



International
Labour
Organization

Non-Discrimination in Employment and Occupation

Youcef Ghellab



**SRO Budapest
DECLARATION**

Non-Discrimination in Employment and Occupation

Meeting of the Labour Legislation Network
of South Eastern Europe

Final Report

Dubrovnik, 2004

Youcef Ghellab

Subregional Office for Central and Eastern Europe, Budapest

InFocus Programme on Promoting the Declaration
on Fundamental Principles and Rights at Work, Geneva

International Labour Organisation

With the Support of the Government of Belgium

Copyright © International Labour Organization 2005
First published 2005

Publications of the International Labour Office enjoy copyright under Protocol 2 of the Universal Copyright Convention. Nevertheless, short excerpts from them may be reproduced without authorization, on condition that the source is indicated. For rights of reproduction or translation, application should be made to the Publications Bureau (Rights and Permissions), International Labour Office, CH-1211 Geneva 22, Switzerland. The International Labour Office welcomes such applications. Libraries, institutions and other users registered in the United Kingdom with the Copyright Licensing Agency, 90 Tottenham Court Road, London W1T 4LP [Fax: (+44) (0)20 7631 5500; e-mail: cla@cla.co.uk], in the United States with the Copyright Clearance Center, 222 Rosewood Drive, Danvers, MA 01923 [Fax: (+1) (978) 750 4470; e-mail: info@copyright.com] or in other countries with associated Reproduction Rights Organizations, may make photocopies in accordance with the licences issued to them for this purpose.

Ghellab, Y.
Non-Discrimination in Employment and Occupation. Meeting of the Labour Legislation Network of South Eastern Europe.
Final Report
Budapest, International Labour Office, 2005

ISBN 92-2-116993-6

Equal employment opportunity, equal treatment, labour standard, EC, community law, labour legislation, Eastern Europe.
13.02.3.

ILO Cataloguing in Publication Data

The designations employed in ILO publications, which are in conformity with United Nations practice, and the presentation of material therein do not imply the expression of any opinion whatsoever on the part of the International Labour Office concerning the legal status of any country, area or territory or of its authorities, or concerning the delimitation of its frontiers. The responsibility for opinions expressed in signed articles, studies and other contributions rests solely with their authors, and publication does not constitute an endorsement by the International Labour Office of the opinions expressed in them. Reference to names of firms and commercial products and processes does not imply their endorsement by the International Labour Office, and any failure to mention a particular firm, commercial product or process is not a sign of disapproval. ILO publications can be obtained through major booksellers or ILO local offices in many countries, or direct from ILO Publications, International Labour Office, CH-1211 Geneva 22, Switzerland. Catalogues or lists of new publications are available free of charge from the above address, or by e-mail: pubvente@ilo.org
Visit our website: www.ilo.org/publns

Photo: © International Labour Organization/Maillard J.

Printed in Hungary

Table of contents

Acknowledgments	iv
Foreword.	v
1. Introduction and Background.	1
2. The Labour Legislation Network.	1
3. Objectives of the Meeting	2
4. Participants	2
5. Content, Structure and Outcome of the Meeting	2
5.1 International Labour Standards on Non-Discrimination in Employment and Occupation	2
5.2 EC Law on Non-Discrimination in Employment and Occupation	5
5.3 Issues of Non-Discrimination Legislation	13
6. Concluding Remarks – Evaluation.	14
Annexes	
Annex 1: Timetable.	17
Annex 2: List of Participants.	18
Annex 3: Terms of Reference for Country Presentations	24
Annex 4: Overview of Country Presentations	25
Annex 5: Case Studies A, B, C	36
Annex 6: List of Documents	42

Acknowledgments

We gratefully acknowledge the extremely valuable contributions of Arturo Bronstein, Elfriede Kretschmer and Constance Thomas to augmenting the knowledge of the members of the Labour Legislation and Labour Relations Network.

We would like to express our special thanks to our colleagues Beate Elsaesser and Krisztina Homolya for taking care of the logistics of the meeting. We would like to extend our thanks to Elisabeth Kaponyi, of Corvinus University, Budapest, who prepared the summary of country presentations and to James Patterson who copyedited this report. We also thank Manuela Tomei, of the InFocus Programme on the promotion of the DECLARATION – ILO Geneva – for coordinating contacts with the Government of Belgium. Last but not least, we are very grateful for the Government of Belgium’s financial support of the network’s activities.

The opinions expressed in the individual sections of this report reflect the views of the individual network members and the experts and do not imply any endorsement by the ILO.

Foreword

The demise of the communist regimes in the countries of South Eastern Europe (SEE) has brought about far-reaching changes in their overall institutional setting, including their labour law and industrial relations systems. New challenges have emerged and many of these countries have undertaken to bring their labour law and industrial relations practices closer to those of Western Europe. The countries which have applied for EU membership – Bulgaria, Croatia and Romania – are obliged to transpose European community law (the so-called *acquis communautaire*) into domestic legislation as one of the conditions of joining. The review and overhaul of labour law, taking into account the prevailing systems in EU member states, is an important policy element in the other recipient countries of the Stability Pact for South-Eastern Europe, namely Albania, Bosnia and Herzegovina, FYR Macedonia, Moldova, and Serbia and Montenegro.

With a view to improving awareness of current labour law trends and challenges, the ILO Sub-Regional Office for Central and Eastern Europe in Budapest (SRO Budapest) has promoted the establishment of a network of experts in labour law and labour relations within the labour ministries of the recipient countries of the Stability Pact for South-Eastern Europe. Most members of this network are involved in drafting national labour legislation. The network receives support from an ILO technical cooperation project on promoting social dialogue and strengthening technical expertise in labour law in SEE countries, which receives financial support from France, Italy and Belgium.

The intention is for members of the network to meet every year. The first meeting was held in Turin in September 2003, organised jointly by SRO Budapest, the Infocus Programme (now Department) on Social Dialogue, Labour Law and Labour Administration at ILO Headquarters, Geneva, and the ILO International Training Centre in Turin. The meeting addressed a number of general issues such as the role of labour legislation in a modern market economy, the role of the labour administration in enforcing labour legislation, and recent trends in comparative labour law, international labour standards and European community law.

The second meeting took place in Dubrovnik, Croatia, 24-25 June 2004. While the meeting in Turin dealt with general issues, the Dubrovnik gathering focussed on non-discrimination in employment and occupation. While this is a relatively new issue in many of the countries in South Eastern Europe, there is increasing awareness that labour markets tend to be gender-biased, as women workers may be discriminated against in many ways, including access to employment, pay and conditions of work, and career development. Discrimination on grounds other than sex, such as religion and national origin, is also a sensitive issue in several of the Stability Pact countries.

The Dubrovnik meeting (which benefited from the financial support of the Government of Belgium) enabled network members to exchange experiences on current problems in combating discrimination and protection of minority rights. It also provided an excellent opportunity to compare different legal and institutional approaches to these questions. Finally, it enabled the participants to assess what works and what doesn't and how national practice could be improved with reference to ILO standards and European community law and the experience of neighbouring countries. To this end the seminar was enriched by comprehensive information on the principles developed by the ILO Committee of Experts on the Application of Conventions and Recommendations, and significant decisions of the European Court of Justice in the field of non-discrimination in employment and occupation.

Non-discrimination in employment and occupation is of paramount importance for both the ILO and the European Union. Both organisations are committed to ensuring that a fundamental right to equal

treatment and equal opportunity is guaranteed and effectively protected, irrespective of sex, religion, political belief, national extraction and other grounds. This is spelled out in the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and reaffirmed in the 1998 ILO Declaration of Fundamental Principles and Rights at Work and Article 21 of the EU Charter of Fundamental Rights. As a follow-up to its 1998 Declaration, the ILO prepared the first Global Report on this subject, *Time for Equality at Work*, in 2003 and adopted a four-year Action Plan (2004-2007) to give practical effect to this principle. The Dubrovnik meeting is part of this effort. International labour standards and European community law provide excellent guidance on how to deal with the problem of discrimination, which is posing a challenge to a number of societies today, including those in South-Eastern Europe. As the national reports show, SEE countries have taken important legal and institutional steps to promote the non-discrimination agenda, with a view to protecting the rights of minorities and guaranteeing full access to employment, vocational training, education, and so on, to everyone. At the same time, institutions have been or are being set up to help implement non-discrimination law and equal rights policies.

However, as a number of national reports show, there remain significant gaps which must be addressed to ensure effective observance of the principle of non-discrimination in employment and occupation, particularly in terms of harmonising existing legislation, establishing the appropriate enforcement machinery, creating appropriate statistical systems to track discrimination, and enhancing awareness among workers and employers at the workplace – and indeed all other stakeholders – about the importance of addressing this challenge.

We trust that the information contained in this report will serve as a starting point for further and deeper reflection among all stakeholders in the countries of South Eastern Europe and beyond on how to mobilise all available tools – legal, institutional, statistical and so on – to promote a workplace and society free from discrimination.

Petra Ulshoefer
Director
ILO Sub Regional Office for Central
and Eastern Europe – Budapest

Zafar Shaheed
Director
Infocus Programme on Promoting
the Declaration on Fundamental Principles
and Rights at Work
ILO-Geneva

1. Introduction and Background

South-Eastern European countries have a number of features in common regarding issues of discrimination in employment and occupation and in legislative reform to enforce non-discrimination. The privatisation process in many of these countries has not yet been completed. Similarly, labour law reform has taken place on a step by step basis which remains incomplete, with a number of legal reforms still to come. Also, legal reforms sometimes take place without sufficient participation in the decision-making process on the part of civil society. Furthermore, economic changes have in many cases led to a degradation of working conditions, including a marked weakening of labour protection. For example, the informal economy is growing and a sizeable part of the labour force works outside a formal employment relationship. While it is true that statistical data and research are scarce and in any case not entirely reliable, many indicators suggest that specific groups in the workforce – such as women, ethnic minorities and disabled persons – are in a particularly vulnerable position in the labour market.

Associated as they are with the European Union, the countries of South-Eastern Europe are faced with several tasks:

- design of a comprehensive legislative framework to prevent discrimination in employment and occupation, taking into account ILO standards and Community law;
- establishment of a coherent machinery to enforce the legislation on non-discrimination (judiciary, labour inspectorate, “Ombudspersons”);
- promotion of a sound policy of non-discrimination in employment and occupation, via social dialogue and collective bargaining where possible.

In view of these challenges the members of the labour legislation network proposed putting the issue of non-discrimination in employment and occupation on the agenda of the second meeting of the network.

2. The Labour Legislation Network

Within the framework of its project on the promotion of social dialogue in Stability Pact recipient countries, the ILO promoted the creation of a network of labour law and labour relations experts (Labour Legislation Network, referred to hereafter as LLN), made up of officials from the labour administrations of the countries covered by the project. The aims of the network include the following:

- to provide its members with opportunities to keep abreast of recent developments in labour law and labour relations;
- to provide a platform for the exchange of experiences in labour legislation reform and social dialogue;
- to provide training in techniques of drafting labour legislation.

For the duration of the project (2003–2005), the network members shall meet on an annual basis to cooperate on a specific topic.

3. Objectives of the Meeting

The members of the LLN were expected to:

- improve their knowledge of ILO standards on non-discrimination in employment and occupation; and
- study the implications of Community law in this field.

They were acquainted with the major concepts of non-discrimination and equal opportunities and were given the opportunity to present the situation in their own country regarding legislation, institutions and practice in respect of non-discrimination in employment as compared to the practice in other participating countries. They also had the chance to discuss in groups possible steps to bring legislation in their respective countries into line with ILO standards and EC law, and to better administer equality law so that it is adequately implemented and enforced.

4. Participants

The meeting participants were high-level labour-ministry officials in charge of labour law and labour relations issues. All are members of the LLN. The group is very well balanced from a gender point of view.

5. Content, Structure and Outcome of the Meeting

Before the meeting, the LLN members were asked to prepare a country brief outlining the main aspects of the relevant national legislation on the basis of terms of reference prepared by the ILO (see TOR-s in Annex 3). The briefs led to an interesting exchange of views among participants on the strengths and weaknesses of national practices in non-discrimination (see comparative overview of country presentations in Annex 4).

After the opening session, Mr Youcef Ghellab, LLN coordinator, presented the objectives, content and methodology of the meeting. He insisted in particular on the need for an interactive meeting based on the active participation of all members. He asked the members of the LLN to present themselves and to describe their expectations of this year's meeting. He remarked that the structure of the meeting clearly matched the expectations expressed by the participants.

5.1 International Labour Standards on Non-Discrimination in Employment and Occupation

The first working session, led by Ms Constance Thomas,¹ was dedicated to the review of ILO principles and standards on non-discrimination. She picked up a number of points that had arisen during the participants' presentations.

¹ Senior Specialist, Equality and Employment Branch (EGALITE), ILO Geneva.

The practical application of non-discrimination legislation

Presentations from some countries stated that there had been very few cases, if any, involving equality issues, which might lead an optimist to suggest that the country was free of discriminatory practices. In fact, a lack of cases is not unusual. However, this indicates rather that there is insufficient awareness of the law on discrimination rather than that the country is free of discrimination. More experience is needed among specialists in the implementation of non-discrimination legislation.

In the SEE region, a growth in experience is noticeable. For example, Romania, which has been addressing discrimination issues longer than other countries in the region, has had cases. By contrast, Bulgaria and Croatia, which have only just started to address these issues, have had no cases so far. The fact that cases of discrimination have been brought forward is a positive sign. Raising awareness among the workers is the first step: workers will not complain if they are not aware of what constitutes a breach of the law. Awareness can be raised by media coverage, training of labour inspectors, training of judges, and so on.

Convincing employers that non-discrimination legislation is useful and necessary

It is easier to change behaviour than attitudes. For employers, enforcement of the law is an important factor in making them heed discrimination issues. However, civil rather than criminal remedies should be used. In order to get the employers' attention, it is important to present a business case, on top of the social justice aspect of non-discrimination. Big multinational companies furnish a good example of how diversity and non-discrimination can have a positive effect on productivity and client orientation. It is of key importance to convince employers that it is worth making the extra effort to employ people who do not fit the mainstream profile.

However detailed, legal provisions may be usefully developed and supplemented with further regulation and so-called soft law, such as guidelines and codes of practice. For example:

- the Czech Republic has issued regulations for labour inspectors;
- Cyprus has developed an innovative legislative approach to equal pay;
- in 2003 the ILO elaborated a Code of Practice on Managing Disability at the Workplace, which provides very useful guidance on measures to prevent discrimination against persons with disabilities.²

In her presentation, Ms Thomas explained in detail the development of ILO policy on gender equality since 1985. She highlighted the shift from the *protective approach* to that of *promotion of equality*.

However, some protective measures are essential for equality. This is the case, for example, with maternity protection. In a number of other cases protective measures might have to be extended to men: for example, with respect to night work the ILO adopted standards in 1990 – namely the Night Work Convention, 1990 (No. 171) and Night Work Recommendation (No. 178) – which aim at improving conditions for both men and women. Pregnant or nursing women must be protected from work with dangerous chemicals. Regarding provisions on hazardous work the ILO calls for prohibitions on objective grounds as they are often abused in order to prevent women in general from working in specific areas: for example, while pregnant or nursing women may be prohibited from working with certain chemicals or close to hazards which are potentially dangerous for them or their children's health, a general ban on females engaging in work involving the use of chemicals or exposure to certain hazards may be in breach of the Equal Treatment Principle as enshrined in Convention No. 111. Equality cannot be

² Available online at: http://www.ilo.org/public/english/employment/skills/disability/policy_c.htm

promoted without effective implementation of the two fundamental ILO conventions in the field of equality, namely the Equal Remuneration Convention, 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

The ILO Conventions are also useful in the drafting of laws. Article 1 of Convention 111 defines “discrimination”. Without such legal definitions, implementation of anti-discrimination law is very difficult. Indeed, both the UN and the EU refer to the ILO definition. Convention 111 refers to seven grounds of discrimination, although countries are free to define more grounds in their legislation. Convention No. 111 also covers de jure and de facto discrimination.

The concepts of direct and indirect discrimination were also extensively discussed. The ILO requires more than a formal statement, that is, the absence of discrimination from the legal text. Both Conventions No. 111 and No. 100 call for ratifying states to take measures appropriate to national conditions and practice to adopt laws and regulations to fully implement and enforce the Equal Treatment and Equal Pay principles. In practice, this means that states which have ratified these conventions are expected, in addition to adopting laws and regulations, to put in place adequate implementation machinery. The ILO prefers a comprehensive approach, involving legislation on all issues relating to discrimination, rather than a piecemeal approach. However, it is up to each country to determine its own legislative approach, provided it fully meets the obligations arising from ratification.

Stability Pact recipient countries often have not one integral law but many different provisions, which sometimes makes it difficult to maintain consistency and ensure complementarity. And if there is a general law on equality a non-discrimination provision is still needed in the Labour Code, used by the labour inspectorate, employers and employees. The Bulgarian Labour Code is particularly good in this respect. Is there a danger of legislative “inflation”? The example of the UK was cited: different items of legislation might be confusing and create a hierarchy. However, if a country has specific legislation on discrimination in employment on all grounds, all areas can be covered by one monitoring body.

The different grounds of discrimination

The issue of ethnic origin is important in relation to South Eastern Europe. The ILO uses the expressions “*national extraction*” and “*ethnicity*”. They include national minorities, naturalised foreigners, descendents of foreign immigrants and linguistic minorities. It should, however, be mentioned that they should not be restricted to officially designated minorities.

The notion of “sex” refers to distinctions based on the biological characteristics of men and women. It also covers pregnancy, marital status, family responsibilities and sexual harassment. While Convention No. 111 does not formally require an ILO member state to adopt a law, it is perhaps the most practical way of providing protection. In this case it is strongly recommended that sexual harassment be expressly included in the law. Where a country has not adopted specific legislation the major source of protection should be case law, which calls for the judiciary to be fully aware of all the elements contained in the Equal Treatment principle and sufficiently motivated to apply this rule in the absence of specific regulations.

Race and colour are covered by ILO standards but not by legislation in SEE countries. In practice, colour is more visible than ethnic origin. However, the latter is of great importance in some of the Stability Pact countries.

Ethnic origin, indigenous and tribal peoples: discrimination against Roma people is prohibited on the grounds of ethnicity, race or religion. The Indigenous Peoples Convention, 1989 (No. 169) does not specifically cover Roma. However, there would be no grounds for a state which has ratified that con-

vention to specifically exclude Roma people from its scope. Coverage of Roma people in legislation in Hungary is particularly good.

Political opinion is a broad concept that covers activities, membership of political parties, socio-political attitude, civic engagement and moral qualities (undefined). Certain positions can be reserved for specific persons if it is a matter of state security, as long as an independent appeals procedure is available.

Social origin covers caste, socio-occupational category and situations a person is born into. For example, China prohibits the employment of persons from rural areas in urban areas. SEE legislation often mentions economic status. It is not an ILO requirement, but is found in the UN Covenant.

Religion is a very broad concept: protection is given both to those who have a religious faith and to those who do not. What is important is what a situation means in relation to employment, not the possession – or otherwise – of religious belief in general.

The headscarf issue can be both a religious and a gender issue. The rule of thumb is “reasonable accommodation” and appropriate restrictions (for example, clothing, working time, specific duties). Europe is starting to have more cases based on religion. Canada is a good example with a rich case law.

Other grounds of discrimination

The ILO is not specific. It requires tripartite consultation on the inclusion of specific grounds such as age, disability and state of health. The ILO conventions are not explicit; therefore one has to look at the code of practice. For example, state of health may usefully be included in legislation on non-discrimination – for example, in relation to HIV/AIDS or other illnesses.

Family responsibility is dealt with by the Workers with Family Responsibilities Convention, 1981 (No. 156). Other discrimination grounds include sexual orientation, nationality and trade union affiliation.

Exceptions

Among the exceptions one might mention the inherent requirements of a job: for example, the requirement that only women be employed as guards in women’s prisons.

However, it should be mentioned that exemptions on the basis of sex are often a signal that a situation should be examined from a safety and health perspective. Also, job experience as a requirement does not fall under discrimination unless a lower wage is paid for the same job due to age.

Affirmative action is acceptable under ILO Conventions

With regard to the scope of Convention 111, it applies to all workers in the public and private sectors and guarantees equal access to vocational training, employment and occupation, as well as equality in terms of conditions of work and security of employment.

The concept of “equal pay for work of equal value” applies to all elements of remuneration. The ILO has no problem with productivity-based pay systems as long as they do not discriminate against women.

5.2 EC Law on Non-Discrimination in Employment and Occupation

Ms Elfriede Kretschmer³ gave a presentation on EC law, including ECJ case law, on non-discrimination in employment and occupation.

³ Judge at the Düsseldorf Labour Court, seconded as National Expert to the European Parliament.

Context

The principle of non-discrimination has to be seen in the context of rights protection in the European Union. According to ECJ case law the general principles of equality and non-discrimination are fundamental rights. The principle of non-discrimination is defined as precluding comparable situations from being treated in a different manner unless the difference in treatment is objectively justified. The concepts of direct and indirect discrimination have been progressively developed by ECJ case law, mainly in relation to non-discrimination on the grounds of nationality and of sex.

The Treaties contain several provisions related to the principle of non-discrimination:

- Article 6 of the EU Treaty refers to the fundamental rights guaranteed by the European Convention on the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the member states as general principles of Community law.
- Article 12 of the EC Treaty prohibits any discrimination on grounds of nationality, regardless of whether citizens are nationals of a member state or not.
- Article 39 (2) EC defines freedom of movement for workers as entailing the abolition of any discrimination based on nationality between workers of member states as regards employment, remuneration and other conditions of work and employment.
- Article 119 of the Treaty of Rome, 1957 (now Art. 141 (1) EC) contained the principle of equal pay for equal work or work of equal value for male and female workers. Para 3 of this article uses the concept of discrimination, although without defining it.
- The Treaty of Amsterdam included in the EC Treaty a competence for the EU to act in relation to discrimination issues (Article 13 EC) on the following grounds: sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (closed list of grounds).
- The Charter of Fundamental Rights of the European Union, now included in the Treaty for a Constitution of Europe, contains in Article II-21 a prohibition of discrimination on any grounds, including the grounds listed in Article 13 EC.

Article 13, paragraph 1 EC states:

- 1 Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

So far, two EU Directives to combat discrimination, based on Article 13 EC, have been adopted:

- 1 Council Directive to implement equal treatment irrespective of racial or ethnic origin (2000/43/EC of June 2000).
- 2 Council Directive establishing a framework for equal treatment in employment and occupation – irrespective of religion or belief, disability, age and sexual orientation (2000/78/EC of 27 November 2000).

The Article 13 Directives cover all *grounds* listed in Article 13 EC, except that of gender:

- Race or ethnic origin (Directive 2000/43/EC);
- Religion or belief, disability, age, sexual orientation (Directive 2000/78/EC).

The prohibition of *sex discrimination* in employment and occupation is contained in Directive 2002/43/EC of 23 September 2002, amending Directive 76/207/EEC based on Article 141 (3) EC.

Personal scope of both Article 13 Directives

Both cover all *natural* persons residing in the territory of the member states – whether legally or not. According to Recital 16 of Directive 2000/43/EC, *legal persons* are covered where they suffer discrimination on the grounds of the racial or ethnic origin of their members.

Material scope of both Article 13 Directives

Both Directives prohibit discrimination in employment in the *public and private sectors, including public bodies*, in relation to the following fields (Article 3 (1) a–d of both Directives):

- a) Conditions of access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.
- b) Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience.
- c) Employment and working conditions, including dismissal and pay.
- d) Membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided by such organisations.

Additional scope of Directive 2000/43/EC

The protection provided in the racial equality directive (Article 3 (1) e–h of Directive 2000/43/EC) goes *beyond employment and occupation* since it covers also social protection, including social security and health care; social benefits; education; access to and supply of goods and services which are available to the public, including housing.

Exceptions

Neither Directive covers differences of treatment based on *nationality* (Article 3 (2) of both Directives). However, the prohibition of discrimination on grounds of nationality is already provided for in the directly applicable Article 12 EC.

Furthermore, Directive 2000/78/EC does not cover the following:

- Payments of any kind made by state schemes or similar, including state social security or social protection schemes (Article 3 (3)).
- Member states may provide that the Directive does not apply to the armed forces in relation to the grounds of disability and age (Article 3 (4)).
- Measures necessary for public security, public order, protection of health and the rights and freedoms of others (Article 2 (5)).

Concepts

The *principle of equal treatment* means, according to Article 2 (1) of both Directives, that there shall be no direct or indirect discrimination based on the grounds covered by the Directives.

The *concept of discrimination* includes the following aspects: direct discrimination, indirect discrimination, harassment and instruction to discriminate.

- *Direct discrimination* shall be taken to occur where one person is treated less favourably than another has been or would be treated in a comparable situation on any of the grounds covered by the Directives (racial or ethnic origin, religion or belief, disability, age, sexual orientation). The same definition can be found in Article 1 (2) of Directive 2002/73/EC on sex discrimination.
- *Indirect discrimination* shall be taken to occur when an apparently neutral provision, criterion or practice would put persons of a particular racial or ethnic origin or having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 2 (2) (b) (i) of Directive 2000/78/EC and similar Article 2 (2) (b) of Directive 2000/43/EC).

This definition is based on ECJ case law on sex discrimination,⁴ which has been developed in particular in relation to part-time work, due to the fact that more women than men work on this basis. However, the definition used in the Article 13 Directives no longer requires statistical evidence to indicate that a substantially higher proportion of one sex is affected.⁵ The new definition was inspired by ECJ case law on the free movement of workers.⁶ It is sufficient that an apparently neutral provision, criterion or practice can cause someone a *particular disadvantage* compared to other persons. Nevertheless, according to Recitals 15 of both Directives, rules of national law or practice may provide for indirect discrimination, to be established by any means, including on the basis of statistical evidence.

In contrast to direct discrimination, the definition of indirect discrimination includes the *lack of objective justification for different treatment*. The justification must be objective and based on a legitimate aim; the means of achieving that aim have to be appropriate and necessary (Article 2 (2) (b) of both Directives).

The justification test is similar to that developed by sex discrimination case law (see, for example, the *Bilka* judgement⁷). The ECJ leaves a broad margin of appreciation for member states in which legislative provisions which form part of state social policy are under scrutiny.⁸

- *Harassment* shall be deemed discrimination when unwanted conduct related to any of the grounds in either Directive takes place with the purpose or effect of violating the dignity of the person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- *The instruction to discriminate* on any of the grounds covered by the Directives shall be deemed to be discrimination.

⁴ See, for example, ECJ, 26 September 2000, Kachelmann, case C-322/98, ECR 2000, p. I-7505.

⁵ See definition in Directive 97/80/EC on burden of proof, Article 2 (2).

⁶ ECJ, 23 May 1996, O'Flynn, case C-237/94, ECR 1996, p. I-2617.

⁷ ECJ, 13 May 1986, Bilka, case 170/84, ECR 1986, p. 1607.

⁸ See, for example, ECJ, 14 December 1995, Megner and Scheffel, case C-444/93, ECR 1995, p. I-4741.

Exceptions

Genuine and determining occupational requirements (Art. 4, Directive 2000/43/EC and Art. 4 (1), Directive 2000/78/EC):

Member states may provide that a difference of treatment which is based on a particular characteristic related to one of the grounds covered by the Directives shall not constitute discrimination where, by reason of the nature of the particular occupational activity concerned or of the context in which it is carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Ground-specific exceptions (Directive 2000/78/CE)

Religion – churches and similar organisations, the ethos of which is based on religion or belief (Art. 4, paragraph 2 of Directive 2000/78/EC).

Member states may retain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing as of 2 December 2000, pursuant to which certain exceptions to the principle of equal treatment are regulated. Such legislation can provide that in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This specific exception allows difference in treatment only in respect to the religion or belief of a person. Difference of treatment based on other grounds are not permitted by this article.

The second subparagraph of Article 4, paragraph 2 of this Directive stipulates that the Directive “does not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos”.

Age – justification of differences of treatment on grounds of age (Article 6 of Directive 2000/78/EC): Contrary to other grounds, discrimination due to age can be justified when the preconditions set by Article 6 of Directive 2000/78/EC are met. As indirect discrimination, by definition, occurs only if differences in treatment are not objectively justified, the main field of application of this provision lies in the justification of direct discrimination because of age.

According to Article 6 of Directive 2000/78/EC member states can provide that difference of treatment on grounds of age shall not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. Paragraph 1 of this article cites legitimate employment-policy, labour-market and vocational-training objectives as such legitimate aims. The following examples – there are others – are listed in this article:

- special conditions concerning access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

- minimum conditions of age, professional experience or seniority in service for access to employment or certain advantages linked to employment;
- maximum age for recruitment based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

According to Article 6, paragraph 2 of Directive 2000/78/EC member states may provide that “the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.”

It must be underlined that age limits which lead to the termination of work contracts constitute dismissal conditions under the meaning of Article 3, paragraph 1, point (c) of Directive 2000/78/EC and therefore must be justified by a legitimate aim. Recital 14 of this Directive, however, seems to be ambiguous in this respect when it states: “*This Directive shall be without prejudice to national provisions laying down retirement ages.*”

Reasonable accommodation

Employers are required to provide “reasonable accommodation” to persons with disabilities (Article 5 of Directive 2000/78/EC) in order to comply with the principle of equal treatment. The employer is required to take appropriate measures, if required, to enable a person with a disability to have access to, participate in or advance in employment, or to undergo training. That obligation does not exist if such measures would impose a disproportionate burden on the employer. Article 5 explicitly states that the burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the member states concerned. However, as follows from Recital 17 of Directive 2000/78/EC, employers are not required to recruit, promote, maintain the employment of or train an individual who is not competent, capable or available to perform the essential functions of the post concerned or to undergo the relevant training.

Besides, Article 7 (2) of Directive 2000/78/EC allows member states to adopt or to maintain specific measures of positive action for persons with disabilities, as for example provisions on the protection of health and safety at work or other measures for safeguarding or promoting the integration of persons with disabilities into the working environment. This provision leaves to the member states a margin for positive action aimed at protecting and promoting persons with disabilities.

Furthermore, Article 2 (2) (b) (ii) of Directive 2000/78/EC states that the measures established in Article 5 to provide reasonable accommodation according to the obligation to eliminate disadvantages shall not constitute indirect discrimination against other persons.

Positive action

Both anti-discrimination Directives foresee that member states may retain or adopt specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in these Directives (Article 5 of Directive 2000/43/EC and Article 7 (1) of Directive 2000/78/EC). It is important to underline that member states do not have any explicit obligation under this concept of positive action to adopt such measures, but merely have the possibility to do so.

It is still an open question whether the criteria allowing positive action developed by ECJ case law in the field of sex discrimination (see the series of ECJ judgements *Kalanke*,⁹ *Marschall*,¹⁰ *Badeck*,¹¹ *Abrahamsson*¹² and *Lommers*¹³) can also be applied in cases of discrimination based on other grounds.

Enforcement and remedies

Both Directives (Articles 7 to 9 of Directive 2000/43/EC, and 9 to 11 of Directive 2000/78/EC) establish a series of provisions intended to guarantee the effective protection and defence of the rights of victims of discrimination. Experience in the field of discrimination on the grounds of sex shows that defence of rights of victims is very difficult. Therefore, both Article 13 Directives emphasise implementation and remedies.

Defence of rights

Member states must ensure that judicial and/or administrative procedures, including conciliation procedures, for the enforcement of obligations under the Directives are available to persons who consider themselves victims of discrimination (Article 7 (1) of Directive 2000/43/EC and Article 9 (1) of Directive 2000/78/EC).

Rights of associations

Article 7 (2) of Directive 2000/43/EC and Article 9 (2) of Directive 2000/78/EC require member states to ensure that associations or other organisations which have a legitimate interest may act either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under these Directives.

Protection against victimisation

Article 9 of Directive 2000/43/EC and Article 11 of Directive 2000/78/EC require member states to introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer in response to a complaint within the framework of any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Burden of proof

Another important issue is the burden of proof. There shall be a sharing of the burden of proof between the complainant and the respondent (Article 8 of Directive 2000/43/EC and Article 10 of Directive 2000/78/EC). Indeed, when persons who consider themselves victims of discrimination establish, before a court or other competent authority, facts from which it may be assumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

As Recital 31 of Directive 2000/78/EC underlines it is not for the respondent to prove whether the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation. Member states may provide in their national legislation that indirect discrimination can be established by any means, also on the basis of statistical evidence. The rules on the

⁹ ECJ, 17 October 1995, *Kalanke*, case C-450/93, ECR 1995, p. I-3051.

¹⁰ ECJ, 11 November 1997, *Marschall*, case C-409/95, ECR 1997, p. I-6383.

¹¹ ECJ, 28 March 2000, *Badeck*, case C-158/97, ECR 2000, p. I-1875.

¹² ECJ, 6 July 2000, *Abrahamsson*, case C-407/98, ECR 2000, p. I-5539.

¹³ ECJ, 19 March 2002, *Lommers* case C-476/99, ECR 2002, p. I-02891.

burden of proof shall not prevent member states from introducing rules of evidence which are more favourable to plaintiffs.

The rule on the burden of proof does not apply to criminal proceedings. Furthermore, member states are allowed to refrain from applying the rules on the burden of proof to proceedings in which it is for the court or competent body to investigate the facts of the case.

Sanctions

According to Article 15 of Directive 2000/43/EC and Article 17 of Directive 2000/78/EC member states are obliged to lay down rules on sanctions applying to infringements of national provisions adopted pursuant to the two Directives and to take all measures necessary to ensure that they are applied. The Directives state explicitly the principle established by ECJ case law¹⁴ that sanctions have to be effective, proportionate and dissuasive.

Specialised bodies

Directive 2000/43/EC obliges member states to establish specialised bodies for the promotion of equal treatment irrespective of racial or ethnic origin. Directive 2002/73/EC establishes that member states must designate a body responsible for the promotion of equal treatment of all persons without discrimination on the grounds of sex. The tasks of this body or bodies would be to provide independent assistance to victims, as well as to undertake independent surveys and prepare independent reports and recommendations. There is no equivalent body for Directive 2000/78/EC.

Although it is not mandatory for member states to designate specialised bodies as regards discrimination on the grounds of religion or belief, disability, age or sexual orientation, from the point of view of effective protection of victims of discrimination it appears advisable to extend the competences of such bodies to all the grounds mentioned in Article 13 EC.

Discussion

The discussion that followed the presentation focused on the following issues:

- The boundary between direct and indirect discrimination. An example of indirect discrimination in relation to non-discrimination on the ground of sex: differences of treatment based on part-time work.
- A mandatory retirement age might be regarded as direct age discrimination.
- Civil service competition for job openings is sometimes limited to certain age groups. Does this practice constitute discrimination? Again, there is no case law. However, the Commission itself has abolished most age limits for its tenders, which can be taken as a signal that the practice was regarded as discriminatory.
- Does the argument of overqualification in relation to a job applicant constitute discrimination? This depends on how precise the job description is: with a precise job description and clearly stated terms of reference the expected qualifications of a job applicant can be precisely described.
- Recent developments in HRD show an increasing trend to anonymise job applications. Photographs are no longer required.

¹⁴ ECJ, 22 April 1997, *Draehmpaehl*, C-180/95, ECR 1997, p. I-2195.

The next session focused on the discussion of three case studies (attached as Annex 5):

1. The first case, drawn from the activities of the ECJ, focused on equal pay between men and women.
2. The second was a preliminary question presented to the ECJ by a German court concerning alleged discrimination on the basis of age.
3. The third case dealt with the jurisprudence of the ILO Committee of Experts on Application of Conventions and Recommendations and dealt with discrimination on the grounds of religion and sex.

The review of these cases led to a lively discussion among the participants on the implications of international and Community law in respect of the important issue of non-discrimination in employment and occupation.

5.3 Issues of Non-Discrimination Legislation

Mr Arturo Bronstein¹⁵ summarised the discussion on non-discrimination legislation on employment and occupation. He underlined the fact that non-discrimination in employment and occupation is first and foremost a human rights issue of relatively recent development (since the 1960s).

In both international and EU law non-discrimination is not a *positive* right: seemingly it is possible to discriminate against a worker provided that such discriminatory treatment is not based on a prohibited ground for such action. A worker's right to equal treatment in employment and occupation may conflict – and in fact often does conflict – with an employer's prerogatives arising from the contract of employment; this creates a conflict between the employer's right to organise his/her enterprise – which includes hiring and firing, assigning jobs and occupations, transferring workers from one post to another, disciplining workers, establishing pay schemes and pay rates and the like – and the right of workers to be treated fairly and to have their dignity respected.

Mr Bronstein explained that international law and EC law were of paramount importance in this field and recalled the crucial role played by CEACR and ECJ, as well as the judiciary in general. He further recalled that gender-equality concepts tend to be more developed than other grounds. However, there is increasing awareness of discrimination on other grounds, for example religion and sexual orientation. Also, discrimination on the grounds of colour or race, state of health or political opinion can be important issues in some countries and not in others. In this respect some issues such as pre-employment screening and graphological and personality tests may be of crucial importance and will certainly merit close consideration in the near future.

Discrimination can occur at any time, that is: before employment, during employment, upon termination of employment and after employment, as illustrated in the table below:

¹⁵ Senior Labour Law Policy Adviser, Infocus Programme (now Department) on Social Dialogue, Labour Law and Labour Administration, ILO-Geneva.

Before employment	During employment	Upon termination of employment
<ul style="list-style-type: none"> – Access to training – Advertisement – Selection – Pre-employment testing 	<ul style="list-style-type: none"> – Precarious contract – Maternity – Harassment – Order incompatible with moral or religious beliefs – Action incompatible with privacy or decency (monitoring of private mail, personal searches) – Refusal of training during employment – Refusal of promotion, career development, etc. 	<ul style="list-style-type: none"> – Discriminatory dismissal

With regard to the question of conflicts with management prerogatives, Mr Bronstein expressed the view that human rights should come before ownership and management rights. In other words, management rights should respect the right to equal treatment. However, the right to equal treatment is not an absolute right. Therefore, it is necessary to accept exceptions in light of the operational requirements and nature of the enterprise. Rules can be constructed by the judiciary in each country.

The importance of machinery, rules and procedures to ensure effective implementation of the legislation was heavily stressed by Mr Bronstein. The machinery is needed with a view to: promoting awareness, monitoring compliance and assisting plaintiffs. The importance of effective remedies was also stressed.

Mr Bronstein paid tribute to the participating countries for the impressive work done of late in terms of legislation in the field of non-discrimination in employment and occupation. The legislation on non-discrimination in employment and occupation in SEE countries is still new and at the same time heavily influenced by EC law. It has still to be tested in practice. Adequate enforcement of this legislation would require effective machinery as well as training, for example, of administrators and judiciary.

6. Concluding Remarks – Evaluation

Mr Youcef Ghellab presented an overview of the results of the meeting. He indicated that the objectives assigned to the meeting by the organisers – namely: (i) to improve LLN members' knowledge of ILO standards and EC law on non-discrimination; (ii) to acquaint them with the major concepts of non-discrimination and equal opportunities; and (iii) to give them the opportunity to learn about innovative policies and practices of non-discrimination in the participating countries – had been achieved, thanks to the excellent presentations made by the resource-persons, the active participation of the LLN members and the excellent programme and organisation.

The participants managed to improve their knowledge of ILO standards and policies, as well as EC law on non-discrimination. The exercises done during the meeting and based on concrete case studies of non-discrimination drawn from the jurisprudence of ECJ, CEACR and the German Federal Labour Court were judged very useful by the participants since they enabled them to see how supervisory-judicial bodies interpret legislation on non-discrimination.

The LLN experts also benefited greatly from one another's experience – both positive and negative – in terms of formulation of legislation, enforcement of the law and monitoring of anti-discrimination policies. For instance, the experience of Romania where the national legislator directly incorporated provisions from the ILO Equal Remuneration Convention, 1951 (No. 100) into the national law on gender equality; and that of Bulgaria, where the exact wording of the Discrimination (Employment and Occupation), 1958 (No. 111) Convention was incorporated into the law on non-discrimination, were considered good examples by participants.

At the same time, the experience of FYR Macedonia and Moldova where the law has entrusted the trade unions with an important enforcement role was considered quite interesting from the social dialogue standpoint. The national programme on Roma people recently formulated by Croatia, which includes a whole set of measures in the fields of employment, education and social protection, was also considered a good example of policy in favour of a minority group. In Albania, the labour inspectorate has created a telephone centre that every worker can call in case of alleged discrimination without providing personal details. Each call triggers a workplace investigation by the labour inspectorate. Other initiatives to promote equal opportunities, taken by Bosnia and Herzegovina and the Republic of Serbia, were also highlighted at the meeting.

Another result of the meeting was the consensus reached among the participants concerning remedies and sanctions. It was judged that financial sanctions were insufficient in labour matters; rather the participants were in favour of a combination of both civil and penal sanctions to address the problem of discrimination in employment and occupation.

The participants also made it clear that a significant number of termination of employment cases were in fact discrimination cases. Therefore, labour offices, the labour inspectorate, the judiciary and all institutions in charge of monitoring the implementation of anti-discrimination legislation should carefully monitor these cases with a view to securing effective enforcement of the law on non-discrimination.

Mr Ghellab presented the LLN members' suggestions for the next meeting. By way of a vote the members determined that the next meeting – to take place in June 2005 – will deal with employment issues (flexible forms of employment, part-time work, transfer of employees, youth employment, employment of disabled persons, incentives to employers, and so on). As regards venue, the representative from Romania offered to act as host. It was decided that the venue will be determined later, after consultation among the LLN members.

Finally, on behalf of all the participants Mr Ghellab warmly thanked the Government of Belgium for its valuable financial support for the organisation of the meeting and the Government of Croatia for agreeing to hold the meeting in Dubrovnik.

ANNEXES

Annex 1: Timetable

2nd meeting of the Labour Legislation Network: Non-Discrimination in Employment Dubrovnik, 24–25 June 2004

	Wednesday 23 June	Thursday 24 June	Friday 25 June
09:00- 10:30		Opening – Objective of the course – Methodology – Participants (Mr. Y. Ghellab, SRO Budapest)	Country Presentations II: – Comparison of the use and impact of institutions for the implementation of non-discrimination legislation – Discussion & comments from experts
10:30–11:00		<i>Coffee break</i>	<i>Coffee break</i>
11:00–12:30		Standards I – ILO standards and principles on non-discrimination in employment and occupation and comments of the ILO supervisory bodies (Ms C. Thomas, ILO Geneva Egalite-Unit) – Discussion	Group Work – Cases studies
12:30–13:30		<i>Lunch</i>	<i>Lunch</i>
13:30–15:00		Standards II – EC law, including ECJ case law on non-discrimination in employment & occupation (Ms E. Kretschmer, Labour Judge, currently working for European Parliament) – Discussion	Synthesis – Wrap-up: main issues in non-discrimination legislation in SEE (Mr. A. Bronstein, IFP/Dialogue, ILO Geneva)
15:00–15:30		<i>Coffee break</i>	<i>Coffee break</i>
15:30–17:30		Country Presentations I: – Comparison of the structure, use and impact of existing non-discrimination legislation – Discussion & comments from experts	Evaluation – Evaluation of the meeting – Next steps (Mr. Y. Ghellab, SRO Budapest)
19:00	<i>Welcome in the Hotel</i>		Dinner in Dubrovnik

Annex 2: List of Participants

Social Cohesion Initiative of the Stability Pact: Strengthening social dialogue and tripartism and enhancing the technical expertise in labour law in the countries of South Eastern Europe

Network of Experts on Labour Law and Labour Relations: List of Members

Mr Ledio Milkani
Head of Institutional Legislation and Integration Section
Ministry of Labour and Social Affairs
Rruga Kavajes 53
Tirana, Albania
Tel: + 355 4 251 352, mobile +355 692 283 078
Fax: +355 424 82 98 +355 422 79 42
E-mail: lmilkani@yahoo.com

Mr Gramos Xhangolli
Secretary of the National Labour Council
Ministry of Labour and Social Affairs
Rruga Kavajes 53
Tirana, Albania
Tel: +355 422 79 42
Fax: +35 5422 79 42
E-mail: gxhangolli@yahoo.co.uk

Mr Damir Dizdarevic
Assistant Minister
Ministry of Civil Affairs of Bosnia and Herzegovina
Trg Bosne i Hercegovine 1
71000 Sarajevo
Bosnia and Herzegovina
Tel: +387 33 2019 923 ext. 5027
Fax: +38 7 332 21074
email: damird@mcp.gov.ba

Ms Džana Kadribegović
Assistant Minister
Ministry of Labour and Social Policy
Vilsonovo setaliste 10
71000 Sarajevo
Bosnia and Herzegovina
Tel: +387 33 52 38 10
Fax: +38 7 33 52 38 10
E-mail: fmsa@fbihvlada.gov.ba

Mr Rajko Kliković
Assistant Minister
Ministry of Labour and War Invalids' Welfare of the Republika Srpska
Vuka Karadzica 4,
Banja Luka, Bosnia and Herzegovina
Tel: +387 5 133 16 51
Fax: +387 5 133 16 52
E-mail: mpb@mpb.vladars.net

Mr Vesselin Atanassov Ilkov
Senior Expert, European Integration and International Relations Directorate
Ministry of Labour and Social Policy
Sofia, Bulgaria
Tel: +359 2 987 25 32
Fax: +359 2 981 91 72
E-mail: v_ilkov@yahoo.com, ilkov@mlsp.government.bg

Mr Nenad Kazija
Lawyer, Advisor in the Section for Labour and Labour Markets for EU Integration
Ministry of Economy, Labour and Entrepreneurship
Ulica grade Vukovana 78
1000 Zagreb,
Croatia
Tel: +385 1 610 6313
Fax: +385 1 619 67 41
nenad.kazija@mingo.hr

Ms Lovrenka Brajković Bulat
Economist, Adviser in the Section for Labour and Labour Markets for EU Integration
Ministry of Economy, Labour and Entrepreneurship
Ulica grade Vukovana 78
1000 Zagreb,
Croatia
Tel: +385 1 610 9137
Fax: +385 1 610 9300
E-mail: lovrenka.bulat@mingo.hr

Mr Nazmi Mustafi
Head of Labour Law/Labour Relations Division
Ministry of Labour and Social Welfare
Pristina
Kosovo
Tel: +381 38 244 231
Fax: +377 44 16 9414
E-mail: nazmimustafi@hotmail.com

Ms Minire Begaj
Expert, Labour Law Division
Ministry of Labour and Social Welfare
Pristina
Kosovo
Tel: +381 38 212 057 or 212 055 (ext. 104/106)
Fax: +377 44 269 767
E-mail: minirebegaj@hotmail.com

Ms Biljana Avramovska
Expert, Department of Labour
Ministry of Labour and Social Policy
Dame Gruev 14
1000 Skopje
FYR Macedonia
Tel: + 389 23 106 220
Fax: + 389 23 220 408
Email: a_biljana@yahoo.com

Ms Catalina Doru
Consultant, Labour Law Department
Ministry of Labour and Social Protection
1, V. Alexandri St.
2009 Chisinau
Moldova
Tel: +373 2 72 99 11
Fax: +373 2 73 87 13
E-mail: catalasca@yahoo.com

Ms Denisa Patrascu
Legal Advisor
Ministry of Labour, Social Solidarity and Family
2B Dem. I. Dobrescu Street, Sector 1
010026 Bucharest
Romania
Phone: + 40 21 312 4286
Fax: + 40 21 310 1828
Email: denisapatrascu@mmssf.ro

Ms Snežana Bogdanović
Senior Advisor to the Minister
Ministry of Labour, Employment and Social Policy
Nemanjina 22-26
Belgrade, Serbia
Tel: +381 11 36 16 265
Fax: +381 11 36 17 498
E-mail: snezab@minrzs.sr.gov.yu

Mr Mirjana Samardžić
Junior Assistant in the Department of Labour
Serbian Ministry of Labour, Employment and Social Policy
Nemanjina 22-26
Belgrade, Serbia
Tel: +381 11 36 16 265
Fax: +381 11 36 31 792
E-mail: mimas@minrzs.sr.gov.yu

Resource person/ILO delegation/interpreters

Ms Elfriede Kretschmer
Seconded National Expert
European Parliament
Secretariat of the Committee on Legal Affairs and the Internal Market
Office: REMARD 02 J 016
Phone: +32.2.284 05 17
Fax: +32.2.284 49 04
E-mail: ekretschmer@europarl.eu.int

Mr Arturo Bronstein
Sr. Labour Law Policy Advisor
ILO IFP/Social Dialogue
Route des Morillons 4
CH-1211 Geneva
Phone: + 41 22 799 7035
Fax: + 41 22 799 8749
E-mail: bronstein@ilo.org

Ms Constance Thomas
Sr. Specialist
ILO EGALITE
Route des Morillons 4
CH-1211 Geneva
Phone: + 41 22 799 7115
Fax: + 41 22 799 6344
E-mail: thomas@ilo.org

Mr Youcef Ghellab
Sr. Specialist SD and IR
ILO-Sub Regional Office
Budapest, Hungary
Tel: +36 1 473 26 52
Fax: +36 1 353 36 83
E-mail: ghellab@ilo-ceet.hu

Beate Elsaesser
Associate Expert SD and IR
ILO-Sub Regional Office
Budapest, Hungary
Tel: +36 1 301 4900
Fax: +36 1 353 36 83
E-mail: elsasser@ilo.org

Krisztina Homolya
Programme Assistant
ILO-Sub Regional Office
Budapest, Hungary
Tel: +36 1 473-2652
Fax: +36 1 353 36 83
E-mail: homolya@ilo.org

Vanja Jancic (interpreter)
Novaka Miloseva 29/1
81000 Podgorica
Montenegro
Tel: +381 81 231038

Maja Vujaskovic (interpreter)
I Proleterske brigade 27/a
Podgorica
Montenegro

Annex 3: Terms of Reference for Country Presentations

1. The participants of the labour legislation network meeting on nondiscrimination in employment, taking place in Dubrovnik, 24–25 June, 2004, are asked to provide the organizers with a brief on the framework of nondiscrimination legislation in their country/area of their labour administration. The briefs will be used as background material to facilitate discussion during the meeting.

2. Structure of the brief:

- The brief should describe the **main features of recently adopted nondiscrimination legislation**, indicating when it was adopted and in which context, if it was adopted in alignment with the EC law and/or international standards.
- The brief should describe the **institutional framework for enforcement** of non--discrimination legislation: are “classic” institutions, such as judiciary and labour inspection responsible, or do other, new institutions, such as an office of the ombudsperson or specialized committees enforce legislation; How is the work of different institutions coordinated?
- Are **cases** on discrimination in employment **tried in court**?
- Is **statistical data** relevant to discrimination available? (ie. on the wage gap between men and women, or on employment of minorities)

Annex 4: Overview of Country Presentations

The legal framework for protection against discrimination varies considerably between the South Eastern European countries. It will come as no surprise that the picture is mixed.

A common element is *constitutional protection* against discrimination. All these countries possess written constitutions that include anti-discrimination provisions; however, the list of prohibited grounds varies between different countries. Disability, age and sexual orientation are not mentioned in any constitutional anti-discrimination clause. These grounds figure only at lower levels of the law: for example, in Romanian Government Ordinance No. 137/2000 and Act No. 27/2004 (in Romania and Bulgaria there exist special disability laws). It is a common finding in the South Eastern European countries that protection against discrimination in employment is the strongest area of existing legislation, even though the degree may vary from country to country.

The countries of South Eastern Europe are typically classified as monist constitutional systems. The constitutions of nearly all these countries incorporate international law and regard it as superseding domestic law.

International regulations, UN instruments¹⁶ and ILO standards (characteristically the Employment and Occupation Convention, 1958 (No. 111) and the Equal Remuneration Convention, 1951 (No. 100)), which are relevant to protecting workers from discrimination, provide an essential foundation for legislation in these countries. The international legal instruments most widely cited in the country reports are ILO Fundamental Conventions Nos. 100 and 111, the UN Charter and the UN Universal Declaration of Human Rights, the European Convention for Protection of Human Rights and Fundamental Freedoms and its Protocols.¹⁷ It should be pointed out that there are only a few references to the European Social Charter or to the Revised Social Charter.¹⁸

As already noted, the South Eastern European countries have written constitutions which include anti-discrimination provisions. However, these states may be divided into those relying on specific anti-discrimination laws and those with a diffuse system of anti-discrimination clauses in many different legislative acts. The countries with specific anti-discrimination laws are those with so-called European Agreements or Stabilisation and Association Agreements with the European Union.¹⁹

Recent years have seen rapid growth in the *implementation of Community law* in certain countries. Bulgaria and Romania, which are quite advanced in their accession negotiations with the EU, and Croatia (which gained candidate status in 2004)²⁰ have already adopted legislation that seeks to implement the two European Union anti-discrimination directives, namely Directive 2000/43/EC and Directive 2000/78/EC. The European Commission has stated that these Directives form part of the *acquis communautaire* that candidate countries are expected to implement prior to accession. These Directives (de-

¹⁶ The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, consolidate the provisions of existing UN instruments concerning race and gender discrimination.

¹⁷ Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms was adopted by the Committee of Ministers of the Council of Europe in June 2000. Under this Protocol, individual victims of discrimination in member states of the Council of Europe are able to bring cases before their domestic courts citing a violation of their rights as guaranteed under the European Convention. If the claimant is unable to obtain a remedy or a favourable ruling in the domestic courts, the case may be appealed to the European Court of Human Rights in Strasbourg.

¹⁸ Romania, Act No. 74/1999 on the ratification of Revised European Social Charter.

¹⁹ As a contribution to the Stability Pact and an interim step towards membership, the European Union set up a new generation of Stabilisation and Association Agreements. They are aimed at the five South Eastern European countries which still have no contractual relationship with the EU, namely Albania, Bosnia and Herzegovina, Croatia, Serbia and Montenegro, and FYR Macedonia. The EU signed the first SAA agreement with FYR Macedonia in April 2001.

²⁰ Croatia presented its application for accession to the European Union on 20 February 2003. The European Council agreed that Croatia had met the political criteria, and so should change status from applicant to candidate country for EU membership. Croatia was awarded candidate status on 18 June 2004.

signed to ensure equal treatment of persons irrespective of racial or ethnic origin and in relation to employment and occupation²¹ – like Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe) cannot be fully effective without enforcement at national level.

Albania, Bosnia and Herzegovina, FYR Macedonia, Moldova, Romania and Serbia are characterised by the absence of a comprehensive, single legal framework and instead rely on a diffuse network of anti-discrimination clauses. Anti-discrimination clauses can be found in various laws rather than in a separate law on discrimination applying across different areas. One of the risks of this approach is inconsistency between anti-discrimination clauses in different pieces of legislation.

The scope of this summary unfortunately prevents in-depth exploration of *minority rights and refugee-related issues*. With regard to *gender equality* some SEE countries have adopted specific legislation creating a legal framework for the promotion of equality between men and women. For instance, there are special gender equality laws in Bosnia-Herzegovina (Law on Gender Equality), Romania (Act on Equal Opportunities between Women and Men) and Croatia (Equality of the Sexes Law). In Bulgaria, gender equality is dealt with in the Anti-Discrimination Act adopted in 2003. As a result, a National Council on Equal Opportunities for Women and Men is expected to be established in Bulgaria in September 2004.

It is important to note that – with the exception of Romania, Bulgaria and Croatia – in the *national legal systems* of the South Eastern European countries the necessary measures are not to be found to protect employees against dismissal or other adverse treatment by the employer in response to complaints made within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of non-discrimination. (The concept of victimisation is mainly found within employment law.)

A number of countries are in the process of establishing or have established specialised bodies (for example, Albania, Bosnia and Herzegovina) with advisory or quasi-judicial powers to tackle discrimination and promote equality. Romania is the only state currently possessing a special body for hearing discrimination cases; Bulgaria is expected to set up a Commission on Protection against Discrimination. Many states possess an Ombudsperson²² (for example, Albania, Bosnia and Herzegovina, Bulgaria, Romania, Croatia and Macedonia) and this often provides a forum for raising complaints of discrimination.

Concerning procedures for bringing a complaint of unlawful discrimination, in most states (for example, Albania, Bosnia and Herzegovina, Serbia) a combination of penal, civil and administrative procedures are available to victims of discrimination.

²¹ Directive 2000/43/EC and Directive 2000/78/EC are confined to employment and vocational training, whereas Directive 2000/43/EC also applies to social protection, including social security and health care; social benefits; education; and access to goods and services. There is a slight difference between the definitions of genuine and determining occupational requirements (Article 4). Only Directive 2000/78/EC stipulates a duty to provide 'reasonable accommodation' (Article 5) and only with respect to disabled persons.

²² Whilst the Ombudsperson has investigative powers, he/she can only make non-binding recommendations.

Brief Summary of Country Presentations

ALBANIA²³

Constitutional provisions

The Constitution of Albania was passed by referendum in November 1998 and is an adequate basis for the proper development and implementation of democratic principles and fundamental freedoms. The Constitution of Albania provides equality for all before the law and prohibits discrimination for reasons such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic condition, education, social status or parentage.²⁴ Albania ratified the European Convention on Human Rights (ECHR) in 1996. Furthermore, Article 121 of the Constitution of Albania states that ratified international conventions shall constitute an integral part of domestic law: in the event of a conflict between an international convention and national law, the former shall prevail.

Civil and Labour Code

The new Albanian Labour Code (2003) prohibits discrimination in employment on the grounds of race, colour of skin, sex, age, religion, political beliefs, nationality, social origin, family relationship and physical or mental disability. According to the Labour Code the terms “employment” and “occupation” mean vocational guidance and training, provision of employment and exercise of different professions, as well as employment conditions related to distribution of labour, job performance, remuneration, social assistance, discipline or termination of the employment contract. However, there are exceptions deriving from the Labour Code, Council of Ministers Decrees or collective labour contracts. The Labour Code imposes fines (50 times the minimum monthly wage) on persons responsible for acts of discrimination.

Institutional framework

According to the country report, there are anti-discrimination provisions in the Labour Inspection Act that secure implementation of labour legislation by employers and employees, and in the Law on the Promotion of Employment, the goal of which is to secure jobs, vocational training and an income for all persons resident in the Republic of Albania.

In Albania legislation has been adopted on a People’s Advocate (“Ombudsperson”) to defend the rights, freedoms and lawful interests of individuals from unlawful or improper actions or failures to act on the part of the public administration. During 2003, the Office of the People’s Advocate dealt with about 4,000 complaints. However, 40 per cent of the cases were found to be outside the Office’s jurisdiction. Of those accepted, 25 per cent were resolved in favour of the complainant.²⁵

As the EU Stabilisation and Association Report 2004 shows, the professional capacities of judges, prosecutors, police (criminal investigations department) and administrative staff in Albania remain limited, and infrastructure and equipment are inadequate. As a consequence, the overall performance of the judicial system is poor, as is its perception amongst the general public. For the time being Albanian law enforcement bodies cannot guarantee consistent enforcement of the law in accordance with internation-

²³ “Non-discrimination in Employment in Albania”, Dubrovnik, 24-25 June 2004, prepared by M.G. Xhangoli and M.L. Milkani.

²⁴ See Article 18 of the Constitution of the Republic of Albania.

²⁵ Op. cit.

al standards.²⁶ In Albania there are neither special procedures for bringing a complaint of unlawful discrimination nor reports on cases of discrimination in employment.

BOSNIA AND HERZEGOVINA

Constitutional provisions

According to Annex IV of the Dayton Peace Agreement, Bosnia and Herzegovina shall consist of two entities (hereafter the “Entities”), the Federation of Bosnia and Herzegovina, which is a federation of ten cantons, and Republika Srpska, to which one should add the Brcko District.

The Constitution of Bosnia and Herzegovina contains a provision on equality stating that all persons within the territory of Bosnia and Herzegovina enjoy human rights and fundamental freedoms – Article 2 of the Constitution – *without discrimination* on any grounds, including sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The Constitution says that Bosnia and Herzegovina and both of its constituent Entities shall ensure the highest level of internationally recognised human rights and fundamental freedoms. To that end, a Human Rights Commission for Bosnia and Herzegovina, as provided for in Annex VI of the Dayton General Framework Agreement, was established with a view to monitoring application of this constitutional principle. The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other laws.

Civil and Labour Code

At the state level of Bosnia and Herzegovina two laws are relevant in respect of non-discrimination in employment and occupation, namely the Law on the Civil Service and the Law on Employment in Institutions of the State of Bosnia and Herzegovina. The first law has special equality clauses that guarantee the rights of civil servants to fair and just treatment in all aspects of human resource policy, regardless of ethnic and social origin, “entity” nationality, religion, political beliefs, gender, race, marital status, and so on. The second law protects public employees of the institutions of the state of Bosnia and Herzegovina who do not have the status of civil servants. The protection guaranteed concerns any discrimination on the grounds of race, colour, gender, language, ethnic or social origin, sexual orientation, political affiliation, and so on.

In addition, the parliament of Bosnia and Herzegovina adopted a law on gender equality in 2003. It guarantees the principle of gender equality in the private and public spheres, especially in education, employment, the economy, social protection and health care. The law protects against both direct and indirect gender discrimination. The concept of gender discrimination as set forth in the law includes gender-based violence and sexual harassment. The provisions of the law cover employment, career development, vocational guidance and vocational training.

At the entity level, namely in the Federation of Bosnia and Herzegovina and in Republika Srpska, there is no special law that specifically regulates non-discrimination in employment and occupation. However, labour legislation in both entities contains provisions that prohibit discrimination in employ-

²⁶ Op. cit.

ment and occupation in very similar words. For instance, in the Federation of Bosnia and Herzegovina, Article 5 of the 1999 Labour Code, as amended in 2000 and 2003, protects both people seeking employment and those in employment against discrimination on such grounds as race, colour, religion, sex, political or other opinions, ethnic or social background, financial situation, membership of trade union, disability, and so on. Similarly, in Republika Srpska the Labour Code adopted in 2000 prohibits discrimination against workers and persons seeking employment. In both entities the Labour Code was amended in 2003 so as to comply with the state-level law on gender equality referred to earlier.

Enforcement machinery

At the level of the State of Bosnia and Herzegovina the protection of human rights and fundamental freedoms referred to in the Constitution is the responsibility of the Ombudsperson for Human Rights, pursuant to the Law on the Ombudsperson for Human Rights. An agency for gender equality was created within the Ministry for Human Rights and Refugees whose task is to monitor enforcement of the law on gender equality at the level of the State of Bosnia and Herzegovina.

At the entity level, enforcement of anti-discrimination legislation is carried out by three types of institution, namely the courts, the labour inspectorate and the Office of the Ombudsperson. In both entities the Ombudsperson has the duty to protect human dignity and fundamental freedoms and must act to reverse the consequences of violation of these rights, especially ethnic cleansing. The Ombudsperson is also entitled to initiate court proceedings and to intervene in any pending proceedings connected with discrimination.

BULGARIA²⁷

Constitutional provisions

The Constitution of Bulgaria has a general anti-discrimination clause which states that “all citizens shall be equal before the law. There shall be no privileges or restrictions of rights on the grounds of race, nationality, ethnic identity, sex, origin, religion, political affiliation, personal or social status or property status.” In addition, the Constitution provides for the supremacy of international law, asserting that any international instruments which have been ratified by the constitutionally established procedure, promulgated and come into force with respect to the Republic of Bulgaria shall be considered part of the domestic legislation of the country. They “shall supersede any domestic legislation stipulating otherwise”.

Civil and Labour Code

Bulgaria is one of those South Eastern European countries that have a general anti-discrimination law. The Law on Protection against Discrimination²⁸ – which entered into force in January 2004 – aims to introduce comprehensive and unified equality legislation covering all Article 13 grounds and enforced by a Protection against Discrimination Commission. It develops further the constitutional principles of prohibition of discrimination and equality under Article 6 by establishing mechanisms for their practical implementation. With this anti-discrimination law the provisions of the Law on the Amendment of

²⁷ Summary report on non-discrimination legislation in Bulgaria, Dubrovnik, 24-25 June 2004, Vesselin Ilkov, senior expert at Ministry of Labour and Social Policy.

²⁸ Promulgated in SG, N 86, of 30.09.2003.

the Labour Code were further developed (coming into force on August 2004) which established compliance with important ILO standards and EU Directives, including 2000/78/EC, 2000/43/EC and 75/117/EEC on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women; 97/80/EC on the burden of proof in cases of sex discrimination; and 76/207/EEC on implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions, amended by Directive 2002/73/EC.

Enforcement machinery

A Commission on Protection against Discrimination is being established in Bulgaria. This special government body with the power to investigate complaints and impose sanctions on violators of the anti-discrimination principle would represent an important step in reducing discrimination and providing adequate remedies and redress for victims of discrimination. The decisions of the Commission may be appealed before the Supreme Administrative Court. It should be pointed out that Bulgaria adopted a law establishing an Ombudsperson in May 2003.

CROATIA²⁹

Constitutional provisions

Equality is guaranteed in the Republic of Croatia to members of all ethnic minorities, while liberty, equality, ethnic or national equality and equality of men and women, social justice, and respect for human rights are among the supreme values of its constitutional system. The Constitution of the Republic of Croatia states: "Everyone in the Republic of Croatia has rights and liberties, irrespective of their race, skin colour, sex, language, religion, political or other conviction, ethnic or social origin, wealth, birth, education, social position or other features. All are equal before the law."

Civil and Labour Code

Over the last few years Croatia has adopted a whole set of laws that deal either directly or indirectly with the problem of non-discrimination in employment and occupation. For instance, the Law on Amendments to the Labour Code, which came into force in July 2003, lays down provisions protecting against discrimination in a new way, in line with European legislation, forbidding both direct and indirect discrimination, as well as providing protection for employees against harassment, including sexual harassment.

The Equality of the Sexes Law, which came into force in July 2003, laid the foundation for the creation of equal opportunities for women and men in all areas of public and social life. This Law also forbids discrimination in recruitment and employment in the public and private sectors.

The Law on Professional and Vocational Rehabilitation and the Employment of Persons with Disabilities,³⁰ which came into force in December 2002, constitutes the legal framework for the prevention of discrimination against and the provision of assistance to persons with disabilities. Furthermore, the

²⁹ Non-Discrimination in the Area of Employment and Occupation in the Republic Of Croatia, Short Country Brief for the Meeting In Dubrovnik, 24-25 June 2004, Republic of Croatia, Ministry of the Economy, Labour and Entrepreneurship. Prepared by Lovrenka Brajkovic and Bulat Nenad Kazija.

³⁰ In the records of the Croatian Employment Institute, about 2.5% in total (or 7,500 persons) of persons with disabilities, about 60% of them men. In Croatia the proportion of disabled persons of working age who are permanently employed is 7.4%. The others all receive benefits in the welfare system.

Law prescribes that the rights of persons with disabilities to professional rehabilitation should be determined by the Croatian Employment Institute or the appropriate regional office.

The Constitutional Law on the Rights of Ethnic [National] Minorities, which came into force in December 2002, together with detailed regulations, created the conditions for the systematic exercise of the rights of ethnic minorities. In addition, since 2003 Croatia has had a National Romany Programme.

In an effort to comply with EU directives Croatia adopted the Homosexual Unions Law, which came into force in July 2003, prohibiting direct or indirect discrimination on the basis of a homosexual union and on the fact of a homosexual orientation.

Enforcement machinery

When the Equality of the Sexes Law came into force, the Office for the Equality of the Sexes of the Government of the Republic of Croatia was set up, an Ombudsperson for Sexual Equality was appointed, and in government bodies the institution of Coordinator (man or woman) for Equality of the Sexes was established, as well as a Sexual Equality Commission of the Government of the Republic of Croatia and a Sexual Equality Committee of the Croatian Parliament.

FYR MACEDONIA³¹

Constitutional provisions

Human rights and fundamental freedoms, including the principle of non-discrimination, are guaranteed by the Constitution. The Constitution (1999) states: "Citizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of sex, race, colour of skin, national and social origin, political and religious beliefs, property and social status. All citizens are equal before the Constitution and the law." The European Convention on Human Rights entered into force in FYR Macedonia in 1997. FYR Macedonia has adopted several other international instruments, including the CEDAW Convention in 1991 (signing its Optional Protocol in 2000), and has ratified ILO Conventions 100 and 111. However, as underlined by the Ombudsperson's reports, while the rights of citizens are in principle respected, the situation is still far from fully satisfactory.³²

Civil and Labour Code

In accordance with the Labour Code employers shall not treat persons seeking employment unequally because of race, colour, sex, age, health and invalidity, religion, political and other beliefs, trade union membership, national or social background, family status, property or other personal matters. The principles of equal remuneration and of equal treatment of men and women have been introduced in relation to employment, training, career advancement, and working conditions. Other laws incorporate in full the principle of non-discrimination, such as the Laws on Judges, on Broadcasting, on Religious Communities and Religious Groups, and on Secondary Education. While the law prohibits discrimination on the basis of disability, this provision remains to be fully implemented. The Parliament has adopted a Declaration on the Protection and Promotion of the Rights of Persons with Special Needs, which will have to be duly implemented.³³

³¹ 'Non-discrimination', Country Brief for Meeting in Dubrovnik, 24–24 June 2004, Ministry of Labour and Social Policy, Republic of Macedonia. Prepared by Biljana Avramovska

³² Sec(2004) 373, Commission staff working paper, Former Yugoslav Republic of Macedonia, Stabilisation and Association Report 2004 (COM(2004) 204 final).

³³ Op. cit.

Enforcement machinery

Every citizen may invoke the protection of the rights and freedoms laid down in the Constitution before the courts and the Constitutional Court in proceedings based upon the principles of priority and urgency. In addition, the Law on the Courts declares that everyone has the right to equal access to the courts in protection of his/her rights and interests. In this regard, in accordance with the Law on Administrative Organs, the administrative organs are also obliged to provide equal legal protection in the implementation of their rights, obligations and interests for everyone who appears in proceedings before them.

The Criminal Code is a powerful instrument in the fight against racism, intolerance and discrimination on whatever grounds. A new law enhancing the Ombudsperson's Office was enacted in September 2002, in compliance with the Ohrid Framework Agreement and Amendment XI of the Constitution. However, the cooperation and assistance provided by the various administrations to the Ombudsperson could be very much improved. As far as the activity of the Ombudsperson is concerned, although citizens' awareness of their rights is increasing (there was a 60 per cent increase in the number of complaints to the Ombudsperson recently), it has not yet reached a high level.³⁴

MOLDOVA³⁵

Constitutional provisions

The Constitution of the Republic of Moldova states: "Every citizen of the Republic of Moldova is equal before the law and public authorities, irrespective of race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, economic conditions or social origin." Since it obtained independence, the Republic of Moldova has ratified a number of international treaties related to equal rights, including the UN Convention on the Elimination of all Forms of Racial Discrimination, the UN Convention on the Elimination of Discrimination in the Field of Education, the CEDAW Convention, and ILO Conventions 100 and 111.

Civil and Labour Code

The Labour Code establishes as fundamental principles governing employment relationships freedom of labour, including the right to freely chosen or accepted work, the right of employees to dispose of their labour, the right to choose one's profession or occupation; prohibition of forced or compulsory labour and discrimination in employment relationships; equal rights and opportunities of employees, equality of employees, without any discrimination, in advancement, in accordance with their efficiency, qualifications and length of service in a particular job, as well as in vocational training and additional training. However, the Labour Code stipulates that distinctions, exclusions, preferences or rights of employees which are determined by the specific requirements of a job, as laid down by the relevant legislation, do not constitute discrimination.

The principle of non-discrimination is also asserted in the Law on the Social Protection of Invalids, the Law on Employment and the Law on the Civil Service. In addition, the Law on Education specifies that the right to education is guaranteed, irrespective of nationality, sex, age, social origin and status,

³⁴ Op. cit.

³⁵ Summary report on non-discrimination legislation in the Republic of Moldova. Prepared by Katalina Dorn.

political or religious reference, or criminal record, and the state ensures equal access to the state institutions of secondary education, vocational, secondary special and higher education in accordance with abilities and skills.

With regard to gender equality, in February 2003 the Government of the Republic of Moldova adopted the National Plan entitled “Promotion of gender equality in society for 2003–2005”, aimed at promoting equality between women and men. In this context, the draft law on equality between women and men, which is to promote the self-affirmation of women in conditions of complete social equality with men, promoting the principles of equal treatment and equality of opportunity for men and women was elaborated and presented to the Government.

Enforcement machinery

To enforce the legislation on equality in employment and connected relationships, the state has established a monitoring system under the Labour Inspectorate (2001) and the trade unions (2000). The latter have been empowered by the Trade Unions Act to play an important role in the enforcement of anti-discrimination legislation alongside labour inspectors and judges.

ROMANIA³⁶

Constitutional provisions

Article 16 of the Constitution of Romania of 1991, as amended in 2003, forbids discrimination based on race, nationality, ethnic origin, language, religion, sex, opinion, political allegiance, wealth or social background.

Civil and Labour Code

In Romania the issue of discrimination is regulated by a patchwork of different laws. In an effort to comply with EU Directive 2000/43/EC and other international instruments dealing with racial discrimination, the Romanian government issued Ordinance No. 137/2000 on preventing and punishing all forms of discrimination. Its amendment (Ordinance Government No. 77/2003) provides for equal rights in the areas of employment, access to public services, health care, education, residence and the right to personal dignity. This Ordinance forbids discrimination in a wide range of areas and on all the relevant grounds, although age is not fully covered. However, the new Labour Code Act No. 53/2003 forbids discrimination also on the ground of age.

This Ordinance fails to outline how its provisions will be related to the existing provisions on employment, health care, education and social services. Act No. 74/1999 on Ratification of the Revised European Social Charter approved in Strasbourg in 1996, Order of State of the Minister of Labour and Social Solidarity No. 508/2002 and Order of State of the Minister of Health and Family No. 933/2002 on Approval of the General Labour Protection Norms, Act No. 202/2003 on Equal Opportunities between Women and Men, Government Decision No. 967/1999 on the Establishment and Functioning of the Inter-Ministerial Consultative Commission in the Area of Equal Opportunities for Women and Men, Government Decision No. 1273/2000 on the Approval of the National Action Plan for Equal Opportunities for Women and Men, Government Decision No. 737/2003 on the Establishment and Functioning

³⁶ Prepared by Denisa Pătraşcu, Romania.

of the Ministry of Labour, Social Solidarity and Family, all contain anti-discrimination principles. Law No. 27/2004 completed the definition of discrimination, established the concept of harassment and laid down penalties, modes of proof and the right of NGOs to participate in court proceedings. In addition, Law No. 202/2002 on Equal Opportunities between Women and Men defines the principle of equal pay for work of equal value.

Enforcement machinery

Under the Constitution, every person is entitled to bring a case before a court to defend their rights, liberties and interests, and it is possible in accordance with the provisions of the Labour Code to seek legal redress in any litigation connected with the conclusion, execution or modification of individual employment contracts. Law No. 48/2002 provides for all discrimination cases that the victim is entitled to seek damages in court proportionate to the harm suffered, as well as to the reestablishment of the situation prior to discrimination, or the termination of the situation created by the discrimination, in accordance with the law.

Romania possesses a special body for hearing discrimination cases. The National Council for Combating Discrimination is an autonomous and independent body without restrictions or subject to the influence of other public institutions or authorities, whose purpose is to receive complaints and punish violations of anti-discrimination principles and provisions. Romania also has an Ombudsperson, whose role is to protect citizens' rights and freedoms, as well as to formulate, in the periodical reports submitted to Parliament, legislative recommendations and concrete measures.

SERBIA AND MONTENEGRO³⁷

Constitutional provisions

In the case of Serbia and Montenegro many substantial questions arise: for example, what level of authority – federal or republic – is responsible for non-discrimination issues. The situation is further complicated by the fact that special conditions exist in Kosovo.³⁸

Serbia and Montenegro is a signatory of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its accompanying Protocols. The legislation of the Republic of Serbia has not yet been fully aligned with the applicable human rights standards and discriminatory provisions and practices (especially concerning Roma and other vulnerable groups).

Civil and Labour Code

The Labour Code in Serbia guarantees employees' rights to equal treatment irrespective of sex, race or any other personal characteristics with respect to entering into an employment relationship, working conditions, wage level, freedom of association, as well as other activities and rights and obligations arising from employment. Implementation of the principle of equality and non-discrimination is provided for in the Charter of Human and Minority Rights and Civil Liberties, the Labour Code and the Law on Employment and Employment Insurance.

³⁷ Brief on the framework of non-discrimination legislation in the Republic of Serbia. Prepared by Snežana Bogdanovic and Mirjana Samardžic.

³⁸ Kosovo is under an Interim International Civilian Administration (UNMIK) after a decision of the UN Security Council of 10 June 1999 (Resolution 1244).

Serbia's new Law on Employment and Unemployment Insurance (2003) specifies the principle of equal opportunity and treatment and the prohibition of discrimination in employment, and guarantees equal accessibility to all jobs and equality of treatment in employment for both men and women.

According to the Charter on Human and Minority Rights and Civil Liberties, which has the force of a constitutional law, the right to work shall be guaranteed in accordance with the law. Serbia and Montenegro shall create conditions in which everyone can earn a living by his/her own work, and everyone shall have the right to free choice of work. This Charter only applies *de facto* in Serbia, as Montenegro is preparing its own legislation. It should be pointed out that the complex division of competencies has also led to difficulties in coordination and has affected the implementation of the state's international obligations.

According to the country report on Serbia, in practice there are clear limits to consistent compliance with the principle of the equality of the sexes in relation to the right to work. In the first place this pertains to the possibility that the Law gives employers to recruit and conclude employment contracts with persons who satisfy their personal criteria. Within this context, experience shows that when establishing an employment relationship, some employers do not fully respect the equal opportunity principle. Above all this pertains to the constraints imposed by employers in terms of the age of employees (especially when women's jobs are in question, for example, that of secretary), but also to rights such as maternity leave and child care leave. It is expected that the new Labour Code will regulate discrimination in a more detailed manner in line with EU Directive 76/207 and Guideline 2000/78 and ILO Fundamental Conventions 100 and 111.

Enforcement machinery

The Penal Code of the Republic of Serbia contains special provisions related to criminal acts in relation to employment relationships. Supervision of implementation of the Labour Code – and so the provisions regulating the prohibition of discrimination – is carried out by the Labour Inspectorate. The latter has the authority to prohibit certain activities in the case of the most serious violations of the law.

Employees can seek enforcement of their rights against an employer's decision by instituting proceedings at the competent court. The Law on Employment and Unemployment Insurance provides for the indemnity of damages incurred due to discrimination in employment and the person considering him/herself discriminated against under this law has the right to seek compensation by legal means.

Annex 5: Case Studies

Case A:

The plaintiff, who has the status of a civil servant, works as a secondary school teacher part-time for the defendant, a public authority of a member state. Full-time teachers there work for 24.5 hours per week, which corresponds to 98 hours a month, based on an average of four weeks per month, whereas the applicant teaches for 15 hours per week, corresponding to 60 hours per month.

In December 1999 the plaintiff was required to teach 2.5 additional hours. Her request for remuneration for those hours was rejected on the ground that the relevant legislation provided that excess hours worked by a teacher who is a civil servant would be remunerated only when the additional work exceeded three hours in a month.

She therefore received no pay for the additional 2.5 hours worked.

The applicant goes before the administrative court.

The defendant submits that part-time teachers are treated in exactly the same manner as full-time teachers. All teachers are entitled to remuneration if more than three additional hours are worked. In that case the additional hours are remunerated in exactly the same manner. Equality of remuneration is ensured for both regular working hours and additional hours.

A few questions

1. What arguments could be brought forward by the applicant to support her claim?

Part-timers are treated differently since the burden of 3 additional hours is higher for part-timers than for full-timers. Part-timers are predominantly females and therefore the national legislation at stake could constitute indirect discrimination because of sex.

2. Is there any applicable Community legislation?

Article 141 EC and Article 1 of Directive 75/117.

(hand-out)

3. What is the basic principle of equal pay?

The principle of equal pay, as enshrined in Article 141 EC and Article 1 of Directive 75/117, means that, for the same work or for work to which equal value is attributed, all discrimination on grounds of sex with regard to the aspects and conditions of remuneration is prohibited unless that different treatment is justified by an objective unrelated to sex or is not necessary to achieve the objective pursued (see to that effect, inter alia, Case C-236/98 JämO [2000] ECR I-2189, paragraph 36; and Case C-381/99 Brunnhofer [2001] ECR I-4961, paragraphs 27 and 28).

4. Can the national court decide the case?

“Art. 234 EC

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- a) the interpretation of this Treaty;
- b) the validity and interpretation of acts of the Community institutions...

Where such a question is raised before any court or tribunal of a Member State, that Court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”

5. What could be a preliminary question in our case?

“Is it compatible with Article 141 EC in conjunction with ... Directive 75/117 ... that men and women teachers, part-time as well as full-time, who are officials ... are not granted remuneration for excess hours worked if that additional work does not exceed three teaching hours in the calendar month?”

6. What is wrong with this question?

Article 234 EC allows only the interpretation of Community law, not the question of compatibility of national legislation with Community law. Therefore the Court is reformulating the question, which by itself would be inadmissible:

“By its question, the national court is essentially asking whether Article 141 EC and Article 1 of Directive 75/117 must be interpreted as precluding national legislation which provides that teachers, part-time as well as full-time, do not receive any remuneration for additional hours worked when the additional work does not exceed three hours per calendar month.”

7. What is pay in the sense of Article 141 and Article 1 of Directive 75/117?

“The term ‘pay’ referred to in Article 141 EC and Article 1 of Directive 75/117 comprises any other consideration, in cash or in kind, present or future, provided that the worker receives it, even indirectly, in respect of his employment from his employer (see in particular Case C-262/88 Barber [1990] ECR I-1889, paragraph 12; and Brunnhofer, cited above, paragraph 33).”

8. What method of comparison is to be used?

“As regards the method to be used for comparing the pay of the workers concerned in order to determine whether the principle of equal pay is being complied with, again according to the case law, genuine transparency permitting an effective review is assured only if that principle applies to each aspect of remuneration granted to men and women, excluding any general overall assessment of all the consideration paid to workers (see Barber, cited above, paragraphs 34 and 35; and Brunnhofer, cited above, paragraph 35). Accordingly, a separate comparison is necessary in respect of the pay for regular hours and the pay for additional hours.”

9. Is there different treatment of part-timers in comparison with full-timers?

“Although that pay may appear to be equal inasmuch as the entitlement to remuneration for additional hours is triggered only after three additional hours have been worked by part-time and full-time teachers, three additional hours is in fact a greater burden for part-time teachers than it is for full-time teachers. A full-time teacher must work an additional three hours over his regular monthly schedule of 98 hours, which is approximately 3% extra, in order to be paid for his additional hours, whilst a part-time teacher must work three hours more than his monthly 60 hours, which is 5% extra. Since the number of additional teaching hours giving entitlement to pay is not reduced for part-time teachers in a manner

proportionate to their working hours, they receive different treatment compared with full-time teachers as regards pay for additional teaching hours.”

10. What follows from such different treatment?

“It is for the national court to determine, first, whether the different treatment established by the legislation in question affects considerably more women than men and, second, whether there is an objective unrelated to sex which justifies such different treatment and whether it is necessary to achieve the objective pursued (see, to that effect, Case C-278/93 *Freers and Speckmann* [1996] ECR I-1165, paragraph 28).”

And the Court of Justice concludes:

“In those circumstances, the question referred for a preliminary ruling should be answered as follows:

Article 141 EC and Article 1 of Directive 75/117 must be interpreted as precluding national legislation which provides that teachers, part-time as well as full-time, do not receive any remuneration for additional hours worked when the additional work does not exceed three hours per calendar month, if that different treatment affects considerably more women than men and if there is no objective unrelated to sex which justifies that different treatment or it is not necessary to achieve the objective pursued.”

Case B:

The plaintiff was born in 1947 and is therefore 57 years old.

In June 2003 the plaintiff and the defendant, a private employer, concluded an employment contract which contained the following clause:

“Clause 5: Term of employment

1. Employment shall run for a fixed term, commencing on 1 July 2003 and ending on 28 February 2004.
2. The fixed term is based on the statutory provision concerning the relaxation of restrictions on fixed-term employment for older workers set out in the fourth sentence, in conjunction with the first sentence, of Paragraph 14(3) of the TzBfG (Teilzeit- und Befristungsgesetz – Law on Part-Time Working and Fixed-Term Employment Contracts) because the employee is older than 52 years of age.”

The national legislation concerning fixed-term contracts developed as follows:

Until 1985, German labour law did not include any statutory provisions on fixed-term employment relationships. Instead, rules governing such relationships were developed by means of case law. To ensure that statutory protection against dismissal would not be undermined by the imposition of fixed terms of employment, the courts established that, where the Kündigungsschutzgesetz (Law on Protection against Dismissal) was applicable, the imposition of a fixed term had to have an “objective justification”.

In 1985 the Beschäftigungsförderungsgesetz (Law on Employment Promotion 1985), paragraph 1 (1), provided, in principle, that, unless there was an objective justification, fixed-term employment relationships could be renewed no more than three times (in direct succession) and could be concluded over a maximum total duration of two years. Under Paragraph 1(2), a fixed term could be imposed, without the need for objective justification, in respect of persons aged 60 and over.

As of 1 January 2001 the possibility of concluding fixed-term contracts without objective justification was broadened to cover all persons aged 58 or over (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge, TzBfG – Law on Part-time Working and Fixed-Term Employment Contracts).

As of 1 January 2004 the age limit was lowered again. It is now possible to conclude fixed-term contracts without objective justification with persons aged 52 and over (Modification of the TzBfG through the so-called Hartz Reform).

The plaintiff believes that the German legislation is contrary to Community law and that his work contract should continue as an indefinite work contract beyond 28 February 2004.

The defendant contends that the very fact that older workers are difficult to place in the labour market constitutes an objective reason.

Since no agreement could be reached between the parties, the plaintiff files a suit against the defendant before the Labour Court.

A few questions

1. Is there any applicable Community legislation?

Directive 1999/70/EC and Directive 2000/78/EC
(hand-out)

2. Concentrating on Directive 2000/78/EC, what are the provisions on age as a reason for unequal treatment?

Recitals 8, 13, 25

Art. 2: Concept of discrimination

Art. 3: Scope

Art. 6: Justification of differences of treatment on grounds of age

Art. 18: Implementation, paragraphs 1 and 2

On age the UK, Germany, Belgium, the Netherlands, and Sweden asked for three years' prolongation; Denmark for one year.

Austria's request was rejected because no particular conditions were cited.

On disability, France asked for three years' prolongation, the UK and Denmark for one year.

New Member States did not ask for any prolongation before 1/5/04, therefore an obligation to comply with the Directive exists as of 1/5/04.

3. Is there a difference of treatment because of age on the basis of the existing legislation?

Persons under 52 years of age enjoy legal protection against dismissal.

Fixed-term contracts lead to termination of work contract without dismissal, therefore the termination of such a contract does not fall under the possible legal review by a labour court.

Fixed-term contracts with persons under 52 years of age are limited in respect of maximum duration (2 years) and maximum number of renewals (3).

Persons of 52 years and over are therefore deprived of specific social protection just because of age. Thus there is indeed a difference in treatment because of age.

4. Does Article 3, Paragraph 3 exclude the applicability of the Directive in such a case?

Article 3 excludes only state schemes linked to payments of any kind by the Member State. The existing legislation does not provide any payment by the state. Reducing labour costs by lowering social protection cannot be considered as payment by the state.

5. *Can this difference in treatment be justified according to Article 6?*

Preconditions of Article 6 are:

- a) a legitimate aim, including legitimate employment policy, labour market and vocational training objectives;
- b) means must be appropriate and necessary.

Is enhancing the employability of elderly people a legitimate objective? Probably yes.

Are the means appropriate and necessary (principle of proportionality)? Doubtful.

There is a large margin of appreciation for Member States, but according to the ECJ:

“Mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed rule is unrelated to any discrimination based on sex nor to provide evidence on the basis of which it could reasonably be considered that the means chosen were suitable for achieving that aim” (Judgment of the Court of 9 February 1999, Case C-167/97, Seymour-Smith, ECR 1999, Page I-006).

Is there a reasonable probability that employers would conclude work contracts with persons of 52 years of age and older only if they can conclude fixed-term work contracts, and only fixed-term contracts without limitation?

Is it proportionate to lower substantially the social protection of all workers of a specific age group (52 and older) so that some workers will get a job? Are there not alternative means to achieve the same objective with less burdensome conditions? For example, the same aim could be achieved if only persons over a certain age could be employed on fixed-term contracts after a certain period of unemployment, for instance, one year. Or, fixed-term contracts with persons of a certain age may be allowed but only for a certain number of years (less than the present 15 years), or with fewer than a certain number of renewals.

6. *What happens if a member state has used the prolongation possibility contained in Article 18, Paragraph 2?*

If the end of the employment contract lies beyond the transposition period, then the case falls within the scope of the Directive. See ECJ Judgement of 29 January 2002, Case C-162/00, Pokrzeptowicz-Meyer, ECR 2002, page I-1049.

If the end of the employment contract lies before the end of the transposition period, then the obligation of the member state is to refrain from enacting any legislation which seriously endangers the aim and objective of the Directive in question. See ECJ, Judgement of 18 December 1997, case C-129/96, *Inter-Environnement Wallonie*, ECR 1997, page I-7411:

“Although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of [former] Article 5 in conjunction with the third paragraph of [former] Article 189 of the Treaty and from the Directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed.”

Case C

The largest national public university has recently adopted an administrative regulation prohibiting the wearing of headscarves by female students. Any female student who violates the regulation will be suspended from school.

In the country in question, a large percentage of the population is Muslim. It is not an Islamic country, nor is Islam the national religion. In fact, the Constitution promotes secularism to ensure national security.

A female student has challenged the University administrative regulation on grounds of sex and religious discrimination, using ILO Convention No. 111, which the Government has ratified, EU directives and national laws prohibiting discrimination on the grounds of sex and religion.

The University replies that the rules are to protect public security and ensure secularism. They contend that headscarves are worn by militant Islamic group members who are terrorists and who threaten national peace and security.

Since the regulation came into force the percentage of female Muslim university students enrolled in the university has declined by 50 per cent and the percentage of male Muslim university students has slightly increased.

Please identify the issues and make a judgement, giving your reasons.

Annex 6: List of Documents

Country Briefs:

- Albania
- Bosnia and Herzegovina
- Bulgaria
- Croatia
- Moldova
- Romania
- Serbia

ILO Documents:

- Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2003: Time for Equality at Work.
- Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2004: Organizing for Social Justice.
- A. Blackett and C. Sheppard: The Links between Collective Bargaining and Equality, DECLARATION Working Paper/10/2003.
- C100 Equal Remuneration Convention, 1951 (translated into Serbo-Croat).
- C111 Discrimination (Employment and Occupation) Convention, 1958 (translated into Serbo-Croat).
- C156 Workers with Family Responsibilities Convention, 1981 (translated into Serbo-Croat).
- R90 Equal Remuneration Recommendation, 1951.
- R111 Discrimination (Employment and Occupation) Recommendation, 1958.

European Commission/Council/Parliament:

- Council Directive 2000/43/EC of June 2000, implementing the principle of equal treatment between persons irrespective of racial and ethnic origin.
- Council Directive 2000/78/EC of November 2000, establishing a framework of equal treatment in employment and occupation.
- Directive 2000/73/EC of the European Parliament and of the Council of 23 September 2002, amendment to Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards employment, vocational training, promotion and working conditions.
- Draft Treaty for establishing a Constitution for Europe (2003/C169/01), 18 July 2003.
- Consolidated Version of the Treaty establishing the European Community.
- Article 141/EC.
- Council Directive 75/117/EEC of February 1975, on the approximation of laws of member states relating to the application of the principle of equal payment for men and women.
- Promoting Diversity: 21 bodies promoting diversity and combating discrimination in the EU – Executive Summary. DG Employment and Social Affairs, D 4, May 2002.

CASE A:

- Hand-out Case A
- Answer Sheet Case A
- Opinion of Advocate General Jacobs
- Judgement of the Court

CASE B:

- Hand-out Case B
- Answer Sheet Case B
- Judgement of the Court

CASE C:

—