



EUROPEAN NETWORK OF LEGAL EXPERTS
IN THE FIELD OF GENDER EQUALITY

Gender Equality Law

in 33

European Countries



How are EU rules transposed
into national law in 2014?

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Gender Equality Law in 33 European Countries:
How are EU rules transposed into national law
in 2014?

Susanne Burri and Hanneke van Eijken

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Part I

Executive Summary

Susanne Burri*

1. Introduction

The purpose of the present publication is to provide a general overview of the transposition of EU gender equality law in the 28 Member States of the European Union, as well as in Iceland, Liechtenstein and Norway (the EEA countries to which most of the EU equality law applies) and two candidate countries: the former Yugoslav Republic of Macedonia and Turkey.¹ This summary of the report offers a comparative analysis of the transposition of EU gender equality rules into national law. This publication is complementary to the publication *EU Gender Equality Law*, which provides an overview of relevant directives and case law of the Court of Justice of the EU (CJEU) in this field and which was last updated in 2013.² These publications are aimed at a broad – and not necessarily legal – public and explain the most important issues of the EU gender equality *acquis* and its implementation.

The term ‘EU gender equality *acquis*’ refers to all the relevant Treaty and Charter provisions, legislation and the case law of the CJEU in relation to gender equality. Another frequently used term is ‘sex equality’. Both terms are used in the present publication, more or less interchangeably. However, it should be noted that while the term ‘sex’ refers primarily to the biological condition and therefore also the difference between women and men, the term ‘gender’ is broader in that it also comprises social differences between women and men, such as certain ideas about their respective roles within the family and in society.

Since the entry into force of the Lisbon Treaty on 1 December 2009, the European Community and the EU have merged into one single legal order, the European Union. However, we continue to work with two treaties, the Treaty on European Union (TEU) that lays down the basic structures and provisions, and the Treaty on the Functioning of the EU (TFEU), which is more detailed and elaborates the TEU.³ In addition, the Charter of Fundamental Rights of the EU entered into force since 2009 and has the same legal value as the two Treaties (the TEU and the TFEU).⁴ The TEU, the TFEU and the Charter all contain provisions that are relevant in the field of gender equality.

It is important to note that one of the values on which the EU is based is equality between women and men (Article 2 TEU). The promotion of equality between men and women throughout the European Union is one of the essential tasks of the EU (Article 3(3) TEU). Since the entry into force of the Lisbon Treaty, Article 8 TFEU specifies that:

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¹ A similar overview was published for the first time in November 2008 and was updated in 2009, 2010, 2011 and 2013: European Network of Legal Experts in the Field of Gender Equality, S. Prechal & S. Burri, updated by S. Burri & H. van Eijken, *Gender Equality Law in 33 Countries. Update 2013*, European Commission 2014. These publications are available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9 and EU Bookshop <https://bookshop.europa.eu/en/home/>, accessed 16 September 2014.

² European Network of Legal Experts in the Field of Gender Equality, S. Burri & S. Prechal, updated by S. Burri, *EU Gender Equality Law. Update 2013*, European Commission 2014, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9 and EU Bookshop, accessed 15 September 2014.

³ See Article 1 TEU which provides ‘(...) The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as ‘the Treaties’). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.’

⁴ See Article 6(1) TEU.

‘In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.’

And Article 10 TFEU contains a similar obligation for all the discrimination grounds mentioned in Article 19 TFEU, including sex:

‘In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’.

This obligation of gender mainstreaming means that both the EU and the Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities.⁵ Although these provisions do not create enforceable rights for individuals as such, they are important for the interpretation of EU law and they impose obligations on both the EU and the Member States.

The Charter of Fundamental Rights of the EU, *inter alia*, prohibits discrimination on any ground, including sex (Article 21);⁶ it recognises the right to gender equality in all areas, thus not only in employment, and the possibility of positive action for its promotion (Article 23). Furthermore, it also defines rights related to family protection and gender equality. The reconciliation of family/private life with work is an important aspect of the Charter; the Charter guarantees, *inter alia*, the ‘right to paid maternity leave and to parental leave’ (Article 33). Since the entry into force of the Lisbon Treaty, the Charter has become a binding catalogue of EU fundamental rights (see Article 6(1) TEU), addressed to the EU institutions, bodies, offices and agencies, and to the Member States when they are implementing Union law (Article 51(1) of the Charter).⁷

This publication gives a country-by-country overview of how each State has implemented EU gender equality law, in particular the relevant directives.⁸ The individual national reports present the implementation of central concepts in national law; equal pay, equal treatment in relation to access to work, working conditions (including dismissal) and occupational social security schemes (matters covered by Article 157 TFEU⁹ and the so-called Recast Directive 2006/54/EC¹⁰), pregnancy and maternity protection and parental leave and adoption leave (matters covered by Directives 92/85/EEC, 2006/54/EC and 2010/18/EU¹¹), statutory schemes of social security (Directive 79/7/EEC), and self-employed persons (Directive 2010/41/EU¹²). The issue of equal treatment of men and women in the access to and supply of goods and services (Directive 2004/113/EC) is covered as well. The country reports also pay attention to enforcement and compliance aspects. A brief assessment of national gender equality law in the light of EU requirements is provided by each of the 33 experts participating in the

⁵ See also Article 29 of the Recast Directive (2006/54/EC).

⁶ The scope of the prohibition of sex discrimination is limited however by the explanations for the Charter, see 2007/C 303/02.

⁷ See S. Koukoulis-Spiliotopoulos ‘The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality’, *European Gender Equality Law Review* No. 1/2008, pp. 15-24 and E. Ellis, ‘The Impact of the Lisbon Treaty on Gender Equality’, *European Gender Equality Law Review* No. 1/2010, pp. 7-13; available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 16 September 2014.

⁸ The full – official – name of the respective directives and their publication are included in Annex II. Annex IV contains a selected bibliography of EU gender equality law (in English or French).

⁹ Ex Article 119 EEC Treaty, Article 141 EC.

¹⁰ This Directive repealed Directives 75/117/EEC, 76/207/EEC (amended by Directive 2002/73/EC), 1986/378/EEC (amended by Directive 96/97/EC) and 1997/80/EEC with effect from 15 August 2009.

¹¹ Which repealed Directive 96/34/EC with effect from 8 March 2012.

¹² Which repealed Directive 86/613/EEC with effect from 5 August 2012.

European Commission's European Network of Legal Experts in the Field of Gender Equality.¹³

2. Transposition of EU gender equality law into national law

The development of EU gender equality law and its transposition into national law has been a step-by-step process, starting, at least for the 'oldest' EU Member States, in the early sixties. In 1957, the Treaty establishing the European Economic Community (EEC), which is the origin of the current EU, contained only one single provision (Article 119 EEC Treaty, ex Article 141 EC Treaty, now Article 157 TFEU) on gender discrimination, namely the principle of equal pay between men and women for equal work. Since then, however, many directives have been adopted which prohibit discrimination on the grounds of sex: the Directive on equal pay for men and women (75/117/EEC), the Directive on equal treatment of men and women in employment (76/207/EEC, amended by Directive 2002/73/EC and now repealed by the Recast Directive 2006/54/EC), the Directive on equal treatment of men and women in statutory schemes of social security (79/7/EEC), the Directive on equal treatment of men and women in occupational social security schemes (86/378/EEC, amended by Directive 96/97/EC and now repealed by the Recast Directive 2006/54/EC), the Directive on equal treatment of men and women engaged in an activity, including agriculture, in a self-employed capacity (86/613/EEC, repealed by Directive 2010/41/EU), the Pregnant Workers' Directive (92/85/EEC), the Parental Leave Directive (96/34/EEC, repealed by Directive 2010/18/EU), the Directive on equal treatment of men and women in the access to and the supply of goods and services (2004/113/EC) and, finally, the already mentioned so-called Recast Directive (2006/54/EC). Recasting existing directives on equal pay (including occupational social security schemes), equal treatment at work and the burden of proof, was aimed at clarification and bringing together in a single text the main provisions of the directives subject to this recasting process.¹⁴ Some case law of the CJEU was also partly incorporated.¹⁵ This Court has played a very important role in the field of equal treatment between men and women, by ensuring that individuals can effectively invoke and enforce their right to gender equality. Similarly, it has delivered important judgments interpreting EU equality legislation and relevant Treaty provisions.

At the national level, the Treaty provisions and the directives must be implemented. This means that in so far that national law does not yet fully comply with the EU provisions, a transposition of the legal provisions into national law is necessary. This was partly done by amending relevant national legislation, such as Labour Codes, legislation relating to employment and social security legislation, and/or the adoption of specific Acts on gender equality and/or non-discrimination. In more recent years, legislation on equal treatment of women and men has been incorporated in some countries into general anti-discrimination laws which also relate to other grounds, such as race, disability or sexual orientation (e.g. **Bulgaria, Czech Republic, Hungary, Ireland, Poland, Romania, Slovakia, Slovenia, Sweden and the United Kingdom**). Some countries now both have an Anti-Discrimination Act and a Gender Equality Act (e.g. **Belgium, Croatia, Denmark, Lithuania, Romania and the Netherlands**), or specific Acts for each gender equality and non-discrimination directive (**Greece**). In **Romania**, the anti-discrimination legislation and the specific law dealing with gender equality have evolved separately, having been amended several times in the past ten years. This has resulted in overlap of the various provisions and in differences in legal protection. However, in case of conflicting provisions, the *lex specialis* (the Gender Equality

¹³ In Annex III the reader can find an overview, per country, of the most important legislation enacted in order to implement the directives or Treaty provisions respectively.

¹⁴ The following directives were subject to this recasting exercise: 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EEC: see Article 34 of Recast Directive 2006/54/EC.

¹⁵ Until the entry into force of the Lisbon Treaty: the European Court of Justice (ECJ). In this report, reference is made to the Court of Justice of the EU (CJEU or Court), also in cases pre-dating the Lisbon Treaty.

Law) prevails. In **Lithuania** the double coverage of gender discrimination in two separate Acts may result in misunderstandings in the application of the law, as both acts regulate the contextually same issue in slightly different ways and to different extents.

In some countries, provisions in their Constitution might play an important role in guaranteeing equality between women and men (e.g. **Belgium, Cyprus, Greece, Germany, Iceland, Latvia, Portugal** and **Spain**). **Turkey** has no specific anti-discrimination law to supplement its constitutional provisions.

3. Central concepts of EU gender discrimination law

The central concepts of EU gender equality law are laid down in most gender equality directives¹⁶ and are often the subject of further interpretation by the CJEU. The following five concepts are briefly discussed:

- *Direct discrimination* occurs ‘(...) where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.’ As a rule, direct discrimination is prohibited, unless a specific written exception applies, such as that the sex of the person concerned is a determining factor for the job, for example a male character in a film has to be a man.
- *Indirect discrimination* occurs ‘(...) where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.’ Indirect discrimination is very much concerned with the effects of a certain treatment and takes into account everyday social realities. For instance, less favourable treatment of part-time workers will often amount to indirect discrimination against women as long as women are mainly employed on part-time terms. Unlike in the case of direct discrimination, the possibilities for justification are much broader.¹⁷
- The concept of *positive action* is defined in EU law as follows: ‘With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or prevent or compensate for disadvantages in professional careers.’ Like indirect discrimination, positive action also takes into account everyday social realities but it goes much further, in the sense that it may require further steps to be taken in order to realise true, genuine equality in social conditions. The provisions permitted as positive action measures aim at eliminating or counteracting the detrimental effects on women in employment or in seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women. Similarly, they should help to fight stereotypes. As an example of positive action the following can be mentioned: the preferential treatment of female employees in the allocation of nursery places when the number of places, due to financial constraints, is rather limited or – even more far-reaching and controversial – female quotas in recruitment and promotion.¹⁸

¹⁶ The definitions given here are from Recast Directive 2006/54.

¹⁷ See the report produced by the European Network of Legal Experts in the Field of Gender Equality, C. McCrudden & S. Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, European Commission 2009, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 1st 6 September 2014.

¹⁸ See the reports produced by the European Network of Legal Experts in the Field of Gender Equality, S. Fredman, *Making Equality Effective: The role of proactive measures*, European Commission 2009 and G. Selanec & L. Senden, *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards*, European Commission 2011, available at: http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf and at EU Bookshop; and L. Senden & M. Visser, ‘Balancing a Tightrope: The EU Directive on Improving the Gender

- *Instruction to discriminate* on grounds of a person's sex is in EU law equated with discrimination. Thus, where an agency is requested by an employer to supply workers of one sex only, both the employer and the agency would be liable and would have to justify such sex discrimination.
- Both *harassment on grounds of a person's sex* and *sexual harassment* are equated with sex discrimination and are explicitly prohibited. They cannot be justified. *Harassment* occurs '(...) where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.'
Sexual harassment occurs '(...) where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.' Both concepts include the violation of a person's dignity and the creation of an intimidating, hostile, degrading, humiliating or offensive environment. The main difference is that in case of harassment on grounds of a person's sex, the person is ill-treated because he or she is a man or a woman. In the case of sexual harassment it rather involves a person being subject to unwelcome sexual advances or, for instance, that the behaviour of the perpetrator aims at obtaining sexual favours. In concrete situations the distinction between the two may be very unclear indeed.¹⁹

How are these central concepts reflected in the national law of the EU Member States, the EEA countries and the candidate countries? Overall, national law has faithfully and often even literally transposed these concepts into national legislation. In **Turkey**, labour and criminal laws referred to the concepts of direct discrimination, indirect discrimination and sexual harassment, with the exception of moral harassment. However, these concepts were not defined in legislation or in case law until a new law was enacted in February 2014.²⁰ The Law amending the Law on the Disabled defines direct and indirect discrimination with regard to the disabled in line with the EU definitions. In the **Czech Republic**, concepts of discrimination are only defined in the Anti-Discrimination Act, and not for example in the Labour Code or the Employment Act, which also contain anti-discrimination provisions. In **Hungary**, the definition of direct discrimination offers less protection because it allows the possibility of exemption due to the enforcement of another person's fundamental right, if it is suitable for the designated purpose and proportional, or otherwise has a reasonable and objective explanation directly related to the relationship.²¹

In some countries, national legislation is stricter than EU requirements or provides more protection than required by EU law. **Estonia**, for example, has a broader definition of direct sex discrimination. In addition to less favourable treatment in connection with pregnancy and childbirth, it also relates to less favourable treatment in connection with parenting and the performance of family obligations.²² The **Irish** Employment Equality Acts state that 'discrimination shall be taken to occur where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds which exists, existed but no longer exists, may exist in the future or is imputed to the person concerned'.²³ The law of **the United Kingdom** covers not only discrimination against women and men but also explicitly prohibits discrimination against a person who is 'proposing to

Balance among Non-Executive Directors of Boards of Listed Companies', *European Gender Equality Law Review* 1/2013, pp. 17-33, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, both accessed 16 September 2014.

¹⁹ See the report of the European Network of Legal Experts in the Field of Gender Equality, A. Numhauser-Henning & S. Laulom, *Harassment related to Sex and Sexual Harassment Law in 33 European Countries. Discrimination versus Dignity*, European Commission, 2011, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9 and EU Bookshop [/](#), accessed 16 September 2014.

²⁰ Law no. 6518, Official Gazette 19 February 2014, no. 28918.

²¹ Article 7(2) of the Equality Act.

²² Article 3(3) Gender Equality Act.

²³ Section 6 of the Employment Equality Act 1998 (as amended).

undergo, is undergoing or [who] has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex'.²⁴ In addition, the UK Equality Act 2010 contains a provision prohibiting 'dual discrimination' (Section 14), defined as direct discrimination on two combined protected grounds. However, this provision does not apply to indirect discrimination, or to discrimination on a combination of more than two grounds, and there are no current plans to implement Section 14.

In the following sub-sections some striking features, differences and problems related to the application of the concepts of direct and indirect discrimination, positive action, harassment and sexual harassment are highlighted.

3.1. The problem of comparisons

It is for instance noteworthy that for example in **the United Kingdom** much emphasis is put on the *comparison*, i.e. a person who is treated less favourably should be compared to another person who is in a comparable situation. The comparator may be real or hypothetical. In some other countries discrimination, or at least a serious presumption of discrimination, is sometimes more readily accepted. It suffices to establish that a person has been put at a disadvantage for reasons of being female or male, without engaging extensively in comparisons of the situations. The **French** *Cour de Cassation* for example acknowledges that the existence of discrimination does not necessarily imply a comparison with other workers.²⁵ However, in equal pay cases for instance, comparisons of the work performed are often necessary.

It is generally accepted that a comparison is not required in the case of pregnancy. This is also the view of the CJEU. The Court held that the refusal to appoint a woman because she was pregnant amounts to direct sex discrimination, which is prohibited.²⁶

3.2. Prohibition of discrimination

In relation to the *prohibition of discrimination*, in some countries specific problems arise because words other than discrimination are used. In **the Netherlands**, discrimination was defined in more neutral terms, namely 'distinction'. Such a term may suggest that each and every differentiation between categories of people amounts to discrimination. The use 'distinction', for that reason, is almost always immediately accompanied with the adjective 'unjustified'. The European Commission criticised the use of the term 'distinction' and the fact that the definitions of direct and indirect discrimination are not similar to the definitions in the directives. As part of the general integration of Dutch equal treatment acts, a proposal is pending to change the definition, using the term discrimination instead of distinction. In two other countries, **Latvia** and **Norway**, discrimination is also defined in terms of differential treatment. Some **Latvian** case law reflects a problematic use of this approach, when for example equal treatment of persons in different situations is not considered to be discriminatory. **Germany** has opted to use the term *Benachteiligung* (putting at a disadvantage) instead of discrimination, as 'discrimination' was considered to have a strong 'disapproving' impact. This terminology is not meant to weaken the protection as compared to EU directives. In **Belgium** a somewhat complex situation exists as to the terms used. There is settled case law that considers any form of discrimination potentially justifiable, whether direct or indirect. Since the first situation – direct discrimination – can in principle not be justified under EU law, unless one of the exceptions applies, a somewhat problematic differentiation has been created between making a 'distinction' on the one hand, and discrimination on the other. Discrimination covers a distinction which cannot be justified and

²⁴ Section 7 of the Equality Act. According to EU law, discrimination in relation to gender reassignment amounts to sex discrimination: see Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143 (*P/S*) and Preamble 3 of Recast Directive 2006/54/EC.

²⁵ Soc. 10 November 2009, No. 07-42849 and Soc. 29 June 2011, No. 10-14067.

²⁶ 8 November 1990, Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-03941 (*Dekker*).

it applies in areas covered by EU law. In other areas, however, even the making of a direct distinction can be justified. For ordinary citizens, this indeed renders the application of gender equality law rather complex. Even courts might not understand such subtleties and the protection provided by EU law is thus weakened.

3.3. Indirect discrimination

The concept of *indirect discrimination* has also posed or still poses problems. In **Hungary**, the concept of indirect discrimination is narrower than the EU definition by stipulating a ‘considerably larger disadvantage’ compared to a ‘particular disadvantage’ as mentioned in Article 2(1)(b) of the Recast Directive. There were no proper definitions of direct and indirect discrimination in **French** law until May 2008, when a new Act was adopted. In **Slovakia**, potential indirect discrimination was not prohibited until 1 April 2013, since then the definition of indirect discrimination is in line with EU law. The **Croatian** Gender Equality Act does not explicitly allow a comparison with hypothetical situations, as required by EU law, while the Anti-Discrimination Act does. Although there is no case law that addresses this issue, the national expert considers it highly unlikely that the courts would adhere to the strict grammatical interpretation of the provision from the GEA.

There are also bright spots, however. In **Poland**, the amended Labour Code drastically improved the definition of indirect discrimination. It now includes a reference to both existing and hypothetical situations. It also mentions not only particularly disadvantageous situations, but also unfavourable disproportions. Finally, it also makes reference to ‘legitimate aim’ and, as regards the means to achieve this aim, to the principle of proportionality. All these elements were lacking before the amendment. Interestingly, in **Finland** the alleged victim of indirect discrimination has to prove that the effect of certain treatment amounts to a less favourable position, which is easier to prove than a particular disadvantage. In **Italy**, neutral criteria which result in disproportionate impact are only legitimate if they are essential requirements for the job.

In **Greece**, to the knowledge of the national expert the notions of indirect discrimination and instruction to discriminate have not yet been applied in case law.²⁷ In addition, in **Bulgaria** for example, case law up to now mainly addresses direct discrimination. In many countries, there is only scarce case law on indirect sex discrimination and when at stake, courts face difficulties when applying this concept (e.g. **Germany**). Recently, the French *Cour de Cassation* applied this concept in two cases.²⁸ The **Spanish** Constitutional Court considered disadvantages faced by part-time workers in relation to pensions a form of indirect sex discrimination.²⁹

3.4. Positive action

The concept of *positive action*, although often a controversial issue, has been transposed in most of the countries. As a rule, it may apply in the various areas covered by EU law, such as employment, occupational pension schemes and access to and the provision of goods and services. The most important area for positive action has, up until now, been access to employment and working conditions. In **Bulgaria**, positive action measures may also be taken in education and training to ensure a fair participation of men and women, thus beyond employment and sometimes including quotas in education. Positive action measures are also explicitly allowed in education for example in **Finland** and **Sweden**. In the **United Kingdom**, the Equality Act 2010 widened the possibilities for positive action, both in and outside the context of recruitment and promotion.

²⁷ Please see the references to CS cases numbers 1247/2008; 2367/2010; 2369/2010; and 18/2014 in the Greek contribution to this report, at p 127.

²⁸ Soc. 6 June 2012, No. 10-21489 and Soc. 3 July 2012, No. 10-23013.

²⁹ Judgment of the Constitutional Court 61/2013 of 14 March 2013. See Case C-385/11 *Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)* [2012], n.y.p. (*Elbal Moreno*)

In many countries, positive action measures are not very widespread and are hardly seen as a priority by the legislature, social partners, or individual employers. Whenever positive action measures exist, they appear to be more frequent in the public sector. Where no obligations are laid down, the public sector is at least encouraged to take positive action measures. In the private sector such measures are, on the whole, voluntary. Only in a few countries obligations exist for the private sector, for instance in the form of equality plans (e.g. **Finland** and **Sweden**). In any case, targets and quotas for the promotion or recruitment of women in employment are rare. Measures tending to facilitate vocational training for women are more widespread. In some countries measures aimed at reconciliation between work and family life are sometimes framed as positive action measures, for instance in **Iceland, Norway** and **Italy**.³⁰ Recently, some countries have adopted legislation aimed at a more balanced gender representation in company boards (e.g. **Finland, France, Germany, Iceland, Italy, the Netherlands** and **Norway**).³¹ In **Bulgaria**, however, the possibility to apply quotas for a balanced gender representation in managing and advisory bodies was abolished in 2006. The issue of positive action in (access to) employment will be addressed briefly in Section 6.3, but it is now appropriate to make some general observations.

The provisions on positive action can be laid down in a country's Constitution, and this has been done, for instance, in **Greece, Portugal** and **Spain**. It would appear that only in **Greece** and **Portugal** are positive action measures explicitly qualified by the Constitution not as derogation from the principle of equal treatment, but rather as a means by which to achieve equality. In **Greece**, Article 1164(2) of the Constitution requires that the legislature and other state authorities take the positive action measures that are necessary and pertinent for promoting gender equality in all areas.³²

In other countries the provisions are of a legislative nature. They are often contained in legislation aiming at equality of opportunity between men and women or in more general anti-discrimination legislation (e.g. **Austria, Denmark, Finland, Germany, Norway, Slovakia, Slovenia, Spain** and **Sweden**). In **Latvian** law, there are no provisions on positive action, except one provision concerning judges.

In principle, positive action provisions are, as in EU law, permissive in nature, i.e. it is allowed on certain conditions, but it is not laid down as an obligation. For example in **Croatia**, 'specific measures' can be taken to promote equal participation of men and women in legislative, executive and judicial bodies, including public services, when one gender is 'substantially underrepresented'. In decision-making bodies in political and public life, less than 40 % amounts to substantial underrepresentation.

However, in some countries specific forms of positive action are framed as an obligation, often applicable in the public sector and/or to company boards. For instance, in the public sector in **Austria**, the preferential treatment of a female candidate who is equally as qualified as a male candidate is obligatory. In **Finland**, different positive action measures have been developed. A minimum of 40 % of men and women is required in all publicly-nominated administrative bodies. Authorities and educational institutions must create administrative and operational practices that advance equality in decision-making. Gender balance is required for the boards of directors in companies with a majority public ownership. Employers of at least 30 people must prepare an annual equality plan, with an assessment of the equality situation at the workplace and a plan on how equality is to be achieved. Similar obligations apply to educational institutions. However, sanctions are lacking. In **France**, a Law introducing a

³⁰ Similarly, see Case C-476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891 (*Lommers*).

³¹ A proposal for a directive on Gender balance among non-executive directors of companies listed on stock exchanges is pending: COM 2012(614).

³² CS 2832-2833/2003, 192/2004.

quota in company boards was adopted in 2011.³³ The Law intends to improve the representation of women in company boards. Firms which have more than 500 employees and revenues over EUR 50 million will have to ensure that each sex has at least 20 % of boardroom seats (with no distinction between executives and non-executives) within 3 years, and 40 % by 2017. In **Germany** public institutions are under an obligation to adopt equality plans to increase women's representation. In **Iceland** the law also imposes obligations concerning a balanced participation of women and men among others in government and municipal committees, councils and boards of certain companies, where representation must not be lower than 40 %. In **Italy** positive actions are promoted and supported by special funding both in the private and the public sector. In the Civil Service, positive action plans have to be drawn up every three years regarding jobs and levels where women are underrepresented. In 2011 a quota system was introduced for the appointment of managing directors and auditors of listed companies and state subsidiary companies. According to this quota system, each sex must represent a proportion of at least one third. This rule is enforced for three periods of tenure of directors and auditors, and punitive sanctions may eventually result in the dissolution of the company board. In addition to the quota system, new regulations were adopted that aim to facilitate a more balanced representation of men and women in company boards, in politics, and in public administration. In **Luxembourg**, employers can receive financial support when employing people of the underrepresented sex (i.e. less than 40 % of the total workforce of this occupation at national level). Since 2011, **Dutch** public and private limited companies with more than 250 employees have an obligation to strive for 30 % of women on their board of executive directors and on their advisory board, although there are no sanctions when the target is not met. Similar measures apply in **Portugal**. **Norway** has legislation requiring a minimum representation of 40 % of each gender in company boards. A proposal for a directive aimed at improving the gender balance in company boards is pending.³⁴

3.5. Instruction to discriminate

In most countries, the prohibition concerning the instruction to discriminate is similarly formulated as in EU law and not further defined (see above). Some countries have adopted a legal definition. In **Bulgaria**, it means direct and intentional encouragement, giving an instruction, exerting pressure or persuading someone to engage in discrimination where the instigator is capable of influencing the person instigated. In **Croatia**, there was confusion whether intent is required or not, a requirement which is not mentioned in Article 2(2)(b) of the Recast Directive. The instruction to discriminate in **German** law is also understood to constitute discrimination, and is not limited to instruction to discriminate against an employee. In **Greece**, the Act transposing Directive 2004/113 uses the wider term 'encouragement' and the Act transposing Directive 2010/41 uses both terms. Therefore, both Acts exceed the directives. The **Dutch** equality body has suggested that the instruction to discriminate (in Dutch law, to make a 'distinction', see Section 3.2.) should include a prohibition of passive tolerance of an existing situation or act.³⁵ However, no case law on the matter has yet clarified this issue. In **Slovakia**, two definitions in the Anti-Discrimination Act clarify the prohibition: in the instruction to discriminate and in the incitement to discriminate. Incitement to discriminate is persuading, affirming or inciting a person to discriminate against a third person and the prohibition applies to all types of relations in areas where discrimination is prohibited. The prohibition is also defined in the **Swedish** Discrimination

³³ *Loi no. 2011-103 du 27 janvier 2011, JO no. 23 du 28 janvier 2011, relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle.*

³⁴ COM (2012) 614. See for more information: http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/boardroom_factsheet_en.pdf, accessed 16 September 2014.

³⁵ ETC Advice 2001-03, p. 6 and 2001-04, p. 4.

Act and in the **United Kingdom** Equality Act. There seems to be no national case law (yet) on this prohibition of discrimination.³⁶

3.6. Harassment

In some countries, the prohibitions of harassment and sexual harassment apply to a broader area than employment (e.g. **Bulgaria** and **Finland**). In most countries, the prohibition of harassment and sexual harassment is framed similarly to EU law. However, in some countries, legislation goes a step further. In **Iceland**, harassment is defined as: ‘Any type of unfair and/or insulting behaviour which is connected with the gender of the person affected by it, is unwelcome and impairs the self-respect of the person affected by it, and which is continued in spite of a clear indication that it is unwelcome. This harassment may be physical, verbal or symbolic. A single instance may be considered as gender-based harassment if it is serious’. The Icelandic definition of sexual harassment is similar to the one of harassment. In **Ireland**, legislation clarifies that the unwanted conduct (a constituent element in the definition of harassment) may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material and that an employee must not be victimised for rejecting such harassment. Some countries adopted (slightly) different definitions. In **the United Kingdom**, the definition of harassment and sexual harassment in the Equality Act 2010 covers unwanted conduct whose purpose or effect is to violate a person’s dignity *or* (rather than *and*) to create an intimidating, hostile, degrading, humiliating or offensive environment for her (Section 26). The definition of harassment is therefore wider than that required by EU law. Where the effect, rather than the purpose, of treatment is relied upon to establish harassment, Section 26(4) of the Act imposes a soft objective test. This is because Section 26(4) provides that the perception of the complainant, the other circumstances of the case, and whether it is reasonable to regard conduct as having a particular effect may be taken into account in determining whether the conduct had the effect of violating dignity or creating an intimidating (etc.) environment.

Some countries adopted slightly different definitions than EU law. In **the Netherlands**, the word ‘unwanted’ is lacking in the definition of sexual harassment in order to place a less heavy burden of proof on the victim to show that the sexual harassment was (subjectively) unwanted. In the view of the Dutch Government, sexual harassment is, objectively speaking, always an offence. In **Slovakia**, the definition of sexual harassment does not explicitly refer to ‘unwanted conduct’.

The transposition of the prohibition of *harassment or sexual harassment* into national legislation has been and in some countries still is problematic. In **France**, a new definition of sexual harassment was adopted after a judgment of the French Constitutional Court, which considered the previous definition unconstitutional due to a lack of clarity.³⁷ The definition is now very similar to the European one and the sanctions have been strengthened.³⁸ The new law defines harassment as imposing on someone, in a repeated manner, words or actions that have a sexual connotation and either affect the person’s dignity because of their degrading or humiliating nature or put him or her in an intimidating, hostile or offensive situation. One single act can also give rise to prosecution where someone is using any kind of serious pressure, with the real or visible goal of obtaining an act of a sexual nature.³⁹ In 2008, **Polish** amendments to the Labour Code significantly improved the definitions of harassment and sexual harassment. They now reflect a clear distinction between sexual harassment and harassment based on sex. The definitions now refer to the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. The relevant provision now also explicitly reflects the idea that discrimination includes less favourable treatment based on a

³⁶ See also I. Asscher-Vonk, ‘Instruction to discriminate’ *European Gender Equality Law Review* No. 1/2012, pp. 4-12, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 4 October 2013.

³⁷ CC 4 May 2012, QPC, No. 2012-240.

³⁸ Law 2012-954 of 6 August 2012.

³⁹ Article L.1153-1 of the French Labour Code and Article 222-33 of the French Criminal Code.

person's rejection of or submission to harassment or sexual harassment. In **Romania**, the New Criminal Code entered into force on 1 February 2014, which sanctions acts of repeatedly demanding sexual favours in a labour or similar relationship, if the victim was intimidated or placed in a humiliating situation.⁴⁰ While expanding the personal scope of the criminal offence of sexual harassment to labour relations between colleagues, irrespective of hierarchical relations, this new definition no longer applies outside the framework of labour relations (for example sexual harassment carried out by a teacher or a doctor against a student or a patient).

In **Lithuania**, sexual harassment is defined as unwanted insulting, verbal, non-verbal, or physical conduct of a sexual nature. The requirement that the conduct must be 'insulting' for it to constitute sexual harassment is not included in the EU definition, which rather stipulates the criterion of an 'offensive' environment. In **Hungary**, sexual harassment is not mentioned in the Equality Act as such, there is only a reference to harassment of a sexual or other nature in the definition of harassment. The prohibition of sexual harassment must therefore be further developed in case law. In **Turkey**, no difference is made between harassment and sexual harassment and no legal definition of sexual harassment exists. In **Belgium**, an employee has to rely on legislation on health and safety at work and cannot invoke the Gender Act in case of presumed (sexual) harassment at work.

4. Equal pay

4.1. Equal pay

As was already observed above, the principle of equal pay for men and women for equal work or work of equal value, today contained in Article 157 TFEU, has been entrenched ever since the 1957 Treaty. In order to facilitate the implementation of the principle, Directive 75/117/EEC was adopted in 1975 and has since been repealed by Recast Directive 2006/54/EC. Indeed both direct and indirect discrimination in pay are prohibited and the CJEU has answered many pre-judicial questions of national courts on this issue.

The introduction of legal principles alone does not eradicate unequal pay between men and women. Unfortunately, still today, the difference between the remuneration of male and female employees remains one of the great concerns in the area of gender equality: women in the EU earn on average 16.4 %⁴¹ less than men, and progress has been slow in closing the gender pay gap.⁴² The differences can be partly explained by other factors, such as traditions in the career choices of men and women; the fact that men, more often than women, are given overtime duties, with corresponding higher rates of pay; the gender imbalance in the sharing of family responsibilities; glass ceilings; part-time work, which is often highly feminised; job segregation etc. However, another part of the discrepancies cannot be explained except by the fact that there is pay discrimination. The principle of equal pay aims to eradicate this pay discrimination.⁴³

One of the important issues in the area of equal pay is the very broad interpretation of the notion of 'pay' by the CJEU. Pay includes not only basic pay, but also, for example, overtime supplements, special bonuses paid by the employer, travel allowances, compensation for attending training courses and training facilities, termination payments in case of dismissal and occupational pensions. In particular, the extension of Article 157 TFEU to occupational pensions has been very important (cf. Section 5).

⁴⁰ New Criminal Code, Article 223.

⁴¹ Eurostat 2012.

⁴² See for information on the gender pay gap for example the website of DG Justice at: http://ec.europa.eu/justice/gender-equality/gender-pay-gap/index_en.htm, accessed 16 September 2014.

⁴³ On legal aspects of the gender pay gap see: European Network of Legal Experts in the Field of Gender Equality, P. Foubert, S. Burri & A. Numhauser-Henning, *The Gender Pay Gap from a Legal Perspective* (including 33 country reports) European Commission, 2010, available at: : http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9 and EU Bookshop <https://bookshop.europa.eu/en/home/>, accessed 16 September 2014.

Another important feature that should be highlighted is that the Recast Directive requires that the Member States ensure that provisions in collective agreements, wage scales, wage agreements and individual employment contracts which are contrary to the principle of equal pay shall be or may be declared null and void or may be amended (Article 23). Moreover, it provides that where job classification schemes are used in order to determine pay, these must be based on the same criteria for both men and women and should be drawn up to exclude discrimination on the grounds of sex (Article 4).

The principle of equal pay under EU law is, in general, reflected in the legislation of the Member States and the EEA countries. This is often the case at both Constitutional and legislative level, either as a part of general labour law or as provided for in specific anti-discrimination legislation. Both direct and indirect discrimination are explicitly covered and the requirement of 'equal pay for similar work or work of equal value' is also often covered. However in **Latvia**, judges and prosecutors cannot rely on gender equality provisions of the Labour Law, and the laws regulating the service of judges and prosecutors do not contain anti-discrimination provisions. These groups can rely on EU norms if they are applicable, and they can also rely on, for example, the non-discrimination provisions of the Latvian Constitution.

4.2. What is 'pay' and what is 'equal value'?

Like at the EU level, in most countries *pay* is interpreted very broadly, not only covering salaries as such, but also including various fringe benefits. In other words, pay may include remuneration proper, in cash or in kind, but also various bonuses, tips, accommodation, marriage gratuities, redundancy and sickness payments, as well as overtime payments and other fringe benefits. An exception is **Portugal** where the national concept of remuneration seems to be narrower than that under EU law.

In **Belgium**, the 2007 Act does not mention work of the same value. In **Germany**, the General Act on Equal Treatment contains a general prohibition of discrimination, but no entitlement to equal pay or concepts of pay and work of equal value are defined in statutory legislation. Specific mechanisms to tackle the gender pay gap are lacking in this country, where the gap amounts to 23 %.⁴⁴ Collective agreements are still a major cause of this considerable gap. No criteria are provided in **Greece** either and the traditional, non-transparent job classification schemes are still widely applied with a considerable risk of indirect sex discrimination.

Some countries, e.g. **the Czech Republic, Hungary and Slovakia**, have laid down some parameters for establishing the *equal value* of the work performed. For instance, the following criteria should be taken into account: the complexity of the work, the responsibility required, the strenuousness of the work, including both physical and psychological strain, the working conditions under which the job is performed, efficiency, experience, the required skills and qualifications, comparable work results etc. By contrast, some other countries do not have such comparable provisions in their legislation (e.g. **Latvia, Malta and Slovenia**).

4.3. Role for collective agreements and for employers

An important instrument for the realisation of the equal pay principle is the review of pay scales and *job evaluation schemes*. However, such schemes have not been scrutinised in depth in all countries concerned. Further, while in many instances direct discrimination has been significantly reduced. It is far from certain whether the job evaluation and classification schemes applied are really sex-neutral, since indirect discriminatory features are less easy to

⁴⁴ According to the German Office for Statistics (*Statistisches Bundesamt*): [https://www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/VerdiensteArbeitskosten/Verdi enstunterschiede/Tabellen/GenderPayGap_EU.html](https://www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/VerdiensteArbeitskosten/VerdiensteVerdi enstunterschiede/Tabellen/GenderPayGap_EU.html), accessed 30 January 2015. See also: Statistisches Bundesamt, *Nachhaltige Entwicklung in Deutschland. Indikatorenbericht 2012*, and https://www.destatis.de/DE/Publikationen/Thematisch/UmweltoekonomischeGesamtrechnungen/Umweltindik atoren/IndikatorenPDF_0230001.pdf?_blob=publicationFile. At pp. 58-59, accessed 8 January 2015.

detect and deal with. Moreover, there is the particular problem that work which is mainly performed by women is still in many cases intrinsically considered to be of lower value.⁴⁵

Such problems exist, for instance, in **Norway**, where there is a highly segregated employment market. The pay differences there are often justified by ‘market value’ arguments and ‘historical differences’. Other justifications for pay differences that are often put forward in many countries and which are also generally accepted are differences in education, the scarcity of labour, seniority, the quality of the work, and efficiency. Indeed, they are part and parcel of the criteria used for the establishment of ‘equal value’. However, it is important to scrutinise such criteria for their potentially indirectly discriminatory effects. In **Poland**, many private enterprises have no job classification schemes. However, since 2011 legislation is applicable to the public sector, which regulates job evaluations and defines the procedures to be followed.

In order to assist the review of pay scales and job evaluation schemes, often new and more objective criteria are needed. In some Member States there are rules, guidelines or other tools which provide criteria for a neutral assessment of the value of the work. In **Belgium**, the joint sector committees must revise their job classification schemes to ensure that they are gender neutral. More efficient and gender-neutral job evaluations may also be developed by the companies themselves, if their works councils so decide. In some countries, investigations into the (indirectly) discriminatory nature of job evaluation schemes can also be performed by equality bodies or labour inspectorates. In **the Netherlands**, the Equality Body is active in developing methods for assessment of equal pay practices. In **Slovenia**, companies with more than 10 employees must adopt an internal document on job classification.

In most Member States, *collective agreements* are an important instrument for achieving equal pay. As a rule they contain provisions on pay as such (they may even contain pay scales) and they often combine this with the issue of equal pay for men and women. Alternatively, pay equality is considered to be included in the more general provisions on gender equality in the collective agreement in question. The problem that may arise, however, is that pay systems consist of several different parts of remuneration. Often, collective agreements lay down the minimum or a basic salary only. The remainder of the pay component is negotiated on an individual basis or is a matter which is left to an assessment by the employer, an assessment which may be rather discretionary. In particular in this respect there is little transparency and in the majority of the countries concerned individual income is considered to be confidential. This makes it difficult to detect whether discrimination occurs. In order to ensure transparency and effective review, CJEU case law requires that the application of the principle of equal pay must be ensured in respect of each element of remuneration and not only on the basis of a comprehensive assessment of the consideration paid to workers.⁴⁶

Since collective agreements are so important, in some countries explicit obligations are imposed on the social partners, with the minimum requirement that collective agreements must include provisions on equal pay. However, the obligations may also go further than this. In **France**, for instance, legislation states that compulsory bargaining, which must take place in enterprises every year on the subject of remuneration, must also include a chapter dealing with equality. As part of this obligation, the social partners must establish an instrument on how to measure equality in pay and then report on the progress on a yearly basis. The law specifies that remuneration includes wages, but also other advantages, in cash or in kind. Various provisions should ensure that this negotiation really takes place and sanctions are

⁴⁵ See on this issue: European Commission, Report on the application of 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), COM (2013) 861, available at: http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/com-2013-861-final_en.pdf, accessed 16 September 2014.

⁴⁶ Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889 (*Barber*).

prescribed when enterprises employing at least 50 employees have not concluded any agreement on sex equality.⁴⁷

In other countries, *obligations* are rather *imposed on employers*. In some countries, for example **Cyprus**, private employers have the obligation to provide information to employees and trade unions on equal pay issues and measures to tackle the gender pay gap. In some countries, employers may be obliged to monitor pay practices in the workplace and present regular surveys, analyses and periodical plans of action for equal pay (e.g. **Sweden**). It would seem that in particular obligations to prepare pay structure surveys or to produce gender-specific wage statistics for the enterprise are believed to be useful to discover any pay discrimination and are (therefore) obligatory. This is for instance the practice in **France**. In other States, there are no obligations as such, but equal pay reviews are carried out on a voluntary basis. The incentive for this is for example the label of ‘good practice employer’.

4.4. Enforcing equal pay

Finally, effective *enforcement* of the relevant *equal pay legislation in the courts* is also of great importance. Unfortunately, only a few cases on equal pay are brought to the courts every year (and some additional cases to the competent equality bodies). A specific reason for this low level of litigation may be that the alleged victim must often look for a comparator in order to claim discrimination. The comparison is, in principle, restricted to the workplace or company where the individual works or where the same collective agreement applies. A comparison across sectors and businesses with different collective agreements is, as a rule, not permitted. According to the CJEU, it must be possible to attribute differences in the pay conditions of workers of different sex performing equal work or work of equal value to a single source, as otherwise there is no body which is responsible for the inequality and which could restore equal treatment.⁴⁸

It seems that the judiciary in **Croatia** overemphasises the importance of a comparator, when for example a formal difference in a job classification scheme might exclude comparability. A similar problem exists in **Greece**. **Irish** law is very prescriptive and requires an actual comparator. In **the United Kingdom**, the legislation defines an appropriate ‘comparator’ for these purposes as a person of the opposite sex who is employed by the same employer in the same establishment, or one at which broadly similar terms and conditions apply, for ‘like work’, ‘work rated as equivalent’ (e.g. by a job evaluation scheme drawn up by the employer) or ‘work of equal value’.⁴⁹ The possibility of a hypothetical comparator in equal pay cases was introduced for the first time by the Equality Act 2010, though it applies only where direct discrimination is alleged.

Another major problem is proving pay discrimination as the necessary information is of an individual and confidential nature and is not easily accessible, or is not at all available.⁵⁰ Thus, for instance, in **Finland, Poland and Romania**, it is very difficult to compare ‘work of equal value’, as information about other jobs (in particular in strongly sex-segregated labour

⁴⁷ See also S. Laulom ‘Gender Pay Gap in France’, *European Gender Equality Law Review* no. 1/2009, pp. 5-15, available at http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 4 October 2013.

⁴⁸ Case C-320/00, *A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd.*, [2002] ECR I-7325 (*Lawrence*).

⁴⁹ The Supreme Court ruled in a recent case that, where claimants seek to rely on comparators employed at a different establishment, the legislation does not require there to be a ‘real possibility’ of the comparators doing the same, or broadly similar, jobs at the claimant’s place of work, *North & Ors v Dumfries and Galloway Council* [2013] IRLR 737, discussed in the *European Gender Equality Law Review* No. 2, 2013, p. 109 available at http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 25 September 2014.

⁵⁰ On 7 March 2014 the Commission adopted Recommendation on strengthening the principle of equal pay between men and women through transparency (C(2014) 1405 final). The Recommendation provides a toolbox of concrete measures designed to assist Member States in taking a tailor-made approach to improving pay transparency.

markets) is not easily accessible for employees. However, in **Finland** these difficulties are partly tackled by the requirement of the Equality Act that larger employers have to provide an assessment of pay differentials as a part of their mandatory equality plan. In **Estonia**, case law exists on the collection and disclosure of information concerning wages. In 2009, the Supreme Court considered that data on pay in the public sector should be accessible, but Estonian law does not require the disclosure of salaries of individuals.⁵¹ In **Iceland**, workers now have the right at all times to voluntarily disclose their wages. It might however be doubted whether such right is useful for employees who presume they are paid less than their colleagues, as they depend on their colleagues for wage information. It might therefore be doubted whether voluntary disclosure of wage information will often happen in practice.

5. Occupational pension schemes

As observed above, the CJEU has made clear in its case law – in particular in the famous *Barber* judgment⁵² – that occupational pension schemes are to be considered as pay and therefore the principle of equal treatment applies to these schemes as well. According to the CJEU, and in contrast to the so-called statutory schemes, to be discussed in Section 8, Article 157 TFEU applies to schemes which are:

- i) the result of either an agreement between workers and employers or of a unilateral decision of the employer;
- ii) wholly financed by the employer or by both the employer and the workers; and
- iii) where affiliation to those schemes derives from the employment relationship with a given employer.

The most important consequence of this case law was that certain aspects of Occupational Social Security Schemes Directive 86/378/EEC, which was adopted in the meantime, were contrary to Article 157 TFEU and had to be amended.⁵³ The most salient forms of discrimination in this Directive were the retention of different pensionable ages for women and men and the exclusion of survivor's benefits for widowers.⁵⁴ In the light of the CJEU's case law, these forms of discrimination were no longer allowed. Similarly, in relation to the use of gender-segregated and different actuarial factors – in particular the different life expectancy of women and men (i.e. the fact that on average women live longer which also means that they need old-age pensions for a longer period of time) – the CJEU 'corrected' the Occupational Social Security Schemes Directive to a certain extent. The provisions on occupational social security schemes are now included in Chapter 2 of Recast Directive 2006/54/EC, which codifies relevant case law on this issue. The case law on occupational pensions had a considerable impact on equal treatment in occupational pension schemes in those Member States where it was previously believed that Article 157 TFEU was not applicable and certain forms of discrimination were still allowed.

5.1. Uncertainty about the nature of national schemes

Apart from the problem that in some countries it was initially believed that Article 157 TFEU did not apply to their national schemes, another source of confusion was – and sometimes still is – the distinction between occupational schemes and statutory schemes. In some countries

⁵¹ Judgment No. 3-4-1-1-09 of the Constitutional Review Chamber of the Supreme Court of 19 May 2009. RT III, 2009, 27, 199. Available <http://www.nc.ee/?id=1036>, accessed 15 January 2014.

⁵² Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

⁵³ Directive 86/378/EEC was amended by Directive 96/97/EC, and has now been repealed by Recast Directive 2006/54/EC.

⁵⁴ Strictly speaking, there is, under CJEU case law, a difference between the retirement age in the sense of the age at which women or men have to leave their employment, which must be equal, and the age at which women and men qualify for their old-age and related pensions. In certain schemes this difference can be retained, see Section 8 on Statutory Schemes of Social Security.

the characteristics of the national social security system do not correspond with a concept such as ‘occupational pension schemes’. This led the respective governments to believe that it was not necessary to transpose the EU provisions on occupational social security schemes, even after the amendments to the initial directive by Directive 96/97/EC. Illustrative of the problems that occur is, for instance, the situation in **Greece**, where the concept of occupational pension schemes is virtually unknown. Therefore, it is unclear which Greek social security schemes fall under this concept and which do not. However, the CJEU found that the Greek civil and military pensions’ scheme, laid down in a code, was to be considered as an occupational pension for the purposes of EU gender equality law. Therefore, the provisions of the code that differentiated between male and female workers with regard to the pensionable age and the minimum length of service infringed the principle of equal treatment. Moreover, the Court made it clear that such differences cannot be justified as a form of positive action: the measures at stake cannot be considered as measures that contribute to helping women conduct their professional life on an equal footing with men.⁵⁵ The crucial question in this case was whether the Greek scheme had to be considered as a statutory one, since in that case a long list of exceptions, including differences in pensionable age, are applicable. The Court decided otherwise. The transposing national Act currently still fails to specify which Greek schemes are occupational and includes no criteria to determine this, and therefore lacks transparency. The pensionable age of men and women in Greece is now equal and has been raised to 67, with effect from 1 January 2013. The higher pensionable age for women has been increased with a very short or no transitional period, while the basis for calculating the pension has been extended to the whole working life. This may well result in pensions for many women being lower than before or wholly impossible, due to career interruptions and a much higher unemployment rate of women than men. Moreover, since 2010, pension cuts are sharper for pensioners under 55 years of age; they have a strong gender dimension, as an ILO Mission to Greece underlined, as most affected pensioners are mothers of minor children who in the past were entitled to an earlier pension.⁵⁶

However, **Greece** is not the only country encountering problems in this field. The distinction between statutory and occupational schemes is (and was) problematic for some other Member States, such as **Denmark, Finland, France**,⁵⁷ and **Italy**.⁵⁸ Moreover, some of the ‘new’ Member States or candidate countries, in particular the post-communist states, had restructured their social security system in accordance with the so-called ‘World Bank Model’ (e.g. **Bulgaria** and the **former Yugoslav Republic of Macedonia**). This model does not follow a three-pillar structure like the one used in the EU framework (i.e. statutory, occupational and private schemes). Instead, the World Bank Model follows the distinction between state schemes, mandatory savings schemes and voluntary schemes. It would seem that it is less obvious how to apply the EU criteria for occupational schemes to the latter model. Furthermore, there may also be other reasons why the national social security structure just does not fit within the EU division, as was the case in the **Czech Republic**. Despite this, in its judgment of December 2008, the CJEU declared that the **Czech Republic** had failed to adopt (all) the laws, regulations and administrative provisions necessary to comply with the relevant directives on equal treatment in occupational pension schemes.⁵⁹ Now, all exceptions allowed in the Recast Directive have been copied into the Czech Anti-Discrimination Act, thus providing a formal rather than a substantive transposition of the relevant provisions.

⁵⁵ Case C-559/07 *Commission of the European Communities v Hellenic Republic* [2009] ECR I-47 (summary). See also Case C-46/07 *Commission of the European Communities v Italy* [2008] ECR I-151.

⁵⁶ ILO, *Report on the High Level Mission to Greece* (Athens, 19-23 September 2011), para. 321: http://www.ilo.org/global/standards/WCMS_170433/lang--en/index.htm, accessed 28 May 2014.

⁵⁷ Following the *Griesmar* case, multiple pension reforms had and still have to be carried out in particular in relation to family benefits for women only: C-366/99, *Joseph Griesmar v Ministre de l’Economie, des Finances et de l’Industrie and Ministre de la Fonction publique, de la Réforme de l’Etat et de la Décentralisation* [2001] ECR I-9383.

⁵⁸ Where the pensionable age of men and women still differs at present and until 2018.

⁵⁹ Case C-41/08 *Commission of the European Communities v Czech Republic* [2008] ECR I-175.

Different conditions applied in relation to access to occupational pension schemes might be indirectly discriminatory, for example the requirement of a large number of years of continuous employment (e.g. **Germany**), the application of a minimum threshold of working hours (e.g. **Ireland**⁶⁰ and **Norway**⁶¹) or a minimum period of employment at an actual work place (e.g. **Poland**). In **Hungary**, the employer can limit access to an occupational pension scheme to a selected group of employees, often those in managerial and key functions. Some forms of indirect sex discrimination were not considered to be unlawful by national courts (e.g. **Germany**⁶²) or have not yet been decided on by courts (e.g. **Hungary**).⁶³

In some countries, occupational pension schemes are scarce (e.g. **Latvia**, **Lithuania** and **Portugal**).

The use of gender-related actuarial factors is, within certain limits, still allowed under the Recast Directive ((see Article 9(1) (h) and (j)). The limited use of gender-related actuarial factors in occupational pension schemes is not prohibited in, for instance, **Belgium**, **the Czech Republic**, **Italy**, **Luxembourg**, **the Netherlands**, **Norway** and **Slovenia**.⁶⁴ The use of unisex actuarial data – i.e. using the same average life expectancy for purposes of the old-age pension for both sexes – is common in for example **Denmark**⁶⁵ and **Sweden**.

6. Access to work and working conditions

In addition to pay, EU gender equality law also covers employment, in particular the access to employment, promotion in employment, access to vocational training and working conditions including conditions governing dismissal (see in particular Chapter 3 of Recast Directive 2006/54/EC).

The transposition in this area has generally taken the form of a general gender equality act and, very often, amendments to labour law legislation or legislation concerning civil servants. Sometimes remarkable degrees of friction may occur in this process, like in **Germany**. In that country discriminatory dismissal is not explicitly covered by the General Act on Equal Treatment, the most important piece of gender equality legislation. Meanwhile the Federal Labour Court has clarified that dismissal is covered by the General Act on Equal Treatment.⁶⁶ General labour law applies to dismissals. One of the common grounds for dismissal in case of economic difficulty is the length of employment. As women often have a shorter working record, there is a risk of indirect discrimination. In **Belgium**, the federal structure, in particular the exclusive jurisdiction of the federate authorities regarding some issues (e.g. vocational orientation and training), causes confusion. In **Denmark**, the extension of equal treatment to membership of and involvement in trade unions and employers' organisations, as EU gender equality law prescribes, took place at almost the same time as the merger of the Women Workers' Union (for other reasons) with the predominantly male

⁶⁰ Protection of Employees (Part-Time Work) Act 2001.

⁶¹ The requirement of a minimum of 14 hours weekly in a collective agreement for access to an additional pension system was recently considered unlawful by a Labour Court: 21 June 2013, Case No. 20/2013.

⁶² See for example Federal Labour Court, judgment of 20 April 2010, 3 AZR 370/08; Federal Labour Court, judgment of 12 February 2013, 3 AZR 100/11; and Federal Labour Court, judgment of 9 October 2012, 3 AZR 477/10.

⁶³ See further: European Network of Legal Experts in the Field of Gender Equality, S. Renga, D. Molnar-Hidassy & G. Tisheva, *Direct and Indirect Gender Discrimination in Old-Age Pensions in 33 European Countries*, European Commission 2010, available at: http://ec.europa.eu/justice/gender-equality/files/conference_sept_2011/dgjustice_oldagepensionspublication3march2011_en.pdf, accessed 4 October 2013.

⁶⁴ See on the use of actuarial values the staff case of an official of the Council of the European Union, a case in which the validity of the exceptions in Article 9(1)(i) and (j) were called into question: Case C-227/04 P *Maria-Luise Lindorfer v Council of the European Union* staff cases 2007 II-B-2-00157 and I-06767;FP-I-B-2-00017.

⁶⁵ The use of gender-related actuarial factors has been prohibited since 1998, but this legislation only applies to workers who joined the scheme after 1 July 1999.

⁶⁶ Since Federal Labour Court, judgment of 6 November 2008, 2 AZR 523/07.

General Workers' Union so that the question whether or not it was lawful to have a women-only trade union became irrelevant.

In respect of all the aspects listed above, direct and indirect discrimination are prohibited (Article 14). Some job requirements might be indirectly discriminatory for women, for example minimum height requirements (1.70 m.) for access to police academies in **Greece**. In some countries, legislation provides specific protection against direct or indirect sex discrimination in the access to employment. **Slovenian** law for example explicitly prohibits an employer from requiring information from an applicant on his/her family and/or marital status, pregnancy and family planning. Sometimes, direct discrimination might be justified under EU law, as a number of exceptions to the principle of equal treatment are allowed.

6.1. Exceptions

The general scheme of gender equality law, at least as laid down in the directives, is that direct discrimination can in principle only be justified on the basis of the exceptions laid down in the directives themselves. This is an important difference from indirect discrimination, which might be justified for a broader range of reasons (see above, Section 3).

One of the most important exceptions concerns *occupational activities for which the sex of the worker is a genuine and determining occupational requirement* (Article 14(2)). Because this is an exception to a fundamental principle it has to be interpreted strictly. Thus the derogation is further tightened by the requirement that it must be appropriate and necessary for achieving the legitimate aim pursued. These requirements resulted, for instance, in the general exclusion of women from the Royal Marines (the British Royal Navy's amphibious infantry requiring a high level of physical strength and fitness) or from the German army (*Bundeswehr*), this exclusion not being accepted by the CJEU.⁶⁷ Only the specific nature of the posts in question or the particular context in which the activities in question are carried out may justify an exception.

EU law allows provisions concerning the *protection of women, particularly as regards pregnancy and maternity* (Article 28(1)). In the past, the existing protective legislation in some Member States concerned issues like restrictions on night work or on certain dangerous or strenuous work, such as mining, ground excavation, work in hyperbaric chambers, the lifting of heavy materials etc. In some countries, this protective legislation excluded women during pregnancy for this kind of work, or the legislation was clearly linked to maternity or parenthood. In other countries, the exclusion was more general, like in relation to the prohibition of night work. Interestingly, while a great volume of protective legislation existed in the former Central and Eastern European countries, by contrast there was very limited protective legislation in the Scandinavian countries. In particular in **Denmark**, there has always been a strong tradition of not accepting protective measures for women. The difference between the countries in this respect can be explained by sociological and/or historical reasons.

Some of these protective provisions have been scrutinised as to their compatibility with EU law and have been abolished, sometimes after the intervention of the CJEU.⁶⁸ In **France**, for instance, the prohibition of night work for women was not abolished until 2001.

The CJEU has made it clear that protective legislation is only allowed to meet women's specific need for protection related to pregnancy and childbirth and it cannot be used to exclude women from a certain type of employment solely on the ground that they ought to be given greater protection than men against risks which affect men and women in the same way.⁶⁹ This does not mean that all forms of protective measures are no longer allowed.

⁶⁷ Case C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence* [1999] ECR I-07403 (*Sirdar*) and Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR I-69 (*Kreil*).

⁶⁸ E.g. on night work Case C-158/91 *Criminal proceedings against Jean-Claude Levy* [1993] ECR I-04287, (*Levy*).

⁶⁹ Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR I-01651 (*Johnston*); Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR I-00069 (*Kreil*); Case C-203/03 *Commission of the European Communities v Republic of Austria* [2005] ECR I-00935.

However, under the current EU gender equality law, they must fit under the ‘sex of the worker as a determining factor exception’ concerning occupational requirements, under the exception on the ‘protection of women, in particular in relation to pregnancy and maternity’ or under the provisions of the Pregnant Workers Directive, as discussed in Section 7.

6.2 Occupational requirements

The transposition of the exception where the *sex of the worker is a determining factor* for the activity at stake basically takes two different forms: either the national transposing legislation contains a 'general' exception setting out abstract criteria of general application across the employment field for cases where the sex of the worker is a determining factor for an occupational activity, or a specific list, identifying particular occupational activities where the sex of the worker is a determining factor. Obviously, a combination of both exists as well. In **Greece**, the Acts transposing the relevant directives in this field contain no exception at all.

The usual activities listed concern singers, actors, fashion or photographic models, military personnel (usually certain units in the armed forces, such as service on submarines in the **French** navy or some specific police forces), private security bodies (e.g. **Cyprus**), wardens in women’s shelters, personal care involving physical contact, membership of religious orders or access to the priesthood. Sometimes the reservation appears to be based on the nature of the job, sometimes it is determined by the context in which the specific activity takes place. In some cases, however, an exception may seem to be specific, but in fact it may turn out to be rather wide. Some generally formulated exceptions, for instance in **the Czech Republic**, give rise to concerns because the formulation is rather open, not very transparent and does not easily lend itself to appraisal. In **Turkey**, until October 2013, both male and female civil servants had to work bare-headed, a requirement which impaired access to employment in particular of women wearing a headscarf and which might be indirectly discriminatory.⁷⁰ In **Hungary**, the exceptions are broader than allowed under the Recast Directive, in particular when a job requiring some physical work is not open for women. The same is true for the exceptions concerning all activities carried out within religious denominations and private life. The exceptions in **Cyprus** concerning prison guards and home care of old or disabled persons might be questioned as well. Religious considerations are one of the continually recurring grounds for derogation in many countries (e.g. **the United Kingdom**).⁷¹ Legislation in **Finland**, for example, also excludes the religious practices of religious communities. However, the Evangelical Lutheran Church of Finland has opened its ministerial offices to women and recent case law confirms that equal treatment has to be applied in church offices and other church jobs, even when they involve religious practices. This does not, however, apply to the religious practices of other religious communities. Where such requirements often hinder the access to employment of women, positive action measures in contrast are meant to facilitate such access.

6.3. Positive action once again

In some countries, *positive action* is also considered to be an exception to the principle of equal treatment. However, other countries understand positive action as an instrument to achieve real equality in everyday life. As was pointed out in Section 3.4, **Greece** and **Portugal** qualify positive action measures as a means to achieve equality, not as an exception,

⁷⁰ Following the democratisation package of 30 September 2013, the quite detailed By-Law on the Garments of Public Personnel (*Kamu Kurum ve Kuruluşlarında Çalışan Personelin Kılık ve Kıyafetine Dair Yönetmelik*, Official Gazette, 25 October 1982, No. 17849), issued by the military Government following the 12 September 1980 military takeover, was amended on 8 October 2013 (Official Gazette, 8 October 2013, No. 28789).

Following this amendment, women with headscarves may hold public offices. Those who have to wear formal suits (uniforms), military personnel, police, judges and prosecutors are excluded. For the excluded public services, the issue is left to the discretion of the relevant organisations, as the headscarf ban is a result of their own internal regulations/practices.

⁷¹ For example for teachers teaching religion in schools based on a certain religious ethos.

in their Constitution and in some States positive action measures are framed as an obligation, in particular in the public sector and for company boards.

Positive action is often conditional, i.e. it is only allowed on certain conditions. For instance in the **Dutch** Equal Treatment Act the following conditions apply: (a) a positive measure must be aimed at diminishing or cancelling disadvantages for women, (b) the disadvantages must be linked to sex, and (c) the measure must be proportionate to the aim. There is no obligation or requirement to introduce and effectuate positive action programmes. Also in other countries, like for instance **Portugal**, the temporary basis is very important. In **Belgium**, the Gender Act of 2007 imposes strict conditions. Due to the fact that an ancillary Royal Decree needed for the implementation of this legal provision has not yet been promulgated, there is uncertainty about the lawfulness of some positive actions.

In **Malta** free – that is, government funded – child care for all has been introduced, and this will clearly benefit women most since they have traditionally forgone working when the family finances did not run to paying for childcare.

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

Another important exception to the principle of equal treatment or, arguably, necessary differentiation, concerns the protection of women as regards *pregnancy and maternity*.

7.1. Pregnancy and maternity

Discrimination for reasons of pregnancy is to be considered as *direct discrimination* under EU law and therefore also in the Member States. Similarly, disorders and complications related to pregnancy, which may result in incapacity to work, form part of the risks inherent in pregnancy and less favourable treatment on that ground, or perhaps even dismissal, amount to direct discrimination as well. Finally, any less favourable treatment of a woman related to pregnancy or maternity leave is included in the prohibition of discrimination (Article 2(2)(c) of the Recast Directive 2006/54/EC).

At the same time, protection for reasons of pregnancy and maternity justifies different treatment for those women concerned. Thus, *special rights*, related to pregnancy and maternity, such as maternity leave, do not amount to discrimination against men (Directive 92/85/EEC and Article 28 of the Recast Directive). While such rights have been seen in the past as an exception to the principle of equal treatment, nowadays they are rather considered as a means to ensure the implementation of the principle of equal treatment for men and women regarding both access to employment and working conditions. In fact, they aim to accommodate the main biological difference between women and men. However, it might be questioned how far protective measures should go, in particular in view of a more balanced division of work and family life between men and women when a very long maternity leave and/or many protective measures exist (e.g. **Bulgaria, Hungary**⁷²). It is submitted that a very long maternity leave might hamper a balanced division of family responsibilities and possibilities on the labour market. A combination of a maternity leave that is not excessively long, paternity leave, parental leave, and child care leave might prevent such drawbacks.

In order to strengthen the protection of pregnant women and women who have recently given birth, the Pregnant Workers Directive 92/85/EEC was adopted in 1992. The most important provisions thereof concern a period of maternity leave of at least 14 weeks (Article 8). Women are entitled to the payment of an adequate allowance during pregnancy and maternity leave (Article 11). This allowance is deemed to be adequate if it guarantees an income at least equivalent to that which the worker concerned would receive in case of illness (Article 11(3)). Another important provision relates to protection against dismissal from the beginning of the

⁷² In **Hungary**, the three-years long parental leave was kept. However the related legal protection of parents was reduced considerably in the new Labour Code which came into force in 2012.

pregnancy until the end of the maternity leave (Article 10). Apart from leave and employment protection, the Directive also provides for health and safety protection for pregnant women or women who are breastfeeding. If there is a risk to health and safety or an effect on the pregnancy or breastfeeding, as established on the basis of detailed guidelines, the employer must take the necessary steps, like temporarily adjusting the working conditions, moving the worker to another job or, if there is no other solution, granting the worker temporary leave. Under a pending proposal, aimed at amending the Pregnant Workers Directive, the minimum maternity leave would be 18 weeks. The European Parliament has proposed a fully-paid maternity leave of at least 20 weeks (and a fully paid paternity leave of two weeks). It seems unlikely that this proposal will be adopted in the short term; the last debate in the Council dates from December 2011 and fully-paid maternity leave (even shorter than 20 weeks) was not supported.⁷³ At national level, the minimum requirements of the Directives are generally met and national (case) law offers more protection and extensive rights.

Pregnancy and maternity protection are often regulated in specific legislation at the national level (e.g. the Maternity Protection Act in **Austria**,⁷⁴ **Cyprus** and **Germany**; or the legislation transposing the relevant directives in **Greece**) and/or as a matter of working conditions under general labour law, as laid down in a Labour Code and sometimes also in specific health and safety legislation. It should be noted that before the transposition of the Equal Treatment Directive (76/207/EEC) it was allowed under **Danish** law and quite usual for employers to dismiss or otherwise treat women unfavourably on grounds of pregnancy.

For reasons of clarity, in **Finland** and in **the Netherlands**,⁷⁵ *pregnancy discrimination* is explicitly *defined as constituting direct discrimination*. Interestingly, also different treatment on grounds of parenthood is defined in **Finland** as indirect discrimination and the provisions also protect men with family responsibilities, while in **Estonia** less favourable treatment in connection with pregnancy and childbirth, parenting and the performance of family obligations constitutes direct discrimination. Comparable provisions exist in **Slovenia**, where also less favourable treatment of workers on grounds of parental leave is considered as discrimination. **Greek** legislation explicitly prohibits discrimination related to pregnancy, maternity, maternity leave, parental leave, adoption leave and paternity leave. In **Lithuania**, an explicit prohibition of discrimination in relation to pregnancy and maternity, parental, adoption and paternity leave is lacking, and the general anti-discrimination provisions apply.

7.2. Maternity leave

All the national legislation provides for at least the minimum period of *maternity leave* of 14 weeks, as set in the Pregnant Workers Directive. Many countries provide for longer periods. For example in **the United Kingdom**, all pregnant employees are entitled to 52 weeks' partially paid maternity leave. In **Ireland**, all employees are entitled to 26 weeks of maternity leave. The length of maternity leave varies from country to country ranging from the somewhat extreme 410 days (i.e. approximately 58 weeks) in **Bulgaria** to 14 weeks (fully paid) in **Germany**. The average duration of the maternity leave in most countries is between 16-20 weeks. In most countries, the period of maternity leave consists of compulsory and facultative leave. Compulsory periods of leave are generally established immediately before and immediately after confinement. In **Greece** the whole period of leave (17 weeks in the private sector, 5 months paid in the public sector) is compulsory. In the private sector, wages

⁷³ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, COM(2008) 637. See on the last debate in the Council in December 2011: [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2008/0193\(COD\)&l=en](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2008/0193(COD)&l=en), accessed 9 October 2013.

⁷⁴ However, the personal scope of this Act does not include some groups of workers, such as homeworkers, and employee-like persons are not protected in the area of occupational safety and health and against termination of their contract.

⁷⁵ Where the term 'distinction' is used, instead of 'discrimination'.

are supplemented by social security benefits, but the conditions for granting benefits are stricter than those for granting sickness benefits. In case these requirements are not met, the income during maternity leave is less than in case of sick leave, and this in our view breaches Article 11(3) of Directive 92/85/EEC. In some countries (e.g. **Austria, Greece, Poland** and **Spain**), the period of maternity leave is extended in case of multiple birth.

In most countries, during the period of maternity leave, employees are entitled to a minimum maternity benefit. The amount of this benefit is often dependent on the length of service or on the amount of contributions to the social security scheme. However, the amount of the benefit can be increased to the equivalent of full pay, for instance on the basis of collective or other agreements, as is the case in for example **Denmark, France** and **Sweden**. In **Ireland**, the statutory maternity benefits are supplemented by some employers up to normal remuneration. In some countries – e.g. **the Netherlands, Poland** and **Germany** – employees simply receive 100 % of their pay. In order to make pregnancy and related leave cost-neutral for employers, they are obliged in **Denmark** to pay into a fund that in turn reimburses employers for any costs related to pregnancy, maternity, parental leave etc. In **Sweden**, the scheme is extremely flexible; it is possible to receive partial benefits during a considerable number of days until the child is 12 years old.

The right to *return* to the same or an equivalent job on terms and conditions which are no less favourable and to benefit from any improvement in working conditions is provided for in Article 15 of the Recast Directive (a similar right including protection against dismissal applies to paternity and adoption leave, insofar as such leaves exist in the Member States).⁷⁶ In most States a worker returning to work after her maternity leave is protected against unfavourable treatment. Workers are generally guaranteed by law to be able to return to the same job or, if this is not possible, to a similar job. In some countries legislation specifies that a worker is entitled to additional vocational training and to benefit from any improvement in working conditions (e.g. **Croatia**). However, a few countries do not provide such a guarantee (e.g. **the Netherlands**)⁷⁷ or they do not do so explicitly (e.g. **Belgium, Germany**). In **Hungary**, this protection does not apply to executive employees. In the view of the authors, and following the judgment of the CJEU in *Danosa*,⁷⁸ this constitutes a breach of Article 15 of Directive 2006/54/EC.

In almost all national legislation there is very strong legal *protection against the dismissal* of a pregnant worker or a person on maternity leave. In **Cyprus**, protection against dismissal is provided from the moment the worker gives a written notice to her employer that she is pregnant until three months after the end of the maternity leave. In **Greece**, protection against dismissal is provided during the whole period of pregnancy and irrespective of the employer's knowledge thereof; and 18 months after childbirth or during a longer absence due to pregnancy-related sickness. In **Germany**, the protection runs until four months after childbirth, thus longer than the period of maternity leave (8 weeks after childbirth) and in **Italy** until 12 months after childbirth. In **Croatia**, there is an absolute ban on dismissal not only during pregnancy and maternity leave, but also during parental and adoption leave and part-time work and – among other things – periods of reduced working hours due to care for a disabled child. In **Poland**, it is irrelevant for the protection of pregnant women against dismissal whether the employee was aware of her pregnancy or the employer has been informed about the pregnancy (see also for example **Italy** and **Spain**). The only thing that

⁷⁶ Article 16 of the Recast Directive.

⁷⁷ The Commission started an infringement procedure on this issue on 24 January 2013, infringement No. 2013/45. On 22 October 2014 the CJEU handed down its judgment on this issue, and dismissed the action as inadmissible because not all of the Article 258 TFEU formalities were complied with. Specifically, the Commission did not identify any rule of Dutch law that in its content or application was contrary to the wording or the objective of the relevant provisions of Directive 2006/54. See: Case C-252/13 *Commission v the Netherlands* [2014], ECR n.y.r.

⁷⁸ C-232/09 *Dita Danosa v LKB Līzings SIA* [2010] ECR I-11405.

matters in Polish law is the objective existence of pregnancy at the time of dismissal. The dismissal of a pregnant worker or a woman on maternity leave is often presumed to be unlawful (e.g. **Portugal**, where it has to be previously approved by a public body)⁷⁹ and in some countries (e.g. in **Greece**) it is deemed to be null and void. In **Cyprus**, a dismissal and/or notice is revoked if an employer is not aware of the fact that an employee is pregnant and the worker presents a medical certificate within five days from the day notice was given to her. In some countries, the pregnant worker is only protected against dismissal once the pregnancy is known to the employer (e.g. **Austria**). However, in **Austria**, fixed-term contracts are extended by law until the maternity leave begins. In **the United Kingdom**, a woman on maternity leave enjoys special protection against redundancy during maternity leave, but if she is made redundant during this leave, the maternity leave period comes to an end.

Compensation is always provided for, and is usually in an amount equivalent to up to six months' salary, often combined with punitive or moral damages. Sometimes the reinstatement of the worker is ordered (e.g. **France** and **Portugal**).

Although the protection of pregnancy and maternity is generally very strong – at least on the legislative side – overall, there is very little litigation. Among the pregnancy and maternity cases that are brought to the national courts, the issue of dismissal is a major focus. In some countries absences related to maternity are not taken into account for the entitlement to benefits such as a Christmas bonus or an assessment necessary for promotion.⁸⁰ Women are reluctant to bring cases to court for fear of victimisation and due to a lack of evidence or the belief that complaining or commencing a case will result in more harm than good. It is not rare for an employer to use tactics to induce the female employee to resign 'voluntarily'. The so-called 'white resignations' in **Italy** are an example of these tactics. To avoid this practice, the resignation or the mutual termination of the employment contract of working mothers now has to be signed in front of an inspector of the Ministry of Labour. The same rule applies to fathers. The period during which this requirement applies runs from the beginning of the pregnancy until the child reaches the age of three.

Practices such as 'white resignations' show that the law 'in the books' is very different from the law in everyday practice.

7.3. Paternity, parental, adoption and child care leave

One of the continually recurring problems in relation to gender equality in employment is the reconciliation of family/private life with work. From this perspective, although not adopted as a specific gender equality directive, the Parental Leave Directive (96/34/EC now repealed by Directive 2010/18/EU)⁸¹ plays an important role in the gender equality discourse. This Directive sets minimum standards designed to facilitate the reconciliation of work with family life. It provides, *inter alia*, for a (in principle) non-transferable right to parental leave to be granted to men and women workers. The length of the parental leave must be at least four months and at least one of these months has to be granted on a non-transferable basis. The leave may be taken from the birth or adoption of the child until that child has reached the age of eight (Clause 2). Workers who take this leave must be protected against less favourable treatment and dismissal (Clause 5(4)), and at the end of the parental leave they have the right to return to the same or equivalent job (Clause 5(1)). Workers may request changes to their working hours and/or patterns when returning from parental leave (Clause 6(1)). In the Recast

⁷⁹ See also the **Former Yugoslav Republic of Macedonia**.

⁸⁰ See in particular the following cases on these and similar issues: C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault* [1998] ECR I-2011 (*Thibault*); C-333/97 *Susanne Lewen v Lothar Denda* [1999] ECR I-7243 (*Lewen*); C-471/08 *Sanna Maria Parviainen v Finnair Oyj* [2010] ECR I-6533 (*Parviainen*); and C-194/08 *Susanne Gassmayr v Bundesminister für Wissenschaft und Forschung* [2010] ECR I-6281 (*Gassmayr*).

⁸¹ This Directive puts into effect the framework agreement on parental leave concluded on 18 June 2009 by the European social partners.

Directive (2006/54/EC), the issue of the reconciliation of work, private and family life is also explicitly emphasised on several occasions. Most notably, the Member States are requested to encourage the social partners to promote equality between men and women as well as providing flexible working arrangements, with the aim of facilitating the reconciliation of work and private life (Article 21(2)). Some countries have included references to reconciliation in anti-discrimination legislation (e.g. **Bulgaria**). Legislation of other countries does not include such references (e.g. in **the Czech Republic, France, Germany, Ireland and Romania**). As such, it does not mean that no attention is being paid to the reconciliation of work, private and family life as the issue is often covered by provisions outside sex discrimination legislation, such as labour law or other more specific legal instruments, such as Acts regulating the adjustment of working time or some forms of full-time or part-time leave for reconciliation purposes.⁸²

A number of countries provide for a mix of various forms of leave: a period of maternity leave to be taken exclusively by the woman is directly followed by a period of parental leave to be taken by either parent as they wish. This is for instance the case in **Sweden**, where the 14 weeks' maternity leave is immediately followed by parental leave for up to 480 days before the child is 12 years of age. These 480 days can be used in a very flexible manner. A comparable system exists now in **Poland** as well, where the paid maternity/paternity/parental leave may amount to 52 weeks. A similar system also exists in **Denmark** for example.

In most European countries, parental leave is an individual and non-transferable (i.e. non-transferable to other persons) right granted to both natural and adoptive parents (in **Greece, Liechtenstein, Malta and Spain** also to foster parents).⁸³ The length of the parental leave varies from country to country but all countries provide for the minimum of at least four months as guaranteed in the Parental Leave Directive 2010/18/EU.⁸⁴ In the same vein, there are variations to the upper limit of the child's age for taking parental leave, e.g. 2 years in **Austria** (except when an older child is adopted), 3 years in the **Czech Republic**, 6 years in **Greece** and 8 years in **Italy, Germany, and Latvia**. In most countries, the leave can be taken in a flexible way, as a whole or in parts, full-time or part-time or even hourly. A paid daily working day reduction exists for example in **Greece**. This was recently made an autonomous right for fathers, even when the mother is self-employed. In the civil service this leave is sometimes proportionally curtailed, a less favourable treatment contrary to Directive 2010/18/EU. In **Lithuania**, adoptive parents are entitled to an additional three months of parental leave in addition to the adoptive parents being entitled to the general right to parental leave until the child reaches the age of three. However, there is no provision on the minimum non-transferable period of parental leave or adoption leave, as required by Directive 2010/18/EU. In **Hungary**, both parents are entitled to unpaid leave until the child reaches the age of three (or the age of ten, in case of permanently ill or seriously disabled children), which includes a twenty four week maternity leave for mothers. . In some countries the period of parental leave is extended in the case of multiple births (e.g. **the Czech Republic**⁸⁵).⁸⁶

⁸² For a more detailed overview see European Network of Legal Experts in the Field of Gender Equality and S. Burri *Legal Approaches to Some Aspects of the Reconciliation of Work, Private and Family Life in Thirty European Countries*, European Commission 2008 and European Network of Legal Experts in the Field of Gender Equality, A. Masselot, E. Caracciolo di Torella & S. Burri, *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood*, European Commission 2012; both reports are available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 9 October 2013.

⁸³ In **Turkey**, adoption leave only exists for civil servants.

⁸⁴ In some countries, this may include different forms of leave.

⁸⁵ In the **Czech Republic**, parental leave is extended if another child is born, so that parental leave can be taken until the youngest child reaches the age of three. If twins are born, parental leave is three years.

⁸⁶ See on this issue Case C-149/10 *Zoi Chatzi v Ypourgos Oikonomikon* [2010] ECR I-84/89 (*Chatzi*) and **Greece** on the application of this judgment by the national court, which upheld the claim for a second parental leave for parents of twins.

As a rule, parental leave is unpaid, although some, often modest, social security benefits may be provided (e.g. in **Belgium, Bulgaria, Poland** and **the Czech Republic**⁸⁷). The leave is paid as a benefit by the social security system and a qualifying period of employment applies. In other countries, parental leave can also be partly paid by the employer as a result of a collective agreement (e.g. **Denmark, France** and **Sweden**). In **Germany**, parents are entitled to parental allowances in the amount of 65 % to 100 % of their former income for up to 14 months and the allowances are financed through taxes. In **Estonia**, 435 days of parental leave are fully paid.

Parental leave is generally taken by women although the leave is often transferable between the parents. The fact that parental leave is often not paid in the private sector is probably one of the reasons why more women take this leave than men. Some countries have introduced policies to encourage fathers to take parental leave. For example, in **Italy** the length of parental leave is extended from 10 to 11 months when the father takes at least three months' leave. In **Germany**, the law provides for a parental allowance for parents for up to 14 months, provided that at least two months are taken by the other parent (normally the father); otherwise the parental allowance is limited to 12 months. Starting in July 2015, a parent working part-time can receive his or her parental allowance in payments of halved amounts while the number of months paid is doubled. In addition, parents working part-time simultaneously while taking simultaneous parental leave for 4 months are entitled to additional parental allowances for these months (partnership bonus). Another example is **Norway**, where 10 weeks of paid leave are reserved for each of the parents and cannot be transferred to the other. **Finland** has a non-transferable 'father's month', which is non-transferable to the mother, but is an extension of the overall period of parental leave, a transferable right available to both parents.⁸⁸ Different forms of partly paid leave (maternity and paternity, parental and home care leave) can be taken until the child is three years old.

Like in the case of pregnancy and maternity, *dismissal* connected with parental leave is strongly prohibited in most countries (e.g. **Croatia, Latvia** and **Poland**). Only limited justifications are accepted, for instance in cases of bankruptcy or reorganisation of an undertaking. Any unfavourable treatment due to applying for or taking parental leave is also prohibited (e.g. **Greece**). Similarly, in most States, a worker *returning to work* after parental leave is protected against unfavourable treatment. A worker is generally guaranteed to be able to return to the same job or, if this is not possible, to a similar job. However, a few countries do not (explicitly) provide such a guarantee or provide less protection (e.g. **Germany**). Overall, the protection granted to workers taking parental leave is the same, whether the worker is a natural or an adoptive parent. In **Lithuania**, employees with childcare responsibilities enjoy specific protection against dismissal.

Some countries have, in addition to parental and adoption leave, a right to childcare leave, which can be taken by parents, but also for example by grandparents (e.g. **Bulgaria**). In a few countries, such as **Greece**, there also are special leaves, for example if a child suffers from cancer. In **Turkey**, a new law allows parents of a disabled child or a child with a chronic illness in the civil service to take leave. In **Ireland**, there is provision for a carer's leave with carer benefit and allowance for up to 104 weeks with a right to return to work when persons have to leave the workforce or work shorter hours in order to care for an incapacitated person(s). A change of working hours after the end of parental leave can be requested in many countries (e.g. in **Liechtenstein, Luxembourg, Poland**), but not in **Spain**.

In some countries, the rights of fathers are regulated specifically (e.g. the Fathers' Leave Act in **Austria**). Paternity leave is not regulated at EU level and in some countries there is no such leave (e.g. **Cyprus**). However, in many countries a right to (paid or unpaid) paternity leave exists, but this leave is often rather short – between 2 days and a month – (e.g. **Belgium**,

⁸⁷ In the **Czech Republic**, the allowance is EUR 460 per month, and can be taken for two years (the average monthly salary in the Czech Republic is about EUR 1000).

⁸⁸ See also **Germany**.

Bulgaria, Estonia, France, Hungary, Latvia, Lithuania, Poland, Portugal, Romania, Spain, Sweden, Turkey⁸⁹ and **the United Kingdom**). In **Slovakia**, both parents cannot take parental leave at the same time, and this period of leave is only available to one of the parents. There is no paternity leave during the period that mothers take maternity leave. In contrast, **Slovenia** has a rather generous full-time paternity leave of 30 days, all of which are fully paid. A right to return to their job or an equivalent job after the paternity leave and to benefit from improvements in working conditions is provided in **Bulgaria** for example.

Like in the case of pregnancy and maternity, parental leave rights are generally well articulated and in many instances extend further than the EU requirements. Yet, their application in practice is far from efficient and court cases are scarce. In addition, in many countries only few fathers actually use their rights (e.g. **the Czech Republic** and **France**). Again, the law in the books is one thing, everyday reality is another.

8. Statutory social security schemes

Equal treatment of women and men in statutory schemes of social security was introduced in 1979 (Social Security Directive 79/7/EEC). Statutory schemes ensure certain benefits for workers, which is not so much a matter that falls under the employment relationship, but is rather a matter of – general – social policy. They concern protection in the case of sickness, invalidity, old age, accidents at work, occupational diseases, and unemployment. Survivors' and family benefits are in principle excluded. Protection of women on the grounds of maternity is framed as an exception to the principle of equal treatment in Article 4(2). The Directive contains a long list of derogations, i.e. areas in which discrimination is not prohibited (Article 7(1)). The two most important derogations pertain to:

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

Despite these derogations, the Directive has had a considerable impact in a number of Member States, such as **the Netherlands, Belgium, Germany, Ireland** and **the United Kingdom**.

Moreover, some litigation revolved around the question of whether a scheme is statutory or occupational. As already pointed out in Section 5 above, this is particularly important since certain exceptions are allowed under the Statutory Social Security Directive 79/7/EEC, but not under Article 157 TFEU or the Recast Directive 2006/54/EC (which repealed the Occupational Schemes Directive).

Most of the transposition measures taken by the respective countries concerned amendments to the rules governing the various schemes. In many countries, social security legislation is a complicated matter, governed by a web of legislative provisions, and this is also true for the introduction of gender equality in this domain. All the relevant legislation had to be screened. The CJEU has often answered prejudicial questions on issues of both direct and indirect sex discrimination in statutory social security schemes.⁹⁰ Even now, legislative gaps persist. For example in **Belgium**, apprentices under the age of 18 in small businesses are not entitled to maternity benefits during maternity leave. In **Bulgaria**, gender-based actuarial factors are used in the pension system. In **Croatia**, workers on sick leave in the six months since returning from parental leave are entitled to less salary compensation due to the fact that their salary on which the compensation is based is then much lower than the average salary.

⁸⁹ Paid or unpaid paternity leave for male workers is left to individual and collective labour agreements. Male civil servants were previously granted paid paternity leave of three days upon the birth of his child. The Sack Law extended this to ten days. Moreover, it introduced an unpaid paternity leave of 24 months for male civil servants, upon request.

⁹⁰ See for an example of prohibited indirect sex discrimination in Austrian law the recent Case C-123/10 *Waltraud Brachner v Pensionsversicherungsanstalt* [2011] ECR I-10003 (*Brachner*).

As women constitute the vast majority of workers that take parental leave, women disproportionately suffer this disadvantage.⁹¹ In many countries, the calculation of benefits in statutory schemes is based on previously earned salary and/or periods of service. Such methods obviously mainly disadvantage women who have interrupted their careers, have faced periods of unemployment, have worked part time,⁹² have taken leaves and on average earned less than men during their working life (e.g. **Belgium, Estonia, Greece, Ireland, Italy, Latvia, the former Yugoslav Republic of Macedonia, Malta and Portugal**⁹³). Equalising the mandatory period of pension contributions further exacerbates this problem (e.g. **Romania**). In addition, some groups are excluded from statutory social security schemes. This is for example the case for so-called mini-jobs in **Germany**. Since 2013, these jobs are subject to mandatory pension scheme contributions with the possibility of exemption. The negative consequences of the current economic crisis are often also felt in the area of pensions and social benefits (e.g. **Bulgaria, Greece, Portugal and Romania**).

In some States, the provisions in general equality legislation may also concern statutory social security. For instance in **Belgium**, the so-called ‘Gender Act’ from 2007 also contains a prohibition of discrimination in statutory social security schemes. Similarly, the **Polish** Anti-Discrimination Act applies to (access to) the social security system. In some countries, laws regulating the social security system include a non-discrimination clause (e.g. **Romania**).

8.1. Family and survivors’ benefits

Family benefits and survivors’ benefits are not covered by the Social Security Directive. An exception to this is when benefits are granted by way of increase, due to the risks mentioned in Article 3(1)(a); i.e. invalidity, old age, accidents at work and occupational diseases, and unemployment (Article 3(2)). Nevertheless, it is interesting to note that in most of the Member States and EEA countries, gender discrimination in these areas has been abolished, independently of EU law requirements. However, there is no widower’s pension in **Cyprus**, except when a widower is permanently incapable of self-support. In **Italy**, some groups of part-time workers are excluded from family allowances. In the **former Yugoslav Republic of Macedonia**, mothers are entitled to a parental benefit and the father can only substitute the mother in specific cases such as death or loss of parenthood of the mother.

8.2. Social assistance

Social assistance is partially excluded from the scope of the Social Security Directive. Only where it intends to supplement or replace the statutory schemes does the prohibition of discrimination laid down in that Directive apply (Article 3(1)(b)). For example, a family benefit for low income families that supplements an unemployment benefit would fall under the scope of the Directive. Yet, it would seem that, overall, the social assistance schemes are at least gender-neutral (which unfortunately sometimes means that men and women are treated equally poorly, the level of benefits often being low). An exception to the equal treatment in social assistance schemes is the fact that a means test, which seems to exist in quite a few of the schemes (although it has different modalities), may amount to indirect discrimination. However, it is to be expected that the means test will be objectively justified if submitted to the courts, the CJEU included. From the CJEU case law it can be deduced that, in schemes which guarantee a minimum subsistence level, the Member States may take into account that persons who are dependent on spouses are less in need of a benefit than single persons. This is indeed motivated by the necessary control of social expenditure.⁹⁴ As it is still the case that more women are dependent on their husbands than the other way round, at the end of the day fewer women than men will qualify for the assistance in question.

⁹¹ The same problem occurs in **Romania**.

⁹² See in particular **Norway** and the recent Case C-385/11 *Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)* [2012], n.y.p. (*Elbal Moreno*).

⁹³ However, maternity and paternity leaves are taken into account.

⁹⁴ Case C-229/89 *Commission of the European Communities v Kingdom of Belgium* [1991] ECR I-02205.

8.3. Derogations from equal treatment: periods of care

As to the derogations from the principle of equal treatment, a similar tendency can be observed: many countries have abolished gender discrimination on their own initiative. As was already observed, the two most important derogations relate to periods of care and to the pensionable age.

As far as periods of care are concerned, these are taken into account by some States in one form or another. In fact, there is a whole array of these ‘advantages’ that relate to the fact that women (or more often one of the parents) have engaged in raising the children. These advantages can take the form of qualifying periods, i.e. periods on leave that still count for the purposes of (certain types of) social security, various bonuses or notional contributions. Much depends on the national scheme in question.

The majority of the countries concerned seem to opt for gender-neutral advantages in this respect. In **France**, legislation granting pension credits to mothers per child had to be amended.⁹⁵ However, female civil servants still enjoy an increased insurance coverage for pensions linked to maternity if there is an agreement between the father and the mother. In case the parents do not agree, the advantage will be granted to the parent who can prove that he/she has contributed more and for a longer period to the education of the child. In **Greece**, women employed in the private sector, in the first place, are entitled to a service/pension credit and only if they make no use of this may the father benefit from it. In some countries only women may benefit (e.g. **Italy**). In **Spain**, the periods of long-term parental leave and working time reduction to take care of children are taken into account for pensions.

8.4. Derogations from equal treatment: difference in pensionable age

As far as the traditional difference in pensionable age is concerned, the overall picture of the statutory schemes in the Member States and the EEA countries is as follows:

- In some States there is no difference in this respect (e.g. **Cyprus, France, Iceland, Ireland, Latvia** (since 2008), **Liechtenstein** (since 2010), **Luxembourg, Malta** (since 2006), **the Netherlands, Norway, Portugal, Sweden, Spain**);
- In other States there is or has been a process of equalising the pensionable age, sometimes with long transitional arrangements (e.g. **Austria, Belgium, Croatia, Denmark, Estonia, Greece** (with a very short transitional period), **Hungary, Italy, Lithuania, Poland** and **the United Kingdom**);
- In the remaining States the difference in pensionable age is maintained (e.g. **Bulgaria, Czech Republic** (if a woman has brought up children), **Romania** and **Slovenia**).

Interestingly, it is in particular the former ‘socialist’ countries that maintain this difference. In these countries the difference is regarded as fair since it compensates for unequal working conditions for men and women. As we have seen in Section 5 on occupational pension schemes the CJEU has another opinion concerning this difference in pensionable age cases and such direct sex discrimination is prohibited. However, in the area of statutory social security differences in pensionable age are not prohibited. Although the difference has given rise to some litigation, the (male) complainants have not been successful very often up to now. In **the Czech Republic**, the lower pensionable age for women, when a woman has raised one or more children, does not apply to men, even where they raise children alone. Very recently, the CJEU considered such a rule incompatible with European Union law and the general principles of equal treatment and non-discrimination.⁹⁶ It remains to be seen whether this approach will be followed in other cases as well.

⁹⁵ See also Case C-206/00, *Henri Mouflin v Recteur de l'académie de Reims* [2001] ECR I-10201 (*Mouflin*) and more recently: Case C-173/13, *Maurice Leone, Blandine Leone v Garde des Sceaux, ministre de la Justice, Caisse nationale de retraite des agents des collectivités locales*, n.y.r.

⁹⁶ Case C-401/11 *Blanka Soukupová v Ministerstvo zemědělství*, ECR n.y.p.

9. Self-employed and assisting spouses

Protection against gender discrimination of self-employed persons, their spouses, and insofar as recognised by national law, the life partners of the self-employed, who are not employees or partners, is a complex area. In some countries (e.g. **the Netherlands**) the number of self-employed persons has been increasing and they experience severe consequences of the recent economic downturn. The quite weak provisions of Directive 86/613/EEC have been modernised and replaced by the stronger provisions of Directive 2010/41/EU, which repeals the former Directive. But even so, the protection of self-employed persons in EU law still shows lacunas. Directive 2010/41/EU requires that the Member States take the necessary measures to ensure the elimination of all provisions which are contrary to the principle of equal treatment, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity (Article 4(1)). Direct and indirect discrimination, harassment and sexual harassment and an instruction to discriminate are prohibited. The Directive does not extend the social protection of the self-employed, but where a system for social protection for self-employed workers exists in a Member State, that State has to take the necessary measures to ensure that spouses and life partners can benefit from social protection in accordance with national law (Article 7). The Member States have to take the necessary measures to ensure that female self-employed workers, and female spouses and life partners may, in accordance with national law, be granted a sufficient maternity allowance allowing interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks (on a mandatory or voluntary basis). Measures also have to be taken to ensure access to temporary replacements or social services (Article 8). Worth mentioning is that equality bodies should provide among other things independent assistance to victims of discrimination, conduct independent surveys etc. (Article 11).

To this one may add, however, that various other gender equality directives are also relevant for the equal treatment of the self-employed, but then in certain respects only. Directive 2006/54/EC, for instance, prohibits discrimination in access to self-employment (Article 14(1)(a)) and occupational social security schemes (Articles 10-11). Also Directive 2004/113/EC, the Goods and Services Directive discussed below, is relevant to the self-employed, because it requires equal treatment in relation to, for instance, the renting of accommodation and services such as banking, insurance and other financial services.

In many Member States, no specific law implementing Directive 2010/41/EU has been adopted (e.g. **Austria, Bulgaria, Germany, Ireland, Italy, Liechtenstein, Lithuania and Luxembourg**). In some countries, the equal treatment legislation applies (e.g. **Denmark, Hungary, Iceland, Italy, the Netherlands and the United Kingdom**). In **Germany**, the General Equal Treatment Act applies in some respects to self-employed persons, although in practice only if they are 'quasi-subordinates'. Self-employed persons are not covered by the statutory social security systems and they can only take part in occupational pension schemes voluntarily. However, there are professional pension funds. In **the United Kingdom**, no new measures were considered necessary to transpose Directive 2010/41/EU, save in the case of Article 8. The State Maternity Allowance⁹⁷, make provision for the payment of a maternity allowance in line with the minimum requirements imposed by the Directive to the partners of self-employed workers who participate in their partners' self-employed business. but who do not receive payment in respect of such participation. Whereas assisting spouses/ partners who were paid for their efforts would have been entitled to maternity allowance prior to the implementation of the Regulations, those who were not paid for their assistance were not.

⁹⁷ The Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-employed Earner) Regulations 2014, which came into effect on 1 April 2014.

Often, the concept of self-employment is not clear at national level or differs according to different national laws (e.g. **Bulgaria, Hungary and Sweden**).⁹⁸ The protection of the health and safety of pregnant self-employed women or assisting spouses merits specific attention. The same is true for conditions applying to access to private insurance schemes in relation to pregnancy and maternity. For instance in **the Netherlands**, self-employed women encounter difficulties in accessing private health insurance schemes, in particular as far as insurance for pregnancy and maternity leave is concerned.

9.1. Pregnancy, maternity and parental rights

The protection of the *pregnancy, maternity and parental rights* of self-employed women and assisting spouses are often closely linked to access to social security schemes in general. In **Finland**, all parents are entitled to benefits during maternity, paternity and parental leave, including the self-employed. In **Norway** self-employed women receive full maternity benefits and in **Belgium**, a limited scheme of (paid) maternity leave of 8 weeks has been introduced. **Italy** has a maternity allowance for self-employed women and in certain areas also three months' remunerated parental leave. Some countries have legislation concerning pregnancy and maternity (and often also adoption), which applies to self-employed women (e.g. **Croatia, Luxembourg, Poland, Slovakia, Slovenia, Spain and Turkey**), but the conditions are sometimes less favourable than for workers (e.g. **Czech Republic**⁹⁹, **Estonia and Iceland**). In **Germany**, self-employed women are not entitled to maternity protection and allowances, unless they are voluntarily insured under the statutory health insurance including sickness benefits. However, such insurance is costly. It might be therefore questioned whether this gap is not contrary to Article 8 of the Directive.¹⁰⁰ Self-employed women are entitled to parental allowances in this country. In **Greece**, only self-employed women who are neither spouses nor life partners may be granted a maternity allowance, while the Act implementing Directive 2010/41/EU applies also to spouses and life partners. In the view of the authors, this might also be a breach of the Directive. In **Latvia**, a self-employed person is covered by the mandatory statutory social insurance (which covers among others maternity), but the spouse of a self-employed person is not; he/she can join the scheme voluntarily. In 2014, the UN CEDAW Committee judged that the Dutch State had violated the CEDAW Convention by abolishing the maternity leave scheme applicable to self-employed women up to 2004 and advised the Dutch State to compensate women who gave birth between 2004 and 2008.¹⁰¹ In most countries no provisions exist on services supplying *temporary replacements* and this is a serious problem. However, sometimes specific facilities are provided such as, for example, a stand-in system in the agricultural sector (**Finland**) or replacements provided through insurance companies. Benefits for temporary replacements are sometimes granted, but only for a short period of time and the benefits are rather low.

9.2. Professional status of assisting spouses

As already observed, the *professional status of assisting spouses and life partners* and in particular their position under the social security scheme is a key problem and the picture is rather complex. In the **former Yugoslav Republic of Macedonia**, assisting spouses are not recognised in legislation as a separate category. The situation of the legal status of assisting spouses, in particular as reflected in the social security scheme, is unclear in **Bulgaria** and in some countries there is no protection or recognition at all.

⁹⁸ See further European Network of Legal Experts in the Field of gender Equality, N. Countouris & M. Freedland, *The Personal Scope of the EU Sex Equality Directives*, European Commission 2012, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 21 October 2013.

⁹⁹ Where there is an obligatory period of 280 days of insurance in order to be entitled to maternity benefit.

¹⁰⁰ The Federal Constitutional Court did not consider it incompatible with the general principle of equality under the German Constitution: Judgment of 3 April 1987, 1 BvR 1240/86.

¹⁰¹ See CEDAW/C/57/D/36/2012, online at <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Jurisprudence.aspx>, accessed 22 May 2014.

A form of recognition of the status of assisting spouses is mirrored in the social security systems of those States where affiliation is compulsory. Mostly additional requirements apply, for instance that an assisting spouse has a taxable income and/or reaches a certain level of income. In these systems assisting spouses enjoy individual rights. In **Austria** for example, helping within the enterprise of a spouse is a legal part of spousal duties as defined by the Marriage Act. However the helping spouse is entitled to an adequate remuneration combined with social security registration in cases, where their contribution reaches the extent of a proper working relation. The status as a helping spouse alone does not create individual rights. In some countries, important steps have been taken in this respect. In **Malta** and **Spain**, a new legal status has been created so as to recognise the work and social protection of assisting spouses. In **Poland**, persons collaborating with a self-employed person are protected against some risks (e.g. old age and disability). These persons include spouses, but also (adoptive) children, parents, and step- and adoptive parents who share a common household with the self-employed person. But some categories of self-employed persons, such as farmers, and persons collaborating with them, enjoy less protection in this country (e.g. no right to childcare leave). In **Belgium**, affiliation to the whole system of social security for the self-employed, covering *inter alia* sickness and certain maternity benefits, has been made compulsory for assisting spouses as well. Also in **Slovenia**, both self-employed persons and assisting spouses are covered by mandatory social security schemes. On certain conditions they are also entitled to maternity and parental leave and benefits. In **Portugal**, the maternity provisions for dependent workers have been partially extended to independent workers. The latter category, which also includes assisting spouses, is also covered by a social security scheme. In **France**, since 2005, the spouse of a self-employed worker, participating in the spouse's activity, has to decide whether he/she wishes to work in the business as an employee, as a partner or as a co-working spouse (*conjoint collaborateur*). In the last-mentioned case, the co-working spouse must contribute to a pension scheme. Furthermore, this spouse can apply for sickness benefit and for a daily maternity benefit plus a benefit for a temporary replacement. The spouse can also apply for a benefit for a temporary replacement for paternity leave. In **Cyprus** assisting spouses are covered compulsorily by the social security scheme for the self-employed and are entitled to all benefits on the same conditions, including maternity allowance. Some form of recognition, combined with mandatory social security coverage, also exists for instance in **the Czech Republic** and **the United Kingdom**. Some countries have a mixed system of mandatory cover for some risks and voluntary insurance for others. For example in **the Netherlands** assisting spouses are automatically covered by the Old-Age Pension Act and the Survivor's Pension Act and they can claim social assistance. Other risks can be covered by private insurance. When assisting spouses may join certain social security schemes on a voluntary basis, this is usually subject to the condition that contributions are paid.

10. Goods and services

The equal treatment of men and women in the access to and the supply of goods and services was introduced in EU gender equality law in 2004(Directive 2004/113/EC). Here, for the very first time, gender equality outside the field of employment is addressed. Direct and indirect discrimination, including less favourable treatment of women for reasons of pregnancy and maternity, is prohibited, as well as harassment and sexual harassment and instruction to discriminate wherever goods or services are offered or supplied (Article 4). The Directive also contains a provision on positive action (Article 6).

An important exception is that the Directive does not apply to the content of media and advertising or to education (Article 3(3)). Another exception relates to goods and services provided exclusively or primarily to members of one sex when there is a justification for doing so. Even so, the aim pursued must be legitimate and the means chosen to achieve that aim must be appropriate and necessary (Article 4(5)). In all new insurance contracts concluded after 21 December 2007, the use of sex as a factor in the calculation of premiums and benefits may not result in differences in individual premiums and benefits (Article 5(1)).

In the *Test-Achats* case, the CJEU considered the derogation to this rule as provided in Article 5(2) invalid with effect from 21 December 2012.¹⁰² Costs related to pregnancy and maternity may in no event result in differences in individual premiums and benefits (Article 5(3)).

The Directive has been transposed in most of the countries by amendments to existing legislation.¹⁰³ In some countries new legislation has been designed to regulate sex discrimination in relation to goods and services. Often the legislation is rather similar to the provisions of the Directive, as regards both the principle of equal treatment and the exceptions allowed (e.g. **Austria, Croatia, Cyprus, Greece, Italy, Liechtenstein, the former Yugoslav Republic of Macedonia, Poland, Romania and Spain**). But in many countries, the legislation goes further than what the Directive requires and also covers areas explicitly excluded from Directive 2004/113/EC. For instance, gender discrimination in *education* is covered in **Belgium, Croatia, France, Hungary, Latvia, Lithuania, Malta, the Netherlands, Slovakia, Sweden and the United Kingdom** (although it permits single-sex schools). Legislation in **Belgium, Croatia, France, Ireland, Latvia, Luxembourg, Malta and the United Kingdom** also covers discrimination in relation to the *media and advertising*. **Lithuanian** legislation prohibits humiliating advertisements and the encouragement of public attitudes that one sex is superior to the other. In for example **Bulgaria** gender-biased or even directly sexist content of advertisements is rather frequent.

On the other hand, some limitations may have sneaked in during the transposition process, for instance in **Germany**. The prohibition of harassment and sexual harassment is not part of the prohibition of discrimination in the provision of goods and services under public law and the provision on sexual harassment in civil law is restricted to the area of employment. In addition, German legislation regulates gender discrimination in access to goods and services only to the extent that the goods and services are covered by ‘mass contracts’. These are contracts concluded on similar terms with multiple parties, typically without reference to the identity of the other party, or where the identity of that person is of little importance. Such a limitation is highly questionable as a proper transposition of the Directive. In **Latvia**, the provision for services between individuals is not covered.

However, overall, the central concepts have been implemented on a satisfactory basis and most of the national legislation provides scope for *positive action* in the area of access to and the supply of goods and services, although sometimes in cautious terms. Such positive action may, for instance, take the form of ‘women’s universities’ and other mechanisms to encourage women to enter technical fields. The main problem is that the national transposition legislation seems to be rather abstract and vague, in particular because the transposing legislation does not define ‘goods’ and ‘services’ (e.g. **Norway**¹⁰⁴ and **Slovenia**).¹⁰⁵

Following the *Test-Achats* case, amendments were made to legislation concerning private insurances in all but three Member States, in which adoption of legislation is pending. In **Germany**, insurance rates were increased for both sexes after 21 December 2012, a clear example of *levelling down*, which disadvantages both men and women.¹⁰⁶ In **Finland**, the use

¹⁰² Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-773 (*Test-Achats*). See on this issue the Communication from the Commission *Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats)*, COM (2011) 9497.

¹⁰³ For a detailed discussion see European Network of Legal Experts in the Field of Gender Equality, S. Burri & A. McColgan, *Sex-Segregated Services*, European Commission 2008 and European Network of Legal Experts in the Field of Gender Equality, S. Burri & A. McColgan *Sex Discrimination in the Access to and Supply of Goods and Services and the Transposition of Directive 2004/113/EC*, European Commission 2009. Both reports are available via: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 21 October 2013.

¹⁰⁴ **Norwegian** legislation does not define ‘goods’ or ‘services’.

¹⁰⁵ In **Slovenian** legislation, two different words are used for ‘goods’.

¹⁰⁶ See <http://www.manager-magazin.de/finanzen/versicherungen/0,2828,849065,00.html> and

of sex-based actuarial factors is only prohibited in policies sold to consumers, and still allowed in insurance schemes sold to employers. In a few countries, proposals to bring legislation in line with the CJEU *Test-Achats* case are still pending (e.g. **Luxembourg**). Below, some salient issues relating to the access to and supply of goods and services are briefly discussed.

10.1. Pregnancy, maternity and parenthood

A rather widespread phenomenon is *discrimination in relation to pregnancy and maternity*. In some countries, pregnant women or women with young children may experience difficulties in obtaining loans, even if these are enterprise-related (see also above Section 9.1). In **Latvia**, insurances do not cover risks related to pregnancy and maternity. Another well-known example of pregnancy discrimination is restrictions on pregnant women travelling by aircraft which are not always necessary and objectively justified. In **Hungary**, it is quite common for mothers with small children to be prohibited from entering a shop with a pram. In **Poland**, owners often refuse to rent flats to pregnant women or families with young children.

Viewed against this background it is important to note that most countries explicitly regulate discrimination in connection with pregnancy and maternity in the area of goods and services (e.g. **Cyprus, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Malta, the Netherlands, Norway, Portugal, Romania, Slovakia, Slovenia, Spain and the United Kingdom**). In other countries discrimination in connection with pregnancy and maternity is not regulated or is only implicitly regulated. Whether this is to be regarded as problematic very much depends on the national context. Another point of concern might be the lack of specific provisions dealing with breastfeeding as a form of discrimination.

Another form of discrimination closely related to maternity discrimination is *discrimination against parents*, i.e. in particular parents with young children who experience difficulties in, for instance, access to public spaces and transport. In some countries discrimination between parents occurs and amounts to direct sex discrimination, for example when fathers are not allowed to stay with their hospitalised children (e.g. **Romania**).¹⁰⁷

10.2. Derogations from equal treatment

Under the Directive, *differences in treatment are allowed* ‘if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’. A great deal of the transposing legislation has adopted this provision and overall the legislation appears to be at least broadly in conformity with the Directive. In some countries – **Estonia, Ireland, the Netherlands and Sweden** – acceptable instances of differential treatment are explicitly listed. In **the Netherlands**, the closed system of exceptions might be regarded as unduly restrictive, as some sex-segregated services should be allowed. Examples of such differential treatment are services to women suffering from domestic or sexual violence, sanitary facilities, changing and sleeping rooms, saunas, swimming pools, fitness clubs, female driving schools and taxi services which specialise in secure taxi services. Differential treatment may be justified in such cases on grounds of personal privacy, decency, safety considerations, etc. Similarly, a difference in treatment in relation to beauty and sports contests may be justified.

However, there are also instances of different treatment which are more questionable, as in the case of male-only clubs. In **Ireland**, a male-only golf club was considered not to be

<http://www.manager-magazin.de/finanzen/versicherungen/0,2828,851956,00.html>, both accessed 12 October 2012.

¹⁰⁷ See further European Network of Legal Experts in the Field of Gender Equality, A. Masselot, E. Caracciolo di Torella & S. Burri, *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood*, European Commission 2012, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 9 October 2013.

discriminatory under the Acts, which gave rise to controversy.¹⁰⁸ In 2012, the **Romanian** National Council for Combatting Discrimination (CNCD) decided on an interesting case of discrimination against women in the access to goods and services. The CNCD sanctioned a service provider for displaying an announcement at the ticket booth that women were not allowed to buy tickets for a particular football game. The CNCD stated that the measure, allegedly taken to protect women from the violence that was expected to escalate at that particular game, did not serve a legitimate aim; these events should not be violent in the first place and such a way of addressing violence in sports may give rise to the idea that women should be generally excluded from football events.¹⁰⁹ Absolutely prohibited under both the Directive and national transposition legislation are practices such as differential pricing of services in or access to nightclubs and differential pricing structures in dating services. Obviously, this type of differentiation reinforces sexual stereotyping and the commoditisation of women, instead of fighting discrimination on grounds of gender.

11. Enforcement and compliance

An important part of EU gender discrimination law relates to the defence of equal treatment rights. Provisions have been enacted regarding protection through court proceedings, remedies and sanctions, the burden of proof, and protection against victimisation. Similarly, the promotion of equal treatment through equality bodies and through social dialogue is considered vital. Relevant provisions can be found in for example Title III of the Recast Directive (2006/54/EC) and in Chapter II of Directive 2004/113/EC.

Before embarking on a brief discussion of all these aspects, it seems advisable to highlight three general points: the so-called direct effect and indirect effect of gender equality law, the role of the CJEU and the role of the European Commission.

In 1975, in the famous *Defrenne II* case, the CJEU decided that individuals may rely on Article 119 EEC Treaty (now Article 157 TFEU) in the national courts in order to receive equal pay for equal work or work of equal value, without discrimination on grounds of sex.¹¹⁰ Later case law also clarified that directives can be relied on in the national courts, although with certain limitations. In any event, this possibility to use EU gender equality law in national proceedings is a powerful tool for individuals to enforce their EU equality rights wherever gender equality law is not properly transposed into national law or where it is not adequately applied and protected. In addition, national courts have the obligation to interpret domestic law, as far as possible, in conformity with EU law, including directives (indirect effect).¹¹¹

Whenever EU gender equality law is relied on in the national courts, the courts are able and sometimes even obliged to request preliminary rulings on the interpretation of EU law provisions from the CJEU (Article 267 TFEU). In the field of equal treatment, since 1971 the Court of Justice has delivered more than two hundred binding judgments, sometimes providing far-reaching interpretations of relevant provisions, like the judgment in *Defrenne II*. Generally speaking, the CJEU has played, in particular through this preliminary procedure, a very important role in improving the ability of women and men to enforce their equality rights.

Finally, the European Commission has an important task in the enforcement of EU gender equality law. The Commission monitors and analyses whether the Member States are fulfilling their obligations regarding the implementation of Treaty provisions and directives.

¹⁰⁸ In the Matter of Section 2 of the Summary Jurisdiction Act, 1857 as amended by Section 51 of the Courts (Supplemental Provisions) Act, 1961, *the Equality Authority v Portmarnock Golf Club and Others and Robert C. Cuddy and David Keane, Ireland and the Attorney General* [2005] IEHC 235. [2009] IESC 73.

¹⁰⁹ CNCD, Decision No. 489 of 21 November 2012.

¹¹⁰ Since the date of the judgment, 8 April 1976, Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455.

¹¹¹ Well-established case law since Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 (*Von Colson*).

The Commission may also initiate inquiries into specific problems in a certain Member State, either on its own initiative or on the basis of complaints by individuals or organisations, which can be submitted to the services of the Commission rather easily. The Commission has the power to bring a case before the CJEU. If the CJEU considers that the Member State has failed to fulfil an obligation under EU law (EU gender equality law included) and the Member State does not take the necessary measures to comply with the judgment of the CJEU within reasonable time, the State might even be subjected to penalties (Articles 258-260 TFEU).

11.1. Judicial procedures

Member States have the obligation to ensure that judicial procedures are available to all persons who consider that they have been wronged by a failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended. According to the CJEU's case law, national courts must provide effective judicial protection and access to the judicial process must be guaranteed (see for example Article 17(1) of Directive 2006/54/EC).¹¹² In practice however, in many countries there is little litigation on sex discrimination. This is often due to lengthy and costly procedures (e.g. **Slovakia**), and insufficient legal aid or costly legal services (e.g. **Latvia**). Fears of suffering career-based disadvantages or facing unemployment, which is sharply rising in some countries, also play a role (e.g. **Greece, Hungary**). Short time limits might also hamper proper transposition of EU law (e.g. **Latvia**).

In a number of countries the courts charged with the enforcement of equality law are *specialised labour courts*. For instance, there is the Industrial Disputes Court in **Cyprus**, the Equality Tribunal and the Labour Court in **Ireland**, special labour and social security courts in **Poland**, and Employment Tribunal in **the United Kingdom**. Normally the *raison d'être* of specialised employment tribunals and/or labour courts is their accessibility for employees, which is reflected among other things by the relative informality of the proceedings, their low costs, etc. Yet, even where they do exist, they do not have a monopoly over the enforcement of sex equality claims; civil and sometimes criminal courts may also be involved.

The main feature with regard to courts is that in a majority of the countries (e.g., **Bulgaria, Cyprus, Finland, Greece, Germany, Latvia, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, the Netherlands, Poland, Portugal and Romania**) there is a division of competence between *civil and administrative courts*. Moreover, in many countries public sector employees, particularly civil servants, are in a special position and there may be special arrangements in the administration of justice, as in **Malta**.

As far as criminal law is concerned, it would seem that the use of criminal law in labour law/gender equality matters is a sensitive issue, in particular for those Member States which prefer law enforcement through administrative and civil law channels (see also below, 11.2). However in **Iceland**, cases involving violations of the Gender Equality Act are handled as criminal cases.

Court proceedings in general and particularly discrimination cases are a stressful experience for the alleged victims of discrimination. Moreover, alleged victims are often in a dependent and therefore vulnerable position. Taking a case to court may prove to be very difficult, also from a financial point of view. Viewed from this perspective, organisations that act on behalf of the victim, or at least support her/him, may play a very important role. To this one may add that in the area of the provision of goods and services, due to the specific difficulties associated with individual litigation in this context, such as low sums to be recovered against high costs, action by organisations is crucial.¹¹³ For these reasons, EU gender equality law provides that *organisations and associations* which have, in accordance

¹¹² Well-established case law ever since Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR I-01651.

¹¹³ As for example Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-773 (*Test-Achats*).

with the criteria laid down in national law, a legitimate interest in whether the provisions of the equal treatment directives are complied with, may act before the courts. Such organisations, for example associations for women's rights or trade unions, may engage, either on behalf or in support of the complainant, with his/her approval, in any judicial and/or administrative procedure provided for the enforcement of the obligations under the equal treatment directives (see for example Article 17(2) of Directive 2006/54/EC).

Much depends on what national law provides. On the one hand, gender equality NGOs, similar associations and often also trade unions may participate in and promote legal action for the defence of collective interests, even in the absence of a specific victim. For example in **Iceland**, organisations bring actions in their own name or on behalf of the alleged victim. Also in **Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, France, Greece, Italy, Latvia, Liechtenstein Lithuania, the former Yugoslav Republic of Macedonia, Malta, the Netherlands, Portugal, Romania,**¹¹⁴ **Spain** and **Sweden** organisations (and in some countries trade unions, see e.g. **Greece, Poland**) may take action on certain conditions on behalf of the victims and, indeed, assist persons in court. In **Italy**, equality advisers may also assist victims or may act directly in their name in cases of collective discrimination, even where the employees affected by discrimination are not immediately identifiable. In **Liechtenstein**, no prior authorisation is necessary when the legal action aims at establishing that discrimination has taken place. On the contrary, in **the United Kingdom**, cases cannot be initiated 'on behalf of' claimants, but organisations may provide support in proceedings. In particular trade unions often are responsible for supporting cases which reach the courts (particularly in the area of equal pay).

In other countries, like **Luxembourg**, ministerial approval is needed in order to permit non-profit organisations to litigate on behalf of victims. In **Austria**, only organisations mandated by legislation may support victims of discrimination in court cases that can be subsumed into the labour dimension of the respective equal treatment legislation.

In many countries, equality bodies may also act on behalf or at least in support of victims of discrimination (see below, in 11.5).

On the other hand, in some countries, like **Germany, Slovenia** and **Turkey**, NGOs, interest groups and other legal entities have no standing before the courts.

Court proceedings are often preceded by an *administrative procedure* and many cases may already be resolved at that level, either, for instance, before an equality body (see below, in 11.5) or through *labour inspectorates*. For example in **Poland**, practice shows that conflicts can often be solved through direct contact between the Labour Inspectorate and the employer.

Conciliation, explicitly referred to in the Recast Directive (see Article 17(1)), also precedes court proceedings. In a number of States conciliation is compulsory, before proceedings are brought before certain courts, or only compulsory in certain types of disputes. In **Liechtenstein**, for example, conciliation is compulsory before proceedings can be brought before the courts. Even where it is not compulsory, conciliation may still play an important role. *Mediation* may play an important role as well (e.g. in **Ireland**) and is even required in **Romania** before an employee can submit a complaint to court or the equality body. The same applies in the area of goods and services.

11.2. Remedies and sanctions

Infringements of the prohibition of discrimination must be met by effective, proportionate and dissuasive sanctions, which might comprise the payment of compensation to the victim.

These requirements were initially developed by the CJEU and only later laid down in EU discrimination legislation (see in particular Articles 18 and 25 of Recast Directive

¹¹⁴ However in **Romania**, this possibility has recently been limited in the Gender Equality Law to administrative procedures only. Given the unfortunate wording of Article 17(2) of the Recast Directive, concerning any judicial and/or administrative procedure, this would probably at first sight not constitute a breach of the Directive. However, such limitation seriously restricts the enforcement of sex equality law at which this provision aims. The Romanian Antidiscrimination Law prescribes that all groups exposed to discrimination may benefit from support in both administrative and court proceedings.

2006/54/EC and Articles 8 and 14 of Directive 2004/113/EC). Compensation or reparation has to be real, effective and dissuasive. Moreover, it has to be proportionate to the damage suffered. The fixing of a prior upper limit may not, in principle, restrict such compensation or reparation. Similarly, national law may not exclude an award of interest.¹¹⁵ In view of these requirements, a compensation rule is questionable in **Belgium**: When the employer fails to reinstate the employee in the job or subject to previous conditions or in case of moral damage, the standard amount of fixed compensation is six month's pay, a sanction that the national expert considers as non-deterrent. Rather low ceilings also exist for example in **Malta**.

The picture in the Member States and EEA countries concerning the issue of remedies and sanctions varies greatly. The sanctions which can be imposed can be administrative, criminal fines or even imprisonment (e.g. **Cyprus, France, Greece, Latvia, Lithuania, Malta and Poland**), civil, disciplinary or any combination of these. Criminal sanctions have never been imposed in **Latvia**, and are hardly ever imposed in **the Netherlands**.

The reinstatement of the employee can be ordered in certain types of proceedings in a number of countries, including **Belgium** (although courts refuse to give such orders, because in an unreasoned judgment of 20 June 1988 the Court of Cassation ruled that the relevant legal provisions cannot entail the victim's compulsory reinstatement), **France, Ireland, Italy, Latvia, Luxembourg and Turkey**. In **Greece** there is no question of reinstatement, as the illegally dismissed employee retains his/her post; the dismissal is deemed never to have taken place. Discriminatory acts are null and void, in some countries 'voidable' or they can be annulled by the administrative or other competent courts (e.g. in **France, Greece, Ireland, Italy, Lithuania, the Netherlands and Spain**). In **Ireland**, a wide range of orders for specific courses of action can be made by the courts – although with maximum awards – and also in **Belgium** the courts may issue injunctions to put an end to discrimination.

Compensation is probably the most common form of remedy. In some countries – for instance **Liechtenstein and Slovenia** (for applicants in the public sector) – limits are imposed on the amount of compensation which can be awarded for a refusal to appoint someone to a particular post. The limits to compensation in relation to other situations that existed in **the United Kingdom** have been abolished as a result of litigation before the CJEU. In **Finland**, the maximum compensation in cases concerning access to employment was capped at EUR 16 210 for all candidates that have been discriminated against, but this maximum was removed in 2009. No maximum was set for other situations where discrimination takes place.

The real issue with compensation, however, is not so much the existence of an upper limit, but rather the non-existence of a minimum amount. In some countries such a minimum does exist, like in **Poland**, where there is a minimum which is related to a minimum remuneration to be established on the basis of specific rules. More generally it would seem that in some countries the problem is not so much the non-existence of effective sanctions and remedies, but rather the unwillingness of the courts to grant such remedies or impose such sanctions (e.g. **Bulgaria**). This is in fact the background to a new type of indemnity introduced in **Sweden**. This discrimination indemnity is exclusive for discrimination and should compensate for the very fact that the indemnities awarded by the courts are not very effective.

In some States, an extra requirement of '*intent*' is imposed for certain remedies, which is difficult to reconcile with EU law standards. For instance, in **Finland**, when relying on tort law, it is required that the defendant has acted *intentionally*. In **Germany** also a requirement of fault, intent or gross negligence is imposed in certain circumstances.

As the examples of pre-existing limits on compensation in **the United Kingdom** show, individual litigation can have an effect beyond the individual case. In this country changes in the legislation resulted from challenges brought by individual applicants. Successfully challenging the conformity of national legislation with EU law means that conflicting national

¹¹⁵ See for example Case C-271/92 *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4397 (*Marshall II*) and Case C-180/95 *Nils Draehmpaehl v Urania Immobilienservice OHG* [1997] ECR I-2195 (*Draehmpaehl*).

law cannot be applied and should bring about an amendment of that legislation, but in this area the impact has been striking.

The above examples also illustrate another problem. By its very nature, the remedy awarded or the sanction imposed, just like equality litigation in general, will often remain limited to the individual case. In many cases a finding that an employer has been discriminating against an employee does not guarantee that the practice will change. Another employee may be obliged to start his/her own legal proceedings. An exception may indeed be when the discrimination lies in national legislation or in a collective agreement and the litigation has the effect that these are amended. As to the amendment of collective agreements, it must be pointed out, however, that much depends on the willingness of the trade unions to renegotiate. As gender equality is often not a leading priority of the unions, discriminatory provisions may continue to exist for a long time. One of the possible mitigating factors is greater standing for NGOs and other interest organisations, which may bring actions in the general interest, discussed briefly above.

11.3. Victimisation

As a matter of EU gender equality law, persons who have made a complaint or instigated legal proceedings aimed at enforcing compliance with the principle of equal treatment have to be protected against dismissal or any adverse treatment or consequence in reaction to their action (see Article 24 of Directive 2006/54/EC and Article 10 of Directive 2004/113/EC).

These provisions have been transposed on a satisfactory basis in most of the countries, in particular in the field of employment. In **Croatia** for example, legislation provides protection in a detailed manner, specifically mentioning reporting and witnessing discrimination, refusing to comply with the discriminatory order or participating in any other proceedings in connection with discrimination. Indeed, in most countries witnesses of discrimination are also protected against victimisation. In **France**, the provision on victimisation also applies to the public sector since 2008. The Gender Equality Law of **Romania** does not contain any provisions regarding victimisation, but in a recent case of sexual harassment a general provision against victimisation has been applied by the Equality Body. In practice, fear for victimisation is often a reason for victims of discrimination not to start proceedings, in particular in existing employment relations.

11.4. Burden of proof

As a result of difficulties which are inherent in proving discrimination, EU gender equality law provides for a shift in the burden of proof. An alleged victim of discrimination has to establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination. It is, however, for the respondent to prove that there has been no breach of the principle of equal treatment. If the Member States so wish, they may introduce more favourable rules for claimants. These rules also apply in the area of goods and services, but do not apply in criminal proceedings (see Article 19 of Recast Directive 2006/54/EC and Article 9 of Directive 2004/113/EC). Again, various aspects of this law of evidence in discrimination cases were initially developed by the Court of Justice and only later laid down in legislation.

In all Member States and the EEA countries, a shift in the burden of proof is implemented in national law. This holds true for civil law and labour law in particular. However, in **Slovakia**, it is not implemented in civil procedure law, but only in the Anti-Discrimination Act and in practice often not applied by national courts in anti-discrimination cases. The shift in the burden of proof generally does not apply in criminal law and sometimes not in administrative proceedings either (e.g. **Lithuania**). The latter may, however, be questionable under EU gender equality law. The burden of proof provision to be applied in anti-discrimination cases in **Bulgaria** requires that a presumed victim of discrimination has to prove (not only establish) facts from which it may be presumed that there has been discrimination, a definition which gives rise to problems in practice. In **Poland**, some courts require that the employee establishes which particular discriminatory criterion has been applied by the employer, a requirement which is questionable under EU law. In **Portugal**, the

shift in the burden of proof does not apply to harassment practices. In **Romania**, the definitions in the Gender Equality Law and the Goods and Service Law are not clear, and they therefore do not correctly transpose the EU provisions.

It is still often very difficult to establish even a presumption of discrimination as the necessary data are often not readily available, in particular in the field of pay. Measures which facilitate the access to data exist in **Italy**: Here, companies with more than one hundred employees must draw up, every two years, a report on the workers' situation (male and female) in relation to recruitment, professional training, career opportunities, remuneration, dismissal and retirement. In contrast, in **Germany**, the Federal Labour Court has clearly restricted the usability of statistical data as *prima facie* evidence of discrimination.¹¹⁶ However, such a view is, in turn, difficult to reconcile with the well-established case law of the CJEU.¹¹⁷

As regards the proof that the defendant has to provide, it might be questioned whether the **Austrian** rule requiring evidence that it is less probable that the decision under dispute was based on the sex of the person meets the requirements of EU law.

Finally, another problem has arisen in **Greece**. The EU rules on the burden of proof as well as those on the standing of organisations and trade unions have been transposed in that country, although only by special legislation implementing the directives. They have not been included in the Codes of Civil and Administrative Procedure, which means that the rules are, in practical terms, almost unknown.

11.5. Equality bodies

Since 2002, by virtue of Directive 2002/73/EC, the Member States and EEA countries are obliged to designate equality bodies. The tasks of these bodies are the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex. They may form part of agencies with responsibilities at the national level for defending human rights or safeguarding individual rights. These bodies must have the competence to provide independent assistance to victims of gender discrimination, to conduct independent surveys concerning gender discrimination and to publish independent reports and make recommendations (see Article 20 of Recast Directive 2006/54/EC and Article 12 of Directive 2004/113/EC).¹¹⁸ Some engage in addition in strategic litigation (e.g. Estonia).

In order to meet these obligations, a number of States, such as **Denmark** (in 2011), **Malta** and **Spain**, have designated a gender equality body. Some States, such as **the Netherlands**, **Portugal**, **Sweden**, or **the United Kingdom**, already had a working (gender) equality body which adequately implemented Directive 2002/73/EC. **Turkey** has no equality body yet, but does have an Ombudsman.

Other States have established an equality body, not in accordance with the standards and obligations laid down in Directive 2002/73 but in response to international human rights agreements. As a result the bodies in question do not specifically and exclusively address the issue of gender equality in the light of EU law. Instead, these bodies adopt a more general human rights approach to gender equality (e.g. recently in **the Netherlands**). Interestingly, in **the United Kingdom** the opposite position has been adopted: the mandate of the equality body has been broadened and the Equality and Human Rights Commission now also addresses human rights issues.

A new development is that gender equality bodies are incorporated into a 'multiple grounds' equality body, insofar as they were not part of such a more encompassing body from the very beginning. Thus, for instance, the equality bodies in **Bulgaria**, **France**, **Germany**,

¹¹⁶ Federal Labour Court, judgment of 22 July 2010, 8 AZR 1012/08.

¹¹⁷ See Case C-127/92 *Dr Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-05535 (*Enderby*) and Case C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* [1999] ECR I-00623 (*Seymour*).

¹¹⁸ On equality bodies in general see R. Holtmaat *Catalyst for Change: Equality Bodies according to Directive 2000/43/EC* 2007, available at http://www.migpolgroup.com/publications_detail.php?id=159, accessed 31 October 2013.

Ireland, the Netherlands, Lithuania, Luxembourg and Slovenia deal with a multiplicity of grounds of discrimination in transposition of all non-discrimination directives.¹¹⁹ Also **Sweden** has recently set up a ‘multiple grounds’ Equality Ombudsman.

One of the major concerns in relation to equality bodies is indeed the *independence* of the bodies or at least their capacity to perform their tasks independently. Much here depends on, *inter alia*, the procedures for appointing the staff of the bodies, their autonomy *vis-à-vis* the Government, their mandate, their investigative powers and, last but not least, their funding. For example **Italy** has various bodies that could qualify as equality bodies under EU law, but it is not entirely clear to what extent they satisfy the EU requirements, in particular that of operating independently. In **Romania**, the equality body was closed down a few years ago and only some of its competences have been taken over by the Ministry of Labour, Family and Social Protection. Such alternative does not fulfil the requirements of independence. In **Slovenia**, the Service for Equal Opportunities operates within the Ministry of Labour, Family and Social Affairs and is not independent. In **Spain**, the Women’s Institute is part of Spain’s central Government, subject to the principle of administrative hierarchy; so its independence is not really guaranteed.

Another matter of concern is that where equality bodies deal with multiple grounds of discrimination, there are fears that this might lead to gender discrimination being marginalised.¹²⁰

The *purposes* of the equality bodies are multiple. Similarly, their *competences* often differ in accordance with their purpose. Very generally speaking, almost all equality bodies have been established to monitor national legislation and measures and to evaluate the implementation of equal treatment and non-discrimination. Most equality bodies have a responsibility to promote gender equality and conduct research in that area. Most of them may also assist victims of discrimination by providing advice, information etc. In addition, however, competences exist which go beyond what the directives require but which are of great importance for the enforcement of gender equality law.

First, some equality bodies have the authority to hear complaints on gender equality and, in some cases, to give a non-binding opinion. This is the case in, for instance, in **Austria, the Czech Republic, Denmark, Estonia, France, Greece, Iceland, Lithuania, the former Yugoslav Republic of Macedonia, Malta, the Netherlands, Norway, Spain, Sweden and the United Kingdom**. In **Cyprus**, gender equality decisions are binding on both the public authorities and between the relevant parties. In **Bulgaria**, the equality body issues binding decisions. In **Bulgaria, Hungary and Iceland** the equality body may impose fines and the **Lithuanian** authority may impose administrative sanctions. The **Irish** Equality Authority may issue non-discrimination notices; a sort of binding indication concerning the steps which have to be taken. The Authority may also refer a case to the Equality Tribunal or the appropriate court.

Second, some of the equality bodies may challenge discrimination in court, often on behalf of a particular victim and sometimes even without an actual victim. They may sometimes do so on their own initiative and in the general interest. For instance, in **Belgium, Bulgaria, and Spain**, equality bodies have standing to litigate, and in **Latvia** the equality body can act as the legal representative of a victim. In **the United Kingdom**, the Equality and Human Rights Commission cannot act on behalf of victims in the ordinary courts, although it can assist individuals in bringing claims and intervene in proceedings. **Malta’s** National

¹¹⁹ Thus also including the ‘non-gender’ directives. See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22 and Council Directive 2000/78/EC of 27 November 2000 establishing a legal framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16.

¹²⁰ See on this aspect K. Nousiainen ‘Unification (or not) of Equality Bodies and Legislation’, *European Gender Equality Law Review* no. 2/2008 pp. 24-33, available at http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 31 October 2013.

Commission for the Promotion of Equality and **Sweden's** Equality Ombudsman can only litigate with the victim's approval.

11.6. The role of the social partners

Increasingly, the social partners, alongside NGOs and other stakeholders, are also called upon to play a part in the realisation of gender equality. Member States and the EEA countries have the obligation to promote social dialogue between the social partners with a view to fostering equal treatment. This dialogue may include the monitoring of gender equality practices at the workplace, promoting flexible working arrangements, with the aim of facilitating the reconciliation of work and private life, as well as the monitoring of collective agreements, codes of conduct, research or exchange of experience and good practice in the area of gender equality. Similarly, the States are required to encourage employers to promote equal treatment in a planned and systematic way and to provide, at appropriate regular intervals, employees and/or their representatives with appropriate information on equal treatment. Such information may include an overview of the proportion of men and women at different levels of the organisation, their pay and pay differentials, and possible measures to improve the situation in cooperation with employees' representatives (see in particular Articles 21 and 22 of Recast Directive 2006/54/EC and Article 11 of Directive 2004/113/EC).

Within the Member States and EEA countries, there is a contrast between the role of social partners in relation to gender equality and the enforcement of gender equality. The important role played by collective agreements and the role of the social partners appears to be a source of concern as they often give little priority to gender equality and sometimes even contain discriminatory provisions (e.g. **Croatia**). The same holds true for the more specific issues of pregnancy, maternity, parental and paternity rights. Often the strength and resolution of the unions in negotiating different working conditions is lacking. The fact that the social partners in general are male-dominated might indeed have an influence (e.g. **Germany**).

On the other hand, where the social partners take an interest this can have some real impact. For instance, in **Denmark**, most of the EU-driven litigation has been brought by trade unions. In other countries they provide free legal counselling to their members. In some countries the social partners have been pioneers in developing better and longer family-related forms of leave (e.g. **France, Sweden**). It is indeed rather common for collective agreements to guarantee longer and better-paid maternity, parental and paternity leave. Similarly, in **the Netherlands**, social partners play an important role and collective agreements often contain supplementary rights to childcare facilities and care leave.

Furthermore, the social partners play a role in the area of equal pay. As was already pointed out above (Section 4.3.), **France** imposes the obligation to negotiate every year on equality and on the gender pay gap. Since 2004, important inter-professional national agreements aimed at promoting professional equality between men and women have been agreed on. In **Liechtenstein**, many collective agreements contain clauses on equal opportunities between men and women, including equal pay. The **Swedish** collective agreements often address gender equality in relation to wage setting and extra wages during parental leave. Also in **Spain** the social partners are under the general obligation to negotiate, in collective agreements, measures promoting equal treatment and opportunities or equality plans. In **Greece**, collective agreements have indeed often improved maternity and parenthood protection. However, since 2010, the collective agreements system – which functioned as a safety net – has been extensively amended. One of the consequences is a sharp decrease in wages, as minimum wages are now fixed by law at lower levels than those fixed by collective agreements.

In **Austria**, further measures taken at national level include the recently institutionalised annual dialogue of the Federal Chancellor with the relevant NGOs and the monitoring by Parliament of government reports. In this country, the social partners may also bring a special case before the Supreme Court to request a declaratory judgment on the existence or non-existence of certain rights which may include equality rights.

Finally, in **Portugal**, the Labour Code establishes a system for an assessment of the content of collective agreements by the CITE (*Comissão Para a Igualdade no Trabalho e no*

Emprego, a public body which deals with gender equality issues specifically in the area of work and employment), to be carried out during the first 30 days after the publication of these agreements and designed to check them for possible discriminatory clauses and to promote the elimination of such clauses by the courts.

12. Winding up: law in the books and law in practice

What conclusions can be drawn from the general overview, giving an overall impression of how the EU rules on gender equality have been transposed in the EU Member States and EEA countries? The most important one is probably that most of these rules have been transposed into national law in a satisfactory manner. The realisation of the equal treatment of women and men is certainly not only an achievement of the EU. On the one hand, at the national level the respective States may always adopt measures that are better and that go further, since, in this area, EU law lays down minimum requirements only. On the other hand, it should also be stressed that, in many respects, EU rules and case law have provided a crucial impetus for gender discrimination law in the Member States and the EEA countries.

However, a correct transposition of the EU rules into national law is not enough. As has already been observed here and there in the overview, what also matters is that the transposed rules are applied in everyday life and are effectively enforced through the appropriate mechanisms, like labour inspectorates, equality bodies and, where necessary, the courts. In other words, law in the books must also be law in everyday practice. Unfortunately the law in the books and the law in practice still differ, sometimes dramatically.

One of the basic preconditions in this respect is that not only lawyers and judges familiarise themselves with EU gender equality law. Last but not least, the broader public must be aware of their rights under EU law. The present publication is a discrete contribution to that effect.

Part II

National Law: Reports from the Experts of the Member States, EEA Countries, Croatia, FYR of Macedonia and Turkey

AUSTRIA – *Martina Thomasberger*

1. Implementation of central concepts

On the basis of the general constitutional concept of equality, equal treatment legislation for the private and the agricultural as well as for the public sector has transposed the concepts of discrimination, indirect discrimination, sex-related harassment and sexual harassment, including the instruction to discriminate, discrimination by association and victimisation. The Equal Treatment Act of 1978 was recast in 2004 in order to cover all aspects of the EU Directive concerning gender equality and anti-discrimination matters. It provides for bans of discrimination within the meaning just mentioned, applying to the essential areas of private employment and to the access to and supply of goods and services as described below. Also, in 2013 the Equal Treatment Act was amended because of the implementation of Directive 2010/41 and now includes a reference to equality measures for self-employed persons in Paragraph 4. The Equal Treatment Act outlines the same anti-discriminatory principles to be further implemented, according to the Constitution of the federal State, by the legislation of the nine provinces (*Laender*) on agri- and silvicultural employment. The Federal Treatment Act of 1993 applies to the public sector, i.e. to federal civil servants and contractual employees (*Vertragsbedienstete*); the antidiscriminatory legislation applying to the public employees of the *Laender*, comprising more than 20 statutes, is moulded along the same principles. The explicit inclusion of the ‘circumstance of having a child’, meaning biological, adoptive or foster parenthood and the obligations implied, gives the definition of indirect discrimination in the private sector an additional perspective. Most of the concepts of discrimination mentioned have been applied in cases particularly of the highest judicial instances, namely the Constitutional Court, the Supreme Court and the High Administrative Court, and furthermore by the equality bodies. The commitment of state activity at all levels to the constitutional aim of de facto equality, implemented inter alia by gender budgeting and mandatory positive action in the public sector, exceeds the requirements of EU law. The transposition of the central concepts is certainly satisfactory.

2. Equal pay and equal treatment at work

2.1. Equal pay

Transposing equal pay legislation applies to any kind of employment relationship with a private or public employer, including apprentices and trainees. In the private sector homeworkers, employees who are posted by businesses that do not have a seat in Austria and employee-like persons are explicitly included, whereas legislation in the public sector explicitly includes persons with a free employment contract. To explain this somewhat complicated definition of the personal scopes of Austrian equal treatment legislation, or at least one of its aspects, it should be pointed out that there is a basic distinction in the Civil Code between employment (labour) relationships on the one hand, and work contracts (*Werkverträge*) on the other. If a person commits herself/himself to ‘services’ (*Dienstleistung*) for another party during a certain period, this constitutes an employment (labour) contract, whereas producing a certain achievement for remuneration is agreed under a work contract. However, the relevant and intentionally flexible provision of the Civil Code lacks precision,

since it fails to define ‘services’. It has been up to the courts and to legal scholars to develop decisive criteria, now considering personal dependency as the essential criterion of an employment relationship. If there is no personal dependency, the Austrian legal system assumes a so-called free service contract (*freier Dienstvertrag*), an ‘in-between’ category regrettably not mentioned in the Civil Code. For the purposes of social security and tax law, persons with a free service contract or ‘free employees’ are considered self-employed. The General Social Security Act, applying essentially to workers, introduced a further ‘in-between’ category. Accordingly, ‘employee-like persons’ (*dienstnehmerähnliche Personen*), are defined as those free service contractees who are economically dependent and obliged to perform services essentially in person without equipment of their own, meaning that some elements of personal and economic dependency prevail over the criteria of self-employment; without being wholly dependent workers/employees, they are still subject to the workers’ regime of mandatory insurance including sickness, invalidity and old age as well as, with some modifications, maternity benefits, retirement, disability and unemployment benefits, and health insurance that also covers maternity benefits.¹

Legislation does not define pay. However, the courts and legal scholars traditionally developed a wide concept of pay that meets EU law. Equal treatment legislation explicitly prohibits pay discrimination and, in the private sector, defines work of equal value insofar as it bans criteria used in job classification systems and in collective agreements which assess the work of women and the work of men in such a way that it results in discrimination. Contravening collective agreements are null and void, as first confirmed by the Supreme Court in 1994.² In conformity with EU law and the Austrian Constitution, case law considers qualification and to some extent also seniority as an acceptable criterion for different wages. Wage transparency measures, not explicitly required by Directive 2006/54/EC but allowed as additional means, were introduced by legislation in 2011. Firstly, job advertisements for private employment have to be transparent by indicating the relevant minimum wage. Secondly, private enterprises with more than 150 employees have to establish biannual aggregations of anonymous data in a three-part structure defined by legislation for the restricted information of the works’ council and the staff; these ‘income reports’ aim at offering a gendered comparison of the job classifications applied and the wages actually paid, in an easily accessible overview. The salaries of civil servants are governed by legislation which formally does not contain gender-specific differences. However, biannual income reports for the public sector to be presented to Parliament were also introduced in 2011. Equal pay legislation is in conformity with EU law.

2.2. Access to work and working conditions

The personal scope of relevant legislation is the same as described for equal pay. However, as the definition of the substantial scope refers to the ‘world of work’ in general, additional aspects apply. The ‘world of work’ includes all forms and levels of occupational counselling, training and re-training measures for their full duration as well as the membership of workers’, employers’ or other specific professional organisations and the access to the benefits or services provided by them. Furthermore, the world of work includes the founding, establishing or extending of an enterprise, as well as taking up or expanding any other form of self-employed activity. With respect to employment relationships, the prohibitions of discrimination are worded as general clauses in order to ensure a broad interpretation to be followed by open-ended enumerations including – in addition to pay and other employers’ benefits not to be considered pay such as access to sport facilities - the conclusion and termination of the employment relationship, training within the organisation, career advancement and other working conditions. Specific provisions apply to discrimination by

¹ See for this and for further references, N. Bei ‘Austria’ in the European Network of Legal Experts in the Field of Gender Equality, M. Freedland and N. Countouris, *The Personal Scope of the EU Sex Equality Directives*, pp. 19-22, 27, The European Commission, 2012, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf, accessed 22 October 2013.

² OGH 14.9.1994, 9 Ob A 801/94.

sexual and sex-related harassment including the instruction to discriminate, and to job vacancies in the private sector, allowing gendered advertisements only if the worker's sex is indispensable for performing the work or service advertised. Comprehensive case law applies. Exceeding the requirements of Directive 2006/54/EC, in the public sector the preferential treatment of women who are as qualified as the best male applicant is obligatory in accordance with the quotas set by Affirmative Action Plans for recruitment, career advancement and for training measures; breach of this obligation amounts to discrimination. This principle has been applied by the competent equality body as well as in case law, particularly that of the High Administrative Court. Transposition is satisfactory.

2.3. Occupational pension schemes

There has been no specific transposition by amendments to the pertinent legislation which, within the broadly defined scope of employment relationships 'based on civil law', covers employers' pledges and employees' prospective entitlements in an occupational social security scheme as regards e.g. invalidity or an occupational pension scheme, the latter complementing statutory pension schemes including surviving dependants' pensions. Occupational pension schemes are typically based on collective agreements at sector or enterprise level. Legislation addresses the employer and states the principle of non-discrimination but in a general way, prohibiting arbitrary criteria. The Supreme Court's case law as well as the competent equality body's practice have clarified and confirmed that, notwithstanding the lack of an explicit rule on the equal treatment of women and men, benefits based on an occupational social security scheme were to be considered pay to which equal treatment legislation for the private sector applies.³ Not taking into account periods of occupation merely due to women's lower statutory retirement age constitutes direct sex discrimination.⁴ Specific regulations apply to pensions of civil servants, female and male civil servants paying the same contributions and retiring at the same age. Pension entitlements can be accrued during child-raising periods subject to the condition that the child has been brought up by the civil servant as the main carer for a maximum period of 48 months. This appears to surpass the minimum requirements of the Directive. Transposition is therefore satisfactory.

3. Pregnancy and maternity protection, parental leave and adoption leave

The relevant Maternity Protection Act, providing essentially for pregnant workers' protection against dismissal and their occupational health and safety, has a wide scope covering all kinds of workers in the private sector and homeworkers, but not employee-like persons (see 2.1.); modifications apply to public employees and domestic workers. Related legislation applies to the agri- and silvicultural sector. Legislation, however, does not define 'pregnant worker' nor 'pregnancy', but a definition is offered in the case law of the Supreme Court.⁵ Also, no definition is included of breastfeeding, to which no legal time limit applies. Pregnant workers are protected against notice and dismissal once the pregnancy is known to the employer; fixed-term contracts are extended by law until the maternity leave begins. Comprehensive case law applies. In any event, workers are not allowed to work in the 8 weeks before the calculated date of birth and for 8 weeks after having given birth (12 weeks in special cases such as multiple birth or caesarean section), which means that the regular duration of maternity leave exceeds Article 8 of Directive 92/85/EEC. Maternity benefits are paid by the mandatory social security health insurance schemes. Entitlement to maternity benefits requires inclusion in the mandatory schemes, which depends upon receiving regular earnings above the statutory social security threshold (for employees in 2015: EUR 405.98 per month).

³ OGH 19.3.1985, 4 Ob 31/85.

⁴ OGH 23.4.2003, 9 ObA 256/02s, directly applying Article 141 Treaty Establishing the European Community.

⁵ 12.4.1995, 9 ObA 23/95 and 16.6.2008, 8 ObA 27/08s. These are in accordance with the CJEU in Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR I-01017 (for in-vitro-fertilisation).

Employee-like persons, persons with free service contracts and self-employed persons are entitled to analogous benefits according to the applicable social security regime. Workers with earnings below the social insurance threshold can opt into a voluntary insurance coverage, which entitles them to basic maternity benefits of €8.85 per day. The legal social security schemes for self-employed persons and for self-employed farmers also include maternity benefit provisions. Under both regimes, women are entitled to hire a trained replacement to help them carry on their business during maternity protection periods. If this is not feasible, they receive a financial benefit of €51,20 per day. Parental leave including parental part-time leave for mothers is provided for by the Maternity Protection Act, for fathers by the Fathers' Leave Act. During parental leave, the employment contract as such is not interrupted, but the essential obligations which arise therefrom – work and pay – are suspended until the contract recovers after the ending of parental leave. Each parent can take up parental leave until the child is 2 years of age, various models of dividing parental leave between the parents as well as of combining parental leave with parental part-time leave apply. Parental leave can be extended by agreement with the employer until the child is 30 months old, but dismissal protection is granted only for a period of 4 weeks after the child reaches the age of two. The individual entitlement of fathers is explicitly provided for. Mothers and fathers are entitled to postpone three months of their respective parental leave until the child is seven years old. The principles described also apply to adoption, commencing on the date of the child's adoption, and to foster parents in the private as well as in the public sector. The Child Care Allowance Act provides for childcare benefits for all parents in 5 alternative forms, regardless of their prior social security status. While the legislation described essentially conforms with or even exceeds EU law, the personal scope of maternity protection legislation leaves employee-like persons unprotected in the area of occupational health and safety as well as against termination of their contract; they may fight the latter, however, as discriminatory under equal treatment legislation.

4. Statutory schemes of social security

The regular mandatory and contributions-based statutory regimes of social security are complex, each being applicable to a certain group of persons, notably workers and employees, employee-like persons, persons engaged in trade and commerce, other self-employed persons, furthermore self-employed persons as well as workers and employees in agri- and silviculture, and finally to specific groups of free professionals. Minimum thresholds apply. The different statutory schemes mentioned provide coverage for health, occupational accidents and illnesses, retirement and disability benefits. Widows' and widowers' pensions are granted if the spouse was validly married at the time of the death of the insured person or, in case of divorce, if he/she received maintenance payments from the insured person at the time of his/her death. In 2005 a major pension reform went into effect with the implementation of the General Pensions Act. Its scope covers all persons born since 1 January 2005. Its aim is to include the complete workforce after a transition period and to give them access to a publicly maintained 'Pensions Account', which presents a transparent statement of all accumulated pension entitlements and their future development. Originally, the standard retirement age in Austria was 65 for men and 60 for women. The Constitutional Court having considered the different pension age for women and men unconstitutional in 1990, legislation provided for a step-by-step system gradually adapting women's regular statutory age of retirement to that of men.⁶ The transition period for equalising the standard retirement age will be from 2024 to 2033. Pension entitlements can be accrued during child-raising periods equally by women and men subject to the condition that the child has been brought up by the insured person as the main carer for a maximum period of essentially 48 months per child. Contribution-based unemployment insurance covers the unemployment of workers and employees and of employee-like persons. Civil servants are not covered by unemployment insurance. Self-

⁶ VfSlg 12568/1990.

employed persons can opt into unemployment insurance and collect benefits in cases where the business cannot be carried on. Unemployment benefits are granted from 20 to 52 weeks according to the age and insurance duration of the beneficiary and can be followed by special assistance benefits. In 2011, the social welfare Acts of the provinces providing for additional social assistance were supplemented by a system of needs-based minimum benefits, the basic benefit amounting to EUR 794.91. An assessment of the complex legislation described as to its apparently overall conformity with EU law seems difficult. Two judicial decisions dealing with the same facts, which were subject to the preliminary ruling in *Waltraud Brachner v Pensionsversicherungsanstalt*,⁷ may highlight problem areas in the intricately interrelated provisions on unemployment benefits and pensions, in particular the entitlement of women to unemployment assistance depending on their spouse's income, which constitutes indirect discrimination.⁸

5. Self-employed persons

Self-employment is essentially defined by the relevant social security legislation. The general provisions in this field cover entrepreneurial activities in trade (industry), defining their personal scope inter alia by reference to the mandatory membership of the Chambers of Commerce and furthermore to tax legislation when providing for mandatory social security. They also apply to 'free employees', i.e. persons with free service contracts who are also considered self-employed by tax law, and to the free professionals under the group-specific social security legislation mentioned above. In principle, being self-employed by definition excludes being an economically dependent worker or semi-dependent employee-like person to whom a quite different scheme of mandatory social insurance applies; in case of doubt or in case of multiple activity, multiple insurance under both schemes is mandatory. However, with the exception of the equal treatment legislation mentioned which applies to the access to self-employment and transposes Directive 2010/41/EU, there is no legislation explicitly banning sex-based discrimination of self-employed persons. As for maternity protection and benefits for self-employed women, see Section 3 above. Helping spouses are covered by the pertinent social security schemes, but there is no obligation for cover guaranteeing independent entitlement. Helping in the enterprise of one's spouse is still a legal part of spousal duties as defined by the Marriage Act. However, the helping spouse is entitled to an adequate remuneration combined with social security registration in cases where their contribution reaches the extent of a proper working relationship. The status as a helping spouse alone does not create individual rights. The notion of 'self-employed worker' (Article 2(a) Directive 2010/41/EU) appears to be contradictory by the standards of the Austrian legal system and is therefore not easily transposed. There seems to be broad consensus among practitioners that further transposing legislation would not be necessary. However, it could be argued that it might be required to expand existing equal treatment legislation for the private sector to ensure equal pay and non-discriminatory working conditions of self-employed persons to give the Directive full effect.

6. Goods and services

The Goods and Services Directive was transposed in 2008. The personal scope is stipulated in the most inclusive and general way possible ('a person' and 'nobody'). The substantive scope provides for the principle of equality including positive measures and prohibitions of discrimination including discrimination by sexual or sex-related harassment as well as victimisation, applying to the access to and the supply of goods and services which are available to the public and apt to be subject of legislation either of the federal State (e.g. civil-law contracts in general, insurance, right to lease an apartment) or of the nine provinces (e.g.

⁷ Case C-123/10 *Waltraud Brachner v Pensionsversicherungsanstalt* [2011] ECR I-10003.

⁸ High Administrative Court 25.1.2011, 2007/08/0035; Supreme Court 6.12.2011, 10 Ob S 129/11k.

childcare facilities). Exceptions are made for private and family life, for the content of media and for advertisements as well as for public and private education. Furthermore, the unequal supply of goods and services does not constitute discrimination if the difference made is justified by a legitimate aim, whose means are adequate and necessary. In addition, the Directive was transposed by amendments to the legislation on private insurances. Relevant cases concerned in particular regimes linking the access to public transport to the different regular statutory ages of retirement of women and men, instead of to whether a person has actually retired or not.⁹ The CJEU ruling in *Test-Achats* was taken into account in the most recent legislative amendment. The former regime of applicable amendments was replaced by the rule that ‘the factor sex may not lead to different premiums or benefits’.

7. Enforcement and compliance aspects

Persons who feel discriminated against on grounds of sex may seek counselling and support from the formally independent Ombudspersons for Equal Treatment Affairs or may ask the competent Equal Treatment Commission for a – legally non-binding – opinion. Claims aimed at the enforcement of rights deriving from any employment relationship have to be filed at the specialised Labour and Social Courts, claims aimed at enforcement of rights in connection with the access to goods and services at the Civil Courts. As to insurances, individuals may claim compensation and consumers’ organisations may claim any other omission before the Civil Courts. Sanctions (damages, financial compensation, restitution *in natura*) in cases of discrimination differ according to the form or area of discrimination and whether there is material and immaterial damage, pay differences or inclusion in social benefits at enterprise level. Measures against victimisation are provided by the prohibition of dismissal or other adverse treatment as a reaction to a complaint of the complainants, of witnesses or other persons who act as supporters. The burden of proof shifts to the defendant in a claim filed by a discriminated person if the alleged victim of a violation has presented credible facts and circumstances, whereas the defendant has to provide evidence that it is less probable that the decision under dispute was based on the sex of the person.¹⁰ In all the proceedings mentioned, the alleged victims of discrimination may formally be supported by a non-governmental organisation, explicitly mandated by legislation, and by the Ombud. The social partners are involved in the enforcement of equality rights as members of the Equal Treatment Commissions, by granting their members cost-free legal counsel as well as representation before the Labour and Social Courts, by direct involvement as lay judges in the Labour Courts’ senates. Finally the collective bargaining partners are entitled to bring a motion for a declaratory judgment to the Supreme Court on the question of the existence or non-existence of rights, which has to be of interest to a minimum of three employees or three employers. Further measures to be mentioned are the recently institutionalised annual dialogue of the Federal Chancellor with the relevant NGOs, the monitoring by governmental reports to Parliament and the competences of the Equal Treatment Ombud to request administrative penalties up to EUR 360 for non-compliance with the provisions on job advertising. Overall, the enforcement appears to be satisfactory. An assessment is difficult, however, insofar as there are no statistics on judicial decisions and as the dual system of enforcement, before the Courts on the one hand and the Equal Treatment Commission on the other, has become fraught with technical details subject to debate.

⁹ Opinions of the Equal Treatment Commission for the private Sector GBK III/51/09, III/54/09, III/69/10, 31.5. 2011; Constitutional Court 15.10. 2010, V 39/10-13, V 40/10-13.

¹⁰ Under the softened provisions of the Recast Directive, the Austrian probability proof seems to be allowed (‘in accordance with their national judicial systems’) as more favourable as it is considered an alleviation for the plaintiff. See OGH 9.7.2008, 9 ObA 177/07. The Supreme Court’s decision notwithstanding, this has remained, a most controversial point among Austrian legal scholars and practitioners.

8. Overall assessment

The overall assessment of the transposition of the relevant Directives by Austrian legislation and case law is positive. However, doubts may be expressed regarding the exclusion of employee-like persons from the Maternity Protection Act particularly in occupational health and safety, and regarding the exclusion of self-employed persons (including persons with free service contracts) from equal pay protection in the private and in the agricultural sector. It might be mentioned moreover, that, in the public and agricultural sectors, separate equal treatment legislation of the nine federal provinces or *Laender* is necessary, slowing down transposition and complicating assessment. Regarding the casuistic and diversified if not fragmented personal scope of Austrian labour law and social security legislation, similar conclusions might be drawn.

BELGIUM – Jean Jacqmain

1. Implementation of central concepts

The principle of equality under the law is enshrined in the Constitution, with the prohibition of discrimination as a corollary. The distinction between direct and indirect discrimination was introduced in compliance with EU law, including the successive definitions of indirect discrimination (from Directive 97/80/EC to Directive 2006/54/EC), and these notions are commonly accepted. However, the settled case law (be it constitutional, civil or administrative) considers that any discrimination, direct or indirect, is potentially justifiable.

This contradiction with the CJEU's stance induced the following artificial solution, embodied in the new anti-discrimination legislation of 10 May 2007 (three Acts aimed respectively at implementing Directive 2000/43/EC, Directive 2000/78/EC, and all the gender equality directives). A difference is made between 'distinction' and 'discrimination': discrimination is a distinction which cannot be justified; when the object of a direct distinction falls within the scope of EU law, there is direct discrimination for which no justification is permissible, unless the Act provides otherwise (see below), while if the object does not fall within the scope of EU law, i.e. exclusively under national law, even a 'direct distinction' can be justified. Case law grounded on the new antidiscrimination legislation is still rather scanty, but there are signs that the law courts do not understand such subtleties and that the protection provided by EU law is thus weakened.

Following the scheme explained above, positive action is regarded as a lawful justification for a 'direct distinction'. There is no requirement of positive action; on the contrary, the Gender Act of 10 May 2007 imposes a set of conditions (developed previously by the Constitutional Court in a matter unrelated to EU law) which fits the CJEU's case law, but is expressed in rather a forbidding way.¹¹ The implementation of the legal provision is conditional on an ancillary Royal Decree which has not yet been promulgated, so that the lawfulness of positive actions which had been undertaken under the previous (and less restrictive) gender equality legislation is uncertain.

¹¹ The provision (Article 16) in the Gender Act reads: 'Any measure of positive action may only be implemented under the following conditions: there must be a manifest inequality; the disappearance of that inequality must be designated as an objective to be reached; the measure of positive action must be temporary by nature and designed to cease as soon as the objective has been reached; the measure may not restrict other persons' rights needlessly'. Moreover, 'In compliance with [those] conditions, [a Royal Decree] will define in which hypotheses and under which conditions any measure of positive action may be implemented'. Such Royal Decree has not yet been adopted. See also: European Network of Legal Experts in the field of Gender Equality, *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards*, September 2011, Belgium at pp. 42-47, http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf accessed 19 February 2014.

Regarding instructions to discriminate, the Act of 10 May 2007 includes the necessary provision to comply with EU law (such instructions are forbidden), but there is no significant related case law.

Belgian law preceded EU law in equating sexual harassment with sex discrimination, but more recently Directive 2002/73/EC (now integrated in Directive 2006/54/EC) introduced a distinction between sexual harassment and gender-related harassment. The present Act of 10 May 2007 complies with the distinction. However, Belgium possesses, within the Well-Being at Work Act of 4 August 1996 (i.e. the legislation aimed at protecting health and safety at work), a complete set of provisions devised for the prevention of and redress for harassment and sexual harassment regardless of the perpetrator's motives. Regrettably, the Act of 10 May 2007 provides that when the victim of harassment/sexual harassment is an employee, she/he must rely exclusively on the Act of 4 August 1996 to obtain protection or redress. Preventing the victim of a gender discrimination which consists of harassment/sexual harassment from relying on the Gender Act appears completely at variance with EU law. Moreover, in contrast with the Act of 2007, the Act of 1996 did not provide any minimum amount of fixed damages as compensation for moral prejudice; this shortcoming was finally corrected by the Act of 28 March 2014.

2. Equal pay and equal treatment at work

2.1. Equal pay

Equal pay is guaranteed both by Collective Agreement No. 25 of the National Labour Council (only applicable to the private sector) and by the Act of 10 May 2007 (which includes the public sector, but with the restriction explained in 2.2. hereafter). Taken together, both instruments cover all the aspects of the notion of pay within the scope of EU law, such as remuneration proper, be it *in specie* or *in natura*, tips, various bonuses, etc. and they include job classification schemes. However, the Act of 10 May 2007 does not mention work of the same value (obviously a mere omission).

The case law on equal pay is extremely scanty. In a couple of cases, the courts accepted that a difference in education was a justification for unequal pay, without checking whether such a criterion was relevant to the job in question.

Although all sectors of activity are encouraged by the Federal Government to develop gender-neutral job classification schemes and the social partners endeavoured to promote such developments when they updated Collective Agreement no. 25 in 2008, the process is very slow and progress reports are not readily available.

Recently, the Act of 22 April 2012, 'aimed at fighting the pay gap between men and women', amended various pieces of legislation in order to induce the social partners (in the private sector) to make fresh efforts: e.g. joint sector committees will have to revise their job classification systems to ensure that they are gender neutral; in individual enterprises, works councils will consider the necessity for a plan aimed at developing a gender-neutral pay structure, etc. However, various technical defects in the drafting of that Act hampered its implementation, so that it had to be amended by the Act of 12 July 2013 (for instance, the Act of 22 April 2012 referred to various pieces of legislation that had already been replaced by newer ones). Moreover, the implementation of the Act of 22 April 2012 required a number of ancillary Royal Decrees, which were only promulgated on 25 April 2014.

2.2. Access to work and working conditions

It should be made clear that given the federal structure of Belgium, vocational orientation and training fall within the exclusive jurisdiction of the federate authorities, which is also true for various other matters such as education (including school staff) or public housing (within the scope of Directive 2004/113/EC). This causes extreme confusion and some significant gaps still remain in the transposition of EU law, although since 2008 every one of the federate authorities have adopted new legislation, usually inspired by federal legislation. Certain (but not all) of those new decrees (*décrets/decreten*) or orders (*ordonnances/ordonnanties*) refer to

Directive 2006/54/EC. Curiously, the federal Gender Act of 10 May 2007 does not; a formal rather than a substantive omission.

With these serious qualifications, Belgian law fits the substantive and personal scopes of the directives, as (within the Federal Parliament's jurisdiction) the Act of 10 May 2007 covers all types of employment relations, in the private and public sectors, and in all their aspects of recruitment, working conditions and dismissal. As to self-employed persons, the Act guarantees equal treatment not only in access to professions, but also in access to partnership in associations of practitioners.

The exceptions which the directives allow (positive action; protection of maternity; positions for which sex is a determining factor) are accepted by the Act of 10 May 2007 as 'justifications of direct distinctions' (see 1. above). However, positions for which sex is a determining factor must be listed in an ancillary Royal Decree which has not been adopted yet.

Moreover, the Act provides that the protection of maternity, far from being discrimination, is a condition for an effective equal treatment of men and women.

2.3. Occupational pension schemes

The provisions of the Act of 10 May 2007 are a carbon copy of those of Directive 2006/54/EC. Concurrently, the Occupational Pension Scheme (Employees) Act of 28 April 2003 complies with the Directive. In that way, Belgian law covers the substantive scope of EU law, prohibiting gender discrimination in all occupational schemes (which, in Belgium, may only supplement the statutory social security schemes).

However, as to personal scope originally the Act of 10 May 2007 did not deal with occupational schemes for the self-employed. This gap has been filled by an amendment to the Act, inserted by an Act of 8 June 2008.

Both Acts (of 2003 and 2007) make use of the faculty of exceptions offered by Article 9(1) i) and j) of the Directive, concerning a limited use of gender-related actuarial factors.

The validity of the same exceptions, both in the Directive and in national law, has been called into question by a CJEU ruling,¹² but no attention has been paid to that development by the Belgian authorities.

There was some case law concerning occupational social security benefits which were related to the different ages of retirement in the statutory pension scheme, but as from 1 January 2009 this age is now 65 for men as well as women (see 4. below), so that there no longer is any litigation in that respect.

3. Pregnancy and maternity protection, parental leave and adoption leave

As to the protection of pregnancy and maternity, the Working Conditions Act of 16 March 1971 (which is applicable to all employers and employees, private and public, in the whole country) provides for a 15-week period of maternity leave, of which the last week preceding the delivery and the nine subsequent weeks are compulsory; extra weeks are available under certain circumstances. An employee who is pregnant or has given birth may only be dismissed on grounds which are unrelated to her physical condition. The right to return to the same job is not formally guaranteed, but the employer's failure to reinstate the employee would be seen as being equivalent to her dismissal. During the maternity leave, tenured staff members in the public services remain entitled to their normal remuneration; the other employees (in the public and private sectors) receive social security benefits equal to 82 % of the gross remuneration (i.e. 100 % of the net remuneration) during the first 30 days and 75 % during the remainder of the leave.

Shortcomings of the protective system concern the lack of statutory provisions to guarantee that the absences related to maternity are taken into account for the entitlement to benefits such as a Christmas bonus, and the amount of the fixed damages to be paid by the

¹² In case C-227/04 P *Lindorfer v Council of the European Union* [2007] ECR I-6767.

employer in the case of an unlawful dismissal (six months' pay) is hardly an effective deterrent. Moreover, entitlement to social security benefits is conditional on having contributed to the Sickness Insurance Scheme for a minimum of 6 months, so that it may occur that an employee does not receive any benefit during maternity leave.

As to the other leave regimes, there are provisions for parental leave (a personal right for any employee for a child under 12, or 21 if he/she is disabled; 4 months full-time or 8 half-time or 20 one-fifth time; with a modest benefit paid by social security; and protection against dismissal); for adoption leave (a personal right for any employee; 6 or 4 weeks when the child is less or more than 3 years old; with the normal remuneration for 5 days and then the same social security benefit as during maternity leave; and protection against dismissal); for paternity leave (a personal right; now also accessible to the same-sex spouse or life partner of the mother; 10 days to be used during the 4 months following the birth; with the normal remuneration for 3 days and then the same social security benefit as during the maternity leave; and some protection against dismissal); and time off (a personal right; 10 days per year; unpaid and without benefit; and no protection against dismissal). Provisions for the last three forms of leave are more generous in the public sector.

4. Statutory schemes of social security

The Act of 10 May 2007 contains a prohibition of discrimination in statutory schemes of social security. The substantive and personal scope is wider than in Directive 79/7/EEC as family benefits and survivors' benefits are included as well as annual holidays and holiday bonuses (in Belgium, a statutory scheme for employees), and the retirement pension scheme for tenured staff members in the public services (which the CJEU's case law would regard as occupational).

Up to the Act of 2007, there were no such general provisions, but various statutes and regulations had been brought into line with the Directive, so that the implementation is adequate, although some limited gaps can still be identified (e.g. apprentices under 18 in small businesses are regarded as dependent children under the Healthcare and Sickness Insurance scheme; consequently, during maternity leave a female apprentice is not entitled to maternity benefits, which are paid by that Insurance, so that the leave is unpaid, an eventuality which cannot affect a male apprentice).

The main objects of debate are, firstly, the weakness of retirement benefits for employees and the self-employed, which are a function of the average earnings over the whole career. Given the pay gap between active men and active women and the negative impact of interruptions in the career due to the unbalanced sharing of family responsibilities, the dimension of *de facto* indirect gender discrimination is obvious. And secondly, the desirability of substituting individual rights for dependents' rights, as the latter may be regarded as a consecration of women's subordinate position (i.e. relying on widows' pensions rather than personal retirement benefits).

Belgium made use of the exceptions concerning the age of retirement and the related duration of a full career until 1996; as from 1997 the differences were progressively reduced and since 1 January 2009, the age is 65 and the full career 45 years for both sexes in the employees' and self-employed persons' schemes (there has never been any difference in the public service scheme).

5. Self-employed persons

Aspects relevant to Directive 2006/54/EC and Directive 79/7/EEC have been mentioned in 2.2., 2.3. and 4.

A limited scheme of maternity leave has been introduced. Presently, its duration is eight weeks, of which five are optional and may be divided into single weeks; a benefit (EUR 440.50 per week) is paid by the maternity branch of the healthcare sickness scheme.

Initially, access to the sickness (and maternity) scheme was made available for helping spouses on a voluntary basis. More recently, affiliation to the whole system of social security for the self-employed was made compulsory for helping spouses.

Obviously, the compulsory affiliation goes much further than the requirements of the Directive.

6. Goods and services

The Act of 10 May 2007 implements the Directive in a rather literal way, although its scope does not exclude education and the media. Some protection against victimisation is provided, as well as minimum fixed damages as a means of redress. There are provisions for positive action (see 1. above) and for goods and services meant for one sex (but the latter must be listed in a Royal Decree which has not yet been drafted).

As to the use of gender-related actuarial factors in insurance, the original Article 10 of the Act provided that it was only permitted until 20 December 2007. However, an Act of 21 December 2007 amended Article 10 so that the exception remained in force (for life insurances only), with a number of safeguards aimed at complying with Articles 5(2) and 16(1) of the Directive. When a consumers' rights association challenged the Act of 21 December 2007 in the Constitutional Court, the latter referred the case to the CJEU for a preliminary ruling. After the latter's decision in case C-236/09 *Test-Achats*,¹³ the Constitutional Court's judgment no. 116/2011 annulled the Act of 21 December 2007 from the same date.

Finally, an Act of 19 December 2012 redrafted Article 10 of the Gender Act to extend the prohibition of the use of gender-segregated actuarial factors to life insurance as from 21 December 2012, while preserving existing contracts within the limits which the European Commission had suggested in its Guidelines of 22 December 2011.

7. Enforcement and compliance aspects

The provisions on victimisation (a prohibition of dismissal or of a negative modification of the employment conditions, unless for reasons unrelated to the employee complaining of discrimination) are standard in labour law and are well understood by the courts. However, when the employer fails to reinstate the employee in the job or subject to the previous conditions, the standard amount of fixed damages (six months' pay) is no deterrent.

The provisions on the burden of proof are a copy of those in Directive 2006/54/EC (the claimant must adduce *prima facie* evidence of discrimination, after which the defendant must demonstrate that there is no discrimination). The related case law is still rather scattered, but recently courts have tended to pay closer attention to elements which the defendants, i.e. employers, produced as evidence of the absence of discrimination.

The Act of 10 May 2007 has improved previous provisions on remedies and sanctions in order to make the courts' power to issue injunctions to put an end to discriminations more effective. There is no case law as yet in that respect. The Act also introduced a long-awaited minimum amount of fixed damages (six months' pay) to be allowed as compensation for the moral damage due to discrimination (unless the victim can demonstrate that the damage is greater). Again, such an amount is hardly a deterrent (see 3. above).

Access to the courts fits the requirements of the directives, which the Act of 10 May 2007 closely follows. Within the scope of the directives, any person claiming to be a victim of gender discrimination may bring an action at the Labour Courts. Moreover, if the source of discrimination is a decision of a public authority, the victim may apply to the *Conseil d'État/Raad van State* for its annulment. Access to the courts is also granted to associations which aim at promoting human rights or combating discrimination.

¹³ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

There is a gender equality body, the Institute for Equality of Women and Men, entrusted with the missions required by the directives and in addition endowed with the power to commence proceedings.

Apart from Collective Agreement (CA) No. 25 on Equal Pay (see 2.1.), updated by CA No. 25ter of 9 July 2008, one can hardly say that the social partners have been very active in the promotion of gender equality. Legislative provisions do not go beyond recognising their capacity to have standing in the courts (in order to assist their individual members or to defend their collective interests) and requiring that they be consulted before Royal Decrees implementing the Act of 10 May 2007 are promulgated.

Collective agreements are contracts between their signatories, but those provisions which improve the employees' individual rights are automatically extended to the whole workforce in question. CAs may be made generally binding by way of Royal Decrees, so that an employer who fails to comply at the same time commits a misdemeanour. CAs are not applicable in the public sector, which uses different systems of collective negotiation.

Again, CA No. 25 must be quoted, as well as some collective agreements which include provisions on positive action, but generally, no great improvements in gender equality have been achieved through such instruments.

Effective implementation of the new Pay Gap Act of 22 April 2012 (see 2.1) will be a test for the social partners' motivation to achieve more decisive results.

8. Overall assessment

Belgium started building up its gender equality legislation in 1978. Over the years, quite an extensive body of case law has been developed but, apart from some pioneers, genuine awareness among practitioners (judges, lawyers, legal advisors with the trade unions and employers' associations) is quite a recent (and welcome) phenomenon. As to the legislation itself, the Act of 10 May 2007 is one element in an ambitious attempt to construct a comprehensive anti-discrimination system and implement European law at the same time. The above comments have expressed misgivings as to the excessive complexity of certain key concepts and case law tends to reveal that they are not ill-founded. It is also regrettable that, six years after the Gender Act of 10 May 2007 came into force, several ancillary Royal Decrees which are necessary for its proper application have not been adopted yet (e.g. concerning positive action, see 1.). Finally, the implementation of EU law in federal Belgium remains crippled by the multiplicity of competent authorities.

BULGARIA – Genoveva Tisheva

1. Implementation of central concepts

Most of the central concepts of the EU gender equality *acquis* were fully transposed in the Bulgarian legislation prior to the EU accession in 2007.

The definitions of direct discrimination and indirect discrimination correspond to the EU definitions. The prohibition on discrimination (as '(...) any limitation of the rights or any privileges') is declared in Article 6(2) of the Bulgarian Constitution. The Law on Protection from Discrimination (LPFD) contains the prohibition on discrimination on a broad range of grounds, including on the ground of gender. It also contains the definitions of direct and indirect discrimination. Direct discrimination represents any less favourable treatment of a person than another person is, has been or would be treated under comparable circumstances. Indirect discrimination is to place a person in a less favourable position in comparison with other persons by means of an apparently neutral provision, criterion or practice, unless the said provision, criterion or practice can be objectively justified in view of a lawful aim and the means for achieving this aim are appropriate and necessary. The Labour Code ensures special protection against direct and indirect discrimination, including that based on sex, in the exercise of labour rights and obligations.

The case law of the Commission for Protection from Discrimination (KZD) and of the courts has so far mainly dealt with the notion of direct discrimination. The possibility to apply positive action measures for achieving gender equality is provided for in the Law on Protection from Discrimination. Such measures are allowed along with measures in favour of disadvantaged groups in general. Thus positive action measures in favour of the under-represented sex may be taken in education and training for ensuring a balance in the participation of men and women, and as special measures for individuals or groups of persons in a disadvantaged position. In the sphere of employment relations, positive action can be taken for encouraging persons belonging to the less represented sex to apply for a certain job or position and for encouraging the vocational development and participation of workers and employees belonging to the less represented sex.

The positive action measures which are allowed in the process of hiring for positions in state and local government administration are in compliance with EU standards. It is a pity, though, that in 2006 the possibility for applying a quota system for the participation of women and men in managing and advisory bodies was abolished. This amendment, made with the justification 'to achieve compliance with EU law', in practice deprived Bulgaria of a much needed tool for achieving gender equality, which is allowed by the EU's case law.

Following an amendment of the law from August 2012, it is not considered discriminatory to treat people differently in relation to initiatives mainly or exclusively promoting entrepreneurship among women, when they are the less represented sex, or for avoiding or compensating for disadvantages in a professional career.

In conclusion, the Bulgarian legislation on positive action goes beyond the employment sphere and thus beyond EU standards. In the employment sphere, the regulation of positive action measures for the under-represented sex is an obligation of the employer.

The case law of the Commission for Protection from Discrimination and of the courts has so far focused on gender quotas in the education system. The Commission ruled in favour of such quotas in languages and teaching university subjects in order to avoid further sex segregation in the labour market (the decision was confirmed by the Supreme Administrative Court). The case law of the civil courts is rather contradictory.

The Bulgarian notion of harassment and sexual harassment corresponds to EU standards. Harassment and sexual harassment are explicitly forbidden and defined by the Law on Protection from Discrimination. Moreover, Bulgarian law goes beyond the regulation of harassment at the workplace and also extends the protection to harassment in educational institutions. The case law consists of court cases and cases before the equality body, initiated by women concerning sexual harassment and there is a tendency that the number of such cases is increasing. There are still gaps in the practical implementation: there are delays in proceedings and the application of the burden of proof principle is not in full compliance with EU standards.

As to the instruction to discriminate, it is explicitly recognised as discrimination and means direct and intentional encouragement, giving an instruction, exerting pressure or persuading someone to engage in discrimination where the instigator is capable of influencing the person instigated.

2. Equal pay and equal treatment at work

2.1. Equal pay

The EU standards of equal pay are fully transposed in Bulgarian legislation. The principle of equal pay is regulated in the Labour Code and in the Law on Protection from Discrimination. The employer shall ensure equal remuneration for equal or equivalent work. It shall apply to all types of pay – remuneration, paid directly or indirectly, in cash or in kind. The notion of equal pay includes the assessment criteria in determining the labour remuneration and the assessment of the work performance. These criteria shall be equal for all employees and shall be determined by collective labour agreements or by internal administrative rules regarding salaries. There is a specific procedure for the assessment of civil servants.

In principle, no justifications for differences in pay for women and men are accepted. This is confirmed by the case law of the Commission for Protection from Discrimination (e.g. *Devnya Cement* – Decision of the CPFD No. 29/4.07.2006, confirmed by Decision No. 10594/1.11.2007 of the Supreme Administrative Court).

The law provides for the possibility of more advantageous working conditions in relation to different working experience or seniority, when it is objectively justified for achieving a legitimate aim with the means deemed necessary.

There is a big gap between the formal recognition of the equal pay principle and its implementation in practice. No specific legislative or policy measures were adopted to address the gender pay gap.

2.2. Access to work and working conditions

The protection given by the Bulgarian legislation in the field of access to work and working conditions is almost in full compliance with the EU equal treatment directives. The main guarantees are given by the Law on Protection from Discrimination, supplemented by the guarantees of the Labour Code (for the labour contracts) and by the respective provisions of the Law on Civil Servants.

The protection provided by the law covers all aspects of working life and is extended to all types of employment relations, including those in the armed forces, with the exception of activities and posts where sex constitutes a determining factor. The protection also covers civil service relationships. In addition, Bulgarian law also contains protection against discrimination in unemployment.

As an exception, different treatment is allowed by reason of the nature of a particular occupation or activity, or of the conditions under which it is performed, gender characteristics constitute an essential and decisive occupational requirement, the aim is legitimate and the requirement does not go beyond what is necessary for its achievement. Two ordinances by the Minister of Labour and Social Policy and by the Minister of Defence determine lists of activities where sex represents such a requirement. More concrete exceptions are provided in cases of occupational activities and religious education or training at religious institutions or organisations.

The detailed regulation of the exceptions goes beyond EU law and presents a risk of non-compliance with the requirements for legitimacy and proportionality – namely, the exceptions based on religious considerations cannot be *a priori* justified.

The case law in the field of equal treatment is scarce and consists mainly of cases before the Commission for Protection from Discrimination.

2.3. Occupational pension schemes

From the beginning of 2000, the pension system in Bulgaria consists of three pillars. The model was based on the World Bank's advice and is different from the pillars in the EU countries. The first pillar is the universal social security fund, a 'pay as you go' type, which is obligatory for persons in an employment relationship or self-employed persons. The second pillar is a mandatory and fully-funded pension fund with defined contributions which are allotted to individual accounts run by licensed pension insurance companies. The third pillar includes supplementary voluntary pension schemes.

In Bulgaria there are no second pillar pension schemes comparable to the type of occupational pension schemes recognised in EU law. Provisions for the establishment of occupational pension schemes are contained in the Social Security Code within the third pillar. These schemes are not yet developed in Bulgaria.

3. Pregnancy and maternity protection, parental leave and adoption leave

Under Bulgarian law, the employer is obliged to adjust the working conditions for pregnant or breastfeeding women while retaining the same salary level. If such an adjustment is not possible, the employer shall grant leave to the woman in question. The period of maternity leave is currently 410 days, 45 of which are prior to giving birth and adoptive mothers can

benefit from this right as well. This extended leave was introduced in January 2009 and the change was justified by demographic considerations, as Bulgaria is the country which is most severely affected by the demographic crisis in Europe. The effects of this measure can be seriously doubted, because a maternity leave period which is too long may harm gender equality in general and the possibilities of Bulgarian women in the labour market in particular. Despite this, the recent changes in the Labour Code and in the Law on Protection from Discrimination at least reveal a development in Bulgarian legislation, shifting from a focus on special protection of women as mothers towards reconciliation measures ensuring more equality both for women and men. In fact, after the child is 6 months old and with consent of the mother (or adoptive mother), the father (or adoptive father) is allowed to use the remaining leave, instead of the mother.

In all other areas, maternity protection is ensured according to EU requirements. For example, the maternity benefits amount to 90 % of the salary and the protection of a pregnant woman from dismissal is almost absolute. Bulgarian women on maternity leave as well as fathers on paternity and childcare leave are explicitly recognised as having the right to return to their job or to an equivalent post and to benefit from improvements in working conditions. In August 2012 salary increases were excluded from the improvements those returning to work are entitled to.

After the end of the maternity leave period, and up to the second year of the child, the parents have a transferable right to childcare leave paid on the basis of the minimum social security benefits. This leave is mainly used by mothers and can also be used by the grandparents of the child. It corresponds to the Bulgarian tradition of grandmothers' support in child rearing. As to parental leave, this was introduced in August 2004 and amended in 2012 in order to achieve compliance with the new Parental Leave Directive. Both biological and adoptive parents of a child between 2 and 8 have, in principle, a non-transferable right to an unpaid parental leave of up to six months. The right to the parental leave cannot be used before the child turns 2. In addition, each of the parents can use up to 5 months of the leave of the other parent upon his/her consent. Parents using parental leave are not explicitly guaranteed the right to return to their job or to an equivalent post. The provisions on parental leave, on the one hand, are therefore more favourable because of the length of the leave but, on the other hand, are not in full compliance with EU standards.

Paternity leave was recently recognised under Bulgarian law. When the parents are married or live together, the father has the right to 15 days' paternity leave upon the birth of the child.

A recent provision of the Labour Code – Article 164b LC¹⁴ – introduces a new type of leave: paid leave for raising an adopted child between the ages of 2 and 5. The adoptive mother has the right to a leave of up to 365 days, and starting 6 months after the adoption of the child; the rest of the leave can be transferred to the father.

Workers and employees who return from maternity, paternity or parental leave have the right to require temporary adjustments of their working arrangements with their employer, in view of reconciliation of their work and family life.

During maternity/childcare leave and the 15 days' paternity leave, the mother and the father are insured under the Code of Social Insurance. The compensation is generally equivalent to 90 % of the average salary received in the previous 18 months. There is an absolute ban on dismissal of a worker or employee on maternity or childcare leave, except in cases where the enterprise has to close down. Legislative changes were adopted at the end of 2009 in the Labour Code, in the Law on Protection against discrimination and in the Law on Public Servants. It guarantees protection against discrimination in the labour market for female workers and employees who are in the advanced stages of assisted reproductive in-vitro treatment. Their rights were made consistent with those of pregnant female workers and employees and with those who are breastfeeding. The protection covers a period up to 20 days from the aspiration of the ova until the transfer of the embryo. The protection corresponds to

¹⁴ SG 104/2013, in force since 1 January 2014.

the principle of protection of pregnant women rather than to the general principle of equal treatment for men and women, as adopted in the *Mayr* case.¹⁵

4. Statutory schemes of social security

Statutory social security schemes in Bulgarian law are formally in compliance with EU standards.

Equality between insured persons, thus also gender equality, is among the guiding principles of the Bulgarian social security system.

According to Article 2 of the Bulgarian Social Security Code (SSC), public social insurance provides benefits, allowances and pensions for: (1) temporary disability; (2) temporarily reduced working capacity; (3) disablement; (4) maternity; (5) unemployment; (6) old age and (7) death. The law differentiates between the benefits of persons insured against all social insurance risks, those insured against employment injury and occupational diseases and persons insured against disablement by general sickness, old age and death (Articles 11-13 SSC). The main reasons to exclude people from receiving benefits are unpaid social security contributions and participation in non-remunerated jobs. Since women prevail in such jobs, they are more often deprived of social security.

With respect to the exclusions, the main one is maintaining the difference in the pensionable age for men and women. By the date of the adoption of the SSC, this age was fixed at 60 years and 6 months for men and 55 years and 6 months for women. Since December 2000 this age has gradually been increased by 6 months for both men and women from the beginning of each year until 63 years for men and 60 years for women is reached. In 2011, changes in the law provided for a smooth increase of the pensionable age both for women and men with 4 months per year from 2012, to 63 for women and 65 for men by 2020. Nevertheless, the increase of the pensionable age was temporarily 'frozen' for 2014 by the Law on the Budget of Social Security for this year,¹⁶ until a new solution can be found in the near future.

The difference in pensionable age is allowed by EU standards but equalisation of it is currently a focus in EU policy. Despite this, lower and different pensionable ages are justified in Bulgaria due to the hardships of the transition and the heavy burden on a generation of working people during this period. The very high level of youth unemployment is another reason for maintaining this pensionable age.

According to the regulations in force, both the first and the second pillar of the Bulgarian pension system belong to the statutory social security. In the second pillar – the additional mandatory and privately managed second tier of the statutory pensions – the insurance companies use gender-related actuarial factors. This is in contradiction with the EU law on equality in statutory pensions. As the Bulgarian second pillar comprises all women and men born after 1960, inequality affects a great number of women. A case was brought before the Supreme Administrative Court against gender-related actuarial factors.

Instead of the system of universal family benefits, targeted family assistance schemes were introduced in Bulgaria. The latter are not based on equality principles but on purely economic criteria.

5. Self-employed persons

Bulgarian legislation is partly in compliance with the minimum standards of the EU. Gender equality in self-employment and the status of helping spouses are not explicitly regulated. Since August 2012, no direct or indirect discrimination is allowed in the public or economic sector in relation to the establishment, equipment or development of an economic activity or

¹⁵ Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR I-01017.

¹⁶ See: Law on the Budget of social security for 2014, Paragraph 4 p. 33, available at: <http://www.tita.bg/page/315>, last accessed 18 April 2014.

any other form of similar activity. Harassment and sexual harassment are explicitly banned in these areas too.

The general provisions of the LPFD and of the Social Security Code remain the only reference to equality in self-employment. Except for freelancers and artisans, there is no clear and explicit definition of self-employed persons as a specific group. The unclear status of helping spouses reflects on their social security status.

There is a guarantee for the rights of those categories of self-employed persons who are registered under the Social Security Code and under the Ordinance on the Social Insurance of Self-Insured Persons and Bulgarian citizens working abroad. For them, mandatory social security schemes do exist. Self-employed women are entitled to compensation for pregnancy and maternity under these schemes. Voluntary social security pension schemes were introduced with the Social Security Code and they are open to all persons in a position to pay the contributions. Namely, spouses of persons registered as practitioners of a liberal profession and/or a skilled craft and registered agricultural producers, with their consent when acting in the course of their work, may voluntarily pay contributions at their own expense for insurance against disability due to general sickness, old age and death, and against general sickness and maternity.

According to the Law on Family Assistance for Children, both categories of women – self-employed persons and helping spouses – are eligible for the allowances for pregnancy and giving birth, and for the targeted child allowances.

6. Goods and services

Equality in the access to and provision of goods and services is guaranteed by the Law on Protection from Discrimination. The private insurance schemes which represent the third pillar of the social security system also fall under the scope of the services directive and are in compliance with its equality principles. No explicit or implicit protection is provided for transsexual people.

Since the end of 2007, the LPFD allows differential treatment in the provision of goods and services in accordance with EU law – when the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Maintaining proportionate differences in individuals' premiums and benefits is no longer allowed since the beginning of 2013.

Media and advertising are not expressly excluded. Despite this, offensive, sexist and discriminatory advertisements, especially of some alcohol brands, are still distributed and left unpunished.

7. Enforcement and compliance aspects

The enforcement mechanisms are new for Bulgarian law and are not yet sufficiently effective, although Bulgaria has achieved a good level of harmonisation with the formal EU requirements. Persons whose rights are violated have access to the courts (with the application of the Civil Procedural Code, CPC) or to the Commission for Protection from Discrimination (with the application of the special procedure under the LPFD, the Administrative Procedural Code and the CPC). In the procedure for protection against discrimination persons who consider themselves to be victims of discrimination have to *prove* (instead of just *establish*) facts from which it may be presumed that there has been discrimination (Article 9 of the Law on Protection from Discrimination). Then the burden of proof falls upon the respondent and he/she has to prove that there has been no breach of the principle of equal treatment. Based on actual practice regarding cases of discrimination based on sex, it can be concluded that the lack of full compliance in the definition of the burden of proof is highly problematic for the protection of the rights of women.

Persons who have or are supposed to have instigated an action against discrimination, or those who intend to instigate such an action, are explicitly protected against discrimination.

The Commission for Protection from Discrimination was created in 2005 as an independent jurisdiction under the law, and its mandate covers all types of direct and indirect discrimination prohibited by law and by international instruments to which Bulgaria is a party. The Commission has broad competences, including initiating discrimination cases of its own volition and assisting the victims of discrimination in bringing a claim. The administrative procedure before the Commission is very flexible and easy to follow by the petitioners. Upon the identification of a discriminatory act, the Commission has the power to impose fines. The latter are higher in cases of repeated acts of discrimination. The decisions of the Commission can be appealed before the Supreme Administrative Court.

Discrimination cases can be brought before the Commission or before the courts but compensation can only be ordered by the civil courts. The procedure for awarding compensation is based on tort law provisions and principles. The general level of compensation, as well as compensation awarded for discrimination, is still very low in Bulgaria and is not proportionate to the damage suffered by the persons whose rights have been violated. The enforcement of sanctions is not effective and they do not have a dissuasive effect.

A positive element in the court procedure is the possibility for trade unions and civil society organisations to join or initiate a discrimination case on behalf of a person who has been discriminated against. When the rights of many individuals are violated, the organisations mentioned can initiate the discrimination procedure before the court.

The Commission is not a body that deals with the promotion, monitoring or analysis of equal treatment based on sex and therefore does not yet fulfil all the requirements for equality bodies dealing with gender equality.

The social partners in Bulgaria do not yet play an important role in the enforcement of gender equality law. Collective agreements that are binding for the respective sectors do not generally have gender equality elements and do not promote gender equality.

8. Overall assessment

The implementation of gender equality standards in Bulgaria is satisfactory and this is mainly due to the adoption of a comprehensive anti-discrimination law and to the establishment of the Commission for Protection from Discrimination (KZD). However, parental leave provisions have to be made effective and the length of maternity leave should be more balanced to offer better possibilities for reconciliation. The protection of mothers and fathers returning from childcare leave and parental leave should be strengthened too. The mechanisms for ensuring equal pay and for addressing the gender pay gap should be put in place. The protection of self-employed persons and helping spouses must be explicitly and further regulated. The definition of the burden of proof in the law and its effective application need serious improvement. The effectiveness of sanctions and the level of compensation in cases of discrimination remain a serious issue and further developments in case law will be the driving force of improvement. In the case of the adoption of a special gender equality law, a special equality body will be established and the enforcement and overall protection will improve as well. Such a law is expected, which should also regulate the role of the social partners in the enforcement of gender equality.

The Bulgarian social security system is not compatible with the EU social security model and respective standards. The occupational social security schemes are part of the third pillar and are not yet developed. The second pillar in Bulgaria belongs to the statutory social security but the insurance companies managing this second tier use gender-related actuarial factors. Discrimination in this second pillar should be eliminated. The Bulgarian second pillar (the additional obligatory contributions of persons born after 31 December 1959) belongs in practice to the first pillar. The discrimination identified with the use of gender sensitive actuarial factors in the Bulgarian second pillar, is therefore in practice discrimination in the first pillar – statutory social security.

1. Implementation of central concepts

Croatian anti-discrimination legislation in general is based on the constitutional guarantee of equal rights and gender equality. Along with freedom, national equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system, these two values are the highest values of the constitutional order and grounds for interpretation of the Constitution (Article 3 of the Croatian Constitution). All persons in the Republic of Croatia are guaranteed enjoyment of rights and freedoms on equal footing, with an open-ended enumeration of prohibited discriminatory grounds (Article 14 of the Constitution). Anti-discrimination legislation in Croatia includes special Acts, such as the Anti-Discrimination Act (ADA) and the Gender Equality Act (GEA), as well as anti-discriminatory provisions in other Acts, such as the Labour Act (LA), the Act on Forms of Same-Sex Cohabitation, the Criminal Code, the Constitutional Act on the Rights of National Minorities, etc. The first Gender Equality Act was adopted in 2003 and was in force until the adoption of a new Gender Equality Act in 2008. On 1 January 2009, the Anti-Discrimination Act entered into force, as a horizontal Act in the field of equal opportunities which includes an exhaustive list of 21 discriminatory grounds (gender, race, ethnic origin, skin colour, language, religion, political or other opinion, national or social origin, property, trade union membership, education, social status, marital or family status, age, health, disability, genetic heritage, gender identity and expression, or sexual orientation) and prescribes judicial protection in discrimination cases. It was amended in 2012 to remove any existing conceptual inconsistencies with the EU *acquis* in the field of gender equality.¹⁷

The concepts of direct and indirect discrimination are aligned with the relevant EU directives and defined nearly identically in the GEA and the ADA, with some grammatical discrepancies. Direct discrimination means any less favourable treatment on grounds of sex (GEA) or other discriminatory grounds (including sex, ADA) where one person is treated, has been or would be treated less favourably than another person in a comparable situation. In comparison, the Act on Forms of Same-Sex Cohabitation includes only past and present behaviour within the definition of direct discrimination. Indirect discrimination under the GEA exists where a neutral provision, criterion or practice puts persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. This definition refers to the present condition ('puts'), as opposed to a grammatically more precise comparable provision from the ADA ('puts or would put'), which includes also future hypothetical situations within the definition of indirect discrimination. Although there is no case law which addresses this issue, it is highly unlikely that the courts would adhere to the strict grammatical interpretation of the provision from the GEA.

The GEA introduces the concept of 'specific measures', as temporary benefits for persons of one gender, which are not deemed as discrimination and whose aim is to achieve true gender equality in practice. They are laid down in laws and other regulations regulating specific areas of public life. The GEA contains general directions for the implementation of such measures, in that it requires that those measures shall serve to promote equal participation of women and men in legislative, executive and judicial bodies, including public services, and to gradually increase the participation of the underrepresented sex in order for its representation to reach the level of its percentage in the total population of the Republic of

¹⁷ Act on Amendments to the Anti-Discrimination Act (*Zakon o izmjenama i dopunama Zakona o suzbijanju diskriminacije*) Official Gazette of the Republic of Croatia (*Narodne novine*) No. 112/12. The amendments entered into force on 19 October 2012.

Croatia.¹⁸ Specific measures are to be introduced when one gender is ‘substantially underrepresented’. Substantial underrepresentation of one gender in decision-making bodies in political or public life exists where representatives of that gender account for less than 40 %. This provision was drafted in accordance with the Council of Europe Committee of Ministers’ Recommendation REC(2003)3 to Member States on balanced participation of women and men in political and public decision-making. In the area of employment, public administration bodies and legal persons that are majority-owned by the State shall apply specific measures and adopt action plans for the promotion and establishment of gender equality.¹⁹ Protection of women, in particular in relation to maternity and pregnancy, is not deemed to be discrimination.²⁰ Specific temporary measures in relation to all discriminatory grounds from the ADA, which are necessary and appropriate for achievement of equality and which are based on laws, by-laws, programmes, measures or decisions, are prescribed as exceptions from discrimination in accordance with Article 9(2)(3) ADA.

Instruction to discriminate is regulated in the GEA, the ADA and the Act on Forms of Same-Sex Cohabitation under the broader term ‘incitement’ (Croatian: *poticanje*) to discriminate. However, there are discrepancies between the GEA, on the one hand, and the ADA and the Act on Forms of Same-Sex Cohabitation, on the other. Namely, incitement of another person to discriminate is deemed as discrimination only if it is done intentionally.²¹ An equivalent provision was contained in Article 4(1) ADA until intent was erased as constitutive element in the 2012 amendments to this Act. The justification for this amendment was found in the necessity to complete the transposition of Directives 2000/78 and 2000/43, which do not mention intent either. Intent is not a constitutive element of incitement to discriminate under the Act on Forms of Same-Sex Cohabitation either. The definitions of harassment and sexual harassment in the GEA and the ADA show some grammatical and linguistic discrepancies, which should not, however, have any relevance for interpretation of their scope. The ADA literally transposes the definition of harassment from Directives 2000/43 and 2000/78, but it also includes the definition of sexual harassment aligned with Directives 2004/113 and 2006/54. The definition of harassment and sexual harassment from the GEA refers to the creation of an ‘unpleasant’ rather than an ‘intimidating’ environment as a result of harassment or sexual harassment, which creates a necessity for extensive interpretation of these two concepts.

2. Equal pay and equal treatment at work

2.1. Equal pay

The notion of ‘pay’ in Croatian labour legislation is defined in the context and for the purposes of implementation of the equal pay principle. It includes the basic wage and any other consideration in cash or kind, which the worker receives directly or indirectly in respect of his/her employment from the employer, based on the employment contract, collective agreement, employment rules or other regulations (Article 83(3) LA²²). Pursuant to Article 83(1) LA, an employer shall pay equal pay to women and men for equal work and work of equal value. Paragraph 2 of the same Article clarifies and describes what is understood under the concepts of equal work and work of equal value. It seems that the Croatian judiciary takes a predominantly formalistic approach in equal pay cases and overemphasises the importance of a comparator. For example, the claimant will be required to prove that the respondent should have treated him/her equally to another person in a comparable situation, whereby any difference in formal requirements overturns comparability (e.g. where a job classification system exists, any formal difference might exclude comparability). The performance of actual tasks will be relevant only where there is no legally prescribed salary classification system.

¹⁸ Article 12(1) GEA.

¹⁹ Article 11(1) GEA.

²⁰ Article 9(3) GEA.

²¹ Article 6(5) GEA.

²² *Zakon o radu*, Official Gazette of the Republic of Croatia Nos. 149/09, 61/11, 82/12 and 73/13.

Otherwise, the employer will be found in breach of a specific obligation arising out of binding legislation or subordinate regulations if they disregard the salary classification system.²³

2.2. Access to work and working conditions

Article 13 of the GEA prohibits any gender-based discrimination in employment and occupation in accordance with Article 14(1)(a)-(d) of the Recast Directive 2006/54 but also extends it to cover discrimination in relation to the balance between a professional and private life and pregnancy, giving birth, parenting and any form of child custody rights. Article 8(1)(1) of the ADA defines its material scope of application in relation to work and working conditions, access to self-employment and occupation, including selection criteria, recruiting and promotion conditions; access to all types of vocational guidance, vocational training, professional improvement and retraining. Article 9(2)(4) ADA transposes Article 14(2) of the Recast Directive by stipulating that if an otherwise discriminatory characteristic represents a genuine and determining condition for performing a certain job, which arises out of the nature of that job, it is deemed to be a derogation from the prohibition of discrimination, provided that its objective is legitimate and the requirement is proportionate. Since the ADA is a general horizontal Act in the field of anti-discrimination, this exception applies to all discriminatory grounds covered by it, not just gender. The concept of positive action is transposed in the more neutral meaning of ‘specific measures’ designed to promote true equality in practice (see explanation in Section 1).

2.3. Occupational pension schemes

The ADA and the GEA do not differentiate between public social security systems and professional or occupational ones. Nevertheless, voluntary pension schemes financed by the employer under the so-called third pension pillar are an example of occupational pension schemes. The new Act on Voluntary Pension Insurance Funds²⁴ specifically refers to the transposition of Recast Directive 2006/54 and Directive 2010/41. It expands the provision on gender equality from the previous Act on Compulsory and Voluntary Pension Insurance Funds,²⁵ in that it requires that the application of the statutes of the closed voluntary pension funds shall not directly or indirectly cause any differential treatment of men and women or allow inequalities in rights from the voluntary pension insurance based on gender. Examples of prohibited differential treatment are enumerated in a non-exhaustive manner to include access to membership; compulsory or optional nature of participation; laying down different rules regarding access to membership or the minimum period of membership required to obtain the benefits; setting different conditions in the event of suspension of rights, during maternity leave or taking care of children; different conditions applicable only to members of one sex upon termination of membership; etc. This provision almost *verbatim* transposes Article 9(1) (a) to (k) of Recast Directive 2006/54. As always when such approach in transposition is used, there are discrepancies in the wording that may result unintentionally from translation and simplification. In any case, only practice will show whether true compliance with Article 9 of Recast Directive 2006/54 has been achieved, and what is ‘lost’ in translation should be interpreted in line with Recast Directive. For example, different rules

²³ For example, in case VS RH Revr-1676/09 the claimant asserted having been paid less for work of equal value, when she actually performed tasks of a higher skilled worker. The Court concluded that since the determination of salary in public services is prescribed by law (categories and coefficients), the respondent may only pay the claimant in accordance with her qualifications, because they would otherwise contravene the explicit and legally binding rule. See also the decision of the Constitutional Court, U-III/579/2008 of 15 April 2010. In VS RH Revr-246/10 the formal job classification was deemed crucial for denying comparability. For a contradictory approach, see the ruling in equal pay case VS RH Revr-135/09, where it was concluded that the title of the job or its classification do not automatically give the right to be paid equally to another worker with the same job title, but that the pay depends on actual work and tasks performed by a particular worker. However, a difference in formal qualifications will overturn comparability and justify difference in pay.

²⁴ *Zakon o dobrovoljnim mirovinskim fondovima*, Official Gazette of the Republic of Croatia No. 19/14.

²⁵ *Zakon o obveznim i dobrovoljnim mirovinskim fondovima*, Official Gazette of the Republic of Croatia Nos 49/99, 63/00, 103/03, 177/04, 71/07, 124/10, 114/11 and 51/13.

for the ‘reimbursement of contributions’ from Article 9(1)(d) of the Recast Directive are transposed as different rules in relation to ‘expected rights’ upon termination of membership in Article 183(2)(1) of the Act on Voluntary Pension Insurance Funds. This is a rather vague term and it is questionable whether it includes reimbursement of contributions as well. However, since Article 183(2) of the Act on Voluntary Pension Insurance Funds, like Article 9(1) of Recast Directive 2006/54, contains ‘examples’ of discrimination, it calls for the widest possible interpretation. This means that other discriminatory behaviour, which is not expressly mentioned, could also be sanctioned.

3. Pregnancy and maternity protection, parental leave and adoption leave

The central Act which regulates pregnancy and maternity protection, parental and adoption leave is the Act on Maternity and Parental Benefits.²⁶ In line with the Croatian pro-natal family policies, the wide scope of beneficiaries under this Act includes employed persons, self-employed persons, farmers, persons with the recognised status of unemployed person and pensioners. Rights granted to the mother and father of a child, adoptive parent, guardian, caretaker or any other natural person entrusted by the competent authority to take care of a child take the form of time off from work (e.g. maternity leave, parental leave, part-time work, breastfeeding leave, time off for ante-natal examinations, and adoption leave) as well as cash benefits. The Act was last amended in 2013, to further align it with the provisions of Directives 92/85/EEC, 2010/18/EU and 2010/41/EU.²⁷ The minimum duration of parental leave was extended from three to four months for each employed or self-employed parent (i.e. parental leave is now eight instead of six months), of which two months are non-transferable to the other parent (usually the mother). The aim of this measure is to motivate fathers to take parental leave. Parental leave is 30 months for twins, and for the third and each consecutive child. The Act does not explicitly refer to the non-transferable two-months rule. It only states that both parents typically use 4 or 15 months of leave, depending on the number of children. According to the practice of the Croatian Institute for Health Insurance (CIHI), the fact that the duration of parental leave is 6 months when only one parent uses the leave makes it clear that two months are non-transferable. However, there is no explanation for this (non)transferability when it comes to parental leave for twins, and for the third and consecutive children. Adoption leave is granted for a period of six months, regardless of the age of the adopted child. Length of service qualification for cash allowance (salary compensation) for employed or self-employed parents is a minimum of 12 months of uninterrupted service or 18 months with interruptions in the last two years. Otherwise, a person is entitled to an allowance of 50 % of the average calculation base (Article 24(8) of the Act on Maternity and Parental Benefits).

Specific prohibition of pregnant women in labour relations is prescribed in the LA, ranging from access to employment and working conditions to termination of the employment relationship. An employer must not refuse employment to a woman nor dismiss her because she is pregnant, nor ask any information about her pregnancy, unless the pregnant worker is personally seeking to acquire a certain pregnancy-related right (Article 68(1) and (2) LA). Pregnant women or women who are breastfeeding are entitled to be transferred to another appropriate position at their request, whereas the employer is obligated to transfer them to another appropriate position if the health of the woman or the child is endangered. In both instances, the new position shall be at least equally paid.²⁸ The absolute ban of dismissal applies during pregnancy, maternity/parental/adoption leave, part-time work, work with reduced working hours due to increased care for a child, leave of absence of a pregnant woman or breastfeeding mother, leave of absence or work with reduced working hours due to

²⁶ *Zakon o roditeljnim i roditeljskim potporama*, Official Gazette of the Republic of Croatia Nos. 85/08, 110/08, 34/11 and 54/13.

²⁷ *Zakon o izmjenama i dopunama Zakona o roditeljnim i roditeljskim potporama*, Official Gazette of the Republic of Croatia No. 54/13.

²⁸ Article 69 LA.

care for a child with developmental disabilities, and during 15 days after termination of a pregnancy or any of those rights.²⁹ However, all these circumstances do not prevent the expiration of a fixed-term contract (Article 71(3) LA).

The LA prescribes the right of the worker to return to the previous or to an equivalent post (if the necessity for the previous job in the meantime has ceased to exist) on terms and conditions which are no less favourable to that worker after the end of maternity/parental/adoption or other forms of childcare leave (Article 73(1) LA). The Constitutional Court ruled that where a person was not returned to the previous or an equivalent post (where another person filled that post and there were no equivalent posts due to restructuring) after maternity leave, this constituted an infringement of the constitutional right to equality and the right to work.³⁰ The worker is also entitled to additional vocational training and to benefit from any improvement in working conditions.³¹

There is an inconsistency between the Labour Act and the Act on Maternity and Parental Benefits regarding night work of pregnant workers, and workers who have recently given birth or are breastfeeding. Namely, the latter Act is in line with Directive 92/85, whereby the workers concerned may be exempted from night work subject to submission of a medical certificate, whereas under the Labour Act they are required to submit a medical certificate in case they would like to do night work.

The latest amendment of the Occupational Safety and Health Act was adopted to finalise harmonisation with Directive 92/85.³² It now prescribes in detail the obligations of the employer to take the measures necessary to protect pregnant workers and workers who have recently given birth or are breastfeeding against health or safety risks at work.

4. Statutory schemes of social security

Although there are no specific guarantees of equal treatment in legislative instruments regulating social security benefits (i.e. the Pension Insurance Act, the Statutory Health Insurance Act, the Act on Employment Mediation and Unemployment Benefits, etc.), the general provisions of the GEA and the ADA cover this field and fully implement Directive 79/7. Between 2010 and 2030, the different pensionable ages for male and female workers and self-employed persons (currently the only exception from Directive 79/7 in Croatian legislation) will be gradually equalised and the retirement age increased from 65 to 67 (for both sexes) by 2038.³³ The right of women to continue working even after reaching the currently prescribed retirement age for women (until reaching the retirement age currently prescribed for men) has been confirmed in a judgment of the County Court in Varaždin.³⁴ Examples of less favourable positions of women in statutory sickness insurance in practice include lower salary compensation for sickness, when a woman takes sick leave (e.g. to take care of a sick child) in the six months after her return from parental leave. This is because sickness benefits are calculated in the range of 100 % to 70 % of a calculation base – the average salary paid in the six months prior to the month in which sick leave is taken, depending on the reason for sick leave. However, the calculation base for the sickness benefits of a woman who returns from parental leave and who takes sick leave to take care of a sick child under three will include the average amount of cash allowances received during parental leave (which cannot be more than 80 % of the calculation base, i.e. currently around EUR 355 (HRK 2 660), resulting in much lower sickness benefits than those calculated from

²⁹ Article 71(1) LA.

³⁰ Constitutional Court, U-III/5/2007 of 29 October 2009.

³¹ Article 73(3) LA.

³² *Zakon o izmjenama i dopunama Zakona o zaštiti na radu*, Official Gazette of the Republic of Croatia No. 143/12.

³³ *Zakon o mirovinskom osiguranju*, Official Gazette of the Republic of Croatia No. 157/13.

³⁴ County Court Varaždin, Gž-473/03 of 20 December 2002. One of the grounds for termination of employment contract under the LA is when a worker (male or female) reaches the age of 65 and 15 years of service, unless the parties agree otherwise. Therefore, a female worker reaching the statutory retirement age for women is entitled to retire, but may not be forced by the employer to do so (as is often the case in practice).

the average salary. Since only around 3 % of fathers take parental leave, female workers are usually more affected by this provision.

5. Self-employed persons

The status of self-employed parents regarding maternity/parental rights is equal to that of parents who are employees (Article 9(1) of the Act on Maternity and Parental Benefits), provided that they have the status of insured person in the compulsory health and pension insurance. Self-employed parents within the meaning of the Act on Maternity and Parental Benefits include persons who themselves perform certain activities. Consequently, the position of female spouses of self-employed workers (including non-marital spouses) is determined according to their own employment, self-employment, unemployment or other status within the meaning of the Act on Maternity and Parental Benefits. Under the Crafts Act³⁵ (Article 30) members of the craftsman's family (spouse, children, parents, adoptive parents, adopted children, children of a spouse and other dependent family members) are entitled to help the craftsman with the performance of his activities (without having to be employed by him). However, there is no provision granting the spouses of self-employed workers social protection or maternity benefits based exclusively on this family relationship. These entitlements are provided in accordance with their personal status in the statutory insurance (i.e. pension, sickness, unemployment).

6. Goods and services

Both the ADA and the GEA implement Directive 2004/113 within their respective fields of application. Both Acts also go beyond the scope of application of this Directive. Article 6(1) GEA generally prohibits any form of gender discrimination in practically all spheres of life (with further provisions specifically referring to media and education), whereas Article 8(1)(8) ADA specifically refers to the access to and supply of goods and services. The latter also explicitly mentions that it is aligned with Directive 2004/113 (Article 1.a ADA). Exceptions to the general prohibition of discrimination on particular discriminatory grounds (Article 9 ADA) were amended and redefined in 2012. A provision which stipulated that the differences in premiums and benefits where the use of sex was a factor of calculation was not deemed to be discrimination was removed with effect from 30 June 2013, in view of the decision of the Court of Justice of the EU in *Test-Achats*.³⁶ Age as a factor of calculation still remains an acceptable exception (Article 9(2)(6) ADA). In addition, any less favourable treatment in the access to and supply of goods and services and sports shall not be deemed discriminatory, if the provision of the goods and/or services is reserved exclusively or primarily to members of one sex or persons with disabilities, provided that such treatment is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

7. Enforcement and compliance aspects

Victimisation in relation to sex discrimination and other discriminatory grounds is prohibited within the material scope of application of the GEA and the ADA respectively. Article 2 of the GEA provides that no one shall suffer adverse treatment for giving a statement before competent bodies as a witness or victim of sexual discrimination or for alerting the public to sexual discrimination. Article 7 of the ADA provides protection against victimisation in a more detailed manner, specifically mentioning reporting or witnessing discrimination,

³⁵ *Zakon o obrtu*, Official Gazette of the Republic of Croatia No. 143/2013.

³⁶ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

refusing to comply with the discriminatory order or participating in any other proceedings in connection with discrimination.

The wording of the two main anti-discrimination laws in Croatia, the ADA and the GEA, on the burden of proof slightly differs, which may lead to inconsistent interpretation. Under Article 20 ADA, a party claiming discrimination does not have to prove it with any degree of certainty – it suffices to establish probability (Croatian: *učiniti vjerojatnim*) that the discrimination occurred (‘shall make it plausible that discrimination has taken place’), while the respondent has to prove the opposite with sufficient degree of certainty. Failing this, it is considered that the right to equal treatment was violated.³⁷ In two Supreme Court cases Gž-25/11 and Gž-41/11 (involving discrimination based on sexual orientation) the rules on the burden of proof were interpreted so as to shift the burden of proof to prove that there had been no discrimination by the respondent, when the meaning of the statements made was obvious in itself (degradation and humiliation).³⁸ This interpretation seems to come close to the burden of proof provision from the GEA, although its wording is formulated much more broadly. According to Article 30(4) GEA a party claiming that his/her right has been violated has to present facts which raise the suspicion that discriminatory behaviour has occurred; the burden of proof then shifts to the opposing party who has to prove that there has been no discrimination. Theoretically, this is an even lighter burden than proving the probability under the ADA.

A victim of discrimination is entitled to seek damages in accordance with the general provisions for compensation of damages. The GEA and the ADA prescribe sanctions for violations of its provisions (punishable as a misdemeanour) in the form of monetary fines. Sexual harassment is also punishable under the Criminal Act (Article 156).

Apart from special legal action for the protection against discrimination, the ADA authorises any person who claims that his/her rights have been violated as a result of discrimination to seek protection in proceedings deciding upon that right as the main issue.³⁹ The GEA authorises any party who considers that her/his rights have been violated due to discrimination described in that Act to file a legal action before the regular court of general jurisdiction,⁴⁰ in other words, to initiate litigation before a municipal court. Pursuant to Article 24(1) ADA, associations, bodies, institutions or other organisations set up in accordance with the law and having a justified interest in protecting collective interests of a certain group, or those which within their scope of activities deal with the protection of the right to equal treatment, may bring a legal action against a person that has violated the right to equal treatment. Representative action is a collective remedy available under the GEA as well, but the general conditions are prescribed in the ADA. So far, it has predominantly been used by associations fighting against discrimination based on sexual orientation.⁴¹

Enforcement of the GEA is entrusted to the Office for Gender Equality and the Ombudsperson for gender equality, as well as other bodies at regional and local levels. The office for Gender Equality is a technical service of the Government for the implementation of activities related to the enforcement of gender equality. The Ombudsperson for gender equality is an independent body in charge of combating discrimination in the field of gender equality. Its tasks include receiving complaints of and providing assistance to natural persons

³⁷ Whereas the first-instance court in this case found that the probability of discrimination requirement had not been satisfied, the appellate court was of the opinion that it was enough for the claimant in a representative action to present the respondent’s statement to the court and concluded that the ‘purposive meaning of that statement was evident in itself: humiliation and degradation of that category of persons’. The claimant showed with probability that discrimination of the target group occurred as a result of that statement, which was enough for the burden of proof to shift to the respondent.

³⁸ In both cases, which share the same factual background, the first-instance courts concluded that the claimants did not make discrimination plausible, i.e. did not show probability that the respondent’s statement had caused direct discrimination. See judgments of the County Court in Zagreb Pnz-8/10 and Pnz-7/10. There are no similar reported cases on the burden of proof involving gender discrimination.

³⁹ Article 16(1) ADA.

⁴⁰ Article 30(1) GEA.

⁴¹ See for example County Court in Zagreb Pnz-8/10 and Pnz-7/10.

or legal entities in the field of gender discrimination, investigating individual complaints prior to the legal proceedings and conducting mediation processes with the consent of the parties, as well as collecting and analysing statistical data on cases of sexual discrimination and conducting independent surveys concerning discrimination, publishing independent reports and exchanging available information with corresponding European bodies. State administrative bodies are obliged to appoint a gender equality coordinator. Local and regional self-government units are required to establish committees for gender equality.

Social partners are obliged to comply with the provisions of the GEA and measures for achievement of gender equality when conducting collective negotiations and concluding collective agreements (CAs) at all levels. CAs are binding on their parties. The general conclusion from the analysis of the CAs in view of gender equality, equal opportunities and work-life balance conducted by the Ombudsperson for gender equality in 2009 is that social partners need further instructions regarding the legal framework for equal treatment and equal opportunities, given that many CAs themselves contain provisions that generate inequalities based on sex.⁴² Out of 120 CAs analysed, only seven contained provisions on equal pay and only in a general manner. The monitoring mechanisms for this obligation are completely lacking. Pursuant to the ADA, the Public Ombudsman shall consult social partners (representative associations of trade unions and employers of a higher level) and civil society organisations when drawing up regular reports, opinions and recommendations on the occurrence of discrimination. The Ombudsperson for gender equality has no equivalent obligation.

8. Overall assessment

The EU gender equality *acquis* in general has been properly transposed in the existing legislative instruments. However, the two horizontal acts (GEA and ADA) may cause confusion, since there are discrepancies between them regarding the definitions of the key legal concepts (i.e. discrimination, harassment, burden of proof, etc.). The proper implementation in actual practice takes time. It is still hard to evaluate the capacity of the national judiciary to apply gender equality law. The case law in this field is still scarce, despite the fact that gender continuously ranks among the top three of discriminatory grounds, according to various studies.

CYPRUS – Lia Efstratiou-Georgiades

1. Implementation of central concepts

Equality between men and women is safeguarded by the Constitution of the Republic of Cyprus. Article 28(1) of the Constitution prohibits any direct or indirect discrimination against any person, *inter alia*, on grounds of sex (Article 28(2)). The main concepts of the EU gender equality *acquis* have gradually been embodied in Cypriot legislation.

The following Laws have transposed into national legislation the provisions of Directives 75/117/EEC, 2002/73/EC and 86/378/EEC and the provisions of Recast Directive 2006/54/EC:

- Equal Pay between Men and Women for the Same Work or for Work to which Equal Value is Attributed Law No. 177(I)/2002 transposed Directive 75/117/EEC. Amendment Law No. 38(I)/2009 transposed relevant provisions of the Recast Directive;
- Equal Treatment of Men and Women as regards Access to Employment and Vocational Training Law No. 205(I)/2002 transposed Directive 2002/73/EC. Amendment Law No. 39(I)/2009 transposed relevant provisions of the Recast Directive;

⁴² <http://www.prs.hr/index.php/analize-i-istrazivanja/obrazovanje-3/180-analiza-kolektivnih-ugovora>, accessed 3 June 2013.

- Equal Treatment of Men and Women in Occupational Social Insurance Schemes Law No. 133(I)/2002 transposed Directive 86/378/EEC. Amendment Law No. 40(I)/2009 transposed relevant provisions of the Recast Directive.

Law No. 205(I)/2002 as amended by Law No. 39(I)/2009 includes the definition of the concepts of direct and indirect discrimination on the ground of sex, of harassment and of sexual harassment, which are the same as in the relevant directives. Positive action is expressly permitted in these laws, but the laws do not mention any special measures. The laws prohibit instruction to discriminate.

The provisions of the above laws have satisfactorily transposed the relevant directives. There are no cases on the matters covered by the laws, except the cases related to pregnancy, child-birth, motherhood or illnesses caused by pregnancy or childbirth.

2. Equal pay and equal treatment at work

2.1. Equal pay

Law No. 177(I)/2002 as amended by Law No. 38(I)/2009 requires employers to apply equal pay for men and women for the same work or for work of equal value. The purpose of the Law is to ensure the principle of equal pay between men and women for the same work or for work of equal value. It prohibits any discrimination on the ground of sex as regards all terms and conditions of pay for the same work or for work of equal value.

The Law abolished all direct or indirect discrimination between men and women that appeared in collective agreements or individual contracts of employment. References to male-female positions in collective agreements and contracts have been abolished. Employers are obliged to take all proper measures which promote equality between men and women and also to promote social dialogue, provisions which are relevant to Article 157 TFEU. The maximum rights enjoyed by one sex shall also apply to the other sex.

The Law covers all categories of employees, men and women, for all activities related to employment, who work or undergo training at work as apprentices on a full-time or part-time basis, for a fixed term or for an indefinite period, irrespective of the place of employment, but not including the self-employed. In the public and semi-public sectors equal pay is applied to all jobs and levels. Unfortunately, most employers in the private sector do not have job classification or job description schemes nor have they conducted an evaluation of every profession or post for the purpose of defining what is the same work or work of equal value.

Where a system of professional classification is used for the determination of pay, such a system must be based on common criteria for all employees, men and women and must exclude any discrimination based on the ground of sex (Article 5(1) and (2) of the above Law).

Amendment Law No. 38(I)/2009 transposed Directive 2006/54/EC and rephrased articles, also for the purposes of implementing Article 20 of the Revised European Social Charter.

The Law authorises the Minister of Labour and Social Insurance to fix minimum wages for a limited number of low-paid jobs by issuing an order.

The Law does not affect the provisions of the Protection of Maternity Law No. 100(I)/1997, as amended or the provisions of the Parental Leave and Leave on grounds of Force Majeure Law No. 69(I)/2002, as amended.

Amendment Law No. 38(I)/2009 also provides that ‘Pay includes the usual basic or minimum wages or emoluments and any other additional benefits, paid directly or indirectly, either in money or in kind, by the employer to the employee, based on the employment relationship’. Furthermore, this Law obliges employers to give information to employees or their trade union about equality of wages, including the percentage of men/women at the various levels of the business, of any differences in wages and possible measures to improve the situation in cooperation with the unions.

2.2. Access to work and working conditions

Law No. 205(I)/2002 as amended by Law No. 39(I)/2009 includes provisions which ensure the implementation of the principle of equal treatment between men and women without direct or indirect discrimination, specifically in the field of access to employment, terms and conditions of employment, dismissal and vocational training.

The Law covers all workers (men and women) who work under a contract of employment, either fixed-term or for an indefinite period, either full-time or part-time. The Law has excluded from its scope of application those occupational activities where the sex of the worker constitutes a determining factor and specifies reasons for the exclusion of such activities. The Law also lists occupations falling within this latter category, i.e. home care of old or disabled persons, prison guards, private security bodies, and artistic performers.

2.3. Occupational pension schemes

In Cyprus there is a clear distinction between statutory pension schemes and occupational pension schemes. The occupational pension schemes cover employees in the public service and in the broader public sector. Also, under the category of occupational pension schemes fall the voluntary provident fund schemes and other similar pension schemes.

Occupational pension schemes provide for benefits in case of old age, including early retirement, death, the interruption of employment due to maternity, sickness or invalidity, industrial accidents and occupational diseases.

Under all occupational pension schemes men and women enjoy equal treatment, as provided in the Equal Treatment for Men and Women in Occupational Social Insurance Schemes Law No. 133(I)/2002 as amended by Law No. 40(I)/2009.

There are no exceptions.

In the private sector the majority of employees are covered by Provident Funds, in addition to their coverage under the Statutory Schemes of Social Security (see below).

3. Pregnancy and maternity protection, parental leave and adoption leave

Protection of Maternity (Amendment) Law No. 64(I)/2002 harmonised the Law with Directive 92/85/EEC. The most recent amendment of the Law by Protection of Maternity (Amendment) Law No. 70(I)/2011 was adopted in order to: a) harmonise Cypriot law with Article 10 of Directive 92/85/EC, b) provide that for adoption of a child under the age of twelve, the maternity leave is 16 weeks (for natural mothers it is 18 weeks), c) provide that a pregnant woman is entitled to paid time off work for antenatal examinations, and d) provide for extension of maternity leave in cases where the baby needs to stay in an incubator for additional days due to premature birth or any other health reason. During the maternity leave, the mother receives a maternity allowance under the Social Insurance Regulations. Dismissal or notice of termination of services is not allowed during the period from the beginning of the pregnancy when the worker gives a written notice to her employer that she is pregnant, up to three months after the end of her maternity leave. Termination of services and/or notice of termination of services to a pregnant worker when the employer is not aware of her pregnancy is revoked, if the worker presents a medical certificate within five days from the day the notice was given to her.

Dismissal or giving notice of termination of services is not allowed for an adoptive mother, from the time she gives a certificate from the Social Welfare Services to her employer that she will take care of the child for adoption, up to three months after the end of her maternity leave.

Maternity leave must not affect employment rights such as rank and position, seniority or the right to promotion or to return to the same or comparable job.

The Parental Leave and Leave on grounds of Force Majeure Law No. 47(I)/2012 harmonised national law with Directives 2010/18/EC and 97/80/EC.

The Law applies to all workers, men and women, who have completed six months of continuous employment with the same employer, including workers on a part-time basis, on fixed-term employment contracts or on a contract or employment relationship of a temporary

nature. In case of successive fixed-term contracts, all such contracts with the same employer are taken into consideration for the calculation of the six-month period.

Any employee parent is entitled to take unpaid parental leave for a maximum of eighteen (18) weeks in total for the birth or adoption of a child, in order for the parent to take care of and participate in the raising of the child, up to the child's eighth birthday. If the parent is a widow or widower the leave is 23 weeks. It is possible to transfer two weeks from one parent to the other.

The minimum period of parental leave per year is one week and the maximum is five weeks. At the end of the parental leave the worker is entitled to return to work in the same or similar post and all his/her rights are safeguarded. An employee may, upon return from parental leave, request changes in the timetable and/or organisation of his work for a fixed period. An employee is entitled to seven days off work per year without pay on grounds of force majeure for urgent family reasons.

The provisions in the national laws do not exceed the requirements of EU law. In Cyprus little use is made of parental leave and time off, which are unpaid. There is no paternity leave.

4. Statutory schemes of social security

The General Social Insurance Scheme (GSIS) falls under Directive 79/7/EEC and covers all persons gainfully occupied in Cyprus, either as employed or self-employed persons.

The current pension system in Cyprus includes: The General Social Insurance Scheme (GSIS), the Social Pension Scheme (SPS), the Special Allowance to Pensioners Scheme, the Public Assistance Scheme, the Occupational Pension Schemes of employees of the public and broader public sector and the Voluntary Provident Funds and other similar collective arrangements.

The GSIS covers the following branches of social security: old-age pension, widow's pension, sickness allowance, unemployment allowance, employment injury allowance, maternity allowance, invalidity pension, orphan's benefit, marriage grant, funeral grant and maternity grant.

A number of elements in the GSIS that did discriminate against women in the past have been removed in the course of the process of harmonisation of the relevant legislation with European Law. Discrimination exists in relation to widowhood. There is no widower's pension, except when a widower is permanently incapable of self-support.

There is discrimination between unmarried and married women in cases in which both are not insured and give birth to one or more children. An unmarried woman is not entitled to receive a maternity grant, whereas a married woman is entitled to this grant due to her husband's participation in the GSIS.

5. Self-employed persons

Directive 2010/41/EU relating to the principle of equal treatment between men and women who are self-employed has been implemented through Social Insurance (Amendment) Law No. 59(I)/2010 and Equal Treatment of Men and Women in Occupational Social Insurance Schemes (Amendment) Law No. 40(I)/2009, which is based on the Recast Directive.

According to Articles 24, 29 and 30 of the Social Insurance (Amendment) Law No. 59(I)/2010, self-employed women are entitled to maternity allowance for a period of 18 weeks and in case of adoption for a period of 16 weeks. A person who is employed in the service of his/her spouse is insured as a self-employed person. Cohabiting partners are not yet recognised under Cyprus national law. The Social Insurance Law provides for maternity allowance and social protection to women who are self-employed as well as to the wives of self-employed workers, as stipulated in Articles 2, 7 and 8 of Directive 2010/41/EU. It should be noted that in Cyprus maternity allowance started to be granted to beneficiaries by the Social Insurance Services as from 1983.

6. Goods and services

All Articles of Directive 2004/113/EC have been incorporated in the Equal Treatment between Men and Women as regards Access to and the Supply of Goods and Services Law No. 18(I)/2008. The Law applies to all persons who supply goods and services to the public, both in the public and private sector, and outside private and family life. The Law does not apply in education, in the mass media and in advertisements, in employment and in vocational activities. The Law provides for a general prohibition of discrimination on the ground of sex.

In December 2007 the Superintendent of Insurance decided to allow a postponement for up to two years for the prohibition of a difference between personal insurance premiums and grants on the grounds of pregnancy and maternity (Article 7(5) of the above Law). The Superintendent of Insurance, on the basis of the decision of the CJEU in the *Test-Achats* case,⁴³ has submitted a draft bill to the Ministry of Justice and Social Order in which suggestions are made for amending Law No. 18(I)/2008 including the deletion of Article 7(5). The bill is ready for submission to the Council of Ministers for approval and then to Parliament for enactment into law.

The Equal Treatment between Men and Women as regards Access to and Supply of Goods and Services Law No. 18(I)/2008 was amended by Law No. 89(I)/2013 in order to comply with the interpretation by the CJEU in *Test-Achats*. In particular, Article 7 of Law No. 18(I)/2008 was amended by adding to Section 2 a provision that Section 1 (which prohibits discrimination on the ground of sex in insurance contracts that leads to differences in calculating premiums and benefits), applies to all new insurance contracts as from 21 December 2012.

The Amendment Law No. 89(I)/2013 added to Article 7(2) Appendix I, which provides that as new insurance contracts are considered those contracts which were entered into as from 21 December 2012. It also added Appendix B, listing cases that are not considered as new insurance policies:

1. The extension of an existing contract.
2. Adjustments effected in parts of an existing contract, e.g. changes for which the insurer's consent is not needed.
3. Additional coverage and/or extensions and/or renewals which occurred prior to 21 December 2012. The transfer of a portfolio from one insurance broker to another without altering its cover.

It also added Appendix II, Article 7(3), which provides an indicative list of cases where the collection, storing, and use of information concerning gender or related to gender, are allowed.

- (a) Regarding the mixture of their portfolio, in reference and with respect to the pricing model meeting the insurance solvency criteria and risk, insurance brokers are allowed to compile and use information regarding gender. This pricing model shall also consider the accruals and internal invoicing costs.
- (b) According to and regarding the reinsurance invoicing model, as there are no differentiations based on gender.
- (c) Regarding promotional and targeted (gender) advertising, and as such cannot decline access to an offered product or service, except in cases where there are pregnancy-related and maternity-related costs. However, these cannot lead to differences in individual premiums and services (7(5)).
- (d) For medical insurance coverage including death, the insurance brokers can compile, analyse and use factors, including inherited historical data and information. It is possible to take into account the determinant, allowing for small variations based on gender.

⁴³ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

Furthermore Article 7(5) independent of the conditions as stated above and 7(1)(2)(3)(4), prohibits differences in independent premiums and services solely justified on pregnancy and maternity costs alone.

7. Enforcement and compliance aspects

Generally, in the Cypriot legal system, the burden of proof in civil cases is based on the balance of probabilities. In criminal cases the guilt of the defendant must be proved beyond reasonable doubt. In cases brought before the Industrial Tribunal the burden of proof rests with the defendant. So the employer has the burden of proof to establish that the dismissal or termination of services was justifiable. The Industrial Tribunal has jurisdiction to deal with labour disputes in the private sector and in semi-government organisations.

In the public sector an employee can have recourse to the Supreme Court (Administrative Section) regarding a complaint that a decision, act or omission of an administrative organ is contrary to any provision of the Constitution or of any law. The employee must prove that any such decision, act or omission has adversely and directly affected his existing legitimate interest (Article 146 of the Constitution).

Recently, three different laws were amended in relation to the burden of proof: Law No. 150(I)/2014 (which amended the Equal Treatment of Men and Women as regards Access to Employment and Vocational Training Laws of 2002 to 2009)⁴⁴; Law No. 151(I)/2014 (which amended the Equal Pay between Men and Women for the Same Work or for Work to which Equal Value is Attributed Laws of 2002 to 2009)⁴⁵ and Law No. 149(I)/2014 (which amended the Equal Treatment of Men and Women in Occupational Social Insurance Schemes Laws of 2002 to 2009)^{46, 47}. These amendments relate to the reversal of the burden of proof in procedures before the Ombudsman. The new provisions give to the Ombudsman the competence to request from the person against whom there is a complaint that any provision of the Law has been violated to prove that no such violation has taken place, in cases where the complainant has produced before the Ombudsman real facts showing that such violation is probable.

In criminal cases, the person who is guilty of an offence under Laws Nos. 205(I)/2002, 177(I)/2002 and 18(I)/2008 is punished with a fine of up to EUR 7000 or six months' imprisonment or both.

Furthermore the above laws provide remedies for damages, either just and reasonable compensation or real damages, and for moral damages for harm to the claimant plus legal interest and reinstatement. Access to the courts is ensured for alleged victims of discrimination according to the Constitution and the above laws. The provision relating to the burden of proof has positive results in labour relations cases.

The Commissioner for Administration (Ombudsman) has the authority to examine complaints of discrimination on the ground of sex. Furthermore, Law No. 205(I)/2002 established a Gender Equality Body in Employment and Vocational Training, which has the power to investigate complaints relating to violation of equal treatment provisions.

Trade Unions and Women's Organisations have the right to represent victims of discrimination before the Ombudsman.

The social partners play an important role in compliance with and enforcement of gender equality laws. Law No. 205(I)/2002 as amended by Law No. 39(I)/2009 provides that any parts of an existing collective agreement, rule of an independent profession or rule of an employers' or workers' organisation that are contrary to the provisions of the Law must be abolished if they contain direct or indirect discrimination against one sex.

⁴⁴ Laws No. 205(I)/2002, 191(I)/2004, 40(I)/2006, 176(I)/2007 and 39(I)/2009

⁴⁵ Laws No. 177(I)/2002, 193(I)/2004 and 38(I)/2009.

⁴⁶ Laws No. 133(I)/2002 and 40(I)/2009.

⁴⁷ Official Gazette of the Republic, 24 October 2014.

In Cyprus collective agreements are gentlemen's agreements and are not binding law currently. Collective agreements are used as a tool to promote gender equality, to comply with Community Law and to eliminate any direct or indirect discrimination against one sex in existing provisions.

8. Overall assessment

After the publication of Laws No. 149(I)/2014, 150(I)/2014 and 151(I)/2014 which provide for the reversal of the burden of proof in procedures before the Ombudsman, in the author's opinion the overall implementation of the EU gender equality *acquis* in Cyprus is satisfactory.

CZECH REPUBLIC – Kristina Koldinská

1. Implementation of central concepts

The concept of equality as such is defined in the Czech Charter of Fundamental Rights and Basic Freedoms, which is part of the Constitution.

The main concepts of discrimination have been defined in the Anti-Discrimination Act (Act No. 198/2009 Coll.). Discrimination is also forbidden through other pieces of legislation, especially the Labour Code, the Employment Act, and also through some special Acts, such as the Act on Professional Soldiers, or the Public Service Act. These last-mentioned Acts, however, do not legally define any central concepts, they generally prohibit discrimination and some of its forms (e.g. harassment). The only exception is the Act on the Service Relationship of Members of the Security Corps, which also includes a definition of direct and indirect discrimination, harassment and sexual harassment. On the other hand, provisions of the above mentioned Acts include more discriminatory grounds than only the six basic grounds, such as language, membership of political parties or trade unions, social origin, and property.

The Anti-Discrimination Act is currently the only piece of legislation that incorporates legal definitions of direct and indirect discrimination, instruction to discriminate, and harassment and sexual harassment. The Anti-Discrimination Act follows the definitions in EU law and does not go further than EU law requires. Positive action is permitted in national legislation on certain conditions. Section 7(3) of the Anti-Discrimination Act defines what type of action does not constitute discrimination. It states that '[M]easures targeted at preventing or reducing disadvantages resulting from being a member of a group of people who may be discriminated against on the ground of their race, ethnic origin, nation, sex, sexual orientation, age, handicap, religion, faith or world opinion shall not be considered as discrimination.'

2. Equal pay and equal treatment at work

2.1. Equal pay

The Anti-Discrimination Act defines pay using the term of remuneration, which 'shall mean any performance, whether monetary or non-monetary, recurring or one-off, which is directly or indirectly provided to a person in paid employment' (Section 5(1)). In the Czech Labour Code pay is defined as wage, salary or remuneration, which is a monetary consideration and an in-kind consideration provided to an employee for work done. Section 110 of the Labour Code regulates the equal pay obligation. All employees are entitled to receive equal pay for the same work or for work of equal value. The same work or work of equal value is taken to mean work of the same or comparable complexity, responsibility and strenuousness, which is performed in the same or comparable working conditions and which is of equal or comparable work efficiency and produces equal or comparable work results. The Labour Code covers almost all basic principles and elements of remuneration, including the principle of equal pay. However, the principle of equal pay for men and women is no longer explicitly mentioned.

The Anti-Discrimination Act does not further specify the equal pay principle, so that for purposes of equal pay, the Labour Code is the more relevant Act in Czech legislation.

2.2. Access to work and working conditions

The Anti-Discrimination Act regulates equal access to employment and includes a general obligation for employers to provide for equal treatment in this regard (Section 5(3)). The protection against discrimination applies to all natural persons who fall within the legal relations covered by the Act (the right to employment and access to employment, access to vocational training, entrepreneurship and other self-employment activities, labour relations and relations of civil servants and other dependent activities, and membership of and activity in trade unions, works councils and organisations of employers, professional chambers, etc.). The Czech legislator used the right to provide that a difference in treatment which is based on a characteristic related to sex shall not constitute discrimination in specific conditions. A general exception as stipulated in EU law is regulated e.g. in the Act on the Service Relationship of Members of the Security Corps, which states that if a substantial reason is given, the difference of treatment (in general, not just related to sex) shall not constitute discrimination, where the aim of such exception is legitimate and the requirement proportionate.

The Labour Code in some parts regulates the prohibition on discrimination in labour relations. Employers are obliged to ensure equal treatment to all employees as regards their working conditions, remuneration for work and the provision of other monetary considerations and considerations of a monetary value, professional training, and the opportunity of being promoted or other advancement in employment.

2.3. Occupational pension schemes

The Anti-Discrimination Act envisages guaranteeing equal treatment in occupational schemes (Section 8). All exceptions allowed in the Recast Directive have been included in the Anti-Discrimination Act.

Whole parts of directives have been adopted literally and in their entirety, and copied in Sections 8-9 of the Anti-Discrimination Act. In this regard, implementation does not seem to be satisfactory as the directives have not been transposed in the real sense of the word, but have just been copied. The obligation to implement this part of EU law has formally been completed but without any real legislative consideration as regards concrete issues.

. However, the scheme includes almost no aspects of occupational pensions, even though it was declared a 'second pillar' system. It is a voluntary system, which could have been joined by opting out of the first pillar with a 3 % obligatory contribution and at least another 2 % from individual savings. The system was administered by private subjects, called pension companies. However, as of 12 November 2014 the Government has decided to abolish it, effective from 1 January 2016. By this date, everything shall be transferred to the third pillar 'individual savings.

In the Czech Republic, there are some other elements of the occupational schemes to be mentioned: For example, there is the possibility for employers to contribute to the individual pension schemes of their employees who are insured under a scheme of supplementary pension savings, and at the same time there is a prohibition on discrimination within this scheme.

3. Pregnancy and maternity protection, parental leave and adoption leave

Czech law has traditionally paid particular attention to pregnant women and guarantees mothers and fathers special protection regarding their employment relationship until their child reaches the age of three.

According to relevant provisions of the Labour Code, pregnant women are protected against having to carry out unsuitable work. If a pregnant woman's job involves tasks which, according to medical opinion, might endanger her pregnancy then her employer must temporarily transfer her to more suitable work for an equal wage. Similar rules apply to

mothers for nine months after the birth of their child and to breastfeeding women. Pregnant women who carry out night work may request to be transferred to day work and the employer must not refuse such request. An employer must also grant a female employee who is breastfeeding her child special breaks for breastfeeding. Breaks for breastfeeding are considered as working hours and a compensatory wage or salary equivalent to the amount of average earnings is paid for such breaks.

If a pregnant woman, a parent looking after a child younger than 15 or a person looking after a bedridden person requests that his/her working hours be reduced, or that some other suitable adjustment be made to the prescribed weekly working time, the employer is obliged to comply with his/her request, provided that he is not prevented from doing so for serious operational reasons.

Parental leave shall be granted to the mother of the child at the end of her maternity leave (the general duration of maternity leave is 28 weeks; the period can be extended to up to 37 weeks if the woman gives birth to two or more children at the same time) and to the father of the child from the day that the child is born, for the amount of time applied for, until the child reaches the age of three. The parents of the child are entitled to take maternity and parental leave concurrently.

Pregnant women and parents looking after children under three years of age who are on parental leave are protected against dismissal. Czech law thus guarantees a return to the same job not only after maternity leave, but also after parental leave, which may last until the child reaches the age of three.

Czech law also provides for a family benefit called parental allowance, which is guaranteed until the child reaches the age of four.

The protection of pregnant women, of mothers for 22 weeks after the birth of their child, and of parents of young children is one of the most generous in Europe. Unfortunately, only a small number of fathers use this protection (only some 5 % of parents claiming parental leave and parental allowance are men), which in practice makes the position of women in the fertile age group worse at the labour market, as employers tend to employ men rather than women, who may go on leave for several years and still keep their rights.

4. Statutory schemes of social security

The statutory schemes of social security apply to the entire working population and provide protection against all risks mentioned by Directive 79/7. The conditions of the Czech social security systems are not normally linked to gender and in general, the Directive is well implemented. The following aspects should be pointed out:

According to the legislation on sickness insurance, maternity benefits may also be paid to the child's father, if the mother and father agree so in writing and if the mother cares for the child for at least six weeks after it is born.

There is a persistent problem with the pension system, as it allows access to more generous benefits for women. The first benefit is connected with the pensionable age. Whereas there is one pensionable age for men, which is gradually being increased, there are differences in the pensionable age for women according to the number of children they have raised. This does not apply to men, even if a man has raised his children alone. The pensionable age will be equal for men and women in 2044, when people born in 1977 will reach 67 years of age. Until then, the current discrimination of men seems to be maintained by legislation. This practice has not been changed following the ECtHR ruling in *Andrle*,⁴⁸ or even following the CJEU ruling in *Soukupova*.⁴⁹

As regards survivor's benefits, there are equal conditions for claiming widow's and widower's pensions. The only difference is in the age which must be reached in order to be able to claim a survivor's pension for an unlimited period.

⁴⁸ *Andrle v the Czech Republic* [2011] nyr. (Application no. 6268/08).

⁴⁹ Case C-401/11 *Blanka Soukupová v Ministerstvo zemědělství* [2013] ECR nyr.

5. Self-employed persons

As regards conditions for establishing and continuing self-employed activities, there do not seem to be any differences between men and women according to Czech law. There might be some specific problems, e.g. the fact that to become a legal professional, it is obligatory to be registered as a legal trainee for a certain period of time. If a trainee works at a law firm only part time, he or she cannot be registered as a legal trainee and therefore the time during which he or she works part time at a law firm is not counted towards the period of legal practice which must be completed to become a legal professional.

Self-employed persons only have voluntary access to sickness insurance, but this is a gender-neutral rule. Still, in some cases, self-employed women who unexpectedly become pregnant can face a problematic situation, as they might have taken out insurance too late (the obligatory waiting period is 280 days of insurance), meaning that they are not entitled to maternity benefits (and could only claim parental allowance, which is quite low in this case), or they might have paid too little in contributions, meaning that their maternity benefits will be very low.

Helping spouses are covered by social security schemes – by sickness insurance and pension insurance, if they have a taxable income from self-employed activities.

6. Goods and services

The Anti-Discrimination Act ensures the right to equal treatment regarding access to goods and services, including housing, if they are provided to the public. There are specific laws regulating access to specific services, which also include an equal treatment rule regarding the access to these services (e.g. legislation on consumer protection, market inspection, access to information services, libraries etc.).

In response to the *Test-Achats* case,⁵⁰ the legislation in the area of private insurance has been amended accordingly, although after the deadline. The amending Act was published and entered into force on 24 April 2013, also changing other legislation on private insurance and prohibiting the use of sex as an insurance criterion for new contracts. The amendment is in complete compliance with the Guidelines on the application of Council Directive 2004/113/EC on insurance, in light of the *Test-Achats* judgment.

7. Enforcement and compliance aspects

The Anti-Discrimination Act defines as legal instruments of protection against discrimination the right of a person who has been affected by discriminatory behaviour (this shall mean not only the victim) to demand through the courts a distancing from such behaviour, the removal of the consequences of this violation, and appropriate redress, including financial redress.

The burden of proof has been transferred to the employer through Section 133a of the Act on Civil Procedure.

The Czech Ombudsman (Public Defender of Rights) became the equality body when the Anti-Discrimination Act entered into force and his office is working very well in this regard. The office publishes a great number of reports and issues public opinions.⁵¹ The new Public Defender of Rights declared that she would like to enforce their competences in the field of equal rights, especially by proposing that her office become competent to represent a victim before the court.

The Anti-Discrimination Act makes it possible for legal entities which have been established in order to protect victims of discrimination to provide information and assistance in the drafting of claims requesting protection against discrimination. Such entities are also

⁵⁰ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

⁵¹ See <http://www.ochrance.cz/en/discrimination/>, accessed 31 May 2013.

competent to propose checks on or the monitoring of a public authority overseeing equal treatment legislation. These private legal entities do not have a direct right of access to the courts, however.

As regards social partners, they hardly play any real role in promoting gender equality in the Czech Republic. Not even collective agreements are used very often as a means to implement EU gender equality law.

Case law in this field is also still very rare in the Czech Republic, especially due to the fact that victims of discrimination are discouraged from claiming their rights by the length of the procedure and possible complications, as well as by the general public opinion, which still maintains gender stereotypes and prejudices, so that it is more often the discriminator who is seen as the victim.

8. Overall assessment

The gender equality *acquis* has been implemented in the Czech Republic quite satisfactorily, although sometimes the implementation did not fully follow the spirit of the EU directives.

The most important work still remains to be done in the area of acceptance of the anti-discrimination rules by Czech society as a whole (from politicians and judges to the general public and the media). There is still quite a long way to go for the Czech Republic towards a society which fully enacts and applies the principle of equal treatment of men and women on a daily basis.

DENMARK – Ruth Nielsen

1. Implementation of central concepts

The definitions of central concepts in the equality directives are repeated – in some cases with a slightly different wording – in all the Danish Acts that implement aspects of the equality directives. The most important Danish implementing Acts are the Equal Treatment Act which applies to access to employment and working conditions, including dismissal, the Equal Pay Act which applies to equal pay and the Gender Equality Act which applies to the promotion of gender equality and the prohibition of sex discrimination in all areas of society that are not covered by more specific legislation. Most labour market matters are covered by more specific legislation. The Gender Equality Act therefore only seldom applies to employment relations.

The definition of direct discrimination in the EU directives is repeated in the Danish implementing legislation with the same wording as used in the directives. The definition of indirect discrimination is also repeated but not with exactly the same wording as used in the Recast Directive.

Under the directives, ‘indirect discrimination’ may be justified by a legitimate (in the Danish version of the directives: *legitim*) aim, and the means of achieving this aim are to be appropriate and necessary. This definition is repeated with slightly different wording in the different Danish laws on gender equality.

Under the Equal Treatment Act, i.e. in the labour market, the responsible Minister may permit measures for the promotion of gender equality aiming at promoting equal opportunities for women and men, in particular by removing factual inequalities which affect access to employment, training, etc.

The provision on instruction to discriminate in the EU directives is repeated in the Danish implementing legislation. The definitions of harassment and sexual harassment in the EU directives are repeated in the Danish implementing legislation with the same wording as used in the directives.

2. Equal pay and equal treatment at work

2.1. Equal pay

Equal pay between men and women is governed in Denmark by the Equal Pay Act which dates back to 1976 when it was adopted to implement the Equal Pay Directive from 1975. It has been amended several times, most recently in 2008 in connection with the implementation of the Recast Directive (2006/54/EC). It means that for the same work or work of equal value men and women must be paid the same. Originally, the Danish Equal Pay Act only provided for equal pay for the same work because that was the wording preferred in collective agreements. After the Commission brought an infringement case against Denmark, the Court of Justice of the European Union (CJEU) found against Denmark. After that judgment the wording of the Danish Equal Pay Act was changed.

2.2. Access to work and working conditions

In Denmark, EU provisions on gender equality in access to work and working conditions, including dismissal, are implemented in the Equal Treatment Act by and large by repeating the text of the underlying directives. In 2005, the Equal Treatment Act was amended so that the scope of application of the principle of equal treatment was extended to membership of and involvement in trade unions and employers' organisations. Until 2005, there was a problem on this point in Denmark, which had a Women Workers' Union. This problem has disappeared. After more than one hundred years the Women Workers' Union ceased to exist as an independent trade union. On 1 January 2005 it merged with the predominantly male General Workers' Union to become 3F, Denmark's biggest trade union.

Denmark has a strong historical tradition of not accepting protective measures for women. The protection of women for reasons other than pregnancy or motherhood does not exist in Danish law.

2.3. Occupational pension schemes

The principle of equal treatment for men and women in occupational pension schemes is governed in Denmark by the Act on Equal Treatment between Men and Women in Insurance, Pension and Similar Matters. In Denmark most occupational pension schemes are defined as contribution schemes. One or two generations ago most pension schemes used actuarial calculations which were gender-related in such a way as to result in women receiving smaller monthly benefits than men for whom the same contributions had been paid. During the last 25 years or so the trend has been shifting. A number of pension schemes were established in connection with the renewal of collective agreements in 1989 and 1993. Most of these schemes use actuarial calculations that result in women receiving the same monthly benefits as men for whom identical contributions have been paid. This is known as the unisex basis of actuarial calculations. A few older schemes, for example the one applying to lawyers, have also adopted the unisex calculation.

In 1998, a new Act providing for unisex occupational pension schemes was adopted. The main provision of the Act prohibits provisions in occupational pension schemes according to which men and women are treated differently on grounds of sex as regards the determination and calculation of contributions and benefits. Of special importance is that the Act prohibits both different contributions and different benefits, also in cases where the reason for different treatment is actuarial factors. However, the prohibition of sexual differentiation on grounds of actuarial factors only applies to workers who joined the scheme after 1 July 1999.

3. Pregnancy and maternity protection, parental leave and adoption leave

Before the adoption of the Equal Treatment Act in 1978 which implemented the Equal Treatment Directive from 1976 it was lawful under Danish law and usual for employers to dismiss or otherwise treat women unfavourably on grounds of pregnancy. A major change in Danish law brought about by the adoption of the Equal Treatment Act was the improved

protection of pregnant women. The Pregnancy Directive was implemented in 1994 by an amendment to the Equal Treatment Act.

Since 2006, the rules on maternity, paternity and parental leave and benefit have been placed in a special Maternity, Paternity and Parental Leave and Benefit Act (*Barselloven*) covering these (and only these) issues. Parents are – between them – entitled to 52 weeks of maternity, paternity and parental leave on full benefit, i.e. 100 % of the normal benefit paid from public funds to persons who are absent from work due to unemployment, sickness or pregnancy. The 52 weeks of parental leave are composed of maternity leave to commence 4 weeks before the expected date of confinement until 14 weeks after the birth of the child, followed by parental leave. Maternity leave can only be taken by the mother. In the maternity leave period the father is entitled to 2 weeks paternity leave. From 14 weeks after the birth of the child the parents are entitled to 32 weeks of parental leave with benefit which they can share as they please. There are some possibilities of prolonging the parental leave period by accepting a reduced benefit and also some possibilities of postponing the leave period until later.

The Maternity, Paternity and Parental Leave and Benefit Act only provides for a benefit which for most workers is considerably lower than full pay. In practice most Danish workers/employees are covered by collective agreements providing for full or partial pay for the whole or part of the period of maternity, paternity or parental leave. As a result pregnancy, etc. may be costly for an employer. During recent years efforts have been made to make pregnancy, etc. cost-neutral for employers by imposing obligations on all employers to contribute to covering the costs of pregnancy, maternity, paternity and parental leave. In the spring of 2004, the Confederation of Danish Trade Unions (LO) and the Confederation of Danish Employers' Organisations (DA) concluded a collective agreement on reimbursement within a maximum of pregnancy, etc. payments by employers who are members of a DA organisation. This solution has since been generalised for the whole private sector of the labour market by legislation. The Act on reimbursement of pregnancy, etc. payments in the private sector (*Barselsudligningsloven*) requires all employers in the private sector who are not under a similar duty by collective agreement to pay contributions to a pregnancy fund.

4. Statutory schemes of social security

In connection with the implementation of Directive 79/7/EEC, Denmark revised its social security legislation to make it sex-neutral with effect from 1984. Before this, the qualifying age for the general statutory old-age pension (*folkepension*) was 67 for men and married women and 62 for unmarried women. This age was made sex-neutral and fixed at 67 for everyone. It was later lowered to 65 and again raised to 67.

5. Self-employed workers

The Directive on self-employed persons and helping spouses was implemented in Denmark in the Equal Treatment Act which extends the prohibition against sex discrimination to anyone who makes decisions on access to or conditions of work as a self-employed person or helping spouse.

6. Goods and services

Denmark has had a Gender Equality Act since 2000. In 2007, Denmark partially implemented the Supply of Goods and Services Directive, except for Article 5 on gender equality and actuarial factors in insurance contracts.

In 2009, Denmark amended the Act on Equal Treatment of Men and Women in Insurance, Pension and Similar Financial Matters in order to implement Article 5 of Directive 2004/113/EC. The amendment added a new chapter to the Act on insurance contracts that are not entered into in connection with employment or occupation. The main new rule was Section 18 b(1) which provided that using sex as a factor in calculating premiums and

benefits related to insurance and related financial services in all new contracts concluded after 21 December 2009 must not lead to differences in individuals' premiums and benefits, subject to Paragraphs 2 and 3. A provider of insurance and related financial services, was, however, under Section 18 b(2) – in accordance with Article 5(2) in the underlying Directive – allowed to apply proportionate differences in individuals' premiums and benefits where the use of gender was a determining actuarial factor for risk assessment. On 1 March 2011, the CJEU declared Article 5(2) of the Directive as invalid.⁵² Danish legislation was adapted to this ruling of the CJEU as of 21 December 2012.

7. Enforcement and compliance aspects

The provision on victimisation in the underlying directives is repeated in the Danish implementing legislation. The provisions on the shared burden of proof in the underlying directives are repeated in the Danish gender equality legislation. In addition the Equal Treatment Act provides for a reversal of the burden of proof in the case of dismissal during pregnancy, maternity, paternity or parental leave.

Under the Equal Treatment Act the typical sanction for a breach of the duty not to discriminate on grounds of sex is compensation which may cover both economic and non-economic loss. In equal pay cases the typical remedy is the payment of the difference in payment between the woman and the male comparator. Interest to compensate for the loss sustained can be awarded. The substantive right to equal pay or compensation for a breach of the ban on sex discrimination will usually be time-barred after 5 years. In principle violations of the Equal Treatment Act can also be sanctioned by a fine. In practice this only happens in case of sex-discriminatory job advertisements. There is no criminal sanction in the Equal Pay Act.

There are no special rules for equality cases on access to the courts. Alleged victims of discrimination will clearly have access. For interest groups their legal standing depends on how concrete an interest they have in the case. The requirement of establishing one or more equality bodies in the Recast Directive (2006/54/EC) and the similar requirements for gender equality bodies in the Equal Treatment Directive and the Supply of Goods and Services Directive were transposed into Danish law in 2011.

Generally, the social partners play a predominant role on the Danish labour market. If a claim is based on a collective agreement the social partners are the only ones who can enforce it. In addition, most employment law cases brought before the ordinary courts are brought by a trade union on behalf of a member.

In Denmark collective agreements cannot be extended to cover employers who are not parties to them. This means that there are no generally applicable collective agreements in Denmark. Collective agreements – as other contracts bind the parties to them and no one else – are, however, a very important source of law in Denmark. Gender equality legislation is subsidiary to collective agreements providing for similar protection as prescribed by legislation.

8. Overall assessment

By and large the Danish implementation of the EU gender equality *acquis* is satisfactory.

⁵² Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

1. Implementation of central concepts

Direct discrimination based on sex was defined in the Gender Equality Act (GEA) for the first time in 2004 and several amendments entered into force in 2009. Article 3(3) of the GEA provides that ‘direct discrimination based on sex’:

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. Direct discrimination based on sex also means less favourable treatment of a person in connection with pregnancy and child-birth, parenting, performance of family obligations or other circumstances related to gender, as well as gender-based harassment and sexual harassment and less favourable treatment of a person due to rejection of or submission to harassment.

It was in 2009 that the last amendment about less favourable treatment of a person due to rejection of or submission to harassment was made.

Indirect gender discrimination is defined in Article 3(4) of the GEA, which entered into force in 2004. The definition has not been changed and is the same as provided in Article 2(1)(b) of the Recast Directive. The GEA includes a prohibition on discrimination based on sex in the private and public sectors, which means that the requirements of the Act do not apply to relations in family or private life.

The Equal Treatment Act (ETA) entered into force on 1 January 2009 and bans discrimination on grounds of nationality (ethnic origin), race, colour, religion or other beliefs, age, disability or sexual orientation.

Chapter 3 of the GEA requires promotion of gender equality in education and training. The State’s and local government authorities’ duty is to change the conditions and circumstances that hinder the achievement of gender equality. The State and local government authorities shall, if necessary, consult the relevant interest groups and non-profit organisations (NGOs) that have a legitimate interest in helping to combat gender discrimination and support equal treatment. The clause ‘if necessary’ allows room for debate about the involvement of NGOs.

Gender equality issues are mentioned in the current Estonian Government’s Coalition Agreement from March 2014. In order to improve gender equality, measures are being implemented in the framework of a pre-defined project of the Gender Equality and Equal Treatment Commissioner as part of a programme for promoting gender equality and reconciliation of work and family life, co-financed by the Norwegian Financial Mechanism 2009-2014. The project is being carried out in 2013-2015 and is targeted at increasing the effectiveness of legal protection against discrimination by raising rights awareness and helping victims of discrimination directly through strategic litigation, as well as increasing the capacity of officials in assisting discrimination victims. The project also supports the implementation of gender mainstreaming obligations stipulated by the GEA.

Article 5(2)(5) of the GEA allows application of temporary specific measures and offering advantages to the less-represented sex to promote gender equality and to reduce gender inequality. However, the meaning of ‘temporariness’ has not been specified in law or case law.

Discrimination is prohibited in Article 12 of the Constitution of the Republic of Estonia. Chapter 2 of the GEA outlines the general principle of non-discrimination and lists exceptions, when unequal treatment is not deemed to be direct or indirect discrimination based on sex.

Discrimination may occur in recruitment processes and selection results may be disputed. It is allowed to collect accessible data in recruitment processes, and the data about job applicants may be stored until the deadline for disputing the recruitment decision has expired (one year). The Estonian Data Protection Inspectorate (AKI) has worked out guidelines for

HR managers regarding the rules on the processing of personal data of employees and job applicants.⁵³

The concepts of harassment on the ground of sex and sexual harassment have been regulated in the GEA since 2004. Before transposition of the Directive 2006/54/EC, the GEA defined ‘sexual harassment’ in connection with the existence of subordination or a dependent relationship. The concept of ‘sexual harassment’ was brought in line with the Directive in 2009, and no changes have been made to the legal definitions in the recent years.⁵⁴ Sexual harassment occurs where any form of unwanted verbal, non-verbal or physical conduct or activity of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating a disturbing, intimidating, hostile, degrading, humiliating or offensive environment.⁵⁵ Gender-based harassment occurs where unwanted conduct or activity related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating a disturbing, intimidating, hostile, degrading, humiliating or offensive environment.⁵⁶ In 2011, an analysis of Estonian legislation pointed out that concepts of sexual harassment and harassment related to sex are defined in line with the EU directives, but ‘*these concepts are not explained in national legislation any further*’.⁵⁷

Sexual harassment and gender-based harassment are forms of direct discrimination based on sex. An employer shall ensure the protection of employees against discrimination. The Gender Equality and Equal Treatment Commissioner accepts applications from persons, and provides opinions on possible cases of discrimination.

2. Equal pay and equal treatment at work

2.1. Equal pay

A definition of work of equal value is lacking in the GEA and there is no relevant national case law either. ‘The same work or work to which equal value is attributed’ is mentioned in Article 6(2)(3) of the GEA. The law stresses the employer’s obligation not to discriminate and to pay remuneration for work at the time and in the amount agreed. The former Wages Act is no longer valid and provisions on wages are now contained in the ECA.

There is a judgment on the collection and disclosure of information concerning wages. This case is important because of the notion that information about wages could be a point of departure for diminishing the gender wage gap. The Supreme Court considered in 2009 that disclosure on pay and salaries in public sector should be available and accessible. The Estonian law requires the disclosure of salary rates and pay schemes applicable in state and local government agencies, not the salaries of individual persons. The judgment also states that pay transparency is related not only to officials, but also to other employees who have an employment contract.⁵⁸ Anonymous pay data specified per position do not contribute to decreasing the gender pay gap.

Some efforts have been made to make wage policies more transparent in the public sector. Parliament passed the new Public Service Act (PSA) in June 2012. The PSA aims to

⁵³ http://www.aki.ee/sites/www.aki.ee/files/elfinder/article_files/Personal%20Data%20in%20employment%20eng.pdf, accessed 29 May 2013.

⁵⁴ A distinction between ‘sexual harassment’ (*seksuaalne ahistamine*, Article 1(d) of the Directive 2006/54/EC and Article 3(1)(5) of the GEA), and ‘gender-based-harassment’ (*sooline ahistamine*, Article 1(c) of the Directive 2006/54/EC and Article 3(1)(6) of the GEA) has been attempted, due to translation and sociolinguistic problems in Estonian.

⁵⁵ Article 3(1)(5) of the GEA (in effect 23 October 2009).

⁵⁶ Article 3(1)(6) of the GEA (in effect 23 October 2009).

⁵⁷ A. Albi ‘*Estonia*’ in: European Network of Legal Experts in the Field of Gender Equality, A. Numhauser-Henning and S. Laulom (eds.) *Harassment related to Sex and Sexual Harassment Law in 33 European Countries*, European Commission, 2011, pp 87-93, available at http://ec.europa.eu/justice/gender-equality/files/your_rights/final_harassment_en.pdf, accessed 8 October 2013.

⁵⁸ Judgment No. 3-4-1-1-09 of the Constitutional Review Chamber of the Supreme Court of 19 May 2009. RT III, 2009, 27, 199. Available <http://www.nc.ee/?id=1036>, accessed 15 January 2014.

make public-sector pay arrangements more transparent by increasing the share of basic salaries and by cutting bonuses.

The National Reform Programme (NRP) 'Estonia 2020' was approved by the Government on 8 May 2014. According to the NRP the Ministry of Social Affairs has to develop and implement an action plan to reduce the gender pay gap in 2013-2016. An action plan to reduce the gender pay gap in Estonia was adopted in 2012 and activities in 2013-2015 are mostly implemented with financial support from the Estonian European Social Fund programme 'Promoting Gender Equality 2011-2013' and the gender equality and work-life balance programme financed from the Norwegian Financial Mechanism 2009-2014.

Case law concerning pay discrimination is scarce.

2.2. Access to work and working conditions

Discrimination in professional life is prohibited and situations where discrimination may occur are listed in Article 6 of the GEA. Employers and legal persons in private law or sole proprietors entered in the register of economic activities as labour-market service providers shall not request information about job applicants' pregnancy, childbirth, parenting, parental obligations or other circumstances related to gender. However, employers make background surveys and case law is lacking.

There is an opinion by the Gender Equality and Equal Treatment Commissioner, where 'discrimination on the basis of parenting and family obligations' was found.⁵⁹ However, equal pay for the same work was not applied, which had been the main cause of the claim. This case concerned a situation where the pay at the 2007 level was offered to a woman who returned to work after childcare leave in 2009. In the period of 2007-2009, wages had risen but the claimant was offered her former salary level. She did not agree and asked for the salary that was appropriate for this job position. According to Article 18(1) of the Employment Contracts Act, when a woman returns from pregnancy and maternity leave she is entitled to the improved working conditions which she would have been entitled to during her absence. The Commissioner analysed the case, asked for explanations and evidence, and found discrimination and unequal treatment on grounds of gender and in connection with parenting and family obligations.

2.3. Occupational pension schemes

The State Pension Insurance Act, the Superannuated Pensions Act, the Old-Age Pensions under Favourable Conditions Act, and the Funded Pensions Act regulate pensions in Estonia. A three-pillar pension system is in place: The first pillar is mandatory state pension insurance, and the second pillar is a mandatory funded pension. The estimates are that the state pension and the funded pension will together account for about half of a person's pre-pension income.

Occupational pension schemes are connected with the third pillar. Unfortunately, the knowledge and understanding of this option is low. The Estonian government is aware of the need to improve financial literacy, and is expected to take necessary actions. At the time of writing (2013), only financial institutions try to attract investment in the third pillar.

The occupational pension scheme is a voluntary supplementary scheme that is supported by the Government through tax deductions; a 21 % income tax rebate on such pension contributions is given. There are many options for saving in this pension scheme, but problems remain with persons on low incomes and limited saving capability. An employer's pension is a solution, which allows companies to contribute to the future of their staff members via the third pension pillar. The incentive can be used for contributions that are up to 15 % of person's cross salary, but do not amount to more than EUR 6 000 per year.

According to the State Pension Insurance Act, the old-age pension is paid to the persons who have reached the general pensionable age. At the moment, this threshold is different for men and women (63 and 61 years respectively, but a gradual decrease in this difference by 6

⁵⁹ Gender Equality and Equal Treatment Commissioner. Opinion No. 19 (in Estonian), 13 February 2012, www.svv.ee, accessed 24 March 2012.

months every year is expected. The pensionable age for women will meet that of men by 2016. On 7 April 2010, the Estonian Parliament's amendment of the State Pension Insurance Act was adopted, providing the general pensionable age of 65 years for women and men. The transition period (starting in 2017) is provided for those born between 1954 and 1960. For these, the retirement age will be gradually increased by 3 months for every year of birth, and will reach the age 65 in 2026. The amendment shall take effect on 1 January 2017.

People working after reaching the pensionable age (i.e. working pensioners) are entitled to a full pension, regardless of their work income. Due to the different pensionable ages for women and men, the Old-Age Pensions Under Favourable Conditions Act refers to the right of women to receive an old-age pension under favourable conditions until 2015.

Amendments to the State Pension Insurance Act entered into force on 1 August 2012 to ensure the equal treatment of self-employed men, women and other employees. In 2012, amendments were made in the Funded Pensions Act to provide for additional contributions to mandatory pension funds upon receipt of parental benefit (entered into force on 1 January 2013). Only one parent (including guardians and caregivers) is entitled to the additional contribution. A person shall submit an application and any necessary additional documents to the Social Insurance Board, in order to make and terminate additional contributions.

Due to Estonia holding the highest gender pay gap in Europe, there is a high risk that women will receive a lower pension in comparison to men in the future.⁶⁰

3. Pregnancy and maternity protection, parental leave and adoption leave

Pregnancy and maternity protection is mainly covered in the ECA, GEA and ETA. Less favourable treatment of a person in connection with pregnancy and childbirth, parenting, and performance of family obligations constitutes direct discrimination.

Women have the right to a pregnancy and maternity leave of 140 calendar days. Only insured women who were working prior to going on pregnancy and maternity leave have the right to the related benefits, others are paid a fixed minimum. Mothers with a child younger than 18 months have the right to breastfeeding breaks. These breaks are compensated to the employer from the state budget.

Fathers have the right to a total of ten working days of paid paternity leave in the period from two months prior to the due date as determined by a doctor or midwife until two months after the birth of the child. The applicant for the leave must inform the employer to this effect and write an application for paternity leave. Parental leave is job-protected for three years: employment contracts are suspended for the term of the parental leave, meaning that the position is retained. About 435 days of the parental leave after maternity leave is fully compensated and both mothers and fathers are entitled to parental benefits.⁶¹ Estonia's parental leave system is one of the most generous.

The ECA regulates the number of days for pregnancy and maternity leave, and adjustments to working conditions are required. An employer cannot cancel an employment contract when an employee is pregnant or has the right to pregnancy and maternity leave, nor can an employer cancel an employment contract when an employee performs important family duties. To ensure a safe working environment for pregnant or breastfeeding women, the employer must ensure lighter working conditions, shortened workdays, suitable breaks, transfer to daytime work and, if necessary, a change in job duties.

⁶⁰ With Eurostat's methodology, the gender pay gap in Estonia is one of the widest in the European Union (30 % in 2012). According to Statistics Estonia, the gender pay gap in Estonia in 2012 was 24.6 %, taking into account all enterprises and institutions and all economic activities. The gender pay gap published by Eurostat does not take into account the indicators of enterprises and institutions with fewer than 10 employees; it also excludes the earnings of employees in agriculture, forestry and fishing and in public administration and defence.

⁶¹ Maternity leave benefits and parental benefits depend on former income, and people with no former income are entitled to the fixed minimum payment. The duration of maternity leave and parental leave together is 575 days, which is covered by full payment depending on the monthly income from the previous calendar year.

The GEA applies to women and men (including fathers and adoptive parents) with parental and family obligations. According to the ECA and the GEA, it is prohibited to discriminate on the basis of parenting and family obligations. Adoptive parents have the same rights as biological parents.

In Estonia, maternity leave and childcare leave are longer than the compulsory minimum leave as foreseen in Directive 92/85/EEC. An issue is, however, whether ‘adequate’ allowances as paid by the State are guaranteed in Estonia. The flexicurity ideas provided in the ECA have their price. Employees’ security has diminished; the ECA allows dismissals for several reasons and compensation has decreased. The problem regarding compensation for dismissed persons was planned to be solved by amendments of the Unemployment Insurance Act (UIA), and the Unemployment Insurance Fund was to decide during the specified period whether to grant a benefit upon insolvency of the employer. The outcome of negotiations is not satisfactory and neither Government nor social partners currently see any room for improvement.

Dismissal of fixed-term employees is more problematic for employers than dismissal of employees on an open-ended employment contract.

4. Statutory schemes of social security

In Estonia an equalisation process concerning the pensionable age is in progress, which will finish in 2026 with the same retirement age for women and men at 65. The current calculation of old-age pension is discriminatory due to the huge gender pay gap. Old-age pension consists of three components: the base amount, a component calculated on the basis of years of pensionable service, and an insurance component.⁶² On average, women have earned less than men, and their insurance component will be lower, because women have ‘earned’ fewer years in a system of indexed pension years and a sum of the annual factors will be lower compared to the average man. As women’s life expectancy is lower, this means that a low-paid person will be punished twice – now and when they retire. At the same time, the relative importance of the insurance component increases every year, which means that the state old-age pension depends more and more on the amount of social tax paid for each specific person or the amount of his or her salary during his or her entire life of employment.

The Act on Amendments to the Funded Pensions Act and the State Pension Insurance Act and Other Associated Acts was passed in June 2012 and entered into force on 1 January 2013. The Act provides for the creation of a supplementary funded pension contribution related to raising a child and the payment of a pension supplement on the basis of the provisions of the State Pension Insurance Act, with the aim of compensating for the potential reduction of pension of the parent in the future as a result of raising a child. The Government decided to start these payments not before 1 January 2015.

5. Self-employed persons

Article 2(b) of Directive 2010/41 states that it covers the spouses of self-employed persons or, when and insofar as recognised by national law, the life partners of self-employed persons, not being employees or business partners. Regarding life partners, the more precise question is whether life partners should also be recognised by national law. In Estonia it has been decided that only spouses who are in a registered marriage could be covered as assisting spouses. National law also includes the restriction, as referred to in Directive 2010/41, that assisting spouses are not employees or business partners of the self-employed person.

⁶² One component is calculated on the basis of years of pensionable service, the amount of which equals the number of years of pensionable service multiplied by the value of a year of pensionable service; the insurance component represents an amount which equals the sum of the annual factors of an insured person multiplied by the value of a year of pensionable service.

It was also decided that the status of entrepreneur will be recognised based on oral statements (not being by an employee or business partner) and that registration at the Tax and Customs Board is required. An assisting spouse will be covered by health insurance, if the spouse pays at least a minimum of social tax (EUR 95.70 a month). Maternity leave is applicable to self-employed persons or assisting spouses, but maternity benefits, which depend on paid social tax, will be at the minimum level. Unfortunately, there are no services supplying temporary replacements for leave periods, and interruptions in occupational activity of self-employed persons and assisting spouses are problematic.

The transposition of Directive 2010/41 resulted in amendments to the Health Insurance Act (HIA), where Article 10.1 was added and related Articles amended.⁶³ Articles 10 and 10.1 regulate the duration of the insurance cover of sole proprietors and their assisting spouses as entered in the register. The spouse of the sole proprietor is entitled to health insurance after 14 days from entering the health insurance database, and at least a minimum monthly social tax is paid by the sole proprietor.

To ensure social protection for persons with a creative occupation who have an irregular income, amendments of the Creative Persons and Artistic Associations Act (CPAAA) and related Acts entered into force on 20 January 2014.⁶⁴ The amount of the state support to the artistic association per member per year shall be 21.5 % of the average wages per month (according to Statistics Estonia, the data of the previous year). The amount of monthly support to a creative person engaged in a liberal profession shall be the minimum wage per month established by the Government of the Republic. This is a basis for social protection of self-employed creative persons engaged in a liberal profession.

6. Goods and services

The Government of the Republic initiated the Bill on Amendments to the Insurance Activities Act and Other Associated Acts (349 SE), which was presented to Parliament in January 2013. The explanatory memorandum of the Bill explores the content of Council Directive 2004/113/EC and refers to the decision of the Court of Justice in *Test-Achats*. From 2007 to 2012, Estonian insurance companies used the right to include sex as a factor in three types of insurance: life insurance, personal accident insurance and health insurance.

Article 5(2) of the GEA lists cases which may be considered as non-discriminatory. Article 5(2)(4.1) entered into force on 6 May 2013. This Article provides that differences are allowed in the treatment of persons due to their sex upon supplying goods and services pursuant to subsection 14.1(2) or subsection 262(15) of the Insurance Activities Act or in cases where the provision of goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and where the means of achieving that aim are proportional to the aim.

The Insurance Activities Act was amended by introducing an Article about the gender factor in risk assessment (Article 14.1). Article 14.1(3) states that neither pregnancy nor maternity shall affect the amount of the insurance premiums and insurance indemnities.

7. Enforcement and compliance aspects

Protection of individual rights or supporting another person is encouraged by widening the scope of protection against victimisation. Less favourable treatment of a person, as well as causing negative consequences for a person based on the fact that this person has relied on the rights and obligations as provided in the GEA, shall be deemed to constitute discrimination. If

⁶³ Articles 5(3.1) and 50(1.1).

⁶⁴ Creative Persons and Artistic Associations Act (CPAAA), RT I 2004, 84, 568; RT I, 10.01.2014, 2. A creative person is an author or a performer within the meaning of the Copyright Act who acts in the field of architecture, audiovisual arts, design, performing arts, sound arts, literature, visual arts or scenography. A self-employed creative person engaged in a liberal profession may use the attribute 'creative person engaged in a liberal profession' in the business name upon entering into the relevant commercial register.

less favourable treatment or negative consequences occur for a person who has supported another person in the protection of his or her rights as provided in the GEA shall also be deemed to constitute discrimination.

Article 4 of the GEA is about shared burden of proof. Article 4(1) of the GEA explains that an application of a person addressing a court, a labour dispute committee or the Gender Equality and Equal Treatment Commissioner shall set out the facts on the basis of which it can be presumed that discrimination based on sex has occurred. In the course of proceedings, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. If this person refuses to provide proof, such refusal shall be deemed to be equal to acknowledgement of discrimination by this person (GEA 4(2)). There have been some court cases, where parties have provided facts proving that there had been no breach of the principle of equal treatment, but none of these cases were related to the gender pay gap.

Opinions of the Gender Equality and Equal Treatment Commissioner are not legally binding. However, in some cases media attention and public interest makes the opinion stronger and more effective. For example, the Agricultural Registers and Information Board, a state agency, has reduced pay for employees returning from parental leave by 10 %. The Commissioner's opinion was so influential that 40 employees received their full wages. In order to improve the efficiency of legal remedies in gender discrimination cases, and to provide exemplary court decisions that will influence society concerning discriminatory practices and attitudes, the Commissioner will engage in strategic litigation. The Commissioner's office will be responsible for choosing the cases that will be brought before the court, arranging legal assistance in proceedings (e.g. contracting litigation lawyers), providing expertise on anti-discrimination laws, and organizing the publication of the outcomes of the proceedings.

The ETA provides for a right to equal treatment and protection against discrimination of persons and bans discrimination of persons. According to Estonian law, only natural persons can be victims of discrimination. Liability applies to both legal and natural persons.

Requirements of EU law and transposition schedules are monitored by the Gender Equality Department officials,⁶⁵ who take the initiative for law amendments, prepare explanatory memorandums, involve other partners and present draft laws to MPs. There is a lack of capacity to monitor implementation of the equality law. The Department runs gender equality programmes, produces reports, and organises calls for national and international projects.

In Estonia two equality bodies exist: the Office of the Chancellor of Justice (predominantly tribunal-type equality body; with an Ombudsman's mandate) and the Gender Equality and Equal Treatment Commissioner (the Commissioner). The Chancellor of Justice should verify that persons are not being discriminated against on grounds of gender, race, nationality, colour, language, origin, religion or religious beliefs, political or other opinion, proprietary or social situation, age, disability, sexual orientation or other status referred to in law. The Chancellor resolves discrimination disputes. In order to settle a discrimination dispute, the Chancellor of Justice shall initiate a conciliation procedure on the basis of an application. The consent of both parties is needed to start a conciliation procedure.

The Office Gender Equality and Equal Treatment Commissioner has increased its number of employees and now has new premises thanks to the Norwegian Financial Mechanisms scheme.⁶⁶ Today the Office has five employees, and three more will be recruited. Capacity building of this independent equality body is very important, because the Commissioner's opinions are a useful step prior to filing a court case. The Commissioner has

⁶⁵ The Gender Equality Department at the Ministry of Social Affairs employs about ten persons.

⁶⁶ From the EEA and Norway Grants, EUR 700 000 was allotted to capacity building of the Commissioner and the Office. It is intended to increase the staff to eight persons. The Norway Grants facility runs to 31 December 2015.

stated that there are no legal experts on gender available in Estonia and she should work with gender experts and train them in legal issues.⁶⁷

On 24 October 2013, the Gender Equality Council was officially established at the Ministry of Social Affairs. After nine years Article 24 of the GEA has finally been implemented. The Council's main responsibilities are advising the Government in matters related to strategies for the promotion of gender equality, approving general objectives of gender equality policy, and presenting opinions to the Government concerning the compliance of national programmes with the obligation of gender mainstreaming. In the coming years, the Council will concentrate on the gender pay gap, gender balance in decision making, gender stereotypes in the media, the educational system and the court system, and violence against women. Presently, there are 22 members.

Legislation provides for collective agreements at national, industry and company level. At national level there are a number of tripartite bodies bringing together the unions, employers and Government. The most important is the Social and Economic Council. Tripartite negotiations have also been important in developing Estonia's system of industrial relations, labour market policy, and the minimum wage. In practice, the most important level is the company (or organisational) level bargaining in private and public sector. If an employer has signed a collective agreement, it applies to all employees, irrespective of whether or not they are union members. Agreements usually last for one or two years. For the majority of employees in Estonia, working conditions, and in particular pay, are fixed in direct discussions between the employer and the individual worker.

8. Overall assessment

Estonia has transposed the requirements of EU equality law. Transposition was possible by amending national laws, and no new laws were initiated in recent years. In 2008, new legal texts, the ECA and the ETA, were adopted. The preparation process of the ECA received a lot of attention and involved different interest groups and organisations. At the same time, amendments to existing laws for transposing EU equality directives were made without public debates. However, awareness about discrimination and equal treatment has risen. Still, awareness and protection of individual rights could be improved, and advice from equality bodies made more easily accessible and more effective.

Gaps exist in the actual application and implementation of national equality legislation. Transposition of equality directives has taken place, while some Chapters of the GEA have not been revisited. For example, according to Article 11(2) of the GEA, employers have to collect sex-segregated data, and the procedure for the collection of these data and a list of the data concerned was expected to be established by the Government of the Republic by regulation. This regulation does not exist and the law has not been implemented. The lack of data hinders gender impact assessment, in general as well as in the drafting of legislation. Promotion of gender equality has mainly been carried out within the framework of international projects and national funding is poor.

FINLAND – Kevät Nousiainen

1. Implementation of central concepts

The main legal instrument for Finnish gender equality law is the Act on Equality between Women and Men. The Act was originally enacted to satisfy the requirements of the UN Women's Rights Convention (CEDAW) in 1986, and the Act reflects the ambitions of the

⁶⁷ Correspondence between the Gender Equality and Equal Treatment Commissioner and the Ministry of Social Affairs, 30 May 2014. <http://dokumendihaldus.sm.ee/Letters/Forms/DispForm.aspx?ID=104661>, accessed on 1 June 2014.

Convention for example by having a broader scope of application than EU gender equality law. Only religious practices of religious communities and family life fall outside the scope of the Act. The Act has been amended several times, and since the 1990s, amendments have often taken place in order to implement the requirements of EU gender equality law. The main concepts in their present form are defined so as to correspond with the definitions in EU law. Direct discrimination is defined in the Act as ‘treating women and men differently on the basis of gender, or treating someone differently for reasons of pregnancy or childbirth’. The explicit reference to pregnancy discrimination was added to the definition for reasons of clarity. Indirect discrimination is defined as ‘treating women and men differently on the basis of gender by virtue of a provision, ground or practice that appears to be gender-neutral but where the effect of the action is such that the person may actually find her/himself in a less favourable position on the basis of gender’. The definition under Finnish law requires less proof by the person claiming discrimination than the definition under EU law, which requires proof of ‘particular disadvantage’. Harassment and sexual harassment constitute discrimination. Definitions of harassment and sexual harassment were introduced into the Act in 2009, and they literally repeat those in EU law, except for the clarification that harassment is conduct related to the sex of a person which is not sexual in character. An employer who, upon being informed that an employee has been the victim of sexual or other gender-based harassment, neglects to take steps to eliminate this harassment discriminates against the employee. Similar provisions apply to educational institutions (excluding those providing basic or primary education) – here Finnish law goes further than EU law – and to labour-market organisations.

Finnish equality law is oriented towards positive action and contains several provisions which impose positive equality duties on public authorities, employers and educational institutions. In all public-nominated administrative bodies, a minimum of 40 % of men and women is required. There are no quotas for elections, as gender balance was seen to be skewed in nominated rather than in elected bodies. Authorities and educational institutions must create administrative and operational practices that advance equality in decision-making. Gender balance is required for the boards of directors in companies with majority public ownership, but not other companies, which have introduced self-regulatory guidelines aimed at better gender balance in their company boards. Employers are to promote equal recruitment and career advancement, promote equality of terms of employment and facilitate the reconciliation of family and working life. Employers of at least 30 persons must prepare an annual equality plan, which must assess the equality situation of the workplace (jobs held by women and men, the pay for the jobs and pay differentials), and present a plan on how equality is to be achieved. Educational institutions must prepare an equality plan and pay attention to gender equality in student selections and performance assessment. Both EU law and the Finnish Constitution put limitations on what type of positive action is allowed.

The efficacy of the provisions regarding positive duties is weakened by a lack of sanctions. Moreover, the prohibition of discrimination under the Act on Equality is not backed up by sanctions in all matters within the material scope of the Act. A person who is discriminated against has legal remedies and the right to compensation mainly in those areas of life where remedies are required also under EU law. Equality authorities monitor the Act also in matters where remedies for individuals are not available, within the bounds of their resources.

2. Equal pay and equal treatment at work

2.1. Equal pay

The Act on Equality does not define pay, but the preparatory works to the Act refer to a broad definition.⁶⁸ Pay discrimination under the Act is a situation where an employer applies pay or

⁶⁸ The original preparatory works for the Act explain that pay means all remuneration paid for work, and the preparatory works present different examples of what is to be considered pay (Government Bill HE 57/1985 vp

other terms of employment so that the employee or employees are disadvantaged on the basis of sex compared to other employees performing the same work or work of equal value. Although work of equal value is expressly mentioned, it is difficult to implement the provision. The Finnish labour market is strongly gender-segregated into 'male' and 'female' jobs, and also mainly regulated through collective agreements. It is difficult for an employee to receive information on the pay in other jobs, and comparing jobs under different collective agreements is a much-disputed issue. The difficulties are partly tackled by the requirement of the Equality Act that larger employers are to provide an assessment of pay differentials as a part of their mandatory equality plan for the workplace. Employers offer many types of justifications for gender pay differentials, such as education, personal performance, work experience and personal qualifications of the employee. Personal performance is a valid justification only if substantiated by an assessment. The scarcity of labour in certain tasks is considered valid justification for differentials if the employer can prove that scarcity really exists in the field in question. Finnish law does not require payment of salaries during family-related leave periods, during which parents are entitled to social benefits. Many collective agreements, however, include an entitlement to salary payment, especially during maternity leave. The Finnish Labour Court has held that the condition of the collective agreement that confirms that the employee is entitled only to regular pay without the extra bonuses is valid.⁶⁹ The question of whether an employee who begins a new maternity leave directly after a family-related leave is entitled to pay also during this new maternity leave has been referred to the CJEU.

2.2. Access to work and working conditions

The Act on Equality prohibits gender discrimination in access to private and public employment, although the wording of the provision restricts 'access' to 'employing a person' or 'selecting someone for a particular task or training', thus excluding preparatory measures and recruitment policies. The exceptions to the prohibition include 'weighty and acceptable grounds related to the nature of the job or the task', which refer to genuine occupational requirements in EU law. The Act also excludes the religious practices of religious communities. In 1986, the same year that the Act was enacted, the Evangelical Lutheran Church of Finland opened its ministerial offices to women, however. Recent case law confirms that equal treatment under the Act on Equality is to be followed in church offices and other church jobs, even when they involve religious practices. The religious practices of other religious communities remain outside the scope of the Act, however. The sanctions under the Act on Equality do not apply to the acts of Members of Parliament or the President of the State and therefore not to any of the appointments they make. Military positions are open to women, but with military service being compulsory for men and optional for women, fewer women have the necessary qualifications. Employers must not manage the work, distribute tasks or arrange working conditions in a discriminatory manner, or terminate an employment or lay off an employee on the basis of gender. The provisions are binding for both private and public employers.

2.3. Occupational pension schemes

The Finnish pension system differs considerably from the assumptions that underpin EU gender equality law. Occupational pensions in the EU sense have been replaced by statutory occupational schemes that include entrepreneurs and agricultural entrepreneurs, and there is no prohibition which is specific to gender discrimination in occupational pension schemes as such schemes do not exist. It is confusing that state pension schemes for public servants fall

Hallituksen esitys Eduskunnalle naisten ja miesten välistä tasa-arvoa koskevaksi lainsäädännöksi, p. 19-20).

The Act underwent extensive reform in 2005, and the preparatory works for the definition of pay in EU law, but do not add a new definition for what is meant by pay under the Act on Equality (Government Bill 195/2004 vp *Hallituksen esitys Eduskunnalle laiksi naisten ja miesten välisestä tasa-arvosta annetun lain muuttamisesta*) supra 2.2.

⁶⁹ Labour Court Decision TT: 2010-139.

within the scope of EU occupational pensions. By EU criteria, Finnish municipal and state pension schemes should be considered as occupational, while other quite similar statutory occupational schemes would not. Gender-specific retirement ages existed for military personnel under the former Finnish state scheme, which the EU Court found discriminatory in the case of *Niemi*,⁷⁰ but now the public as well as the private schemes are gender-neutral and non-discriminatory. Individual pension schemes are sometimes offered as part of an employment contract, but they are treated as private pensions, and their conditions fall under the protection of goods and services.

3. Pregnancy and maternity protection, parental leave and adoption leave

Treating someone differently for reasons of pregnancy or childbirth is defined as direct discrimination. Employing a person, selecting her for a task or training, or deciding the duration of employment or pay or other terms of employment so that the person finds herself in a less favourable position on the basis of pregnancy or childbirth constitutes employment discrimination on the ground of gender. Treating someone differently on the basis of parenthood is defined as indirect gender discrimination. The provision also protects men with family responsibilities and is more favourable to victims of discrimination than EU law is. Persons returning from family-related leave are entitled to return to former duties under the Employment Contract Act, which also prohibits discrimination on the basis of family relations. If an employer terminates the job of a pregnant worker or a person on family-related leave, the termination is presumed to be on the ground of pregnancy or such leave. Family-related forms of leave are similar in both the private and public sectors.

Employees are entitled to leave during maternity and paternity, and to parental leave periods, during which they receive income-related benefits from the sickness insurance system. Maternity leave and benefits cover around four months, after which parental leave and benefits are available until around 11 months from the beginning of maternity leave. After that, a parent has the right to remain on so-called home care leave until the child is three years old, and return to his or her job after that. The home care leave merely provides a flat-rate benefit. Parental leave is transferable between parents, and home care leave is also available to mothers and fathers. These leaves are mainly taken by mothers. Paternity benefits are reserved for the father. After an amendment in 2012, paternity benefits are paid for a period of 36 weekdays (six weeks) provided that the mother is not on maternity or parental leave simultaneously. Thus, this non-transferable period is earmarked for the father as a solo care-giving parent. If the father does not use his right, the leave and benefits are lost.

4. Statutory schemes of social security

Employed persons in the public and private sectors, self-employed persons, entrepreneurs and agricultural entrepreneurs are covered by statutory insurance schemes against old age, invalidity and sickness, including short-term incapacity to work. As stated above, these statutory schemes are in fact a hybrid between occupational and statutory social insurance. The social insurance system is in practice highly uniform, although different types of occupation are regulated under different pieces of legislation. The schemes are paid by the insured person and his or her employer on a statutory basis, and protect persons in gainful occupations. After the recent reforms, the time spent on family-related leave is a pension credit. The statutory schemes are gender-neutral as to the obligation to contribute, the contributions, and the benefits including survivors' benefits; the military pension scheme that was at stake in *Niemi* was exceptional and was considered void even before the scheme in question was amended in 2005. The universal, residence-based national pension scheme guarantees a minimum income to those who do not receive such income from occupational schemes. The national pension is coordinated with occupational statutory pensions so that

⁷⁰ Case C-351/00 *Pirkko Niemi* [2002] ECR I-7007.

occupational pension benefits reduce the amount paid from the national pension scheme. The national pension remains important especially for elderly women without an employment history. The general prohibitions on discrimination on the basis of gender in the Constitution and the Act on Equality cover social insurance.

5. Self-employed persons

The term 'helping spouse' no longer exists under Finnish law. Persons who have an income from occupational activity without being employees are considered as entrepreneurs. An entrepreneur shall insure him/herself under the entrepreneurs' or agricultural entrepreneurs' pension schemes. In a family enterprise, family members can be owners, entrepreneurs or employees, but an entrepreneur cannot deduct pay and social security costs paid to a spouse from the occupational income. There are no legal obstacles to spouses establishing an enterprise together, or both spouses being defined as entrepreneurs. Social benefits, such as maternity benefits, are paid from the insurance scheme. The contributions are based on an annual income estimation, corresponding to what would be paid to an outsider for the job in question. Persons defined as entrepreneurs in a family enterprise have sometimes found it difficult to convince the authorities that they are in fact unemployed and no longer gainfully occupied in the family enterprise. Farmers are considered entrepreneurs with a specific social security scheme. The income from family farms must be divided between the spouses. Unless the spouses propose otherwise, the income shall be divided 50/50. A minimum of one third is not transferable between them. Maternity, paternity and parental leave benefits are paid to all parents, gainfully occupied or not, but the level of the benefits varies on the basis of occupational income. For agricultural entrepreneurs, temporary replacements are provided for parents on family-related leave, but there is no organised stand-in service for other entrepreneurs. The family-related benefits for entrepreneurs and the temporary replacement system in agriculture exceed the requirements of EU gender equality law.

6. Goods and services

An amendment of the Act on Equality that came into force at the beginning of 2009 provides that it is to be considered as discrimination if a supplier of goods and services puts a person into a disadvantageous position, or causes him/her to be the target of adverse consequences after s/he has claimed her rights or become involved in a procedure concerning gender discrimination. Although such discrimination was also prohibited before under the general prohibition of gender discrimination, before the amendment compensation was not available for persons denied access to goods and services on the grounds of sex.

The use of sex as an actuarial factor in the calculation of insurance premiums and benefits in insurances sold to consumers was prohibited under insurance legislation after 21 December 2012 in new insurance policies, and by 1 July 2013 also in older policies. The amendment was caused by the requirements of EU law following the *Test-Achats* case. As use of sex as an actuarial factor is only prohibited in policies sold to consumers, the use of sex is still allowed in insurance schemes that are sold to employers. Employers may therefore provide extra protection for their personnel through non-mandatory group or other insurance schemes which use sex as an actuarial factor.

7. Enforcement and compliance aspects

A person who has availed him/herself of the remedies or been partly involved in settling a discrimination matter is protected against victimisation by the Act on Equality. The burden of proof in discrimination cases is divided between the alleged victim and the defendant so that if the victim shows facts on the basis of which discrimination can be presumed, it is for the defendant to show that there has been no violation. Under penal law, the burden of proof in discrimination cases lies with the prosecutor or the victim. Various remedies are available for victims of discrimination. Compensation claims under the Act on Equality are brought to the

ordinary courts, and compensation is determined in each case depending on the nature of the violation. Even the minimum compensation of EUR 3 240 can be reduced or waived due to the offender's financial situation or other circumstances of the case. Compensation under the Tort Liability Act and the Employment Contracts Act can also be paid to the victim of discrimination, but then the rules on the burden of proof are different. Tort liability requires that the defendant has acted intentionally, which is not required in discrimination cases under the Act on Equality. Because the compensation can be reduced or waived, it is doubtful whether the relevant EU-law standard is fully met. At present, the maximum compensation in cases concerning access to employment is capped at EUR 16 210 for those candidates who would not have been chosen for the task even if no discrimination had taken place, but after an amendment of the Act on Equality in 2009 the maximum was removed in relation to the candidate with the greatest merits, who but for discrimination would have been appointed. No maximum is set for other situations where discrimination takes place. Judicial remedies also exist under administrative law, when the decision made by an administrative body is claimed to be discriminatory and thus void. Administrative law can in these cases offer a stronger remedy than compensation, as the victim can be reinstated in office or be nominated to a position that was wrongfully denied to him or her. The Equality Ombudsman has the competence to assist a party in a case involving compensation when the case is of general interest. In practice this does not happen. The Labour Court decides all cases involving collective agreements, but the victims of discrimination have no direct access to the Labour Court, as only social partners can initiate cases there. Labour-market organisations often assist their members in discrimination cases, but have no official standing when doing so; neither have other stakeholders such as women's associations. The remedy system is complicated.

There is no access to mediation or another less burdensome procedure than the ordinary courts. The Ombudsman for Equality and the Equality Board are the bodies that supervise the implementation of the Act on Equality. The Ombudsman mainly has consultative and supervisory competence. The Equality Board, whose members represent working life and equality expertise, is nominated by the Government. The Board can prohibit the continuation of a discriminatory practice. Discriminatory advertising for a vacancy, discrimination in appointing an employee or discrimination at work, as well as discriminatory advertising for a place in education are also punishable under the Finnish Penal Code.

8. Overall assessment

EU gender equality law has mainly been implemented correctly in Finland. Because Finnish gender equality law precedes the country's membership of the EU, and because the social security system differs from the general European model, there are problems in assessing implementation. The remedy system under Finnish law could be less complicated and allow more room for associations and other stakeholders. The compensation system is not completely satisfactory from the European point of view, but the amendment in 2009 removed the problem of limited compensation in cases of access to employment. There is a longer tradition of gender-neutral legislation in Finland than in most European States, and provisions on positive action and the reconciliation of family and working life exceed what is required by EU gender equality law.

FRANCE – Sylvaine Laulom

1. Implementation of central concepts

Until May 2008, the main concepts of EU gender discrimination law had not been properly implemented in France, as French legislation included no legal definition of the concepts of direct and indirect discrimination, although courts have applied the European definitions in

gender case law. The Act adopted on 15 May 2008 defines these concepts, mostly in accordance with the European definition.⁷¹ The Act applies to public and private relationships. According to this Act, there is direct discrimination where one person is treated less favourably on grounds of sex than another is, has been or will be. Courts interpret the French definition in compliance with the European one. Indeed, for the *Cour de cassation* ‘the existence of discrimination does not necessarily imply a comparison with other workers’.⁷² The definition of indirect discrimination is now the same as the European one. There have been very few cases on indirect discrimination. However, since 2012 the *Cour de cassation* has applied this concept in several cases.⁷³

Concerning positive action, the Labour Code recognises the possibility to take positive action through temporary measures laid down by decree or by collective agreements at sectoral levels and some collective agreements organise some positive action. The reform of the Constitution, adopted at the end of July 2008, includes an amendment which will facilitate positive actions. Thus a bill introducing a quota in company boards was adopted on 27 January 2011.⁷⁴ The bill intends to improve the representation of women in company boards and it imposes a quota for each sex. Firms which have more than 500 employees and revenues over EUR 50 million will have to ensure that each sex has at least 20 % of boardroom seats within 3 years, and 40 % in 6 years.

As provided by the Directive,⁷⁵ discrimination now also includes the instruction to discriminate against persons on grounds of sex (or the other grounds). At first, harassment and sexual harassment were not defined in relation to discrimination. The 2008 Act adds a new definition to these concepts, as required by EU law. However, the new Act has not repealed the existing definitions. This could create some problems of coordination as two different definitions of harassment could now concurrently apply.

Another problem is that the new definition of sexual harassment was found unconstitutional by the French Constitutional Court, which states that the definition was not sufficiently clear or precise.⁷⁶ The decision came as a bombshell, as it removed the prohibition on sexual harassment from the French criminal code. This decision and more importantly its consequences were clearly unexpected, as the decision left a legal vacuum in the Criminal Code, given its immediate effect. The main consequence of this decision was that as from the date of its publication no one could be convicted or punished on the ground of sexual harassment, as the offence no longer existed, and alleged offenders were systematically discharged. The new French legislature quickly addressed this issue and a new law was adopted in August 2012. It includes a new definition of sexual harassment, very similar to the European one, and the sanctions have been strengthened. The new law defines harassment as imposing on someone, in a repeated manner, words or actions that have a sexual connotation and either affecting the person’s dignity because of their degrading or humiliating nature or putting him or her in an intimidating, hostile or offensive situation.⁷⁷ One single act can also give rise to prosecution where someone is using any kind of serious pressure, with the real or visible goal of obtaining an act of a sexual nature (Article 222-33 of the Criminal Code).

⁷¹ Loi no. 2008-496 du 27 mai 2008, *portant diverses dispositions d’adaptation du droit communautaire dans le domaine de la lutte contre les discriminations*.

⁷² Soc. 10 November 2009, No. 07-42849, Bulletin and Soc. 29 June 2011, No. 10-14067, Bulletin.

⁷³ Soc. 6 June 2012, No. 10-21489 and Soc. 3 July 2012, No. 10-23013. Soc. 15 January 2014, No. 12-20688.

⁷⁴ Loi no. 2011-103 du 27 janvier 2011, JO no. 23 du 28 janvier 2011, *loi relative à la représentation équilibrée des femmes et des hommes au sein des conseils d’administration et de surveillance et à l’égalité professionnelle*.

⁷⁵ Directive 2006/54/EC OJ L 204/23 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).

⁷⁶ CC 4 May 2012, QPC, No. 2012-240.

⁷⁷ See Crim. 14 January 2014, No. 11-81362.

2. Equal pay and equal treatment at work

2.1. Equal pay

The Labour Code provides for equal pay for men and women ‘for the same job or a job of equal value’. The definition of remuneration that it gives is the same as Article 157 TFEU. The principle of equal pay also applies in the public sector. Much of the case law on equal pay raises the issue of the possible justification for unequal pay. Differentiation is therefore possible on the basis of an objective reason like seniority, efficiency, quality of work, or difference in job classification. However, most of the time this litigation is not based on sex discrimination but on a difference between one worker and others placed in the same situation as a general principle of equal pay for equal work applies in France.

Some provisions go further than what EU law requires, in involving the social partners. There is now an obligation to negotiate on equal pay at sectoral level and in enterprises. In order to ensure the effectiveness of mandatory bargaining, specific information must be provided on the situation of male and female workers including a comparison between both groups. In order to improve the content of collective agreements on equal pay,⁷⁸ sanctions are now prescribed when enterprises employing at least 50 employees have not concluded any agreement on sex equality.

2.2. Access to work and working conditions

French law needed some adaptations in the 1980s and 1990s. For example, it was only in 2001 that the prohibition of night work for women was abolished. Now, the implementation of Directive 2006/54/EC seems satisfactory. The protection of employees from sex discrimination covers every aspect of working life. As provided by the Directive, any provision contrary to the principle of equal treatment which is included in collective agreements or contracts of employment is null and void. Exceptions are very few. Article L.1142-2 states that the prohibition of discrimination does not apply when the sex of the worker constitutes a determining factor in employment and that the objective sought is proportionate and the exception is also proportionate. A decree also defined the types of employment concerned: it only covers actors and models. Some other exceptions still exist. For example, it seems that the navy has not yet opened up posts on submarines to women. A few exceptions also exist in some specific police forces (e.g. the *gendarmérie mobile*).

2.3. Occupational pension schemes

Article L.913-1 of the Code of Social Security ensures the implementation of Recast Directive 2006/54/EC and states that any clauses in agreements, decisions, and contracts which are in breach of the non-discrimination principle are null and void. As provided by the Directive, the prohibition of discrimination in occupational social security schemes applies to the working population including the self-employed.

The *Griesmar* case clearly highlights some of the French difficulties in implementing the Directive in occupational pension schemes.⁷⁹ In French occupational pensions, various family benefits used to exist which favoured women in particular in order to compensate for the time they spent raising children. After the *Griesmar* case, many developments took place in the field of pensions. However, there are still some special pension schemes embodying similar discrimination between men and women. Cases are regularly brought before the courts and, following the *Griesmar* case, the *Cour de cassation* and the *Conseil d'Etat* have recognised the existing discrimination.⁸⁰ These special pension schemes are currently being renegotiated.

⁷⁸ *Loi No. 2010-1330, 9 Novembre 2010 portant réforme des retraites, Décret No. 2011-822, 7 juillet 2011, JO 9 juillet*, p. 11930.

⁷⁹ *Case C-366/99 Joseph Griesmar v Ministre de l'Economie, des Finances et de l'Industrie et Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation* [2001] ECR I-09383.

⁸⁰ See, for example, *Conseil d'Etat*, 7 June 2006 case No. 280 126 or *Cour de cassation*, 8 July 2004, case No. 03-30210, also see the HALDE's deliberations, No. 2006-39 and 2006-201.

3. Pregnancy and maternity protection, parental leave and adoption leave

The period of maternity leave is six weeks before the presumed date of confinement and ten weeks after confinement; the same provisions apply to civil servants. During her maternity leave, the worker is entitled to maternity benefits on condition that she has been registered under the social security system for at least ten months on the presumed date of confinement. The amount of the maternity benefit is calculated on the basis of the average salary received over the last three months. Many collective agreements nevertheless provide that the worker receives full pay during maternity leave. At the end of her maternity leave, the worker will be reinstated in her previous job or given similar work.⁸¹ The wages must be increased after the maternity leave in order to follow any general increases received by individual co-workers of the same category during the period of the employee's leave. In general, the worker is also entitled to all the advantages occurring during her leave that she would have been entitled to if she had not taken maternity leave. She is entitled to normal paid leave and to the normal rights to vocational training as if she had not been absent.

Dismissal is prohibited from the beginning of the pregnancy until four weeks after the end of the maternity leave⁸², even if the employer was not notified of the pregnancy, except in the event of a serious fault by the worker or if the dismissal is objectively necessary for reasons not linked to pregnancy, confinement or adoption. The *Cour de cassation* has allowed a right of reinstatement when this rule is infringed.⁸³

According to the Labour Code and to civil servant statutes, any worker, irrespective of the size of the enterprise, has an individual right to parental leave in the case of the birth or adoption of a child, if the employee has been working in the enterprise for at least one year before the birth or adoption of the child. The period of parental leave is initially for one year, and can be renewed twice until the child is three years old. Parental leave can be granted on a full-time or part-time basis. During parental leave, the employment contract is suspended and after parental leave, the worker has the right to return to the same job or, if this is not possible, to an equivalent or similar job, where the same advantages apply as before. Parental leave is unpaid but employees could be eligible for specific allowances. However, as the level of allowances is low, the parental leave is mostly taken by low-qualified women and could lead to some women withdrawing from the labour market.⁸⁴

Since 2001, paternity leave has been recognised for all fathers who are employees and civil servants. Paternity leave is eleven consecutive days for the birth of a single baby. Paternity leave is paid by the social security scheme up to a ceiling and could therefore be unattractive for executives. Some companies have adopted full pay for fathers in terms of a 'parent-friendly' measure. The *Cour de cassation* held that paternity leave is a right recognised for the father of a child and there is no sex discrimination in refusing the benefit to the female partner of the mother.⁸⁵

In many respects, French provisions go further than European law, mostly because maternity leave and specifically parental leave are longer than the European minimum required and also because it also includes a paternity leave. This is also why no new elements have been needed to transpose Directive 2010/18/EU.⁸⁶ However, parental leave is mostly taken by women.

⁸¹ See Soc. 3 February 2010, No. 08-40.338.

⁸² See Soc. 30 April 2014, No. 13-12321: the 4-week period of protection is suspended during the paid leave when it is taken directly after the maternity leave.

⁸³ 30 April 2003, Bull, No. 152.

⁸⁴ See Dares, Premières Synthèses, *Pourquoi certaines femmes s'arrêtent-elles de travailler à la naissance d'un enfant?*, Juillet 2003, no. 29.2 and Credoc Dossier d'études, *Congé parental et carrières professionnelles des mères*, no. 147, 2011.

⁸⁵ Cass, 2^eme civ. 11 March 2010, No. 09-65853.

⁸⁶ The only measure implementing Directive 2010/18 has been a decree adopted on 18 September 2012 (Decree No. 2012-1061), which modifies the rule for parental leave for public servants. The decree recognises parental leave as an individual right. Before, for public servants, the mother and the father could take the parental leave or could share it but could not take it simultaneously. This is now possible.

4. Statutory schemes of social security

Statutory social security schemes respect the principle of equality between men and women. First, the French legislator has chosen to implement the exception in Article 7(b) of Directive 79/7/EEC according to which Member States can exclude from the scope of their legislation the advantages in respect of old-age pension schemes granted to persons who have brought up children. However, a new provision included in the law to finance social security in 2010 was adopted in December 2009.⁸⁷ As for civil servants, a specific right for women linked to maternity has been maintained: increased insurance coverage for pensions in the private sector for a maximum of one year for women who have given birth to one or more children. For the second year, the mother will continue to benefit from another increase in insurance coverage for children born before 1 January 2010, except if the fathers can prove, in the year following the publication of the law, that they have raised their children on their own. For children born after 1 January 2010, the mother will continue to benefit from an increased insurance coverage for a second year, if there is agreement between the father and the mother, expressed in the six months following the child's 4th birthday. If there is disagreement between the parents, the advantage will be granted to the parent who can prove that he/she has contributed more and for a longer period to the education of the child. If both parents have contributed equally to the child's education, the benefit will be divided into two.

5. Self-employed persons

In French law, there are some binding provisions that protect women engaged in an activity in a self-employed capacity. The conditions under which a company is formed are the same for both married and unmarried couples. Since 2005, the spouse of a self-employed worker, participating in the spouse's activity, has to decide whether he/she wishes to work in the business as an employee, as a partner or as a co-working spouse (*conjoint collaborateur*). In this case, the spouse can apply for sickness benefits and he/she must contribute to a pension scheme. She/he can also apply for a daily maternity benefit plus a benefit for temporary replacement. The spouse can also apply for a benefit for temporary replacement for paternity leave. Self-employed women have a right to a daily maternity benefit for a period of 44 days, a period which can be extended by twice 15 days. The maximum period for this benefit is therefore 74 days, which is less than the 14 weeks provided by Directive 2010/41/EU. Specific rules can apply to various categories of self-employed workers. For example, since 2012, associated lawyers have the right to a maternity leave of 16 weeks (as opposed to 12 before). The extension of this period is a result of Directive 2010/41/EU.

6. Goods and services

Directive 2004/113/EC has been implemented without much debate by two Acts. The first Act of December 2007 reproduces Article 5 of the Directive.⁸⁸ The 2008 Act also reproduces the scope of and most of the exceptions in Directive 2004/113/EC. It provides a general prohibition of direct or indirect discrimination based on sex in the access to and supply of goods and services. The Act also adopts the exception by using almost the same terms as the Directive. However the Act does not exclude, as the Directive does, the non-discrimination principle for the content of media or advertising. Concerning public or private education, the Act merely states that the non-discrimination principle does not prohibit the organisation of non-mixed schools.

French legislation made use of the exemption from the principle of equal treatment allowed by Article 5 Paragraph 2 of Directive 2004/113/EC. The *Test-Achats* ruling was

⁸⁷ Article 65 of Act No. 2009-1646 of 24 December 2009, *loi de financement de la Sécurité Sociale pour 2010*.

⁸⁸ See the new Article 117-1 of the Code of Insurance.

enforced in December 2012.⁸⁹ A ministerial order adopted on 18 December 2012 states that gender differentiations can only apply to insurance contracts concluded before 20 December 2012 or those which are tacitly renewed.⁹⁰ The implementation of the *Test-Achats* ruling occurred at the last moment possible. Several months later, a Bill was adopted⁹¹ modifying Article L 111-7 of the Insurance Code, to delete any reference to gender differentiations. The implementation of Directive 2004/113/EC seems satisfactory and the *Test-Achats* ruling has been taken into account. However, the Directive and the French legislation are not very well known and no case law has been published on the interpretation of the Directive, for example.

7. Enforcement and compliance aspects

Different rights are also recognised to facilitate the bringing of claims regarding discriminatory actions and the referral of such cases to the Courts.

Concerning victimisation, the Labour Code states that no employee can be the subject of disciplinary action, be dismissed or be subject to a discriminatory act for having testified to having witnessed discrimination or having talked about this and the 2008 Act has extended the scope of this provision to the public sector.

The burden of proof has been amended, first by case law influenced by the European directives and by CJEU decisions,⁹² and then by the Act of 16 November 2001. Employees or job applicants who feel that they have been discriminated against must present the court with evidence ‘that leads one to believe that direct or indirect discrimination has taken place’. In the light of this evidence, it is up to the defendant to ‘prove that the decision taken was justifiable according to objective facts that had no connection with any form of discrimination’.

Recently, the *Cour de cassation* heard a case similar to the *Meister* case.⁹³ For the *Cour de cassation*, respecting an employee’s personal life and respecting the employer’s business secrets are not in themselves an obstacle to the application of Article 145 of the Code of Civil Procedure,⁹⁴ when a national Court finds that the requested measures are legitimate and are necessary for the protection of the rights of the party who has requested them. The Court of Appeal was right in deciding that the employees had a legitimate aim in demanding the communication of information necessary for the protection of their rights, information that only the employer had and that he refused to communicate.

As to remedies and sanctions, in France these meet the European standards and they are proportionate and effective. Any discriminatory actions by employers are regarded as null and void, and the employee retains all previously held rights. In the context of a dismissal, this means that any dismissal on discriminatory grounds could be annulled and a worker dismissed on a discriminatory ground can claim her/his reinstatement and he/she is regarded as never having left the job. This is a specific sanction for discriminatory acts. In a case where the employee does not want to continue the employment relationship, he or she is eligible for a compensatory payment equal to at least the previous six months’ wages as well as compensation granted for unlawful dismissal. In situations other than dismissal the sanction is compensation that should entirely compensate the damage. Penal sanctions are also possible even if they are rarely used. Under the Labour Code the employer risks a maximum of one year imprisonment and a fine of EUR 3 750. Under the Criminal Code the employer

⁸⁹ Case C-236/09 *Association belge des Consommateurs Test-Achats ASBL and Others v Conseils des ministres* [2011] ECR I-00773.

⁹⁰ Order of 18 December 2012, on equality between men and women in insurances, JO 20 December 2012.

⁹¹ Bill No. 2013-672, July 2013, on the regulation of banking activities.

⁹² See *Cour de cassation*, 23 November 1999, Bull. V No. 447.

⁹³ Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH* [2012] (n.y.r.).

⁹⁴ According to this Article, ‘if there is a legitimate reason to preserve or to establish, before any legal process, the evidence of the facts upon which the resolution of the dispute depends, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of a petition or by way of a summary procedure’.

additionally risks a maximum of three years' imprisonment and a fine of EUR 45 000 for certain more serious infringements.

Access to the courts is also safeguarded. The right to bring a court case concerning a discrimination claim has also been extended under certain conditions to representative trade unions and to associations which have been legally established for at least five years.

The Defender of Rights (who replaced the former HALDE) is an independent administrative body. His mandate covers all forms of direct and indirect discrimination prohibited by French legislation or in international agreements ratified by France. Victims of discrimination may directly present their case to the Defender of Rights. Without replacing the traditional channels for redressing discrimination within the legal system, the Defender of Rights can identify discriminatory practices. The Defender of Rights can also help victims make a case against agents of discrimination and, thanks to special powers, carry out an investigation and demand explanations from defendants, by conducting hearings and collecting other evidence, including the gathering of information on site. It can issue recommendations and publish them thus encouraging the defendant to comply with them.

Through the obligation to annually negotiate on equality and on the gender gap, the legislator intends to induce the social partners to play an active role in the implementation of gender equality law. The possibility that trade unions have to bring a court case on behalf of an employee also gives trade unions a role in the enforcement process.

8. Overall assessment

Although the process of implementing the directives has been long, the overall implementation seems satisfactory. In some respects, French law goes further than the European obligations, for example in providing for longer parental leave, for paternity leave, or by obliging the social partners to negotiate on the pay gap. However, even if formally the situation is satisfactory, for years there has been very little litigation on equality issues and, moreover, most of the litigation has concerned men claiming the same rights as women (see, for example, the *Griesmar* case). Some elements reveal an evolution. Generally, the number of cases on discrimination brought before the courts is increasing. Lawyers, judges and legal literature are becoming more familiar with the instruments of discrimination regulation and this will have consequences for sex discrimination.

GERMANY – Ulrike Lembke

1. Implementation of central concepts

Germany's main law implementing EU gender discrimination law is the General Act on Equal Treatment (AGG; *Allgemeines Gleichbehandlungsgesetz*⁹⁵). It defines the four concepts of discrimination – direct and indirect discrimination, harassment and sexual harassment – with the same wording as the European anti-discrimination directives. The law employs the term 'putting at a disadvantage' (*Benachteiligung*) instead of 'discrimination' (*Diskriminierung*), but does not mean to weaken the protection as compared to the European directives. The legislator intended to emphasise that only unjustified different treatment deserves the negative term of discrimination. The Federal Constitutional Court explicitly recognised the European concept of indirect gender discrimination as also applying under German constitutional law.⁹⁶ The instruction to discriminate is also understood as being discrimination, and it is not limited to instruction to discriminate against an employee.

⁹⁵ *Allgemeines Gleichbehandlungsgesetz* of 14 August 2006, Official Journal (*Bundesgesetzblatt BGBI*), part I p. 1897.

⁹⁶ Many German courts, however, still face difficulties when applying the concept of indirect discrimination, see U. Sacksofsky *Mittelbare Diskriminierung und das Allgemeine Gleichbehandlungsgesetz* Berlin 2010.

Positive action is explicitly permitted if used to prevent or offset disadvantages based on gender. This applies to the area of employment as well as to the provision of goods and services. According to the Federal Constitution, public entities are even under a duty to further women's equality in actual practice. As a consequence, the federal level and the federal states have enacted laws to further equality between the sexes. Most of them oblige public institutions to enact plans to increase women's representation on all levels of employment, and to hire or promote women instead of an equally qualified man, unless there are exceptional reasons to decide in favour of the male candidate. In contrast, there are no laws obliging private enterprises to promote women's equality. On 11 December 2014, the federal Government presented a draft law on a statutory 30 % minimum gender quota for supervisory boards of listed and co-determined private companies by 2016. In addition, it presented amendments to the Statute on Bodies within Federal Control (*Bundesgremienbesetzungsgesetz*) to ensure a 30 % minimum gender quota by 2016, and aim for 50 % by 2018.⁹⁷

2. Equal pay and equal treatment at work

2.1. Equal pay

The prohibition of discrimination with regard to pay is covered by Section 2(1)(2) of the General Equal Treatment Act, which prohibits any discrimination on the grounds of sex in relation to employment and working conditions, including pay, in particular in contracts between individuals and in collective agreements. Furthermore, possible justifications for different treatment do not include a lower rate of remuneration for the same or equivalent work on the grounds of sex/gender on account of special (protective) regulations applying to sex/gender.

The AGG cannot implement the provisions of Directive 2006/54/EC due to the date of its entry into force, but the Federal Government claims that the broad scope of the AGG covers all provisions in the Directives. Differing from the preceding regulation, the AGG does not contain an entitlement to equal pay but a general prohibition of discrimination, and the courts state that there is no legal rule providing for the same pay for the same work, neither under the AGG nor in German law in general.⁹⁸ The term 'pay' is not defined in the AGG but interpreted in an extensive way, and includes all benefits granted by the employer. It therefore covers the salary and all other contributions of financial value, such as one-off payments, premiums, benefits in kind or paid leave. Unfortunately, definitions of 'work of equal value' are also lacking in the AGG, although the classification and evaluation of work is one of the main obstacles to equal pay. For a definition of 'work of equal value', the Federal Labour Court, in its rare decisions on the topic, focuses on the requirements for work performance, but this is not beyond indirect discrimination itself.⁹⁹

The principle of equal pay is part of the gender equality principle in Article 3(2) and (3) of the German Constitution which binds the State, as an employer, as well as the parties to collective labour agreements. And there are several statutory provisions for the public and the private sector prohibiting discrimination with regard to pay. But most wages and job classification systems in Germany are determined by collective agreements under the Act on Collective Bargaining (*Tarifvertragsgesetz*) which contains no provisions on equal pay. Due to its understanding of the autonomy of collective bargaining (freedom of coalition) under the

⁹⁷ Co-determination refers to the right of workers to participate in the management of the companies for whom they work. For information on the amendments, see: <http://www.bmfsfj.de/BMFSFJ/gleichstellung.did=212316.html>, accessed 8 January 2015. Little remains of the former ambition to establish a statutory 40 % minimum gender quotas for supervisory and executive boards within ten years. In 2014, 6 % of all executive board members were female.

⁹⁸ Federal Labour Court, judgment of 25 January 2012, 4 AZR 147/10; State Labour Court of Hamburg, judgment of 1 March 2011, 2 Sa 56/10.

⁹⁹ See Federal Labour Court, judgment of 19 April 2012, 6 AZR 578/10, on the incomparability of (female) secretarial services and (male) technical services within the armed forces.

German Constitution, the Federal Labour Court decided that the evaluation of work and the establishment of systems of pay are crucial parts of this autonomy and that the State must not interfere with these decisions of the social partners. Although most trade unions in Germany regard themselves as being bound by the principles of gender equality, including equal pay, collective agreements are still a major cause of the considerable gender pay gap, traditionally favouring the male breadwinner model and devaluing 'female' professions as well as part-time work. Even collective agreements with public services and social institutions contain gender-discriminatory classification systems. Individual claimants proving gender discrimination are entitled to an upward adjustment of their wages ('*Anpassung nach oben*'), and any provisions of a working agreement that violate the prohibition of discrimination shall be ineffective under Section 7(2) of the AGG. But normally courts do not change the underlying collective agreement or declare the agreement or its discriminatory provisions invalid – due to the freedom of collective bargaining.

The gender pay gap remains at 23 % in Germany, and this figure has not changed since 1995. The main obstacle to tackling pay discrimination is that there are no specific mechanisms to implement the principle of equal pay in practice. Although tackling the gender pay gap is one of the main topics on the agenda of the respective Ministry, no draft law¹⁰⁰ has been presented yet.

2.2. Access to work and working conditions

Under the General Equal Treatment Act (AGG), the prohibition of discrimination on the grounds of sex/gender applies to access to work, working conditions, and promotion, both in individual and collective agreements, as well as to vocational training and to membership of, involvement in, and the benefits of employers' and employees' organisations. The law is applicable to all employment relationships between private parties and to employees in the civil service who do not enjoy the special status of civil servants. Dismissals are not covered by the AGG. Instead, they remain under the general laws on dismissal, which do not contain a prohibition of gender discrimination. Despite the clear text of the law, the Federal Labour Court interprets the AGG as covering dismissals,¹⁰¹ but one of the four main criteria for selecting the employees to be dismissed in the event of economic difficulties is still the length of their employment by the employer in question. It is therefore unclear whether this interpretation will prevent indirect gender discrimination by dismissal.

Under the AGG, differential treatment based on sex is permissible if the type of activity or its context require the employee to be a man (or woman). This requirement must pursue a legitimate aim and must be proportionate. German law reflects, even in its wording, the permissible exceptions under Directive 2006/54/EC. German courts have decided that the preference for appointing female equal opportunity commissioners or even the exclusion of male equal opportunity commissioners may be justified due to the relevant working requirements.

For civil servants, special laws contain rules on gender equality and non-discrimination, and the AGG only applies insofar as there are any gaps.

2.3. Occupational pension schemes

Occupational pension schemes are covered primarily by the Act on Occupational Pension Schemes (*Betriebsrentengesetz*; BetrAVG)¹⁰² and additionally by the AGG. The AGG is applicable insofar as the BetrAVG, which applies to benefits for retirement, invalidity, or for surviving family members under occupational pension schemes set up by private employers, does not contain special precedent provisions. The BetrAVG does not contain a prohibition on gender discrimination, but gender discrimination with regard to occupational pension schemes

¹⁰⁰ However, see Documents of the Federal Parliament (Bundestags-Drucksache) 17/9781 of 23 May 2012, <http://dip21.bundestag.de/dip21/btd/17/097/1709781.pdf>, accessed 15 May 2013.

¹⁰¹ Since Federal Labour Court, judgment of 6 November 2008, 2 AZR 523/07.

¹⁰² *Gesetz zur Verbesserung der betrieblichen Altersversorgung (Betriebsrentengesetz)* of 19 December 1974, Official Journal (*Bundesgesetzblatt BGBl*), part I p. 3610.

might be a question of ‘equal pay’ under the AGG.¹⁰³ The Federal Labour Court considered entitlements to early retirement pensions that depended on the formerly different (earlier) retirement ages of women to be unlawful indirect discrimination.¹⁰⁴ And following the case law of the CJEU, the Federal Labour Court developed effective protection against gender discrimination, and especially indirect discrimination of (mostly female) part-time workers. In particular, it held that the employer must not exclude part-time employees from occupational pension schemes, and it required the employer to conclude pension agreements that provide for different classes of workers according to their working hours.¹⁰⁵ The Federal Constitutional Court considered lower pension schemes for part-time civil servants to be indirect sex discrimination and incompatible with the constitution.¹⁰⁶

The law on occupational pension schemes does not make use of the exceptions permitted by Article 8 of the Recast Directive. The law no longer permits different retirement ages for men and women. But indirect sex discrimination remains a problem in practice. For example, the Federal Labour Court held that the failure to take periods of bringing up children into consideration for the purpose of occupational pensions constitutes neither direct nor indirect discrimination on the grounds of sex and does not violate European or national constitutional law.¹⁰⁷ The condition of a 15-year period of service for the same employer to be entitled to occupational pensions constitutes no indirect sex discrimination either.¹⁰⁸ The Federal Labour Court explicitly rejects the addition of (interrupted) periods of service for the same employer.¹⁰⁹

3. Pregnancy and maternity protection, parental leave and adoption leave

Going beyond the European directives, the Maternity Protection Act (*Mutterschutzgesetz; MuSchG*)¹¹⁰ grants pregnant employees a right to a fully-paid leave of six weeks before, and eight weeks after childbirth. During this time, they also remain entitled to the benefits of health insurance schemes, and their contributions to social security schemes continue to be paid. During their pregnancy, employees may not perform work that is dangerous to their own health or to that of the unborn child. They also have a right to special protection, such as breaks or the possibility to sit down. Pregnant women must not be dismissed during their pregnancy and four months after childbirth.¹¹¹ When the employee herself terminates the contract with her employer during maternity leave and the contract is re-entered into within a year after confinement, the law presumes the labour relation uninterrupted with regard to the duration of the employment as a condition for benefits, premiums or promotion. There is no need for a ‘right to return’ because the employment relationship remains unaffected by maternity leave. (For example, the holiday entitlement is completely preserved.) During maternity leave, employees are entitled to maternity allowances in the amount of their last net income. Maternity allowances are financed by sharing the costs between the statutory health insurance and all employing enterprises in a complicated contribution procedure. Paternity

¹⁰³ See Federal Labour Court, judgment of 11 December 2007, 3 AZR 249/06. The Court considered provisions that granted men a survivor’s pension only if the deceased wife had been the main provider of the family income to be discriminatory, following its judgment of 3 September 1989, 3 AZR 575/88.

¹⁰⁴ Federal Labour Court, judgment of 15 February 2011, 9 AZR 750/09.

¹⁰⁵ Federal Labour Court, judgments of 4 March 1989, 3 AZR 490/87; of 23 January 1990, 3 AZR 58/88; of 20 November 1990, 3 AZR 613/89; and of 5 October 1993, 3 AZR 695/92.

¹⁰⁶ Federal Constitutional Court, judgment of 18 June 2008, 2 BvL 6/07.

¹⁰⁷ Federal Labour Court, judgment of 20 April 2010, 3 AZR 370/08.

¹⁰⁸ Federal Labour Court, judgment of 12 February 2013, 3 AZR 100/11.

¹⁰⁹ Confirmed by the Federal Labour Court, judgment of 9 October 2012, 3 AZR 477/10.

¹¹⁰ *Gesetz zum Schutz der erwerbstätigen Mutter (Mutterschutzgesetz)* of 24 January 1952, Official Journal (*Bundesgesetzblatt BGBI*), part I p. 2318.

¹¹¹ Before, German courts confirmed the dismissal of pregnant workers when they did not reveal their pregnancy during their recruitment. It was not until 2003, that the Federal Labour Court, judgment of 6 February 2003, 2 AZR 621/01, decided that questions concerning the possible pregnancy of a female candidate are unlawful.

leave is not granted under German law, but civil servants can apply for a day's special leave on the occasion of their partner's confinement.

Parental and adoption leave is provided under Sections 15-21 of the Federal Law on Parental Allowance and Parental Leave (*Bundeselterngeld- und Elternzeitgesetz; BEEG*).¹¹² Mothers and fathers are entitled to parental leave up to three years after birth or, in the case of an (intended) adoption or full-time foster care, beginning with the child's entry into the household. The parental leave can be taken by performing part-time work when employer and parent agree upon the conditions. The employee is entitled to the employer's consent to a reduction of working hours when he or she has been working for an employer with more than 15 employees for more than six months, unless there are urgent adverse operational reasons.¹¹³ During parental leave, employees cannot be dismissed. The law on parental leave does not grant a right to return to the same or a comparable job or to benefit from any improvement of working conditions.

The law on parental leave goes beyond the European requirements by providing for a parental allowance for parents for up to 14 months, provided that at least two months are taken by the other parent (normally the father). It amounts to 67 % of the average salary of that parent during the past twelve months, but cannot exceed EUR 1 800. Parents with a salary of more than EUR 1 200 are only entitled to 65 % of the former salary. Parents with a salary of less than EUR 1 000 receive an increase which can bring their parental allowance up to 100 % of the former salary. Parental allowance may not be less than EUR 300. Since 2013, the BEEG provides for siblings' bonuses (10 % of the parental allowance and at least EUR 75) and an additional allowance of EUR 300 per child in case of multiple births. The parents can take parental leave simultaneously or one after the other, but simultaneous parental leave results in a significantly reduced amount of the allowance. Surprisingly, the Federal Social Court decided that the applicable regulations for calculating the amount neither violate the constitutional protection of the family, especially the free decision on the optimal division of labour between the parents, nor the principle of equality, especially gender equality.¹¹⁴ Since the BEEG was amended in 2012, female employees expecting another child can terminate their parental leave to switch to maternity leave with clearly better conditions.¹¹⁵ On 1 January 2015, further amendments of the BEEG entered into force. These amendments extend the duration of the entitlement to parental allowances of parents that work part-time, and thoroughly increase the flexibility of parental leave. The intention is to encourage both parents to work part-time during parental leave and to share family responsibilities and childcare duties more equally.¹¹⁶

Employees are entitled to take time off work in the case of the sickness or accident of a family member. Exceeding European requirements, this right is also granted in the case of the death or marriage of a close family member or when the employee's wife gives birth. In these cases, employees continue to be paid by their employer.

4. Statutory schemes of social security

Under the Social Codes, statutory social security schemes apply to all employees and persons in vocational training. They automatically fall under these schemes (unemployment,

¹¹² *Gesetz zum Elterngeld und zur Elternzeit (Bundeselterngeld- und Elternzeitgesetz, BEEG)* of 5 December 2006, Official Journal (*Bundesgesetzblatt BGBI*), part I p. 2748.

¹¹³ The employer's wish for the performance of certain tasks in full-time employment does not constitute an adverse operational reason, not even when the tasks of a leading position are in question: Federal Labour Court, judgment of 15 December 2009, 9 AZR 72/09.

¹¹⁴ Federal Social Court, judgment of 15 December 2011, B 10 EG 1/11 R.

¹¹⁵ This amendment was a consequence of the *Kiiski* and the *Küçükdevici* case, intensified by several German judgments emphasising that the former legislation constituted an infringement of European law, e.g. Administrative Court of Berlin, judgment 15 May 2012, 7 K 48/11; Administrative Court of Augsburg, judgment of 29 September 2011, Au 2 K 11/1018; Administrative Court of Gießen, judgment of 18 March 2010, 5 K 1084/09.GI.

¹¹⁶ See Official Journal (*Bundesgesetzblatt BGBI*) of 29 December 2014, part I at p. 2325.

healthcare, work accidents, retirement). Going beyond the Directive, they also apply to statutory care insurance. The contributions to these social security schemes are borne equally by the employee and employer and are deducted from the salary before payment to the employee.

However, according to Social Code No. IV (*Sozialgesetzbuch IV*), so-called mini-jobs with an income of up to EUR 450 are not subject to statutory social security but instead to tax advantages. For years, experts have agreed on the identification of mini-jobs as an often involuntary form of employment and a poverty trap, especially for female employees, and therefore on the recommendation for the termination of their present promotion.¹¹⁷ Since January 2013, so-called mini-jobs are subject to mandatory pension scheme contributions with the possibility of exemption. The mandatory pension scheme contributions are a fine idea insofar as every year in a mini-job counts as a contribution year for pension schemes, but the marginal contributions cannot build up a significant amount and therefore fail to prevent poverty in old age.

On 23 May 2014, the Federal Parliament adopted a law on statutory pension schemes covering an extension of the recognition of childcare periods by statutory pension schemes and professional insurance funds and introducing the option of an early entry into retirement at the age of 63 without deductions. The German Women Lawyers Association gravely criticises the option of early retirement due to its gender impact: Its requirements are disproportionately met by well-paid male employees who did not interrupt their working life for childcare periods and cannot be met by employees in marginal or minor employment or employees who have taken childcare leave for longer periods – the overwhelming number of them being female.

5. Self-employed persons

Self-employed persons are covered by the AGG. Consequently, any gender-based discrimination with respect to access to self-employed activities and promotion is prohibited. This provision is of little relevance as the chapter referred to gives a right of action against private employers who discriminate, and hence does not apply to the situation of the self-employed. The provision is of importance only insofar as it grants protection against employers' associations or professional organisations. Concerning working conditions or the discriminatory termination of self-employment contracts, the self-employed person may only invoke Section 19 of the AGG, which covers the protection against discrimination in the area of civil law.¹¹⁸ This section transposes the requirements of Directive 2004/113/EC. Unfortunately, the AGG restricts the notion of a good or service 'available to the public' to so-called 'mass contracts', i.e. contracts which are typically concluded irrespective of the identity of the other contracting party, or where the identity of that person is of little importance. In consequence, a self-employed person is only protected against discriminatory working conditions or discriminatory termination of his or her contract when this contract meets the requirements of Section 19 of the AGG, which is not the rule because the identity of the contracting parties regularly is of some importance. Self-employed persons can only enjoy the full protection of the AGG if they are in fact 'quasi-subordinates'.¹¹⁹

Directive 2010/41/EU has not yet been implemented into German law. The Federal Government and the Federal Council were averse to its contents and questioned its need as

¹¹⁷ For example: A. Herzog-Stein et al. (eds.) *Minijobs*, WSI-Mitteilungen 1/2012, http://www.boeckler.de/wsi_38633.htm; resolutions of the 68th Deutscher Juristentag 2010, p. 5, http://www.djt.de/fileadmin/downloads/68/68_djt_beschluesse.pdf, both accessed 27 May 2013; R. Zimmer 'Geringfügige Beschäftigung von Frauen – ein prekärer Zustand' in: in: C. Hohmann-Dennhardt et al. (eds.) *Geschlechtergerechtigkeit. Festschrift für Heide Pfarr* pp. 296-310, Baden-Baden, Nomos 2010.

¹¹⁸ G. Thüsing *Arbeitsrechtlicher Diskriminierungsschutz*, München 2007, paragraph 94, emphasises that the pursuit of self-employed activities or professions is only covered by Sections 19-21 of the AGG.

¹¹⁹ See J.-H. Bauer et al. *Allgemeines Gleichbehandlungsgesetz. Kommentar* Section 2 Paragraph 16, München 3rd ed., 2011.

well as the competence of the European Union concerning social security law.¹²⁰ Self-employed persons (and freelancers) are not covered by the statutory social security systems and they cannot normally take part in occupational pension schemes. Self-employed persons can voluntarily become members of the statutory social security scheme (which is expensive) or they may be covered by Section 17(1) of the BetrAVG¹²¹ under rare and special circumstances. Normally, neither of these systems applies. Some self-employed persons have private insurance, but most self-employed persons as well as nearly all members of the liberal professions are covered by one of the many professional pension funds (*berufsständische Versorgungswerke*) in Germany. Every liberal profession has its own pension fund in every German state which is authorised on the legal basis of its own state law. Only very few of these many special laws deal with questions of gender equality. A major problem for members of the liberal professions is that child-raising periods are not taken into account by every professional pension fund.¹²²

Self-employed women are not covered by the Maternity Protection Act and are therefore not entitled to maternity protection and maternity allowances. In the opinion of the Ministry for Family, Seniors, Women and Youth, there is no necessity to implement Article 8 of Directive 2010/41/EU in national law,¹²³ because self-employed women who are voluntarily insured under the statutory health insurance including sickness benefits – which many are not because of the costs involved – are entitled to maternity allowances in the amount of these sickness benefits (usually 70 % of their previous income). The Federal Constitutional Court decided that the unequal treatment between employees and self-employed women related to maternity allowances is compatible with the general principle of equality under the German Constitution.¹²⁴ But the compatibility with European law is more than doubtful. Self-employed parents are not entitled to parental leave because there is no employer to whom such a claim can be addressed. But they are entitled to parental allowances on the same conditions as employees, although the more complicated calculation of the amount can place them at a disadvantage.

6. Goods and services

The AGG contains a prohibition on gender discrimination in relation to the provision of goods and services. But not every contract is covered by the applicable Section 19 of the AGG. First of all, the provisions of the AGG are restricted to contracts concluded under civil law. For the provision of goods and services under public law, the principle of equality contained in the German Constitution applies. This means that in this area harassment and sexual harassment are not considered to be discrimination¹²⁵ and the special rules on support by anti-discrimination organisations do not apply. Second, the AGG falls short of the requirements of Directive 2004/113/EC by containing several exceptions. Under Section 19(1)(1) of the AGG, the application is restricted to so-called ‘mass contracts’ which are concluded in great numbers and typically irrespective of the identity of the other contracting party or where the identity is of small importance. Moreover, a landlord who rents out up to 50 apartments does not fall under the provision, and nor do contracts that will bring the parties into close spatial contact or into relationships of trust or with both parties being housed on the same piece of land under Section 19(5) of the AGG. Third, in violation of Directive 2004/113/EC, the

¹²⁰ See Parliamentary Publication (*Bundestags-Drucksache*) 16/13830 of 20 July 2009, p. 149.

¹²¹ Persons who are not employees can invoke the BetrAVG under Section 17(1) when they were guaranteed benefits for retirement, invalidity, or for surviving family members on the occasion or as a result of their self-employed work for an enterprise.

¹²² The Federal Constitutional Court, judgment of 5 April 2005, 1 BvR 774/02, decided that professional pension funds for lawyers have to offer non-contributory membership during child-raising periods for up to three years to meet the requirements of the gender equality principle under the German Constitution.

¹²³ See Parliamentary Publication 17/9615 p.53 et seq.

¹²⁴ Federal Constitutional Court, judgment of 3 April 1987, 1 BvR 1240/86.

¹²⁵ However, there is recent academic literature on the concept of sexual harassment as sex discrimination, prohibited by the Constitution: S. Baer *Würde oder Gleichheit* Baden-Baden 1995.

prohibition of sexual harassment under Section 3(4) of the AGG is restricted to the area of employment.¹²⁶

In accordance with Directive 2004/113/EC, Section 19 of the AGG does not apply to contracts under family or inheritance law. The law goes beyond the requirements of Directive 2004/113/EC in that it extends protection against gender discrimination also to the areas of social protection, including social security and health services, as well as social advantages and education. But this extension is not exercised in practice and moreover, the prohibition only extends to such services provided under civil law.

Under the AGG, differential treatment based on sex is permitted in the provision of goods and services if there is an objective reason. This formulation is wider than the one permitted under the Directive, which requires a legitimate aim and the proportionality of the measure. According to academic writing, these restrictions must be read into the German law. Examples of 'objective reasons' given in the AGG are the prevention of danger or harm to others, the need to protect privacy or personal security, or the granting of special advantages where there is no interest in enforcing equal treatment. For the latter reason, the provision of a service in a sex-segregated way is considered permissible by legal commentators, as long as both men and women receive it to the same extent. An objective reason could be the desire of women to exercise at a fitness centre free of male observation and possible harassment.

Section 19 of the AGG covers all private-law insurances. In the light of Article 14 of Directive 2004/113/EC, the Higher Regional Court of Hamm awarded compensations in the amount of EUR 2 000 for non-pecuniary harm suffered by the applicant whose health insurance was terminated due to her alleged concealing of pregnancy complications.¹²⁷ More difficult to understand is a decision of the District Court of Hannover rejecting the application for compensation by a female pregnant applicant whose application for membership in a private health insurance would only be accepted on the condition that benefits for pregnancy and childbirth were excluded.¹²⁸ The compatibility of this decision with Section 20(2)(2) of the AGG and the sex equality directives is at least questionable. In March 2011, the Court of Justice of the European Union declared sex-segregated insurance rates invalid as from 21 December 2012. On 9 April 2013, amendments to the SEPA-accompanying Act (*SEPA-Begleitgesetz*) entered into force to implement this *Test-Achats* ruling. The insurance industry had held on to 21 December 2012 as the final date. Private insurance companies in Germany had broadly published very questionable¹²⁹ advertisements for cheaper insurances before 21 December 2012, especially aiming at male customers. It is obvious that afterwards insurance rates were increased for both sexes and thus the only winner from unisex rating are the companies themselves.

7. Enforcement and compliance aspects

The AGG prohibits victimisation in labour relationships and gives the victim of discrimination or any person who supported him/her a right of action against the employer. This rule also applies to the discrimination of civil servants.

In civil and labour cases, there is a shift of the burden of proof: If the claimant proves facts permitting the conclusion that there was discrimination, the defendant has to submit evidence to the contrary. The decision will be taken to the disadvantage of the party whose set of facts cannot be corroborated by the court. However, the lack of a right of access to the

¹²⁶ According to the prevailing opinion of legal commentaries, this restriction is not applicable in the civil service and has to be eliminated for the provision of goods and services by directive-consistent interpretation.

¹²⁷ Higher Regional Court of Hamm, judgment of 12 January 2011, 20 U 102/10, I-20 U 102/10.

¹²⁸ District Court of Hannover, judgment of 26 August 2008, 534 C 5012/08.

¹²⁹ Some used slogans such as 'Now men can get angry! Men's sales: Why you should act now!' ('*Da kann Mann sauer werden! Männerschlussverkauf: Warum Sie jetzt handeln sollten!*') or 'Change before unisex rates apply!' ('*Wechseln Sie, bevor die Unisex-Tarife kommen!*') or 'Men, do you really want gender equality?' ('*Männer, wollt ihr wirklich Gleichberechtigung?*') or unnerved their customers with countdown clocks and questions such as whether their insurance policies were 'unisex safe' ('*Unisex-sicher*').

employer's files or an employer's obligation to publish employees' salaries and fringe benefits in practice undermines the rules on the burden of proof. Moreover, the Federal Labour Court has clearly restricted the usability of statistical data as prima facie evidence.¹³⁰

The AGG provides for a right to damages to compensate for discrimination. The remedies and sanctions for breaching the prohibition of gender discrimination differ according to the field of law. In labour and civil cases, the victim has a right to pecuniary compensation, but not to reinstatement or the fulfilment of the denied contract. However, in both cases, the perpetrator of the discrimination can exonerate himself/herself by showing that he/she did not act negligently or intentionally. This requirement of fault is not compatible with the case law of the CJEU with respect to labour law. In labour cases the victim of gender discrimination has a right to moral damages even if he/she would not have received the benefit in question (especially hiring or promotion) in a discrimination-free procedure. The damages amount to a maximum of three months' salary and can be deemed dissuasive, especially because they are to be paid to every victim that brought a case. In the case of discrimination caused by collective agreements, the employer is responsible only if he/she acted with gross negligence or intentionally under Section 15(3) of the AGG. The compatibility of this provision with the European directives is more than doubtful.¹³¹ In civil-law cases, the victim can also bring a claim for the cessation of the discrimination and non-repetition.

In the employment relationships of civil servants, all claimants have the right to a discrimination-free repetition of the (hiring or promotion) procedure, and there is even a right of the best candidate to be chosen under the Constitution. The effectiveness of this remedy depends on the authority informing the victim of discrimination of its decision before the other candidate is appointed to the post. Otherwise, the victim can merely claim compensation. Criminal sanctions and administrative fines are not available in cases of gender discrimination.

Access to the courts is ensured for individuals who claim to have been the victim of gender discrimination. Anti-discrimination interest organisations do not have standing in court, but may only support individual claimants. This means that the realisation of gender equality through the courts remains exclusively in the hands of individual claimants. In cases of discrimination within the context of employment and access to goods and services provided under civil law, labour courts and civil courts (the 'ordinary courts') are competent. In some of the German states, actions concerning discrimination in access to goods and services cannot be brought to court before the failure of a prior mediation procedure. Administrative courts are competent to decide claims against a public authority, both when the case is brought by a civil servant for alleged gender discrimination and when gender discrimination in the provision of public services is asserted. Claimants have a right to (financial) legal aid for court and lawyer's fees if, by superficial examination, their case has good chances of success. In civil and labour cases, the claim has to be brought within two months¹³²; in administrative and social-law cases, the time period is one month.

Since 2006, there is a general anti-discrimination authority on the federal level (*Antidiskriminierungsstelle des Bundes*). Its powers extend to all grounds of discrimination contained in the European anti-discrimination directives. Its tasks are to inform individuals claiming to have been discriminated against and the general public of the legal means available in case of discrimination. Moreover, the authority shall conduct studies on discrimination and shall propose measures to prevent discrimination. The authority has no

¹³⁰ Federal Labour Court, judgment of 22 July 2010, 8 AZR 1012/08, overruling State Labour Court of Berlin and Brandenburg, judgment of 26 November 2008, 15 Sa 517/08.

¹³¹ Labour Court of Cologne, judgment of 28 November 2013, 15 Ca 3879/13, restricted its application to cases of indirect discrimination and association-level collective agreements.

¹³² The Federal Labour Court, judgment of 21 June 2012, 8 AZR 188/11, decided that in labour-law cases, the two-month period does not violate the principles of equivalence and effectiveness.

power to support individuals in anti-discrimination suits, and cannot impose any fines for discrimination. On the level of the states (*Länder*), only very few comparable bodies exist.¹³³

Although the social partners are aware of their responsibility to prevent and abolish gender discrimination in collective agreements, they have not yet undertaken any systematic assessment. The legislator is reluctant to impose specific obligations on the social partners in this respect, pointing to its obligation to respect their freedom of coalition under the Constitution. Yet, legislation obliging the social partners to live up to their responsibility would be constitutional as it would merely emphasise their obligations flowing from EU law.

Collective agreements play an important role in German labour law, but vary to a great extent. Most collective agreements are concluded at the level of the states. Collective agreements contain rules on the contents, conclusion, and dissolution of employment contracts. These rules are binding and directly applicable between an employer and employee if both are members of the social partners that concluded the agreement. Currently, there are 68 000 collective agreements in Germany, 506 of which have been declared to be generally applicable by the Ministry of Labour and Social Affairs. However, the Ministry neither publishes these agreements nor makes them accessible in any other way.¹³⁴ The social partners do not consider collective agreements as a particular effective means to implement EU gender equality law. Critics argue that the reason for this is that women are under-represented in these organisations.

8. Overall assessment

Overall, Germany's implementation of EU gender equality law is satisfactory on the legislative level. Although in some respects legislation goes beyond the requirements of the directives (e.g. scope of application, maternity protection, parental allowances), in other fields there are some disturbing gaps of implementation, such as the exclusion of dismissals from the scope of application of the General Equal Treatment Act, the resistance to implementing Directive 2010/41/EU, the restriction of access to court and of legal protection in relation to the provision of goods and services to so-called 'mass contracts', thus limiting the protection of self-employed persons as well, and the restriction of the prohibition of sexual harassment to the area of employment. European Law requires unequivocal transposition of directives.

Moreover, although courts and legal practitioners are aware of EU law, the case law of the CJEU, and the obligation to interpret national law in the light thereof, many provisions lack implementation in practice. Some of the main obstacles are the lack of a definition of 'work of equal value', the lack of access to employers' files and remuneration data, the overemphasis on the freedom of coalition for the social partners and their collective agreements, the necessity of fault in labour-law cases and the problems when dealing with questions of indirect sex/gender discrimination.

GREECE – *Sophia Koukoulis-Spiliotopoulos*

1. Implementation of central concepts

The Acts transposing the Gender Equality Directives 2006/54/EC (Employment and Occupation (Recast)), 2004/113/EC (Goods and Services) and 2010/41/EU (Self-Employed Persons) copy the definitions of direct and indirect discrimination from these directives.

¹³³ For example, the antidiscrimination authorities of Berlin (<http://www.berlin.de/lb/ads/>) and Schleswig-Holstein (<http://www.landtag.ltsh.de/beauftragte/ad/index.html>), and the anti-discrimination office for Saxony (<http://www.adb-sachsen.de/>), all accessed 27 May 2013.

¹³⁴ See Ministry of Labour and Social Affairs, http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen-DinA4/arbeitsrecht-verzeichnis-allgemeinverbindlicher-tarifvertraege.pdf?__blob=publicationFile, April 2013, p. 5, accessed 27 May 2013.

With regards to positive action, Article 4(2) of the Constitution (Const.) ('Greek men and women have equal rights and obligations') requires the promotion of gender equality.¹³⁵ Article 116(2) Const. is more explicit than EU law ('Positive measures aiming at promoting equality between men and women do not constitute discrimination on grounds of sex. The State shall take measures to eliminate inequalities existing in practice, in particular those detrimental to women'). It requires that the legislature and all other state authorities take the positive measures that are necessary and pertinent for promoting gender equality in all areas.¹³⁶

The Act transposing the Recast Directive stipulates (as the Directive does) that instruction to discriminate on grounds of sex constitutes sex discrimination. The Act transposing Directive 2004/113 uses the wider term 'encouragement' and the Act transposing Directive 2010/41 uses both terms. Therefore, both Acts exceed the Directives.

The Acts transposing Directives 2006/54, 2004/113 and 2010/41 copy the definitions of harassment and sexual harassment from the Directives.

The law is satisfactory in all cases, but the notions of indirect gender discrimination and instruction or encouragement to discriminate have not yet been applied.

2. Equal pay and equal treatment at work

2.1. Equal pay

The Act transposing the Recast Directive copies the definition of 'pay' from the Directive. While discrimination against women is widespread, equal pay litigation is scarce. Older judgments of the Supreme Civil Court (SCC) dealt with a family allowance paid by the employer at a percentage of the basic salary to all male workers who were married and had children, without any further condition, but regarding which female workers were subjected to two conditions: that their husband was unable to maintain himself due to invalidity or illness, and that the children be maintained by the mother. The SCC held that this allowance constituted 'pay', since it was paid in respect of the employment relationship. Therefore, women should receive it on the same conditions as men. It relied on the constitutional equal pay norm (see below) in light of, and in conjunction with, ILO Convention No. 100 and Article 119 TEC (now Article 157 TFEU) as interpreted by CJEU case law.¹³⁷ It therefore reversed its previous case law which had not found any discrimination in this respect as it applied the breadwinner concept.

Article 22(1)(b) Const. requires, since 1975, equal pay for work of 'equal value', without distinction on any ground, including sex. This provision exceeds EU law which only concerns sex discrimination. The equal pay principle, as enshrined in Article 157 TFEU, has been included, since 1984, in the Act transposing the Equal Pay Directive (75/117/EEC) and is also included in the Act transposing the Recast Directive. The last-mentioned Act also requires that discrimination on grounds of sex or family status be excluded and that equal treatment be applied in 'professional' classification and 'personnel' evaluation systems. The term 'job' in both cases would make it clearer that it is the nature of the job that matters and would promote awareness of the equal value notion, which remains a dead letter, while the traditional, non-transparent job classification in collective agreements (CAs) and other wage-fixing instruments is unchanged, making indirect gender discrimination very likely.

There is no case law relying on the Act transposing Directive 2002/73 or the Act transposing the Recast Directive. Most judgments do not concern gender discrimination; they apply the wider constitutional rule of equal pay, usually to the same work, performed under the same conditions. Differences in the legal nature of the employment relationship of the workers compared (e.g. one worker is under a private-law contract, the other is a civil servant) or the wage-fixing instrument (e.g. one worker is covered by a CA, the other is not, or they

¹³⁵ Council of State (CS) (Supreme Administrative Court) 1933/1998 (Plen.).

¹³⁶ CS 2832-2833/2003, 192/2004.

¹³⁷ SCC 3/1995 (Plen.) mentioned in CJEU Case 187/98 *Commission v Greece* [1999] ECR I-7713.

are covered by different CAs) are often used to justify pay differences, even in the same firm or service and for the same work.¹³⁸ This shows unawareness of what the equal value notion means.

2.2. Access to work and working conditions

Article 4(2) Const. exceeds EU gender equality law; it covers all sectors and fields. The Act transposing the Recast Directive applies (as the Directive does) to the private and the public sector; to any field and relationship or form of employment or performance of services and any vocational training. It covers access to all levels of employment and professional training; working conditions, including dismissal, and membership of and involvement in workers' or employers' professional organisations, including benefits that they provide. Case law has only dealt with subordinate employment and public posts (see below).

Article 4(2) Const. can be invoked against the State, public bodies and private parties. It refers to 'Greek men and women', but Article 116(2) Const. refers to 'men and women'. The constitutional gender equality rule must therefore be considered to also cover foreigners. The Act transposing the Recast Directive makes no distinction as to nationality. Therefore, in light of the Constitution and human rights treaties, gender equality law must be considered to cover Greeks and all foreigners, even non-EU citizens. There is no case law on this issue.

Article 116(2) Const. allowed 'derogations' from gender equality. In 2001, by virtue of a constitutional revision, its content was replaced by the requirement of positive action. This was the result of a big NGO campaign and case law holding that Article 4(2) Const. requires substantive equality. This is why the Acts transposing Directives 2002/73 and the Recast Directive allowed no derogations; this is consistent with EU law, since derogations are a mere option and Member States may enact more favourable provisions.

Case law had condemned gender discrimination in access to employment in the private and the public sector¹³⁹ relying on Article 4(2) Const., Directive 76/207 and the Act transposing it. After the constitutional revision, maximum quotas for access of women to military and police academies and military or semi-military corps were repealed, but there is still potentially indirect discrimination. For example, until 1999, there were maximum quotas for access of women to police academies; the minimum height requirement was 1.70 m. for men and 1.65 m. for women. As the quotas were repealed, the minimum height for women was raised to 1.70 m. The Council of State (CS) accepted that the average height of men is higher than that of women, but it held that the requirement did not breach the Constitution or Directive 76/207, because justified by reasons of public interest related to police duties.¹⁴⁰ This 'mere generalisation' cannot exclude indirect discrimination, according to the CJEU. In a recent similar case where the claimant requested a preliminary reference to the CJEU, a CS section referred the matter to a larger section to assess the need for a reference.¹⁴¹ There is no case law relying on the Act transposing the Recast Directive; a few judgments rely on the Act transposing Directive 2002/73. An example is an Athens Administrative Court of Appeal (ACA) judgment on the minimum height for access to posts of professional soldiers, which was lower for women than men. The ACA considered this a positive measure.¹⁴²

Many women are in flexible and precarious forms of employment (fixed-term, part-time, temporary, seasonal). The ILO Committee on the Application of Conventions and recommendations (CEACR), responding to complaints by the Greek General Confederation of Labour (GSEE), and the Ombudsman stress that, due to the crisis and austerity measures, 'many enterprises replaced stable work with precarious work; the percentage of women who took such flexible work as newly recruited or already in employment increased, thereby

¹³⁸ SCC 3/1997 (Plen.), 288/2003, 453/2002.

¹³⁹ SCC 1360/1992 (private banks); CS 1917/1998 (Plen.) (Police Academies).

¹⁴⁰ CS 1247/2008, 2367 and 2369/2010. See S. Koukoulis-Spiliotopoulos 'Greece' *EGELR* 1-2009 pp. 60-63.

¹⁴¹ CS 18/2014.

¹⁴² Athens ACA 14/2011.

making gender-based discrimination more visible'. In the public sector, where women are the vast majority, measures aimed at reducing employment greatly affect them.¹⁴³

2.3. Occupational pension schemes

The notion of 'occupational scheme' was virtually unknown until 2009, in spite of two Greek CJEU cases.¹⁴⁴ This was mainly because a decree transposing the relevant directive merely copied it, without indicating which Greek schemes are occupational or providing any criteria for spotting them. Therefore, the CJEU requirements of clarity and transparency had not been complied with. In 2009, the CJEU found Greece to be in breach of Article 157 TFEU, due to gender discrimination in ages and other conditions for civil servants' pensions.¹⁴⁵

In July 2010, in a sweeping social security reform, pensionable ages were raised for men and women, in all schemes: they should reach 65 in the public sector by 2013 and in the private sector by 2015; the contributory periods increased. The calculation of the pension amount must be based on the entire working life (until then, it was based, in the private sector, on the best five years out of the last ten years of employment, and in the public sector, on the last month or the last five years). These measures, which were meant to cope with the financial crisis rather than implement EU gender equality law, were introduced in an abrupt and inflexible way with very short transition periods, and penalised women who often have a shorter and/or irregular working life due to family responsibilities. They were, moreover, not accompanied by measures facilitating reconciliation of family and work or dealing with acute problems in law and in practice affecting the right of parents to reconcile family and work.¹⁴⁶ Shortly after, an Act transposing the Recast Directive copied its provisions on occupational schemes without referring to the reform and fixed different transition periods, creating further uncertainty. Therefore, the transposition is not satisfactory.

In November 2012, pensionable ages for men and women were abruptly raised to 67, in all pension schemes, entering into effect on 1 January 2013. This meant, for many women, a further increase to their pensionable age of at least two years or more, depending on the length of employment, with no transition period, in breach of the principle of legal certainty.¹⁴⁷ So, the number of women who will in practice be able to receive a pension will be much smaller than before, due to the specificities of their working lives as exacerbated by their far higher unemployment rate. Moreover, the continuous and growing pension cuts, since 2010, have been sharper for pensioners under 55; they therefore have a strong gender dimension, as an ILO Mission to Greece underlined, as the most seriously affected pensioners are mothers of minor children who in the past were entitled to an earlier pension.¹⁴⁸

Case law usually ignores the distinction between statutory and occupational schemes; it relies on Article 4(2) Const. The only case addressing the occupational character of a scheme was *Evrenopoulos*.¹⁴⁹ The Athens ACA asked the CJEU whether a scheme covering the personnel of a public corporation (the State Electricity Company (DEI)) was occupational, and if so, whether a provision which granted a survivors' pension to widowers subject to conditions not applying to widows, conflicted with Article 119 TEC (now 157 TFEU). The CJEU held that the scheme was occupational; therefore, Article 119 precluded the application of that provision. Consequently, the ACA upheld the applicant's right to a widower's pension. Some judgments pre-dating the CJEU 2009 judgment (see above) held that the civil servants' scheme fell within the scope of Directive 79/7/EEC, but they upheld the rights of men to an

¹⁴³ CEACR Observations adopted 2012, published 102nd ILC Session (2013), Convention No. 111: <http://www.ilo.org/dyn/normlex/en/f?p=1000:11003:0::NO>; Greek Ombudsman *Annual Report 2012*: <http://www.synigoros.gr>, both accessed 25 May 2014.

¹⁴⁴ C-147/95 *DEI v Evrenopoulos* [1997] ECR I-2057; C-457/98 *Commission v Greece* [2000] ECR I-11481.

¹⁴⁵ C-559/07 *Commission v Greece* [2009] ECR I-47.

¹⁴⁶ See proposals by the Greek League for Women's Rights endorsed by 30 NGOs: <http://www.leaguewomenrights.gr>, accessed 30 May 2014.

¹⁴⁷ Cf. CJEU Case 286/12, *Commission v Hungary*, judgment of 6 November 2012.

¹⁴⁸ ILO, *Report on the High Level Mission to Greece* (Athens, 19-23 September 2011), para.321: http://www.ilo.org/global/standards/WCMS_170433/lang-en/index.htm, accessed 28 May 2014.

¹⁴⁹ Case C-147/95 *DimossiaEpicheirissi Ilektrismou (DEI) v. EfthimiosEvrenopoulos* [1997] ECR I-2057.

earlier pension under the conditions applying to women, on the basis of Article 4(2) Const.¹⁵⁰ Mothers employed on a private-law contract or having an independent profession, who are insured under any social security scheme, except the farmers' scheme, are entitled to a service/pension credit; if the mother makes no use of this, the father can benefit from it. Such an entitlement is provided for civil servants who are parents, irrespective of sex.

3. Pregnancy and maternity protection, parental leave and adoption leave

There is no general regime regarding maternity and parenthood protection. Rules in the public and the private sector vary; they are scattered, complex and frequently modified.

Maternity leave in the *private sector* is seventeen weeks; wages are supplemented by social security benefits. The conditions for granting the benefits (200 working days in the last two years before childbirth) are stricter than those for granting sickness benefits (100 working days in the last year before the sickness), which is in breach of Directive 92/85/EEC. A recent statutory provision¹⁵¹ abolished or diminished several social security contributions (mostly paid by employers) and the corresponding benefits. This affects, inter alia, maternity benefits.

It is prohibited to refuse to hire on grounds of pregnancy or maternity and to dismiss during pregnancy, eighteen months after childbirth, or during a longer absence due to pregnancy-related sickness; except on a serious ground (reduced output due to pregnancy is no such ground). This ground must be invoked and proved by the employer, and the dismissal must be reasoned, in writing, and be notified to the woman and the labour inspectorate; otherwise it is null and void. The woman does not have to disclose her situation, except where this is needed for the employer to take 'positive measures' (e.g. for health and safety, maternity leave). Maternity leave is working time for all purposes. Women are entitled to return to the same or an equivalent post on not less favourable conditions and to benefit from any improvement in working conditions that they would obtain during their absence. Less favourable treatment on grounds of pregnancy or maternity is prohibited. This is satisfactory implementation.

In the *public sector*, maternity leave is five months, paid. A three-month paid adoption leave is granted to female civil servants who adopt a child under the age of six. The above protection applies, along with constitutional guarantees of civil servants' permanence. So, Directive 92/85/EEC is exceeded as to length of leave, pay and protection against dismissal. Women employed by the State, local authorities and other legal persons governed by public law under a contract of indefinite duration receive the above leave. However, those working for the same employers under a fixed-term contract receive the less favourable private-sector maternity leave, and when they lack 200 days of service (see above), they are deprived of any income for most of the leave, which is in breach of Directives 92/85/EEC and 2006/54/EC.

The law, except for the disadvantages regarding social security benefits and fixed-term employment, is satisfactory and Greek courts have traditionally favoured maternity protection. For example, prior to the transposition of Directive 2002/73 and the Recast Directive, the SCC, relying on the Act transposing Directive 76/207, Article 4(2) Const. and Article 141(1) TEC (now Article 157 TFEU), held that a prejudicial modification of working conditions after maternity leave constituted discrimination on grounds of sex.¹⁵² However, some recent judgments are incompatible with EU law. It has been held, for example, that maternity protection does not extend beyond the expiry of a fixed-term contract, the employer not being obliged to renew it; and that a woman was not entitled to a voluntary pay rise given during her maternity leave to all her colleagues performing the same work.¹⁵³ In practice, as the CEACR and the Ombudsman deplore (see 2.2. above), mainly in the private sector 'women are exposed to indecent conditions of work, especially during pregnancy and after

¹⁵⁰ See e.g. Court of Audit 44/2009 (Plen.).

¹⁵¹ Article First, paragraph IA, subparagraph IA3, of Act 4254/2014, OJ A 85 of 7 April 2014, p. 1427.

¹⁵² SCC 37/2004.

¹⁵³ SCC 1341/2005, 317/2011 (fixed term) and 1221/2004 (pay rise).

childbirth’ and ‘discrimination related to pregnancy and childcare leave was the most prominent form of discrimination’. In particular, after maternity leave, downgrading or flexible forms of employment are imposed on women (in particular part-time or rotation work) and dismissals are frequent.

With regard to *parental leave*, the Act transposing Directive 2010/18/EU covers all natural, adoptive and foster parents working in the private and public sector, in any relationship or form of work, including part-time, fixed-term and temporary work. It excludes transfer of parental leave to the other parent. It sets minimum standards not affecting more favourable rules, but as it did not specifically repeal conflicting provisions and there is no case law yet, there is legal uncertainty. In our opinion, the legal situation is as follows:

In both the *public and private sectors*, both parents previously had after one year of employment with the same employer, an individual non-transferable right to a three-and-a-half months’ unpaid leave, after maternity leave, for each child up to the age of three and a half. The transposing Act raised the leave to four months and the child’s age to six. In case of more children, one year of employment must elapse between the leaves. The leave is working time, but social security coverage is only maintained if the worker pays his/her contributions and those of the employer, something that seems incompatible with EU law. Very few women and almost no men take this leave, due to the loss of earnings and to the reluctance of employers to grant it. Parents who have a child via surrogacy are entitled to the same parental leave as natural parents. There are no provisions or case law regarding multiple births in the private sector.

In addition, mothers, and subsidiarily fathers in the private sector, were entitled to a paid working-day reduction for thirty months after maternity leave. This was recently made an autonomous right for fathers, even when the mother is self-employed. Alternatively, a paid leave of equivalent length may be agreed with the employer. The employer’s refusal to grant this leave may constitute an abuse of a right,¹⁵⁴ but such agreements seem rare. Mothers are granted an additional six-month leave, paid through social security benefits at the rate of the legal minimum wage. Parents of handicapped children are entitled to an unpaid working-day reduction. Leaves and working-day reductions are working time for all purposes.

In the *public sector*, under the Civil Servants Code (CSC) both parents additionally had a transferable nine-month paid leave after maternity leave, until the child reached the age of four, as an alternative to a reduced working day. The Act transposing the Directive increased the child’s age to six. Therefore, the Directive is exceeded regarding the length of the leave and pay; moreover, there is no previous service requirement. In practice, the longer transferable leave is still granted in the public sector, as it results from circulars of competent ministries.¹⁵⁵

However, there are no individual rights for each parent, as the Directive requires. A male civil servant whose wife did not work was denied this leave and the reduced working day, unless his wife was seriously ill or handicapped. This provision was recently deleted from the CSC, but, regarding judges and some other categories of civil servants (such as the armed and security forces), it was maintained. Civil servants, whose spouse is a private-sector worker, are only granted the reduced working day or leave to the extent that it exceeds their spouse’s rights. The entitlement of male and female judges to the CSC nine-month leave, which was upheld by case law,¹⁵⁶ was curtailed by four months on the occasion of its formal extension to fathers, in breach of the Directive.¹⁵⁷ Following a CS judgment which found this contrary to

¹⁵⁴ SCC (Plen.) judgment No. 10/2010.

¹⁵⁵ See e.g. Ministry of Education Circular Φ.351.5/43/57822/Δ1/05.05.2014, which purports to clarify the parental leave regime applying to state school teachers, in accordance with the Civil Servants Code, following the transposition of Directive 2010/18, paragraph D4, p. 9, available at: <http://www.mpratis.gr/014/ad050514.pdf>, accessed 15 January 2015.

¹⁵⁶ See leading cases CS (Plen.) 3216/2003; CS 1 and 2/2006.

¹⁵⁷ See Greek National Commission for Human Rights (NCHR) *Comments on the bill ‘fair trial and its reasonable length’*: www.nchr.gr, accessed 20 May 2014.

the Constitution, Articles 20 and 24 of the EU Charter of Fundamental Rights and Directive 2010/18/EU,¹⁵⁸ the judges were again granted the nine-month paid leave by law.

There is an irrational and unlawful practice in the civil service when the leave is requested not upon expiry of the maternity leave, but later; or if the child was born before the parent was appointed to the civil service. Although the child is still under the prescribed age and the parent made no use of the reduced working day (as an alternative to the nine-month leave), a ‘fictitious use’ of the reduced working day is taken into account, the leave being proportionately curtailed. The Legal Council of State¹⁵⁹ agreed with this practice, which breaches Directive 2010/18/EU, the Act transposing it and the Act transposing the Recast Directive, which prohibit any less favourable treatment on the grounds of an application for or the taking of parental leave. This practice is continuing, as it is shown by circulars of competent ministries.¹⁶⁰

Responding to a preliminary reference of the Thessaloniki ACA, the CJEU held that Directive 96/34 does not require two periods of parental leave for twins. However, ‘it obliges the national legislature to establish a regime which, according to the situation in the Member State concerned, ensures that parents of twins receive treatment that takes due account of their needs. It is up to national courts to determine whether national rules meet that requirement and, if necessary, to interpret them, insofar as possible, in conformity with [EU] law’. As neither the parental leave regime nor the childcare structures met the above requirement, the ACA upheld the claim for a second parental leave.¹⁶¹ Subsequently, the CSC granted an additional paid six-month leave for each child beyond the first in case of multiple births.

Decisions of the Minister of Education exclude maternity and parental leave time from the period required for teachers to apply for the posts of school director and school counsel. The CS annulled such a decision following recourse by the League for Women’s Rights.¹⁶²

In the private sector, both parents have a transferable right to unpaid time off for an illness of a dependent child or other family member, which is working time. This is satisfactory implementation of the Directive, but it does not apply in the public sector. In the private and the public sector parents of a child under the age of 16 have a transferable right to time off for school visits (paid). The Act transposing the Directive provides for parents in the private and the public sector an individual right to a ‘special leave’ for a child under the age of 18 who suffers from cancer or needs blood transfusion or dialysis or a transplant (paid) or is hospitalised due to a serious disease or accident (unpaid); in the latter case the exhaustion of the parental leave is required; this is unlawful, as the purposes of the special leave and the parental leave differ. The CSC also grants a transferable right to a paid ‘special leave’ to employees with a spouse or child suffering from a disease which requires regular blood transfusion or periodic hospitalisation, or a child suffering from a serious mental handicap or Down syndrome, with no further condition. Therefore, the CSC prevails regarding time-off

¹⁵⁸ CS 3590 and 3591/2013 (Plen.) On these judgments see European Network of Legal Experts in the Field of Gender Equality, S. Koukoulis-Spiliotopoulos ‘Greece’ in: *European Gender Equality Law Review* 1/2014, available at: http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2014_1_final_web_en.pdf, accessed 28 August 2014.

¹⁵⁹ Opinion 64/2008. The Legal Council of State gives opinions at the request of public authorities which are not binding, unless the competent Minister endorses them, which was the case with this opinion.

¹⁶⁰ See e.g. Ministry of Education Circular Φ.351.5/43/57822/Δ1/05.05.2014, which purports to clarify the parental leave regime applying to state school teachers under the Civil Servants Code, following the transposition of Directive 2010/18, paragraph D4, p. 9, available at: <http://www.mpratis.gr/014/ad050514.pdf>. This circular refers to Minister of Home Affairs Circular ΔΙΑΔ/Φ.51/590/οικ.14346/29.05.2008, p. 5. The latter, which is accessible at: <http://www.poeota.gr/download/14346-2008.pdf>, states that it complies with the above mentioned Legal Council of the State Opinion 64/2008, Both circulars accessed 15 January 2015.

¹⁶¹ Case C-149/10 *Zoe ChatzivIpourgoslkonomikon (Minister of Finance)* [2010] ECR I-8489; ACA 1842/ 2010; see S. Koukoulis-Spiliotopoulos ‘Greece’ *EGELR* 1-2011: http://ec.europa.eu/justice/gender-equality/document/index_en.htm, accessed 30 May 2014.

¹⁶² CS 4875/2012; see European Network of Legal Experts in the Field of Gender Equality, S. Koukoulis-Spiliotopoulos ‘Greece’ in: *European Gender Equality Law Review* 1-2013, available at: http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2013-1_final_web_en.pdf, accessed 28 August 2014.

for a spouse and the absence of any condition. Time-off and special leaves are working periods for all purposes. Most of the above provisions exceed the Directive.

The Act transposing the Directive prohibits a dismissal and any less favourable treatment due to an application for or the taking of parental leave or time-off or a special leave; this also applies where EU law is exceeded. The CJEU also condemns adverse treatment related to leaves exceeding minimum EU-law requirements.¹⁶³ Legislation predating the above Act prohibits any direct or indirect discrimination against workers with family responsibilities (dependent children or other family members) regarding access to and the maintenance of employment or professional development. The rights after maternity leave (see above) also apply after parental leave.

4. Statutory schemes of social security

Both legislation and case law deal with all schemes in the same way, without distinguishing between statutory and occupational, and allow no exceptions (see 2.3. above).

5. Self-employed persons

The Act transposing Directive 2010/41 stipulates that it applies to self-employed workers and their spouses or life partners. However, it provides, in breach of the Directive, that only self-employed women (not spouses or life partners) may be granted a maternity allowance allowing a temporary interruption of their activity due to pregnancy or maternity for at least fourteen weeks. The source, the amount and the procedure for paying this allowance shall be set out by common decision of the competent Ministers, which has not yet been issued. Therefore, the implementation is unsatisfactory. There are no exceptions in social security.

There is also indirect discrimination against women. Social security coverage of family workers (employer's spouse, children and other close relatives) starts and ends on the day of notification of the commencement or termination of employment; otherwise, the worker is not covered, even if contributions are paid. This is an exception to the general rule that coverage starts automatically upon commencement of work. This mostly affects women, who are the majority of family workers. Moreover, the income of a spouse derived from an undertaking owned by the other spouse is added to the latter's income, making income tax higher. This also affects mostly women, who are usually the ones working for their spouses. In all the above cases, this also creates a disincentive for women's economic activity.

6. Goods and services

The Act transposing Directive 2004/113 has the same scope as the Directive. Following the CJEU's *Test-Achats* judgment,¹⁶⁴ the exceptions allowed by this Act were abolished.

7. Enforcement and compliance aspects

Women rarely complain for fear of losing their job and/or being labelled troublemakers, and due to lack of evidence. The prohibition of victimisation cannot ease their fears, which are growing along with their sharply rising unemployment. According to data of the Hellenic Statistical Authority (ELSTAT), from March 2009 to March 2014, the official unemployment rate rose from 9.2% to 26.8%. The male unemployment rate rose from 6.6% to 23.8%, the female unemployment rate from 12.7% to 30.6%. Unemployment in the 15-24 age group rose from 25.1% to 58.3%; for the 25-34 age group from 12.1% to 35.5%.¹⁶⁵ Long-term

¹⁶³ See e.g. CJEU Case C-284/02 *Sass* [2004] ECR I-11143 (maternity leave longer than 14 weeks).

¹⁶⁴ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

¹⁶⁵ ELSTAT Press release 5 June 2014 for March 2014: <http://www.statistics.gr>, accessed 5 June 2014.

unemployment (over 12 months) is 72 % of total unemployment,¹⁶⁶ the long-term rate for women being generally higher, and even higher in the 30-44 age groups, which are more likely to have young children.¹⁶⁷ An unemployment allowance is paid to the unemployed registered with the Manpower Employment Organisation (OAED), whose figure for unemployment is currently lower than those reported by Elstat (993 118 v.1.274 843). This is paid for a maximum of twelve months and it is subject to increasingly strict conditions; about 9 % of the registered unemployed received it in April 2014.¹⁶⁸ Its amount is EUR 360 per month, plus EUR 36 for each dependent child; and the long-term unemployed may receive a personal allowance of EUR 200 per month for another twelve months, subject to a strict means test. These amounts are well below the poverty threshold, which according to Eurostat is EUR 580 for Greece.¹⁶⁹

The rule on the standing of organisations to engage in litigation, which could help, is not applied as it has not been incorporated into the procedural codes. The author is only aware of one NGO having recourse (see 3 above). The same is true for the burden of proof rule;¹⁷⁰ there was a preliminary reference to the CJEU, which does not seem to have had any impact.¹⁷¹

There are, moreover, barriers to justice, as litigation costs are sharply rising, proceedings are too long (the ECtHR has issued a pilot judgment against Greece)¹⁷² and legal aid is inadequate and subject to very strict conditions. The Greek National Commission for Human Rights (NCHR),¹⁷³ the CEACR and the Ombudsman (2.2. above) deplore this situation.

Remedies and sanctions are proportional and dissuasive. An unlawful dismissal is declared null and void (by civil courts) or annulled (by administrative courts); the dismissal is deemed never to have occurred; the worker retains his/her post; reinstatement is not needed. An unlawful refusal to hire or promote is declared null and void by the civil courts and the hiring or promotion is deemed to exist from the time it should have occurred. Administrative courts annul such a refusal and order retroactive hiring or promotion. Full back pay plus legal interest is always awarded, and possibly moral damages. There are also criminal sanctions, administrative fines, and disciplinary sanctions for civil servants. However, women rarely have recourse to justice (see above) while the number of complaints submitted to the Ombudsman is increasing.

The Ombudsman, whose independence is constitutionally guaranteed, is the equality body. A deputy Ombudsman deals with gender equality. In the area of goods and services, the Ombudsman deals with the public sector; the Consumers' Ombudsman deals with the private sector. Ombudsmen receive complaints, intervene between the parties attempting to achieve a solution that ensures the rights of the complainant, and give non-binding opinions.

Collective agreements (CAs) have often improved maternity and parenthood protection. Since 2010, the CA system has gradually been dismantled through repeated and extensive statutory interventions in free and voluntary collective bargaining; the CA hierarchy was reversed, so that enterprise-level CAs (where women's bargaining power is weaker) prevail over sectoral CAs. National general collective agreements (NGCAs), a safety net of last resort, were annihilated, as minimum wages throughout the country – their main object – were first reduced by statute (by 32 % for workers below the age of 25 and 22 % for all other

¹⁶⁶ ELSTAT, *Unemployed 15+* (length of unemployment) (first quarter 1998–fourth quarter 2013): http://www.statistics.gr/portal/page/portal/ESYE/PAGE-themes?p_param=A0101&r_param=SJO01&y_param=TS&mytabs=0, Table 06, accessed 1 June 2014.

¹⁶⁷ Direct information from ELSTAT.

¹⁶⁸ OAED, available at: <http://www.oaed.gr/images/statistika/aprilios2014/ekthesiapriliyoy2014.pdf>, accessed 30 May 2014.

¹⁶⁹ European Committee of Social Rights 23.5.2012 *GENOP-DEI and ADEDY v Greece* Complaint No. 66/2011, available at: http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/complaints_EN.asp?, accessed 28 May 2014.

¹⁷⁰ NCHR *Comments on the Bill implementing Directive 2006/54*: <http://www.nchr.gr>, accessed 28 May 2013.

¹⁷¹ Case C-196/02 *Nikoloudi v Organismos Tilepikoinonion Ellados (OTE)* [2005] ECR I-1789.

¹⁷² ECtHR *Athanasiou v Greece*, 21 December 2010 (final since 21 March 2011).

¹⁷³ NCHR *Comments on the bill 'fair trial and its reasonable length'*: <http://www.nchr.gr>, accessed 1 June 2013.

workers) and then replaced by statutory wages of the thus reduced amount. New NGCAs only concern non-wage matters and do not have a national scope; they only bind the signatory employers' and workers' federations and their members. Following GSEE complaints, the CEACR and the ILO Committee on Freedom of Association (CFA), strongly deplored these state interventions.¹⁷⁴ Enterprise-level CAs, mostly reducing wages to the above statutory levels, are sharply rising (from 238 in 2010 to 976 in 2012).¹⁷⁵

8. Overall assessment

The implementation of EU law on the access to and conditions of work is rather satisfactory. However, certain discriminatory provisions remain on the books, while certain notions, such as equal value and indirect discrimination, are not applied, due to insufficient legal criteria and a lack of sensitisation. Measures for maternity protection and reconciliation of family and work exceed EU law in certain respects. However, there is still discrimination in legislation and in practice. Consecutive social security reforms make the prospects for women to obtain an old-age pension increasingly bleaker. Remedies and sanctions are very effective, but seldom applied, as women, in particular in the current socio-economic context, are reluctant to complain. Incorporating the rules on the burden of proof and the standing of organisations into the procedural codes would help.

In compliance with an EU/IMF assistance programme, wages, pensions, social benefits and services are decreasing; employment is deregulated; essential safety nets, including CAs, are abolished or neutralised; while taxes and other charges are increasing. This is achieved by an avalanche of long and tortuous pieces of legislation, dealing with subjects unrelated to one another ('omnibus laws'), often with retroactive effect, difficult to combine amongst themselves and with other legislation and constantly and unpredictably modified. In this context of general insecurity, unemployment, in particular of women and young people, is soaring and gender stereotypes are reinforced. Indeed, the crisis and the austerity measures have a 'disproportionate impact on women', as strongly deplored by the ILO CEACR, which also calls for a rapid 'reverse engineering of austerity'.¹⁷⁶

HUNGARY – Beáta Nacsá

1. Implementation of central concepts

The new Fundamental Law, which replaces the previous Constitution and came into force on 25 April 2011, declares that 'Women and men shall have equal rights.' This legislative target is intended to be reached by the uniform 'Equality Act' (Act CXXV of 2003) in which sex and sex-related grounds are just one among the 20 grounds of legally prohibited discrimination, which even includes a general clause of 'any other status'. Consequently the prohibited grounds are much wider than what is required by in the EU *acquis*, although in

¹⁷⁴ CEACR Observations adopted 2012, published 102nd ILC Session (2013), Conventions 98 (right to organise and collective bargaining) and 100 (equal pay): [http://www.ilo.org/wcmsp5/groups/public/--ed_norm/--relconf/documents/meetingdocument/wcms_193260.pdf](http://www.ilo.org/dyn/normlex/en/f?p=1000:11003:0::NO;CFA 365th Report, Governing Body 316th Session, 1-16 November 2012, Case 2820 (Conventions 87 (freedom of association) and 98 (right to organise and collective bargaining): <a href=), both accessed 25 May 2014.

¹⁷⁵ Ch. Ioannou and K. Papadimitriou *Collective bargaining in Greece in 2011 and 2012* April 2013, available at: <http://www.omed.gr/el/index.php?module=seminars&action=downloadfile&myid=16>; Labour Institute of GSEE (INE/GSEE) *Annual Report 2013* pp. 30, 192, 311-312, available at: <http://www.inegsee.gr>, both accessed 1 June 2014.

¹⁷⁶ CEACR Observations adopted 2012, published 102nd ILC Session (2013), Conventions 100 and 111 (equal pay, discrimination): <http://www.ilo.org/dyn/normlex/en/f?p=1000:11003:0::NO>, accessed 25 May 2014.

such legislation the issue of sex discrimination is less emphatic, and the transposition of gender equality directives is less rigorous, than it could be in a separate law.¹⁷⁷

The Equality Act defines the basic concepts of equality law (direct and indirect discrimination, harassment, unlawful segregation, victimisation and instruction to commit any of the above forms of unlawful treatment), which are to be applied in the entire legal system. The Hungarian concepts go beyond the relevant EU regulations as much as the definitions of direct and indirect discrimination and unlawful segregation protect groups (and not only individuals) against unequal treatment. This difference had some impact on jurisdiction in case of unlawful segregation of Roma children in schools, but not in gender equality case law.

All central concepts are rather similar to those of in Directive 2006/54/EC, although the Hungarian definitions are usually more limited. The definition of direct discrimination is narrower because it allows the possibility of exemption due to the enforcement of another person's fundamental right, if it is suitable for the designated purpose and proportional, or otherwise has a reasonable and objective explanation directly related to the relationship.¹⁷⁸ Similar exemptions are allowed in the Directive only in relation to indirect discrimination. The concept of indirect discrimination is also narrower because of stipulating 'considerably larger disadvantage' compared to 'disadvantage' as mentioned in the Directive. The definition of harassment is identical to that in the Directive, although sexual harassment as such is missing from the Equality Act. This omission was intended to be eliminated by the modification of the Equality Act in 2006, which inserted into the definition of harassment that the violation of dignity of the person occurs as a result of a conduct 'of sexual or other nature'. Consequently, the content of sexual harassment must be developed through the jurisdiction of ETA and the courts. Up to now the case law of ETA has properly transposed the content of sexual harassment written in the Directive: the ETA imposed a fine for habitually making remarks about the attractive appearance of a female co-worker, using a very intimate tone (calling her 'puppy' or 'piglet'), repeatedly offering himself as her sexual partner publicly.¹⁷⁹ Instruction to discriminate is properly transposed into the Equality Act.

Positive action is mentioned in the fourth modification of the Fundamental Law, stating that 'equal opportunities and social convergence shall be promoted by introducing special measures'. The rules of such measures are regulated by Article 11 of the Equality Act, stating that positive action might be issued by Act, by Government decree based on the Act, or by collective agreement; and that it must not violate fundamental rights, it must not grant unconditional preference and it must not exclude the consideration of individual aspects. In regard of gender inequalities, no positive action has been ordered by law in Hungary yet, beyond the (questionable) specific pension entitlements of women after 40 years of service.

The idea of establishing a quota system for political elections has met strong rejection from political parties (with the exception of LMP (*Lehet Más A Politika*: Politics Can Be Different), despite the fact that women's participation in elected bodies is extremely low in Hungary.¹⁸⁰ The new parliamentary elections held in 2014 resulted in a 9.5 % participation rate for women. The ruling FIDESZ-KDNP permanent party alliance (*Fiatal Demokraták Szövetsége – Kereszténydemokrata Néppárt*: Alliance of Young Democrats – Christian Democratic People's Party) has the lowest participation rate: out of 133 MPs only 9 are women, which equals 6.7 %.¹⁸¹ According to the announcement of the re-elected Prime Minister, the new Government will have only male members.

¹⁷⁷ Consequently the number of sex or sex-related cases is rather low (in 2012, 53 cases; 17 %) compared to all cases adjudicated by the Equal Treatment Authority (further on: ETA), which is the main administrative executor of equality legislation, <http://www.egyenlobanasmod.hu/data/2012report.pdf> accessed 19 September 2013. For the year 2013 no comparable data had been published until 1 July 2014.

¹⁷⁸ Article 7(2) of the Equality Act.

¹⁷⁹ 365/2011 EBH.

¹⁸⁰ The participation of women in politics is marginal: the ratio of women in Parliament is 9 %, and in municipalities it ranges from 5-19 %. Central Statistical Office, *Women and Men in Hungary 2009-2010*, Budapest 2011, pp. 216-17.

¹⁸¹ The author's calculations on the basis of data published by the National Election Office http://www.valasztas.hu/hu/ogvyv2014/858/858_0_index.html, accessed 29 May 2014.

2. Equal pay and equal treatment at work

Issues of equal pay and equal treatment at work are regulated by both the Equality Act and Act No. I. of 2012 on the Labour Code (further on: LC).

2.1. Equal pay

The previous Constitution expressly guaranteed equal pay for equal work, which is no longer included in the new Fundamental Law. Still, the specific rules on equal pay in the new Labour Code remained almost identical to those in the previous Code and properly transpose relevant EU law. The concept of 'pay' covers all direct or indirect payments, whether in cash or in kind, provided to the worker on the basis of employment. For the purposes of equal pay, the equal value of work is determined on the basis of the nature of the work performed, its quality and quantity, working conditions, the required vocational training, physical or intellectual efforts, experience, responsibilities and labour market conditions.¹⁸² The latter criterion, which was inserted into the paragraph by the new Code, according to the intentions of drafters, opens up the possibility for nationwide employers to provide different wages in different parts of the country, although it might lead to different interpretations as well. The Equality Act expressly prohibits exemptions in regard of direct sex discrimination cases in pay. Although rules prohibiting wage discrimination seem to be in place, the gender wage gap is still rather considerable in Hungary, especially among university/college graduates and managerial employees.¹⁸³

Wages paid on the basis of performance or job classification should also be provided in compliance with the principle of equal pay. Job classification is established either by law in the public sector or by (usually company level) collective agreements in the private sector. While such job classification systems do reduce wage differences in the private sector, especially among workers with lower wages,¹⁸⁴ they do not have a similar effect in the public sector because the acts establishing wage scales allow considerable deviation from the wage payable on the basis of the wage scale. According to the Act on public servants, the director of the state administrative organ may increase the basic wage of the public servant by 50 %, or may reduce it by 20 %.¹⁸⁵ The wage adjustment is linked to the result of the evaluation of performance or quality of work done in the previous year, although no detailed regulations exist in this regard. Although equal pay rules are applicable to public servants, the possibility of wage adjustment may result in a gender-based wage gap in the public sector.¹⁸⁶

In case law, when attempting to justify wage differences, employers usually refer to their freedom of contract, and/or the differences in the bargaining power of different employees. This happened in a case in which female storekeepers earned 70-100 % less than their male colleagues.¹⁸⁷ Such a classical example of gender discrimination in pay is rather rare in

¹⁸² Article 12(3) of the LC.

¹⁸³ In 2010, the ratio of women holding a university/college degree was only 71 % of that of the comparable men, while the same ratio in case of simple work was 96 %. See Central Statistical Office, *Women and Men in Hungary 2009-2010*, Budapest 2011, p. 167.

¹⁸⁴ L. Neumann *Van-e munkaerő-piaci hatása a decentralizált kollektív alkunak Magyarországon?* (Does decentralised collective bargaining have any effect in the labour market?) *Közgazdasági Szemle*, May 2001 pp.409–429.

¹⁸⁵ Article 133(3) of Act CXCIX of 2011 on public servants

¹⁸⁶ According to a recent study based on microeconomic data, 8 % of the gender wage gap in the public sector does not result from any observed factor e.g. education, segregation, etc, so might be the result of unlawful wage discrimination (but also from unobserved personal features of public servants: e.g. decision-making capacity). A. Lovász *Jobbak a nők esélyei a közszférában? A női-férfi bérkülönbség és a foglalkozási szegregáció vizsgálata a köz- és magánszférában* (Do women have better opportunities in the public sector? The gender wage gap and occupational segregation in the public and the private sector) Budapest Working Papers on the Labour Market BWP – 2013/2, Centre for Economic and Regional Studies, Hungarian Academy of Sciences, Budapest, Hungary.

¹⁸⁷ <http://www.egyenlobanasmod.hu/jogesetek/en/117-2010-en.pdf>, accessed 19 September 2013. The decision of ETA was confirmed by the Supreme Court in published decision No. KGD 2013/5.

Hungarian case law. It is much more frequent that the employer arbitrarily provides better wage conditions for some individuals or some groups of workers.¹⁸⁸

2.2. Access to work and working conditions

The regulations of the Equality Act provide protection against any direct and indirect discrimination listed in the Recast Directive¹⁸⁹ in relation to access to work and working conditions. The Equality Act gives a more detailed list of terms and conditions related to which the rules of equal treatment must be followed (including e.g. compensatory and disciplinary responsibility).

On the other hand, however, the exceptions regulated by Article 22 of the Equality Act go somewhat further than the Recast Directive and offer the employer some leeway not only in the cases listed in Article 14 (access to employment, including the training leading to it) but also regarding any other terms and conditions of employment. Furthermore, in Hungarian law the need to differentiate between the sexes should only be ‘substantial and legitimate’ instead of ‘determining’ as is stipulated by the Directive.

All elements taken together, the Hungarian Act provides weaker protection to women by making the differentiation between workers justifiable by the employer with a much wider scope than is provided by the Recast Directive. The wider margin for sex-based differentiation under Hungarian law may be illustrated by the decision of the ETA where a lower-rank clerical job requiring some physical work (sometimes lifting weights of ten kilos) was qualified as being ‘preferably for males’, on this ground rejecting a female applicant.¹⁹⁰

2.3. Occupational pension schemes

Hungary established the legal framework for occupational pension schemes by Act CXVII of 2007. Since early 2011, only one investment company provided occupational pension services for employers, which was a combination of an HR instrument through which key personnel and management can be rewarded and attached more closely to the company, and a company instrument providing savings for old age. Terms and conditions are to be decided by the employer within the framework of the investment company’s manual. The more selective the terms and conditions of the scheme as set up by the employer are, the more likely it is that some gender-related indirect discrimination might occur, because men are significantly overrepresented in managerial and key positions in Hungary. It will take years before some case law may develop in this regard.

3. Pregnancy and maternity protection, parental leave and adoption leave

Traditionally Hungarian labour law provided pregnant women and mothers of small children with a wide range of strong entitlements (far beyond the *acquis*), safeguarded by effective and dissuasive sanctions. The strong labour protection has been criticised as hindering the employment prospects of women. Labour economists especially have flogged the three-year (parental) leave, arguing that spending such a long period out of work considerably reduces the chances of re-entering the labour market.

Despite the criticism, the three-year parental leave has been maintained by the recent Government, although the related legal protection of parents has been considerably reduced in the new Labour Code, which came into force in 2012.

The major change in the latter regard was that only pregnant women who notify the employer of their pregnancy were entitled to legal protection against dismissal. The Constitutional Court, however, nullified the legal provision requesting prior notification about

¹⁸⁸ For example, in one case, some groups of nurses working in different departments of the same hospital were entitled to work hazard bonuses, while other groups of nurses were not, despite working under identical or very similar conditions. Kúria, Kfv. III. 39 148/2011. Published: EBH 2011/2424 (in the end the employer stopped paying the hazard bonus for all its nurses, and therefore the claimants’ reference point ceased to exist).

¹⁸⁹ Directive 2006/54/EC OJ L 204/23 of 5 July 2006.

¹⁹⁰ ETA Decision no. 441/2008.

pregnancy in order to enjoy legal protection against dismissal, therefore the rule again applies that the status itself and not its notification activates the legal protection.¹⁹¹

The new Labour Code is still rather generous in regard of short-term and long-term leaves, which are provided for both natural and adoptive parents. Short-term leaves are granted for the period of receiving IVF treatment in a healthcare institution; for the duration of mandatory pregnancy-related medical examinations; and for nursing the child until the end of the ninth month for one or two hours daily (in case of one child and twins).

As far as long-term leaves are concerned, mothers (both natural and adoptive) are entitled to twenty-four weeks of maternity leave, for which period pregnancy-confinement benefit is paid, the amount of which is equal to 70 % of the average daily pay (with no ceiling on payments).

Following the end of maternity leave, both parents are entitled to unpaid leave until the child reaches the age of three (or the age of ten, in case of permanently and seriously ill children). For the period of this leave, two types of parental benefits are provided from the central budget: childcare benefit and childcare fee. Both are family entitlements, except for the childcare fee until the child reaches the age of one, which is provided only for (insured) mothers. The benefit is a flat-rate amount, equal to the amount of the minimum old-age pension, and is paid until the child reaches the age of three. The childcare fee is paid to insured parents only, from the end of the maternity leave until the child reaches the age of two. Young parents are entitled to the childcare fee if they give birth during or shortly after attending college and/or university. The amount of it is equal to 70 % of average daily earnings, with a ceiling of twice 70 % of the minimum daily wage.

Following the expiry of any of the aforementioned leaves, under the new Labour Code (LC), the employer is no longer expressly obliged to re-employ the employee. The content of the regulations are rather vague and ambiguous, and it raises the possibility of a violation of Clause 5 of Directive 2010/18/EU. Article 65(3) of the LC prohibits the dismissal of an employee who is on maternity or parental leave. If the employer violates this obligation, the employee may claim his/her reinstatement into his/her original job, according to Article 83 of the LC. Furthermore, according to Article 59, upon the employee's return from maternity and parental leave the employer has to make an offer to the employee about the modification of his/her wage, adjusted by the amount of the average annual wage increase for employees in the same position. In the absence of such employees, the rate of actual annual wage increases implemented by the employer applies.

According to the recent regulations, legal protection is granted while the parent is on leave until the child reaches the age of three.¹⁹² If the mother or the single father returns to work before the child reaches the age of three, instead of protection, restriction on dismissal will apply. The form of such restriction varies according to the actual reason for dismissal. If the reason for dismissal is related to the employee's behaviour, it must be so serious that it could serve as basis for dismissal with immediate effect. If the reason for dismissal is related to either the capabilities of the employee or the operation of the employer, the employee could be dismissed only if there is no vacancy at the employer's relevant premises which corresponds to the capabilities, practice and qualification used by the employee in his/her current position.¹⁹³

¹⁹¹ The procedure at the Constitutional Court was initiated by the Commissioner for Fundamental Rights, claiming that the obligation of notification about early pregnancy generally (without any particular legal reason) violates pregnant women's human dignity and their right to privacy: 17/2014. (V. 30.) Constitutional Court Decision on the nullification of the phrase of 'prior to dismissal' in Article 65.(5) of Act I of 2012 on the Labour Code (17/2014. (V. 30.) AB határozat a munka törvénykönyvéről szóló 2012. évi I.törvény 65. § (5) bekezdése „a felmondás közlését megelőzően” szövegrésze alaptörvény-ellenességének megállapításáról és megsemmisítéséről). Decisions of the Constitutional Court and the Official Journal of the Constitutional Court; available online: http://www.mkab.hu/letoltesek/abk_2014_17_alairt.pdf, accessed 5 June 2014.

¹⁹² If both parents take unpaid leave, only the mother is entitled to legal protection against dismissal. If a single father takes the leave, he – like the mother – is also covered by protection against dismissal.

¹⁹³ Article 66(4) of the Labour Code.

If the employer unlawfully dismisses a pregnant woman, or the protected parent of a child under the age of three on childcare leave in violation of the rules on dismissal protection (prohibition on dismissal), the employee is entitled to reinstatement into her/his previous work, while (s)he is also entitled to any lost wages.

The aforementioned legal protection covers neither the extremely widely defined circle of executive employees (either male or female), nor employees employed through a ‘simplified employment relationship’. The regulation on simplified employment is not compatible with Clause 1(3) of Directive 2010/18/EU, because of the exclusion of workers in simplified employment relationships (who are specifically defined part-time workers) from the coverage of the parental leave regulations. The regulation does not specify any period of time following which workers with simplified employment have a right to parental leave. The dismissal protection of a parent who is temporarily away from work in order to take care of a sick child, was repealed by the new Labour Code. In this event, the parent can be lawfully dismissed, but the start of the notice period is delayed until (s)he returns to work.

4. Statutory schemes of social security

The Hungarian social security system covers all who perform work, receive income and pay contribution (the concept of ‘insured’), regardless of the form of contract and type of employment relationship. The scope of the legislation covers all risks specified in Directive 79/7/EEC (sickness, invalidity, old age, industrial accidents and occupational diseases, unemployment) and ensures equal treatment with regard to access to, contribution to and benefits from insurance covering these risks.

The pensionable age is 62 for both men and women and will gradually increase until reaching 65, in 2023. Starting in 2011, women are now entitled to a social security pension, regardless of their age, if they have completed 40 years of service and paid contribution correspondingly. This right is solely dependent on sex, regardless of family status or number of children. All childcare leaves build up service time for the purposes of pension entitlement. Both parents are entitled to sick leave with sickness benefits in order to take care of a sick child (with reduced job protection, as has been explained above).

Hungarian law goes further than EU law as it also applies gender equality to survivor’s pensions (for surviving spouses, orphans or parents), and family allowances, in which regard neither the entitlement nor the amount depends on the sex of the claimant.

5. Self-employed persons

The Equality Act covers not only employed women but those in ‘other relationships for work’, which covers self-employed persons as well. Consequently, the prohibition of discrimination on the basis of sex, pregnancy and family status applies to these women as well. However, it must be noted that the concept of ‘self-employed person’ has not been transposed into Hungarian law properly: instead, the concept of ‘individual entrepreneur’ is used, in which regard the (usually fictive) ‘entrepreneurial’ position of the individual is taken into account, and the need for specific (legal) protection is neglected. While equal treatment is formally guaranteed, no attention is paid to the disproportionately disadvantaged position of self-employed women in reality. For example, in case of pregnancy and childbirth, although an individual entrepreneur is formally entitled to the same benefits as other women in employment relationships, in reality she can rarely enjoy them because of being unable to stay away from her business for such a long period, and usually no supportive childcare services are available either.

Still, the Hungarian legal system complies with the EU *acquis* in the sense that it does not differentiate between men and women in the norms relating to individual entrepreneurship.

6. Goods and services

According to the Equality Act, the principle of equal treatment has to be observed in all public services, including public and higher education, social care, child welfare, healthcare services, public utilities, etc. Private services are also covered by the Equality Act if they concern offers and calls for offers (tenders) presented to the public (preliminarily undefined persons), and if they concern services that are provided and goods that are sold at premises open to the public.

The extensive legislation has not had much impact in practice: there are several discriminatory practices regarding women or mothers of small children. It is quite common – especially in the countryside – for mothers with small children to be prohibited from entering a shop with a pram. The usual justification of this discriminatory practice is that prams can be used for the purposes of shoplifting. The Equal Treatment Authority applies sanctions to fight this unlawful practice.

The recent Government Decree on homebirth discriminates against women on the ground of age, because entire groups of women are excluded from homebirth (women under 18 and over 40, the latter in case of a first birth), and is discriminatory on the ground of wealth, as well, because only women who can pay for the extremely expensive private insurance can enjoy the right to freely determine the conditions of their delivery.¹⁹⁴

7. Enforcement and compliance aspects

Per year, only around 50 cases are filed with the Equal Treatment Agency regarding gender, pregnancy and motherhood, out of which approximately 5-7 cases are considered well-grounded.¹⁹⁵ There are no specific statistics with regard to cases filed with labour courts and courts of other jurisdictions. Still, we may assume that the number of cases is equally low.

The Equal Treatment Agency (ETA) has little to offer to petitioners: the Agency can only establish the infringement of law, issue fines and order the publication of its decision on its own and the violator's website, but is not authorised to impose sanctions which could repair the harm suffered by the petitioner (e.g. reinstatement into the job, payment of compensation). For the application of such sanctions, the applicant has to submit the case to a court of law (instead of or following the procedure at the ETA). Hungarian anti-discrimination legislation makes it rather difficult and expensive for women to seek effective, proportionate and dissuasive penalties, since the enactment of the Equality Act, as has been pointed out by experts on several occasions.

Both the enforcement of gender equality law and the enactment of new pieces of legislation have been hampered by the recent empowerment of the ever-existing male approach, which permeates private and public relationships alike. This attitude has prevented Hungary in the past two decades from criminalising domestic violence, which finally took place in 2013, when a very controversial law was passed.¹⁹⁶

8. Overall assessment

With some gaps, Hungarian law has properly transposed the EU *acquis communautaire*, although the adequacy of Hungarian law has been reduced in the past few years.

The major theoretical shortcoming of Hungarian legislation (dating back to the original adoption of the Equality Act) is that the excessively wide scope of the Equality Act is counterbalanced by the similarly excessively wide terms for exemptions. Consequently, protection is weak because the accused could exculpate him/herself in most of the cases.

¹⁹⁴ 35/2011 (III. 21.) Korm. rendelet az intézeteken kívüli szülés szakmai szabályairól, feltételeiről és kizáró okairól (Government Decree 35/2011 (III.21.) on the rules, conditions and excluding factors regarding giving birth outside (healthcare) institutions).

¹⁹⁵ Data provided by the Equal Treatment Agency.

¹⁹⁶ Article 19 of Act LXXVIII of 2013, establishing the new crime of domestic violence.

More clearly targeted legislation which counterbalances the interests of the parties more carefully and reflectively for specific situations of infringements of equal treatment rights would provide a much more reliable and solid legal protection in the gender equality field.

The recent renaissance of the belief in the omnipotence of the free market forces' power and the freedom of contract (resulting for example in the argument that all or almost all legal boundaries must be eliminated in order to make the employer able to decide freely over the continuation or termination of employment contracts) provide the violators of equality law with an inexhaustible resource for justifications, which are sometimes even accepted by the courts.

The idea that the equal sharing of family responsibilities is the key to combating gender discrimination is still not widely accepted either by the general public or the legislator. The societal norms that women are responsible for family matters (which are strengthened by the ruling political forces) are contrary to the ideas on the balanced participation of women and men in family and working life. The regulations regarding generous parental leaves and the attitudes towards caring for children mutually reinforce each other in Hungary, which hinders women's equal participation in many aspects of life.

ICELAND – *Herdís Thorgeirsdóttir*

1. Implementation of central concepts

In 1994, a human rights section was included in the Icelandic Constitution, introducing a provision guaranteeing in Article 65 Paragraph 1 the enjoyment of human rights without prejudice to sex, religion, opinion, national origin, race, colour, property, birth or other status.

During the constitutional amendment process, a later paragraph was added to the said Article 65 specifically stating: 'Men and women shall enjoy equal rights in all respects'.

As a prohibition against discrimination was already mentioned in the first paragraph, the latter paragraph is a clear indicator of the strong emphasis on the need for affirmative action to achieve gender equality without explicitly mentioning the need for temporary measures in favour of the underrepresented sex.

The right not to be discriminated against was introduced into the human rights chapter to confirm the Icelandic legislator's dedication to the existing international treaty obligations. Iceland ratified the International Covenant on Civil and Political Rights (ICCPR) in 1979. Article 26 of the ICCPR is an unequivocal statement of the right of all persons to be equal before the law and to be entitled without any discrimination to the equal protection of the law. The principle of non-discrimination in the Icelandic Constitution was meant to have a wider application than the non-discrimination clause of the European Convention on Human Rights, which was incorporated into Icelandic law in 1994, as it was to apply to the whole spectrum of legislation so that everyone is equal before the law. It was furthermore mentioned in the explanatory report to the amended provisions of the Constitution that certain specific international treaties provided scope for positive action where there was a real need to improve the situation of groups in danger of being discriminated against. Iceland ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1985. CEDAW contains a provision (Article 4) enabling States Parties to adopt temporary special measures aimed at accelerating de facto equality between men and women. The drafters of the amended human rights chapter of the Constitution stated that it might well be justifiable to resort to measures in legislation to accelerate de facto equality.

Article 65 does not protect equality as a substantial right. It rather is a guiding principle which is to prevail in any decision bearing on equality, such as for example referred to in Administrative Procedures Act No. 37/1993 (Article 11), which applies to state and municipal administration. The principle of equality in its Article 11 provides that public authorities when deciding cases shall make every effort to ensure that, legally, it is consistent with and observes the rules of equal treatment. The parties to a case must not be discriminated against

on the grounds of their sex (or ethnic origin, colour, nationality, religion, political conviction, family or other comparable considerations).

The first equal rights act was adopted in 1976, placing the obligation on authorities to work towards de facto gender equality. Since then the law has been amended four times by Laws No. 65/1985, No. 28/1991, No. 96/2000 and the present gender equality act, the Act on Equal Status and Equal Rights of Women and Men (Act No. 10/2008, hereinafter GEA).

The GEA of 2008 is to firmly and fully establish the principles of the EU directives that have been incorporated through the EEA treaty into Icelandic law: Directive 75/117/EC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Directive 76/207/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Directive 92/85/EC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; Directive 96/34/EC on the framework agreement on parental leave; Directive 97/80/EC on the burden of proof in cases of discrimination and Directive 2002/73/EC amending Council Directive 76/207/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

The 2008 GEA defines the central concepts of the law in Article 2 as follows:

- Direct discrimination: When one individual receives less favourable treatment than another of the opposite sex in comparable circumstances.
- Indirect discrimination: When an impartial requirement, standard of reference or measure affects either sex more strongly than the other, unless this is appropriate, necessary or justifiable in terms of impartial considerations independent of gender.
- Gender-based harassment: Any type of unfair and/or insulting behaviour which is connected with the gender of the person affected by it, is unwelcome and impairs the self-respect of the person affected by it, and which is continued in spite of a clear indication that it is unwelcome. This harassment may be physical, verbal or symbolic. A single instance may be considered as gender-based harassment if it is serious.
- Sexual harassment: Any type of unfair and/or insulting sexual behaviour which is unwelcome and impairs the self-respect of the person affected by it, and which is continued in spite of a clear indication that it is unwelcome. This harassment may be physical, verbal or symbolic. A single instance may be considered sexual harassment if it is serious.
- Gender-based violence: Violence based on gender which results in, or could result in, physical, sexual or psychological injury or suffering on the part of the victim; also the threat of such and coercion or arbitrary deprivation of freedom, both in private life and in a public venue.
- Gender mainstreaming: Organising, improving, developing and evaluating the policy-making process in such a way that the gender equality perspective is incorporated in all spheres in the policy-making and decisions of those who are generally involved in policy-making in society.
- Affirmative action: Special temporary measures that are intended to improve the position of, or increase the opportunities of, women or men, aimed at establishing gender equality in a specific field where either sex is at a disadvantage. In such cases it may prove necessary to give either sex temporary priority in order to achieve balance.
- Wages: Ordinary remuneration for work and further payments of all types, direct and indirect, whether they take the form of perquisites or other forms, paid by the employer to the employee for his or her work.
- Terms: Wages together with pension rights, holiday rights and entitlement to wages in the event of illness and all other forms of employment or entitlements that can be evaluated in monetary terms.

The Icelandic national law provisions exceed the requirements of EU law regarding positive action. Where EU law is merely permissive, the GEA explicitly states that the aim of this Act

is to promote gender equality in all spheres of society by: working to secure equal influence of women and men in society; specifically improving the position of women and increasing their opportunities in society; working against wage discrimination and other forms of gender-based discrimination on the employment market; enabling both women and men to reconcile their work and family life; and working against gender-based violence and harassment and negative stereotypes regarding the roles of women and men.

The GEA imposes positive obligations on employers and trade unions to work purposefully to bring women and men on an equal footing within their enterprises or institutions and to take steps to avoid jobs being classified as specifically women's or men's jobs. Particular emphasis shall be placed on achieving equal representation of women and men in managerial and influential positions. The last aim mentioned above is elaborated in Section III of the GEA on rights and obligations in the labour market, stating in Article 18: 'Particular emphasis shall be placed on achieving equal representation of women and men in managerial positions'.

The GEA stipulates in its Article 15 that regarding the participation in government and municipal committees, councils and boards, care shall be taken to ensure as equal a representation of men and women as possible and not lower than 40 % where there are more representatives in a body. This shall also apply to the boards of publicly-owned limited companies and enterprises in which the state or a municipality is the majority owner. When nominations are made to national and local government committees, councils and boards, a man and a woman shall be nominated unless objective circumstances make it impossible to nominate both and then the nominating party must explain the reasons for this.

On 1 September 2013 a new law amending the Act on Public Limited Companies¹⁹⁷ took effect. This law provides that on Boards of Directors of Official Public Limited Companies and Public Limited Companies with more than 25 employees generally on an annual basis, each sex shall be represented on the Board when the Board consists of three persons, and when members of the Board of Directors are more than three in such Companies it shall be ensured that the sex ratio be not lower than 40 %.¹⁹⁸ By the end of 2013 women constituted 31 % as opposed to 69 % men on the boards of directors and substitute directors in public limited companies with more than 50 employees.¹⁹⁹

2. Equal pay and equal treatment at work

2.1. Equal pay

The equal pay clause in Article 19 of the GEA stipulates: 'Women and men working for the same employer shall be paid equal wages and enjoy equal terms of employment for the same jobs or jobs of equal value'. The phrase 'equal wages' means that wages shall be determined in the same way for women and men. The criteria on the basis of which wages are determined must not involve gender discrimination. In assessing whether the work is of 'equal value' the criteria are based on a contextual and coherent evaluation. The underlying premise is that when this assessment or evaluation takes place the individuals in question are working for the same employer as provided in the first paragraph of Article 19 of the GEA. Significant changes have taken place in recent years and hence 'the same employer' covers employment in the same ownership, such as in the case of subsidiaries or branches. A job-classification system is used at the municipal level in Iceland. When such a system is used it is confirmed

¹⁹⁷ Act No. 13/2010 amending Act No. 2/1995.

¹⁹⁸ http://www.mbl.is/frettir/innlent/2013/03/17/konur_bjodi_sig_fram_i_stjornir_fyrirtaekja/, accessed 19 June 2013.

¹⁹⁹ According to a survey by Credit Info for the SA-Confederation of Icelandic Employers; http://www.mbl.is/frettir/innlent/2014/01/17/konur_31_prosent_stjornarmanna/, accessed 18 June 2014.

that the evaluation does not assess the performance of the employer but entails analysis of the basic requirements that apply to those carrying out the job.²⁰⁰

Pay inequality still prevails and is not decreasing in Icelandic society. The unexplained gender pay gap (according to Eurostat) was 18.1 % in 2012; 18.5 % in the general labour market and 16.2 % among civil servants.²⁰¹ In 2013 the unadjusted gender pay gap (using the Eurostat calculation) for the general labour market in Iceland increased to 19.9 %, from 18.1 % in 2012. Among public servants the unadjusted gender pay gap was 15 % in 2013. In the public sector the gender pay gap among those working for the State (16.2 %) was wider than that for the municipal sector (5.6 %). At the municipal level, 75 % of employees are women, which may explain the much narrower gender pay gap.²⁰² The widest unadjusted gender pay gap exists in the financing and insurance sector, where it is 37.1 %. The narrowest unadjusted gender pay gap is in the health and social sector, where it is 9.1 %.²⁰³

The present Government adheres to the parliamentary resolution for the period of 2011-2014 on the strategy in gender equality matters with emphasis on equal opportunities and for both sexes to have equal chances in society. The main objective of the strategy is to mainstream gender equality in all spheres of decision-making and policy-making in society. A new strategy in gender equality matters will be submitted during the next session of Parliament this autumn, based on recommendations of a working group. The focus will be on disintegrating the gender-segregated labour market.²⁰⁴

In an attempt to raise public awareness of wage discrimination and the changing of public attitudes in accordance with Paragraph (38) of the preamble to the Recast Directive, the present equal pay clause, Article 19 (3) of the GEA now grants workers the right at all times, upon their choice, to disclose their wages, as a lack of transparency enables employers to discriminate. The framing of this clause is, however, not likely to render any real results as those that have grounds to believe that they are discriminated against cannot enforce disclosure within their workplace. A remedy that depends on the willingness of a co-worker to disclose his (better) terms in a competitive environment is not helpful and does not constitute actual transparency.

2.2. Access to work and working conditions

Vacant positions that are open for application shall be equally accessible to women and men, as stipulated in Article 20 of the GEA. The provision makes it mandatory on employers to take the necessary measures to ensure that women and men have equal opportunities regarding retraining, continuing education (lifelong learning), vocational training, and attending courses held to enhance vocational skills or to prepare for other assignments or occupations.

2.3. Occupational pension schemes

Pension Act No. 129/1997 provides for a mandatory affiliation to the pension fund provided for in the applicable collective agreement, for all workers between the ages of 16 to 70. The participation in workers' pension schemes is determined by the collective agreement on which the basic wages for each worker are determined. The general pension age is 67 and the qualifying condition is to have resided in Iceland for at least 40 years (three years for a reduced pension) between the ages of 16 and 67, and to have an annual income below EUR 25 423 (ISK 4 148 420). A pension supplement is granted if the insured's annual income does not exceed a certain amount. Social allowances (means-tested) are paid for living expenses

²⁰⁰ A report of a working group on the equal rights pay policy in the general labour market (2008), p. 40, http://www.velferdarraduneyti.is/media/08frettir/Skyrsla_starfshops_um_jafnlaunastefnu_a_almennum_vinnu_markadi.pdf, accessed 25 June 2013.

²⁰¹ http://www.mbl.is/frettir/innlent/2013/04/23/launamunur_kynjanna_18_1_prosent/, accessed 19 June 2013.

²⁰² http://www.mbl.is/frettir/innlent/2014/05/26/launamunur_kynjanna_19_9_prosent/, accessed 18 June 2014.

²⁰³ http://www.mbl.is/frettir/innlent/2014/05/26/launamunur_kynjanna_19_9_prosent/, accessed 18 June 2014.

²⁰⁴ Eyglo Hardardottir, Minister of Welfare in Frettabladid, 19 June 2014.

such as housing and medicine costs if the insured's annual income does not exceed a certain amount.

Women whose careers have been interrupted by having children or working part time, or who have started working outside the home later in life, have not been able to add much to the modest income provided by social security through the mandatory occupational fund. There are no advantages granted to persons (women) who have brought up children, specifically concerning periods of interruption of employment.

3. Pregnancy and maternity protection, parental leave and adoption leave

The scope of the Act on Maternity/Paternity Leave and Parental Leave, No. 95/2000 (hereinafter MPPL Act) with subsequent amendments, applies to the rights of parents working in the domestic labour market to be granted maternity/paternity leave and parental leave. It applies to parents who are employed by others or who are self-employed. The MPPL Act also applies to parents who are not active in the labour market and parents attending full-time educational programmes as to receiving a maternity/paternity grant. The aim of the MPPL Act is to ensure a child's access to both her/his parents and to enable both women and men to reconcile work and family life.

Under the MPPL Act each parent has an independent entitlement to maternity/paternity leave for up to three months due to birth, primary adoption or reception of a permanent foster child. This entitlement is not transferable. In addition, the parents have a joint entitlement to an additional three months, which either parent may draw in its entirety or the parents may divide between them.

Maternity/paternity leave counts as working time for the purpose of assessing work-related rights, such as the right to holidays or the extension of the holiday period under wage agreements, wage increases due to seniority, entitlement to wages in the event of illness, a notice period of termination of employment and the right to unemployment benefits (Article 14 MPPL). The employment relationship between an employee and her/his employer shall remain unchanged during maternity/paternity leave or parental leave.²⁰⁵

Special consideration to women in connection with pregnancy and childbirth shall not be regarded as discrimination.²⁰⁶

4. Statutory schemes of social security

The social security scheme in Iceland is a tax-financed public pension scheme, which provides a flat-rate or means-tested basic pension. The social security scheme is a resident-based scheme covering the whole population. This is in addition to the occupational pension scheme, which is financed by the contributors: both employees and employers. The whole working population must pay contributions into an occupational pension fund according to the Pension Act and receives pension payments from this pension fund, only being entitled to additional payments from social security if their pension payments from occupational funds are below a certain level. Directive 79/7/EEC is in Annex XVIII to the EEA treaty. The first pillar targeted by Directive 79/7/EEC overlaps with the second pillar targeted by Directive 86/378/EEC as regards pension payments because traditional first-pillar pension payments decrease if the pensioner simultaneously receives benefits from occupational pension schemes, which are statutory in Iceland.²⁰⁷

The pensionable age is the same for both sexes. Persons who are aged 67 years or older, and who have been resident in Iceland for at least three calendar years between the ages of 16 and 67, are entitled to old-age pensions.

²⁰⁵ Article 29 MPPL.

²⁰⁶ Article 24 of Gender Equality Act No. 10/2008; Article 11 of Act on Maternity/Paternity Leave and Parental Leave No. 95/2000.

²⁰⁷ Act on Mandatory Insurance of Pension Rights and on Activities of Pension Funds No.129/1997.

The exceptions provided for in Article 7 of Directive 79/EEC have not been implemented in Social Security Act No. 100/2007²⁰⁸ (there are no derived benefits), which is under revision at present.

5. Self-employed persons

The principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and the provisions on the protection of self-employed women during pregnancy and motherhood are to be found in the GEA, which applies in all spheres of society; in the Act on Maternity/Paternity and Parental Leave which applies to parents who are self-employed and also to parents who are not active in the labour market; and in the Act on Working Environment, Health and Safety in Workplaces No. 46/1980, which covers all business operations where one or more persons are employed, whether they are owners of the enterprise or employees. Spouses of self-employed individuals in agriculture were given special concern during the preparation of the Act on Maternity/Paternity and Parental Leave as the means to earn money among farmers are more restricted than among other walks of life. The gender pay gap is smaller in agriculture than in other spheres and, at the same time, average wages in agriculture are lower than in other fields of work. Women farmers who run a farm in co-operation with their spouses complain that they do not enjoy full recognition as self-employed individuals. Two self-employed persons cannot run a farm on an equal basis. The social security number of a farm can only be linked to one spouse, usually the husband, and hence the male farmer is the only official recipient of government payments.

Pension Act No. 129/1997 provides for compulsory pension-fund participation of all employed persons from the ages of 16 to 70, employees or self-employed persons. No one may be refused participation in a pension fund for reasons of health, age, marital status, family size or gender. According to the Pension Act all employees receive the same benefits for equal contributions regardless of the longer life expectancy of women compared to men. Individuals receive payments throughout their lives.

The minimum pension fund contribution is calculated based on the total of wages and compensation for any kind of work, job and service. The minimum contribution is 10 % of the contribution base, of which 2 % is deducted from the worker's wages and 8 % is added by the employer. In addition to this, a worker may pay 2 % into a supplementary contribution scheme (public or private pension fund) and in that case the employer's counter-contribution is 2 %.

Directive 2010/41 was incorporated into the EEA treaty on 2 February 2012. The deadline to implement the Directive has not yet passed.

6. Goods and services

Directive 2004/113 on equal treatment of men and women in the access to and supply of goods and services has not been incorporated into the EEA treaty by the EEA Joint Committee and has therefore not been implemented directly into domestic law. On 16 May 2012 the National Parliament (the Althing) granted the Government permission to confirm the decision of the EEA Joint Committee, No. 147/2009, to incorporate Directive 2004/113 into the EEA Treaty. It is therefore to be expected that this incorporation will take place in the coming months and that it will subsequently be implemented into domestic law.

²⁰⁸ As amended by Acts No. 105/2007, No. 160/2007, No. 17/2008, No. 57/2008, No. 112/2008, No. 155/2008, No. 173/2008, No. 55/2009, No. 70/2009, No. 97/2009, No. 120/2009, No. 136/2009, No. 65/2010, No. 162/2010, No. 164/2010, No. 51/2011, No. 106/2011, No. 126/2011, No. 178/2011, No. 28/2012 and No. 134/2012.

The GEA prohibits discrimination in the areas of employment, occupation and vocational training while Directive 2004/113/EC covers other areas outside employment and professional life and will therefore supplement the existing legislation when implemented.

7. Enforcement and compliance aspects

The Supreme Court of Iceland is the highest judicial instance in Iceland and hears appeals of the district courts (two-level judicial system). Individuals, enterprises, institutions and non-governmental organisations, either in their own name or on behalf of their members, who consider that they are victims of violations of the GEA may submit their case to the Gender Equality Complaints Committee but its rulings may not be referred to a higher authority. The Centre for Gender Equality, if it has reason to suspect that an institution, enterprise or non-governmental association has violated the GEA, shall investigate whether there is reason to request the Gender Equality Complaints Committee to examine the matter. The relevant institution or NGO shall be obliged to provide the Centre for Gender Equality with the material it considers necessary to reveal the facts of the case. If the parties concerned do not comply within a reasonable time limit, the Centre may decide that they are to pay per diem fines until the information has been provided. When a party against whom a ruling is directed fails to comply with it, the Centre may instruct the party to take satisfactory remedial measures in accordance with the ruling within a reasonable time limit.

The prohibition against discrimination is set forth in Section IV of the GEA, including the general prohibition against discrimination, the prohibition against discrimination regarding terms at work and on engagement in employment, and in connection with a complaint or demand for redress.

If a superior is charged with alleged gender-based or sexual harassment, he or she shall be non-competent to take decisions regarding the working conditions of the claimant during the examination of the case, and the next superior shall take such decisions.

No person may waive the rights set forth in the GEA.

Sanctions include compensation for financial and non-financial loss. Violations of the GEA, or of regulations issued under the GEA, may be punishable by fines unless heavier penalties are prescribed in other statutes. Fines shall be paid to the State Treasury.

Cases involving violations of the GEA, or of regulations issued thereunder, shall be handled as criminal cases. Once a prima facie case is established the burden of proof shifts to the defendant: for example, the employer must demonstrate that a difference in wages can be explained on other grounds than sex.

8. Overall assessment

The overall implementation of the EU gender equality *acquis* appears to be satisfactory.

IRELAND – Frances Meenan

1. Implementation of central concepts

The Irish Constitution of 1937 forbids any exclusion by reason of sex from Irish nationality and citizenship. Article 40 states that ‘all citizens shall, as human persons, be held equal before the law’ and proceeds to allow the State, in its enactments, to ‘have due regard to differences of capacity, physical and moral, and of social function’. Article 45 provides that all citizens, ‘men and women equally’, have the right to an adequate means of livelihood’, and directs the State to ensure that they may ‘through their occupations find the means of making reasonable provision for their domestic needs’.

The Employment Equality Acts 1998 to 2011²⁰⁹ prohibit discrimination, both direct and indirect, on nine grounds,²¹⁰ including the gender ground. The scope of the Acts is very broad and includes all workers and agency workers.²¹¹ There is no reference to gender re-assignment; however, the Government published a revised General Scheme for the proposed Gender Recognition Bill in June 2014.²¹² The Programme also provides that at least 40 % of persons on state boards should be women.²¹³ The Employment Equality Acts implement the requirements of EU law. Discrimination shall be taken to occur where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds which exist, existed but no longer exists, may exist in the future or is imputed to the person concerned.²¹⁴ An instruction to discriminate against persons on grounds of gender shall be deemed to be discrimination. There may also be discrimination by association. Indirect discrimination is prohibited in respect of remuneration and equal treatment.²¹⁵ Indirect discrimination occurs where an apparently neutral provision puts persons of a particular gender at a particular disadvantage in respect of remuneration or any matter other than remuneration, as compared with other employees of their employer, unless the provision is objectively justified by a legitimate aim and a means of achieving that aim are appropriate and necessary.

There may be positive action in respect of any measures maintained or adopted with a view to ensuring full equality in practice between men and women and providing for a specific advantage so as to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Both gender harassment and sexual harassment are prohibited.²¹⁶ Harassment is any form of unwanted conduct related to gender and references to sexual harassment are to any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, being conduct which in either case has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. Unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material. An employee must not be victimised for rejecting such harassment.

2. Equal pay and equal treatment at work

2.1. Equal pay

The Employment Equality Acts 1998 to 2011 provide that there cannot be direct or indirect pay discrimination in relation to employment on the gender ground. Remuneration has a wide definition and includes not only basic pay and is similar to Article 157 TFEU. It has been held to include accommodation, bonus earnings, commission payments, marriage gratuities, overtime payments, permanent health insurance, redundancy payments and sickness payments. In order to bring a claim a claimant must show that there is a person of the opposite sex (the comparator) in the same employment working for the same or an associated employer

²⁰⁹ As of July 2014, the Irish Human Rights and Equality Commission Act was signed by the President, but is awaiting the necessary commencement orders.

²¹⁰ Gender, civil status, family status, sexual orientation, religion, age, disability, race and the Traveller community ground (the Traveller community is the community of people commonly so called who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland) (Section 6 of the 1998 Act). 'Civil status' means single, married, separated, divorced, widowed, in a civil partnership or being a former civil partner or in a civil partnership that has ended by death or by being dissolved. This term was provided by the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

²¹¹ Protection of Employees (Agency Workers) Act 2012.

²¹² Available at www.welfare.ie. Accessed 3 September 2014.

²¹³ http://www.taoiseach.ie/eng/Publications/Publications_2011/Programme_for_Government_2011.pdf, accessed 3 June 2014.

²¹⁴ Section 6 of the Employment Equality Act 1998 (as amended).

²¹⁵ Sections 19 and 22 of the Employment Equality Act 1998 (as amended).

²¹⁶ Section 14A of the Employment Equality Act 1998 (as amended).

doing 'like work'. 'Like work' is defined as where two people perform the same work under the same or similar conditions or each is interchangeable with the other, similar work or work performed by one is equal in value to the work performed by the other, having regard to such matters as skill, physical or mental requirements, responsibility and working conditions. A claimant is entitled to the same rate of remuneration as a comparator of the opposite sex. The employer may use the defence of grounds other than sex.

2.2. Access to work and working conditions

The Employment Equality Acts 1998 to 2011 apply. An employer shall not discriminate against an employee or a prospective employee in relation to access to employment, entry requirements, conditions of employment, training or experience for or in relation to employment, promotion or degrading, or classification of posts, instructions or practices.²¹⁷ There shall be no discriminatory advertising and the Equality Authority may apply to the courts to obtain an injunction preventing the appointment of any person to which the advertisement relates. The Acts apply likewise to a partner in a partnership as if s/he were an employee. There cannot be discrimination in respect of vocational training. It is not unlawful to confine a post to a man or a woman where gender is a *bona fide* occupational qualification.

2.3. Occupational pension schemes

Occupational benefit schemes are defined in Part VII of the Pensions Act 2004. There cannot be discrimination (direct or indirect) on the ground of gender.²¹⁸ The definition includes schemes for both self-employed and employed persons. 'Occupational benefits' include benefits in the form of pensions relating to termination of service, retirement, old age or death, interruptions of service by reason of sickness or invalidity (income continuance), accidents, injuries or diseases arising out of or in the course of a person's employment, unemployment, expenses incurred in connection with children or other dependants. There are detailed provisions which render unequal rules null and void and automatically equalise the terms of the scheme to provide the equivalent treatment. Where there are provisions which infringe the principle of equal pension treatment on the gender ground and which are purported to take effect on or after 5 April 2004 (the date of the commencement of the Act), the provision is levelled up from that date until equalised on another basis. Both the Protection of Employees (Part-Time Work) Act 2001 and the Protection of Employees (Fixed-Term Work) Act 2003 provide that part-time employees who work less than 20 % of the normal hours of work of a comparable full-time employee may be treated less favourably in respect of pensions. Such exclusion could constitute indirect discrimination.

Pensionable age has been the same for men and women in Ireland both in occupational pensions and in respect of statutory retirement.²¹⁹ Account shall not be taken of differences in the level of contributions or the amount of benefits which have been included for the purpose of removing or limiting differences as between men and women or to the extent that the difference results from the use of actuarial factors differing according to sex. There cannot be gender discrimination in respect of survivor's benefits or a deceased member's widow or widower.

3. Pregnancy and maternity protection, parental leave and adoption leave

The Maternity Protection Acts 1994 and 2004 cover all female employees and the employed father on the death of the mother. An employee is entitled to paid time off for antenatal and postnatal medical checks and also for certain antenatal classes. Maternity leave is for 26

²¹⁷ Section 8 of the Employment Equality Act 1998 (as amended).

²¹⁸ Or on any of the other eight grounds listed in the employment equality or equal status legislation. The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 also amends the pensions legislation and amends the 'marital status' ground to that of 'civil status'.

²¹⁹ The normal retirement age is usually 65 years. However, the Public Service Pensions (Single Scheme and Other Provisions) Act 2012 has raised the minimum pension age to 66 years.

consecutive weeks. Employees on maternity leave are in receipt of state maternity benefit for the duration of such leave but employers may 'top up' payment to normal remuneration. An employee is also entitled to an optional 16 weeks (unpaid) additional maternity leave. There are certain rules in the event of the illness of the mother and/or the hospitalisation of the baby. An employee is deemed to be in employment during any leave. Dismissal during leave or notices of termination given during leave and to take effect during leave or after the end of leave are void. Any period of probation, training or apprenticeship is suspended during absence on leave. There is a general right to return to the same job for employees who have been on maternity leave. There is a right to suitable alternative work provided the work is appropriate and under the same terms and conditions of employment.

Employers must carry out a risk assessment of the health and safety of employees who are pregnant or breastfeeding. An employee who is pregnant or is breastfeeding is granted paid health and safety leave from their employment if their employer cannot remove a risk to their health and safety, or alternatively provide the employee with 'risk-free' duties. If a doctor certifies that a woman should not perform night work during pregnancy or within fourteen weeks of the birth then she shall be transferred to day work. There is entitlement to time off work or a reduction of working hours for breastfeeding.

The Adoptive Leave Acts 1995 and 2005 mirror the maternity leave provisions (as appropriate) for an adopting mother or sole male adopter.

The Parental Leave Acts 1998 to 2008 as amended by the European Union (Parental Leave) Regulations²²⁰ provide that each employee parent (with one year's service) is entitled to 18 weeks unpaid leave for each natural or adopted child until it reaches the age of eight. Leave is non-transferable between parents except when they are working for the same employer. Parental leave may consist of a continuous period of 18 weeks or of separate blocks of a minimum of 6 continuous weeks or by agreement on more favourable terms. The employee has the right to return to his/her own job or suitable alternative employment. Parents are also allowed to request a change in their working hours or pattern of work. Employers are required to consider the request but are not required to grant it. Time spent on parental leave is deemed to be time spent at work. There is provision for *force majeure* leave in the event of the urgent illness of a relation (including a relationship of domestic dependency and same-sex partners) where the immediate presence of the employee is required and is indispensable.

There is provision for carer's leave with carer's benefit and allowance (up to 104 weeks under the Carer's Leave Act 2001 with a right to return to work) when persons have to leave the workforce or work shorter hours due to looking after an incapacitated person in their own home.

4. Statutory schemes of social security

Employers and employees pay Pay-Related Social Insurance contributions. Most contributory entitlements are based on the number of weeks of contributions. The social welfare provisions are contained in the Social Welfare (Consolidation) Act 2005 (as amended). Such legislation and rules are complex. The legislation provides for state benefits/assistance in respect of disability, unemployment, occupational injuries, health and safety (where the employment would affect mother and child), old age (contributory and non-contributory) and retirement, invalidity, widow's and widower's pension. There are various other supplementary schemes for such persons. There are also various schemes which provide additional allowances or supplements for persons who may wish to go back to work or enter the workforce. In summary they provide for the granting of various benefits if persons wish to obtain higher education at a later age. Since 1991 most part-time workers are included in the social welfare scheme. However, this group would have reduced social welfare contributions, i.e. the number of years of contribution, and arguably this could be deemed to be indirect

²²⁰ S.I. No. 81 of 2003.

discrimination as the vast majority of such employees are women. In the main all movement in the tax and social welfare system is towards individualisation. Whilst the rules are extremely complicated, there appears to be compliance with Directive 79/7.

5. Self-employed persons

Regarding Directive 2010/41/EU, Ireland had requested the additional time period allowed for in Article 16(2) for the implementation of Articles 7 and 8, and have notified existing measures for the remainder.²²¹ The Social Welfare and Pensions Act 2014 provides that the spouse or civil partner of a self-employed person who carries out the same or ancillary tasks and earns over EUR 5 000 shall be entitled to Pay Related Social Insurance, and be eligible to receive various entitlements (maternity and adoptive leave benefit and state pension).²²² The Act will be effective from the year 2014. This provision applies where there is no formal partnership in place (e.g. a family business).

The definition of the contract of employment in the Employment Equality Acts extends to include the self-employed within the scope of the legislation. Family members working together are generally not insurable under the social welfare legislation. Spouses of an employed or self-employed contributor are specifically exempt from social insurance contributions. However, spouses who are partners in a family business, or who work together in a legally incorporated company can be insurable. Self-employed partners have protection under the Employment Equality Acts 1998 to 2011 and self-employed women are entitled to state maternity and adoptive leave benefits. Individual pension contracts concluded for or on behalf of self-employed persons are excluded from the scope of the Pension Acts 1990-2012.²²³

6. Goods and services

The Equal Status Acts 2000²²⁴ to 2012 provide that there cannot be direct discrimination, discrimination by association or by imputation, or indirect discrimination based on gender²²⁵ in respect of the access to and supply of goods and services, the disposal of premises and the provision of accommodation, activities of educational establishments and activities of registered clubs. A male-only golf club was considered not to be discriminatory under the Acts.²²⁶ There cannot be gender discrimination or sexual harassment. There are certain exceptions on the ground of gender (for example on grounds of authenticity, privacy, sporting facilities or single-sex schools). The non-discrimination provision provides that it shall not apply to differences in the treatment of persons in relation to annuities, pensions, insurance policies or any other matters related to the assessment of risk where the treatment is effected by reference to actuarial or statistical data obtained from a source on which it is reasonable to rely, or other relevant underwriting or commercial factors and is reasonable having regard to the data or other relevant factors. Ireland is availing itself of the derogation. From 21

²²¹ The Department of Social Protection has just published the details in respect of the payment of Pay Related Social Insurance ('PRSI') by the spouse or civil partner of the self-employed who are doing the same or ancillary tasks as their spouse or partner. See: <http://www.welfare.ie/en/Pages/Change-to-Self-Employed-Social-Insurance.aspx>, accessed 3 September 2014.

²²² See: <http://www.oireachtas.ie/viewdoc.asp?DocID=26812&CatID=87>, accessed 3 September 2014.

²²³ I.e. one-member schemes.

²²⁴ There was a further amendment to these Acts in respect of claims against licensed premises by the Intoxicating Liquor Act 2003.

²²⁵ Or on any of the other grounds as under the Employment Equality Acts 1998 – 2008, as set out above. The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 also amended the Equal Status Acts 2000 to 2008. The definition of 'family status' includes 'being pregnant'. There is no reference to gender reassignment.

²²⁶ In the Matter of Section 2 of the Summary Jurisdiction Act, 1857 as amended by section 51 of the Courts (Supplemental Provisions) Act, 1961, *the Equality Authority v Portmarnock Golf Club and Others and Robert C. Cuddy and David Keane, Ireland and the Attorney General* [2005] IEHC 235, [2009] IESC 73.

December 2009 there cannot be differences in the treatment in relation to pregnancy and maternity. The Equal Status (Amendment) Act 2012 entered into force on 20 December 2012. The Act provides for the amendment of certain provisions of the Equal Status Act 2000 so as to provide in Irish law for the mandatory introduction of unisex contributions (premia) and benefits in insurance as from 21 December 2013.

7. Enforcement and compliance aspects

A person may seek material information from the person who allegedly discriminated against them.²²⁷ The parties may refer a case to mediation. In any proceedings under the Employment Equality Acts the claimant must present a *prima facie* case of discrimination and, if this is successful, the burden of proof then falls on the respondent to show that there was no such discrimination. The claim must be brought within six months of the alleged discrimination. If there are proceedings on more than one ground, each ground is a separate claim. Cases are referred in the first instance to the Equality Tribunal or on the gender ground only to the Circuit Court. A decision of the Equality Tribunal may be appealed before the Labour Court. There may be appeals on a point of law before the High Court. The Equality Tribunal may order in respect of equal pay arrears of remuneration not earlier than three years prior to the date of reference of the claim with an order for on-going equal pay, and an order for compensation for the effects of acts of discrimination or victimisation. In equal treatment cases there may be an order for compensation of up to a maximum of two years' remuneration or EUR 40 000 whichever is the greater²²⁸ and/or an order for a specified course of action. In dismissal cases reinstatement, re-engagement or compensation up to a maximum of two years' remuneration may be ordered. If the claim is referred to the Circuit Court there is unlimited compensation (for the effect of the discrimination for six years prior to the reference of the claim). Where the claimant is not an employee the maximum award is EUR 13 000. Interest may be awarded and the Circuit Court may award costs. There are provisions for enforcement and criminal sanctions. The administration of the Equality Tribunal has been transferred to the Department of Jobs, Enterprise and Employment from the Department of Justice and Equality. The intention of the new system is to provide speedier, cheaper and more efficient access to adjudication in respect of employment protection legislation. It should be noted, however, that if a claimant is successful in respect of their claim and also in respect of a claim of victimisation that they may obtain the full award under both claims.

A prospective claimant under the Equal Status Acts 2000 to 2012 must notify the person alleged to have discriminated against them within two months of the discrimination. A claim must be referred to the Equality Tribunal within six months of the alleged prohibited conduct. Compensation may be awarded up to a maximum of EUR 6 348 and/or an order may be issued for a specified course of action to be taken; however, a claim on the gender ground may also be brought to the Circuit Court which may order unlimited compensation. Claims against licensed premises are brought to the District Court. The claim may be referred to mediation if the parties so agree. There are provisions for enforcement and criminal sanctions.

Claims under the Pensions Acts 1990 to 2013 may be referred to the Equality Tribunal or to the Circuit Court (on the gender ground only with unlimited jurisdiction) within six months of the date of termination of employment.

²²⁷ However, in Case C-104/10 *Patrick Kelly v National University of Ireland (University College Dublin)* [2011] ECR I-06813, the CJEU considered that in relation to vocational training an applicant who considers that he has been discriminated against is not necessarily entitled to information on the qualifications of the other applicants for the course.

²²⁸ The maximum amount of compensation can only be awarded by the Equality Tribunal, even though a claimant may have been successful on more than one discriminatory ground. Claimants have the option of a reference to the Circuit Court where there may be an award of compensation for the last six years of discrimination with no upper financial limit.

Any person may refer a collective agreement to the Equality Tribunal where it is considered that a provision of the agreement is discriminatory. If such an agreement/provision is considered discriminatory, it is null and void. Collective agreements are generally considered to be non-binding. There are certain registered employment agreements (e.g. in the construction industry) where the agreement is legally binding.

The social partners generally play a part in employment equality law, for example the Irish Business and Employers' Confederation and the Irish Congress of Trade Unions work in partnership in respect of equality generally.

The Equality Authority has considerable powers to include the function of working towards the elimination of discrimination, provides information on the maternity, adoptive and parental leave legislation and may provide codes of practice, conduct research and information, carry out equality reviews and audits, conduct inquiries and may issue a non-discrimination notice where it is satisfied that there has been or is discrimination. The Equality Authority may provide assistance to persons who consider that they are or have been discriminated against. The Equality Authority is the body charged with the promotion of equality. It is proposed that this body will be amalgamated with the Human Rights Commission and be called the Irish Human Rights and Equality Commission.

Any litigation (which is rare) in respect of social welfare is a reference to a deciding officer and on appeal to an Appeals Officer and if necessary to the High Court.

8. Overall assessment

Overall, the EU directives have been satisfactorily transposed into Irish law and are applied continuously by both the Equality Tribunal and the Labour Court. It is questionable, however, whether the legislation includes 'real and effective compensation' given that awards are capped even where there is discrimination on more than one ground. The decisions of the Equality Tribunal and Labour Court are detailed and reasoned decisions. They are available online²²⁹ and the Equality Authority, the Equality Tribunal and the Labour Court all provide excellent annual reports to include detailed legal sections. There are considerable delays in cases getting a date for hearing. In many cases the delay is up to two years after the commencement of the proceedings. In practice this can have a dissuasive effect on a claimant. There has been a considerable volume of case law and the Equality Tribunal, the Labour Court and the courts have applied the jurisprudence of the CJEU.

ITALY – Simonetta Renga

1. Implementation of central concepts

Decree No. 198/2006, a consolidation Act called 'Code of Equal Opportunities between Men and Women', gathers all gender anti-discriminatory provisions which were issued to implement EU directives or which already complied with them. It regards women's participation in all fields, including work relationships. The Code was then amended by Decree No. 5 of 25 January 2010, implementing Recast Directive 2006/54/EC.

In general, we can state that all notions of direct and indirect discrimination as well as the notion of harassment and sexual harassment almost literally reflect the respective concepts set by EU directives. As regards the justification clauses, the notion of indirect discrimination is stricter than EU law: in fact, neutral criteria which result in a disparate impact are only legitimate if they are essential requirements for the job.

Less favourable treatment based on a worker's rejection of or submission to harassment or sexual harassment shall be considered discrimination under Article 2 of the Code and less favourable treatment related to pregnancy, motherhood or fatherhood, also adoptive, as well

²²⁹ See: www.employmentrights.ie. Accessed 3 June 2014.

as to the respective rights, is considered as direct gender discrimination. The same goes for instruction to discriminate.

Case law is very scanty on all these matters and generally does not add anything to legislative provisions.

Positive actions are not just permitted but also promoted and sustained by the allocation of a specific Fund, both in the private and in the public sector. Further funds have been allocated for the promotion of female self-employment and entrepreneurship and for the reconciliation of working life with family/private life. Decree No. 5/2010 provided that a method which enables an objective and technical assessment of the plans to be submitted for financing shall accompany the evaluation of these plans. The Civil Service plays a leading role in the enhancement of positive actions, as in this sector three-year positive action plans shall be drawn up regarding jobs and levels where women are under-represented. As a sanction, if the Civil Service infringes the obligation to draw three-year action plans the Civil Service is prohibited from recruiting new personnel.

A quota system was introduced by Act No. 120 of 12 July 2011 for the appointment of managing directors and auditors of listed companies and state subsidiary companies, where each sex cannot be represented in a proportion lower than one third. This rule shall be enforced for three periods of tenure of directors and auditors. The sanction procedure in the event of infringement of the rule is very gradual and only after two warnings of the *Consob* (the National Securities and Exchange Commission), which is also charged with monitoring compliance with the gender balance principle, can the penalty of dissolution of the Company Board be applied. As regards state subsidiary companies not quoted in the regulated market, the same principles are enforceable.

Furthermore, Act No. 215 of 23 November 2012 introduced new regulations aimed at achieving gender equality in politics and in hiring procedures in public administration. One of the main interventions regards the statutes of municipalities and provinces, which must now provide regulations to ensure (and not only 'promote' as under previous legislation) the representation of both sexes in government bodies and in other corporate bodies (not elective ones) of the municipality or the province or in businesses and institutions depending on them. Moreover, it is provided that the regulations governing the election of municipality and province councils and governing the appointment of the respective local government bodies must also respect the principle of gender equality and guarantee the representation of both sexes. Act No. 65/2014 recently modified previous regulations so as to ensure a better gender balance in the election of the Italian members of the European Parliament. Under these regulations, not more than 50 % of the candidates on each list can be of the same sex; the first and the second candidates on the list cannot be of the same sex; in case of two or three preferential votes, they must be given to candidates of different sex, and if not, the second and the third preferential vote must be cancelled. Finally, gender balance in politics is also supported by Act No. 13/2014, which recently provided for a reduction of parties' public financing if they do not fulfil gender balance requirements regarding the list of candidates for political elections.

2. Equal pay and equal treatment at work

2.1. Equal pay

Legislation regarding equal pay applies to all employees in the private as well as in the public sector. Article 37 of the Constitution states that a female worker shall have the same rights and, for equal work, the same remuneration as a male worker. This constitutional principle was reworded and clarified by an ordinary provision stating that a female worker shall be entitled to the same remuneration as a male worker where the services required are equal or of equal value, and that occupational classification systems applied for the purpose of determining remuneration shall adopt common criteria for men and women.

No justifications for differences in pay are provided by Italian legislation, save those allowed on the ground of the general notion of indirect discrimination, such as a premium

awarded by the employer to salespeople who are available for frequent business trips where workers obtaining it are mainly men, but mobility is an essential requirement for the job.

The concept of pay is not defined by the law, but has been widely construed by Italian courts, on the basis of collective agreements, as including any economic benefit in cash or in kind directly and indirectly paid on the ground of the employment relationship. Under industry-wide agreements, different job classifications on the ground of sex have been abolished from the 1960s onwards. However, indirect discrimination could hide in additional wages bargained at the local or enterprise level and in the so-called *superminimo individuale* (possible sums granted on the basis of individual bargaining): the partial reversal of the burden of proof could be an important measure to disclose this, but no recent and specific studies or case law can be recorded on the matter.

The implementation of EU directives is, on the whole, satisfactory.

2.2. Access to work and working conditions

As regards the personal scope, the Code of Equal Opportunities provides a ban on gender discrimination which applies to all persons employed in any sector (both private and public, including the military forces) and irrespective of the size of the employer. On this point implementation is fully satisfactory, although it does not go further than EU law.

As regards the substantive scope, the ban on discrimination covers all stages of the employment relationship, i.e. access to work, for the employed and self-employed, with a wide meaning, including vocational guidance, training, further training or refresher courses, as well as membership of and involvement in an organisation of workers or employers, or any organisation whose members carry out a particular profession, including the benefits provided by such organisations; working conditions, including the assignment of duties, promotion and remuneration; termination of employment; social security benefits, including retirement age.

The law does not authorise any general *a priori* exclusion of women. It only allows two exceptions: a gender requirement in hiring in artistic and fashion activities and in the pursuance of public performances, when such a requirement is essential to the nature of the work/job; and specific exceptions, provided by collective agreements, to the prohibition on discrimination in access to work for women in cases of particularly heavy work.

2.3. Occupational pension schemes

In this area, the Government has implemented the Recast Directive (Decree No. 5/2010). This piece of legislation, however, does not include any provisions on the personal and material scope of the principle of non-discrimination, on its implementation as regards self-employment or on retroactive effects of the measures introduced. In particular, in relation to the material scope, the application of the principle of non-discrimination to public servants' benefits paid based on the employment relationship (Article 7.2 of Directive 2006/54/EC) is not mentioned at all. It also allows the setting of different levels of benefits insofar as this may be necessary to take account of actuarial calculation factors, which differ according to sex. Among the actuarial factors, the higher life expectancy of women is often taken into consideration by occupational funds. Therefore, women's pension can be lower or their contribution rate higher than those provided for men. Last but not least, these provisions fail to implement the Recast Directive as regards pensionable age, which remains different for men and women. Indeed, the occupational old-age pension is awarded on reaching the pensionable age as established in the statutory system, where, at present and until 2018, women's pensionable age is lower than that for men. Women can, however, carry on working until the pensionable age set for men: for this purpose, the protection against unfair dismissal has been extended to the extra period during which they can choose to work. In this respect, therefore, men are subjected to more disadvantageous treatment than women, as they cannot anticipate their pension and have a fixed pensionable age set at 66.

On the other hand, in the civil servants sector, following the Court of Justice decision, Act 3.8.2009, No. 102, as modified by Act No. 122/2010, has equalised the pensionable age of men and women at 65.

More in general, the regime of the supplementary funds makes no provision for the recovery of 'fictional contributions',²³⁰ during maternity leave or during leave for serious family reasons: the funds' regulations are allowed to omit provisions such as those on notional contributions, or on redemption (e.g.: recover the contributions by paying them). In the case of maternity, many fund regulations provide for a reduced rate of notional contributions, i.e. only the contributions corresponding to the amount of the maternity allowance are credited.

3. Pregnancy and maternity protection, parental leave and adoption leave

Italian legislation, consolidated by Decree No. 151/2001, goes far beyond the requirements of the EU directives. It provides for a compulsory maternity leave of five months. The Decree also provides for: a 10-month parental leave (continuous or in various periods) to be taken until the child reaches the age of 8, which is paid for 6 months provided that the child is not older than 3; time off in connection with childcare; and leave for workers taking care of disabled persons. According to Article 4 of Act No. 92/2012 (temporarily, from 2012 to 2015), fathers are also entitled to three days of paternity leave in the first five months following the child's birth, of which two days can be an alternative for the mother and one day is compulsory for the father. Many other provisions extend some of the mother's rights to the father, e.g. the mother's compulsory leave in special cases and remunerated time off to take care of the child. As a measure to encourage fathers to take parental leave (which is still quite unusual in Italy), the maximum total length of the leave awarded per child has been increased from ten to eleven months if the father takes it for at least three months. The most important care leaves are paid (80 % of full salary for compulsory leave, and 30 % of full salary for parental leave) and can be used by the hour or as a time credit system (according to criteria to be established by collective agreements); the institution of fictional prevents workers from suffering disadvantages in the future enjoyment of pension benefits due to absence from work for caring duties. At the end of the leave, workers have the right to return to the same workplace (or, if not possible, to a workplace in the same municipality as the previous one) and to the same job or, if that is not possible, to an equivalent job. Furthermore, a woman on maternity leave has the right to benefit at the end of this period from any improvement in working conditions to which she would have been entitled during her absence.

As regards dismissal, it must also be noted that the protection afforded is much stronger than required by EU legislation, as it is ensured purely on grounds of pregnancy, regardless of whether the employer has been informed or not. Moreover, protection is granted during pregnancy and maternity leave and for a period of 12 months following childbirth. Furthermore, Act No. 92/2012 extended the period during which a notice of mutual termination of the employment contract or resignation of working mothers shall be signed in front of an inspector of the Minister of Labour. This period now starts at the beginning of the pregnancy and ends when the child reaches the age of three. The same rule applies to the father. Moreover, this Act re-introduced a similar mechanism of validation of all workers' resignation or mutual termination of employment contract, so as to avoid the practice of blank resignation/mutual termination, which is also punished by an administrative and, in certain circumstances, penal sanction. Act No. 99/2013 extended the provisions on white resignations to some atypical forms of self-employment contracts, such as the so-called contracts on projects and joint ventures (*associazione in partecipazione*). All these provisions also apply to national and international adoption and official custody of a child.

²³⁰ Those are contributions which are credited without cost to the employee for periods during which the worker has not worked (for example in case of illness or maternity) and therefore he has received benefit payments from the national social security system (INPS).

4. Statutory schemes of social security

The directives on statutory schemes of social security have never been specifically implemented.

However, the contributory pension system does not reveal discriminatory features in the light of Directive 79/7/EEC.

Survivors' provisions are part of the old-age pension system and as such fall within the objective scope of the Directive. The Code of Equal Opportunities lays down the principle of gender equality as regards survivors' benefits.

However, the latest legislation on pensions is far from woman-friendly. Indeed, Act No. 214/2011 provides for an increase of the minimum contribution condition from 5 to 20 years: if the claimant has less than 20 years' contributions, the pension will be paid from the age of 70. Moreover, it introduced a new minimum benefit amount condition according to which pensions will be paid at 70 rather than at 66 (67 by 2021) when their amount is less than EUR 643 a month. The relevant conditions are particularly difficult to fulfil by those who do atypical work, i.e. intermittent, temporary, occasional and part-time work, which is often done by women. This means that many women may risk receiving their pension only from the age of 70.

The exclusions in Article 7(1) of the Directive have been used in the pension system in relation to both the pensionable age and the advantages as regards old-age pensions for the purpose of child-rearing.

As regards pensionable age, Act No. 214/2011 set the pensionable age in the public sector at 66 for men and women. In the private sector, the same provision fixed the pensionable age at 66 for men by 2012; women's pensionable age will be gradually increased to 66 in 2018. All employees, however, men and women in the private and in the public sector, will have a pensionable age of 67 by 2021.

Advantages as regards old-age pensions for the purpose of child-rearing are provided under the new contribution system for the benefit of women. More favourable coefficients of transformation (according to which pensions are calculated) are fixed for maternity. Then, again in relation to maternity, a reduction in the age of retirement of 4 months per child is granted, with a maximum limit of 12 months. As an alternative to this, it is also provided that women with children are able to receive a retirement pension subject to reduced conditions.

Then, as regards the exclusions in Article 3(2) of the Directive, the Italian family allowance falls under this clause. The scheme reveals discriminatory features as regards part-time workers working less than 24 hours a week and vertical part-timers, who are entitled to benefits in proportion to the number of days spent at work, independently from the number of hours worked each day.

It must also be pointed out here that vertical part-time workers cannot benefit from unemployment allowances in relation to the periods of suspended work, on the assumption that the inactivity during those periods is voluntary, as it is part of the working time agreement which exists between the employer and the vertical part-timer.

5. Self-employed persons

The actual impact of Directive 86/613/EEC, and later of Directive 2010/41, on national regulations has been very weak, also because the regulations on access to professions, self-employment, the establishment of companies, small entrepreneurs (including farmers), family enterprises, agrarian families and conjugal enterprises were not discriminatory and they did not require a significant intervention. Minor amendments to both the Code of Equal Opportunities and the Code on the Protection of Motherhood and Fatherhood recently clarified that the ban on discrimination also applies to entrepreneurship, and extended the right to maternity allowance to self-employed fisherwomen in small-scale coastal and inland fishing.

On the whole the Code of Equal Opportunities between Men and Women fully implements the EU principle of substantial equality in the field of entrepreneurial activity,

providing for the promotion of female self-employment through preferential measures meant to favour access to banking credits and public funds, to improve professional training and qualifications for women in this field, and to promote the presence of businesses owned or managed by a large percentage of women in the most innovative sections of different production sectors.

In relation to social security provisions, the coverage in terms of social protection is provided by specific public schemes concerning the commercial, agricultural and craft sectors.

As for maternity rights entitlements, a maternity allowance is provided for mothers who are not covered by the social security system and earn less than a certain amount. Self-employed women are entitled to a maternity allowance, independent of their decision whether or not to suspend their work activities. Workers on projects have a right to suspend the work relationship. Furthermore, three months of remunerated parental leave are granted to women performing the liberal professions and to self-employed women in the sectors of commerce, handicraft, agriculture, and in the other sectors mentioned above.

6. Goods and services

Directive 2004/113/EC was implemented by Decree No. 196/2007, which adds ten articles to the Code of Equal Opportunities. On the whole, it satisfies EU law requirements, but does not go any further, as it literally reflects the text of the Directive, including provisions on its substantive scope and on the exceptions allowed.

There is no legislation implementing the results of the *Test-Achats* case,²³¹ and neither are there any projects for new legislation on the issue. The insurance companies seem to be relying on the EU Commission guidelines. The ANIA (association of insurance companies) regards the guidelines as a soft-law tool for the interpretation of the CJEU decision. The insurance company market, however, regards the guidelines as non-exhaustive in relation to Italian legislation and believes that some issues need further clarification.

7. Enforcement and compliance aspects

The Code of Equal Opportunities provides protection against victimisation of employees and all other persons who are victim of detrimental treatment by their employer in reaction to requiring compliance with the principle of equal treatment between men and women.

The provision on the partial reversal of the burden of proof can be deemed to be a satisfactory implementation of Directive 97/80/EC, and it has been used by the scanty case law on indirect discrimination. As regards the use of quantitative/statistical data, the Code goes further than EU law as it requires companies with more than one hundred employees to draw up every two years (and to deliver to the company union representatives and to the Regional Equality Advisers) reports on the workers' situation (male and female), as regards e.g. recruitment, professional training, career opportunities, remuneration, dismissal and retirement.

Minor criminal sanctions can be imposed for the infringement of the prohibition on discrimination in the access to work and working conditions and administrative sanctions can be imposed for the protection of motherhood and fatherhood. Positive actions are also provided as remedies against collective discrimination ascertained by the court. Revocation of public benefits or even exclusion, for a certain period, from any further award of financial or credit inducements or from any public tender can also be imposed as penalties in the case of ascertained direct or indirect discrimination. The general remedy of nullity is enforceable for all discriminatory acts. Moreover, the special remedy (reinstatement) provided by Article 18 of the Worker's Statute is enforceable in the event of dismissal on the ground of pregnancy or

²³¹ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

marriage. Compensation for economic damage can be awarded following the general principles on contractual and extra-contractual liability, without upper limits. This piece of national legislation can reasonably be considered to be in line with the Directive.

Cases on equality rights are judged under procedures for labour disputes. Ordinary or special urgent legal proceedings can be brought to court, according to different circumstances.

Italian legislation empowers Equality Advisors to assist victims of discrimination. They can act directly in their name in cases of collective discrimination, even where the employees affected by the discrimination are not immediately identifiable. Regional and Provincial Advisors can also proceed when delegated by an individual employee or can intervene in the process initiated by the latter. Also associations and organisations promoting respect for equal treatment between male and female workers are entitled to act on the workers' behalf.

As regards the functions required by EU law, a central role is played by the Net of Equality Advisors and the Equal Opportunities National Committee (EONC) set up by the Labour Ministry Central Offices. The EONC is entrusted with the task of stimulating social dialogue and the dialogue with non-governmental organisations on equality issues and of exchanging information with the EU bodies that operate in the field of equal treatment. New tasks are entrusted to the National Equality Advisor as well, which shall conduct independent surveys, publish independent reports and make recommendations on the implementation of gender equality. The law states that equality bodies shall perform independent activities, but it is up to the Minister of Labour to set the conditions for the organisation and the functioning of the Equality Advisors' staff.

8. Overall assessment

As regards labour law, several legislative interventions in the last twenty years have created, on the whole, a good level of implementation of EU directives. Sometimes domestic legislation has gone further than EU law. This is the case with regulations on maternity and paternity protection and leave, positive action, gender data on personnel in businesses employing more than 100 workers, justification clauses for indirect discrimination, and the promotion of female self-employment.

The main remarkable gap that may be detected is found in the functions of bodies entrusted with the promotion of respect for the principle of equal treatment, the conformity of which relies on the concept of independence adopted at EU level.

More in general, the analysis of the recent national legislation implementing EU law shows a tendency to merely transpose it by verbatim repetition of the EU Directive, which does not ensure the necessary coordination with other provisions.

As regards social security legislation, despite the fact that the directives have never been specifically implemented, domestic legislation is, on the whole, relatively well in line with EU law.

LATVIA – Kristine Dupate

1. Implementation of central concepts

The CJEU has held that discrimination can arise either through the application of different rules to comparable situations or through the application of the same rules to different situations.²³² The Constitutional Court of Latvia has adopted the same legal doctrine to interpret Article 91 of the Constitution of Latvia which contains the general principle of equality.²³³ However, the principle of non-discrimination in the majority of Latvian normative

²³² Case C-279/93 *Finanzamt Köln-Altstadt v Roland Schumacker*, [1995] ECR I-00225, Paragraph 30.

²³³ See, for example, the decision of the Constitutional Court of Latvia in Case No.2000-07-0409, OG No. 4, 4 April 2001, accessed 29 May 2013.

acts is formulated as ‘prohibition of differential treatment’ instead of the term ‘prohibition of discrimination’. This may result in an inadequate application of EU law, for example by excluding discrimination which arises due to the equal treatment of persons in different situations, by excluding exceptions provided in the framework of the principle of non-discrimination or in the form of formally incorrect findings by national courts such as finding that discrimination is justified because the relevant persons were not in similar situations.²³⁴ In that sense, Latvian courts approach the differential treatment of persons as a ground for justification, rather than the rule that different treatment of different situations does not fall under the scope of the prohibition of discrimination. National legislation provides an identical definition of direct discrimination as the one in EU law. Since 2010 the definition of direct discrimination explicitly prohibits less favourable treatment on grounds of pregnancy, maternity and paternity leave in almost all relevant fields²³⁵ except in the field of statutory social security.²³⁶

The definition of indirect discrimination is implemented correctly in all fields, except in the field of statutory social security, where the definition still requires comparable situations.²³⁷ Such incompatibility in the Labour Law was only corrected at the end of 2010.²³⁸

Latvian law does not provide for any kind of positive action,²³⁹ except one ‘soft quota’ provision requiring aiming for gender balance when electing judges for the self-governing bodies of the Supreme Court.²⁴⁰ Such provision was inserted to favour male judges, because since the re-establishment of the Supreme Court after Soviet occupation there has always been more female than male judges.²⁴¹

The prohibition of harassment, sexual harassment and instruction to discriminate is implemented in all fields²⁴² but one – in the field of statutory social security individuals are only afforded protection against harassment.²⁴³

²³⁴ Decision of Riga City Vidzemes District court of 17 July 2006 in Case No. C 30-1667/9-2006.g. (not published).

²³⁵ Regarding employment: the Labour Law (*Darba likums*), OG No. 105 6 July 2001, respective amendments OG No. 47, 25 March 2010; regarding employment services: the Law on Support of Unemployed Persons and Jobseekers (*Bezdarbnieku un darba meklētāju atbalsta likums*), OG No. 80, 29 May 2002, respective amendments OG No. 51/52, 31 March 2010; regarding self-employment: the Law on Prohibition of Discrimination against Natural Persons – Performers of Economic Activities (*Fizisko personu – saimnieciskās darbības veicēju – diskriminācijas aizlieguma likums*), OG No. 199, 19 December 2012, repealing previous law, OG No. 89, 9 June 2009, referring to definitions provided by the Law on the Protection of Consumer Rights; regarding education (vocational training): Education Law (*Izglītības likums*), OG No. 343/344, 17 November 1998, respective amendments OG No. 47, 24 March 2010, referring to definitions provided by the Law on the Protection of Consumer Rights; regarding access to and supply of goods and services: the Law on the Protection of Consumer Rights (*Patērētāju tiesību aizsardzības likums*), OG No. 104/105, 1 April 1999, respective amendments OG No. 104, 9 July 2008.

²³⁶ The Law on Social Security (*Likums ‘Par sociālo drošību’*), OG No. 144, 21 September 1995.

²³⁷ The Law on Social Security (*Likums ‘Par sociālo drošību’*), OG No. 144, 21 September 1995.

²³⁸ *Darba likums*, OG No. 105 6 July 2001, respective amendments OG No. 47, 25 March 2010.

²³⁹ The author leaves undiscussed any provisions of secondary national law in the field of vocational training for unemployed persons, allowing them to participate in special training programmes for special groups (e.g. parents after long childcare leave, disabled persons) organised by the State Employment Agency and funded by the European Social Fund, because they have an *ad hoc* nature.

²⁴⁰ The Law on Judicial Power (*Likums ‘Par tiesu varu’*), OG No. 1, 14 January 1993, respective amendments OG No. 160, 7 October 2005.

²⁴¹ The composition of the Supreme Court on January 2013: 27 females and 23 males, available on <http://www.at.gov.lv/lv/about/judges/>, accessed 29 May 2013.

²⁴² Article 29(4) and (7) of the Labour Law (*Darba likums*), OG No. 105 6 July 2001; Article 4(3) and (4) of the Law on Prohibition of Discrimination against Natural Persons – Performers of Economic Activities (*Fizisko personu – saimnieciskās darbības veicēju – diskriminācijas aizlieguma likums*), OG No. 199, 19 December 2012; Article 3¹(7) and (8) of the Law on the Protection of Consumer Rights (*Patērētāju tiesību aizsardzības likums*), OG No. 104/105, 1 April 1999; Article 21(5) and (6) of the Law on Support of Unemployed Persons and Jobseekers (*Bezdarbnieku un darba meklētāju atbalsta likums*), OG No. 80, 29 May 2002; Article 3¹(8) of the Education Law (*Izglītības likums*), OG No. 343/344, 17 November 1998, referring to the definitions provided by the Law on the Protection of Consumer Rights.

²⁴³ The Law on Statutory Social Security, Article 2¹(5).

It follows that Latvia in general has implemented the main concepts of EU gender equality law, but with some gaps in the field of statutory social security. Nevertheless, the scope of the prohibition of discrimination on the grounds of sex is wider under Latvian law than under EU law as sex discrimination is prohibited in the entire system of education²⁴⁴ and in advertising.²⁴⁵

2. Equal pay and equal treatment at work

The main legal instrument in the field of employment is the Labour Law, which applies to all workers employed in the private and the public sectors. Although it is not applicable to public officials, civil servants and some other categories of the public service, the laws which cover the above contain provisions for the application of the norms on non-discrimination in the Labour Law.²⁴⁶ Therefore, the non-discrimination provisions of the Labour Law are applicable to employees of both sectors as well as civil servants and officers of the public sector.

The gender equality provisions of the Labour Law are not applicable to judges and public prosecutors. This may be explained by a failure of the legislator to identify all laws regulating special service at the time of initial implementation of EU gender equality law. As a consequence, judges²⁴⁷ and public prosecutors²⁴⁸ are still only protected against discrimination with regard to access to a post.

2.1. Equal pay

The concept of equal pay is provided by Article 60 of the Labour Law. Article 60(1) lays down the general obligation of an employer ‘to define equal pay for men and women for the same work or work of equal value’. This is the only provision.

There is no explicit definition of ‘equal pay’ provided by the law. However, Article 59 of the Labour Law does define ‘pay’ as regularly paid remuneration for work, which also includes bonuses and other kinds of remuneration in connection with employment as provided by normative acts,²⁴⁹ collective agreements or employment agreements. A decision of the Supreme Court in 2010 demonstrates awareness of the different definitions of ‘pay’ under EU and national law.²⁵⁰ In particular, the Supreme Court recognised that compensation for unfair dismissal is to be considered as a component of ‘pay’ within the meaning of equal pay on the basis of the decision of the CJEU in *Seymour-Smith*.²⁵¹ In addition the Supreme Court already in two decisions interpreted the concept of pay in matters falling within the competence of national law in accordance with the CJEU’s decisions on equal pay.²⁵² It follows that the Court intends to unify the content of the concept of ‘pay’ under EU and national law.

²⁴⁴ The Education Law (*Izglītības likums*), OG No. 343/344, 17 November 1998, respective amendments OG No. 47, 24 March 2010.

²⁴⁵ The Advertisement Law (*Reklāmas likums*), OG No. 7, 10 January 2000.

²⁴⁶ In particular, Article 2(4) of the Law on the State Civil Service (*Valsts civildienesta likums*), OG No. 22 September 2000; Article 3(2) of the Law on Service of Persons with Special Service Ranks at System of Interior Affairs and Imprisonment Office (*Iekšlietu ministrijas sistēmas iestāžu un Ieslodzījuma vietu pārvaldes amatpersonu ar speciālajām dienesta pakāpēm dienesta gaitas likums*), OG No. 101, 30 June 2006; Article 3(2) of the Law on Custody Courts (*Bāriņtiesu likums*), OG No. 107, 7 July 2006; Article 6(8) of the Law on the National Guard of the Republic of Latvia (*Latvijas Republikas Zemessardzes likums*), OG No. 82, 26 May 2010; Article 12(2) of the Law on Military Service (*Militārā dienesta likums*), OG No. 91, 18 June 2002.

²⁴⁷ Article 51(2) of the Law on Judicial Power (*Likums ‘Par tiesu varu’*), OG No. 1, 14 January 1993.

²⁴⁸ Article 33¹(1) of the Prosecutors’ Office Law (*Prokuratūras likums*), OG No. 65, 2 June 1994.

²⁴⁹ Normative or legislative acts may also include regulations of the Cabinet of Ministers and binding regulations of the municipalities.

²⁵⁰ Decision of the Supreme Court (15 December 2010) in Case No.SKC-694/2010, available in Latvian on <http://www.at.gov.lv/files/archive/departments/2010/694-10.pdf>, accessed 28 May 2013.

²⁵¹ Case C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* [1999] ECR I-00623.

²⁵² Decision of the Supreme Court (19 December 2012) in Case no. SKC-1979/2012, available in Latvian at: <http://www.at.gov.lv/lv/info/archive/departments/2012/>, accessed 29 May 2014; Decision of the Supreme Court (27 March 2014) in case no.SKC-1683/2014, not yet published.

There are no legislative acts to define such concepts as ‘equal work’ and ‘work of equal value’ and no case law dealing with issues such as justifications for differences in pay. The current legal regulation on equal pay is inefficient because it does not specify more detailed obligations of the employer. Such conclusion is based on the fact that the pay gap has not decreased during recent years²⁵³ while only few cases have been brought before Latvian courts on equal pay for the same work. Moreover, the lack of detail obligations with regard to equal pay has led to a breach of such principle even by the legislator. In particular in regards to school teachers, the majority of whom are women. They were excluded from the scope of the Law on Remuneration of State Officials and Employees of the State and Municipal Institutions²⁵⁴ adopted in 2009 with a view to establish a uniform and objective remuneration system in public sector. According to unofficial information, the reason for this exclusion was a lack of budget resources, because there are a considerable number of school teachers in Latvia. However, it is known that the CJEU does not allow justifying indirect pay discrimination on the basis of budgetary considerations.²⁵⁵

2.2. Access to work and working conditions

Article 29(1) of the Labour Law prohibits discrimination in all stages of employment: recruitment, working conditions and dismissal. A person may claim discriminatory refusal to employ on the grounds of Article 34 of the Labour Law, discriminatory working conditions on the grounds of Article 95 of the Labour Law, discriminatory dismissal on the grounds of Article 29(1) and discriminatory dismissal during a probationary period on the grounds of Article 48 of the Labour Law. Additionally, in 2010 the legislator amended the Law on Support of Unemployed Persons and Jobseekers,²⁵⁶ which now provides for a prohibition of discrimination with regard to access to employment services and training provided by the State Employment Agency. Protection against discrimination in access to employment from the perspective of private providers of recruitment services is stipulated by Cabinet of Ministers’ Regulation No. 458.²⁵⁷ The right to equal access to a profession for self-employed persons and non-discrimination with regard to their access to and supply of goods and services necessary for the performance of the commercial activity is provided by the Law on Prohibition of Discrimination against Natural Persons – Performers of Economic Activities.²⁵⁸

Latvian law contains only one exception: The Labour Law allows differential treatment where the sex of a person constitutes a genuine and determining occupational requirement. Consequently, in Latvia it is for employers to decide if such exception is applicable in each particular case.

2.3. Occupational pension schemes

The main act regulating occupational pension security schemes is the Law on Private Pension Funds. The only provision that relates to gender equality is Article 11, which provides that an employer may only apply objective criteria (such as profession, position and seniority) regarding the participation in and amount of contributions to private pension funds. The

²⁵³ According to data of the Central Statistical Bureau of Latvia, women on average earned 14 % less in 2006 and in 2010 15 % less than men, available at: <http://data.csb.gov.lv/DATABASE/Iedzsoc/Ikgad%C4%93jie%20statistikas%20dati/Darba%20samaksas%20strukt%C5%ABra/Darba%20samaksas%20strukt%C5%ABra.asp>; and <http://data.csb.gov.lv/DATABASE/Iedzsoc/Ikgad%C4%93jie%20statistikas%20dati/Darba%20samaksas%20strukt%C5%ABra%202010/Darba%20samaksas%20strukt%C5%ABra%202010.asp>, both accessed 30 May 2014.

²⁵⁴ OG No. 199, 18 December 2009, Article 2(3).

²⁵⁵ Joined Cases C-4/02 *Hilde Schönheit v Stadt Frankfurt am Main* and C-5/02 *Silvia Becker v Land Hessen* [2003] ECR I-12575.

²⁵⁶ OG No. 80, 29 May 2002, respective amendments OG No. 51/52, 31 March 2010.

²⁵⁷ The Regulation of the Cabinet of Ministers No. 458 ‘The procedure on licensing and supervision of merchants – providers of recruitment services’ (*Ministru Kabineta 2007.gada 3.jūlija noteikumi Nr.458 “Komersantu – darbiekārtošanas pakalpojumu sniedzēju – licencēšanas un uzraudzības kārtība”*), OG No. 108, 6 July 2007.

²⁵⁸ *Fizisko personu – saimnieciskās darbības veicēju – diskriminācijas aizlieguma likums*, OG No. 199, 19 December 2012.

participation in private occupational social security schemes is not widespread among Latvian employers.

In addition to pensions provided by private pension funds, there are several categories of persons employed in the public sector who are entitled to long-term service pensions: persons in military service, a certain category of persons serving at the Ministry of Interior Affairs, public prosecutors, judges and artists employed by the State or a municipality.²⁵⁹ Although this kind of pension is fully paid from the state budget, it still complies with all three criteria established by the CJEU in *Niemi*,²⁶⁰ thus falling within the scope of Article 157 TFEU. Usually, the persons in the categories listed above are entitled to early retirement, and therefore, until they reach the statutory pensionable age, this special pension serves as a bridging pension.

In general Latvia has complied with its obligations regarding implementation of EU gender equality law concerning working conditions, except regarding equal pay, where implementation measures are not satisfactory.

3. Pregnancy and maternity protection, parental leave and adoption leave

The provisions of Directive 92/85/EC and Directive 2010/18/EU with regard to employment rights have been implemented by the Labour Law. Under Latvian labour law provisions, the maternity period lasts from the moment of the notification of pregnancy by a certificate issued by a doctor until one year after childbirth or during the entire period of breastfeeding. The Amendments to the Labour Law currently in the process of being adopted in Parliament envisage a restriction of the period in which a woman can have special maternity protection. In particular, it regards the currently unrestricted breastfeeding period, which will be restricted to the child reaching the age of two.²⁶¹ In the context of sex discrimination law, the Supreme Court has followed EU law and ruled that official notification of pregnancy is irrelevant if an employer knew about the worker's pregnancy.²⁶²

In addition to the requirements of Directive 92/85/EC the Labour Law provides that an employer cannot send a worker on a business trip or compel her to work overtime or at night during the maternity period unless she agrees to this in writing.²⁶³ The Labour Law prohibits the dismissal of the worker during the maternity period, except in cases strictly defined by the law.²⁶⁴ The Labour Law also gives women the right to insist on part-time work during the maternity period.²⁶⁵

Upon return to work after pregnancy, maternity, paternity and childcare leave an employer is obliged to provide the same or equivalent work on the same working conditions.

²⁵⁹ Law on Pensions for the Military (*Militārpersonu izdienas pensiju likums*) OG No. 86, 1 April 1998; Law on Pensions for Employees of the System of the Ministry of Interior Affairs with Special Ranks (*Par izdienas pensijām Iekšlietu ministrijas sistēmas darbiniekiem ar speciālajām dienesta pakāpēm*), OG No. 100/101, 16 April 1998; Law on Pensions for Prosecutors (*Prokuroru izdienas pensiju likums*) OG No. 181, 3 June 1999; Law on Long-Term Service Pensions for Judges (*Tiesnešu izdienas pensiju likums*) OG No. 7 July 2006; Law on Pension for Artists of State and Municipal Orchestras, Choirs, Concert Organisations, Theatres, and Circuses (*Valsts un pašvaldību profesionālo orķestru, koru, koncertorganizāciju, teātru un cirka mākslinieku izdienas pensiju likums*), OG No. 106, 7 July 2004.

²⁶⁰ Case C-351/00 *Pirkko Niemi* [2002] ECR I-07007.

²⁶¹ Proposal of Amendments to the Labour Law (*Grozījumi Darba likumā*) No.756/Lp11, available in Latvian at the home page of Parliament (*Saeima*), available at: <http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/1016FA82F40AC4EFC2257BC50037F713?OpenDocument> accessed 29 May 2014.

²⁶² Decision of the Supreme Court of Latvia in Case No. SKC-11706/2010, 8 December 2010, available in Latvia at: <http://www.at.gov.lv/files/archive/department1/2010/skc-1170-10.pdf>, accessed 5 September 2011.

²⁶³ Articles 53(3), 136(7) and 138(6).

²⁶⁴ Article 109(1).

²⁶⁵ Article 134(2). The Labour Law provides for the right to claim part-time employment. It is optional for a worker (she may use such right if she wishes), but it is mandatory for an employer if a woman claims part-time employment.

If during the period of leave working conditions have been improved a parent is entitled to these improved working conditions in the same way as if she/he has not been on leave.²⁶⁶

Under the Labour Law, maternity leave may commence from 56 days before and to 56 days after the expected date of confinement. In addition, if a woman has visited a doctor and has registered as a person under medical supervision due to pregnancy by the 12th week of pregnancy she is entitled to an extra leave period of 14 days.²⁶⁷ The Labour Law provides that the employer must not employ a pregnant worker two weeks before and after giving birth.²⁶⁸ During maternity leave a woman continues to acquire the right to annual leave.²⁶⁹ Fathers have a right to 10 days of paternity leave within two months after the birth of their child, adoptive parents have a right to 10 days of leave if an adoption child is younger than 3 and all parents (also adoptive) have a right to 18 months of parental leave until the child reaches the age of 8.²⁷⁰

Maternity, paternity and parental allowances are paid under the statutory social insurance system. The amount of maternity and paternity allowances constitutes 80 % of the gross salary and the amount of childcare allowance is 70 % of the gross salary.²⁷¹ Until 2012 the amount of maternity and paternity allowances was 100 % of the gross salary, but due to the deficit in the statutory social insurance budget that was caused by the economic crisis and the bad demographic situation, the amount was reduced to 80 %.²⁷² In addition, on account of the economic crisis, the amount of the allowances has been restricted for the period from 1 July 2009 until 31 December 2014. A person may receive a full daily allowance of up to EUR 16.37 (LVL 11.51), but for earnings exceeding such amount only 50 %.²⁷³ Since 2013 the minimum full amount has been doubled. Now an individual is entitled to a full daily allowance of up to EUR 32.75 (LVL 23.02).²⁷⁴

Since 1 October 2014, the system has changed. Parents who are ensured under the statutory social insurance system and are on full-time parental leave will be entitled to a parental allowance amounting to 60 % of their average salary (statutory social insurance contribution salary), until the child reaches the age of 12 months. If a parent would like to receive the parental allowance until the child reaches the age of 18 months, the allowance will amount to 43.75 % of their average salary. If a parent chooses to stay in full-time or part-time employment during the period that the child is younger than 18 months, he/she will be entitled to 30 % of the parental allowance (30 % of the full allowance (60 % of the average salary)).²⁷⁵

The new system provides for a much higher degree of flexibility, as parents who decide not to interrupt their work are now entitled to state support in the form of a social allowance.

²⁶⁶ Articles 149(6), 154, 155 and 156.

²⁶⁷ Article 154.

²⁶⁸ This provision is in contrast with Article 8 of Directive 92/85 and the CJEU ruling in *Boyle*, which provides for a mandatory maternity leave of two weeks in total. Case C-411/96 *Margaret Boyle and Others v Equal Opportunities Commission* [1998] ECR I-06401, Paragraph 49.

²⁶⁹ Article 152.

²⁷⁰ Articles 155 and 156.

²⁷¹ The Law on Maternity and Sickness Insurance (*Likums Par maternitates un slimības apdrošināšanu*), OG No. 182, 23 November 1995.

²⁷² The Law on Maternity and Sickness Insurance (*Likums Par maternitates un slimības apdrošināšanu*), OG No. 182, 23 November 1995, respective amendments OG No. 202, 23 December 2011.

²⁷³ The Law on the Payment of State Allowances for the Period from 2009 until 2012 (*Likums Par valsts pabalstu izmaksu laika periodā no 2009. līdz 2012.gadam*), OG No. 100, 30 June 2009. Initially special measures on account of the economic crisis were taken until 31 December 2012, but on 14 April 2011 Parliament adopted amendments envisaging the extension of this 'crisis period' until 31 December 2014 (OG No. 99, 29 June 2011).

²⁷⁴ Amendments to the Law on the Payment of State Allowances for the Period from 2009 until 2014 (*Likums Par valsts pabalstu izmaksu laika periodā no 2009. līdz 2014.gadam*), OG No. 192, 6 December 2012.

²⁷⁵ For example, if a parent's gross salary was EUR 1 000, the amount of parental allowance would be EUR 600 or 60 % of the social insurance contribution salary. This applies to employed parents who are on full-time parental leave. If however a parent decides to stay in active employment he/she will be entitled to 30 % of the parental allowance, i.e. 30 % of EUR 600 (or the normal parental allowance), which would amount to EUR 180. Article 10⁶ of the Law on Maternity and Sickness Insurance. Amendments OG No. 228, 22 November 2013.

The previous system was seen as a serious obstacle to equal opportunities in the labour market for women, because it did not allow parents to combine parental leave with employment. However, under the new system the allowance is available to only one of the parents, which still fails to encourage the sharing of parental duties while remaining in active employment. Latvian law goes far beyond the minimum requirements regarding pregnancy, maternity, paternity and parental protection in employment and in statutory social security. This especially concerns the length of the period of special maternity protection, the length of pregnancy/maternity, paternity and parental leaves and the rights to and the amount of the allowances. At the same time it is visible that the majority of discrimination cases arise on the grounds of pregnancy and maternity.²⁷⁶ The system of statutory social allowances during the various leaves is also unsatisfactory: although it replaces previous earnings it is not flexible and therefore does not allow effective combination of private and professional life.

4. Statutory schemes of social security

The prohibition of discrimination in the field of statutory social security is provided by the Law on Social Security.²⁷⁷ The Law on Social Security constitutes umbrella legislation regulating the whole social security system – including the right to healthcare, education, jobseekers' assistance, state social allowances, state social insurance allowances, and social assistance as provided by the State and municipalities. It follows that the principle of non-discrimination provided by the Law on Social Security goes far beyond the requirements of EU law.

Since 2008, entitlement to the state old-age pension commenced at the age of 62, for both sexes. However, starting on 1 January 2014 the retirement age is gradually being increased until in 2025 persons will be entitled to statutory old-age pension only at the age of 65.²⁷⁸

Although formally the social security sector must comply with the principle of non-discrimination, there are gaps stemming from special laws and regulations on the calculation of particular benefits, especially in relation to the acquisition of benefit entitlements following periods of interruption due to childcare leave. Each employed person has a right to state social insurance protection in proportion to the contributions made by him/her and by the employer. During childcare leave, parents are insured by the State instead of insuring themselves, but at a minimum amount.²⁷⁹ Consequently, being on childcare leave affects negatively the amount of the old-age pension. Since a considerably larger proportion of women than men still use the right to childcare leave, this situation constitutes indirect discrimination against women. Such treatment does not correspond to the principle of non-discrimination provided by the Law on Social Security, although it complies with an exception allowed under Directive 79/7/EEC.

5. Self-employed persons

The protection against discrimination under Latvian law extends to self-employed persons. The newly modified Law on the Prohibition of Discrimination against Natural Persons –

²⁷⁶ *Ombudsman: Employers have learned how to hide discrimination (Tiesībsargs: Darba devēji iemācījušies diskrimināciju maskēt)*, 10 July 2012, available in Latvian on <http://www.tiesibsargs.lv/lv/darba-deveji-diskriminaciju-iemacijusies-masket>, accessed 31 May 2013.

²⁷⁷ The Law on Social Security (*Likums 'Par sociālo drošību'*), OG No. 144, 21 September 1995..

²⁷⁸ The Law on State Pension (likums "Par valsts pensijām"), OG No.182, 23 November 1995, amendments OG No.104, 4 July 2012.

²⁷⁹ Until 2013 the monthly amount starting at which parents on childcare leave were insured was EUR 71 (LVL 50). On 1 January 2013 this amount was doubled and it is now EUR 142 (LVL 100), which however is half of the statutory minimum salary (EUR 284 or LVL 200); the Law on Statutory Social Insurance (*Likums 'Par sociālo apdrošināšanu'*), OG No. 274/276, 21 October 1997; the Cabinet of Ministers Regulation No. 230 'Regulation on mandatory state social insurance contributions from the state budget and statutory social insurance budget' (*Noteikumi par valsts sociālās apdrošināšanas obligātajām iemaksām no valsts pamatbudžeta un valsts sociālās apdrošināšanas speciālajiem budžetiem*), OG No. 91, 30 June 2001, respective amendments OG No. 201, 21 December 2012.

Performers of an Economic Activity protects self-employed persons not only against discrimination with regard to access to self-employment but also in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.²⁸⁰

Latvian law also protects self-employed persons and helping spouses during periods of pregnancy and maternity. In particular, according to the Law on State Social Insurance any self-employed person is subject to mandatory statutory social insurance,²⁸¹ but the spouse of a self-employed person has the right to voluntarily join the statutory social security system. She/he may then insure herself/himself against the risks of old age, maternity, disability, sickness and childcare obligations.

It is doubtful whether such regulation ensures the effective protection of helping spouses in practice, since there is only a right to join the state social security system voluntarily.

6. Goods and services

Directive 2004/113/EC is implemented by the Law on the Protection of Consumer Rights²⁸² and the Law on Insurance Companies and their Supervision.²⁸³ However, implementation is incomplete because the Law on the Protection of Consumer Rights only concerns those goods and services providers who act within their professional capacity. They do not cover the sale of goods or the provision of services between private parties. For example, the law does not cover the situation where a person sells his/her own apartment and offers it to the general public by public offer.

Taking into account the CJEU decision in the *Test-Achats* case,²⁸⁴ Article 5.1 of the Law on Insurance Companies and their Supervision prohibiting sex discrimination has been modified. Parliament deleted the provisions of this Article that allowed the use of actuarial factors and gave the Cabinet of Ministers the authority to define the types of insurance regarding which it is permissible.²⁸⁵

However, one problem regarding the provision of equal rights in the field of insurance remains. The implementing provisions only require the definition of equal premiums and benefits irrespective of sex, pregnancy and maternity. Like Article 5 of Directive 2004/113/EC, they do not require the inclusion in insurance programmes of risks related to pregnancy and maternity. As a result, no insurance company in Latvia provides any standard travel and health insurance programme covering risks related to pregnancy and maternity. Consequently, the norms prohibiting pregnancy and maternity discrimination turn out to be meaningless in practice.

7. Enforcement and compliance aspects

EU gender equality law in Latvia only provides individual enforcement measures, i.e. Latvia does not have any laws providing for any kind of horizontal measures that must be taken by the State.

²⁸⁰ The Law on Prohibition of Discrimination against Natural Persons – Performers of Economic Activities (*Fizisko personu – saimnieciskās darbības veicēju – diskriminācijas aizlieguma likums*), OG No. 199, 19 December 2012, repealing previous law, OG No. 89, 9 June 2009.

²⁸¹ This applies if the annual income on average reaches the monthly statutory minimum salary. The Cabinet of Minister Regulation No. 992 ‘Regulation on minimum amount of mandatory statutory social insurance contributions and its definition for self-employed persons’ (*Noteikumi par valsts sociālās apdrošināšanas obligāto iemaksu objekta minimālo apmēru un tā noteikšanas kārtību pašnodarbinātajam*), OG No. 190, 15 December 2008.

²⁸² *Patērētāju tiesību aizsardzības likums*, OG No. 104/105, 1 April 1999.

²⁸³ *Apdrošināšanas sabiedrību un to uzraudzības likums*, OG No. 188/189, 30 June 1998, respective amendments OG No. 35, 4 March 2009.

²⁸⁴ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

²⁸⁵ Respective amendments OG No. 154, 28 September 2012.

Consequently, gender equality norms are enforceable only on an individual basis. Also, Latvian law does not envisage any rights to collective claims or rights to claim protection of rights in the name of a person other than claimant him/herself.

The enforcement measures in individual cases of breach of the non-discrimination principle are the following: Individuals may bring civil claims before regular courts dealing with civil and criminal cases in disputes regarding private-law transactions (employment and access to and supply of goods and services). In employment disputes, individuals may ask for non-discriminatory employment conditions, reinstatement (except in discriminatory recruitment cases) and compensation, including moral damages. Regarding disputes on the access to and supply of goods and services, individuals may claim the provision of goods and services in a non-discriminatory way and compensation. Individuals may request administrative authorities such as the State Labour Inspectorate and the courts to impose administrative sanctions. Currently, Article 204¹⁷ of the Administrative Violation Code provides for an administrative penalty of EUR 400 to EUR 700 (LVL 100 to LVL 500) if a person has breached the principle of non-discrimination as laid down in specific laws.²⁸⁶ Article 149¹ of the Criminal Law providing for criminal sanctions if a person has breached the principle of non-discrimination was repealed in 2012, because since its adoption in 2007 it had been never applied in practice.²⁸⁷ There are some problems with the timeframe for submitting a claim to court when the principle of non-discrimination has been breached in an employment relationship. In discrimination cases, Latvian Labour Law allows three months for submitting a claim.²⁸⁸ Other types of claims under the Labour Law, according to Article 31(1), must be submitted with a time limit of two years, except for claims of unfair dismissal. This seems to be in breach of two principles provided by EU law: effectiveness and equivalence.²⁸⁹

The prohibition of victimisation and the rule on reversal of the burden of proof are located in the Labour Law, the Law on the Protection of Consumer Rights, the Education Law, the Law on Support of Unemployed Persons and Jobseekers and the Law on the Prohibition of Discrimination against Natural Persons – Performers of an Economic Activity.²⁹⁰ In the past, the application of the reversed burden of proof by national courts was unsatisfactory; in only a small number of discrimination cases did the national courts explicitly refer to the application of this principle. However, in recent years the Supreme Court has paid particular attention to the correct enforcement of such right by providing an explicit interpretation based on the case law of the CJEU.²⁹¹

Formally, the national courts are accessible for victims of discrimination. However, victims of discrimination do not always go to court. One of the reasons for this is the cost of legal services, which is high, and another is the fear of victimisation. There are also problems with the enforcement of the principle of equal pay, because firstly, information on remuneration is usually confidential and, secondly, there is no effective control mechanism on payment systems in private businesses.

The Law on Associations and Foundations provides for the right of non-governmental organisations to represent the interests of individuals before a national court. In addition, the National Equality Body in Latvia functions as the Ombudsman's Office of the Republic of Latvia. The Ombudsman's office supervises the implementation and enforcement of all international law covering the principle of non-discrimination in the field of human rights.

²⁸⁶ OG No.51, 20 December 1984, Amendments with regard to the amount of the penalty in connection with the change of currency to the Euro, OG No.201, 15 October 2013.

²⁸⁷ OG. No.199/200, 8 July 1998, respective amendments OG No.107, 5 July 2007 and OG No.27 December 2012.

²⁸⁸ Amendments to the Labour Law, OG No. 47, 25 March 2010. The term for bringing a claim was extended from one to three months. Such amendments do not solve the problem, however.

²⁸⁹ Case C-326/96 *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd.* [1998] ECR I-07835, Paragraph 44.

²⁹⁰ The Labour Law grants protection against victimisation not only in the case of the use of non-discrimination rights, but for any of the employment rights.

²⁹¹ See, for example, the decision of the Senate of the Supreme Court in Case No. SKC-684/2012, 6 July 2012, available in Latvian at: <http://www.at.gov.lv/lv/info/archive/departments/2003-12artezem/article11/>, accessed 29 May 2014.

According to the Ombudsman Law, the Ombudsman has the right to represent the interests of private persons in civil-law proceedings when there has been a breach of the principle of non-discrimination. So far the Ombudsman's Office has acted as representative in two cases.

Collective agreements are usually applicable in one enterprise or institution. However, there are some sectors of industry which have generally binding collective agreements (e.g. construction, medicine, the railways), but they do not specifically deal with issues concerning gender equality. Trade union movements and workers' representatives' organisations are not yet well developed.

8. Overall assessment

In general the EU gender equality *acquis* has only partially been implemented in Latvian law. However, in spite of some specific legal gaps and the necessity for more detailed regulation, e.g. regarding equal pay, the major deficiency is the lack of any horizontal provisions (or umbrella law) on the obligations of the State in the provision of equal rights and equal opportunities.

LIECHTENSTEIN – Nicole Mathé

1. Implementation of central concepts

Directives 2006/54/EC and 2004/113/EC have been transposed into national legislation by the amendment of the Gender Equality Act (GLG), which entered into force on 8 June 2011.²⁹² Definitions of pay and social security systems are newly introduced that exactly follow the wording of Directive 2006/54/EC.

The main concepts of EU gender discrimination law were implemented in Liechtenstein by the GLG. The GLG contains definitions of direct and indirect discrimination that exactly follow the wording of Directive 2006/54/EC. Positive action is allowed insofar as there is no discrimination if adequate measures are taken to achieve factual equality. Instructions to discriminate are also considered as discrimination according to the GLG. Definitions concerning harassment and sexual harassment in the GLG again follow those in Directive 2006/54/EC.

The intention of the legislator by introducing these definitions into national law was indeed to attain harmonisation with EU law. These definitions were already part of the former legislation, which is now structured differently. There is no case law dealing with these concepts however, and consequently the field of interpretation is still rather open.

2. Equal pay and equal treatment at work

2.1. Equal pay

Article 1a (a) and (b) of the GLG establishes the prohibition of direct and indirect discrimination of female and male employees on grounds of sex. The definition of pay was recently introduced by the amendment of the GLG, which entered into force on 8 June 2011, and corresponds to the wording of Directive 2006/54/EC. The prohibition also specifically concerns sex discrimination resulting in unequal pay. Pursuant to Article 5 GLG a person who is discriminated against by receiving unequal pay has the right to compensation for the difference in salary from the date of instituting proceedings to five years before and after that date until the termination of the employment contract. The obligation to pay equal salaries to men and women for equal or equivalent work was already integrated into labour legislation (Paragraph 1173a Article 9(3) of the Civil Code) in 1995. Enforcing the right to equal pay for

²⁹² GLG as amended by the Official Gazette (LGBI) 2011/212, <http://www.gesetze.li/Seite1.jsp?LGBI=1999096.xml&Searchstring=Gleichstellungsgesetz&showLGBI=true>, accessed 22 May 2014.

equal or equivalent work then became possible on an individual basis. The law does not specify in detail the extent to which pay differentials are accepted.

2.2. Access to work and working conditions

The Gender Equality Act regulating the promotion of *de facto* equality between women and men entered into force on 5 May 1999 and applies to employees in private and in public employment relationships. Article 3(4)(b) GLG provides for an exception to discrimination where, firstly, adequate measures are taken to achieve factual equality, and, secondly, by reason of the nature of the particular occupational activity concerned or of the context in which it is carried out, a characteristic related to sex constitutes a genuine and determining occupational requirement.

2.3. Occupational pension schemes

In Liechtenstein a specific law provides for occupational pension schemes (*Gesetz über die betriebliche Personalvorsorge, BPVG*), covering benefits for old age, invalidity and death. The working population consists of 41 % women and 59 % men. These figures show that fewer women than men benefit from occupational schemes. Since 2010 the pensionable age of 64 years has been the same for women and men. Recently introduced by the amendment of the GLG, which entered into force on 8 June 2011, is Article 1a(f) GLG containing the definition of social security systems existing in Liechtenstein. The prohibition of discrimination shall cover statutory as well as occupational social security schemes.

3. Pregnancy and maternity protection, parental leave and adoption leave

Several laws contain norms which are relevant to the subject, namely the Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*), the Labour Code (*Arbeitsgesetz*) and the Sickness Insurance Act (*Krankenversicherungsgesetz, KVG*). The prohibition of discrimination which also applies to maternity was recently introduced by the amendment of the GLG (e.g. regarding the return to the workplace after maternity leave), which entered into force on 8 June 2011 pursuant to Article 3(1) GLG.²⁹³

Articles 35, 35a and 35b of the Labour Code entered into force on 1 January 1998 and regulate health protection, occupational activities, alternative work and the continued payment of wages during maternity. According to these provisions, working conditions for pregnant workers and women who are breastfeeding have to be adapted so that their health and that of their children are not affected. Women in this condition can only be employed with their consent. They are allowed to leave the workplace by simple notification. Breastfeeding mothers are entitled to time off which is necessary for breastfeeding. Women are not allowed to work for eight weeks after childbirth. Pregnant workers are not allowed to work from 8 p.m. to 6 a.m. during the eight weeks preceding childbirth. The employer is obliged to offer them equal work between 6 a.m. to 8 p.m. The same applies in the event of a medical indication at any other moment during the pregnancy and for the period between 8 and 26 weeks after childbirth. Women are entitled to the continued payment of 80 % of their salary plus adequate compensation for the rest if their employer is not able to offer them equal work between 6 a.m. and 8 p.m. During the entire period described, the woman must not be deprived of any advantage with respect to her professional position in the company, her seniority or any promotion linked to her regular position.

Paragraph 1173a Article 18 Section 3 ABGB prescribes that the employer has to continue to pay salary to the employee during absence due to pregnancy and childbirth, provided that the employment contract was concluded for a period of more than at least three months, or that the employment relationship has already lasted for more than three months. A reduction in the annual leave is not allowed if the employee is absent from her workplace for up to five months a year on the grounds of pregnancy and childbirth. According to Paragraph 1173a

²⁹³ GLG as amended by LGBl. 2011/212.

Article 49 Section 1(b) ABGB the employer is not allowed to give a notice of dismissal to the employee during her pregnancy and up to 16 weeks after childbirth. This last provision was introduced in 1992.

Furthermore, Paragraph 1173a Article 36b ABGB²⁹⁴ provides for a return to the workplace after maternity leave. This provision was changed in 2011 and now stipulates the right to return to the former position after maternity leave, and if this is not possible, to an equivalent position under conditions which are not worse than for the former position. The employee has the right to all improvements of working conditions which could have been achieved during the period corresponding to the time that she was on leave.

Article 15 KVG provides that benefits shall be paid to women for 20 weeks, of which at least 16 weeks are after childbirth, provided that the woman in question was insured before childbirth for a period of at least 270 days, of which three months must have been consecutive. The allowance under this maternity insurance scheme amounts to 80 % of the insured salary.

Protection is also foreseen with regard to parental leave and for employees with family obligations: if they have to raise children under the age of 15 and have relatives or close persons needing care, this has to be taken into account when fixing their working hours. Such an employee has to agree to working overtime and he or she can ask for a lunch break of at least an hour and a half (Article 36 Labour Code).

If the employee has been employed for more than a year or if the contract was concluded for more than one year, the employee is entitled to four months' parental leave.²⁹⁵ A new element introduced by the transposition of Directive 2010/18/EU was the upgrade from three to four months of parental leave. For the calculation of the duration of the labour contract several consecutive fixed-term contracts with the same employer are to be combined. The right to parental leave is established upon the birth of a child and leave can be taken until the child is three years old. In the case of adoption or the permanent care of a foster child, leave can be taken until the child is five years old. The employee has to inform the employer of the intended period of parental leave three months in advance. The employer may request that the employee selects a different period if there are reasonable work-related grounds, such as the fact that the work in question is seasonal work, that no replacement can be found in time, that a certain number of other employees are all asking for parental leave at the same time, or because the employee's position in the company is of strategic importance. In companies with fewer than 30 employees the employer has the right to defer the period of parental leave in all cases where the planned leave would interfere with the operations of the company. The employee is entitled to take parental leave on a full-time, part-time or hourly basis, provided he/she respects the justified interests of the employer.²⁹⁶ After parental leave, the employee has the right to return to his or her former work or, if this is not possible, to equivalent or similar work under conditions which are not worse than for the former position. After the end of the parental leave the employee can request the employer for a change in working hours for a certain period which has to be agreed upon by both the employer and the employee. In the response to such a request the employer also has to consider justified interests of the employee.²⁹⁷ (Paragraph 1173a Article 34(a-c) ABGB).

4. Statutory schemes of social security

The first pillar is considered to consist of the obligatory sickness insurance (*Krankenversicherung, KVG*), the invalidity scheme (*Invalidenversicherung, IVG*), the old-age scheme (*Alters- und Hinterlassenversicherung, AHVG*), the accidents at work and occupational diseases scheme, called obligatory accidents insurance (*Unfallversicherung*,

²⁹⁴ ABGB as amended by LGBl. 2011/214.

²⁹⁵ Paragraph 1173a Article 34a ABGB as amended by LGBl. 2012/402.

²⁹⁶ Paragraph 1173a Article 34b(4) ABGB as amended by LGBl. 2012/402.

²⁹⁷ Paragraph 1173a Article 34c ABGB as amended by LGBl. 2012/402.

UVersG), and unemployment insurance (*Arbeitslosenversicherung, ALVG*). Every person domiciled in Liechtenstein is insured on a compulsory basis against sickness and nursing, accidents, invalidity and old age. Employees are, in addition, insured against accidents at work and occupational diseases as well as unemployment.

Following existing stereotypes mostly women benefit from family and survivors' benefits. But Liechtenstein's legislation has been changed in order to eliminate gender discrimination as far as possible. In general spouses of both sexes are treated equally.

In this field gender equality has gone rather far. Since 2010 the pensionable age is equal for men and women (64 years) (Article 55 AHVG). Pensions for widows and widowers are foreseen in the law (Articles 57 and 58 AHVG) and equal for both. Advantages for parents who dedicate time to the education of their children are equally divided between them. They benefit from so-called '*Erziehungsgutschriften*', a fictitious income, which is added upon the calculation of the pension for the period dedicated to family work. With regard to the main points no gender-discriminatory provisions can be found. It should be added that only for a transitional generation (male spouses born in 1944 and earlier) will an additional pension for the female spouse be paid by the insurance, if the wife was born in 1954 or earlier.

5. Self-employed persons

The first equality report of the Liechtenstein Government in 1997 stated that the legislation concerning commerce had to be free from any gender-based discrimination and had to be construed as gender-neutral from a material point of view. Provisions in the former Commercial Code were not allowed to have any gender-discriminatory effects. It was also stated in the report that Article 30 Section 2 of the former Commercial Code (*Gewerbegesetz*) had been amended in 1996 so as to allow widows and widowers to continue a business enterprise based on the trading licence of the deceased spouse. Now it has been replaced by a new Commercial Law that no longer contains such a specific norm.

Article 46a of the Marriage Act (*Ehegesetz*) regulates the compensation for participating spouses of self-employed persons in the enterprise and entered into force on 1 April 1993. If one spouse performs work in the enterprise of the other spouse, he or she is entitled to compensation for this work. The amount of the compensation is calculated on the basis of the nature of the work and the period during which it was performed. The standard of living of the spouses as a whole and the maintenance allowance are also taken into consideration in this calculation. Directive 2010/41/EU has been implemented into Liechtenstein's legislation by the GLG, KVG and BPVG.

6. Goods and services

Directive 2004/113/EC has been transposed into national legislation by the amendment of the Gender Equality Act (GLG), which entered into force on 8 June 2011.²⁹⁸ Article 4a (5) lit. (c) (1)-(3) GLG implements Article 5(2) of Directive 2004/113/EC and is still in force because the *Test-Achats* ruling of the CJEU does not automatically affect EEA law.²⁹⁹ The EEA Committee shall be competent there. In principle the CJEU ruling is applicable to exchanges of services between EU residents.

7. Enforcement and compliance aspects

The GLG provides for judicial protection before the courts and for a conciliation procedure prior to the court procedure.³⁰⁰ In addition, specific protection in the case of so-called revenge

²⁹⁸ GLG as amended by LGBl. 2011/212, <http://www.gesetze.li/Seite1.jsp?LGBl=1999096.xml&Searchstring=Gleichstellungsgesetz&showLGBl=true>, accessed 22 May 2014.

²⁹⁹ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

³⁰⁰ Articles 7b and 11 GLG.

dismissals is foreseen where persons are dismissed as a reaction to a complaint within the business or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment (Article 10 GLG). Furthermore, the GLG includes a provision concerning the prohibition of any reprisal for the employee him/herself and any other employees involved in the case, as a reaction to a complaint within the business or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.³⁰¹

Norms introduced in 2006 concern improved protection against unfair dismissal and the possibility for group actions, and, in addition, the procedure was amended through facilitation respectively easing the burden of proof.

Pursuant to Article 5 GLG a person who is discriminated against by receiving unequal pay has the right to compensation for the difference in salary from the date of instituting proceedings to five years before and after that date until the termination of the employment contract. According to Article 5(1)(a-c) GLG a person discriminated against has the right to demand before the court or the administrative authority that imminent discrimination is to be forbidden or has to be omitted, an existing discrimination has to be removed or a discrimination has to be declared if it is still disruptive. If there is any discrimination in refusing an appointment or in the termination of a private employment contract, the person in question is entitled to compensation on the basis of the determined salary. In the first case the prescription period is three months from the moment of the employee being informed of the refusal by the employer. In the second case the person has to appeal to the employer in writing within the notice period (normally a three-month notice period) and if the contract is not continued the prescription period is six months from the end of the contract (Paragraph 1173a Article 48 ABGB). The compensation for discrimination by refusing an appointment corresponds to a maximum amount of three monthly salaries. This amount is the same even if there are more persons demanding compensation. The compensation for discrimination in a termination of a private employment contract also corresponds to the amount of three monthly salaries in total, or at least EUR 4 200 respectively (CHF 5 000), when concerning (sexual) harassment (Article 7c(3) GLG).

Article 7 GLG gives organisations that have had their seat in Liechtenstein for five years and that deal with equality matters between women and men in a broad sense the opportunity to defend the interests of employees in sex discrimination cases before the courts. Individual persons affected by sex discrimination need to give their prior authorisation when the legal action in the name of the organisation is to state that discrimination has taken place. Before bringing the case to court the employer's opinion has to be heard. The court's decision takes the form of a declaration that discrimination has (not) been shown. In order to receive compensation, the individuals concerned will each have to start separate and individual proceedings, although this will be much easier following a group action. It should be mentioned that the amended GLG includes the new possibility for organisations to bring a claim under the name of the concerned person, to participate in the name of that person or only to participate in the procedure to help the concerned person.³⁰²

Articles 18 and 19 GLG provide for the Gender Equality Commission and the Gender Equality Office. Since March 2005 the Equality Office has dealt with equal opportunities. Its competence has been modified with regard to its independent position. Article 19(3) GLG explicitly states that the Equality Office shall be independent with respect to its tasks of counselling authorities and the private sector, executing public relations as well as studies and recommendations on the appropriate measures to authorities and the private sector. The social dialogue is guaranteed in Article 19(2)(e) GLG where the Equality Office shall cooperate with public or private institutions; the Government report explains that under institutions one shall also understand the social partners.

Collective bargaining (especially the so-called *Gesamtarbeitsvertrag*, GAV, Paragraph 1173a Article 101 *et seq.* ABGB) is an instrument used in Liechtenstein's private

³⁰¹ Article 7a GLG.

³⁰² Article 7(1)(b) GLG.

law whose function is rather similar to the law itself. This particular collective bargaining agreement (GAV) puts into force clauses between the parties which override the individual labour contract and partly the legal regulations and can also apply to third parties. The GAV is mutually agreed and signed by the employees' representative (the trade union *LANV*) and by the representative of the employers (the *GWK*). The contracting parties wish to achieve several goals by signing the GAV, such as preserving the labour peace, settling disputes by mutual consent, enhancing the social, economic and environmental development of each branch of trade, as well as keeping Liechtenstein's marketplace competitive in a social market economy by encouraging innovations and a modern labour organisation. This also includes equal opportunities for men and women with regard to equal pay. A third of all GAVs explicitly contain a clause concerning equal opportunities between men and women. It has to be mentioned that the GAVs (such as in the metal industry, the non-metal industry and the building trades) that mention equal opportunities between men and women are applied to the largest number of employees.

8. Overall assessment

From a purely theoretical legal view it can be confirmed that the application of the principle of equal treatment is satisfactory. However, because of the lack of case law concerning gender equality in Liechtenstein it is difficult to assess whether enforcement is satisfactory as well. Nevertheless, active awareness-raising campaigns are conducted concerning gender equality.

LITHUANIA – Tomas Davulis

1. Implementation of central concepts

The Constitution of 25 October 1992³⁰³ establishes the general principle of equality (Section 29) and provides the right to fair remuneration for work where the concept of 'fair remuneration' also includes the principle of non-discrimination (Section 48(1)).³⁰⁴ Despite the fact that the Constitution contains a clause on the direct effect of constitutional provisions, the Constitutional Court has not yet examined the possibility to rely on them in disputes between private persons (horizontal effect).

This circumstance underlines the importance of ordinary legislation when implementing the principle of equality. There are several pieces of legislation addressing the issue. First of all, the Labour Code of 4 June 2002³⁰⁵ mentions, among the principles of labour law, the principle of fair remuneration and the general principle of the equality of employees irrespective of *inter alia* their gender, marital and family status as well as (since 2012) the intention to have children. However, for the practical implementation of these principles the consideration of special laws on equal treatment is indispensable. The Equal Opportunities Act for Women and Men (EOAWM)³⁰⁶ and the Equal Opportunities Act (EOA)³⁰⁷ introduce the central concepts and provide basic rules, define the scope of their application, and establish the mechanisms of supervision and enforcement. One of the Lithuanian peculiarities, however, is a certain 'double coverage' of discrimination on the ground of sex by these two different Acts. The EOAWM is a special law particularly dealing with gender discrimination

³⁰³ State Gazette (*Valstybės žinios*), 1992, No. 33–1014.

³⁰⁴ Ruling of 18 December 2001 of the Constitutional Court of the Republic of Lithuania.

³⁰⁵ State Gazette, 2002, No. 64–2569.

³⁰⁶ State Gazette, 1998, No. 112–3100. An unofficial translation into English is available on the Internet site of the Lithuanian Parliament on http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=421709, accessed 1 July 2013.

³⁰⁷ State Gazette, 2003, No. 114–5115. An unofficial translation into English is available on the Internet site of the Lithuanian Parliament on http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=389500, accessed 1 July 2013.

whilst the Equal Opportunities Act (EOA) intends to deal with discrimination on the grounds stipulated by the EU equality directives of 2000 and a number of other domestic grounds, such as nationality, language and social origin. With the amendments from 2008, gender was also added to the list of the prohibited grounds of discrimination under the EOA. This double coverage can at some point create misunderstandings, in the application of the law, as both acts regulate the contextually same issue in slightly different ways and to different extents., The EOAWM is a *lex specialis* but the later EOA is more advanced in terms of coverage, including a precise description of obligations.

In defining major concepts in the EOAWM, the Lithuanian legislator has tried to keep in line with relevant European directives. There is only a small number of slight language differences in transposing the central definitions of the EU directives, but they are rather insignificant. Direct discrimination means treatment where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation. Indirect discrimination shall mean an act or omission, legal provision, assessment criterion or practice that formally are the same for women and men, but whose implementation or application would put persons of one sex at a particular disadvantage compared to persons of the other sex, unless such act or omission, legal provision, assessment criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. An instruction to discriminate is clearly indicated as amounting to discrimination, but is not further defined. Sexual harassment is defined as unwanted insulting, verbal, non-verbal, or physical conduct of a sexual nature. The requirement that the conduct must be 'insulting' for it to constitute sexual harassment is not included in the EU definition, which rather stipulates the criterion of an 'offensive' environment. . Harassment means any unwanted conduct when, because of the sex of a person, another person attempts to violate the dignity of the first person or the dignity of the first person has been violated and there is an attempt to create an intimidating, hostile, humiliating or offensive environment or this type of environment has been created. Positive actions are explicitly mentioned as an exception to the principle of non-discrimination. They are defined as specific temporary measures laid down by specific laws, aimed at accelerating the guaranteeing of factual equal rights for women and men and which must be repealed upon the implementation of equal rights and equal opportunities for women and men. However, the reference to specific laws makes this action practically unenforceable since there are no other laws allowing these measures to be taken.

2. Equal pay and equal treatment at work

2.1. Equal pay

The Labour Code defines the concept of 'pay' as 'the basic salary and all additional payments directly paid by the employer to the employee for the work performed under an employment contract'. The indirect payment is not explicitly mentioned here, and therefore different benefits or services provided by third parties (subscriptions, tickets, meals, insurance-type or pensions-type benefits etc.) do not fall under the domestic notion of pay. In those cases the general principle of equality of employees may be applied but there is no court practice on this point yet. Under the Labour Code, men and women shall receive equal pay for equal or equivalent work. In the work classification system for determining pay, the same criteria shall be equally applicable to both men and women, and the system must be elaborated in such a way as to avoid any discrimination on the grounds of sex. The EOAWM also introduces the principle of equal pay. It stipulates that the employer is obliged to provide equal pay for work of equal value, to provide equal working conditions and equal benefits. The application of less (more) favourable terms of employment or payment for work to an employee is considered as a 'violation of equal rights for women and men' and this is punished according to the rules of administrative law.

The scope of application of the principle of equal pay and equal treatment at work is quite confusing in Lithuania, because of the inconsistency of the legislator in adopting two different laws on equal treatment and the differences in the notion of 'employee' under

domestic and EU law. The Labour Code and the EOAWM are applicable to all employees, i.e. persons involved in a relationship based on a contract of employment. Public servants can rely on the Labour Code (and therefore on the EOAWM) only by way of analogy of law. The scope of application of the EOAWM does not explicitly include 'public servants', but the Equal Opportunities Act (EOA) does. Therefore public servants will be covered by equality legislation either directly or by way of analogy. Politicians, the highest rank of government officers, judges, public prosecutors, and military personnel do not fall into the category of public servants *stricto sensu* but again, by way of analogy of law, they may enjoy the same protection as public servants. However, court practice is lacking on this point.

2.2. Access to work and working conditions

As far as working conditions are concerned, the Labour Code expressly prohibits the rejection of job applications and the termination of employment contracts on the ground of sex. The Labour Code contains no further provisions expressly prohibiting direct or indirect discrimination as regards access to employment, vocational training and promotion, and working conditions, but they are consolidated in the EOAWM. According to Section 5 p.1 of the Act, the employer is obliged to apply gender-neutral recruitment and promotion criteria and conditions, except where the work can only be performed by persons of a particular sex, where the necessity of a particular sex may be grounded on the nature of activity or the context in which it is carried out, provided that the objective sought is legitimate and complies with the principle of proportionality (exception of Article 14(2) of Directive 2006/54/EC). In addition, the EOAWM obliges employers to provide equal working conditions and equal opportunities to improve qualifications, to provide equal benefits and to apply the principle of equal pay for equal work, including all payments. The special protection of women during pregnancy, childbirth and nursing as well as requirements for safety at work which are applicable to women and aimed at protecting women's health have been withdrawn from the scope of application of the principle of non-discrimination.

2.3. Occupational pension schemes

Occupational social security schemes in the private sector were introduced in 2006 but are still very rare in Lithuania. The pension and social security schemes for public servants form part of the general statutory scheme, accompanied by specific state pension schemes for judges, academics/scientists, some public officers, and members of the armed forces. Different pensionable ages in occupational pension schemes are expressly prohibited under the EOAWM. In 2008 the EOAWM was supplemented to include new provisions on the prohibition of discrimination based on sex in social security schemes, including provisions that aim to supplement or replace the state social security system. Sickness, invalidity, old-age, early retirement, accidents at work, occupational diseases, unemployment and social protection schemes are covered by the principle of non-discrimination, including survivors' pensions, allowances and other benefits. Exclusions related to the type of occupational social security scheme are not provided by the law. The Act cites examples of prohibited actions: discrimination is prohibited in the establishment of possibilities to participate in and enjoy social protection, in the determination of contributions and their level, in the determination of allowances including those granted to spouses and dependants, as well as in the determination of the duration of the payment of allowances. The non-discrimination provisions in social security schemes are applicable to 'employed persons', including self-employed persons, persons who terminate their employment due to sickness, maternity, an accident at work or forced unemployment as well as to persons looking for employment, disabled workers and persons who are entitled to receive the benefits on their behalf. This means that public servants and other categories of state employees who are covered by the system of state pensions (military personnel, academics/scientists and judges) are clearly covered by the principle of non-discrimination to this extent. The same is true for self-employed persons, who are not yet mentioned elsewhere in equality legislation.

3. Pregnancy and maternity protection, parental leave and adoption leave

Labour legislation traditionally provides an extensive list of guarantees and special arrangements for three groups of employees:

- pregnant workers (pregnant women who submit to their employer a certificate issued by a healthcare institution confirming that they are pregnant);
- workers who have recently given birth (mothers who submit to the employer a certificate confirming that they have given birth and who take care of a child of up to one year old); and
- breastfeeding mothers (mothers who submit to their employer a certificate confirming that they are taking care of and breastfeeding a child of up to one year old).

All three groups of employees must not be assigned to perform work in conditions that may be hazardous and may affect the health of the woman or the child. If they have to attend medical examinations, they must be released from work for such examinations without any loss of average pay. Special paid breaks are foreseen for breastfeeding. The law requires the consent of an employee if the employer wishes to assign her to night work (between 10 p.m. and 6 a.m.), to send her on a business trip, to work overtime or to work on Saturdays and Sundays or on public holidays. There are no specific rules prohibiting discrimination in relation to pregnancy and maternity, maternity leave, parental leave, adoption leave and paternity leave. The majority of violations would definitely be covered by the general rules on non-discrimination in the Labour Code and the EOAWM.

There is no direct provision prohibiting dismissal on the grounds of an application for, or the taking of, parental leave, but the Labour Code includes a general prohibition on the dismissal of an employee during his/her leave, regardless of the type of leave. The dismissal of a pregnant woman is prohibited from the day that her employer receives the certificate confirming her pregnancy until one month after her maternity leave. Furthermore, the employment contracts of employees raising a child (children) under the age of three must not be terminated without any fault on the part of the employee. In addition, Lithuanian labour law provides for a number of procedural requirements and guarantees which are applicable to workers with childcare responsibilities. Employees raising children under the age of 14 may only be dismissed in exceptional cases. Priority to retain a job shall be given to employees who are raising children in an incomplete family, or have adopted children under the age of 16.

The Labour Code grants pregnant employees a maternity leave of 70 calendar days before confinement and 56 calendar days after confinement. Similar rules apply in the case of adoption. During maternity leave a worker is entitled to a state social security allowance paid by the State Social Insurance Fund. At the end of maternity leave, workers have the right to return to the same job on the same terms as before the leave and to benefit from the improvement of working conditions. The Labour Code also requires the period of maternity leave to be taken into account for the determination of the next annual leave.

Parental leave until the child has reached the age of three is granted to the mother (adoptive mother), the father (adoptive father) and also to other relatives. In addition, in case of adoption a leave of up to three months can be taken by the adoptive mother or father even after the child reaches the age of three. However, the three months period does not meet the minimum length of four months set by Directive 2010/18/EU. Parental leave and adoption leave are granted at the choice of the family and may be taken as a single period or be distributed in parts. However, there are no rules on a non-transferable period of leave. During parental leave a parental allowance is paid by the State Social Insurance Fund for a period of up to two years. The person concerned retains his/her job, with the exception of cases where the enterprise has been dissolved. At the end of parental leave, workers have the right to return to the same job on the same terms as before their leave. Unlike what is stipulated regarding maternity leave, there is no explicit provision that the worker shall benefit from any improvement in working conditions to which he/she would have been entitled during his/her absence because of parental leave. In addition, the law does not provide for the minimum

non-transferable period of parental leave or adoption leave, as required by the Directive 2010/18/EU.

The Lithuanian Labour Code is heavily loaded with other family-friendly arrangements which go beyond the requirements of the directives. For example, paternity leave with a paternity allowance is guaranteed for fathers until the child reaches the age of one month. A prolonged minimum annual leave of 35 calendar days (whilst the normal minimum leave is 28 calendar days) is granted to employees who, as single parents, are raising a child. Employees raising two children under the age of 12 are entitled to a paid day off and additional unpaid leave and employees raising three or more children under the age of 12 are entitled to two paid days off per month. Since those labour-law provisions on maternity and paternity protection have a long history they enjoy wide public acceptance. The courts are also very active in protecting pregnant women from unfair dismissal despite the fact that the protection goes much further than what is required by European legislation.

4. Statutory schemes of social security

A person who is awarded a pension may continue to work and receive double income: his/her pension and his/her wage. All categories of employees including public servants and higher officials are covered by all types of state social security schemes whilst the majority of self-employed persons are covered by the pension scheme only.

The EOAWM amendments of 2008 have significantly broadened the scope of application of the equal treatment principle which now applies to the state social security schemes in the same way and to the same extent as occupational pension schemes (see Section 2), the only exception being the different pensionable ages. The EOAWM provides for a temporary statutory exception for different pensionable ages for women and men. For a long time the pensionable ages for men and women were different: 60 for women and 62.5 for men. The pensionable age for women has been increased by four months annually from 2012 and for men by two months annually, and the retirement age for both men and women will reach 65 in 2026. One should keep in mind that in Lithuanian labour law, some employees' guarantees (notification periods or priority to retain the position where dismissals are concerned) are related to the statutory pensionable age of the workers, which is still different for women and men.

5. Self-employed persons

The notion of self-employed person (under Lithuanian law, the following are perceived as a self-employed person: owners of individual enterprises, members of partnerships, persons in registered individual economic activity, persons with business certificates, farmers and their partners, sportsmen and artists) emerges in the legal framework of taxation and state social insurance. The majority of them are persons who are only covered by pension insurance (age, disability and widows/widowers' pensions). Helping spouses of other categories of self-employed persons and persons treated as such may participate in voluntary social insurance schemes. All these persons may be covered by pensions and sickness and maternity state social insurance on a voluntary basis. Still, there are national social schemes granting certain services and cash benefits awarded to these women regardless of their social insurance, financial situation or professional activity (e.g. birth grants).

Self-employed persons generally do not fall under the EOAWM and only one provision concerning the principle of equality in social security schemes explicitly refers to them. An important gap is the fact that there is no specific provision prohibiting discrimination in relation to access to self-employment or occupation, vocational training and working conditions or the establishment of self-employed activity. The transposition of Directive 2010/41/EU is highly minimalistic and clearly not sufficient. Section 3 of the EOAWM 'The Duty of State and Municipal Institutions and Agencies to Implement Equal Rights between Women and Men' has been amended to introduce the new obligation of state and municipal authorities and institutions to prevent sex discrimination, and was supplemented by the new

obligation not to violate the equal rights of women and men when providing administrative or public services. Since Directive 2010/41/EU is meant to govern all relations between self-employed persons and their spouses with third parties, Lithuanian law fails to include the relationships with state companies, public bodies or private persons (notaries) etc. within its scope.

6. Goods and services

The EOAWM *prima facie* meets the requirements of Directive 2004/113/EC as it prohibits any kind of discrimination. The exceptions in the application of the principle of equality related to media and education have not been implemented in the EOAWM, but the EOAWM is not applicable in the sphere of private and family life. The EOAWM only addresses relationships between consumers and salespersons, producers and service providers, as it states that salespersons, producers and service providers must apply equal pay terms or guarantees for the same or equally-valued products, goods and services to all consumers irrespective of their sex. They also have to assure that there will be no humiliation, restriction of rights or granting of privileges, or the forming of any public attitudes towards the superiority of one sex over the other when providing information on their products, goods and services or when advertising them. Furthermore, the EOAWM lists discriminatory acts such as granting different conditions of payment or guarantees for the same and equally-valued goods, services or products or allowing different opportunities for selecting goods; presenting information about products, goods and services or advertisements forming the public opinion that one sex is superior to another; discrimination of consumers on grounds of sex; and intimidation of a person who has complained about discrimination. There will be no direct discrimination if the sale of goods or the provision of services to persons of a certain sex or to the majority of a certain sex is justified by a legitimate aim, provided that these restrictions are appropriate and necessary. Under the Law on Insurance,³⁰⁸ insurance companies were allowed to apply sex-differentiated contribution rates after a risk evaluation within the sphere of insurance. With the amendments of 2013³⁰⁹ Lithuanian law now complies with the CJEU ruling in *Test-Achats*.³¹⁰

7. Enforcement and compliance aspects

In case of a violation of the principle of non-discrimination four different types of sanctions may be imposed. Criminal sanctions may be imposed following a criminal offence. Serious discrimination on the grounds of *inter alia* sex shall be punishable by community service order, arrest or imprisonment for up to three years, but there have been no cases so far. Administrative fines from EUR 29 (LTL 100) to EUR 1 160 (LTL 4 000) for breach of the EOAWM may be imposed by the Equal Opportunities Ombudsperson, but in many cases the Ombudsman issues a simple warning. The violation of equal opportunities for women and men or the sexual harassment of colleagues, subordinates or customers may (but not necessarily shall – this is left to the employer to decide) result in disciplinary sanctions imposed on the related employee, e.g. dismissal.

The rules on the judicial enforcement of rights are no less favourable than those governing similar domestic actions. In cases of discriminatory refusal or dismissal compensation may be awarded but the court is free not to reinstate the employee. In the case of financial claims by an employee, the court may grant the employee payment of interest when the employer has breached financial duties: 0.06 % interest per day of delay. In addition, in all labour cases the court may award financial compensation for non-material

³⁰⁸ State Gazette, 2003, No. 94-4246.

³⁰⁹ State Gazette, 2013, No. 46-2247.

³¹⁰ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

damage caused by discrimination. The compensation for non-material damage has no maximum amount. However, the courts are reluctant to award high compensation for non-material damage. For example, for the discriminatory refusal to employ Roma women as waitresses in a bar, the employer was obliged to pay compensation of approximately 2½ times the minimum wage for non-material damage instead of employment.

The EOAWM contains a provision on the reversal of the burden of proof while examining complaints or disputes between persons arising from discrimination on the ground of sex. This rule has to be applied in the civil courts of general competence or in the Commissions on Individual Labour Disputes. If there is a dispute in the administrative courts involving public servants, the rule on the reversal of the burden of proof shall also be invoked. However, the Highest Administrative Court has rejected the right of the Equal Opportunities Ombudsman to shift the burden of proof to the accused employer in a procedure of investigation of a complaint by the Office of the Ombudsperson.

Access to the courts is generally safeguarded for alleged victims of discrimination but cases are very rare. Since 2008 the EOAWM allows the victim to be represented in administrative procedures and court proceedings by organisations of workers and employers and by other legal persons having a legitimate interest. This right for NGOs has recently been confirmed by the Higher Administrative Court, which will improve the possibility of defence of the rights of victims. However, cases regarding discrimination on the grounds of social origin, nationality or age have started to dominate the poor landscape of discrimination cases.

The Office of Equal Opportunities Ombudsman as an independent state institution supervises the implementation of both the EOAWM and the EOA. The Office investigates complaints, supervises the implementation by the public institutions and employers, hears cases of administrative offences and imposes administrative sanctions, consults victims of discrimination, assists public organisations and NGOs, collects, analyses and summarises data on equal opportunities in Lithuania, submits recommendations, etc.

The impact of the social partners in the promotion of gender equality is rather weak. The social partners do not attempt to explain or promote the principle of equality unless there is a focused initiative sponsored by European funds. Collective agreements are binding, but the impact of collective bargaining in promoting equal opportunities is less than fractional. Inclusion of these issues into the agenda of collective bargaining is not strived for by either of the parties: for employees it is more desirable to at least have a collective agreement on wages or other working conditions than to consider gender equality issues which are, according to both parties, believed to be the task of state authorities or to be irrelevant.

8. Overall assessment

The formal implementation of the EU gender equality directives in Lithuania is considered satisfactory. National legislation has traditionally been heavily loaded with guarantees for women and persons raising children, which is why it is not difficult to maintain a formally women-friendly environment. However, there are significant gaps related to more sophisticated questions, such as coverage of self-employed persons or practical implementation of non-discrimination legislation. Despite the great political attention the practical implementation of the principle of equality at the workplace is rather weak: only a few cases have been brought to court, the issue has not received any special attention from social partners and it definitely is not among the priorities of individual employees and employers. Employees, trade unions and even lawyers are reluctant to use the powerful instruments offered to them by the national legislation transposing EU law. The rare EU-funded state initiatives and the initiatives by the social partners are insufficient to promote real enforcement of equality rights. NGO activities are fragmental and limited to surveys and public campaigning only.

1. Implementation of central concepts

Usually, Luxembourg national law reproduces the definitions given by EU law. Generally speaking, the Luxembourg Government has adopted the so-called ‘one to one’ implementation approach of EU law.

The concepts of direct and indirect discrimination as well as those of harassment and sexual harassment are literally reproduced in national legislation transposing EU gender equality law. Sexual harassment at the workplace was introduced at the national level in 2000³¹¹. Since then it is laid down by law that employers have to abstain from any sexual harassment in employment relationships. Employers also have to take care that any act of sexual harassment of which they are informed ceases immediately and they have to take preventive measures to ensure the protection and the dignity of their employees. In the case *L’Estrade c/Barthelemy c/Etat*,³¹² the Supreme Court of Justice (Cour Supérieure de Justice) recognised the employer’s responsibility for acts by his manager, arguing that the manager was the physical representative of the employer. Case *Rausch c/Luxair*³¹³ of the Supreme Court of Justice maintains that the employer is not obliged to start a formal investigation before suspending a worker who is accused of having engaged in sexual harassment.

Even if the concept of harassment was mentioned by law previously, no definition was provided until the adoption of the Law transposing Directive 2002/73/EC (equal treatment between men and women in employment) on 30 April 2008.³¹⁴ On 29 March 2007, the Supreme Court of Justice considered, arguing that since the concept of harassment was not defined in national labour law, it was advisable to refer to the definition in Directive 2000/78/EC. Furthermore, the judgment determined that it is up to the worker to provide proof of the components of harassment. The Supreme Court of Justice therefore referred exclusively to the definition of harassment given by the Directive without considering its provisions as regards the burden of proof.

Since July 2006, the Luxembourg Constitution includes the provision that women and men are equal regarding rights and duties and that the State promotes the elimination of any obstacles in the field of equality between women and men.³¹⁵ Although positive actions previously existed, the adoption of this provision provides a legal basis for those actions. In this area, the Ministry of Equal Opportunities has developed a programme in order to encourage private enterprises to adopt projects on equality between women and men. The programme on positive actions was extended to the public sector in late 2011. The first results of this extension were presented in 2012. These positive actions are exclusively intended to promote the under-represented sex on the labour market. The Minister in charge of gender equality has announced a modification of the legal framework for positive actions, without giving any further details yet.

The current legal framework for positive actions consists of Article L.243-1 to Article L. 243-5 of the national Labour Law. Positive actions are defined as concrete measures granting specific advantages in order to facilitate the exercise of a professional activity by the under-represented sex or to prevent or compensate disadvantages in the professional career path. Positive action projects can relate to either one or more companies, or to a sector or an economic branch. The State subsidises the agreed private projects.

The Labour Law also contains provisions that allow employers to obtain financial support when they employ people of the under-represented sex. According to Article L.242-1 the under-represented sex in a profession is considered to be the sex whose representation is

³¹¹ Labour Code Article L.244-1. – Article L.245-8.

³¹² C.S.J. 30 January 2003 No. 26327.

³¹³ C.S.J. 29 June 2006 No. 30051.

³¹⁴ <http://www.legilux.public.lu/leg/a/archives/2008/0070/a070.pdf#page=2>, accessed 2 June 2014.

³¹⁵ Article 11(2) of the Constitution.

equal to or lower than 40 % of the total workforce in this occupation at the national level. Moreover, according to Article L.242-3 employers may implement specific advantages in order to facilitate the activity of the workers of the under-represented sex or to prevent or compensate disadvantages in their professional career path.

Instruction to discriminate on the ground of gender constitutes discrimination. Provisions reproducing the terms of EU law have been implemented in all the laws on equal treatment between women and men. In this regard, Luxembourg law complies with EU law.

2. Equal pay and equal treatment at work

2.1. Equal pay

On 10 July 1974 equal pay for women and men for the same work or for work to which equal value is attributed was introduced by Grand Duchy Regulation. Remuneration includes the wages or the basic or minimum ordinary salary and all other direct or indirect advantages and benefits, in cash or in kind, paid by the employer. Since then provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay have been declared null and void. The highest remuneration is automatically substituted when pay is not equal.

According to the amended Law of 12 June 1965 on collective agreements, the social partners have to envisage in any collective agreement the application of the principle of equal pay between women and men.

The question concerning the direct effect of European legislation was placed before the Luxembourg courts. The first judgment (*Bank M.M. Warburg-Brinckmann Wirtz International c/ Pagani*) on this matter was delivered by the *Cour d'Appel de Luxembourg* (Court of Appeal of Luxembourg) on 21 April 1982. This judgment substantially adopts, once again, the terms of the *Defrenne II* judgment³¹⁶ by the CJEU by saying that Article 119 of the EEC Treaty (now 157 TFEU) applies directly without European or national measures being necessary for its implementation. The question addressed by the Court was to determine whether a household premium constituted an advantage paid directly or indirectly to employees. The Court determined that the premium was to be considered as remuneration within the meaning of Article 119 of the EEC Treaty (now 157 TFEU), ILO Convention No. 100 and the Grand Duchy Regulation from 1974. This judgment reinforced the Grand Duchy Regulation of 1974, which ranks lower in the legal hierarchy.

On 28 March 1991, the Court of Appeal of Luxembourg decided in *Laroche c/ Administration communale de Pétange* that it is sufficient to establish a difference in wages between female and male workers engaged in the same cleaning service. The employer had argued that the difference in wages between women and men workers was justified by the fact that male workers were likely to be engaged in more strenuous tasks than female workers. Since this decision there has been no further significant case law on the issue.

The Government programme presented in December 2013 announced a new legal framework on equal pay. No concrete project has been presented yet.

2.2. Access to work and working conditions

As the Recast Directive 2006/54 has not been implemented by a specific law, one must refer to the Law of 13 May 2008, which implemented Directive 2002/73/EC.

Regarding access to employment, a difference in treatment based on a characteristic related to sex does not constitute discrimination within the meaning of the law when, because of the nature of the particular activities concerned or their framework, such a characteristic constitutes an essential and determining professional requirement. The objective has to be legitimate and the requirement proportional. The exceptions in the Recast Directive were already covered in national law. This means that national law is in compliance with EU law.

³¹⁶ Case C-43/75 *Defrenne v Société Anonyme Belge de Navigation Aérienne. (SABENA)* [1976] ECR 455, [1976] 2 CMLR 98 a.k.a. *Defrenne II*.

2.3. Occupational pension schemes

The legal framework for occupational pension schemes is provided by the Law of 8 June 1999. Self-employed persons pay their contributions on the same basis as workers and have the same pension rights.

Occupational pension schemes which contain regulations that are contrary to the principle of equal treatment between women and men are declared null and void. Article 16 of this Law is an exact and complete reflection of Article 6 of Directive 96/97/EC on the implementation of the principle of equal treatment for men and women in occupational social security schemes, meaning that different levels of benefits are allowed, insofar as they may be necessary to take account of actuarial calculation factors which differ according to sex.

3. Pregnancy and maternity protection, parental leave and adoption leave

The protection of pregnant workers and workers who have recently given birth or are breastfeeding was reformed by the Law of 1 August 2001.³¹⁷

According to this Law, pregnant workers cannot be required to work in the eight weeks preceding the expected date of confinement. Also, workers cannot be required to work for eight weeks following childbirth. The total duration of maternity leave, however, can exceed 16 weeks. This is the case, for example, when the birth takes place after the expected date.

Maternity leave is granted on the basis of a medical certificate and is treated as a period of sick leave. In Luxembourg, absence from work on grounds of sickness is fully paid. Social security schemes and labour law both remain applicable.

During maternity leave, the employee's job has to be preserved. The dismissal of workers is prohibited throughout the period from the beginning of their pregnancy to the end of the maternity leave.

Workers are entitled to two 45-minute breaks per working day if they are breastfeeding after maternity leave.

Parental leave was introduced by law in 1999.³¹⁸ According to this Law, workers who have worked in Luxembourg for at least twelve months at the time of the birth of their child are entitled to parental leave.

Parental leave is an individual right and cannot be transferred from one working parent to the other. The overall monthly parental allowance is paid by the State.

There are two types of paid parental leave. Full-time parental leave is six months and cannot be refused by the employer. Part-time parental leave is twelve months and relies on the employer's agreement. Throughout parental leave, employment relationships are maintained and the worker is entitled to reinstatement or, in the event that this is impossible, similar work corresponding to his/her qualifications must be provided with equivalent remuneration. Workers who do not fulfil the condition of duration of work in order to be entitled to paid parental leave are now entitled to an unpaid parental leave of 3 months.

As the social partners did not issue an opinion on the implementation of the Directive, the Government decided to adapt the current legislation in order to comply with the Directive without such opinion. Parental leave legislation was modified by the law of 19 June 2013.³¹⁹ This law extends the unpaid parental leave from 3 to 4 months. It also implements Clause 6(1) by introducing a right to request changes to her/his working hours and/or patterns for workers when they return from parental leave. Employers have to give their response taking into account both the employer's and the worker's needs. In case of a positive reply, the period of the changes is limited to a period of one year.

The dismissal of workers when on parental leave is prohibited. The Supreme Court of Justice stated³²⁰ that if the employer proves that it is impossible to reinstate the worker in

³¹⁷ <http://www.legilux.public.lu/leg/a/archives/2001/0102/a102.pdf#page=2>, accessed 2 June 2014.

³¹⁸ Labour Code Article L.234-43 – Article L.234-49.

³¹⁹ http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexdpata/Mag/140/213/123192.pdf, accessed 2 June 2014.

³²⁰ Judgment C.S.J. 7 June 2007 No. 31422.

his/her original work, he can propose other work, even if this is of a different kind. In the relevant court case, the worker concerned had refused the proposed new work, in particular because of less favourable career expectations, which was not proved. The contested dismissal was declared valid.

In another case concerning a dismissal, the Supreme Court of Justice held that the prohibition of dismissal does not exclude a dismissal due to the reorganisation of the company involving the removal of the work/position where the employee worked before his parental leave.³²¹ After the period of protection during parental leave, a dismissal due to these reasons remains valid. The worker in question had been dismissed on the day after the end of her parental leave.

Paternity leave is a short period of mandatory leave for fathers.³²² The duration of the leave granted to male employees for the birth of a legitimate or a legally recognised child born out of marriage is 2 days. It is part of the so-called 'leaves for personal reasons' and has the same effect as the normal annual leave.

In case of adoption of a child under the age of 16, the employee has an unconditional right to 2 days of leave (similar to the paternity leave).³²³ If the adopted child is too young to be admitted to the first year of primary school, the adoption leave is extended to 8 weeks for a single adoption and 12 weeks for a multiple adoption.³²⁴ The leave cannot be refused by the employer but must be requested. Only one of the adoptive parents is entitled to take the adoption leave. However, both of the adoptive parents are entitled to take parental leave.

Single adoptive parents are entitled to adoption leave on the condition that the adopted child has not already lived together with him/her before the adoption.³²⁵

Adoptive leave has the same effects as maternity leave. During the adoption leave, the employee receives maternity benefits, which are paid by the State. The employment contract remains intact during the leave and the employer has to keep the same or a similar job available during the leave. On return to work, there is no guaranteed right to improved working conditions. The adoption leave is taken into account for seniority and related benefits. It is also taken into account for the calculation of the legal annual leave.

The employee on adoption leave is protected against dismissal during the period of adoption leave. If the employee does not want to go back to work after the adoption leave, he/she may resign without notice at the end of the leave.

Current legislation in Luxembourg meets the EU standards, with the exception of the current legislation on parental leave, which is about to be amended, however.

4. Statutory schemes of social security

The principle of equal treatment between women and men in matters of social security was introduced by the Law of 15 December 1986.

This Law concerns workers, self-employed persons as well as workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment. Retired or incapacitated workers and self-employed persons are also covered. The pensionable age is the same for women and men (65). No sex-specific advantages are granted. In fact, certain advantages related to children's education mainly favour women since they are still the ones who assume this role.

Bill No. 5155 reforming divorce regulations has been pending since May 2003. One of the aims of this legislative project is to introduce the splitting of pension rights by civil judgment. NGOs have insisted that splitting pension rights should be mandatory and regulated by social law.

³²¹ Judgment C.S.J. 6 December 2007 No. 32095.

³²² *Code du Travail* (Labour Code), Article L.233-16.-1.

³²³ *Code du Travail* (Labour Code), Article L.233-16.-6.

³²⁴ *Code du Travail* (Labour Code), Article L.234-55 (1).

³²⁵ *Code du Travail* (Labour Code), Article L.234-55 (2).

The compliance of national legislation with EU law should be analysed in this area in order to identify possible gaps.

5. Self-employed persons

There is no specific law in Luxembourg on self-employed persons and their treatment. The concept of 'self-employed person' is defined, however (social security scheme – Act on Social Insurance), which implies that self-employed persons are protected against sex discrimination insofar as these specific laws grant such protection.

Self-employed persons have the same rights as employees regarding maternity leave.

6. Goods and services

On 18 December 2007, Parliament adopted the Law that transposes Directive 2004/113/EC. The Law entered into force on 21 December 2007.

According to this Law, discrimination between women and men is prohibited in the access to and supply of goods and services which are available to the public and which are offered outside the area of private and family life. This prohibition does not apply to education.

The Law establishes platforms of dialogue between the Ministries concerned and the entities having a legitimate interest in contributing to the fight against discrimination based on sex.

The Law allowed the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance where the use of that criterion is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. This has been changed in order to comply with judgment of the European Court of Justice in *Test-Achats*.³²⁶

For contracts concluded after 20 December 2009, the expenses related to pregnancy and maternity cannot result in differences in insurance premiums and benefits.

This is one of the few examples where Luxembourg legislation exceeds the requirements of EU law, as the law also applies to media and advertising since the reform of 2012.

On 25 July Bill No. 6454,³²⁷ which aims to amend the law transposing Directive 2004/113/EC in order to comply with the judgment in *Test-Achats* of the Court of Justice of the European Union, was presented to Parliament.³²⁸ The legislative process is still on-going.

7. Enforcement and compliance aspects

As mentioned, the Luxembourg legislator usually implements EU law by adopting the text of the latter. As a result, Luxembourg equality law generally meets European standards. This minimalist approach also implies that the national provisions seldom go beyond the minimum level as contained in the European directives.

Regarding victimisation, national equal treatment law guarantees protection from adverse treatment for complainants as well as for witnesses. This also applies to the field of the access to and supply of goods and services as well as to work and employment.

Directive 97/80/EC on the burden of proof in cases of discrimination based on sex was implemented by a law in 2001. This Law, of 28 June 2001, deals with direct and indirect discrimination based on sex. The Law applies to civil-law proceedings and the administrative procedure concerning the public or private sector in relation to access to employment, pay, professional promotion, access to independent work, working conditions and occupational

³²⁶ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

³²⁷ http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/133/165/113624.pdf, accessed 2 June 2014.

³²⁸ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

social security schemes. According to this Law, respondents have to prove that there has been no violation of the principle of equal treatment between women and men if claimants establish, before the court or another competent authority, facts from which it may be presumed that there has been direct or indirect discrimination. Since 2007, the same rules apply in the field of the access to and supply of goods and services.

According to EU gender equality law, remedies and sanctions have to be effective, proportionate and dissuasive. Luxembourg's gender equality law contains several specific provisions in the event of discrimination based on sex. In the event of a dismissal, the worker can call for the dismissal to be nullified in order to retain his/her job, or if necessary to be reinstated. Concerning job offers, any person who makes an offer which is not in conformity with the principle of equality between women and men is punishable by a fine of EUR 251 to 2 000.

The Law transposing Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services has introduced an innovative provision by allowing victims to choose between a fixed allowance (EUR 1 000) and covering the damage actually suffered as regards moral harm. The second option implies that the claimant will bear the burden of proof.

Regarding access to court, it is worth underlining that non-profit associations and trade unions can, on certain conditions, engage in proceedings on behalf or in support of any victim. Associations can do so in the field of work and employment as well as in the field of the access to and supply of goods and services. Trade unions can only do so in the field of work and employment. Associations should obtain ministerial approval, which will be given on certain conditions determined by law.

No specific body exists regarding gender equality. A national equality body, the Centre for Equal Treatment (*Centre pour l'égalité de traitement*) was established by law on 28 November 2006. The Centre for Equal Treatment is concerned with discrimination based on race and ethnic origin, disability, age, religion or belief, sexual orientation and sex. The CET is directed by a board of five members who are appointed by Parliament.

The Women's Labour Committee (*Comité du Travail Féminin*) consists of women's NGOs, employers' and workers' organisations and ministries. This advisory body is responsible for studying, either on its own initiative or at the Government's request, all matters connected with the work, training and professional advancement of women. This Committee constitutes a very good platform for exchanges between the various actors in the field of gender equality.

Social partners can negotiate collective agreements which can be declared a general obligation. In that case, the sectors concerned must obey the rules thus laid down. The checks carried out before a general obligation is declared relates to the form and not to the content of the deposited agreement.

Any provision which is contrary to the principle of equality between women and men is formally prohibited. Collective agreements must include the principle of equal pay and methods to prevent sexual and moral harassment. It can be considered regrettable that the elaboration of equality plans does not appear among the obligatory measures imposed on the social partners.

In fact, the legal provision including the obligation to refer to the results of negotiation on various matters, such as the application of 'equality plans of women and men', can be considered as not very effective because the social partners mostly comply with this by mentioning that the matters have been discussed. A few exceptions to the above-mentioned principle can be highlighted, however. On the one hand, the provisions as regards parental leave and maternity leave are beyond the minimum required by EU law. On the other hand, one may note that certain texts envisage extensive consultation and dialogue mechanisms with civil society.

8. Overall assessment

Generally, Luxembourg complies with the implementing provisions, although certain adaptations are sometimes necessary. It is regrettable, however, that the European general framework is rarely exceeded at the national level.

It seems that the concern for promoting equality between women and men has decreased in Luxembourg in recent years. As is true for the European level, one can discern a tendency to gather together the various grounds for discrimination in political actions. This approach results in much confusion.

Considering that equality between women and men is a fundamental EU principle, it is important to reinforce this principle. Action could consist of reinforcing the principle of equal pay for example. More than fifty years of dealing with this matter have certainly brought improvement, but the pay gap between women and men remains. As a concrete measure, one could consider introducing an obligation to establish gender equality plans within the framework of collective agreements. Such plans should include measures such as data collection, follow-up activities and regular evaluation and adaptation.

FORMER YUGOSLAV REPUBLIC OF MACEDONIA – *Mirjana Najcevska*

1. Implementation of central concepts

The principle of equality is guaranteed by the Constitution of the former Yugoslav Republic of Macedonia (Article 9). A list of circumstances in which the freedoms and rights of the individual and the citizen may be limited specifies that a limitation must not be discriminatory based on sex, race, colour of skin, language, religion, national or social origin, property or social status (Article 54).

The basic anti-discrimination law is the Law on prevention and protection against discrimination, in force since 1 January 2011. The concepts of direct and indirect discrimination, instruction to discriminate and harassment and sexual harassment are present in the legislation. The definitions are in line with EU law definitions. The concept of positive action is also introduced in the Law on prevention of and protection against discrimination. According to its Article 13, affirmative actions that are justifiable and are taken by the authorities, administration, bodies of local self-government, and public institutions and persons will not be considered as discrimination until factual equality is reached. The main law dealing with equality between men and women is the Law on Equal Opportunities for Women and Men. The first version of this Law was adopted in 2006 and it was changed in 2008. The Law was never actually implemented (not enforced in more detailed measures) and has not produced any visible changes in the field of gender equality. In January 2012, the former Yugoslav Republic of Macedonia adopted the new Law on Equal Opportunities for Women and Men in spite of numerous comments and concerns raised during the public debate (organised only after the Draft Law had entered the parliamentary procedure). According to the introducer of the Draft Law, unlike the previous Law on Equal Opportunities for Women and Men, the new law includes obligatory provisions. Furthermore, the Draft Law transposes three EU Directives: 2002/73/EC, 2000/78/EC and 2004/113/EC.

The Government is continuously adopting new strategies, action plans and annual operational plans for the implementation of action plans.³²⁹

On 27 April 2014, early parliamentary elections were held in the former Yugoslav Republic of Macedonia. The underrepresentation of women during the elections and some problems related to voting practices remain in spite of the clear legal obligations.

Women did not have factual visibility (they were not perceived as a specific vulnerable group) during the elections and gender-related discrimination was not treated as a significant

³²⁹ <http://www.mtsp.gov.mk/?ItemID=BD66FCC3A7FBCB47AB9150CBFECD2C96>, accessed 2 June 2014.

issue in the political parties' campaign activities. Most of the political parties did include gender-related activities in their programmes (except DPA – one of the main ethnic Albanian parties). On 18 March 2014, a declaration condemning hate speech and discriminatory language against women, lesbians, gay men, bisexuals, transsexual people and marginalised communities was signed by several political parties (among which was the main opposition party SDSM, but not the main governing party VMRO-DPMNE). According to the preliminary findings and conclusions of the International Election Observation Mission (IEOM),): 'Gender representation criteria were respected in the election administration bodies. As per legal requirements, every third candidate on parliamentary candidate lists was reserved for the less represented gender. However, women were underrepresented in rallies observed by the OSCE/ODIHR EOM, and gender issues were not raised in campaign programmes.'³³⁰

Gender-based budgeting is part of the Strategy for Gender Equality 2013-2020. So far it has been implemented as a pilot activity in several ministries, which should have submitted a budget statement at the beginning of 2014. However, NGOs claim a lack of transparency of the whole process, a lack of monitoring tools, and a lack of visibility of budget changes in pilot institutions. The main problem is the enormous gap between legislation and its implementation. Some practical steps are contrary to the general legislative intention. For example, among basic measures in the Law on Equal Opportunities for Women and Men is education on equal opportunities. However, in the new (2014-2015) academic year instead of Gender Studies (temporarily closed), a new programme is now offered at the University: 'Sn Cyril and Methodius' – Family studies. This new programme promotes traditional family values and traditional gender roles.

2. Equal pay and equal treatment at work

2.1. Equal pay

The definition of 'pay' introduced in the Directive (Article 2(e)) is included in the Labour Law and corresponds with the definition in Article 2(e). Article 108 of the Labour Law contains a special and explicit provision concerning equal remuneration for men and women, providing that 'an employer has a duty to determine equal remuneration for men and women for the same kind of work or work of equal value.' According to the same Article, all provisions in a contract for employment or in a collective contract, and general actions of the employer that deviate from this rule will be annulled. The equal pay provisions under the Labour Law are also applicable to civil servants.

However, there is a large gap between the formal recognition of the principle of equal pay and its implementation in practice and so far no claims have been brought before the courts. With the amendments to the Law on Minimum Wage, adopted in February 2014, the difference still remains between the minimum wage in the textile industry and all other sectors. Employees in the textile industry (mainly women) will continue to receive 10 % less than all other workers.

2.2. Access to work and working conditions

The Recast Directive has been partly transposed in Macedonian legislation. The transposition is mentioned and could be directly connected to the Labour Law (as the wording of the Directive could be recognised in the Labour Law) and the Law on Employment and Social Protection during Unemployment (Employment Law). With the changes made to the Employment Law in 2010 two new articles were introduced according to which:

- everybody has the right to access to employment without any restrictions according to the principle of equal treatment included in the Labour Law and other laws; and

³³⁰ <http://www.osce.org/odihr/elections/fyrom/118078?download=true>, accessed 2 June 2014.
http://www.most.org.mk/images/MOST/Preliminarna%20izjava_vtor%20krug_28.04.2014_ENG.pdf, accessed 2 June 2014.

- in case of direct and indirect discrimination the citizen has the right to demand compensation, and the burden of proof is on the employer.

The general non-discrimination Article in the Labour Law encompasses selection criteria, recruitment conditions, and treatment at work, promotion, professional training and other benefits, as well as termination of employment. A specific ban on discrimination in vacancy announcements is regulated by Article 24 of the Labour Law (the only exception is on the ground of sex).

The protection provided by this Law covers all aspects of working life and includes all types of employment relationships (both in the private and in the public sector). The protection also covers civil service relationships. Furthermore, equality legislation applies to employees who are deployed to work in Macedonia by an employer who has no seat in the former Yugoslav Republic of Macedonia. Exceptions are only allowed if the sex of the worker is an indispensable precondition for performing the work or service.

Contrary to Article 9 of the Recast Directive, according to the main pension legislation, there are different retirement ages for men and women (62 versus 64 respectively).

2.3. Occupational pension schemes

The pension system in the former Yugoslav Republic of Macedonia is composed of three pillars established by three laws: the Law on Pension and Disability Insurance, the Law on Mandatory Fully-Funded Pension Insurance, and the Law on Voluntary Fully-Funded Pension Insurance. The composition of this three-pillar system was introduced in 2000. The model is based on the World Bank's advice, and it is different from the pillars in the EU countries.

The first pillar is the universal social security fund, a 'pay as you go' type, which is obligatory for persons in an employment relationship and for self-employed persons. The second pillar is a mandatory and fully-funded pension fund with defined contributions which are allotted to individual accounts organised by licensed pension insurance companies. The third pillar includes supplementary voluntary pension schemes, and covers both domestic and foreign citizens between the ages of 18 and 70, regardless of their employment status, on a voluntary basis.

3. Pregnancy and maternity protection, parental leave and adoption leave

Pregnancy, maternity and parental rights are regulated by the Labour Law. The same conditions apply in the case of adoption, commencing on the date of the child's adoption.

Maternity protection mainly complies with EU requirements. On 23 January 2013, the Official Gazette published the Law Amending the Law on Labour Relations (Amendments) concerning protection of pregnancy, birth and parenthood. On 30 December 2013, without any broader and/or public debates, Parliament adopted amendments to the Labour Law concerning prolonged, unpaid parental leave of a maximum of three months until the child reaches the age of three. In spite of the title including the term 'parental', this leave only relates to women. The newly added Article 170-a of the Labour Law, entitled 'Unpaid Parental Leave', states that only 'the female worker' has the right to use this additional parental leave. This formulation therefore prevents the father from using this prolonged leave despite the general title of the new article. The prolonged leave could be up to three months and the mother cannot be dismissed from her job for using this opportunity. Also, an amendment to the Law on Health Insurance was adopted. The financial means for this prolonged leave would fall under a specific programme of the Ministry of Health.

4. Statutory schemes of social security

The former Yugoslav Republic of Macedonia is declared to be a social State and social security is defined in the Constitution. According to Article 34 of the Constitution, 'the citizens have the right to social security and social insurance'. Article 35 of the Constitution

stipulates: 'The Republic takes care of the social protection and social security of citizens under the principle of social justice'.

Equality between insured persons, therefore also gender equality, is among the guiding principles of the former Yugoslav Republic of Macedonia's social security system. Various laws regulate social benefits, such as the Law on Health Insurance, the Law on Social Protection, the Law on Pension and Disability Insurance, and the Law on Employment and Social Protection during Unemployment (Employment Law).

However, the main reasons for excluding people from receiving benefits are unpaid social security contributions and participation in non-remunerated jobs. Since women prevail in such jobs, they are more often deprived of social security.

Regarding family benefits, there is no difference based on sex. As regards survivors' benefits, there are also equal conditions for claiming a widow's and a widower's pension. The only difference is in the age which must be reached in order to be able to claim a survivor's pension for an unlimited period.

Women receive special financial benefits for their third and fourth child. With the last changes to the Law on social protection, the victims of domestic violence will receive lump-sum benefits.

5. Self-employed persons

Self-employed people exercise the same rights under the Law on Pension and Disability Insurance as well as under the Law on Employment and Social Protection during Unemployment (Employment Law).

However, self-employment is often connected with running the family business. To this end, the action plans and support for self-employment favour women's active engagement in the family business. Yet, Macedonian legislation does not recognise helping spouses as a separate category.

Furthermore, with the last changes of the Law on Pension and Disability Insurance, instead of the category 'individual farmer', the phrase 'holder of family farm' is introduced. The same change is introduced in the Law on Health Insurance. As women are head of their household in only 23 % of the cases, this change could introduce new dependence of women and could be a new source of discrimination.

6. Goods and services

The Law on Equal Opportunities for Men and Women as regards access to and the supply of goods and services has implemented all articles of Directive 2004/113/EC.

Equality in the access to and supply of goods and services is also guaranteed by the Law on the Prevention of and Protection against Discrimination. This Law applies to all persons who supply goods and services to the public, both in the public and the private sector, offering goods and services outside the private and family sphere.

7. Enforcement and compliance aspects

The relevant procedure is defined in the Law on the Equal Treatment of Women and Men. According to Article 23 of this Law: 'The procedure based on a written initiative submitted by individuals, citizens' associations, unions and other legally registered entities to establish the unequal treatment of women and men (the procedure further on) is initiated by the Ministry of Labour and Social Policy. The procedure at the Ministry of Labour and Social Policy is carried out by an Attorney'. The procedure is completed by a written opinion in which the state of affairs is established by the Attorney and his/her opinion on the circumstances of the case is included.

Protection through litigation may be enforced in accordance with the Labour Law. In the Labour Law it is stressed that it is the worker – the individual victim of the discrimination – who is the one who can initiate proceedings before the competent court of law.

Civil servants can initiate an administrative procedure and submit an administrative complaint. The administrative procedure and complaint are subject to strict time limits, but the procedure and complaint are not complex and also not very costly.

Persons who feel discriminated against on the ground of their sex may also seek protection from the Ombudsperson, or before the Commission for protection against discrimination which has been established according to the Law on the Prevention of and Protection against Discrimination. According to this Law, the burden of proof shifts to the defendant in a claim filed by a person claiming to have suffered discrimination if the alleged victim has presented credible facts and circumstances, whereas the defendant has to provide evidence that the disputed decision is based on a reason other than the sex of the person.

The shifting of the burden of proof was recently and partially introduced in three laws. The Labour Law envisages this shift in Article 11(1) and (2), while the Law on Social Protection regulates it in its Article 23. An intriguing piece of legislation is the Child Protection Law: its Article 9-I, first paragraph, stipulates this shifting of the burden of proof, while in the second paragraph its application is excluded in misdemeanour and criminal proceedings. This leads to the conclusion that the shifting of the burden of proof is only applicable in administrative procedures and litigation.

According to the Law on the Prevention of and Protection against Discrimination, in all relevant proceedings the victims of discrimination may formally be supported by trade unions and civil society organisations, which can join or initiate a discrimination case on behalf of a person who has been discriminated against. When the rights of many individuals have been violated, the organisations mentioned can initiate discrimination proceedings before a court. Victimisation is covered by the Law on the Prevention of and Protection against Discrimination (Article 10).

The Legal Representative for Equal Opportunities for Women and Men formally functions in the Ministry of Labour and Social Policy and a procedure for individual claims has been laid down. However, there is no information on the functioning of this body.

8. Overall assessment

The general situation could be described as a process of continuous adoption of and changes to many laws, with the explanation that they are transposing EU directives, and of continuous adoption of many strategies and action plans related to gender equality. However, there are no envisaged funds for the implementation of the strategic priorities, or established procedures for accountability and responsibility regarding the implementation of action plans or/and annual operational plans.

In addition, the main concern is the increased trend of promoting regressive traditional models for the division of roles and family values through interventions in laws and policies, as well as through a large number of media campaigns supported with significant funding from the national budget.

The joint activities of the representatives of the former Yugoslav Republic of Macedonia's Orthodox Church and the Government continue.

MALTA – Peter G. Xuereb

1. Implementation of central concepts

The main laws (Acts) passed by the Maltese House of Representatives in order to implement or transpose the relevant EU Directives into Maltese law are the Employment and Industrial Relations Act 2002 (hereafter: EIRA)³³¹ and the Equality for Men and Women Act 2003

³³¹ Chapter 452 of the Laws of Malta (hereafter EIRA).

(hereafter: EMWA).³³² The implementation was completed by the passing of a number of pieces of subsidiary legislation in the form of Legal Notices under powers conferred by these main Acts of Parliament. This legislation viewed *in toto* seeks (in the view of the expert largely successfully) to implement all the main concepts and provisions of the EU gender *acquis*.

Some rationalising has taken place over the years. The Equal Treatment in Employment Regulations of 2004 (the ETE Regulations)³³³ plugged many of the gaps, generally bringing all concepts and definitions into line with EU law. Later Acts of Parliament amending the primary legislation in April 2009 brought the EIRA and the EMWA themselves more fully into line with EU law. These were Act No. IV 2009, amending the EMWA, and Act No. V 2009, amending the EIRA. New definitions were included for discrimination of all kinds. In 2011, the Procedure for Investigations Regulations 2011 were adopted (Legal Notice 316 of 2011), governing the conduct of investigations by the National Commission for the Promotion of Equality (NCPE), and further empowering the Commissioner for the Promotion of Equality for the purpose. More recent legislation includes detailed regulations on equal treatment in employment, on equality regarding various types of leave, including maternity leave, and the extension of equality to employees in the public service (both full-time and part-time, fixed-term or indefinite).³³⁴ It further includes legislation on access to goods and services and their supply.³³⁵ Proposed legislation includes a Gender Identity Act.³³⁶ In the above legislation one will find the definitions and main rules relating to discrimination, positive action (permitted both by EMWA and by the Constitution), harassment and sexual harassment, and all further principles and rules implementing the various directives. The definitions in the law of the various concepts such as discrimination (direct and indirect), harassment and sexual harassment, and instruction to discriminate are faithful reproductions of the definitions in EU law.

2. Equal pay and equal treatment at work

2.1. Equal pay

The Equal Treatment in Employment Regulations (ETE Regulations), made under the EIRA, spell out the position as therein envisaged. The EMWA is also pertinent, as the wide wording of its provisions catches all terms or conditions which infringe the equal pay principle through the use of job classification schemes.

The ETE Regulations were amended in 2007 to establish clearly, via Article 3A ('It shall be the duty of the employer to ensure'), the obligation to ensure equal treatment in pay for equal work, and, via Article 12A ('It shall be the duty of the employer to prevent'), the obligation upon all employers to take all measures to prevent breaches of the relevant provisions in the ETE Regulations (and hence in the EIRA).

Neither the EIRA nor the EMWA define the concept of 'work of equal value'. Nor, in the case of the ETE Regulations, is there a definition of the phrase therein used in Article 3A, namely 'work to which equal value is attributed'. There has been no reported case law involving gender where the Courts have had to establish this. However, in *Neil John Pavia v Mediterranean Aviation Co. Ltd.*, an airline pilot alleged unequal pay and the Tribunal applied

³³² Chapter 456 of the Laws of Malta (hereafter EMWA).

³³³ http://www.google.com.mt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fwww.justiceservices.gov.mt%2FDownloadDocument.aspx%3Fapp%3Dlom%26itemid%3D11229&ei=VDpjVP7ZK8fyPK_SgTg&usq=AFOjCNEtWuvnWcApalJndj_54cp034dOwQ&bvm=bv.79189006.d.ZWU&cad=rja accessed 10 November 2014.

³³⁴ All available at Laws of Malta website at <http://www.justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono&gotoID=452>, accessed 25 May 2013.

³³⁵ Available at <http://www.justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono&gotoID=456>, accessed 25 May 2013.

³³⁶ Act IX of 2012 amended the EMWA so as to provide for gender identity as a prohibited ground of discrimination.

Article 27 of the EIRA.³³⁷ It examined all relevant contracts and job descriptions, and looked into technical details relating to descriptions of aircraft and pilot classes. It applied the comparator principle and sought to locate the complainant's salary in the light of the salaries paid to colleagues in a similar situation (other pilots assigned to another type of aircraft), in terms of qualifications and experience. It found that there was a case of unequal pay for no objective or justifiable reason, and quantified the compensation payable. The Tribunal did not associate the discrimination with any of the traditional grounds of discrimination, pointing out Article 27 of the EIRA does not require such a ground to be identified or even to be a substantive component of the prohibited practice.

The ETE Regulations apply, in virtue of Article 1(2) of the Regulations, to all persons as regards both the public and the private sector and including service with the Government.

2.2. Access to work and working conditions

The principal law is the EIRA. This provided for the possible extension of its provisions to public officers, which has been done. The other main piece of legislation in the area is the EMWA, which contains provisions that overlap with those of EIRA and apply to all employees. 'Employment' is defined broadly to include self-employment. The EMWA contains the main provisions on direct and indirect discrimination, victimisation, harassment and sexual harassment, positive action, the validity of collective agreements, and the spouses of self-employed workers, and it includes specific provisions prohibiting discrimination by educational establishments, providers to the public of goods and services and accommodation facilities, and for access to financial services. Together, the two Acts provide for the duties of employers, as well as remedies including the right to compensation. The EMWA provides expressly that 'positive action' may be taken to redress a structural disadvantage. No specific measures have as yet been adopted on this score, but the ETE Regulations now fully reflect EU law on the matter. On the other hand, the present Government has introduced free – i.e. Government-funded – childcare for all, and this will clearly benefit women most since they have traditionally forgone working when the family finances did not run to paying for childcare.

2.3. Occupational pension schemes

The relevant legislation is the Equal Treatment in Occupational Security Schemes Regulations,³³⁸ enacted under the powers given by the Social Security Act.³³⁹ The extension of the material scope to occupational social security schemes is reflected in Maltese law. Now in force is the Retirement Pensions Act, Act XVI of 2011, which in part implements the Occupational Pensions Directive, Directive 2003/41/EC and related measures. The (on-going) pension reform, currently stalled, is designed to introduce compulsory occupational ('second pillar') and private ('third pillar') pensions, but so far no developments have occurred.

3. Pregnancy and maternity protection, parental leave and adoption leave

Maltese law provides for all the different types of leave and seeks to dovetail them in the manner indicated by relevant EU legislation. The period of maternity leave was increased in two stages, from fourteen weeks to what is now a period of eighteen weeks, in place since January 2013.³⁴⁰ Previously, the employer paid the employee's wages in full during the period of maternity leave. The Government has now assumed part of this cost in return for an

³³⁷ Industrial Tribunal, Decision No. 2003, Case No. 2627/LC, of 1 June 2010, available (in Maltese) at http://industrialrelations.gov.mt/industryportal/industrial_relations/industrial_tribunal/rulings/trib_dec_2010.aspx accessed 5 September 2013.

³³⁸ Legal Notice 317 of 2005.

³³⁹ Chapter 318, Laws of Malta.

³⁴⁰ Regulation 2 of the Protection of Maternity (Employment) (Amendment) (No.2) Regulations 2011, Legal Notice 503 of 2011, amending Regulation 6 of the Protection of Maternity (Employment) Regulations of 2003, Legal Notice 439 of 2003.

increase in the employer's social security contributions. This could lead to longer periods of maternity leave being stipulated by law in future.

The rights to parental leave are found in the Employment and Industrial Relations Act of 2002 and in Regulations made thereunder, including the Parental Leave (Entitlement) Regulations 2003.³⁴¹ The Parental Leave Entitlement Regulations refer to 'parental leave on the grounds of birth, adoption, fostering or legal custody of a child' (Regulation 4(1)), so that no distinction is made between the different possible reasons, as set out, for the claim of 'parental' leave. In all cases, it is 'parental leave'. This leave is distinct from other leaves, such as maternity leave.

Regulation 9(2) provides that 'during the period of parental leave, an employee shall not, upon the resumption of duties at the workplace, be entitled to any other leave, bonuses or allowances and shall not avail himself of such entitlement which might have accrued during such period'.

There is a public/private sector difference, with twelve months available to public-sector employees while a maximum of four months is statutorily available to private-sector employees. Parental leave under the Parental Leave Entitlement Regulations is a four-month period of leave given to a parent in order to enable that parent to personally care for a child below the age of eight. It is separate from other leaves. According to the Public Service Management Code, which relates to public-sector employees, employees who have served for twelve months are permitted up to twelve months unpaid parental leave. Those who immediately prior to the utilisation of parental leave avail themselves of the paid maternity leave entitlement, are required to put in six months of service if they wish to run parental leave after maternity leave. The six months of service must be worked in one aggregate period, either immediately before or immediately after the utilisation of the parental leave or the five-year unpaid career break to which parents or legal guardians are entitled under the Public Service Management Code.

As to the implementation of Directive 2010/18, the Parental Leave Directive was implemented in Malta by way of amendment of the Parental Leave (Entitlement) Regulations 2003, the amendments of which entered into force on 8 March 2012. This was facilitated by the Parental Leave Entitlement (Amendment) Regulations of 2011,³⁴² passed under powers given by the principal Act, namely the Employment and Industrial Relations Act 2002.

Parental leave must be availed of in established periods of one month each (Regulation 4(1)). Unless otherwise prescribed by collective agreement, the employer together with the employee may decide whether to grant the parental leave on a full-time or a part-time basis, piecemeal or in the form of a time-credit system. Therefore, agreement, collective or in default individual, is at the basis of the mode of enjoyment.

According to the Public Service Management Code, for public employees with at least twelve months of service are allowed to avail themselves of a maximum of twelve months unpaid parental leave on the grounds of birth, adoption, legal custody, and foster care of children who are under the age of eight. Unpaid parental leave may be utilised in aggregates of four-month, six-month or nine-month periods, or the maximum of twelve months. The period of parental leave chosen may only be taken in one period and may be shared by both parents. When parents apply for parental leave, the selected period must be declared up front. Any outstanding parental leave that is not utilised (from the twelve-month entitlement) is forfeited and may not be used at a later date, unless covered by specific other provisions. The maximum of twelve months of unpaid leave may be availed of in respect of each child. By way of exception, four months of the parental leave entitlement may be broken down in periods of one month at a time, and until the child is eight years old. The director concerned, together with the employee, may decide that these four months are granted on a full-time or a part-time basis, in a piecemeal way or in the form of a time credit system.

³⁴¹ Parental Leave (Entitlement) Regulations 2003, as amended by the Parental Leave Entitlement (Amendment) Regulations of 2011, which amendments came into force on 8 March 2012. Legal Notice 204 of 2011.

³⁴² Legal Notice 204 of 2011.

There is a minimum statutory notice period of three weeks. For public employees taking unpaid leave, the Public Service Management Code provides that employees are required to give at least three months' notice, except where such leave does not exceed three months, in which case a three-week notice period would suffice. The employee must have been in the employment of the same employer for a continuous period of at least twelve months.

As to additional measures addressing the specific needs of adoptive parents, there is a rule stipulating the form of evidence required to be given to the employer (Regulation 5). Also, the Public Service Management Code makes provision for a right to eighteen weeks' paid adoption leave, and makes provision for the special needs of parents involved in international adoption.

4. Statutory schemes of social security

The Social Security Act is deemed to cover all the relevant risks and the general principle of equality between men and women is applied.³⁴³ This law applies to all persons who work for an employer for eight hours or more per week. This likely has the effect of ruling out of its operation (and protection) many female workers who work few hours with the same employer per week (for example, as home helps). In general, Maltese law has in the past not addressed the matters referred to in Article 7(1) of the relevant Directive, i.e. the exclusions. However, the Government has declared its intention to abide by its obligation under the Directive to periodically examine the matter of the exclusions. The statutory scheme was amended by the Social Security (Amendment) Act of 2006 to provide for equal retirement ages and for the gradual (phased-in) increase in the retirement age to 65 for both men and women.

5. Self-employed persons

Directive 2010/41 was sought to be transposed by the amendment of the Equality for Men and Women Act of 2003, Chapter 456 of the Laws of Malta, by the Equality for Men and Women (Amendment) Act of 2012; and by the Equal Treatment in Self-Employment and Occupation (Amendment) Order 2012, which amended the ETSEO Order of 2007. The first amending Act introduced a new definition of 'self-employed worker' into Article 2, in a manner that combines in one provision Paragraphs (a) and (b) of the Directive. It is expressly stated in the definition that this meaning is 'in line with Directive 2010/41 of the European Parliament and the Council of 7 July 2010'. The Equal Treatment in Self-Employment and Occupation (Amendment) Order of 2012 amended the ETSEO Order of 2007 in order expressly to bring the law into line with the Directive. The broad effect of the above legislation was to apply many of the provisions of the Equal Treatment in Employment Regulations to the self-employed and to their spouses, and to implement Directive 2010/41.

The Industrial Tribunal has now delivered its ruling in the *Psaila Savona Case*.³⁴⁴ This case had been pending for four years, only to end with the Tribunal deciding in March of this year that it had no competence to hear the case on the merits since there was no employment relationship between the parties but rather a consultancy agreement. In effect, the Tribunal held that there was no contract of service and therefore no employer-employee relationship, so that the relationship was not governed by the law relating to employment relationships.

³⁴³ Social Security Act, Chapter 318 of the Laws of Malta.

³⁴⁴ A. Massa *Tribunal takes four years on pregnant woman's case. And then it decides it has no jurisdiction over sacked mother's claim* Sunday Times of Malta, March 16, 2014, 00:01 available at: <http://www.timesofmalta.com/articles/view/20140316/local/Tribunal-takes-four-years-on-pregnant-woman-s-case.510749>, accessed 15 July 2014. *Av Dr Anika Psaila Savona v. CHI Ltd.* Case Number 2757 /MF, Decision Number 2275, Industrial Tribunal, 3 March 2014, available at: <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CD4QFjAC&url=http%3A%2F%2FIndustrialrelations.gov.mt%2Fdownload.aspx%3Fid%3D2262&ei=ba5gU-noEKOR4AT04YHoDg&usq=AFQjCNEUnT-xFLCMyMEf4NmJdg9MtxWqqA>, accessed 15 July 2014.

Nor, it was held, did the Industrial Tribunal have competence to decide disputes other than those arising from a contract of employment.

Dr Anika Psaila Savona, a lawyer, had alleged unfair dismissal on grounds of pregnancy. Her employer, a leading hotel group, argued that she was not an employee but a 'legal consultant' operating as a self-employed person, and that she was therefore not covered by employment legislation, as well as that she was not dismissed on grounds of pregnancy.

The case was to test the limits of the anti-discrimination provisions of the Employment and Industrial Relations Act of 2002 (Chapter 452 of the Laws of Malta, hereafter 'EIRA') and the Protection of Employment (Maternity) Regulations by reference to the definitions of 'employer', 'employee', 'contract of service' and 'contract of employment'.

The claimant argued that irrespective of profession and designation, and even the signing by her of a 'consultancy agreement' she was in fact and in law an employee at the time of her dismissal, albeit as a highly qualified professional. The Employment Status National Standard Order of 2012³⁴⁵ in Paragraph 3 sets out a presumption in favour of an employment relationship; the criteria to be applied in supporting the presumption centred on the concepts of dependent work.

The proviso added to the definitions in the EIRA of 'contract of service' and 'contract of employment' by the Employment Status National Order (Legal Notice 44 of 2012) appeared possibly to indicate an outcome in favour of the claimant if the facts showed that in the course of carrying out her duties she acted under instruction to a high degree. Legal Notice 44 had the object of 'clarifying' certain provisions of the EIRA. No preliminary reference was made, since the Tribunal dismissed the case for lack of jurisdiction. The Tribunal also argued that as no employment was present, the Industrial Tribunal was not the proper forum. The claimant has since filed a case before the civil court, where the possibility of a reference to the Court of Justice may arise.

6. Goods and services

The transposition of Directive 2004/113/EC was first delayed but then effected with the adoption of the Access to Goods and Services and their Supply (Equal Treatment) Regulations, 2008 (hereafter: AGSS Regulations).³⁴⁶ Existing legislation had already covered particular issues. For example, the EMWA made provision regarding banking and financial services establishments offering goods, services or accommodation and protection against sexual harassment at those places (Article 9); Article 10 covers advertisements; Article 8 deals with educational establishments and similar entities and access to courses, awards, selection and assessment. Some other provisions of relevance were in force, such as that on employment agencies in the Equal Treatment in Employment Regulations of 2004. Article 3 of the Directive is implemented by reproduction in Regulation 1 of the AGSS regulations.

Article 5 of the Directive has been transposed in Regulation 5 AGSS. These Regulations were amended by means of the Access to Goods and Services and their Supply (Equal Treatment) (Amendment) Regulations 2012³⁴⁷ in order to bring the said Regulations into line with the *Test-Achats* ruling³⁴⁸ and the Guidelines issued by the European Commission. On 13 February 2012, the MFSA amended Insurance Rule 6 of 2011 on the Scheme of Operations Relating to the Business of Insurance so as to refer to the Guidelines issued by the European Commission to clarify that the unisex rule contained in Article 5(1) of the Directive is to apply to all insurance contracts entered into after 21 December 2012.

³⁴⁵ S.L. (Subsidiary legislation) 452.108 of 31 January 2012, Legal Notice 44 of 2012, as amended by Legal Notices 110 and 364 of 2012.

³⁴⁶ Legal Notice 181 of 2008.

³⁴⁷ L.N. 417 of 2012.

³⁴⁸ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

7. Enforcement and compliance aspects

The EIRA did not make the breach of Articles 26 or 27 a criminal offence. It did provide for civil liability in Article 30, which empowers the Industrial Tribunal to give relief. Further to this, Article 10 of the ETE Regulations, made under the EIRA, also adds a right of access to the Civil Court for relief by way of injunction and/or compensation. These Regulations, via Article 14 of the Regulations, also render all breaches of the Regulations – and therefore also of the ‘equal pay for same or equal work’ principle – a criminal offence punishable by a fine (*multa*) not exceeding EUR 2329.37 or imprisonment for a period not exceeding 6 months, or both. Without prejudice to remedies available under Article 30 of the EIRA, Article 19 of the EMWA grants a right of access to the competent court of civil jurisdiction (the ‘Civil Court First Hall’) for an injunction and/or compensation. The time limit for the bringing of the action is four months ‘from the alleged breach’, according to the ETE Regulations. While it is considered that the prospect of imprisonment provides an adequate deterrent, it cannot really be said that the prospect of the fine is any real deterrent, due to its rather low ceiling.

Under the Protection of Maternity (Employment) Regulations of 2003, it is an offence for any person to contravene the Regulations, punishable by a fine of not less than EUR 465.87, a minimum considered by many NGO experts to be too low to provide a deterrent. Any breach of the Parental Leave Regulations is an offence rendering the offender liable to a minimum penalty of EUR 116.47 and a maximum penalty of EUR 1164.69, and again it can be seriously doubted whether this provides sufficient deterrence in practice.

Both in terms of the EIRA and of the EMWA, avenues for redress include the Industrial Tribunal and the Civil Court; the Civil Court sitting in its constitutional jurisdiction; the Constitutional Court; the Public Service Commission (for the public service) and the Ombudsman (whose recommendations are non-binding). The Industrial Tribunal and the Court are also accessible with the assistance of the NCPE; Malta’s ‘equality body’ as established under the EMWA. It possesses powers of investigation and mediation and, with the victim’s approval, of suit. Until a few years ago, the annual reports of the NCPE used to declare that some one hundred or so complaints were filed each year in the gender context and that a large number of these were settled after mediation by the NCPE. The numbers seem to have dropped markedly in recent years to a few dozen. The NCPE annual report for 2013 has now been published.³⁴⁹ Meanwhile, it was announced in Parliament that the NCPE would have its brief widened, so that it will become the main Human Rights Body for Malta, under the new title of National Commission for Equality and Human Rights.³⁵⁰ However, various NGOs objected that the NCPE is not fully independent of the Government, and Government is said to be revising its plans.³⁵¹

Regulation 10 of the ETE Regulations applies to all situations of sex discrimination in employment and vests the right to access the Industrial Tribunal (without prejudice to the right to bring an action in the Civil Court for an order to cease and desist) for a declaration of *nullity of any contract, collective agreement or clause as such, and for compensation*. As is usual, it places the burden of proof on the employer once the claimant proves facts from which it can be presumed that ‘there has been direct or indirect discrimination’.³⁵² Previous reports have raised the issue of the lack of clarity as to the wording and potential application of the rule on the burden of proof in judicial proceedings in the context of discrimination. A recent amendment of the Equality for Men and Women Act seeks to place the burden of proof of non-discrimination even more clearly on the defendant after the claimant shows facts suggesting discriminatory treatment, bringing the law squarely in line with EU law on this

³⁴⁹ The NCPE Annual Reports can be accessed on the NCPE website at http://msdc.gov.mt/en/NCPE/Pages/Our_Publications_and_Resources/NCPE_Annual_Reports.aspx, accessed 10 November 2014.

³⁵⁰ Times of Malta, Tuesday, 27 May 2014, p.8.

³⁵¹ Caroline Muscat, *Human Rights Body has to be Independent*. Times of Malta, Saturday 31 May 2014 <http://www.timesofmalta.com/articles/view/20140531/local/Human-rights-body-has-to-be-independent-521268>, accessed 2 June 2014.

³⁵² The same applies in the context of maternity, parental and urgent family leave, by Regulation 10(4).

point.³⁵³ As to time limits, the EIRA and the ETE Regulations 2004 set a peremptory period of ‘within four months of the alleged breach’ for the filing of the complaint or the bringing of the action. The EMWA, which applies also beyond the employment context, sets no time limit.

In 2011, Parliament adopted the Procedure for Investigations Regulations 2011 made under the power conferred by Article 18(3) of the EMWA, which lay down important provisions for the carrying out of investigations under the Act, giving the Commissioner for the Promotion of Equality the power to require information or documents and to summon persons to give information orally.

Under the AGSS Regulations any contractual provision, internal rules or governing rules that breach EU law are rendered null and void by operation of law, and are unenforceable, in virtue of Regulation 10(2). Enforcement of good practice, for example with regard to exclusion from places of leisure and entertainment for reasons of race, is another matter.

The NCPE and other associations, organisations or legal entities having a ‘legitimate interest’ may engage themselves on behalf of or in support of a complainant in all judicial proceedings, with the complainant’s approval. There is no clear provision engaging the ‘social partners’. While the trend is to regard collective agreements as binding, they cannot be said to have been employed as such to implement Union Law. Also, the dearth of cases shows the reluctance of complainants to sue or authorise others to sue on their behalf. Otherwise, remedies include an order to cease and desist and/or, in the eventuality, reinstatement and compensation.

However, in general it can be said that where the law imposes a penalty (a fine) such penalties are surely too low to sufficiently dissuade and deter in all cases. Imprisonment is laid down for cases of victimisation, harassment or sexual harassment.

8. Overall assessment

Categorical assessment is impossible without sufficient court judgments. Also, it remains true that the manner of implementation in general has itself given rise to some lack of clarity in the law. There are the respective but overlapping spheres of the EIRA and the EMWA. Regulations for giving ‘better effect’ to the primary legislation have been made under the EIRA and under the EMWA. The EIRA regulations effectively updated the principal legislation’s key concepts and brought these concepts closer to the definitions in the respective EU directives. The situation was much improved by the enactment of Acts IV and V of 2009. Still, where penalties are set down, they are regarded as weak in the estimation of many, such as to provide no truly effective deterrent. Also, European law really does need to take a hand in solving the problem that complainants are reluctant to take up their rights and pursue remedies through the national tribunals and courts,³⁵⁴ for example by examining the use of public interest actions. Having said this, the overall comment should be that the Maltese courts and tribunals have the tools at their disposal to fully ‘apply’ Union law by properly interpreting and applying the Maltese law in place as well as giving effect to directly applicable or directly effective Union law.

THE NETHERLANDS – Rikki Holtmaat

1. Implementation of central concepts

In the Netherlands, the earliest equal treatment legislation dates from 1975, when the Equal Pay Act came into force. In 1980 this Act was included in the Equal Treatment Act (ETA) for

³⁵³ *Onus now on defendants to prove non-discrimination*, Times of Malta, Tuesday 27May 2014 27, p. 8.

³⁵⁴ See: NCPE study entitled *Under-reporting of discriminatory incidents in Malta – a research study*. ISBN Number: 978-99909-89-40-3. Available on NCPE website at www.equality.gov.mt, accessed 30 May 2013.

Men and Women in Employment (amended several times), which was followed in 1994 by a General Equal Treatment Act (GETA) also covering several other grounds and extending the scope to the area of goods and services. In 2004 the ETA and GETA were amended and brought into line with the newest Directives.³⁵⁵ For a long time now, the Dutch Government has been in the process of developing an Integration Act in which all of the existing equal treatment laws (including laws prohibiting discrimination on the grounds of age and disability) will be integrated. In the Coalition Agreement of November 2012 between liberals and social democrats, there is no mention of this Integration Act, so it seems that the new Government does not regard it as a priority issue.³⁵⁶

In 2008, the Government of the Netherlands received a letter from the European Commission, pointing out alleged inadequacies in the transposition of the equal treatment directives.³⁵⁷ In this letter, the Commission *inter alia* criticised the definitions of direct and indirect discrimination in the Dutch equal treatment laws, and the overly broad scope of some legal exceptions in the ETA (including the exception for personal services). In reaction to this procedure, the provisions of the equal treatment laws that were considered too broad were brought into line with the Directives in November 2011, including the exception as regards personal services.³⁵⁸

The GETA and the ETA explicitly permit positive action on certain conditions; this is formulated as an exception to the prohibition on making a distinction on the ground of sex. These conditions imply that (a) a positive measure must be aimed at diminishing or eliminating disadvantages for women, (b) the disadvantages must be linked to sex and (c) the measure must be proportionate to the aim. There is no obligation or requirement to introduce and effectuate positive action programmes in the equal treatment laws. In 2011, Parliament adopted an amendment to the Civil Code in which it is stipulated that public and private limited companies with more than 250 employees have an obligation to strive for 30 % of women on their board of executive directors and on their advisory board.³⁵⁹ There is no sanction when this target is not met.

Instructions to discriminate are prohibited by law, as is discrimination itself. The term 'instruction' is not defined. The (then) Equal Treatment Commission (ETC)³⁶⁰ suggested that the legislator had interpreted this word too restrictively (in the Memorandum of Explanation to the EC Implementation Bill) and that the prohibition of instruction to make a distinction should also include a prohibition of the *passive toleration* of an existing discriminatory situation or act.³⁶¹ As yet, there is no case law to clarify this point.

Harassment and sexual harassment are prohibited by law in the same way as discrimination itself. The definition of (sexual) harassment in the ETA and in the GETA is quite similar to the definition in the EU directives. However, there is one difference as compared to the directives' definitions: the word 'unwanted' is lacking in the definition of sexual harassment. The Government believes that this would place quite a heavy burden of proof on the victim to show that the sexual harassment was (subjectively) unwanted. Instead, the Government wanted to emphasise that sexual harassment, objectively speaking, is always an offence. Therefore, leaving out 'unwanted' does not seem to be a problem, since this offers

³⁵⁵ Act of 21 February 2004 regarding the amendment of the General Equal Treatment Act and some other Acts in order to implement Directive 2000/43/EC and Directive 2000/78/EC.

³⁵⁶ In December 2013, a letter was sent to Parliament by the Minister of the Interior and Kingdom Relations, indicating that other legislative projects received prioritisation, given that the proposed Integration Act would not result in any substantial changes. See *Kamerstukken II* 2013/14, 28 481, no. 23.

³⁵⁷ Letter dated 31 January 2008 (no. 2006-2444), with reference to the infringement procedure of 18 December 2006, infringement no. 2006/2444.

³⁵⁸ Act of 7 November 2011, published in the Law Gazette 2011, 554. In the Memorandum of Explanation, it is emphasised that the proposal is meant to streamline, not to change any of the substantive content of equal treatment legislation.

³⁵⁹ Act of 6 June 2011, published in the Law Gazette 2011, 275.

³⁶⁰ In 2012, the ETC was abolished and replaced by the Netherlands Institute for Human Rights (NIHR), which took over its functions as regards equal treatment issues. See Section 7 of the current report.

³⁶¹ ETC Advice 2001-03, p. 6 and 2001-04, p. 4.

more protection to potential victims of discrimination/sexual harassment. Notwithstanding this clear position of the Government that sexual harassment is, *objectively* speaking, an offence, the Dutch Supreme Court, in a judgment in 2009, interpreted the definition of sexual harassment in such a way that it left some room for the accused to adduce subjective arguments (concerning the motive for the behaviour in question).³⁶²

2. Equal pay and equal treatment at work

2.1. Equal Pay

The definition of Article 2(2) Recast Directive has not been transposed literally into Dutch equal treatment legislation. Pay has been defined in Article 7(2) ETA as ‘any remuneration owed by the employer to the employee in return for the labour of the latter’.³⁶³ Many possible elements of pay are included, e.g. the payment of expenses.³⁶⁴ The then ETC held that also remunerations ‘in kind’ (e.g. the use of a lease car) are included in the concept of pay.³⁶⁵ Dutch courts and the Netherlands Institute for Human Rights (NIHR) closely follow CJEU case law regarding the meaning and scope of the concept of pay.³⁶⁶ The main Dutch equality body has conducted extensive research into the causes and consequences of unequal pay in certain sectors of the labour market³⁶⁷ and is active in developing methods for assessment where and how equal pay occurs.

In the Netherlands, a two-way approach is used in order to combat unequal pay practices. The first approach is through concrete comparison of the salary of a person of one sex to that of a person of another sex, which can be found in Articles 7-10 ETA and Articles 7:646-7:649 Civil Code. This means that there is a right to equal pay for work of equal value or of approximately equal value for workers who work for the same employer. There is an obligation to use (standardised) work classification schemes to evaluate the value of jobs that are being compared. However, the then ETC held several times that in fact the job classification system itself was discriminatory since it was not gender neutral.

The second approach is the comparison of (apparently neutral) employment conditions concerning any kind of remuneration for work, e.g. a practice granting extra pay for workers who are prepared to work overtime. This type of conditions can be contested under the provisions prohibiting indirect sex discrimination. In that case, it will be tested whether there is an objective justification. The normal (stringent) objective justification test is applicable here. No justifications for pay differences are accepted, as soon as it is established that these differences do in fact exist and are related to sex.

2.2. Access to work and working conditions

The GETA and ETA both prohibit unlawful distinctions in the context of employment. These Acts apply to all sectors of public and private employment and occupation, including contract work, self-employment and military service. The ETA also covers the area of access to professional education and the conditions in which this education takes place (including examinations). In addition, the ETA covers the area of occupational pensions (as part of equal pay). Finally, the GETA covers membership of or involvement in an employers’ organisation or trade union, or a professional occupational organisation, as well as with regard to the benefits which may arise from that membership or involvement.

³⁶² Supreme Court of the Netherlands (*Hoge Raad*) 10 July 2009, ECLI:NL:HR:2009:BI4209. To be found at: http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=kenmerken&vrije_tekst=BI4209, accessed 31 May 2014.

³⁶³ Pension payments or entitlements are included in this definition.

³⁶⁴ *Kamerstukken II*, 1973/74, 13 031, no. 3, p. 4.

³⁶⁵ ETC Opinion 2000-45.

³⁶⁶ See I.P. Asscher-Vonk & W.C. Monster *Gelijke Behandeling bij de Arbeid*, Kluwer, Deventer 2002, p. 195.

³⁶⁷ See e.g. Opinion 2011-54 concerning an investigation that the ETC conducted of its own accord into the general situation of unequal pay in the sector of general hospitals.

2.3. Occupational pension schemes

As a consequence of the *Barber* judgment³⁶⁸ and Directive 96/97/EC, in 1998 some provisions concerning occupational pension schemes were included in the ETA (Articles 12a/12e ETA). The intention of this amendment was to transpose the *acquis* as precisely as possible and to add nothing more in terms of the protection or reparation of women's rights than what is required by the directives and the case law of the CJEU. The exceptions in this legislation are in accordance with the directives.

3. Pregnancy and maternity protection, parental leave and adoption leave

Pregnant women and women who have recently given birth are protected by equal treatment legislation, since this legislation states '(...) the term direct *distinction* on the ground of sex must also be understood as a distinction on the ground of pregnancy, childbirth and maternity.'³⁶⁹ This means that in respect of all the aspects of the employment relationship that are covered by the GETA and ETA, pregnant women and mothers are protected against all forms of discrimination (i.e. including indirect discrimination and (sexual) harassment). In the Civil Code, Article 7:670(2), there is an explicit prohibition on dismissing a woman during pregnancy. There is no explicit right to return to the same or a comparable job after having taken pregnancy or maternity leave; the Government did not deem it necessary to implement these provisions in the Directive since this right is guaranteed under the right not to be treated unfavourably with respect to any condition of work, or the prohibition on dismissing somebody because of pregnancy, childbirth or motherhood. The European Commission does not share this view and started an infringement procedure in January 2013, as it considered the Dutch system to be insufficient as regards the protection of the right to return to the same or comparable job.³⁷⁰ On 22 October 2014 the CJEU handed down its judgment and dismissed the action as inadmissible because not all of the formalities of Article 258 TEU were complied with. Specifically, the Commission did not identify any rule of Dutch law that in its content or application was contrary to the wording or the objective of the relevant provisions of Directive 2006/54.³⁷¹

The issue of leave is mainly addressed in the Work and Care Act.³⁷² In this Act, a range of care leave arrangements is provided:

- Pregnancy/maternity leave: granted for a period of 16 weeks. Prior to confinement, a leave of four to six weeks is compulsory, which implies that 10 to 12 weeks remain for leave after confinement. Women are entitled to receiving benefits equal to 100 % of their salary during their leave, up to a maximum daily wage of approximately EUR 196. The pregnant woman can decide herself when to start the leave, provided that she announces this three weeks in advance.
- Parental leave: parents who have worked for their current employer for at least one year are entitled to take a specified amount of parental leave to care for their own, adopted or foster children, until the child reaches the age of eight. This right is non-transferable to the other parent. Parents can take 26 weeks half-time leave (pro rata for part-time employees) per child.
- Adoption and foster-parent leave: both of the adoption/foster parents are entitled to four consecutive weeks of leave for the adoption of a child. Both adoption parents are eligible for adoption benefits equal to 100 % of their salary during leave.
- Fathers have the right to attend the birth of their child and an additional two days of paternity leave which can be taken at any time within the following four weeks. The

³⁶⁸ Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-01889.

³⁶⁹ ETA Article 1 Section 2, GETA, Article 1 Section 2.

³⁷⁰ Infringement procedure of 24 January 2013, infringement no. 2013/45

³⁷¹ Case C-252/13 *Commission v the Netherlands* [2014], ECR n.y.r.

³⁷² Act of 16 November 2001, published in Law Gazette 2001, 537.

current Government has recently proposed a plan to extend the right to paternity leave with three additional days of (unpaid) leave to a total of five days.³⁷³

In August 2011, the Government proposed a bill to Parliament in which several of the procedural regulations concerning parental leave and adoption leave will be changed in order to make it easier for workers to take leave and to arrange this leave in such a (flexible) way that it will meet their specific needs. This bill has been discussed several times in Parliament, but it has not been voted on yet.³⁷⁴

4. Statutory schemes of social security

There is no specific national legislation prohibiting discrimination in statutory social security schemes. The Government abolished – sometimes after it had been forced to do so by the courts on the ground of their application of EU law – many discriminatory provisions in social security laws after Directive 79/7 came into force. Insofar as there are still instances of direct or indirect discrimination in this area, Dutch citizens may refer directly to the Directive or to Article 26 of the ICCPR.³⁷⁵ All of these provisions have in fact often been used in court cases, leading to the eradication of the most important instances of sex discrimination in this area. In the recent past, most discussions in this area were about the right of self-employed women to be covered under the statutory scheme that provides women with a pregnancy and maternity benefit. After they were excluded from this scheme in 2004, the Government, after strong pressure by women’s NGOs, decided to re-include self-employed women in this scheme in 2008. In 2014, the UN CEDAW Committee ruled that the Dutch State had violated the CEDAW Convention by abolishing the maternity leave scheme applicable to self-employed women up to 2004 and advised the Dutch State to compensate women who gave birth between 2004 and 2008.³⁷⁶

5. Self-employed persons

It is essential to note that the number of self-employed persons has been increasing in the Netherlands, and that they have been experiencing severe consequences of the recent economic downturn. In the GETA and the ETA, self-employment is brought under the scope of the equal treatment norms. It is prohibited to discriminate as regards ‘the conditions for and access to the liberal professions and with regard to pursuing the liberal professions or development within them’. Although the term ‘self-employment’ is not used in this context, giving a broad interpretation to the term ‘liberal profession’ will guarantee that not only doctors, architects etc. are covered, but also freelancers, sole traders, entrepreneurs, etc. The NIHR does indeed interpret this term widely.

6. Goods and services

Sex discrimination in the area of goods and services has been covered under the GETA since as early as 1994. For that reason, the Government did not deem it necessary to implement Directive 2004/113. The only change that was made is that – with respect to offering goods and services – a prohibition on sexual harassment was added to the GETA.

³⁷³ *Kamerstukken II*, 2013-14, 32 855 no. 15.

³⁷⁴ *Wet Modernisering regelingen voor verlof en arbeidstijden; Kamerstukken II*, 2010/11 32 855, nos. 1-17.

³⁷⁵ Dutch courts do have the power to strike down legislation that violates any directly applicable provision of international law (under Articles 93 and 94 of the Constitution). Constitutional review by the Courts is not possible, however, according to Article 120 of the Constitution. Therefore, a Constitutional ‘equality review’ does not exist.

³⁷⁶ See CEDAW/C/57/D/36/2012, online at <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Jurisprudence.aspx>, accessed 22 May 2014.

GETA Article 7 lays down the prohibition of making a distinction which is applicable to (in brief):

- the supply of or access to goods or services, which also includes all forms of education;
- the provision of career orientation and guidance (*loopbaanoriëntatie*); and
- advice or information regarding the choice of an educational establishment or career.

It is furthermore specified in this Article that the GETA only applies to the above-mentioned areas if the alleged discriminatory acts are committed either (a) in the course of conducting a business or exercising a profession, (b) by the public service, (c) by institutions which are active in the field of housing, social services, healthcare, cultural affairs *or education*, or (d) by private persons not engaged in carrying on a business or exercising a profession, but only insofar as the offer is made publicly.

The exception of positive action, provided for in that Directive, is also included in the GETA.

Dutch legislation concerning sex-segregated services is in conformity with the Directive and even goes beyond the requirements: Dutch equal treatment law in principle forbids sex-segregated services unless one of the legal exceptions can be applied. These exceptions are comprehensively listed in the Equal Treatment Order (a Ministerial Decree). This boils down to a closed system of possible justifications for sex-segregated services. Article 4(5) of the Directive, however, only prescribes that sex-segregated services shall have a legitimate aim and shall be proportional. Certain types of sex-segregated services can of course violate the principle of equality and non-discrimination, but examples of harmless and even favourable segregated services do exist as well. Dutch legislation on this issue may therefore be regarded as unduly restrictive. An open system of justifications (as is reflected in Article 4(5) of 2004/113) seems to leave sufficient room for favourable forms of sex-segregated services, but at the same time is adequate in ruling out discriminatory and undesirable kinds of sex-segregated services.

Providing goods and services (by means of laws, decrees, subsidies, etc.) by government institutions is excluded from the scope of the equal treatment laws. Bringing all unilateral governmental decisions and acts under the scope of the GETA (and subsequently under the enforcement by the NIHR) would mean that the margins of appreciation of national and local governments about how to construct their policies and laws or regulations would be severely limited. In addition, the need to bring these unilateral governmental decisions and acts within the ambit of the GETA could clash with some fundamental features of the Dutch legal system, e.g. the fact that the Constitution excludes the possibility of a constitutional review of legislation (Article 120 of the Constitution) and that all government acts are already 'governed' by Article 1 of the Constitution (prohibiting unequal treatment and discrimination). In addition, there is a refined system of administrative appeal/administrative courts in the Netherlands, to which cases of direct and indirect discrimination can be submitted.

7. Enforcement and compliance aspects

The equal treatment Acts protect against victimisation, dismissal and against other forms of disadvantages as a result of the fact that a person has invoked the statutory equality Act or has otherwise assisted in proceedings under these Acts, e.g. by means of testimony. This is in accordance with the standards in the directives. However, research shows that victims of discrimination are nevertheless very hesitant to bring (official) complaints or to commence judicial proceedings.³⁷⁷

³⁷⁷ See the report: M. van Genugten & J. Svensson *Dubbel de dupe? Een studie naar de benadeling van werknemers die ongelijke behandeling aan de orde stellen* University of Twente/ CGB, 2010. To be downloaded from: <http://www.mensenrechten.nl/publicaties/detail/10028>, accessed 31 May 2014.

The ETA and GETA have a provision concerning the burden of proof that is in line with the directives. The partially reversed burden of proof also applies in group actions under Article 3:305a Civil Code and Article 1:2(3) of the General Act on Administrative Law. Strictly speaking, the partially reversed burden of proof does not apply in procedures before the NIHR. However, on a voluntary basis the Commission may apply it in its procedures. There is some discussion about the question whether the burden of proof rules are applicable in cases of victimisation.³⁷⁸

Sanctions in the event of discrimination are imposed by the courts. (In the following we leave aside criminal sanctions for discriminatory offences, since they are hardly ever imposed, especially not in the case of sex discrimination.) According to the GETA and the ETA, discriminatory dismissals and victimisation dismissals are voidable. The employee can ask the court to invalidate the termination of the contract and can thereby claim wages. He/she can also demand to be reinstated in the job, or he/she can claim pecuniary damages under the system of sanctions in general administrative law, contract law and/or tort law. However, damages are hardly ever claimed (let alone awarded) in cases of discrimination. Contractual provisions which are found to be in conflict with the GETA and the ETA shall be considered null and void. If the claim or complaint has been brought by interest groups the sanctions are similar.

The GETA and ETA mention some additional ‘sanctions’. Sanctions under these laws are imposed by the NIHR, not by the courts. Under Article 13(2) GETA, the NIHR may make recommendations to the party found to have made an unlawful distinction. Under Article 13(3) the NIHR may also forward its findings in an Advice to the Ministers concerned, and to organisations of employers, employees, professionals, public servants (consumers of goods and services) and to relevant consultative bodies. Under Article 15(1) the NIHR may initiate a legal action with a view to obtaining a court ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or requesting an order that the consequences of such conduct be rectified. This power must be considered in light of the fact that the NIHR’s Opinions are not binding. The NIHR has never made use of this possibility. It is seriously doubted in academic legal circles whether the range of sanctions available under the equal treatment legislation is in conformity with the requirement that sanctions be ‘effective, proportionate and dissuasive’.

Access to the courts is ensured for victims of discrimination. Also, interest groups whose aim is to help victims of discrimination or to combat discrimination have access to the courts. There is a system of free legal aid for people with a low income, although this has been restricted in recent years as part of austerity measures. Access to the NIHR is free of charge.

The NIHR is the main officially designated equality body. In addition to being the National Human Rights Institute, its task is to hear complaints (from individuals and organisations) about discrimination (and to give non-binding opinions), to give advice to organisations that want to revise their policies, to monitor developments and to advise the Government with respect to the implementation of anti-discrimination legislation and/or any necessary revision of this legislation. Secondly, there is an organisation called ‘Art. 1’ (referring to Article 1 of the Constitution.) This organisation now covers all of the Article 19 TFEU non-discrimination grounds, including sex discrimination, and is officially designated as one of the equality bodies. It mainly has a role in assisting victims and in monitoring the occurrence of discrimination. In addition to these organisations at the national level, there are so-called Anti-Discrimination Bureaus (*anti-discriminatievoorziening, ADV*) at the local level.³⁷⁹ In 2009, these local ADVs were given a legal basis in the Act on Local Anti-

³⁷⁸ See S. D. Burri ‘Bewijsperikelen bij vermeende discriminatie. Jurisprudentie van het HvJ EU over bewijslastverdeling in gelijkebehandelingszaken, de zaken Kelly (C-104/10) en Meister (C-415/10).’ *Tijdschrift voor de Arbeidsrechtpraktijk* (2012-8) pp. 360-365 for an overview of the relevant provisions of Dutch national law on the burden of proof.

³⁷⁹ The ADVs were designated as Equality Bodies in the Memorandum of Explanation to the Act on Local Anti-Discrimination Bureaus; *Kamerstukken II*, 2007/08, 31 439, no. 3, p. 7.

Discrimination Bureaus.³⁸⁰ All municipalities are obliged to establish and subsidise an ADV. The main task of these Bureaus is to assist victims of discrimination and to monitor the situation in this regard.

Social partners play an important role, although this has not been regulated in the equal treatment laws. As regards sex discrimination the trade unions play an especially active role in the field of equal pay. Also, they stimulate the discussion on positive action (e.g. by means of quotas).

Collective agreements are used as a means to supplement the legal rules governing labour contracts. A collective agreement is binding on all employers who are (represented by the) parties to the collective agreement and all employees of an employer that is a party to the collective agreement (regardless of membership of a trade union). In addition, the collective agreement can be declared binding by the Minister for Social Services and Employment. In case of a binding collective agreement, all arranged regulations are binding on all contracts: individual employment contracts may only differ in favour of the employee. The length of the validity of collective agreements is at most 5 years. In collective agreements one can find rules concerning inter alia the (supplementary) right to childcare facilities, supplementary rights to care leave (including parental leave), et cetera.

8. Overall assessment

The overall impression is that the implementation of the EU gender equality *acquis* is to a great extent satisfactory. The Government has made some amendments in reaction to questions asked by the European Commission.³⁸¹ However, there are some issues that are still debatable. For example, it is argued that the Dutch Government has an unduly narrow interpretation of the prohibition of an ‘instruction to make a distinction’ and that it has adopted an unduly restrictive approach as regards the ‘scope of liability’ for discrimination. The fact that the partially reversed burden of proof is not applicable in victimisation claims also seems to fall short of EU requirements. In addition, there is no explicit right to return to the same or a comparable job after having taken pregnancy or maternity leave. The latter is the subject of an infringement procedure started by the European Commission in January 2013.³⁸² In addition, the requirement that sanctions should be ‘effective, dissuasive and proportionate’ is certainly not met by Dutch legislation, which seems to be the most serious shortcoming of the implementation of EU law in this respect. Finally, Dutch equal treatment law concerning sex-segregated services is in line with the requirements. However, it can be argued that the current closed system of justifications regarding sex-segregated services is unduly restrictive, as it rules out certain favourable and desirable forms of sex-segregated services as well.

NORWAY – Helga Aune

1. Implementation of central concepts

As to the concepts of direct and indirect discrimination, the general clause of the Gender Equality Act (GEA), Section 5, states that direct or indirect differential treatment (discrimination) of women and men is not permitted. Overall, the concepts are in line with the EU *acquis*.

³⁸⁰ In Dutch: *Wet gemeentelijke antidiscriminatievoorziening*, which came into force on 27 June 2009, published in the Law Gazette 2009, 313.

³⁸¹ Letter dated 31 January 2008 (no. 2006-2444), with reference to the infringement procedure of 18 December 2006, infringement no. 2006/2444.

³⁸² Infringement procedure of 24 January 2013, infringement no. 2013/45.

Positive action is explicitly permitted, but has been interpreted with a limitation not inherent in the wording of the GEA. GEA Section 7 explicitly states that only different treatment that promotes gender equality in conformity with the purpose of this Act is allowed. The same applies to special rights and rules regarding measures that are intended to protect women in connection with pregnancy, childbirth and breastfeeding. Further provisions as to which types of different treatment are permitted include provisions regarding affirmative action in favour of men in connection with the education and care of children. One of the few measures that have been implemented regarding positive action is an obligation to secure a balanced gender representation on company boards. The boards in all state-owned companies, as well as public limited companies in the private sector are obliged to have a minimum representation of 40 % of each gender. The provisions of Norwegian legislation in their wording are further-reaching and more progressive regarding the promotion of the status of women than the current *acquis*, as is shown by the judgment of the EFTA Court in Case No. E-1/02, in which a measure to increase the number of women in academic positions was found to be in contravention of Directive 76/207/EEC Article 3(1). Since this judgment, only few measures for positive action have been implemented. GEA Section 10 bans instructions regarding acts that are in contravention of provisions of this Act. It is specified that such instructions shall be regarded as illegal differential treatment. No case law has emerged on this theme. GEA Section 8 bans both gender-based harassment and sexual harassment. The law defines 'gender-based harassment' as unwelcome conduct related to a person's gender that has the effect or purpose of offending another person's dignity. The term 'sexual harassment' is defined as unwelcome sexual attention that is offensive to the object of such attention. It is the employer and management of organisations or educational institutions that shall be responsible for preventing and seeking to preclude the occurrence of harassment in contravention of provisions of the GEA within their sphere of responsibility. Gender-based harassment may be brought before the Gender Equality Ombud and the Gender Equality Tribunal, whilst the prohibition against sexual harassment shall be enforced by the courts of law.

2. Equal pay and equal treatment at work

2.1. Equal pay

The legal standard 'equal pay for work of equal value' is codified in GEA Section 21, in which the starting point is that women and men in the same enterprise shall receive equal pay for the same work or work of equal value. The pay shall be fixed in the same way for women and men regardless of sex. The term 'pay' means the ordinary remuneration for the work as well as all other supplements or advantages or other benefits provided by the employer. This aspect normally poses no difficulties, although there have been issues relating to part-time workers (mainly women) receiving less favourable employment insurances, which usually also provide additional occupation pension rights. After the introduction of WEA Section 13-1(3) in 2005, in which the discrimination of an employee who works part time or on a temporary basis is banned, discrimination because of part-time work has received additional attention. It is especially in terms of other benefits provided by the employer (including pensions) that large female-dominated professions have found that they received less than other groups. The right to equal pay for the same work or work of equal value applies regardless of whether such work is connected with different trades or professions or whether the pay is regulated by different collective wage agreements. Whether the work is of equal value is to be determined after an overall assessment, in which importance is attached to the expertise that is necessary to perform the work and other relevant factors, such as effort, responsibility and working conditions. This is the theory. In reality it has proved quite difficult for employees with different professional backgrounds to establish that their job is of equal value. As the employment market is highly gender-segregated in Norway, there are certain professions with a high proportion of women, such as nurses, and other professions with an equivalently high proportion of men, such as engineers. Key justifications for pay differences between different professional sectors have been the 'market value' and 'historical

differences'. The introduction of a system for group action might change all this, although no group litigation cases on equal pay have yet been heard. The Norwegian Public Report (*Norsk Offentlig Utredning*; NOU) 2008:6 showed that key differences regarding pay equality occur during maternity leave and because of the gender-segregated employment market.³⁸³

2.2. Access to work and working conditions

The implementation of the EU directives related to access to work and working conditions has overall been good. In relation to matters concerning pregnancy and the question of effective remedies, implementation is not as effective as it should have been. GEA Section 17 states that in connection with the employment, promotion, dismissal or lay-off of employees, no difference must be made between women and men in contravention of Section 5. The opinions of the Gender Equality Ombud and Tribunal in relation to discrimination in the hiring process in reality are quite ineffective, as these cases are only heard after another applicant has successfully secured the vacant position, and as the Ombud and Tribunal have no power to grant compensation. In order to be awarded compensation a case must be filed at the ordinary courts.

2.3. Occupational pension schemes

There are no gender-specific differences in relation to occupational pension schemes in Norwegian law and, as such, relevant EU legislation has been complied with. However, a number of schemes operate on conditions requiring that a person has to work at least 14 hours weekly before participation in a supplementary pension system and rights to benefits are earned. In its judgment of 21 June 2013, in Case No. 20/2013, the Labour Court ruled that the threshold in a collective agreement requiring 14 hours of weekly work in order to be part of the additional pension system was deemed illegal and discriminatory, and in violation of the protection against discrimination against part-time workers in WEA Chapter 13 (based on the Part-Time Work Directive). The Labour Court's judgment will most likely have consequences for similar thresholds of 14 hours' weekly for participation in occupational additional pension Acts.³⁸⁴ To the expert's knowledge, such amendments had not yet taken place in June 2014.

3. Pregnancy and maternity protection, parental leave and adoption leave

The general regime for the protection of pregnant women and women who give birth is excellent in general, and most regulations in terms of financial benefits go further in terms of time than what is stipulated in EU law. Pregnant women with strenuous work and work with hazardous substances might have the right to a pregnancy allowance, if their employer is not able to adapt their workload to less strenuous work. Prenatal check-ups are free, and employees have a right to time off with pay. All medical expenses during pregnancy, birth and the postnatal phase are covered by the national insurance scheme. Protection against dismissal while an employee is pregnant is provided for in WEA Section 15-9. An employee who is pregnant or is on maternity leave cannot be dismissed for this reason alone. Any employer who dismisses an employee in one of these periods must prove that there are reasonable grounds for the dismissal which are not related to the pregnancy or the period of absence from work. The GEA prohibits the discrimination of pregnant employees and those on leave. The law itself specifies the right to return to the same or a comparable job and the right to improved working conditions on the same terms as those that employees who were not on leave were granted during the related period. In addition, the law also states that the

³⁸³ A Norwegian Public Report involves the appointment of a Committee to analyse issues or challenging topics, and to suggest possible solutions to bring forward the work. NOUs constitute part of the preparatory work of legislative law-making. Committee on Gender and Pay (*Kjønn og Lønn*), NOU 2008:6, see <http://www.regjeringen.no/nb/dep/bld/dok/nouer/2008/nou-2008-6.html?id=501088>, accessed 10 June 2014.

³⁸⁴ The Norwegian Public Service Pension Fund (*Lov om Statens Pensjonskasse*) 28 July 1949 No. 26 Paragraph 5, the Company Defined Pensions Act (*Foretakspensjonsloven*) 24 March 2000 No. 16 Paragraph 3-5, and the Defined Contribution-based Pension, (*Innskuddspensjonsloven*) 24 November 2000 No. 81 Paragraph 4-2.

employee upon returning from leave is entitled to ask for pay raise negotiations on an equal footing to the other employees who were not on leave.

Parents, including adoptive parents, have a right to extensive leave from work as stipulated in the Working Environment Act (WEA), for a period of up to three years, although only one of these potential years off are paid leave. The right to benefits during this leave is laid down in the National Insurance Act (NIA). The parental benefit period in connection with birth is either 49 weeks at the full rate, or 59 weeks at the reduced rate. Of this, the mother must take three weeks of leave before the birth. The leave period is divided into three parts, where 10 weeks are reserved for each of the parents and cannot be transferred to the other. It is up to the couple to decide how to spend the remaining period of the leave. In order to earn the right to these benefits, parents must be employees and have had a minimum income for at least 6 of the 10 months immediately prior to the receipt of parental benefits. Under the current legislative regime, one may question whether or not the Maternity Leave Directive 92/85 has been implemented correctly under Norwegian law, as according to provisions in the NIA the maternity leave, defined as six weeks directly after the birth, is included in the parental leave period.

Non-working mothers are entitled to compensation in the form of cash in relation to the birth. Nursing mothers are since 1 January 2014 entitled to paid time off from work to breastfeed according to the WEA section 12-8.

4. Statutory schemes of social security

The NIA provides a basic package of benefits for sickness, invalidity and old age, which depend on the time of residency in Norway and the years of gainful employment. Legislation addressing occupational accidents, the Act of 16 June 1989, No. 65, makes it mandatory for all employers to ensure that all employees are covered through a private insurance paid by the employer which ensures full protection against accidents at work and occupational diseases. In addition there are various laws providing compulsory additional benefits in case of accidents or old-age benefits. The main reasons for excluding people from receiving benefits are that they work in minor employment, in non-remunerated jobs or in temporary jobs. The basic package is granted, but no additional compensation is provided. No exclusions have explicitly been stipulated in relation to the exclusions mentioned in Article 3(2) and Article 7(1) of the Directive. Non-discrimination is safeguarded in the statutory scheme through the application of the rules of the GEA. In the process of creating and amending laws, the Ombudsman takes part in the response to proposals for law. The problems in practice become more evident as a result of the gender-segregated employment market and the high percentage of women working part time. These two factors play a part as men and women have different outcomes in their accrued rights to an additional pension.

5. Self-employed persons

The NIA provides compulsory coverage for all people working or residing in Norway for 12 months. This gives anyone basic coverage in terms of benefits. The level of the benefits will vary depending on the person's previous income. Legislation is gender neutral in its wording. As Directive 86/613/EEC and later Directive 2010/41/EC³⁸⁵ has so few requirements that are targeted and specific, Norwegian legislation is satisfactory. However, in light of the existing gender-segregated employment market in Norway, key areas must be highlighted in order to focus on areas where equal treatment regardless of sex is not always achieved. This especially concerns helping spouses and their economic independence. The situation may be improved especially by strengthening the helping spouse's right to individual rights. Helping spouses do

³⁸⁵ Adopted as part of the EEA Agreement through the EEA-Committee's decision of 1. July 2011. As no amendments in national legislation were necessary, the adoption was in force as from the same date.

not have individual rights under the additional pension system of the NIA. The married couple must agree on how much income is to be reported for each of the parties when filing the tax return at the end of the year. If no income is reported for the helping spouse, she remains 'invisible'. Legal measures should provide helping spouses with individual rights to pay, pension credits, holiday pay and social security benefits, so that helping spouses do not have to depend on the goodwill of their spouse to receive compensation for their work. Norway has a low number of self-employed women. They did not traditionally fully benefit from the good maternity rights and social security benefits which follow from public employment. Self-employed women have since 2008 received full maternity benefits.

6. Goods and services

Directive 2004/113/EC is implemented in the EEA Agreement. The relevant provisions of the Directive are covered by the GEA, but following our traditional legal technique it is not a copy out. Whether or not this transposition is sufficient to make the wording of the Directive known to the public might be discussed. Existing Norwegian legislation is, as was mentioned before, considered as meeting the requirements of the Directive through the wording of the (GEA), see Sections 1, 2 and 5. Section 1 states that the Act shall promote gender equality, and in particular aims to improve the position of women. Section 5 states that direct or indirect differential treatment of women and men is not permitted. Section 2 states that the Act shall apply to all areas, except for a clause granting the King, i.e. Government, the power to decide by means of a Regulation about women in military service that women generally or in part may be exempted from the provisions in the GEA. The GEA is therefore not limited to the employment market.

The concepts of 'goods' and 'services' are not defined in national legislation. Case law will be interpreted as closely as possible in line with the approach taken by the CJEU. However, according to the GEA, the prohibition against discrimination on the ground of sex has been applied to health services, all public funded, with no concern as to whether or not it is a service or goods offered. See the cases of the Tribunal: 2/2006 (routines for finding breast cancer versus prostate cancer), 9/2006 (egg donation versus sperm donation), 4/2003 (different prices for sterilisation of men and women) and 1/2004 (sex as actuarial factor in calculation of insurance premiums covering income loss due to sickness and accidents).

7. Enforcement and compliance aspects

Protection against victimisation is implemented in GEA Section 9, which states that no person may be subject to reprisal/disciplinary action for having presented claims of breach of the GEA or having implied that such a complaint may be brought. The same rule applies to any witnesses to such actions. The burden of proof is regulated in the GEA, Section 27. In all discrimination cases where there are circumstances that give reason to believe that there has been direct or indirect differential treatment in contravention of the GEA, such differential treatment shall be assumed to have taken place unless the person responsible proves on a balance of probabilities that such differential treatment nonetheless did not take place. This applies equally to situations of reprisals. This has been interpreted by the Ombud and the Tribunal to mean that as long as there are objective facts that can substantiate the case the burden of proof shifts to the employer. Various kinds of administrative remedies are established, such as orders to stop any discriminatory practice and the duty to provide information to the Ombud and the Tribunal. Norway has a free low-threshold complaint system for gender equality and other discrimination grounds. The Gender Equality and Anti-Discrimination Ombud accepts cases of gender discrimination and will, after having heard both parties, issue a decision as to whether she finds that discrimination has taken place or not. The Ombud's decision may be appealed before the Equality and Anti-Discrimination Tribunal. The Ombud/Tribunal system works effectively to such an extent that few cases are handled by the ordinary courts. The Ombud and the Tribunal do not have the mandate to award compensation according to the GEA, Section 26, but they can recommend the party to

pay compensation in cases where a party is found to have acted in breach of the GEA. As such agreements are private, neither statistics as to the level of compensation nor as to the number of agreements exist. Cases of discrimination may be handled by the ordinary courts, but between 1985 and June 2008 there were fewer than 30 cases. Cases alleging that collective agreements contain clauses that are discriminatory may be taken to the Labour Court by one of the parties to the agreement. The Labour Courts have only handled fewer than 15 cases of alleged sex discrimination.³⁸⁶

8. Overall assessment

The overall implementation of the EU gender equality acquis is satisfactory. As there is very little case law from the ordinary courts concerning the GEA, little of the practice from the CJEU is referred to in national judgments. The Recast Directive (2006/54/EC) as well as all other gender equality directives have been implemented through the EEA Agreement and are covered in national legislation mainly through the GEA, the WEA and the NIA. One of the greatest challenges in the future is to bridge the gap between the legislation on the individual's right to protection against discrimination and the structural phenomena that are the basic foundations of discrimination which may therefore occur on an individual basis. For Norway, this concerns for instance the gender-segregated employment market and the extensive use of part-time work among women. CEDAW Article 5a may be the useful legislative tool in this respect.

POLAND – Eleonora Zielińska

1. Implementation of central concepts

Equal treatment of women and men at the workplace and in access to social security benefits is traditionally a matter of constitutional values and is included in the Article 33 of Polish Constitution. The equality rule and the prohibition of discrimination (direct and indirect, due to various reasons, including sex) are provided for in the Labour Code and repeated (with some modifications) in the Law on the Promotion of Employment and Institutions of the Labour Market, in the Law on Social Security Systems and in the Law on Capital Pensions, as well as in the Law on the implementation of several EU equality directives (further: Antidiscrimination Law), introduced in 2010.

The most developed regulations on equality are contained in the Labour Code, which considers the equality rule as one of the fundamental principles of labour law, meaning that other provisions of labour law and their interpretation must be consistent with this rule. It also contains the definition of direct and indirect discrimination, harassment and sexual harassment. In addition, it permits positive action, prohibits instruction to discriminate and protects from victimisation. According to the Labour Code, direct discrimination is taken to occur where one employee, on one or more grounds, has been, is or could be treated in a comparable situation less favourably than other employees. After the 2008 amendments, the legal definition of indirect discrimination now includes an additional reference to hypothetical situations and also mentions, in addition to particularly disadvantageous situations, unfavourable disproportions. It also makes reference to 'legitimate aim' and, as regards the means to achieve this aim, to the principle of proportionality.

While describing the area in which indirect discrimination may occur, the amended Labour Code refers to establishment and termination of employment, conditions of work, promotion and access to training in order to upgrade professional qualifications. The definitions of harassment and sexual harassment in the Labour Code, as improved in 2008, reflect a clear distinction between sexual harassment and harassment based on sex. In

³⁸⁶ For information on cases, see generally <http://www.lovddata.no/>, accessed 10 June 2014.

addition, the definitions of harassment and sexual harassment refer to the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. The relevant provisions also explicitly reflect the idea that discrimination includes less favourable treatment, based on a person's rejection of, or submission to, harassment or sexual harassment.

The Labour Code provides for protection against worse treatment in case of filing a discrimination claim, not only for the employee concerned, but also for persons supporting and assisting him/her. The prohibition of retaliation now also covers other kinds of unfavourable treatment besides dismissal from work. In comparison to the Labour Code, the Antidiscrimination Law includes a slightly different wording and context of the definitions of direct and indirect discrimination, as well as the definitions of harassment and sexual harassment (both, however, quite unfortunately labelled as sexual harassment, just as they were before the 2008 amendments to the LC). The Antidiscrimination Law also introduces the new notion of 'unequal treatment', unknown to the Labour Code, and states that it covers one or more forms of conduct constituting direct and indirect discrimination, harassment and sexual harassment as well as less favourable treatment connected with the rejection of or submission to harassment or sexual harassment, and also the encouragement to display such behaviour. In addition, the Antidiscrimination Law provides for the possibility of awarding special damages in situations where the violation of the equal treatment principle occurs with regard to pregnancy or maternity (or paternity) leave. The protection is applicable both by virtue of the law and upon request for enforcement. Although in such a case the special protection provided for victims of discrimination, including a reversal of the burden of proof, applies, neither this provision of the Antidiscrimination Law nor any provision of the Labour Code explicitly states that discrimination includes any less favourable treatment of a woman related to pregnancy or maternity leave.

2. Equal pay and equal treatment at work

2.1. Equal pay

The principle of equal pay for equal work or work of equal value for women and men is laid down in the Constitution and the Labour Code, without any legal justifications for differences in pay. This principle should be applied in all kinds of employment relationships.

According to the Labour Code, work of equal value is work which requires employees to have comparable professional skills and qualifications (certified by documents or by practice and professional experience), as well as comparable responsibility and effort. In the light of the Supreme Court case law, equal tasks are tasks which are alike with regard to the type of work, the qualifications necessary in order to perform them, the conditions in which they are performed, as well as their quantity and quality. Tasks of equal value on the other hand are tasks which are different as to the type of task, yet still sufficiently similar to be compared with regard to the above legal criteria. Remuneration is understood to include all possible components, irrespective of their description or nature, as well as other benefits related to employment, granted to workers as payment, either in money or in kind. The literature mentions in this regard various allowances and so-called bonuses, such as company car, company flat, access to company medical services and paid voluntary medical (or other) insurance, as well as premiums, and severance pay. According to the case law of the Polish Supreme Court the reimbursement of travel costs is part of remuneration (understood as compensation payments). In other words, the aim of the equal treatment rule in this respect is to provide for standards, equal to all employees, with regard to income from employment in the wide sense. The LC regulations in this respect may be criticised as being contradictory to CJEU case law, as its provisions make remuneration dependent on the length of employment, regardless of the type of work performed. Nevertheless, in the light of Supreme Court case law, an employer, arguing that different qualifications and lengths of employment were the grounds for differentiation of remuneration of employees performing equal tasks, should

demonstrate that they are significant with regard to the performance of those tasks. In the opinion of the Supreme Court,³⁸⁷ 'equal work' in the meaning of Article 18^{3c} LC refers to tasks actually performed by the employees, not to the description of the obligations of the employer. In another judgment,³⁸⁸ the Supreme Court noted that the terms 'equal work' and 'work of equal value' have different meanings. In cases where the infrastructure of the employer includes several positions which involve the same kind of work (understood as work that is identical with regard to the kind and qualifications necessary in order to perform it, as well as its quantity and quality), there is no need to compare those positions with respect to the criteria stipulated in Labour Code.

The particular difficulties in the application of Article 4 of Directive 2006/54/EC may explain the enduring lack in many enterprises of a system of occupational classifications for the purpose of determining remuneration, as well as the lack of a universal system for valuing work and establishing criteria, allowing comparison of various kinds of work. In the public sector, Ordinance No. 1 of the Prime Minister, dated 7 January 2011, on the principles of description and job valuation in the civil service (based on the law on the civil service) can be considered as a sort of model regulation with regard to job valuation. This ordinance *inter alia* regulates the procedures for conducting job valuation (by a specially designated team). Annexes to the ordinance include model job descriptions, stating their place in the organisational infrastructure of the office, a description of the main tasks, authorisations and powers, description of the complexity of the work and creativity, the necessary independence and ability to show initiative, external contacts, factors hindering the performance of particular tasks, different from the ones traditionally occurring in typical administrative positions, as well as the required skills and professional experience. A brief analysis of this document has not revealed any criteria which might give rise to sex discrimination. However, in the methodology of evaluation, the key element is the assessment of the significance of each elementary or synthetic criterion, which requires a separate, more complex comparative analysis.

In the private sector, however, where various systems for evaluating work are applied only on a voluntary basis, different surveys have proved that the extent of work valuation practices is limited (involving only 7 % of small enterprises, 9 % of medium-sized enterprises and 33 % of large enterprises (having more than 250 employees)). In most of those cases simplified methods of evaluating have been used. Worth noting is also the very low social awareness of the use of work valuation for the elimination of the gender pay gap.

According to case law however, the consequences of not having a valuation system in place may be severe, since – according to the Supreme Court – raising the remuneration of just one employee, while omitting others, employed in different positions, does not constitute unequal treatment, and does not violate the prohibition to discriminate, if the employer has not implemented a system of work valuation (in extreme cases it may only be regarded as violation of the principle of community life). Another obstacle in eliminating the gender pay gap are the wage confidentiality clauses that apply in most enterprises. These make it extremely difficult for the employee to obtain knowledge about unequal pay. Due to the fact that the Labour Code contains no regulations on confidentiality concerning remuneration, different practices exist in particular enterprises. According to the law on unfair competition, the prohibition of revealing information about salary may be justified by protection of the employer against such competition, as well as by protection of the privacy of the individual employee. The Constitutional Court in its judgment of 7 May 2001(K. 18/00) found the provisions of the Act of 3 March 2000 on remuneration of persons in charge of legal entities owned by the State Treasury for at least 50 % to be compliant with the Constitution with regard to the regulations stipulating the obligation to disclose the remuneration of these persons, explaining that this information is not subject to protection in the same way as personal details or trade secrets. However, in other cases the situation is still unclear,

³⁸⁷ 12 January 2010 – I PK 138/09.

³⁸⁸ 18 September 2008 – II PK 27/08.

especially since the position of the Supreme Court in this regard has so far been rather ambivalent and the Data Protection Plenipotentiary strongly advocated in favour of the confidentiality of wages. In such circumstances the employees wanting to obtain this information are discriminated against, and usually find themselves in a hopeless situation. The turning point in this regard may be the Supreme Court judgment of 25 May 2011 (II PK 304/10), in which the Court found that the fact that an employee disclosed to other employees information covered by the so-called salaries confidentiality clause, in order to prevent unfair treatment and wage-related forms of discrimination, cannot in any way serve as ground for dissolution of his contract of employment. The introduction of a transparent system of remuneration, permanent monitoring of wages from a gender perspective and clear rules for disclosing information on individual wages may at least be a partial solution to these problems.

2.2. Access to work and working conditions

The Constitution guarantees equal access to employment, promotion and positions. This principle is laid down in the Labour Code, underlining that it also means equal access to vocational training, upgrading professional qualifications, regardless of whether the employment is full-time or part-time. This principle applies to every employee regardless of the label of her/his work contract; essential in this respect are conditions in which work has to be performed (under another person's guidance as to the place, time and conditions of work).

The law states that the principle of equal treatment does not affect the decision not to employ someone because of her/his sex if this is justified due to the type of work, the conditions for its performance or the occupational requirements placed on employees. The definition of acceptable exceptions to the principle of equal treatment includes reference to the principle of proportionality and to the notion of 'legitimate aim' and provides a precise formulation of the exception (referring to 'genuine and determining occupational requirements') in cases related to the character of work to justify the fact of not being offered an employment contract based on the grounds listed in the Labour Code. The differentiation based on age in establishing conditions of work, promotion and access to training raising professional qualifications is exceptionally allowed when the criterion of length of employment is applied. Acceptable is also the differentiation of the situation of employees in order to protect parenthood or disability. Provisions of the Labour Code in this respect were supplemented by the Antidiscrimination Law, which contains provisions specifying that, in relation to employment, the prohibition of unequal treatment *inter alia* on the ground of sex, shall apply to: access to and receiving of professional training (including additional education, proficiency courses and requalification training (vocational orientation and reorientation), as well as professional apprenticeships (practical training); conditions of undertaking and performing economic or professional activities, in particular in the form of an employment relationship or work on the basis of civil-law and mandate contracts (including the so-called managerial contracts); unpaid employment in the form of voluntary work; access to the activities in trade unions, organisations of employers and professional corporations; and access to and conditions for the enjoyment of publicly available instruments and services of the labour market. As a result, the personal scope of the protection against discrimination, with regard to conditions of undertaking and performing economic and professional activities, has been significantly expanded.

2.3. Occupational pension schemes

According to the Law on Occupational Pension Schemes, this system may be applied to any person employed on the basis of a contract of employment (whether appointed, elected or nominated for the relevant contract, or concerning a cooperation contract) on a full or part-time basis for a period not shorter than three months. The category of employees entitled to this form of insurance also includes those employed in representative bodies of legal persons, on the basis of contract, designation or election, as well as members of agriculture production cooperatives, or cooperatives of farmers' units. Participants in this scheme also include *expressis verbis* entitled natural persons conducting an economic activity (self-employed

persons), as well as partners of commercial law companies, mentioned in this law, which are subject to mandatory retirement and disability insurance. The aforementioned Law also explicitly authorises participation in the programme of workers receiving a retirement pension from the mandatory social security system, even when they are older than 70. This right is granted to them for as long as they are employees. The limitations connected to the form of the employment contract and the minimum time limits for the employment are the only legal requirements for participating in the system. The Act on Occupational Pension Schemes of 2004 has solved the case of non-compliance of Polish law with EU law by eliminating, in particular, the provisions that differentiated the required retirement ages for women and men.

3. Pregnancy and maternity protection, parental leave and adoption leave

The Labour Code – after amendments introduced by the laws of 21 November 2008, of 6 December 2008 and of 5 November 2009, as well as amendments of 28 May 2013 and of 26 July 2013³⁸⁹ – deals in a rather satisfactory fashion with the protection of pregnant women in employment as well as persons on maternity/paternity or parental leave (*urlop rodzicielski*) and childcare leave (*urlop wychowawczy*).

In particular, the Labour Code provides for a prohibition on employing pregnant women for work which is particularly heavy or detrimental to their health and the duty of an employer to assign a pregnant woman to another job in order to avoid exposure to any danger. If this is impossible or inadvisable, the woman should be released from performing work while retaining full pay. A pregnant woman cannot be dismissed from work. In the opinion of the Supreme Court, it is irrelevant for the protection of pregnant women from dismissal whether the employee was aware of her pregnancy, the employer had been informed about this fact, or that the pregnancy has been terminated by miscarriage. The only thing that matters is the objective existence of pregnancy at the moment of dismissal. The Labour Code also contains the prohibition of dismissal during maternity leave and contains an explicit guarantee for women after maternity leave, regarding their return to their previous position (or, if that is not possible, to an equivalent position, corresponding with the relevant woman's qualifications) with a remuneration equal to that received by other employees working in the same position who did not profit from maternity benefits. Polish labour law sees maternity leave as the personal right of an employee, although at present part of this leave may be taken by the father of the child (on the same conditions as the mother). The length of the paid maternity/paternity/ parental leave is subject to permanent change. Since 17 June 2013 it may amount to 52 weeks, which is the longest period in the history of Polish regulations. Entitled to the leave in this length are parents of all children born since 31 December 2012. It consists of 20 weeks of maternity leave (for one child), 6 weeks of additional leave and 26 weeks of parental leave (*urlop rodzicielski*). In case of multiple births, the length of these leaves (with the exception of the parental leave) are extended (maternity leave amounts to 31 weeks for twins, 32 weeks for triplets, 35 weeks for quadruplets and 37 weeks for quintuplets, or more children, in a single delivery – additional leave extends to 8 weeks). The entire leave may be shared between the mother and the father, with the exception of the first 14 weeks after childbirth, which have to be taken by the mother.

The length of maternity/additional/parental leaves in case of adoption (of one or more children simultaneously) is regulated along similar lines.

Regardless of the above leaves, the father is entitled to paternity leave, which currently amounts to 2 weeks. It is fully paid and provides for protection against dismissal as well. The father must take the leave before the child reaches the age of 1 (7 in case of adopted children). Entitled to the almost 1-year leave, related to parenthood, are not only parents employed on contracts, but all employees who pay for the social security fund, i.e. also those employed on order contracts and the self-employed. Pregnancy and parenthood benefits of unformed

³⁸⁹ *Ustawa z dnia 26 lipca 2013 o zmianie ustawy kodeks pracy, Dz.U. 2013 poz.1028* (Law of 26 July 2013 amending Labour Code, JoL 2013 Item 1028).

services (police, border guards, fireguards, customs officers, prison guards, etc.) have also been adjusted to the level of regular employees.

Additional maternity leave and parental leave may be combined with part-time employment (not more than half-time). The employer is not obliged to grant a request for part-time employment however. He may refuse it, if such mode of work is not possible with regard to the organisation and type of work. The employer is obliged to inform the employee about the reason for refusal in writing. Maternity leave may be initiated up to 6 weeks before the birth. Additional leave (6 weeks) may be divided in up to 2 parts, each of which being at least 1 week long. The 26 weeks of parental leave may be divided in up to 3 parts, each of which being at least 8 weeks long. The leave has to have a continuous character, meaning that parental leave has to start immediately after additional maternity leave. If, for example, a mother returns to work for a short period and then takes parental leave, she will only be entitled to child-care leave (*urlop wychowawczy*). Renouncing even one day of the additional maternity leave will result in the expiration of the right to the remaining leave, including parental leave. Parental leave may be taken by both parents simultaneously, although in such case the overall amount of the leave must not exceed 26 weeks. It is not possible for both parents to take additional and maternity leaves simultaneously. For example, parents cannot simultaneously take 3 weeks each of additional maternity leave (to amount to the total 6 weeks allocated for this leave).

During all of the above leaves the employees are entitled to allowances. During the first 26 weeks of the leave (maternity and additional) the allowance amounts to 100 % of the last salary. During the next 26 weeks of parental leave it amounts to 60 %. If the mother declares beforehand that she will take the entire 52 weeks of the leave, then she will receive 80 % of the last salary during the entire leave. Should she later on change her mind and stop her additional maternity leave, and/or parental leave, entirely or partially, she will receive a supplement of the allowance to the 100 %. The unpaid childcare leave (*urlop wychowawczy*), to which both parents and both adoptive parents are equally entitled, may be granted, as a general rule, for three years up to the child's 5th birthday (since 17 June 2013; before it was until the 4th birthday) and divided into up to four parts; both parents may take it simultaneously for up to three months. Every worker is entitled to this childcare leave if he or she has been employed for at least 6 months (regardless of the place of employment). Every parent and adoptive parent is exclusively entitled to one month of childcare leave. As a rule this right cannot be transferred to the other parent or adoptive parent. During the parental leave low-income families are entitled to an allowance of 60 % of the minimum wage. For others this leave is unpaid.

The Labour Code, among other things, includes the following provisions: prohibition on terminating an employment contract during childcare leave, the right to return to the same job or, if this is impossible, to an equivalent post, the inclusion of a period of childcare leave term into the period of employment, constituting the basis for calculation of employment benefits, as well as the recognition of the right of an employee, entitled to childcare leave, to request reduced working hours. Since 2008 there is a protective period of 12 months, during which the employer must not dissolve the employment contract with an employee who has returned from maternity (additional, or paternity/parental) leave and decides to work in a shortened working time schedule, instead of going on childcare leave. The employer is obliged to accept the employee's choice. Such a contract can only be dissolved in the event of bankruptcy or liquidation of the enterprise or for disciplinary reasons. Of some importance is the decision of the Constitutional Tribunal that declared as unconstitutional, according to the principle of the protection of maternity, the government regulation which stated that in case maternity allowances coincided with allowances connected with childcare leave, the first excludes the latter. The Labour Code provides for the right to paid time off in case of emergencies for family reasons.

Since 2008 also other family-friendly measures have been introduced. For instance, the bases of the retirement and disability pensions insurance contributions, paid from the state budget during childcare leave have increased. The maternity leave payment for farmers was also increased. Currently there is also an extended maximum length of the period of payment

of sickness benefits for pregnant women (270 days), and the protection of unemployed women during pregnancy and after giving birth has been improved. Also, the possibility exists to use the enterprise's social fund for the development and maintenance of nurseries and kindergartens for their employees' children, situated at the place of employment, or the release from payment of contributions to the employment fund for the period of 36 months, for every employee continuing work after return from maternity, paternity parental or childcare leave. These possibilities have been extended by the so-called 'Nursery Law of 2011', which provides that such care may be organised by local authorities, organisations and private persons. According to this law, new forms of care for children under the age of three may be introduced (including crèches, group babysitters, day clubs and legally employed nannies, available to working parents of children under the age of three whose social security fees are related to the nation-wide minimum wage to be paid by the State). It should be noted that the amendment of the Law on promotion of employment and institutions of the labour market, adopted on 14 of March 2014,³⁹⁰ provides for a number of measures aimed at increasing employment of workers and taking care of children. It offers them, among others: activation benefits; grants for telework, as well as financing it for employers; employment to young mothers; and creating in-house nurseries and kindergartens.³⁹¹

The Polish rules dealing with maternity exceed the minimum standard of protection provided in the EU directives in regard to the length of paid maternity/parental leave. The regulations may raise some criticism due to their complexity, and also because under Polish law almost all such leaves are generally designed as an individual right of the woman. Only paternity leave and one month of child-care leave are exclusive rights of the father. All other child-care-related rights of the father are in various ways closely connected with the right of the mother. This means that first, the employee father is not entitled to any part of maternity leave, additional leave or parental leave at all if the mother is not entitled to them. This may arise if, for example, she died during delivery and therefore did not use the maternity leave; or if she was not employed and therefore not covered by social insurances, even if the father is insured. Second, if the mother is entitled to these leaves, the father can take advantage of them only on the condition that the mother waives her right. Third, all leaves (except childcare leave) must be taken subsequently one after another, which excludes flexibility of any kind. Fourth, taking parental leave is only possible directly after taking the additional maternity leave, meaning that despite the declared optional character of additional maternity leave, taking it is in fact obligatory to be eligible for parental leave. There is also no obligatory part of parental leave that has to be used by each of the parents.³⁹² The regulation adopted in Poland may also be criticised with regard to the relatively short length (two weeks) of the non-transferable leave for the child's father. In 2012, 28 600 fathers took paternity leave, which is significantly more than in the previous years (14 900 in 2011; 17 200 in 2010), when the duration of leave was only one week. In 2013, six times more father took paternity leave than in 2012.³⁹³ The non-transferability of the leave is indicated as the main motive for taking the leave.³⁹⁴ In the view of the expert, there may be a risk of further excluding women from the labour market if only the duration of leaves connected with childbirth are extended, and no effective attempts are made to change the collective social mentality surrounding the division of tasks in the family.

³⁹⁰ Dz. U. 2014 poz. 598

³⁹¹ <http://www.mpips.gov.pl/aktualnosci-wszystkie/kobieta-rodzina-i-przeciwdzialanie-dyskryminacji/art.6628.rodzice-na-rynku-pracy.html>, accessed 9 September 2014.

³⁹² So: M.Latos-Miłkowska, *Urlop rodzicielski* (Parental leave), *Monitor Prawa Pracy*, No 8, p. 39 and B. Godlewska-Bujok, *Implementacja dyrektywy 2010/18/UE dotyczącej urlopu rodzicielskiego* (Implementation of the Directive 2010/18/UE on parental leave) in: *Prawo Europejskie w praktyce* (European Law in practice). http://pewp.pl/index.php?option=com_content&view=category&id=37&layout=blog&Itemid=56.

³⁹³ See: <http://www.polskieradio.pl/42/275/Artykul/1159366,Urlop-ojcowski-staje-sie-w-Polsce-coraz-bardziej-popularny->, accessed 14 January 2015.

³⁹⁴ *Boom na urlopy ojcowskie* (Boom for paternal leaves), *Rzeczpospolita* 24 January 2013, <http://www.rp.pl/artykul/973419.html>.

Similar objections are raised with regard to child-care leave. The main criticisms concern the exclusion of the possibility to use the leave after the child reaches the age of five, which also applies in case of adoption, and the condition that parents can only take the childcare leave together for four months. Even if these four months were qualified as individual rights of each parent, this is certainly not the case with the other 32 months of this leave. Also, during this time only one of them has the right to shortened working time. This situation is not compliant with Directive 2010/18/EU.³⁹⁵ According to case law of the Court of Justice of the EU, if a Member State grants rights to leave exceeding the minimum length required by EU law, this means that EU regulations also apply to the duration of the leave that exceeds this minimum.³⁹⁶ In addition, despite recommendations resulting from Directive 2010/18/EU, the Polish Labour Code provides insufficient protection for the employer. The current notice period of two weeks seems to be too short in order to enable the employer to adjust the organisation of work or to recruit a substitute.³⁹⁷ Furthermore, only very low-income families are entitled to the allowance connected with child-care leave, the value of which is only symbolic.

4. Statutory schemes of social security

The reform of the social security system carried out in 1998 made the system more universal and uniform in the sense that the application of the Social Security Law was no longer limited to employees, but also covered persons performing work not based on an employment relationship (e.g. the self-employed, performing work on the basis of an agency contract or a contract of mandate). The only group still to fall outside the scope of the Act are farmers, who are covered by a separate Law from 1990, which provides, in comparison to the general system, limited benefits but at the same time requires very low contributions.

In the current system, social security contributions are divided into the following categories: old-age and disability pensions, sickness and maternity insurance, insurance against accidents at work and occupational diseases. The protection against unemployment is regulated in the Law on Social Aid. To a large extent the current statutory social security system seems to conform to the requirements of the EU regulations. This is also mainly true for the well-developed anti-discriminatory provisions. It should be mentioned that the Antidiscrimination Law explicitly provides that the horizontal protection enshrined in its provisions also applies to any violation of the principle of equal treatment in the access to social security system.

Since 2013, the heavily criticised difference in the retirement ages of women and men has been in the process of equalisation. At the same time, the standard retirement age is also being increased, to eventually reach the age of 67. In case of men the age of 67 years will be reached by the year 2020 and for women by 2040. There is hope that this change may lead to a future reduction of the gap between the old-age pensions of retired women and men (according to estimations, without equalising the retirement age, the old-age pensions of women would be about 50 % lower). Nevertheless, men will be delayed by two years in obtaining retirement benefits, whereas women may be delayed by up to seven years; which may be perceived as gender-based discrimination. These objections are reinforced by mistrust in the operation of retirement funds, which were to earn money for future pensions but have thus far produced nothing but losses. On 6 December 2013 the Law on amendment of certain laws with regard to determination of the rules of paying out retirement benefits from means

³⁹⁵ Directive of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC. OJ L 68 of 18.3.2010.

³⁹⁶ This was indicated by the First President of the Supreme Court in his opinion about the draft law, adjusting the Polish Labour Code to Directive 2010/18. Opinion of 20 December 2012 on the draft Law. Parliamentary Document No. 909, p. 3.

³⁹⁷ Given the length of the childcare leave, it has therefore been suggested to extend the duration of the notice period regarding the intention to take the leave, to 30 days. M. Latos-Milkowska, *Ochrona interesu pracodawcy (Protection of the interests of the employer)*, Lexis Nexis, Warszawa 2013.

aggregated in open retirement funds (OFE) was adopted.³⁹⁸ According to this Law, from 1 April until 31 July 2014 members of OFE decided where they wanted to direct a part of their contributions: to the OFE of their choice (as before), or to the Social Insurance Institution (ZUS). In the processes of calculating for retirement benefits paid by the ZUS, and capital benefits paid by the OFE, tables of average life duration were applied, which are uniform for men and woman.³⁹⁹

5. Self-employed persons

The Law on Economic Activity generally stipulates that undertaking and performing an economic activity is free to anyone on an equal basis, when the necessary conditions laid down in the law are observed. The statutory social security system provides for the same mechanisms for all social and professional groups, including self-employed workers and persons co-operating with them. Persons performing work e.g. on the basis of an agency contract or a contract of mandate and persons co-operating with them are poorly protected, although also covered by this system. In the context of this Law, the category of persons co-operating with the self-employed person includes the spouse, but also other persons (children, including adopted children, and parents, including step- and adoptive parents). However, in order to be covered by the insurance, the spouse and other persons mentioned above must not only co-operate with the self-employed person, but must also share a common household with them. Both self-employed persons and persons co-operating with them are subject to obligatory (compulsory) old-age and disability insurance and insurance against accidents at work and occupational diseases. The insurance against sickness and in the case of motherhood may be joined by these persons on a voluntary basis. According to provisions introduced by the law of 28 May 2013 on amendment of the Labour Code and certain other laws, a woman conducting economic activity may collect maternity benefits, not only during maternity leave, but also additional maternity leave and parental leave, just as a person employed on the basis of a labour law contract. In order to qualify for such benefits, no minimal insurance period is required. A mother conducting economic activity may combine running the company with taking care of a child, which will not result in losing the right to maternity benefits. While collecting maternity benefits, she will be released from the obligation to pay social care insurance and retirement contributions (which are paid by the State), but she will have to pay sickness insurance contributions. If however after giving birth the person decides to suspend her activity for the period of collecting the benefits, she will be released from all of the above contributions.

Pursuant to the Law of 1990, the social insurance of farmers covers the farmers themselves as well as members of their household working with them, including their spouse. The social insurance for farmers includes insurance in case of accidents, sickness and motherhood, as well as old-age and disability pensions. For farmers (and members of their household) operating an agricultural farm of more than 1 hectare, the insurance is obligatory. For other farmers or members of their households it is optional.

According to Article 15 Section 1 and Section 1a of the Law of 20 December 1990 on social insurance of farmers, with amendments in force since 1 September 2013, an insured person (farmer or household member) is entitled to maternity benefits. This is on an obligatory basis with regard to the birth of a child and accepting for adoption a child aged up

³⁹⁸ *Ustawa o zmianie niektórych ustaw w związku z określeniem zasad wypłaty emerytur ze środków zgromadzonych w otwartych funduszach emerytalnych*. Dz. U. 2013 poz.1717 (Law on amendment of certain laws with regard to determination of the rules of paying out retirement benefits from means aggregated in open retirement funds). JoL 2013 Item 1717.

³⁹⁹ This results from Article 26 of the law of 17 December 1998 on retirement benefits and disability allowances paid from ZUS (*ustawa z 17 grudnia 1998 r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych* (Dz.U. 1998 Nr 162 poz. 1118)), and from the content of Article 24 of the Law of 21 November 2008 r. on capitalized retirement benefits, unified text JoL 2014 Item 1097 (*Ustawa z dnia 21 listopada 2008 o emeryturach kapitałowych* tj. Dz. U. z 2014 r. poz. 1097), which contains the above mentioned reference to Article 26 of the Law on retirement benefits and disability allowances paid from ZUS.

to seven years, and amounts to four times the basic retirement benefits (which in 2014 amounted to EUR 200, or PLZ 844).

However, a self-employed person has no right to childcare leave. With the exception of this provision, Polish legislation seems to be compatible with the requirements laid down in EU law, although the provisions referring to the rights resulting from social security for some categories of workers (in particular farmers) and persons co-operating with them may not be covered unambiguously, mostly because they are less protected than self-employed persons.

6. Goods and services

The Antidiscrimination Law *inter alia* implemented the Service Directive, which means that it now guarantees equal access for women and men to publicly offered goods and services, including housing and the provision of benefits and electricity. These provisions apply to all natural and legal persons, as well as organisational entities, without legal personality, which the law confers legal capacity.

At the same time it explicitly provides for several exclusions originating from various equality directives: Among other things, it does not apply to private and family life or activities connected with these spheres, or to the content of advertisements or the access to educational services. This Law states that it does not apply to differentiated treatment in the access to goods and services, based on sex, if the supply of goods and services exclusively or primarily to members of one sex constitutes a justified legitimate goal and the means of achieving this goal prove to be appropriate and necessary.

7. Enforcement and compliance aspects

No case law could be identified in relation to victimisation. However, the reversed burden of proof in discrimination cases before labour courts (in force since 2001) has raised many controversies in judicial decisions. A related provision of the Labour Code requires the employer to prove that he/she was guided by considerations other than sex, in decisions such as terminating the employment relationship, establishing the rate of pay or granting promotion. In the event of a breach of the principle of equal treatment the injured party may initiate legal proceedings before the courts.

As a shortcoming in the provisions of the Labour Code concerning the burden of proof, the following may be perceived (although there is some room for discussion): it does not explicitly require the employee, acting as the claimant, to indicate the facts on the basis of which discrimination may be presumed, but rather establishes an unconditional shift of the burden of proof to the employer. The Supreme Court interprets this rule in accordance with its interpretation in EU law. However, there are courts that require the person claiming damages with regard to unequal treatment to identify the reason for the particular act of discrimination, as well as the circumstances proving unequal treatment because of this reason. The reason for such requirement is the proper setting of evidence proceedings and enabling the employer to defend him/herself by providing evidence that he/she did not apply the discriminatory criteria of which he is accused. Such approach is highly controversial, since neither the Labour Code nor EU law provide for the obligation of the employee to submit evidence that the employer's actions were guided by a particular discriminatory criterion prohibited by law, especially given the fact that this law only provides for an exemplary list of grounds of discrimination. Also, the argument is justly raised that it is too much to expect the employee to know the motivation of the employer's alleged discriminatory behaviour. It therefore seems justified that the employee should only be required to make the case of unequal treatment probable, creating a legal presumption of discrimination, whereas it should be the obligation of the employer to provide evidence to the contrary. With regard to the Antidiscrimination Law, this problem may also give rise to concern, especially with regard to whether the provision 'making plausible the fact of the violation' results in setting a higher standard of proof for the claimant than that provided for in the wording of the EU law, which simply refers to

‘establishing of facts from which it may be presumed that there has been direct or indirect discrimination’.

All disputes arising from employment relationships are decided by special labour and social security courts. Complaints asserting discrimination, according to the Antidiscrimination Law, are decided by regular civil courts. The access to labour courts used to be simple. However, since 2006, this access is no longer free of charge if the amount of the claim is higher than EUR 11 700 (PLN 50 000). In such cases, similar to all regular civil cases, the court fee amounts to 5 % of the claim. This has resulted in a decline in the number of individual claims, which may be a sign that the reduction in the level of judicial protection, e.g. against discrimination, is unjustified.

If the principle of equal treatment has been violated, an employee has the right to a compensation which is not less than the minimum wage (currently approximately EUR 375). An analysis of actual practice that the courts usually properly interpret the legal character and function of this compensation, stating that it is a sanction for the mere act of violating the equal treatment rule, and that therefore the sanction should cover both material and non-material losses of the employee. The courts properly indicate that the wording ‘compensation in the amount of not less than’, without setting an upper limit, allows for differentiation of the amount of compensation, depending on the type and severity of the discriminatory behaviour of the employer and its consequences. Unfortunately, there are no reliable data as to the level of compensation awarded in cases of gender discrimination. On the basis of some press information one may estimate that the average level of compensation in gender discrimination cases varies on average from 1 to 5 times the minimum monthly wage, and only tends to be higher in exceptional cases (the maximum amount awarded was, approximately EUR 25 000 (PLN 100 000)). Compensation in the amounts usually awarded is not likely to have a dissuasive effect.

In addition to civil-law remedies, the administrative monitoring body, the State Labour Inspectorate (*Państwowa Inspekcja Pracy*) may also initiate proceedings against a discriminating employer. These proceedings are considered to be effective. In April 2014, the Inspectorate published the results of its investigation into the layoffs of persons returning from maternity, paternity, and parental leaves and the observance of other employee rights, including those related to childcare. This investigation covered 581 companies. The report indicates among other things that in cases of violation of the law, employees rarely go to court. Even in cases where the inspectors themselves referred matters to the court, the persons concerned often backed out of the proceedings and cases were frequently remitted. Practice shows that one often can achieve more through direct contact between the Labour Inspectorate and the employer, than by going to court.⁴⁰⁰ In addition, the Penal Code of 1997 provides, for the most serious and notorious cases of violations of employees’ rights, for a maximum penalty of up to 2 years’ imprisonment (or a fine or restrictions to the convicted person’s liberty). The criminal punishment of a deprivation of liberty for up to 3 years may also be imposed in the most serious instances of sexual harassment. In 2011 the legal measures were supplemented by the criminalisation of stalking. Time will show what role this provision will play in relation to fighting sexual harassment. However, the practical significance of penal-law sanctions in discrimination cases was minor, not least because all sexual crimes were traditionally prosecuted not *ex officio*, but at the victim’s request only. In 2013, the situation changed insofar that currently it is only stalking that is prosecuted only at the victim’s request.

It also has to be stressed that the trade unions may play a rather significant role in proceedings related to a violation of the principle of equal treatment, both in and outside the judicial system. In the former case they may initiate proceedings on behalf of employees, take part in judicial proceedings as a representative of the employee or present opinions to the court. The right to initiate proceedings is also granted to some other social organisations, such

⁴⁰⁰ See: <http://finanse.wp.pl/kat,1013819,title,4-proc-kobiet-zwolnionych-w-ciagu-pol-roku-od-powrotu-z-macierzynskiego.wid,16495436,wiadomosc.html?ticaid=112bdd>, accessed 1 June 2014.

as e.g. human rights NGOs, or social associations of disabled persons. However, in practice these organisations do not play an important role.

The role of collective agreements in promoting equal treatment of women and men and preventing gender discrimination is insignificant. Such agreements can be concluded at the level of an individual enterprise or of a part of or the whole branch of an employment sector. An analysis of the collective labour agreements at enterprise level indicated that they very seldom include regulations which are more favourable for employees than the minimum stipulated in the provisions of labour law. More often they simply repeat the Labour Code provisions on equal treatment. This trend is coupled with an increased frequency of cases where the parties to collective labour agreements suspend the application of the entire agreement or a part thereof.

The Antidiscrimination Law gives the task of implementing the principle of equal treatment mainly to the Human Rights Defender who has the following competencies: analysing, monitoring and supporting equal treatment of all persons, conducting independent surveys concerning discrimination, elaborating and publishing independent reports and making recommendations on any issues relating to discrimination. The Human Rights Defender can also, within certain limits, give assistance to individual victims of discrimination. However, questions may be raised as to the Human Rights Defender's ability to effectively exercise this mandate, considering the specific character of the work and competences of the Human Rights Defender and the fact that the increase in duties has not been accompanied by sufficient financial resources for their fulfilment. Therefore the Human Rights Defender has determined her priorities with regard to preventing discrimination, among which gender-based discrimination has not been mentioned.

8. Overall assessment

The process of the transposition of selected EU equality directives into the Polish Labour Code was already initiated before Poland's accession and it had progressive character: in 2001, a new Section called 'equal treatment of women and men in employment' was adopted. In 2003 this Section was renamed and modified so as to allow the application of its provisions also to instances of discrimination based on grounds other than gender. The Law of 2004 on the Promotion of Employment and Institutions of the Labour Market dealing with discrimination in the access to hiring or job training accomplished the process of the transposition of equality directives in the field of access to work. In 2006, 2008 and 2013 further amendments to the Labour Code were introduced, revising the central concepts and dealing mainly with the protection of women's health during pregnancy, extension of maternity and paternity leaves and also providing for different forms of flexible working time arrangements. In 1998, the general reform of the mandatory social security scheme took place. The Law on Occupational Pension Schemes of 2004 achieved compliance of Poland's legislation with relevant EU directives in this respect. In 2011 the Antidiscrimination Law entered into force, supplementing provisions of the labour law regulating access to employment and vocational training and providing for horizontal protection in case of violation of the principle of equal treatment in the access to goods and some services, as well as the access to the social security system. As a result of these legislative changes, labour law as well as social security law and the regulation of access to goods and some services, correspond, in general, with the requirements of the EU gender equality directives. However, when it comes to the transposition of particular EU concepts and regulations, despite several consecutive amendments, legislation still shows some inadequacies and deficiencies. Sometimes, binding law provisions are overprotective, e.g. in the prohibition of the performance of certain activities by all women. The provisions aimed at the protection of parenthood are not treated as individual rights of a particular employee, with regard to his/her contributions for the social security system, but are rather attached to the mother only. The Ministry of Labour and Social Policy has prepared a draft law aimed to change this situation,

but it seems that in the form in which it has been presented it does not sufficiently fulfil the requirements of the Directive.⁴⁰¹ However, for now the law in force creates a serious barrier for effective reconciliation of work and family life on an equal basis for men and women. In addition, the actions of the legislator aimed at applying the provisions on equal treatment in employment to instances of discrimination based on reasons other than gender resulted in some detrimental aspects in the field of protection against discrimination based on gender. For example, exceptions to the equal treatment principle provided in the Labour Code no longer refer to pregnancy, rather to parenthood only. In addition, questions may be raised as to whether the equality body's mandate and resources are adequate for its activities.

PORTUGAL – *Maria do Rosário Palma Ramalho*

1. Implementation of central concepts

In Portugal, the major principles and main concepts of gender equality are dealt with in the Portuguese Constitution and in the Labour Code (LC).⁴⁰² The Constitution establishes a general principle of non-discrimination on several grounds, including sex, and considers the active promotion of equality between men and women as a fundamental task of the Portuguese State.⁴⁰³ As to the Labour Code, it establishes a non-discrimination principle, on the grounds of sex and on other grounds, in the field of employment and working relations. This principle is developed by the LC in several provisions.⁴⁰⁴

The main concepts in this area, such as direct discrimination, indirect discrimination, positive action, harassment and sexual harassment have been transposed over the years into the Portuguese legal system, and have now been integrated in the LC.⁴⁰⁵ The content of these notions is consistent with European law, and in some cases they have a broader scope than in European law. This is true for positive actions, which are explicitly allowed by legislation, and are considered as non-discriminatory measures, provided that they are established on a temporary basis in order to correct a factual discrimination which already exists.⁴⁰⁶

2. Equal pay and equal treatment at work

2.1. Equal pay

The Portuguese Constitution establishes the right to equal pay for equal work⁴⁰⁷ as a general principle but the EU-law provisions in this area are dealt with by the LC, which establishes the right to equal pay between men and women, for equal work or work of the same value.⁴⁰⁸

⁴⁰¹ See: <http://www.mpiips.gov.pl/bip/projekty-aktow-prawnych/projekty-ustaw/ubezpieczenia-spoeczne/ustawy-o-zmianie-ustawy-o-swiadczeniach-pienieznych-z-ubezpieczenia-spoecznego-w-razie-choroby-i-macierzynstwa-oraz-niektorych-innych-ustaw-/#akapit7>, accessed 13 November 2014.

⁴⁰² The Portuguese Constitution dates from 1976, but has been revised on several occasions. There is a new Labour Code (LC), which was approved by Law No. 7/2009 of 12 February 2009, and applies to employees of the private sector. This Code has transposed Directive 2006/54. In what regards employees in public services, until recently equality issues were dealt with in Law No. 59/2008, of 11 September 2008 (general Act dealing with employment in public service), with some minor differences from the rules of the LC, since that Law did not cover the changes introduced in the LC of 2009. However, just recently, there has been a major change in the general legislation applicable to civil servants, and Law No. 59/2008 was replaced by Law No. 35/2014, of 20 June 2014 (*Lei Geral do Trabalho em Funções Públicas*), which entered into force on 1 August 2014. Under this new Act (Article 4 No. 1 c) and d)), equality issues and maternity and paternity issues regarding civil servants, regardless of the nature of the job and the type of employment, are to be governed by the Labour Code. Therefore, the legislative system has become simpler.

⁴⁰³ Portuguese Constitution, Article 13 and Article 9(h).

⁴⁰⁴ LC, Articles 23, 24 and 30.

⁴⁰⁵ For the concepts of direct and indirect discrimination, and equal work and work of equal value, see Article 23 of the LC, and for the concept of positive action, Article 27 also of the LC.

⁴⁰⁶ Article 27 of the LC.

⁴⁰⁷ Portuguese Constitution, Article 59 No. 1 a).

The concept of pay for this purpose is laid down in the law, as well as the notions of equal work and work of the same value. The concepts of equal work and work of the same value are consistent with EU Law. As to the concept of remuneration, this is established in a rather unclear way, since apparently it does not rely on the EU-law broad notion of equal pay for the purpose of gender equality,⁴⁰⁹ but on the national concept of remuneration,⁴¹⁰ the content of which is narrower (in the sense that it does not cover all financial advantages granted to the employee under a labour contract). Nevertheless, for the purposes of the equal pay principle, the LC explicitly states that this principle applies not only to remuneration but also to other financial benefits granted to the employee under a labour contract.⁴¹¹ Therefore, national legislation meets the requirements of EU law, although in an indirect way.

Differences in pay are allowed, provided they are based on objective criteria, common to men and women (e.g. productivity, seniority, the lack of periods of absence). Nevertheless, despite the formal compliance of these criteria with EU law, indirect discriminatory practices cannot be ruled out when considering the criteria related to the lack of periods of absence of the worker, because justified absences are also taken into consideration for this purpose (except absences for maternity reasons), including absences for care reasons, which are more common among women than among men.

With respect to another issue, national legislation on equal pay goes beyond the requirements of EU rules regarding the sanctions that are applicable to collective agreements that do not comply with the equal pay principle. Whenever a collective agreement or internal provision of a company restricts a certain type of remuneration to men or to women, the LC establishes that these rules are automatically applicable to employees of both sexes, provided they perform equal work or work of the same value.⁴¹²

2.2. Access to work and working conditions

The principle of equality in access to work, working conditions, and professional training is developed in the LC, both in a general way and specifically as regards gender equality.⁴¹³ The Code prohibits discriminatory practices against employees in access to employment, to promotion and to professional training. Some exceptions to this principle are allowed, on the grounds of the nature of the profession or of the context of the performance of the labour contract, but only if the different treatment is objectively justifiable and determining. Harassment and sexual harassment are also prohibited.⁴¹⁴

In this area, Portuguese legislation again ventures beyond EU law as regards discriminatory provisions in collective agreements. Whenever a profession or a professional category is reserved by the collective agreement either to men or to women, or whenever a requirement to have access to a certain job or promotion is applicable only to female or to male candidates, these provisions are to be considered automatically applicable to employees of both sexes.

2.3. Occupational pension schemes

The Portuguese legislation regarding occupational social security systems is Decree-Law No. 12/2006 of 20 January 2006 and Decree-Law No. 307/97 of 11 November 1997. The first law regulates the trust funds that deal with professional social security schemes. The second one has transposed Directive 86/378/EEC, including the changes introduced by Directive 96/97/EC, into national law.

⁴⁰⁸ LC, Articles 24 No. 2 b) and 31 No. 2 b)..

⁴⁰⁹ Article 157 No. 2 of the TFEU.

⁴¹⁰ LC, Articles 24 No. 2 b) and 31 No. 2 b).

⁴¹¹ LC, Article 24 No. 2 c).

⁴¹² LC, Article 26 No. 2.

⁴¹³ LC, Article 24 and Articles 30, 31, and 32, respectively..

⁴¹⁴ LC, Article 29.

Occupational social security systems are intended either to supplement or to replace the legal and public statutory social security system.⁴¹⁵ Old-age pensions, as well as invalidity pensions and survival and other family support pensions can integrate these systems.⁴¹⁶

In Portugal, occupational social security schemes are rare, due to the universal scope of the general public social security system. Over the years almost all specific social security schemes (some of which cover many benefits and others having a more limited scope) have been integrated into the public social security scheme.

The main area where specific social security subsystems still exist is the financial sector, especially in banking companies. Here, the schemes rely on collective agreements and may differ in the nature of the pension (supplementary to the statutory pension or replacing this pension) as well as in the form of calculating the pension. The variety of situations makes it too difficult to describe them, but it should be noted that gender equality issues are not addressed in these schemes, as there are no specific safeguards for gender equality.

However, in recent years even in the financial sector the future of these occupational social security schemes has become uncertain. In fact, most of these schemes were partially integrated in the national and statutory social security system in 2011,⁴¹⁷ after an agreement with the main banks on the transfer of the trust funds, regarding a percentage of the pensions, to the State, which then assumed the direct responsibility to pay those pensions. After this transfer, occupational social security schemes lost their importance and they only survive as supplementary social security schemes based on collective agreements.

3. Pregnancy and maternity protection, parental leave and adoption leave

The LC provides protection during pregnancy and after giving birth. This protection is granted to both the mother and the father, except in matters physically and directly related to the state of pregnancy and giving birth. These rules are supplemented by other legislation.⁴¹⁸ The main provisions regard two main areas: the protection of women while pregnant and during maternity leave; the recognition of several leaves related to maternity and parenthood.

As to the protection of women during pregnancy and maternity leave, the following measures should be mentioned: while pregnant and when breastfeeding, women have the right not to perform night work and extra work, as well as to be transferred to a non-dangerous job; they have the right to attend medical examinations during pregnancy and, while breastfeeding, they have the right to reduced working time; the dismissal of these women is presumed unlawful and must be previously approved by a public body; finally, in case of unfair dismissal these women have the right to return to their jobs.⁴¹⁹

As to the leaves concerning maternity and parenthood the situation is the following: women who have given birth have the right to a paid maternity leave, from 120 days to 150 days. This can be divided with the father of the child, or it can be directly granted to the father if the mother cannot enjoy it (in case of death or illness). With regard to adoption, leave is granted under the same conditions of maternity leave, and fathers have their own right to a compulsory paid paternity leave of 10 days, followed by 10 more days of non-compulsory leave, following the birth of the child. Both the mother and the father have the right to parental leave after maternity leave (3 months on a full-time basis or 12 months on a part-time basis) which can be followed by other non-paid parental leaves up to a possible maximum of two or three years, to take care of young children. Finally, when returning from leave, both the father and the mother have the right to return to their previous jobs, as well as the right to work part time for a certain period of time for the purpose of taking care of young children.⁴²⁰

⁴¹⁵ Decree-Law No. 307/97 of 11 November 1997, Article 1.

⁴¹⁶ Decree-Law No. 307/97 of 11 November 1997, Article 4.

⁴¹⁷ Decree-Law No. 127/2011 of 31 December 2011.

⁴¹⁸ LC, Articles 33 et seq., and Decree-Law No. 91/2009 of 9 April, and for public servants Decree-Law No. 89/2009 of 9 April.

⁴¹⁹ LC, Articles 46, 47, 58, 59, 62 and 63.

⁴²⁰ LC, Articles 35, 38, 40, 41, 43, 44, 51, 52 and 53.

In this area, national law meets the requirements of the directives, and even goes beyond EU law as regards the right to short paid absences to attend medical examinations during pregnancy, and the right to reduced working time when breastfeeding. The most positive aspect of these rules is the fact that the provisions are in general directed at both the father and the mother, and this perspective contributes to a more balanced participation of both of them in childcare tasks.

4. Statutory schemes of social security

In Portugal, most of the social security provisions fall under the scope of Directive 79/7/EEC and the situations contemplated by the Directive are covered by the Social Security General Law.⁴²¹

This Law establishes two social security systems. The first one is the ‘system of social citizenship protection’, which integrates three subsystems: the ‘social action subsystem’ (intended to promote actions in the social field), the ‘solidarity subsystem’ (intended to eradicate poverty in situations that do not fall under the ‘contribution’ system), and the ‘family protection subsystem’ (intended to compensate people for specific family charges).⁴²² The second social security system is the ‘contribution system’, which is intended to compensate the social risks of persons with a professional activity, and is based on the contributions of employers and employees.⁴²³

This second and more general system integrates social protection related to sickness, invalidity and old-age pensions, family allowances (in situations related to maternity, paternity and adoption), involuntary unemployment, accidents at work and occupational diseases, in the sense of Directive 79/7/EEC.⁴²⁴

The rights granted by this general legislation are further developed by specific legislation and each type of benefit is granted under specific conditions,⁴²⁵ but it should be observed that gender equality issues are not addressed in these schemes, and there are no specific safeguards for gender equality.

The main reason for excluding people from receiving social benefits, under the contribution system, is employment for an insufficient period of time, since almost all benefits depend on a minimum period of paid work with registered contributions to the social security system. This minimum period differs for each type of benefit, but it is the same for men and women. On the other hand, leave periods related to maternity and paternity are taken into account as working time, so that social security benefits cannot be excluded for a minimum contribution time on that account.

Finally, it should be noted that, in the context of the recent financial crisis in Portugal, the value of public pensions and other allowances under the statutory social security system has decreased considerably in the past few years, while the conditions to access public allowances (related to health, maternity and paternity, unemployment, poverty or other social risks) have

⁴²¹ Law No. 4/2007 of 16 January 2007.

⁴²² Law No. 4/2007, Article 6 et seq. (the citizenship system – ‘*sistema de protecção social de cidadania*’); Article 29 et seq. (the social action system – ‘*subsistema de acção social*’); Article 41 (solidarity social system – ‘*sistema de solidariedade social*’); Article 44 et seq. (the family protection system – ‘*sistema de protecção da família*’).

⁴²³ Law No. 4/2007, Article 50 et seq. (‘*sistema previdencial*’).

⁴²⁴ Law No. 4/2007, Article 52.

⁴²⁵ Old-age and invalidity pensions for dependent workers – Decree-Law No. 187/2007 of 10 May 2007; Old age and invalidity pensions for independent workers – Decree-Law No. 328/93 of 25 September 1993, with the changes introduced by Decree-Law No. 240/96 of 14 December 1996 and by Decree-Law No. 397/99 of 13 October 1999; Sickness allowance – Decree-Law No. 28/2004 of 4 February 2004, as amended by Decree-Law No. 146/2005 of 26 August 2005, and by Decree-Law No. 302/2009 of 22 October 2009; Accidents at work and occupational diseases – LC, Articles 281 et seq. and Law No. 98/2009 of 4 September 2009; Family allowances, related to maternity, paternity and adoption – Decree-Law No. 91/2009 of 9 April and, for the public sector, Decree-Law No. 89/2009 of 9 April; Unemployment – Decree-Law No. 220/2006 of 3 November 2006, as amended by Decree-Law No. 70/2010 of 16 June 2010 and by Decree-Law No. 64/2012 of 15 March 2012.

become stricter, and both the amount and the duration legally established for these allowances have been consistently reduced.

This development affects women more strongly than men, since the average amount of their pensions tends to be lower than the average amount of men's pensions.

5. Self-employed persons

The impact of Directive 86/613/EEC in Portugal has not been very significant, in the sense that gender equality in the area of independent work is not considered an important issue, contrary to what happens in the area of dependent work. The secondary importance of this issue is in contrast to the growing importance of the self-employment of women, not so much in traditional areas like agriculture but especially in the area of goods and services.

As regards Directive 2010/41/EC, this Directive has not been formally transposed into Portuguese legislation, since the authorities consider that national provisions already comply with the Directive.

Despite the limited effects of these directives in national legislation, Directive 2010/41/EC has been important in Portugal concerning specific issues: economically dependent workers, maternity and paternity provisions and helping spouses in the area of social security.

Workers who are formally independent, in the sense that they do not have an employment contract but still economically depend on an employer, are covered by the LC rules on non-discrimination in general, gender equality and maternity and paternity.⁴²⁶

Maternity provisions regarding dependent workers are partially extended to independent workers who have access to public allowances in the case of maternity, paternity or adoption, on the same conditions as dependent workers.⁴²⁷ However, in situations related to family duties or sickness, these workers are not protected, at least not by the general social security schemes, regardless of the fact that these situations may be connected to maternity and paternity.

In the social security area, helping spouses are covered by the legal social security scheme of independent workers.⁴²⁸ There are also specific provisions concerning assisting spouses in the area of agriculture.⁴²⁹

Law No. 3/2011 of 15 February 2011 transposed Directives 2000/43/EC, 2000/78/EC and 2006/54/EC in what regards non-discrimination in independent work and procedural rights of private or public organisations to assist victims of discrimination. This Law, which is applicable both in the private sector and in the public sector, establishes a broad concept of independent work, considering as such all professional activity that is not performed under an employment contract or in an equivalent situation.

Non-discrimination in this area is directly related to equal opportunities that must be granted in the access to independent work, in professional training, and in the conditions in which the work is performed. Any act that favours or causes damage to these workers, performed by the beneficiary of the work and based on any discriminatory factor, is prohibited, including direct and indirect discriminatory practices and harassment practices. These principles are compatible with specific legal rules concerning protection against discrimination of foreigners, which fall under the scope of Directive 96/71/CE. In addition, the principles are also compatible with the rules concerning the protection of pregnancy, maternity and paternity, adoption and other situations related to the reconciliation of professional and family life.

⁴²⁶ LC, Article 10.

⁴²⁷ Decree-Law No. 328/93 of 25 September 1993, Article 53 No. 1 and Decree-Law No. 91/2009 of 9 April 2009, Article 4 No. 1.

⁴²⁸ Decree-Law No. 328/93 of 25 September 1993, with the changes introduced by Decree-Law No. 240/96 of 14 December 1996. Article 6 No. 1(c).

⁴²⁹ Decree-Law No. 159/2001, of 18 May 2001.

A significant point to be noted is the growing involvement of the Government as regards gender equality in decision making, especially as regards the presence of women in company boards. In this area, the Government approved a Resolution in 2012⁴³⁰ designed to promote the increased participation of women on the boards of public and private companies and, following this resolution, other legislative measures have been established: for instance, as regards public companies, Decree-Law No. 133/2013, of 3 October 2013 (which establishes the general features of public companies), establishes that the governance boards of public companies (administration board and surveillance board) must aim to have both men and women as members, and establishes the obligation of public companies to put in place equality plans⁴³¹; and Law No. 67/2013, of 28 August 2013 (which establishes the general features of administrative independent agencies for the monitoring of economic activity both in the private and in the public sector), establishes that the board of these agencies must include at least 33 % of the members of each sex, and that the presidency of this board must be alternately occupied by men and women.⁴³²

6. Goods and services

Directive 2004/113/EC has been transposed into national legislation by Law No. 14/2008 of 12 March 2008. This legislation is in accordance with the Directive concerning the notions of discrimination (direct and indirect), harassment and sexual harassment, the scope of the Law, which applies to both the private and the public sector, and the rules regarding the enforcement and monitoring of the Law.⁴³³

This legislation goes beyond the requirements of the Directive in the following respects: discriminatory practices in contractual practices are forbidden; the rules imposed by the Directive on actuarial factors are generally applicable to all contracts and not only to contracts concluded after December 2007 (except in insurance contracts related to maternity); finally, the Law includes a system of sanctions to ensure its practical implementation.⁴³⁴

7. Enforcement and compliance aspects

Concerning enforcement, the following points are to be noted:

The provisions on the burden of proof have been transposed into national legislation by the LC, which applies the rule of the reversal of the burden of proof to all actions regarding discriminatory practices (gender included), with the exception of actions based on harassment practices.⁴³⁵

The law establishes both civil and administrative sanctions (civil damage compensation and administrative fines) to respond to discriminatory practices, and it also establishes direct sanctions applicable to collective agreements, such as automatic replacement of discriminatory clauses by neutral clauses.⁴³⁶ The standard of these measures is adequate.

The access to the courts for alleged victims of discrimination is safeguarded and they have the right to seek counsel as well as to report discriminatory practices to the legal authorities (the ACT – Labour Inspection Service, and the CITE – Commission for Equality in Employment, a public body that deals with gender equality issues specifically in the area of work and employment).⁴³⁷ Also, the law establishes the rights and competences of other

⁴³⁰ Council of Ministers' Resolution No. 19/2012, of 8 March 2012.

⁴³¹ Article 31 No. 6 and Article 50 No. 2.

⁴³² Article 17 No. 8.

⁴³³ Law No. 14/2008 of 12 March 2008, Articles 2, 3, 8, 9 and 11.

⁴³⁴ Law No. 14/2008 of 12 March 2008, Articles 4, 6, 10, 17, 12 and 13.

⁴³⁵ LC, Article 25 No. 5 and No. 6.

⁴³⁶ LC, Articles 28 and 26.

⁴³⁷ ACT – *Autoridade para as Condições de Trabalho* and CITE – *Comissão para a Igualdade no Trabalho e no Emprego*.

private and public organisations to assist victims of discrimination, including the right to intervene in judicial procedures.⁴³⁸

Social partners can play a role in the enforcement of gender equality law, since provisions concerning labour law are discussed with them. However, gender equality does not seem to be considered an important subject at this level.

The LC establishes that collective agreements should implement the necessary measures to enforce equality.⁴³⁹ However, this rule is not mandatory and equality issues are not an important issue in collective bargaining. This situation could change if the issue were to be considered as a mandatory content of collective agreements, since these agreements are binding and are usually declared to be generally applicable. The LC also establishes a system of assessment of the content of collective agreements by the CITE, performed during the first 30 days after the publication of these agreements and designed to check them for possible discriminatory clauses and promote elimination of such clauses by the court.⁴⁴⁰

8. Overall assessment

Portuguese legislation formally complies with EU law, although exceptions are apparent concerning some particular points, such as the concept of remuneration, the burden of the proof rule in harassment situations and the extent of social protection regarding some professional categories. However, when one looks beyond the legal framework, the material weaknesses of the system are easily apparent, especially on four points.

Firstly, although the law establishes many protective measures, the State does not finance them where needed, and therefore some of these measures do not work in practice (this is true for some of the maternity and paternity measures). Secondly, there is no practical implementation of the legal measures by collective agreements, with or without the assistance of the State. Thirdly, there is no relevant case law regarding gender equality to describe, since in Portugal hardly any cases have been decided in this area. And finally, a recent survey conducted by the CITE in relation to pay shows that the pay gap between men and women is still significant (around 18.5 %)⁴⁴¹, which leads to the conclusion that even in such a traditional issue as equal pay there is still a lot to be done.

This situation indicates a lack of practical implementation of the legal provisions in this area. The system exists in law, but its practical effectiveness is weak.

Finally, the author wishes to emphasise the negative impact of the financial and economic situation of Portugal with respect to the level of protection granted by legislation in the area of equality. The impact of this situation is enormous and seems to become structural.

ROMANIA – *Iustina Ionescu*

1. Implementation of central concepts

The Romanian Constitution of 1991 included the principle of non-discrimination and equality before the law, 'sex' being one of the ten protected grounds expressly recognised in the text of the Constitution.⁴⁴² Specifically regarding gender equality, there are only two provisions in the Constitution, having a limited scope. First, the principle of equal pay for equal work does

⁴³⁸ Law No. 3/2011 of 15 February, Articles 1 and 8.

⁴³⁹ LC, Article 492 No. 2 d).

⁴⁴⁰ LC, Article 479.

⁴⁴¹ The results of this survey were disclosed by Council of Ministers' Resolution No. 18/2014, of 7 March 2014, which accordingly approved some measures intended to reduce the pay gap.

⁴⁴² Romanian Constitution of 1991, Articles 4 and 16.

not cover work of equal value and other payments except salary.⁴⁴³ Second, the State guarantees equal opportunities for women and men to access public offices.⁴⁴⁴

Not until the early 2000s was anti-discrimination legislation introduced, as a result of pressure from civil society. Once again, gender discrimination and discrimination against all other groups protected by law have been dealt with separately. In 2000, the Government adopted a multi-ground general anti-discrimination statute which covered discrimination on the ground of sex, as part of an open-ended list of grounds of discrimination (hereafter 'Antidiscrimination Law'); an equality body was established to deal with administrative complaints on all grounds of discrimination (*Consiliul National pentru Combaterea Discriminariilor*: the National Council for Combating Discrimination (hereafter CNCD)). Two years later, Parliament adopted a special law dealing exclusively with gender equality: the Law on equal opportunities between women and men (hereafter 'Gender Equality Law'); a second equality body was established to deal only with public policies on gender equality in the field of employment (*Agentia Nationala pentru Egalitate de Sanse intre Femei si Barbati*, ANES, closed down in 2010).

Although having a separate legal framework addressing gender equality had positive effects because special attention was given to gender equality, actual practice showed a series of downsides to this legislative approach. In practice, the political and administrative commitment to gender equality is limited to the field of employment. ANES was not independent, being placed under the Ministry of Labour. The two laws evolved separately, having been amended several times in the past ten years. This has resulted in overlap in the various provisions and in differences in the legal protection available to persons exposed to sex discrimination, compared to all other groups exposed to discrimination. In this legal maze, one must keep in mind that the special law (Gender Equality Law) overrides the general law (Antidiscrimination Law); the latter only applies when the former is silent on a particular issue.

At the moment, the main concepts in the field of gender equality have been fully transposed into the Gender Equality Law. The concept of direct discrimination is understood as the less favourable treatment of a person based on sex compared to how another person is, has been or would be treated in a comparable situation.⁴⁴⁵ Indirect discrimination is an apparently neutral provision, criterion or practice that would put persons of one sex at a particular disadvantage compared to persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.⁴⁴⁶ Positive action is permitted, not required.⁴⁴⁷ There are two different provisions in the Gender Equality Law regarding positive action. On the one hand, it covers special actions that are adopted on a temporary basis in order to accelerate the realisation in practice of equal opportunities between women and men.⁴⁴⁸ On the other hand, it is aimed at protecting certain categories of women or men, and not women as a group in comparison with men.⁴⁴⁹ The concept of instruction to discriminate is understood as any order or provision to discriminate.⁴⁵⁰ Harassment is defined as any unwanted conduct related to the sex of a person, having the purpose or effect of affecting the dignity of the respective person and creating an intimidating, hostile, humiliating and offensive environment.⁴⁵¹ Sexual harassment is sanctioned by two distinct laws. The Gender Equality Law sanctions any unwanted behaviour having a sexual nature, manifested physically, verbally or non-verbally,

⁴⁴³ Romanian Constitution of 1991, Article 38(4).

⁴⁴⁴ Romanian Constitution amended in 2003, Article 16(3).

⁴⁴⁵ Law 202/2002 regarding equal opportunities and equal treatment between women and men (*Lege nr.202/2002 privind egalitatea de sanse si de tratament intre femei si barbati*), Article 4(a) (hereafter 'Gender Equality Law').

⁴⁴⁶ Gender Equality Law, Article 4(b).

⁴⁴⁷ Gender Equality Law, Article 4(e) and Article 5(b).

⁴⁴⁸ Gender Equality Law, Article 4(e).

⁴⁴⁹ Gender Equality Law, Article 5(b).

⁴⁵⁰ Gender Equality Law, Article 6(2).

⁴⁵¹ Gender Equality Law, Article 4(c).

having the purpose or effect of affecting the dignity of the respective person and, especially, creating an intimidating, hostile, degrading, humiliating or offensive environment.⁴⁵² The New Criminal Code, which entered into force on 1 February 2014, sanctions acts of repeatedly demanding sexual favours in a labour relation or a similar relation, if the victim was intimidated or placed in a humiliating situation.⁴⁵³ While expanding the personal scope of the criminal offence of sexual harassment to labour relations between colleagues, irrespective of hierarchical relations, this new definition no longer applies outside the framework of labour relations (for example, sexual harassment by a teacher or a doctor against a student or a patient no longer falls under the criminal offence of sexual harassment⁴⁵⁴).

The only case law available is from the CNCD, imposing sanctions for sexual harassment in cases where a colleague or supervisor was displaying obscene gestures or gestures having a sexual nature, watching adult movies at the workplace, threatening the victim for them to respond to sexual advances.⁴⁵⁵ Sexual harassment was also involved in a case where an intimidating, humiliating and hostile environment was created in the office by a supervisor who was making indecent comments about the victim's looks, including sexual innuendo, lascivious eyes, studying certain parts of her body, blatant references to acts or sexual organs and a contemptuous attitude that continued throughout the day, and occasional warnings that as her supervisor he may put her on the list of persons that will be let go.⁴⁵⁶

2. Equal pay and equal treatment at work

2.1. Equal pay

The Romanian Constitution is limitative regarding equal pay. It does not cover work of equal value, only equal work, and it only applies to salary, not other types of remuneration or benefits for work.⁴⁵⁷ There is no case law of the Constitutional Court explaining how these limitations should be interpreted.

Despite the Constitutional provisions, the Labour Code fully transposes the principle of equal pay. It applies to equal work and work of equal value and to 'all the elements and conditions of remuneration.'⁴⁵⁸ Similar provisions are stipulated in the Antidiscrimination Law⁴⁵⁹ and the Gender Equality Law.⁴⁶⁰ The scope of the notion of 'pay', as stipulated by the Labour Code, includes the salary, any other remuneration or benefits, bonuses and other supplements.⁴⁶¹ The payment in kind of a part of the salary is allowed only if it has been expressly provided for in the applicable collective labour agreement or in the individual employment contract.⁴⁶²

There are wage schemes approved by law only for the public service. For all other employees, salary is negotiated on an individual basis. Minimum wage levels may be established by collective labour agreements. Nevertheless, there is no legal obligation for employers to conclude such agreements, only to initiate negotiations if they have more than 21 employees.⁴⁶³ Since 2011, no general collective agreement has been in force at the national level. Salary details are confidential and it is difficult to find out what amounts are paid to

⁴⁵² Gender Equality Law, Article 4(d).

⁴⁵³ New Criminal Code, Article 223.

⁴⁵⁴ Old Criminal Code, Article 203¹.

⁴⁵⁵ CNCD, Decision No. 180 of 19 July 2010.

⁴⁵⁶ CNCD, Decision No. 382 of 18 October 2012.

⁴⁵⁷ Romanian Constitution, Article 41(4).

⁴⁵⁸ Labour Code, Article 6(3).

⁴⁵⁹ Government Ordinance 137/2000 regarding preventing and sanctioning all forms of discrimination (*Ordonanta Guvernului nr.137/2000 privind prevenirea si sanctionarea tuturor formelor de discriminare*), Article 6(b), (c) (hereafter 'Antidiscrimination Law').

⁴⁶⁰ Gender Equality Law, Article 7(c).

⁴⁶¹ Labour Code, Article 160.

⁴⁶² Labour Code, Article 166.

⁴⁶³ Labour Code, Article 229.

male colleagues.⁴⁶⁴ In very few cases, trade unions or representatives of the employees are entitled to access information about wages.⁴⁶⁵ As a result, despite the legal definition of discrimination also allowing a hypothetical comparator,⁴⁶⁶ in its case law regarding equal pay, the National Council for Combating Discrimination requires the parties to submit evidence regarding a real comparator.⁴⁶⁷ Moreover, there are no job classification schemes, so it is difficult to compare jobs and positions involving work of equal value.

2.2. Access to work and working conditions

The Labour Code guarantees equal treatment on the ground of sex for all employees on an employment contract. In December 2012, the Gender Equality Law expanded its scope to all workers, including self-employed persons and spouses of self-employed persons who are not employees or associates, in cases where they contribute on a regular basis to the work carried out by the self-employed person.⁴⁶⁸

The Gender Equality Law details the scope of equal opportunities and equal treatment between women and men in the field of employment. It covers non-discriminatory access and performance of a profession or occupation, access to employment in all job openings at all levels, equal income for work of equal value, non-discriminatory access to vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience. It also covers promotion, employment and working conditions in compliance with health and safety safeguards at the workplace, benefits other than the salary, as well as non-discriminatory access to public and private social security systems, non-discriminatory access to organisations of workers, employers or professionals, including the benefits provided for by such organisation, non-discriminatory access to social services and social benefits provided for by the law.⁴⁶⁹

A landmark case decided by the CNCD in 2012 addressed the issue of equal access to specialised training leading to employment in police for women and men. The women's rights NGO Equality Partnership Centre filed a complaint stating that police schools allocated places based on sex and that much fewer places were allocated to women compared to men. CNCD found this policy to be discriminatory against women. It ruled that it is the candidate who should decide for herself/himself whether to take the risks implied in a job in the police force, while the employer has the means to assess the performance of each candidate corresponding to the activity that she/he will carry out.⁴⁷⁰

As to exceptions to the legal protection of gender equality, the Gender Equality Law transposed the exception in the Recast Directive regarding genuine and determining occupational requirements applied in the access to employment including training leading to such employment.⁴⁷¹ However, the Romanian legislator expanded this exception to 'any difference of treatment based on a characteristic related to sex'.⁴⁷² For example, working conditions or dismissal could fall under 'any treatment', which goes beyond the understanding of the Recast Directive.⁴⁷³ Not having case law available on this issue makes it difficult to predict how this will work out in practice.

In 2013, the Pitești Court of Appeal upheld the CNCD decision sanctioning for harassment a local police chief who made discriminatory remarks during a press conference regarding women in police forces and expressed his opinion that the number of women in

⁴⁶⁴ Labour Code, Articles 162-163.

⁴⁶⁵ Labour Code, Article 163.

⁴⁶⁶ Gender Equality Law, Article 4 Point a and Antidiscrimination Law, Article 2(1).

⁴⁶⁷ E-mail correspondence with a member of the Steering Committee of the National Council for Combating Discrimination. See also Decisions Nos. 75 of 19 February 2013, 393 of 12 June 2013 and 564 of 12 December 2012 (on file with the National Expert).

⁴⁶⁸ Gender Equality Law, Article 7(2).

⁴⁶⁹ Gender Equality Law, Article 7.

⁴⁷⁰ CNCD, Decision No. 485 of 12 October 2012.

⁴⁷¹ Gender Equality Law, Article 9.

⁴⁷² Gender Equality Law, Article 6(c).

⁴⁷³ Recast Directive, Article 14(2).

police forces should be limited.⁴⁷⁴ In this case the Court did not consider ‘sex’ to be a general determining occupational requirement for police forces.⁴⁷⁵

There are other exceptions prescribed by the Gender Equality Law that limit the scope of the legal gender equality protection – they apply to all activities carried out within the religious denominations and in private life.⁴⁷⁶ In these spheres, the exceptions are no longer limited to genuine and determining occupational requirements, objectiveness and proportionality, falling foul of the European *acquis*. Interestingly, these broad exceptions only apply to gender – there are no similar provisions in the Antidiscrimination Law.

2.3. Occupational pension schemes

From the beginning of 2008, the pension system in Romania consists of three pillars. The first pillar is the universal social security fund, a ‘pay as you go’ type, which is mandatory for persons in an employment relationship or self-employed persons. It uses the majority of the contribution to social insurance paid by the employer and the employee. The second pillar is a mandatory and fully-funded pension fund with defined contributions which are allotted to individual accounts run by licensed pension insurance companies. The third pillar includes supplementary pension schemes on a voluntary basis. Both the law regulating the social security system⁴⁷⁷ and the law regulating voluntary supplementary pension schemes include general non-discriminatory clauses.⁴⁷⁸ Moreover, the Gender Equality Law prescribes equal access for women and men to social security systems, public or private.⁴⁷⁹

3. Pregnancy and maternity protection, parental leave and adoption leave

Romanian legislation in the field of pregnancy and maternity protection and parental leave exceeds the requirements of EU law. Maternity leave lasts for 126 days, 63 days being allocated before birth and 63 days after birth, with a mandatory minimum of 42 days after birth. Parental leave of one year or two years (three years for a child with disabilities) may be taken after maternity leave, by all workers, women and men equally, who are parents and had a taxable income in the last 12 months. Starting 1 March 2012, at least one month of the parental leave is allocated on a non-transferable basis to the second parent.⁴⁸⁰ The right to parental leave is granted both to biological and adoptive parents.

In 2010, parental leave legislation was reformed. The previous allowance of 85 % of the income was capped at different levels depending on the length of the parental leave. For parental leave lasting one year the allowance may range between approximately EUR 112 (RON 500) and EUR 761 (RON 3 400), whilst for parental leave lasting two years the allowance is lower; between approximately EUR 112 (RON 500) and EUR 268 (RON 1 200). This measure, along with the one providing a small monthly incentive (EUR 112 (500 RON)) until the child reaches the age of two, are measures aimed to encourage parents, especially women, to return to work earlier.⁴⁸¹ However, these legislative measures are not supported by practical measures creating the necessary conditions for parents to return to work earlier, such as ensuring enough places in affordable nurseries and kindergartens, and creating facilities for employers that are willing to take measures to balance work and family life. This situation disproportionately affects women because they more frequently take parental leave.

⁴⁷⁴ CNCD, Decision No.412 of 17 October 2011.

⁴⁷⁵ Pitești Court of Appeal, Civil Judgment No.48 of 8 February 2013.

⁴⁷⁶ Gender Equality Law, Article 3.

⁴⁷⁷ Law 263/2010 regarding the unified public pensions system (*Lege nr.263/2010 privind sistemul unitar de pensii publice*), Article 2(d).

⁴⁷⁸ Law 411/2004 regarding pension funds managed by private entities (*Legea nr.411/2004 privind fondurile de pensii administrate privat*), Article 6(5) (hereafter ‘Public Pensions Law’).

⁴⁷⁹ Gender Equality Law, Article 7(g) and Article 9(e).

⁴⁸⁰ Government Emergency Ordinance No. 111/2010 regarding leave and monthly allowance for parental leave (*Ordonanta de Urgenta a Guvernului nr.111/2010 privind concediul si indemnizatia lunara pentru cresterea copiilor*), Article 11 (hereafter ‘Parental Leave Law’).

⁴⁸¹ Parental Leave Law.

According to the statistics published by the Ministry of Labour, Family, Social Protection and the Protection of the Elderly, the percentage of men taking parental leave is only around 15-18 %, and it is more widespread in the rural area compared to the urban area.⁴⁸²

As to paternal leave, according to the law, fathers who contribute to social security insurance have the right to a five-day fully-paid leave, in the first two months after the birth of their child. The leave may be extended to 15 working days if the father has completed an infant care course.⁴⁸³ This right does not apply to adoption.

Romanian legislation also respects the standards regarding the risks regarding health and safety, and any possible effects on pregnancy or breastfeeding, including those relating to assessment, exposure, night work, ante-natal exams, and maternity risk leave (up to 120 days).⁴⁸⁴

Employers are not allowed to dismiss pregnant workers, workers who are on maternity risk leave, maternity leave or parental leave. A similar protection against any type of dismissal is ensured for a period of six months after the end of parental leave.⁴⁸⁵ The only exception is when the employer is closing down or is under judicial reorganisation. After maternity leave or parental leave, the worker who has been on leave has the right to return to his/her job or to an equivalent one and also has the right to benefit from all advantages having occurred during his/her leave.

Unlawful dismissal may be challenged before a labour court within 30 days from the notice of dismissal. The burden of proof is on the employer. Court procedures are long and exhausting. The CNCD has developed substantial case law sanctioning employers for harassment and unlawful dismissal of women on the ground of pregnancy.⁴⁸⁶ However, the Bucharest Court of Appeal has overturned recent decisions of the CNCD in this field.⁴⁸⁷ Even though these three judgments are not final, they reflect the formalistic view that some judges have with respect to the competence of the CNCD in the field of sanctioning discriminatory treatment related to pregnancy in employment relations. At the same time, this strict interpretation has led courts to apply a strict definition of discrimination on the ground of sex. In particular, it found that the ground 'sex' was not applicable because there was no evidence that the employees were treated that way because they were women.

4. Statutory schemes of social security

The law regulating the social security system includes a general non-discriminatory clause, where one of the protected grounds is sex.⁴⁸⁸ There are several types of pensions: the old-age pension, anticipated pension, partially anticipated pension, invalidity pension, and survivors' pension. Moreover, persons insured under the public system have the right to paid support in case of death. As to sickness, accidents at work and occupational diseases schemes and associated benefits, the law provides for medical leave and public health insurances to insured persons. Only contributors to the social security system have access to these benefits.

The newly adopted Public Pensions Law (Law No. 263/2010) maintains the difference in the pensionable age for men (65) and women (63), despite a Constitutional Court decision stating that equalising the pensionable age is constitutional. The initial draft introduced by the Government proposed equalising the pensionable age for men and women at 65. In its reasoning, the Constitutional Court acknowledged that the social conditions for women in

⁴⁸² MLFSPE, Statistical Bulletin. Social Assistance. 2010, 2011, 2012, 2013, available at <http://www.mmuncii.ro/j33/index.php/ro/transparenta/statistici/buletin-statistic>, accessed 4 September 2014.

⁴⁸³ Law 210/1999 regarding paternal leave (*Legea 210/1999 privind concediul paternal*).

⁴⁸⁴ Government Emergency Ordinance No. 96/2003 regarding the protection of maternity at the workplace (*Ordonanta de Urgenta a Guvernului nr.96/2003 privind protectia maternitatii la locurile de munca*).

⁴⁸⁵ Parental Leave Law, Article 24.

⁴⁸⁶ CNCD, Decision No. 417 of 15 December 2010, Decision No. 28 of 18 January 2012, and Decision No. 61 of 6 February 2013.

⁴⁸⁷ Bucharest Court of Appeal, Judgments Nos 3918 of 9 December 2013, 1712 of 27 May 2013, and 4585 of 24 July 2012.

⁴⁸⁸ Public Pensions Law, Article 2(d).

Romania had improved in recent years, similar to other European States. In the Court's opinion, this change shows there is no longer a justification for the different treatment based on sex that is thought to be more favourable for women.⁴⁸⁹ The political decision was to maintain the difference in the pensionable age, with the exception of military personnel, police forces, penitentiary public officers and other public officers from the public order and national security.⁴⁹⁰ A complaint submitted to the CNCD in 2009, by a school teacher complaining that women are obliged to retire five years earlier than men, was declared inadmissible because the CNCD is not competent to examine discrimination included in law.⁴⁹¹

Women are actually disadvantaged by the difference in pensionable age, as clearly showed by statistics. Another different treatment contributing to their disadvantaged situation is that during parental leave, predominantly taken by women, the points assigned for their contribution to the social security fund do not reflect their actual income (only 25 % of the medium income at the national level registered during leave, irrespective of the person's actual income).⁴⁹² In addition, the Public Pensions Law introduced an equalised requirement regarding the period of contribution to the social security fund (35 years for both men and women), which will downgrade women's pensions even more in comparison with men.⁴⁹³

5. Self-employed persons

In Romanian legislation the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity, including financial facilities, is in compliance with the principle of gender equality. The conditions for the formation of a company by spouses are not more restrictive than the conditions for the formation of a company by unmarried persons. Several projects implemented with European structural funds supported activities aimed at encouraging entrepreneurial initiatives among women.

Recent amendments of the Gender Equality Law explicitly extended its scope to apply to self-employed persons and their spouses who work for them.⁴⁹⁴ Nevertheless, this is the only law that operates with the concept of 'assisting spouse'; this type of work is unregulated in Romania. Therefore, it will be difficult to establish that a person is actually an assisting spouse. Moreover, there are no benefits granted to assisting spouses that do not have a taxable income.

6. Goods and services

As mentioned above, the Antidiscrimination Law and the Gender Equality Law have a scope that is wider than the field of employment. They also cover the issue of equal access to goods and services, including on the ground of sex. However, the Romanian Government decided to adopt a separate piece of legislation – The Goods and Services Law⁴⁹⁵ – exclusively transposing Directive 2004/113. While it fully transposes the Directive, this law has numerous provisions showing overlap with the rest of the existing legislation in the field of equality and non-discrimination.

⁴⁸⁹ Romanian Constitutional Court, Decision No. 1237 of 6 October 2010, published in Official Journal No. 785/2010.

⁴⁹⁰ Public Pensions Law, Article 54.

⁴⁹¹ CNCD, Decision No. 455 of 20 August 2009.

⁴⁹² Public Pensions Law, Article 97(1)(b).

⁴⁹³ Public Pensions Law, Article 53(3).

⁴⁹⁴ Government Emergency Ordinance No. 83 of 4 December 2012 amending Law No. 202/2002 regarding equal opportunities and equal treatment between women and men (*OUG Nr.83 din 04.12.2012 pentru modificarea și completarea Legii nr. 202/2002 privind egalitatea de șanse și de tratament între femei și bărbați*).

⁴⁹⁵ *Ordonanța de Urgență a Guvernului nr.61/2008 privind implementarea principiului egalității de tratament între femei și bărbați în ceea ce privește accesul la bunuri și servicii și furnizarea de bunuri și servicii*.

The Goods and Services Law exactly reproduces the scope and all exceptions provided for in Directive 2004/113. It applies to all persons who provide goods and services available to the general public, public or private legal persons and public bodies. These goods and services are offered outside the field of private and family life and do not apply to media and advertising, education and employment, including independent professions. Such legal limitations are inconsistent with the rest of Romanian legislation, which exceeds the requirements of Directive 2004/113 and was in place even before the Goods and Services Law was adopted. First, the Antidiscrimination Law does not allow any exceptions, e.g. regarding real estate contracts, bank loans and any other type of contract.⁴⁹⁶ Second, the Gender Equality Law applies to services in the field of education and media and advertising.

As to the compliance with the *Test-Achats* case,⁴⁹⁷ at the end of December 2012, the Commission for the Surveillance of Insurances (*Comisia de Supraveghere a Asigurărilor*) issued a press release stating that the result of the *Test-Achats* case was to enter into force on 21 December 2012. It was not until 11 September 2013 that the Commission adopted the norms for the regulation of unisex premiums and benefits.⁴⁹⁸ The norms stipulate among other provisions that 'sex' as an actuarial factor in the calculation of premiums and benefits should not result in differences in the premiums and benefits for the insured person. Moreover, at the end of April 2013, the Goods and Services Law was amended in order to comply with requirements laid down in the *Test-Achats* decision. Proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data is no longer allowed by law.⁴⁹⁹ Moreover, sex as a factor in the assessment of premiums and benefits within insurance services and associated financial services must not determine differences in premiums and benefits for the insured person, in all contracts concluded by this person.⁵⁰⁰

The case law of the CNCD in this field is dominated by a series of cases of discrimination based on sex against men who are refused by hospitals when they wish to accompany their small children during hospitalisation. The CNCD acknowledged that hospitals' policy is rooted in the stereotype that only mothers or other women from the family are to take care of small children.⁵⁰¹ In 2012, the CNCD decided on an interesting case of discrimination against women in the access to goods and services. The CNCD sanctioned a service provider for displaying an announcement at the ticket booth that women were not allowed to buy tickets for a particular football game. The CNCD stated that the measure, allegedly taken to protect women from the violence that was expected to escalate at that particular game, did not serve a legitimate aim; these events should not be violent in the first place and such a way of addressing violence in sports may give rise to the idea that women should be generally excluded from football events.⁵⁰²

⁴⁹⁶ Antidiscrimination Law, Article 10.

⁴⁹⁷ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

⁴⁹⁸ Comisia de Supraveghere a Asigurărilor, Norm No.11/2013 on the implementation of the principle of equal treatment between women and men in access to services in the field of insurances and the provision of services in the field of insurances (*Norma nr.11/2013 privind implementarea principiului egalității de tratament între femei și bărbați în ceea ce privește accesul la serviciile din domeniul asigurărilor și furnizarea de servicii în domeniul asigurărilor*), published in Official Journal No.593 of 20 September 2013.

⁴⁹⁹ Law 128/2013 for the abolishing of Article 7(2)-(4) of Emergency Ordinance No. 61/2008 regarding the implementation of the principle of equal treatment between women and men with respect to access to and supply of goods and services (*Legea 128/2013 pentru abrogarea alin. (2)-(4) ale art. 7 din Ordonanța de urgență a Guvernului nr. 61/2008 privind implementarea principiului egalității de tratament între femei și bărbați în ceea ce privește accesul la bunuri și servicii și furnizarea de bunuri și servicii*), Article I (hereafter '2013 Amendment of Goods and Services Law').

⁵⁰⁰ 2013 Amendment of Goods and Services Law, Article II.

⁵⁰¹ E.g. CNCD, Decision No.187 of 19 July 2010.

⁵⁰² CNCD, Decision No. 489 of 21 November 2012.

7. Enforcement and compliance aspects

The Gender Equality Law does not contain provisions regarding victimisation. However, the Goods and Services Law⁵⁰³ and the Antidiscrimination Law sanction victimisation as any adverse treatment carried out in reaction to a complaint or legal action introduced in court by a person regarding a breach of the principle of equal treatment.⁵⁰⁴ The CNCD has recently applied this general provision and sanctioned an employer for firing a woman in reply to her lodging an internal complaint about sexual harassment.⁵⁰⁵

The burden of proof has three different definitions in the three laws in the field.⁵⁰⁶ Only the recently amended provisions regarding the burden of proof of the Antidiscrimination Law are in compliance with the Directives.⁵⁰⁷ The CNCD applies the burden of proof from this general law in cases of alleged discrimination on the ground of sex. This practice is beneficial, given the fact that the definitions from the Gender Equality Law and the Goods and Services Law are unclear, and therefore fail to correctly transpose the Directives. Nevertheless, the CNCD remains inconsistent in applying the burden of proof in cases of discrimination on all grounds.

Civil-law compensation, reinstatement, and administrative sanctions are available remedies to victims of breaches of the principle of gender equality. The Gender Equality Law introduces a difference regarding employees that complain about discrimination on the ground of sex, compared to all other victims of discrimination. They first have to file an internal complaint with the employer, and only if the conflict is not solved by mediation may they submit a complaint to court or to the CNCD.⁵⁰⁸ The same is prescribed for alleged victims of sex discrimination related to access to and supply of goods and services: they must first seek to reconcile with the service provider.⁵⁰⁹ The administrative sanctions vary from EUR 680 (RON 3 000) to EUR 22 720 (RON 100 000), except for cases that occur in the field of access to and supply of goods and services, where the administrative fine is lower (from EUR 340 (RON 1 500) to EUR 3 400 (RON 15 000)). In practice, administrative fines awarded by the CNCD are closer to the minimum range; this is when the CNCD does not choose to issue written warnings and recommendations instead of fines. Moreover, civil-law compensations for moral damages, when awarded by courts for breaches of the principle of equality, are very low in the Romanian justice system, rendering the mechanism ineffective.

Administrative complaints and court actions against sex discrimination are tax exempted. Recently, an amendment of the Gender Equality Law has limited the possibility of alleged victims to be represented or assisted by trade unions or non-governmental organisations to administrative procedures only, and not court proceedings, which is in breach of the Directives.⁵¹⁰ Nonetheless, the Antidiscrimination Law prescribes that all groups exposed to

⁵⁰³ Emergency Ordinance No. 61/2008 regarding the implementation of the principle of equal treatment between women and men with respect to access to and supply of goods and services (*Ordonanta de Urgenta a Guvernului nr.61/2008 privind implementarea principiului egalitatii de tratament intre femei si barbati in ceea ce priveste accesul la bunuri si servicii si furnizarea de bunuri si servicii*), Article 14 (hereafter ‘Goods and Services Law’).

⁵⁰⁴ Antidiscrimination Law, Article 2(7).

⁵⁰⁵ CNCD, Decision No. 345 of 6 September 2011.

⁵⁰⁶ Antidiscrimination Law, Article 20(6) and Article 27(4), Gender Equality Law, Article 44, and Goods and Services Law, Article 12.

⁵⁰⁷ Law 61/2013 for the amendment of Government Ordinance No. 137/2000 regarding the prevention and sanctioning of all forms of discrimination (*Legea 61/2013 pentru modificarea Ordonantei Guvernului nr. 137/2000 privind prevenirea si sanctionarea tuturor formelor de discriminare*).

⁵⁰⁸ Gender Equality Law, Article 39.

⁵⁰⁹ Goods and Services Law, Article 9.

⁵¹⁰ Gender Equality Law, Article 44, introduced by Emergency Government Ordinance 83/2012 for the amendment of Law No. 202/2002 regarding equal opportunities and treatment between women and men (*Ordonanta de Urgenta a Guvernului 83/2012 pentru modificarea si completarea Legii nr. 202/2002 privind egalitatea de sanse si de tratament intre femei si barbati*).

discrimination may benefit from such support in both administrative procedures and court proceedings.⁵¹¹

The national gender equality body, the National Agency for Equal Opportunities between Women and Men (*Agenția Națională pentru Egalitate de Șanse între Femei și Bărbați* (ANES)), was closed down a few years ago. Only some of its competences have been taken over by the Ministry of Labour, Family and Social Protection through the Department for Equal Opportunities between Women and Men, an alternative that does not fulfil the conditions of independence. The CNCD is the national equality body dealing with all grounds of discrimination.

Social partners do not play a decisive role in Romania in ensuring compliance with and enforcement of the Gender Equality Law. Although legally binding, collective agreements are not widespread and they are not used as specific means to implement gender equality.

8. Overall assessment

The implementation of the EU gender equality *acquis* is satisfactory and this is mainly due to the adoption of the general Antidiscrimination Law and the establishment of the CNCD. Although having special legislation focusing exclusively on gender equality shows particular political support to gender issues, the way in which EU legislation has been transposed has resulted in overlap, lack of clarity and inconsistencies that affect women from all groups protected against discrimination. This situation makes it more difficult for courts or other competent authorities to examine and sanction discrimination in an effective, proportionate and dissuasive way. It is imperative that all laws in the field of antidiscrimination and gender equality are consolidated in one piece of legislation, while bearing in mind that higher standards established in each of these laws should be preserved.

Despite generous legal provisions, courts and the CNCD choose lower or symbolic sanctions, frequently rendering the sanctioning mechanism ineffective. This has an impact on the limited case law because persons exposed to discrimination do not feel motivated to bring complaints or take further legal action.

Closing down the national gender equality body (ANES) was detrimental because now there no longer is a specialised institution focusing exclusively on gender equality. The Equal Opportunities Department within the Ministry of Labour and the CNCD do not substitute the ANES's absence.

SLOVAKIA – Zuzana Magurová

1. Implementation of central concepts

The Antidiscrimination Act (ADA) is a general Act on equal treatment in public and private relationships and protection against discrimination.⁵¹² The ADA regulates direct discrimination, indirect discrimination, harassment and sexual harassment, instruction to discriminate, incitement to discriminate and victimisation.

The definition of direct discrimination in the ADA is almost identical to the definition taken from directives. Direct discrimination is defined not only as an action but also an omission that causes one person to be treated less favourably than another is or has been treated in a comparable situation.

The ADA applies an individual rather than a collective principle to the definition of indirect discrimination. Until the adoption of the amendment of the ADA that has been in effect since 1 April 2013, the definition deviated from the definitions contained in

⁵¹¹ Antidiscrimination Law, Article 28.

⁵¹² Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination and on amendment of certain Acts (Antidiscrimination Act), as amended.

the directives by permitting only actual, not potential discrimination. The current definition is almost identical to the definitions contained in the directives.

From 1 April 2008, repeated attempts were made to introduce positive action (literally ‘temporary balancing measure’, as translated from Slovak) into the ADA. During the adoption process, Parliament refused to include temporary balancing measures on the grounds of sex and ethnic or racial origin. Instead it replaced these grounds by ‘social and economic disadvantage’. In an amendment to the ADA adopted in 2013, the initial formulation ‘discrimination does not mean the adoption of temporary balancing measures to eliminate the forms of social and economic discrimination and discrimination on the grounds of age and disability aimed to achieve the equality of opportunities in practice’ was replaced by ‘discrimination does not mean the adoption of temporary balancing measures for the elimination of disadvantages arising on the grounds of race or ethnic origin, membership of a national minority or ethnic group, gender or sex, age or disability, aimed to achieve equality of opportunities in practice’. The ADA therefore permits the adoption of positive action on the grounds of sex and gender for the first time.

In the ADA the prohibition of an instruction to discriminate is realised in two definitions: in the instruction to discriminate and in the incitement to discriminate. The instruction to discriminate usually abuses the subordinate position of an individual to discriminate against a third party. Incitement to discriminate is persuading, affirming or inciting a person to discriminate against a third person and the relevant prohibition applies in all types of relations in areas where discrimination is prohibited.

The definition of harassment in the ADA is not fully compatible with the directives, but in some aspects goes beyond the requirements of the directives and may guarantee a higher level of protection against harassment than the directives. In addition to covering the intention or consequence of a violation of an individual’s dignity, it permits an actual or potential intervention into a person’s freedom. As the ADA does not define this freedom in detail, it can be widely interpreted as personal freedom, freedom of religious belief, conviction, speech and movement. Unlike the directives, the definition of harassment in the ADA does not contain any direct reference to the ground on which the harassment is prohibited. However, from the logical and systematic interpretation it is clear that the prohibition of harassment is relevant only on the grounds as defined in the recital of the ADA.

The definition of sexual harassment (provided in the ADA of 1 April 2008) is not fully compatible with the definitions contained in the directives. It does not include an explicit reference to unwanted conduct. From the interpretation of the definition it is also clear that potential violation of an individual’s dignity should be assessed individually and independently from whether an intimidating, hostile, degrading, humiliating or offensive environment has been created. The definition of sexual harassment in the ADA requires a cumulative fulfilment of the condition of actual or potential violation of an individual’s dignity and the creation of an intimidating, hostile, degrading, humiliating or offensive environment without indicating the difference between these two requirements. This means that the definition of sexual harassment in the ADA is restrictive compared to the definitions contained in the anti-discrimination directives.

2. Equal pay and equal treatment at work

2.1. Equal pay

The principle of equal pay for men and women is generally guaranteed under the Slovak Constitution.⁵¹³ According to Section 36, all employees have the right to fair and satisfactory conditions at work, in particular the right to remuneration for the work performed and the right of collective bargaining. The principle of equal pay can also be deduced from the ADA. It provides that the principle of equal treatment applies to employment relationships, including to remuneration. The general principle of equal pay for equal work is laid down in

⁵¹³ Act No. 460/1992 Coll. Constitution of the Slovak Republic, as amended, effective since 1 October 1992.

the Labour Code.⁵¹⁴ Its provisions state that pay conditions must be agreed on without any discrimination on grounds of sex. Women and men shall be entitled to equal pay for the same work or work of equal value. This condition applies to all remuneration for work and all benefits that are paid in relation to employment in accordance with Article 157 TFEU and Article 4 Recast Directive. The principle of equal pay covers employees, part-time workers (including job sharing), and workers who perform home-work or telework.

Article 119a of the Labour Code includes a definition of work of equal value. The same work or work of equal value is considered to be work of the same or comparable complexity, responsibility and urgency, which is performed in the same or similar working conditions producing the same or comparable productivity and results of work for the same employer.⁵¹⁵

According to the Labour Code, if the employer implements a system of job valuation, the valuation must be based on the same criteria for men and women without any sexual discrimination. In the valuation of the work of women and men, employers may use other objectively measurable criteria if they can be applied to all employees without regard to sex. There are no detailed provisions on job classifications and remuneration is based on collective or individual agreements. The only job classification is the classification contained in an attachment to the Labour Code which contains a job classification for the purposes of determining a coefficient for setting the right minimum pay for each particular job. The attachment specifies 6 degrees of work difficulty according to the following criteria: complexity, responsibility and physical/mental effort.

The Labour Code also applies (subsidiarily) to employment relationships of civil servants and public servants, unless stipulated otherwise by a special regulation. Examples of such special regulations are the Act on State Service, for civil servants, and the Act on Performing Work in the Public Interest, the Act on Rewarding Some Employees when Performing Work in the Public Interest and the Government Regulation on Catalogues of Jobs to be performed in the Public Interest, for public servants.

Pay and employment conditions of civil servants are covered only by separate laws. The Act on State Service covers civil servants: court clerks, judicial trainees of courts, judicial trainees of the prosecution.⁵¹⁶ This Act does not cover the constitutional representatives: members of Parliament, the President, members of the Government, the president and vice-president of the Supreme Audit Office, judges of the Constitutional Court, judges, prosecutors, the public guardian of rights (Ombudsman), and the director of the Bureau of National Security, whose remuneration is regulated in separate laws.

There are also separate laws covering the remuneration for specific groups of civil servants, such as policemen, professional soldiers, members of the Slovak Intelligence Service, the Bureau of National Security, Prison Corps and Judicial Guard (so-called 'power branches').

According to the position to which civil servants are appointed and the function to which they are assigned, they receive a salary based on the relevant salary class. The salary class is specified according to the most demanding activity to be performed in the relevant civil service employment post, in compliance with Annex 1, which contains the description of the particular salary classes.

The Act on Performing Work in the Public Interest covers public servants. This includes, inter alia, employees of state administration authorities (except those falling under the civil service), municipalities, regional bodies, and legal entities set up by any of the previous bodies.⁵¹⁷

⁵¹⁴ Act No. 311/2001 Coll. Labour Code, as amended.

⁵¹⁵ The situation has improved in the definition of wages in the amendment of the Labour Code, effective since 1 September 2007. It was an essential reform, in which the definition of wage contained in Article 118 was changed and the principle of equal remuneration for equal work and for work of equal value was laid down in the new Article 119a.

⁵¹⁶ Act No. 400/2009 Coll. on State Service and on amending and supplementing certain other Acts, as amended.

⁵¹⁷ Act No. 552/2003 Coll. on Works Performed in the Public Interest, as amended.

The Act on Rewarding Some Employees when Performing Work in the Public Interest regulates the salaries of public servants, their ranking in salary classes and in salary levels.⁵¹⁸ For each salary class in the public service, there are specific rules relating to the qualifications required and work difficulty, which are determined according to criteria such as complexity, responsibility and physical/mental efforts. The ranking of public servants in salary levels depends on the length of their experience.

The Government Regulation on Catalogues of Jobs to be Performed in the Public Interest contains the details of all activities that are covered by the individual job classes.⁵¹⁹ They are divided according to whether mental or physical work prevails in each particular job.

There is no known case law in relation to sex-based discrimination in job classification systems. No information is available regarding relevant national case law on this issue.

2.2. Access to work and working conditions

General regulations regarding the right to equal treatment for women and men with regard to access to employment, vocational training, working conditions and remuneration are contained in the ADA, and more detailed regulations in the Labour Code and other laws.

In conformity with the principle of equal treatment the ADA includes a prohibition of discrimination on the grounds of sex in the field of access to employment, occupation, self-employment and functions including job requirements (which also encompasses job advertisements), and conditions and means of performing employee selection. The Act also includes a general prohibition of discrimination in the access to vocational training and job selection consultancy agencies. The ADA also includes a prohibition of discrimination in terms of promotion. The ADA furthermore refers to the existing laws in the area of employment, self-employment and occupation without making any distinction between legal relationships in the private and the public sector.

The Labour Code already contains more detailed regulations regarding access to employment. In addition to the general equal treatment clause in Article 13 that applies to all employment relationships (including part-time work, job sharing, home-work and telework) from the beginning until the termination of the employment, it contains a special Article on so-called 'Pre-contractual Relations' (Article 41). This Article contains a specific prohibition for a future employer to require information on pregnancy and family relationships and a prohibition to breach the equal treatment principle. This Article also applies to the employment relationships of civil servants and public servants.

In Article 14(1) of the Act on Services of Employment the right to access to employment is defined as the right to receive help either in the search for an appropriate job, or in vocational training and preparation for the labour market. The right to access to employment is guaranteed in accordance with the principle of equal treatment. In order to achieve the application of the equal treatment principle in access to employment, the Act also contains a provision in Article 13(z)(a) about the duty of employment agencies to inform job applicants about their right to equal treatment in access to employment. Moreover, the Act contains a specific prohibition in Article 62 that prohibits job advertisements with job offers containing any restrictions or discrimination on the grounds inter alia of sex, marital or family status, or social origin. According to this Article, the criteria for selection of employees must guarantee equal opportunities for all citizens.

The original wording of the concept of different treatment in the ADA as adopted in 2004 was changed in September 2007 to produce a more precise definition, identical to the wording of the Recast Directive. The ADA has a different definition in Section 8(1). The respective provision provides that 'a treatment that is justified by the nature of occupational activities or by the circumstances under which such activities are carried out, if the ground constitutes a

⁵¹⁸ Act No. 553/2003 Coll. on Rewarding Some Employees when Performing Work in the Public Interest, as amended.

⁵¹⁹ Government Regulation No. 341/2004 Coll. on Catalogues of Jobs to be Performed in the Public Interest.

genuine and determining occupational requirement, shall not constitute discrimination, provided that the objective is legitimate and the requirement is proportionate’.

2.3. Occupational pension schemes

The occupational pension schemes are not regulated by special legislation. Some provisions of the Act on Additional Pension Savings, however, could be considered as laying down conditions for such schemes.⁵²⁰ The aim of this Act is to enable an insured person, e.g. an employee according to Labour Code and professional dancer, to receive an additional pension income in old age or during invalidity and to grant his or her survivors an additional pension income in the event of the insured person’s death. In Article 7, the Act prohibits discrimination in the accrual of additional pension savings, referring to the ADA (including the provisions on legal protection and proceedings in matters concerning the violation of the principle of equal treatment). It also states that any provisions of the collective agreement connected with additional pension savings, or of the employer’s agreement, participant’s agreement, plan of endowments/payments, or bylaws of the additional pension fund that are not in full compliance with the principle of equal treatment are invalid. Pursuant to Article 34 of this Act, the additional pension savings company is obliged to, inter alia, apply the principle of equal treatment in relation to all savers.

3. Pregnancy and maternity protection, parental leave and adoption leave

According to the ADA, objectively justified differences in treatment on grounds of sex are allowed where their purpose is the protection of pregnant women and mothers.

The Labour Code provides that for pregnant women, mothers until the completion of the ninth month after confinement and breastfeeding mothers, working conditions shall be secured that will protect their medical state with respect to pregnancy, childbirth, care for the child after birth, and their special relationship with the child after birth.

Pregnant women, mothers until the end of the ninth month after confinement and breastfeeding women must not be employed in work activities that are physically inappropriate or harmful for them. If a pregnant woman performs work that is prohibited for pregnant women to perform, or which according to medical opinion threatens her pregnancy, the employer shall be obliged to implement a temporary change to her working conditions. If a change to the woman’s working conditions is not possible, the employer shall temporarily transfer her to work that is suitable and in which she may earn the same salary as the salary that she earns for her normal work within the scope of the employment contract. If this is not possible, he/she shall transfer her, upon her agreement, to a different type of work. If transfer of a pregnant woman to day work or transfer to other suitable work is not possible, the employer shall be obliged to give the pregnant employee time off and wage compensation. If a woman, in work she was transferred to by no fault of her own, earns a salary that is lower than that earned in her normal work, for the purpose of balancing out the difference she shall be provided with an equalisation benefit for pregnancy and motherhood according to the Social Insurance Act. The employer is also obliged to transfer a pregnant woman working nights to day work, if the pregnant woman applies for such transfer. If she cannot be transferred to day work, the employer is obliged to give a pregnant employee time off and wage compensation.

An employer shall be obliged to allow a mother who breastfeeds her child special breaks for breastfeeding, in addition to the normal work breaks. Only women who have given birth to a child are entitled to such breaks; fathers or other persons nursing a child are not. Breaks for breastfeeding shall count as working time and shall be covered by wage compensation in the amount of the average earnings (paid by the employer).

For women and men, working conditions shall be secured that will enable them to perform their social tasks in the upbringing of children and their care. To these persons the

⁵²⁰ Act No. 650/2004 Coll. on Additional Pension Savings, as amended.

legislator therefore grants special protection, which is manifested in working conditions, adaptation of working hours, prohibition of termination of the employment relationship within a protected period, maternity or parental leave and childcare, in various provisions of the Labour Code.

Maternity leave is given by the employer to its employees in the form of time off. Maternity leave of a woman connected with childbirth must not be shorter than 14 weeks and if the woman goes on maternity leave before childbirth, the maternity leave must not end before the sixth week after childbirth. Female employees are entitled to maternity leave in connection with childbirth and to care for a newborn child either for the duration of 34 weeks, or 37 weeks in the case of single mothers, or 43 weeks for multiple births. Maternity leave generally commences 6 weeks prior to the expected date of confinement. A woman goes on maternity leave from the date stated by the doctor. Male employees are also entitled to parental leave on the same conditions if they are the ones who care for a new-born child. A man goes on parental leave from the birth of the child. Male employees are entitled to parental leave in two separate cases: 1. from the birth of a child in connection with the care of a new-born child (the same scope as maternity leave) or 2. if he requests parental leave in order to enhance the care of a child until the age of three.

The employer is obliged to give parental leave to the parents (women or men) at their request. Parental leave shall be allowed until the child turns three and if the child is in ill health until the child turns six. Parental leave is allowed within the scope requested by the parent, but is usually for a period not shorter than one month.

Slovak legislation complies with the directives, and the regulations on the length of maternity and parental leave go further than the directives require. However, there is still a great deal of room for improvement from a legislative point of view, which could contribute to achieving gender equality in practice. One obstacle is that if both parents apply for parental leave, only one will be entitled to parental allowance. Despite the fact that the Labour Code provides that the second spouse/parent can take parental leave in the form of unpaid time off from work (with maintenance of employment guaranteed), the parental allowance is not enough to cover the living costs of the second spouse/parent. Slovak legislation does not offer paternity leave for fathers around the time of the birth of their child or in the weeks after the birth, which they can use in the period that the mothers are also on maternity leave.

4. Statutory schemes of social security

In Slovakia, there are no specific regulations regarding occupational social security schemes. The social security system is based on three schemes: social insurance, which secures a decent income in old age, invalidity, pregnancy and disease, and provides survivors' pension; state social benefits, which are direct financial contributions by the State to offer assistance in overcoming an undesirable fall in the population's standards of living due to the occurrence or lasting of certain events in the lives of families (dependent children) and citizens; and social assistance, which is the contribution of the State to help the citizen in need, where the role of the State is only to assist the citizen in overcoming his/her crisis situation. It is expected that the citizen will actively seek to overcome his/her crisis situation.

Social insurance consists of a mandatory public insurance component (based on mandatory contributions and defined benefits) governed by the Act on Social Insurance,⁵²¹ a mandatory or voluntary savings component governed by the Act on Old-Age Pension Savings⁵²² and a voluntary private savings component, which is a supplementary component governed by the Act on Additional Pension Savings.

The scope of social insurance according to the Act on Social Insurance consists of five independent sub-schemes: sickness insurance, pension insurance (old-age insurance and invalidity insurance), accident insurance, guarantee insurance and unemployment insurance.

⁵²¹ Act No. 461/2003 Coll. Act on Social Insurance, as amended.

⁵²² Act No. 43/2004 Coll. Act on Old-age Pension Savings, as amended.

The Act on Social Insurance covers employees: public servants, civil servants, constitutional representatives, the public guardian of rights (ombudsman), employees in an employment relationship according to the Labour Code, members of co-operatives, etc.

This Act does not relate to the so-called ‘power branches’, i.e. specific groups of civil servants, such as policemen, professional soldiers, members of the Police Corps, the Slovak Intelligence Service, Bureau of National Security, Prison Corps and Judicial Guard. Separate laws regulate the schemes of these groups of professionals. Their employer (Ministry of Defence, Ministry of Interior) pays contributions to special funds associated with ministerial budget chapters.

5. Self-employed persons

A special Act only regulating the issues of self-employed persons does not exist in Slovakia. The term ‘self-employed person’ was previously regulated by several Acts,⁵²³ which however included different definitions of this term. The definition of this term was unified in 2011.⁵²⁴

The maternity allowance paid by the Social Insurance Agency and the parental allowance paid by the State are also paid to self-employed women, on the same conditions as employed women.

The equal treatment of self-employed persons and the protection of self-employed women during pregnancy and motherhood are regulated in several special laws. In relation to self-employed persons the directives have been transposed more or less satisfactorily. In all legislation that contains a definition of self-employed persons, the principle of equal treatment is expressly enshrined in compliance with the concept of equal treatment as in the ADA.

6. Goods and services

Directive 2004/113/EC has been transposed by an amendment to the ADA included in Act No. 85/2008 Coll. and also partially by the Insurance Act and the Consumer Protection Act.⁵²⁵ The amendment to the ADA broadens the protection against discrimination in the area of social protection, healthcare, education, as well as in the access to and the supply of goods and services, including housing, that are provided to the public by legal entities and individuals, i.e. entrepreneurs. The grounds on which discrimination should be prohibited are: sex, religion or belief, race, national or ethnic origin, disability, age, sexual orientation, marital status, family status, colour of skin, language, political or other opinion, national or social origin, property, lineage or other status. In previous legislation the only grounds on which discrimination was prohibited in these areas were sex, race and national or ethnic origin. Prohibition of discrimination in the access to and supply of goods and services is limited to the sale of goods and the supply of services in public and targeted to the public. The provisions of the ADA do not apply to goods and services offered or provided on a private basis (e.g. providing and offering goods to the members of a private association, family etc.).

Under the Consumer Protection Act, when providing goods and services to consumers the seller has the obligation to comply with the principle of equal treatment stipulated in the Antidiscrimination Act.

⁵²³ Act No. 461/2003 Coll. Act on Social Insurance, as amended; Act No. 5/2004 Coll. Act on Services of Employment, as amended.

⁵²⁴ The Act on Social Insurance defines a self-employed person as an individual who has reached the age of 18 and is registered in accordance with tax regulations as: an entrepreneur who has income from agricultural production, forestry and water management, an entrepreneur who conducts business on the basis of a trade licence (tradesperson), an entrepreneur who conducts business on the basis of an authorisation other than a trade licence (e.g. auditor, tax consultant, notary public), a partner in a public company, an active partner in a special partnership, an entrepreneur who has income from author’s activity, industrial or other intellectual property, an expert and interpreter, and an entrepreneur who has income from intermediary business according to other regulations.

⁵²⁵ Acts No. 8/2008 Coll. Insurance Act and No. 250/2007 Coll. Consumer Protection Act, respectively.

Amendments to the ADA and the Insurance Act (in effect since 1 April 2013) significantly intervened in the insurance sector. The ADA previously allowed the use of differences based on sex for the determination of the amount of insurance premiums and the calculation of insurance benefits by insurance companies without regarding such approach as discriminatory. Since 1 April 2013 such different approach, with the exception of insurance contracts concluded before 1 April 2013, is regarded as discrimination.

7. Enforcement and compliance aspects

Victimisation, according to the ADA, is considered to be discrimination. It is an action or omission which has adverse consequences for the person in question and directly relates to legal protection against discrimination when the person in question or a third person submits a complaint regarding or testifies to a breach of the principle of equal treatment. The ADA does not regulate other methods of protection with respect to a breach of the principle of equal treatment (e.g. filing complaints or seeking reconciliation). However, special laws regulating the principle of equal treatment also regulate opportunities to claim protection. For example, the Labour Code allows an employee to complain to the employer when there has been a breach of the principle of equal treatment, with the employer then being obliged to respond to the complaint without unnecessary delay, to rectify the situation, to refrain from illegal action and to remove its consequences. This provision also applies to the public sector at universities and schools. A common feature of these provisions is that there are no procedural mechanisms specified for investigating the complaints.

The ADA also regulates anti-discrimination proceedings. It is the only Act that also includes provisions regarding the shift of the burden of proof. The draft ADA initially also envisaged an amendment of the Code of Civil Procedure, but this idea was abandoned in the end. The courts therefore tended to 'only' adhere to the procedural rule and avoid the application of the provisions included in the ADA. They often justified the non-application of the principle of the shift of the burden of proof by the fact that this procedural principle was not provided for in the Code of Civil Procedure. Consequently, victims of discrimination were often unsuccessful in court proceedings due to lack of evidence. As some judgments concerning racial discrimination show, the situation is gradually improving. From the quoted judgments it is obvious that when courts apply the concept of the shift of the burden of proof, they apply it in accordance with the directives and with the case law of the European Court of Justice. The amendment of the provisions of Article 11(2) of the ADA has also contributed to the improvement of the situation. Due to the inaccurate transposition, the initial wording of Article 11(2) of the ADA contained the formulation '...if the claimant submits evidence (no facts) to the court...', which weakened the claimant's position in the proceedings regarding the violation of the principle of equal treatment. This deficiency has been eliminated by amendment of the quoted provision, which was replaced by '...if the claimant informs the court about facts...'

In comparison with the directives, according to the ADA the shift of the burden of proof is applied in relation to all forms of discrimination, i.e. not only in relation to direct or indirect discrimination. The scope of applicability of the shift of the burden of proof is therefore wider.

According to the ADA, every person who considers him/herself to have been wronged because the principle of equal treatment has not been applied to them may pursue their claims according to the judicial process. The application of this provision in practice has so far shown that court protection in proceedings in such cases is very limited. This particularly applies to cases where the aggrieved party can only claim adequate financial compensation or non-pecuniary compensation. In many cases in which women are discriminated against, only the claim for adequate compensation is possible. If the sanction in the form of redress is to be effective, proportionate and dissuasive, the amount of money claimed needs to reflect this. Many women who have been discriminated against are therefore discouraged from submitting a complaint to court, as the high court fees often constitute a real barrier to protecting their right to equal treatment and enjoying protection from discrimination.

The social partners still pay little attention to equal opportunity. Trade unions primarily try to negotiate the highest possible increase in wages and the greatest degree of job security for employees. Equal opportunity issues included in collective agreements have mostly concerned the working conditions of pregnant women and employees taking care of young children.

The ADA can be regarded as a progressive and comprehensive piece of legislation, which in many provisions goes beyond the requirements of the anti-discrimination directives and has a wider scope *ratione personae* and *ratione materiae*. It not only provides for the prohibition of discrimination, but also for the proactive obligation to take measures for the protection against discrimination and the instruction to discriminate as one of the forms of discrimination. The action in the public interest is an important instrument which creates conditions for the procedural enforcement of the principle of equal treatment.

Deficiencies in the ADA are the inaccurate transposition of provisions concerning sexual harassment.

SLOVENIA – Tanja Koderman Sever

1. Implementation of central concepts

In the year 2007 important changes to the Employment Relationship Act (hereinafter the ERA) and the Act Implementing the Principle of Equal Treatment (hereinafter the AIPET) were made in order to properly implement some concepts of EU gender discrimination and to make uniform and gather all the relevant definitions in the above-mentioned laws.

According to the above-mentioned legislation direct discrimination occurs when a person has been, is or could be treated less favourably than another person in an equal or comparable situation on the ground of his/her personal circumstances. Indirect discrimination occurs when an apparently neutral provision, criterion or practice in equal or comparable situations and under similar conditions has put, puts or might put a person with certain personal circumstances in a less favourable position compared to 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. Less favourable treatment of workers related to pregnancy and parental leave and instructions to discriminate are also deemed to be discrimination.

Under the AIPET, the ERA and the Regulation on Measures to Protect the Dignity of Employees in Public Administration harassment is unwanted conduct, based on any kind of personal circumstance, with the purpose or effect of violating the dignity of the person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. And sexual harassment is any form of undesired verbal, non-verbal or physical action or behaviour of a sexual nature with the effect or purpose of adversely affecting the dignity of a person, especially where this involves the creation of an intimidating, hostile, degrading, humiliating or offensive environment. Any sexual and other harassment is deemed to be discrimination.

Special measures (positive action measures and encouraging measures) are explicitly permitted and defined in the AIPET and in the Act on Equal Opportunities for Women and Men (hereinafter the AEOWM). They are temporary measures aimed at establishing real equal opportunities for women and men as well as promoting gender equality in specific fields of social life, in which the non-balanced representation of women and men or the unequal status of persons of one gender is ascertained. Positive action measures that give priority to persons of the gender which is underrepresented or is experiencing an unequal status and encouraging measures that provide special benefits or introduce special incentives for the purpose of eliminating the non-balanced representation of women and men or an unequal status on account of gender may be adopted by state authorities, employers, political parties, civil society organisations and other subjects.

The definitions of the central concepts in the national legislation are almost identical to the definitions in Directive 2006/54/EC. Some provisions go even further than what EU law

requires. An example is Provision 6 of the ERA which considers as discrimination not only the less favourable treatment of women related to pregnancy or maternity leave but all workers related to pregnancy and parental leaves, and the latter are provisions of the AIPET and the AEOWM which provide a precise and detailed legal ground for the adoption of positive action measures.

Other than the interpretation of sexual harassment, there is no relevant case law regarding the interpretation of other related concepts by the national courts. The sexual harassment found in the cases concerned was verbal (harassers gave comments about clothing and a person's body, told sexual or sex-based jokes, requested sexual favours or repeatedly asked a person out), in some cases it consisted of physical acts (assault, impeding or blocking movement, inappropriate touching of a person or a person's clothing, kissing, hugging, patting etc.) and in one case it was visual (emails of an inappropriate sexual nature).

2. Equal pay and equal treatment at work

2.1. Equal pay

In addition to the general provisions of the ERA, the AIPET and the AEOWM dealing with equal pay indirectly when prohibiting discrimination on grounds of gender there are also some provisions in the ERA and in the Act on the System of Salaries in the Public Sector (hereinafter the ASSPS) which directly apply the principle of equal pay. In accordance with the relevant provision of the ERA workers must be paid equally for equal work and for work of equal value regardless of their sex; any provisions in individual employment contracts or collective agreements or any acts by the employer that breach this principle are void. Furthermore, the ASSPS lays down the principle of equal pay for male and female workers for work in comparable posts and functions in the public sector and provides a legal basis for publicly divulging salaries in the public sector. The concept of pay covers salary, composed of a basic salary, salary on the basis of work efficiency and benefits, and any other types of remuneration.

According to the ERA companies with more than 10 employees must adopt an internal document on job classification. This internal act, which systematises jobs, determines the internal organisation of work, jobs, hierarchy and the organisation of work in the company. For the public sector the Regulation on Internal Organisation, Post Classification, Posts and Titles within the Bodies of the Public Administration and Justice was adopted.

Slovenian legislation does not provide a definition of what should be understood to be 'work of equal value'. In addition, there is no relevant case law on this issue. Another problem in Slovenia is that the data on salaries of workers in the private sector are not considered as personal data and are therefore not available to co-workers. Due to the lack of information on comparable jobs and the salaries of comparators it is therefore extremely difficult for a potential victim of discrimination to start judicial proceedings in relation to discrimination before the competent court.

2.2. Access to work and working conditions

Common bases and premises for ensuring equal treatment of all persons as regards access to employment, vocational training and promotion and working conditions are determined by the AIPET, whereas concrete provisions are included in the ERA and in the Public Servants Act (hereinafter the PSA). In addition to the general prohibition of discrimination concerning job applicants and employees on the ground of gender in the ERA, there are also some special provisions: the provision of equal treatment for job applicants in advertising a vacancy and during the selection procedure; protecting workers from harassment and sexual harassment and obliging employers to take measures to prevent harassment, sexual harassment and bullying, and protecting workers against unfair dismissal due to gender, pregnancy etc. In addition, the principle of equal access to work positions is defined by the PSA. These provisions cover all workers who have entered into an employment relationship on the basis of an employment contract and workers in 'atypical' employment such as fixed-term workers, temporary agency workers, unemployed persons performing public works, part-timers and

home-workers. Volunteers are also specifically protected against discrimination based on the Act on Volunteering.

There are two provisions in the ERA allowing for exceptions to equal treatment. The first provides the legal grounds for such exceptions, and the second allows for an exception when advertising a vacancy only for men or only for women and when the advertisement is worded in a way which indicates that in the recruitment one of the sexes would be given priority, if the recruitment of one particular sex constitutes a genuine and determining working requirement, provided that the objective is legitimate and the requirement is proportionate

The implementation of the EU legislation is satisfactory. However, in respect of Article 26 of the ERA, prohibiting an employer from requiring that the applicant provides information on his/her family and/or marital status, pregnancy and family planning, Slovenian law goes even further than required by European law.

2.3. Occupational pension schemes

According to the new pension reform of 2013, occupational insurance is obligatory for people performing particularly hard work and work which is harmful to health or work which cannot be performed successfully after a certain age. Occupational insurance is the insurance where employer contributions are being collected into accounts of the insured persons, so that after retiring they can obtain a supplementary pension and other rights deriving from the insurance. In addition, persons included in the compulsory statutory pension insurance scheme or persons already exercising rights deriving from this insurance, may join the supplementary insurance scheme. Supplementary insurance can be collective, where premiums are fully or partially paid by the employer, or individual, where premiums are paid by the insured person. This is the insurance where the insured persons pay amounts into their own accounts, so that after retiring they can obtain a supplementary pension and other rights deriving from the insurance. Insurance conditions set out in the pension scheme and the conditions for the acquisition of rights under the supplementary insurance shall not differ in respect of gender or any other personal circumstance.

According to exceptions allowed by EU Directives, the supplementary pension from the supplementary insurance is calculated with the application of adequate actuarial calculations which consider the life expectancy of the insured person on the basis of adequate mortality tables.

3. Pregnancy and maternity protection, parental leave and adoption leave

The ERA contains some general provisions regarding the right to parental leave, the obligation to inform an employer of the commencement of parental leave, how it will be distributed and the benefits during periods of leave. But the most important provisions are found in the Parental Care and Family Benefits Act (hereinafter the PCFBA-1). According to the newly adopted PCFBA-1 there are three different types of parental leave: maternity leave, parental leave and paternity leave. Female workers are entitled to a period of full-time maternity leave of 105 days, of which 15 days are compulsory. Furthermore, each of the parents has a right to a parental leave of 130 days, of which a mother may transfer 100 days to the father and 30 days are non-transferable. The father may transfer all of his 130 days to the mother. It can be exercised directly after the end of maternity leave to take care of the child. However, part of the parental leave, with a maximum of 75 days, can be transferred and used until the child finishes the first year of primary school. Paternity leave of 30 days is granted to the father on a non-transferable basis, of which 15 days must be used before the baby is six months old and 15 days before the child finishes the first year of primary school. The adoptive parents or the persons to whom the child has been entrusted for raising and nursing for the purpose of adoption are entitled to the same parental leave as birth parents, until the child finishes the first year of primary school. Adoption leave therefore is not a separate category of leave but has been combined with parental leave. During these periods of leave insured persons are entitled to benefits which are equal to 100 % (maternity benefit) or 90 % (parental benefits and paternity benefits) of their average salary over the 12 months

immediately prior to the date on which the benefit was claimed. During maternity leave, parental leave and paternity leave workers remain employed under the terms of the existing employment agreement and are therefore generally entitled to return to the same job at the end of the leave according to Article 186 of the amended ERA.⁵²⁶

Concerning health protection at the workplace for pregnant workers and workers who have recently given birth or are breastfeeding and leave from work for antenatal examinations the Regulation on the protection of health at the workplace of pregnant workers and workers who have recently given birth or are breastfeeding is relevant. It contains provisions on the assessment of any risk to the safety or health and any possible effects on the pregnancy or breastfeeding of the workers concerned, and on measures and actions to be taken with respect to the health and safety at work based on the results of the assessment. In addition, it defines cases in which exposure is prohibited and entitles female workers to time off for antenatal examinations.

Two provisions of the ERA prohibit dismissals. The first is a general provision and prohibits dismissal due to taking sickness or parental leave. The second is a provision providing special protection against the dismissal of women during pregnancy and breastfeeding and parents on full-time parental leave.

In recent years, there has been an increase of case law regarding pregnancy and maternity. The majority of cases deal with unlawful dismissal on account of pregnancy and breastfeeding. In addition, women often report cases where their fixed-term contracts are not renewed after they get pregnant. Unfortunately, not many of these cases have been brought to court since it is difficult to prove that the reason that a fixed-term contract is not renewed is connected to pregnancy or maternity.

In addition to the above-mentioned gap, Slovenian provisions go further than what European law requires, mostly because maternity and parental leave are longer and benefits during their duration are higher than the European minimum required.

4. Statutory schemes of social security

The social security of Slovenian citizens and others is above all ensured by compulsory social security schemes (the health insurance scheme, the pension and invalidity insurance scheme, the unemployment insurance scheme and the social assistance scheme). Particular insurance schemes are regulated by various laws (the Health Protection and Insurance Act, the PIIA, the Labour Market Regulation Act and the Social Security Act) which all determine rights and obligations for both genders equally.

The new PIIA no longer excludes gender equality in relation to the determination of different conditions for the acquisition of old-age and invalidity pension as regards pensionable age and the completion of the pension-qualifying period. The pensionable age has been increased to 65 and the pension-qualifying period to 40 years. Both conditions will be equal for both genders after the transitional period, in 2018.

5. Self-employed persons

The Slovenian Companies Act and the Institutes Act are neutral as regards gender and therefore provide equal opportunities for women and men. The relevant EU directive is also well implemented in the social security area, where self-employed persons and helping spouses are covered by mandatory social security schemes. Self-employed persons and helping spouses are also covered by the mandatory parental care insurance and are therefore entitled to maternity and parental leave and benefits if they engage in an independent agricultural activity in the Republic of Slovenia as their sole or principal occupation and are already included in the mandatory pension and disability insurance scheme.

Slovenia completely fulfils the requirements of EU law regarding self-employed.

⁵²⁶ Employment Relationship Act, Official Gazette of the Republic of Slovenia, Nos 22/2013, 78/2013.

6. Goods and services

Directive 2004/113/EC has been transposed by the AIPET, the Insurance Act (hereinafter the IA) and the Consumers Protection Act (hereinafter the CPA). The AIPET provides for equal treatment irrespective of gender in the access to and supply of goods and services, which are available to the public, including housing and their supply. The IA provides for the equal treatment of all insured persons and prohibits differences in insurance premiums and benefits on the grounds of sex, maternity and pregnancy in general. The CPA obliges enterprises to sell goods and provide services to all consumers on equal conditions.

Exceptions are provided for in the AIPET and the IA. The AIPET provides a legal basis for allowing different treatment based on gender regarding insurances and related financial services. However, according to the newly adopted amendments to the IA, insurance companies may in relation to life insurances, accident and health insurances take into consideration the personal circumstance of gender in the determination of premiums and benefits in general only if this does not lead to differentiation at the individual level.

The implementation of Directive 2004/113/EC is satisfactory, although the relevant paragraph in the AIPET providing for equal treatment in the access to and supply of goods and services should be concretised. In particular, the same term for 'goods' could be used in directives and laws. The word '*dobrina*' is used for 'goods' in the AIPET, and the word '*blago*' is used in the CPA. However, the word '*blago*' could be used to follow the wording from the Directive 2004/113/EC. In the view of the expert this differentiation in wording is not problematic, but it should be noted that the wording should not differ from the translation of the Directive.

7. Enforcement and compliance aspects

Concerning victimisation, the ERA and the AIPET state that a victim of discrimination and a person assisting a victim of discrimination must not be subjected to adverse consequences due to his/her actions.

As regards the burden of proof the ERA states that if an applicant or a worker in a dispute alleges facts from which it may be presumed that there has been discrimination, it is up to the respondent to prove that there has been no breach of the principle of equal treatment.

In case of a breach of the prohibition of discrimination an administrative fine may be imposed on an employer and some criminal sanctions may also be imposed. Moreover, access to the courts is safeguarded as well. A worker or a rejected applicant may request judicial protection before the labour court and claim continuation of his/her employment including all rights deriving from the employment contract, reinstatement to a former position, payment of social security contributions and salary with statutory interest, reimbursement of legal costs etc. In addition, a worker may claim damages arising from unlawful acts, actions or omissions pursuant to the general rules of civil law. Damages are not limited in the private sector, but are limited for job applicants in the public sector. For this reason the implementation of EU law might not be satisfactory.

Access to the courts is only ensured for alleged victims of discrimination. Interest groups and other legal entities are excluded. All the above-mentioned remedies and sanctions in Slovenia are effective, proportionate and dissuasive.

The Slovenian body aiming to create equal opportunities and conditions for the equal representation of both genders in all areas of social life is the Service for Equal Opportunities (hereinafter the Service) operating within the Ministry of Labour, Family and Social Affairs. The ministry also employs the Advocate for the Principle of Equality (hereinafter the Advocate) who hears cases of alleged discrimination. The Service and the Advocate are not independent, which is not in accordance with the requirements of EU law.

A collective agreement binds the parties to that collective agreement or its members and is therefore valid for all persons employed by an employer or employers to whom the collective agreement applies. The validity of the collective agreement or part thereof may be extended to all employers in an activity or activities regarding which the collective agreement

has been concluded. Since collective bargaining is of great importance and collective agreements are generally applicable and have a legal status which is similar to legislation, they should deal with equality issues more often. So far, however, gender equality provisions are rare and mostly deal with the neutral use of expressions for a worker in the masculine grammatical gender, the prohibition of discrimination, damages, and the reconciliation of work and family life.

8. Overall assessment

In order to become a member of the EU, Slovenia first made a detailed analysis of the national legislation in force in all areas of the law prior to accession. Consequently a major part of the legislation was adjusted, revised or newly adopted in order to implement the EU gender equality *acquis*. As is now evident, overall implementation seems satisfactory. In some aspects, Slovenian law even goes further than what EU requires, for example in providing for longer maternity and parental leave and higher benefits during leave, or by prohibiting an employer from requiring certain information from the applicant. However, there are some gaps as well. For example, provisions that would guarantee the right to return to the same or equivalent job after returning from leave are lacking, the concept of work of equal value is not defined, the provision on the implementation of the Goods and Services Directive in the AIPET is too general, the amount of compensation in the PSA is limited and the Service and the Advocate are not independent. In addition, there is almost no litigation on equality issues.

SPAIN – María Amparo Ballester Pastor

1. Implementation of central concepts

The definition of central concepts related to sex discrimination can be found in Law 3/2007 of 22 March 2007, on effective equality between women and men.⁵²⁷ This Law is applicable in all contexts, especially in political, civil, labour, socio-economic and cultural areas.

The Spanish concepts of direct and indirect discrimination on grounds of sex can be found in Article 6 of Law 3/2007, which essentially reproduces the same concepts as contained in Directive 2006/54/EC. In 1991 the Spanish Constitutional Court recognised the application of the concept of indirect discrimination in relation to a remuneration system contained in a collective agreement that did not adequately value the conditions in which the jobs done mostly by women were developed.⁵²⁸ More recently, the concept of indirect discrimination has been applied by the Constitutional Court in relation to the pejorative treatment given by the social security system to part-time workers.⁵²⁹

The Spanish concepts of gender-related harassment and sexual harassment are contained in Article 7 of Law 3/2007. In contrast to the concepts contained in Directive 2006/54/EC, Spanish regulations do not expressly require that harassment should be non-desired behaviour. However, the omission from Spanish law of the ‘undesired’ nature of harassment does not make much difference, because if this behaviour creates an intimidating, degrading or offensive situation, it will be equally ‘undesired’ by the victim. The Spanish Constitutional Court has interpreted that certain conduct may be considered as sexual harassment although there is no expressed and categorical opposition on the part of the victim, if there is some

⁵²⁷ http://noticias.juridicas.com/base_datos/Admin/lo3-2007.html, accessed 27 May 2014.

⁵²⁸ Judgment of the Constitutional Court 145/1991 of 1 July 1991, <http://www.ugt.es/Mujer/artemisa/sentenciat.pdf>, accessed 27 May 2014.

⁵²⁹ Judgment of the Constitutional Court 61/2013 of 14 March 2013, <http://www.tribunalconstitucional.es/es/jurisprudencia/paginas/Sentencia.aspx?cod=20788>, accessed 27 May 2014.

evidence of the victim's opposition and always if the behaviour concerned is serious enough to be considered offensive.⁵³⁰

Positive action measures are recognised as legitimate in Article 9.2 of the Spanish Constitution, which expressly refers to the obligation of public authorities to remove the obstacles to achieve real equality. Article 11 of Law 3/2007 and Article 17 of the Workers' Statute (WS⁵³¹) both recognise the legal possibility of measures to achieve real equality between women and men. Positive action measures can be implemented in the public as well as in the private sector, and can consist of the preferential hiring of women in professions in which they are under-represented (quota). However, according to Article 17 of the Worker's Statute, the preference to female candidates will only be applied when they are equally suitable as the male candidate. In this way, Spanish Law respects the CJEU doctrine on quota. Outside a strictly labour-related context, Law 3/2007 establishes the need for a balanced presence of women and men, which may imply an imposed quota, e.g. on the Board of Directors of trading companies, in the management bodies of the Civil Service or on electoral candidate lists.

2. Equal pay and equal treatment at work

2.1. Equal pay

A general prohibition of discrimination on grounds of sex is established in Article 14 of the Spanish Constitution. In addition, Article 35 of the Spanish Constitution expressly refers to the right of equal salary without discrimination on the grounds of sex. At ordinary legislation level, Article 28 WS states that 'the employer is obliged to pay the same amount for work of equal value, rendered directly or indirectly, whatever its nature, salaried or not, without discrimination on grounds of sex...'. The Spanish Constitutional Court has issued several rulings,⁵³² pointing out that systems of professional classification and promotion must rely on criteria which should be neutral and not result in indirect discrimination, e.g. using 'physical effort' or 'arduous work' as a reason to give a higher value to men's activities. However, there are not many recent judicial rulings on equal pay in Spain, particularly from the Supreme Court.

2.2. Access to work and working conditions

Article 22 *bis* of the Employment Law⁵³³ stipulates that the Public Employment Agency has an obligation to monitor all job offers so that they do not contain discriminatory criteria of access to employment. Article 22 *bis* of the Employment Law specifically establishes that employment vacancies referring to one sex must be considered discriminatory, except when sex is a genuine and determining occupational requirement (the equivalent to the Spanish 'bona fide occupational qualification').

The Constitutional Court has declared some cases to be non-constitutional where women had been denied access to certain jobs based on the risks that there could be to their health, if those working conditions could be equally hazardous to men.⁵³⁴

The principle of equal access to public-sector employment is contained in general terms in Law 3/2007 on Equality (Article 51), and in specific terms on the Armed Forces and Official Security Forces (Articles 65 and 67), including the requirement of a balanced composition of women and men in staff recruitment and evaluation bodies. In relation to pregnancy, the Supreme Court has ruled that, if possible, the time and/or place of a written

⁵³⁰ Judgment of the Constitutional Court 224/1999 of 13 December 1999, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/3966>, accessed 27 May 2014.

⁵³¹ http://noticias.juridicas.com/base_datos/Laboral/rdleg1-1995.html, accessed 27 May 2014.

⁵³² For instance, Judgment of the Constitutional Court 58/1994 of 28 February 1994.

⁵³³ Law 56/2003 of 16 December 2003, available at http://noticias.juridicas.com/base_datos/Laboral/156-2003.t2.html#a22, accessed 28 May 2014.

⁵³⁴ For example, Judgment of the Constitutional Court 229/1992 of 14 December 1992, in relation to the access of women to working activities in mines.

test for the access to a position in the Public Sector must be adapted to the particular circumstances of a female candidate that has just given birth.⁵³⁵

Article 24.2 WS establishes that rules for promotion in companies must guarantee the absence of direct or indirect discrimination between women and men. The Spanish Supreme Court has established that indirect discrimination in promotion occurs when the criteria used for promotion (in this case it was freely designated by the employer) result in women hardly ever reaching the highest positions in the company, when the employer cannot prove that there is an objective and reasonable justification for it.⁵³⁶

2.3. Occupational pension schemes

Occupational pension schemes are private, free and voluntary and are totally excluded from the social security system (which is public and compulsory). They are regulated by collective agreements as improvements to the basic statutory schemes and therefore they are not used in all sectors of the economy or in all companies. Collective agreements must respect the constitutional principle of equality and the prohibition of discrimination on grounds of gender. The compromise (pension obligations) established in the collective agreement should be guaranteed through collective insurances or occupational pension schemes. All employees, including those with a special labour contract, can participate in the occupational pension schemes, as one of the principles on which the occupational pension schemes are based is a general prohibition of discrimination in the access to them.

3. Pregnancy and maternity protection, parental leave and adoption leave

Protection during pregnancy, after a recent birth and during breastfeeding periods are regulated in the Prevention of Labour-Related Accidents Law and includes adapting working conditions or changing the post or function when there is a health or safety risk.⁵³⁷ If these measures are not possible or adequate, the employee affected can be put in a situation where the contract is suspended (which will last as long as required for health or safety protection) on account of risk during pregnancy or natural breastfeeding (for children younger than nine months), with the right to a financial benefit equivalent to 100 % of the monthly salary and with the right to return to the previously held post. Dismissals during these periods when the employment contract is suspended, as well as the dismissal of pregnant women, from the start of the pregnancy to the start of maternity leave, will be considered null and void except when the reason for the dismissal is a serious fault on the part of the worker or when the dismissal is objectively necessary for reasons not linked to pregnancy and maternity, such as economic or technical reasons. The Constitutional Court has established that the nullity of the dismissal in these situations is automatically applied if there is no just cause for dismissal, even if the employer has no knowledge of the pregnancy.⁵³⁸ However, the Constitutional Court has also ruled that the dismissal of a pregnant woman during the probationary period is not automatically considered null and void if the employer argues that he/she did not have knowledge of the pregnancy.⁵³⁹

⁵³⁵ Judgment of the Supreme Court of 14 March 2014, appeal number 4371/2012, <http://www.poderjudicial.es/search/doAction?action=contentpdf&datasematch=TS&reference=7010892&links=%224371/2012%22&optimize=20140402&publicinterface=true>, accessed 16 May 2014.

⁵³⁶ Judgment of Supreme Court of 18 July 2011, rec. number 133/2010, <http://www.poderjudicial.es/search/doAction?action=contentpdf&datasematch=TS&reference=6134165&links=%22133/2010%22&optimize=2011003&publicinterface=true>, accessed 29 May 2014.

⁵³⁷ Law 31/1995 of 8 November 1995, http://noticias.juridicas.com/base_datos/Laboral/131-1995.html, accessed 29 May 2014.

⁵³⁸ Judgment of the Constitutional Court 92/2008 of 21 July 2008, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/6324>, accessed 29 May 2014.

⁵³⁹ Judgment of the Constitutional Court 173/2013 of 10 October 2013, http://www.tribunalconstitucional.es/Documents/NOTA_INFORMATIVA_64_2013/2011-03773STC.pdf, accessed 27 May 2014.

Maternity leave lasts for 16 continuous weeks (with two further weeks for each child, in the event of multiple births), 6 of which must be taken by the mother immediately following the birth. Maternity leave can be taken part time if there is an agreement with the employer or if this right is referred to in collective agreement. If both parents work, the mother may choose to cede part of the remaining leave period (10 weeks) to the other parent. If the mother dies, the father can have the full maternity leave (16 weeks) even if the mother did not work. In cases of adoption or fostering of a child younger than six, the leave will be 16 weeks as well. The same maternity leave will apply if the adopted or fostered child is older than six but she/he has special difficulties regarding adaptation to the new social environment. Employees who make use of these leave periods for birth or adoption will be entitled to remuneration equivalent to 100 % of their monthly salary, whenever the legal requirements are met (basically, a minimum period of previous working time is required, which varies depending on the age of the mother). Public-service employees basically have the same rights.

Paternity leave, independent of whether maternity leave is shared with the mother, lasts for 13 continuous days, extended by 2 more days for each child, for adoption or fostering, with the right to 100 % of the monthly salary. Although this leave is intended for the father, the provision is drafted in neutral terms so as to be compatible with family structures where both parents are of the same sex. For public-service employees, the leave period is 15 days. The aim of Law 3/2007 (which first introduced paternity leave in Spain) was to gradually extend the leave to 4 weeks, over a 6-year period. However, the promised extension of the paternity leave has been postponed year after year.

There are several kinds of parental leave in Spanish legislation. First, either of the parents with children younger than nine months (including adopting and fostering parents) have the right to paid leave of an hour a day. Although this is called 'breastfeeding permission' its objective is not only to breastfeed but, more generally, to take care of the child (Article 37.4 WS). Second, workers have the right to unpaid leave that may last until three years after the child's birth or after the official adoption or fostering date.⁵⁴⁰ Third, parents of children younger than 8 can ask for a reduction in working time, in which case their salary is reduced proportionally.⁵⁴¹ Fourth, parents can ask for a reduction in working time for the purpose of taking care of a child that is seriously ill, in which case the social security system guarantees that the worker receives 100 % of his/her salary.⁵⁴² If dismissal takes place during any of the parental leaves described above, the dismissal will be considered null unless there is a just cause for it (in the same terms as those that apply to pregnancy or maternity leave).⁵⁴³ The period of nine months after birth is also protected by the nullity of a dismissal.

There are several aspects in Spanish law that could still be in violation of the parental leave Directive. First, Spanish legislation does not guarantee time off from work on the grounds of force majeure, as required by Clause 7 of Directive 2010/18/EU, because there is no general permission applicable in cases of sickness or accident making the immediate presence of the worker indispensable. Article 37.3 WS establishes permission for a two-day leave of absence if a relative has a serious illness or requires a surgical procedure, but there are other situations that could require the presence of the parents on grounds of force majeure but that are not considered by Spanish legislation. Second, Spanish legislation could be in violation of Clause 6 of Directive 2010/18/EU because nothing has been established in order to guarantee that employers shall consider and respond to parents' requests for changes to working hours and/or patterns for a set period of time when they return to work after a parental leave.

⁵⁴⁰ Article 46.3 WS.

⁵⁴¹ Article 37.5 WS.

⁵⁴² Article 135 General Law of Social Security, Legislative Royal Decree 1/1994 of 20 June 1994, http://noticias.juridicas.com/base_datos/Admin/rdleg1-1994.t2.html#c8, accessed 29 May 2014.

⁵⁴³ Article 108 of the Law regulating social jurisdiction, Law 36/2011 of 10 October 2011, <http://www.boe.es/buscar/act.php?id=BOE-A-2011-15936&tn=2&p=20120714>, accessed 29 May 2014.

4. Statutory schemes of social security

Workers that have to take care of dependents may have more problems when trying to accrue contributory pensions, so Spanish legislation has established the non-rebuttable presumption that during long-term parental leave (called *excedencia*) there has been effective contribution to the system. It has also been established that during the first two years of the time reduction to take care of children, the contribution to the system will be considered as if the work had been performed full time.⁵⁴⁴ There are other situations in which contribution to the system is considered applicable, even if no work has effectively been performed, in the event of birth, adoption or foster care of children.⁵⁴⁵ A non-contributory maternity leave is established by the social security system if a working mother does not comply with the minimum requirements that apply to the contributory maternity leave.

In general, the Spanish social security system complies with Directive 79/7. However, the existence of indirect discrimination in Spain was detected by the CJEU in *Elbal* in relation to the requirements to accrue contributory pensions that apply to part-time workers.⁵⁴⁶ Spanish legislation has been changed in accordance with the CJEU's judgment, so currently the minimum time of work required for the access to pensions must be reduced proportionately depending on the duration of the working day of each part-time worker.⁵⁴⁷

5. Self-employed persons

Self-employed persons have access to maternity leave, paternity leave and sick leave if there are risks during pregnancy or breastfeeding. There are some particularities (for instance, self-employed persons cannot take part-time maternity leave) but, in general, the legislative treatment is quite similar to that established for employees.

Benefits have been established to promote that both spouses working in the same family business are included in the social security system.⁵⁴⁸

6. Goods and services

Directive 2004/113/EC has been implemented through Law 3/2007 on equality between women and men. The Directive can be said to have been correctly implemented, at least from a formal point of view, as the most relevant provisions of the Directive have been transposed literally. Spanish legislation expressly establishes that the use of sex as an actuarial factor in the calculation of premiums and benefits must not result in differences in individuals' premiums and benefits (following the *Test Achats* case).⁵⁴⁹ The Directive's impact has been rather limited despite its proper implementation. This is probably due to the lack of initiatives on behalf of the authorities, the lack of a specific regulation of the rights and obligations in the various areas and in contractual agreements, as well as the lack of court claims concerning specific discrimination issues.

7. Enforcement and compliance aspects

Article 96⁵⁵⁰ of the Law Regulating Social Jurisdiction establishes the reversal of the burden of proof in a manner similar to Article 7 of Directive 97/80/EC. According to that Article,

⁵⁴⁴ Article 180 General Law of Social Security.

⁵⁴⁵ Additional Provision 44 and Additional Provision 60 of General Law of the Social Security System.

⁵⁴⁶ Case 385/11 *Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)* [2012] ECR n.y.r.

⁵⁴⁷ Royal Legislative Decree 11/2013, of 2 August 2013.

⁵⁴⁸ Benefits established by Law 3/2013 of 6 July 2013.

⁵⁴⁹ Benefits established by Law 3/2013 of 6 July 2013.

⁵⁵⁰ Article 96 of the Law regulating social jurisdiction, Law 36/2011 of 10 October 2011.

when evidence of a violation is presented, the defendant must demonstrate the existence of reasons unrelated to the intention to discriminate to objectively justify the conduct.

In equal treatment cases, the persons so affected have standing before the courts and, if the victim so authorises, so do trade unions and associations for the promotion of equality. When the victims are a group of unspecified persons or if they are difficult to determine, the following entities will have standing before the courts: public entities that have as an objective the equality between women and men, most representative unions and national associations that have amongst their objectives the equality between women and men.⁵⁵¹

If a dismissal takes place on grounds of sexual discrimination, the employer's decision will be declared null and void, with the immediate effect of readmission to the post and according to the same conditions as previously applied. All decisions taken by the employer which amount to victimisation of an employee for making an internal complaint or submitting a judicial claim seeking compliance with the principle of equal treatment and non-discrimination, will be considered as discrimination on the grounds of gender and the effects will be null and void.

Any sexual harassment, discrimination and harassment on grounds of gender is considered a serious transgression. The fine will be between EUR 6 251 to EUR 187 515.⁵⁵²

The role of collective agreements in the development of equality issues was not really relevant before the enactment of Law 3/2007. Since then, there is a general obligation for the social partners to negotiate, in collective agreements, measures promoting the equality of treatment and opportunities for women and men or equality plans in those companies required to implement them.

The Women's Institute is a theoretically autonomous body attached to the Ministry of Health, Social Services and Equality of Spain. Its function is the promotion and encouragement of conditions that produce social equality of the sexes and allow women's participation in political, cultural, economic and social life.⁵⁵³ The Women's Institute is part of Spain's central Government, subject to the principle of administrative hierarchy; so its independence is not really guaranteed.

8. Overall assessment

Law 3/2007 on effective equality between women and men mostly fulfils the basic standards of EU gender discrimination law. However, Spanish legislation might not meet the standards of the European Union in the following respects: a) the access to retirement of part-time workers currently still contains indirect sex discrimination, as has been established in Elbal, until legislation is amended; b) time off from work on the grounds of force majeure is not guaranteed, as required by Clause 7 of Directive 2010/18/EU, because there is no general permission applicable in cases of sickness or accident that makes the immediate presence of the worker indispensable; c) Spanish legislation could be in violation of Clause 6 of Directive 2010/18/EU because nothing has been established in order to guarantee that employers shall consider and respond to parents' requests for changes to working hours and/or patterns for a set period of time when they return to work after a parental leave.

⁵⁵¹ Article 11 of the Law of Civil Procedure, Law 1/2000 of 7 January 2000, http://noticias.juridicas.com/base_datos/Privado/11-2000.11t1.html#a11b, accessed 30 May 2014.

⁵⁵² Article 8.12 of the Law of Transgressions and Fines in Labour-Related Areas, Legislative Royal Decree 1/1995 of 4 August 1995, http://noticias.juridicas.com/base_datos/Laboral/rdleg5-2000.html#a8, accessed 30 May 2014.

⁵⁵³ <http://www.inmujer.es/elInstituto/conocenos/home.htm>, accessed 30 May 2014.

1. Implementation of central concepts

As of 1 January 2009 the existing non-discrimination legislation in Sweden was ‘merged’ into the 2008:567 Discrimination Act, covering discrimination on the grounds of gender, transsexual identity/expression, ethnicity, religion and other beliefs, sexual orientation, disability and age.

The 2008 Discrimination Act contains a general set of definitions in its Chapter 1. The Act is truly ‘horizontal’ in that the general definitions cover all grounds of discrimination within the scope of the Act, which subsequently stipulates the prohibitions of discrimination in employment, education, etc., area by area.

Direct discrimination is to disfavour somebody by treating him or her less favourably than someone else is treated, has been treated or would have been treated in a comparable situation if the disadvantage is connected to sex, transsexual identity/expression, ethnicity, religion or other belief, disability, sexual orientation or age.

Indirect discrimination is to disfavour somebody by applying a provision, a criterion or a method of approach that appears to be neutral but which in practice especially disfavours persons of a particular sex, unless the provision, criterion or method can be objectively justified based on a reasonable goal and the means are appropriate and necessary in order to achieve this goal.

Instructions to discriminate are defined as orders or instructions to discriminate against an individual as described in the previous paragraphs of Section 4 that are given to someone who is either in a subordinate or dependent position relative to the person who gives the orders or instructions or who has undertaken to act on that person’s behalf.

Harassment is defined as conduct that violates a person’s dignity and that is associated with any one of the grounds covered by the Act, whereas sexual harassment is defined as conduct of a sexual nature that violates a person’s dignity.

Positive action (*positiv särbehandling*) is not a concept used by the Swedish legislator. Chapter 3 of the 2008 Discrimination Act deals with what is called ‘active measures’ in working life and education, respectively. Here it concerns proactive measures such as equality plans, etc. Affirmative actions are dealt with in Chapter 2 on the bans of discrimination. According to Chapter 2 Section 2.2, the prohibition against discrimination in working life does not apply ‘if the treatment of the person concerned is part of an effort to promote equality [between men and women] in working life and is not a matter of applying pay terms or other terms of employment’. A later section on education contains a similar permissive rule related to recruitment in forms of education other than basic schooling. Also the bans on discrimination in political labour-market activities and professional access and activities contain an opening for efforts to promote equality between the sexes, whereas the rule on membership of certain organisations permits benefits for members of a certain sex provided this is a similar effort to promote equality.

In the expert’s opinion, the implementation of central concepts is satisfactory.

2. Equal pay and equal treatment at work

2.1 Equal pay

The 2008 Discrimination Act does not contain an express ban on pay discrimination. Pay discrimination is implicitly and tacitly covered by the ban on discrimination in working life including pay and other conditions in Chapter 2 Section 1. In the application of the law, the parties and the courts must interpret the concept of pay in accordance with the case law of the CJEU, and, to the best of the expert’s knowledge, they do so in a satisfactory manner. The concept of equal pay is dealt with, however, in relation to the requirement of periodical action plans for equal pay in Chapter 3 of the 2008 Discrimination Act: ‘Work is to be considered equal in value to other work if, based on an overall assessment of the nature of the work and the requirements imposed on the worker, it may be deemed to be of similar value.

Assessments of work requirements shall take into account criteria such as knowledge and skills, responsibility and effort. When the nature of the work is assessed, particular regard shall be taken of the working conditions’.

There is no express legislation on the justification of pay differences. A number of cases have been heard by the (Swedish Supreme) Labour Court, however. The negative outcome of most of these cases has been criticised claiming that the Labour Court has too willingly accepted ‘the market argument’ presented by employers as an excuse for pay differentials, thereby failing to live up to the standards of EU law. Nevertheless, some of these cases reflect important progress as regards the possibilities to initiate legal claims based on a comparison of work of equal value. Here only two landmark cases will be mentioned. Labour Court case 1996 No. 41 concerned Örebro County and the health sector or, to be more exact, the question of whether the pay of a midwife was discriminatory as compared to that of a hospital technician. The Labour Court did not exclude the possibility that the work of a midwife and a hospital technician could be compared and found to be of equal value, but in the case at stake it did not find the method used by the Equal Opportunities Ombudsman to be sufficient to prove that this was the case. No discrimination was found to be at hand. Also a somewhat later case – Labour Court 2001 No. 13 – concerned Örebro County and the health sector. This, too, concerned alleged pay discrimination of a midwife as compared to a hospital technician. In this case the midwife and the technician were found to perform work of equal value following an assessment in terms of knowledge and skills, responsibility, effort and working conditions (now part of the definition of work of equal value according to the 2008 Discrimination Act). A *prima facie* case of pay discrimination was therefore found to be at hand. The Labour Court, however, accepted the employer’s ‘excuse’ that the higher wages of the technician were due to market arguments – there was an alternative labour market for technicians with significantly higher wages, an acceptable motive to adjust the wages of technicians to a somewhat higher level. The Court therefore ruled that no discrimination had taken place. (Compare also the ‘parallel’ Labour Court case 2001 No. 76: a nurse and a hospital technician were compared and their work was found to be of equal value, but also in this case pay discrimination was finally found not to be at hand).

It is worth noting that the rules on active measures include quite far-reaching requirements on periodical action plans for equal pay by employers with 25 or more employees. It is also worth mentioning, however, that these requirements were weakened by the introduction of the 2008 Act. (Now plans are required every three years as compared to every year and the threshold as regards the number of employees increased from 10 to 25 employees.)

2.2 Access to work and working conditions

EU law as regards working life is mainly implemented by Chapter 2 of the 2008 Discrimination Act. An employer – whether in the public or private sector – is prohibited from discriminating against (1) an employee, (2) somebody making a request regarding employment or who is applying for employment, (3) somebody applying for or performing a practice/training period, or (4) somebody who is available as or acting as a temporary agency worker with the employer. These are therefore the persons protected whereas the Act relates to any decision made by the employer (or anybody acting on his or her behalf).

The Swedish legislator has made use of the exception in Article 2.6 of Directive 2002/73/EC. The prohibitions on discrimination do not apply in connection with decisions on employment, promotion or training for promotion where a particular characteristic related to sex, etc., by reason of the nature of the work or of the circumstances in which it is carried out constitutes a genuine and determining occupational requirement with a legitimate objective and the requirement is adequate and necessary for attaining that objective. The bans on gender discrimination in vocational training, etc., are also implemented by Chapter 2 Section 5 on education whereas Chapter 2 Sections 9, 10 and 11 implement the discrimination bans regarding political labour-market activities, professional activities and membership of trade unions and other professional organisations, respectively.

2.3 Occupational pension schemes

There is no express legislation as regards occupational schemes and gender discrimination. In accordance with the case law of the CJEU such private schemes (i.e. apart from public social security pension schemes) are seen as pay and are therefore covered by the general ban on discrimination in working life described above. Generally speaking, occupational pension schemes are known to be gender neutral in their design.

3. Pregnancy and maternity protection, parental leave and adoption leave

The 1995 Parental Leave Act contains the central rules on parental leave including maternity and paternity leave. The 1995 Act stipulates the right to leave of absence in relation to the employer whereas the right to pay during such leave is covered by the general social security parental leave benefit scheme (regulated in the 2010 Social Insurance Code). However, 'extra parental wages' paid by the employer according to a collective agreement are especially important to large groups of salaried employees since there is an upper 'ceiling' in the social security benefits scheme.

There are six different types of leave: maternity leave of fourteen weeks before and/or after giving birth and during breastfeeding, full leave with or without parental benefits until the child is 18 months old (or during 18 months following adoption), partial leave with parental benefits, partial leave without parental benefits, leave with temporary parental benefits for the sake of caring for a sick child and full or half-time leave with municipal care support.

Parental benefits are paid during 480 days for each child (also adopted) until the child is 12 years old (however, only 96 of these 480 days can be taken after the child is 4 years old): 390 days at sickness benefits level and another 90 days at the (guaranteed) minimum level. Sixty days at sickness benefits level are non-transferable between the parents. Parental benefits at sickness benefits level are income related and therefore require prior employment, but there is also a basic guaranteed level in the parental benefits scheme for parents not complying with this condition. The scheme is extremely flexible in that it is also possible to draw partial benefits during a considerable amount of days until the child is 12 years old. It is thus possible to draw even only one eighth of leave or benefits per day, if so desired by the parents. This means the parents would receive a reduced working time by one hour per day (one 'benefit' day would therefore last for eight working days).

Parental leave with temporary parental benefits is provided with a maximum of 60 days a year per child when caring for a sick child. Such leave is also provided as paternity leave during 10 days after the birth of a child. Following the adoption of a child the parents have 10 such days of leave together. On 1 July 2008 a care support of EUR 319 (SEK 3 000) per month was introduced. Such support is provided at municipality level, but the introduction of such benefits is voluntary.

Maternity leave is always granted for seven weeks prior to and seven weeks after giving birth as well as when breastfeeding – two weeks of such leave are compulsory. A parent is also always entitled to full leave for the care of a child until the child is 18 months old (or within 18 months of adoption), irrespective of whether the parent receives parental benefits. There is also always a right to partial leave without parental benefits in the form of a reduction in normal working hours by up to one quarter for the care of a child until it is 8 years old. Additionally, there is always a right to parental leave whenever one receives benefits from the social security parental benefits scheme or municipal care support.

The Parental Leave Act contains rather detailed rules on notice and decisions regarding leave. There is a general prohibition on unfair treatment (*missgynnandeförbud*) for reasons connected with parental leave under the Act covering protection against dismissal on the grounds of maternity, paternity and parental leave as well as deteriorated working conditions. There is also an express right to discontinue the leave and resume working to the same extent as prior to the period of leave. Maternity leave is not only covered by this general prohibition of unfair treatment but is also – as is pregnancy – covered by the ban on direct gender discrimination in Chapter 2 Section 1 of the 2008 Discrimination Act. This is, however, not

clearly stated anywhere but is a matter of interpreting the case law of the CJEU treating discrimination related to pregnancy and maternity leave as direct discrimination. There is no strict prohibition against dismissal during pregnancy or leave for unrelated reasons, but the notice period cannot be made effective until the worker is actually back at work.

The provisions on the rights to leave clearly exceed the requirements of Directive 2010/18/EU, both with regard to the number of days and in that it provides paternity leave of 10+60 days.

4. Statutory schemes of social security

Chapter 2 Section 14 of the 2008 Discrimination Act implements Directive 79/7/EEC. A prohibition on (among other grounds) gender discrimination covers the social insurance system and related benefit systems including the unemployment insurance and the public student aid system. The second paragraph of Section 14 expressly states that the prohibition concerning social insurance and related benefit systems does not imply an obstacle to the application of remaining provisions concerning widow's pensions, wife's supplements and child allowance payments. Generally speaking, the current public social security pension scheme is gender neutral and the express exception rule refers to transitional rules applicable to a small group of women.

5. Self-employed persons

There is a ban on discrimination in the 2008 Discrimination Act in connection with qualification, certification, authorisation, registration, approval or similar arrangements including rights to initial financing that are needed or may be of importance in enabling an individual to engage in a certain occupation. This ban does not prevent positive action as part of an effort to promote equality, however. There are also prohibitions on discrimination as regards political labour-market activities and membership of certain organisations, respectively. All these rules have implications for the self-employed in terms of a ban on discrimination. However, the concept of 'self-employed person' does not have a clear-cut meaning in Swedish law. The Swedish concept of an employee is quite broad and may cover situations which in an EU context are considered to concern self-employment or helping spouses. The rules on discrimination in working life apply to this extent.

6. Goods and services

According to the 2008 Discrimination Act, a prohibition on discrimination applies to anyone (or his/her representative) who (1) outside private and family life provides goods, services or housing for the public, or (2) arranges a public meeting/gathering. There is, however, also an express exception for gender discrimination services or housing if the different treatment can be justified by a legitimate aim and the means are appropriate and necessary for achieving this aim. One example is sheltered housing for women having experienced violence and 'single-sex' housing for students in accordance with the conditions of a donation. Since 21 December 2012 there no longer is an exception for insurance services, however. In order to implement the CJEU's judgment in the *Test-Achats* case,⁵⁵⁴ a new section was introduced into the 2008 Discrimination Act reading: 'Where insurance services are concerned there must not be any difference between women and men in insurance premiums or insurance compensation for the individual on the ground of gender-related factors'. The new rule only applies to insurance contracts entered into after 21 December 2012.

⁵⁵⁴ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

7. Enforcement and compliance aspects

The bans on victimisation in the various directives are implemented by Chapter 2 of the 2008 Discrimination Act. Section 18 concerns employers and Section 19 other parties covered by the different prohibitions on discrimination, and they ban the victimisation of any individual because he or she has reported or drawn attention to instances of discrimination or taken part in an investigation into discrimination as well as rejected or accepted harassment or sexual harassment by the alleged discriminator. Corresponding rules have long existed but have not been the subject of any important case law.

A general rule on the reversed burden of proof is contained in Chapter 6 Section 3. This covers all types of alleged discrimination or victimisation within the scope of the Discrimination Act.

Remedies and sanctions are regulated by Chapter 5 of the 2008 Discrimination Act. Section 1 introduces a new type of indemnification, ‘discrimination indemnification’, which is exclusive for cases of discrimination. Its function is to compensate for the ‘degradation’ caused by any type of discrimination or harassment and to have a preventive effect regarding discriminatory behaviour in society. The general aim of introducing this new type of indemnification is to make the general courts change their practices and award higher indemnification amounts. In the recent case of Labour Court 2014 No. 19, ‘discrimination indemnification’ was merged with punitive damages and set at approximately EUR 5 500 (SEK 50 000). This was a case where a pregnant woman was not called in for an interview regarding a permanent position. Since she was not in a position to really obtain the position at issue the Court considered this a ‘less serious form of discrimination’ with a reference to *Draehmpaehl*. Indemnification to cover economic loss is additionally paid in the case of discrimination or victimisation by an employer. Such indemnification is not possible, however, in relation to decisions on appointments or promotions. Here, respect for the ‘hiring at will’ doctrine in Swedish law impedes payment of economic indemnification! Chapter 5 Section 3 contains a rule on the invalidity of discriminatory decisions or conditions. In cases of a discriminatory dismissal the rules on reinstatement in the 1982 Employment Protection Act apply.

The Equality Ombudsman (*Diskrimineringsombudsmannen*, DO) is the equality body covering all groups within the scope of the Discrimination Act (Chapter 4). This body is ‘a merger’ of the former four different ombudsmen, including the Equal Opportunities Ombudsman (*Jämställdhetsombudsmannen*, JämO). It has the task of monitoring compliance with the Act generally, but may also bring an action on behalf of an individual claiming discrimination of any type. This requires the consent of the individual in question. The DO decides whether there is sufficient reason to bring a claim, e.g. that a ruling in the dispute is of importance for the application of the law. The 2008 Act introduced a new possibility, also for certain NGOs, to submit an action to court provided that they have the concerned individual’s consent. Both the DO’s and the NGOs’ right to bring such an action is secondary to the right of any trade union to represent their members. The remedies as regards non-compliance with the rules on active measures are fines and there is a special Commission against Discrimination to monitor this at the request of the DO.

The rules on litigation are contained in Chapter 6 of the 2008 Discrimination Act. Alleged discrimination in working life is dealt with according to the Labour Disputes Act, which means that the Swedish Labour Court rules in the last – and usually also the first – instance. Only when an individual who is not a member of any trade union and is not represented by the DO brings a claim does he or she start out in the general District Court, the Labour Court serving as the appeal court. As regards discrimination in any other area of society, claims are brought in the general court system.

The Swedish labour market – both public and private – is to a great extent covered by collective agreements. However, there is no such thing as generally applicable collective agreements; from a legal point of view collective agreements are only binding on the employers/unions entering into them and their members. On the other hand, there is an obligation for the employer bound by an agreement to apply the conditions of the applicable

agreement to all employees in the activities covered. Collective agreements are not known to contain general regulations on gender discrimination, but frequently address gender as regards wage-setting principles, extra wages during parental leave, etc.

8. Overall assessment

Generally speaking, the 2008 Discrimination Act implements most of the directives covered by this report, including the Recast Directive. Directives 92/85/EEC and 2010/18/EU are mainly implemented through the Parental Leave Act. The Swedish legislator has taken a rather keen interest in the implementation of EU discrimination regulation in recent years and has even preceded EU law on occasion. Generally speaking, the implementation of gender law sufficiently meets the requirements of EU law. This also holds true for the implementation of central concepts.

Swedish law has been criticised by the Commission, however, as not having included an express rule indicating that discrimination related to pregnancy and maternity leave proper is regarded as sex discrimination. Other gaps in the Swedish implementation of EU gender legislation have been identified by the Commission as regards the implementation of Directive 76/207/EEC as amended by Directive 2002/73/EC in respect of limited rights to compensation as well as lacking rights for NGOs to represent alleged victims. The Government – not necessarily in agreement with the Commission – has remedied these issues through the 2008 Act. Moreover, the introduction of the special ‘discrimination indemnification’ can be expected to result in a welcome increase in the levels of indemnification. However, a question mark can be placed as regards discrimination in hiring and promotion. Even if discrimination is proved, there is no right to the position/promotion as such or to compensation for economic loss. Arguably, with regard to transparency, etc., one can also question the method of the 2008 Act to prohibit any discriminatory decision in working life without expressly mentioning access to employment, etc., in parallel with Article 3 Directive 2002/73/EC. This especially renders the bans on discriminatory pay and occupational pension schemes far from transparent and this is also true for pregnancy/maternity as a ground for direct sex discrimination.

Swedish legislation goes beyond the requirements of EU law with its prohibition on discrimination regarding basic schooling and higher education. The rules on rights to parental leave are quite extensive and to a great extent related to social security benefits, and are protected by a general prohibition on unfair treatment for reasons connected with parental leave. It is also worth mentioning that according to Chapter 2 Section 13 of the 2008 Discrimination Act, gender discrimination is outlawed concerning healthcare and social services, which goes beyond the requirements of EU law.

TURKEY – Nurhan Süral

1. Implementation of central concepts

The amended Article 10 of the Constitution on equality allows for positive discrimination: Measures taken with this goal in mind cannot be considered as violations of the principle of equality.⁵⁵⁵ Also by means of an amendment to Article 90 of the Constitution in 2004,⁵⁵⁶ ratified international agreements on fundamental rights and freedoms including the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), have been granted priority over national laws.

⁵⁵⁵ Law No. 5982, Official Gazette 13 May 2010, No. 27580. This law was approved through a referendum held on 12 September 2010.

⁵⁵⁶ Law No. 5170, Official Gazette, 22 May 2004, No. 25469.

There is no separate non-discrimination legislation in Turkey. Article 5 of the Labour Law (*İş Kanunu*) is the most extensive provision on the prohibition of discrimination. This Article regulates the principle of equal treatment, prohibiting discrimination on the basis of race, sex, language, religion and sect, political opinion, philosophical belief, colour, disability⁵⁵⁷ or any such considerations.

The concepts of direct and indirect discrimination, as well as sexual harassment are used in labour and criminal laws but have not been defined. No distinction has been made between 'harassment' and 'sexual harassment'. Law no. 6518⁵⁵⁸ amending the Law on the Disabled⁵⁵⁹ defines direct and indirect discrimination with regard to the disabled in line with EU Directive 2006/54/EC. Another amendment is that in the supply of services provided in the Law on the Disabled, attempts will be made to prevent disabled females from suffering dual discrimination.

Where a legal concept is used but not defined by law, it is up to the judiciary to interpret and clarify the legal concept. So far, there is no case law to clarify the concepts of 'direct and indirect discrimination' as used in the Labour Law. The new Penal Code⁵⁶⁰ regulates four types of crimes under the title 'Crimes against sexual inviolability': Sexual assault, sexual exploitation of children, sexual intercourse with an under-aged person, and sexual harassment. Sexual harassment has not been defined in the Article itself (Article 105) but in the reasons appended to the Article. According to this definition, sexual harassment occurs when acts of a sexual nature sexually disturb the victim thereby violating the moral decency but not the physical inviolability of the victim. In other words, this behaviour may be verbal (remarks about one's figure/looks, crude sexual jokes, verbal sexual advances/offers, unwanted messages or emails) or non-verbal (staring, whistling, indecent exposure) but not physical. Acts involving physical contact, such as patting, kissing, fondling, hugging, grabbing, and rape constitute types of sexual assault. There was an application to the Constitutional Court claiming that Article 105/1 of the Penal Code on sexual harassment was unconstitutional based on the fact that sexual harassment has not been defined therein and it therefore remained an ambiguous concept and that this contradicted the constitutional principle of the legality of crimes and penalties. The Constitutional Court rejected the claim stating that on the basis of other crimes specified under the title 'Crimes against sexual inviolability' and the reasons appended to Article 105, sexual harassment has to be understood as any disturbing behaviour with a sexual aim/overtone that does not amount to a sexual assault or sexual exploitation.⁵⁶¹ In sexual harassment, the perpetrator and the victim may be of different sexes or the same sex, single or married. Previously, moral harassment ('mobbing') was not an asserted claim in labour relations but in recent years it has become an increasingly frequent workplace violence complaint, although it has not been described as a crime in the Penal Code. The Prime Ministry issued a circular on the deterrence of mobbing in public bodies and institutions and private workplaces.⁵⁶² This circular defines mobbing as deliberate and systematic behaviour during which an employee is humiliated, degraded, socially excluded, intimidated, has his or her personality and dignity violated and is subjected to (hostile) ill treatment. Under Article 417 entitled 'Protection of the worker's personality' of the new Obligations Code that became effective on 1 July 2012, employers are to take the necessary measures to prevent sexual harassment in the workplace and to prevent further damage for those who have already been victims of sexual harassment.⁵⁶³ The employer has to 'provide an environment compatible with morals' in his workplace.

⁵⁵⁷ 'Colour' and 'disability' were added by Law no. 6518 in February 2014 (Official Gazette, 19 February 2014, No. 28918). Before this amending law, it was clearly stated in the Law on the Disabled that disability cannot be a basis for discrimination.

⁵⁵⁸ Official Gazette 19 February 2014, no. 28918.

⁵⁵⁹ Law no. 5378, Official Gazette 07 July 2005, no. 25868.

⁵⁶⁰ *Türk Ceza Kanunu*, Law No. 5237, Official Gazette 12 October 2004, No. 25611.

⁵⁶¹ Constitutional Court 25 February 2010, Case No. 2008/55, Decision No. 2010/41 (Official Gazette 22 June 2010, No. 27619).

⁵⁶² Official Gazette 19 March 2011, No. 27879.

⁵⁶³ Official Gazette 4 February 2011, No. 27836.

Positive discrimination and positive action are not concepts which are used by the Turkish legislator, but in action plans and government circulars there are proactive measures, affirmative actions and a gender mainstreaming approach to enhance female employment and gender equality. In the National Action Plan – Gender Equality 2008-2013,⁵⁶⁴ (*Toplumsal Cinsiyet Eşitliği Ulusal Eylem Planı 2008-2013*), revision of the existing Labour Law with the purpose of incorporation of EU gender equality definitions was stated as one of the strategies for action to combat gender discrimination in the labour market and to decrease the gender pay gap. A Prime Ministry circular on the enhancement of female employment and the provision of equal opportunities, envisages gender equality mainstreaming.⁵⁶⁵

2. Equal pay and equal treatment at work

2.1. Equal pay

The principle of ‘equal pay for equal work or work of equal value’ is also expressly laid down in Article 5 of the Labour Law. The application of certain protective measures on the basis of sex does not justify the payment of a lower wage.

2.2. Access to work and working conditions

Under Article 5 of the Labour Law, the principle of equal treatment with regard to sex means that there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly, by reference to sex or pregnancy as regards the conclusion, content, implementation, and termination of labour contracts. Occupational activities for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor are excluded. In an employment relationship, excluding selection, gender discrimination is a reason to justify a claim for wrongful treatment or unlawful dismissal.

If the worker proves *prima facie* that there may be discrimination, it is up to the employer to prove the contrary. If discrimination is proved, the court will determine a remedy even if there has been no consequent loss or suffering. A female worker who considers herself to have been treated in a discriminatory fashion on the basis of her sex during the course of her employment or dismissal may pursue her claims and demand pay amounting to four months’ basic wages. This is the so-called ‘discrimination pay’. The introduction of a ceiling to the amount of discrimination pay contradicts the *acquis*.

The main shortcomings of Article 5 of the Labour Law, when viewed under the EU *acquis*, can be rectified by taking the following measures:

- laying down the prohibition of discrimination on the basis of age, sexual orientation and gender reassignment;
- implementing the principle of equal treatment in the access to employment, vocational training, promotion, and working conditions; and in the access to all types and to all levels of vocational guidance, vocational retraining, including practical work experience;
- defining direct and indirect discrimination;
- providing a more effective level of protection; associations, organisations, and other legal entities should also be empowered to engage in proceedings;
- granting an employee giving evidence on behalf of or defending the discriminated person the same protection;
- promoting dialogue between social partners to address different forms of discrimination based on gender in the workplace and to combat them; and
- establishing an equality body⁵⁶⁶ for the promotion, analysis and monitoring of and support for equal treatment.

⁵⁶⁴ For the full text in English see: http://www.ksgm.gov.tr/Pdf/NAP_GE.pdf, accessed 22 December 2011.

⁵⁶⁵ *Başbakanlık Kadın İstihdamının Artırılması ve Fırsat Eşitliğinin Sağlanması Genelgesi*, Official Gazette 25 May 2010, No. 27591.

⁵⁶⁶ The democratisation package of 30 September 2013 included the confirmation of the establishment of an Anti-Discrimination and Equality Body. There is an Ombudsman Institution linked to the parliamentary speaker’s

Under Article 70 of the Constitution, every Turkish citizen has the right to enter the public service. No criteria other than qualifications for the office concerned shall be taken into consideration for recruitment in the public service. There is also a 2004 Prime Ministry circular on Acting in Accordance with the Principle of Equality in Employee Recruitment stating that unless there is a genuine and determining occupational requirement, job notices by public bodies and organisations cannot specify the sex of applicants.⁵⁶⁷ The democratisation package introduced on 30 September 2013 spoke of the removal of legal barriers for women with headscarves to take up public posts, the intention to increase penalties for hate crimes, and the intention to criminalise illegal force and intervention in personal life styles. Accordingly, the By-law on the Garments of Public Personnel⁵⁶⁸ was amended⁵⁶⁹ and women with headscarves may now hold public offices. Those who have to wear formal suits (uniforms), military personnel, police officers and judges and prosecutors, are excluded. For the excluded public services, the issue is left to the discretion of these organisations as the headscarf ban is a result of their own internal regulations/practices.

Law no. 6529⁵⁷⁰ enacted in March 2014 to further realise the principles prescribed in the democratisation package amended the Criminal Law, criminalising unlawful or forceful interventions in personal life style choices arising from one's ideas, beliefs or convictions. Such acts shall be punishable by one to three years' imprisonment. The same rule shall be applied to preventions of the use of freedom to announce religious beliefs, opinions and convictions either by force or by another illegal act.

In the private sector, discrimination in selection procedures is not prohibited by Article 5 but, according to Article 122 of the Criminal Code (*Türk Ceza Kanunu*) as amended by Law no. 6529, the person who discriminates as a result of hatred stemming from differences in language, race, nationality, sex, disability, political thought, belief or considerations and accordingly conditions employment of a particular person, or sale, transfer or lease of a movable or immovable object to a person, or prevents a person from using a public service shall be punished by one to three years' imprisonment.

ISKUR, the Turkish Employment Office, issued a notice in April 2006 outlawing discriminatory job advertisements. Requests, including statements or specifications in job notices or advertisements, concerning preferences and limitations constituting discrimination shall not be put into effect by employment offices.

2.3. Occupational pension schemes

There is no express legislation as regards occupational schemes and gender discrimination. Generally speaking, occupational pension schemes are recognised as being gender-neutral in their design. There is no available data or research on the gender-neutral nature of these occupational schemes.

3. Pregnancy and maternity protection, parental leave and adoption leave

The rules on pregnancy and childbirth in the Labour Law and the By-Law⁵⁷¹ on the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries,⁵⁷² draw

office. This Institution has a Chief Ombudsperson and five Ombudspersons elected by the Turkish Parliament, a secretary general and staff, and a separate budget. One of the Ombudspersons is tasked with complaint applications regarding women's and children's rights (The Law on the Ombudsman Institution, Law no. 6328, Official Gazette 29.06.2012, no. 28338).

⁵⁶⁷ [Personel Temininde Eşitlik İlkesine Uygun Hareket Edilmesi ile İlgili 2004/7 Sayılı Başbakanlık Genelgesi 2004/7](#), Official Gazette 22 January 2004, No. 25354.

⁵⁶⁸ *Kamu Kurum ve Kuruluşlarında Çalışan Personelin Kılık ve Kıyafetine Dair Yönetmelik*, Official Gazette, 25 October 1982.

⁵⁶⁹ Official Gazette, 08 October 2013, No. 28789.

⁵⁷⁰ Official Gazette, 13 March 2014, No. 28940.

⁵⁷¹ The Prime Ministry, the ministries and public corporate bodies may issue by-laws to ensure the application of laws related to their particular fields of operation. By-laws make laws more concrete and detailed.

almost completely on EU directives. This newly issued By-Law provides for provisional measures to protect pregnant workers and workers who have recently given birth or are breastfeeding against risks, and prohibits their exposure to certain chemical, physical and biological agents (Annexes). These agents are defined in the By-Law on Health and Safety Measures for Works with Chemicals⁵⁷³ that draws on Directives 1998/24/EC, 1991/322/EEC, 2000/39/EC, 2006/15/EC, and 2009/161/EU.

The so-called ‘Sack Law’⁵⁷⁴ (a law amending quite a large number of laws is called a sack (bag) law) became effective on 25 February 2011. New types of leave were introduced and substantial (generous) increases were made in the duration of the current forms of leave for civil servants and workers with a permanent employment contract in the public sector.

Ante-natal rights and requirements: Definitions given of a ‘pregnant worker’, a ‘worker who has recently given birth,’ and a ‘breastfeeding worker’ are the same as in Directive 92/85/EEC (By-Law, Article 4) and so are the rules on pregnancy accommodation.

Maternity leave: The maternity provisions generally either meet, or are more generous than, the minimum requirements of Directive 92/85/EEC. In Turkey, there is a compulsory maternity leave of 16 weeks. A novelty introduced by the Sack Law is that where childbirth occurs before the due date, the unused prenatal portion of the leave is added to the post-natal portion of the leave. Short-term incapacity benefits are also to be paid for this portion added to the post-natal leave. An amendment made in the Civil Servants Law by the Sack Law concerns the death of a female civil servant during maternity leave. Where this occurs, the civil servant father, if he so requests, may use the leave granted to the mother.

Additional maternity leave: The worker, if she so requests, has to be granted unpaid leave for up to six months following the post-natal period.⁵⁷⁵ The two periods, compulsory and additional, run consecutively, so as to provide an entitlement to 16 weeks (18 weeks in the case of a multiple pregnancy) plus 6 months of leave. There can be no gap between the two periods. Additional unpaid maternity leave upon request was one year for female civil servants. The Sack Law has extended this one-year period to two years.

Adoption leave: Adoption leave was first introduced for civil servants by the Sack Law. If a child under the age of age three is adopted, the adoptive parents will be granted, upon request, an unpaid adoption leave of up to 24 months. If both spouses are civil servants, then these periods can be taken consecutively.

Other forms of family-related leaves: Paid or unpaid paternity leave for male workers is left to individual and collective labour agreements. Male civil servants were granted paid paternity leave of three days upon the birth of his child. The Sack Law extends this to ten days. Moreover, it introduces an unpaid paternity leave of 24 months for male civil servants, upon request. Where both additional maternity leave and paternity leave are to be taken, these leaves may be used in a way coinciding each other or consecutively. In such a case the total cannot exceed 24 months per child.

In the Labour Law and the Civil Servants Law, there is no leave under the title of ‘Parental leave.’ A worker may request leave for a valid reason and this may be a family-related reason. In the Civil Servants Law, there are forms of leave entitled ‘excuse leave’ and ‘sickness and patient companionship leave’ that may be used for family-related reasons.

⁵⁷² *Gebe veya Emziren Kadınların Çalıştırılma Şartlarıyla Emzirme Odaları ve Çocuk Bakım Yurtlarına Dair Yönetmelik*, Official Gazette, 16 August 2013.

⁵⁷³ *Kimyasal Maddelerle Çalışmalarda Sağlık ve Güvenlik Önlemleri Hakkında Yönetmelik*, Official Gazette 12 August 2013, no. 28733.

⁵⁷⁴ Official Gazette 25 February 2011, No. 27857 bis.

⁵⁷⁵ Article 74 of the Labour Law.

A newly introduced type of leave is a leave for the civil servant parent of a disabled child or a child with a permanent illness. Article 7 of Law no. 6525⁵⁷⁶ amending Article 104E of the Civil Servants Law envisages a paid leave of up to ten days for the civil servant mother or father in case of illness of a child with at least 70 % disability (if the child is married then if the child's spouse is also at least 70 % disabled) or a child with a permanent illness. This leave can be used wholly or partially in a period of one year.

Nursing periods: The daily nursing period is 1½ hours during weekdays for female workers until the child is one year old. This was also true for female civil servants, but now, with the Sack Law, it is 3 hours a day for a period of six months following the termination of maternity leave and 1½ hours a day for the second six-month period.

Childcare: Under the By-Law on the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries, workplaces employing between 100 and 150 female workers are to establish nursing rooms while those employing more than 150 female workers have to establish day nurseries consisting of a nursing room and a day nursery (Article 13). The number of male workers with custody of children as a result of death of wife or divorce, must be added to figures necessitating the establishment of nursing rooms and day nurseries. The children of male workers are to benefit if the mother has died or if parental authority has been granted to the father by a court decision. The establishment, conduct and functioning of such facilities are entirely at the expense of employers. Employers may come together to establish a common nursing room and/or day nurseries. Outsourcing (agreements with nurseries authorised by public authorities) is also possible for the provision of such services. If the day nursery is more than 250 metres away from the workplace, the employer is to provide transportation services (Articles 13 and 14).

Protection against dismissal: In Turkey, the labour contract is deemed to have been suspended during maternity leave. Therefore, dismissal for any reason during the period of maternity leave is legally non-permissible. Moreover, during employment, pregnancy and maternity do not constitute valid reasons for contract termination.

4. Statutory schemes of social security

In relation to pregnancy and giving birth, there are benefits in kind and benefits in cash. Maternity medical benefits cover medical examinations, medication, in-vitro fertilisation, and hospitalisation designed to cover care for the insured woman or the uninsured wife of the male worker.

Maternity allowance is a short-term incapacity benefit designed to compensate for a worker's loss of earnings due to pregnancy and giving birth. Unless there is a provision to the contrary in the individual or collective labour contract, there will be no pay by the employer during maternity leave; the worker will be paid maternity allowance equalling sick pay by the social security organisation (Law No. 5510,⁵⁷⁷ Article 18). To qualify for this maternity allowance, a female worker has to have made the relevant contributions for at least 90 days in a period of one year before the birth.

In some schemes, the worker can make up for any unpaid leave by way of extra contributions. During a period of unpaid maternity leave, neither the worker nor the employer will be expected to contribute. The worker may, if she chooses, pay contributions for the statutory (compulsory) maternity leave but the employer will not have a duty to contribute. If the worker pays contributions for the statutory maternity leave period, this period counts as pensionable service. Also, where a worker resigns due to pregnancy or having given birth, she

⁵⁷⁶ Official Gazette 27 February 2014, no. 28926.

⁵⁷⁷ Social Insurances and General Health Insurance Law (*Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu*), Official Gazette 16 June 2006.

may, if she chooses, pay contributions for a maximum period of two years during which she remains unemployed. This period starts at the birth and the worker may benefit from this provision for two separate births.⁵⁷⁸

The so-called ‘milk money’ (a nursing allowance) is a lump-sum payment made to a breastfeeding worker or to the uninsured breastfeeding wife of the male worker for each newborn child provided that the child is alive.⁵⁷⁹ To qualify for the nursing allowance, a female worker or the working husband of the woman has to have paid at least 120 days’ contributions within a period of one year before the birth.

If a female worker is the mother of a disabled child in need of constant care, she will be entitled to early retirement: 90 extra pensionable days will be added to each year of service.⁵⁸⁰ It is the Social Security Organisation Health Board (*Sosyal Güvenlik Kurumu Sağlık Kurulu*) that determines the child’s condition on the basis of the relevant by-law.⁵⁸¹

5. Self-employed persons

Legislation is gender neutral in its wording. Turkey has a very small number of self-employed women. Self-employed women will receive full maternity benefits.

6. Goods and services

The Law of Property,⁵⁸² the Law of Obligations⁵⁸³ and the Social Insurances and General Health Insurance Law⁵⁸⁴ are the main laws in this field. Until recently, female university students who wore a headscarf were denied the right to education. There is no actual law prohibiting the use of headscarves by female university students, but this was prohibited by a constitutional court decision of a political nature.⁵⁸⁵ The ban was eliminated in 2010 after the Higher Education Board (YÖK) sent a circular to universities on the issue. The insurance industry implements unisex pricing.

7. Enforcement and compliance aspects

Sanctions in cases of discrimination are imposed by the courts. Access to the courts is ensured for victims of discrimination but interest groups whose aim is to assist victims of discrimination or to combat discrimination do not have access to the courts. The worker concerned can claim particular types of compensation and if he/she has increased job security he/she can request the court to invalidate the termination of the contract and can thereby claim wages. He/she can also demand to be reinstated in his/her job. If not reinstated, he/she can claim pecuniary damages under the system of sanctions in general labour law. There are attempts to establish an equality body. The social partners do not play a significant role as regards gender equality in the labour market and the role of collective agreements in the development of equality issues has never been really relevant.

8. Overall assessment

Turkey is highly responsive to change and it has taken initiative in the adaptation process by developing new legal rules and innovative policies. The EU dimension of the promotion of

⁵⁷⁸ Article 41, Law No. 5510.

⁵⁷⁹ Article 16, Law No. 5510.

⁵⁸⁰ Article 28, Law No. 5510.

⁵⁸¹ Article 15, By-Law on Incapacity for Work and Schemes for Invalidity (*Çalışma Gücü Ve Meslekte Kazanma Gücü Kaybı Oranı Tespit İşlemleri Yönetmeliği*), Official Gazette, 11 October 2008, No. 27021.

⁵⁸² The Law of Property (*Eşya Hukuku*) is the fourth book of the Civil Code (*Medeni Kanun*), Official Gazette 8 December 2001, No. 24607.

⁵⁸³ Law of Obligations (*Borçlar Kanunu*), Law No. 6098, Official Gazette 4 February 2011, No. 27836.

⁵⁸⁴ *Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu*, Law No. 5510, Official Gazette, 16 June 2006.

⁵⁸⁵ Decision No. 1991/8 of 9 April 1991, Official Gazette, 31 July 1991.

gender equality is taken into consideration in the preparation of new legislation, legislative amendments, government programmes, policies, projects and development programmes. The institutional dimension of gender equality (the establishment of new institutions to promote gender equality) and the formulation of gender mainstreaming policies are prioritised.

UNITED KINGDOM – Aileen McColgan

1. Implementation of central concepts

The Equality Act was passed in April 2010 and was implemented, insofar as is relevant here, in October 2010 and April 2011. It brings together all British discrimination law dealing with sex, ethnicity, disability, sexual orientation, religion or belief and age. It has replaced the main implementing measure for the EU gender discrimination law in the United Kingdom, previously the Sex Discrimination Act 1975 (SDA) and the Equal Pay Act 1970 (EqPA) (the latter covering inequality in contractual conditions rather than simply in pay). The 2010 Act also regulates direct and indirect discrimination including positive action, instructions to discriminate, harassment and sexual harassment. It explicitly covers not only discrimination against women and men but also discrimination against a person ‘proposing to undergo, is undergoing or [who] has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex’ (Section 7), discrimination related to pregnancy and maternity and (in the field of employment) discrimination on the ground that a person is married or in a civil partnership (Section 8). The Equality Act 2010 consolidated more than it changed in the field of gender equality, attention being drawn below to the most significant changes it has made.

Direct discrimination is defined (Section 13) as less favourable treatment ‘because of a protected characteristic’ such as sex, pregnancy or maternity or gender reassignment. Comparison is required between the treatment of the claimant and that which was or would have been received by a (real or hypothetical) comparator in materially similar circumstances (Section 23). No comparator is required to establish pregnancy discrimination. Section 17 provides that such discrimination occurs where a woman is treated *unfavourably* (rather than *less favourably*), outside the context of work, because she is pregnant, has given birth or (for a six-month period) is breastfeeding. Section 18 provides that pregnancy discrimination occurs in the context of work where a woman is treated unfavourably because she is pregnant, or suffering from pregnancy-related illness, or in connection with maternity leave.

In *Equal Opportunities Commission v Birmingham City Council*⁵⁸⁶ the House of Lords ruled that the Council had discriminated directly against schoolgirls in setting a higher mark for success in the ‘11 plus’ examination (by which children were selected for grammar schooling) for girls than for boys, because there were fewer grammar school places available for girls. Their Lordships ruled that it was unnecessary to establish an intention or motive on the part of the council to discriminate against girls. Shortly afterwards, in *James v Eastleigh Borough Council*⁵⁸⁷ their Lordships ruled that the proper approach to the test for direct discrimination was to ask (in a case in which a man challenged discrimination on grounds of (discriminatory) state pensionable ages) whether ‘but for’ his sex he would have been more favourably treated. The benefit of the ‘but for’ test is that it excludes arguments (as in the *EOC* case) that less favourable treatment was motivated by factors other than an intention to discriminate against the disfavoured group, such as customer preference, chivalry, etc.⁵⁸⁸ The preparatory materials and explanatory notes to the 2010 Act make it clear that the ‘but for’

⁵⁸⁶ [1989] AC 1155.

⁵⁸⁷ [1990] 2 AC 751.

⁵⁸⁸ See also *R (on the application of European Roma Rights Centre & Ors) v Immigration Officer at Prague Airport & Ors* [2005] 2 WLR 1.

test continues to apply to direct discrimination despite the change in definition from ‘on grounds of’ to ‘because of’.

The Equality Act 2010 contains a provision prohibiting ‘dual discrimination’ (Section 14), defined as direct discrimination on two combined protected grounds. This provision does not apply to indirect discrimination, or to discrimination on a combination of more than two grounds. The current Government, which faces a general election in May 2015, has made it clear that it does not intend to implement the provision.

The Equality Act 2010 defines indirect discrimination as occurring (Section 19) where a ‘provision, criterion or practice’ is applied which is or would be applied to persons with whom the claimant does not share a ‘protected characteristic’ (such characteristics including sex). There is some controversy as to whether the test for justification is adequate to comply with EU law, and whether its adoption was regressive, the test prior to the implementation of Directive 2002/73/EC being that established by the CJEU in cases such as *Bilka v Kaufhaus*.⁵⁸⁹ It appears from the application of a materially identical test applicable to race discrimination that the courts will interpret the new test so as to give effect to the EU approach to the extent that this is more demanding than the words of the domestic provision.⁵⁹⁰

The ‘but for’ approach to direct discrimination had the effect that less favourable treatment on the ground of sex was prohibited by the SDA, in the absence of a specific provision, even where its purpose was to ameliorate existing disadvantages and/or past discrimination (positive action). The exceptions provided by the Equality Act’s predecessor were very narrow and applied in the employment context only to permit the provision of training to, and encouraging applications from, women or men where they were very under-represented in the relevant work. The 2010 Act widened the scope for positive action, allowing such action where (outside the context of recruitment and promotion) it is a proportionate means of reducing disadvantage, meeting particular needs or encouraging participation by the under-represented gender (Section 158). The Act further allows ‘tie-break’ discrimination in the context of recruitment and promotion where it is a proportionate means of encouraging participation by the under-represented gender or minimising sex-related disadvantage (Section 159).

The Equality Act 2010 in Section 111 prohibits the issue of instructions to discriminate by a person who is him or herself in a position such that discrimination by them against the person to whom the instruction is issued would breach the Act. Section 111 also prohibits such persons from causing or inducing discrimination. These provisions may be enforced by individuals.

The Equality Act 2010 also prohibits harassment and sexual harassment broadly along the lines of Directive 2006/54/EC, though the definition in Section 26 covers unwanted conduct whose purpose or effect is to violate a person’s dignity *or* (rather than *and*) to create an intimidating, hostile, degrading, humiliating or offensive environment for her. The test in Section 26 is therefore somewhat more generous than that required by the Directive. The Act imposes a soft objective test for conduct whose *effect* rather than *purpose* is relied upon, Section 26(4) providing that the perception of the complainant, the other circumstances of the case and whether it is reasonable to regard conduct as having a particular effect may be taken into account in determining whether conduct had the effect of violating dignity or creating an intimidating etc. environment.

⁵⁸⁹ Case C-170/84 *Bilka v Kaufhaus* [1986] ECR I-01607 and [1994] ECR I-03567.

⁵⁹⁰ *R (E) v Governing Body of the Jews Free School and Couronne & Ors v Crawley Borough Council & Ors* [2008] All ER (D) 54, *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213.

2. Equal pay and equal treatment at work

2.1. Equal pay

The Equality Act 2010 provides that a claimant can demand the insertion of an ‘equality clause’ into his or her contract of employment to bring it into line with that of her/his ‘comparator’, in the event of a successful claim.⁵⁹¹ The Act defines as an appropriate ‘comparator’ for these purposes a person of the opposite sex who is employed by the same employer, in the same establishment or one at which broadly similar terms and conditions apply, in ‘like work’, ‘work rated as equivalent’ (e.g. by a job evaluation scheme undertaken by the employer) or ‘work of equal value’. The Supreme Court ruled in *North & Ors v Dumfries and Galloway Council*⁵⁹² that, where claimants seek to rely on comparators employed at a different establishment, the Equality Act does not require there to be a ‘real possibility’ of the comparators doing the same, or broadly similar, jobs at the claimant’s place of work. Claims by reference to comparators falling outside these strict categories may be made by reference to Article 157 TFEU, and (in a change to the previous position) claimants can also challenge direct discrimination in pay by reference to a hypothetical comparator. The employer can block an equal pay claim by pleading the ‘GMF’ defence, that is, by showing that any difference is genuinely due to a material factor (or factors) which is ‘not the difference of sex’.⁵⁹³ A pay-related factor which is indirectly discriminatory can succeed as a defence only if it is justified in accordance with EU law; directly discriminatory pay-related factors cannot be justified; and sex-neutral pay-related factors do not have to be justified. The Equality Act also provides some protection from victimisation connected with discussions related to pay (this to prevent employers from avoiding equal pay claims by keeping workers ignorant of relative rates of pay (Section 77)).

2.2. Access to work and working conditions

The Equality Act 2010 applies, in the context of work, to those employed ‘under a contract of service or of apprenticeship or a contract personally to execute any work or labour’, and applies also to partners, office holders and agency workers who are protected from discrimination by both agency and (where they are ‘employed’ by the agency) by the employer with whom they are placed. It does not however apply to those who are engaged under a contract which does not require the personal execution of work, such as the claimant in *Mirror Group Newspapers Ltd v Gunning*, who complained that a newspaper group had refused to transfer a distribution agreement from her father to her on the latter’s retirement.⁵⁹⁴ Also of general interest is the 2005 decision of the House of Lords in *Percy v Church of Scotland* in which their Lordships accepted (contrary to previous case law) that a minister of religion was employed for the purposes of an SDA claim.⁵⁹⁵ Both of these cases would be as applicable under the Equality Act 2010 as they were under its predecessor.

The Equality Act applies in relation to ‘arrangements for appointment, decisions whether to appoint and the terms offered, as well as to ‘access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services’, dismissal or subjection to harassment or ‘any other detriment’. Prior to October 2013 the Act explicitly applied to harassment by third parties where the harassment had occurred to the knowledge of the employer on at least two previous occasions and s/he subsequently failed to take such steps as would have been reasonably practicable to prevent further harassment. This provision was repealed from October 2013. The prohibitions on discrimination and harassment, but not victimisation, continue to apply after employment has ended. There is no distinction between private and public employment. The Equality Act does not define the geographical scope of the employment provisions. Previously, under the SDA, ‘employment at an establishment in

⁵⁹¹ Part 4, Chapter 3 Equality Act.

⁵⁹² [2013] IRLR 737.

⁵⁹³ Section 69 Equality Act.

⁵⁹⁴ [1986] ICR 145.

⁵⁹⁵ [2005] UKHL 73 [2006] ICR 134.

Great Britain' was defined to include cases in which the worker works wholly or partly in Great Britain, or works wholly outside Great Britain for the purposes of business carried out by the employer at an establishment in Great Britain, and was or is ordinarily resident in Great Britain at the time when s/he applied for or was offered the employment, or at any time during the course of the employment.

The Equality Act provides exceptions to the prohibition on sex discrimination, Schedule 9, Part 1 permitting A to apply in relation to work a requirement to have a particular protected characteristic where 'A shows that, having regard to the nature or context of the work – (a) it is an occupational requirement, (b) the application of the requirement is a proportionate means of achieving a legitimate aim, and (c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it). Religious organisations may discriminate on grounds of sex in appointing ministers of religion. The Equality Act excepts from its provisions those acts done 'for the purpose of safeguarding national security [which are] proportionate to do for that purpose'. Finally, limited exceptions apply to discrimination required by statutory provisions concerned with the protection of women.

2.3. Occupational pension schemes

The Equality Act 2010 applies to occupational pensions as it does to other forms of pay, both as regards access to schemes and payments made thereunder.

3. Pregnancy and maternity protection, parental leave and adoption leave

Discrimination on the ground of pregnancy or maternity leave is prohibited by the Equality Act broadly in line with EU law (Sections 17 and 18 Equality Act), but there is no prohibition as such on the dismissal of pregnant women for reasons not associated with pregnancy. All pregnant women are entitled to reasonable paid time off for prenatal care. All pregnant employees are entitled to 52 weeks' maternity leave during which all normal contractual entitlements other than wages or salary are maintained. Special protection is provided against redundancy arising during maternity leave, with women on leave being entitled to be offered any suitable alternative vacancy which is available. If a woman on maternity leave is made redundant her maternity leave period comes to an end. Payment during maternity leave is generally at 90 % of the normal salary for six weeks followed by 33 weeks at a fixed rate (EUR 166.93 (GBP 138.18) from April 2013 or 90 % of salary, whichever is less).

Adoption leave is similar to maternity leave except that either adopting parent can take it, pay is at EUR 166.93 (GBP 138.18) or 90 % of salary, whichever is less, for 39 of the total 52 weeks available and return to work is in line with that applicable after more than 26 weeks' maternity leave regardless of the period of leave taken. Paternity leave is fixed at two weeks, paid at EUR 166.93 (GBP 138.18) or 90 % of salary, whichever is less, and is subject to a qualifying period of 26 weeks' employment. Employees are entitled to return to the same job. Parental leave is fixed at 18 weeks per parent per child, which is to be taken in minimum periods of one week, subject to a maximum of four weeks in any one year, unpaid, in the first five years of the child's life (18 years in the case of disabled children). All leave is available only to employees and notice requirements apply.

4. Statutory schemes of social security

Generally speaking the statutory social security scheme does not discriminate directly on grounds of sex except insofar as the state pensionable age is still in the process of being equalised, and meanwhile some benefits remain linked with the differential pensionable ages. Discrimination as regards survivors' benefits is also being phased out. Women can, however, be rendered ineligible for some benefits by the earnings or benefit entitlement of those with whom they cohabit. This is not a problem directly linked to sex as the rules are sex-neutral, but it is the result of the statutory security scheme being premised on a model of female

dependency, and serves disproportionately to disadvantage women by reinforcing their economic dependency.

5. Self-employed persons

Those ‘self-employed’ women who provide work under contracts ‘personally to execute any work or labour’ will be protected by the Equality Act 2010. Relevant questions will include whether the ‘self-employed’ woman in fact provides work under a contract (however short-term) under which she is responsible for the personal execution of the work which the contract covers. Further, the decision of the Supreme Court in *Jivraj v Hashwani*⁵⁹⁶ would appear to deny the protection of anti-discrimination law to anyone who would not be regarded as a (subordinated) ‘worker’ for the purposes of EU law, unless (as in the case of contract workers, police officers, partners in firms, barristers and advocates) such persons are expressly covered by the legislation.

The Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-employed Earner) Regulations 2014, which came into effect on 1 April 2014, make provision for the payment of a maternity allowance in line with the minimum requirements imposed by the Directive to the partners of self-employed workers who participate in their partners’ self-employed business but who do not receive payment in respect of such participation. Whereas assisting spouses/partners who were paid for their efforts would have been entitled to maternity allowance prior to the implementation of the Regulations, those who were not paid for their assistance were not..

6. Goods and services

The Equality Act prohibits discrimination across the substantive scope of cover under Directive 2004/113/EC. The Act goes beyond the Directive in applying to some extent to education (though it permits single-sex schools) and the content of media and advertisements.

7. Enforcement and compliance aspects

All employment-related cases are heard by employment tribunals at which costs are not generally recoverable (by contrast with the normal position that costs are awarded to the successful party). Cases relating to goods and services are heard by county courts where judges have little expertise in discrimination claims. Such claims are relatively rare.

The Equality Act prohibits victimisation in connection with claims brought under that Act, although the victimisation provisions do not appear to apply after the end of an employment or other relationship covered by the EqA. The burden of proof in relation to victimisation is subject to the normal rules on reversal. The case law is complex but, for the most part, a ‘but for’ approach is adopted which is similar to that described above in relation to direct discrimination. The Act defines victimisation so as not to require a comparator, providing that it occurs where (Section 27) a person is subjected to a detriment because s/he has done or is believed to have done, or possibly be about to do, a ‘protected act’ (that is, an act connected with the Equality Act).

The rules on the burden of proof in the Equality Act are modelled on those in the Directive, the burden passing where the claimant establishes facts from which an inference of discrimination might be drawn. The courts are struggling with what exactly is required in order to shift the burden but this is significantly a question of fact rather than law. For instance, a difference in treatment and a difference in gender are insufficient. However, if statistics suggest that women are disadvantaged in comparison to men in a given organisation, or if the employer has wrongfully failed to disclose documents relating to a case during legal

⁵⁹⁶ [2012] 1 All ER 629.

proceedings, or if there is some other evidence which might suggest that discrimination has occurred,; a tribunal may look to the employer for an explanation of the alleged mistreatment.

The Equality Act provides for declarations, recommendations that the respondent take within a specified period action designed to obviate or reduce the adverse effect on the complainant or on any other person of an act of discrimination (Section 124(3)), and (unlimited) compensation in relation to employment-related discrimination. Compensation can be significant. Outside the employment context declarations, damages and injunctive relief are available. The Equality Act provides (Section 124(50)) that in the case of unintentional indirect discrimination a tribunal ought not to consider compensation without first considering the making of a declaration and/or a recommendation. Domestic remedial provisions are open to criticism mainly on the ground that they apply to so few cases in practice: the individual complaints-based model adopted by domestic law means that most sex discrimination goes unchecked.

As to whether access to the courts is safeguarded for victims of discrimination, victimisation, although unlawful, is commonplace in employment-related cases and potential claimants fear destroying their careers by taking action. The Equality and Human Rights Commission can support claimants, as can trade unions and other voluntary bodies. But cases cannot be brought 'on behalf of' claimants, much less on behalf of anonymous claimants. The Commission does have powers of 'formal investigation' which could uncover widespread discrimination in particular sectors etc. but the exercise of these powers by the Commission's predecessor bodies was constrained by the courts in a number of cases and formal investigations are in practice very difficult to carry out as a result. It is possible for interest groups to challenge sex discrimination by way of judicial review if they can show a sufficient interest in the case but the overall answer would have to be that the very individual operation of the law in practice is insufficient to protect from sex discrimination.

The Equality and Human Rights Commission, which came into being in 2007 as a single body in place of the various equality commissions, seeks to implement the requirements of EU law. Trade unions do not have any formal legal role in the implementation of gender equality law, though in practice they are responsible for supporting many of the cases which reach the courts (particularly in the area of equal pay). In the UK collective agreements are not used as means to implement EU gender equality law as they are non-binding and increasingly reached only at the level of the enterprise.

8. Overall assessment

The main difficulties with the existing domestic law relate to the individual model of enforcement, as well as to the very narrow comparator-driven approach to equal pay claims notwithstanding the small extensions made by the Equality Act 2010 in this regard. The implementation of the Equality Act 2010 has done much to harmonise domestic discrimination provisions across the board, but does not significantly alter the complexity of sex discrimination law.

Northern Ireland

The Equality Act 2010 does not apply to Northern Ireland where the Sex Discrimination (Northern Ireland) Order 1976 as amended, and the Equal Pay (Northern Ireland) Act 1970 as amended, continue to apply. Attention will be drawn below only to those provisions which are materially different from the corresponding provisions of the Equality Act 2010. Unless otherwise stated, the Great Britain case law referred to above is applicable in Northern Ireland.

1. Implementation of central concepts

As above, the relevant provisions are the Sex Discrimination (Northern Ireland) Order 1976 as amended, and the Equal Pay (Northern Ireland) Act 1970 as amended. The 1976 Order regulates direct and indirect discrimination including positive action, instructions to discriminate, harassment and sexual harassment. It explicitly covers not only discrimination against women and men but also discrimination connected with gender reassignment, etc., in similar terms to the Equality Act 2010 in Great Britain (see above).

Direct discrimination is defined (Paragraph 3) as less favourable treatment 'on the ground of' a person's sex/pregnancy/gender reassignment/married or civil partnership status. There is no provision for 'dual discrimination'. The exceptions provided for positive action in Northern Ireland are much narrower than in Great Britain, extending only (as did the Equality Act's predecessor's provisions) to the provision of training to, and encouraging applications from, women or men where they were very under-represented in the relevant work. Instructions to discriminate are prohibited but only the Northern Ireland Equality Commission (EHRC) has the right to enforce the provisions dealing with instructions to discriminate.

2. Equal pay and equal treatment at work

2.1. Equal pay

The Equal Pay (Northern Ireland) Act 1970 as amended is worded in broadly similar terms to the relevant parts of the Equality Act 2010 save that claimants cannot in Northern Ireland challenge direct discrimination in pay by reference to a hypothetical comparator and the Northern Ireland Act does not provide protection from victimisation connected with discussions related to pay.

2.2. Access to work and working conditions

The Sex Discrimination (Northern Ireland) Order 1976 as amended applies in materially identical terms in Northern Ireland as the Equality Act 2010 does in Great Britain except that the prohibitions on victimisation as well as discrimination and harassment continue to apply after employment has ended. The Order applies to, 'employment at an establishment in Northern Ireland' which is defined to include cases in which the worker works wholly or partly in Northern Ireland, or works wholly outside Northern Ireland for the purposes of business carried out by the employer at an establishment in Northern Ireland, and was or is ordinarily resident in Northern Ireland at the time when s/he applied for or was offered the employment, or at any time during the course of the employment.

2.3. Occupational pension schemes

The Equal Pay (Northern Ireland) Act 1970 applies to occupational pensions as it does to other forms of pay, both as regards access to schemes and payments made thereunder.

3. Pregnancy and maternity protection, parental leave and adoption leave

The provisions dealing with discrimination on the ground of pregnancy or maternity leave are materially identical to those which apply in Great Britain.

4. Statutory schemes of social security

The position in Northern Ireland is the same as that in Great Britain.

5. Self-employed persons

The position in Northern Ireland is the same as that in Great Britain. The Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-employed Earner)

Regulations (Northern Ireland) 2014 are materially identical to the Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-employed Earner) Regulations 2014, which apply in Great Britain.

6. Goods and services

The position in Northern Ireland is the same as that in Great Britain.

7. Enforcement and compliance aspects

The position in Northern Ireland is the same as that in Great Britain save that victimisation is regulated after the end of the employment or other relationship covered by the SD (Northern Ireland) Order in Northern Ireland. The Northern Ireland Order defines victimisation as 'less favourabl[e]' treatment 'by reason that the person victimised has' done a protected act (that is, an act connected with the Order or the Equal Pay (Northern Ireland) Act). The Northern Ireland Equality Commission plays the role of single body in Northern Ireland.

8. Overall assessment

In addition to the difficulties noted in Great Britain, the absence of a single Equality Act in Northern Ireland does mean that there are sometimes arbitrary differences between different protected grounds.

Annex I

Questionnaire

EU Gender Equality Law in 33 European Countries: Update 2014

Questionnaire

The purpose

The so-called General Report should provide a description of EU gender equality law in all 33 countries participating in the Gender Equality Network: the 27 Member States, the acceding country (Croatia), and Iceland, Liechtenstein, Norway, FYR of Macedonia and Turkey. It should furthermore include a description of any measures going beyond the minimum requirements of the directives in these countries.⁷¹⁷ The relevant gender equality directives, in addition to Article 157 TFEU, are Directives 2006/54 (Recast Directive), 2004/113 (Goods and Services), 79/7 (Statutory Social Security), 2010/41 (Self-Employed Workers), 92/85 (Pregnancy and Maternity) and 2010/18 (Parental Leave). The report will contain a country-by-country overview of how each country has implemented these directives. The issues addressed in this General Report will at least include the implementation of general concepts of discrimination and (sexual) harassment, access to work and working conditions (including pay and occupational pension schemes), statutory social security, self-employed workers, pregnancy and maternity protection and parental leave, access to and supply of goods and services and information on the implementation of so-called horizontal provisions, e.g. protection against victimisation, the burden of proof, remedies and sanctions, gender equality bodies, the role of social partners etc.

This General Report, a kind of handbook, is aimed at a broad public (policy makers, legal professionals, researchers), and will be updated each year. As the report will be aiming at a broad (non-legal) public, the text should give a general overview, and should be clear, easily accessible and easy to read. Technical legal language and details should be avoided.

The content

This report will consist of two parts: an executive summary (Part A) and the national reports (Part B). An overview of relevant national legislation and a selected bibliography will be included in annexes to this report.

Part A: The executive summary

The executive summary will contain a comparative analysis of the transposition of EU gender equality rules. This part (approximately 30 pages) will also be provided separately in a quality and format suitable for online and printed publication (camera ready) in English, German and French.⁷¹⁸

⁷¹⁷ A similar report, *EU Gender Equality Law in 33 European Countries*, was produced by the European Network of Legal Experts in the Field of Gender Equality under previous contracts and has since been updated each year, except in 2012, following a change of the work programme suggested by the Commission. This report is available on http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 11 April 2013.

⁷¹⁸ A similar publication, *EU Rules on Gender Equality: How are they transposed into national law?*, was produced by the European Network of Legal Experts in the Field of Gender Equality under previous contracts, and was updated in 2010. This publication is available on http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9 and from the EU Bookshop, <http://bookshop.europa.eu/en/search/?webform->

Part B: The implementation of the EU gender equality *acquis* in the Member States, the acceding country and EEA countries

Preliminary remark 1:

This part includes a country-by-country overview of how each country has implemented EU gender equality law, in particular the relevant directives. It should also indicate as much as possible the extent to which national measures go beyond the minimum requirements of EU gender equality law.

For the purposes of this report the term ‘implementation’ should be understood as referring mainly to the *transposition* of directives into national law (sometimes, of course, such transposition is not necessary, in particular where national legal provisions already comply with the requirements of the directive in question). In other words, what we are looking for is an easily accessible, accurate and clear description for the general public of the main legislative⁷¹⁹ provisions transposing EU gender equality directives and Article 157 TFEU, including pre-existing national provisions that adequately (or not) ‘implement’ the directives. However, we would like the national experts to also include some interesting and leading cases of the national courts regarding the provisions that implement (transpose) the directives, since transposition of the directives and interpretations by the courts of the relevant provisions cannot be separated. We fully realise that including court case law in the report poses a problem in at least two respects: in some countries hardly any cases are decided, while in others there are too many cases to report. As to the selection to be made, we trust the wisdom of our experts – exactly because they are experts! The same holds true for producing a concise but clear description. As experts you are in the best position to distinguish what really matters for a good general description of your national legislation for a broad general public, and what is important for lawyers but less important for the general public.

It would also be most helpful for the ‘lay public’ to have your personal assessment of the quality and effectiveness of the implementation. Therefore, could you please indicate in each section to what extent, in your opinion, the national implementation is satisfactory or whether there are extensive gaps or mistakes in implementation? Please note that this assessment is not about whether there are problems beyond the areas covered by EU gender equality law as it stands now. For reasons of space we are obliged to leave out considerations regarding what should be addressed by national and/or EU legislation beyond the existing scope of EU law.

1. Implementation of central concepts

Please discuss how the main concepts of EU gender discrimination law have been implemented in your country. If relevant, you may also refer to the relevant constitutional provisions on equality and non-discrimination. Please focus on the main definitions. If a certain Act (e.g. when implementing the social security directive) uses different definitions, mention this briefly. An indication of how the concepts are interpreted by the courts is also an important element.

The concepts concerned here are the following:

- direct discrimination;
- indirect discrimination;
- positive action: EU law is merely permissive in this regard - is positive action expressly permitted or required in national legislation, and how is it framed?;
- instruction to discriminate;
- harassment and sexual harassment.

[id=WFSimpleSearch&DefaultButton=findSimple&WFSimpleSearch_NameOrID=Gender+Equality+Rules&SearchConditions=&SearchType=1&findSimple.x=18&findSimple.y=12](#), accessed 11 April 2013.

⁷¹⁹ Acts of Parliament or other delegated but important legislation.

Reminder:

- Please do not forget to indicate if, in your national law, provisions exceed the requirements of EU law;
- Please do not forget to indicate whether, in your opinion, the implementation is satisfactory or whether there are extensive gaps or important mistakes.

Preliminary remark 2:

What follows below is roughly structured along the lines of the various directives. The most relevant provisions are mentioned for your convenience (please note that additional and/or other provisions might also be relevant for your country).

The central concepts are excluded here, as they are already addressed in Section 1. In addition, enforcement is addressed in Section 7.

Therefore, please do not discuss the aspects covered by Sections 1 and 7 in Sections 2 to 6. Avoid repetition as much as possible. Please briefly describe landmark cases where you consider them relevant.

2. Equal pay and equal treatment at work (Article 157 TFEU and Recast Directive 2006/54)

Please discuss the issue of equal pay (Article 157 TFEU and Article 4 Recast Directive) regarding the following:

- the scope of the notion of ‘pay’ as implemented in your country;
- the formulation of the equal pay obligation in the legislation of your country (provisions on equal work/work of the same value; job classification schemes; work of equal value; wage transparency measures, etc.). Please also describe relevant national (landmark) case law on these issues;
- the justifications for differences in pay that are accepted under legislation and/or case law.

Please discuss the issues of access to work and working conditions (Articles 14, 3 and 28(1) of the Recast Directive) regarding the following:

- the personal and substantive scope of the relevant legislation (and case law);
- whether and to what extent the exceptions in the Recast Directive have also been adopted in national law.

Please discuss the issue of occupational pension schemes (Articles 5-9 and Article 12 Recast Directive) regarding the following:

- the personal and substantive scope of the relevant legislation (and case law). Please pay attention to the exclusions from the material scope in Article 8 of the Recast Directive;
- whether and to what extent the exceptions have been implemented;
- whether there are examples of discrimination as mentioned in Article 9 of the Recast Directive.

Reminder:

- Please do not forget to indicate if, in your national law, provisions exceed the requirements of EU law;
- Please do not forget to indicate whether, in your opinion, the implementation is satisfactory or whether there are extensive gaps or important mistakes.

3. Pregnancy and maternity protection, parental leave and adoption leave (Directive 92/85, relevant provisions of the Recast Directive and Directive 2010/18)

Please discuss:

- the general regime of protection of pregnant women and women who have recently given birth (leave, benefits during leave, protection against dismissal, right to return to the same or comparable job etc.) and new elements introduced in the transposition of these directives by Directive 2010/18/EU;
- the general regime of maternity, parental leave, adoption leave, paternity leave and time off.

Reminder:

- Please do not forget to indicate if, in your national law, provisions exceed the requirements of EU law;
- Please do not forget to indicate whether, in your opinion, the implementation is satisfactory or whether there are extensive gaps or important mistakes.

4. Statutory schemes of social security (Directive 79/7)

Please discuss:

- the personal and substantive scope of the relevant legislation (and case law);
- whether and to what extent the exceptions in Directive 79/7 have been implemented.

Reminder:

- Please do not forget to indicate if, in your national law, provisions exceed the requirements of EU law;
- Please do not forget to indicate whether, in your opinion, the implementation is satisfactory or whether there are extensive gaps or important mistakes.

5. Self-employed workers (Directive 2010/41 and some relevant provisions of the Recast Directive)

Please discuss:

- the personal and substantive scope of the relevant legislation (and national case law);
- the issues of social protection (Article 7 of Directive 2010/41) and maternity benefits (Article 8 of Directive 2010/41);
- the exceptions regarding the self-employed (Articles 10 and 11 of the Recast Directive).

Reminder:

- Please do not forget to indicate if, in your national law, provisions exceed the requirements of EU law;
- Please do not forget to indicate whether, in your opinion, the implementation is satisfactory or whether there are extensive gaps or important mistakes.

6. Goods and services (Directive 2004/113)

Please discuss:

- how Directive 2004/113 has been implemented in your country, in particular concerning its substantive scope (Article 3). Describe national case law if relevant;
- the extent and manner in which your country, in national legislation, provides for the exceptions stated in Directive 2004/113, in particular Article 5(2) in the light of the *Test-Achats* case. Please report on the implementation of the *Test-Achats* ruling in national legislation.

Reminder:

- Please do not forget to indicate if, in your national law, provisions exceed the requirements of EU law;
- Please do not forget to indicate whether, in your opinion, the implementation is satisfactory or whether there are extensive gaps or important mistakes.

7. Enforcement and compliance aspects (horizontal provisions of all directives)

Preliminary remark 3:

If relevant and helpful, please indicate in your answer the differences found regarding the relevant directives (e.g. access to courts will often involve different courts for private employment (civil law), civil service (administrative law) or statutory social security (administrative law) etc.).

Please discuss:

- how the provisions on victimisation are implemented in national legislation and interpreted in case law;
- how the provisions on the burden of proof have been given effect in legislation and case law;
- what type of remedies and sanctions (e.g. compensation, reinstatement, criminal sanctions, administrative fines etc.) exist in your country for breaches of EU gender equality law, and whether, in your opinion, they meet the standards of being effective, proportionate and dissuasive;
- whether the access to courts is safeguarded for alleged victims of discrimination, and for anti-gender discrimination interest groups or other legal entities;
- whether your country has a gender equality body (or a more general body) that seeks to implement the requirements of EU law;
- whether the social partners play an important role in compliance with and enforcement of gender equality law, and whether there are any legislative provisions in this respect;
- to what extent your country has collective agreements that are used as means to implement EU gender equality law. Please indicate the legal status of collective agreements in your country (binding/non-binding, usually declared to be generally applicable or not).

Reminder:

- Please do not forget to indicate if, in your national law, provisions exceed the requirements of EU law;
- Please do not forget to indicate whether, in your opinion, the implementation is satisfactory or whether there are extensive gaps or important mistakes.

8. Overall assessment

Please give your overall assessment of the implementation of the EU gender equality *acquis* in your Member State. Please do not forget to indicate whether, in your opinion, the overall implementation is satisfactory or whether there are extensive gaps or important mistakes.

Annex II

EU Directives

- Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women OJ L 45 of 19 February 1975, p. 19-20.
- Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OJ L 39 of 14 February 1976, p. 40-42.
- Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, p. 24-25.
- Council Directive of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (86/378/EEC) OJ L 225 of 12 August 1986, p. 40-43.
- Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood OJ L 359 of 19 December 1986, p. 56-58.
- Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) OJ L 348 of 28 November 1992, p. 1-8.
- Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC OJ L 145 of 19 June 1996, p. 4-9.
- Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes OJ L 46 of 17 February 1997, p. 20-24.
- Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OJ L 269 of 5 October 2002, p. 15-20.
- 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, p. 37-43.
- 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, p. 23-36.

- Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC OJ L 68 of 18 March 2010, p. 13-20.
- Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC OJ L 180 of 15 July 2010, p. 1-6.

Annex III

National legislation

AUSTRIA

Daily updated legislation, legislative announcements and journals, and court decisions are available in German on at: <http://www.ris.bka.gv.at>; initiatives for legislation and other parliamentary materials at: <http://www.parlinkom.gv.at>; and equality bodies' decisions at <http://www.bka.gv.at/site/5555/default.aspx>.

All Laender legislation can be viewed at: <http://www.chancen-gleichheit.at/NR/rdonlyres/E502F419-EA00-434C-899C-AB77573834C4/0/BrochureEqualOpportunitiesEqualTreatmentLegislationinAustria.pdf>, all accessed 11 November 2014.

- Federal Constitution Act 1920 as amended by OJ No. 68/1998 and OJ No. I 1/2008
- Federal Budget Act 2013, OJ No. I 139/2009
- Equal Treatment Act, OJ I 66/2004 as amended by OJ Nos. I 82/2005, I 98/2008, I 7/2011 and I 107/2013
- Federal Equal Treatment Act, OJ I 65/2004 as last amended by OJ Nos. I 6/2011, I 140/2011 and I 120/2012
- Civil Servant Act, OJ No. 333/1979 as amended
- Contract Public Employees Act, OJ No. 86/1948 as amended
- Federal Rural Code, OJ No. 287/1984 as amended
- Labour Constitution Act, OJ No. 22/1974 as amended
- Maternity Protection Act, OJ No. 221/1979 as amended
- Midwife Act, OJ No. 310/1994 as amended by OJ No. 116/1999
- Fathers' Leave Act, OJ No. 651/1989 as amended
- Business Support Act OJ No. 359/1982 as amended
- Child Care Allowance Act, OJ No. I 103/2001 as last amended by OJ No. I 117/2013
- Constitutional Act on Different Age Limits of Women and Men in Social Insurance, OJ No. 832/1992 (expiring in 2033)
- Act on the Federal Government's Reports concerning the Reduction of Women's Disadvantages, OJ No. 837/1992, expiring in 2018
- Occupational Pensions Act, OJ No. 282/1990 as amended
- Pensions Act 1965 OJ No. 340/1965 as last amended by OJ No. I 86/2013
- General Pensions Act OJ No. I 142/2004 as last amended by OJ No. I 138/2013
- General Social Insurance Act OJ No. 189/1955 as amended
- Unemployment Insurance Act 1977, OJ No. 609/1977 as amended
- Trade (Industry) Social Insurance Act OJ No. 560/1978 as amended
- Chambers of Commerce Act 1998 OJ No. 103/1998 as amended
- Income Tax Act OJ No. 400/1988
- Farmers' Social Insurance Act OJ No. 559/1978 as amended
- Social Insurance of Self-Employed Persons in Free Professions Act OJ No. 624/1978 as amended
- Artists' Social Insurance Fund Act, OJ I 2001/131 as amended
- Act on the Regulation of Businesses 1994, OJ No. 194 as amended
- General Civil Code, Justice Act Collection No. 946/1811 as amended
- Act on Insurance Contracts 1958, OJ No. 2/1959 as last amended by OJ No. I 12/2013
- Insurance Monitoring Act, OJ No. 569/1978 as amended
- Equal Treatment Commission and Equal Treatment Ombud Act, OJ No. I 2004/66 as amended by OJ Nos. I 82/2005, I 2/2008, I 98/2008, I 7/2011 and I 107/2013
- Labour and Social Court Act, OJ No. 194/1985 as last amended by OJ No. 135/2011

BELGIUM

The following are all available in French and Dutch at <http://www.juridat.be>, accessed 24 May 2014.

- Working Conditions Act of 16 March 1971
- Well-Being at Work Act of 4 August 1996
- Gender Act of 10 May 2007
- Act of 22 April 2012 Aimed at Fighting the Pay Gap between Men and Women

The following is available in French and Dutch at <http://www.cnt-nar.be>, accessed 24 May 2014.

- Collective Agreement No. 25 of 15 October 1975 Concerning Equal Pay of Male and Female Workers

BULGARIA

All webpages accessed 5 June 2013.

- Law on Protection from Discrimination (*Закон за защита от дискриминация*), of 1 January 2004, available in Bulgarian at <http://lex.bg/laws/ldoc/2135472223>
- Labour Code (*Кодекс на труда*), of 1 January 1987, the Bulgarian version can be accessed on <http://lex.bg/laws/ldoc/1594373121>
- Code of Social Insurance (*Кодекс за социално осигуряване*) of 1 January 2000, available in Bulgarian at <http://lex.bg/laws/ldoc/1597824512>
- Civil Procedural Code (*Граждански процесуален кодекс*), of 1 March 2008, available in Bulgarian at <http://lex.bg/laws/ldoc/2135558368>
- Administrative Procedural Code (*Административнопроцесуален кодекс*) of 12 July 2006, available in Bulgarian at <http://www.lex.bg/bg/laws/ldoc/2135521015>

CROATIA:

- Gender Equality Act (*Zakon o ravnopravnosti spolova*) Official Gazette of the Republic of Croatia No. 82/08
- Anti-Discrimination Act (*Zakon o suzbijanju diskriminacije*) Official Gazette of the Republic of Croatia Nos 85/08 and 112/12
- Act on Forms of Same-Sex Cohabitation (*Zakon o istospolnim zajednicama*) Official Gazette of the Republic of Croatia No. 116/2003
- Labour Act (*Zakon o radu*) Official Gazette of the Republic of Croatia Nos. 149/09 and 61/11
- Act on Maternity and Parental Benefits (*Zakon o rodiljnim i roditeljskim potporama*) Official Gazette of the Republic of Croatia *Narodne novine* Nos. 85/08, 110/08, 34/11 and 54/13
- Occupational Health and Safety Act (*Zakon o zaštiti na radu*) Official Gazette of the Republic of Croatia Nos. 59/96, 94/96, 114/03, 86/08, 75/09 and 143/12

CYPRUS:

- Constitution of the Republic of Cyprus 1960 as amended by Laws Nos. 95/89, Official Gazette 2419 of 17 June 1989; 106(I)/1996, Official Gazette 3102 of 29 November 1996; 115(I)/1996, Official Gazette 3110 of 28 December 1996; 104(I)/2002, Official Gazette 3620 of 05 July 2002; 127(I)/2006, Official Gazette 4090 of 28 July 2006; and last amendment Law No. 51(I)/2010
- Equal Treatment for Men and Women as Regards Access to Employment and Vocational Training Law No. 205(I)/2002, Official Gazette 3658 of 6 December 2002; No. 176(I)/2007; and last amendment Law No. 39(I)/2009
- Administrative Regulations No. 176/2009, Official Gazette 4351 of 24 April 2009
- Equal Pay between Men and Women for the Same Work or for Work to which Equal Value is Attributed Law No. 177(I)/2002, Official Gazette 3638 of 27 September 2002, Law No. 193(I)/2004, last amendment Law No. 38(I)/2009
- Maternity Protection Law No. 100(I)/1997, Official Gazette 3207 of December 1997; Law No. 45(I)/2000 and the Maternity Protection (Amendment) Law No. 64(I)/2002, which entered into force on 31 May 2002, Official Gazette 3608 of 31 May 2002; amendment Laws Nos. 8(I)/2008 Official Gazette 4189 of 18 April 2008; No. 43(I)/2008 Official Gazette 4170 of 04 July 2008; and last amendment Law No. 70(I)/2011
- The Parental Leave and Leave on Grounds of Force Majeure Law of 2002, Law No. 69(I)/2002, which entered into force on 1 January 2003, Official Gazette 3610 of 7 June 2002, as amended by Law Nos. 111(I)/2007, 11(I)/2010 and 47(I)/2012
- Act on Persons with Disabilities Law No. 127(I)/2000, as amended by Law Nos. 57(I)/2004, 72(I)/2007, and 102(I)/2007
- The Social Insurance Law 1980-2009 Law No. 41/1980; the Social Insurance (Amendment) (No. 2) Law No. 51(I)/2001, Official Gazette 3487 of 6 April 2001, last amendment Law No. 22(I)/2009, Official Gazette 4198 of 20 March 2009; and amendment Law Nos. 93(I)/2009, 112(I)/2009 and 59(I)/2010
- Equal Treatment for Men and Women in Occupational Social Insurance Schemes Law No. 133(I)/2002, which entered into force on 1 January 2003, Official Gazette 3623 of 19 July 2002, last amendment Law No. 40(I)/2009
- The Provident Funds (Amendment) Law of 2002, Law No. 130(I)/2002, which entered into force on 1 January 2003, Official Gazette 3623 of 19 July 2002 (included in the Provident Funds Law 1981-2002, last amendment No. 208(I)/2012)
- Establishment, Registration, Operation and Supervision of the Occupational Retirement Benefits Fund Law No. 146(I)/2006, Official Gazette 4097 of 17 November 2006, last amendment Law No. 208(I)/2012
- Equal Treatment of Men and Women as Regards Access to and Supply of Goods and Services Law No. 18(I)/2008, Official Gazette 4162 of 2 May 2008, last amendment Law No. 89(I)/2013

CZECH REPUBLIC

The following texts can be accessed at the official website of the Czech Collection of Laws, <http://aplikace.mvcr.cz/sbirka-zakonu/>, accessed 5 September 2013.

- Act No. 198/2009 Coll. on Equal Treatment and Legal Instruments of Protection Against Discrimination
- Act No. 262/2006 Coll. containing the Labour Code
- Act No. 435/2004 Coll. on Employment
- Act No. 187/2006 Coll. on Sickness Insurance
- Act No. 155/1995 Coll. on Pension Insurance
- Act No. 426/2011 Coll. on Retirement Savings
- Act No. 427/2011 Coll. on Supplementary Pension Savings
- Act No. 266/2006 Coll. on Employees' Accident Insurance

- Act No. 218/2002 Coll. on the Service of Officials in Public Administration and on Remuneration of These Employees and Other Employees in Public Administration
- Act No. 221/1999 Coll. on Professional Soldiers
- Act No. 361/2003 Coll. on the Service Relationship of Members of the Security Corps

DENMARK

All Danish legislation is published electronically in Danish by the Danish State in the Retsinformation www.retsinfo.dk accessed 5 September 2013, where it is available free of charge (tax-financed). The Danish Official Journal (Lovtidende) is no longer published on paper but only electronically. It contains links to the Retsinformation.

- Equal Pay Act, Consolidation Act No. 899 of 5 September 2008
- Gender Equality Act, Consolidation Act No. 1678 of 19 December 2013
- Maternity, Paternity and Parental Leave and Benefit Act, Consolidation Act No. 872 of 28 June 2013
- Act on Reimbursement of Pregnancy (etc.) Payments in the Private Sector, Act No. 417 of 8 May 2006, later amended by Act No. 288 of 2010; Act No. 598 of 2011; Act No. 326 of 2012, Paragraph 16; Act No. 529 of 2012; Act No. 1347 of 2012, Paragraph 6; and Act No. 596 of 2013, Paragraph 13
- Act on Equal Treatment between Men and Women in Insurance, Pension and Similar Matters, Consolidation Act No. 775 of 29 August 2001, later amended by Act No. 523 of 2007, Paragraph 43; Act No. 517 of 2008, Paragraph 11; Act No. 133 of 24 February 2009 (which changed the title of the Act into the present title, Act on Equal Treatment between Men and Women in Insurance, Pension and Similar Matters); Act No. 133 of 2009, Paragraph 2; Act No. 1231 of 2012, Paragraph 48; and Act No. 1287 of 2012, Paragraph 6

ESTONIA

All Estonian legislation and case law is published electronically in Estonian by the State Gazette (Riigi Teataja) at: <https://www.riigiteataja.ee> (unofficial English translation available at: <https://www.riigiteataja.ee/en/>), accessed 1 June 2014.

- Employment Contracts Act, RT I 2009, 5, 35
- Equal Treatment Act (ETA), RT I 2008, 56, 315
- Gender Equality Act (GEA), RT I 2004, 27, 181
- Health Insurance Act (HIA), RT I 2002, 62, 377
- Insurance Activities Act (IAA), RT I 2004, 90, 616
- Occupational Health and Safety Act (OHSA), RT I 1999, 60, 616
- Parental Benefits Act (PBA), RT I 2003, 82, 549
- Public Service Act (PSA), RT I, 6 June 2012, 11
- The Regulation of the Government of the Republic of 10 June 2010, No. 71 ‘The Statute of the Gender Equality and Equal Treatment Commissioner and the Chancellery’, RT I 18 June 2010, 33, 170
- Unemployment Insurance Act, RT I 2001, 59, 359

FINLAND

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Annex V

List of national equality bodies

AUSTRIA

Ombud for Equal Treatment (*Anwaltschaft für Gleichbehandlung*)

Address Taubstummengasse 11, A-1040 Vienna, Austria
Telephone +43 1 532 02 44
Email gaw@bka.gv.at
Website www.gleichbehandlungsanwaltschaft.at

The Ombud for Equal Treatment also has regional offices in Styria, Carinthia, Upper Austria, and Tyrol. More information is available at: <http://www.chancen-gleichheit.at/NR/rdonlyres/E502F419-EA00-434C-899C-AB77573834C4/0/BrochureEqualOpportunitiesEqualTreatmentLegislationinAustria.pdf>, accessed 11 November 2014.

BELGIUM

Institute for the Equality of Women and Men (*Institut pour l'égalité des femmes et des hommes*)

Address Rue Ernest Blérot 1, 1070 Brussels, Belgium
Telephone +32 2 233 42 65
Email egalite.hommesfemmes@iefh.belgique.be
Website <http://igvm-iefh.belgium.be/>

BULGARIA

The Commission for Protection Against Discrimination

Address 35 Dragan Tzankov Blvd., Sofia 1125, Bulgaria
Telephone +359 2 807 3030
Email kzd@kzd.bg
Website www.kzd-nondiscrimination.com

CROATIA

Office of the Ombudsman

Address Opatička 4, 10000 Zagreb, Croatia
Telephone +385 1 4851855
Email ombudsman@ombudsman.hr
Website www.ombudsman.hr

CYPRUS

The Office of the Commissioner for Administration (Ombudsman)

Address ERA House, 2 Diagorou Street, 1097 Nicosia, Cyprus
Telephone +357 22 405 500
Email ombudsman@ombudsman.gov.uk
Website www.no-discrimination.gov.uk

The Gender Equality Committee in Employment and Vocational Training

Address Clementos 9, 1061 (Office 312) Nicosia, Cyprus
Telephone +357 22 400 846
Email genderequalitycommittee@mlsi.gov.cy
Website <http://www.eif.gov.cy>

Commissioner for Gender Equality

Address 125 Athalassas Avenue, 1461 Strovolos, Nicosia, Cyprus
Telephone +357 22 805 929
Email iantoniou@presidency.gov.cy
Website www.mjpo.gov.cy

CZECH REPUBLIC**The Office of the Public Defender of Rights**

Address Udolni 39, 602 00 Brno, Czech Republic
Telephone +420 542 542 888
Email podatelna@ochrance.cz
Website www.ochrance.cz

DENMARK**The Danish Institute for Human Rights**

Address Strandgade 56, Postboks 9080, DK-1401 Copenhagen K, Denmark
Telephone +45 32 69 88 88
Email center@humanrights.dk
Website www.humanrights.dk

ESTONIA**The Gender Equality and Equal Treatment Commissioner**

Address Gonsiori 29, 15027 Tallinn, Estonia
Telephone +372 626 9259
Email info@svv.ee
Website www.svv.ee

The Chancellor of Justice

Address Kohtu 8, 15193 Tallinn, Estonia
Telephone +372 693 8404
Email info@oiguskantsler.ee
Website <http://oiguskantsler.ee/en>

FINLAND**The Ombudsman for Equality**

Address PO Box 33 (Meritullikatu 1), FIN-00023 GOVERNMENT, Finland
Telephone +358 9 1607 3248
Email tasa-arvo@stm.fi
Website www.tasa-arvo.fi

FRANCE

The Defender of Rights (formally HALDE)

Address Rue Saint Florentin 7, 75008 Paris, France
Telephone +33 (0) 1 53 292 200
Email communication@defenseurdesdroits.fr
Website www.defenseurdesdroits.fr

GERMANY

The Federal Anti-Discrimination Agency (FADA)

Address Glinkastraße 24, 10117 Berlin, Germany
Telephone +49 (0) 3018 555 1865
Email poststelle@ads.bund.de or beratung@ads.bund.de
Website www.antidiskriminierungsstelle.de or
www.federal-anti-discrimination-agency.com

GREECE

The Greek Ombudsman (public sector)

Address Hatziyianni Mexi 5, 115 28 Athens, Greece
Telephone +30 210 72 89 600
Email Greek_Ombudsman@synigoros.gr
Website www.synigoros.gr

The Consumers' Ombudsman (private sector)

Address
Telephone +30 210 6460 862/814/612/734/458
Email grammateia@synigoroskatanaloti.gr
Website <http://www.synigoroskatanaloti.gr>

HUNGARY

The Hungarian Equal Treatment Authority

Address Margit krt.85, 1024 Budapest, Hungary
Telephone +36 1 336 7843
Email ebh@ebh.gov.hu
Website www.egyenlobanasmod.hu

The Commissioner for Fundamental Rights

Address Nádor street 22, 1051 Budapest, Hungary
Telephone +36 1 475 7100
Email panasz@ajbh.hu or hungarian.ombudsman@ajbh.hu
Website www.ajbh.hu

ICELAND

The Centre for Gender Equality (*Jafnréttisstofa*)

Address Jafnréttisstofa, Borgum vid Nordurslód, 600 Akureyri
Telephone +354 460 6200
Email jafnretti@jafnretti.is
Website www.jafnretti.is

The Icelandic Human Rights Centre

Address Icelandic Human Rights Center, Túngata 14, 101 Reykjavík
Telephone + 354 552 27 20
Email info@humanrights.is
Website <http://www.humanrights.is/english/>

IRELAND

The Equality Authority

Address 2 Clonmel Street, Dublin 2, Ireland
Telephone +353 1 417 3363
Email info@equality.ie
Website www.equality.ie

ITALY

The National Equality Adviser (*La Consigliera Nazionale di Parità*)

Address Ministero del Lavoro e delle Politiche Sociali via Flavia, 6 - 00187
Roma
Telephone +39 (0) 6 4683 4031
Email consigliernazionaleparita@lavoro.gov.it
Website <http://www.lavoro.gov.it/ConsiglieraNazionale/>

LATVIA

The Office of Ombudsman of the Republic of Latvia

Address Baznīcānu Street 25, LV-1010 Riga, Latvia
Telephone +371 676 867 68
Email tiesibsargs@tiesibsargs.lv
Website <http://www.tiesibsargs.lv/eng/>

LIECHTENSTEIN

The Gender Equality Office of Liechtenstein

Address Stabsstelle für Chancengleichheit (SCG), Städtle 38, Postfach 684,
9490 Vaduz
Telephone +423 236 60 60
Email info@scg.llv.li
Website www.llv.li/amtstellen/llv-scg-home.htm

LITHUANIA

Office of the Equal Opportunities Ombudsperson

Address Šeimyniškių 1A, Vilnius 09312, Lithuania
Telephone +370 5 261 27 28
Email mvlgk@lrs.lt
Website www.lygybe.lt

LUXEMBOURG

The Centre for Equal Treatment (CET)

Address 26 Place de la Gare, L-1616 Luxemburg
Telephone +352 26 48 30 33
Email info@cet.lu
Website www.cet.lu

FYR MACEDONIA

The Ombudsman of the Republic of Macedonia

Address Dimitrie Cuposki st. No.2 (building of GP 'Pelagonija')
Telephone +389 (0)2 3129 335
Email contact@ombudsman.mk
Website www.ombudsman.mk/

The Commission for Protection against Discrimination

Address Kej Dimitar Vlahov 66, (building of the MRTV), 20th floor, Skopje,
Bulgaria
Telephone +389 (0)2 3232 242
Email contact@kzd.mk
Website www.kzd.mk

MALTA

The National Commission for the Promotion of Equality

Address Gattard House, National Road, Blata I-Bajda HMR 9010, Malta
Telephone +356 2590 3850
Email equality@gov.mt
Website www.equality.gov.mt

NETHERLANDS

The Netherlands Institute for Human Rights

Address Kleinesingel 1-3, 3572 CG Utrecht, the Netherlands
Telephone +31 (0) 30 888 38 88
Email info@mensenrechten.nl
Website www.mensenrechten.nl

Art.1

Address Grotekerkplein 5, 3011 GC Rotterdam, the Netherlands
Telephone +31 (0) 10 201 02 01
Website www.art1.nl (email contact is possible via this webpage)

NORWAY

The Equality and Anti-Discrimination Ombud (LDO)

Address PO Box 8048, Dep, N-0031 Oslo, Norway
Telephone +47 23 15 73 00
Email post@LDO.no
Website www.ldo.no

POLAND

The Human Rights Defender

Address Al. Solidarności 77, 00-090 Warsaw, Poland
Telephone +48 800 676 676
Email biurorzecznika@brpo.gov.pl
Website www.rpo.gov.pl

PORTUGAL

The Commission for Citizenship and Gender Equality (CIG)

Address Av. da República, 32 - 1º, 1050-193 Lisbon, Portugal
Telephone +351 800 202 148
Email cig@cig.gov.pt
Website www.cig.gov.pt

The Commission for Equality in Labour and Employment (CITE)

Address Rua Viriato, nº 7 – 1º, 2º e 3º andares, 1050-233 Lisbon, Portugal
Telephone +351 217 803 700
Email gera@cite.gov.pt
Website www.cite.gov.pt

ROMANIA

The National Council for Combating Discrimination (NCCD)

Address 1-3 Valter Maracineanu Square, District/Sector 1, Bucharest,
Romania
Telephone +40 21 312 65 78
Email support@cncd.org.ro
Website www.cncd.org.ro

SLOVAKIA

The Slovak National Centre for Human Rights (SNSLP)

Address Laurinská 18, 811 01 Bratislava, Slovakia
Telephone +421 2 208 501 14/ 15
Email info@snslp.sk
Website www.snslp.sk

SLOVENIA

The Advocate of the Principle of Equality *within the* Ministry of Labour, Family and Social Affairs

Address Kotnikova 28, 1000 Ljubljana, Slovenia
Telephone +386 (0) 1 369 7503
Email zagovornik.uem@gov.si
Website www.zagovornik.net

SPAIN

The Institute of Women

Address C/ Condesa de Venadito, No. 34, 28027 Madrid
Telephone +34 900 191 010
Email *via the website at* www.inmujer.gob.es/en/elInstituto/contacto.do
Website www.inmujer.gob.es/home.htm

SWEDEN

The Equality Ombudsman

Address Box 3686, 103 59 Stockholm, Sweden
Telephone +46 8 120 20 700
Email do@do.se
Website www.do.se

TURKEY

The Ombudsman

Address Remzi Oğuz Arık Mh. Ali Dede Sokak. No: 8 06540 Çankaya /
Ankara
Telephone +90 312 465 22 00
Email iletisim@ombudsman.gov.tr
Website <http://www.kamudenetciligi.gov.tr/>

UNITED KINGDOM

The Equality and Human Rights Commission (ECHR)

Address Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX, UK
Telephone +44 20 7832 7800
Email correspondence@equalityhumanrights.com
Website www.equalityhumanrights.com

The Equality Commission for Northern Ireland (ECNI)

Address Equality House, 8-9 Shaftesbury Square, Belfast, BT2 7DP, UK
Telephone +44 28 90 890 890
Email information@equalityni.org
Website www.equalityni.org

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