council Resolution (UNSCR) 1325 on Women, Peace and Security, and in September 2015 the EU High Representative for Foreign Affairs and Security Policy created the post of the European External Action Service Principal Advisor on Gender and on the implementation of Resolution

¹⁷⁴ See also Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, COM (2016) 109 final.

¹⁷⁵ See: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0098+0+DOC+XML+V0//EN> (last accessed 23.05.2017).

1325.¹⁷⁶ In any case, Kosovo should work on its prosecution of gender-based crimes. So far, Kosovo legislation fulfils the requirements of the existing EU law. There will be changes to EU law in order to fulfil the obligations of the Istanbul Convention.¹⁷⁷ It is suggested that Kosovo includes the Istanbul Convention in its Constitution under International Conventions that are applicable, which implies the adoption of decisions on the conclusion of the Convention itself. Additional policy reviews should be undertaken to inform amendments to applicable law provisions, towards better addressing the requirements of the Istanbul Convention and its justiciability within Kosovo law.

¹⁷⁶ See: https://eeas.europa.eu/headquarters/headquarters-homepage_en/5846/15th%20anniversary%20and%20Global%20Review%20of%20UNSCR%201325 (last accessed 27.06.2017).

¹⁷⁷ “The decision on signing is the first step in the process of the EU joining the Convention. Following the official signing, accession requires the adoption of the decisions on the conclusion of the Convention. These decisions will need the consent of the Parliament”, in: <http://www.consilium.europa.eu/en/press/press-releases/2017/05/11-violence-against-women/>.

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- Consolidated version of TFEU: Articles 8-10, 18-19 and 157 TFEU
- Charter of Fundamental Rights of the EU; Chapters III and IV (articles 20-38)

EU Directives (equal treatment between men and women)

- Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of **employment and occupation (recast)**
- Council Directive 2010/18/EU implementing the revised Framework Agreement on **parental leave** concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC

- Council Directive 92/85/EEC 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
- Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of **social security**
- Directive 2010/41/EU of the European Parliament and of the Council 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
- Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of **goods and services**

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- Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (*Test-Achats*)

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CJEU, 28 July 2016, C-423/15, Kratzer

Annex I. Historical Background

The current Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) entered into force in 2009. Originally, the first Treaties entered into force in the 1950s, shortly after the Second World War, which many pioneers of the “European Communities” (now EU) had experienced. The content of these three “founding Treaties” was influenced by the then recent past and by the then current economic realities. The intervening years have seen many amending Treaties to the “founding Treaties”, which resulted in unwieldy documents.

It is helpful to understand the difference between the “European Community/Communities” and the “European Union”. For our purposes, the main Treaty was the European Economic Community Treaty (EECT), which entered into force in 1958. The name was amended to the European Community Treaty (ECT) in recognition of its expanded scope beyond the “economic”, by the Treaty of Amsterdam. The first such Community was created by the European Coal and Steel Community Treaty, which entered into force in 1952. The European Coal and Steel Community Treaty had a life span of only 50 years. It lapsed, or ended, in 2002. The subject matter (coal and steel) have a limited life span. However, these historical treaty developments underline the context in which the Communities came into being.

Before the Lisbon Treaty entered into force on 1 December 2009, the European (Economic) Community, and therefore EC law, was only one part of the EU. Most of the GEL is law that was based on provisions of the E(E)C Treaty which pre-date the EU Treaty. Since the Lisbon Treaty, the EC and the EU have merged into one single unit, the EU, which succeeds and replaces the EC. However, the EU continues to work with the two following treaties. The Treaty on European Union (TEU) lays down the principles and values of the EU, its basic structures and what we may call constitutional provisions. It also deals with the common foreign and security policy, for example. The Treaty on the Functioning of the EU (TFEU) deals with the functioning of economic, social and other policies, as well as the adoption of secondary legislation (such as regulations, directives, etc.) and the roles of institutions and bodies, such as the CJEU. For historical reasons, the Charter of Fundamental Rights of the EU is a separate document to the two Treaties (TEU and TFEU), but its legal status is confirmed in Article 6(1) of the TEU. The Charter entered into force in 2009 and has the same legal value as the two Treaties. The TEU, the TFEU and the Charter all contain provisions that are relevant in the field of gender equality.

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