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Equality and non-discrimination



In 2011, the European Union (EU) and EU Member States took a significant number of legal and policy steps to address issues of equality and non-discrimination. These developments were of particular interest to lesbian, gay, bisexual and transgender (LGBT) persons as well as persons with disabilities. Recognition of the reality of multiple and intersectional discrimination grew. Debates also centred on the permissibility of restricting freedom of religion and belief, both at the level of case law and at that of national legislation.

This chapter analyses developments in legislation, policies and practices that occurred in the areas of equality and non-discrimination at the supranational and national levels in 2011. It begins by providing an outline of issues relating to non-discrimination legislation and policy as a whole and on developments relating to equality bodies. The chapter then moves on to explore developments in relation to the following grounds of discrimination: multiple discrimination; sex; sexual orientation and gender identity; disability; age; and religion or belief. The chapter should be read together with Chapter 6 on racism and ethnic discrimination.

5.1. Cross-cutting developments

The Council of the European Union continued to discuss the European Commission's proposal for a horizontal directive prohibiting discrimination beyond employment on the grounds of sexual orientation, age, disability and religion or belief (Horizontal Directive).¹

At the national level, some EU Member States adopted non-discrimination legislation transposing EU laws on equality. New legislation, for instance, implementing the Equal Treatment Directive,² the Racial Equality

Key developments in the area of equality and non-discrimination:

- equality bodies and legal practitioners in EU Member States begin to frame cases in terms of multiple discrimination and to collect data on cases alleging discrimination on a number of grounds in combination;
- various EU Member States launch legislative, institutional and policy initiatives aimed at tackling discrimination based on sex; the gender pay gap in the labour market, however, is decreasing in just half of EU Member States;
- EU Member States make significant efforts to collect data on the situation of lesbian, gay, bisexual and transgender persons and a number of Member States decide to include same-sex partners in the definition of "family member" for the purposes of free movement and family reunification;
- the European Commission clarifies how the EU is to implement the UN Convention on the Rights of Persons with Disabilities and three more EU Member States ratify the convention;
- preparations for the 2012 European Year of Active Ageing begin. Case law provides an important contribution, especially in combating discrimination against older persons, while employment rates for young persons continue to lag behind those of older persons;
- case law clarifies where restrictions on religious freedom are justified and where they may be considered discriminatory, while some national legislative proposals and their impact on various religious practices of Jews and Muslims remain open to discussion.

¹ European Commission (2008).

² Council Directive 2000/78/EC, OJ 2000 L 303, p. 16.

Directive³ and the Gender Equality Directives⁴ came into force on 1 January in **Poland**.⁵ The legislation implements anti-discrimination provisions concerning gender equality, sexual orientation, racial and ethnic origin, age, disability, religion or belief, creed and nationality. It includes references to various forms of discrimination, such as direct discrimination, indirect discrimination, unequal treatment understood as direct discrimination, and when instructions are given to discriminate against persons (for example in the context of employment or housing) on grounds protected by law. The legislation also incorporates the concepts of harassment and sexual harassment, as well as discrimination resulting from less favourable treatment based on a person's rejection of or submission to harassment. According to the new law, any physical or legal person subjected to unequal treatment is entitled to compensation.

Similarly, the Council of Ministers in **Spain** approved the Comprehensive Act on Equality of Treatment and Non-Discrimination (*Proyecto de Ley Integral de Igualdad de Trato y no Discriminación*) in May.⁶

Promising practice

Awareness raising: combating discrimination, campaigning for equality

The Federal Anti-discrimination Agency in **Germany** (*Antidiskriminierungsstelle des Bundes*) launched a poster campaign in November 2011 to encourage people to seek advice if they feel they are discriminated against. The slogan of the campaign was 'No one should be put in a box', or literally 'No one fits in a drawer!' (*Kein Mensch passt in eine Schublade!*). It ran through January 2012 and covered six grounds of discrimination: age, disability, ethnic origin, sex, religion or creed and sexual identity. All these grounds are protected under Germany's General Equality Law (*Allgemeines Gleichbehandlungsgesetz*).

Federal Anti-discrimination Agency, (*Antidiskriminierungsstelle des Bundes*): http://www.antidiskriminierungsstelle.de/DE/Service/Kampagne2011/kampagne_node.html;jsessionid=A4E5BC69CEA897F8E2EFA12A8A5DAC4B.2_cid103

By 2010, all EU Member States had established or designated one or more bodies responsible for promoting equality ('equality bodies'), thereby meeting obligations set out under the terms of the Gender Equality and

Racial Equality Directives (Table 5.1). Important institutional changes took place in **France** in this respect in 2011, where the constitutionally independent Rights Defender (*Défenseur des Droits*) was established under Fundamental Law No. 2011-333 and Ordinary law No. 2011-334 of 29 March 2011 and took effect in May. The functions of the Rights Defender incorporate those previously covered by the Ombudsman of the Republic (*Médiateur de la République*), the Advocate for Children (*Défenseur des enfants*), the National Commission of Security Ethics (*Commission Nationale de Déontologie de la Sécurité*), and the High Authority for the Fight against Discrimination and for Equality (*Haute Autorité de Lutte contre les Discriminations et pour l'Égalité, Halde*) – which was the former equality body.

5.2. Multiple discrimination

This section covers developments that occurred in 2011 in the field of multiple discrimination. It is a relatively new concept in the equality field but awareness of it is on the rise. It does not yet have a distinct legal status, but EU political institutions and civil society organisations are devoting ever greater attention to it. It begins with an overview of the relevant EU and national legislation and policies before discussing how multiple discrimination featured in cases investigated or decided in some EU Member States, whether through the courts or equality bodies.

First though, the concept of multiple discrimination must be defined: it describes situations where discrimination takes place on the basis of more than one protected ground. It can be characterised as either additive or intersectional.⁷

Additive multiple discrimination refers to situations where the role of different grounds of discrimination can be distinguished from one another. This would cover a situation, for instance, where an elderly woman faces discrimination on the grounds of sex at the workplace and discrimination on the grounds of age when accessing healthcare.

Intersectional discrimination refers to situations where discriminatory treatment can be attributed to a combination (or intersection) of two or more grounds. For example, this would cover a situation where a Roma woman may be sterilised against her will (see Chapter 6 for case law covering such situations). This discriminatory treatment would not be based only on her sex (since not all women face this treatment), but neither would it be based only on her being a Roma (since Roma men may not face this treatment). The discriminatory treatment is based specifically on the combination of her gender and origin.

3 Council Directive 2000/43/EC, OJ 2000 L 180, p. 22.

4 Council Directive 2004/113/EC, OJ 2004 L 373, p. 37; Directive 2006/54/EC, OJ 2006 L 204, p. 23.

5 Poland, Law on Equal Treatment.

6 Spain, Comprehensive Act on Equality of Treatment and Non-Discrimination (2011).

7 FRA (2012).



Table 5.1: Bodies required under EU law: national equality bodies and their respective mandates, by country

Country	Name of body in English	Name of body in national language	Employment						Beyond employment (education, goods and services, housing, etc.)						Quasi-judicial	Promotion		
			Gender	Race and ethnic origin	Age	Disability	Sexual orientation	Religion and belief	Other grounds	Gender	Race and ethnic origin	Age	Disability	Sexual orientation			Religion and belief	Other grounds
AT	The Austrian Ombud for Equal Treatment	Anwaltschaft für Gleichbehandlung	√	√	√		√	√		√	√							√
BE	Centre for equal opportunities and opposition to racism	Centrum voor gelijkheid van kansen en voor racismebestrijding/Centre pour l'égalité des chances et la lutte contre le racisme		√	√	√	√	√		√	√	√	√	√	√			√
	Institute for the equality for women and men	Instituut voor de Gelijkheid van Vrouwen en Mannen/ Institut pour l'Égalité des Femmes et des Hommes)	√						√	√					√			√
BG	Commission for Protection against Discrimination	Комисия за защита от дискриминация	√	√	√	√	√	√	√	√	√	√	√	√	√	√		
CY	The Office of the Commissioner for Administration (Ombudsman)	Επίτροπος Διοικήσεως	√	√	√	√	√	√	√	√	√	√	√	√	√	√		
CZ	The Public Defender of Rights (Ombudsman)	Veřejný ochránce práv	√	√	√	√	√	√	√**	√	√	√	√	√	√	√**		√
DE	The Federal Anti-Discrimination Agency	Antidiskriminierungsstelle des Bundes	√	√	√	√	√	√		√	√	√	√	√	√			√
DK	The Danish Institute for Human Rights	Institut for Menneskerettigheder	√	√	√*	√*	√*	√*		√	√							√
	Board of Equal Treatment	Ligebehandlingsnævnet	√	√	√	√	√	√	√	√	√					√	√	
EE	Gender Equality and Equal Treatment Commissioner	Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
EL	Greek Ombudsman	Συνήγορος του Πολίτη	√	√	√	√	√	√		√	√				√			
ES	Race and Ethnic Equality Council	Consejo para la Promoción de la Igualdad de Trato y No Discriminación de las Personas por el Origen Racial o Étnico		√							√							√
FI	The Ombudsman for Equality	Tasa-Arvovaltuutettu	√					√										√
	The Ombudsman for Minorities	Vähemmistövaltuutettu		√							√							√
FR	Defender of Rights	Défenseur des droits	√	√	√	√	√	√	√	√	√	√	√	√	√	√		√
HU	The Commissioner for Fundamental Rights	Alapvető Jogok Biztosa	√	√	√	√	√	√		√	√	√	√	√	√		√	
	The Hungarian Equal Treatment Authority	Egyenlő Bánásmód Hatóság	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	
IE	Equality Authority	An tÚdarás Comhionannais	√	√	√	√	√	√	√	√	√	√	√	√	√	√		√
IT	National Office against Racial Discrimination	Ufficio Nazionale Antidiscriminazioni Razziali (UNAR)		√	√	√	√	√			√	√	√	√	√	√		√
LT	Office of the Equal Opportunities Ombudsman	Lygių galimybių kontrolieriaus tarnyba	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	
LU	Centre for Equal treatment	Centre pour l'égalité de traitement	√	√	√	√	√	√		√	√	√	√	√	√			√

Table 5.1: (continued)

Country	Name of body in English	Name of body in national language	Employment						Beyond employment (education, goods and services, housing, etc.)						Quasi-judicial	Promotion	
			Gender	Race and ethnic origin	Age	Disability	Sexual orientation	Religion and belief	Other grounds	Gender	Race and ethnic origin	Age	Disability	Sexual orientation			Religion and belief
LV	Office of the Ombudsman	Tiesībsarga Birojs	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
MT	National Commission for the Promotion of Equality (NCPE)	Il-Kummissjoni Naz-zjonali għall-Promozzjoni tal-Ugwaljanza	√							√	√						-
	Director of Industrial and Employment Relations (DIER)	Dipartiment tar-Relazzjonijiet Industrijali u tal-Impieg	√							√	√						-
NL	The Dutch Equal Treatment Commission (ETC)	Commissie Gelijke Behandeling (CGB)	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
PL	Human Rights Defender/ Commissioner for Civil Rights Protection	Rzecznik Praw Obywatelskich	√	√	√	√	√	√	√	√	√				√		√
PT	The Commission for Citizenship and Gender Equality	Comissão para a Cidadania e a Igualdade de Género (CIG)								√			√		√		√
	Commission for equality in labour and employment - CITE	Comissão para a Igualdade no Trabalho e no Emprego	√														√
	High Commission for Immigration and Intercultural Dialogue	Alto Comissariado para a Imigração e Diálogo Intercultural (ACIDI)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
RO	The National Council for Combating Discrimination (NCCD)	Consiliul National pentru Combaterea Discriminarii - CNCD	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
SE	Equality Ombudsman	Diskrimineringsombudsmannen (DO)	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
SI	The Office for Equal Opportunities / Advocate of the Principle of Equal Treatment	Urad za Enake Možnosti	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√*
SK	National Centre for Human Rights	Slovenské národné stre-disko pre ľudské práva	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
UK	Equality and Human Rights Commission	Equality and Human Rights Commission	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	Equality Commission for Northern Ireland	Equality Commission for Northern Ireland	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
HR	Office of the Ombudsman	Uredu pučkog pravobranitelja		√	√				√	√				√	√		√

Notes: * Not exclusively; **Nationality/parental status; - Information not available at time of printing

Source: Equinet, 2012

5.2.1. Overview of the situation in 2011

Although the concept of multiple discrimination has not yet achieved a distinct legal status, the challenges it poses to civil society are recognised among political institutions and civil society organisations in the EU.

While existing EU directives relating to equality do not expressly oblige EU Member States to treat multiple discrimination as a distinct category of discrimination, the concept is covered by secondary EU law. The Racial Equality Directive and the Employment Equality Directive recognise it as a conceptual and factual reality. Furthermore, a legal definition of multiple

discrimination would enter into EU law should the European Parliament accept proposed amendments to the draft Horizontal Directive.

The European Parliament also referred to the concept of multiple discrimination in six resolutions it adopted in 2011:

- European Parliament Resolution of 8 March 2011 on equality between women and men in the European Union – 2010/2138(INI)
- European Parliament Resolution of 9 March 2011 on the EU strategy on Roma inclusion (2010/2276(INI))



- European Parliament Resolution of 12 May 2011 on the proposed ILO convention supplemented by a recommendation on domestic workers
- European Parliament Resolution of 8 June 2011 on the external dimension of social policy, promoting labour and social standards and European corporate social responsibility (2010/2205(INI))
- European Parliament Resolution of 13 September 2011 on the situation of women approaching retirement age (2011/2091(INI))
- European Parliament Resolution of 26 October 2011 on the Agenda for New Skills and Jobs (2011/2067(INI))

In June 2011, the Council of the European Union acknowledged the importance of addressing multiple discrimination in the context of the European Disability Strategy 2010–2020.⁸ In May 2011, the Council had also called for a greater focus on the difficulties faced by Roma women and girls who are at risk of multiple discrimination.⁹

Multiple discrimination also features in the work of pan-European non-governmental organisations (NGOs) operating in the area of fundamental rights, such as the European Network Against Racism (ENAR).¹⁰

At the level of national legislation, multiple discrimination is covered by six Member States: **Austria**,¹¹ **Bulgaria**,¹² **Germany**,¹³ **Greece**,¹⁴ **Italy**¹⁵ and **Romania**.¹⁶ It is, however, not always defined as such in the legislation, which tends to be limited to 'dual' discrimination covering two grounds. In Austria (through legislation) and Germany (through official guidelines), courts and equality bodies are directed to award higher levels of compensation where victims have suffered discrimination on multiple grounds.

In practice, when national equality bodies record data relating to complaints of discrimination that are lodged with them, they do not systematically register all of the grounds of discrimination that could be relevant to these cases; they often only categorise a complaint under one ground of discrimination. When they do report more than one ground, equality bodies usually report cases that

combine only two grounds. More evidence is needed to understand whether this is due to the registering practices of equality bodies – in that they only register a maximum of two grounds – or whether multiple discrimination in practice tends to involve just two grounds.

Equality bodies in seven EU Member States (**Austria, Belgium, Hungary, Luxembourg, Portugal, Slovenia and the United Kingdom**) record cases involving more than one ground of discrimination as a distinct category, thereby giving an indication of the number of cases where multiple discrimination is alleged. The equality bodies in Hungary, Luxembourg, Slovenia and the United Kingdom collect specific data on multiple discrimination, despite a lack of national legal provisions prohibiting it.

Equality bodies in six other EU Member States (**Bulgaria, Germany, Greece, Italy, Poland, Romania**) do not collect data on multiple discrimination, although legislation on multiple discrimination is in place in these Member States. In Greece, the law transposing the non-discrimination directives does not explicitly prohibit multiple-discrimination; however, labour inspectors, who monitor the application of this law in the private sector, are required to take such cases into account.

In terms of prevalence, the **German** equality body published research relating to multiple discrimination in late 2010.¹⁷ The report shows that 7.8 % or 357 of all the complaints lodged with it between August 2006 and November 2010 concerned multiple discrimination cases. Of these cases, the largest proportion related to the intersection between gender and age (21 %), followed by disability and age (17 %), ethnic origin combined with other grounds (8 %), disability and gender (8 %), sexual identity and disability (3.5 %), and ethnic origin, religion and gender (3.5 %).

5.2.2. Acknowledgement of multiple discrimination in case law

A number of cases dealt with by national courts in 2011 could have been analysed through the prism of multiple discrimination, although this was not done. Most of the following cases were decided on the basis of one ground of discrimination.

Several court judgments relating to cases of women wearing headscarves in public were handed down in **Belgium** in 2011 by the Court of First Instance of Brussels, the Police Court in Brussels, the Court of Appeal of Liège and the Criminal Court of Dendermonde. All of these cases, address a combination of discrimination based on sex and discrimination based on religion or belief.

⁸ Council of the European Union, Employment, Social Policy, Health and Consumer Affairs Council (EPSCO) (2011a).

⁹ EPSCO (2011b).

¹⁰ European Network Against Racism (ENAR) (2011).

¹¹ Austria, Federal Disabled Persons Equality Act, para. 11; Austria, Federal Disabled Persons Employment Act, Art. 2, para. 70; Art. 3, para. 24e; Austria, Equal Treatment Act, Art. 1, para. 12 (13); Art. 1, para. 51 (1); Art. 1, para. 26 (13); para. 19a.

¹² Bulgaria, Protection against Discrimination Act, Art. 4, para. 1.

¹³ Germany, General Equal Treatment Act, Art. 4, 9 (1), 25 (5) AGG; Germany, Law on Equal Treatment of Soldiers.

¹⁴ Greece, Law 3996/2011, Art. 2, para. 1 (h).

¹⁵ Italy, Legislative decree 215/2003 Art. 1; Italy, Legislative Decree 216/2003, Art. 1.

¹⁶ Romania, Anti-discrimination Law, Art. 2.

¹⁷ Germany, Federal Anti-Discrimination Agency (2010).

In January 2011, the Court of First Instance of Brussels ruled that wearing a headscarf on a bowling track is not a proven safety risk.¹⁸ The court concluded that the principle of non-discrimination is violated when a person wearing a headscarf is refused entry into a bowling track only because she is wearing a headscarf. The court found that this constitutes indirect discrimination, in that a neutral measure placed a specific burden on women wearing headscarves.

The Police Court in Brussels also rendered a judgment in January 2011. It ruled that a municipal regulation prohibiting the wearing of all clothing hiding totally or in great part the face of persons violates freedom of religion.

The case presided over by the Court of Appeal of Liège related to a woman who was wearing headgear to cover the effects of her chemotherapy; she was denied access to a restaurant attached to a bowling alley because she refused to remove her head covering. In February 2011, the Court of Appeal of Liège reversed the judgment that was delivered by the Court of First Instance of Huy in May 2010, which decided that the refusal to let persons enter a restaurant attached to a bowling hall for the sole reason that they wore headgear was indirectly discriminating to those who wear headgear for religious or health reasons. This case is currently before the Court of Cassation.

In another judgment rendered in February 2011, the Criminal Court in Dendermonde found that a real estate agent did not act in a discriminatory manner by telling a woman wearing a headscarf that a piece of real estate was unavailable, although it was available. The court judged that there was no proof that the estate agent had discriminated against her on the basis of religion, because it could not be established that the headscarf was the sole reason why the estate agent did not want to cooperate with the applicant.¹⁹

The Equality Ombudsman (*Diskrimineringsombudsmannen*) in **Sweden** reached a settlement with a school in Stockholm that had banned a female student from wearing a headscarf during classes.²⁰ The Equality Ombudsman brought an action against the school for discrimination on the grounds of religion and sex. The parties reached an agreement that awarded the student SEK 40,000 (about €4,500). The school's new president abolished the clothing rules in August 2011. In a similar case, a high school student who wore a headscarf to an introductory meeting for summer internships was subsequently denied an internship. The Equality Ombudsman began proceedings alleging discrimination on the grounds of sex and religion, but the case was dismissed for procedural reasons.

18 Belgium, Court of First Instance, Brussels, 25 January 2011.

19 Belgium, Criminal Court of Dendermonde, 14 February 2011.

20 Sweden, Equality Ombudsman (2011a), Case NB 2009/1224.

FRA ACTIVITY

Proving multiple discrimination in court

FRA research examining multiple discrimination in the context of access to healthcare finds that discrimination on multiple grounds often does not feature strongly among arguments presented by legal practitioners before the courts. One of the main reasons for this is that legal counsels tend to prefer consolidating their arguments around one ground only. Focusing on the one ground that creates the strongest case is a tactical decision designed to maximise the likelihood of a successful outcome.

FRA, Inequalities and Multiple Discrimination in Access to Health, forthcoming

The **Austrian** Equal Treatment Commission (*Gleichbehandlungskommission*) delivered a finding of discrimination on several grounds in 2011 in a case brought by a woman of Columbian origin who claimed that she was sexually harassed by a co-worker because of her ethnic origin. After repeatedly refusing her co-worker's advances, the woman filed a complaint with the police. She was eventually dismissed from her post on the grounds of poor German-language knowledge. The commission made a finding of sexual harassment and harassment due to ethnic origin, as well as gender discrimination and discrimination based on ethnic origin regarding the termination of her employment. In this case, the grounds of discrimination were analysed in a 'parallel' manner, each in isolation from the other, rather than in combination.²¹

In **Portugal**, an elderly couple with disabilities living on the third floor of a building without a lift requested the installation of a stair-lift. Since the co-owners refused, the couple filed a complaint before the Court of First Instance. The court issued a protective order and ordered the installation of the stair-lift. The co-owners lodged an appeal, but the Lisbon Court of Appeal dismissed their application. While the Court of Appeal's judgment does not expressly use the term "multiple or intersectional discrimination", it is nevertheless grounded on the intersection of two grounds: age and disability.

5.3. Discrimination on the grounds of sex

This section addresses discrimination on the grounds of sex. It begins by presenting institutional and legal developments, including the establishment of equality bodies covering discrimination on the grounds of sex. It then considers evidence of indirect discrimination in the labour market. Finally, it discusses the protection of

21 Austria, Equality Commission (2011), Case GBK I/230/09-M, 1 February 2011.

pregnant workers and those on maternity leave from an anti-discrimination perspective.

5.3.1. Institutional and legal developments in relation to discrimination on the grounds of sex

The United Nations (UN) Entity for Gender Equality and the Empowerment of Women (UN Women) which became operational in January 2011 is responsible for promoting gender equality. UN Women merged and built upon four previously separate parts of the UN system: the Division for the Advancement of Women; the International Research and Training Institute for the Advancement of Women; the Office of the Special Adviser on Gender Issues and Advancement of Women; and the UN Development Fund for Women. The main tasks of UN Women are to support intergovernmental bodies in their formulation of policies and standards; to provide assistance in the implementation of these standards; and to hold the UN system accountable for its own commitments on gender equality.

Several EU Member States reformed their bodies promoting gender equality. In March 2011, the **Danish** Institute for Human Rights (DIHR) was designated as the body responsible for the promotion, analysis, monitoring and support of equal treatment of all persons, including concerning discrimination on the grounds of gender. This new mandate empowers the DIHR to provide assistance to victims of discrimination, conduct surveys, publish reports and make recommendations on any issue relating to discrimination on the grounds of sex.

The Council for Gender Equality (*Rada vlády SR pre rodovú rovnosť*) in **Slovakia** terminated its activities, and its mandate was transferred to the newly created Council for Human Rights, National Minorities and Gender Equality (*Rada vlády SR pre ľudské práva, národnostné menšiny a rodovú rovnosť*). The council supervises several committees, including the Committee for Gender Equality (*Výbor pre rodovú rovnosť*).²²

The Act on Equality between Women and Men (*Laki naisten ja miesten välisestä tasa-arvosta*) in **Finland** was amended by law 488/2011 in May 2011.²³ The reform pertains to penal provisions regarding the prohibition of discriminatory announcements, when advertising education or training places. The act now provides that anyone violating this prohibition shall be sentenced to a fine for a discriminatory announcement. The public prosecutor is, however, only allowed to bring charges concerning a discriminatory announcement if

it has been notified of the case by the Ombudsman for Equality (*Tasa-arvovaltuutettu*).

Concerning developments in case law, the Karlsruhe Court of Appeals (*Oberlandesgericht Karlsruhe*), in **Germany**, ruled that a job advertisement for a business manager was not gender neutral – the advertisement only used the masculine form *Geschäftsführer* – and, as such, constituted a violation of the prohibition of discrimination under the provisions of non-discrimination legislation. In its September 2011 judgment, the court awarded financial compensation of €13,000 to the claimant, a woman whose job application had been rejected.²⁴

5.3.2. Evidence of indirect discrimination in the labour market: the gender pay gap and the glass ceiling

Large differences in pay between women and men – the so-called gender pay gap – remain a reality throughout the EU, as data published annually by Eurostat show (Figure 5.1). The latest available data show that although the gender pay gap decreased by 1 % in the EU as a whole between 2008 and 2010, women were still paid, on average, 16.4 % less than were men. The lowest gender pay gaps in 2010 are found in **Slovenia** (4.4 %), **Italy** (5.5 %) and **Malta** (6.1 %), and the highest in **Austria** (25.5 %), the **Czech Republic** (25.5 %) and **Germany** (23.1 %).

The gender pay gap decreased in 15 Member States between 2008 and 2010, generally modestly. The largest decreases were observed in **Lithuania** (-7 %), **Slovenia** (-4.1 %), **Malta** (-2.5 %) and the **United Kingdom** (-1.9 %). The gender pay gap increased in seven Member States between 2008 and 2010, with the highest variations observed in **Latvia** (+4.2 %), **Portugal** (+3.6 %), **Romania** (+3.5 %) and **Bulgaria** (+2.1 %).

At the national level, the Institute for the Equality of Women and Men in **Belgium**, one of the country's equality bodies, found that women earn on average 10 % less per hour than men do.²⁵

Although **Finland's** gender pay gap is above the EU27 average, the *Global gender gap report* published in late 2010 by the World Economic Forum rates it as the third-best country in the world when it comes to equality between women and men.²⁶ Finland initiated an equal pay programme with the aim of narrowing the gender pay gap to a maximum of 15 % by 2015.²⁷ The means taken to achieve this goal include: a transparent policy regarding

22 Slovakia, Slovak Government's Council for Human Rights, National Minorities and Gender Equality (2011a).

23 Finland, Finlex (2012).

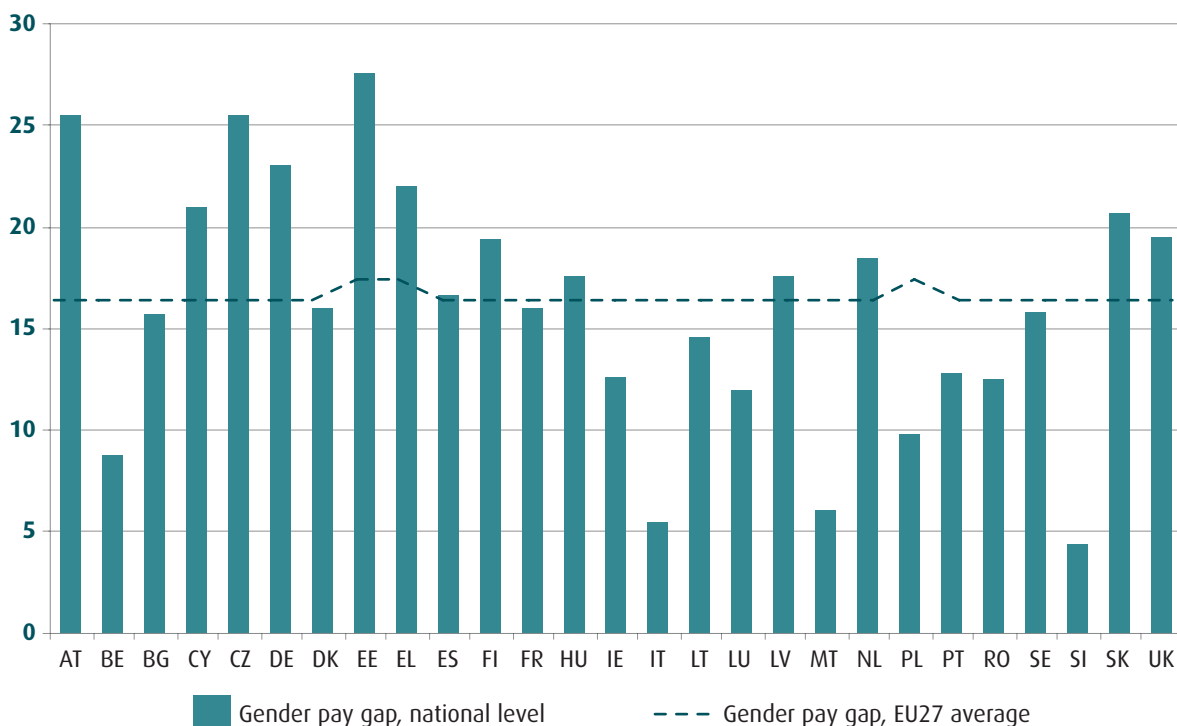
24 Germany, Higher Regional Court Karlsruhe (2011).

25 Belgium, Institute for the Equality of Women and Men (2011).

26 World Economic Forum (2010).

27 Finland, Ministry of Social Affairs and Health (2011).

Figure 5.1: Gender pay gap, by country in 2010 (%)



Notes: Data for Estonia (EE) and Greece (EL) cover the year 2008. Data for Poland (PL) cover the year 2009. Industry, construction and services (except public administration, defence, compulsory social security). For information on how the gender pay gap is calculated, see: http://epp.eurostat.ec.europa.eu/cache/ITY_SDDS/de/earn_grpgg2_esms.htm.

Source: Eurostat, 2011

contracted pay; decreasing occupational segregation in the labour market by encouraging women to take up jobs in more traditionally male sectors and vice versa; decreasing gender-based segregation of occupations; and support for women’s career development.

A reform of the pension system that came into force in **Lithuania** in January 2012 standardised pension ages for men and women. The Law on the State Social Insurance Pension (*Valstybinių socialinio draudimo pensijų įstatymas*) was amended in June 2011, introducing an equal pension age of 65 for women and men.²⁸

In addition to the gender pay gap, women in the EU also face a glass ceiling when it comes to attaining certain positions on the labour market, such as high-ranking economic and political posts.

In March 2011, Viviane Reding, Vice-President of the European Commission, announced that she was inviting publicly listed companies in the EU to sign the *Women on the Board Pledge for Europe*, which includes a voluntary commitment to increase women’s presence on corporate boards to 30 % by 2015 and to 40 % by 2020. According to the European Commission, women currently

represent only 12 % of the board members of Europe’s largest companies.²⁹

“Closing the gender gap at the top of the business world is a win-win situation. Only by working together will we be able to succeed. High level commitment and more effective measures from governments, social partners and businesses are crucial to speed up progress. The EU can play an important role in proposing solutions to a challenge, which is common to all Member States.”

Commissioner Viviane Reding speaking at the Bertelsmann Women in Leadership Conference in Berlin on 22 September

The Equality and Human Rights Commission’s (EHRC) 2011 report on *Sex and Power* shows that women in the **United Kingdom** held 17.4 % of Cabinet posts and that the number of female editors of national newspapers declined to two from a peak of four in 2011. The report argues that, at the current rate with no policy change, it would “take another 70 years to achieve an equal number of women directors in the FTSE 100 (the index of 100 most capitalised British companies on the London Stock Exchange) and another 45 years to achieve an equal number of women in the senior judiciary”. The report also estimates that it would require another 14 general

28 Lithuania, Seimas (2011).

29 European Commission (2011a).

elections – or 70 years – to achieve an equal number of women MPs.³⁰

On Women's Day in 2011, the **French** Association for Executive Employment (*Association Pour l'Emploi des Cadres*) published a statistical survey, *Female Managers and Male Managers: persistence of professional inequalities*. The study shows that large variations in remuneration persist and that women still face the glass ceiling: after 40 years of employment, 11 % of women occupy a senior management post compared to 23 % of men.³¹

5.3.3. Protection against discrimination for pregnant workers and those on maternity leave

Negotiations on the proposed revision of the Pregnant Workers Directive³² continued without conclusion in the Council of the European Union in 2011. The progress report submitted by the Hungarian Presidency to the Permanent Representatives Committee and to the Council of the European Union in June 2011 highlights divergences between the European Parliament's position and the views of EU Member States.³³

While some EU Member States encouraged the Council to consider discontinuing its work on the issue, others stressed that it should continue. In general, delegations considered that the Pregnant Workers Directive should cover maternity leave only. Many delegations stressed that the proposal should essentially remain focused on health and safety at work and not address additional issues. Only a few delegations showed flexibility on the issues of adoption and paternity leave.

A number of relevant developments in legislation and case law took place at the national level. In July 2011, the National Council of the **Slovak Republic** (*Národná rada Slovenskej republiky*) enacted changes to the Labour Code to improve labour market protection for pregnant women, mothers and also fathers. The amended Labour Code now reads: "The employer may terminate probation employment of a pregnant woman, a mother within nine months of giving birth or a nursing mother only in writing and only in exceptional cases that are not related to the pregnancy or motherhood, and must justify it duly in writing, otherwise it shall be deemed null and void."³⁴ A similar provision was incorporated into Law No. 346/2005 Coll. on Civil Service of Professional Soldiers of the Slovak Armed Forces (Article 1, Paragraph 112).

The Protection of Maternity Law (100(I), 2007) in **Cyprus** was amended in 2011 to enhance the protection against dismissal on grounds of pregnancy and maternity.³⁵ One amendment stipulates that should an employer dismiss an employee while she is unaware of being pregnant, she would still be entitled to inform the employer of her pregnancy at a later stage via a valid medical certificate. This would force the employer to repeal the dismissal or the notice for dismissal.

In **Malta**, the uninterrupted period of maternity leave was extended from 14 to 16 weeks as of January 2012 and will be further extended to 18 weeks as from 1 January 2013. However, this extension does not come along with an entitlement to full pay during these additional weeks (amendment to the Employment and Industrial Relations Act, Cap. 452).³⁶

Pregnant workers sometimes face discrimination in employment because of their pregnancy, as the cases reported below illustrate. Cases arising at the national level also point to where protection against discrimination for pregnant workers could be improved.

The **Hungarian** Equality Treatment Authority (*Egyenlő Bánásmód Hatóság*, EBA) represented an employee, who had been repeatedly humiliated at the workplace since her employer had discovered that he could not dismiss her because she was undergoing an assisted reproductive procedure. The EBA imposed a fine of HUF 500,000 (about €1,700). The employer appealed and the case is still pending.³⁷

The Equality Tribunal in **Ireland** ruled in favour of a complainant who had been dismissed from her telesales job. Once her pregnancy became known, the director of the company she worked for began to openly denigrate her sales ability and terminated her contract. This was found to constitute discrimination and harassment contrary to Sections 8(6)(c) and 14A of the Employment Equality Acts 1998-2008. The respondent was ordered to pay the complainant €18,200 in compensation for the discriminatory dismissal – the equivalent of a year's salary – and €10,000 for the effects of harassment.³⁸

The Equality Ombudsman (*Diskrimineringsombudsmannen*) in **Sweden** reached a settlement with a complainant's employer, awarding her SEK 85,000 (about €9,300).³⁹ The employer had changed the complainant's conditions of employment when he found out

30 United Kingdom, Equality and Human Rights Commission (EHRC) (2011), pp. 2-3.

31 Association for Executive Employment (2011).

32 Council Directive 92/85/EEC, OJ 1992 L 348.

33 Council of the European Union (2011).

34 Slovakia, Law No. 257/2011.

35 Cyprus, Protection of Maternity Law (2011).

36 Malta (2011), Employment and Industrial Relations Act (Cap. 452).

37 Hungary, *Egyenlő Bánásmód Hatóság*, Resolution Case 301/2011, Budapest.

38 Ireland, Equality Tribunal (2011a) *B. Farrell v. Irish Youth Promotions Ltd.* (in liquidation) DEC-E2011-002.

39 Sweden, Equality Ombudsman (2011b) Case ANM 2011/66.

that she was pregnant. In another case, the Equality Ombudsman reached a settlement with an employer awarding the complainant SEK 100,000 (about €10,950). Here, the complainant who had been offered a job was dismissed from the recruitment process after she told the employer about her pregnancy.⁴⁰

5.4. Discrimination on the grounds of sexual orientation and gender identity

This section examines developments in legislation, policy, practice and case law relating to lesbian, gay, bisexual and transgender (LGBT) persons in 2011. It begins with a general examination of questions of discrimination and violence against LGBT persons and then moves on to discuss policy developments relating to promoting equality for, and combating discrimination against, LGBT persons. Next, the section considers developments in relation to free movement and the legal recognition of transgender persons.

5.4.1. Discrimination and violence against LGBT persons

In June 2011, the UN Human Rights Council adopted a Resolution on human rights, sexual orientation and gender identity.⁴¹ The resolution highlights concerns about acts of violence and discrimination based on sexual orientation and gender identity.

At the EU level, the European Parliament adopted a resolution in September 2011 calling for the full implementation of the rights of LGBT persons in the EU and for the systematic defence of such rights in the EU's external relations. The European Parliament also called on the European Commission and EU Member States to implement to the greatest extent possible the relevant opinions of the European Union Agency for Fundamental Rights (FRA) on LGBT rights.⁴²

At the national level, some EU Member States introduced changes to equal treatment legislation. **Greece** included gender reassignment as a protected characteristic in anti-discrimination legislation.⁴³ The equality bodies in **Poland** and **Denmark** took over coverage of sexual orientation discrimination and gender identity discrimination, respectively. In Poland, the Human Rights Defender (*Rzecznik Praw Obywatelskich*) and the Government Plenipotentiary for Equal Treatment

(*Pełnomocnik Rządu ds Równego Traktowania*) were granted extended competencies in the field of equality and non-discrimination to cover discrimination on the grounds of sexual orientation. In Denmark, the Danish Institute for Human Rights was appointed to promote, evaluate, monitor and support equal opportunities for all, regardless of gender identity.

The Ombudsman for Minorities in **Finland**, in light of the lack of explicit provisions ensuring protection against discrimination of transgender persons, called for an amendment of gender equality legislation to include the "protection of gender minorities".⁴⁴

Finland also adopted criminal legislation prohibiting incitement to hatred on grounds of sexual orientation and introduced an aggravating circumstance for crimes committed on the grounds of bias against LGBT persons. Through an amendment of the Criminal Code by law 511/2010, incitement to hatred is prohibited also on the grounds of sexual orientation. The provision on aggravating circumstances for increasing the punishment also covers sexual orientation.⁴⁵

In **Denmark**, the government published a political programme in October 2011 that included LGBT rights. Under the slogan 'Equality and diversity makes Denmark strong', the programme mentions efforts to improve the registration, investigation and prevention of hate crimes against LGBT people and other minority groups.

The **Polish** Parliament debated legislation amending the criminal code.⁴⁶ If adopted the legislation would extend criminal protection against hate speech and hate crimes motivated by a victim's sexual orientation, gender identity, disability, age or gender.

In terms of case law, the Court of Justice of the European Union (CJEU) clarified the terms of the Employment Equality Directive in a May 2011 ruling on the *Römer* case. The CJEU held that a supplementary retirement pension paid to a partner in a civil partnership, which is lower than that granted in a marriage, may constitute discrimination on the grounds of sexual orientation, which the directive prohibits.⁴⁷

In *Hannon v. First Direct Logistics Limited*,⁴⁸ the Equality Tribunal in **Ireland** awarded a transsexual worker over €35,000 in compensation for discrimination she

40 Sweden, Equality Ombudsman (2011c) Case No. A 158/10.

41 United Nations, Human Rights Council (2011).

42 European Parliament (2011a).

43 Greece, Law 3896/2010, Art. 3, para. 2.

44 Finland, Ombudsman for Equality (2011).

45 Finland, Parliament of Finland, Act Amending the Criminal Code (511/2011).

46 Poland, Draft law amending the Polish Criminal Code.

47 Court of Justice of the European Union (CJEU) *Römer v. Freie und Hansestadt Hamburg* C-147/08, 10 May 2011.

48 Ireland, Equality Tribunal (2011b) *Hannon v. First Direct Logistics Limited*, File No. EE/2008/04, 29 March 2011.



endured on the grounds of sex and disability. The tribunal found that the deterioration in her conditions of work – which occurred after she had informed her employer of her true identity and need to live in this identity – amounted to constructive dismissal resulting from her transition to female from male.

Some EU Member States increased efforts to collect data on the situation of LGBT persons. For example, the national statistical offices in the **Czech Republic** and in **Italy** began gathering data on same-sex households as part of their national censuses. In spring 2011, the Czech Statistical Office conducted a Population and Housing Census that contained a question on a registered partnership between persons of the same sex.⁴⁹ Similarly, the census questionnaire used by the Italian National Institute for Statistics aimed to collect data for the first time on the number of same-sex households present in the country.⁵⁰

In November 2011, the UN High Commissioner for Human Rights delivered a report on *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*. The report reviewed the applicable international standards, recalling that all people, including LGBT persons, are entitled to enjoy the protection provided for by international human rights law. It documented homophobic and transphobic violence and discrimination in all regions of the world, while emphasising that “quantifying homophobic and transphobic violence is complicated by the fact that few States have systems in place for monitoring, recording and reporting these incidents” (paragraph 23).⁵¹

The Council of Europe Commissioner for Human Rights published a report in June 2011 on discrimination on the grounds of sexual orientation and gender identity in Europe.⁵² The report finds that homophobic and transphobic attitudes persist in all 47 Member States, but that attitudes vary significantly among and within countries. Its recommendations are especially useful to support ongoing efforts among the Member States to implement the Recommendation of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity.⁵³

“Millions of people in Europe are discriminated [against], stigmatised and even [become] victims of violence because of their actual or perceived sexual orientation or gender identity. They cannot fully enjoy their universal human rights. There is an urgent need for all European governments to remedy this situation and take policy and legislative measures to combat homophobia and transphobia.”

Council of Europe Commissioner for Human Rights, Thomas Hammarberg, 23 June at the launch of his report on discrimination on grounds of sexual orientation and gender identity. Press release available at: www.coe.int/t/commissioner/News/2011/110623LGBTStudy_en.asp

Studies carried out in some EU Member States show that the position of LGBT people continues to be problematic. Research carried out by the **Cyprus** Family Planning Association and accept-LGBT Cyprus illustrates that LGBT people in the country experience violence, psychological harassment, lack of acceptance or discrimination in the context of access to employment, housing, health, education and other services, as well as within faith communities, family, relationships and social attitudes.⁵⁴

Discrimination and bullying among young people belonging to ‘sexual and gender minorities’ have been shown to be common phenomena in **Finland**. In a survey of 636 respondents belonging to a ‘sexual or gender minority’ relating to discrimination in the context of education and leisure time, 36 % said that they have, at some point in their school life, been the target of bullying on the basis of their sexual orientation or gender identity.⁵⁵

In a survey of 478 respondents at the University of Warsaw in **Poland**, 30 % were of the opinion that being openly non-heterosexual could be a reason for feeling uncomfortable. According to the report, 35 % of all respondents had witnessed acts of harassment of non-heterosexual fellow students.⁵⁶

49 Czech Republic, Czech Statistical Office (2011).

50 Dardanelli, S. *et al.* (2009), pp. 37-38.

51 United Nations General Assembly (2011).

52 Council of Europe, Commissioner for Human Rights (2011).

53 Council of Europe, Committee of Ministers (2010).

54 Cyprus, Cyprus Family Planning Association and accept-LGBT Cyprus (2011).

55 Finland, Huotari, K. *et al.* (2011), pp. 45, 129.

56 Poland, Queer Uniwersytecie Warszawskim (2011).

FRA ACTIVITY

Online European LGBT survey kicks off

The FRA initiated research for an EU-wide online survey – the first of its kind on such a scale. The survey will collect comparable data on the experiences of violence and discrimination of LGBT persons, as well as their level of awareness about their rights, among other issues. The survey will also cover Croatia. In addition, the FRA will conduct research in 2012 with public authorities and key service providers to identify barriers to promoting and fulfilling LGBT rights at all levels of government, and to collect promising practices.

For more information, see: <http://lgbtsurvey.eu>

5.4.2. Promoting equality and combating discrimination through mainstreaming

Some EU Member States are in the process of developing systematic action plans to promote equality for LGBT persons. For instance, the Home Office in the **United Kingdom** launched an action plan for delivering equality for LGBT people,⁵⁷ as well as a distinct transgender equality action plan, highlighting where different measures are required.⁵⁸

The **Estonian** Ministry of Social Affairs included the goal of increasing of awareness and tolerance regarding LGBT issues as an area for further activity in its development plans for 2011–2014 and 2012–2015.⁵⁹

A Task Force for People with Non-Heterosexual Orientation (*Pracovná skupiny pre ľudí s neheterosexuálnou orientáciou*) was established in **Slovakia**. This task force will serve as an advisory body under the government's Council for Human Rights, National Minorities and Gender Equality.⁶⁰

⁵⁷ United Kingdom, Home Office (2011a).

⁵⁸ United Kingdom, Home Office (2011b).

⁵⁹ Estonia, Ministry of Social Affairs (2011a, 2011b).

⁶⁰ Slovakia, Slovak Government's Council for Human Rights, National Minorities and Gender Equality (2011b); Slovakia, Slovak Government's Office (2011).

Promising practice

National Action Plans on violence and discrimination offer specific support to LGBT citizens

In Portugal, the Fourth National Action Plan against Domestic Violence (*IV Plano Nacional contra a Violência Doméstica*) has found that LGBT persons are particularly vulnerable to domestic violence. The plan proposes targeted measures to protect this group, although these have not yet been specified. In the Fourth National Action Plan for Equality, Gender Citizenship and Non-Discrimination (*IV Plano Nacional para a Igualdade, Género, Cidadania e não Discriminação*), 'sexual orientation and gender identity' is listed as a strategic domain, under which awareness-raising measures are planned, targeting the public in general, but also strategically important professions (politicians, civil servants, professionals in various sectors such as health, education, social work, security and defence, justice, the media and among NGOs) and young people.

For more information, see: http://195.23.38.178/cig/portalcig/bo/documentos/IV_PNI.pdf

5.4.3. Free movement and civil justice for LGBT persons

Individuals are given certain rights to move to and reside in EU Member States other than their own by virtue of EU legislation relating to freedom of movement. People who are considered to be family members, such as spouses or registered partners, of an individual exercising their right to free movement may be entitled to certain rights. According to the terms of the Free Movement Directive,⁶¹ however, a Member State is not obliged to recognise the validity of same-sex marriages or registered partnerships unless these are recognised under national law.

The greatest number of developments at national level concerned changes to the definition of 'family member' to include same-sex partners for the purposes of free movement and family reunification. **Austria, Estonia, Greece, Latvia, Malta, Romania, Slovakia** and **Slovenia** all instituted this change.

Draft amendments to existing legislation in **Lithuania** would apply the concept of 'family member' to include "a partner, with whom the citizen of a Member State has a durable relationship" and to others who were dependant or managed a common household in the country of origin, if family ties can be proven.⁶²

⁶¹ Directive 2004/38/EC, OJ 2004 L 158, p. 77.

⁶² Lithuania, Law amending the Law on the Legal Status of Aliens, No. XIP-2360(2) 21 June 2011.

In contrast, new legislation in **Romania** prohibits the transcription/registration of civil status certificates or extracts issued by foreign authorities for same-sex marriages or same-sex civil partnerships concluded abroad.⁶³ This transcription is a requirement for obtaining entry and residence into Romania for spouses or partners, which necessarily only recognise partnerships between men and women.

The European Commission presented a proposal in March 2011 for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.⁶⁴ This proposal was accompanied by a separate proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.⁶⁵ Both proposals would apply to opposite-sex and same-sex marriages as well as to registered partnerships. According to its 2012 work programme, the Commission is scheduled to make two legislative proposals to facilitate the cross-border recognition of civil status documents.⁶⁶

Certain rights or obligations in relation to property may result from entering a registered partnership or marriage. These may become difficult to exercise in a cross-border context, particularly with regard to same-sex spouses or partnerships that are not recognised in EU Member States. European citizens exercising their right to free movement may encounter practical barriers in needing to provide official documentation, such as birth or marriage certificates, in their host state in order to receive certain benefits. Different, sometimes burdensome, rules exist across the EU Member States. The European Parliament strongly supported plans to enable the mutual recognition of civil status documents, which would include marriage certificates, and called for further efforts to reduce barriers for citizens who exercise their rights of free movement.⁶⁷

5.4.4. Legal recognition of transgender people

Developments relating to legal recognition of transgender persons occurred in legislation, case law, policy and medical practice in some EU Member States.

⁶³ Romania, Government Emergency Ordinance No. 80/2011, Article I. (20), Part I, No. 694. Article 277 of the new Civil Code does not recognise same-sex marriages or civil partnerships lawfully concluded abroad. While there is an exception concerning legal provisions regulating freedom of movement of the EU and EEA citizens, it is unclear what the impact of this contradiction will be in practice.

⁶⁴ European Commission (2011b).

⁶⁵ European Commission (2011c).

⁶⁶ European Commission (2011d), p. 8.

⁶⁷ European Parliament (2011a), para. 40.

As regards the rectification of official documents following gender reassignment, legislative developments with an impact on the legal gender recognition of transgender and transsexual persons took place in **Portugal**, where a new law was adopted to simplify the procedure and remove requirements deemed to be disproportionate.⁶⁸

The **Croatian** Ministry of Health and Social Welfare adopted an Ordinance on the Procedure of Collecting Medical Documentation on Sex Change in October 2011.⁶⁹ It identifies the opinion of the National Health Council as the document needed in order to change information on sex in birth records. This opinion is based on a request form by the applicant and on accompanying opinions of health and other professionals.

Developments in three EU Member States suggest a possible evolution in legislation in the future. In the **Netherlands**, a bill to amend Article 1:28 of the Civil Code relating to transsexuality and changes to the birth certificate was presented to parliament in September 2011. The bill is pending at parliament.

Denmark has announced a review of regulations on gender reassignment treatment. Among other matters, this will examine the possibility for individuals to obtain legal gender reassignment without having to satisfy the precondition of undergoing surgical treatment.

The National Board of Health and Welfare in **Sweden** presented the results of an inquiry on care and support for transgender people.⁷⁰ According to current legislation, to undergo gender reassignment surgery a person must be older than 18 years of age, a Swedish citizen, sterilised and unmarried. The report called for an end to the requirement that all those seeking gender reassignment must be unmarried and sterilised.

“The permanent nature and irreversibility of transsexual persons’ perceived gender cannot be assessed against the degree of the surgical adaptation of their external genitals but rather against the consistency with which they live in their perceived gender. The unconditional prerequisite of a surgical gender reassignment according to § 8:1 no. 4 TSG [relating to statutory recognition of transsexuals] constituted an excessive requirement because it requires of transsexual persons to undergo surgery and to tolerate health detriments even if this is not indicated in the respective case and if it is not necessary for ascertaining the permanent nature of the transsexuality.”

German Federal Constitutional Court, Press release No. 7/2011, 28 January 2011

Judicial decisions in some EU Member States have also led to an evolution in national law. In **Germany**,

⁶⁸ Portugal, Law 7/2011.

⁶⁹ Croatia, Ministry of Health and Social Welfare (2011).

⁷⁰ Sweden, National Board of Health and Welfare (2010).

Section 8 of the 1980 Transsexuals Act had required permanent infertility and surgery as a precondition to obtaining legal recognition of a person's preferred gender under the law of civil status. In January 2011, the Federal Constitutional Court declared these requirements unconstitutional.⁷¹

The Constitutional Court in **Malta** found in November 2010 that the impossibility of a transgender woman to marry a person of her choice violated Article 12 of the European Convention on Human Rights (ECHR), which protects the right to marry and establish a family. This judgment was overturned on appeal in May 2011. The court ruled that the applicant could not be considered a woman under the Marriage Act, even though an annotation had been made in her birth certificate as early as 2006 to reflect her preferred female gender.⁷²

Other EU Member States witnessed changes to the terminology or methodology of medical diagnoses relating to gender identity. In **Finland**, the National Institute for Health and Welfare (*Terveyden ja hyvinvoinnin laitos/ Institutet för hälsa och välfärd*) updated the national version of the World Health Organisation's International Classification of Diseases in 2011. Accordingly, dual-role transvestism, fetishism, fetishistic transvestism, sado-masochism or multiple disorders of sexual preference are no longer classified as diseases.⁷³

The National Institute for Forensic Medicine (*Institutul Național de Medicină Legală "Mina Minovici"*, NIFM) in **Romania** adopted a new methodology for evaluating cases of so-called 'sexual identity disorder'. According to LGBT organisations several components of this methodology may, however, encroach upon the right to private life, as they have an impact on the physical and mental integrity of the person and their dignity.

Under the new Romanian methodology, it takes three years of evaluations (three phases) to certify whether a person is transgender. The NIFM can interrupt the evaluation if the person does not comply with its recommendations and requests at any moment. The person is expected to avail him- or herself of a battery of tests, hospitalisations and mandatory psychotherapy for at least two years. A social investigation is also foreseen, usually performed by the local authorities from the person's residence who may, as part of the enquiry, interview family members, work colleagues and neighbours. The applicant is also required to carry out activities in an environment predominated by persons belonging to the preferred sex and to have direct

relations with people that suffered sex reassignment surgery and people that chose not to subject themselves to sex reassignment surgery.

FRA ACTIVITY

Transgender rights to personal safety and equality

The FRA and the Office of the Council of Europe Commissioner for Human Rights jointly hosted a roundtable discussion on the rights of transgender persons in Vienna on 22 and 23 September 2011. The wide-ranging discussions revolved around issues including legal certainty with respect to 'gender identity', visibility of transgender persons and experiences (and lack thereof), the role and interconnections of different players and good practices. The group's conclusions included the need for more engagement by authorities, equality bodies and other actors in collecting reliable data and the need to respect the privacy of respondents. The discussions addressed the issues of: how to gather data on transgender rights, such as by making use of official national statistics, employment surveys, household surveys; what type of data is needed, such as experiences in schools, number of transgender persons going to medical clinics; and of which tools can be useful for collecting data, such as third-party reporting, ensuring anonymity of reports, including questions in existing EU-wide surveys.

For more information, see: http://fra.europa.eu/fraWebsite/lgbt-rights/infocus11_2709_en.htm

5.5. Discrimination on the grounds of disability

This section provides an overview of legal and policy developments in the field of discrimination on the grounds of disability, with a particular focus on the United Nations Convention on the Rights of Persons with Disabilities (CRPD). The section begins with an update on the ratification and implementation of the CRPD. It then considers legal developments at the level of Member States, before moving on to discuss issues of accessibility, participation in the labour market, inclusive education and independent living, all from the perspective of discrimination against persons with disabilities.

5.5.1. Ratification and implementation of the CRPD

The CRPD entered into force for the EU as a whole in January 2011. Under Article 33 (2) of the CRPD, the EU is obliged to establish a framework, including one or more independent mechanisms, with responsibility for promoting, protecting and monitoring the implementation

71 Germany, Federal Constitutional Court, Order of 11 January 2011 – 1 BvR 3295/07, Press release No. 7/2011, 28 January 2011.

72 Malta, Constitutional Court, Civil appeal 43/2008/2, *Joanne Cassar v. Director of Public Policy*, 23 May 2011.

73 Finland, National Institute for Health and Welfare (2011).

Table 5.2: Ratification of the UN Convention on the Rights of Persons with Disabilities (CRPD), by country

Country	Year of ratification	Optional Protocol
AT	2008	Yes
BE	2009	Yes
CY	2011	Yes
CZ	2009	No
DE	2009	Yes
DK	2009	No
ES	2007	Yes
FR	2010	Yes
HU	2007	Yes
IT	2009	Yes
LT	2010	Yes
LU	2011	Yes
LV	2010	Yes
PT	2009	Yes
RO	2011	No
SE	2008	Yes
SI	2008	Yes
SK	2010	Yes
UK	2009	Yes
HR	2007	Yes

Note: Data as of 31 December 2011.

Source: FRA, 2011; see http://fra.europa.eu/fraWebsite/disability/disability_en.htm

of the CRPD. In 2011, the European Commission identified four bodies that would together form the EU framework. The four bodies are: the European Parliament's Petitions Committee, the European Ombudsman, the European Commission and the FRA. To ensure the involvement of persons with disabilities and their representative organisations, the Commission has also invited the EU-wide representative organisation of persons with disabilities, the European Disability Forum (EDF), as an observer. Within the framework, the FRA is expected to contribute to promoting the CRPD; to collect and analyse data within the limits of its mandate; and, in cooperation with the Commission, to develop indicators and benchmarks to support the monitoring process.

Cyprus, Luxembourg and Romania ratified the CRPD in 2011, with Cyprus and Luxembourg also ratifying its Optional Protocol. This brings the number of EU Member States that have ratified the treaty to 19, with 16 of these also having ratified its Optional Protocol, as Table 5.2 shows.

Discussions and preparatory work regarding implementation remain ongoing in the remaining eight EU Member States. Croatia ratified the CRPD and its Optional Protocol in 2007.

Some EU Member States developed national action plans in the area of disability designed to implement the CRPD and achieve the objectives outlined in the European Commission's European Disability Strategy 2010–2020,⁷⁴ including **Germany**⁷⁵ and **Sweden**.⁷⁶ **Spain** adopted new legislation in August 2011 to bring national law and policy into line with the requirements of the CRPD.⁷⁷ The legislation includes the regulation of transport, information society and civil protection.

5.5.2. Legal developments relevant to discrimination against persons with disabilities at the level of Member States

The issue of reasonable accommodation of persons with disabilities was the subject of legislative changes

⁷⁴ European Commission (2010).

⁷⁵ Germany, Federal Ministry of Labour and Social Affairs (2011).

⁷⁶ Sweden, Ministry of Health and Social Affairs (2011).

⁷⁷ Spain, Act for the full legal adaptation to the Convention on the Rights of Persons with Disabilities; Spain, Royal Decree (2011).

in **Poland**⁷⁸ and **Slovenia**.⁷⁹ The European Commission brought legal proceedings against **Italy** in June 2011 for having incorrectly transposed Article 5 of the Employment Equality Directive. According to the Commission, Italian law fails to place all employers under an obligation to provide reasonable accommodation for persons with disabilities.

FRA ACTIVITY

Providing reasonable accommodation for those with mental health problems

The FRA issued a report examining how disability is addressed in international and European law and exploring the obligation to provide reasonable accommodation as contained in international and European standards. The report – *The legal protection of persons with mental health problems under non-discrimination law; understanding disability as defined by law and the duty to provide reasonable accommodation in European Union Member States* – found that non-discrimination legislation does indeed protect persons with mental health problems in almost all EU Member States. In most cases persons with mental health problems also benefit from reasonable accommodation measures, or other protection measures, in the employment context. The report concludes by presenting examples of where legislation extends the duty to provide reasonable accommodation beyond employment, such as in the areas of education, housing and access to goods and services.

Croatia introduced new legislation in 2011 explicitly prohibiting direct and indirect discrimination against those accessing social assistance,⁸⁰ abolishing pre-conditions requiring severe health impairments of claimants to have occurred before the age of 18. Persons with a disability or severe health impairments will now qualify for this benefit irrespective of the age at which their impairment occurred.

5.5.3. Accessibility

Accessibility is a necessary precondition for the social, economic and political inclusion of people with disabilities, the elderly and those with reduced mobility or other temporary functional limitations. As announced in the European Disability Strategy 2010–2020, the European Commission is exploring the merits to propose a European Accessibility Act by the end of 2012.

78 Poland, Law on Equal Treatment.

79 Slovenia, Law Amending the Law on Vocational Rehabilitation and Employment of Disabled Persons.

80 Croatia, Social Assistance Act (SAA).

The Commission contemplates “a business-friendly proposal” aiming to improve the market of goods and services that are accessible for persons with disabilities and elderly persons, based on a “design for all” approach using harmonised standards.

“[T]here is a strong relationship between mobility, disability and social inclusion, especially with regard to freedom and access to communication (including Braille and sign languages and other alternative forms of communication), freedom of movement in all fields of life and access to services; whereas full participation in all aspects of society needs to be promoted, bearing in mind the importance of Community policies regarding information and communications technologies, as well as home robotics and online communication solutions, and the need to move towards full accessibility by promoting compatible standards in the single market and facilitating their dissemination.”

European Parliament report on mobility and inclusion of people with disabilities and European Disability Strategy 2010-2020 (2010/2272 (INI))⁸¹

The resulting competition among providers and the opening up of markets across EU Member States is intended to increase the choice of accessible goods and services at more affordable prices, thereby stimulating business opportunities and economic growth and as a result facilitating the social integration of persons benefiting from these goods and services.⁸² The Commission opened up a public consultation in December 2011 on the European Accessibility Act, encouraging input from a broad range of stakeholders.⁸³

Policies and programmes aimed at increasing physical accessibility to buildings were launched in some EU Member States, including **France**,⁸⁴ **Germany**⁸⁵ and **Romania**.⁸⁶ Enhancing accessibility goes beyond physical environment and may also concern procedures, processes, services or virtual environments (see Chapter 7 for information on measures taken to promote the accessibility of polling stations).

The lack of accessibility has also been the focus of attention of equality bodies in some EU Member States. For instance, in its 2010 annual report, the Office of the **Bulgarian** Ombudsman (*Омбудсман на Република България*) points to a lack of accessibility, both physical and in terms of administrative processes, in hospitals, social assistance departments, the homes of persons with disabilities and public transport.⁸⁷

81 European Parliament (2011b).

82 European Commission (2011e).

83 European Commission (2011f).

84 France, Bill 3431; France, Interdepartmental Monitoring Body of Accessibility and Universal Design (2011).

85 Germany, Bundeskompetenzzentrum Barrierefreiheit (2011); Germany, Federal Ministry for Work and Social Affairs (2011), p. 196.

86 Romania, PROIECT (2011).

87 Bulgaria, Office of the Bulgarian Ombudsman (2011), p. 10.

Promising practice

Improving access to buildings

The Danish Organisation for Accessibility for All (*Foreningen Tilgængelighed for Alle*) developed an Accessibility Label Scheme (*Mærkeordningen for Tilgængelighed*). The scheme's purpose is to make clear how accessible government office buildings, as well as companies and organisations that provide public access, actually are. There are seven focus categories: wheelchair users, reduced mobility, visual impairments, hearing impairments, asthma and allergies, mental disabilities and reading difficulties. It provides signs that indicate when a building has complied with the minimum accessibility requirements in any of the seven focus categories. All court buildings that have been included in the scheme are presented online with a factsheet concerning the building and its accessibility at <http://www.godadgang.dk> and <http://www.borger.dk>. The organisation also drafts a report on the accessibility of each building and includes recommendations for possible improvements.

For more information, see: www.godadgang.dk, compare also Chapter 5.

FRA ACTIVITY

Developing easy-to-read communication material

The FRA published a series of short publications in an easy-to-read format to make its research accessible to people with intellectual disabilities. The information focuses on FRA's work in the area of disability and includes a summary of its 2010 report on political participation.

For more information, see: http://fra.europa.eu/fraWebsite/disability/disability_en.htm

5.5.4. Combating discrimination against persons with disabilities: employment, inclusive education and independent living

A report by the European Parliament on the mobility and inclusion of people with disabilities points out that discrimination in the context of employment is often more strongly related to access to employment than to discrimination in the workplace for those already in employment.⁸⁸ Of the estimated 80 million persons with disabilities living in the EU, the report notes that only 30–40 % are employed, placing persons with disabilities at greater risk of living in poverty. At the national level, low levels of employment of persons with disabilities have been the subject of research and confirmed by occupational health specialists and equality bodies in **Denmark**,⁸⁹ **Finland**⁹⁰ and **Slovenia**.⁹¹

⁸⁸ European Parliament (2011a).

⁸⁹ Denmark, Thomsen, L.B. and Høgelund, J. (2011).

⁹⁰ Finland, Finnish Institute of Occupational Health (2010).

⁹¹ Slovenia, *Univerza na Primorskem, Fakulteta za management* (2010).

The World Health Organisation and the World Bank, in their joint *World Report on Disability* published in 2011, underline that promoting equality by prohibiting discrimination and positive action measures are more likely to benefit those already in employment than those in search of employment.⁹² The report points out that people with disabilities have generally poorer health, lower educational achievement, fewer economic opportunities and higher levels of poverty than people without disabilities.

European Structural Funds are a useful tool for improving accessibility and promoting the inclusion of people with disabilities in the labour market, thereby increasing their participation in civil society. In October 2011, the European Commission submitted its proposal for a Regulation laying down common provisions for the funds for the period from 2014 to 2020.⁹³ The proposal sets out a number of provisions related to disability, particularly in relation to accessibility and independent living. Most importantly, Article 87(3)(ii) says that operational programmes financed by structural funds shall include “a description of the specific actions to promote equal opportunities and prevent any discrimination based on [...] disability [...] during the preparation, design and implementation of the operational programme and in particular in relation to access to funding, taking account of the needs of the various target groups at risk of such discrimination and in particular the requirements of ensuring accessibility for disabled persons”. In addition, one of the general conditions that must be in place before funds are disbursed concerns disability, and requires “the existence of a mechanism which ensures effective implementation and application of the UN Convention on the Rights of Persons with Disabilities”. Moreover, the monitoring committees evaluating operational programmes must examine “actions to promote equality [...] and non-discrimination, including accessibility for disabled persons”.

⁹² World Health Organization and World Bank (2011).

⁹³ European Commission (2011g).

The **Spanish** Ministry of Labour and Immigration's 2010 annual report of activities, for example, reveals that financing through the European Social Fund enabled 8,243 persons with disabilities to find a job by the end of 2010.⁹⁴ This fund has also financed awareness-raising campaigns to promote the recruitment of workers with disabilities among employers.

“People with disabilities often have unique insights about their disability and their situation. In formulating and implementing policies, laws and services, people with disabilities should be consulted and actively involved. Disabled people’s organisations may need capacity-building and support to empower people with disabilities and advocate for their needs. When suitably developed and funded, they can also play a role in service delivery – for example, in information provision, peer support and independent living.”

World Health Organization and World Bank (2011), World Report on Disability, p. 265

Inclusive education is a precondition for the integration of people with disabilities in society, in particular because education and formal qualifications open up access to employment and career advancement. In some EU Member States, however, children with disabilities are only allowed to attend ‘special schools’ and are not admitted into mainstream education.

This can severely disadvantage the children’s education, as an expert hearing the Children’s Commission of the Lower House of the **German** Parliament (*Bundestag*) concluded.⁹⁵ The expert hearing also determined that a majority of children with disabilities in Germany have learning disabilities and speech disorders, while a much smaller proportion have severe disabilities. Nonetheless, 85 % of children with disabilities attend special schools. The experts who took part at the hearing favoured integrating children with disabilities into the mainstream education system and providing for specially trained teachers instead of retaining two distinct educational systems.

The ready availability of good quality support teachers is crucial to ensure inclusive education. In this context, the Constitutional Court in **Italy** found unlawful legislation that introduced a maximum ceiling on the number of learning-support teachers in state schools and prevented schools from hiring fixed-term teachers to assist children with serious disabilities.⁹⁶ Similarly, the Court of Milan found that a Ministry of Education decision to reduce the number of special assistance hours given to children with disabilities amounted to discrimination.⁹⁷ The court concluded that the government failed to respect the duty to adopt reasonable accommodation for children requiring

special assistance in the education system. Although the actual number of support teachers increased in Italy, the teacher/pupil ratio decreased, given a 45 % rise in the number of pupils with disabilities in the last decade.

Independent living is recognised by Article 19 of the CRPD, which also includes a right to personal assistance. In 2011, the European Network of Independent Living called on the EU to take a range of measures that would protect and promote these rights.⁹⁸ The notion of independent living originated in the disability movement’s efforts to encourage alternatives to institutional living by advocating a concept based on giving people with disabilities choice and control over their own lives. Living independently empowers people with disabilities to take part in the life of their community on an equal basis with others. It acts as a vehicle for autonomy and control over living arrangements and daily life activities.

The **United Kingdom’s** Office for Disability Issues thus reports that over one-fifth of disabled people believe that they frequently do not have choice and control over their daily lives. The report highlights that when persons with disabilities received direct payments and personal budgets to organise personal assistance they exercised greater choice and control.⁹⁹

The body responsible for monitoring the implementation of the CRPD in **Austria** issued an opinion on personal assistance (*Stellungnahme zu persönlicher Assistenz*) in June 2011.¹⁰⁰ The opinion emphasised that persons with disabilities ought to be given the choice and control over their personal assistance and that this choice is an important vehicle facilitating inclusion into society. The opinion noted that there was no adequate and needs-based funding for personal assistance in Austria.

Deinstitutionalisation programmes increase the possibility for persons with disabilities to live independently. One such project was established for children living in institutions in **Bulgaria**, with every child benefiting from a personalised programme of deinstitutionalisation.¹⁰¹ The project includes plans for the development of family care homes, protected homes where small numbers of children are accommodated together, day-care centres for children with disabilities and centres for rehabilitation and social integration in cities and villages across the country. The planned services would allow for greater capacity (2,076 places) than is currently required, in case more children require such services in the future – such as children under the age of three living in institutions and children living in the community but at risk of abandonment.

94 Spain, Ministry of Labour and Immigration (2011).

95 Germany, German Parliament (2011a).

96 Italy, Constitutional Court (2010), Law No. 247/2007.

97 Italy, Court of Milan (2011).

98 European Network on Independent Living (ENIL) (2011).

99 United Kingdom, Office for Disability Issues (2011).

100 Austria, Independent Monitoring Board (2011).

101 Bulgaria, Ministry of Labour and Social Policy (2011).



In a report highlighting poor living conditions for patients with intellectual and psycho-social disabilities who live in psychiatric institutions and social care homes, the Mental Disability Advocacy Centre in **Croatia** highlights the need for urgent reforms in the field.¹⁰² The report recommends the immediate introduction of a package of reforms prioritising deinstitutionalisation and the establishment of community-based care to remedy the situation.

“[U]nder International and European human rights law, Governments should transfer from a system of institutional care to alternative community-based services that enable children, persons with disabilities (including users of mental health services) and older people to live and participate in the community.”

Office of the High Commissioner for Human Rights, Brussels office, Forgotten Europeans, forgotten rights (2011)

5.6. Discrimination on the grounds of age

This section deals with discrimination on the grounds of age. It begins by presenting international developments related to the rights of older people and then moves on to discuss the labour market situation of younger and older workers across the EU Member States. The section finishes by outlining initiatives promoting the independence of older people and their dignified living in order to combat abuse against the elderly.

5.6.1. International developments

In December 2010, the UN General Assembly established an Open-ended Working Group for the purpose of strengthening the protection of the human rights of older persons, also known as the Open-ended working group on Ageing.¹⁰³ Its mandate calls for the consideration of the existing international framework on the human rights of older persons and for the identification of possible gaps and how best to address them, including by considering the feasibility of further instruments and measures, where appropriate.¹⁰⁴

The Committee of Ministers of the Council of Europe gave mandate to its Steering Committee for Human Rights to elaborate a non-binding instrument on the promotion of the rights and dignity of the elderly between 2012 and 2013. A drafting group was set up to this effect.

The year 2012 is the European Year of Active Ageing and Solidarity between Generations, for which preparations

began in 2011.¹⁰⁵ The aim here is to raise awareness of opportunities available for older adults to stay in the workforce, should they wish to do so; to play an active role in society; and to live a healthy life. Another objective is to highlight challenges politicians and stakeholders must take up if they are to improve opportunities for active ageing and for living independently in the areas of employment, healthcare, social services, adult learning, volunteering, housing, information technology, services or transport.

Numerous activities have already been scheduled in EU Member States in the run up to the European Year of Active Ageing and Solidarity between Generations, including among others, the commissioning of studies on the reality of active ageing, such as was done by the **Belgian** Federal Public Service for Social Security,¹⁰⁶ awareness raising campaigns, such as the **Bulgarian** Red Cross' *Age Awareness and Advocacy of Older People Project*,¹⁰⁷ or the annual e-learning day organised by the **Estonian** e-Learning Development Centre in the framework of the Adult Learner Week.¹⁰⁸

5.6.2. Discrimination on the grounds of age in employment

Court judgments that found age discrimination in employment, particularly in relation to recruitment and dismissal, were delivered at the EU and national level. In a case relating to **Germany**, the CJEU ruled in September in *Prigge and Others v. Deutsche Lufthansa AG* that prohibiting airline pilots from working after the age of 60 constitutes discrimination on the grounds of age.¹⁰⁹

In July, the **Austrian** Supreme Court (*Oberster Gerichtshof*) made a finding of age discrimination in the case of a doctor who was refused a post of general practitioner with the statutory health insurance (*Vertragsarzt*) at the age of 58. The recruitment rules exclude persons over the age of 55, unless there is an agreement reached between the insurance company and the job applicant. The applicant argued that this clause constituted age discrimination. The Court of Appeal made a finding of age discrimination which the Supreme Court confirmed on appeal.

The District Court of Helsinki (*Helsingin käräjäoikeus/Helsingfors tingsrätt*), **Finland**, ruled in June that the Social Insurance Institution (*Kansaneläkelaitos/Folkpensionanstalten*) discriminated against a 58-year-old applicant with better qualifications and more work experience than a 46-year-old applicant who was offered the managerial

¹⁰² Croatia, Mental Disability Advocacy Centre and Association for Social Affirmation of People with Mental Disabilities (2011).

¹⁰³ United Nations, General Assembly (2010).

¹⁰⁴ United Nations (2011).

¹⁰⁵ European Commission (2012).

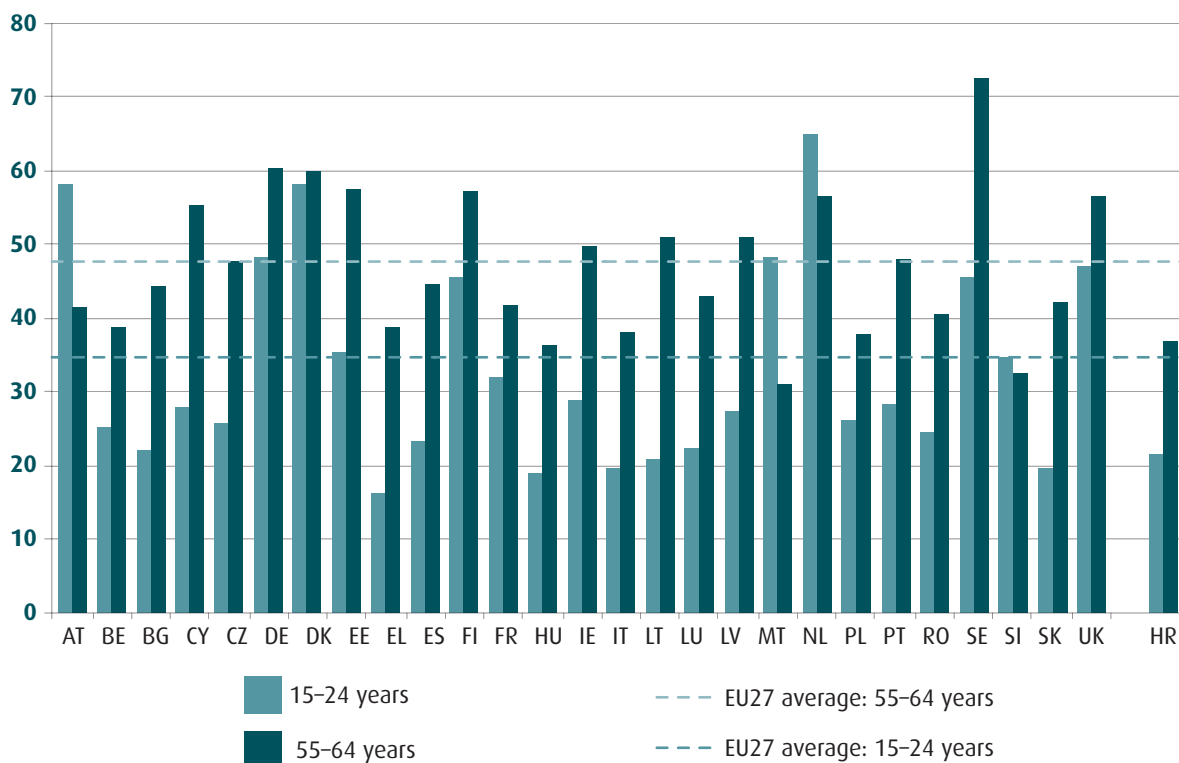
¹⁰⁶ Belgium, Federal Public Service Social Security (2011).

¹⁰⁷ Bulgaria, Red Cross (2011).

¹⁰⁸ Estonia, Estonian e-Learning Development Centre (2011).

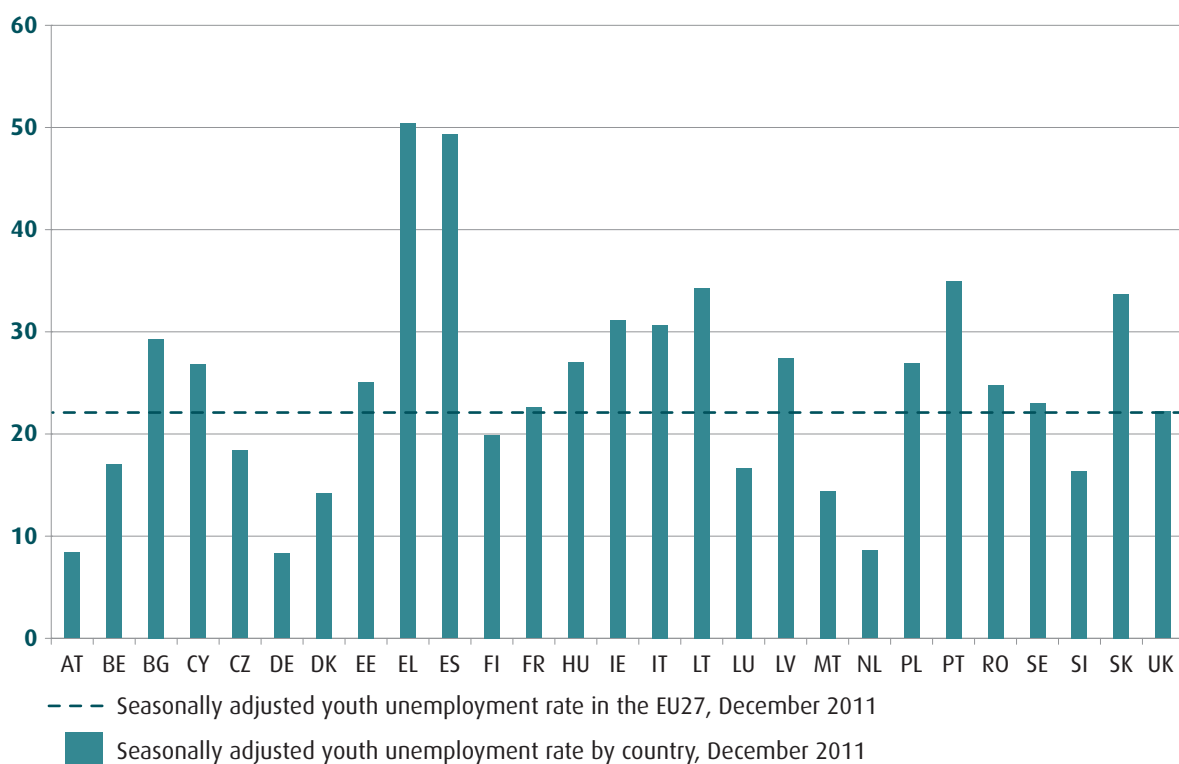
¹⁰⁹ CJEU, *Reinhard Prigge and Others v. Deutsche Lufthansa AG*, Case C-447/09, 13 September 2011.

Figure 5.2: Employment rates by age groups, by country, fourth quarter 2011 (%)



Source: Eurostat, 2012

Figure 5.3: Seasonally adjusted youth unemployment rate in 2011, by country (%)



Note: Data refer to young persons under the age of 25.

Source: Eurostat, 2012, Euro area unemployment rate at 10.8 %, p. 4, available at: http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-02042012-AP/EN/3-02042012-AP-EN.PDF



position they both applied for.¹¹⁰ The claimant was paid €8,000 in compensation.

The Supreme Court in **Spain** issued two decisions abolishing a maximum threshold of 30-years of age when applying for certain posts within the Spanish police.¹¹¹ These are the first court decisions to recognise and abolish age-based discrimination in access to jobs in the Spanish central administration. Their importance lies in the influence they could have over a large number of pending legal proceedings on the same issue, namely: alleged age-based discrimination in more than 15 recruitment cases affecting more than 30,000 public sector jobs since 2004.

The **Greek** Council of State ruled that the maximum age of 35 years for candidates to posts of judges of lower courts is not contrary to either the Greek Constitution, Directive 2000/78 establishing a general framework for equal treatment in employment and occupation or to national legislation transposing this directive. The duration of military service – which is only compulsory for men – is, however, not taken into account here, since it would otherwise conflict with the principle of gender equality.¹¹²

The European Ombudsman drafted a recommendation to the European Commission in March, asking it to establish that it did not discriminate on the grounds of age in the case of a 63-year-old candidate in a selection competition for an assistant post.¹¹³

Lower rates of employment for younger and older workers could be indicative of indirect discrimination on the grounds of age in employment. Data collected by Eurostat on a quarterly basis thus show that younger persons between the ages of 15 and 24 and older persons between the ages of 55 and 64 have lower rates of employment compared to the active population (age group 15 to 64) as a whole. In addition, younger persons have lower rates of employment than older persons across most of the EU Member States, with the exception of **Austria, Malta, the Netherlands** and **Slovenia** (Figure 5.2).

Likely explanations for differences in the employment rates of younger and older persons include the possibility that job requirements are set at too high a level for many graduate positions, as the Equal Opportunities Ombudsman in **Lithuania** suggests. Such high expectations particularly affect the job prospects of young women who went on maternity leave after completing their degrees.¹¹⁴

The unemployment rate among young people under the age of 25 exceeds 10 % throughout the EU, except in

Austria, Germany and the **Netherlands**, as data from Eurostat show (Figure 5.3).

Younger workers are also faced with long-term unemployment. In its 2011 update on *Global Employment Trends for Youth* between the ages of 15 and 24, the International Labour Organization cites **Italy** as an example of a developed economy where the long-term youth unemployment rate far surpasses that of other adults. In 2010, young people there were three and a half times more likely to be in long-term unemployment than were other adults. In other EU Member States such as **Belgium, France, Greece, Hungary, Ireland, Slovakia, Spain**, and the **United Kingdom** young people were about twice as likely to find themselves in a similar situation.¹¹⁵

5.6.3. Ageism

Research published in 2011 points out that ageism – that is, discrimination or unfair treatment based on age – persisted in EU Member States. In its 2011 *European report on preventing elder maltreatment*, the World Health Organization (WHO) notes that “elder maltreatment is pervasive in all countries in the [WHO] European Region”,¹¹⁶ with at least four million people a year experiencing maltreatment due to their age.

At the national level, the Ombudsman in **Croatia** signals evidence of involuntary placement of older persons in retirement homes, suggesting that further monitoring of the system of legal capacity restrictions is required.¹¹⁷

The **Finnish** Ministry of the Interior published an action plan in May 2011, aiming to improve security for the elderly. The programme contains recommendations to improve safety, including preventing abuse, violence and crime against the elderly.¹¹⁸

A British charity working for the benefit of older persons, Age UK, published a study on ageism in Europe.¹¹⁹ The study was conducted by the European Research Group on Attitudes to Age (Eurage), “an international team of researchers specialised in ageism, attitudes to age and cross-cultural comparisons” led by the University of Kent in the United Kingdom (for more information on Eurage, see www.eurage.com). The study was based on the findings of the European Social Survey and found that old age is the most widely experienced source of discrimination in Europe. Around 64 % of respondents in the **United Kingdom** and 44.4 % across Europe considered old-age discrimination to be a serious problem.

110 Finland, District Court of Helsinki, Dnro L10/27675.

111 Spain, Supreme Court, STS 2187/2011, 21 March 2011; STS 2185/2011, 21 March 2011.

112 Greece, Council of State (2011).

113 European Ombudsman (2011).

114 Lithuania, Office of Equal Opportunities Ombudsman (2010).

115 International Labour Office (2011), p. 3.

116 World Health Organization, Sethi, D. *et al.* (eds.) (2011).

117 Croatia, Ombudsperson (2011), pp. 28-32.

118 Finland, Ministry of the Interior (2011).

119 Age UK (2011).

Promising practice

Festival celebrating the elderly in Ireland

The Bealtaine Festival in Ireland is a yearly national festival celebrating older people in the arts. Bealtaine runs in partnership with over 400 organisations and groups which organise events throughout the country. Each year, the participating organisations collaborate closely with a small number of artists, groups or organisers to facilitate challenging or unusual events, providing advice, networking and some funding support. The Bealtaine festival has grown in scope and ambition in the 15 years since its inauguration, and is recognised globally as the first such festival of its kind – a national festival celebrating older people.

For more information, see: www.bealtaine.com

5.7. Discrimination on the grounds of religion or belief

This section explores legal, social and policy developments relating to discrimination on the grounds of religion or belief that took place in 2011. It begins by considering legal developments relevant to discrimination on the grounds of religion or belief. It then moves to case law exploring the boundaries of where freedom of religion or belief could justifiably be curtailed. The section concludes by examining the manifestation of religious intolerance in EU Member States.

5.7.1. Legal developments relevant to discrimination on the grounds of religion or belief

Legislative developments took place in several EU Member States that could adversely affect the religious practices and rituals of members of some faith groups, particularly Jews and Muslims in **Belgium**, **France** and the **Netherlands**.

Legislation came into force or was proposed in these Member States relating to banning the wearing of face-covering apparel in public spaces. While generally framed in terms of national security, these developments could affect Muslim women who wear full-face veils in accordance with their religious beliefs.

Legislation prohibiting the concealment of the face in public spaces (*Loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace*)

public) came into force in **France** in April 2011.¹²⁰ Similar legislation prohibiting the wearing of all clothing partly or completely hiding the face in public spaces (*Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage*) came into force in **Belgium** in July 2011.¹²¹ An individual appeal to annul this law was filed before the Constitutional Court on 17 November 2011. The ruling has not yet been delivered. The **Dutch** Council of Ministers voted in favour of a bill in September 2011 proposing that face-covering apparel should be banned, as such clothing is perceived to be in contradiction with principles of equality between men and women.¹²² The Dutch Parliament (*Tweede Kamer der Staten-Generaal*) has been considering the bill since February 2012.¹²³

“Derogation from stunning in case of religious slaughter taking place in slaughterhouses was granted by Directive 93/119/EC. Since Community provisions applicable to religious slaughter have been transposed differently depending on national contexts and considering that national rules take into account dimensions that go beyond the purpose of this Regulation, it is important that derogation from stunning animals prior to slaughter should be maintained, leaving, however, a certain level of subsidiarity to each Member State. As a consequence, this Regulation respects the freedom of religion and the right to manifest religion or belief in worship, teaching, practice and observance, as enshrined in Article 10 of the Charter of Fundamental Rights of the European Union.”

Council Regulation (EC) No. 1099/2009 of 24 September 2009 on the protection of animals at the time of killing

In June 2011, the **Dutch** Parliament had accepted a bill – proposed by the Party for Animals (*Partij voor de Dieren*) – that would have led to banning the ritual slaughter of animals without first stunning them. The Dutch Senate (*Eerste Kamer der Staten-Generaal*) rejected the bill in its proposed format in December 2011. Had this bill been accepted, it could have had repercussions on the provision of kosher or halal meat to practitioners of Judaism or Islam. The debate, however, is still ongoing, with the Secretary of State for Agriculture in discussion with representatives of Jewish and Muslim groups to define modifications that could be applied to the legislation.¹²⁴

A bill proposing the banning of ritual slaughter without anaesthetising animals was proposed by the New-Flemish Alliance party (*Nieuw-Vlaamse Alliantie*) in late 2010 in **Belgium**. The bill is still pending before Parliament (*Chambre des représentants*). Its substance, according to its

120 France (2011) Law 2010-1192.

121 Belgium (2011) *Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage*.

122 Netherlands, Ministry of the Interior and Kingdom Relations (2011).

123 Netherlands, Lower House of Parliament (2012).

124 Netherlands, Government of the Netherlands (2012).

authors, is that the well-being of animals should take precedence over the right to freedom of religion.¹²⁵

Discussions on practices of ritual slaughter were also held in **France**, although within the framework of the protection of consumers and the traceability of consumer products, particularly in relation to labelling meat as coming from animals that were slaughtered without being stunned. A decree relating to the modalities of slaughter was submitted to the consultative committee on the health and protection of animals (*Comité consultatif de la santé et de la protection animale*) in October.¹²⁶

5.7.2. Cases of discrimination on the grounds of religion or belief

Documented cases of unequal treatment on the grounds of religion or belief often relate to discrimination against Muslim women wearing veils at the workplace. These cases also often relate to the intersection of sex and religion as grounds of discrimination.

A number of cases pertaining to discrimination on the grounds of religion or belief are reported in the context of education. With respect to the display of religious symbols, the Grand Chamber of the European Court of Human Rights (ECtHR) ruled in March in *Lautsi and others v. Italy* that the requirement set by Italian law to display crucifixes in the classrooms of state schools does not violate the rights of parents to education and teaching in conformity with their own religious and philosophical convictions (protected under Article 2 of Protocol No. 1 of the ECHR).¹²⁷ Although the ECtHR did not find cause to examine the case under Article 14 of the ECHR prohibiting discrimination, its judgment sheds light on the question of when differential treatment on the grounds of religion might be justifiable. In this case, the ECtHR considered that the display of a crucifix is essentially a “passive symbol” that “cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities”. At the same time, it acknowledged that “the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed.”

The ECtHR concluded that the point at which religious activities or symbols can be considered to infringe upon freedom of conscience or religion is when an active process of “indoctrination” takes place.

“It is true that by prescribing the presence of crucifixes in state-school classrooms – a sign which, whether or not it is accorded in addition a secular symbolic value, undoubtedly refers to Christianity – the regulations confer on the country’s majority religion preponderant visibility in the school environment. That is not in itself sufficient, however, to denote a process of indoctrination on the respondent State’s part and establish a breach of the requirements of Article 2 of Protocol No. 1.”

European Court of Human Rights, Lautsi and others v. Italy, 18 March 2011, paragraph 71

The Federal Administrative Court (*Bundesverwaltungsgericht*, BVerwG) in **Germany** found that not permitting pupils to pray within school premises outside of school hours could amount to discrimination on the grounds of religion or belief (case BVerwG 6 C 20.10, OVG 3 B 29.09). The BVerwG concluded that putting restrictions on praying within school premises could not be justified on the grounds of the right to education nor by invoking the neutrality of the state.

Restrictions could, however, be justified to safeguard the religious freedom of other pupils or in the interest of ensuring peaceful coexistence among pupils at the school. Since there had been several incidents motivated by religious tensions among pupils at the school in question, the BVerwG was prepared to accept that allowing an individual to pray on its premises could give rise to additional tensions.

The BVerwG nevertheless found that the school should have explored less intrusive means than an outright prohibition – such as providing a separate prayer room – for the limitation to be considered as proportionate to the need of preserving peaceful coexistence. The school had, however, already tried this, but the dedicated prayer room had given rise to conflicts between pupils wearing headscarves and those who did not, and because male students refused to share the room with female pupils. The school judged that the decision to restrict prayers altogether was justified in light of the fact that a dedicated prayer room proved not to be an adequate solution to the problem.¹²⁸

Other cases relate to situations where freedom of religion exercised by religious organisations may itself result in discrimination. Article 4 (2) of the Employment Equality Directive¹²⁹ stipulates that churches and other public or private organisations with an ethos based on religion or belief may require individuals working for them to be loyal to that ethos, as long as this requirement conforms to national constitutions and laws.

¹²⁵ Belgium, *Chambre des Représentants* (2010).

¹²⁶ France, *Assemblée Nationale* (2011).

¹²⁷ European Court of Human Rights (ECtHR), 30814/06, *Lautsi and others v. Italy*, 18 March 2011.

¹²⁸ Germany, Federal Administrative Court, BVerwG 6 C 20.10, OVG 3 B 29.09, 30 November 2011.

¹²⁹ Council Directive 2000/78/EC, OJ 2000 L 303, p. 16.

In September, the **German** Federal Labour Court (*Bundesarbeitsgericht*) ruled that the dismissal of a Catholic chief physician working in a Catholic hospital because of the doctor's remarriage was unlawful.¹³⁰ By contrast, in *Siebenhaar v. Germany* – a case concerning the dismissal of an employee from a kindergarten run by a Protestant parish on the grounds of her active involvement with another religious community – the ECtHR found no violation of Article 9 of the ECHR guaranteeing freedom of religion or belief.¹³¹

According to the domestic courts that had examined the case, the dismissal had been necessary to preserve the Church's credibility, which outweighed the jobholder's interest in keeping the post. In ruling that the dismissal of the kindergarten teacher by the Protestant Church for active commitment to another religious community was justified, the ECtHR found the German labour courts' findings to be reasonable.

5.7.3. Evidence of intolerance towards religious groups

Intolerance towards religious groups persisted among sections of the general public and in political discourse in EU Member States in 2011. ENAR, the European Network Against Racism, reports incidents of intolerance directed at Jews, Muslims and minority non-Orthodox Christians in the EU. ENAR relates evidence showing that, as well as being the victims of violence, members of ethnic and religious minorities suffer discrimination in employment, housing, education, health and access to goods and services.¹³²

The UN Special Rapporteur on freedom of religion or belief criticised integration debates in **Germany** because they focused on Muslims. This focus, he argued, could push some Muslims towards radicalisation and intolerance.¹³³

The Institute of Race Relations noted that some anti-Muslim rhetoric in the **United Kingdom** is influenced in part by counter-terrorism policies, which have been shown to contribute to the treatment of Muslim minorities as 'suspect communities'.¹³⁴ This finding echoes that of comparative research funded by the Economic and Social Research Council on the impact of counter-terrorism policies on Irish and Muslim communities in Britain carried out at London Metropolitan University.¹³⁵

Intolerance against Muslims was evident in **Bulgaria**, where supporters of the Ataka political party attacked Muslims who congregated for Friday prayer in Sofia's Banya Bashi

mosque on 20 May 2011. Several people were injured in the attack and the police made a number of arrests on the day. Pre-trial proceedings were initiated immediately. Similarly, violence against Jehovah's Witnesses erupted in Burgas when the Bulgarian National Movement (*Българско национално движение*) organised a demonstration in April calling for the banning of this faith. A group of young men with hoods raided the Kingdom Hall, the place of worship of the Jehovah's Witnesses, with bystanders chanting and shouting slogans to encourage their actions. Seven demonstrators were detained, of which five were later convicted as per the penal code, the scope of which was extended in April in line with the transposition into Bulgarian law of the Framework Decision on Combating Racism and Xenophobia.

Outlook

EU institutions, national courts and equality bodies are expected to increasingly recognise and use the concept of multiple discrimination – a trend that would allow policy makers to elaborate measures tailored to addressing the obstacles facing those most vulnerable to discrimination on several grounds.

Whereas the adoption of the European Commission's proposal for a horizontal directive prohibiting discrimination beyond employment on the grounds of sexual orientation, age, disability and religion or belief risks further delays, it is crucial that its primary aim – namely to engage in a more all-encompassing fight against discrimination – is put into practice.

At the national level, legislative measures taken to fully implement the CRPD and to combat discrimination on grounds of sexual orientation or gender identity will provide guidance to policy makers as they strive to combat all forms of discrimination more effectively. Also, the growing national-level emphasis on measures to promote accessibility for persons with disabilities may enhance the chances of achieving more inclusive education and independent living. There needs to be vigilance, however, to ensure that the impact of the economic crisis does not unduly affect the provisions of services to persons with disabilities.

The 2012 European Year of Active Ageing and Solidarity between Generations will offer an opportunity for policy makers to address and redress discriminatory treatment and the exclusion older people experience in some EU Member States.

Legal developments relating to health and safety, security issues or the protection of consumers that could adversely affect persons who follow religious practices in accordance with their beliefs will need close monitoring, so as to avoid situations of indirect discrimination on the grounds of religion or belief.

¹³⁰ Germany, Federal Labour Court (2011), 2 AZR 543/10, 8 September 2011.

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¹³² ENAR, Gauci, J. (2011); ENAR, Iganski, P. (2011).

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¹³⁴ United Kingdom, Institute of Race Relations (2011).

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UN & CoE

20 January – Committee of Ministers of the Council of Europe issues declaration on religious freedom

January

February

March

7 April – Council of Europe Committee of Ministers adopts the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)

April

11 May – Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) opens for signature and is signed by 11 Member States on the same day

May

17 June – United Nations Human Rights Council adopts Resolution on human rights, sexual orientation and gender identity

June

July

August

September

October

November

December

EU

January

February

8 March – European Parliament adopts a Resolution on equality between women and men in the European Union

9 March – European Parliament adopts a Resolution on the EU strategy on Roma inclusion

March

April

12 May – European Parliament adopts a Resolution on the proposed ILO convention supplemented by a recommendation on domestic workers

May

8 June – European Parliament adopts a Resolution on the external dimension of social policy, promoting labour and social standards and European corporate social responsibility

17 June – Council of the European Union issues conclusions on the support of the implementation of the European Disability Strategy 2010–2020

June

July

August

13 September – European Parliament Resolution on the situation of women approaching retirement age

28 September – European Parliament Resolution on human rights, sexual orientation and gender identity

September

26 October – European Parliament Resolution on the agenda for new skills and jobs

October

28 November – European Commission holds its third conference on 'Ageing in dignity: designing effective strategies for tackling elder abuse'

November

December

