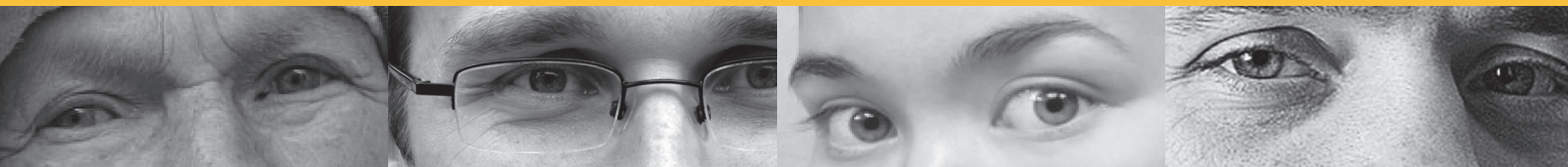




EUROPEAN NETWORK OF LEGAL EXPERTS
IN THE FIELD OF GENDER EQUALITY

European Gender Equality Law Review

No. 2 / 2014



IN THIS ISSUE

E. Caracciolo di Torella and Petra Foubert

Maternity Rights for Intended Mothers? Surrogacy
Puts the EU Legal Framework to the Test

Paul Post and Rikki Holtmaat

A False Start: Discrimination in Job Advertisements

A False Start: Discrimination in Job Advertisements

*Paul Post and Rikki Holtmaat**

1. Introduction

Anybody who has ever watched a swimming competition, sprinting event or motor race, has undoubtedly realised that fair competition can only exist by virtue of an equal start. In sports, therefore, referees will monitor the start of the game with special attention, thus guaranteeing a level playing field, i.e. a situation in which all play by the same rules and no-one has an unfair advantage over others. Equal treatment legislation in the field of employment, too, aims at creating a level playing field, a job market in which all have a fair and equal chance to participate in paid labour. Discrimination in the labour market, however, despite all ongoing efforts, remains a widespread phenomenon – a practice that in many cases commences with job advertisements that are either directly or indirectly discriminatory. Discriminatory job ads are the labour market equivalent of a false start.

Many women experience discrimination in the labour market, which often begins with a discriminatory job advertisement. If women are already discouraged from applying for a job because an advertisement, explicitly or implicitly, makes it clear that the company is seeking a male worker, their chances of finding a job are seriously diminished. For the excluded job seekers, the advertisement can plant a seed of a lack of confidence in the enforcement of equal treatment law. Discriminatory advertisements, moreover, signal to the wider public that discrimination is an accepted practice that the authorities are unable or unwilling to tackle. They send out a message that distinctions based on the prohibited non-discrimination grounds may still be made and will not be punished, regardless of the legislation in place. The importance of putting an end to this form of discrimination is therefore obvious.

In order to get an impression of the situation in this regard, a questionnaire was sent to all 33 country experts of the European Network of Legal Experts in the Field of Gender Equality, with the purpose of assembling information on the prevalence of this phenomenon, the respective country's legal framework and relevant case-law, as well as good practices. This article is based on this information and, furthermore, builds on previous comparative research into discriminatory job advertisements conducted by the authors of this article in 2013 and commissioned by the CEE-office of the International Labour Organization in Budapest.¹

This article will, in Section 2, sketch out the legal framework of the European Union (EU). In Section 3, an overview of the situation in the various countries will be given. In the Section 4, the legal obstacles that were reported by the experts will be identified. Section 5 of this article aims to contribute towards the development of tools to improve the effectiveness of the legal norms for prevention and elimination of discrimination in job advertisements by identifying examples of effective legislation and of good practices.

* Paul Post is an LL.M. student at Leiden University and a Student Assistant at the Department of European Law. Rikki Holtmaat is a Professor in international non-discrimination law at Leiden University. She is a member of the European Commission's Network of Legal Experts in the Non-Discrimination Field and of the European Commission's Network of Legal Experts in the Field of Gender Equality. The authors would like to acknowledge and thank Susanne Burri and Alice Welland for their assistance and valuable suggestions.

¹ Working title: "Wanted": Effective Legal Measures to Eliminate Discrimination in Job Advertisements', not yet published. Countries participating in this study were Portugal, the UK, the Netherlands, Moldova, Romania and Ukraine.

2. Legal Framework of the European Union

The history of the EU shows an ever-expanding involvement of the Union with the issue of sex discrimination in the field of employment relations and in other spheres of economic activity.² The prohibition of discrimination on the ground of sex in the area of employment can currently be found in the so-called ‘Recast Gender Equality Directive’ of 2006,³ which prohibits discriminatory selection criteria and recruitment conditions.⁴ Job advertising is part of the recruitment process and is thus included within the scope of this Directive.

2.1. Direct discrimination

Both direct and indirect sex discrimination are prohibited under the Recast Directive. Direct discrimination occurs ‘where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation’.⁵ This means that the prohibited discrimination ground is explicitly mentioned as a job requirement in the advertisement. This often happens by naming a job in the feminine or masculine form (see Section 3 of this report). Any form of direct discrimination in job advertisements is prohibited, unless one of the Directive’s justification grounds (or exceptions) is applicable. In the context of job advertisements, the most important possible justification ground is the genuine occupational requirement, which arises ‘by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out’.⁶

With respect to some jobs it may be necessary to advertise for a person from a particular sex, for example if an employer needs to hire female models for a fashion show of the latest women’s fashion. In that case, one of the essential job requirements explicitly refers to the prohibited non-discrimination ground of sex, which makes such a requirement suspect on the ground of direct discrimination.⁷ From the text of the Recast Directive and the Court of Justice of the European Union’s (CJEU) case-law, four requirements can be derived which must all be fulfilled to establish a genuine need to set these occupational requirements, and these are always closely and strictly scrutinised by the CJEU, because this concerns an exception to the general principle of equal treatment. It must be shown (by the employer) that:

1. the objective pursued is legitimate;
2. the characteristic required constitutes a *genuine* and *determining* occupational requirement for carrying out the function in question;
3. the characteristic is *related to* the particular discrimination ground, in this case: sex (so it does not need to be directly referring to that ground as such); and
4. the characteristic is appropriate and necessary for effectively carrying out the particular function.

A further possibility to justify direct discrimination in a job advertisement could be that the company or organisation has a positive action programme in place and aims to hire more persons belonging to an underrepresented category of workers, as is provided for in Article 157(4) of the Treaty on the Functioning of the European Union (TFEU). Article 3 Recast Directive provides that ‘Member States may maintain or adopt measures (...) with a view to

² A comprehensive and detailed overview can be found in: E. Ellis & P. Watson, *EU Anti-Discrimination Law*, Oxford: Oxford University Press 2012. An on-line recently updated overview can be found in: S. Burri & S. Prechal, European Network of Legal Experts in the Field of Gender Equality, *EU Gender Equality Law. Update 2013*, Luxembourg: European Commission 2014, available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/eu_gender_equality_law_update2013_en.pdf, accessed 4 November 2014.

³ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast) OJ L 204 of 26 July 2006, pp. 23-36.

⁴ Article 14(1)(a) Recast Directive.

⁵ Article 2(1)(a) Recast Directive.

⁶ Article 14(2) Recast Directive.

⁷ A ‘genuine occupational requirement exception’ applies where a direct reference to a discrimination ground is made, while other essential characteristics of a particular function may be formulated in neutral terms and may be suspected of constituting indirect discrimination. See below where indirect discrimination is discussed.

ensuring full equality in practice between men and women'. This means that, if such a programme exists and fits into the very narrow criteria set by the CJEU, a job advertisement can state that the employer wants to hire more women in order to have a more balanced workforce.⁸

2.2. Indirect discrimination

Indirect discrimination is defined as the situation 'where an apparently neutral provision, criterion or practice would put persons of a certain sex at a particular disadvantage'.⁹ In other words: the rule, practice or condition does not openly refer to sex, and in that regard appears to be neutral. But nevertheless, the impact may be that particular groups of people are excluded or otherwise disadvantaged. Most of the time, the essential requirements of functions (or job descriptions and prerequisites for performing the job) are formulated in a neutral way, but such neutral requirements may in fact put women in a disadvantaged position. An example could be an advertisement that requires experience in the military, when men are overrepresented in the military service.

Indirect discrimination can be objectively justified, which means that an employer who puts requirements in an advertisement that have a disproportionate impact on a particular category of job seekers, has to demonstrate that he/she is pursuing a legitimate aim and that the means of achieving that aim are appropriate and necessary (see above).

2.3. Some other aspects of EU non-discrimination law

A few other aspects of EU non-discrimination law are particularly relevant in the context of combating discrimination in job advertisements. A first one concerns the personal scope of the Directive: who is bound by the equal treatment norms and liable for a violation of these norms? This is not made explicit in EU law, but the Recast Directive applies to employment relations in both the public and the private sphere, thereby indicating that all employers have to respect the relevant equal treatment norms, including temporary agencies. Apart from employers, various other parties are involved in job advertising, most notably the companies or organisations that publish the advertisement in their newspaper or on their website. EU legislation as such does not apply to these latter parties,¹⁰ but – as we shall see in the remainder of this article – in many countries the scope of the equal treatment legislation has in fact been expanded in such a way that the prohibition does also apply to them.

A second issue is the question as to standing (*locus standi*): who may rely on the norms that are included in the Directive? It is presumed that the Directive primarily protects employees from discrimination in their employment relationship. However, someone who is seeking a job does not yet have an employment relationship with the employer who has issued the discriminatory job advertisement. Nevertheless, EU legislation does not exclude this job seeker from pursuing a claim in legal proceedings because the scope of this legislation also covers the pre-contractual recruitment phase.¹¹ It is, furthermore, important to note that Article 17 Recast Directive explicitly includes the possibility that Member States allow for non-governmental organisations (NGOs) or other organisations to file a complaint about discrimination on behalf of victims or possible victims. However, it is up to the Member States to regulate the extent and conditions of such legal actions. In the contributions of the country experts, we see several examples of national equal treatment laws that make it

⁸ See e.g. Cases C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051; C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363; and C-158/97 *Badeck v Landesanwalt Beim Staatsgerichtshof des Landes Hessen* [1999] ECR I-1875.

⁹ Article 2(1)(b) Recast Directive.

¹⁰ It could be argued that publishing a job advertisement in a newspaper is a service, provided to job seekers who buy the paper to read the advertisements. In as far as this argument would be accepted by the CJEU, this could be brought under the prohibition to discriminate in the area of publicly offered goods and services, as prohibited in Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 of 21 December 2004, pp. 37-43.

¹¹ Article 14 Recast Directive.

possible for interest groups or NGOs to hold an employer liable for a discriminatory job advertisement.

A third issue that will be examined more closely in the remainder of this article concerns the obligation of all Member States, which is enshrined in Article 25 Recast Directive, to ensure ‘effective, proportionate and dissuasive’ penalties. Article 288 TFEU stipulates that Directives are binding on each Member State ‘as to the result to be achieved’, but the choice ‘of form and methods’ is left to the national authorities. Article 17(1) of the Directive lays down the right of persons who have experienced discrimination to pursue their claims in legal proceedings before a court, after possible recourse to other competent authorities. This means that they not only have the right to actual access to judicial procedures, but also the right to have the case examined.

In the case of a discriminatory advertisement, it is difficult to determine which sanction or remedy would meet these criteria, as the damage suffered is unclear since it is not certain that the claimant would have been hired if the advertisement had been non-discriminatory. When it is accepted that it is not only aspiring applicants who in principle could apply (the targeted group of the advertisement), but also members of the general public who take offence or NGOs, the damage becomes even more abstract. An administrative or criminal law fine would, in that case, perhaps be a more appropriate sanction. One possibility could be to oblige employers to re-issue the advertisement. If the state opts for fines or damages, these need to be dissuasive and proportionate to the damage suffered by the applicant (Article 18 Recast Directive). A famous case before the CJEU concerned a woman who was discriminated against during an application procedure, but who only got reimbursed for the actual costs that she had incurred (a stamp for the application letter and some travel expenditure). In that case, the CJEU ruled that such a minimal level of compensation was not a dissuasive form of sanction for discrimination.¹² The Court has taken a firm stance on fixed upper limits for the amount of compensation, ruling that they cannot constitute proper implementation of EU law,¹³ although it has adopted a somewhat looser approach in cases in which it was found that the applicant would not have got the job even if there had been no discrimination.¹⁴

Discrimination is particularly hard to substantiate, which means that the claimant in a discrimination case faces considerable difficulty in proving the alleged discrimination. Article 19(1) of the Recast Directive therefore provides for a reversal of the burden of proof once the claimant has provided the tribunal with *prima facie* evidence. There must be *prima facie* evidence of a particular disadvantage for women as a result of that neutral criterion. To prove this, it is enough that it is shown by the applicant (on the basis of statistical or other evidence¹⁵) that one sex is in fact excluded. This means that it is not necessary to prove that the employer *intended* to exclude women or men. When this has been established, the burden of proof will shift to the employer.

In *Kelly and Meister*, the CJEU ruled that that an unsuccessful job applicant is not entitled to see the file of a successful applicant with the purpose of proving that he or she was more qualified than that person. However, account may be taken of the refusal of any access to information in deciding if there are facts that give rise to a presumption of discrimination, and thus shift the burden of proof.¹⁶ In *Firma Feryn*, the CJEU held that publicly made statements by which an employer makes clear he or she will not recruit employees of a certain group, may also constitute facts that lead to a presumption of discrimination.¹⁷

¹² Case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR I-1891.

¹³ Case C-271/91 *Marshall v Southampton and South West Area Health Authority (No 2)* [1993] ECR I-4367.

¹⁴ Case C-180/95, *Draehmpaehl v Urania Immobilienservice OHG* [1997] ECR I-2195.

¹⁵ The authors cannot go into the details of the means of proving *prima facie* evidence of indirect discrimination. See E. Ellis & P. Watson 2012, at p. 160.

¹⁶ Case C-104/10 *Kelly* [2011] ECR I-6813, Case C-415/10 *Meister v Speech Desing Carrier Systems GmbH* [2012] ECR I-0000.

¹⁷ Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-5187.

3. The situation in the national states: prevalence and case-law

Although the prevalence of discriminatory advertisements differs considerably from country to country, a few Europe-wide trends may be discerned. Firstly, several experts emphasise that the number of discriminatory advertisements has decreased considerably over the last decade (e.g. **Bulgaria, Estonia, Finland, Hungary, Lithuania**), and point to a high level of general awareness of gender equality requirements and a correspondingly rare occurrence of discriminatory advertisements (**Austria, France, Hungary, Iceland, Ireland, Latvia, the Netherlands, Norway, Portugal, Slovenia, Sweden**). In some countries, however, this practice is still widespread (**Czech Republic, former Yugoslav Republic of Macedonia, Greece, Poland, Spain, Turkey**), with the **Greek** expert mentioning recent research from which it turned out that, out of 150 reviewed advertisements, 36 (24 %) were directly discriminatory on the ground of sex and the expert from the **former Yugoslav Republic of Macedonia** remarking that in her country, advertisements ‘usually discriminate on the ground of sex’.

The use of the M/F device and/or adding endings to the title of a profession in declensions of both sexes is now widespread (**Austria, Belgium, Germany, Latvia, Liechtenstein, Luxembourg, the Netherlands, Portugal**). In the **United Kingdom**, it is common to refer to the fact that the employer is, or is attempting to be, an ‘equal opportunities employer’. However, some experts think that the effectiveness of such clauses is diminishing. The **Belgian** expert, for example, finds that the long-term usage of the M/F tool means that one hardly pays any attention to its eventual absence from an advertisement. In **Portugal**, if the advertisement fails to use neutral language and instead uses the gender-specific form to designate the profession, it is to be considered indirectly discriminatory if the profession is dominated by one of the sexes, despite the ‘magic formula’ ‘M/F’ being included in the advertisements.

Advertisements containing discriminatory requirements or drafted in gender-specific language seem to be published by smaller companies more often (**Hungary, Latvia, the Netherlands, Romania**). Also, there seems to be a big difference between low- and high-end jobs: most examples given by the experts concern advertisements for low-skilled and low-paid jobs, for example cleaners (**Cyprus, Greece, Hungary**). In this context it is interesting that the expert from the **Czech Republic** notes that job advertisements for low-paid jobs are very often published using the female word, whereas advertisements for highly-qualified and well-paid jobs more often use the male word.

In addition, there seems to be a difference between advertisements that are published on websites and advertisements in newspapers, with the former category more often being found to contain discriminatory requirements (**Latvia, the Netherlands**). This might be overlapping with the finding that high-skilled jobs, which are more frequently published in (national) newspapers, less often contain discriminatory requirements, but we suggest that this may also partly be due to the fact that newspapers in general will have more experience in applying the non-discrimination rules.

Directly discriminatory advertisements seem to occur less frequently than indirectly discriminatory ones. An example was provided by the **German** expert, concerning a job advertisement on behalf of a transport and logistics company seeking a managing director, which did not contain a female designation. The court explored the grammatical possibilities of gender-neutral and gender-sensitive job advertisements and emphasised that advertisements should fulfil higher requirements than are usual in everyday language or even in law texts. The female applicant was awarded damages amounting to one month’s salary.¹⁸

An example of an indirectly discriminatory advertisement was mentioned by the **Swedish** expert. The advertisement in question showed a man surrounded by objects that reflected stereotypically male interests, such as a guitar, footballs and a snowboard, accompanied by the text: ‘We are looking for people like me! And not just one, but hundreds!’ The Swedish ombudsperson considered that the advertisement gave the impression that the company was

¹⁸ Higher Regional Court of Karlsruhe, judgment of 13 September 2011, 17 U 99/10.

looking for male engineers of 25-30 years old. It did not matter that the advertisement was part of an advertising campaign in which some advertisements also addressed women, since these were published separately.

The general impression outlined by the country experts as regards case-law is rather disappointing. Often there seems to be a complete lack of recent case-law from the courts (for example **Austria, Bulgaria, Estonia, Iceland, Latvia, Liechtenstein, Luxembourg, Malta, Norway, Portugal, the Netherlands, Norway, Poland, Spain, United Kingdom**). This indicates that effective enforcement mechanisms are lacking. In some countries, there is some case-law from the equality bodies or the ombudsperson, but these judgments are in general non-binding recommendations and less authoritative than judgments of regular courts. The **Turkish** expert notes that case-law in her country has more impact on public bodies than on the private sector, and mentions that in the private sector there have been no legal procedures before the courts on the basis of gender discrimination in job advertisements, whereas she cites a few cases pertaining to the public sector. Most attention, as the **German** expert rightly points out, seems to be paid to advertisements that are discriminatory on the grounds of ethnicity or age, with discrimination on the ground of sex receiving little attention.

4. Legal issues

Discriminatory advertisements are prohibited in all states that were included in the survey. Most legal systems provide for an explicit prohibition of this form of discrimination (for example **Austria, Belgium, Bulgaria, Cyprus, Finland, Germany, Greece, Hungary, Iceland, Lithuania, Malta, the Netherlands, Norway, Romania, Spain**), sometimes to be found in labour law (**Czech Republic, Estonia, France, former Yugoslav Republic of Macedonia, Latvia, Luxembourg, Portugal, Slovenia**). In a few countries, the prohibition is implicit and should be read into more general provisions guaranteeing equal access to employment (e.g. **Italy, Liechtenstein, Poland, Sweden**) or into the criminal code provision on discrimination (**Turkey**). In the **United Kingdom**, the Equality Act 2010, by contrast with the previous legislation, does not contain an express prohibition on discriminatory advertising. The expert from the **United Kingdom** notes in this context that, instead of the current implicit prohibition, it would be preferable to have greater clarity in the form of explicit provisions concerning discrimination in advertisements.

4.1. Personal scope: who can be held liable?

The personal scope of the equal treatment legislation, i.e. who can be held liable, differs considerably between the countries involved in the survey. It is clear from the experts' reports that the employer is in the first place liable for the content of the job advertisement, but the legal situation regarding the liability of recruitment agencies and publishers varies widely from country to country. In **Bulgaria, the Czech Republic, Germany, Greece, Portugal and Slovenia**, only (potential) employers can be held accountable. In the majority of the remaining states recruitment agencies can also be held liable.

By contrast, publishers can only be held liable in a minority of the countries included in this report, such as **Cyprus, France, former Yugoslav Republic of Macedonia, Iceland, Italy, Luxembourg, Malta, the Netherlands, Norway, Romania, Spain, the United Kingdom**. Almost no examples, however, were given of media that had actually been held liable for a discriminatory advertisement, although the **Romanian** expert mentions that seven newspapers had been sanctioned for publishing discriminatory job advertisements. This virtual absence of case-law concerning the liability of publishers seems to indicate that applicants, when confronted with a choice as to who to hold liable for an advertisement, opt for the employer, probably because the employer is more easily found liable, or because the law makes it clear that the employer is liable, but is unclear about the liability of the publisher. It remains unclear, because of a lack of case-law on this matter, as to what the publisher's legal situation is in this regard (which is explicitly mentioned in the country reports of **Hungary and Liechtenstein**).

In the **Netherlands**, newspapers and other media that publish job advertisements usually include an exoneration clause that excludes any responsibility for the content of the advertisement, in order not to be exposed to any such claims. The **Italian** expert mentions that newspapers, in order to avoid being held liable for complicity with a discriminatory job advertisement, normally include a general statement that all job advertisements are open to both male and female candidates. Again, because of a lack of case-law, it is unclear whether such general statements would indeed be deemed sufficient in order for a newspaper not to be held liable in a case where it had published a discriminatory ad.

4.2. Legal standing: who can bring a claim?

In many countries, for example **Belgium and Latvia**, an individual who claims to be a victim of discrimination must, in order to have standing before the courts, demonstrate that he or she has suffered damage; or must prove that he or she is a victim who is 'affected' by the discrimination (**Czech Republic**). This requirement is highly problematic, as it is very complicated to prove damage as a result of a discriminatory advertisement. A claimant can hardly ever prove that, but for the discriminatory requirement, he or she would have got the job. In **Latvia**, the legislation even implies that the person who brings such a claim needs to have been refused a position on a ground of discrimination. Obviously, this is a very high threshold that can deter wronged individuals from bringing rightful claims.

In **Germany and Poland** (amongst others), potential applicants can bring a claim for damages and/or compensation. In these countries, other members of the discriminated group have no standing to bring a case, let alone the general public. This kind of requirements poses questions, as rightly remarked by the expert of the **United Kingdom** (where the legal situation in this regard is as yet unclear), as to the standing of an individual who is deterred from applying for a post on the basis of a discriminatory advertisement, as that individual might be held not to have been subject to any tangible form of less favourable treatment and might therefore need to prove to be an potential applicant. By contrast with the countries where such a threshold exists, in **Cyprus and Norway**, anybody (i.e. potential applicants, members of the discriminated group, the general public) who finds an advertisement in violation of the equal treatment legislation may bring a case before the court.

The expert from **Poland** provided a possible explanation for the reluctance to grant standing to persons who are not directly affected by a discriminatory advertisement. Often, it is held that the possibility of obtaining compensation by a potential employee is intended for expenses made with respect to the search for employment that were incurred in vain due to a discriminatory policy of the employer; such damages are not to be seen as a source of income for people searching for 'imprecise' job ads placed by employers. It is exactly this attitude that renders the prohibition of discriminatory advertisements practically unenforceable by individuals in many countries. The opposite position, i.e. allowing anybody to take legal action against discriminatory job ads, would enhance the situation where individual citizens could play an important role in the enforcement of equal treatment law, and would thus be preferable.

The legal situation regarding the standing of organisations, such as labour unions and NGOs, is equally divergent. Most often, trade unions and associations/foundations have standing (**Bulgaria, Cyprus, Czech Republic, Hungary, Iceland, Liechtenstein, Lithuania, Norway, Portugal**), which in some countries is subject to the requirement that they aim at the defence of gender equality/human rights protection (**Belgium, France, former Yugoslav Republic of Macedonia, Greece, Italy, Romania, Spain, the Netherlands**); in other countries, standing is subject to the consent of the person who is discriminated against, which *de facto* extends strict rules on standing of individuals to legal entities (**Malta, Poland**). Such previous approval of a victim is certainly problematic when it concerns a discriminatory advertisement, because it requires potential applicants to step forward and claim their rights, which is exactly the reason why the problem of discriminatory ads is so persistent. In some countries, e.g. **Hungary, Italy**, *ex officio* powers are granted to the equal treatment body or labour inspectorates to bring a case before the courts. In a few countries, however, associations have no standing at all (**Germany, Latvia, Slovenia**).

The conclusion is that the legal situation in many countries does not comply with the CJEU's jurisprudence in the cases of *Firma Feryn*¹⁹ and *ACCEPT*,²⁰ where the Court ruled that an actual individual who suffered a disadvantage is not necessarily required to establish discrimination. Limited standing seriously hinders the enforcement of equal treatment norms regarding access to employment, such as the prohibition of discriminatory advertisements, and is as such objectionable. This is especially so because discriminatory advertisements by their very nature do not disadvantage one particular individual, but rather cause damage to society as a whole by preventing the establishment of an inclusive job market and by signalling that discrimination goes unpunished.

4.3. Effectiveness of sanctions

Discriminatory advertisements are often punished with (administrative) fines, such as in **former Yugoslav Republic of Macedonia**, where a fine amounting to EUR 2 000 to EUR 3 000 may be imposed by the courts (similarly in **Slovenia**, with administrative fines ranging from EUR 3 000 to EUR 20 000), and in **Spain**, where the offender can be condemned to pay a fine of at least EUR 6 251. The **Romanian** expert mentions a case in which discrimination against women was found and sanctioned with a fine of EUR 465 for a job advertisement that was solely directed at men. This decision was upheld on appeal, on the ground that the employer had failed to prove the existence of a genuine occupational requirement.

In some countries, furthermore, fines may be imposed *ex officio* by labour inspectorates. In the **Czech Republic, Greece, Italy, and Poland**, for example, this is the case, but the **Greek** expert mentions that the Greek labour inspectorate prefers to deal with concrete complaints regarding a refusal to hire on the ground of sex, whereas the imposition of fines for discriminatory advertisements would be impracticable.

The **Latvian** expert remarks that in her country, individuals and NGOs usually submit a complaint to the office of the ombudsperson, which can only issue a non-binding opinion. The **Norwegian** expert mentions two cases before the ombudsperson in which discrimination was found, but no fines were imposed. In other countries too, it seems to be the case that the threshold for bringing a case before a court is very high, while equal treatment bodies may be more accessible, but do not have compulsory jurisdiction and cannot impose sanctions that meet the EU criteria as set out above in Section 2.

Generally speaking, awarding compensation in the form of damages for discriminatory advertisements encounters legal problems, because the damage suffered is very difficult to estimate. This issue, however, plays a role in many other forms of general damages, and could be addressed by using standardised compensation, for example the statutory minimum wage or a fixed fine. In **Poland**, for example, the claimant is entitled to damages equalling at least the amount of the monthly statutory minimum wage, if the employer fails to prove before the court that there was no discrimination. In **Belgium**, the equal treatment legislation provides for a fixed amount of damages of EUR 650, but the expert observes that amount seems to be too low, as it has not recently encouraged anybody to take legal action. In **Germany**, the damages may not exceed the amount of three months' salaries (see above under section 3, where a case was discussed in which damages amounting to one month's salary were awarded). The **Spanish** expert mentions a case in which a company was condemned to pay damages amounting to EUR 1 202.²¹

The main problem as regards the effectiveness of the prohibition of discrimination in job advertisements is that too few cases are brought before a court or an equality body, either because of lack of awareness or/and because standing is too limited. Nonetheless, effective sanctions are indispensable for the protection of equal treatment. If countries choose to limit

¹⁹ Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-5187.

²⁰ Case C-81/12 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, Judgment of 23 April 2013.

²¹ High Court of Justice Cantabria, Third or Social Hall, judgment of 14 November 2005, appeal no. 905/2005, <http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=1089678&links=&optimize=20051215&publicinterface=true>, accessed 7 November 2014

access to court, they should at least provide the equality body or ombudsperson with the possibility of imposing sanctions. Also, the possibility of awarding damages may incentivise potential applicants and other members of the discriminated group to bring a claim, which obviously improves the effectiveness of the system as a whole.

5. Good practices

Most country experts were unable to mention any good practices in their country. Still, the survey resulted in some interesting good practices being put forward. For example, various experts mentioned the effectiveness of media campaigns (**Cyprus, Estonia, Hungary, Italy**). A practice that might be of interest to countries with gender-specific nouns is found in **Belgium**, where the Ministry of the French-speaking community regularly updates a handbook on how to introduce feminine forms for denominating jobs and functions.

In **the Netherlands**, an independent Advertising Commission (*Reclamecodecommissie*) has been established by advertising and media companies. Anyone feeling that an advertisement is discriminatory can lodge an appeal with the Commission, resulting in a low-cost arbitration. A decision of this Commission can be appealed before a regular court, where a binding judgment can be obtained. Many discriminatory job advertisements in newspapers and journals were brought to the attention of the Commission by active individuals and NGOs, which drew a lot of attention from the media and greatly contributed to raising awareness on this topic.

In **Malta**, the National Commission for the Promotion of Equality (NCPE) introduced the practice of contacting the main local websites that advertise job vacancies and informing them about the usage of gender-inclusive language in adverts. The owners of these websites were also informed about the set of Guidelines that the NCPE had issued in order to raise awareness about the island's equality legislation concerning advertising job vacancies. In other countries, such as **France, the Netherlands and Sweden**, guidelines for the editing and drafting of job advertisements are also made available to employers and media.

A good practice that has broader implications than solely discriminatory advertising is put forward by the **German** expert: a pilot project on 'anonymised job applications' started in 2010 by the Federal Anti-Discrimination Body. Under this project, employers agreed to receive only data about the professional qualifications of an applicant before deciding about the invitation to an interview. The applications lack photographs as well as any personal data which could provide information about the sex/gender, age, family situation, ethnic origin, migrant background etc. of the potential applicant. The **German** expert mentions that the project caused a broad public debate about stereotypes and discrimination in recruitment processes. Similarly, in **Liechtenstein**, a method called 'Job-Speed-Dating' was introduced by the national labour market service institute, which enabled potential job applicants and potential employers to meet directly and personally without any prior written contact. This procedure might be advantageous from the perspective of combating gender discrimination. Still, both practices would seem to be most useful in the phase after a job advertisement has been published, because they would prevent discrimination while reading application letters and/or during the interview.

6. Conclusion

The questionnaire that was sent to all 33 country experts of the European Network of Legal Experts in the Field of Gender Equality with the purpose of assembling information on discriminatory advertisements has, as set out above, resulted in several important findings. It is interesting to note that major differences exist between the various countries. The prevalence of discrimination in job advertisements differs from country to country, with no clear regional dimension being discernible. Also, the legal situation is highly divergent, regardless of the fact that all EU Member States are bound by the Recast Directive. Despite this varied picture, five core recommendations can be made on the basis of the experts' reports as regards improving the effectiveness of the prohibition of discrimination in job

advertisements. Firstly, all countries covered in this report already prohibit discriminatory advertisements, but some only do so implicitly. Given the symbolic value of anti-discrimination legislation, we think that all countries should include an explicit prohibition on discriminatory advertising in their national anti-discrimination law, covering all grounds that fall under the national equal treatment legislation. Publishers of advertisements could also refer to this explicit provision.

A second point of interest is that, in most of the 33 countries, only the employer can be held liable (sometimes because the prohibition of discriminatory advertisements is to be found in labour law). This prohibition is not very adequate, as many employers only incidentally publish a job advertisement and lack knowledge of the exact requirements of equal treatment legislation. We therefore recommend shifting the focus to those who are professionally and/or regularly involved in publishing job advertisements: temporary agencies, recruitment agencies and the media, including internet fora where job ads are placed. Expressly extending the liability for discriminatory advertisements to these parties would be a step in the right direction, as it would increase the effectiveness of the prohibition and remove the uncertainty as regards the position of recruitment agencies and the media in this context.

Thirdly, it is clear from the complete lack of recent court case-law reported by virtually all experts that legal standing should not be limited to people who have a direct interest in bringing a case. On the contrary, as advertisements do not specifically address one individual, but are communicated to the broader public, it should be possible for anyone belonging to a group that is discriminated against, or for associations/foundations representing the interests of this group, to bring a claim before the national equality body or, preferably, before the courts. This increases the chance that the prohibition of discrimination in job advertisements is not just a dead letter, but is actually enforced.

Fourthly, effectiveness would be increased if the labour inspectorate, national equality body or ombudsperson were to take responsibility for ensuring that equal treatment law is respected everywhere, especially if civil society activism is lacking. Clear, comprehensive and accessible information should be provided on how to comply with the requirements of anti-discrimination law, as this could prevent many well-meaning employers and media from unknowingly publishing discriminatory advertisements. The public body's role would ideally also extend to actively checking and monitoring all job ads and, ultimately, bringing cases before the national equality body or court. It is clear from the country experts' contributions that, if these bodies do not take this responsibility, nobody else does, with predictable consequences.

A fifth point concerns the dissuasiveness of remedies and sanctions. Currently, the problem seems to be twofold: only very few cases are brought before a national equality body or court; and when they reach this stage and a violation of the equal treatment law is found, although we have seen that in some cases fines have been imposed and that in other cases damages were awarded, normally only a non-binding opinion is issued. More often awarding sufficient fines or damages might work as a two-edged sword, on the one hand deterring employers and other parties from publishing discriminatory ads, on the other hand incentivising wronged individuals (either potential applicants or others) to bring a claim, and thus enforcing equal treatment norms.

It is true that eradicating discrimination in job advertisements does not eradicate discrimination from society. Advertisements are the start of the recruitment process, and discrimination takes place during later phases of recruiting as well, often with severe material and general damages for individual victims. Still, one should not underestimate the important symbolic value of job advertisements. Every discriminatory job advertisement that is tolerated by the authorities sends out two signals: to the discriminator, that his or her illegal actions are permitted; and to those who are discriminated against, that their rights are not enforced and protected. Combating the phenomenon is therefore essential in ensuring equal opportunities for all who are willing to participate in the labour market.

Hence it is crucial to combat discriminatory advertisements effectively, for which – as set out above – a multi-layered approach is required. Explicit legal standards, the inclusion of recruitment agencies and traditional publishers and web fora as norm-addressees, the

expansion of standing to all individuals belonging to the group that is discriminated against and all organisations representing their interests, a stronger role for public authorities in providing guidelines for employers, checking compliance and bringing cases before an equality body or court, and dissuasive remedies and sanctions are all necessary to reach the goal of ensuring the elimination of discriminatory advertisements – and to ensure that nobody loses the opportunity to find a job due to a false start.