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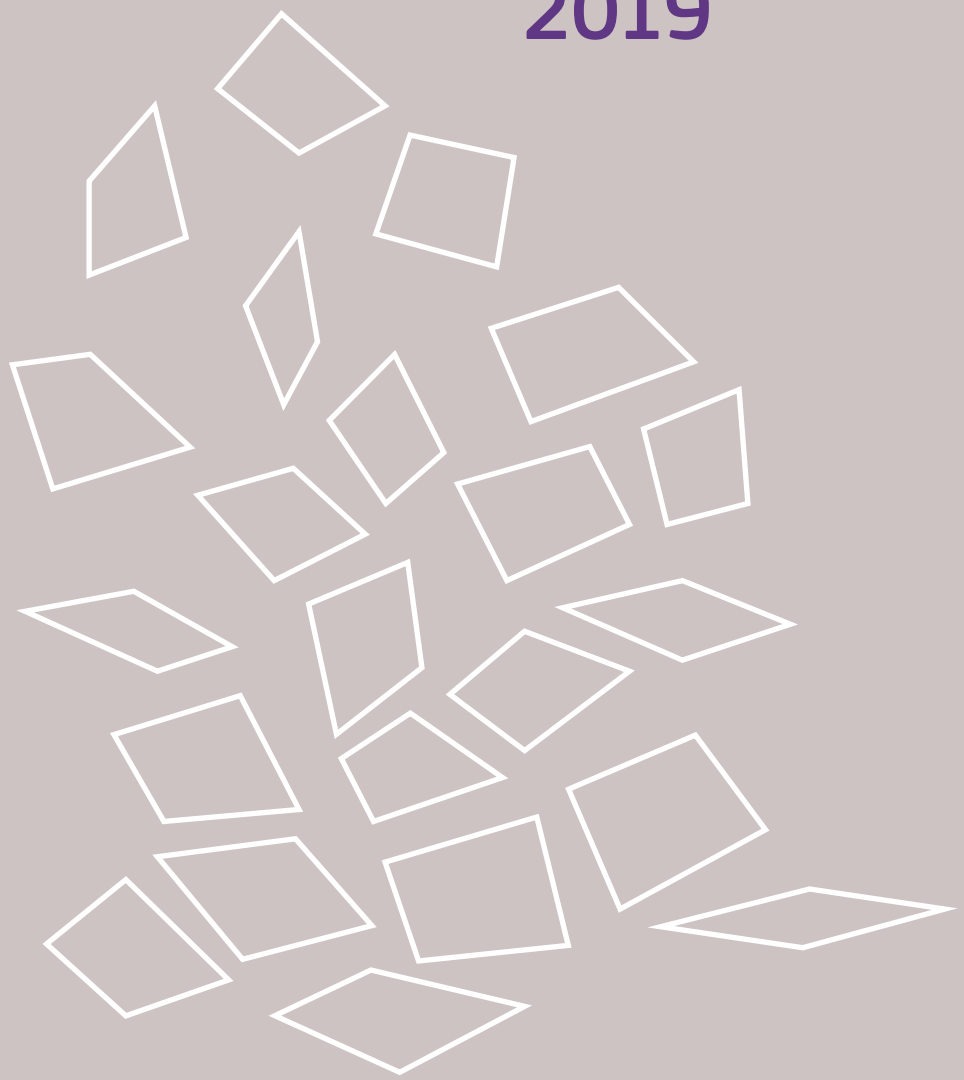
A comparative analysis of gender equality law in Europe

2019



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A comparative analysis of gender equality law in Europe 2019

The 28 EU Member States, Albania, North Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey compared

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for the European network of legal experts
in gender equality and non-discrimination

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Introduction

This report provides a general overview of the ways in which EU gender equality law has been implemented in the domestic laws of the 27 Member States of the European Union, as well as Iceland, Liechtenstein and Norway (the EEA countries), the United Kingdom and five candidate countries (Albania, Montenegro, North Macedonia, Serbia and Turkey).[1] The analysis is based on the country reports written by the gender equality law experts of the European equality law network (EELN).[2] At the same time, the report explains the most important elements of the EU gender equality *acquis*. The term 'EU gender equality *acquis*' refers to all the relevant EU Treaty and EU Charter of Fundamental Rights provisions, legislation and case law of the CJEU in relation to gender equality.

The development of EU gender equality law has been a step-by-step process, starting, at least for the 'oldest' EU Member States, in the early 1960s. In 1957, the Treaty establishing the European Economic Community (EEC), the origin of the current EU, contained only one single provision (Article 119 EEC Treaty, nowadays Article 157 Treaty on the Functioning of the European Union '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. In chronological order these are 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the Directive on equal treatment of men and women in employment (76/207/EEC, amended by Directive 2002/73/EC), both now repealed and replaced by Recast Directive 2006/54/EC, the Directive on equal treatment of men and women in statutory schemes of social security (79/7/EEC), the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 and replaced by 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 and replaced by Directive 2010/41/EU), the Pregnant Workers' Directive (92/85/EEC), the Parental Leave Directive (96/34/EEC, repealed and replaced 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 the aforementioned so-called Recast Directive on sex equality in employment and occupation (2006/54/EC). The latest addition is the Work-Life Balance Directive (2019/1158/EU), which will repeal Directive 2010/18/EU with effect from 2 August 2022. For your convenience, the weblinks to the six EU gender equality law directives currently in force (plus Directive 2019/1158) are attached to this report as annex 1.

With the entry into force of the Lisbon Treaty on 1 December 2009, the European Community and the EU 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 European Union (TFEU), which is more detailed and elaborates the TEU.[3] In addition, the Charter of Fundamental Rights of the EU entered into force in 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 to the field of gender equality.

The TEU declares 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

1 The report builds on Timmer, A., Senden L. (2019), *A comparative analysis of gender equality law in Europe 2018*, European Commission, available at: https://www.equalitylaw.eu/downloads/4830-gender-equality-law-in-europe-2018-pdf-554-kb. It also builds on Susanne, B. (2018), *EU gender equality law – update 2018*, European Commission, available at: https://www.equalitylaw.eu/downloads/4767-eu-gender-equality-law-update-2018-pdf-444-kb.

2 All gender equality country reports are available on the EELN website: http://www.equalitylaw.eu/country.

3 See Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU), Article 1, 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.

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:

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

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 provision lays down the obligation of gender mainstreaming. It 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.

In addition, the Charter of Fundamental Rights of the EU prohibits discrimination on any ground, including sex (Article 21);[6] it recognises the right to gender equality in all areas, and is thus not limited only to employment, and it also recognises 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). The Charter applies 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] i.e. when they are acting '*within the scope*' of Union law.[8]

Another source of EU gender equality law is the case law of the Court of Justice of the EU (CJEU).[9] 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.

This report will discuss how the above-mentioned Treaty provisions and the directives are implemented at the national level. As this report will show, transposition has been carried out in various ways: by amending relevant national legislation (such as Labour Codes), by adopting legislation relating to employment and social security legislation, and/or by adopting specific acts on gender equality and/or non-discrimination. The weblinks to the EU directives which are discussed in this report are annexed to the report. This comparative analysis provides a state-of-the art overview of the implementation of EU gender equality law and the most recent developments in this area. It discusses the most important topics

5 See also Article 29 of the Council Directive 2006/54/EC 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) (*Recast Directive*), OJ L 204, 26.07.2006, pp. 23-36.

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

7 See Koukoulis-Spiliotopoulos, S. (2008) '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; available at: https://www.equalitylaw.eu/downloads/2790-european-gender-equality-law-review-1-2008 and Ellis, E. (2010), 'The impact of the Lisbon Treaty on gender equality', *European Gender Equality Law Review* No. 1/2010, pp. 7-13; available at: https://publications.europa.eu/en/publication-detail/-/publication/17996235-b3b6-4733-9596-10e584fb57bc/language-en/format-PDF/source-86553203.

8 Judgment of 26 February 2013, Åkerberg Fransson, C-617/10, EU:C:2013:105.

9 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), including in cases pre-dating the Lisbon Treaty.

of EU gender equality law, namely core concepts such as direct and indirect discrimination and (sexual) harassment; equal pay and equal treatment at work; maternity, paternity, parental and other types of care leave; occupational pension schemes; statutory schemes of social security; self-employed workers; equal treatment in relation to goods and services; violence against women in relation to the Istanbul Convention; and enforcement and compliance issues.

1 General legal framework

1.1 Constitution

Sex discrimination is explicitly prohibited in the Constitutions of **all countries** under review, apart from **Denmark**, **Liechtenstein** and the **United Kingdom**.

In the case of the **United Kingdom**, this is explained by the fact that the constitution is unwritten and so by definition contains no articles dealing with non-discrimination. The Human Rights Act 1998, however, partially incorporates the European Convention on Human Rights (ECHR) into domestic law, and by so doing gives Article 14 ECHR – which includes a prohibition of sex discrimination – *quasi*-constitutional force. This appears still to be the case now that the United Kingdom has left the EU.[10]

In addition, a large number of countries (**Albania**, **Austria**, **Bulgaria**, **Croatia**, **Estonia**, **Finland**, **France**, **Germany**, **Greece**, **Hungary**, **Italy**, **Liechtenstein**, **Lithuania**, **Luxembourg**, **Malta**, **Montenegro**, **North Macedonia**, **Poland**, **Portugal**, **Romania**, **Serbia**, **Slovenia**, **Spain**, **Turkey**) have also adopted provisions pertaining to equality between men and women in their Constitutions. The Greek Constitution also requires that the legislature and all other state authorities take any positive measures which are necessary and pertinent in promoting gender equality in all areas.

In most countries these constitutional provisions on equality between men and women and the prohibition of sex discrimination can be invoked horizontally, meaning between private parties. The exceptions are, **Ireland**, **Italy**, **Latvia**, **Liechtenstein**, **Montenegro**, the **Netherlands**, **Slovakia** and **Sweden**, where this is not possible. In a few countries (**Belgium**, **Germany**, **Lithuania**) horizontal application is a subject of debate. Moreover, in **Austria**, the relevant national provision does not have horizontal effect, but general principles of equality and gender equality do have indirect horizontal effect and these have to be taken into account by courts in relation to the interpretation of norms or contracts, especially in cases of economic or factual imbalance between the parties.

1.2 Equal treatment legislation

All countries apart from **Latvia** have enacted specific equal treatment legislation. Until recently **Turkey** was another exception, but with the adoption in 2016 of the Act on the Human Rights and Equality Institution, Turkey now has specific equal treatment legislation. In some countries, equal treatment between men and women is part of a broader Anti-discrimination Act that also relates to other grounds (e.g. **Czech Republic**, **Hungary**, **Ireland**, **Poland**, **Romania**, **Slovakia**, **Slovenia**, **Sweden**, **United Kingdom**). Other countries have both an Anti-discrimination Act (which sometimes also includes a prohibition of sex discrimination) and a Gender Equality Act (e.g. **Albania**, **Belgium**, **Bulgaria**, **Croatia**, **Denmark**, **Finland**, **Greece**, **Lithuania**, **Montenegro**, **Netherlands**, **Romania**, **Serbia**). The **Bulgarian** Gender Equality Law was promulgated in 2016, however by the end of 2017 only minor steps had been taken to implement the law. **Norway** adopted a new act relating to equality and the prohibition of discrimination in 2017, which entered into force on 1 January 2018. It unites all four previously existing laws on equality and non-discrimination in one law.

10 While the information presented in this report covers the period up to the cut-off date of 31 December 2018, the United Kingdom is not referred to as a Member State of the EU any more as the report is published after the official exit of the United Kingdom from the EU.

2 Implementation of central concepts

This chapter discusses how central concepts of EU gender equality law have been transposed in the countries under review. Some of the concepts discussed in this chapter are defined in the EU gender equality law directives, namely direct and indirect sex discrimination; and harassment and sexual harassment. Other concepts have not been explicitly defined in the Directives, yet they are crucial elements of EU gender equality law, such as the concepts of sex, gender and transgender, as well as the concept of positive action. Overall, the countries under review have faithfully and often literally transposed the EU concepts into national legislation. Yet, as the analysis below will show, some difficulties remain at the level of transposition. Most of the difficulties relate to the level of enforcement.

2.1 Sex/gender/transgender

2.1.1 Definition of 'gender' and 'sex'

EU law does not provide definitions of the concepts of 'sex', 'gender' and 'transgender', and does not distinguish clearly between sex and gender.[11] Similarly, very few countries define the concepts of 'sex', 'gender' and/or 'transgender' in their legislation. **Finland**, **Montenegro**, **Romania**, **Serbia** and **Sweden** are exceptions. In the **Finnish** Act on Equality between Women and Men, a new subsection (Section 3(5)) defines what is meant by gender identity and expression of gender. Article 10 of the **Serbian** Gender Equality Act defines both sex and gender: 'sex' relates to the biological features of a person, while 'gender' means the socially established roles, position and status of women and men in public and private life from which, due to social, cultural and historic differences, discrimination ensues on the basis of biological membership of a sex. **Romania** recently (2015) introduced definitions of sex and gender, as well as 'gender stereotypes' in its Gender Equality Law, whereby gender is understood to mean the combination of roles, behaviours, features and activities that society considers to be appropriate for women and for men. In **Sweden**, Chapter 1 Section 5.1 of the Discrimination Act defines sex as the fact 'that someone is a woman or a man'. In the **United Kingdom**, more specifically in Great Britain, there is a partial definition of 'sex' in Section 11 of the Equality Act 2010, which provides that, 'In relation to the protected characteristic of sex— (a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman'.

A few experts note that since the entry into force of the Istanbul Convention in their country, the Convention's definition of gender has entered the domestic legal order (e.g. **Croatia**, **Turkey**).[12]

2.1.2 Protection of transgender, intersex and non-binary persons[13]

Legal gender recognition, giving trans and intersex people the possibility to obtain official acknowledgment of their preferred gender, is often the gateway to obtaining equality rights.[14] In several countries, however, there is no specific legal framework in place to regulate gender recognition (e.g. **Cyprus**, **Latvia**, **Liechtenstein**), or recognition is incomplete (**Bulgaria**).

11 For discussion see Lembke, U. (2016) 'Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies', *European Equality Law Review* No, 2/2016, pp. 46-55; available at: https://www.equalitylaw.eu/downloads/3938-european-equality-law-review-2-2016.

12 Gender is defined in Article 3(c) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) CETS No.210, to mean 'the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men'.

13 See Van den Brink, M., Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis,* European Commission, available at: https://www.equalitylaw.eu/downloads/4739-trans-and-intersex-equality-rights-in-europe-a-comparative-analysis-pdf-732-kb.

14 Van den Brink, M., Dunne, P., (2018) *Trans and intersex equality rights in Europe – a comparative analysis,* European Commission, p. 55.

It is well-established in the case law of the Court of Justice,[15] and subsequently also in Recital 3 of Recast Directive 2006/54/EC, that discrimination arising from the gender reassignment of a person falls within the prohibition of sex discrimination. In line with this, several countries have explicitly codified the prohibition of discrimination due to gender reassignment, namely **Belgium** and **Malta** (where gender identity or expression are considered separately as grounds for sex discrimination), **Bulgaria**, **Finland**, **Greece**, **Luxembourg**, **Montenegro**, **Portugal**, **Slovakia**, **Sweden** and the **United Kingdom**. In most of these countries this is part of a broader prohibition of gender identity and gender expression discrimination.

Many countries have a broad prohibition of discrimination on the ground of gender identity (and often also gender expression) in their legislation (e.g. **Albania**, **Belgium**, **Croatia**, **Czech Republic** (where the term 'gender identification' is used, which according to the expert means the same as gender identity), **Finland**, **France**, **Hungary**, **Luxembourg**, **Malta**, **Montenegro**, **Netherlands**, **Norway**, **Portugal**, **Serbia**, **Slovenia**, **Sweden**). In **Finland**, Section 3 of the Act on Equality of 2014, defines gender identity as 'the person's own experience of (his or her) gender', and expression of gender as 'articulating one's gender by clothing, behaviour or in some other similar manner'. In a 2016 act re-transposing EU Directives 2000/43/EC and 2000/78/EC, **Greece** introduced a prohibition of direct and indirect discrimination on the ground of 'gender identity or characteristics'. **Maltese** law includes definitions of 'gender expression' and 'gender identity'. Act LXI of 2016 furthermore introduced the notion of 'lived gender', which is defined as referring to each person's gender identity and its public expression over a sustained period of time. In the **Netherlands**, an amendment to the General Equal Treatment Law was adopted in 2018, specifying that the term 'gender' also includes sex characteristics, gender identity and gender expression.

A few experts are of the opinion that their national legislatures should amend the legislative framework regarding transgender and gender identity discrimination or create such a framework (e.g. **Estonia**, **North Macedonia**, **Poland**). In **North Macedonia** a draft law is currently pending which would for the first time include gender identity as a prohibited ground of discrimination.

In **Spain**, there is no State law (applicable to the whole of Spain) that specifically states the principle of non-discrimination against transgender, intersex and non-binary people. However, several Autonomous Communities have approved such legislation. In **Turkey**, the Human Rights and Equality Institution Act of 2016 does not cover transgender, intersex and non-binary people and cannot be extended by the courts or equality bodies. The expert deems that Turkish law is therefore not in compliance with the Turkish Constitution, EU law, or indeed human rights law, on this point.

In 2017, the Federal Constitutional Court of **Germany** issued a landmark judgment that clarified that the prohibition of sex discrimination covers gender identity, and that this also protects people who identify as neither male nor female. The court decided that the birth register must allow for a 'third gender'. Subsequently, on 13 December 2018, the federal parliament passed the Law on Amending the Information to be Recorded in the Birth Register with amendments to the Civil Status Act.[16]

2.2 Direct sex discrimination

2.2.1 Explicit prohibition

The Gender Recast Directive 2006/54/EC defines direct discrimination as occurring 'where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation' (Article 2(1)a). As a rule, direct discrimination is prohibited and cannot be justified, unless a specific written exception applies, such as that the sex of the person concerned is a determining factor for the job ('a genuine and determining occupational requirement', Article 14(2) Gender Recast Directive).

15 Judgment of 30 April 1996, *P v S and Cornwall County Council*, C-13/94, EU:C:1996:170.

16 Germany, Law on Amending the Information to be Recorded in the Birth Register (Amendments to the Civil Status Act) *(Gesetz zur Änderung der in das Geburtenregister einzutragenden Angaben)* 18 December 2018.

Direct sex discrimination is prohibited in **all countries** under review. The definition of direct sex discrimination appears unproblematic in almost all countries. In **Hungary**, however, the definition of direct discrimination offers less protection in sex discrimination cases than the EU definition, because it allows the possibility of exemption in cases in which a difference in treatment is unavoidable because the fundamental right of another person has to be protected, if it is suitable for the designated purpose and proportionate, or otherwise has a reasonable and objective explanation directly related to the relevant relationship.[17] This means that the Hungarian definition allows for justifications of direct sex discrimination that are not allowed under EU law.

2.2.2 Prohibition of pregnancy and maternity discrimination

Referring to case law of the Court of Justice, the Gender Recast Directive also states that 'unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex' (Recital 23). Such treatment is therefore also covered by the directive. In line with this, most countries under review explicitly prohibit pregnancy and maternity discrimination as a form of discrimination (**Albania**, **Belgium**, **Croatia**, **Cyprus**, **Czech Republic**, **Denmark**, **Estonia**, **Finland**, **France**, **Germany**, **Greece**, **Hungary**, **Iceland**, **Ireland**, **Italy**, **Latvia**, **Liechtenstein**, **Luxembourg**, **Malta**, **Montenegro**, **Netherlands**, **North Macedonia**, **Norway**, **Romania**, **Slovakia**, **Slovenia**, **Spain**, **Turkey**, **United Kingdom**).

In some of the countries where this type of prohibition is not explicitly codified, it is nevertheless established in case law or other documents that unfavourable treatment related to pregnancy or maternity constitutes sex discrimination (e.g. **Austria**, **Serbia**). In **Sweden** pregnancy and maternity discrimination is only indirectly – and tacitly – covered by the Discrimination Act's ban on direct sex discrimination. According to the national expert, the Swedish implementation can – and has been[18] – criticised on this point as not transparent. In **Portugal** discrimination on the ground of pregnancy and maternity is prohibited.[19] However, there is no explicit mention in the law that pregnancy and maternity discrimination is to be qualified as direct sex discrimination. In **Poland** neither the Anti-discrimination Law nor any provision of the Labour Code explicitly states that discrimination includes any less favourable treatment of a woman because of her pregnancy or childbirth-related leave. However, Article 12 of the Anti-discrimination Law stipulates that, in case of a breach of the equal treatment rule with regard to pregnancy or childbirth-related leave, the person concerned has the right to damages, according to Article 13 (which refers to discrimination-related damages).[20] In addition, in the case law based on the Labour Code, discrimination with regard to pregnancy is considered to be sex-based discrimination.[21]

2.2.3 Specific difficulties

Most experts report that there are no difficulties with applying the concept of direct sex discrimination at national level. Nevertheless, there do appear to be some difficulties, although not as many as with indirect discrimination. Several experts report a scarcity of case law (e.g. **Croatia**, **Estonia**, **Slovakia**) or indeed an absence of case law (**Liechtenstein**).

In **Hungary**, the Equality Act refers to 19 explicit grounds, such as sex, racial origin, etc., and a general term: 'any other status, characteristic feature or attribute'.[22] This has created the impression that it is

17 Hungary, Equality Act, Article 7(2) and (3).
18 Compare Votinius, J. (2011) 'Troublesome transformation. EU law on pregnancy and maternity turned into Swedish law on parental leave', in: Rönnmar, M. (ed.), *Fundamental Rights and Social Europe*, Hart Publishing, Oxford.
19 Poland, Labour Code, Articles 24(1) and 25(6).
20 The Draft Law amending the Antidiscrimination Law proposes to add the following provision: 'The violation of equal treatment rule … in relation to pregnancy or maternity constitutes direct sex discrimination'.
21 Poland, The Supreme Court (SC) in its judgment of 8 January 2008, II PK 116/07; and the ruling of the SC of 8 July 2008, IPK 294/07.
22 Article 8 of the Equality Act defines discrimination as follows: 'Direct discrimination occurs if a person or a group is treated less favourably on the ground of his/her/its protected characteristic than any other person or group in comparable situation.'

enough to refer to discrimination in general without indicating the protected ground on the basis of which legal redress is claimed. There are still many cases adjudicated by the *Kuria* (the Supreme Court) where the claimant did not indicate the protected ground of their claim during the first instance procedure.[23]

In **Belgium**, according to settled case law, direct discrimination is potentially justifiable. This does not accord with EU law and to resolve this problem the Belgian legislature has introduced a difference between 'distinction' and 'discrimination'. Direct discrimination is defined as a direct distinction that may not be justified when the object of such direct distinction falls within the scope of EU law (Article 13 of the Gender Act).

The **Spanish** expert observes that, in theory, Spanish legislation allows for the use of a hypothetical comparator, but to date no case law has dealt with this. It is therefore not known whether the judiciary is prepared to accept this concept.

The expert from **Greece** notes that, although in general few difficulties exist with the concept of direct sex discrimination, a 2018 judgment from the First Instance Civil Court of Athens[24] required a finding of fault, contrary to EU law.

The expert from **Germany** observes that the German General Equal Treatment Act does not contain a prohibition of discrimination in cases without an identifiable victim (cf. CJEU in *Feryn*).[25] This likely holds true for most countries.

2.3 Indirect sex discrimination

2.3.1 Explicit prohibition

The Gender Recast Directive 2006/54/EC defines indirect discrimination as occurring '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' (Article 2(1)b).[26] Indirect discrimination concerns measures that appear neutral, but which have a disadvantageous effect on particular people. For instance, less favourable treatment of part-time workers will often amount to indirect sex discrimination, as long as mainly women are employed on a part-time basis (e.g. C-170/84 *Bilka*). Another example is the case of *Kalliri*, in 2017, where the CJEU ruled that requiring a minimum height (1.70 meters for both men and women) to enter the Police Academy in **Greece** must be considered indirect sex discrimination, as far fewer women than men fulfil this criterion.[27]

As with direct discrimination, indirect sex discrimination is explicitly prohibited in **all countries** discussed in this report. Not all national definitions are fully in line with the EU concept of indirect discrimination, however. In **Poland**, the legislator thus translated the Directive's notion 'particular disadvantage' as the 'particularly disadvantaged situation'. Both **Hungary** and **Cyprus** apply a more stringent test. In **Hungary**, the concept of indirect discrimination is narrower than the EU definition, as it stipulates a 'considerably larger disadvantage' compared to a 'particular disadvantage' as mentioned in Article 2(1)(b) of the Recast Directive. Something similar is at issue in **Cyprus**, where the Greek translation of 'particular disadvantage' is 'notably disadvantageous position'. The **Serbian** expert reports that the definition of indirect discrimination does not contain any 'would' language (i.e. anything in the conditional tense), and

23 For example, *Kúria* Pfv. 20351/2014/6.
24 Greece, Athens FICC No 2323/2018 (Labour Disputes Procedure).
25 CJEU, Judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV,* C-54/07, EU:C:2008:397.
26 See also Article 2(b) of 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, pp. 37-43 (Directive 2004/113/EC).
27 CJEU, Judgment of 18 October 2017, *Kalliri,* C-409/16, EU:C:2017:767.

can be interpreted as being limited to an actual occurrence of disadvantage, making it impossible to challenge neutral provisions before they in fact cause actual disadvantage to anyone.

2.3.2 Statistical evidence

Indirect discrimination is difficult to prove.[28] In order to establish a presumption of indirect sex discrimination – in other words to establish the presumption that a neutral provision, criterion or practice has a particular disadvantageous effect on people of a particular sex – some countries allow statistical evidence. Statistical evidence is allowed (though not required) in **Belgium**, **Cyprus**, the **Czech Republic**, **Denmark**, **Estonia**, **Finland**, **France**, **Germany**, **Greece**, **Hungary**, **Ireland**, **Lithuania**, **Malta**, the **Netherlands**, **Norway**, **Poland**, **Romania**, **Serbia**, **Spain**, **Sweden** and the **United Kingdom**. In several countries there is no case law available (including **Albania**, **Croatia**, **Iceland**, **Luxembourg** and **Slovakia**).

2.3.3 Application of the objective justification test

The possibilities for justification are much broader than with direct discrimination,[29] as the definition of indirect discrimination includes an objective justification test, which states: *'…unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'* (Article 2(1)b Gender Recast Directive). The CJEU has repeatedly ruled that the objective justification test is to be interpreted strictly.[30]

Many experts report that case law that applies the objective justification test is lacking (e.g. **Montenegro**, **Poland**, **Slovakia**). Contrary to the strict interpretation of the objective justification test by the CJEU, **Hungarian** courts have applied the test widely.

2.3.4 Specific difficulties

The concept of indirect discrimination is complex and has caused difficulties for national courts. In many countries there is scant case law on indirect sex discrimination (including **Belgium**, **Latvia**, **Norway**) In several countries (**Estonia**, **Liechtenstein**, **Luxembourg**, **Montenegro**, **North Macedonia**, **Portugal**, **Slovakia**, **Slovenia**, **Turkey**) there appears to be no case law at all yet on indirect sex discrimination. On the positive side, in some countries indirect sex discrimination cases are emerging more frequently than in the past (e.g. **Croatia**).

Specific difficulties that the experts have reported include:

- There is a tendency among some judges to require an intention to discriminate on the part of the perpetrator, though intent is not a criterion to prove indirect discrimination (**Belgium**, **Greece**).
- Job classifications and collective agreements: the **German** expert reports that many German courts face difficulties when indirect discrimination is linked to the gender-related division of labour and care work, and when discrimination is rooted in the job classification systems of collective agreements, due to a specific understanding of the autonomy of collective bargaining (freedom of coalition) under the German Constitution. The **Spanish** expert, too, notes problematic aspects of cases on indirect discrimination in relation to incorrect job evaluations in collective agreements.
- Courts are still reluctant to rely on statistical data as evidence (**Serbia**).

28 General issues related to the burden of proof are discussed further below in Section 10.2.

29 See the report produced by the European Network of Legal Experts in the Field of Gender Equality, McCrudden, C., Prechal, S. (2009) *The concepts of equality and non-discrimination in Europe: A practical approach*, European Commission, available at: http://ec.europa.eu/social/BlobServlet?docId=4553&langId=en.

30 CJEU, Judgment of 20 October 2011, *Waltraud Brachner v Pensionsversicherungsanstalt*, C-123/10, EU:C:2011:675; Judgment of 9 February 1999, *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez,* C-167/97, EU:C:1999:60; Judgment of 20 March 2003, *Helga Kutz-Bauer v Freie und Hansestadt Hamburg*, C-187/00, EU:C:2003:168.

2.4 Multiple discrimination and intersectional discrimination

Multiple discrimination refers to discrimination based on two or more grounds simultaneously. The closely related yet distinct concept of intersectional discrimination refers to discrimination resulting from an interaction of grounds of discrimination which produces a new and different type of discrimination. The European Equality Law Network produced a thematic report on intersectional discrimination in 2016, written by Sandra Fredman.[31]

Multiple discrimination and/or intersectional discrimination is explicitly covered in the national legislation of **Austria**, **Bulgaria**, **Croatia**, **Denmark**, **Germany**, **Greece** (although the 2016 Act which prohibits multiple discrimination does not include sex as a prohibited discrimination ground), **Ireland**, **Italy**, **Malta** (currently still in Bill format), **Montenegro**, **North Macedonia**, **Norway**, **Poland**, **Romania**, **Serbia**, **Slovenia** and **Turkey**. In several, but by no means all, countries there is case law that addresses these types of discrimination: **Albania**, **Austria**, **Belgium**, **Croatia**, **Denmark**, **Estonia**, **France**, **Germany**, **Greece** (Ombudsman's Mediation Report), **Ireland**, **Italy**, the **Netherlands**, **Norway**, **Poland**, **Romania**, **Serbia**, **Slovakia**, **Sweden** and the **United Kingdom**.

The experts from **Cyprus**, the **Czech Republic**, **Estonia**, **Finland**, **Iceland**, **Latvia**, **Liechtenstein**, **Luxembourg** and **Spain** note that in their countries there is neither legislation explicitly covering multiple and/or intersectional discrimination nor explicit case law.

2.5 Positive action[32]

2.5.1 Definition and approach

Several provisions of EU law allow for positive action in the field of gender equality.[33] Article 157(4) TFEU states: '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 to prevent or compensate for disadvantages in professional careers.'

As a rule, positive action may be taken in the various areas covered by EU law, including employment, occupational pension schemes and access to and provision of goods and services. The most important area for positive action has, until now, been access to employment and working conditions. Whenever positive action measures exist, they appear to be more common 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 do obligations exist for the private sector, for instance in the form of equality plans (e.g. **Finland**).

31 Fredman, S. (2016) *Intersectional discrimination in EU gender equality and non-discrimination law*, European Commission, available at: http://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb.

32 See the reports produced by the European Network of Legal Experts in the Field of Gender Equality, McCrudden, C. (2019) *Gender-based positive action in employment in Europe,* European Commission, available at: https://www.equalitylaw.eu/downloads/5008-gender-based-positive-action-in-employment-in-europe-pdf-1-9-mb; Fredman, S. (2009) *Making equality effective: The role of proactive measures*, European Commission, available at: http://ec.europa.eu/social/BlobServlet?docId=4551&langId=en; Selanec, G., Senden, L. (2011) *Positive action measures to ensure full equality in practice between men and women, including on company boards*, European Commission, available at: https://www.equalitylaw.eu/downloads/3864-positive-action-measures-to-ensure-full-equality-in-practice-between-men-and-women-including-on-company-boards-pdf-2-639-kb; Xenidis, R. and Masse-Dessen, H. (2018) 'Positive action in practice: some dos and don'ts in the field of EU gender equality law', *European Equality Law Review* No. 2/2018, pp. 36-62, available at https://www.equalitylaw.eu/downloads/4759-european-equality-law-review-2-2018-pdf-1-206-kb; Krstic, I. (2016) 'Implementation of positive action measures for achieving gender equality in North Macedonia, Montenegro and Serbia', *European Equality Law Review* No. 2/2016, pp. 22-33, available at https://www.equalitylaw.eu/downloads/3938-european-equality-law-review-2-2016.

33 See Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47-390 (TFEU), Article 157(4); Article 23 Charter of Fundamental Rights; Article 3 Gender Recast Directive 2006/54/EC; Article 6 Goods and Services Directive 2004/113/EC.

All countries under review have enacted legislative provisions allowing positive action. The exception is **Latvia**: Latvian law neither allows nor provides for any kind of positive action, except one soft-quota provision concerning the election of judges in self-governing bodies. In **Lithuania**, the act is essentially a dead letter law: positive action is defined in the act as being specific temporary measures laid down by specific laws, but there are no such laws in force that would allow positive action to be taken.

In a recent report by the European Equality Law Network on gender-based positive action in employment, it has become clear that there are significant differences between countries as to what is actually meant by 'positive action', and what types of measures this concept covers.[34] There is also significant terminological confusion, as besides 'positive action' several other terms are in use such as 'affirmative action', 'partité', and 'special measures'.[35] Christopher McCrudden, the author of the report, has found that the underlying problem is conceptual confusion.[36] EU law construes positive action as an exception to the non-discrimination principle,[37] thus following a formal rather than a substantive equality approach. Many Member States, EEA countries and candidate countries follow this approach.

Several countries take a more pro-active approach on positive action (including **Finland**, **Greece** and **Sweden**). In **Greece**, positive action is not merely allowed, it is required by the Constitution in all areas (Article 116(2)). In addition to provisions on positive action, **Swedish** law includes the concept of 'active measures' in the areas of working life and education. The employer or education-provider must continuously and actively seek information on needs that may arise in relation to different grounds for discrimination. The information gathered must then be transposed into active measures to create an inclusive and accessible workplace or educational institution.

2.5.2 Specific difficulties

Many national experts report difficulties in relation to positive action, both at the conceptual level and at the level of implementation.

- Positive action is seen as the exception to the (formal) equality principle, rather than as an essential aspect of achieving substantive equality (e.g. **Bulgaria**, **Cyprus**, **Turkey**).
- 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 (e.g. **Bulgaria**, **Czech Republic**, **Estonia**, **Montenegro**). The expert from **Cyprus** reports that, though such measures are allowed, no positive action measures have been taken at all. The **Serbian** expert states that while positive action measures are allowed by the Serbian constitution and legislature, they are not a priority for individual employers.
- In line with this, the **Hungarian** expert notes that strong political objections exist against taking certain types of positive action measures – especially against quotas.
- The case law of the CJEU, particularly the cases *Kalanke, Marschall, Badeck* and *Abrahamsson*,[38] has prevented the **Netherlands** from developing affirmative action policies to hire women at universities.[39] In **Germany** this case law has also proved problematic. Similarly, the expert from

34 McCrudden, C. (2019) *Gender-based positive action in employment in Europe,* European Commission, pp. 80-84, available at: https://www.equalitylaw.eu/downloads/5008-gender-based-positive-action-in-employment-in-europe-pdf-1-9-mb.

35 McCrudden, C. (2019) *Gender-based positive action in employment in Europe,* European Commission, pp. 80-84, available at: https://www.equalitylaw.eu/downloads/5008-gender-based-positive-action-in-employment-in-europe-pdf-1-9-mb.

36 McCrudden, C. (2019) *Gender-based positive action in employment in Europe,* European Commission, p. 84, available at: https://www.equalitylaw.eu/downloads/5008-gender-based-positive-action-in-employment-in-europe-pdf-1-9-mb.

37 McCrudden, C. (2019) *Gender-based positive action in employment in Europe,* European Commission, pp. 52-55, available at: https://www.equalitylaw.eu/downloads/5008-gender-based-positive-action-in-employment-in-europe-pdf-1-9-mb.

38 Judgment of 17 October 1995, *Kalanke v Freie Hansestadt Bremen*, C-450/93, EU:C:1995:322*;* Judgment of 11 November 1997, *Marschall,* C-409/95, EU:C:1997:533; Judgment of 28 March 2000, *Badeck,* C-158/97, EU:C:2000:163*;* Judgment of 6 July 2000, *Abrahamsson,* C-407/98, EU:C:2000:367.

39 Netherlands Institute for Human Rights *(College voor de rechten van de mens)*, Opinions 2011-198 and 2012-195, available at: www.mensenrechten.nl.

Norway reports that EU law has formed a brake on the development of positive action measures in Norway in the context of academic education.[40]

– Weak monitoring (e.g. **Bulgaria**, **Finland**).
– Positive action measures can be costly (e.g. **Iceland**).

However, there are also some experts who have noted that positive action is well-established in the non-discrimination legislation of their country (e.g. **Greece**, **Portugal**).

2.5.3 Measures to improve the gender balance on company boards

Of particular interest is the issue of gender balance on company boards.[41] A proposal from the Commission on this topic is pending.[42] An increasing number of countries have adopted measures that aim to improve the gender balance on company boards. The countries which have adopted such measures are **Albania**,[43] **Austria**, **Belgium**, **Bulgaria**, **Denmark**, **Finland**, **France**, **Germany**, **Iceland**, **Ireland**, **Italy**, **Luxembourg**, the **Netherlands**, **Norway**, **Portugal**, **Romania**, **Serbia**, **Slovenia**, **Spain** and **Turkey**.

2.5.4 Positive action measures to improve the gender balance in other areas

In a number of countries there are also other positive action measures, often in the form of 'soft' measures, to improve the gender balance in specific fields, such as positive action regarding political candidates' lists, workers' representatives lists (e.g. in **France**), or regarding the composition of political bodies. The experts from the following countries report that such measures exist in their countries: **Albania**, **Belgium**, **Croatia**, **Finland**, **France**, **Germany**, **Greece** (where there is a legal requirement that each sex must make up at least one third of the members of the service councils and of candidates in local and parliamentary elections), **Iceland**, **Ireland**, **Italy**, **Liechtenstein**, **Luxembourg**, **Montenegro**, **North Macedonia**, **Norway**, **Poland** (where there is a legal requirement that each sex must make up at least 35 % of the candidates), **Portugal**, **Serbia**, **Slovenia**, **Spain**, **Turkey** and the **United Kingdom**. In **Greece** such measures are compulsory and their implementation is subject to judicial review. In **Hungary** political parties can adopt positive action measures; this regulation, however, is rarely applied in practice.[44] The **Swedish** expert reports that the representation of women in Parliament and Government is close to 50 % and this number was achieved without using quotas.

40 Cf. EFTA Court, Judgment of 22 April 2002, *Surveillance Authority v the Kingdom of Norway,* E-1/02.

41 Selanec, G., Senden, L. (2011) *Positive action measures to ensure full equality in practice between men and women including on company boards*, European Commission, available at: https://www.equalitylaw.eu/downloads/3864-positive-action-measures-to-ensure-full-equality-in-practice-between-men-and-women-including-on-company-boards-pdf-2-639-kb; and Senden, L., Visser, M. (2013) 'Balancing a Tightrope: The EU Directive on improving the gender balance among non-executive directors of boards of listed companies', *European Gender Equality Law Review* No. 1/2013, pp. 17-33, available at https://publications.europa.eu/en/publication-detail/-/publication/47bf7a78-e399-41a5-bd77-bc95281ee6be/language-en/format-PDF; Senden, L., Kruisinga, S. (2018) *Gender-balanced company boards in Europe A comparative analysis of the regulatory, policy and enforcement approaches in the EU and EEA Member States*, European Commission, available at: https://www.equalitylaw.eu/downloads/4537-gender-balanced-company-boards-in-europe-pdf-1-68-mb.

42 The Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures of 14 November 2012, COM (2012) 614 final, as amended by the Malta Presidency 2012/0299 (COD) 31 May 2017.

43 In Albania, this concerns only public company boards.

44 Hungary, Equality Act, Article 11 (1)b.

2.6 Harassment and sexual harassment[45]

2.6.1 Definition and explicit prohibition of harassment and sexual harassment

EU law prohibits harassment on the ground of a person's sex and sexual harassment and equates both with sex discrimination. Neither harassment on the ground of sex nor sexual harassment can be justified. Gender Recast Directive 2006/54/EC Article 2(1)(c) defines *harassment* as '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.'[46] Article 1(d) defines *sexual harassment* as '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'.[47] Both definitions include the violation of a person's dignity and the creation of an intimidating, hostile, degrading, humiliating or offensive environment. These conditions are cumulative, i.e. both need to have been met in order to comply with the definition. The main difference is that in the case of harassment on the ground of a person's sex, the person is ill-treated because he or she is a man or a woman (or, presumably, because they identify as non-binary). In the case of sexual harassment, it instead involves a person being subject to unwelcome sexual advances or, for instance, the aim of the perpetrator's behaviour is to obtain sexual favours. In concrete situations the distinction between the two may be unclear.[48]

All countries covered by this report have prohibited both harassment and sexual harassment in national legislation.

French law takes a step further and also prohibits sexist behaviour at work. This is defined as behaviour based on gender, with the purpose or effect of harming dignity or creating an intimidating, hostile, degrading, humiliating or offensive work environment (see Article L.1142-2-1 of the French Labour Code).

2.6.2 Scope of the prohibition of harassment and sexual harassment

The Gender Recast Directive prohibits harassment and sexual harassment in the context of employment, including access to employment, vocational training and promotion. Similar obligations and definitions apply to the access to and supply of goods and services according to Directive 2004/113/EC. In most countries the scope of the prohibition on harassment and sexual harassment is wider than in EU law (**Albania**, **Belgium**, **Bulgaria**, **Croatia**, **Denmark**, **Estonia**, **Finland**, **Germany**, **Greece**, **Hungary**, **Iceland**, **Latvia**, **Montenegro**, **North Macedonia**, **Norway**, **Poland**, **Romania**, **Slovakia**, **Slovenia**, **Spain**, **Sweden**, **United Kingdom**). In some of these countries harassment and sexual harassment are prohibited in all spheres of life.

As regards sexual harassment, **Germany** only prohibits it in the employment context, thereby falling short of fully implementing EU law, as Directive 2004/113/EC Article 4(3) also prohibits harassment based on sex and sexual harassment in the access to and supply of goods and services.

45 Petroglou, P. (2019) 'Sexual harassment and harassment related to sex at work: time for a new directive building on the EU gender equality acquis', *European Equality Law Review* No. 2/2019, pp. 16-34, available at: https://www.equalitylaw.eu/downloads/5005-european-equality-law-review-2-2019-pdf-3-201-kb.

46 See also Article 2(c) Directive 2004/113/EC and Article 3(c) Directive 2010/41/EU.

47 See also Article 2(d) Directive 2004/113/EC and Article 3(d) Directive 2010/41/EU.

48 See the report of the European Network of Legal Experts in the Field of Gender Equality, Numhauser-Henning, A., Laulom, S. (2011) *Harassment related to sex and sexual harassment law in 33 European countries. Discrimination versus dignity*, European Commission, available at: https://publications.europa.eu/en/publication-detail/-/publication/e06dcc86-b7bf-459e-8241-47502ef379c4/language-en/format-PDF/source-86560771.

2.6.3 Understanding of (sexual) harassment as discrimination

As mentioned above, EU law has explicitly opted to consider harassment on the grounds of a person's sex and sexual harassment as a form of sex discrimination.[49] In practice at the national level, however, this is not always the case. The **Belgian** expert, for example, reports that harassment and sexual harassment are hardly ever perceived or analysed as forms of gender discrimination in case law. Not all countries have enacted legislation that specifies that harassment and sexual harassment amount to discrimination (see Article 2(2)(a) of Directive 2006/54/EC). Countries where legislation which considers harassment a form of discrimination does not exist are **Montenegro**, **Portugal** and **Serbia**.

2.6.4 Specific difficulties

Many national experts have reported that the number of cases that concern harassment on the basis of sex and sexual harassment is low (including **Cyprus**, **Germany**, **Greece**, **Iceland**, **Montenegro**, **Slovakia**, **Spain**, **Turkey**), or that there is no case law at all (**Liechtenstein**). More broadly, several experts note that there is a general lack of measures addressing harassment and sexual harassment in employment (e.g. **Germany**, **Serbia**).

Reasons why victims are hesitant to go or are dissuaded from going to court include:

- They are deterred by the length and costs of judicial proceedings (**Cyprus**).
- Sanctions are too low to have a deterrent effect (**Croatia**).
- Fragmented legislative framework and different types of proceedings available (**Croatia**).
- In cases of sexual harassment at work, it is the victim who is moved to another work location, if possible, and not the perpetrator (**Croatia**).
- It is difficult to provide proof of harassment (e.g. **Austria**, **Bulgaria**, **Finland**, **Greece**, **Romania**), especially as there are often no witnesses.
- They fear victimisation and/or do not want to risk acquiring a 'bad reputation' in the labour market (e.g. **Bulgaria**, **Estonia**, **Greece**, **Portuga**l, **Turkey**). This can be worsened by a general precariousness in the labour market and high unemployment (**Spain**); or the small size of the labour market (**Luxembourg**). In relation to victimisation, the expert from **Greece** adds that victims often fear that the perpetrator might bring criminal charges against them for slander (which is quite common in practice) and/or civil claims for moral damages.
- The existence of non-disclosure agreements (**United Kingdom**).

Several experts have also reported other types of legal difficulties:

- In **Romania** the fact that sexual harassment is prohibited both in the Criminal Code and in the Gender Equality Law raises difficulties. On several occasions, when alleged acts of harassment took place within labour relations, the National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*, CNCD) decided to declare the case inadmissible *rationae materiae*, without actually referring the case to the prosecutor's office.[50] This is problematic because a criminal investigation into sexual harassment starts with a complaint from the alleged victim within three months from the time of the act, a period that is usually lost through CNCD procedures, leaving the victim without effective remedy.

49 For a discussion of difficulties with this concept see the report by the European Network of Legal Experts in the Field of Gender Equality, Numhauser-Henning, A., Laulom, S. (2011) *Harassment related to sex and sexual harassment law in 33 European countries. Discrimination versus dignity*, European Commission, available at: https://publications.europa.eu/en/publication-detail/-/publication/e06dcc86-b7bf-459e-8241-47502ef379c4/language-en/format-PDF/source-86560802.

50 E.g. CNCD (2014, 2008), Decision No. 589 of 22.10.2014, available at: http://nediscriminare.ro/uploads_ro/docManager/727/hotarare_589-14_V.O.pdf; Decision No.648 of 20.11.2008, available at: http://nediscriminare.ro/uploads_ro/docManager/896/hot._648-2008.pdf.

- In **Norway** problems arise because the Equality Tribunal is only competent to enforce the prohibition of harassment and not sexual harassment. This will change as of 1 January 2020, after which the Tribunal can treat cases on sexual harassment.
- The expert from **Poland** observes that it can be difficult to distinguish harassment based on sex from bullying, especially if the harassment lasted a long time. The two types of behaviour are prohibited by two different legal provisions, and in the case of bullying a shift in the burden of proof is not provided.

In recent years, thanks to #MeToo and related movements, the existence of sexual harassment and sex-based harassment has received more societal attention. This has had various effects. The experts from **Bulgaria** and the **Czech Republic** note that there is widespread resistance to the concept of sexual harassment in society, which manifested in resistance to the #MeToo movement. Some other experts have reported positive effects, however, in the sense that the number of cases has increased.

2.7 Instruction to discriminate

In EU law, instruction to discriminate on the ground of a person's sex is equated with discrimination (Article 2(2)(b) of the Gender Recast Directive 2006/54/EC).[51] Thus, for example, 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. EU law does not clearly define an instruction to discriminate.

All countries have prohibited instruction to discriminate. In most countries, the prohibition concerning the instruction to discriminate is similar in formulation to that in EU law and is not further defined. Some countries have adopted a legal definition, however. In **Bulgaria**, it means direct and intentional encouragement, giving an instruction, exerting pressure or persuading someone to engage in discrimination.

Few experts report difficulties with the concept of instruction to discriminate. In **Croatia**, there was confusion about whether intent is required or not, a requirement which is not mentioned in Article 2(2)(b) of the Recast Directive. In **North Macedonia**, it is in practice very difficult to prove instruction to discriminate. The courts rejected several cases where the claimant asserted that hate speech constituted an instruction to discriminate. In many countries there has not yet been any case law regarding instruction to discriminate (**Belgium**, **Croatia**, **Cyprus**, **Estonia**, **Germany**, **Greece** (where the legislation transposing Directives 2004/113/EC and 2010/41/EU also prohibits 'encouragement' to discriminate), **Luxembourg**, **Malta**, **Romania**).

2.8 Other forms of discrimination

Several countries also prohibit other forms of discrimination in their national law, such as discrimination by association or discrimination based on assumed characteristics (**Albania**, **Bulgaria**, **Croatia**, **Cyprus**, **Czech Republic**, **Denmark**, **Finland**, **Germany**, **Greece** (which prohibits discrimination by association, but only in respect of grounds of discrimination other than sex), **Hungary** (which prohibits assumed discrimination, segregation and retaliation), **Ireland**, **Montenegro** (which prohibits segregation), **Norway**, **Serbia**, **Turkey**, **United Kingdom** (**Great Britain**)). Discrimination by association was developed in EU law in relation to disability discrimination in the *Coleman* case.[52] It refers to a situation when someone is discriminated against by virtue of their association with someone who possesses a protected characteristic.

51 See also Asscher-Vonk, I. (2012) 'Instruction to discriminate', *European Gender Equality Law Review* No. 1/2012, pp. 4-12, available at: https://publications.europa.eu/en/publication-detail/-/publication/dea2021f-0be4-476f-bd8f-86829326380a/language-en/format-PDF/source-86561026.

52 CJEU, Judgment of 17 July 2008, *Coleman*, C-303/06, EU:C:2008:415; see also Karagiorgi, C. (2014) 'The concept of discrimination by association and its application in the EU Member States', *European Anti-discrimination Law Review 18,* pp. 25-36, available at: https://publications.europa.eu/en/publication-detail/-/publication/d172d22d-30f5-44ab-afa2-4768e7a68689/language-en/format-PDF.

Assumed discrimination occurs when someone is treated differently based on assumptions related to a personal characteristic. For example, an employer could treat an employee disadvantageously because they assume the employee is pregnant.

In **Ireland**, the Employment Equality Act has a particularly broad definition of discrimination as it refers to any of the discrimination grounds which (i) exists, (ii) existed but no longer exists, (iii) may exist in the future, or (iv) is imputed to the person concerned. Discrimination is also taken to occur where 'a person who is associated with another person is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation'.[53]

2.9 Evaluation of implementation

On the whole, with some specific difficulties mentioned in the paragraphs above, the national experts are of the opinion that the key concepts of EU gender equality law have correctly transposed into national law. Most of the difficulties relate to the level of implementation and enforcement, rather than the legal framework itself. The lack of case law that virtually all experts mention has various root causes, amongst which experts indicate lack of knowledge about the law on the part of all actors (victims, employers, judges etc).

53 Ireland, Section 6 of the Employment Equality Act 1998 (as amended).

3 Equal pay and equal treatment at work (Article 157 on the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54)

3.1 Equal pay[54]

The principle of equal pay for men and women for equal work or work of equal value, now contained in Article 157 TFEU, has been entrenched ever since the beginning in the EEC 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 preliminary questions from national courts on this issue. These have included the scope of the notion of 'pay', which the CJEU has interpreted broadly; 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 (see Section 5).

Significantly, 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).

Unfortunately, despite this legal framework, the difference between the remuneration of male and female employees remains one of the great concerns in the area of gender equality: on average, the average gross hourly wage difference between men and women (= gender pay gap) in the EU is 16.2 %[55] and progress has been slow in closing the gender pay gap.[56] The differences can partly be explained by factors other than discrimination: e.g. 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, which the principle of equal pay aims to eradicate.[57]

3.1.1 Implementation in national law

The principle of equal pay under EU law is, in general, reflected in the legislation of the Member States and the EEA countries, both at the constitutional and the legislative level, either as part of general labour law or as provided for in specific anti-discrimination legislation. Furthermore, in some states equal pay is also guaranteed (partly) by collective agreement (**Belgium**). In **Denmark**, while the principle of equal pay is valid for and binding on the contracting parties, in practice, there are no express equal pay clauses

54 See the reports produced by the European Network of Legal Experts in the Field of Gender Equality on this topic: Burri, S. (2019) *National cases and good practices on equal pay*, European Commission, available at: https://www.equalitylaw.eu/downloads/5002-national-cases-and-good-practices-on-equal-pay; Foubert, P. (2017) *The enforcement of the principle of equal pay for equal work or work of equal value*, European Commission, available at: https://www.equalitylaw.eu/downloads/4466-the-enforcement-of-the-principle-of-equal-pay-for-equal-work-or-work-of-equal-value-pdf-840-kb.

55 European Commission (2018), 'The gender pay gap in the European Union', Factsheet, see: https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/equalpayday-eu-factsheets-2018_en.pdf.

56 European Commission (2018), 'The gender pay gap in the European Union', Factsheet, see: https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/equalpayday-eu-factsheets-2018_en.pdf.

57 On legal aspects of the gender pay gap, see the report produced by the European Network of Legal Experts in the Field of Gender Equality, Foubert, P., Burri, S., Numhauser-Henning, A. (2010) *The gender pay gap from a legal perspective (including 33 country reports)*, European Commission, available at: https://publications.europa.eu/en/publication-detail/-/publication/8745534d-d450-4ae1-bfe2-0f7389d361ef/language-en/format-PDF/source-86561461.

in Danish collective agreements. This implicit way of regulating the issue does not contribute to a better understanding of the notion of pay. Collective agreements in Denmark are private contracts, hence, in principle, a matter for the contracting parties.

Meanwhile, the **Hungarian** expert has expressed concern about the fact that the equal pay principle as such, which was included in the former constitution, has not been adopted in Hungary's new constitution (the Fundamental Law of Hungary, 2011), despite opposition members asking to keep it in place and although the new constitution does contain the wider provision that 'Women and men shall have equal rights'. The **Romanian** Constitution lays down the principle of equal pay but it does not cover work of equal value, only equal work, and it only applies to salaries, not to other types of remuneration or benefits for work.[58] There is no case law from the Constitutional Court explaining how these limitations should be interpreted. Yet the Labour Code,[59] the Anti-discrimination Law[60] and the Gender Equality Law[61] fully transpose the principle of equal pay, covering all these aspects. By contrast, in **Greece** the principle of equal pay for equal work or work of equal value is enshrined in the Constitution and this principle covers any ground whatsoever and is not limited to sex. However, the scope given to the principle still varies in a number of respects, as the following section will show.

In **Germany**, the Pay Transparency Act entered into force on 6 July 2017.[62] Earlier drafts had been discussed and amended on many occasions to water down the means for the effective enforcement of equal pay. Nevertheless, the Act contains an explicit prohibition of direct and indirect pay discrimination on the grounds of sex/gender (including pregnancy and motherhood). It tries to provide a definition of 'same work' and 'work of equal value', covering the kind of work, training requirements, working conditions and the key requirements of the actual work in question. The prohibition of pay discrimination is repeated under the heading 'pay equality' (although there is still no obligation to pay the same remuneration for the same work under German law, but rather there is a prohibition of pay discrimination on the grounds of sex, which is different). Agreements violating the prohibition of pay discrimination on the grounds of sex/gender are invalid. The Act explicitly prohibits victimisation connected to the exercising of rights under this law.

In **Iceland**, 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 has been used at the municipal level in Iceland. When such a system is used it is confirmed that the evaluation does not assess the performance of the employee but entails an analysis of the basic requirements that apply to those carrying out the job.[63] This has changed since the adoption of the Equal Pay Certification Standard with the amendment of Article 19 of the Gender Equality Act (GEA) which became effective on 1 January 2018. Companies with 25 or more employees are now obliged to obtain equal pay certification which meets the so-called equal pay standard and prove that their wage decisions are relevant considerations and are not based on gender.

3.1.2 Definition in national law

While many countries have implemented the concept of pay as contained in the Recast Directive and as it ensues from the interpretation of the CJEU of Article 157 TFEU, there are also still quite a number of countries in which the concept is not clearly defined as such in law (**Austria**, **Bulgaria**, **Estonia**, **Finland**, **Italy**, **Latvia**, **Norway**, **Sweden**, **United Kingdom**) or where there is no single and exhaustive definition

58 Romania, Constitution, Article 41(4).
59 Romania, Labour Code (*Codul Muncii*), Article 6(3).
60 Romania, Anti-discrimination Law, Article 6(b), (c).
61 Romania, Gender Equality Law, Article 7(c).
62 Germany, Pay Transparency Act of 30 June 2017, Official Journal 2017, p. 2152, https://www.gesetze-im-internet.de/entgtranspg/BJNR215210017.html.
63 Report by 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_vinnumarkadi.pdf.

of pay provided for, such as in **Belgium**. While in some countries this has not caused problems, because of the way that legislation has developed (**United Kingdom**), in others some uncertainty persists as to whether it is understood in the same way as it is contained in EU law. In some of these countries, compliance with EU law can be deduced mainly from the case law (**Latvia**, **Norway**, **Sweden**) or from a web of different laws (**Estonia**, **Malta**) and in combination with collective agreements and case law (**Austria**, **Italy**). Collective agreements may also provide for definitions (**Belgium**). The definition contained in national law may also be less elaborate than in EU legislation, yet with the meaning being the same (**Netherlands**). In **Portugal**, the new legislation on pay transparency (Law No. 60/2018, of 21 August 2018), has clarified the notion of remuneration and has been brought in line with Article 157(2) TFEU. This notion now explicitly includes other financial advantages apart from salary, including the payment of travel expenses and expenses relating to the performance of the work, bonuses, or premiums linked to productivity, seniority or good attendance. In **Germany**, the new Pay Transparency Act explicitly defines 'pay', in line with the EU concept.

In a few countries, the concept still does not (seem to) fully comply with the definition and scope of Article 157(2) TFEU. In **Lithuania**, the Labour Code of 2016 contains a special provision (Section 26(4)) that is in line with the definition of pay under EU law, which states that, for the purposes of discrimination, pay shall also encompass all indirect payments related to the performance of work under the employment contract (Article 140(6) of the Labour Code).

In **Slovakia**, the definition does not apply to all remuneration for work and all benefits that are paid in relation to employment allowances, discharge benefits, non-mandatory travel reimbursements, contributions from a social fund, supplementary payments to sickness insurance benefits, and contributions to supplementary pension saving funds are thus excluded from the notion of pay. Somewhat odd omissions may also be found in other domestic laws, such as the **Belgian** Gender Act, which does not expressly stipulate that it also covers work of equal value, and the **Serbian** law, which does not refer explicitly to remuneration 'in kind'. Moreover, pay is understood to mean the earnings including tax and dues payable on earnings and all employment-related income, while the following are excluded: travel costs to and from work; time spent on business trips; and costs for accommodation and food for working in the field, if the employer failed to provide the employee with accommodation and food without compensation; a retirement gratuity, of the minimum amount of three average monthly earnings; a refund of funeral expenses in the event of death of a member of immediate family, and to members of the immediate family in the event of death of the employee; and the compensation of damage sustained due to an injury at work or a professional illness; and employment anniversary bonus and solidarity assistance.

The definition in **Polish** law is considered deficient to the extent that, when speaking of work-related benefits, it omits the clarification included in the directive according to which the benefit may be both directly and indirectly related to employment and that it has to originate from the employer. Secondly, it also does not indicate a specific understanding of the principle of equal pay with regard to remuneration for work carried out in a piece-rate system[64] as well as in a time-rate system.[65] While the **Romanian** Labour Code fully transposes the equal pay principle and concept of pay, the Romanian Constitution uses a more limited formulation and the relevance of this has not been clarified so far by the Constitutional Court. As for the law of **Montenegro**, it is not clear whether it fully conforms to the EU concept of pay, because the labour legislation concerned is in the process of being drafted.

64 In this scheme, the level of an employee's remuneration depends on the quantitative results of their work (the degree to which the standard was achieved, e.g. the number of shoes produced).

65 In the case of a time-based system, the amount of remuneration depends on the amount of time worked in a given settlement period. In this system, the remuneration rates are set in relation to the number of time units (an hour, a day, a week or a month) and work efficiency has no influence on the rate.

3.1.3 Explicit implementation of Article 4 of Recast Directive 2006/54

Article 4 of the Recast Directive requires national law to prohibit explicitly direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration, but not all national legal systems provide for such an explicit stipulation (**Latvia**, **Montenegro**, **Netherlands**, **Poland**, **Slovenia**, **Sweden**, **United Kingdom**) or only partly (**Czech Republic**, **Serbia**). In the **Czech Republic** equal pay for men and women is not explicitly mentioned, but the principle of equal pay for all employees apparently also includes equal pay for men and women.

In **Germany**, gender discrimination concerning pay is covered by statutory law, applying to the labour market in general. German courts have generally stated that there is no legal rule providing for the same pay for the same work, but that there is a general prohibition of pay discrimination based on gender. Furthermore, while most wages and job classification systems in Germany are determined by collective agreements under the Act on Collective Bargaining, this act does not contain any provisions on equal pay. Even collective agreements with public services and social institutions still contain gender-discriminatory job classification systems.

Although the new Pay Transparency Act 2017 contains an explicit prohibition of direct and indirect pay discrimination on the ground of sex/gender (including pregnancy and motherhood) and employers are required to develop a non-discriminatory payment system, it still does not tackle discriminatory structures in collective bargaining and job classifications. On the contrary, when a collective agreement applies, the employer is not obliged to explain the criteria and procedures used in wage-setting, but can simply refer to the agreement for explanation and justification, despite the fact that there are still gender-discriminatory job classifications established by collective agreements and that they remain one of the obstacles to equal pay. Furthermore, although the prohibition of pay discrimination is repeated under the heading 'pay equality', under German law there is still no obligation to pay the same remuneration for the same work, but rather just the prohibition of pay discrimination on the grounds of sex.

The Swedish expert has criticised the 'tacit' way of regulating pay discrimination in **Sweden** as being insufficiently clear. The **French** Labour Code also states that a job classification system (grading system) must be based on rules allowing for the implementation of the equal pay principle. Section 7 of the **Finnish** Act on Equality defines direct and indirect discrimination and Section 8 prohibits pay discrimination, in principle using the definitions under Section 7. However, it may still be difficult to distinguish direct and indirect pay discrimination in practice. The preparatory works to the Act on Equality refer to the possibility that the general prohibition of discrimination under Section 7 may be applied to pay discrimination in some cases that fall outside the scope of Section 8, for instance when employees do not do equal work or work of equal value, if an employee is placed at a disadvantage on the basis of sex. Section 7 does not provide a victim of discrimination with the right to obtain compensation under the Act on Equality, but compensation under tort law or the Employment Contract Act is possible.[66]

3.1.4 Permissibility of pay differences

Some countries do not provide for such a possibility in the (case) law (**Austria**, **Cyprus**, **Czech Republic**, **Denmark**, **Latvia**, **Liechtenstein**, **Luxembourg**, **Malta**, **Poland**, **Romania**, **Serbia**, **Slovakia**, **Slovenia**, **Spain**, **Sweden**) or it is ultimately left to the courts to decide on this (**Latvia**, Liechtenstein, **Lithuania**, **United Kingdom**). In **Hungary**, exemptions are no longer possible in direct wage discrimination cases.[67] In other countries, accepted justifications for pay differences in the law in the case of equal work or work of equal value include the following ones, ranging from job-related grounds to personal qualifications in relation to the job and to certain external factors that may induce a pay differential:

66 Finland, Government Bill 57/1985 vp, p. 16.

67 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities (*2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról*), 28 December 2003, Article 22(2).

- salary classification systems prescribed by law (**Croatia**) or job classification systems in collective agreements (**Germany**);
- quantity and quality of the work (**Albania**, **Montenegro**, **Turkey**) or productivity (**Portugal**);
- being employed at different times (**Malta**, **Netherlands**);
- responsibility (**Albania**, **Finland**);
- working conditions, unpleasant or abnormal working hours (**Albania**, **Finland**, **Montenegro**);
- being a manager (**North Macedonia**);
- performance of extra duties, 'red circling' or maintaining a personal rate of pay because of particular circumstances that are not based on sex (**Finland**, **Ireland**);
- seniority (**Belgium**, **Bulgaria**, **Poland**, **Portugal**, **Turkey**);
- differences in formal qualifications (educational level) for the job (**Albania**, **Croatia**, **Finland**, **Iceland**, **Netherlands**, **Turkey**) or demand for higher qualifications for the performance of a wider range of tasks (**Ireland**);
- relevant work experience from previous jobs with the same or other employers (**Netherlands**) or work experience and professional skills in general (**Albania**, **Bulgaria**, **Finland**, **Iceland**);
- productivity (**Portugal**), personal performance/work results (**Finland**, **Montenegro**, **North Macedonia**), economic performance (**Estonia**);
- the lack of periods of absence, excluding the exercise of maternity and paternity rights (**Portugal**);
- age (**Sweden**);
- capabilities (**Sweden**);
- lack of periods of absence for workers (**Portugal**);
- alignment with the last salary earned (**Netherlands**);
- guarantees to receive a specific salary or supplement granted in the past;
- competitiveness (**Hungary**);
- labour shortages (in some circumstances) (**Finland**, **Netherlands**) and demand and supply in the labour market (**Estonia**, **Sweden**);
- the merging of two organisations or some other form of reorganisation (**Netherlands**), introduction of a new pay system, or changes in the tasks or market-based factors (**Finland**, but only on a temporary basis);
- being a specialist from abroad (**Estonia**);
- collective bargaining outcomes (**Sweden**) and pay negotiations (**Netherlands**).

The **Swedish** justifications ensue from case law and have been reported to be offering too broad a scope and the same applies to the **Netherlands**. While the Netherlands Institute for Human Rights (NIHR) considers, for example, an alignment with the last salary earned to be a non-neutral criterion, the courts do not always follow this and consider it in principle a valid justification. An employer is also entitled to introduce new regulations for new employees, even though these may lead to pay differences between the new and the old personnel.[68]

In **Greece**, differences in the legal nature of the employment relationship (e.g. one worker is employed under a private-law contract, while another is a civil servant) or the wage-fixing instrument (e.g. one worker is covered by a collective agreement (CA), another is not, or they are covered by different CAs) are often used as justifications, even within the same company or service where the workers are employed by the same employer and perform the same work.[69] This also occurs in **Turkey**, especially in the public sector.

In **France**, pay differentials can only be justified if the work is not of the same value. Therefore, courts concentrate on the value of jobs and not on the justification argument. Seniority, if it is not already included in a separate bonus, can be a justification for a disparity in pay.[70] **Latvian** courts are also more

68 Netherlands, The Hague Court of Appeal, *JAR* 2005/113, 4 February 2005.
69 Greece, SCPC (Civil Section) Nos 3/1997 (Plen.), 288/2003, 453/2002 (these are not gender cases).
70 France, Judgment of the Court of Cassation Soc., 19 December 2007, no. 06-44.795.

concerned with the establishment of the similarity of the cases than with the justification of differences. **Spanish** legislation does not make any express reference to justifications for pay differences, thus leaving a lot of leeway for courts to allow these or not to consider all the circumstances of the case. For instance, the Constitutional Court has considered that justification is possible for pay differences when jobs occupied mostly by men require more responsibility and a higher degree of concentration than jobs occupied mostly by women.

Romanian law does not address the issue of justifications at all, but leave full discretion to individual negotiation of salaries. In **Macedonia**, in the private sector there is also such discretion for the negotiation of salaries for managers. In **Hungarian** case law, employers may justify the wage difference by referring to their freedom of contract and/or the differences in the bargaining power of different employees. This argument usually does not save them from being liable for wage discrimination, as happened in a case in which female store workers earned 70-100 % less than their male colleagues. If, however, the employer invests some effort into fabricating an argument about the necessity of the challenged policy because of competitiveness, or applying preferential treatment regarding the comparator, the employer has a good chance of winning the case.

While **Greek** law does not allow for justification of pay differentials, differences in the legal nature of the employment relationship (e.g. being under a private-law contract or being a civil servant) or the wage-fixing instrument (e.g. being covered by a collective agreement or not) are often used as justifications, even in the same firm or service and for the same work. There is also a tendency to justify pay differences on budgetary grounds, by mere generalisations and by referring to the lack of assessment criteria for the work compared.

The **Polish** Supreme Court considers that the actual performance of the worker determines whether work is equal, and not the description of the obligations of the employee deriving from the employment contract. The **Portuguese** expert has noted that the permissibility of pay differences related to a worker's periods of absence is liable to be indirect discrimination; the law in this regard explicitly indicates that the exercise of maternity and paternity rights ('parenthood rights') cannot justify different remuneration, because other leave situations are included, including time off for reasons relating to care for other relatives, which is more common among women than among men. In addition, indirect discrimination can arise here, even in situations relating to a worker's periods of absence to take care of children, apart from maternity, paternity and parental leave, because the notion of 'parenthood rights' is not clear in the law and therefore tends to be interpreted in a strict sense, e.g. only in relation to specific rights attached to maternity, paternity and parental leave.

According to Article 9 of the **Norwegian** GEADA, differential treatment may be allowed in cases where that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and proportionate. This provision applies to all areas of society, including pay, but it is also required that the characteristic in question is of decisive significance for the performance of the work or the pursuit of the occupation. In **Iceland**, equal pay certification does not prevent a company from implementing a pay roll system that is performance based if the different wages are based on relevant considerations and not gender.

3.1.5 Requirements for comparators

In many states a comparator is not required. The **French** Court of Cassation, for instance, holds that 'the existence of discrimination does not necessarily imply a comparison with other workers'. A judge may thus find that a decision amounts to sex discrimination even when there are no men in the company who can be used as comparators. **Spanish** courts resolve equal pay cases by analysing the identity of functions or their equal value, without considering the possibility of introducing the concept of (a hypothetical) comparator, even if the law does not seem to exclude this possibility. The **Hungarian** expert

has noted that while the law does not require a comparator, the review of the published cases reveals that taking, elaborating and contrasting the actual pay of the claimant with another concrete employee significantly improves the claimant's chances of winning the case. But also referring to a hypothetical comparator is not excluded. In **Denmark** as well there is no legal requirement to this effect but in practice a comparator is often used to assert or prove discrimination, both within the same employer as well as across different sectors.

However, in other countries an actual comparator still needs to be identified on the basis of the law (**Austria**, **Croatia**, **Czech Republic**, **Estonia**, **Finland**, **Germany**, **Ireland**, **Malta**, **Northern Ireland**, **Netherlands**, **Portugal**, **Romania**, **Slovakia**, **Sweden**, **United Kingdom**). In **Poland**, it is only required in cases of direct discrimination. Some countries also allow for a hypothetical comparator (**Albania**, **Austria**, **Germany**, **Norway**, **Poland**, **Romania**, **Sweden**), while in others this is unclear, although not considered to be excluded (**Iceland**, **Portugal**, **Spain**) and is left to the courts to be decided (**Italy**, **Malta**, **Serbia**). In the **United Kingdom**, a hypothetical comparator may be relied upon but only where direct discrimination is concerned. In yet other countries, the situation is somewhat more diverse as the law itself may not be explicit as such (**Bulgaria**, **Greece**, **Latvia**), although case law does show a comparator being required. Thus, in **Latvia**, the Supreme Court, in a recent judgment in an unequal pay case, held that a court must assess the real level of the professional qualifications of an employee (for example, their education or skills for the performance of a job, etc.), the character of the work in question and the employment conditions, and then compare these indicators with those of other workers in order to establish whether the claimant has performed equal work or work of equal value and whether they have been paid according to their qualifications and the character of the job in question.[71]

In **Greece**, the definition of discrimination may be considered as implicitly requiring a comparator. In **Iceland**, the prevailing comparator is the equal pay certification, which is now required for all employers with 25 or more employees, confirming that they meet the equal pay standards. In **Germany**, in practice, equal pay cases are not decided with regard to the sex and income of comparable employees[72] but with regard to the most sophisticated job classifications set up by collective agreements which are not challenged by the courts. Furthermore, under the new Statute on Pay Transparency, employees (and civil servants, judges and the military) are entitled to obtain information on the gross remuneration of their fellow employees doing the same work or work of equal value and up to two remuneration components. The employee exercising this right must identify the comparable same work or work of equal value and the comparison group of employees of the opposite sex must contain at least six people. However, this does not work out well in practice. The first evaluation of the Pay Transparency Act in 2019 reveals that so far the right to information has hardly been used.[73]

In **Ireland**, there was a case of 14 claimants, clerical officers employed by the Department of Justice, Equality and Law Reform, who were assigned to clerical duties in the police force. They brought a claim for equal pay and the comparators were members of the force who were assigned to perform certain clerical and administrative duties. Following on the judgment from the CJEU in this case,[74] the matter was remitted to the High Court,[75] which in turn remitted it to the Labour Court, stating that the Labour Court should adopt the following approach. Namely that the Labour Court should choose comparators drawn

71 Latvia, decision of the Supreme Court on 27 April 2017 in case No. SKC-792/2017, point 10.3.

72 For an exceptional case of direct pay discrimination up to the end of 2012, see State Labour Court of Rhineland-Palatinate, Judgment of 13 January 2016, 4 Sa 616/14.

73 German Federal Government (2019), Report on the implementation of the Pay Transparency Act with Comments by the Social Partners), https://www.bmfsfj.de/bmfsfj/service/publikationen/bericht-der-bundesregierung-zur-wirksamkeit-des-gesetzes-zur-foerderung-der-entgelttransparenz-zwischen-frauen-und-maennern/137226.

74 CJEU, Judgment of 28 February 2013, *Kenny v Minister for Justice and Law Reform,* C-427/11, EU:C:2013:122. For a complete commentary on this case, see Meenan, F., *Enforcement of the principle of equal pay*, European Equality Law Network (November 2016), available at: https://www.equalitylaw.eu/downloads/3950-paper-frances-meenan-workshop-equal-pay-pdf-385-kb.

75 Ireland, [2014] IEHC 11, Judgment of Mr. Justice McCarthy of 13 January 2014. For clarification, this case originated in an appeal on a point of law from a determination of the Labour Court of 27 July 2007 (EDA 13/2007). Certain questions were referred to the CJEU. The judgment was delivered on 28 February 2013.

from the generality of all those engaged in clerical work for or as members of the police force; then the Labour Court should address the issue of whether or not the work performed by the claimants is like work; then if the work is like work, the Labour Court should address the issue as to whether or not the difference in pay is objectively justified. This will not involve consideration of the reasons for the assignment of members of the police force to certain posts. Industrial relations issues cannot of themselves be the sole basis justifying a difference in pay, but regard may be had to industrial issues as one of a number of factors. In addition, consideration must be given to the context of the generality of those engaged in clerical work; this will extend to taking into account the nature of not only the clerical work but all police work, including all incidents of service in the police force. The matter is presently before the Labour Court which is to hear submissions as to how it should proceed in the selection of comparators. The most recent decision by the Labour Court was in November 2015.[76]

In other countries, a comparator may not be required in all situations (**Estonia**, **Netherlands**, **North Macedonia**), may be applied more leniently in some cases (**Finland**) or may not be explicitly required by law but sometimes in practice (**Bulgaria**). In the **Netherlands**, a comparator is not required in situations of possible indirect discrimination in which the effects of a certain rule or practice, e.g. the granting of extra pay to workers who are prepared to work overtime, is that substantially more men than women receive an advantage. In these situations, it must be examined whether there is an objective justification for the difference in pay. The normal (stringent) objective justification test is applicable here. In this approach no specific comparator is needed, as different pay systems can be compared with one another. In most cases these systems or practices will be used within one company or group of companies, but theoretically it is possible that a comparison could be made between systems or practices that appear in a collective agreement or a statutory arrangement.

In **Finland**, a hypothetical comparator is not allowed, but in pay discrimination concerning pregnancy the comparison may be made with the person herself (if she had not become pregnant). In practice, the comparator requirement may be more flexible. For example, if a neutral norm has a differential impact on a group of people defined by having the same protected characteristic, this establishes the assumption that the norm itself is discriminatory. Such collective considerations are not necessary in cases that address whether or not a norm that is per se neutral has been applied in a discriminatory manner. If the application of certain criteria cannot be objectively justified, then it can be assumed that pay differentials are caused by gender. There are also cases where the main issue has been whether a comparison may be made if there are both women and men among those receiving lower pay.

The Labour Court has held that the burden of proof may be shifted onto the respondent employer if the claimant can present at least one comparator of the opposite sex who has better pay for equal work, irrespective of the fact that there are both women and men in lower and higher pay brackets doing equal work.[77] However, the Supreme Court and the Supreme Administrative Court have previously decided that in cases concerning the new pay system for judges, since both men and women were placed in lower bracket offices, pay discrimination could not exist. In these cases the claimants had not even managed to establish an assumption of discrimination, which would reverse the burden of proof onto the respondent employer.[78] It seems that neither the Supreme Court nor the Supreme Administrative Court proceeded to consider whether indirect discrimination could have been occurring. Evidence of indirect discrimination would have required a comparison of how female and male judges were positioned in different pay brackets.

In **North Macedonia** and **Romania**, the comparator requirement relates only to cases of direct discrimination. In the latter country, the National Council for Combating Discrimination has also required parties to provide evidence regarding a real comparator, even if the law allows for a hypothetical one. This

76 Ireland, *Department of Justice, Equality and Law Reform v CPSU* EDA1518. This decision was essentially a case management conference.
77 Finland, Labour Court TT:2002-7-10.
78 Finland, cases from the Supreme Court KKO 2009:78 and the Supreme Administrative Court KHO 2005:51.

is explained by the fact that in practice salaries are established in direct negotiations between employer and employee, and by the lack of norms establishing salary schemes that would in fact allow for a hypothetical comparator. **Polish** law is comparable in this regard, in that the written law also allows for a hypothetical comparator but case law indicates that it must be an actual comparator, and the prevalent view is also that a comparator may not be a person employed by another employer. Furthermore, Polish law stipulates the comparator requirement only explicitly for direct discrimination, yet such a requirement also seems to be implied in the law for indirect discrimination cases. In the **United Kingdom**, a hypothetical comparator may be relied upon only in direct discrimination cases, but case law on this is lacking so far.

In the **Netherlands** a complex two-way approach is used, the first one requiring a concrete comparison of the salary of a person of one sex with that of a person of another sex. The comparator should be an actual person within the same company, so no hypothetical comparator is allowed. The second approach is not specific for equal pay, but is an application of the concept of indirect discrimination. In this approach a certain practice, e.g. the granting of extra pay to workers who are prepared to work overtime, may be contested if the result of this practice is that substantially more men than women receive the extra pay. It then has to be examined whether there is an objective justification for the difference in pay. In this approach no specific comparator is needed, as different pay systems can be compared with one another. In most cases these systems or practices will be used within one company or group of companies, but theoretically it is possible that a comparison is made between systems or practices that appear in a collective agreement or a statutory arrangement.

In **Greece**, the provisions transposing the definition of direct discrimination from the directives allow a hypothetical comparator. However, according to **Greek** case law, applying the broader equal pay principle requires a comparator in the same enterprise or service or in the framework of the same wage-fixing instrument (e.g. collective agreement, statutory or administrative provision) and when there is no such comparator, the claimant can allege that they fulfil the conditions for the higher pay provided by an instrument for workers performing or having performed the same work, and claim the pay difference. In **Estonia**, a comparable employee means an employee working for the same employer, engaged in the same or similar work, but by default the comparison is made on the basis of the collective agreement and in the absence thereof a comparable employee in the same region is taken. In **Malta**, employees are to be compared with others in 'the same class of employment', with the same employer. Whether comparison of the position of employees with different employers is possible has not been tested as yet.

The above already reveals quite some difficulties that the requirement of a comparator may present in practice. A clear hurdle concerns the requirement that a comparator has to be employed by the same employer (**Croatia**, **Estonia**, **Greece**, **Malta**, **Netherlands**). In **Croatia**, as an exception, a comparator may be a person employed by different employers in the event of temporary agency work (where the agency and user are employers). Article 46(5) of the Labour Act (on employment contracts for temporary work) provides that the amount of the agreed salary of the assigned employee should not be '…lower and less favourable, respectively, than the salary (…) of an employee who is employed with the user in the same job, to which the assigned employee would have been entitled if he or she had entered into a contract of employment with the user.' This provision is broad because it prohibits different salaries for the assigned employee and the employee working with the user irrespective of gender, i.e. it also applies to employees of the same gender. In **Greece**, it is also considered problematic that, according to case law, the hypothetical comparator must perform or have performed the same work. Another hurdle concerns the point of reference that is to be taken for the comparison: formal requirements as entailed e.g. in a job classification system or the performance of actual tasks; whenever there is a legally prescribed salary classification system the performance of actual tasks will be irrelevant (**Croatia**).

Case law related to comparators, proof and evidence

National case law reveals the problems that may present themselves in practice in relation to the requirement of a comparator. In the **Czech Republic**, such a case was at the interface of the issue of

determining 'equal value' and proof. A woman working as a head physician at a hospital was earning considerably less than her male colleagues. The Public Defender of Rights came to the conclusion that if a female employee proves a difference in remuneration compared to her male colleagues performing work of equal value, it is up to the employer to provide evidence that the difference is not connected to gender. If the employer remunerates its employees according to a system which lacks transparency, it must prove that the system is set up to be neutral and does not lead to discrimination in remuneration.

The court had to decide whether the position of the head physician was different because different departments at the hospital differ from each other (i.e. it was not the same job for which the same remuneration would be required) or whether it was, indeed, work of the same value within the meaning of Section 110 of the Labour Code. The court concluded that work of the same value must be defined carefully, taking into account e.g. number of medical procedures performed, whether it is a surgical field or not, the ability of the head physician to ensure the functioning of the department by attracting a large number of patients (with financial resources), length of practice, expertise and the reputation of the primary practitioner in the field.[79] The court also concluded that an assumption that the work was of the same value could not be derived just from the fact that the labour contracts of the two employees in question were very similar.

A recent case before the **Estonian** Supreme Court,[80] concerned the cancellation of the employment contract of a female lawyer in a regional office of the Tax and Customs Board in December 2015, for which economic reasons were given. The lower level courts briefly discussed possible discrimination in relation to issues around the extraordinary cancellation of the employment contract and possible compensation to be paid to the claimant. The claimant stated that she was discriminated against when she was paid a lower wage compared to male colleagues and lawyers at the Tallinn office for the same work. She had worked for the Tax and Customs Board since 2004 and, due to the new law on the civil service,[81] had been given a new employment contract in March 2013, just before new salary guides were adopted on 8 April 2013. The claimant noted that her salary level had stayed at the lowest level, but that given her long career and high competence, she should be paid at the higher pay level for lawyers. The claimant asked for compensation for the unpaid part of her pay between April 2013 and December 2015.

The claimant was asked to provide the names of all comparators, e.g. names of male employees doing the same work. The claimant rejected the request and stated that names are not necessary as proof in discrimination cases. The Circuit Court had ruled that the claimant had not fulfilled the requirement to provide exact evidence and so it ignored the discrimination claim.[82] The court decided that the claimant had discontinued the discrimination claim and so did not discuss the issue. The civil chamber of the Supreme Court found several procedural mistakes and determined that the cancellation of the employment contract was void, due to the absence of a legal basis or the non-conformity with the law, or nullified, due to a conflict with the principle of good faith. The Court ruled that the former employer should pay the employee compensation. Unfortunately, the Supreme Court did not explore possible discrimination against the employee.

In another case, the Supreme Court of **Estonia** also ruled that two different types of legal measures applied to two employees cannot be deemed to constitute discrimination, if these two employees cannot be considered to be comparable individuals.[83] Further, there is no discrimination if two employees are indeed treated differently from one another, but that difference is due to objective reasons that are not related to the gender of the employees. The Supreme Court also set aside the required compensation for

79 Czech Republic, Judgment No. 78 EC 1342/2011 of the District Court in Blansko, of 30 June 2015. No ECLI available.
80 Estonia, Supreme Court, Judgment of the Civil Chamber, *Insler v Tax and Customs Board*, No. 2-16-708 of 21 November 2018.
81 The Civil Service Act entered into force on 1 April 2013, the number of civil servants was reduced and specialists were given the position of employees. The civil service is made up of officials and employees. An official is a person who is in the public administration service and is appointed to a post and an employee is someone recruited for a job in an authority.
82 Estonia, Supreme Court, Judgment of the Civil Chamber, No. 2-16-708 / 54 of 21 November 2018, available at https://www.riigiteataja.ee/kohtulahendid/detailid.html?id=238029596.
83 Estonia, Supreme Court, Judgment of the Civil Chamber, No. 3-2-1-135-11 of 4 January 2012.

non-proprietary damage caused by the dismissal, because the claimant referred to economic harm (the lack of a job, the lack of income) and was unable to prove non-proprietary damage. This decision makes it extremely complicated, if not even impossible, to apply for non-proprietary damage in the future. The major arguments of the Supreme Court were that the claimant was in a higher position, had damaged the reputation of the employer and had shown no remorse for what had happened. The decisive factor was the fact that, unlike his colleague, the assistant manager had greater responsibility and his violation of the rules was more serious. Consequently, the difference in the employees' treatment by the employer was considered justified.

The **Dutch** Court of Appeal of 's-Hertogenbosch ruled that an employer had not clarified why the work experience of the male comparator was of more value than the work experience of the female employee.[84] The employer also failed to explain why a reduction in the hours of the male employee justified a higher hourly wage. The fact that the employer was not transparent about his motives for paying the male worker a higher salary than his female colleague therefore led the court to rule that the employer had discriminated against the woman and had to pay to her the same salary as that paid to the man. The NIHR has published several opinions on equal pay. The NIHR examines – or asks a job classification and evaluation specialist to examine – whether a comparator does work of equal value. The outcome differs depending on the situation. Sometimes employees can indeed be compared,[85] but sometimes the conclusion is that the comparator chosen by the claimant does not perform the same work or work of equal value.[86]

In **Finland** as well the choice of comparator and the burden of proof have been central in several cases. There is legal uncertainty as to when the employee has been able to provide facts from which it may be presumed that there has been direct or indirect discrimination. Finnish courts have come to different conclusions in the so-called 'judge cases' that were brought to the courts when the pay system for judges was changed, and judges were redistributed among different pay categories. The definition of pay discrimination under Section 8 of the Act on Equality requires that the employer implements conditions on pay so that one or several employees are disadvantaged on the ground of sex. The Labour Court in case TT:2002-7-10 accepted that the burden of proof shifted to the employer, when an employee had shown that their pay was lower than the comparators, who were of the opposite sex. The employee was not required to show that the disadvantage was caused by their sex in order to shift the burden of proof. The Labour Court required that the employer must justify pay differentials in each case.

Later, Supreme Court case KKO 2009:79 and Supreme Administrative Court case 2005:51 were based on a different interpretation. These courts held that the employees had not been able to establish a presumption of discrimination to shift the burden of proof onto the respondent, as the courts assumed that sex was not the ground of the disadvantage, as both women and men were placed in lower pay categories.

In **Hungary**, in 2018, the Equal Treatment Authority established direct discrimination in a case in which a civil servant working in a public health institution on labour, fire security and safeguarding complained that her salary was lower than men who worked in the same field.[87] In another case, in 2017, the Equal Treatment Authority skilfully used statistical evidence to establish a case of indirect wage discrimination.[88] In this case, female workers claimed that they were victims of indirect discrimination when they had not received their extra '13th month payment' (an in-cash benefit) due to being on sick leave with their children. The preconditions for this benefit had been set by the applicable collective agreement. Only

84 Netherlands, Court of Appeal 's-Hertogenbosch, *JAR* 2013/13, 13 November 2012 and *JAR* 2013/106, 5 March 2013.
85 Netherlands, College voor de Rechten van de Mens, Opinion 2012-142, 15 August 2012: unequal pay because male colleague was graded three steps higher, because of shortages on the labour market, negotiations and previous work experience.
86 Netherlands, College voor de Rechten van de Mens, Opinion 2018-30, 30 March 2018: no unequal pay because the comparators have a higher position.
87 Hungary, Equal Treatment Authority (*Egyenlő Bánásmód Hatóság*) Decision No. EBH/152/2018.
88 Hungary, Equal Treatment Authority (*Egyenlő Bánásmód Hatóság*) Decision No. EBH/130/2017.

employees who were absent from work for fewer than 25 days per year were eligible to receive the benefit. The calculation of the workers' days of absence did not include annual paid holiday, work-related illness, or illness which needed inpatient hospital care. The mothers of young children claimed that, even though the regulations were seemingly impartial, they were disproportionately detrimental and discriminatory towards mothers with children under the age of 12, which is the age limit for eligibility for sickness payments based on children's rights under the social security scheme. The Equal Treatment Authority conducted a statistical investigation comparing the number of workers who were and were not eligible for the benefit and the total number of workers, and the number of female workers who had and did not have children under the age of 12. The statistical investigation showed that the rule determined by the collective agreement was disproportionately disadvantageous to female workers with young children compared to male or female workers who had no children. On the basis of the statistical evidence, the Equal Treatment Authority established indirect discrimination and ordered the employer to eliminate it.[89] This case is a very important stepping-stone in Hungarian anti-discrimination case law, because it sets a good example of how to investigate indirect wage discrimination cases and how to collect, examine and evaluate statistical evidence.

3.1.6 Existence of parameters for establishing the equal value of the work performed

Interestingly, it appears that national law specifies (to some extent) how and by what criteria the equal value of work performed should be established in only about one third of the countries covered by this report (**Bulgaria**, **Croatia**, **Czech Republic**, **Finland**, **France**, **Germany**, **Hungary**, **Ireland**, **Luxembourg**, **Montenegro**, **Norway**, **Poland**, **Portugal**, **Serbia**, **Sweden**, **United Kingdom**). The applicable law in **Cyprus** contains an open-ended list of parameters to be considered when establishing equal value. In **Norway** as well the parties can in principle raise all aspects/parameters that they consider relevant. Criteria are of a personal, job-related and labour-market nature:

- knowledge (**Luxembourg**, **Norway**, **Sweden**);
- professional qualifications (including titles and diplomas) and vocational training (**Albania**, **Cyprus**, **France**, **Germany**, **Hungary**, **Luxembourg**, **Malta**, **Montenegro**, **North Macedonia**, **Norway**, **Poland**, **Portugal**, **Serbia**);
- professional (work) experience (**Albania**, **Bulgaria**, **France**, **Hungary**, **Luxembourg**, **North Macedonia**, **Poland**, **Portugal**);
- seniority (**Bulgaria**, **Cyprus**, **Malta**) or experience (**Luxembourg**);
- skills (**Croatia**, **Ireland**, **Malta**, **Montenegro**, **Poland**, **Serbia**, **Sweden**, **United Kingdom**);
- performance (**Montenegro**);
- work results (**Czech Republic**);
- nature of the job (**Albania**, **Croatia**, **Cyprus**, **Finland**, **Germany**), plus quantity and quality (**Albania**, **Finland**, **Hungary**, **Portugal**);
- responsibilities/strenuousness/decision-making/significance (**Albania**, **Croatia**, **Cyprus**, **Czech Republic**, **France**, **Hungary**, **Luxembourg**, **Ireland**, **Lithuania**, **Montenegro**, **Norway**, **Poland**, **Portugal**, **Serbia**, **Sweden**, **United Kingdom**);
- complexity (**Czech Republic**);
- physical efforts, manual work (**Albania**, **Croatia**, **Cyprus**, **France**, **Hungary**, **Luxembourg**, **Ireland**, **Norway**, **Poland**, **Portugal**, **Serbia**, **Sweden**, **United Kingdom**); according to the ECJ, payment based on physical effort may be indirectly discriminatory against women.[90]
- mental effort, stress (**France**, **Hungary**, **Luxembourg**, **Ireland**, **Norway**, **Poland**, **Portugal**, **Serbia**, **Sweden**, **United Kingdom**);
- working conditions (**Albania**, **Croatia**, **Cyprus**, **Czech Republic**, **Hungary**, **Finland**, **Germany**, **Ireland**, **Montenegro**, **Norway**, **Portugal**, **Sweden**);
- whether substitution for one another is possible (**Croatia**);

89 Hungary, Equal Treatment Authority (*Egyenlő Bánásmód Hatóság*) Decision No. EBH/130/2017.
90 Judgment of 1 July 1986, *Gisela Rummier v Dato – Druck GmbH*, Case 237/85, EU:C:1986:277, Paragraph 24.

– labour-market conditions (**Hungary**) and market value; in **Norway** a recurring point of discussion is to what extent this can justify unequal pay.

For **France**, the list contained in the law is not exhaustive and this also seems to be the case for the **United Kingdom**. The **Hungarian** expert has noted that the newly introduced criterion of labour-market conditions, according to the intentions of drafters, opens up the possibility for nationwide employers to provide different wages in different parts of the country. This criterion is considered to be an odd fit with the law at issue, as all other criteria deal with the individual and it also provides some leeway for employers. In **Finland**, very dissimilar jobs can be considered to be of equal value, if they are equally demanding. Given the deeply gender-segregated labour market, this is of particular importance. In deciding whether equal work can be established, attention shall also be paid to the differences used in job classifications. However, the preparatory works also state that if the system of classification used in a collective agreement *de facto* discriminates on the basis of gender, the social partners shall modify the agreement in question.[91] The Equality Board has adopted a similar approach in a case on pay discrimination.[92] More generally, in **Turkey**, there is a tendency to justify pay differences by mere generalisations.

In other countries, it is left largely to the social partners to deal with this in collective agreements (**Austria**, **Bulgaria**, **Finland**, **Turkey**). In **Austria**, work evaluation systems are contained either in collective agreements or in obligatory agreements between works councils and employers and in some cases in individual agreements between employers and employees. Equal treatment law, however, obliges all parties at every level of collective bargaining to apply the equal pay principle and to ensure that no discriminatory criteria for work evaluation processes are implemented.

In yet other countries, it is mainly equality bodies that provide for guidance in this respect (**Belgium**, **Estonia**). The **Belgian** Institute for the Equality of Women and Men thus issued a methodological instrument, the 'Gender neutral checklist_for job assessment and classification', which was given legal recognition in the sense that when a joint sector committee adopts a job classification system, the latter must now be submitted to a department of the federal Ministry of Employment for an assessment of its gender neutrality, with the checklist being one element to be taken into consideration for this purpose. The **Estonian** Gender Equality and Equal Treatment Commissioner found sex discrimination after job evaluations in some opinions, deducing requirements from the law in a more indirect way. In **North Macedonia**, the Ministry of Information Society and Administration publishes a job classification system without determining pay, but based on the same criteria for both men and women.

In **Croatia**, the employer is obliged to pay the salary stipulated by regulations, collective agreements, employment rules or employment contracts. If the basis and parameters for the determination of salary are not stipulated in a collective agreement, any employer employing more than 20 employees shall stipulate them in employment rules. In the absence of such agreement and rules, and if the employment contract does not provide sufficient information to determine the salary, the employer shall pay the employee an 'adequate salary'. An adequate salary is the salary usually paid for equal work, and if this cannot be determined, the court will decide on it in accordance with the given circumstances.

Dutch equality law stipulates that work must be valued on the basis of a sound system of job evaluation. The idea behind this rule is that employers should make their reward systems transparent. **Greek** law refers to 'professional' instead of 'job' classification and also refers to the use of 'personnel evaluation', which is considered misleading, as it may imply that the classification and evaluation concern the worker rather than the job content, as required by the CJEU. In **Iceland**, job classification systems are used at the municipal level and these systems base the evaluation not on the performance of the employee but entail analysis of the basic requirements that apply to those carrying out the job. In **Luxembourg**, Article L225-3(2) of the Labour Code incorporates the obligation for classification systems to have common

91 Finland, Government Bill HE 57/1985, 19.
92 Finland, Equality Board opinion No. L 2/2005.

criteria for women and men. In **Croatia**, many collective agreements include a general provision on equal pay for equal work, but without further explanations or parameters.

In **Iceland**, the Equal Pay Standard is also intended to make pay, and any differences in pay for similar work, more transparent but it does not demand the same uniform pay system for all companies and institutions. One of the biggest challenges enterprises face in the implementation of the Standard is classifying which jobs are of the same or equal value. The Standard requires each workplace to introduce the same four to five key criteria with sub-criteria under each one. The Standard highlights four main criteria (IST 85: 2012, Annex B): expertise /competence, responsibility, strain and working conditions. These must be elaborated with specific content. Companies may have different (sub)criteria that make sense for each business, but the Standard obliges them to work out a more formalised system for their pay decisions, e.g. by carrying out wage analysis. This requires that jobs are classified by evaluating them against each other and assigning them weight. These are then used as a uniform measure to classify all jobs, so that the jobs within each workplace are comparable to each other on the basis of the uniform classification and salary system.

Case law approaches

In some countries, specific parameters for the determination of 'equal work' and 'work of equal value' ensue from case law. The **Greek** expert has noted that in 'equal value' cases under the broader equal pay principle, the typical major premise is that the equal pay principle applies to 'workers employed by the same employer, who belong to the same category, have the same formal qualifications and provide the same services aimed at serving the same category of needs, under the same conditions'. So, workers with different qualifications or performing different duties are not compared, even where they perform the same work under the same conditions. Some judgments require that the content of the work be specified, but the criteria are unclear.

Swedish case law contains a few old but really instructive cases as regards the comparison of work claimed to be of equal value.[93] Two of them concern Örebro County and the health sector. The issue at stake was 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 this to be of equal value, but in this case did not find the method used by the Equality Ombudsman (*Diskrimineringsombudsmannen* – DO) to be sufficient to prove it. No discrimination was thus found. The second case also concerned alleged pay discrimination against a midwife as compared to a hospital technician. In this case, the midwife and the technician were indeed 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 thus found. The Labour Court, however, accepted the employer's objection that the higher wages of the technician were due to market forces – 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. There was thus no discrimination. This can be compared with the 'parallel' Labour Court Case 2001 No. 76, in which a nurse and a hospital technician were compared and their work was found to be of equal value, but the wage difference could be explained by market reasons. Thus, in this case too the wage discrimination claim was dismissed.

The **Italian** Tribunal of Aosta of 13 April 2016 ascertained gender discrimination in pay where a female manager, in the head office of the accounts department of the local casino, had been paid about EUR 92 000 a year whereas her male colleagues had been paid about EUR 140 000 a year on average and some other male employees at a lower level received higher remuneration than she did. This case has to be recorded as gender discrimination in pay, which is taken to court very rarely in Italy. Moreover, the judgment shows a rigorous interpretation of Article 28 of Decree No 198/2006, which provides the

93 Sweden, Labour Court Case 1996 No. 41 as compared to Labour Court Case 2001 No. 13.

principle of equal pay for equal work. In fact it states that the intention to discriminate as well as the possible fairness of the remuneration considering the job and the minimum wages provided by collective agreements are useless: the discrimination is proved by the mere fact that the female worker received a lower wage compared to male colleagues while she, as a manager, had higher responsibilities and weaker protection against dismissal. The judgment awarded the worker damages of about 41 % of her remuneration, considering that a fair remuneration could amount to EUR 130 000 a year (this was a little higher than that of the better paid employees).

The **Spanish** Constitutional Court has issued several rulings,[94] 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 higher value to men's activities.[95] The Supreme Court also established that workers at the same company doing different work deserve the same payment if the difference is based on the fact that the kind of jobs done mostly by women are undervalued in relation to the jobs occupied mostly by men.[96] The Supreme Court considered, in relation to a hotel, that the chambermaids (predominantly women) were performing work of equal value to that of the bartenders (mostly men), on the basis of which they deserved equal pay.[97] The jobs were considered to be of equal value because both were on Level IV of the wage structure set out in the applicable collective agreement.[98]

In **Norway**, a landmark case before the Labour Court[99] concerned an equal pay claim by female bioengineers as compared to other types of engineers who were all male, the bioengineers being paid lower hourly wages than the other engineers. The court found, after a thorough and specific evaluation of the various elements of the job tasks, that it was indeed work of equal value and that the equal pay rule had been violated. The Court found that the clause collectively negotiated was invalid, while the remaining part of the collective agreement remained valid. Another landmark case is Tribunal Case 42/2009 where a municipality was ordered to remedy the error of not paying equal pay to women working in afterschool care compared to men in equivalent positions as 'work leaders'.[100] The Equality Tribunal undertook a specific evaluation of the job tasks at the two workplaces.

In a case before the **Icelandic** Supreme Court the issue concerned whether jobs at the same level in the hierarchy were of equal value; the job of an equality officer in the municipality whose wages were based on a job evaluation linked to collective agreements, as opposed to the job of an employment officer with higher wages as the post was held by an engineer and the evaluation was linked to the collective agreements for engineers. The Supreme Court held that, in order for jobs to be considered of equal value, an all-inclusive evaluation was needed; although aspects of the jobs were different, the Court considered that the aim of the Gender Equality Act would not be achieved if wage equality was only to reach people within the same class of work, as freedom of contract on the labour market was subject to the wage equality provided for in the GEA. In this case the claimant had shown that she had been discriminated against as the jobs were comparable in substance and form.[101]

94 For instance, Spain, Judgment of the Constitutional Court 58/1994 of 28 February 1994, ECLI:ES:TC:1994:58: http://hj.tribunalconstitucional.es/es/Resolucion/Show/2575.
95 For instance, Spain, Judgment of the Constitutional Court 145/1991, of 1 July 1991, ECLI:ES:TC:1991:145: http://hj.tribunalconstitucional.es/es/Resolucion/Show/1784.
96 Spain, Judgment of the Supreme Court of 14 May 2014, appeal number 2328/2013, ECLI: ES:TS:2014:1908 www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7084867&links=&optimize=20140602&publicinterface=true.
97 Spain, Judgment of the Supreme Court of 14 May 2014, appeal no. 2328/2013.
98 Spain, Judgment of the Supreme Court of 14 May 2014, appeal no. 2328/2013, ECLI: ES:TS:2014:1908: www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7084867&links=&optimize=20140602&publicinterface=true.
99 Norway, ARD-1990-148.
100 Norway, http://www.diskrimineringsnemnda.no/nb/innhold/side/vedtak.
101 Iceland, Supreme Court case No. 11/2000, judgment of 31 May 2000.

In **Belgium**, a furniture factory had classified its blue-collar workers in four categories, but all female workers belonged to the third one. One of them took legal action, claiming that she was performing the same tasks as the men in the first category, who were entitled to higher remuneration. After hearing a number of workers as witnesses, the labour court in Bruges concluded that the claim was valid and that the employer had been discriminating against women. Fixed damages equal to six months' pay were allowed to the claimant.[102] When the employer appealed, the Labour Court of Appeal in Ghent (division of Bruges) completely upheld the ruling.[103]

The **French** expert has also reported three relevant cases from the Court of Cassation, dating from 1997, 2010 and 2014, which concentrated on the issue of equal work and work of equal value.[104] In **Malta**, a case[105] investigated by the National Commission for the Promotion of Equality (NCPE) in 2015 addressed the issue of pay and this was the subject of an article published by the *Times of Malta*.[106] The NCPE concluded an investigation[107] following a complaint from a female employee that she was receiving a lower wage than male employees who were at a similar or same level and had similar responsibilities. The NCPE's commissioner deemed that the company's arguments that there is no set salary scale for managers should not be detrimental to the company's employees and that the company should strive for more transparency in the manner in which wages are set.

According to the **German** expert, German courts have supported the deficiencies of statutory law by establishing sophisticated differences between the principle of equal pay and the prohibition of pay discrimination, giving broad leeway to collective bargaining[108] and refusing to review complicated work assessment procedures due to lack of criteria or displaying gender stereotypes to found their decisions. Legal action against pay discrimination has only been successful in some cases concerning pensions. Before the 2017 Pay Transparency Act entered into force, courts decided time and again that neither Article 157 TFEU nor Sections 1 or 7 of the General Equal Treatment Act provide for the general principle of 'the same pay for the same work' but only apply in cases of sex/gender discrimination which, unfortunately, could almost never be found or proven.[109]

In **Poland**, a number of cases have related to situations where employees claimed to be unequally paid for equal work, but not on the grounds of sex. However, the findings as to what should be taken into account when determining pay for equal work and what should be understood as work of equal value are also relevant in cases of gender discrimination. In the judgment of 9 May 2014,[110] the Supreme Court generally stated that equality is not the same thing as equal treatment, as it may require differential treatment in order to equalise opportunities or ensure equal results, or to reward and motivate the best employees financially. Different treatment of workers in terms of employment, including pay, is possible.

102 Belgium, Labour Court Bruges, Judgment of 25 June 2013, *Algemene Rol* No. 07/127676/A, unreported. The fact that the expert only heard about this case with a four-year delay is due to the haphazard way in which case law is made available (with the sole exceptions of decisions of the Constitutional Court, the *Conseil d'État/Raad van State* – higher administrative court – and, not exhaustively, the Court of Cassation).

103 Belgium, Labour Court of Appeal Ghent, Judgment of 5 December 2014, *Algemene Rol* No. 2013/AR/197, unreported.

104 France, Judgment of the Court of Cassation of 12 February 1997, No. 95-41694. Judgment of the Court of Cassation of 6 July 2010, No. 09-40021, Judgment of the Court of Cassation of 22 October 2014, No. 13-18362.

105 NCPE (2016) *Annual report 2015*, p.38. https://ncpe.gov.mt/en/Documents/Our_Publications_and_Resources/Annual_Reports/NCPE%20AR%202015.pdf.

106 *Times of Malta* (2018), 'Woman finds male colleagues are paid €500 more per month – investigation proves her right', 24.01. January 2018, available at: https://www.timesofmalta.com/articles/view/20180124/local/woman-finds-male-colleagues-are-paid-500-more-per-month-investigation.668732.

107 NCPE (2016) *Annual report 2015* https://ncpe.gov.mt/en/Documents/Our_Publications_and_Resources/Annual_Reports/NCPE%20AR%202015.pdf.

108 There is only one judgment (Federal Labour Court, judgment of 20 August 2002, 9 AZR 353/01) in favour of a female applicant and declaring regulations of a collective agreement to be unconstitutional, but as the applicant lost her vacation benefits due to her maternity leave taken before birth, this might rather be seen as a decision upon maternity protection although involving equal pay.

109 E.g. Germany, Federal Administrative Court, Judgment of 9 April 2013, 2 C 5/12; Federal Labour Court, Judgment of 25 January 2012, 4 AZR 147/10; State Labour Court of Rhineland-Palatinate, Judgment of 11 October 2018, 5 Sa 455/15; State Labour Court of Baden-Württemberg, Judgment of 21 October 2013, 1 Sa 7/13; Labour Court of Berlin, Judgment of 1 February 2017, 56 Ca 5356/15.

110 Poland, Supreme Court, Judgment of 9 May 2014, *S.W. v Polish Railways*, I PK 276/13.

However, it must be based on a legitimate need for which such differentiation is allowed. In a ruling of 11 October 2013,[111] the Supreme Court clarified what permissible reasons are for wage differentiation, stating that equal work is work of the same nature, the same with regard to the qualifications required to perform it, the conditions under which it is performed and the quantity and quality of the work. However, it also considered that the quantity and quality of work performed constitute acceptable premises for wage differentiation.[112]

Another example of work in the same position (equal work) was dealt with in the jurisprudence of courts of appeal. The Court of Appeal in Szczecin in its judgment of 6 March 2018[113] thus stated that: 'There is no rational argument in support of the thesis that an employee currently employed in a given position should receive the same remuneration as an employee previously employed in the same or a similar position, or a few years back. The essence of the right guaranteed in Article 18_{3c} of the Labour Code is the equality of employees in the process of providing work, and not the guarantee of obtaining remuneration at a specified level of value'. In its judgment of 7 February 2018,[114] the Supreme Court held that length of service may constitute a justified reason for a pay differentiation when the employer does not provide for a length of service allowance, and when professional experience translates into the quality of the employee's length of service. However, it is not permissible to differentiate remuneration twice on the basis of the same criteria: length of service, by taking it into account when determining the basic remuneration rate, and then by also granting the length-of-service allowance.

In a judgment of 8 December 2015,[115] the Supreme Court noted that the criterion of length of service is not, in itself, a sufficient parameter for determining whether the work of compared employees is equal or of equal value, as provided for in Article $18_{3c}(1)$ of the Labour Code, as it does not refer to the objective characteristics of the work performed. At the same time, length of service may justify differentiation of remuneration components other than the length-of-service allowance for employees performing the same or equal work or work of equal value only if the practice and greater professional experience gained during a longer period of service at a comparable workplace objectively justifies a higher remuneration for employees with higher qualifications and higher professional efficiency resulting from a longer period of service at the same workplace.

Subsequent cases concerned the situation of alleged unequal pay for work of equal value. In a judgment of 14 March 2018,[116] the Supreme Court ruled that the same description of the position held by the claimant at work, as compared to other employees, namely 'chief (main) specialist' does not determine *ipso jure* that such employees provide work of equal value. When dismissing the claimant's cassation appeal (for a technical reason) the Supreme Court indicated 'for the record' that in the employer's organisational structure there was only one human resources position, which was occupied by the claimant. The comparison of her work with the work of other people occupying the position of 'main specialists' in the company, such as an accountant, manager or PR specialist, in terms of the scope of described duties, required professional qualifications and rules of liability, which were 'diametrically' different from the scope of duties performed by the applicant. This was the reason why there was no violation of the principle of equal treatment in this case. This judgment raises doubts as to whether the Supreme Court in the circumstances of this case was entitled to make such a categorical statement without focusing on detailed, separate examination of each of these positions.

The issue of the right to remuneration was also raised in a situation where the position occupied by the applicant was unique in the organisational structure of a given employer. In its decision of 25 April

111 Poland, Supreme Court, Judgment of 27 June 2013, III PK 28/13.
112 Similar argumentation can be found in Poland, Supreme Court, Judgment of 14 December 2017, II PK 322/16.
113 Poland, Court of Appeal in Szczecin, Judgment of 6 March 2018, III Apa 20/17.
114 Poland, Supreme Court, Judgment of 7 February 2018, II PK 22/17. Cf also the Polish Supreme Court, Judgment of 15 March 2016, II PK 17/15.
115 Poland,Supreme Court, Judgment of 8 December 2015, I PK 339/14.
116 Poland, Supreme Court, Judgment of 14 March 2018, II PK 125/17.

2018,[117] the Supreme Court held that: 'In the case of performance of employee duties in a position which is not repeated in the organisational structure of the employer, there is no reasonable possibility to indicate and verify objective criteria for comparability of equal work for which there is the right to equal remuneration.' Admittedly, this ruling was made in the context of dismissing the cassation appeal due to it being manifestly ill-founded. Maybe this is the reason why the Supreme Court did not consider in this case the possibility of comparing the claimant's remuneration with the remuneration of employees performing work of equal value and also excluded from the outset the possibility of comparing the remuneration of employees for equal work but performed in other comparable enterprises.

In **Croatia** as well very few equal pay cases are actually based on claims of sex discrimination;[118] most case law concerns equal pay cases in public services and administration and involving complaints on the formal salary classification system and the actual tasks performed by the worker. Although the same guarantee of equal pay applies in public services as in private employment relationships, the formalistic approach of courts to the rigid system of job classification in public services renders almost impossible any unequal pay claim. This can be concluded indirectly from a series of cases involving claims of public servants that they should be paid more because they actually perform the tasks of higher skilled workers or work classified in another job category. Any formal difference in professional classifications will overturn comparability, as well as the fact that the public servant performs tasks of a higher paid job category without any formal decision of the public body, even where their superiors have given informal orders to perform those tasks.[119]

3.1.7 Wage transparency

There can only be awareness of pay discrimination when wage and job evaluation systems are public and transparent. The European network of legal experts in gender equality and non-discrimination published a comprehensive report on pay transparency in the EU,[120] following the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency,[121] which sought to contribute to raising awareness regarding this issue.

Remaining problems

Many problems persist regarding pay transparency. There is still a considerable number of states that do not provide for any legal measures whatsoever to ensure wage transparency and where this issue has not been addressed in case law either (**Bulgaria**, **Croatia**, **Czech Republic**, **Greece**, **Hungary**, **Ireland**, **Liechtenstein**, **Luxembourg**, **Macedonia**, **Malta**, **Montenegro**, **Romania**, **Serbia**, **Slovakia**, **Spain**).

In **Latvia**, workers' representatives or trade unions formally have the right to require information on pay levels according to Article 11(1) of the Labour Law, however, there is no information on any case where such a right would have been used for the purpose of ensuring the equal pay principle. The **Slovene** expert has noted that both the lack of information on comparable jobs (as the concept of equal work and the term comparator are not defined) and on the salaries of co-workers makes it extremely difficult for potential victims of discrimination to start judicial proceedings. In **Cyprus**, the legislation does not provide for a wage transparency requirement in the sense of obliging employers to disclose pay rates and the gender pay gap generally or to the interested party.

117 Poland, Supreme Court, Judgment of 25 April 2018, I UK 499/17.
118 See, for example, an unsuccessful equal pay claim alleging discrimination based on sex and age: Municipal Labour Court in Zagreb, Pr-1433/12, County Court in Zagreb, Gžr-2213/14 and Constitutional Court of the Republic of Croatia, U-III-1711/2015.
119 See, for example, Supreme Court of the Republic of Croatia, Revr-1952/09; Revr-196/10; Revr-201/11).
120 Veldman, A. (2017) *Pay transparency in the EU*, European Commission, available at: https://www.equalitylaw.eu/downloads/4073-pay-transparency-in-the-eu-pdf-693-kb.
121 Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency, OJ L 69, 8.3.2014, p. 112–116, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014H0124.

In **Serbia**, the Action Plan for the Implementation of the Strategy for Prevention and Protection against Discrimination for the period 2014-2018 requires further elaboration of the principle of equal pay for men and women and the introduction of sanctions for acting contrary to this principle,[122] but does not require pay transparency. In **Turkish** law, rules on wage transparency are also lacking. Payments to employees and public officials are confidential. Therefore, it is difficult to detect any differences in wages. However, in a recent case, the Court of Cassation decided that sharing the amount of a pay rise with a colleague did not constitute a valid ground for the termination of the employment contract.[123]

In **Hungary**, the possibility of excessive wage adjustment in the public sector is linked to the result of the unspecified evaluation of performance or quality of work done in the previous year. It is considered that the possibility of severe wage adjustment reduces the transparency of wages, and may also contribute to the statistically proven gender-based wage gap in the public sector, the more so given the fact that it is quite frequent in both the private and the public sector that the employer arbitrarily provides better wage conditions for some individuals or some groups of workers. For example, in one case, some groups of nurses working in different departments of the same hospital were entitled to receive hazard bonuses, while other groups of nurses were not, despite working under identical or very similar conditions.[124] During the litigation, the employer stopped paying the hazard bonus to all its nurses, meaning that the claimants' reference point ceased to exist, and their claim was dismissed.

In the **Netherlands**, the requirement of wage transparency ensues primarily from case law. In case law, reference is sometimes made to one of the standard considerations of the CJEU, i.e. that real transparency, which makes effective verification possible, is ensured only when the principle of equal pay is applied to every element of the salaries of men and women. In this respect, the Supreme Court ruled on 12 April 2002 that a reversal of the burden of proof that work is of equal value is appropriate if a company applies a reward system that is characterised by a complete lack of transparency.[125] According to the Supreme Court this was not the case in this particular matter. Employers must thus make clear in what way and on the basis of which standards they evaluate the work of their employees. The NIHR follows the same approach. An example is the opinion in which the NIHR ruled that the employer had not made clear which part of the extra pay a male worker received was related to labour shortage. The NIHR explicitly observed that the lack of a transparent salary system is the employer's own risk.[126]

A number of experts have referred to trade secrets and protection of privacy/confidentiality as factors hampering transparency, such as in **Belgium**, the **Czech Republic**, **Estonia**, **Lithuania**, **North Macedonia**, **Poland**, **Romania** and **Slovenia**. In **Belgium** there is no transparency as to the remuneration of managers who are hired by public economic enterprises under employment contracts, although the High Administrative Court in a judgment of 2 May 2016 found that the protection of privacy and of the company's economic interests could not serve as a blanket justification for refusing to make the managers' wages transparent at the Vlaamse Radio- en Televisieomroeporganisatie (VRT), the Flemish public radio and television broadcasting organisation.[127] In another case which involved the European Trade Union Institute a female researcher complained of pay discrimination in comparison with male colleagues. The Labour Court of Appeal in Brussels[128] found that the employer's pay system was opaque and simply referred to the CJEU's decision in Case 109/88 *Danfoss*[129] to conclude that there was gender discrimination.

122 Serbia, Action Plan for the Implementation of the Strategy for Prevention and Protection against Discrimination, Official Gazette of the Republic of Serbia, No. 107/2014, 62.
123 Turkey, Court of Cassation 9th Division, 5 October 05.10.2017, 2016/24041, 2017/15069.
124 Hungary, Supreme Court (*Legfelsőbb Bíróság*) Judgment No. Mfv.II.10.514/2011; adopted as Decision in Principle No. as 2424/2011. in Labour Law.
125 Netherlands, Supreme Court, *JAR* 2002/101, 12 April 2002.
126 Netherlands, College voor de Rechten van de Mens, Opinion 2012-142, 15 August 2012. See also Opinion 2009-76, 6 August 2009.
127 Belgium, Council of State, Dumortier, n°234.609 at www.raadvst-consetat.be.
128 Belgium, Labour Court of Appeal Brussels, Judgment of 19 October 2014, *Chroniques de droit social/Sociaalrechtelijke Kronieken*, 2005, p. 16 with J. Jacqmain's case note.
129 CJEU, Judgment of 17 October 1989, *Danfoss*, Case 109/88, EU:C:1989:383.

In **Estonia**, the Employment Contracts Act stipulates that the employer has no right to disclose information about wages calculated, paid or payable to the employee without the employee's consent or without a legal basis. Pay secrecy could be a workplace policy that prohibits employees from discussing how much money they make. The Gender Equality and Equal Treatment Commissioner has a right to ask for all documents about working conditions and wage policy. Also pursuant to a Supreme Court ruling, it is considered impossible to analyse gender pay differences because of the level of privacy protection. And even though public sector wages are public and are published on the Ministry of Finance homepage, in some spheres of economic activity, wage data are classified (defence, Security Police Board and the Foreign Intelligence Agency).

Similarly, in **North Macedonia** employers use the protection of privacy argument to treat wage levels as confidential data and as a ground for including confidentiality clauses on wages in employment contracts. In the **Czech Republic**, there are still many employment contracts which require employees to keep silence about their salary. In **Poland** as well there is an ongoing discussion between employers emphasising that remuneration data are part of trade secrets and therefore subject to confidentiality clauses in employment contracts, with some courts following this reasoning. But such information is also considered protected under the personal data protection act and, if considered as a personal good, employees should be entitled to disclose their salaries if they so wish; the obligation to preserve secrecy would then only apply to the employer. Yet there is general consensus that the prohibition to disclose information cannot extend to general remuneration tables, which may determine the range of remuneration, depending on the position, rank or qualifications. There are, nevertheless, legal provisions stipulating directly that information about the remuneration of certain people is public.[130] In the first case the Constitutional Court found the provisions of the Act of 3 March 2000 on remuneration of people in charge of legal entities owned at least 50 % by the State Treasury to be compliant with the Constitution with regard to the regulations stipulating the obligation to disclose the remuneration of these people, explaining that this information is not subject to protection in the same way as personal details or trade secrets.[131] In the other ruling, the Supreme 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 grounds for dissolution of his contract of employment.[132]

The **Romanian** Labour Code stipulates that salaries are confidential and must be determined by individual direct negotiations between employer and employee. The law stipulates only one exception – trade unions or employees' representatives may access information regarding salaries in order to promote the employees' interests and defend their rights,[133] provided two cumulative conditions are met: the request for information is strictly in connection with the employees' interests and the request is made in the framework of the direct relationship between the trade union or employees' representative and the employer.[134] But this does not constitute a right of employees. In **Lithuania** as well individual wages belong to the sensitive data protected by statutory or contractual confidentiality clauses. A wage is usually set by individual agreement and not collectively by a collective agreement. Even in the public sector, with rigid regulation of wage policies, employers are given wider discretion (pay-rate brackets, e.g. from EUR 1 000 to EUR 1 400 or non-transparent system of performance reward) to decide individually on the exact level of remuneration for an individual employee.

There also remain considerable differences between the states covered in this report regarding the extent to which wage transparency is considered a problem that needs to be addressed at all with a view to effectively combating pay discrimination. The **Turkish** expert has thus noted that pay differentials are not

130 As examples, certain groups of public servants or people in decision-making positions, as provided for, e.g. in the Law of 3 March 2000 on remuneration of persons in charge of some legal entities (unified text JoL 2018 Item 1252).
131 Poland, Constitutional Court Judgment of 7 May 2001 (K 18/00).
132 Poland, Supreme Court, Judgment of 25 May 2011, II PK 304/10.
133 Romania, Labour Code, Article 163.
134 Romania, Labour Code, Article 163.

a serious problem in the public sector and are mostly problematic in the private, informal sector, as well as among public officials with an administrative law employment contract. In the formal sector, collective agreements are deemed transparent.

The **German** expert has expressed serious doubt about whether pay transparency can actually bring about any change in court decisions. In a recent case of (alleged) pay discrimination, the Labour Court of Berlin emphasised that Article 157 TFEU does not require equal pay for equal work but prohibits sex discrimination.[135] The court could not identify any discrimination on the grounds of sex, but instead justified differentiations due to seniority and the different contract arrangements for freelancers and permanent employees. Unequal pay for the same or equivalent work could not in itself indicate discrimination. As there was no discrimination, the court rejected the claimant's request for information about the pay structure and the salaries of other male colleagues performing equivalent work. The defendant employer had confirmed that male colleagues doing equivalent work were paid a higher salary than the claimant but denied discrimination. The pay difference was explained by different collective agreements for freelancers and permanent employees, on the one hand, and differences in seniority (the period of employment with the same employer) between the claimant and other (male) freelancers, on the other. During the public hearing, the judge explained that higher remuneration would mainly depend on negotiating skills, supposedly more pronounced in men, and contractual freedom, and that maternity and childcare periods would often lead to shorter periods of employment for women, less seniority and, thus, lower wages without any discrimination being involved. The State Labour Court of Berlin and Brandenburg confirmed the ruling of the first instance court and denied the applicant the shift of the burden of proof because she could not offer further evidence that the lower remuneration for the work of equal value was based upon sex/gender discrimination.[136]

Implementation of the transparency measures set out by the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women.

Only a few states took specific action to follow up on the Commission's Recommendation on transparency, including **Croatia**, **Finland**, **Germany**, **Italy**, **Lithuania**, **Luxembourg** and **Poland**, although in a number of these this action has not yet been turned into law. In July 2015, the **Croatian** Government thus adopted the Action Plan for the determination and regulation of the salary system, with the overarching aim of establishing equal pay for equal work and transparency in the salary systems in the public and the private sector, to be laid down in the Act on Salaries in the Public Sector in September 2015. Wage transparency was to be enhanced through the introduction of wage categories, which should enable differentiation of work according to quality and increase work productivity, i.e. improve the relation between wages and productivity. Unfortunately, however, this initiative came to an end with the entry into office of the new Government in January 2016 and no other legislative steps have been announced since then.

In **Italy** also, a draft delegated act was presented to Parliament in March 2015 and is under examination by the Commission for Labour, although it has still not become law. In **Poland**, an initiative to impose an obligation on companies to report on wage differences between men and women was announced in 2012, but no concrete legislative steps have been taken so far. In **Estonia**, some measures for pay transparency were planned by national strategies[137] and the draft of the Act on Amendments to the Gender Equality Act and Associated Acts was prepared but not passed in parliament due to opposition from some women's organisations, the equality body, and trade union and employers' representatives.[138] The draft act aimed to tackle the gender pay gap: it was intended to give more responsibilities and rights

135 Germany, Labour Court of Berlin, Judgment of 1 February 2017, 56 Ca 5356/15.
136 Germany, State Labour Court of Berlin and Brandenburg, judgment of 5 February 2019, 16 Sa 983/18.
137 Estonia,The Welfare Development Plan 2016-2023; National Action Plan 2016-2019, State Budget Strategy 2019-2022; Action plan of Estonia 2020 for 2018–2020 (Adopted by the Government of the Republic of Estonia on 26 April 2018), https://www.riigikantselei.ee/sites/default/files/content-editors/Failid/nrp_estonia2020_action_plan.pdf.
138 Estonia, Act on Amendments to the Gender Equality Act and Associated Acts, available at: https://www.riigikogu.ee/tegevus/eelnoud/eelnou/920bb10b-1e71-48fa-896d-c8f2c473867a/Soolise%20võrdõiguslikkuse%20seaduse%20muutmise%20ja%20sellega%20seonduvalt%20teiste%20seaduste%20muutmise%20seadus.

to the Labour Inspectorate and was targeted at public sector employers with 10 or more employees. However, a lack of common understanding and opposition to the draft law enabling effective monitoring of the implementation of equal pay for women and men led to lengthy parliamentary debates (lasting six months) and ultimately to the failure of the draft act. Arguments against it related to the selection of the sector (why only the public sector), an increased administrative burden and the poor use of pre-existing capacities, such as gender equality bodies and agencies (questioning the necessity of establishing yet another institution). In **Malta**, the National Commission for the Promotion of Equality in its input to the Equality Bill proposed strengthening protection in relation to pay and referred to the provisions of the Commission's Recommendation.[139]

In **Finland**, pay audits had already been required by the Act on Equality since 2005 but the provision was amended in 2014. Pay audits are required for employers with a minimum of 30 employees as part of equality planning, the aim being to clarify that there are no unfounded pay differentials between women and men. The equality plan must involve an analysis of job classifications, pay and pay differentials by gender, and if there are clear differences the employer must analyse their reasons and grounds. The main pay components are to be taken into consideration and employers must conduct the audit in cooperation with the employees' representative.

More recently, the Commission's Recommendation provided the incentive for the Equality Ombudsman to report on pay transparency in 2018.[140] Its report contains an analysis of the legal prerequisites of pay transparency and balancing requirements of the equal pay principle, particularly the right to privacy and data protection.[141] The Ministry of Social Affairs and Health nominated a tripartite working group (the Pay Transparency Working Group) to consider the proposals made by the Equality Ombudsman for amending the legal provision concerned (Section 6(b) of the Equality Act). Meanwhile it has become clear that the employees' representatives in the Working Group[142] support an amendment of the provision on pay transparency along the lines proposed by the Equality Ombudsman, whereas the employers' representatives reject it. As the Government resigned before the final report was published, no political conclusions were drawn. The issue of pay transparency has featured in the negotiations for a new Government.

Some countries, such as **France**, did not consider it necessary to take specific action following the Recommendation, arguing that most of the recommendations have already been adopted (see next section). Similarly, in **Portugal** some of the issues covered by the Commission Recommendation are already provided for in legislation, such as information on company wages disaggregated by sex being already available to employees. Furthermore, gender equality (including equal pay) is a mandatory topic of collective agreements and the Gender Equality Agency in the Field of Employment has a duty to check all collective agreements just after their publication in order to see whether they include discriminatory clauses. If this is the case, the Agency can present the case to the public attorney, who can take it to court in order to have these clauses declared null and void. This rule, introduced by the Labour Code of 2009, is in line with point 5 of the Recommendation.

139 NCPE (2015) 'NCPE's Input to the HREC and Equality Bills', p. 6. https://meae.gov.mt/en/Public_Consultations/MSDC/Documents/2015%20HREC%20Final/NCPE.pdf.

140 Ministry of Social Affairs and Health and Maarianvaara, J. (2018) *Selvitys palkka-avoimudesta* (Report on pay transparency), Ministry of Social Affairs and Health, available at: http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/161103/R_41_18_Selvitys_palkka-avoimuudesta.pdf?sequence=1&isAllowed=y Nousiainen, Kevät Palkka-avoimuuden oikeudelliset edellytykset (Legal Prerequisites of Pay Transparency), in Ministry of Social Affairs and Health and Maarianvaara, Jukka, 2018, pp. 17-38).

141 Nousiainen, K. 'Palkka-avoimuuden oikeudelliset edellytykset' ('Legal prerequisites of pay transparency') in Ministry of Social Affairs and Health and Maarianvaara, J. (2018) *Selvitys palkka-avoimuudesta* (Report on pay transparency), pp. 17-39.

142 Ministry of Social Affairs and Health (2019) *Palkka-avoimuustyöryhmän loppuraportti* (The Final report of the pay transparency working group), Reports of the Ministry of Social Affairs and Health 2019:32, available at: http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/161495/STM_rap_2019_32_Palkka-avoimuustyoryhman_loppuraportti.pdf.

Introduced wage transparency rules and enforcement mechanisms

However, in an increasing number of countries, some form of rule or duty seeking to enhance wage transparency has been introduced, including:

– *reporting duties*: The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017[143] in the **United Kingdom** requires employers in the private, public and voluntary sectors with 250 or more employees to publish, annually, information on their mean and median gender pay gaps, as well as the number of men and women in each pay quartile. The 2017 **German** Pay Transparency Act restricts the reporting duty to businesses with more than 500 employees and there are no effective sanctions provided in the case of non-compliance. Following upon the **Irish** National Strategy for Women and Girls 2017 to 2020,[144] on 26 June 2018, the Government approved the General Scheme of the Gender Pay Gap Information Bill,[145] requiring employers to publish annually information related to the pay of men and women so as to reveal any difference and the scale of that difference. It is proposed that for the first two years of the legislation, it shall apply to employers with over 250 employees and then within three years the upper limit will become 150 employees. Income reports (**Austria**, companies with 150+ employees); bi-annual m/w report relating to appointments, training, promotion, pay, etc. (**Italy**, companies with 100+ employees); annual reports comparing the situation of men and women in the company (**France**, different duties for companies with 50+ and 250+ employees; see below for detailed explanation); 'pay mapping' duty (**Finland**, companies with 30+ employees); duty of gender-segregated wage statistics (**Denmark**, but in 2016 the law was changed so as to no longer impose a duty on smaller companies with 10+ full-time employees, but only on companies with 35+ full-time employees and with at least 10 men and 10 women with comparable jobs); duty for employers to provide wage statistics each semester, disaggregated by sex, to the staff delegation (**Luxembourg**); duty to provide work councils and trade unions with anonymised data on the average wages of employees (except those in managerial positions) according to gender and professional groups, for companies with more than 20 employees (**Lithuania**). In **Montenegro**, Article 55 of the General Collective Agreement requires that, once a year, the employer informs the trade union at an appropriate level of the total calculated gross and net salaries paid out, including contributions for mandatory social insurance and the amount of the average salary paid by the employer. This information applies to all employees, so there is no specified obligation in respect of diverse functions. **Albanian** Law sets an obligation on wage transparency for public institutions only, requiring every public institution to publish on its webpage in an easily understandable and accessible format information related to: '(…) salaries of officials having the obligation to declare property and assets according to the law, salary structures for other employers, (…).'[146] According to the **Belgian** Gender Pay Gap Act (as amended in 2014), differences in pay and labour costs between men and women should be stated in companies' annual reports and every two years, 50+ companies should carry out a comparative analysis of their wage structure, showing the rates for their female and male employees. If this shows that women earn less than men, the company must draw up an action plan. An employer may also appoint a works mediator, to which women can turn if they suspect discrimination. If there is a pay differential, the works mediator will try to find a compromise with the employer. In the **Netherlands**, companies are obliged, on the basis of Article 31d of the Works Councils Act, to submit data to works councils once a year about equal treatment of men and women and about the levels and the content of employee benefits (pay etc.) in the company. These data should be broken down by gender. The **Croatian** Bureau of Statistics publishes an annual publication 'Men and women in Croatia' (from 2006 onwards), which contains a separate chapter with gender-disaggregated data on employment and earnings. The publication is easily accessible online, on the Bureau's website, and is published in Croatian and English. However, only employers

143 United Kingdom, Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, 6 April 2017. https://www.legislation.gov.uk/uksi/2017/172/contents/made.
144 http://www.genderequality.ie/en/GE/Pages/Conferences.
145 The Government published the Gender Pay Gap Bill 2019 in April 2019. https://www.oireachtas.ie/en/bills/bill/2019/30/.
146 Albania, Law No. 119/2014.

who are legal entities are required to report annually to the Croatian Bureau of Statistics the average remuneration by category of employee or position, broken down by gender.

- *pay information right*: In **Finland** the employer is required to provide the victim of alleged pay discrimination with 'information on the grounds of his/her pay and other information that is necessary for assessing whether there has been discrimination', under Section 10.3 of the Act on Equality. However, the employer is not obliged to disclose the information about a comparator who refuses to disclose their pay details. The comparator's pay information may in such cases be required to be revealed through an intervention by the Equality Ombudsman. The new **German** law restricts the right to information to businesses with more than 200 employees, although the majority of women work in smaller enterprises. In **Norway** as well a similar right is provided for under Article 32 of the GEADA, but is coupled with a duty of secrecy for the person receiving the information. In **Greece**, the Authority for the Protection of Personal Data imposed a EUR 70 000 fine on a private firm for refusing to provide data to an employee on the comparative evaluation of its employees, which he had requested in order to be able to exercise his employment rights. In **Slovenia**, the employer can refuse to give such information on the ground of an employee refusing to give consent. In **Iceland**, the law stipulates a right for employees to disclose their wages if they choose to do so, which is not deemed to be very effective, given the unlikelihood that men will disclose their higher wages to female colleagues.

- *recording duty*: In **Portugal**, companies must keep sex-segregated records of recruitment forms and procedures for a minimum period of five years. These records must also include information that allows for the investigation of wage discrimination. **Spanish** Royal Decree 6/2019, of 1 March 2019, which came into force immediately after it was passed[147] establishes an obligation for employers to keep a record of the average remuneration in the company, in relation to professional groups or jobs of equal value. Workers' representatives have the right to receive annual reports of this record. It also establishes the presumption that there is a prima facie case of discrimination when, in companies with more than 50 workers, the average remuneration of workers of one sex is at least 25 % higher than the average remuneration of workers of the other sex.

- *publication of salaries of certain persons* (**Poland**) also pursuant to staff regulations (**Belgium**);

- *duty for employers to establish a remuneration system*: In **Lithuania**, legislation entered into force in 2017 which established such a duty for companies with more than 50 employees and a requirement to make it available to employees. The system must specify categories of employees according to their position and qualification, the remuneration for each of them and the level of the base rate wage, the grounds and procedure for granting additional payments, and the procedure of wage indexing.

- *duty for employers to establish an equal pay action plan:* In **Sweden**, this duty includes a survey of provisions and practices regarding pay and other terms of employment that are used at the employer's establishment and pay differences between men and women. In **Lithuania**, companies with more than 50 employees have to adopt an internal policy on equal opportunities, which must be discussed in their works council. If the **Portuguese** Gender Equality Agency in the Field of Employment (CITE) detects wage inequalities in a company, it notifies the employer to present an 'evaluation plan of the wage differences in the company' that is intended either to justify those differences or to eliminate those with no objective justification, and that will be put in place for a period of 12 months.

- *duty to establish a sound job evaluation system* (**Netherlands**, **Portugal**). In **Austria**, sectoral collective agreements in the private sector are required to contain gender-neutral pay schemes that structure minimum pay levels according to material and temporal qualification levels. Collective

147 Spain, Royal Decree 6/2019, of 1 March 2019, www.boe.es/buscar/act.php?id=BOE-A-2019-3244.

agreements are accessible to the public in a database maintained by the Trade Union Federation, which is regularly updated as soon as pay rises come into effect.[148] In rare cases, where a job falls into an area not regulated by a collective agreement, adequate pay levels can be inferred by looking at the best comparable sectoral pay schemes. However, a higher rate of pay can be negotiated at any time. The **Belgian** Collective Labour Agreement No. 25 on equal pay for male and female employees obliges all sectors and individual enterprises to assess and, if necessary, correct their job evaluation and classification systems to ensure gender neutrality as a condition of equal pay. The Collective Agreement modified on 9 July 2008 provides that discrimination between men and women must be excluded from all conditions of remuneration. The communication and control of revised job evaluation and classification systems by the federal service in charge of collective agreements is one positive outcome of the law (between 1 July 2013 and 30 November 2014, more than 150 collective agreements were checked and subsequently some of them were corrected or completely modified).[149] The Institute for the Equality of Women and Men also issued a methodological instrument, the gender neutral checklist for job assessment and classification, which subsequently gained legal recognition.[150] The checklist is one of the elements taken into consideration in the check by the federal service. In two **Dutch** collective agreements the employer committed itself to carrying out an investigation into equal pay in its company. The results of one of these investigations have already been published.[151] The outcome is that pay differences do indeed exist within the company and that the main cause appears to be the under-representation of women in higher positions. The company has announced that it will discuss with the works council and the trade unions how to redress this situation.

– *investigation powers of specific inspectors or equality bodies and possibility of sanctions*: In **Italy**, the local Labour Inspectorate may obtain gender-differentiated data at the workplace as regards hiring, vocational training and career opportunities. In **Portugal**, the workers and union representatives also have the right to ask the CITE for advice on alleged gender pay discriminatory practices inside the company; if the CITE concludes that there is wage discrimination on the ground of sex, the employer is compelled to eradicate it and may be subjected to a fine. In **Cyprus**, a specific inspector is appointed to also ensure the full and effective application of gender equality law, and to whom all kinds of information must be disclosed upon request.

– *monitoring duty*: The **Swedish** Mediation Office – a public authority – monitors wage developments in the Swedish labour market including equal pay developments, but it must be stressed that in Sweden, pay – and pay structures – is for the social partners to decide through collective bargaining. Every year, the **Portuguese** Ministry of Employment and Social Affairs publishes detailed statistical data on the salary gap between men and women, at general and sectoral levels, and statistical data by company, profession and qualification level, based upon the annual balance sheet provided by companies. In **Belgium**, monitoring annual reports and comparative analysis is part of the tasks of company auditors within their role of annual accounts monitoring. Despite instructions given by the Institute of Company Auditors,[152] currently, this obligation is not really effective as auditors are not systematically checking the accuracy of figures provided. Moreover, the reports are only accessible internally to the works councils, limiting their use in legal cases, for example. The labour inspectors also have a role in checking information provided by enterprises, but due to their limited human resources, this is barely carried out. What is more, all data mentioned in the reports are confidential. Finally, the fact that no mediator has been appointed so far is a signal that although the law provides a number of mechanisms to ensure that equal pay in companies is real, it is not really effective.

148 https://www.kollektivvertrag.at/cms/KV/KV_0/home.
149 Deloose, S. (2018) *La loi sur l'écart salarial, effectivité et conformité au droit européen* (The law on the pay gap – effectiveness and conformity with EU law), Final essay for the L.L.M. at the Université libre de Bruxelles, p.18.
150 Available in French and Dutch at www.igvm-iefh.belgium.be.
151 Aegon (2019), *Vrouwen bij Aegon gelijk beloond* (Equal pay for women and men at Aegon), 11 February 2019, available at https://nieuws.aegon.nl/gelijke-beloning/.
152 *Institut des réviseurs d'entreprise*, Communication 2014/10, 29 October 2014.

According to the **Danish** Equal Pay Act, the Government is obliged to present a national statement on the status and development of the gender pay gap every three years. This monitoring report is based on an extensive review as well as a large dataset and is made public.

– unenforceability of confidentiality clauses in labour contracts (**Northern Ireland**).

– *duty to produce salary guides in the public sector* (**Estonia**, **Slovenia**). The **Estonian** Civil Service Act stipulates that the salary guide of the authority must be disclosed on the web page of the authority. A salary guide is a procedure for the determination and payment of salaries and prescribes the basic salary or the basic salary range for the position, the conditions and procedure for payment of the variable salary, additional remuneration and benefits provided by law and the time and manner of the payment of the salary. A list of institutions and authorities (heads of authorities, ministers and high-level representatives) is provided which should establish salary guides. The procedure for drafting the salary guide and determination of the salary components for other public bodies should be specified by a Government regulation.[153]

– *Protection against retaliation*: In **Portugal**, the dismissal or the application of disciplinary measures against a worker up to one year after they ask the CITE for the advice indicated above is presumed unlawful;

– *Pay audit requirements*: Under Section 6(b) of the **Finnish** Act on Equality, the employer is under a positive obligation to conduct regular pay audits (pay mapping). If pay differentials are found, the employer must enquire into the causes and reasons for these differentials. Pay audits in **Germany** are not mandatory. In the **United Kingdom**, the Equality Act allows the adoption of regulations requiring large employers (250+) to carry out and publish equal pay audits. To some extent **Sweden** can be said to have implemented the Commission's Recommendation by requiring the employer to carry out yearly pay audits. The audit must comprise a survey and analysis of wages and wage differences, referring in particular to the comparison between: women and men performing work that is to be regarded as equal; groups of employees performing work considered to be dominated by women and groups not dominated by women performing work of equal value; employees performing work considered to be dominated by women and a group of employees performing work not considered to be female-dominated but better paid despite the work requirements being deemed to be lower. This information is not to be sent or reported anywhere, but it must be sent to the Equality Ombudsman upon request. A trade union to whom the employer is bound by collective agreement also has the right to obtain the information needed to collaborate on the monitoring of wage statistics for equality, and the survey and yearly analysis of pay levels. To the extent that this information is related to an individual employee, it is subject to rules on professional secrecy. So far, **Iceland** has introduced the most developed pay audit system, which is explained in more detail below.

– *Penalties*: In **Great Britain**, no civil penalties for non-compliance with the reporting duty are currently proposed, although this is to remain under review,[154] but failure to report is 'an unlawful act' and the Equality and Human Rights Commission can take enforcement action It may open an investigation if it suspects a considerable pay gap is being hidden by employers. Reputational risks are also a consideration if employers fail to comply with the regulations: information is publicly available online[155] and often attracts media attention. Furthermore, any term of a contract which prohibits or restricts a person from making a 'relevant pay disclosure' to anyone is unenforceable. A tribunal must (subject to certain exceptions) require an employer who loses an equal pay claim to

153 Estonia, Regulation of the Government of the Republic No. 76 of 16 March 2013 on administration of the state personnel and payroll database remuneration levels (*Riigi personali- ja palgaarvestuse andmekogusse andmete esitamise ja arvestuse toimingute teostamise kord. Vabariigi Valitsuse määrus nr 76*), 16 May 2015.

154 Government Equalities Office (2016), *Mandatory Gender Pay Gap Reporting: Government Consultation on Draft Regulations*, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504398/GPG_consultation_v8.pdf.

155 See https://gender-pay-gap.service.gov.uk/Viewing/search-results.

carry out an equal pay audit. Regarding the above new Bill introduced in **Ireland**, the Human Rights and Equality Commission may make application to court if there is an alleged breach of the proposed legislation. There will also be additional enforcement powers and access to the Workplace Relations Commission if an employee considers that there has been a breach of the legislation.

On 1 June 2017, the **Icelandic** Parliament passed, by a vast majority, a law (Law No. 56/2017, which came into force on 1 January 2018) requiring companies and institutions employing 25 or more workers to obtain annual equal pay certification of their equal pay systems and the implementation thereof, on the basis of the requirements of a management requirement standard[156] to prove that they offer equal pay for work of equal value, regardless of gender.[157] The Equal Pay Standard ÍST 85 (the Standard) is the first to be deliberately developed according to international ISO standards, allowing it to be translated and adopted in other countries. The Standard is applicable to all companies regardless of their size, field of activity and the gender composition of their staff. It describes the process that companies and public institutions can follow in order to ensure equal pay within their organisation and is aimed at implementing effective and professional methods for making pay decisions, their effective review and improvement. The Standard ensures professional working methods in order to prevent direct or indirect discrimination and can be purchased at Icelandic Standards.[158]

In order to obtain qualification, companies and institutions need to implement an equal pay management system following guidelines in the Equal Pay Standard. An accredited auditor will conduct an audit, and if the company or institution fulfils the requirements, it will receive a certification that must be renewed every three years. Equal pay certification under the standard is designed to confirm that decisions on pay are based only on relevant considerations. The Standard does not entail a requirement that individuals receive exactly the same for the same work or comparable work, as employers have discretion to take into consideration individual factors applying to groups and particular personal skills when deciding wages. Nevertheless, it does make the inflexible demand that decisions on wages are based on relevant considerations, such as individuals' qualifications, experience, responsibilities or job performance, criteria which do not involve gender discrimination of any type, direct or indirect. The Standard states that the normal procedure is that information on employees' wages is presented in the form of statistics in such a way that they cannot be traced to the individuals involved.

The organisations of the social partners are commissioned to monitor compliance to ensure that workplaces acquire equal pay certification and that it is renewed every three years. In cases where a workplace either has not acquired equal pay certification or has failed to renew it by the deadline, the organisations of the social partners will be able to report it to the Centre for Gender Equality. The Centre will maintain a register of companies and institutions that have acquired certification or confirmation and will display it in an accessible manner on the Centre's website. The Centre can also impose on the workplace a formal demand to rectify the situation by a certain deadline. Rectification measures can involve, for example, the provision of information and release of materials or the drawing up of a scheduled plan of action on how the workplace intends to meet the requirements of the Equal Pay Standard. If the workplace fails to act on instructions of this type, the Centre for Gender Equality is authorised to impose *per diem* fines. Appeals can be referred to the Minister of Social Affairs and Equality against a decision to impose *per diem* fines. The minister will also order assessments every two years of the results of certification and confirmation of the equal pay systems of companies and institutions under the act and will issue regulations on the execution and structure of these assessments.

156 The Standard ÍST 85 Equal Pay Management System – requirements and guidance.
157 https://www.government.is/news/article/2018/01/30/Questions-and-Answers-on-equal-pay-certification/.
158 http://stadlarad.is.

In **France**, the new general labour legislation[159] and the Law of 29 March 2018 now detail new obligations for private companies[160] with regard to collecting the statistics necessary to monitor the participation of women and men in employment. However, a historical view shows that, in practice, in the private sector, these more recent legislative developments seem to limit the scope of these obligations in three ways.

Firstly, there is less visibility of the data presenting for each job category the situation of women and men in hiring, training, promotion, in terms of qualifications, grade, working conditions and pay, as these are now contained in a more general database, and also the scope of the negotiations on equality at work is no longer separate from other issues relating to working conditions. Secondly, the Macron executive order on the Labour Law reform of 2017[161] also concerns the general obligation of employers to negotiate on equality between women and men, which is still mandatory at least every four years when there is a group of union representatives.[162] However, the frequency of this negotiation can be set at a minimum of every four years by an agreement at company level. It is only if there is no agreement on the timetable that the negotiation is held every year. The scope of the negotiation must include the gender pay gap.[163] The financial penalty in the absence of negotiation on equality reflects its binding nature.[164] Thirdly, the recent decree on indicators to close the gender pay gap and monitor the promotion of women and men with specific actions might not be sufficiently effective to detect disparities and correct them.[165] The decree was adopted to implement Law no. 2018-771 of 5 September 2018[166] which provides that, in companies with more than 50 employees, the employer must publish indicators each year relating to the pay gap between women and men and the actions implemented to eliminate it. The decree also defines the methodology used to establish the indicators (L.1142-8 of the Labour Code).

According to the decree, the following indicators for companies with more than 250 employees (Article D. 1142-2 Labour Code) must be published:

1) The gender pay gap between women and men, calculated in reference to the average pay of women compared to the average pay of men, by age cohorts and categories of equivalent jobs.
2) The rate of disparities in individual pay rises that do not reflect promotions between women and men.
3) The rate of disparities in promotions between women and men.
4) The percentage of employees who benefited from a pay rise during the year of their return from maternity leave if there were increases in pay during their leave period.
5) The number of workers of the under-represented sex among the ten employees who earn the highest wages in the firm.

For companies of between 50 and 250 employees, the same indicators are to be published except one: there is no obligation to publish the rate of disparities in promotion between women and men. It is problematic to think that the differences in the number of promotions for women and men should not be

159 France, Article L2323-17 abolished by the new labour law reform, Executive Order (Ordonnance) n° 2017-1386 du 22 September 2017, Article 1.
160 See *Travail, genre et sociétés* 2017/1 no. 37 p. 129-171. Des lois à la négociation, quoi de neuf pour l'égalité professionnelles, https://www.cairn.info/revue-travail-genre-et-societes-2017-1.html.
161 France, Executive Order no. 2017-1385 of 22 September 2017 on strengthening collective negotiations (*Ordonnance n° 2017-1385 du 22 septembre 2017 relative au renforcement de la négociation collective*).
162 A '*Section syndicale*', Article L 2242-1, Labour Code, Executive order no. 2017-1385 of 22 September 2017, Article 7, available at https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=F8AE21B6103C2E0DAB89A4A342C59D81.tplgfr43s_2?cidTexte=JORFTEXT000035607311&idArticle=LEGIARTI000035608867&dateTexte=20190406&categorieLien=id#LEGIARTI000035608867.
163 France, Article L2242-1, Labour Code.
164 France, Article L2242-8, Labour Code.
165 France, Decree no. 2019-15, 8 January 2019 on closing the gender pay gap and combating sexual violence and sexism (*Décret n° 2019-15 du 8 janvier 2019*), available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037964765&categorieLien=id.
166 France, Chapter IV, Article 104-107, available at https://www.legifrance.gouv.fr/eli/loi/2018/9/5/MTRX1808061L/jo/texte.

monitored in these medium-sized companies.[167] The French expert considers it also regrettable that no indicators are required for smaller companies (under 50 employees), since the majority of the job pool is within these companies. Under the new decree, the results of the company in view of the indicators are published each year on the company's website, or in the absence of such a website, the indicators are circulated to employees by other means. In the public sector, similar pay gap indicators will soon be required with the new reform of the civil service adopted in the summer of 2019.[168]

In **France**, there are new measures to correct the gender pay gap detected by the new indicators (Article L 1142-9 Labour code). First, there is a duty to inform the works councils and engage in negotiations on professional equality. In companies where the results in points obtained with regard to the indicators are lower than 75, the collective bargaining negotiations on equality will focus on adequate and relevant measures to correct and, eventually, programme annual or pluri-annual financial measures to close the gender pay gap (Article D. 1142-6). These indicators can be made available to works councils. The results are presented by socio-professional categories, levels or hierarchical pay grades or other rankings according to jobs. If the indicators cannot be calculated, the employer must explain these challenges. In the event that no agreement is found on measures with employee representatives, the employer takes its own measures after consultation with the works council. This decision is monitored by the public authorities. There are also financial sanctions if the indicators reflect a certain level of disparity (L. 1142-10). In companies of at least 50 employees, if the total number of points linked to the indicators is under 75, the company has three years to comply and limit the pay disparities. If the company achieves a result of 75 points before the three years have elapsed then a new time limit of three years is awarded to correct the disparities which starts the year the 75 points result is published (Article D. 1142-8).[169]

The **Irish** Government approved the General Scheme of the Gender Pay Gap Information Bill on 26 June 2018.[170] The proposed legislation will be cited as the Gender Pay Gap Information Act 2018. The Employment Equality Act 1998 will be amended by the insertion of a number of sections to include: '*Gender Pay Gap Information*'. There is a legislative proposal on equal pay for women and men in the **Netherlands**, which was submitted to Parliament on 7 March 2019[171] The main elements of this are the following:

– Reversal of the burden of proof. Employers with 50 or more employees should apply for a certificate which shows that they apply the standard for equal pay. If they do not have such a certificate and a person states that he or she is not paid equally, the assumption is that this is indeed the case. The employer may refute this assumption.
– Obligation to provide information in the annual report by employers with 50 or more employees about differences in pay between employees who carry out work of (almost) equal value. If unequal pay exists, this must be reported in the annual report together with information on the way in which these differences will be eliminated.

167 See European Equality Law Network, Flash Report (2019), 'New decree on gender pay gap in France', available at: https://www.equalitylaw.eu/downloads/4859-france-new-decree-on-gender-pay-gap-in-france-pdf-106-kb.
168 France, Act no. 2019-828 of 6 August 2019 on the transformation of the civil service (*Loi n° 2019-828 du 6 août 2019 de transformation de la fonction publique*).
169 This encourages companies to introduce measures to comply, postponing the sanction if the pay disparity is reduced within the three years. However, it can result in companies reducing their pay disparity once every three years to postpone any possible sanction. The decree describes the procedure to sanction the company if the three-year time limit is not respected: an agent from the labour inspectorate sends a report to the regional director (Article D. 1142-9.). The director informs the company it is considering a financial sanction within the next two months after the report and the director can take into account justifications for the non-compliance and correction of the pay disparity (economic hardship, company restructuring or merger or bankruptcy (Article D. 1142-11). The director has two choices: impose a sanction of the equivalent of 1 % of the earnings and company profits from the past calendar year based on revenues from activities (social security contribution base Article D. 1142-13) or award extra time to comply within a maximum of one year. Public authorities enforce the rules, which avoids the constraints of judicial adjudication. However, in view of the possible exemptions to enforcement in case of economic hardship in the company, the sanctions might be less rigorously enforced and this would undercut the binding and dissuasive nature of the publication of the indicators and their effect.
170 The Government published the Gender Pay Gap Bill 2019 in April 2019: https://www.oireachtas.ie/en/bills/bill/2019/30/.
171 Summary of a legislative proposal on equal pay for men and women: https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35157.

- The Labour Inspectorate will be given the tasks of monitoring the application of the law and of imposing fines in cases of non-compliance.
- Employees of employers with 50 or more employees will get the right to ask for information about the salary of colleagues who do the same work or work of (almost) equal value.

Trade unions and the NIHR are positive about the proposal, but employers fear an administrative burden and are of the opinion that the proposal does not address the real cause of unequal pay, the fact that women work substantially fewer hours than men. It is hard to predict whether the proposal will be adopted by the present Government, in view of the fact that it has been submitted by opposition parties and is probably not supported by the (majority of the) governing coalition parties.

3.1.8 Other initiatives to enhance transparency and to close the gender pay gap

In a number of countries, some more practical, supporting tools have been developed to assist employers in addressing the gender pay gap within their organisation. In the **Netherlands**, a website, www.gelijkloon.nl (part of www.wageindicator.org), subsidised by the Dutch Government, provides substantive information about (equal) pay and enabling the comparison of wages. In addition, the NIHR has developed the equal pay Quickscan (see www.wervingenselectiegids.nl). If pay discrimination is suspected, a worker can turn to the NIHR, who can actively investigate and obtain necessary pay data from the employer. Furthermore, the Foundation for Labour (*Stichting van de Arbeid*) is in the process of updating its checklist for equal pay, which dates from 2001. This checklist is meant for those who create, apply and evaluate systems for the payment of employees, thus trade unions, employers' organisations, employers, HR managers and works councils. It is not obligatory to use the checklist, it is available as a tool.[172]

In **Poland**, in May 2017, a free software application to measure the pay gap was made available on the website of what is now called the Ministry of Family, Labour and Social Policy (MRPiPS).[173] The ministry encourages employers to use the tool, explaining that providing equal pay for equal jobs or jobs of equal value is not only an obligation on employers, but also brings many advantages. The MRPiPS proposes estimating the so-called 'corrected pay gap', where employees' wages are compared considering features such as sex, age, education, the position occupied, working time or the length of service. Although the **Polish** expert considers the introduction of this tool, which is free of charge, to be a positive step, its voluntary nature is criticised. It is also considered that it should be mandatory to publish monitoring results and to make those available to a wide audience.

The **Luxembourg** Ministry for Gender Equality offers an online tool to companies which want to analyse their situation regarding equal pay. The *Logib-Lux*[174] is a calculating instrument based on Excel, which allows identification of the causes of disparities regarding remuneration between men and women in a company. After submitting the relevant data, the company receives a report on the remuneration structures within the company in which the causes of any pay gap are identified. The report establishes if the gender pay gap is justified by objective factors or if it indicates indirect discrimination based on sex. It also indicates methods for improving pay equality. It must be noted that companies are not obliged to communicate the results of the report to MEGA. If they used *Logib-Lux* in the procedure on positive action, they must only document that they used it to check equal pay.

172 Stichting van de Arbeid (Foundation for Labour) (2001), 'Je verdiende loon! Checklist gelijke beloning mannen en vrouwen' (The salary you deserve! A checklist for equal pay for men and women), 19 July 2001, https://www.stvda.nl/-/media/stvda/downloads/publicaties/2009/je-verdiende-loon-2009.pdf.

173 https://www.mpips.gov.pl/narzedzie-do-mierzenia-luki-placowej. See also: https://www.mpips.gov.pl/gfx/mpips/userfiles/_public/1_NOWA%20STRONA/Aktualnosci/2017/NierownoscPlacowa_raport.pdf, https://www.mpips.gov.pl/aktualnosci-wszystkie/art,5543,9609,luka-placowa-w-polsce.html.

174 http://mega.public.lu/fr/travail/genre-ecart-salaire/mesures/logib/index.html.

The **German** government has also offered Logib-D as a management tool to help employers identify if there is a pay gap between their male and female employees.[175] There were strong indications that another tool (eg-check)[176] was better suited to detect pay discrimination on the grounds of sex/gender and to design pay structures and evaluation systems free of sex/gender discrimination. The tool Logib-D was designed to detect only the 'adjusted' wage gap, ignoring structural and indirect discrimination of women in working life. In 2019, the Federal Ministry for Family, Senior Citizens, Women and Youth is presenting a newly developed tool, the *Evaluierung von Arbeitsbewertungsverfahren* (EVA) list for the evaluation of job assessment procedures and sample analyses.[177]

In **Estonia**, employers have expressed concern about the increasing administrative burden of carrying out pay analyses from a gender perspective. The Estonian e-governance project, Reporting 3.0, is aimed at developing an automated data transmission channel for various bodies, such as the Tax and Custom Board and Statistics Estonia.[178] There is a pilot project that involves transmitting accounting data directly from the institutions' IT systems, which would enable employers to make pay analyses without creating additional datasets. Such initiatives could contribute to reducing the resources that are required to carry out pay audits.

In **Bulgaria**, a priority issue for the Ministry of Education and Science in 2017 was to increase remuneration for pedagogical experts in the pre-school and school sectors and to attract young specialists to the profession, as well as keeping them in this important sector, where possible.[179] As the sector is highly feminised, all improvements are pertinent to the issue of equal pay. Since 1 September 2017, remuneration for pedagogical staff was increased by 15 %, the aim of the government being to double remuneration in the sector by the end of its mandate. Other incentives and additional payments were provided for those working in small towns, such as transport costs, payments for clothing, etc. There is a special EU-funded project in which the NGO, Gender Project Foundation (GPF) is a partner, entitled 'Zero GPG – Gender equality: Innovative tool and awareness raising on GPG'. The project is about creating an enabling environment for tackling the gender pay gap (GPG) by working with government, trade unions, employers' associations, academics and NGOs. A manual for trainers on countering GPG was created, as well as an innovative web-based instrument for calculating the GPG.[180] Similarly, the **Irish** National Strategy for Women and Girls 2017-2020 also sets out to develop practical tools to assist employers in calculating the gender pay gap within their organisations and to consider its aspects and causes, mindful of obligations regarding privacy and data protection.

Other states have adopted measures and tools that aim to enhance not just equal pay but gender equality more generally. In December 2017, the **Swedish** Government thus launched the Action Plan for Gender Equal Life Incomes, addressing a number of areas connected to life income, such as education, gender segregation in the labour market, gender pay gap, leave of absence and working hours, work environment and sick leave, and parental leave. This action plan describes the current situation and a number of issues that affect life income, and presents the measures that the government has implemented, or plans to implement, in order to reduce income differences between women and men.[181]

175 See https://www.bmfsfj.de/bmfsfj/service/publikationen/logib-d/82318.
176 See https://www.eg-check.de/eg-check/DE/Weichenseite/weiche_node.html.
177 See https://www.bmfsfj.de/bmfsfj/service/publikationen/der-entgeltgleichheit-einen-schritt-naeher/80406.
178 https://news.err.ee/933124/new-project-speeds-up-data-transmission-within-estonia; on 17 October 2019, Statistics Estonia and the Government Office presented a new web application called the Tree of Truth. It is a gauge of important national indicators, giving a simple, honest and objective picture of how the country is doing, https://www.stat.ee/news-release-2019-123.
179 The Report on the implementation of the National Plan on Gender Equality for 2017, adopted by the Council of Ministers in July 2018, available here: http://www.gov.bg/bg/prestsentar/zasedaniya-na-ms/dneven-red-na-zasedanieto-na-ministerskiya-savet-na-18-07-2018-g. The Report on the implementation of the Recommendations of the CEDAW Committee, available here: https://www.mlsp.government.bg/ckfinder/userfiles/files/politiki/ravni%20vyzmojnosti/normativni%20aktove/bg%20zakonodatelstvo/Doklad%20CEDAW%202017.pdf.
180 The project 'Innovative tool and awareness raising on GPG' https://gender-bg.org/bg/proekti/archive-proekti/33-proekt-zero-gpg-gender-equality.html.
181 See https://www.regeringen.se/4b0b1f/contentassets/f26c798733cd41258ec06ff8bd8186d5/handlingsplan-jamstallda-livsinkomster.

In 2014, the **Cypriot** Government established a two-tier certification system. According to this system companies may receive certification for a specific good practice they implement in the field of gender equality, or an equal employer certification if they have established and implemented a detailed equality plan. In **Malta** as well an audit system devised by the National Commission for the Promotion of Equality (NCPE) for organisations applying to be certified with the Equality Mark is one measure that is used in order to study the wage patterns of such organisations and ensure that there is no discrimination. However, the Equality Mark certification is optional and so is only taken up by organisations that take gender equality to heart.

In **France**, companies with fewer than 300 employees can conclude an agreement with the state to receive financial assistance to carry out a study of their employment equality situation and of the measures they would need to take to ensure equal opportunities between men and women. The **Albanian** Law on local government finance, No. 68/2017, provides for gender budgeting in Article 2(8): to ensure that the creation and distribution of local financial resources accelerates and realises gender equality.

3.1.9 Remaining specific difficulties

Beyond the general problem of wage transparency, many experts have reported specific difficulties in their country which obstruct the effective application and enforcement of the principle of equal pay for equal work and work of equal value in practice (**Belgium**, **Bulgaria**, **Croatia**, **Cyprus**, **Estonia**, **Finland**, **France**, **Germany**, **Greece**, **Hungary**, **Ireland**, **Italy**, **Latvia**, **Lithuania**, **Montenegro**, **Netherlands**, **North Macedonia**, **Norway**, **Poland**, **Romania**, **Serbia**, **Slovakia**, **Spain**, **Sweden**, **Turkey**, **United Kingdom**).

Some of these reported difficulties are of a rather general and/or persistent nature. In **Germany**, indirectly discriminatory provisions in collective agreements are considered a root cause for the persisting gender pay gap. This is reinforced by labour court decisions stating that the evaluation of work and the establishment of pay systems are a crucial part of the autonomy of collective bargaining and that the state may not interfere with this autonomy even if the pay systems seem to be arbitrary or unjust. It is still to be seen whether the statute on general minimum wages, which entered into force on 1 January 2015, might influence the gender pay gap.

A recent case decided by the Labour Court of Berlin, concerning a female freelancer working for a public service broadcaster in the position of a senior editor on a full-time basis, with defined duties and receiving a fixed monthly remuneration, confirms this. The complainant took legal action upon realising that her male colleagues doing the same or equivalent work were being paid significantly more than herself. However, the court decided that she had not been discriminated against on the ground of sex, but rather that there were justified differentiations due to seniority and the different contract arrangements for freelancers and permanent employees, which followed from the collective agreement. The court explained that higher remuneration would mainly depend upon negotiating skills, supposedly more pronounced in men, and contractual freedom and that maternity and childcare periods would often lead to shorter periods of employment for women, less seniority and, thus, lower wages, without any discrimination being involved.

Another problem concerns the restriction of cases to individual claims, when tackling structural problems (such as discriminatory classifications and pay structures). The fact that there is no possibility of collective or class actions regarding equal pay has been identified, time and again, as one of the main obstacles to achieving gender equality.

While in **Italy** job classification is required by legislation to be gender neutral, no formal job evaluation and job analysis systems are available in Italy's legal and industrial relationships systems. Moreover, local and enterprise contracts are not easily available and seldom published either on the websites and in paper form. Collective agreements and job evaluation schemes are not normally monitored.

The implementation of equal pay has received quite a lot of attention in **Belgium**, but the legal arsenal is only concentrated on one factor in the gender gap – job evaluation and classification – and not on the whole range. While a number of sound mechanisms are in place, such as the works mediator and the Special Commission, which can provide advice on equal pay disputes in response to a labour court's request and which are well equipped to examine claims of work of equal value, no works mediators have been appointed since the act came into force four years ago and the Special Commission has been consulted only twice, with the last case being 30 years ago.

In **Estonia**, it is considered problematic that individual pay agreements between employers and employees are dominant and it is often claimed that women agree to work for lower pay. Employers' pay systems and practice are not monitored and the majority of employers do not carry out wage analyses from a gender perspective. It is hoped that the administrative burden of carrying out such analyses will reduce with the introduction of innovative digital solutions. However, there is a workforce shortage in the ICT sector, outsourcing is widely used and gender equality promotion is dependent on the human resources policies of the company. The Estonian state provides foreign recruitment support, as part of the 'Work in Estonia' project, but gender equality is not a priority issue in this context. In **Lithuania** as well there is an overwhelming dominance of individual agreements in the setting of wages and an absence of collective agreements. The rules on confidentiality are also considered to contribute to the reluctance of employees to challenge discriminatory practices in the area of pay. In practice, a difference in pay for women and men is considered to be a problem of equality law, which is governed by public law instruments, and not a problem related to individual labour law.

In the **Romanian** private sector there is also complete discretion to negotiate salaries. In **Latvia**, the major problem is that neither political, nor executive power recognises gender equality as a problem. This is due to the fact that indicators on women's participation in the labour market (Latvia – 72.7 %; EU-28 – 66.5 %);[182] gender pay gap (Latvia – 15.7 %; EU-28 – 16 %);[183] and women in decision-making bodies are relatively high in the average EU-28 context. However, such favourable statistics cannot be explained by actual gender equality but rather by the considerably higher level of education of women and the fact that women in Latvia are used to bearing a double burden of obligations – the majority still work on a full-time basis, while spending considerably more hours on family and household work.

Some experts have also referred to general aspects of their labour markets, in particular the problem of gender segregation in the workforce. The **North Macedonian** expert mentioned this as one of the main problems for the gender pay gap. While many government documents attribute the lack of women's participation in the labour market to traditional attitudes, this claim is not supported by evidence. Research has shown that, actually, discrimination in the labour market, the lack of policies to reconcile work and family life, the lack (and the cost) of care and childcare facilities all contribute to the high economic inactivity rates among women. In **Slovakia** as well horizontal and vertical segregation is a big problem. The fields of healthcare, social services and education tend to be dominated by women: over four fifths of the workforce in these sectors are women and the figure is three fifths for the public policy sector. Horizontal segregation of the labour market in Slovakia is very pronounced and 'female' jobs are less valued. The gender pay gap occurs not only between sectors, but also within sectors. A higher educational level does not automatically mean that women obtain better positions and better pay.[184]

In 2015, the Defender of Rights produced a comprehensive study of the multiple factors that interact to produce the gender pay gap in **France**.[185] First, ingrained stereotypes about male and female work lead

182 Eurostat 2018,'Employment rate by sex', available at: https://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tesem010&language=en.

183 Eurostat (2017), 'Gender Pay Gap Statistics', available at: https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics.

184 See Porubänová, S. (2016) *The gender pay gap in Slovakia*, European Parliament, p. 2, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583140/IPOL_STU(2017)583140_EN.pdf, in English.

185 https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_fic_20150629_salaire_egal_fh.pdf.

to gendered orientation by schools of girls into certain types of jobs. This explains the segregation of the workplace, with some jobs being predominantly male and other positions predominantly female. In these predominantly female jobs, career advancement is not always possible and in predominantly male jobs there is no critical mass of women in the highest ranks, producing a glass ceiling for women. The impact of maternity enhances the risk that employers limit female promotions. As a result of these barriers and child rearing, more women end up in part-time work. They suffer from discrimination, stereotypical images of women and biased representations of their contribution to the workplace which perpetuate the recurring systemic sex discrimination in employment, affecting their pay. Hence this report explains how all these factors correlate in a vicious circle and can prevent the effective application of equal pay for work of equal value.

The **German** expert also observed that deep-rooted cultural and structural gender inequalities still seem to exist, as evidenced by the worsening gender-based segregation in the labour market.[186] Gender-specific career choices are increasing, not decreasing. The unequal distribution of care work is persistent. Although significantly more women are now employed, the total working time volume of women has not increased – more women share the same total working time, meaning that they work in ever smaller part-time jobs. The massive expansion of childcare has not yet had a significant impact. Gender stereotypes, which are internalised at an early age (not least due to an aggressive marketing policy for everything that children might need, with one version for girls and one for boys), play an important role in entrenching gender segregation. The rise of right-wing populist parties and movements furthers anti-feminism and traditional gender roles.[187] Moreover, left-wing policies often claim that 'identity politics' (meaning anti-discrimination politics and the protection of minorities) have caused the rise of right-wing populism and draw the hardly helpful conclusion that they have to focus on the 'normal citizen' (meaning the *white* blue-collar worker).[188] Instead of this kind of backlash against gender and other equality policies, new strategies to deal with the transformation of working life are necessary. The **Bulgarian** expert also noted that the political environment, and the backlash in interpretation of core principles, especially in the last two years, may represent a threat even to the understanding of concepts largely accepted to date, such as equal pay and equal working conditions.

The **Montenegrin** expert has pointed to illegal employment as a significant problem. In **Bulgaria**, there is no substantial development of case law concerning equal pay and the lack of a clear gender approach in cases of pay discrimination to the detriment of women is considered a main problem. This is due, in the first place, to the fact that in the anti-discrimination law equal pay is regulated as equal pay for all, based on all grounds. Secondly, Section 3 of Chapter II of this law is called 'Protection in the exercise of the right to work' which is interpreted in practice as a separate ground of discrimination – discrimination in employment. Thus claims for equal pay are considered without regard to any grounds of discrimination, especially not the ground of sex. The fact that women shoulder most (or more) of the unpaid domestic and care work within the household, might hinder their participation in the labour market. This is specifically mentioned by the Cypriot expert.

In other countries it is the comparison of work that poses particular problems. In **Croatia** and the **Netherlands**, the actual comparator requirement and its application by the courts is deemed problematic. In the **Irish** expert's opinion, one of the key issues in respect of the gender pay gap is in segregated employment, as a complainant must have a comparator of the opposite sex in order to pursue an equal

186 See Federal Government (2017), Second Gender Equality Report, Berlin, with further references. Documents are available at https://www.gleichstellungsbericht.de/. The committee of experts consisted of Eva Kocher (chair), Thomas Beyer, Eva Blome, Holger Bonin, Ute Klammer, Uta Meier-Gräwe, Helmut Rainer, Stephan Rixen, Christina Schildmann, Carsten Wippermann, Anne Wizorek and, Aysel Yollu-Tok.

187 E.g. AK Fe.In (2019), *Frauen*Rechte und Frauen*Hass. Antifeminismus und die Ethnisierung von Gewalt* (Women's rights and misogyny. Anti-feminism and the ethnicisation of violence); Schutzbach, F. (2019), *Antifeminismus macht rechte Positionen gesellschaftsfähig* (Anti-feminism makes right-wing positions socially acceptable), available at https://www.gwi-boell.de/de/2019/05/03/antifeminismus-macht-rechte-positionen-gesellschaftsfaehig.

188 E.g. Heisterhagen, N. (2018), *Die liberale Illusion: warum wir einen linken Realismus brauchen* (The liberal illusion: why we need a left-wing realism).

pay claim. The **United Kingdom** expert has also noted that in the case of outsourcing, there is the difficulty that the outsourced worker cannot generally use as a comparator a (male) worker who is working for the outsourcer, or for an organisation to which his job has been contracted out (this is as a result of the CJEU ruling in the *Lawrence* case).[189] In contracted-out cases the pay is generally determined by the organisation to which the work is contracted and not the organisation for which it is (ultimately) done. There are examples of cases in which contracted-out workers did successfully claim equal pay with male comparators who had remained in the employment of the original employer.[190] The British expert also noted that there are many difficulties in practice in relation to equal pay, because the question of whether work is of equal value is not one about which workers can be certain in advance of bringing a claim (this being a matter for the employment tribunal to determine). This problem is additional to the issues associated with all equal pay (and, indeed, discrimination) claims: complex laws to navigate; the requirement in practice for (expensive) specialist legal assistance; and the concerns workers have about being victimised for bringing discrimination/equal pay complaints.

The **Polish** expert has referred to the lack in many companies of a system of occupational classification as well as the lack of a universal system for valuing work and establishing criteria, allowing for the comparison of various kinds of work. This also causes difficulties in claiming damages resulting from wage discrimination. In **Cyprus** as well most employers in the private sector do not have an evaluation and job classification system or job description scheme put into place nor have they proceeded to evaluating posts or professions with a view to defining same work or work of equal value. Earlier research on the gender pay gap has also revealed that posts mainly occupied by women are placed on lower salary scales. The **Latvian** expert has criticised the lack of definition of the equal pay for equal value principle, the lack of criteria for assessing the equal value of work, and also the legislator's failure to take adequate account of EU gender equality law. The Latvian Parliament adopted a law on remuneration of state officials and employees with a view to establishing a uniform remuneration system, but excluded school teachers from it. Since most of these are women, this constitutes indirect discrimination. In **Greece**, the lack of transparency, together with the lack of revision of traditional, felt-fair (i.e. classifications that have been traditionally considered fair due to stereotypes, without any justification), non-transparent job classifications to the detriment of formerly 'female' (and still female-dominated) categories, render the legal provisions on equal pay to a great extent ineffective.

The **Swedish** expert has noted that the main problem does not reside in proving that work is of equal value but in proving that actual discrimination took place, the Labour Court being too ready to accept employers' justifications for pay differentials. Likewise, the **Italian** expert has observed that many gender-neutral criteria can easily be explained by the employer as being objectively necessary and proportionate, responding to a real need of the business. Likewise, the **Italian** expert has observed that it might be difficult to detect the gender pay gap, which can be concealed in an apparently neutral definition of wages (and be a form of indirect discrimination) stated by collective agreements or in additional wages bargained at local or enterprise level and in personal bonuses; most of the time, such criteria can easily be explained by the employer as objective, necessary and proportionate criteria, which are essential requirements of the job.

The **Polish** and **Hungarian** experts have noted similar problems in proving discrimination. **Hungarian** courts are also excessively strict when judging the amount of compensation to be paid to victims of sex discrimination. In one case, when the directly discriminated female bus driver was not employed because of her sex, only the lost wages were paid until the day she found employment somewhere else, despite the Supreme Court noting that CJEU case law requires persuasive sanctions. In an important case in 2017, the Equal Treatment Agency concluded that a human resources measure that is still widespread, which

189 CJEU, C-320/00, *A. G. Lawrence and Others v Regent Office Care Ltd*, 17 September 2002.

190 United Kingdom, *Glasgow City Council v Unison Claimants*, Court of Session, [2017] CSIH 34, 30 May 2017, available at: https://www.scotcourts.gov.uk/search-judgments/judgment?id=669034a7-8980-69d2-b500-ff0000d74aa7; *Asda Stores Ltd v Brierley*, Court of Appeal (Civil Division), [2019] EWCA Civ 44, 10-12 October 2018, available at: https://www.bailii.org/ew/cases/EWCA/Civ/2019/44.html.

links a portion of pay to an employee's presence in the workplace constitutes indirect pay discrimination as it is disproportionately detrimental to female workers with young children, who take more leave to care for their sick children than men do. At the same time, however, it is deemed that this may reinforce the traditional role division between men and women in Hungarian society that persists.

Outsourcing, subcontracting and (other) exclusions from the scope of the law constitute a problem in a number of countries. In **Macedonia**, the Law on Agencies for Temporary Employment[191] thus declares that temporary employees (employees hired via the agency; subcontractors) cannot be paid less than non-agency employees for the same or similar work, but this is not the case for seasonal and part-time workers and for those working from home.[192] There are no clauses on their protection except for part-time workers, where the word 'proportionally' is used concerning pay. For all these categories, the issue of remuneration should be regulated exclusively by the employment contract between the employer and the employee.

In **Turkey**, subcontracting is a justification for pay differentials where there are different employers. In practice, primary employers do establish a primary employer-subcontractor relationship by engaging the primary employer's employees through the subcontractor[193] in order to keep employee payments low, avoid obligations related to social insurance, and prevent employees from using their trade union rights or collective labour agreements.

Greek case law considers out-sourcing a justification for pay differentials between workers covered by different wage-fixing instruments. This applies to workers employed by different employers, but also to those employed by the same employer who are covered by different wage-fixing instruments, which is incompatible with EU law. It is also a justification in the case of different employers, which is compatible with EU law. Equal pay cases are scarce in Greece and usually do not concern gender discrimination, even though in practice discrimination against women is quite common and has been growing since the onset of the financial crisis.

However, it is notable that, in 2017, the Supreme Civil Court dealt with a few cases and actually adopted two contradictory approaches towards levelling up as an effective way of eliminating gender discrimination in pay. In the first case, a company's statutes provided that the employment relationship had to end after 30 years of actual service for male employees and after 25 years of service for female employees. The court found that this constituted gender discrimination to the detriment of male employees and extended to them the more favourable treatment provided to female employees, so that they could benefit from the legal compensation and from even higher compensation within the framework of a voluntary exit scheme. In contrast, in two other rulings, the Supreme Civil Court did not apply the equality principle in the same way. These cases concerned the distribution of the capital of a group insurance scheme following the transfer of a bank and the refusal of its successor to continue this voluntary practice. The court found the liquidation that took into account different ages for men (65 years) and for women (60 years) to be lawful and rejected the male applicants' claim that this constituted discrimination based on sex, with the reasoning that the more favourable age provision that was valid for women must be deemed invalid and could not be extended to male employees (levelling down). Apart from this, the Ombudsman found that cuts in pay and allowances during pregnancy, maternity and parental leave have increased the gender pay gap.

191 Republic of North Macedonia, Law on Agencies for Temporary Employment, 2006. Full title: Republic of North Macedonia, Law on Agencies for Temporary Employment (Закон за агенции за привремено вработување), Official Gazette of the Republic of Macedonia, Nos. 49/2006, 102/2008, 145/2010, 136/2011, 13/2013, 38/2014, 98/2015, 147/2015, 27/2016.

192 Republic of North Macedonia, Labour Law, 2005.

193 See e.g. Turkey, Court of Cassation 7th Division, 19.10.2015, 16920/19734; Bakirci, K (2017), 'The concept of employee: The position in Turkey' in, *Restatement of labour law in Europe: Vol I: The concept of employee,* 1st Edn (B. Waas/ G.H. van Voss eds.), Hart Publishing, United Kingdom, pp. 721-747.

Some experts have also underscored the impact of the financial crises and austerity measures on securing equal pay. In **Greece**, there is thus a common belief that austerity measures in the years of the crisis have had an adverse impact on wages exceeding those stipulated in collective agreements (in some cases even shrinking to the minimum wage); this has resulted in a significant decrease in the gender pay gap while structural inequalities still persist. In the private sector, the rapid growth of flexible forms of employment as well as the replacement of contracts of indefinite duration by fixed-term contracts has led to a significant reduction in wages. The International Labour Organization Committee of Experts on the Application of Conventions and Recommendations (ILO CEACR) stresses, referring to the Ombudsman, that flexible forms of employment, mainly part-time and rotation work, are more often offered to women, especially during pregnancy and upon return from maternity leave, reducing their levels of pay, while lay-offs due to pregnancy, maternity and sexual harassment are increasing. 'Flexibility had been introduced without sufficient safeguards for the most vulnerable, or safeguards which had been introduced by law were not effectively enforced.'[194] In its 2016 Observations on the implementation of ILO Convention No. 100 (equal remuneration), the ILO CEACR again deplores the absence of impact assessment of austerity measures on women's pay, while 'the rapid growth of flexible forms of employment has led to a widening of the gender pay gap and to obstacles in women's career development'.[195]

In **Germany**, the government took several far-reaching decisions as a result of the financial crisis. On the one hand, it has reduced social security or made access much more difficult, a decision from which women in particular are suffering as a result. It has also focused on export industries, thereby promoting industries in which men predominate, albeit without taking into account the fact that they are undergoing fundamental transformation processes. Such export industries continue to be the focus of attention, and at the same time no concept has been developed as to how to deal with the rapidly growing services sector, in which men and women work under mostly unacceptable conditions and with wages that do not secure their livelihoods. With the privatisation of essential areas of previously public tasks, the state has released significant fields of work from its control, and the Minimum Wage Act is proving to be fairly ineffective.

3.2 Equal treatment at work; access to work and working conditions

EU gender equality law also covers employment, in particular access to employment, promotion, access to vocational training and working conditions, including conditions governing dismissal (see Chapter 3 of Recast Directive 2006/54/EC). Here we discuss the extent to which domestic law aligns with both the personal and material scope of the Recast Directive in this respect, possible exceptions to the equal treatment principle and particular difficulties that emerge in relation to equal treatment at work.

3.2.1 The personal and material scope

Transposition in this area has generally taken the form of a general gender equality act and, very often, amendments to labour law or to legislation concerning civil servants. Most of these national laws provide for a definition of the personal scope in relation to access to employment, vocational training and working conditions (see Article 14 of Directive 2006/54), except for **Belgium**, the **Czech Republic**, **Latvia**, **Luxembourg**, the **Netherlands** and **Norway**. But this does not necessarily seem to be problematic. While the **Belgian** Gender Act has no proper personal scope, its material scope is broader than all the EU gender equality directives, and as a result it applies to anyone involved in any situation falling within the material scope. In the **Netherlands** as well the personal scope derives from the material scope of the law. **Czech** law provides that parties to a legal relationship are obliged to guarantee the equal treatment of all physical persons who make use of their right to employment and the Anti-discrimination Act specifically

194 ILO Greece: Observation (CEACR), adopted 2011, published 101st ILC session (2012), Equal Remuneration Convention 1951 (No.100), available at: www.ilo.org/dyn/normlex/en/f?p=1000:13201:0::NO:13201:P13201_COUNTRY_ID:102658.

195 ILO Greece, Observation (CEACR), adopted 2016, published 106th ILC session (2017), available at: www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3297841.

provides for equal treatment in access to employment, vocation, entrepreneurship, self-employment etc. In **Greece**, the legislative definition of the personal scope is broader than in EU law, but the concept of 'worker' ensues from case law. In **Luxembourg**, the law reproduces Article 14 of the Directive in this regard, but does not define the concept of 'worker'. The application of the link of subordination ensues from case law. **Norwegian** law does not define the personal scope nor the concept of 'worker', but the law in combination with the case law shows compliance with EU (case) law. There is also no definition of a 'worker', an employment contract' or an 'agreement' in statutory law in **Sweden**. Whether **Montenegrin** law contains a concept of 'worker' or 'employee' in conformity with EU law is unclear.

Most legal systems provide for a definition of a 'worker' or, alternatively, of an employment agreement or contract (**Netherlands**, **Portugal**), which is generally considered to be in compliance with the case law of the CJEU. Yet there are also still some deficiencies to be signalled (**Austria**, **Czech Republic**, **Denmark**, **Latvia**, **Lithuania**, **Turkey**, **United Kingdom**). **Danish** law employs different definitions of 'worker'. The personal scope of the equal pay principle in **Lithuanian** law is rather confusing and does not encompass everyone falling with the EU notion of worker, e.g. it excludes public servants. By way of legal analogy, however, they may still enjoy the same protection as workers. The **Austrian** expert has noted that 'free contract workers' (people working under contractual conditions that cannot be wholly subsumed under labour law, entailing some characteristics of self-employment), are not fully covered by gender equality law, even if in reality they share more characteristics with regular employees. In **Turkish** law the concept of 'worker' covers dependent workers (employees with a private law employment contract, civil servants, public officials with an administrative law employment contract) and self-employed persons. However, the concept of 'worker' is not in compliance with EU law because employees with a private law employment contract, civil servants, public officials with an administrative law employment contract and self-employed are regulated by different legislation, they have different rights and they are under different obligations. In **Cyprus** and the **United Kingdom**, self-employed persons are excluded from the definition of worker, which is deemed to be inconsistent with EU law. **Latvian** law only protects judges and prosecutors against discrimination with regard to access to employment, and members of the boards of directors of capital companies are not protected against discrimination by law at all.

The material scope in relation to (access to) employment has also been defined in the national law of most states, in accordance with Article 14(1) of Recast Directive 2006/54, except for **Norway** and **Sweden** where the ban on any form of discrimination covers any decision-making by the employer in working life with no further specification whatsoever. The Swedish expert considers this problematic from the perspective of transparency for those concerned. Norwegian law applies to all areas of society and can as such be seen as broader than the scope of the Directive.

In other states as well the scope is wider than that contained in the Directive, as has been noted above in relation to **Belgium**. In **Croatia**, it also includes discrimination in relation to work-life balance, as well as pregnancy, giving birth, parenting and any form of custody. **French** law simply states that it applies to the public and private sector and covers all aspects of working life. **Spanish** law also applies, for instance, to staff recruitment and evaluation bodies.

In **Greece**, the scope is wider, also prohibiting discriminatory publications and advertisements and mentioning 'family status' as a prohibited ground of discrimination. **Romanian** law is also considered to be wider in scope. The law mentions 'family status' and 'marital status' as forbidden grounds. It also lists various aspects related to employment that are protected, from choosing a profession or activity to membership of trade unions and social services. **Irish** law comprises an extensive, detailed overview of the material scope and, most recently, the publication, display or causing to be published or displayed, of a discriminatory advertisement in so far as this relates to access to employment has been included in this as well. An 'advertisement' is defined as '[including] every form of statement to the public and every form of advertisement, whether to the public or not'.

In other countries, the material scope appears more limited in certain respects. The **Czech** Anti-discrimination Act does not include, for example, vocational training and access thereto, promotion or recruitment conditions. In **Portugal**, the material scope does not cover self-employment and occupation, since self-employment is outside the scope of the Labour Code. In **Iceland**, the scope is a bit more limited as it does not cover membership of, and involvement in, an organisation of workers or employers. **Lithuanian** law is found to be in contravention of EU law as regards non-discriminatory access to employment and promotion for the self-employed. In **Latvia** the material scope is only defined by the Labour Law, which is limited with regard to personal application. Moreover, there is no complete protection against discrimination with regard to access to membership of workers', employers' or professional organisations, including trade unions. In **Finland**, the material scope of the provision on (access to) employment is formulated as a form of 'discrimination in working life' by an employer, and refers to situations of access to work, and thus depends on the definitions of 'employer' and 'employee'. The term 'employee' even covers people whose work is comparable with employment, but some self-employed people may fall outside the definition. A separate provision covers discrimination in relation to access to education.

3.2.2 Exceptions

The possibility of exceptions for occupational activities, as provided for in Article 14(2) of the Recast Directive, has been implemented in the national laws of all states, except for **Greece**. Exceptions, or grounds for exceptions, provided for in many such laws (or ensuing from case law) include:

- singers, dancers, actors and artists (**Belgium**, **Bulgaria**, **Cyprus**, **France**, **Italy**, **Netherlands**, **Northern Ireland**);
- fashion models (**Italy**) and photographic models (**Belgium**, **France**);
- prison warders (**Belgium**) or work in male prisons and (public and private) security forces (**Cyprus**);
- work for the Marine Corps and the submarine service (**Netherlands**) and for the military depending on the type of military force (**Romania**), such exceptions having been repealed in other countries (**France**);
- equal opportunities commissioners and official guardians (**Germany**);
- church ministers (**Netherlands**) and other positions in which religious, ideological conviction or national/ethnic origin fundamentally determine the nature of the organisation (**Hungary**) or religious grounds as such (**Bulgaria**, **North Macedonia**, **United Kingdom**);
- preservation of decency or privacy (**Northern Ireland**) or moral reasons (**Cyprus**);
- where the job is likely to involve the holder of the job doing their work, or living, in a private home (**Northern Ireland**);
- personal service, care and nursing (**Cyprus**, **Netherlands**, **Northern Ireland**);
- biological characteristics being determinant for the job (**Austria**);
- positions in foreign countries that do not apply the principle of gender equality in employment (**Belgium**) or in countries whose laws or customs are such that the duties could not, or could not effectively, be performed by a woman (**Northern Ireland**, **Cyprus**);
- where the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina; **Northern Ireland**) (excluding natural health or strength; **Cyprus**);
- working underground in mines (**Cyprus**).

In other states, there has been no identification of the possible jobs concerned (**Latvia**, **Liechtenstein**) or the exception is formulated in a general way referring to the nature of the work or the context in which the work is carried out, without further specification (**Sweden**, **Norway**, **Portugal**). In **Iceland**, the Article 26(3) of the GEA allows the advertisement of a vacant position that prefers one sex over the other, if the aim of the advertiser is to promote a more equal representation of women and men in an occupational sector. The same applies if there are 'valid reasons' for advertising for a man or a woman only. In **Finland**,

exceptions can be made for a 'weighty and acceptable reason' but it is unclear what this covers and whether it aligns with EU law.

The exceptions provided by **Polish** law 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. In **Hungary**, for employment discrimination cases, the Equal Treatment Act used to establish an additional, somewhat broad and vaguely worded exemption,[196] which was modified in 2017 and entered into force on 1 January 2018. Most importantly, the amendment[197] has reduced the scope of the exemption from any kind of employment situation to only the hiring process, and the wording of the provision is clearer. By now repeating the wording of Article 14(1) of Directive 2006/54, the transposition of the EU acquis into Hungarian legislation has been improved. Yet, the exception provision in the Equal Treatment Act[198] does allow employers to prove that, 'by objective consideration', there is 'a reasonable explanation' for discrimination, 'directly related to the relevant [employment] relationship'. This exception can cover situations where, for example, sex discrimination is justified by deeply rooted socio-cultural norms (e.g. that bath attendants should be females in a women's public bath). However, sometimes the (alleged) financial interest of the employer is also seen as a 'reasonable explanation' for sex discrimination, thus the phrasing of this provision may be problematic from the aspect of gender equality. In **Italy**, derogation is possible regarding 'particularly strenuous' jobs, tasks and duties as provided for by collective agreements. This exception has always been deemed to be in compliance with EU law, since it is also considered a rational choice of the legislator to identify these jobs in collective bargaining rather than to set them in stone in legislation.

Most national laws also provide for the exception on the protection for women, in particular as regards pregnancy and maternity (Article 28(1) of the Recast Directive), except for **Germany** and **Latvia**. In **Greece**, the protection of paternity and family life is added. In **France** and **Italy**, the law does not explicitly provide for this either, but it does not impede as such the definition of some specific rules for women. **Polish** law does not permit pregnant and breastfeeding women to perform work that is particularly arduous or harmful to their health, a list of such work being laid down in the Ministerial Act of 3 April 2017. In **Spain**, notwithstanding the applicability of the pregnancy and maternity protection rules, it is impossible to prohibit women from performing certain professional activities. 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.

3.2.3 Particular difficulties

A number of national experts have also reported particular difficulties related to the personal and/or material scope of national law in relation to access to work, vocational training, employment, working conditions etc., concerning a broad range of issues:

– Certain categories of workers being excluded from the personal/material scope of the national law, such as certain types of self-employed workers (**Germany**), domestic workers who work four days a week or less in a private household (**Netherlands**) or the discriminatory termination of self-employment contracts by employers/clients not being explicitly covered (**Netherlands**).

196 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities (*2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról*), 28 December 2003, Article 22(1) Point (a).

197 Act L of 2017 amending certain Acts in respect of the entry into force of the Act on the Code of General Administrative Procedure and the Act on the Code of Administrative Court Procedure (*2017. évi L. törvény az általános közigazgatási rendtartásról szóló törvény és a közigazgatási perrendtartásról szóló törvény hatálybalépésével összefüggő egyes törvények módosításáról*), 16 May 2017, Article 226(2).

198 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities (*2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról*), 28 December 2003, Article 7(2) Point (b).

- Problems related to non-discriminatory hiring and promotion, women still often being rejected on grounds of pregnancy, motherhood and family obligations (**Estonia**, **Montenegro**) or on the basis of the argument that it's a 'man's job' (**Serbia**) or that a man is more suitable for the position (**Montenegro**). In **Montenegro** these problems occur notably in the private sector. A concrete, recent example regarded recruitment in the Supreme Court of **Iceland** where 10 out of 11 judges are men and the evaluation committee was composed of only men. It suggested that out of the three qualified applicants (two men and one woman) a man should be appointed.
- Discriminatory dismissal after maternity leave or reassignment to a lower or less well-paid position when returning from parental leave (**Montenegro**, **Serbia**).
- Difficulties for women in making use of their right to return to work or to an equivalent job after pregnancy and maternity leave, especially if a reorganisation of work has led to the termination of certain jobs (**Croatia**).
- Exceptions regarding access to certain jobs on religious grounds (**Bulgaria**); it is considered that these cannot be a priori justified and there is a potential problem of non-compliance with EU law in this regard.
- Wrongful use of terminology; in **Latvian** law, it is not clearly stated that non-compliance with special protection measures leads to discrimination based on sex. It also uses the formulation 'prohibition of differential treatment' instead of 'prohibition of discrimination', this being problematic from the perspective that equal treatment in different situations may amount to discrimination as well.
- In **Estonia** it is common practice that job applicants are asked about their personal life in job interviews. In 2015 the Gender Equality and Equal Treatment Commissioner received 70 complaints about gender discrimination.
- The **Serbian** expert has also reported that traditional gender stereotypes influence the fact that women dedicate significant time to unpaid jobs and childcare. The majority of citizens believe that successful women neglect their family duties and that a higher salary unavoidably causes family problems.
- In **Montenegro**, the Ombudsman stated in his 2015 Report that 'in order to achieve better results and support for the struggle for gender equality, ongoing education and directing public awareness towards the values of equal treatment and equal opportunities for members of both sexes are essential. It seems that there is a certain lack of detailed statistical analysis and scientific research, as well as other strategic acts aimed at fostering gender equality, including a gender-sensitive approach to budget planning'.[199]

199 Montenegro, Ombudsman's Report for 2015, p. 151.

4 Pregnancy, maternity, paternity, parental and other types of leave related to work-life balance

In addition to the general prohibitions of direct and indirect discrimination, EU legislation (and CJEU case law) explicitly prohibit any less favourable treatment of women in relation to pregnancy and maternity leave in the Recast Directive 2006/54/EC.[200] However, provisions concerning the protection of women, particularly as regards pregnancy or maternity are allowed[201] or even required. Currently, two directives provide specific protection and rights in relation not only to pregnancy and maternity, but also to parental leave. The Pregnant Workers Directive 92/85/EEC had to be transposed by November 1994 into the national law of the EU Member States, while this was required for the Parental Leave Directive 96/34/EC by June 1998.[202] Directive 2010/18/EU repealed Directive 96/34/EEC by 8 March 2012 and implemented the revised agreement on parental leave that the European social partners reached in June 2009, which lays down minimum requirements on parental leave and time off for *force majeure*.[203]

Article 33 of the Charter of Fundamental Rights of the EU on the reconciliation of private/family life and work is also relevant when Member States implement EU law.[204] As regards self-employed workers, Directive 2010/41/EU applies to maternity benefits (see Section 7).[205] In April 2017, the Commission's initiative for the European Social Pillar recognised once again the importance of work-life balance for workers, as the Pillar not only includes the principle of gender equality and equal opportunities, but also work-life balance.[206] The European Commission simultaneously published a proposal for a directive on work-life balance.[207] This proposal was adopted two years later and the Directive 2019/1158 on work-life balance for parents and carers – which will repeal the Parental Leave Directive 2010/18/EU – entered into force on 12 July 2019.[208] This Chapter provides a comparative analysis of the implementation into national law of Directives 92/85/EEC and 2010/18/EU, as well as relevant national law.

A specific difficulty concerning leave is that the names of some forms of leave in a few countries do not correspond to the qualification of the different forms of leave in EU law. For example, in **Montenegro**, maternity leave is part of parental leave. One could say that both parents are entitled to parental leave, but that there is a 'mother's quota', which forms the maternity leave. How to define the different types of leave also plays a role for example in **Albania**, **Portugal** and **Slovakia** as regards paternity and parental

200 See Article 2(2)(c) 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), OJ L 204, 26.7.2006, p. 23–36, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054.

201 See Article 28(1) of the Recast Directive 2006/54/EC.

202 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 1992, L 348/1 available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992L0085; A proposal aimed at amending this directive (COM 2008(637) final) was withdrawn on 6 August 2015 due to the lack of agreement after years of negotiations, see https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008PC0637.

203 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 2010, L 68/13 available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010L0018.

204 See, for example: McColgan, A. (2015), *Measures to address challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European Union, available at: https://www.equalitylaw.eu/downloads/3631-reconciliation.

205 See in particular Article 8.

206 See *The European Pillar of Social Rights in 20 Principles*, in particular principles 2, 3 and 9: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en.

207 Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM (2017) 253, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0253.

208 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 12.7.2019, p. 79–93, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.188.01.0079.01.ENG; For more information see Chieregato, E. (2020), 'A work-life balance for all? Assessing the inclusiveness of EU Directive 2019/1158' *International Journal of Comparative Labour Law and Industrial Relations*, 36(1).

leave. In **Turkey**, childcare leave would correspond to parental leave. The information provided within the national context by the national experts is therefore crucial to understand how the different forms of leave correspond to each other. However, given the aim of this comparative analysis, the framework of the following sections follows the relevant EU legislation. After an introduction to the general context (Section 4.1), pregnancy and maternity protection, as well as maternity leave, are considered (Sections 4.2 and 4.3), followed by adoption, parental leave, paternity leave, time off/care and surrogacy leave (Sections 4.4-4.8). In Section 4.9 flexible working-time arrangements are discussed, and the chapter ends with a short evaluation.

4.1 General (legal) context

The country reports show that in some countries, many surveys and specific research relating to work-life balance issues have been carried out (as for example in the **Czech Republic**, in particular on the gender impact of the tax system or in **Poland** on the use of flexible working time). A significant amount of research mentioned by the national experts shows to what extent household and care responsibilities are unequally divided between men and women – the so-called 'gender care gap'.[209] The negative impact of parenthood is (much) greater on the labour market participation, careers, pay and pensions of women than men. This aspect was explicitly mentioned by the national experts of **Albania**, **Bulgaria**, the **Czech Republic**, **Finland**, **Germany**, **Hungary**, **Italy**, **Liechtenstein**, the **Netherlands**, **Poland**, **Portugal**, **Serbia**, **Spain**, **Sweden**[210] and **Turkey**. This tendency is particularly marked in **Croatia**, according to a recent study.[211]

In **Greece**, qualitative research showed that the relationship between work and family life has been significantly influenced by the new conditions imposed by the recent economic crisis.[212] Seven years after the advent of the crisis (2009-2016), Greek society had undergone a variety of changes which are reflected in income, employment, state care services and benefits and allowances affecting those working in both the public and the private sectors. In these circumstances, the relationship between work and family life, as shown by the project's case studies, has suffered from the successive shocks of social transformations that took place during the crisis. This is especially true for female professionals. In addition, key dimensions of gender inequality which existed even before the recent economic crisis have also been prevalent. Reconciling work and family life has become extremely difficult, for women in particular, due to poor incomes and the lack of services offered by the state. The traditional role of women as mothers and housewives is thus reinforced.

In **Turkey**, the Directorate of Women's Status in the Ministry of Family, Employment and Social Services states in its strategic plan that the lack of sufficient preschool education and care services impedes the labour market participation of women. According to the national expert, Turkey must develop such

209 Mentioned by the authors of the *Second gender equality report* of the German Federal Government: Federal Government (2017), *Second gender equality report*, Berlin, available at: https://www.gleichstellungsbericht.de/. The committee of experts consisted of Eva Kocher (chair), Thomas Beyer, Eva Blome, Holger Bonin, Ute Klammer, Uta Meier-Gräwe, Helmut Rainer, Stephan Rixen, Christina Schildmann, Carsten Wippermann, Anne Wizorek, and Aysel Yollu-Tok.

210 See Swedish Government Report (2017), *Jämställt föräldraskap och goda uppväxtvillkor för barn – en ny modell för föräldraförsäkringen* (Equal parenting and good conditions for children growing up – a new model for parental insurance), SOU 2017:101, available (in Swedish with English summary) at: https://www.regeringen.se/4afa97/contentassets/01a6fba2043a4e58aeac32cf52bd3449/sou-2017_101_jamstallt-foraldraskap-och-goda-uppvaxtvillkor-for-barn.pdf. The introduction of non-transferable days in the parental leave regulation has led to a more equal sharing of parental leave by couples, in addition to other factors such as education and higher earnings for mothers: see, among many others, Ma, L., Andersson, G., Duvander, A-Z., Evertsson, M. (2018), *Forerunners and laggards in Sweden's family change fathers' uptake of parental leave, 1993-2010*. Working Paper 2018:01, Stockholm University Linnaeus Center on Social Policy and Family Dynamics in Europe, SPaDE., available at https://www.su.se/polopoly_fs/1.371819.1518171269!/menu/standard/file/WP_2018_01.pdf.

211 The research was conducted within the framework of the EU funded project managed by the Croatian Ombudsperson for Gender Equality 'In pursuit of full equality between men and women: reconciliation between professional and family life'. See Klasnić, K. (2017), *Utjecaj rodne podjele obiteljskih obveza i kućanskih poslova na profesionalni život zaposlenih žena* (Impact of gender division of family and household obligations on professional life of employed women), Ombudsperson for Gender Equality, available at http://rec.prs.hr/wp-content/uploads/2018/01/Brosura_prijelom_finalno_web.pdf.

212 Thanopoulou, M., Tsiganou, J. (2016), *Gender in science without numbers – From academia to work-life balance, Main results of case studies*, Εθνικό Κέντρο Κοινωνικών Ερευνών (National Centre for Social Research), Athens.

services in the light of Article 12(2)(c) of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and Article 27 of the European Social Charter (ESC).

Surveys and figures on the complaints equality bodies receive on pregnancy and maternity discrimination show that such discrimination occurs. This aspect was highlighted specifically in the country reports of **Belgium**,[213] **Cyprus**,[214] **Germany**,[215] and the **United Kingdom**. In the **United Kingdom**, new and expectant mothers who are casual, zero-hours or agency workers were 'less likely to feel confident about challenging discriminatory behaviour', according to the Women and Equalities Committee.[216]

Some experts report unfavourable treatment of pregnant women who, at the end of a fixed-term contract, are not offered a new contract, probably due to their pregnancy and/or maternity leave (e.g. **Croatia**, **Netherlands**, **North Macedonia** and **Norway**). In **Finland**, young women are more often employed on fixed-term contracts than other groups. The availability of home care leave – a parental right to remain at home and take care of a child until the child is three on a flat-rate benefit – is often seen as a factor that has a negative impact on participation in the labour market by young women. In **Serbia**, women are sometimes questioned about their family plans during job interviews or are constantly on short-term contracts.[217]

Some surveys show that reconciling work and family life is difficult for many parents, for example in **Belgium**.[218] This is not the case in **Iceland** where the main conclusions of one survey were that employees did not find it difficult to balance work and family life, however many of them would like to reduce their number of working hours per week.[219]

In the **Netherlands**, a large number of women work part-time. According to recent research, the Dutch system is characterised by three aspects that appear to uphold and strengthen one another: 1) the fact that women predominantly work in sectors with many part-time jobs and relatively low salaries; 2) the unequal distribution of work and care, with women carrying out most caring tasks and an infrastructure that puts women at a disadvantage in this respect; and 3) explicit ideas and social norms that influence the choices men and women make in regard to education, careers and care.[220] In **Austria**, the incidence

213 A study commissioned by the Belgian Institute for the Equality of Women and Men reported in 2017 that three out of four women workers have faced at least one form of discrimination, prejudice, unequal treatment and unpleasant treatment because of their pregnancy or maternity; 22 % of pregnant workers faced direct discrimination and 69 % suffered indirect discrimination: Institute for the Equality of Women and Men (2017), *Grossesse au travail. Experience de candidates, d'employées et de travailleuses indépendantes en Belgique,* (*Pregnancy at work – Experiences of candidates, employees and self-employed women in Belgium*).

214 The equality body in Cyprus reported that 25 % of the complaints received between 2011 and 2016 concerned discrimination at work, including dismissal, due to pregnancy or maternity. The Committee on Gender Equality in Employment and Vocational Training (Ministry of Labour) reported that 50 % of the complaints received concerned unlawful dismissals of pregnant workers.

215 However, nearly no cases are reported on the website of the Agency. See https://www.antidiskriminierungsstelle.de/DE/ThemenUndForschung/Geschlecht/Gleichbehandlung_der_Geschlechter_im_Arbeitsleben_neu/Gleichbehandlung_Geschlechter_Arbeitsleben_node.html.

216 House of Commons Women and Equalities Committee (2016), *Pregnancy and maternity discrimination*, available at: https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/90/90.pdf p. 20, para. 56.

217 Human Rights and Business Country Guide for Serbia, Belgrade Centre for Human Rights, the Danish Institute for Human Rights, 26, available at: http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2016/09/Country-Guide-Serbia-FINAL-English-August-2016.pdf.

218 A survey, from the Belgian Family League (*Ligue des familles*), found that eight out of ten parents have difficulty reconciling work and family life and one in four workers say they are on the verge of exhaustion. The most frequently expressed demand by parents is a collective reduction in working time. The Family League also proposes 'conciliation leave,' which could be taken in hours rather than in days: Family League (Ligue des familles) (2018), *Comment adapter le monde du travail à la vie des parents?* (How can the world of work be adapted to the lives of parents?), available in French at: https://www.laligue.be/Files/media/495000/495841/fre/2018-10-25-enquete-travail-et-parentalite.pdf.

219 Msc Paper on Reconciliation of work and family life by Ragnheiður G. Eyjólfsdóttir; 'Reconciliation of work and family life', Msc thesis, Reykjavík University Course in Organisational Behaviour and Talent Management, 30 May 2013, https://skemman.is/bitstream/1946/16358/1/Ragnheidure-Lokaritgerð.pdf.

220 McKinsey & Company (2018), *Het potentieel pakken* (Address the potential), available at: https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Europe/The%20power%20of%20parity%20Advancing%20gender%20equality%20in%20the%20Dutch%20labor%20market/MGI-Power-of-Parity-Nederland-September-2018-DUTCH.ashx.

of part-time work is high as well and this contributes to the high gender pay gap and gender pension gap. In **Liechtenstein** and **Norway** many more women than men work part-time if they have family responsibilities. In contrast, in the **Czech Republic**, **Montenegro** and **Poland** for example, not many workers work part-time; if they do, they mostly have family responsibilities.

Some national experts also report that family-friendly measures such as leave are used much more by women than men (e.g. **Germany** and the **United Kingdom**). In **Germany**, the complexity of the care system has been criticised.[221] In the **Czech Republic** and **Slovakia**, research shows that the parental leave for three years with a parental allowance has negative consequences for the women who take such a long period of leave. In **Lithuania** the 'children's money' allowance granted upon request to parents without any precondition tends to reduce the willingness of women to return to work. Some experts also point at the role of traditional stereotypes in hampering a more equal sharing of work and care between men and women (e.g. **Germany**, **Italy**, **Lithuania** and **Poland**).

In some countries, the policies and legislation aim to boost birth rates (for example, in **Croatia** and **France**). In **Latvia**, there are also political discussions about the need to raise birth rates, but these are not linked to work-life balance issues.

The lack of services and costs related to (childcare) services also impedes a more gender balanced division of work and care, in particular for lower or medium income groups (e.g. **Italy**). In southern and western **German** states, there is still a lack of tens of thousands of kindergarten places. Research showed that in **Austria** employees with small children consider that the conditions, effects and availability of childcare at their workplace is an important factor in their employment decisions. This survey also revealed that employees with children under 12 years of age prefer flexible working time arrangements.[222]

There are also more positive trends. In **Luxembourg**, the number of fathers who took parental leave after an income-related parental leave pay[223] was introduced in 2016 increased dramatically by 190%. In 2016, mothers represented 75.3 % and fathers 24.7 % of the beneficiaries. In 2017, mothers represented 55.4 % and fathers 44.6 %. In **Poland**, currently a quarter of the workers taking all kinds of child care related leave are fathers, but still only about 1 % of parental leave is taken by men.[224] In **Portugal**, a survey published in 2017 shows a growing use of paternity leave and parental leave by fathers and the extensive use of childcare facilities for children prior to school age.[225]

A study in the **Czech Republic** highlighted to what extent public funding for pre-school places pays off. In **Montenegro**, there is a large network of public pre-school facilities with a high coverage. In **Italy**, the Ministry of Economy and Finance offers free childcare to workers. In **Sweden**, in addition to the right to work shorter hours for employees with small children, subsidised day-care facilities for children are available for working parents.

While in some countries the legislation on work-life balance complies with the EU requirements, the effectiveness of national law is hampered by a fear of exercising rights to leave, in particular when workers have precarious jobs, which is the case for many young workers. The gender pay gap and the fact that men/fathers are the main breadwinners also play a role in this respect (e.g. in **Italy**).

221 German Federal Government (2017), *Second gender equality report*, Berlin, p. 113.

222 L&R Social Research (2014), *Vereinbarkeit von Beruf und Kinderbetreuung – betriebliche Rahmenbedingungen aus Sicht berufstätiger Eltern* (Reconciliation of work and childcare – operational framework from the perspective of working parents) available at: https://www.femtech.at/sites/default/files/Studie_Vereinbarkeit_Beruf_Familie_2014.pdf.

223 The lower limit is EUR 1 922.96 per month, equal to the social minimum wage for non-qualified workers, and the upper limit is EUR 3 204.93 per month, equal to the social minimum wage increased by two thirds.

224 https://www.gov.pl/web/rodzina/wiadomosci-polityka-rodzinna; https://www.gov.pl/web/rodzina/rosnie-liczba-urlopow-rodzicielskich; https://www.gov.pl/web/rodzina/ojcowie-coraz-chetniej-korzystaja-z-urlopow-rodzicielskich; https://www.gov.pl/web/rodzina/urlopy-dla-rodzicow-2; https://www.gov.pl/web/rodzina/urlopy-dla-rodzicow-w-2019-najnowsze-dane.

225 CITE *(Comissão para a Igualdade no Trabalho e no Emprego) Report 2017,* pp. 63-66.

As regards legislation, in most countries, the Labour Code contains legal provisions relevant for work-life balance issues, in addition to other Acts. The **Belgian** system is particularly complex, as new measures have been added to old ones without harmonising the regulations with different objectives (redistribution of work or reconciliation of work and private life).

The right to an adequate reconciliation between work and family life is granted in the **Portuguese** Constitution as a fundamental right for workers.[226]

Sometimes, specific Acts apply to for example the protection of motherhood and paternity, as is the case in **Cyprus**; or entitlements to parental leave, childcare leave and benefits (e.g. **Croatia**, **Denmark** and **Ireland**); or on remote working (e.g. **France**).

The **Lithuanian** Labour Code explicitly requires that employees' conduct and their actions at work shall be assessed by their employers with a view to practically and effectively implementing the principle of work-life balance.

In 2018, the European network of legal experts in gender equality and non-discrimination published a thematic report on *Family leave: enforcement of the protection against dismissal and unfavourable treatment*.[227] This report addresses the protection against discrimination and unfavourable treatment as well as dismissal due to the take-up of family-related leave – pregnancy and maternity leave, parental and adoption leave, paternity leave and carers' leave – at national level in the 28 Member States and three EEA countries (Iceland, Liechtenstein and Norway). It also provides detailed information on access to justice and enforcement issues.

4.2 Pregnancy and maternity protection[228]

Discrimination for reasons of pregnancy is considered as *direct discrimination* under EU law[229] and therefore also in the Member States. 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 Recast Directive 2006/54/EC).

At the same time, protection for reasons of pregnancy and maternity justifies different treatment for the women concerned. Thus, *special rights* and specific protection 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 2006/54/EC). In CJEU case law, when specific protection does not apply, the principle of equal treatment between men and women can be applied[230] or the general principle of equal treatment.[231] While in the past rights protecting women in relation to pregnancy and maternity have been seen as an exception to the principle of equal treatment, nowadays they are 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. 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 for women for a long period of time. If women are entitled to an additional period of maternity leave followed by parental leave, a long period of leave might hamper their careers as, for example, the **Irish** and **Finnish** experts

226 See Articles 59(1)(b) and 67(h).
227 Masselot, A. (2018), *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European Commission, available at: https://www.equalitylaw.eu/publications/thematic-reports.
228 Mulder, J. (2018) 'Promoting substantive gender equality through the law on pregnancy discrimination, maternity and parental leave', *European Equality Law Review* 2018/1, pp. 39-49, available at: https://www.equalitylaw.eu/downloads/4639-european-equality-law-review-1-2018-pdf-1-086-kb.
229 See, for example, Cases C-438/99 *Jiménez Melgar* and C-109/00 *Tele Danmark*.
230 See the case of an IVF treatment when Directive 92/85/EEC did not apply: CJEU, Judgment of 26 February 2008, *Sabine Mayr v Bäckerei und Konditorei Gerhard FlöcknerOHG*, C-506/06, ECLI:EU:C:2008:119.
231 See, for example, CJEU, Judgment of 16 September 2010, *Zoi Chatzi v Ipourgos Ikonomikon*, C-149/10, ECLI:EU:C:2010:407.

pointed out. The unequal uptake of leave might be reinforced when men are lacking or entitled only to a very short paternity leave and/or leave is unpaid. It is submitted that a very long maternity leave might hamper a gender-balanced division of family responsibilities and opportunities on the labour market. A combination of a maternity leave that is not excessively long, paternity leave, an individual right to parental leave, care leave and childcare 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 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 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. At national level, the minimum requirements of the Directives are generally met and national (case) law offers more protection and extensive rights.

4.2.1 Definitions in national law and obligation to inform employer

According to Article 1(1) of the Pregnant Workers Directive 92/85/EEC, the directive applies to pregnant workers, workers who have recently given birth or are breastfeeding. These three groups are defined in Article 2:

> '(a) pregnant worker shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice;
> (b) worker who has recently given birth shall mean a worker who has recently given birth within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice;
> (c) worker who is breastfeeding shall mean a worker who is breastfeeding within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice.'

In some countries, the concepts of pregnant worker, worker who has recently given birth and a worker who is breastfeeding are defined, sometimes in the same, and sometimes in different Acts (**Albania**, **Bulgaria**, **Croatia**, **Germany**,[232] **Greece**,[233] **Ireland**, **Lithuania**, **Luxembourg**,[234] **Malta**, **Portugal**, **Slovakia**, **Slovenia**, **Turkey**). In **Bulgarian** legislation, equal protection is granted to female workers and employees who are at an advanced stage of in-vitro fertilisation treatment. Their rights were made consistent with those of pregnant female workers and employees and with those who are breastfeeding.

In many countries, no definitions of a pregnant worker, a worker who has recently given birth or a breastfeeding worker exist in national law (**Austria**, **Cyprus**,[235] **Czech Republic**, **Denmark**, **Finland**,

232 As transgender people can claim legal recognition of their new gender status without surgery, 'pregnant men' may occur (although there are going to be fierce discussions about the question of whether they, after giving birth, can be recognised as the mother or the father on the birth certificate). Moreover, since intersex* children are no longer to be assigned one of two genders at birth, people without a female or male gender status or with a 'diverse' status may become pregnant in the future. The law itself speaks of pregnant and breastfeeding 'persons'.

233 The definitions specify: '*provided that this is required for taking a positive measure in her favour*', i.e. for example maternity leave.

234 A woman who has recently given birth is not defined, but a premature birth is.

235 The equality body took a more restricted approach than required under EU law in case number 27/2017.

France, **Iceland**, **Italy**, **Latvia**,[236] **Liechtenstein**, **Montenegro**, **Netherlands**, **Poland**, **Serbia**, **Spain**, **Sweden**, **United Kingdom**).

A legal obligation to inform the employer (often in order to benefit from pregnancy protection and/or before maternity leave) is frequently found (**Albania**, **Bulgaria**, **Cyprus**, **Denmark**, **Estonia**, **Finland**, **France**, **Germany**, **Hungary**,[237] **Iceland**, **Ireland**, **Italy**, **Lithuania**, **Luxembourg**, **Malta**, **Montenegro**, **Netherlands**, **North Macedonia**, **Portugal**,[238] **Slovenia**, **Turkey**, **United Kingdom**). However, there is no such (formal) obligation in **Austria**, **Belgium**,[239] the **Czech Republic**, **Greece**,[240] (except in case of positive measures), **Latvia**, **Liechtenstein**, **Poland**, **Serbia**, **Slovakia**, **Spain** or **Sweden**. In order to benefit from protective measures, pregnancy has most often to be proved, for example by a medical certificate. However, in **Norway**, the protection of pregnant employees applies to any employee who is pregnant, not only to employees who have informed their employer about their condition.

4.2.2 Protective measures

The aim of the Pregnant Workers Directive 92/85/EEC is to encourage improvements in the health and safety at work of pregnant workers and workers who have recently given birth or who are breastfeeding (Article 1). Articles 4-6 of this Directive require specific measures from employers in order to prevent the workers to which the directive applies from being exposed to dangerous substances, processes or working conditions, which are specified in non-exhaustive lists in Annexes to the directive.[241] Employers must assess the risks and decide what measures should be taken. These may include temporarily adjusting the working conditions and/or the working hours of the worker concerned. If this is not possible, the worker should be moved to another job. Pregnant workers, workers who have recently given birth and workers who are breastfeeding cannot be obliged to perform night work during a certain period to be determined at national level. These workers must then be able to work during daytime or – if such a transfer is not possible – have a longer period of leave (Article 7). Employment rights and maintenance of a payment to, and/or entitlement to an adequate allowance must be ensured (Article 11(1)).

These provisions are implemented in **Albania**, **Austria**, **Belgium**, **Bulgaria**,[242] **Croatia**, **Cyprus**, the **Czech Republic**, **Denmark**, **Estonia**, **Finland**, **France**, **Germany**, **Greece**, **Hungary**, **Iceland**, **Ireland**, **Italy**, **Latvia**, **Liechtenstein**, **Lithuania**, **Luxembourg**,[243] **Malta**, the **Netherlands**, **North Macedonia**, **Poland**, **Portugal**, **Serbia**, **Slovenia**, **Spain**,[244] **Sweden**, **Turkey** and the **United Kingdom**. The ban on employing pregnant women and women who are breastfeeding for prohibited work is absolute in **Poland**, even if the woman concerned does agree to the work.

In **Norway**, the protective measures mentioned in Articles 4-7 of Directive 92/85/EEC are not explicitly implemented in national law, but the legislation provides broad protection against health hazards for all

236 However, the period relevant for pregnancy and maternity protection is defined in Article 37(7) of the Labour Law.
237 If the notification of pregnancy is given following the delivery of a letter of dismissal, the dismissal may be withdrawn by the employer within 15 days following the notification.
238 In order to have access to the relevant protection rules. However, these rules are applicable not only if the worker has formally informed the employer of her condition but also, regardless of that formal communication, whenever the employer has direct knowledge of the worker's condition (Article 36(2) of the Labour Code).
239 However, in the event of a dispute, it will be up to the worker to prove that the employer was informed. Thus, the visible nature of the pregnancy is sufficient to provide the employer with information.
240 If an employer dismisses a pregnant worker without being aware of her condition, once informed of the pregnancy the employer must adopt measures in order to deal with the nullity of the dismissal of the pregnant worker (i.e. reinstatement): SCPC (Civil Section) No 954/2018.
241 Annex 1 of Directive 92/85/EEC was amended by Directive 2014/27/EU of the European Parliament and of the Council of 26 February 2014 amending Council Directives 92/58/EEC, 92/85/EEC, 94/33/EC, 98/24/EC and Directive 2004/37/EC of the European Parliament and of the Council, in order to align them to Regulation (EC) No 1272/2008 on classification, labelling and packaging of substances and mixtures, *OJ* 2014, L 65/1.
242 These provisions also apply to a woman at an advanced state of in-vitro fertilisation.
243 The prohibition of night work applies from 10 pm until 6 am.
244 The Spanish Supreme Court transferred to the employer the burden of proof that the work undertaken by the worker was compatible with breastfeeding after the CJEU C-531/15 *Otero Ramos* and C-41/17 *Gonzalez Castro* cases: Judgment of the Supreme Court of 26 June 2018, appeal number 1398/16, ECLI: ES:TS:2018:2651.

employees in relation to the rules on the general working environment, working hours, the information and consultation obligation and the entitlement to leave. Pregnant workers are protected under the general provisions. The same is true in **Montenegro**, where protective measures have to be taken by the employer to protect the health of a pregnant worker and her child. The scope of the specific protection of pregnant and breastfeeding women and mothers until the completion of nine months after confinement is broad in **Slovakia**.

Interestingly, in **Germany**, in a paradigm shift, Section 13 of the new Maternity Protection Act provides for a hierarchical range of employers' duties to guarantee protection and safety for pregnant or breastfeeding employees. The first and primary task is the substantial reshaping of the work environment.[245] Only when the required level of safety cannot be reached by such a reshaping or when the reshaping would require a disproportionate effort can the employer require a change of the specific workplace. If safety can neither be guaranteed by reshaping the work environment nor by a change of workplace, the employer is not allowed to employ the pregnant or breastfeeding employee during the period of pregnancy or breastfeeding (generally covering the first year after the birth of the child).[246] The national expert considers that by qualifying the reshaping of the work environment as a priority and the prohibition of work as a last resort, pregnancy and breastfeeding might cease to have the status of special obstacles to a successful working life and may become part of a comprehensive concept of occupational safety (influenced by EU law requirements). A newly established Commission for Maternity Protection will further develop guidelines concerning risk assessment, technical safety, occupational medicine and hygiene.

The situation in the countries under review is diverse as regards the prohibition of night work for pregnant workers, workers who have recently given birth and breastfeeding workers. Article 7 of Directive 92/85/EEC requires the Member States to take the necessary measures to ensure that these workers are not obliged to perform night work during their pregnancy and for a period following childbirth, to be determined at national level. This period can be quite long. For example in **Bulgaria**, night work is forbidden for pregnant workers and workers in an advanced stage of in-vitro fertilisation treatment; this also applies to mothers with children up to six years old, and mothers who care for children with disabilities, notwithstanding their age, unless their explicit written consent is given. Fathers are not protected under this provision, even if they are lone parents, which could be regarded as direct sex discrimination. In contrast, in **Italy** the prohibition of night work applies not only to mothers, but also to fathers.[247] In **Hungary**, night work is prohibited for women during pregnancy until their child(ren) reaches three years old, also for single parents (fathers) until their child(ren) reaches three year old – even in cases where the employee would consent to perform night work.[248] Such a long period can be detrimental for employees who are not offered daytime work during the prohibited period of night work. The option of daytime work or leave from work must be offered to workers according to Article 7(2) of Directive 92/85/EEC.

In **Montenegro**, it is not only women during pregnancy and women who have children under three years of age who may not work longer than the full-time hours or overnight. Exceptionally, an employed woman who has a child older than two years of age may work at night, but only if she consents to such work in writing. In addition, parents with a child with severe disabilities and single parents who have a child under seven years of age may not work longer than the full-time hours or at night, unless they give their written consent.

245 Although not discussed in the legislative process, there are some considerable links to the concept of reasonable accommodation.

246 Most of the regulations entered into force on 1 January 2018.

247 Until the child is three years old. The dismissal of a working mother of children aged under three years who refused to be employed in night work was considered null and void by the Italian Court of Cassation, as the employer had not proved that there was no day job where she could have been employed: case No. 23807 of 14 November 2011.

248 Hungary, Act I of 2012 on the Labour Code (*2012. évi I. törvény a munka törvénykönyvéről*), 6 January 2012, Article 113(1) Points (a)-(b), (3).

In **Denmark**, **Estonia**, **Finland**, **Norway**, **Sweden**[249] and the **United Kingdom** there is no specific legal prohibition of night work for pregnant (and/or breastfeeding) women. However, if health risks exist, the employer must provide daytime work. In **Albania**, there is a prohibition of night work for pregnant women and women who have recently given birth until their child reaches the age of one year, if this would be harmful to the health and safety of the woman and/or the child. A similar provision applies to breastfeeding women for a period of 63 days after birth. In **Iceland**, it is prohibited to oblige an employee who is pregnant to work at night. This also applies for the six months after she gives birth, if it is necessary for her health and safety and is confirmed with a medical certificate.

The situation is slightly different in the **Czech Republic**, where night work is not generally prohibited for pregnant women, but there is an obligation for the employer to transfer a pregnant or breastfeeding woman, or a mother until nine months after delivery, from night work to day work, if she requests this.[250] A similar situation exists in **Slovakia**. On the contrary in **Poland**, the prohibition of night work has an absolute character, which means that a pregnant woman cannot perform night work regardless of whether such work poses any risk to her health or not, or whether there is any objective reason why she should not perform night work. The consent of the pregnant employee is irrelevant.

4.2.3 Prohibition of dismissal

Article 10(1) prohibits dismissal of workers from the beginning of their pregnancy until the end of their maternity leave (as stipulated in Article 8, thus 14 weeks), save in exceptional cases not connected to pregnancy or maternity. If an employer dismisses an employee during the period of her pregnancy or during maternity leave, they must substantiate the grounds for dismissal in writing (Article 10(2)). The following table gives an overview of how Article 10 is implemented in the 31 countries under review.

Table 1 Protection against dismissal during pregnancy and maternity leave

Albania	Yes, except in exceptional cases not linked to pregnancy or childbirth.
Austria	Yes. Employers can only terminate contracts after having informed the works council and having obtained subsequent consent from the labour courts.
Belgium	Yes.
Bulgaria	Yes, except on certain grounds (Article 333 paragraph 5 & 6 and 338 of the Labour Code).
Croatia	Yes. The protection extends for 15 days after the end of maternity leave. Exceptionally, dismissal due to business reasons in the procedure of winding up (liquidation) of a company is allowed even during maternity leave (Article 34(4) Labour Act). However, application of this exception is practically impossible, because the notice period cannot begin and is suspended during pregnancy and the exercise of any right related to maternity or parenthood (Article 121(2) Labour Act). The same applies in case of employer's insolvency (Article 191(3) Insolvency Act), although in practice, dismissal due to an employer's insolvency may have an immediate effect, where the insolvency procedure is opened and closed on the same day (when the employer/insolvency debtor has no assets).
Cyprus	Yes. The protection extends for five months after the end of the maternity leave.
Czech Republic	Yes.
Denmark	Yes.
Estonia	Yes.
Finland	Yes.
France	Yes. The protection extends for ten weeks after birth.

249 There is no prohibition against night work for pregnant women. However, a pregnant employee or an employee who has recently given birth may not perform night work if she provides medical certificates stating that such work would be detrimental to her health or safety: Swedish Work Environment Statute AFS 2007: 5, Section 9A.

250 Czech Republic, Section 41 of the Labour Code.

Germany	Yes (except under exceptional circumstances not related to pregnancy). The protection extends for four months after childbirth.
Greece	Yes, for the whole protected period (i.e. during pregnancy and 18 months after childbirth or during a longer absence due to illness related to pregnancy or childbirth).
Hungary	Yes, a dismissal with notice is prohibited during pregnancy, maternity leave, parental leave and IVF treatment (for six months), with a few exceptions. Fathers are only protected from dismissal during parental leave if they are the sole carers of their child(ren) and the mother is not available.
Iceland	Yes.
Ireland	Yes.
Italy	Yes. Protection is granted for a period of 12 months following the date of confinement.
Latvia	Yes.[251] An employee on maternity leave may only be dismissed in the case of the liquidation of the employer's company.
Liechtenstein	Yes.
Lithuania	Yes.
Luxembourg	Yes.
Malta	Yes. By Regulation 12 of the Protection of Maternity (Employment) Regulations.
Montenegro	Yes.
Netherlands	Yes, from the beginning of the pregnancy, during maternity leave and for six weeks after resuming work after maternity leave or after a period of illness caused by pregnancy or childbirth.
North Macedonia	Yes.
Norway	Yes.
Poland	Yes. Dismissal is prohibited during pregnancy and maternity/parental leave except in specific situations, such as the employer's bankruptcy or liquidation.
Portugal	Yes. The procedure applying to all forms of dismissals is stricter regarding dismissals of women during pregnancy, maternity leave, parental leave and breastfeeding of a child, since it involves the intervention of a (public) Agency for Equality in Employment (CITE), which has to approve the dismissal in advance (Article 63 of the Labour Code).
Romania	Yes.
Serbia	Yes.
Slovakia	An employer cannot give notice[252] to an employee within the protected period, also meaning within the period of a female employee's pregnancy, when a female employee is on maternity leave or a male employee caring for a new-born child is on parental leave (during the same period as maternity leave). An employer cannot immediately (without notice) terminate the employment relationship with a pregnant employee, a female employee on maternity leave, or a male employee caring for a new-born child on parental leave.[253]
Slovenia	Yes, according to Article 115/5 of the ERA.
Spain	Yes. However, less protection during the probationary period as dismissal is not automatically considered null and void if the employer argues that they were not aware of the pregnancy.[254]
Sweden	No special rule. This right – upon request – follows from general labour law.

251 The employer has the right to give notice of dismissal in case of temporary incapacity to work for more than six months (Article 101, Paragraph 1, Clause 11) and repeated periods of incapacity. According to the national expert, this provision is contrary to the CJEU Judgment of 30 June 1998, *Mary Brown and Rentokil Limited,* C-394/96, ECLI:EU:C:1998:331.

252 An employment relationship may be terminated by agreement, by notice, by immediate termination and by termination during the probation period (Article 59, Section 1 of the Labour Code).

253 Slovak Republic, Act No. 311/2001 Coll. Labour Code, Article 68, Section 3.

254 Spain, Judgment of the Constitutional Court 173/2013 of 10 October 2013, ECLI:ES:TC:2013:173: available at http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23619. The Spanish expert points to a lack of protection if this argument is put forward by the employer and remains uncontested when there has been no communication by the pregnant worker about her condition.

Turkey	Yes. However, there is no obligation to reinstate employees who are employed for a definite period or employees who are employed in an establishment with less than thirty employees, or employees who do not meet a minimum seniority of six months in case of discriminatory or invalid or unjustified dismissal.
United Kingdom	No. Dismissal from the beginning of the pregnancy until the end of the maternity leave is not prohibited in national law, but if the dismissal is related to the pregnancy or maternity leave then it will automatically be deemed unfair (under the Employment Rights Act 1996 Section 99) and will be discriminatory under the Equality Act 2010.

4.2.4 Redundancy and payment during maternity leave

Payment during maternity leave (in some case by the public social security system) does not cease when the employee is made redundant (for reasons not connected to pregnancy or maternity) in **Albania**, **Austria**, **Belgium**, **Bulgaria**, **Cyprus**, **Denmark**, **Estonia**, **France**, **Germany**, **Hungary**, **Iceland**, **Italy**, **Latvia**, **Liechtenstein**, **Lithuania**, **Luxembourg**, **Malta**, **Montenegro** (in case of collective dismissals), the **Netherlands**, **North Macedonia**, **Norway**, **Portugal**, **Serbia**, **Slovakia**, **Slovenia**, **Spain** and **Sweden**.

In **Greece**, the payment for maternity leave ceases, but a monthly flat rate unemployment allowance is paid. There is no legal regulation on this issue in **Finland**; payment in case of redundancy would depend on the collective agreement.

In case of the employer becoming insolvent, the status as an insured person in the mandatory health insurance in **Croatia**, which is a prerequisite for the payment of maternity (and parental) benefits, is automatically terminated. Sometimes employees are not aware of this and are confronted with an obligation to reimburse payments retroactively. Measures have now been taken in order to ensure that insolvency proceedings are not closed if there is no proof that all workers have been formally deregistered from the mandatory insurance registers.[255]

In **Ireland**, dismissal by reason of redundancy can only come into effect on the completion of maternity leave (or additional maternity leave).

4.2.5 Employer's obligation to substantiate a dismissal

In most countries the employer has the obligation to substantiate a dismissal, often in writing (**Austria**, **Bulgaria**, **Croatia**, **Cyprus**, **Czech Republic**, **Denmark**, **Estonia**, **Finland**,[256] **France**, **Germany**, **Greece**,[257] **Hungary**, **Iceland**, **Ireland**, **Italy**, **Latvia**, **Liechtenstein**, **Lithuania**, **Malta**, **Montenegro**,

255 Croatia, Decision on termination, non-commencement of damages recovery procedures and on writing-off of claims for damages based on undue maternity and parental benefits and on settlement of damages from mandatory health insurance (*Odluka o obustavi, nepokretanju postupaka naknade štete i o otpisu tražbina na ime naknade štete po osnovi nepripadno ostvarenih prava na rodiljne i roditeljske potpore te o podmirenju naknade štete iz obveznog zdravstvenog osiguranja*), NN No. 16/2019.

256 If an employer dismisses a pregnant employee or an employee on family-related leave, the dismissal is assumed to be caused by pregnancy or use of family-related leave unless the employer can provide a different credible reason (Chapter 7, Section 9(2)). An employer may dismiss a pregnant employee or an employee on family-related leave using normal grounds of dismissal only if the employer ceases all operations.

257 The employer must also the dismissal to the Labour Inspectorate: Article 10 of Decree 176/97. In the absence of a justification in writing at the time of the termination, the termination will be null and void: Dodecanes CA No 43/2014.

Netherlands, **North Macedonia**, **Norway**, **Poland**,[258] **Portugal**, **Slovakia**, **Slovenia**, **Spain**,[259] **Sweden**, **Turkey**,[260] **United Kingdom**) and in some countries only on request by the worker (e.g. **Belgium** and **Luxembourg**) or implicitly, when the employer has to prove that the reason for dismissal was not pregnancy or childbirth, as is the case in **Albania**.

In **Italy**, legislation has been adopted in order to combat so-called blank resignation of working mothers.[261] 'Blank resignation' refers to an undated resignation letter signed by a worker at the time of recruitment which can be used by the employer to make the worker resign when needed (i.e. when pregnant). Often the employer makes recruitment conditional on the prospective employee signing such a letter.

4.3 Maternity leave

4.3.1 Duration, payment and share of maternity leave

Article 8 of the Pregnant Workers Directive requires a continuous period of maternity leave of at least 14 weeks allocated before or after confinement, of which two weeks at least allocated before or after confinement are compulsory. According to Article 11(2) and (3), during this maternity leave the rights connected with the employment contract must be ensured and workers on maternity leave are entitled to maintenance of a payment, and/or an adequate allowance which has to be at least equivalent to sick pay (which might be subject to a ceiling). Eligibility requirements for benefits laid down under national legislation are allowed (Article 11(4)).

All countries provide for at least the minimum period of maternity leave of 14 weeks, as set out in the Pregnant Workers Directive. Many countries provide for longer periods. The following table gives an overview of the length of maternity leave, as well as the length of any potential obligatory period of maternity leave, the possibility to share maternity leave with the father, and the amount of payment mothers receive during maternity leave.

Table 2 Maternity leave

Country	Duration	Obligatory period	Possibility to share ML with the father?	Payment
Albania	365 days (390 for multiple birth)	35 (or 60) days before the expected confinement and 63 days after birth	Yes, after 63 days' obligatory maternity leave	80 % allowance until 150 days after birth

258 In every case of dismissal (with the exception of employment contracts for a defined period of time), the employer has the obligation to substantiate the decision: Article 30(4) Labour Code.

259 In the case of dismissals for redundancy, the Supreme Court has ruled that the employer must justify the specific reason for including a pregnant woman in the group of people dismissed. If the employer fails to do so, the dismissal of the claimant must be declared null and void: Judgment of the Supreme Court of 14 January 2015, appeal number 104/2014, ECLI: ES:TS:2015:711: available at www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=7324092&links=&optimize=20150313&publicinterface=true; Judgment of the Supreme Court of 20 July 2018, appeal number 2708/16, ECLI: ES:TS:2018:3248: available at www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8515525&statsQueryId=106519600&calledfrom=searchresults&links=&optimize=20181001&publicinterface=true; see on this issue CJEU Judgment of 22 February 2018, *Jessica Porras Guisado v Bankia SA and Others*, C-103/16, ECLI:EU:C:2018:99.

260 However, this is not always the case (Turkey).

261 Act No. 92/2012 changed Article 55, Paragraph 4 of Decree No. 151/2012 and extended the period during which mutual termination of the employment contract or resignation letters of working mothers must 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.

Country	Duration	Obligatory period	Possibility to share ML with the father?	Payment
Austria	16 weeks	8 weeks before birth – longer individual maternity leave before birth in cases of medically attested health risks for mother or foetus; 8 weeks after birth, 12 weeks in cases of premature births, multiple births or delivery by Caesarean section; no more than 20 weeks in full	No	100 % of average earnings (without ceiling) if earning for at least 3 months prior to the maternity leave more than the mandatory social security threshold, in 2019: EUR 446.81 per month. Unemployed pregnant women are entitled to a maternity benefit that amounts to 180 % of their regular monthly unemployment benefit or unemployment benefit per diem.
Belgium	15 weeks	1 week before birth, 9 after birth	No, but if the mother dies after giving birth the remaining leave is transferred to the mother's spouse/life partner[262]	82 % for the first 30 days (approx. 4 weeks), 75 % (daily maximum EUR 106.90) remainder
Bulgaria	410 days (58.5 weeks)	45 days (6.5 weeks) before birth	Since 2009, fathers can replace the mother with her consent after the child is 6 months old	410 days (58.5 weeks) are paid at 90 % of the average income, no ceiling
Croatia	98 days: 28 days before and 70 days after confinement Additional voluntary leave from the 71st day after confinement until child reaches the age of 6 months	98 days: 28 days before and 70 days after confinement	The time from 71st day after birth until child reaches age of 6 months is entirely transferable to the father	Compulsory and additional (voluntary) maternity leave are both paid at the rate of 100 % of the base for calculation of salary compensation, in accordance with the provisions on mandatory health insurance (no ceiling). If no prior length of service is satisfied (12 months uninterrupted length of service / 18 months interrupted length of service): 70 % of budgetary calculation base (currently EUR 312 (HRK 2 328))

262 Or if the worker has to remain in hospital after giving birth while the child can be taken home.

Country	Duration	Obligatory period	Possibility to share ML with the father?	Payment
Cyprus	18 weeks (at least 2 weeks before and 9 weeks after confinement)	11 weeks fully compulsory, starting at least two weeks before the expected due date	No	72 % of the weekly average of the basic insurable earnings of the beneficiary in the previous contribution year. Maternity benefit cannot be more than the person's normal income. This situation might arise if the mother receives part of her salary from her employer during maternity leave
Czech Republic	28 weeks, 37 weeks in case of multiple births	There is a 12-week obligatory period of maternity leave before (6, max. 8 weeks) and after the birth; this period should not end less than six weeks after the birth	Possible to transfer the maternity leave to the father after the child reaches the age of six weeks	70 % of average income of the last 12 months, with a ceiling of EUR 1 545
Denmark	18 weeks (4 before birth and 14 after birth)	2 weeks after birth	No	Benefit for 18 weeks. Mothers are only entitled to wages during absences related to pregnancy and childbirth if such a right follows from a collective agreement or an individual employment contract. If the mother is only entitled to benefit and not to wages, she will get 90 % of the wages, max EUR 547.48 (DKK 4 075) per week. According to many collective agreements: 100 % of salary
Estonia	20 weeks (140 calendar days: 70 days pregnancy leave and 70 days maternity leave)	None, but pregnancy leave should start between 30 and 70 days before the expected birth in order to receive 70 days of benefit	No	100 % of average earnings of the insured person in the preceding calendar year, no ceiling

Country	Duration	Obligatory period	Possibility to share ML with the father?	Payment
Finland	105 weekdays (between and including Monday to Saturday) – approximately 16.5 weeks	2 weeks before estimated birth and 2 weeks after	No	Payment is dependent on previous earnings: 90 % for the first 56 working days after birth up to EUR 50 606, and for salaries higher than this, 32.5 % of salary for the rest. Women with no previous earnings are entitled to a minimum benefit.
France	16 weeks (six weeks before estimated birth date and 10 weeks after)	2 weeks before and 6 weeks after	No	100 % of average earnings with ceiling of EUR 82.32 per day.
Germany	14 weeks, up to 18 weeks in cases of premature or multiple births	6 weeks before and 8 weeks after birth; 12 weeks after birth in cases of premature or multiple births. During the 6 weeks antenatal protection period the employee is allowed to work voluntarily, but the employer is prohibited from requiring her to work.	No	100 % of last average income of the last 13 weeks or 3 months for dependent employees, no ceiling
Greece	Public sector: 5 months (approx. 22 weeks); private sector: 17 weeks (in addition, six months special leave granted to women only after the end of the maternity leave)	All. Public sector: 2 months (approx. 9 weeks) before birth and 3 months (approx. 13 weeks) after; private sector: 8 weeks before birth and 9 weeks after	No	Public sector: 100 %, paid by employer, without upper limit. Private sector: part is paid by employer, with a social security allowance for the remaining period, which covers wages for the majority of women.
Hungary	24 weeks	2 weeks obligatory; in the absence of agreement: 4 weeks before birth	No	70 % of the average daily salary – no ceilings on payments
Iceland	4 months after birth[263]	First 2 weeks after birth is obligatory	The 4 months are not transferable but parents are not prevented from taking the leave simultaneously	80 % of average total wages of the last 12 months (finishing 6 months before birth). The ceiling is EUR 3 770 per month

263 Act No. 149/2019, Article 1, came into effect 1 January 2020, amending the Act on Maternity, Paternity Leave and Parental Leave No. 95/2000.

Country	Duration	Obligatory period	Possibility to share ML with the father?	Payment
Ireland	26 weeks	2 weeks	Fathers cannot share the leave, but if the mother dies the father takes over the remaining leave	First 26 weeks are paid at a level of EUR 240 gross per week, following 16 weeks are unpaid. The employer can choose to 'top up' the payment if agreed between employer and employee
Italy	22 weeks (5 months)	All: 2 (or 1) months before birth, 3 (or 4) months after	Fathers may obtain maternity leave after the birth for the whole length of maternity leave or for the remaining period in special cases (e.g. death or serious illness of the mother). And optional right to take one day of leave within five months after the birth	80 % of average daily remuneration paid throughout the entire maternity leave period, no ceiling
Latvia	56 days before and 56 days after the expected date of confinement. Plus extra 14 days if woman has visited a doctor and registered her condition before 12th week of pregnancy (18 weeks in total)	None, it is the right of the pregnant worker, but an employer must not employ a pregnant woman 2 weeks before and 2 weeks after she gives birth	The right to maternity leave is not accessible to fathers, unless exceptional circumstances occur – the death of the mother or the mother waives her parental rights	80 % of gross salary for entire maternity leave period, no ceiling[264]
Liechtenstein	20 weeks	8 weeks after birth are compulsory, following 12 weeks are voluntary. 4 weeks before birth	No	80 % of salary for full 20 weeks, 16 of which must follow childbirth. No explicit ceiling; the payment is based on the maximum income for the obligatory insurance for illness and old age, which varies according to the general development of salaries
Lithuania	70 calendar days before expected childbirth and 56 days after childbirth.	Fully voluntary, but if not taken, the employer must grant 14 days leave immediately after childbirth	No	If the woman has been insured for more than 12 months over the previous 24 months, 100 % of reimbursed remuneration. The minimum benefit is EUR 228 per month.

264 The fact is that, in reality, maternity allowance exceeds the normal salary, because people in active employment after deduction of taxes are entitled to approximately 68 % of their gross salary.

Country	Duration	Obligatory period	Possibility to share ML with the father?	Payment
Luxembourg	20 weeks (8 weeks antenatal leave and 12 weeks post-natal leave), but can be extended if birth takes place after expected date of delivery	All the maternity leave is compulsory	No	100 %, granted on the basis of a medical certificate and treated as period of sick leave, no ceiling to payment
Malta	18 weeks	4 weeks before and six weeks after the expected date of confinement	No	100 % for first 14 weeks paid by the employer, then 4 weeks maternity benefit. The rate is in accordance with the Social Security Act. The rate may be subject to an increase. Ceiling of EUR 175.84 per week
Montenegro	Parental Leave (including maternity leave) can last up to 365 days counting from the birth of the child	An employed woman may start maternity leave 45 days, and compulsorily 28 days, before giving birth. The mother of the child cannot cancel maternity leave before the expiry of 45 days from the date of birth	Yes, after the obligatory period of 45 days after the birth of the child the parental leave may be used by the father, if the mother has ceased to exercise the right to maternity/ parental leave	100 % of the basic wage if the mother was employed continuously for 12 months by the employer concerned. If an employee has continuously worked between 6 and 12 months before the leave, the compensation of the employer is calculated as 70 % of the average monthly salary. If an employee has worked continuously between 3 and 6 months the compensation is 50 % of the average monthly salary. If an employee has worked continuously up to 3 months, the compensation is 30 % of the average monthly salary
Netherlands	16 weeks	Between 4 and 6 weeks are compulsory before birth and at least 10 weeks after birth[265]	No, except in case of the mother dying during the birth or maternity leave	100 % of salary paid, up to maximum daily wage of EUR 214.28 per day

265 If the child has to remain in hospital for longer than eight days after the birth, the maternity leave may be extended. The maximum extension is ten weeks: Article 3:1(5) Work and Care Act, 2001.

Country	Duration	Obligatory period	Possibility to share ML with the father?	Payment
North Macedonia	9 months (38 weeks), 15 months for multiple births	73 days (approx. 10 weeks): 28 days (4 weeks) before birth and 45 days (approx. 6 weeks) after birth	The leave cannot be shared, but can be taken over by the father after 9 months (38 weeks), or 15 months (52 weeks) for multiple births, provided that the mother is incapacitated or she does not use the leave	100 % of the average individual salary for the last 12 months (52 weeks) (or minimum 6 months (approx. 25 weeks)), but not higher than the value of four average salaries at national level (EUR 1 400 approximately). If the mother uses the obligatory part, the rest of the leave is paid 50 % on top of her regular salary
Norway	The parents can choose 100 % or 80 % payment in the parental leave. 15 weeks of maternity leave is part of the parental leave termed the 'mother's quota' if you choose 100 % payment. If the mother chooses 80 % the mothers (and fathers) quota is 19 weeks.	3 weeks before birth and 6 weeks after	Depends if you choose 100 % or 80 % payment in parental leave. 15 (or 19) weeks reserved for each of the parents. The remaining period of parental leave can be shared	Level of sick pay, 100 % of normal full pay with a maximum of EUR 57 389,65 per year
Poland	20 weeks and from 31 to 37 weeks in cases of multiple birth, depending on the number of children	14 weeks after birth	The remaining weeks can be taken by the father, with consent of the mother	100 % of average earnings, no ceiling
Portugal	'Initial parental leave just for the mother' 6 weeks after birth. 'Initial parental leave' for the remaining time until 120 or 150 days, according to the choice of parents	6 weeks for the mother after birth (the 'initial parental leave')	The period remaining after the confinement period of 6 weeks after giving birth can be divided between both parents	No payment by the employer, but a social security allowance paid on the basis of 100 % of the average salary of the worker if 120 days are taken or 80 % if 150 days are taken. No ceiling to payment
Romania	18 weeks	6 weeks after birth	No	85 % of average monthly income of the last 6 months, not more than 12 minimum salaries

Country	Duration	Obligatory period	Possibility to share ML with the father?	Payment
Serbia	45 days at the earliest, and 28 days in any case, prior to the time of the expected delivery and three full months from the date of birth	Must commence maternity leave 28 days before the expected date of delivery and cannot be on maternity leave shorter than 3 full months		The amount of maternity pay is equal to the average basic salary paid in the past 12 months prior to the month in which maternity leave was taken, up to a maximum of 5 average salaries in Serbia. If an employee has worked for less than 12 months, for the months that are missing the salary is calculated as 50 % of the average monthly salary
Slovakia	34 weeks (37 weeks for single mothers; 43 for multiple births)	6-8 weeks before birth and 6 weeks after birth	No, but men can receive maternity allowance if the mother agrees to it and not at the same time	Maternity benefit for 34 weeks amounting to 75 % of the mother's daily income, maximum EUR 1 394.30 per month in 2018
Slovenia	15 weeks, which commence 4 weeks before the expected date of birth	15 days (approx. 2 weeks), before or after birth or both	No. The father has the right to maternity leave only if the mother: 1. has died, 2. has left the child, 3. is permanently or temporarily unable to live and work independently	100 % of the average salary of the last 12 months immediately prior to the date on which benefits were claimed; no ceiling
Spain	16 weeks, 10 of which are transferable to the father	6 weeks after birth for the mother	Yes	100 % of monthly salary, dependent on minimum period of working time, no ceiling (however, maximum monthly amount of social security contributions and thus maternity benefits of EUR 3 803.70.[266]

266 For the contributory maternity leave. There is also a non-contributory maternity leave if a working mother does not meet the requirements of the contributory maternity leave.

Country	Duration	Obligatory period	Possibility to share ML with the father?	Payment
Sweden	14 weeks (7 weeks before estimated birth and 7 weeks after birth)	2 weeks before or after birth	No	Maternity benefits are paid at sick-leave level (80 % of income up to a level of approximately EUR 49 000 per year). If not, income based, benefits are paid at the basic level (*grundnivå*) of EUR 30 (SEK 225) per 250) a day.
Turkey	16 weeks	All: 8 weeks before birth and 8 weeks after – 8 weeks before birth can be reduced to 3 weeks (with approval of doctor), with the remaining 5 weeks added to the 8 weeks after birth. Multiple births: 2 additional weeks added to antenatal leave	No, but if a civil servant or employee dies after giving birth, the remaining leave is transferred to the spouse	For civil servants, regular salaries are paid throughout the leave by public bodies. Female employees are paid via the Social Security Institution, which amounts to sickness payments (two thirds of regular wages).[267]
United Kingdom	52 weeks	2 weeks after birth	Yes, between 2 and 26 weeks may be transferred to the father (shared parental leave)	Entitled to 39 weeks of maternity pay; 90 % of salary in the first 6, and a fixed rate of GBP 148.68 (EUR 166.13) per week during the remaining 33 weeks

4.3.2 Conditions for eligibility

In **Italy**, **Montenegro**, **Serbia** and **Sweden**, no specific conditions apply for entitlement to maternity benefits. In **Malta**, the applicant must be a citizen of Malta, married/cohabiting with a citizen of Malta, a citizen of a European Union Member State, a citizen of a member country of the European Social Charter, or have refugee status and ordinarily reside in Malta or Gozo. Moreover, she must have availed herself of more than 14 weeks of maternity leave.

The following countries have specific eligibility conditions for entitlement to (full) maternity benefits, most often required periods of employment or (statutory social) insurance: **Albania**, **Austria**, **Belgium**, **Bulgaria**, **Croatia**, **Cyprus**, the **Czech Republic**, **Denmark**,[268] **Estonia**, **Finland**, **France**, **Hungary**, **Iceland**, **Ireland**, **Liechtenstein**, **Lithuania**, **Luxembourg**, the **Netherlands**, **North Macedonia**, **Norway**, **Poland**, **Portugal**, **Serbia**, **Slovakia**, **Slovenia**, **Spain**,[269] **Turkey** and the **United Kingdom**.

In **Germany**, quasi-subordinate workers are covered by the new Maternity Protection Act. However, they are explicitly not entitled to maternity allowances except when they are insured under a statutory health

267 For outpatient (not hospitalised) treatment. For inpatient treatment, the maternity allowance is set at half the daily earnings.
268 The right to maternity benefit depends on the mother's legal residence in Denmark.
269 For the contributory maternity leave a previous period of working time is required, but this does not apply to the non-contributory maternity leave.

insurance scheme and even then the allowance is no more than EUR 13 per day and EUR 210 in total.[270] The national expert considers that, with regard to the criteria for a comparable need for social protection, these mothers (to be) should be equally covered.

In **Greece**, social security legislation makes the payment of the maternity allowance conditional on the completion of 200 working days during the two years preceding the commencement of maternity leave.[271] According to the national expert, this constitutes a violation of Article 11(4) of Directive 92/85/EEC. Moreover, the granting of maternity allowance is subject to stricter conditions than the granting of sickness allowance (the granting of the latter is subject to 120 working days in the year preceding the notification of the sickness).[272] The national expert considers this a violation of Article 11(3) of Directive 92/85/EEC, which requires that the maternity allowance guarantee income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health.[273] In addition, fixed-term state employees are not entitled to the same rights and protection as their colleagues with permanent contracts. The national expert points at diverse forms of direct sex discrimination of, in particular, substitute state school teachers with fixed-term contracts.

In **Latvia**, official employment is required, but a calculation on presumed income is possible in order to be entitled to an allowance.

4.3.3 Right to return to the same or an equivalent job

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 Recast Directive 2006/54/EC. 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 an equivalent or similar job. In **Finland**, the criteria that determine an equivalent job are the nature of the employee's previous work and their education and work experience. The **Irish** Maternity Protection Act contains very detailed rules on return to work.[274] In **Italy**, workers have the right to return to the same workplace or to another workplace in the same municipality and to work there until the child is one year old. In the **United Kingdom**, women have the right to return to the same job if returning from a period of no more than 26 weeks' leave. If the employee takes a longer period of maternity leave, the right to return to the same job is qualified: if return to the same job is not reasonably practicable, the right is to return to another job which is suitable for the worker, appropriate for her to do in the circumstances, and which is on terms and conditions not less favourable than those which would have applied had she not been absent.[275]

However, a few countries do not provide such a guarantee (e.g. the **Netherlands**)[276] or they do not do so explicitly (e.g. **Belgium**, **Estonia**, **Germany** and **Turkey**). In **Germany**, such a provision is not necessary. Due to the German concept of maternity leave, the issue of 'returning to the same job' does not arise because the employment relationship remains totally unaffected. However, a transfer to a non-equivalent

270 The Federal Social Court, judgment of 26 September 2017, B 1 KR 31/16 R, decided that public broadcasters are obliged to contribute to the funding of maternity allowances for anyone for whom they pay social security contributions, even if they classify these people as 'freelancers' under labour law.
271 Greece, Article 39 of Act 1846/1951 on IKA, OJ A 179/21.06.1951.
272 Greece, Article 31(2) of Act 1846/1951, OJ A 179/21.06.1951, as amended by Article 36(4) Act 3996/2011, OJ A 170/05.08.2011.
273 The national expert highlights that the fact that Greek law foresees a maternity leave that exceeds the minimum EU law requirements in length and pay is irrelevant. The CJEU has also condemned adverse treatment related to forms of leave granted by national legislation which exceeded minimum EU law requirements: See e.g. CJEU, C-284/02, *Land Brandenburg v Ursula Sass*, 18 November 2004; ECLI:EU:C:2004:722, concerning maternity leave longer than 14 weeks.
274 In Section 26.
275 United Kingdom, Regulation 18(2), 18A.
276 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 had been 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 Judgment of 22 October 2014, *Commission v the Netherlands*, C-252/13, ECLI:EU:C:2014:2312.

post after maternity leave would be direct discrimination under the General Equal Treatment Act and the worker concerned would be awarded compensation.[277] In **Estonia**, equivalent job and improved working conditions are mentioned if returning from maternity leave, but not explicitly stressed after parental leave. While there is prohibition of dismissal, it happens that women/men cannot enjoy their rights after parental leave. In **Croatia**, if an employer could not provide an equivalent job, this would be considered a regular dismissal, for which the employer would have to have a justifiable reason. The employer must stipulate the reasons in writing and provide a statement of the reasons.

In **Hungary**, the new Labour Code does not expressly guarantee the right to return to the original job or an equivalent job at the end of maternity/parental leave. Due to the cumulative interpretation of various sections of this Code, however, the employee has the right to return to work with the same employer and, in the absence of a mutually agreed modification of the employment contract, the employee has the right to return to their original job.

In **Greece**, this requirement often seems to be disregarded in practice in the private sector, as evidenced by the complaints submitted by women to the Ombudsman.

4.4 Adoption leave

EU law does not require the Member States to introduce a specific adoption leave. However, Member States which recognise such a right must ensure that men and women exercising the right to adoption leave are protected against dismissal and are entitled at the end of this leave to return to their jobs or to equivalent posts on conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence (Article 16 of Directive 2006/54/EC).

In addition, adoptive parents are entitled to parental leave according to Clause 2 of the Parental Leave Directive 2010/18/EU. Clause 4 of this Directive stipulates that the Member States and/or social partners shall assess the need for additional measures to address the specific needs of adoptive parents.

All countries provide for adoption leave, but in some countries age limits of the adopted child apply and the length of adoption leave differs between countries. For example, in **Austria**, adoption leave of at least six months can be taken when older children below the age of seven are adopted. In **Bulgaria**, an adoptive mother of a child up to five years old has right to leave of 365 days from taking the child but no later than the child reaching the age of five years. When the adoptive parents are married and the mother works under a labour contract, she can agree for the adoptive father to take the leave after the first six months. In the **Czech Republic**, adoption leave can last until the child reaches three years of age; if a child is older than three, but younger than seven, when adopted, the leave can be taken for 22 weeks. The adoptive parents are entitled to maternity benefit and also to a parental allowance paid from the state's social support system, under the same conditions as biological parents.

In **Estonia**, adoption leave is 70 days following the date of entry into force of the court judgment approving the adoption (if a child is under 10), paid entirely by the state. An adoptive parent has the same rights as biological parents. In the **United Kingdom**, specific eligibility conditions apply, such as 26 weeks' qualifying service. In **Belgium**, **Croatia** and **Spain** the period of leave is extended for adoption of a disabled child.

In **Albania**, **Bulgaria**, **Estonia**, **Hungary**, **Ireland**, **Italy**, **Luxembourg**, **North Macedonia**, **Norway**, **Poland**, **Portugal**,[278] **Slovakia**, and **Spain**,[279] most if not all protections and rights available under

277 Germany, Labour Court of Wiesbaden, Judgment of 18 December 2008, 5 Ca 46/08.
278 Compared to the 'initial parental leave'.
279 In cases of adoption or fostering of a child younger than six years.

statutory maternity leave are also available under statutory adoption leave. The same is true in **Greece**, although in the public sector the protection does not apply to workers with a fixed-term contract and the national expert points out a breach of Directives 2010/18/EU and 1999/70/EC.

In **Slovakia** so-called substitute parents (i.e. adoptive parents, foster carers or carers in the event of the death of the child's mother) can apply for maternity and parental leave. In **Romania** there is no specific adoption leave, but the law stipulates that parents who adopt a child have a right to parental leave.[280] In Lithuania, there is a similar approach[281] as well as in **Serbia** and **Sweden**.

4.5 Parental leave

Directive 2010/18/EU repealed Directive 96/34/EC by 8 March 2012 and implements the revised Framework Agreement on parental leave that the European social partners reached in June 2009.[282] This Agreement lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents (Clause 1(1)). Member States may adopt more favourable measures. The Framework Agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each Member State. The Agreement thus also applies to part-time workers, fixed-term contract workers and temporary agency workers (Clauses 1(1) and 1(2)). They are entitled to an individual right to parental leave on the grounds of the birth or adoption of a child so as to take care of that child until a given age (up to eight years). The parental leave shall be granted for at least a period of four months and should, in principle, be provided on a non-transferable basis. To encourage both parents to take leave on a more equal basis, at least one of the four months has to be provided on a non-transferable basis (Clause 2). In practice, up until now parental leave is still much more often taken by mothers than fathers.[283] Member States are not yet obliged to introduce (partially) paid parental leave.

In July 2019, a new Directive on Work-life Balance 2019/1158 entered into force which also addresses parental leave.[284] The main changes are notably that the non-transferable period is increased from one month to two months of parental leave which cannot be transferred from one parent to the other (Article 5(2)). Workers will be entitled to an adequate payment or allowance during the two non-transferable months of the parental leave. The amount of the allowance has to be determined by the Member States (Article 8(1) and (2)). In addition, specific provisions apply regarding employment rights, protection against unfavourable treatment and dismissal, as well as the burden of proof, victimisation and penalties (Articles 10-14). Finally, equality bodies will be competent with regard to issues of discrimination within the scope of the Directive (Article 15). The Directive must be transposed into national law by 2 August 2022 (Article 20(1)).[285]

In 2015, the former European Network of Legal Experts in the Field of Gender Equality, published a comprehensive report on the implementation of the Parental Leave Directive 2010/18/EU.[286]

280 Romania, Article 8(2) of the Government Emergency Ordinance No.111/2010.
281 There is a right to three months parental leave for adoptive parents: Article 134(2) of the Labour Code.
282 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 2010, L 68/13.
283 See Eurostat: http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do.
284 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 12.7.2019, p. 79–93, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.188.01.0079.01.ENG.
285 The implementation period is two years longer as regards the payment of the two last weeks of the non-transferable period of parental leave (Article 20(2)).
286 Do Rosário Palma Ramalho, M., Foubert, P., Burri, S. (2015), *The Implementation of Parental Leave Directive 2010/18 in 33 European Countries*, European Commission, available at: http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2723&Itemid=295. See also the report published in 2018: Masselot, A. (2018), *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European Commission, available at: https://www.equalitylaw.eu/publications/thematic-reports.

Many countries did not formally implement the Parental Leave Directive 2010/18/EU because they believed that their national legislation already complied with EU law (**Austria**, **Czech Republic**, **Finland**, **Germany**, **Hungary**, **Iceland**, **Latvia**, **Lithuania**, **Portugal**, **Spain**, **Sweden**). In addition, the experts for the EEA countries of **Iceland**, **Liechtenstein** and **Norway** indicate that national law is in accordance with EU law. **Albania** has partially implemented Directive 2010/18/EU. In **Turkey**, there is no legislation and/or national collective agreement, or case law specifically mentioning parental leave within the understanding of Directive 2010/18/EU. However, there are provisions for family-related leave or leave related to childcare for civil servants that may be used for family/parental issues, which are quite generous and exceed Directive 2010/18/EU. The other three candidate countries (**Montenegro**, **North Macedonia** and **Serbia**) have not implemented the Directive.

In the other countries, formal transposition of the Directive has occurred or minor amendments to national law have been made.

Directive 2010/18/EU contains minimum requirements. The entitlements to parental leave differ greatly, in particular as regards length and/or income during leave, and in some countries much more favourable provisions apply. For example, in **Norway**, parents are entitled to 12 months of leave, of which 46 weeks are paid (parental benefit) at the full daily rate, respectively 56 weeks at a reduced rate in connection with the birth of the child. In addition, parents are entitled to two more years of (unpaid) parental leave until the child is three years old or until the workers have another child. In **Portugal**, there are several types of 'parental leave', including a 'grandparent's leave', a right to leave to assist a daughter younger than 16 who has given birth, for a maximum of 30 days.[287] Taken together, different forms of leave to be able to take care of children are more generous than the parental leave provided for in Directive 2010/18/EU.

In **Estonia** parental leave is quite generous, as it can last until the child is three years old. But it is also very inflexible, given the fact that it must immediately follow maternity leave (of 70 days) and can only be taken by one person at a time. It is assumed that the mother continues with the leave and is entitled to the monthly parental benefit. If the initial recipient of the parental benefit is the father, it must be requested in advance and the mother must prove that she is not on parental leave. As this requirement only applies to the mother, this amounts to direct sex discrimination.

More favourable rules also apply in some countries to parents of a disabled child or a child with a long-term illness (e.g. **Belgium**, **Croatia**, **Cyprus**, **Czech Republic**, **Denmark**, **Finland**, **France**, **Greece**, **Hungary**, **Ireland**, **Montenegro**, **Portugal**, **Serbia**, **Slovenia**, **Sweden**). For example, in **Belgium**, if the child is disabled, parental leave can be taken until the child is 21 years old and parents of twins are entitled to parental leave for each child. In **Slovenia**, parental leave can be extended by 90 days; in **Poland** an additional childcare leave of 36 months can be taken until the child is 18 years old (thus in total 72 months).

If the period specified in a fixed-term contract ends during parental leave, there is no obligation for the employer to prolong the employment relationship in the **Czech Republic**, but the parental allowance from the state social support system continues to be paid without any change.

4.5.1 Duration, payment and transferability of parental leave

In **all countries**, national legislation regarding parental leave is applicable to both the public and the private sectors (although not always in the same way).

287 Portugal, Article 50 of the Labour Code.

The length of this leave varies considerably by country, however. The table below provides an overview.[288]

Table 3: Parental leave

Country	Parental leave		
	Length	Payment	Transferable?
Albania	Minimum 4 months until the child is six	Unpaid	No[289]
Austria	Individual right until the child is 2[290]	Unpaid (but benefit: Small Children's Allowance)	No[291]
Belgium	4 months per parent	Flat rate	No
Bulgaria	6 months per parent	Unpaid	In part (up to five months). Directive 2010/18 requires that one of the four minimum months should be non-transferable. In BG, a longer leave is provided and the one-month non-transferable period is respected.
Croatia	6 months if only one parent uses the parental leave or for single parents. 8 months combined[292] (for the first and second child), (30 months combined for third and consecutive children or twins)	Yes, paid by state budget at 100 % of the salary, but capped at 120 % of the budget calculation base (currently EUR 538).[293]	Two months non- transferable
Cyprus	18 weeks per child (individual right for each parent/23 weeks for widow(er)s	Unpaid	Non-transferable, exceptionally only if two weeks leave at least have been taken, two weeks of the remaining leave are transferable.
Czech Republic[294]	Until the child is 4	Flat rate (EUR 1200, CZK 3000 000 for the whole period)	Yes
Denmark	32 weeks per child	100 % (some collective agreements) and parental benefit (EUR 448 per week)	Yes
Estonia	3 years minus 70 days	100 % paid (ceiling exists) for 435 days, then unpaid	Yes
Finland	26 weeks per child (158 weekdays)	70 %, capped	Yes[295]

288 This table has been adapted from McColgan, A. (2015), *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European Commission, pp. 68-69, available at http://www.equalitylaw.eu/downloads/3631-reconciliation.

289 Unless one of the parents dies.

290 Each parent is able to reserve three months of leave to take later. Parents are also entitled to share one month of parental leave. In this case, the overall period is shortened for this 'double month' and parental leave is only granted for 23, rather than 24, months.

291 Both parents have the same right to parental leave; there is no provision for proper transferability. Under the legal provisions, parents have the right to divide the duration of parental leave between them; an agreement on how to do this must be reached. Only one parent at a time can take the leave, except for one month where one parent takes over from the other.

292 Usually 4 months for one parent and 4 months for the other parent, of which two months are non-transferable.

293 Croatia, Article 24b of the Act on Maternity and Parental Benefits.

294 In the Czech Republic parental leave should be distinguished from parental allowance.

295 According to parental agreement (Chapter 9, Section 8 of the Sickness Insurance Act).

Country	Parental leave		
	Length	Payment	Transferable?
France	One year, and can be renewed twice until child is 3 years old	Flat rate, period depends on the first child (six months, one year if the parents share the leave), second child (additional six months), subsequent children	Yes. Possibility to extend the parental leave if the other parent takes six months.
Germany	3 years per parent	67 % up to 100 % for 14 months (when 2 months are taken by the other parent), then unpaid, 4 additional months paid when both parents are working part-time	No, but the parental allowances depend on the sharing of parental leave between the parents
Greece	4 months per parent (9 in the public sector)	Unpaid (private sector) fully paid (public sector)	Yes, in public sector; no, in private sector
Hungary	Three years, until the child is 3 (general rule)[296]	70 % (capped) until the child is 2, then very low flat rate	Yes, it is a joint right for the parents. When the child is one year old, transferable to one of the grandparents
Iceland	4 months per parent	Unpaid	An independent entitlement by each parent. Non-transferable.
Ireland	18 weeks per parent	Unpaid	No
Italy	10/11 months for both parents per child. Single parents: 10 months	30 % (social security allowance) for a total of six months for both parents for the first six years of the child's life	In part (two months)
Latvia	18 months per parent (under the Labour Law)	60 % for one of the parents who stopped working (under social security law, until child attains 12 months of age)[297]	No
Liechtenstein	4 months per parent	Unpaid	No
Lithuania	Until the child is 3	Allowance up to two years. 100 % until the child is one year. Or 70 % after the end of the maternity leave until the child reaches one year and 40 % until the child is two years, subject to minimum and maximum ceilings	Yes
Luxembourg	4 or 6 months per parent full-time; 8 or 12 months half-time; or flexible leave over a period of 20 months	Social security benefit, proportion of the wage, min 1 922 EUR, max 3 200 EUR (for full- time leave)	No
Malta	4 months per parent (12 months per child in the public sector)	Unpaid	No

296 Longer in cases of twins or disabled children.
297 Alternatively, if a parent would like to receive parental allowance until a child is 18 months old, then the amount of allowance will be 43.75 % of the gross salary.

Country	Parental leave		
	Length	Payment	Transferable?
Montenegro	45 days after the birth of the baby until the expiry of 365 days from the day of commencement of maternity leave	100 % (when having worked continuously for 12 months and more, before the leave) 70 % (when having worked continuously between 6 and 12 months before the leave) 50 % (between 3 and 6 months) 30 % (3 months or less)	Yes, if one parent stops parental leave, the other parent is entitled to use the unused part
Netherlands	26 weeks per parent	Unpaid, but collective agreements may impose a (partially) paid leave (public sector)	No
North Macedonia	52 weeks (78 weeks for multiple childbirth) – father is entitled to parental leave if the mother does not take maternity leave	Paid by the state	Yes, the father can use the leave only if the mother does not use it
Norway	12 months fully paid, 12 months each of the parents unpaid	100 % for 46 weeks or 80 % for 56 weeks, capped	In part
Poland	32 weeks (34 in case of multiple birth) In addition: 36 months childcare leave	6 (or 8) weeks, 100 % allowance, then 60 % for the remaining weeks Unpaid	Yes
Portugal	3 months (full-time) per parent, 12 months (part-time) (parental leave in strict sense)	25 % (allowance during the first three months, if parental leave is taken immediately after maternity leave)	No
Romania	2 years per child	85 %, cannot be lower than 85 % of the national minimum wage	Transferable, except for one month that is mandatory for the parent who did not take the parental leave
Serbia	3 months after the birth until 365 days after commencement of maternity leave (2 years for every third and subsequent child)	100 % (if parent has worked for at least 6 continuous months) 60 % (if parent has worked for between 3 and 6 months) 30 % (less than 3 months) In addition, allowance based on social security system, which is part of birth policies.	No
Slovakia	Until the child is 3[298]	Flat rate (EUR 214.70 for one child, EUR 268.40 for twins and EUR 322.05 for triplets and more)	No

298 Six if disabled.

Country	Parental leave		
	Length	Payment	Transferable?
Slovenia	260 days per child	100 % social benefits, capped (minimum and maximum)	In part
Spain	Until the child is 3[299]	Unpaid	No
Sweden	480 days (includes maternity leave) per child	80 %, capped for 390 days, then flat rate at EUR 16 (SEK 180)	In part (90 days not transferable)
Turkey	No regulation on parental leave. (forms of unpaid leave related to children for women employees; family-related leave or leave related to childcare for civil servants)		
United Kingdom	18 weeks per parent	Unpaid	No

4.5.2 Right to return to the same or an equivalent job

According to Clause 5(1) of Directive 2010/18/EU, workers have at the end of the parental leave workers have the right to return to the same or equivalent job.[300] Workers are entitled to rights acquired (or in the process of being acquired) on the date on which parental leave starts. These rights must be maintained as they stand until the end of parental leave (Clause 5(2)).[301]

In most countries where parental leave exists, Clause 5(1) and (2) has been implemented explicitly. However, there is no such legal right in **Albania**. In the **Netherlands**, there is no explicit legal right to return to the same or a comparable job after taking parental leave. The specific protection against unfavourable treatment related to parental leave is considered sufficient by the Dutch government. It is submitted that a specific legal provision would be a better way to implement Clause 5(1) and (2). This clause has not been explicitly implemented in **Belgium** either, but this seems not to be problematic in practice in the public sector. In the private sector, collective agreements might not take into account the period of parental leave for example for Christmas bonuses.

Bonusses. In **Hungary**, the new Labour Code does not expressly guarantee the right of a parent to return to their original job or an equivalent job at the end of parental leave. A cumulative interpretation of the relevant regulations, however, leads to the conclusion that such a right is provided. The **German** Federal Parental Leave and Parental Allowances Act does not explicitly cover the right to return to one's former job or to an equivalent post.[302] The German Women Lawyers' Association points out that the lack of a right to return to work after parental leave violates Directive 2010/18/EU.[303]

In **Spain**, a worker has the right to return to the same job within one year of unpaid leave and to a similar job after one year of unpaid leave. In the **United Kingdom**, the right to return to the same job exists for employees from a period of no more than four weeks' leave.

299 In addition, workers with children younger than nine months, including adoptive and foster parents, and civil servants with children younger than 12 months have the right to paid leave of one hour per day.

300 See, for example, CJEU 7 September 2017, C-174/16 (*H.*), ECLI:EU:C:2017:637.

301 See on social security entitlements Clause 5(5) of Directive 2010/18/EU and CJEU Judgment of 16 July 2009, *Gómez-Limón*, C-537/07, ECLI:EU:C:2009:462.

302 See Nassibi, G. et al. (2012), 'Geschlechtergleichstellung durch Arbeitszeitsouveränität' (Gender Equality and Working Time Sovereignty), *Zeitschrift des Deutschen Juristinnenbundes*, pp. 111-116.

303 See German Women Lawyers' Association (2014), 'Stellungnahme vom 26.06.2014 zum Entwurf eines Gesetzes zur Einführung des Elterngeld Plus mit Partnerschaftsbonus und einer flexibleren Elternzeit im BEEG', https://www.djb.de/verein/Kom-u-AS/K4/st14-10/.

In **France**, workers returning from parental leave are entitled to training if working techniques and methods have changed. **Irish** law explicitly addresses specific situations, such as a transfer of undertaking. In **Latvia**, the obligation to provide the same or and equivalent job is absolute, there are no exceptions even if the post is abolished on account of structural, organisational or other objective reasons.

4.5.3 Protection against less favourable treatment or dismissal[304]

Workers who take parental leave must be protected against less favourable treatment and dismissal (Clause 5(4)). If a worker is dismissed unlawfully, the calculation of fixed damages and of indemnity must be based on the full-time remuneration prior to the start of the (part-time) parental leave.[305]

In most countries, employees are specifically protected against unfavourable treatment and dismissal related to applying for and/or taking parental leave. However, there is no such right in **Albania**. In **Bulgaria**, the anti-discrimination provisions apply, which prohibit discrimination on the ground of family status. In the **Czech Republic**, **Latvia**, **Liechtenstein**, **Slovakia** and **Turkey**, the Employment Act protects against any kind of adverse treatment because of the use of rights, thus including the right to parental leave.[306] This includes, in the **Czech Republic**, a prohibition on giving notice during the protected period, thus also during parental leave. In **Hungary**, specific protection relates to maternity and paternity, thus including protection against unfavourable treatment in relation to parental leave according to the national expert.

In **Belgium** the protection starts from the date when the employee has received notice until three months after the end of the leave. In **Finland**, the employer may dismiss a person on maternity, paternity, parental, adoption or care leave only if the employer's activities cease completely. The situation is different in the **Netherlands**, where dismissal of an employee during parental leave for reasons not connected to the leave is not explicitly prohibited.

4.6 Paternity leave

Most countries provide fathers with the right to paternity leave, though in many countries this leave is very short. The Work-life Balance Directive 2019/1158 adopted in 2019 requires that fathers be entitled to a paid paternity leave of at least 10 working days to be taken on the occasion of the birth of the child (Article 4).[307] The payment or allowance must at least be equivalent to sick pay and may be subject to a ceiling. The right to a payment or allowance can be subject to periods of previous employment, but not more than six months before the expected date of birth (Article 8(1) and (2)).

The table below provides an overview of the current length and level of payment of paternity leave in 36 countries.[308]

304 See the report produced by the European Network of Legal Experts in the Field of Gender Equality, Masselot, A. (2018) *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European Commission, available at: https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb.

305 See the CJEU Judgment of 22 October 2009, *Christel Meerts v Proost NV*, C-116/08, ECLI:EU:C:2009:645 and Judgment of 27 February 2014, *Lyreco Belgium NV v Sophie Rogiers*, C-588/12, ECLI:EU:C:2014:99.

306 In **Lithuania**, the approach is similar.

307 Such leave is intended for fathers, or where and insofar as recognised by national law, equivalent second parents and irrespective of the marital or family status, as defined by national law. Such leave shall not be subject to a period of work or length of service qualification.

308 This table has been adapted from McColgan, A. (2015), *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European Commission, p. 65, available at: http://www.equalitylaw.eu/downloads/3631-reconciliation.

Table 4: Paternity leave

Country	Paternity leave	
	Length	Payment
Albania	0	N/A[309]
Austria	0-31 days[310]	EUR 700 – deducted from the father's Small Children's Allowance at a later stage, if he decides to take it.
Belgium	10 days	100 % for 3 days, then 82 % (this is equal to 100 % net as no contributions are deducted from social security benefits)
Bulgaria	15 days	90 %
Croatia	0	N/A
Cyprus	2 weeks	72 % (paternity benefit)
Czech Republic	5 days[311]	70 % (benefit paid from sickness insurance)
Denmark	2 weeks	100 %
Estonia	10 days	100 %
Finland	54 days	70 % (capped)
France	11 days[312]	100 % (capped)
Germany	0	N/A
Greece	2 days[313]	100 %
Hungary	5 days[314]	100 %
Iceland	4 months[315]	80 % (capped)
Ireland	2 weeks	EUR 240 gross per week
Italy	5 days compulsory leave, plus one day optional	100 %
Latvia	10 calendar days	80 %
Liechtenstein	0	N/A
Lithuania	One month after birth.	100 % capped
Luxembourg	10 mandatory leave days	100 % (capped)
Malta	1 day in private sector and 2 days in public sector	100 %
Montenegro	By collective agreement. Usually 5 working days.	100 %
Netherlands	5 days	2 days 100 %, 3 days unpaid[316]
North Macedonia	7 days	100 %
Norway	2 weeks	Unpaid, but some employers offer pay on a voluntary basis or pay is required by collective agreement. Fathers can also take the 'father's quota' of the parental leave, which is paid (see previous section)
Poland	2 weeks	100 %

309 The insured father or adoptive father has the right to take care of the child after the 63-day post-partum period, if this right is not exercised by the mother or there are no conditions for the mother to benefit. This paternity leave can last for 267 days.
310 Civil servants are entitled to four weeks' leave; certain groups of employees in the private sector are entitled to leave periods of varying lengths according to some collective agreements or to 28 to 31 days of 'family time', according to a written agreement with the employer.
311 Paternity leave was introduced in Law 148/2017, which entered into force on 1 February 2018.
312 Eighteen in the case of multiple births.
313 Five days for the military.
314 Seven in the case of twins.
315 Cf., Act No. 149/2019, Art. 1, came into effect 1. January 2020, amending the Act on Maternity, Paternity Leave and Parental Leave No. 95/2000.In addition, parents have a joint entitlement to an additional three months, which either parent may take in its entirety or the parents may divide between them.
316 As of 1 January 2019, a new law enters into force, which provides for 5 days fully paid paternity leave.

Country	Paternity leave	
	Length	Payment
Portugal	15 days compulsory, and 10 optional additional days	100 %
Romania	5/15 days[317]	100 %
Serbia	7 days	100 %
Slovakia	0	N/A
Slovenia	30 days	100 %
Spain	Five weeks[318]	100 %
Sweden	2 weeks (in addition to the 90 non-transferable days of parental leave)	80 % capped (in addition to 90 days of benefits at income-replacement level of parental leave)
Turkey	Employees: 5 days Civil servants: 10 days (plus optional 24 months)	100 % Civil servants: 100 % (optional 24 months unpaid)
United Kingdom	2 weeks	Flat rate[319]

4.7 Time off and care leave

The Parental Leave Directive 2010/18/EU requires that workers are entitled to time off on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable (Clause 8). The Work-life Balance Directive 2019/1158 which entered into force on the 1st of August 2019 has a similar provision (Article 7) and in addition introduces an unpaid carers' leave of five working days per year (Article 6). This new carers' leave enables carers to provide care or support to a relative or to a person who lives in the same household as the worker and who is in need of significant care or support for a serious medical reason (Article 3(1)(c)). The protection of workers taking this carers' leave is broader than in case of time off for *force majeure* as required by Directive 2010/18. With the Work-life Balance Directive 2019/1158, the employment rights of workers taking carers' leave will have to be maintained (Article 10), these workers have to be protected against discrimination (Article 11) and enjoy protection against dismissal (Article 12). Articles 10 and 11 also apply to time off in case of *force majeure* as defined in Article 7 of Directive 2019/1158. The same is true for provisions which apply to the whole Directive 2019/1158 such as the role of the Equality bodies (Article 15).[320]

In national law, the distinction between the right to take time off for different (often specified) reasons and the new carers' leave in Article 6 of Directive 2019/1158 is not always clear. In some countries, time off in case of *force majeure* can be taken for a longer period as is the case for example in **Portugal** (see table 5 below). What is defined then as time off in case of force majeure might be (very similar to) a carers' leave as defined in Article 6 of Directive 2019/1158.

Time off in case of *force majeure* as defined in Clause 8 of the Parental Leave Directive 2018/10 is available in all Member States. However, in **Greece**, there is no general provision on time off for urgent family reasons in case of sickness or accident, although there are several provisions of special forms of leave and time off on specific grounds. Similarly, in the **United Kingdom**, different kinds of situations of unexpected emergencies are mentioned in which employees are entitled to time off as is 'reasonable' in order to take action that is 'necessary'.

317 Fifteen days if the father has completed a course in infant care.
318 From 3 July 2018, Law 6/2018.
319 At the same rate as statutory maternity pay.
320 These provisions have to be implemented by 2 August 2020 (Article 20 (1)).

In **Iceland**, no right to time off for *force majeure* exists and there is no care leave. However, there is a right of parents to financial assistance when they are not able to pursue employment or studies due to the special care required by their children who have been diagnosed as suffering from chronic illnesses or severe disabilities. The amount is 80 % of the employee's average aggregate wages, based on a 12-month period ending two months prior to the diagnosis of the child.

The table below provides an overview of any other types of leave that are available. If only time off for *force majeure* is available, if the period of time off is substantial or not limited or if additional requirements apply, this is also mentioned in the table.[321]

Table 5 Availability of longer period of time off and/or care leave

Country	Purpose(s) of leave	Maximum period of leave	Compensation?	Other relevant information
Albania	Time off for different specific reasons	14 days per year	100 % wage	Additional period of 30 days per year unpaid
	Care leave	12 (15 days if child is younger than 3 and ill) per year	Yes, wage	
Austria	Care for relatives living in the same household in cases of sickness	One week or two weeks for children under the age of 12 per year	Paid (100 %)	
	Care for terminally ill relatives	Up to three months with an extension period of another three months		Employees need an agreement with their employer and can claim a benefit (Pflegekarenzgeld, usually in the amount of unemployment benefit) if the relative/ child has the right to level 3 Care benefit (Pflegegeld Stufe 3)
	Care for severely ill relatives or severely ill children	Three months		
Belgium	In the private sector: 10 days per year (not necessarily related to childcare). Diverse regulations in the public sector.	10 days a year	Unpaid	
	Care for young or disabled children or seriously ill relative	48 months over a career	State benefits	Private sector only,[322] subject to 24 months' service and may be taken part-time[323]

321 This table has been adapted from McColgan, A. (2015), *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European Commission, pp. 91-92, available at: http://www.equalitylaw.eu/downloads/3631-reconciliation.

322 Public-sector workers may take up to five years full-time and five years part-time leave during their career, which may be used for any reason. Such leave is unpaid but entitles the worker to a low level of social security payment; this is paid at a higher level when the leave is used to care for a sick child. There is a proposal to bring the public sector in line with the private-sector scheme, although without improving the level of social security payable to public-sector workers.

323 The 48-month maximum applies regardless of whether leave is taken full-time or part-time.

Country	Purpose(s) of leave	Maximum period of leave	Compensation?	Other relevant information
Bulgaria	Care for sick child, spouse or relative	Up to 60 days per year for a child, 10 for an adult	70 % pay by the employer for the first 3 days and 80 % after that from social insurance for insured persons	
Croatia	Care for sick family member (child or spouse)	60 days per illness for children up to seven, 40 days per illness for children from seven to 18, 20 days per illness for children over 18 and spouse	70 % of salary capped, 100 % of salary for children under 3. All payments subject to a ceiling of EUR 561 (HRK 4 257) per month.	
Cyprus	Reasons of force majeure; care for sick family members and close relatives	11 days per year	No	
Czech Republic	Care for ill child (or a member of family) Long-term care for family member	No limit per year for care of ill child younger than 10 years. Paid for 9 (or 16 days). 90 days	Caring benefit (60 % of daily salary) paid from sickness insurance Long-term care allowance (60 % of daily salary)	
Denmark	Care for disabled/ terminally ill relative	6+ months	Yes	
Estonia	Time off to take care of sick adult or disabled person Care leave for child up to 14 years or a disabled child up to 18 years	5 days per year 10 working days per year	100 % paid Unpaid	
Finland	Care for compelling unexpected family reasons related to illness or accident Care for sick relative Care leave for child	Short temporary Fixed term Up until child is 3 years old	Unpaid Unpaid Flat rate benefit	Based on agreement, but involves protection against dismissal
France	Care for a terminally ill child or spouse	Six months	State benefits available	May be taken part-time
Germany	Emergency childcare leave Care for a close relative	Up to 10 working days per year for each child (single parents 20 days). Maximum for more children 25 days (single parents 50 days) Two years	70 % of income (statutory health insurance scheme) State benefits available	 May be taken part-time

Country	Purpose(s) of leave	Maximum period of leave	Compensation?	Other relevant information
Greece	Care for a child or spouse in hospital or requiring transfusions, or a disabled child	Public sector: 22 days per year Private sector: from 10 to 30 days per year, depending on the case[324]	Public sector: all leave paid. Private sector: most leave unpaid No	Additional specific leave exists
	Care for sick dependents	Private sector: 6 days per year. Public sector: 4-6 days per year	Yes Yes	
	School visits	Private sector: 4 days per year Public sector: 4-5 days per year	Yes Yes	
Hungary	Care for a relative	Between 30 days and two years	State benefits may be available	Need for care is certified by a physician
Ireland	Care for seriously ill or disabled person	104 weeks (208 weeks if an employee has to look after more than one person)	State benefits	Subject to one year of continuous service
Italy	Illness of child younger than three	For period of illness	Unpaid	Details of the nature of such leave to be determined between employer and worker
	Care for seriously disabled relatives	Three days per month	Yes (100 %)	
	Care for seriously disabled spouse	Two years	Yes (capped)	
	Death or serious illness of a close relative	Three days per year	Yes	
	For serious family reasons	Two years over a career	No	
Latvia	In case of force majeure	Not limited	Yes (100 %)	Only condition is that the employee informs the employer
Liechtenstein	In case of force majeure for urgent family reasons	1 to 3 days, several times a year	Yes (80 %), but eligibility requirement	Evidenced by medical certificate
Lithuania	Full-time care leave for a sick child, relative or spouse – up to 120 days	120 days per year for a seriously ill child, 7 for an adult	State benefits for up to 7 days (at once) and up to 120 days per year for a seriously ill child	
Luxembourg	Care for a sick child	Maximum 12 days for child younger than 4; 18 days for child between 5 and 13; 5 days for child between 14 and 18	Yes, 100 %	

324 This types of leave presuppose the exhaustion of other paid leave, except annual leave; according to the national expert this condition conflicts with Directive 2010/18/EU.

Country	Purpose(s) of leave	Maximum period of leave	Compensation?	Other relevant information
Malta	Time off for *force majeure*	Minimum of 15 paid hours a year (deducted from annual leave) in private sector. 16 hours in public sector.		
Montenegro	Serious illness of a close family member Death of an immediate family member Special care for a child with special needs	Determined by collective agreement 7 days Until the child turns 3	Yes Yes Yes	
Netherlands	Care for a sick parent or partner Care for a close relative or dependent	10 days 6 weeks	Yes, at 70 % No	May be taken part-time Worker may reduce hours by up to 50 %
North Macedonia	Care leave for a sick child under the age of three	Up to 30 days a year	Paid (100%)	
Norway	Care for close relatives and/or other close persons during terminal stage of life. Care for parents, spouse, cohabitant or registered partner and disabled or chronically sick child	60 days 10 days per year	Yes, equal to sick leave pay (100 % salary) Yes, equal to sick leave pay (100 % salary)	May be taken part-time May be taken part-time
Poland	Care of at least one child younger than 14 Care for a child Care for family member	2 days per year Up to 60 days per year Up to 14 days per year	100 % 80 % 80 %	May be taken part-time Maximum is 60 days per year, irrespective of the number of family members
Portugal	Time off on grounds of force majeure Care for a child (under or over 12 years) Care for a grandchild when the mother is under 16 at the time of birth Care for dependents	30 days per year 15 days per year 10 days a year	No No	

Country	Purpose(s) of leave	Maximum period of leave	Compensation?	Other relevant information
Serbia	Time off (*force majeure*)	7 working days per year	Yes	
	Special care of a child or another person: absence from work or work half-time	Until the child turns five	Yes, compensation of earnings	Also for other groups (e.g. adoptive parents, foster parents) until the child turns three
Slovakia	Time off (force majeure) for urgent family reasons in case of sickness or accident	No limit on number of times per year	Allowance under Social Insurance Act	
	When accompanying: (i) a family member to a medical facility for examinations or treatment upon sudden disease or accident, and also for planned examinations and treatment	(i) Maximum 7 days per calendar year	Yes	
	(ii) A disabled child to a social care facility or special school	(ii) Maximum 10 days per calendar year	Yes	
Slovenia	Time off (*force majeure*)		50 % salary, but not less than 70 % of the minimum salary	
	Care for close relatives	Up to 15 days, possibility of extension	80 % salary	
	Absence from work due to personal circumstances such as: – marriage, – the death of a spouse or cohabitant or the death of a child, an adopted child or a child of the spouse or the cohabitant, – the death of parents, meaning his father or mother, the spouse or cohabitant of a parent, or an adoptive parent, – a serious accident suffered by the worker or – accompanying child to school on his first day of primary school.	From 1 day to up to a maximum of seven working days in an individual calendar year.	100 % salary	Leave on full-time basis only; number of days depends on situation

Country	Purpose(s) of leave	Maximum period of leave	Compensation?	Other relevant information
Spain	Time off in some situations (e.g. death of a relative): up to 4 days			
Sweden	Care for sick child under the age of 12 Care for seriously ill relatives	60 days yearly per child 100 days (240 if the relative has AIDS)	80 % salary capped State benefits	
Turkey	For employees and civil servants Care for a disabled child or a child with a permanent sickness Death of a child / spouse / parent / sibling For civil servants: Sickness and patient companionship leave	Up to 10 days 7 days for civil servants; 3 days for employees 3 months	Yes Yes Yes	No age limit for the child, can be used wholly or partially within 1-year period Upon medical report, may be extended, no age limit for child
United Kingdom	Time off for unexpected emergencies	No cap	No	

4.8 Leave in relation to surrogacy

In just a few countries parental leave is available in cases of surrogacy. Countries that have provided for this right are: **Greece**,[325] **Spain** and the **United Kingdom**. In **Ireland**, there is no legislative right to leave in relation to surrogacy, but a parent *in loco parentis* might be entitled to parental leave. In **Portugal** surrogacy has been allowed under very strict conditions since 2016, but the legal consequences are not entirely clear. In the expert's opinion the law should be read as implying that the legal parents are entitled to parental leave. In the **Netherlands**, intended parents will have a right to parental leave if they become the legal parents of the child, e.g. through adoption, or if they take permanent care of the child and live at the same address. The surrogate mother might also be entitled to parental leave if she is still the legal mother of the child. In **North Macedonia**, the surrogate mother is entitled to 45 days of birth leave and the commissioning mother is entitled to maternity and parental leave. In **Iceland**, a draft on altruistic surrogacy is still pending. According to the draft, the surrogate mother, while pregnant, would have all the same rights as any pregnant woman with regard to health services. According to Article 23 of the draft law, the surrogate mother and her spouse would be entitled to maternity/paternity leave and parental leave. In **Croatia**, adoption leave would be possible.

In a few countries, surrogacy is not legally regulated (e.g. **Albania**, **Belgium**, **Croatia**, **Hungary**, **Italy**, **Latvia**, **Montenegro**, **Poland**, **Turkey**). In **Denmark**, any agreement on surrogacy is invalid. In the following countries, surrogacy is neither legal nor explicitly prohibited: (**Austria**,[326] **Bulgaria**, **Estonia**,

325 The commissioning parents are assimilated with natural parents concerning all forms of leave for the care and raising of the child. Both the commissioning and the surrogate mother are entitled to reduced working days.

326 Parents may, however, enter into a surrogacy contract in a country where this is legal. If the biological parents are Austrian citizens, the children must be recognised legally as citizens, granted residency rights on entering the country, and included in all provisions of Austrian law, such as social security participation, as legal offspring of the surrogate parents. This would also have to be extended to the right to parental leave and parental part-time arrangements for the parents.

Finland, **France**, **Germany**, **Liechtenstein**, **Luxembourg**, **Malta**, **Norway**, **Serbia**,[327] **Slovakia**, **Slovenia** and **Sweden**).

4.9 Flexible working-time arrangements

According to Clause 6(1) of the Parental Leave Directive 2010/18/EU, parents returning from parental leave may request changes to their working hours and/or working patterns for a set period of time. The employer has to consider and respond to such requests, taking into account both the employer's and the worker's needs. Even if this is a rather weak provision, it might offer possibilities in practice to adjust working time and working hours while remaining employed (see also Article 21(2) of the Recast Directive 2006/54/EC). In should be noted that EU law does not guarantee a right to part-time work.[328]

The Work-life Balance Directive 2019/1158 introduces more rights to request flexible working arrangements for workers with children up to a specified age (at least eight years) and carers (Article 9). These arrangements include the right to request adjustment of working patterns, including through the use of remote working arrangements, flexible working schedules or reduced working hours (Article 3(1)(f)).

The three tables below offer an overview of the possibilities for workers to access reduced -hours (for example from full-time to part-time work) or extend working time (Table 6), have an individual right to adjust weekly working time patterns (Table 7) and the possibility to work from home or remotely (Table 8).

Table 6 Right to reduce or extend working time[329]

Country	Access to adjustment of working time		
	If so, tied to care purposes?	Right or right to request?	Compensation?
Albania	Only for breastfeeding women to breastfeed the child. Two hours.	Right	Yes, salary is paid
Austria	Yes (parents of children up to the age of 4 and, under some conditions, 7).[330]	Right to reduce working time	No
Belgium	Yes. Not tied to care purposes. In the private sector mostly 'time credits' In the public sector, staff regulations with possibility of career-breaks.	Right	Yes (statutory social benefit)
Bulgaria	No right[331]		
Croatia	Yes, but only as part of arrangements for maternity and parental rights and benefits.	Yes, in relation to maternity and parental leave	Yes
Cyprus	Yes, not tied to care purposes.	Right to request	No

327 However, there is a very restrictive right to surrogate motherhood in the draft of the Civil Code.

328 See CJEU Judgment of 15 October 2014, *Teresa Mascellani v Ministero della Giustizia*, C-221/13, ECLI:EU:C:2014:2286. The case concerned a female worker whose employer ordered the conversion of a part-time employment relationship into full-time employment without the consent of the employee concerned. The national provision was not contrary to the Part-time Work Directive 97/81/EC.

329 The table has been adapted from: McColgan, A. (2015), *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European Commission, p. 36, available at: http://www.equalitylaw.eu/downloads/3631-reconciliation.

330 When caring for dying relatives or severely ill children, workers can apply for a temporary reduction in working hours. Similarly, workers can reduce working hours for a period of three months in cases where a severely sick or disabled relative needs help with their care.

331 Only the employer has the initiative to reduce or extend working time.

Country	Access to adjustment of working time		
	If so, tied to care purposes?	Right or right to request?	Compensation?
Czech Republic	Yes. Part-time work under some conditions for some groups	Right, with exceptions	No
Denmark	Yes, not tied to care purposes.	Right to request	No
Estonia	Yes, not tied to care purposes	Right to request	No
Finland	Yes	Right, with exceptions	Wage-related, flat rate or no benefit depending on type of leave
France	Right to work part-time, not tied to care purposes	Right to request	No
Germany	Yes, not linked to care purposes	Right, with exceptions. Now also a bridge part-time work, thus temporary reduction of working time[332]	No[333]
Greece	Private sector: reduced paid daily hours for breastfeeding and childcare or alternative, corresponding length, in the latter case upon agreement with the employer Public sector: reduced paid hours provided by law or in alternative the 9 months parental leave	Right	Yes
Hungary	Yes, tied to care purposes	Right	Social security benefits (childcare allowance)
Iceland	Yes, tied to care purposes	Right, with exceptions	No
Ireland	Yes, not tied to care purposes	Right to request	No
Italy	No, except right to part-time work in some situations	Right to request	No
Latvia	Yes, tied to care purposes	Right for some specific groups	Possibly (unclear as yet)
Liechtenstein	No legal right	Employer has to consider a request to shift from full-time to part-time work	No
Lithuania	Yes, tied to care purposes	Right for certain groups. Right to request part-time	No[334]
Luxembourg	No right		
Malta	No right		Right to request if working in the public sector
Montenegro	Yes. Right to work part-time until the child is 3 or when care for a child with disabilities is needed	Right	Yes. Working hours to be considered as full-time working hours for the purpose of exercising rights arising from and based on employment.
Netherlands	Yes, but not tied to care purposes	Right, unless compelling business or organisational reasons justify a refusal.	No
North Macedonia	Yes, for care of children with disabilities	Right to request	No

332 Section 9a of the amended Part-Time and Fixed-Term Employment Act entered into force on 1 January 2019. There is still no right to extend working time on request.
333 Except where the part-time working arrangement carries entitlement to Home Care Support Benefit.
334 Where the reduced hours arrangement is for parents of children under 12 (or a disabled child under 18), who are entitled to have their weekly hours reduced by two hours (four hours for parents of three or more children under 12).

Country	Access to adjustment of working time		
	If so, tied to care purposes?	Right or right to request?	Compensation?
Norway	Yes, not tied to care purposes	Right[335]	No
Poland	Yes, for persons entitled to parental and childcare leave	Right to reduce working time (half-time during these types of leave).	No
Portugal	Yes, tied to care purposes	Right, with exceptions	No
Romania	Yes, only for women employees who are breastfeeding children under one year old.	A few collective agreements provide for this right	Yes
Serbia	No right		
Slovakia	Yes, only certain groups or with consent of the employer	Right, with exceptions	No
Slovenia	Yes, tied to care purposes	Right	Social security contributions paid for some parents[336] Right to return after a period
Spain	Yes (parents, adopting and fostering parents of children younger than 12 year) and person who cares for a child	Right to reduce working time for a maximum of two years	Sometimes[337]
Sweden	Yes (parents of a child up to 8 years old)	Right	Sometimes[338]
Turkey	Yes, (for pregnant workers, workers having recently given births/ breastfeeding workers and for biological and adopting employee and civil servant parents who are employees).). Approval of the employer required for some groups of employees.	Right	No
United Kingdom	Yes, not tied to care purpose	Right to request	No

Table 7 Individual right to adjust working time patterns

Country	Possibility to adjust working patterns?	Right or right to request?
Albania	No	
Austria	Yes	Right
Belgium	Yes	Right to request
Bulgaria	No, only on initiative of the employer	Right to request for certain groups
Croatia	No, only for certain categories of workers (if the nature of the work so requires) on employer's initiative.	No right, only employer's initiative. Employee's consent required in certain cases (Article 67(4) and (5) Labour Act)
Cyprus	No[339]	

335 Specific right for employees who reached the age of 62, or for health, social or other welfare reasons.
336 Those with a child under three or a disabled child under 18, or two children, one of whom has not completed the first year of primary schooling. Additional rights for other persons caring for or nursing a child (e.g. guardians).
337 Where the reduced hours arrangement is in the form of 'breastfeeding permission' (available to either parent).
338 If parents have not yet exhausted their right to parental benefit.
339 National legislation does not provide for a legal right to adjust working time patterns beyond the right to reduce or extend working time. The right to adjust working time patterns might be stipulated in collective agreements in certain sectors or agreed in individual contracts or though practice/custom.

Country	Possibility to adjust working patterns?	Right or right to request?
Czech Republic	Yes	Right, with exceptions
Denmark	No	
Estonia	No	
Finland	No, except 'working time bank'[340]	
France	No, but collective agreements could provide specific some rights and possibility to bank hours	
Germany	No,[341] but collective and works agreements could provide specific rights	
Greece	No[342]	
Hungary	No	
Iceland	Yes	Right
Ireland	Yes	Right to request
Italy	Yes, in limited situations	
Latvia	No	
Liechtenstein	No	
Lithuania	No	
Luxembourg	Yes	Limited under some conditions
Malta	No	Right to request if working in the public sector
Montenegro	No	
Netherlands	Yes	Right to request
North Macedonia	Yes, for workers returning from parental leave	Right to request for medical reasons, until the child is three years old
Norway	Yes	Right, unless major disadvantages for the employer
Poland	Yes, specific groups	Right
Portugal[343]	Yes	Right, employer can justify a refusal
Romania	No	No
Serbia	Yes, for specific groups	Right to request
Slovakia	Yes, for specific groups on employers' initiative and agreement with the employee	
Slovenia	No	
Spain	No, only in collective agreements or accepted by the employer	
Sweden	Yes (for parents of a child up to 8 years old)	Right
Turkey	No	
United Kingdom	Yes	Right to request

340 But a new Act will enter into force in 2020.
341 Under Section 7(2) of the amended Part-Time and Fixed-Term Employment Act, the employer is obliged to discuss an employee's wish to change the duration and/or situation of the existing contractual working time.
342 Except in the maritime sector: upon return from parental leave, a seafarer can request changes to their working time for a maximum of seven days, if the operational needs of the ship allow for this in the captain's judgment. Also, in order to facilitate a return to work, the seafarer and their employer can agree on suitable measures for returning to the workplace (Article 5(5) and (6) of Decree 80/2012).
343 No possibility for the employer to impose flexible working time arrangement on workers with children under three without specific and written consent of the working parent (Articles 206 No. 4(b) and 208-B No. 3(b) of the Labour Code).

Table 8 Access to remote working/homeworking

Country	Right to remote working/homeworking
Albania	No. It may be possible upon agreement by contract with the employer
Austria	No. Access may be possible by agreement with employer or in case of a works council agreement.
Belgium	No
Bulgaria	No. It may be possible based on an arrangement with the employer.
Croatia	No
Cyprus	No, although some collective agreements might provide for it
Czech Republic	No
Denmark	No
Estonia	No, unless agreed with employer
Finland	No, although many collective agreements provide for it
France	No. But an employer has to justify a denial of a request from a worker with disabilities.
Germany	No, although many collective agreements provide for it[344]
Greece	No, unless agreed with employer
Hungary	No, unless agreed with employer. Specific right for some part-time workers
Iceland	No, although some collective agreements provide for it
Ireland	No, although some collective agreements provide for a right / right to request
Italy	No. Only right to teleworking in some situations.
Latvia	No
Liechtenstein	No
Lithuania	No
Luxembourg	No. Telework regulated in some collective agreements.
Malta	No, but available in the public sector
Montenegro	No, depending on agreement with employer
Netherlands	Yes, right to request
North Macedonia	Yes, right to request
Norway	No, although many collective agreements provide for it
Poland	Yes, for workers with a disabled child
Portugal	Yes, a worker with a child under three has a right to telework
Romania	No
Serbia	No
Slovakia	No
Slovenia	Yes, right to request. Right to return to previous working arrangements
Spain	No
Sweden	No
Turkey	Yes, if there is mutual consent (Article 14 EA)
United Kingdom	Yes, right to request

In some countries there is a possibility of 'banking' working hours, up to certain limits (e.g. **Belgium**, **Croatia**).

344 Under Section 12 of the Federal Equality Act, public employers are obliged to offer family-friendly working hours and general conditions.

4.10 Assessment

The previous sections of this chapter show that in general the implementation of the EU directives is satisfactory. However, there are still some problematic issues in the legislation of some countries which have been highlighted by the national experts of the network and which should be remedied. In addition, many surveys reveal the gender imbalance of work and care and the negative impact, mainly on women, as regards career possibilities and related income, pensions etc. Another problematic aspect is that enforcement in practice is often lacking. There is very little case law on work-life balance issues, while pregnancy and maternity discrimination seem to be widespread. This is worrying, as the gap between law on the statute books and law in action does not seem to be becoming narrower.

The country reports show the huge diversity of measures at national level aimed at the reconciliation of work, private and family life. In some countries, the complexity of the national legislation has been criticised (for example, in **Germany**). The EU directives and provisions reflect a slow, step-by-step process towards more specific rights, in particular with the recently adopted Work-life Balance Directive 2019/1158 which is the first piece of legislation in the area of gender equality law in a decade. In most of the countries, new leave and/or rights as well as payment will have to be introduced (paternity leave, parental leave, carers' leave and flexible working time arrangements). The required changes will range between quite significant and minor and their effects in practice will have to be awaited. However, with the adoption of the Work-Life Balance Directive and the accompanying communication on Work-Life Balance, it is clear that work-life balance issues are firmly on the EU agenda, providing an impetus for further developments at national level.

5 Occupational pension schemes (Chapter 2 of Directive 2006/54)

The CJEU has made clear in its case law – in particular in the famous *Barber* judgment[345] – that occupational pension schemes are to be considered as pay. 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 7, 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 what is now Article 157 TFEU and had to be amended.[346] The most salient forms of discrimination in this Directive were maintaining the different pensionable ages for women and men and the exclusion of survivor's benefits for widowers.[347] In the light of the CJEU's case law, these forms of discrimination are 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 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 what is now Article 157 TFEU was not applicable and certain forms of discrimination were still allowed.

The case law on occupational social security schemes is now codified in Chapter 2 of Gender Recast Directive 2006/54/EC.

5.1 Direct and indirect sex discrimination in occupational social security schemes

Most countries have prohibited direct and indirect discrimination on the ground of sex in occupational social security schemes. This is not done explicitly in **Germany**, **Latvia**, **Poland**, **Sweden** and **Turkey**. In **Sweden**, for example, the payments in occupational pension schemes are – in parallel with the case law of the CJEU – regarded as pay and are thus covered by the ban on (among other grounds) gender discrimination in the Discrimination Act. This ban covers all types of employer decisions; occupational pension schemes are not mentioned explicitly. In **Turkey**, there is no specific prohibition as regards occupational schemes but the constitutional rule on gender equality applies to state schemes as well as occupational schemes. In **Serbia** and **Montenegro** there are no occupational pension schemes.

5.2 Personal scope

Article 6 of Gender Recast Directive 2006/54/EC defines the personal scope of Chapter 2 as follows: 'This Chapter shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.'

345 Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.
346 Directive 86/378/EEC was amended by Directive 96/97/EC, and has now been repealed by Recast Directive 2006/54/EC.
347 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 maintained, see Section 6 on Statutory Schemes of Social Security.

In most countries the personal scope is the same as in the Directive. However, some national experts report that the personal scope of national law relating to occupational social security schemes is more restricted than in the Directive (**Austria**, **Estonia**, **North Macedonia**, **Slovenia**, **Turkey**). In **Austria**, for example, where occupational pension schemes are not widespread, the personal scope of the two applicable laws (the Act on Occupational Pension Schemes (*Betriebspensionsgesetz)* and the Act on Private Pension Bearers (*Pensionskassengesetz*)) covers every worker and employee working under a private contract whose employer has established an occupational social security scheme, including board members. The laws cannot be applied to unemployed people or people on sick leave with social security benefits or during periods of disability. In **Germany**, the personal scope is more restricted as self-employed people (and freelancers) cannot normally take part in occupational pension schemes. The expert from the **United Kingdom** expresses concern as to the extent of application of the Equality Act and the equivalent provisions in Northern Irish law to the self-employed: in *Jivraj v. Hashwani* the Supreme Court indicated that autonomous workers were not within the concept of 'worker' for the purposes of UK discrimination law provisions.[348]

5.3 Material scope

Article 7 of Gender Recast Directive 2006/54/EC defines the material scope of Chapter 2. On the basis of this provision, occupational schemes which provide protection against sickness, 'invalidity', old age including early retirement, industrial accidents and occupational diseases, unemployment, and occupational schemes which provide for other benefits in particular survivor's benefits and family allowances, all fall under the scope of the Directive.

In most countries the same material scope applies (e.g. **Cyprus**, **Czech Republic**, **Denmark**, **Finland**, **France**, **Greece**, **Hungary**, **Liechtenstein**, **Lithuania**, **Malta**, **Netherlands**, **Norway**, **Portugal**, **Slovakia**, **Sweden**, **Turkey**, **United Kingdom**).

A few experts report that national legislation relating to occupational social security is more restricted than in the Directive (**Croatia**, **Germany**, **North Macedonia**, **Poland**, **Slovenia**).

5.4 Exclusions from material scope

Article 8 of Gender Recast Directive 2006/54/EC provides that certain contracts and schemes can be excluded from the material scope of the Directive. Most countries did not make use of this possibility. Experts from **Cyprus**, the **Czech Republic**, **Germany**, **Greece**, **Ireland**, **Liechtenstein**, **Malta**, **Portugal** and **Turkey** report that the national legislator has made use of this exclusion clause. The **Czech Republic**, **Greece** and **Portugal** have adopted Article 8 verbatim in their national law. The most common exclusion appears to relate to self-employed people. In **Germany**, self-employed people (and freelancers) cannot normally take part in occupational pension schemes. Similarly, in **Turkey** there are no mandatory occupational pension plans for the self-employed.

5.5 Case law and examples of sex discrimination

Article 9 of Gender Recast Directive 2006/54/EC gives several examples of discrimination. While most countries appear to be free from the types of discrimination mentioned in this article and many experts report that there is no case law, some national experts have reported problems. Much of the case law at national level dates from some time ago. Current cases and developments are discussed below.

Article 9(1)f prohibits different retirement ages for men and women. As of 2018, the application of a different pensionable age for men and women in **Italy** has come to an end. In **North Macedonia**, on

348 United Kingdom, [2011] UKSC 40.

the basis of the main pension legislation (Article 18 of the Law on Pension and Disability Insurance), there are still different retirement ages for men and women (64 versus 62). In addition, the calculation of pension regarding disability is different for men and women (Article 52). In 2016, the Constitutional Court held that the difference in retirement age does not constitute sex discrimination. Instead, the Court characterised the difference as positive discrimination, based on the special societal protection of mothers and motherhood.

Apart from different retirement ages, other problems and developments also appear. In **Belgium**, the Court of Cassation fairly recently found that, as the Gender Act of 10 May 2007 is *d'ordre public*, a retired female worker could rely on Article 12 of the Act to reclaim occupational disability benefits which had been denied to her when she had reached the age of 60 (before the Act came into force), while they would have been allowed for a man up to the age of 65.[349] In **Finland** differential actuarial factors have been problematic. This will be discussed under statutory schemes. In **Germany**, while the law no longer permits different retirement ages for men and women, indirect sex discrimination remains a major problem. The Federal Labour Court has held that a 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.[350] The condition of a 15-year period of service for the same employer in order to be entitled to occupational pensions was not considered to constitute indirect sex discrimination either.[351] The Federal Labour Court explicitly rejects the addition of (interrupted) periods of service for the same employer.[352]

The **Icelandic** expert reported an interesting 2012 Supreme Court case. The Supreme Court held that the pension rights of a man in a divorce case did not fall under 'marriage property' under the Law in Respect of Marriage.[353] The claimant in this case, the former wife, referred to Article 102(2) of the Marriage Act which states that pension rights should not be excluded from divorce settlements if apparently unreasonable. The couple in this case had been married for 35 years and had had four children. His income had been considerably higher than hers, as she had not been working full-time, and subsequently he was expecting a higher old-age pension, albeit no concrete calculation was presented with regard to their expected pensions. The Supreme Court held that pension rights in case of divorce should only be shared in exceptional circumstances as the general principle in the law is that pension rights are not to be shared in the case of divorce. The Supreme,Court in assessing whether these circumstances were exceptional, held that all circumstances must be scrutinised in context; the claimant (the wife) had acquired her own pension rights with her work outside the home and it had to be assumed that she would be able to increase her entitlement to pension rights before retiring. The Supreme Court furthermore pointed out that there was no explicit evidence regarding the value of the pension rights in question to support the claim of exceptional circumstances, hence confirming the ruling of the lower court.

In **Greece**, some occupational schemes continue to be discriminatory, in spite of national case law condemning this. For example, Article 32(1) of the Civil and Military Pensions Code[354] sets more favourable conditions for the granting of a pension to fathers of deceased military personnel than those applying to mothers. Although the Court of Audit[355] held that mothers were entitled to a pension subject to the same conditions as fathers, the provision remained.

349 Judgment of 16 September 2013, (2014) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 282.
350 Germany, Federal Labour Court, judgment of 20 April 2010, 3 AZR 370/08.
351 Germany, Federal Labour Court, judgment of 12 February 2013, 3 AZR 100/11.
352 Confirmed by the Federal Labour Court, judgment of 9 October 2012, 3 AZR 477/10.
353 Iceland, Supreme Court case No. 568/2012.
354 Greece, Presidential Decree 169/2007, OJ A 210/31.8.2007.
355 Greece, Court of Audit 751/2000.

5.6 Sex as an actuarial factor

One particularly difficult issue is the use of actuarial factors in occupational social security schemes when they differ depending on sex.[356] The use of gender-related actuarial factors is still allowed, within certain limits, under the Recast Directive (see Article 9(1)(h) and (j)).

Gender-related actuarial factors in occupational pension schemes can be used in **Belgium**, the **Czech Republic**, **Germany** (partly), **Greece**, **Ireland**, **Italy**, **Liechtenstein**, **Malta**, the **Netherlands** and the **United Kingdom**. In **Germany**, lawyers are discussing the question of whether the *Test-Achats* ruling should be applied to occupational pension schemes.[357] In 2013, the Higher Regional Court of Celle decided that the state pension agency (covering around four million employees in the public sector) is obliged to employ gender-neutral actuarial factors under constitutional and European equality law.[358] The Higher Regional Court of Cologne disagreed.[359] In 2017, the Federal Court of Justice decided that the use of different gender-based actuarial factors by the state pension agency or by pension schemes organised under private law is incompatible with the prohibition of sex/gender discrimination under the German Constitution as well as with Directive 2006/54/EC and the *Test Achats* ruling.[360]

Latvia has no formal provision allowing gender-based actuarial factors, but in practice these can be used in cases where an employer provides an insurance product under an occupational social security scheme which does not fall under the Law on Private Pension Funds.

5.7 Difficulties

A perennial source of confusion is the distinction between occupational schemes and statutory schemes. In some countries the characteristics of the national social security system do not correspond to the concept of 'occupational pension schemes'. This led 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. The distinction between statutory and occupational schemes is (and was) problematic in, for example, **Greece** (where social security legislation and case law deal with all schemes in the same way, without distinguishing between statutory and occupational ones). Another problem, signalled by the **Latvian** expert, constitutes the identification of what falls under the concept of occupational scheme, for example, does this also encompass additional health and life insurance sometimes provided by an employer? In addition, 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**, **Latvia** and **North Macedonia**). This model does not follow a three-pillar structure like that 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 is less obvious how to apply the EU criteria for occupational schemes to the latter model.

356 See Jacqmain, J. and Wuiame, N. (2015) *Gender based actuarial factors and EU gender equality law*, EELR 2015/1, available at: https://publications.europa.eu/en/publication-detail/-/publication/2bc75714-7955-46e2-a500-669d41fdf9cf/language-en/format-PDF/source-86561749, pp. 14-24.

357 E.g. Beyer, A., Britz, T. (2013), 'Zur Umsetzung und zu den Folgen des Unisex-Urteils des EuGH' (Implementation and Consequences of the Test-Achats Ruling) *Versicherungsrecht* No. 28, pp. 1219-1227; Labour Court of Munich, judgment of 21 May 2013, 22 Ca 15307/12.

358 Germany, Higher Regional Court of Celle, judgment of 24 October 2013, 10 UF 195/12.

359 Germany, Higher Regional Court of Cologne, judgment of 6 January 2015, 12 UF 91/14.

360 Germany, Federal Court of Justice, judgment of 8 March 2017, XII ZB 663/13, with further references.

6 Statutory schemes of social security (Directive 79/7)

Equal treatment of women and men in statutory schemes of social security was introduced in 1979, by Social Security Directive 79/7/EEC. Such schemes ensure certain benefits for workers. This refers to measures established by national legislation that protect workers against risks such as sickness, 'invalidity', old age, accidents at work, occupational diseases and unemployment.

In contrast to occupational pension schemes, discussed in the previous chapter, statutory social security schemes do not fall under the concept of pay. Some litigation has revolved around the question of whether a scheme is statutory or occupational.[361] This is particularly important since certain exceptions are allowed under Statutory Social Security Directive 79/7/EEC, but not under Article 157 TFEU or Recast Directive 2006/54/EC.

6.1 Implementation of the principle of equal treatment

Most of the transposition measures taken by the 36 countries covered in this report 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. Almost all national experts report that the principle of equal treatment for men and women in matters of social security has now been implemented in national legislation.

In some countries this has not been done by specific legislation expressly transposing Directive 79/7/EEC, but rather through general equal treatment law or provisions in the Constitution (e.g. **Belgium**, **Denmark**, **France**, **Hungary** and **Spain**). Thus, in **Spain** there is no legislation or single legal provision expressly stipulating the prohibition of gender discrimination in statutory social security schemes. However, Article 14 of the Constitution, which generally prohibits gender discrimination, applies to social security as well. In **Greece**, a similar provision of the Constitution (Article 4(2)) also applies to social security in general, while there is legislation of limited scope that prohibits it in the field of Directive 79/7/EEC. In the **Netherlands** as well as **Italy**, there is no specific national legislation prohibiting discrimination in statutory social security schemes. However, nearly all forms of sex discrimination in this area have been eradicated in these countries.

All social security schemes are gender neutral (with the exception that there are different pensionable ages for men and women – discussed below). However, there are no specific provisions explicitly mentioning the principle of equal treatment.

6.2 Personal scope

Article 2 of Directive 79/7/EEC lays down the personal scope of the Directive. On the basis of this provision, the Directive applies to 'the working population – including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment – and to retired or invalided workers and self-employed persons'.

While many experts report that the personal scope of national law is the same as in the Directive, several experts have reported that the national law relating to statutory social security is broader in personal scope than the Directive (**Finland**, **Iceland**, **Italy**, **Latvia**, **North Macedonia**, **Norway**, **Serbia**, **Slovenia**, **Sweden**, **Turkey**).

361 See, for example, Judgment of 28 September 1994, *Bestuur van het Algemeen Burgerlijk Pensioenfonds v G. A. Beune,* C-7/93, EU:C:1994:350.

For example, in **Latvia**, the Law on Social Security applies to everyone residing in Latvia legally (with some exceptions concerning citizens of third countries with temporary residence permits). In **Sweden**, generally speaking, the social security system is individual and based on either residence or gainful activities, including both employment and self-employment. Many schemes – such as that on parental leave and pensions – include a guaranteed level covering all Swedish residents, which makes the coverage broader than required by Article 2. The scope is also broader in **Serbia**, as Article 4 of the Law on Social Protection stipulates that each individual or family in need of help and support to overcome their social and subsistence difficulties, and to create conditions in order to meet their basic needs, have the right to social security.

In the **Netherlands**, however, the personal scope of national law appears more restricted than the personal scope of the Directive, as self-employed people are not always covered by statutory social security regimes. National law relating to statutory social security schemes covers employees and former employees, i.e. those who receive an invalidity pension or an unemployment benefit or a sickness benefit on the basis of one of the social security laws. In some cases, self-employed persons are included. Dutch law refers to what are termed *gelijkgestelden*, i.e. workers who do not qualify as a worker in the sense of the Civil Code (Article 7:610), but who work under similar conditions (quasi/para-subordinate workers). Examples of this are various types of flexi-workers or home workers. For some of these persons a threshold applies: their employment relationship must have lasted for at least 30 days and their income must amount to at least 40 % of the minimum income as regulated by law. In addition, for some employment relations the possibility of being covered under the social security schemes is restricted to those who work for at least two days per week.[362] Excluded from the scope of social security schemes are, among others, directors of a company who own a majority of the shares of that company and domestic staff who work on fewer than four days a week for the same employer. According to the Central Appeals Tribunal, the interpretation of 'domestic staff' includes not only domestic cleaners or child-minders and the like, but also 'professional carers' such as trained nurses providing medical care at home in the service of an individual employer.[363]

6.3 Material scope

Article 3 of Directive 79/7/EEC lays down the material scope of the directive. It covers sickness, 'invalidity', old age, accidents at work, occupational diseases and unemployment.

While many experts report that the material scope of national law is the same as in EU law, several experts have reported that national law relating to statutory social security is broader in material scope than the Directive (e.g. **Albania**, **Austria**, **Belgium**, **Finland**, **Germany**, **Latvia**, **Liechtenstein**, **Montenegro**, **Serbia**).

Social assistance is partially excluded from the scope of the Social Security Directive. Only where it intends to supplement or replace 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.

Article 3(2) stipulates that the directive does not cover family benefits and survivors' benefits. The exception is when family benefits are granted by way of increases of benefits due in respect of the risks referred to in paragraph 1(a). Nevertheless, in almost all of the Member States and EEA countries, gender discrimination in these areas has been abolished, independently of EU law requirements. **Cyprus** is an exception when it comes to survivor's benefits: a widow's pension is payable only to a widow. A widower's pension is payable only if a widower is permanently incapable of self-support. The Parliament amended

362 Netherlands, Arts. 1 and 5 of the Decree designating cases where employment relationship is considered to be employment (*Besluit aanwijzing gevallen waarin arbeidsverhouding als dienstbetrekking wordt beschouwd*), 2008 Stb. 2008, 574.
363 Netherlands, Central Appeals Tribunal (CRvB), *RSV* 1996/247, 29 April 1996.

the law, but the President of the Republic referred it to the Supreme Court for a legal opinion on whether the law is unconstitutional, with reference to Article 80 of the Constitution. There is currently a proposal to amend the law as regards widower's pensions.

In **Italy**, some groups of part-time workers (i.e. those working less than 24 hours a week and vertical part-timers) are excluded from family allowances. In **Greece**, the legislation implementing Directive 79/7/EEC does not cover all the schemes which must be considered statutory.

6.4 Derogations from material scope

Article 7 of Directive 79/7/EEC contains a number of derogations Member States are permitted to make from the principle of equal treatment. In this respect a similar tendency can be observed: several countries have abolished gender discrimination on their own initiative. In other words, several states do not make use of the derogations at all or do not do so anymore (**Belgium**, **Denmark**, **Ireland**, **Luxembourg**, **Montenegro**, **Netherlands**, **Norway**, **Slovakia**, **Sweden**). The two most important derogations relate to periods of care and to the pensionable age.

Derogations from equal treatment: differences in pensionable age (Article 7(1)(a))
As far as the traditional difference in pensionable age is concerned, the overall picture of the statutory schemes in the Member States, the EEA and the candidate countries is as follows:

- In the largest group of states there is no difference (any more) in this respect between men and women (**Belgium**, **Cyprus**, **Denmark**, **Finland**, **France**, **Germany**, **Greece**, **Iceland**, **Ireland**, **Italy** (as of 2018), **Latvia**, **Liechtenstein**, **Luxembourg**, **Malta**, **Montenegro**, **Netherlands**, **Norway**, **Portugal**, **Sweden**, **Spain**).
- In other states there is a process of equalising the pensionable age, sometimes with long transitional arrangements (**Austria**, **Bulgaria**, **Croatia**, **Czech Republic**, **Estonia**, **Hungary** (general rule for old-age pension), **Lithuania**, **North Macedonia**, **Serbia**, **Slovakia**, **Turkey**, **United Kingdom**).
- In the remaining states the difference in pensionable age is maintained (**Romania** and **Slovenia**).
- **Hungary** and **Poland** form a category of their own: these are countries which have recently introduced differences between men and women in this respect. Hungary introduced more differences in the form of an early retirement option available only for women and, in 2016, Poland reinstated different pensionable ages: 60 for women and 65 for men.

Interestingly, in countries that have maintained or reintroduced a difference in pensionable age, the difference is regarded as fair since it compensates for unequal working conditions for men and women. As we have seen in the previous chapter 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 to date.

In the **Czech Republic**, the statutory pension system applies a different pensionable age for men and women and it also allows only women to reduce their pensionable age if they have raised more than one child. This does not apply to men, even if a man has raised his children alone. The pensionable age is being gradually increased and will be equal for men and women in 2044, when people born in 1977 will reach retirement at 67. Until then, the current discrimination against men is maintained by legislation. This practice has not been changed following the ECtHR ruling in *Andrle*,[364] or even following the CJEU ruling in *Soukupova*.[365]

364 ECtHR, *Andrle v the Czech Republic,* no. 6268/08, 17 February 2011.
365 CJEU, Judgment of 23 October 2012, *Blanka Soukupová v Ministerstvo zemědělství,* C-401/11, EU:C:2012:658.

Derogations from equal treatment: periods of care (Article 7(1)b)

Article 7(1)(b) provides that Member States can decide to exclude from the principle of equal treatment advantages in respect of old-age pension schemes granted to people who have brought up children, and the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children. In the states under review, there is a whole array of 'advantages' that relate to the fact that women (or more often one of the parents) have been engaged in raising their children. These advantages can take the form of qualifying periods, i.e. periods of 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.

In **France**, for example, legislation granting pension credits to mothers per child had to be amended.[366] 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. If the parents do not agree, the advantage will be granted to the parent who can prove that they have contributed more and for a longer period to the upbringing of the child.

Another example is **Italy**, where advantages as regards old-age pensions for the purpose of child-rearing are provided 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 four 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.

In **Spain**, Article 60 of the General Law of Social Security stipulates a pension supplement exclusively applicable to mothers of at least two children. The supplement also applies to the mothers of adopted children. No equivalent measure is available to fathers who were responsible for taking care of their children. The supplement is an increase of between 5 % and 15 % of the pension and may exceed the maximum pension established in the social security system. The supplement is established to compensate for the losses in their professional careers suffered by women as a result of caring for their children. The Spanish legal expert notes that the exclusion of fathers from this benefit is problematic, as these losses can also occur for men who spend time caring for their children.

6.5 Sex as an actuarial factor

Unlike Recast Directive 2006/54/EC dealing with occupational social security schemes (see Section 5.6), Directive 79/7/EEC does not mention the use of gender-related actuarial factors. The list of derogations under Article 7(1) is exhaustive, and the use of gender-based actuarial factors in the calculation of social security benefits is not included. The first time the CJEU ruled on the legality of the use of sex-based actuarial factors in the calculation of social benefits, was Case C-318/13 (*X*). The Court delivered a judgment following a dispute between X and the Finnish Ministry of Social Affairs and Health concerning the grant of a lump-sum compensation paid following an accident at work.[367] The calculation of that lump sum was based on the age of the worker and his remaining average life expectancy. In order to determine this, the worker's sex was taken into account. X, a man, then complained that he received less compensation than a woman of the same age would have received in a comparable situation. The

366 See also Judgment of 13 December 2001, *Henri Mouflin v Recteur de l'académie de Reims,* C-206/00, EU:C:2001:695 ; and more recently Judgment of 17 July 2014, *Maurice Leone and Blandine Leone v Garde des Sceaux, ministre de la Justice and Caisse nationale de retraite des agents des collectivités locales*, C173/13, EU:C:2014:2090.

367 CJEU, Judgment of 3 September 2014, *X*, C-318/13, EU:C:2014:2133.

CJEU ruled that the difference in calculation constituted a form of unequal treatment, which cannot be justified.[368]

In most countries, sex is not used as an actuarial factor in the calculation of social security benefits. The exceptions are **Belgium**, **Bulgaria** and **Germany**. In **Bulgaria**, at the end of 2017, under Act No. 92/2017, the use of sex as an actuarial factor in additional life pension for old age considered as part of the statutory pension system was declared inadmissible. Implementation of the act is yet to be monitored.

In **Finland**, following the CJEU's judgment in *X*, the Supreme Administrative Court found that the use of sex-segregated life expectancy in calculating lump-sum compensation under the Employment Accidents Act breached EU law, and that X had suffered a loss due to the Act.[369] The Employment Accidents Act (608/1948) was replaced by the Act on Employment Accidents and Occupational Diseases (459/2015), which came into force on 1 January 2015. The new Act does not contain any provisions using sex as an actuarial factor.

Belgian legislation concerning accidents at work is similar to that in **Finland**, except that only one third of the total value of the life-long compensation benefit may be paid as a lump-sum amount; gender-segregated mortality tables are used in order to calculate this value. After the European Commission requested all Member States to screen their statutory security schemes in the light of Case C-318/13, a Royal Decree amended a previous decree in order to impose the use of gender-neutral actuarial factors for lump sums to be paid as of 1 January 2016.

In **Bulgaria**, until almost the end of 2017, when the legislation[370] was amended, actuarial factors based on sex were still used in the calculation of social security benefits in the area of supplementary mandatory social insurance for people born after 31 December 1959. This practice implemented by private insurance companies was systematically challenged and brought before the Supreme Administrative Court between 2011 and 2013 by a group of Bulgarian women born after December 1959. Their complaints were all rejected.

In **Germany**, sex-based actuarial factors are not generally used. Concerning pensions for civil servants, however, the administration uses gender-specific mortality tables to identify the average life expectancy of men and women and calculates (among other criteria) on this basis. The Federal Administrative Court doubts that this method of 'pure statistical gender equality' is compatible with the EU law principle of equal pay and has expressed its interest in a clarifying decision from the CJEU.[371]

6.6 Difficulties

As regards difficulties with the implementation of Directive 79/7/EEC, some countries face the problem mentioned in Chapter 5.7 above: that their security schemes are not comparable to either statutory social security schemes or occupational social security schemes (e.g. **Bulgaria** and **Romania**).

The CJEU has often answered preliminary questions on issues of both direct and indirect sex discrimination in statutory social security schemes.[372] Legislative gaps persist, however. In particular, several national

368 The Court reasoned that: 'Such a generalisation is likely to lead to discriminatory treatment of male insured persons as compared to female insured persons. Among other things, when account is taken of general statistical data, according to sex, there is a lack of certainty that a female insured person always has a greater life expectancy than a male insured person of the same age placed in a comparable situation.' (Finding 38).

369 Finland, Supreme Administrative Court, KHO:2015:8.

370 Act amending the Social Security Code (ZID KSO) (published in State Gazette No 92 of 17 November 2017).

371 Germany, Federal Administrative Court, judgment of 5 September 2013, 2 C 47/11.

372 See for an example of prohibited indirect sex discrimination in Austrian law the recent Judgment of 20 October 2011, *Waltraud Brachner v Pensionsversicherungsanstalt,* C-123/10, EU:C:2011:675 (*Brachner*); Judgment of 22 November 2012, *Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*, C-385/11, EU:C:2012:746.

experts have raised the precarious position of some groups of part-time workers – often women – who work for just a few hours per week (e.g. **Germany** and the **Netherlands**). Furthermore, one may question the maintenance and reintroduction of different pensionable ages in some countries in the light of the Court's ruling in Case C-9/91, in which it underscored the temporal element by holding that: 'Although the preamble to the Directive does not state the reasons for the derogations which it lays down, it can be deduced from the nature of the exceptions contained in Article 7(1) of the Directive that the Community legislature intended to allow Member States to maintain temporarily the advantages accorded to women with respect to retirement in order to enable them progressively to adapt their pension systems in this respect without disrupting the complex financial equilibrium of those systems, the importance of which could not be ignored. Those advantages include the possibility for female workers of qualifying for a pension earlier than male workers, as envisaged by Article 7(1)(a) of the Directive.' (para. 15).[373]

The experts from Italy and Latvia report inequalities in the calculation of particular benefits, due to women taking childcare leave and thereby interrupting their contributions to social security schemes. In **Latvia**, during childcare leave, parents are insured by the state instead of insuring themselves, but at a minimum amount. Consequently, being on childcare leave negatively affects the amount of their old-age pensions.

The expert from **Italy** notes that the latest legislation on pensions is far from female-friendly. Act No. 214/2011 provides for an increase of the minimum contribution condition from five to 20 years: if the claimant has less than 20 years' contributions, the pension will be paid from the age of 70. Furthermore, it introduced a new minimum benefit amount condition according to which pensions will be paid at 70 rather than at 66 (67 by 2021) if 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.

In **Spain**, there is also a specific problem in relation to the pension supplement that was established exclusively for mothers in Article 60 of the General Law of Social Security in 2015, given that it implies a difference between mothers and fathers who take care of children which could be in violation of Article 7.2 of Directive 79/7/EEC. Such differences should be disappearing, not being newly established.

In **Luxembourg**, the High Council of Social Security questioned the compatibility of Article 196 §2(c) of the Social Security Code with Article 10a §1 of the Constitution. The background history to Article 196 is that when it was introduced, it was considered that young women could enter into marriages with older men with the sole objective of being entitled, without paying pension contributions, to a survivor's pension rights for the remainder of their lives. In order to prevent such an excessive burden on the finances of the old-age pension scheme, a limit of 15 years in the age difference between spouses was introduced. This provision was never repealed. While the Superior Court did not find indirect discrimination on grounds of sex, it found discrimination between spouses or partners with an age difference of greater than 15 years and those with an age difference of less than 15 years. However, the Constitutional Court did not consider the provision to be contrary to the Constitution, arguing that it seemed reasonably proportionate to the aim pursued.[374]

373 Case C-9/91, The Queen c/ Secretary of State for Social Security, ex parte the Equal Opportunities Commission, ECLI:EU:C:1992:297.

374 Luxembourg, Constitutional Court, Case law N°129 of 7 July 2017. Memorial A N°638 of 14 July 2017. available at: http://data.legilux.public.lu/file/eli-etat-leg-memorial-2017-638-fr-pdf.pdf.

7 Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)

Protection from sex discrimination against self-employed workers, their spouses, and insofar as recognised by national law, life partners, who are not employees or partners, is a complex area. The number of self-employed workers has been increasing in Europe and they experienced severe consequences as a result of the recent economic downturn. The relatively 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, lacunas remain in the protection of self-employed workers in EU law.

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 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 must 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 must 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 must also be taken to ensure access to temporary replacements or social services (Article 8). It is worth mentioning that equality bodies should, among other things, provide independent assistance to victims of discrimination, conduct independent surveys etc. (Article 11).

In addition, various other gender equality directives are also relevant to the equal treatment of the self-employed, but only in certain respects. Directive 2006/54/EC, for instance, prohibits discrimination in access to self-employment (Article 14(1)(a)) and to occupational social security schemes (Articles 10-11). Directive 2004/113/EC, on Goods and Services, is also 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.

7.1 Implementation of Directive 2010/41/EU

The European Network of Legal Experts in the Field of Gender Equality has recently published a report on the implementation of Directive 2010/41/EU.[375]

In several states no specific law implementing Directive 2010/41/EU has been adopted (e.g. **Albania**, **Belgium**, **France**, **Liechtenstein**, **Spain**). In several other states existing laws were amended to include provisions related to the self-employed (**Austria**, **Bulgaria**, **Croatia**, **Cyprus**, **Estonia**, **Hungary**). In some countries, general equal treatment legislation applies but this does not necessarily cover the full scope of the directive (**Austria**, **Denmark**, **Finland**, **Iceland**, **Italy**, **Germany**, **Netherlands**, **Norway**, **United Kingdom**). **Greece** has enacted a law to specifically implement the directive,[376] but not all of the directive's provisions were transposed.

375 Barnard, C. and Blackham, A. (2015), *Self-employedEmployed: The implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity,* European Commission, available at: http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2732&Itemid=295.

376 Greece, Act 4097/2012 (OJ A 235/03.12.2012).

7.2 Personal scope

7.2.1 Scope and definitions

Article 2 of Directive 2010/41/EU lays down the personal scope of the directive. It stipulates that the directive covers self-employed workers and their spouses or life partners. Self-employed workers are defined as 'all persons pursuing a gainful activity for their own account, under the conditions laid down by national law'. This leave considerable room for national law to define who might be considered a self-employed worker. The question of who a self-employed worker is according to national law is difficult, however.[377] The definition of self-employment is often not clear at national level. Catherine Barnard and Alysia Blackham have provided a categorisation of different types of definitions.[378]

Whereas some countries have copied the definition of the Directive (e.g. **Greece**), in several states 'self-employed person' or 'self-employment' is not defined at all in national legislation (**Austria**, **Bulgaria**, **Denmark**, **Finland**, **France**, **Italy**, **Ireland**, **Montenegro**, **Netherlands**, **Poland**, **Sweden**). In **France**, the criteria for self-employment are developed on the basis of cases from the *Cour de Cassation* (the French Supreme Court). According to the case law, a self-employed person can be defined as a person who provides services to another party in an independent and non-subordinate manner.

7.2.2 Different categories of self-employed

The Directive does not distinguish between different types of self-employed workers. Some countries, however, do differentiate between categories of self-employed workers (e.g. **Albania**, **Croatia** (where the differentiation exists only for tax purposes, not for social security legislation), **Germany**, **Iceland**, **North Macedonia**, **Romania**, **Spain** and **Turkey**). In some of these countries not all self-employed workers enjoy the same rights. In **Iceland**, for example, not all self-employed workers are considered to be part of the same category with regard to unemployment. There is a special unemployment fund for benefit payments to farmers, small fishing-vessel owners and lorry drivers.[379] Other self-employed individuals, just like wage earners, are entitled to apply to the Directorate of Labour for unemployment benefits when becoming unemployed.

In **Romania** and **Turkey**, agricultural workers also form a separate category. In **Germany**, there are hundreds of professions in the field of self-employment and many of them are organised in associations with the right of self-regulation and their own social security systems, especially professional pension funds. Thus, self-employed workers are covered by various and very different federal and state laws, as well as professional regulations. In **Spain**, there are two kinds of self-employed workers: the ordinary ones (who are called *autónomos)*, and the economically dependent self-employed workers (who are called *trabajadores autónomos económicamente dependientes* or *TRADE).*

7.2.3 Recognition of life partners

As to the recognition of spouses and life partners of self-employed people, the picture at the national level is diverse. The experts from **Austria**, **Bulgaria**, **Cyprus**, the **Czech Republic**, **Denmark**, **Estonia**, **Hungary**, **Italy**, **Latvia**, **Lithuania**, **Malta**, **Montenegro**, **North Macedonia**, **Norway**, **Poland**, **Romania**, **Serbia**, **Slovakia** and **Turkey** report that national law does not recognise life partners or only to a minor extent. In **Greece** they are recognised: social security rights were granted in 2016, but only to life partnership agreements that were entered into after 23 December 2015. People who entered into

377 Barnard, C., Blackham, A. (2015) 'Self-employment in EU Member States: the role for equality law', *European Equality Law Review* 2015/2, pp. 7-10.
378 Barnard, C., Blackham, A. (2015) 'Self-employment in EU Member States: the role for equality law', *European Equality Law Review* 2015/2, pp. 7-10.
379 Iceland, Article 7 of the Unemployment Insurance Act No. 54/2006.

a life partnership agreement before 23 December 2015 have the right, if they so wish, to acquire such rights by means of a notarial deed. However, life partners have not yet been granted rights related to employment.

7.3 Material scope

Article 4 of Directive 2010/41/EU lays down the material scope of the directive. It provides that, 'there shall be no discrimination whatsoever on grounds of sex in the public or private sectors, either directly or indirectly, 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)). Harassment and sexual harassment and an instruction to discriminate are also prohibited.

Many experts report that the material scope of national law is the same as in the Directive (e.g. **Austria**, **Cyprus**, **Estonia**, **Greece**, **Slovakia**, **Spain**, **Sweden**). The expert from **Albania** reports that legislation there is broader than the directive.

7.4 Positive action

Article 5 of Directive 2010/41/EU gives Member States the possibility of taking positive action (within the meaning of Article 157(4) TFEU) with a view to ensuring full equality in practice between men and women in working life, for instance aimed at promoting entrepreneurial initiatives among women.

The majority of states have not made use of this power in the context of self-employment (**Austria**, **Belgium**, **Bulgaria**, **Cyprus**, **Czech Republic**, **Denmark**, **Finland**, **Greece**, **Hungary**, **Ireland**, **Latvia**, **Liechtenstein**, **Lithuania**, **Malta**, **Netherlands**, **Norway**, **Poland**, **Romania**, **Slovakia**, **Slovenia**, **Sweden**, **United Kingdom**).

Where positive action has been taken, this has been related to providing financial incentives and subsidies for female entrepreneurs (**Albania**, **Croatia**, **Spain**, **Turkey**); preferential treatment for loans for female entrepreneurs to set up or develop a business (**Estonia** (although this is solely project-based, a national support scheme does not exist), **France**, **Germany**, **Italy**, **Poland**, **Sweden**, **Turkey**); providing training (**Croatia**, **Estonia**, **Italy**, **North Macedonia**, **Turkey**) and advice services (**Spain**); tax relief or exemptions (**Poland**) and social security contribution reductions (**Spain**); support, mentoring, counselling and other activities to encourage women's self-employment (**Germany**, **North Macedonia**, **Serbia**); and financial support for independent women's networks (**Luxembourg**).[380]

Despite these actions and programmes, gender inequality persists in this sphere. The **Serbian** expert, for example, explained that women face more unfavourable conditions for the development of their enterprises than men due to their position in the labour market, the gender gap in property ownership, greater involvement of women in the home, and the still strong gender stereotypes which cause a lack of confidence among women and influence their willingness to initiate their own business venture. The main problems in Serbia are: difficulties in obtaining funds from financial institutions and lack of initial capital, disadvantageous traditional lending models and non-creditworthiness, the property usually being registered in the husband's name, the lack of microfinance institutions, and the lack of knowledge and skills for entrepreneurship.[381]

380 Barnard, C. and Blackham, A. (2015), *Self-employed: The implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*, available at: http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2732&Itemid=295, at pp. 19-20.

381 The National Strategy for the Improvement of the Position of Women and Promotion of Gender Equality, Official Gazette of the Republic of Serbia, No. 15/2009.

7.5 Social protection

Article 7 of Directive 2010/41/EU provides that '[w]here a system for social protection for self-employed workers exists in a Member State, that Member State shall take the necessary measures to ensure that spouses and life partners can benefit from a social protection in accordance with national law.' The Member States may decide whether the social protection is implemented on a mandatory or a voluntary basis.

All countries have a system of social protection in place for self-employed workers. These systems vary considerably, however. In some countries, self-employed workers are covered in the same way as employees (e.g. **Croatia**, **Montenegro**, **Slovenia**). Often there is a combination of mandatory (e.g. covering pensions and health insurance) and voluntary (e.g. covering sickness insurance) schemes in place. In the **Netherlands**, for example, self-employed people are covered by the national insurance schemes, which provide for basic welfare benefits, by the Surviving Dependants Act and, from pensionable age (65 years and three months in 2015), by the General Old-Age Pensions Act. They cannot, however, automatically rely on employment-related insurance schemes, such as unemployment and disability benefits. Instead, they can choose to join these insurance schemes voluntarily (but will only benefit if they meet certain criteria, such as having paid contributions for at least three years); take out (generally more costly) private insurance; or remain uninsured. Furthermore, they do not (yet) have access to a supplementary collective pension scheme.

The recent report on the implementation of the directive, by Barnard and Blackham, notes that social protection for spouses (and sometimes life partners) is mandatory in most countries (**Austria**, **Belgium**, **Croatia**, **Cyprus** (not life partners), **Czech Republic**, **Denmark**, **Finland**, **France** (not spouses and life partners in the liberal professions), **Germany**, **Iceland**, **Ireland**, **Italy**, **Liechtenstein**, **Luxembourg**, **North Macedonia** (not life partners), **Norway**, **Poland**, **Portugal**, **Spain**, **Sweden**, **Turkey** (not life partners).[382] Voluntary systems exist in **Bulgaria**, **Estonia**, **Lithuania** (not life partners), **Luxembourg** (voluntary if not in agriculture), **Romania**, **Slovakia**, **Slovenia** and the **United Kingdom** (though with some residence-based entitlements).[383]

In **Greece**, Article 7 of the directive has not been transposed and the people covered by this article are not covered by social security legislation.

7.6 Maternity benefits

Article 8 of Directive 2010/41/EU regards maternity benefits for female self-employed workers and female spouses and life partners of self-employed workers. Paragraph 1 states that:

> 'The Member States shall 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 enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks.'

382 See Barnard, C. and Blackham, A. (2015), *Self-employed: The implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*, European Commission, available at: http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2732&Itemid=295, at p. 22.

383 See Barnard C. and Blackham, A. (2015), *Self-employed: The implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*, European Commission, available at: http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2732&Itemid=295, at p. 22.

Barnard and Blackham reported that few countries have amended their law to comply with this article.[384] Several national experts have reported problems with the implementation of the provision either formally or in practice (e.g. **Denmark**, **Germany**, **Greece**, **Latvia**, **Lithuania**, **North Macedonia**). In 2016, **Denmark** repealed the 2013 Act on Maternity for Self-Employed Workers because only very few self-employed workers made use of the fund it had established. In **Greece**, only self-employed women – not spouses or life partners – may be granted maternity allowance. In **Germany**, only self-employed artists, publicists and women helping family members in the agricultural sector are entitled to maternity allowances under special regulations. In **Lithuania**, spouses of self-employed workers are not covered by the regulation on maternity allowances, while life partners are not recognised at all. Similarly, in **North Macedonia** female spouses or life partners cannot enjoy maternity leave either.

The expert from **Spain** provides an illustration of how maternity leave for self-employed women works in practice: as self-employed women usually declare a lower than real income, the maternity allowance hardly serves to replace the loss of their previous income. In fact, self-employed women tend to go back to work immediately after the compulsory six weeks after birth, foregoing the rest of their maternity leave. In Spain, there are no services supplying temporary replacements or other kinds of social services, other than the reductions in the social security contribution if the self-employed woman hires someone to replace her during her maternity leave or during the time devoted to the care of children.

7.7 Occupational social security

7.7.1 Implementation of provisions regarding occupational social security

Article 10 of Recast Directive 2006/54/EC stipulates that 'Member States shall take the necessary steps to ensure that the provisions of occupational social security schemes for self-employed persons contrary to the principle of equal treatment are revised with effect from 1 January 1993 at the latest'.

As regards the question of whether national law has implemented the provisions regarding occupational social security for self-employed workers, the picture is again diverse. The experts report that this is not the case in **Austria**, **Estonia**, **France** (although the principle of equality does apply), **Germany**, **Ireland**, **Latvia** (not explicitly), **Lithuania**, **Montenegro** (occupational social security not recognised), **North Macedonia**, **Serbia** (occupational social security not recognised), **Spain**, **Sweden**, **Turkey** and the **United Kingdom**. In several of these countries, the view was taken that no implementation was required (e.g. the **United Kingdom**). In **Greece**, Article 10 has been reproduced in the Act transposing the Directive, but without any clarification as to which Greek schemes are occupational.

7.7.2 Exceptions for self-employed workers regarding matters of occupational social security

Article 11 of Recast Directive 2006/54/EC provides for exceptions for self-employed workers regarding matters of occupational social security. In certain circumstances, Member States may defer compulsory application of the principle of equal treatment. Such exceptions only appear to apply in **Greece**, **Ireland** and **Portugal**. In **Ireland**, single member schemes are excluded from the Pensions Acts. In **Portugal**, Article 5 of Decree-Law No. 307/97, of 11 November 1997 (which deals with gender equality in occupational social security) uses the exceptions for self-employed workers regarding matters of occupational social security. In **Greece**, the national expert reports that the relevant article of the Act transposing the Directive is not clear.[385]

384 See Barnard, C. and Blackham, A. (2015), *Self-Employed: The implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*, European Commission, available at: http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2732&Itemid=295 at p. 23.

385 Greece, Article 8(3) of Act 3896/2010.

7.8 Prohibition of discrimination in the access to self-employment

Article 14(1) of Recast Directive 2006/54/EC provides that there shall be no direct or indirect sex discrimination in relation to 'conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion'. This prohibition of discrimination has been implemented in **all countries**, albeit not everywhere explicitly specifically for self-employed workers. The exceptions are **Lithuania**, **North Macedonia** and **Serbia**. What is notable about this list is that it includes all the candidate countries.

In **Germany**, the prohibition of gender-based discrimination against self-employed workers is restricted to access to self-employed activities and promotion. It is contested whether self-employed people may invoke Section 19 of the General Equal Treatment Act (transposing requirements of Directive 2004/113/EC) against discrimination concerning working conditions or the discriminatory termination of self-employment contracts.[386] The courts have not yet confirmed this possibility. In **Sweden**, as regards the self-employed there is no prohibition applicable to discrimination as regards the choice of a business partner. Nor does legislation cover the termination of contractual relationships with a self-employed person.

386 See Thüsing, G. (2007), *Arbeitsrechtlicher Diskriminierungsschutz*, Paragraph 94, Munich.

8 Goods and services (Directive 2004/113)

In conformity with Directive 2004/113/EC, all EU Member States have proceeded to prohibit in their laws direct and indirect discrimination on grounds of sex in the access to and supply of goods and services, also including non-EU Member States **Iceland**, **Liechtenstein**, **Montenegro**, **North Macedonia** and **Norway**. In **Turkey**, the new Article 5 of the Act on the Human Rights and Equality Institution transposes this directive as well. In **Serbia** the prohibition concerns only the provision of services and not goods.

(i) Scope of domestic laws

According to Article 3(1) of the Directive, it 'shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context'. Yet there are quite some differences between states when it comes to the material scope of their national laws, depending in particular on whether they have used the exclusion of Article 3(3):

> 'This Directive shall not apply to the content of media and advertising nor to education.'

While quite some countries have used the above exclusions (**Austria**, **Cyprus**, **Estonia**, **Finland**, **Germany**, **Greece**, **Italy**, **Liechtenstein**, **Norway**, **Poland**, **Portugal**, **Romania**), in yet more countries the material scope is actually broader than required by the Directive because it also applies to the content of media, advertising and education (**Belgium**, **Bulgaria**, **Croatia**, **Denmark**, **Estonia**, **Hungary** (housing and education), **Iceland**, **Latvia**, **Lithuania**, **Luxembourg**, **North Macedonia**, **Malta**, **Serbia**, **Slovakia**, **Slovenia**, **Spain**, **United Kingdom**). However, in **Slovene** law the terms goods and services are not defined.

The scope of **Maltese** and also **North Macedonian** law are framed very widely, the latter referring to bodies of the legislative, executive and judicial authorities, local self-government bodies and other bodies in the public and private sectors, public enterprises, political parties, mass media and the civil sector, and all the entities providing goods and services available to the public, offered outside the area of private and family life. **United Kingdom** law covers 'facilities' as well as goods and services and does not require that services are of a nature which would generally be paid for. **Spanish** law contains two specific provisions that offer protection to pregnant women and women on maternity leave: costs related to pregnancy and childbirth do not justify differences in premiums and benefits for individual people and, in the access to goods and services, it is not allowed to inquire about the pregnancy of a woman, except for health protection.

Serbian law provides for a duty of social and healthcare institutions and other institutions dealing with the protection of women and children to adjust their work organisation and working hours to the requirements of their clients. Two cases were decided by the **Swedish** Equality Ombudsman, both concerning harassment of women by a taxi driver and a bus driver respectively. The two women were awarded compensation of EUR 6 300 and EUR 3 150 respectively. **Ireland** has reported a case that did not lead to a finding of discrimination: the denial of return passage by an airline to a pregnant woman was not considered to be based on the pregnancy, but on the stage of pregnancy and the risk this posed to safety.

Some countries have taken something of an in-between position in this regard. The **Netherlands**, for instance, only allows exceptions regarding education, so as to give institutions for special education some room to follow their own beliefs. Likewise, in **France** the law allows for the organisation of single-sex schools (both public and private) schools. **Ireland** has used the exceptions of both education and advertising, whereas **Turkey** has availed itself of the exceptions of advertising and media but not

education. In **Sweden** the situation is different again: media and advertising are not covered by the non-discrimination principle, whereas education is. In **Norway**, the non-discrimination principle extends to both education and advertising.

In some countries, the precise material scope is unclear because the legislation simply guarantees equal access to goods and services without any further specification (**Czech Republic**, **Montenegro**). The **Romanian** Goods and Services Law was adopted to transpose the Directive and incorporated its scope and permitted exclusions, yet such legal limitations are inconsistent with the rest of **Romanian** legislation that was already in place and which exceeds the Directive requirements. Such legislation does not allow for any exceptions, e.g. regarding real estate contracts, bank loans and any other type of contract, and also applies to services in the field of education and media and advertising. Moreover, the 2015 amendment of the Gender Equality Law introduced the explicit obligation that advertising agencies refrain from using gender stereotypes in their productions.

According to **Bulgarian** statutory law the non-discrimination principle only extends to education, but on the basis of case law also includes media and advertising. The scope of the **Lithuanian** implementing law does not clarify whether access to goods and services is fully covered, as on the one hand it defines 'different opportunities' for selecting goods and services as a violation of the equal treatment principle that can trigger an administrative penalty, but on the other it does not prohibit situations where the refusal to supply goods or provide services is based on the consumer's sex. Furthermore, the consumer is always perceived as a physical person only. The supply of goods or the provision of services can be denied to legal persons who are represented by natural persons of a certain sex.

Importantly, in some countries the material scope is more restricted. **German** law is confined to contracts concluded under civil law and also provides for certain exceptions, such as the application to so-called 'mass contracts' only. Furthermore, the prohibition of sexual harassment is confined to the area of employment. **Latvian** law does not cover goods and services which are publicly offered by natural persons outside commercial activities, for example, if a natural person publicly advertises the sale of their own apartment. Non-profit associations are not covered either because they are precluded from providing any goods and services in return for payment, consequently their activities are not considered as commercial. In **Estonia**, the law mainly refers to nationality, race and colour as grounds prohibiting discrimination in the access to goods and services and it allows for some exceptions and differences in treatment of people due to their sex. The applicable **Irish** Equal Status Act cannot be used to challenge legislative provisions that may be discriminatory under Directive 2004/113/EC. The best approach to resolve such an issue is to seek a judicial review of the relevant decision and to plead that the decision is in breach of the directive.

(ii) Possibility of justifications

Article 4(5) of Directive 2004/113/EC stipulates that '[t]his Directive shall not preclude differences in treatment, 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'. In some countries, the law does not (explicitly) provide for any such possibility of justification of differences in treatment in the provision of goods and services (**Denmark**, **Iceland**, **Montenegro**, **North Macedonia**, **Portugal**, **Serbia**), but most domestic laws do (**Austria**, **Bulgaria**, **Croatia**, **Cyprus**, **Czech Republic**, **Estonia**, **Finland**, **France**, **Germany**, **Greece**, **Hungary**, **Italy**, **Latvia**, **Liechtenstein**, **Luxembourg**, **Malta**, **Poland**, **Slovenia**, **Spain**, **Turkey**, **United Kingdom**). However, application of this rule and case law have been very scarce so far.

In the **Netherlands**, such justifications include sanitary facilities, changing rooms, dormitories and saunas, beauty and sports contests, and the protection from or fight against sexual violence and harassment, and aid for victims thereof. Such sex-segregated services aimed at protection must be necessary and proportionate. **German** law allows differential treatment if there is an objective reason for this, examples of this being the prevention of danger or harm to others or the need to protect privacy or personal

security. However, the requirement of proportionality does not exist in the respective German legislation. In **Belgium**, while the federal Gender Act allows for justifications, these have not been further stipulated in an ancillary Royal Decree. But as certain aspects of the notion of 'goods and services' fall within the respective jurisdictions of the federal authorities and statutes, courts may in fact assess proposed justifications for differences in treatment, a case in point concerning the access to a fitness facility reserved for women. This was considered justified because of the morphological differences between men and women and the protection of privacy.

The **Finnish** Equality Ombudsman has considered that offers to one sex only are justified if their monetary value is small and when special offers are made for the annual mother's or father's day celebrations. Some public baths and swimming pools offer some hours for men and women separately, and public saunas are offered for men and women separately. In **Northern Ireland**, limited exceptions for small dwellings are allowed, exceptions designed to protect privacy and decency in circumstances where personal and/or health care is provided or service users will be in a state of undress, as well as to protect religious freedom. In **Ireland**, a male-only golf club was not considered to be discriminatory. In **Estonia**, services specifically aimed at supporting women represent a justifiable exception to the prohibition of gender discrimination in the consumption and supply of goods and services (e.g. shelters). Estonia has a regulated women's support service and most shelters for victims of domestic violence are prepared to meet victims' needs, e.g. women can be accompanied by children.

In **Lithuania**, there is no statutory provision on the possibility of justifications of sex discrimination in the sphere of goods and services, but the Office of the Equal Opportunities Ombudsperson does investigate individual complaints. For example, women on parental leave until their child reaches the age of three were refused consumer credit for financing the purchase of domestic electric appliances. The Ombudsperson dismissed this complaint on the ground that there was no evidence that the company had the intention to discriminate against the women. It also justified the equal quotas for boys and girls with regard to access to a Jesuit grammar school for reasons of 'creditable' proportional representation of both sexes. Nor did it see a violation of equal treatment in the activities of the 'pink taxi' company, which was established to provide services for women only.

In **Bulgaria**, interesting decisions have been taken by both the Supreme Administrative Court and the Commission for the Protection from Discrimination, which show a certain amount of deference to moral arguments and persisting stereotypes as an excuse for not dealing with the issues at stake from the perspective of discrimination. Experts and women's NGOs in Bulgaria are convinced that these decisions are also due to the fact that media and advertisements are excluded from the scope of the Directive. Justifications for differences in treatment are specified in the Act on the Human Rights and Equality Institution of **Turkey** (Article 7) with regard to all types of discrimination, including the provision of goods and services.

(iii) Compliance with the *Test-Achats* ruling

Since the *Test-Achats* ruling,[387] the laws of all EU Member States have been amended so as to ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits, from the date set for this by the *Test-Achats* ruling, being 21 December 2012 (see also Article 5(1) and (2) of Directive 2004/113/EC).

The only non-EU states in which this is not the case are **Liechtenstein**, **North Macedonia**[388] and **Serbia**. In **Montenegrin** law there is no explicit prohibition on this, but it can be inferred from general equality

387 CJEU, Case C-236/09.

388 Please note, however, that Article 3(4) of the Law on Equal Opportunities for Men and Women 'prohibits discrimination based on sex in access to goods and services in the public and private sector, including discrimination in premiums from insurance schemes'. (MK report 2019, page 61).

law that it does not allow for an exception in this regard. In EEA countries, the CJEU ruling is applicable to exchanges of services between EU residents only and therefore in **Liechtenstein** differences in premiums and benefits are still allowed. In **Serbia** as well risk factors based on sex in connection with insurance premiums and benefits are still used in practice. While **Hungarian** law has been changed, it still allows exemption from the unisex rule as regards group life, accident and sickness insurance schemes.

In **Finland**, employers have started to provide pension schemes for some of their employees (typically for directors or high-level executives) that are not considered to be consumer insurance schemes, and as they are not statutory schemes, sex may then be used as an actuarial factor. **Estonian** law still allows insurance undertakings in the assessment of insured risks in sickness insurance to take into account risks which are characteristic only of people of one gender and to differentiate, if necessary and corresponding to the extent of the specified risks, the insurance premiums and insurance indemnities of women and men. This provision is considered to be in contravention of EU law. In **Slovenia**, insurance undertakings may, in relation to life assurance, accident and health insurance, take into consideration the personal circumstance of gender in the determination of premiums and benefits in general, if this does not lead to any differentiation at the individual level.

A noteworthy effect of the amendment to the **Spanish** law in order to comply with the *Test-Achats* ruling has been an increase in car insurance costs for women, since previously it was quite common for insurance companies to establish lower prices for women. Under **Romanian** law all insurance companies have the obligation to draft and apply internal norms and procedures regarding the collection, processing, publishing and updating of statistical and actuarial data used for the calculation of premiums and/or benefits.

(iv) Possibility of positive action measures

Many legal systems allow for positive action measures in relation to the access to and supply of goods and services (in accordance with Article 6 of the Directive); in some countries this was clarified only recently (**Montenegro**). However, the adoption of such measures is the exception rather than the rule, as only **Ireland**, **North Macedonia**, **Spain**, **Sweden** and the **United Kingdom** have done it thus far. Such measures include public measures in relation to access to certain goods when women are in special situations of risk; for example, **Spanish** law states that the Government will promote the access of women to housing when they are in a situation of need or at risk of exclusion, and when they have been victims of gender-based violence.

The **Irish** Electoral (Amendment) (Political Funding) Act 2012 provides that in order to obtain state funding during the next parliamentary term, each political party must have at least 30 % female candidates running in the next general election. This legislation was enacted because of the low number of women parliamentarians, but a constitutional action against this provision has been initiated in the courts. In **Northern Ireland** as well positive action measures are allowed in relation to political parties and voluntary bodies. In **Sweden**, differential treatment of men and women with regard to services and housing is allowed, when this is for a legitimate aim and the means applied are necessary and appropriate. In **Estonia**, a child maintenance support fund primarily children and women, because the majority of single parents are women. Regulations for the fund's payments are stipulated by the Family Benefits Act (FBA) and the fund became operational on 1 January 2017.[389]

(v) Specific problems

Several states have reported specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in relation to the access to and supply of goods and services. These include:

389 Estonia, Chapter 4 of the Family Benefits Act, RT I, 24.12.2016, 5, available at: https://www.riigiteataja.ee/en/eli/521062017011/consolide.

- complaints regarding discrimination in the access to and supply of health services, mostly in connection with female reproductive health, i.e. abortion and accessibility of contraception. In **Croatia**, the Ombudsperson for Gender Equality reported several complaints during 2017 concerning the denial of abortions by certain health institutions, and the difficulties experienced by women in such cases because health workers may refuse to perform an abortion and pharmacies may refuse the morning-after pill to women for reasons of conscience. In February 2017, a decision by the Constitutional Court confirmed the constitutionality of the act regulating the right to freedom of choice regarding childbirth, stating that this is implied in the right to privacy, which includes self-determination, freedom of choice and dignity. It has therefore confirmed the existing freedom of women to decide on the termination of their pregnancy (within the legally prescribed limits);[390]
- banks refusing to grant loans to women during periods of pregnancy and maternity and parental leave (**Croatia**), but following recommendations of the Ombudsperson for Gender Equality many banks changed their practices. Nevertheless, cases of male clients on parental leave being discriminated against have been reported, as have cases regarding compensation for new-born children arising out of life insurance policies being only available for women;
- unequal standards of care and protection for women giving birth, depending on the hospital and differences in fees for voluntary abortion (**Croatia**);
- application of a waiting period before self-employed women can insure themselves with private insurance companies against the risk of maternity leave (the **Netherlands**);
- private health insurance companies terminating the membership of pregnant women or excluding benefits for pregnancy and childbirth from the beginning (**Germany**);
- the access to health services attached to insurance contracts being restricted by the widespread practice of establishing an initial period during which the contract has no effect, this period possibly covering pregnancy time (**Portugal**);
- reported cases of refusals to rent flats to pregnant women (**Poland**);
- denial of services, e.g. in restaurants, to breastfeeding mothers (**Germany**, **Poland**). In a ruling of 14 December 2017, the Court of Appeal in Gdańsk found that preventing a woman from breastfeeding her child at a restaurant table constituted discrimination with regard to sex, ordering the restaurant owner to pay damages equivalent to EUR 500 plus interest. In addition, the restaurant owner was obliged to issue a public statement apologising to the woman for this unlawful behaviour;
- mothers (occasionally fathers, as well) not allowed to enter shops or buses with a pram (**Poland**);
- the protection under domestic legislation is considered not sufficiently clear and precise so as to allow individuals to understand their rights and for providers of goods and services to understand their legal obligations as far as transsexual people, pregnant women and women who have recently given birth are concerned (**Lithuania**);
- -in the absence of legislation stipulating what kinds of risks have to be covered by private insurance programmes, insurance companies do not provide any standard travel and health insurance programme covering risks related to pregnancy and maternity (**Latvia**).

By contrast, in **Italy**, Article 4(2) of Directive 2004/113/EC has been applied to maintain the exemption from fees for all clinical tests related to pregnancy and for certain clinical tests during the same period. Moreover, having children is regarded as a preferential ground to have access to public housing, while having more than one child is a preferential ground to gain access to a public kindergarten.

390 Croatia, Constitutional Court of the Republic of Croatia, Decision of 21 February 2017, U-I-60/1991.

9 Violence against women and domestic violence in relation to the Istanbul Convention

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) establishes a set of comprehensive obligations for addressing violence against women and domestic violence within the legal framework of international human rights law.[391] The Convention recognises in its preamble the structural nature of violence against women ('a manifestation of historically unequal power relations between women and men')[392] and states the purpose of the promotion of substantive equality between women and men, including by empowering women.

The Council of Europe (CoE) adopted the Istanbul Convention on 6 April 2011, and it entered into force on 1 August 2014. In Europe, it is the first instrument to set legally binding standards specifically to prevent violence against women (including girls under the age of 18).[393] The Convention covers a broad range of measures, including data collection, awareness-raising, protection, provision of support services and measures to address migrant women and women lodging asylum claims. It also deals with legal measures on criminalising forms of violence against women and the cross-border dimension of violence against women.

In October 2015, the European Commission published a 'Roadmap: (A possible) EU Accession to the Council of Europe Convention on Preventing and Combating Violence against Women, and Domestic Violence (Istanbul Convention)', detailing an initiative that could potentially lead to a Council Decision on EU accession to the Istanbul Convention.[394] Article 216(1) TFEU gives the EU the external competence to conclude international agreements where Treaties or legally binding EU acts so provide, where the agreement is necessary to achieve one of the objectives referred to by the Treaties, or is likely to affect common rules or alter their scope.[395] Given that combating crime and promoting gender equality are clearly established as objectives in the EU acquis, the EU has the general competence to accede to the Istanbul Convention. Under Article 216(2) TFEU, agreements concluded by the EU are binding on its institutions and its Member States.[396] Thus, in case of EU accession to the Istanbul Convention, the Member States will be bound by both the EU policies that implement the Convention and the duties arising from their own ratification. To date, the only international human rights treaty ratified by the EU is the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD).[397] On 13 June 2017, the EU became a signatory party to the Istanbul Convention. The European Network of Legal Experts in Gender Equality and Non-Discrimination published a report on the legal implications of EU accession to the Istanbul Convention in 2016.[398]

As of the information cut-off date of this comparative analysis, the Istanbul Convention has been signed by 45 members of the Council of Europe, 33 of which have ratified the Convention.[399] All 27 EU Member States have signed, as well as the **United Kingdom**, and 20 EU Member States have also ratified it.[400]

391 Council of Europe, CETS No. 210, adopted 11 May 2011 and entered into force 1 August 2014.
392 Preamble, Istanbul Convention.
393 See Article 3(f) of the Convention.
394 European Commission, (2015) *(A possible) EU Accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention),* available at: http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf. After the cut-off date of this report the European Parliament adopted its resolution of 28 November 2019 on the EU's accession to the Istanbul Convention and other measures to combat gender-based violence, available at: http://www.europarl.europa.eu/doceo/document/TA-9-2019-0080_EN.html.
395 Article 216(1) TFEU.
396 Article 216(2) TFEU.
397 Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC), available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010D0048&rid=1.
398 Nousiainen, K., Chinkin, C. (2015) *Legal implications of EU accession to the Istanbul Convention,* European Commission, available at: https://www.equalitylaw.eu/downloads/3794-legal-implications-of-eu-accession-to-the-istanbul-convention.
399 In 2019 (after the cut-off date of this report), the Convention had been ratified by 34 members of the Council of Europe and signed by 45.
400 In 2019, 21 EU Member States had ratified the Convention: **Ireland** ratified after the cut-off date of this report.

Of the EEA states, **Norway** and **Iceland** have ratified the Convention.[401] All the candidate countries (**Albania**, **Montenegro**, **North Macedonia**, **Serbia** and **Turkey**) have ratified the Convention.

All EU Member States have signed the Convention and the following have ratified the Convention: **Austria**, **Belgium**, **Croatia**, **Cyprus**, **Denmark**, **Estonia**, **Finland**, **France**, **Germany**, **Greece**, **Ireland**, **Italy**, **Luxembourg**, **Malta**, **Netherlands**, **Poland** (although some members of the current Government and the President of the Republic of Poland have threatened withdrawal from the Convention), **Portugal**, **Romania**, **Slovenia**, **Spain** and **Sweden**.[402] In **Hungary**, the leaders of the ruling right-wing political alliance announced that there is no intention to ratify the Convention. In **Bulgaria**, the Constitutional Court ruled on the constitutionality of a draft law for the ratification of the Convention in 2018, finding by a simple majority that the Convention is not in compliance with the Bulgarian Constitution.

According to the report 'Legal implications of EU accession to the Istanbul Convention',[403] several Member States that have signed the Convention have also taken steps towards ratification. The EU competence in the area of criminal law is of particular importance because the Istanbul Convention is an instrument for combating crime, and legislative amendments effected in the Member States before ratification are often in the form of modifications to national Criminal Codes. Many experts report that violence against women is an actively debated topic in politics and society. Proposals to amend the law are therefore ongoing in several countries, including those which had already ratified the Istanbul Convention a few years ago (e.g. the **Netherlands**).

401 **Iceland** ratified in 2018, while **Liechtenstein** has still not done so.
402 **Ireland** ratified the Convention after the cut-off date of this report, in 2019.
403 Nousiainen, K., Chinkin, C. (2015) *Legal implications of EU accession to the Instanbul Convention,* European Commission, available at: https://www.equalitylaw.eu/downloads/3794-legal-implications-of-eu-accession-to-the-istanbul-convention.

10 Compliance and enforcement aspects (horizontal provisions of all directives)

This chapter concerns the way in which states have given effect to the horizontal provisions of all EU gender equality directives, that is to say those that have a bearing on ensuring compliance with and enforcement of the EU rights and obligations contained therein.

10.1 Victimisation

As a matter of EU gender equality law, people 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 (Article 24 of Directive 2006/54/EC and Article 10 of Directive 2004/113/EC). Experts from all Member States, except for **North Macedonia** and to some extent **Sweden**, have reported that their national level is up to the EU standard, in some states the prohibition having been made more explicit recently (**Croatia**, **Italy**). In **North Macedonia**, protection is only ensured for anti-mobbing procedures. Victimisation is defined in a limited way as unfavourable treatment and exposure of a person to endure damage because of initiating a procedure or testifying in such a procedure. In **Sweden**, the prohibition as such seems to meet the requirements of the Recast Directive. What can be called into question is the fact that the ban on reprisals does not meet the requirement in Article 2.2.a of the directive that it should be included in the actual concept of discrimination. However, the Labour Court awarded compensation in damages of EUR 7 900 to a woman who was dismissed on the very day she made a complaint about sexual harassment.

In **Turkey**, the old Article 5 of the Employment Act was the main provision but was deemed inadequate. Now, a new approach to enforcement is envisaged by the Act on the Human Rights and Equality Institution (Act No. 6701). The Human Rights and Equality Institution must investigate discrimination upon a complaint and ex officio, and must impose a fine on natural persons and on public/private legal entities in case of discrimination. Furthermore, it must help and guide victims concerning administrative and legal procedures.

Yet there are certain limitations to the level of protection in some other states as well. In **Portugal**, there is no explicit reference to victimisation in relation to discrimination in the legal system, this being confined to the area of employment. The **Belgian** expert considers the effectiveness of the protection against victimisation in his country disputable, because it mostly concerns dismissal of the victim and the amount of fixed damages for unlawful dismissal is considered too limited to be a real deterrent (six months' gross remuneration), unless for very small businesses. The **Latvian** expert has noted that it would be desirable to implement protection against victimisation in the field of social security as well.

In February 2017, a proposal to amend the definition of victimisation in the Gender Equality Act passed the first reading in the **Croatian** Parliament, this under pressure of the European Commission to bring this definition more in line with that contained in the Anti-discrimination Act. In the expert's opinion this was not really necessary from a legal point of view, but it may still add to the legal certainty of those concerned. The **Montenegrin** expert has noted that a number of law enforcement officers in her country are ignorant about the notion of victimisation. In **Estonia**, 95 % of domestic violence cases are settled through alternative proceedings, one drawback of which is that an appeal is precluded and cases never reach the Supreme Court, meaning that the development of legal texts and interpretation remains poor regarding intimate partner violence, domestic violence and violence against women and girls. Survivors of domestic violence also report that mediation procedures are often imposed on them, that these are humiliating and they feel victimised. It is therefore questionable whether Estonia fulfils the requirement of Article 48 of the Istanbul Convention, which stipulates that the parties must take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of the Convention.

10.2 Burden of proof

A second important issue concerns the provision made in national law for a shift of the burden of proof in sex discrimination cases. 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 (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[404] and only later laid down in legislation.

In all domestic legal systems covered by this report the shift of the burden of proof is ensured, in most of them by way of legislation and in some confirmed in case law (**Bulgaria**, **Ireland**, **Italy**, **Norway**, **Slovakia**). In **Estonia**, if the employer refuses to provide proof, such a refusal is deemed to be an acknowledgment of discrimination. However, the rules pertaining to the burden of proof establish high evidentiary thresholds that represent obstacles to victims of discrimination seeking redress. In **Slovakia**, legislation has been improved and the scope of applicability of the shift of the burden of proof is now actually wider than that contained in the directives, as it applies to all forms of discrimination.

However, in some countries the law is somewhat ambiguous, containing slightly different rules in various pieces of legislation (**Croatia**, **Serbia**). In some countries, there has not been any experience with this in practice, because of the lack of (adequate) case law (**Liechtenstein**, **Serbia**). In yet others, the case law is not very satisfactory. While the **Hungarian** Supreme Court guidelines on employment cases point to the difference between the burden of proof in cases on misuse of the law (direct burden of proof) and equal treatment cases (shared and reversed burden of proof) and regardless of the ongoing discussion of the burden of proof, lower-level courts in Hungary still rather frequently request claimants to prove the occurrence of discrimination.

In **Greece**, the rules on the statute books are fine, but they do not seem to be applied, as the Ombudsman also notes, even in spite of a relevant CJEU preliminary ruling in a **Greek** case.[405] An important reason for this is that they are contained in the legal acts transposing the directives without being incorporated into the procedural codes and are therefore hardly known. In **Romania**, the burden of proof has three different definitions in three different legislative acts, of which two fall short of the EU definition. This leads to a situation of inconsistent application of the burden of proof in practice. In **Poland**, the burden of proof provision in the law has been understood by many courts as requiring claimants not just to present basic facts, but also to make probable the existence of discrimination by indicating its ground, so in fact asking about the employer's motivation.

Another problem relates to access to information. In **France**, the Court of Cassation heard a case very similar to the CJEU's *Meister* case, holding that 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 access to and that he refused to communicate.

In **Germany**, the lack of information rights is also considered problematic, together with the courts' reluctance to use statistical data as prima facie evidence. The 2017 Pay Transparency Act does not entirely solve these problems. **United Kingdom** law is considered deficient in the light of EU (case) law to the extent that a potential claimant may be unable to obtain the necessary information to establish facts that are such as to shift the burden of proof.

404 In CJEU, *Danfoss* and *Kelly and Meister.*
405 CJEU, C-196/02 *Nikoloudi* [2005] ECR I-1789.

Some countries, however, do provide for a specific right to information, such as **Ireland**. In **Italy**, as regards the use of quantitative/statistical data, national legislation goes further than EU law, as it requires companies with more than one hundred employees to draw up bi-annual reports on the workers' situation as regards recruitment, professional training, career opportunities, remuneration, dismissal and retirement. In **Latvia**, access to information is not guaranteed by law and it is up to the court to decide if there is a ground to request any information which is only at the disposal of the respondent.

A particular problem has occurred in **Finland**, where case law has centred on whether a comparison may be made if there are both women and men among those with lower pay. The Labour Court has held that the burden of proof may be shifted onto the defendant if the claimant can present at least one comparator of the opposite sex who has better pay for equal work, irrespective of there being both women and men in lower and higher pay brackets doing equal work. However, in cases concerning the new pay system for judges, the Supreme Court and the Supreme Administrative Court decided that because both men and women were placed in lower pay bracket posts, there could be no pay discrimination. The claimants had not even managed to establish an assumption of discrimination, which would reverse the burden of proof onto the defendant. The Courts did not proceed to consider whether indirect discrimination could have been at issue, which would have required a comparison of how female and male judges were positioned in different pay brackets.

10.3 Remedies and sanctions

The degree to which EU gender equality law will have the desired effects will depend to a considerable extent on the remedies and sanctions national laws provide for. While it is up to the Member States to decide on the applicable remedies and sanctions for breaches of EU gender equality law (e.g. compensation, reinstatement, criminal sanctions, administrative fines etc.), EU law requires that infringements of the prohibition of discrimination must be met with effective, proportionate and dissuasive sanctions. The CJEU initially developed these requirements and they were only later laid down in EU discrimination legislation (see Articles 18 and 25 of Recast Directive 2006/54/EC and Articles 8 and 14 of Directive 2004/113/EC). Compensation or reparation must also be proportionate to the damage suffered. The fixing of a prior upper limit may not, in principle, restrict this. Similarly, national law may not exclude awarding interest.[406]

(i) Types of remedies and sanctions

As a consequence of the national autonomy that remains, the variety of national remedies and sanctions provided for victims is huge. These include, also depending on the type of violation of gender equality law involved:

- declaration of the rights of the claimant (**United Kingdom**);
- request for annulment of unlawful provisions (**Belgium**, **Greece**, **Liechtenstein**, **Serbia**), nullity of discriminatory provisions and practices (**Bulgaria**, **France**, **Greece**, **Italy**, **Luxembourg**, **Malta**, **Spain**), prohibition or termination of the discriminatory activities (**Bulgaria**, **Estonia**, **Greece**, **Hungary**, **Latvia**, **Norway**, **Serbia**, **United Kingdom**) or action for restitution (**Slovakia**, **Slovenia**, **Turkey**);
- certain right to reinstatement (**Austria**, **Cyprus**, **Estonia**, **Finland**, **France**, **Greece**, **Hungary**, **Ireland**, **Latvia**, **Lithuania**, **Luxembourg**, **Malta**, **Netherlands**, **North Macedonia**, **Portugal**, **Romania**, **Slovenia**, **Spain**, **Turkey**) or nullity of the dismissal (**Estonia**, **Greece**, **Spain**, **Sweden**) and of the refusal to hire or promote (**Greece**);
- compensation (**Austria**, **Bulgaria**, **Czech Republic**, **Finland**, **France**, **Germany**, **Hungary**, **Italy**, **Liechtenstein**, **Malta**, **Netherlands**, **North Macedonia**, **Portugal**, **Romania**, **Serbia**, **Spain**,

406 See, for example, CJEU, 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*).

Sweden, **Turkey**, the **United Kingdom**), also explicitly including interest (**Cyprus**, **Greece**, **Ireland**, **Lithuania**) and compensation for non-material or moral damages (**Bulgaria**, **Cyprus**, **Denmark**, **Estonia**, **Greece**, **Hungary**, **Iceland**, **Latvia**, **Lithuania**, **Luxembourg**, **Norway**, **Poland** (in practice), **Romania**, **Serbia**, **Slovakia**, **Slovenia**) when a person's reputation, respect in society or dignity has been harmed (**Czech Republic**) or distress has been caused because of victimisation (**Ireland**);
- penalty payments and administrative fines (**Austria**, **Belgium**, **Bulgaria**, **Cyprus**, **Denmark**, **Finland**, **Greece**, **Hungary**, **Iceland**, **Latvia**, **Luxembourg**, **North Macedonia**, **Norway**, **Portugal**, **Romania**, **Serbia**, **Slovenia**, **Spain**, **Sweden**, **Turkey**);
- denial or revocation of certain public allowances or financial benefits (**Italy**, **Portugal**);
- automatic application of the most beneficial pay provision to employees of both sexes, provided they perform equal work/work of the same value (**Greece**, **Portugal**);
- publication of the court's decision (**Serbia**), at the respondent's costs (**Croatia**) or publication of the decision on the website of the respondent and that of the Equal Treatment Authority (**Hungary**);
- temporary measures in order to prevent discriminatory treatment and to avoid major irreparable damage (**Serbia**).

In the **Netherlands**, since 1 July 2015, victims of discriminatory dismissals can also request reasonable compensation instead of requesting the court to invalidate the termination. Until this date damages were hardly ever claimed (let alone awarded) in cases of discrimination and the expectation is that this will now change. A 'transitional benefit' was also introduced on 1 July 2015. All employees who have been employed for two or more years, whether on the basis of a permanent contract or a fixed-term contract, are entitled to this benefit in the event of the termination of their employment, unless the termination is the result of serious misconduct by the employee.

The **Irish** expert has reported a case in which the claimant (a very senior sales and marketing director) obtained a total of EUR 315 000 for discriminatory dismissal during maternity leave and for distress caused by victimisation. **Swedish** law allows for 'discrimination compensation', which according to its Supreme Court can be divided into dignity compensation and preventive compensation.

In **Turkey**, the newly introduced Act on the Human Rights and Equality Institution now provides for the possibility for the Human Rights and Equality Board to issue warnings and to impose an administrative fine, and for the gravity of the violation, the perpetrator's economic status and multiple discrimination, if any, to be considered as aggravating factors. Discriminatory acts will be punishable with fines of between TL 1 000 and TL 15 000.[407] If the Board determines that the discriminatory act constitutes a crime, it will report this crime.

In **Portugal**, a new law was introduced in 2017 specifically reinforcing the protection of harassment victims by granting them accrued rights to damage compensation and imposing upon the employer the duty to approve a Code of Conduct in relation to harassment practices in the company as well as the duty to start a disciplinary procedure against perpetrators of harassment. It also extended the protection against dismissal to witnesses of harassment who denounce such practices.

Under the **German** Victim Compensation Act, if the offender is not identified, victims of gender-based violence can make a claim for compensation. However, an important restricting condition is that the assault must have been of a physical nature, although the consequences compensated can include severe psychological harm or suffering. Victims of stalking or hate speech including rape and death threats, of revenge porn or of cyber harassment are thus not entitled to any compensation, irrespective of the severity and duration of their suffering.

407 Due to the high fluctuation of the Turkish Lira no conversion to Euro is given.

While in many states the level of compensation is capped (see further below), this is not the case in **Finland**, **France**, **Italy**, **Norway**, **Poland** and the **United Kingdom**. In **Lithuania** the compensation for non-material damages has no maximum amount either, but the courts are reluctant to award high compensation for non-material damages. For example, for the discriminatory refusal to employ Roma women as waitresses in a bar, the employer was obliged to pay compensation of approximately 2.5 times the minimum wage in non-material damages instead of employment. By contrast, in **Slovenia** damages are not capped in the private sector, but they are as regards the award of non-material damages. In **Romania**, alleged victims of gender discrimination first have to file a complaint with the employer or service provider before they can submit a complaint to the court or the national equality body, this is in contrast with alleged victims on other discrimination grounds.

Criminal sanctions are also possible in a number of states, but for different categories of gender discrimination:

- Discrimination in employment and in the access to goods and services may be a ground for imprisonment in **Belgium**, for one month to one year.
- The **Finnish** Penal Code prohibits discrimination at work and an aggravated form of discrimination at work on the basis of sex and several other grounds, including family relations, in relation to access to employment and at work. The penalty for the former crime is a fine or a maximum of six months of imprisonment, and for the latter a fine or a maximum of two years of imprisonment.
- Under the **French** Labour Code the employer risks a maximum of one year of imprisonment and a fine of EUR 3 750 and under the Criminal Code any discrimination can be punished with a maximum of three years of imprisonment and a fine of EUR 45 000. But these sanctions are rarely used.
- In **Cyprus**, anyone who intentionally contravenes the provisions on the prohibition of pay discrimination shall be guilty of an offence and be punished with a fine not exceeding EUR 6 860 or by imprisonment not exceeding six months or with both such penalties. Furthermore, anyone who violates the provisions on gender discrimination, in the event of conviction with a fine not exceeding EUR 7 000, or by imprisonment not exceeding six months or with both such penalties.
- In **Croatia**, sexual harassment provides a ground for a penal sanction, if committed against a subordinate person or other person dependent on the offender, or a person who is especially vulnerable due to age, illness, disability, dependency, pregnancy, or severe physical or mental impairment, involving imprisonment for up to one year.
- In **Greece**, an 'offence to sexual dignity' can lead to imprisonment for six months to three years and a pecuniary penalty of at least EUR 1 000, if it is committed through the exploitation of the situation of a worker or candidate for employment.
- In **Turkey**, criminal sanctions can be imposed for crimes against sexual inviolability, including harassment and sexual assault, and involve imprisonment of varying duration according to the gravity of the crime, ranging from three months to 12 years and even longer.
- In **Lithuania**, 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.
- In **Serbia**, violation of equality law generally may lead to imprisonment for three months to five years.
- In **Malta**, a fine or imprisonment for up to six months or both is possible in case of victimisation and (sexual) harassment.
- In **Poland**, imprisonment for up to two years is possible in the case of very serious and notorious violations of employees' rights, as well as fines and restrictions to the convicted person's liberty and up to three years of imprisonment is possible in the most serious cases of sexual harassment.
- In **Austria** as well severe sexual harassment is seen as a criminal offence carrying the threat of punishment of up to six months of imprisonment or a criminal fine.
- In **North Macedonia**, where a breach of equality law constitutes a crime this can lead to a penal sanction/imprisonment.
- In **Norway**, sexual harassment and harassment may both constitute crimes, depending on the particular harassment. Sexual harassment in the form of sexual acts and sexual conduct without

consent (other than rape and attempted rape) carries a one-year prison sentence. However, there are large differences between the harassment, the penalties and what is actually interpreted as punishment in the courts. Bullying and harassment expressed in physical violence are crimes, as are threats. The harassment does not have to be linked to a discrimination ground and can be punished with a fine or imprisonment of up to 2 years. Hate speech is regarded a crime when its linked to skin colour, ethnicity, religion and sexual orientation, but not when it comes to sex/gender.

– In **Portugal**, criminal-law sanctions can concern all discrimination grounds, in both private and public employment, but can only consist of penalties.
– The decriminalisation provided by **Italian** Decree No. 8 of 15 January 2016 involved changes in the sanctions for the infringement of the ban on gender discrimination in the working relationship: minor criminal sanctions (a fine from EUR 250 to EUR 1 500) have now been substituted by administrative monetary sanctions from EUR 5 000 to EUR 10 000. The change concerns all cases of discrimination covered by the Code of Equal Opportunities, i.e. all sectors, both public and private and all aspects of the working relationship.

(ii) Persisting problems

Importantly, quite a lot of the experts believe that their national laws do not (fully) comply with the general EU standard of effective, proportionate and dissuasive sanctions (**Bulgaria**, **Finland**, **Hungary**, **Latvia**, **Montenegro**, **Netherlands**, **North Macedonia**, **Poland**, **Romania**, **Serbia**, **Slovakia**) or observe that serious problems persist in this regard (**Czech Republic**, **Estonia**, **Germany**, **Spain**, **Sweden**). In **Greece**, the sanctions are effective, proportionate and dissuasive, but their use is limited as procedural and socio-economic problems deter recourse to legal proceedings (see the next section).

One significant, more common problem concerns the (fixed and/or low) level of compensation and damages and also, in some countries, the way these are applied by the courts (**Belgium**, **Bulgaria**, **Czech Republic**, **Estonia**, **Finland**, **Hungary**, **Latvia**, **Lithuania**, **Malta**, **Montenegro**, **Netherlands**, **Poland**, **Romania**, **Serbia**, **Spain**). These sanctions are not considered to meet the requirement of dissuasiveness and are also not considered to be appropriately balanced with the costs, length and uncertainty of judicial proceedings.

Although in the **Czech Republic** an offence in the area of equal treatment may be sanctioned with a fine of up to EUR 37 040, labour inspectorates have never imposed such a high fine. In 2018, they imposed some 21 fines, amounting in total to a mere EUR 21 540 (approx. EUR 1000 each). The **Spanish** expert considers the remedies and sanctions to be proportionate in theory, but in practice moral damages are difficult to prove and when they are recognised by the courts, quite low sums are awarded. Furthermore, certain sanctions can only be imposed by the labour inspectorate, which does not always consider gender discrimination a priority. Similarly, in **Serbia** anti-discrimination proceedings are not treated as urgent in practice and sanctions imposed for moral damages have ranged from EUR 40 to EUR 830, which is only symbolic when compared to some other laws. Even in severe cases of discrimination courts have only imposed the smallest amounts and the execution of court decisions has been problematic as well.

In **Hungary**, in 2015, the amount of fines applied by the Equal Treatment Authority (ETA) were extremely low: only EUR 310 in two employment discrimination cases, in which a camerawoman's and a driver's employment application were refused because of their sex. This year the ETA, out of the 240 adjudicated cases, the ETA found a violation of equal treatment in 33 cases and in 27 of them a fine was imposed, the total sum of which is approximately EUR 26 000, which is only slightly higher than the maximum threshold that can be imposed in one single case.[408] In 2016 the amount of the fines imposed increased considerably, but the figure is still far below the maximum applicable amount (EUR 1 500-3 000 compared

408 Report on the activity of the ETA 2015, available at: http://egyenlobanasmod.hu/sites/default/files/tajekoztatok/EBH_T%C3%A1j_2015_EN_Y11593.pdf.

to the statutory maximum of EUR 20 000). Higher fines were mainly imposed in cases where pregnant women were dismissed during their trial period. Unfortunately, more recent data are not available.

In a recent case in the **Netherlands**, the District Court of Limburg[409] decided that an employee whose contract had not been extended because of her pregnancy was not entitled to compensation for material (income) damage, because it was likely, according to the court, that the contract would only have been extended one more time for one year and would have ended afterwards. During that year, the employee had also received a social security benefit and therefore she had suffered no loss of income. The court furthermore granted compensation for non-pecuniary damage of only EUR 1 000, which does not meet the requirement of an effective, proportionate and dissuasive sanction.

In **Lithuania**, the Equal Opportunities Ombudsperson and the courts are rather reluctant to impose severe sanctions for breaches of equality legislation. In **Finland**, it is deemed problematic that the compensation may be reduced or removed altogether if considered reasonable, taking into account the economic circumstances of the violator, their attempts to prevent harmful effects caused by the act, or other circumstances. The **Swedish** expert has noted the specific restriction applying to economic compensation in relation to appointments and promotions, which rules out the possibility in these cases of indemnities in addition to 'discrimination compensation'. This restriction, which is a result of the Swedish 'hiring at will' doctrine, can possibly be questioned in the light of the principle of equal access to employment and its effective implementation.

In **Ireland**, compensation can only be awarded on the basis of one discrimination ground even if more grounds are at issue in a particular case and it is doubtful whether 'real and effective compensation' is available, given that awards are capped even where there is discrimination on more than one ground. While in **Norway** case law on the matter is sparse, and sanctions therefore hardly imposed, it is noteworthy that in three recent cases high non-pecuniary damages were awarded, above EUR 12 000, which is high in comparison with, for example, cases of unjustified dismissal.

In **Romania**, while administrative sanctions may range between EUR 680 and EUR 22 720, the national equality body stays close to the minimum level and, when awarded by the courts, moral damages are very low rendering the sanction ineffective. In **Turkey**, 'discrimination compensation' is limited to a maximum of four months' wages under Employment Act Article 5. In **Malta**, fines/compensation levels range from EUR 116.47 to EUR 2 329.27, depending on the type of violation of gender equality law involved, which is generally considered to be too low to provide a deterrent. Although the level of compensation in **Poland** is not capped, the usual awards given in practice are considered unlikely to have a dissuasive effect.

The **North Macedonian** expert has noted that, while the Labour Inspectorate is now authorised to issue administrative fines without a court procedure, the amounts of the administrative fines that can be imposed have been reduced significantly. For example, a previous EUR 400 fine now limited to EUR 70.[410] The **Italian** expert deems the decriminalisation provided by Decree No. 8 of 15 January 2016 a retrograde step in the effectiveness of sanctions, even though it aims to reduce the workload of the criminal courts. Although the new sanctions are harsher than the previous ones, they have lost both the greater deterrent effect of criminal sanctions and the enforceability of the special procedure of Article 15 of Decree No. 124/2004, which allowed the employer to avoid a criminal trial by the restoration of a lawful condition (i.e. halting the unlawful situation, if possible) and the payment of a quarter of the maximum fine.

Other problems concern, for instance, the freezing effect of the old, inflexible case law of the **Belgian** Court of Cassation which means that no court may order the reinstatement of a worker under an employment contract. In **Germany**, when discrimination results from collective agreements, the employer is only

409 Netherlands, District Court Limburg, 13 December 2017, ECLI:NL:RBLIM:2017:12124.

410 The change to this law was effected in a short procedure, without any discussion (in a plenary session or in a session of the Commission on Equal Opportunities of Women and Men), http://www.sobranie.mk/materialdetails.nspx?materialId=c88da9f4-f206-491a-aa81-714494a882bd.

responsible if they acted with gross negligence or intentionally. Furthermore, the employer as well as a person providing goods and services are obliged to pay material damages only when they can be held responsible for the discrimination by personal fault. These conditions hamper enforcement and there is also the problem that the compensation granted for personal harm is very modest.

In **North Macedonia**, the weak court system and ineffectiveness of the Gender Equality Body and the Anti-discrimination Commission are seen as particularly problematic. In **Iceland**, despite the burden of proof lying with the employer, it is still difficult for the claimant to gather enough evidence to bring a case before the complaints committee. The clause permitting workers to disclose their wage terms is anything but a guarantee of transparency. Rather to the contrary, it may be seen as a scapegoat for not fixing the problem.

In **Norway**, as of January 2018, the Equality and Anti-discrimination Ombud no longer treat complaints; rather, the Equality and Anti-discrimination Tribunal is now in charge of this. However, the Ombud's role in promoting equality has been strengthened, with her task being to provide guidance on matters of equality and discrimination to anyone who turns to her, including individuals. Another important task of the Ombud is to follow up the duty of public and private employers to promote equality, and report on equality and non-discrimination. According to the Act on the Equality and Anti-discrimination Ombud and the Equality and Anti-discrimination Tribunal (EAOA), only the Tribunal has an albeit limited authority to award damages in employment relationships and to award compensation for economic loss in cases where the defendant has no objections to the claim for compensation, or the Tribunal finds reasons to dismiss the defendant's objections. This limited authority means that many cases concerning sex discrimination must still be taken to court to be awarded compensation and redress.

The **Montenegrin** expert has pointed to more general issues, such as slow responses from state bodies and other respondents, the complex bureaucracy and psychological barriers, as being problematic.

10.4 Access to courts

Another issue that is of prime importance for ensuring effective compliance with and enforcement of EU gender equality law concerns adequate access to courts for alleged victims of sex discrimination. Member States have the obligation to ensure that judicial procedures are available to everyone who considers 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 (e.g. Article 17(1) of Directive 2006/54/EC).[411] In this respect as well significant problems and obstacles persist in the states covered by this report, which may not always be legal barriers.

(i) Low level of litigation and explanatory factors

While access to courts as such is ensured in all states, a widespread general problem remains that overall the level of gender equality litigation is still (very) low in many states. In addition to the low levels of compensation that may act as a deterrent to engaging in judicial proceedings (see the previous section), the most often reported difficulties and barriers encountered by victims of sex discrimination and which may explain the low level of litigation concern:

– the cost of legal proceedings (**Belgium**, **Croatia**, **Estonia**, **Finland**, **Greece**, **Latvia**, **North Macedonia**, **Norway**, **Poland**, **Slovakia**, **United Kingdom**; importantly, in the latter country, the Fees Order which imposed a financial burden on potential claimants was found to be unlawful by the

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

Supreme Court in 2017 for contravening the right to an effective remedy under EU law and imposing disproportionate limitations on the enforcement of EU employment rights);
- overly short time limits for initiating proceedings (**Germany**, **United Kingdom**);
- length of proceedings (**Croatia**, **Estonia**, **Greece**, **Italy**, **Norway**, **Slovenia**);
- the conditions of entitlement to legal aid (**Belgium**, **Greece**);
- lack of a right of associations to bring proceedings (**Germany**; only possible for works councils, but these have not done so as yet);
- lack of trust or faith in the courts/legal system (**Estonia**, **Italy**, **Montenegro**, **North Macedonia**);
- only courts being allowed to award compensation and these not necessarily recognising the equality body's finding of discrimination as a basis for awarding compensation (**Bulgaria**, **Hungary**);
- lack of access to information, in particular other court rulings on the matter (**Croatia**, **Latvia**);
- benefits ensuing from court action too minor (discussed extensively in the previous section);
- 'stigma' of being a 'troublemaker' associated with such cases (**Croatia**, **Czech Republic**, **Estonia**, **Malta**) and fear of retaliation or victimisation (**Greece**, **Latvia**, **Liechtenstein**, **North Macedonia**, **United Kingdom**);
- being part of a small-scale community (**Estonia**, **Liechtenstein**, **Luxembourg**, **Malta**, **Montenegro**);
- lack of confidence of claimants that they will be believed (**United Kingdom**) and difficulty of proof (**Greece**, **Italy**, **Latvia**, **Turkey**);
- lack of family support and understanding (**Montenegro**, **Serbia**);
- lack of awareness and knowledge about existing equality law (**Estonia**, **Italy**, **Montenegro**, **Serbia**);
- lack of experience and custom of defending own rights (**Estonia**);
- lack of skilled, experienced advice and assistance (**Greece**, **United Kingdom**);
- strongly rooted traditional gender stereotypes which entail a greater degree of tolerance (**Montenegro**, **Serbia**);
- the socio-economic crisis, ensuing high female unemployment and long-term unemployment, and unemployment benefits which are low and subject to strict conditions unemployment (**Greece**).

Among more specific factors that have been highlighted as being particular causes of the reluctance to take individual legal action is the currently often applied concept of 'diversity', which limits gender to being just one of the criteria amidst many others, thereby shifting the focus of policymakers and the media. In **Belgium** pay scales in the private sector are governed by collective agreement and a pay discrimination claim may therefore be considered to be quite bold.

The **Hungarian** expert has noted that while access to court is safeguarded by legislation, the case law of lower-level courts proves the considerable gaps in the legal practice in four areas: the broad interpretation of exemptions provided for in the law; the reluctance to award dissuasive compensation; the minimisation of the severity of violence against women; and inadequate application of the rules on the burden of proof. On the other hand, an amendment to the rules on non-material damages for pain and suffering might lead to more effective, proportionate and dissuasive sanctions in the future.

A ruling by the Supreme Court of **Iceland** in a sexual harassment case is not considered to be very encouraging in persuading victims to go to court. The woman in this case claimed non-pecuniary damages from her employer for sexual harassment by her superior during a work trip. The Supreme Court held that the behaviour of the man was 'completely inappropriate' (inviting her to join him in a hot tub where he sat naked; knocking on her door an hour after she had bid good night), yet in the Court's view more explicit sexual behaviour ('other things and more') was required for this to be considered sexual harassment.

(ii) Legal – financial – aid

A particular point requiring attention concerns the legal aid that is available for alleged victims of gender discrimination. A divergent picture emerges here as well, especially when making a distinction between financial aid and legal advice or assistance (see below point (iii)).

In some countries no legal financial aid is provided (**Austria**, **Lithuania**, **Luxembourg**, **Romania**), in others this is income-dependent (**Belgium**, **Bulgaria**, **Estonia**, **Finland**, **France**, **Greece**, **Hungary**, **Iceland**, **Latvia**, **Malta**, **Montenegro**, **Norway**, **Poland**, **Sweden**) or only available for particular types of cases (**North Macedonia**, **Turkey**) or before specific courts (**Cyprus**).

In **Iceland**, financial aid may also be granted if the outcome of the case is likely to have great general significance or have a strong impact on the employment, social status or other personal status of the applicant. The Legal Aid Committee also examines factors such as whether the applicant has tried to settle the case, for example through administrative appeal, and whether there is a chance that the case would be successful in court, by looking at the case law of the courts. Hence in light of the Supreme Court's decision mentioned above, the prospects of legal aid for alleged victims of sexual harassment are considered not very promising.

In **Turkey**, no legal expenses can be imposed on victims of violence. In **Montenegro**, victims of gender discrimination usually receive free legal aid from NGOs in the form of information, legal advice and representation. In **Poland**, a claimant can also request the court to assign a legal representative to defend their case. In **North Macedonia**, the first court verdict finding discrimination against a pregnant worker based on the Law on Prevention and Protection against Discrimination was issued on 3 March 2016, meaning six years after the adoption of the Law, and thanks to the financial support of an international NGO. In **Turkey**, applications to the Human Rights and Equality Institution are free of charge and the Institution must investigate discrimination upon complaint and ex officio, must impose a fine on natural persons and public/private legal entities in case of discrimination, and must help and guide victims concerning administrative and legal procedures. The decisions of the Institution must also specify the legal means/procedures for the parties to challenge its decisions. Natural persons and legal entities can file complaints of discrimination. Applications can be made directly to the Human Rights and Equality Institution or through governors in towns and sub-governors in sub-towns.

In the **Netherlands**, free legal aid for people with low incomes has been restricted in recent years as part of austerity measures. In **Portugal**, victims of discrimination have free access to the courts and in case of economic difficulties the individual has the right to a public attorney for this purpose and does not have to pay the costs of the proceedings.

In **Serbia**, the Law on Free Legal Aid adopted in 2019, which entered into force on 1 October 2019, provides for free legal aid for victims of discrimination. However, the problem is that it is still unclear how this law applies in practice. Victims can also submit a complaint to the Commissioner for Protection of Equality, which is free of charge, as is the entire procedure. In **Sweden**, victims of sex discrimination in all contexts can be represented by the Equality Ombudsman without any costs. But the Ombudsman is free to choose which cases are taken to court and the number of cases brought is very limited (25 in 2014) in relation to the number of complaints (1 949 of which 224 were more closely scrutinised). Furthermore, trade unions also provide legal assistance free of charge.

In the **United Kingdom**, legal aid may be available in the county court and for judicial review applications in the high court, but the limitations on cases in which such aid is available, the very low income thresholds below which it is available and the restrictions on legal aid in public law challenges are such that it is of extremely limited assistance to prospective claimants. In **Greece**, legal aid is also subject to the condition that the remedy is admissible and not manifestly ill-founded. Victims of offences against sexual freedom or abuse of sexual life for financial benefit and victims of domestic violence who lodge penal complaints are exempted from litigation costs, without any conditions.

In **Austria**, statutory corporations for employees and the trade unions offer free legal consultations in labour and social security law and in urgent cases they provide free representation for all levels of jurisdiction for their members. Claimants can also file a petition to the relevant court for financial aid

concerning court fees, which may also include legal representation by an attorney. This can be granted if the claimant meets certain financial criteria and the claim poses legal difficulties in its pursuit.

(iii) Action by proxy of interest groups, equality bodies and social partners

When it comes to access to courts for anti-discrimination/gender equality interest groups or other legal entities that can act on behalf of or represent alleged victims of sex discrimination, this is provided for in quite a number of countries (**Austria**, **Belgium**, **Bulgaria**, **Croatia**, **Cyprus**, **Czech Republic**, **Denmark**, **Estonia**, **France**, **Greece**, **Hungary**, **Iceland**, **Italy**, **Latvia**, **Liechtenstein**, **Lithuania**, **Luxembourg**, **Montenegro**, **Netherlands**, **Norway**, **Portugal**, **Serbia**, **Spain**, **Sweden**). However, in **Greece** the relevant provisions are incorrectly worded (regarding the pre-requisites of recourse to courts by legal entities) and in any case not widely known and not often applied, as they have not been incorporated into the procedural codes. The ground acted upon may not always be gender discrimination, but e.g. protection of consumer rights (as was the case for *Test-Achats*) or simply trade unions providing legal assistance generally to their members (**Belgium**). This may be beneficial to the extent that they also bear the costs. However, the following brief overview reveals quite a number of limitations of the applicable national regulations for actions by proxy.

In **Austria**, such action is limited to the so-called 'Klagsverband', an umbrella organisation of several non-governmental organisations acting in the field of anti-discrimination. In **Portugal**, in the field of discrimination these actions are allowed in all cases where a collective interest regarding the promotion of equality is recognised to the entity that initiates the proceedings. In addition, collective representatives of a victim of discrimination (e.g. trade unions) can promote judicial actions on the victim's behalf or assist the victim in those actions. In **France**, trade unions have the right to act on behalf of an alleged victim of discrimination without being mandated as such, whereas other associations need the written consent of the claimant.

In **Spain**, in theory, there are many mechanisms for intervention by interest groups and legal entities for the defence of victims of discrimination. However, these actions are quite rare and most cases of gender discrimination submitted to the courts are pursued by individual victims. In **Serbia**, trade unions may also initiate proceedings in case of discrimination of larger groups of people or on behalf of individuals giving their consent.

In **Denmark**, **Finland** and **Italy** trade unions can bring cases as well and in **Bulgaria** and **Sweden** both trade unions and other non-profit organisations may bring discrimination cases to court, but with trade unions having a priority right to do so. The Gender Equality and Equal Treatment Commissioner in **Estonia** is calling for the right to go to court with discrimination cases, but the Ministry of Justice is opposing this proposal. In **Greece** NGOs have legal standing, but they have inadequate resources for actually bringing cases. In **Slovakia**, NGOs can represent victims only before regular courts, not the Constitutional Court.

The **Finnish** Ombudsman has a mandate to assist a victim in court, but the mandate has so far never been used. In other countries, such entities may not be entitled to bring legal action on behalf of the claimant as they must bring their own case (**Germany**, **Ireland**) and may only be supported by counsel or financially (**Finland**, **North Macedonia**, **United Kingdom**). In **Romania**, an amendment to gender equality law in 2012 limited the possibility for alleged victims to be represented by trade unions or NGOs to administrative procedures only, and not court proceedings. In **Turkey**, interest groups have no legal standing, so cannot act on behalf of a claimant, nor is there a right to start class actions. There is only legal standing for the Ministry of Family, Employment and Social Affairs.

Services. In **Montenegro**, an organisation engaged in the protection of fundamental rights may bring proceedings, but only with the consent of the person discriminated against. Likewise, in **Malta** legal entities with a 'legitimate interest' may engage themselves on behalf or in support of a complainant in all judicial proceedings, with the complainant's approval. **Polish** law rules out the possibility of group

proceedings in claims against employers, but it allows trade unions, NGOs and the Human Rights Defender to initiate a case on a claimant's behalf, provided they have the consent of the claimant.

10.5 Equality bodies

Since 2002, by virtue of Directive 2002/73/EC, the Member States and EEA countries have also been obliged to designate equality bodies. The tasks of these bodies are the promotion, analysis, monitoring and support of equal treatment of everyone 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 (Article 20 of Recast Directive 2006/54/EC and Article 12 of Directive 2004/113/EC).[412]

All states have put an equality body into place that seeks to implement the requirements of EU and national gender equality law, including **Turkey** as of very recently. However, these bodies differ in terms of purpose, competence and the discrimination grounds they can deal with. In some countries, there are specific bodies limited to dealing with gender equality issues (**Belgium**, **Croatia**, **Cyprus**, **Iceland**, **Italy**), whereas in most countries they can also act in defence of non-discrimination on other grounds (**Austria**, **Bulgaria**, **Czech Republic**, **Denmark**, **Estonia**, **Finland** (the Equality and Non-Discrimination Board, although the Equality Ombudsman has a mandate on the ground of gender), **France**, **Greece**, **Germany**, **Hungary**, **Ireland**, **Latvia**, **Liechtenstein**, **Lithuania**, **Luxembourg**, **Malta**, **Montenegro**, **Netherlands**, **North Macedonia**, **Norway**, **Poland**, **Serbia**, **Slovakia**, **Slovenia**, **Sweden**, **United Kingdom**). **Romania** has both types of bodies.

These bodies may just have an informative and/or research function (e.g. **Germany**, **Luxembourg**) or they may also investigate complaints, give legal advice and assistance, issue (non-binding) opinions, recommendations and warnings, try to obtain out-of-court settlements, bring cases to court, etc. (**Denmark**, **Estonia**, **Finland**, **Greece** (no recourse to courts), **Hungary**, **Iceland**, **Ireland**, **Italy**, **Lithuania**, **Montenegro**, **Norway**, **Poland** (no recourse to courts against private actors), **Serbia**, **Slovakia**, **Sweden**). Some equality bodies may also issue fines (**Cyprus**, **Hungary**, **Lithuania**) or impose sanctions (**Bulgaria**).

In **Hungary**, the Equal Treatment Agency can now require publication of its decisions not only on its own website but also on that of the defendant. In the past few years, the ETA's case law has also demonstrated a tendency towards choosing more serious sanctions from among its repertoire. In 2017, the amount of fines imposed thus reached a total of EUR 26 500 in 15 cases (out of 30 cases) in which a violation of equal treatment was found. The **Irish** Human Rights and Equality Commission can also invite a company or group of companies to carry out an equality review or to prepare and implement an equality action plan.

The situation in **North Macedonia** is rather opaque, as the law also provides for a special state agent to act as a gender equality body, but seemingly without having independent powers of investigation, monitoring and reporting. No information is available regarding its actual functioning. The Ombudsman can also protect people from sex discrimination, for example by representing groups of victims of discrimination in court. The Commission for Protection against Discrimination (the multi-mandate equality body) is also competent to act in cases of sex and gender discrimination in both the public and the private sector. It also has monitoring and reporting competences, including on these two grounds. However, it provides no visibility for gender equality in its mandate.

412 On equality bodies in general see Holtmaat, R. *Catalyst for change: Equality bodies according to Directive 2000/43/EC* 2007, available at: https://www.equalitylaw.eu/downloads/1199-catalysts-for-change-en.

The **Croatian** expert has noted that many victims feel more confident complaining to the Ombudsperson for Gender Equality in out-of-court, less formal proceedings at no cost than when going to court. The same applies in **Greece** where the Ombudsperson investigates 300-400 individual complaints annually. Similarly, in **Portugal** the difference between the reduced number of actions brought before the courts and the intense work of the national equality body (CITE) gives grounds for concluding that the more effective action regarding practical implementation takes place outside the courts. Alleged victims of discrimination also have the right to seek advice and to report discriminatory practices to both CITE and the Labour Inspection Services.

The **Polish** expert has also observed that practice shows that often more can be achieved through direct contacts between the Labour Inspectorate and the employer than by going to court, referring to a wide investigation involving 581 companies regarding the dismissals of people returning from maternity, paternity and parental leave and the observance of other employee rights. **Turkey** has put into place the Human Rights and Equality Institution based on a new Act that entered into force in April 2016, through which two gaps in relation to gender equality were closed: the lack of a specific law on non-discrimination and the lack of an equality body. Turkey also has an Ombudsman institution, and one of the five Ombudspersons is responsible for women and children. It can try to settle complaints but also seek to obtain a judicial settlement if need be, in which case the judge will consider the (non-binding) report of the Ombudsperson.

The **French** Defender of Rights body can also help victims to make a case against agents of discrimination and, thanks to special powers, can 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. Another noteworthy development concerns the establishment of Anti-discrimination Bureaux (ADVs) in the **Netherlands**; all municipalities are obliged to establish and subsidise an ADV, the main task of these Bureaux being to assist victims of discrimination and to monitor the situation in this regard. While the **Estonian** Gender Equality and Equal Treatment Commissioner receives more complaints every year, its resources are scant.

In **Montenegro**, the Ombudsman was given the role of monitoring discrimination cases processed before various enforcement bodies. Apart from shortcomings in human and financial resources, the Ombudsman has reported that its work is made more difficult due to the lack of case records relating to discrimination. Although the Law on Prohibition of Discrimination is clear and imperative, the bylaws and regulations to this Act are entirely vague and ambiguous, which has also already been reported by the Ombudsman, as has the inconsistency and inaccuracy of the Rulebook on the Content and Manner of Keeping Separate Records on Cases of Reported Discrimination,[413] which is supposed to provide for the establishment of special records in the form of an electronic database, enabling immediate access to data to the Ombudsman.[414]

In December 2016, the **Swedish** Government appointed a Committee to prepare a new public authority tasked with ensuring monitoring, analysis, coordination and necessary support in the area of gender equality. This authority will be operational from 1 January 2018.

10.6 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

413 Official Gazette of Montenegro no. 50/2014.
414 Official Gazette of Montenegro no. 50/2014, p. 135.

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 (Articles 21 and 22 of Recast Directive 2006/54/EC and Article 11 of Directive 2004/113/EC).

However, it appears that in some countries social partners do not play any particular role of significance in this regard (**Bulgaria**, **Czech Republic**, **Estonia**, **Latvia**, **Lithuania**, **Luxembourg**, **Romania**, **Slovakia**, **Turkey**, **United Kingdom**) or it is unclear what the results are (**Iceland**, **Italy**, **North Macedonia**, **Malta**).

In other countries, social partners fulfil more visible roles in the development and promotion of gender equality law, by:

- giving opinions (**Austria**, **Belgium**, **Croatia**), also in court cases (**Poland**);
- monitoring the application by employers of labour provisions (**Poland**);
- initiating legal action, including assistance of trade union members in individual cases (**Belgium**, **Finland**, **Greece**, **Hungary**, **Poland**, **Sweden**) or intervening in labour law disputes in favour of litigants (**Greece**);
- stimulating discussion on certain issues, such as equal pay and positive action (**Netherlands**, **Sweden**, **Greece**);
- engaging with equality bodies (**Liechtenstein**, **Croatia**);
- representatives of social partners being statutory members of the national equal treatment commission or body (**Italy**) and the right to co-decide on the commission's opinion (**Austria**);
- there being a legal obligation to present and discuss new legislation with the social partners, and the breach of this stipulation making it unconstitutional and therefore not applicable (**Portugal**) or there being a tradition to involve social partners in such discussion (**Croatia**, **Norway**, **Slovenia**);
- in **Estonia**, after the national parliamentary elections in spring of 2015, the Gender Equality Council, an advisory body of the Ministry of Social Affairs consisting of 22 representatives of different organisations, submitted recommendations for the Government to promote gender equality in 2015-2018, sending them to all parties represented in the new Parliament;[415]
- collective agreements (see Section 10.7).

In some other countries, the role of social partners in this area is quite strong. In **France**, there has been a long tradition of involving the social partners mainly through the obligation to negotiate annually on equality and the gender gap. Since 2012, sanctions can be imposed on companies that do not respect their obligation to negotiate and to conclude agreements on gender equality. In **Ireland**, both employers' bodies and trade unions have been considered effective in implementing equality legislation, without there being legislative provisions on this. In **Cyprus**, the social partners play an important role in the application of gender equality law through the Labour Advisory Body. In **Serbia**, the Confederation of Autonomous Trade Unions has had a specific Women's Section since 2002, which takes a variety of initiatives to combat gender discrimination and to reinforce women's rights and protection of maternity. Interestingly, Serbian law also provides that in collective negotiations, trade unions and employers' organisations should make an effort to ensure that 30 % of the representatives of the least represented sex are included in the negotiation committees.

415 The recommendations prioritised five objectives: 1) reducing the negative impact of gender stereotypes in everyday life and on the decisions of women and men and on the development of economy and society; 2) supporting equal economic independence for women and men; 3) increasing gender balance at all levels of management and decision-making; 4) increasing the quality of life for both women and men; and 5) supporting systematic and effective implementation of gender mainstreaming. In 2016, the Council also gave its comments to the draft Welfare Development Plan 2016-2023 which includes the Government's gender equality policy priorities and also reflects the Council's previous proposals.

In **Greece**, large trade unions have special Secretariats for Women/Equality; however, possibilities for the unions to bring discrimination cases to court is limited by the inadequate transposition of the relevant EU law provisions and the non-incorporation of the relevant national provisions into the procedural codes. In **Finland**, trade unions can also bring cases to the Labour Court and to the Equality and Non-Discrimination Board and the social partners are influential in proposing and drafting legislation regarding all issues of working life, including all gender equality law. The social partners traditionally also have joint discussions on gender equality issues.

In other countries, this role could possibly be bigger given the strong position of trade unions. In **Sweden**, the labour market is characterised by a high level of organisational involvement, both at the employers' and the employees' level, with about 75 % of workers being affiliated to a trade union. The role played by the social partners is crucial to non-discrimination law. The Discrimination Act thus requires the employer to cooperate with trade unions on active measures to bring about equal rights and opportunities and to combat discrimination in working life. The Act also states that a trade union to whom the employer is bound by collective agreement has the right to obtain necessary information to collaborate on the monitoring of wage statistics and pay equality. Trade unions and employers are aware of the risk of wage discrimination when negotiating wages, and most trade unions have particular policies to come to terms with and prevent an augmentation of the gender pay gap. Moreover, the trade union has a priority right to bring an action on behalf of its members (in fact many discrimination cases brought before court are brought by trade unions). Social partners also play a predominant role in the **Danish** labour market. Most employment law cases brought before the ordinary courts are brought by a trade union on behalf of a member and, if a claim is based on a collective agreement, the social partners are the only parties who can enforce it. Although in **Portugal** all legal provisions concerning labour law are discussed with the social partners on a regular basis, including provisions on gender equality, gender equality is not traditionally considered an important issue by the social partners.

10.7 Collective agreements

In an extension of the previous section, when it comes specifically to the relevance of collective agreements as a means to implement EU gender equality law, the national systems also show a divergent picture. More generally, collective agreements may be binding as a contract but in most states they are not generally binding for non-signatory parties unless a specific measure to that effect has been taken.

In some states collective agreements are of considerable importance for the promotion of equality (**Austria**, **Greece**, **Sweden**). In **Sweden**, collective agreements determine working conditions in general and especially regarding pay. Such collective agreements are legally binding for employers and members of the signing trade union. As pay regulation rests entirely with the social partners they are also under a duty to address the gender pay gap, but they have to do so only on the basis of the general ban on discrimination as no other specific rules apply in this regard. However, given the social partners' autonomy and the strongly gender-segregated nature of the Swedish labour market, it is in fact difficult to assess the Swedish wage-setting system. In **Austria** as well, collective agreements are the basis for national wage policies and can also cover various workplace policies. The state does not influence the collective bargaining process and collective agreements have the legal status of binding general labour ordinances. Their personal scope applies to all enterprises and to all workers of the relevant sector or industry and covers the entire state territory or at least regional areas (such as one of the provinces). Collective bargaining parties have observed the equal pay principle for many years, resulting for instance in the elimination of special low wage groups for female workers. Collective agreements are also used to implement progressive provisions such as additional paid or unpaid parental leave periods, positive action measures etc. **Portugal** shows an interesting approach regarding the enforcement of the equal pay principle via collective agreements, as its Labour Code establishes that whenever a collective agreement or internal provision of company regulations restricts a certain type of remuneration to men or to women, these stipulations are automatically applicable to employees of both sexes, provided they perform equal

work or work of the same value. Furthermore, the Labour Code also provides for assessment of collective agreements on possible discriminatory clauses by the national equality body, just after the publication of these agreements. This has proven to be very effective, either because the equality body convinces the social partners to change the clause in question, or, when this does not happen, because the court declares the clause null and void. In **Cyprus**, collective agreements are also used as a tool to implement gender equality law, but they have no force of law. While collective agreements are not generally applicable in **Denmark**, they are still an important source of law as gender equality legislation is subsidiary to collective agreements, providing for similar protection as prescribed by legislation. In **Belgium** a specific collective agreement on equal pay was adopted in the past, which has been declared generally binding by a Royal Decree. In the **Netherlands**, collective agreements provide for supplementary, more beneficial rules than those contained in legislation regarding inter alia the right to childcare facilities, care leave and parental leave. Since the incorporation of the gender equality principle in the **Greek** Constitution, the social partners have often included gender equality issues in collective bargaining and have gradually eradicated direct discrimination in pay, yet this has not been the case for indirect discrimination regarding professional classification in collective agreements. They have also improved maternity and parenthood protection. In **Norway**, eight collective agreements have been made nationally applicable to secure equal pay in certain sectors and all the main agreements refer to gender equality as a specific target.

However, it has also been signalled that collective agreements are not used as a (real) means to implement EU gender equality law (**Bulgaria**, **Czech Republic**, **Estonia**, **Finland**, **Germany**, **Hungary**, **Iceland**, **Italy**, **Latvia**, **Lithuania**, **Luxembourg**, **Malta**, **Montenegro**, **Poland**, **Romania**, **Slovenia**, **Turkey**, the **United Kingdom**), that not all collective agreements contain clauses geared towards ensuring equality (**North Macedonia**, **Liechtenstein**), or when they do contain some innovative measures, these may be merely formal without any concrete measures having been taken (**France**). Furthermore, collective agreements may even contain provisions inciting inequalities based on sex (**Croatia**, **Germany**). In **Germany**, the still mostly male-dominated nature of social partner organisations is also considered an obstacle for using collective agreements as an effective means to implement gender equality law. In **Hungary**, collective agreements are mainly concluded at company level and since collective agreements may deviate from legislation, they are not deemed a suitable means for implementing equality law. Under the new Labour Code, collective agreements are used to reduce workers' rights. In **Finland**, collective agreements are not used for implementing EU gender equality law, except possibly soft-law measures in the form of recommendations addressed to the social partners. In **Greece**, since 2010, the system of collective agreements has gradually been dismantled through repeated and extensive statutory interventions in collective bargaining. Furthermore, the collective agreement hierarchy was reversed, so that enterprise-level agreements (where women's bargaining power is weaker) prevail over sectoral agreements. Minimum-wage fixing has also been removed from collective bargaining for the whole country and minimum wages have now been reduced by statute in a way which is discriminatory on grounds of age. These measures are required by Memoranda of Understanding as bailout conditionalities. In **Slovakia**, equal opportunity issues included in collective agreements mostly concerned the working conditions of pregnant women and employees taking care of young children. In **Luxembourg**, there is a legal obligation for social partners to refer to the results of the negotiations, including on the application of equality plans for women and men, but this is not considered very effective, since social partners mostly limit themselves to observing that this matter has been discussed.

Sometimes, collective agreements may still contain rules violating equal treatment legislation as revealed by a recently published case from the **Hungarian** Equal Treatment Authority. The collective agreement in this case contained a rule based on which the employer did not provide a voucher (a form of benefit) to the employee while she was on maternity leave. The ETA and the labour court established that this violated the regulations on equal wages and the employer was obliged by the court to pay the wage difference to the employee. No further sanctions were applied.[416]

416 Hungary, EBH/19/2016 http://egyenlobanasmod.hu/hu/jogeset/ebh192016.

11 Overall assessment: law on the books versus law in practice

The comparative analysis presented in this report of the legal state of affairs in 36 European countries in all fields covered by EU gender equality law shows that much has been achieved. However, it is also clear that many concerns remain. Despite the regulations in force in these states, it appears that in many countries specific problems of proper transposition and application of EU gender equality law remain in all areas. These not only to substantive deficiencies of legislation and its application by national courts, but also to the 'patchwork' nature of applicable national laws, which affects the clarity and consistency of the overall body of national gender equality law. Some experts also consider that transposition has remained a rather formal process, equality laws never really being scrutinised and modified in order to support the substantial and genuine equality of women and to assess whether these laws produce the desired results.

In addition to specific problems of national equality law, the report has also revealed quite a number of more general problems that occur in many states or at least in a considerable number of them.

The gender pay gap remains one of the main concerns. On a positive note in this respect, we can see the reinforcement of legal frameworks and the development of some practical tools in various states with a view to enhancing the application of the equal pay principle and to bring about actual progress. The most telling example of this concerns the introduction of a mandatory equal pay certification system, based on an equal pay management standard in **Iceland**, but also of a free software application to measure the pay gap in **Poland**.

Nevertheless, the Pay Transparency Act introduced in 2017 in **Germany** still reveals several deficiencies that will hamper true progress and continue to act as barriers to access to justice, such as the need for comparable employees and problems concerning the burden of proof. The exception for remuneration systems under collective agreements is also an important obstacle to the analysis and removal of structural pay discrimination. Moreover, without the ability to bring collective or class actions, more rights for works councils and binding obligations, the principle of equal pay will not be strengthened by insulated transparency measures.[417] In this respect, more transparency should be considered as a condition, but not a substitute, for anti-discrimination law enforcement.

Another general concern relates to the enforcement of equality law, which can be seen as one of the major challenges to overcome in the future, as the lack of litigation in most states can be taken as an indicator that the practical effectiveness of the legal framework is weak. In Section 10.4, a broad range of factors explaining the low level of litigation have been identified, which are in need of more in-depth investigation and also require a more comprehensive policy strategy to overcome them. These factors also expose other general problems, such as the lack of transparency and access to information. It is not only wages and pay systems that fall short in terms of transparency and accessibility of data and statistics, but also, for instance, gender equality case law. In some states, this case law is not published or is very poorly accessible. This is not only a likely cause of inconsistent interpretation by courts, but it also does not add to the general awareness of gender equality law among all parties concerned. In this context, the limited or incorrect media coverage of gender discrimination cases may also be criticised. This state of affairs reinforces another commonly encountered problem: the lack of specific knowledge and expertise on the part of courts and equality bodies, as well as of lawyers and potential victims of gender discrimination.

Effective enforcement is also very much hampered by the length and costs of legal proceedings, the **United Kingdom** expert framing this very pointedly by observing that 'the real problem across the United Kingdom is that enforcement is difficult and increasingly expensive to the extent that the legal rights are in danger of becoming paper entitlements only'. The **Norwegian** situation is also telling in this regard,

417 See German Women Lawyers' Association, https://www.djb.de/verein/Kom-u-AS/K1/st17-05/; https://www.djb.de/verein/Kom-u-AS/K1/pm18-11/.

where most discrimination cases are brought to the Equality and Anti-discrimination Tribunal because of the low threshold and it being free of charge.

On top of this, the low levels of compensation awarded in many states by the courts also creates a disincentive for bringing cases to court at all. The fact that many national laws contain upper limits of compensation also raises serious doubts as to the compatibility with EU law requirements. Only the **French** and **Irish** reports show some optimism in this regard, demonstrating an increase in the number of court cases and more familiarity with the instruments on regulating discrimination and good accessibility of court rulings.

Another issue concerns the role taken by social partners in implementing and promoting gender equality law. The picture emerging here is that in many countries the social partners could play a more active role in this regard and that much more could be done. The autonomy of social partners in some countries, which sometimes allows them to deviate from legislation, has, in fact, not contributed much to gender equality to date. In some cases it has even had a negative effect. Social partners could give more weight and priority to gender equality in collective bargaining and agreements. More generally, several experts have observed that there is a lack of attention or sense of urgency with regard to gender equality and that more could be done, including at the levels of the legislature and executive authorities when it comes to mainstreaming gender equality into all policies, but also at the level of equality bodies. Recent political and administrative reforms in a number of countries are exacerbating this problem, as well as jeopardising the independence of the judiciary and/or equality bodies (**Estonia**, **Hungary**, **Poland**).

Last but not least, a very worrying issue raised in some reports concerns multiple discrimination and the current reinforcement of gender stereotypes, traditional family values and traditional gender roles limiting women's free choices that is filtering through in national policies, legislation and case law. In some countries, this is clearly related to conservative governments being in place (**Hungary**, **Poland**). Recent measures of concern in **Poland** are: the establishment of a child benefit system that encourages women to leave the labour market; budget cuts regarding the activities of the Commissioner for Human Rights; and the police investigation of the financial administration of the Centre for Women's Rights, the most active women's NGO. In other countries, it may be related to the financial crisis and austerity policies (**Greece**). Media content may also still be characterised by sexism and misogyny (**Serbia**).

Another highly worrying, connected issue concerns the number of cases of (sexual) harassment, domestic and gender-based violence (e.g. **Montenegro**). Although in some countries new laws have been introduced to reinforce protection against and to prevent and punish such harassment and violence (**Estonia**, **Portugal**, **Serbia**) or such protection has been reinforced through case law (**Germany**), the level of protection offered by domestic laws in other countries is deemed insufficient. For instance, people who experience such offences may not be considered as 'vulnerable victims' (**Slovakia**) or compensation for damage inflicted may be limited to cases of physical violence (**Germany**). It must be watched closely whether and how this tendency develops in the near future.

Annex 1 – EU gender equality Directives

Directive 79/7/EEC

http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31979L0007

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, 10.1.1979, p. 24–25 (DA, DE, EN, FR, IT, NL)
Greek special edition: Chapter 05 Volume 003 P. 160 - 162
Spanish special edition: Chapter 05 Volume 002 P. 174 - 175
Portuguese special edition: Chapter 05 Volume 002 P. 174 - 175
Special edition in Finnish: Chapter 05 Volume 002 P. 111 - 112
Special edition in Swedish: Chapter 05 Volume 002 P. 111 - 112
Special edition in Czech: Chapter 05 Volume 001 P. 215 - 216
Special edition in Estonian: Chapter 05 Volume 001 P. 215 - 216
Special edition in Latvian: Chapter 05 Volume 001 P. 215 - 216
Special edition in Lithuanian: Chapter 05 Volume 001 P. 215 - 216
Special edition in Hungarian Chapter 05 Volume 001 P. 215 - 216
Special edition in Maltese: Chapter 05 Volume 001 P. 215 - 216
Special edition in Polish: Chapter 05 Volume 001 P. 215 - 216
Special edition in Slovak: Chapter 05 Volume 001 P. 215 - 216
Special edition in Slovene: Chapter 05 Volume 001 P. 215 - 216
Special edition in Bulgarian: Chapter 05 Volume 001 P. 192 - 193
Special edition in Romanian: Chapter 05 Volume 001 P. 192 - 193
Special edition in Croatian: Chapter 05 Volume 003 P. 7 - 8

This Directive applies to statutory social security schemes and prohibits direct and indirect discrimination based on sex, in particular with reference to family or marital status, with respect to the scope of the schemes and the conditions for accessing them. It specifies that measures taken for the protection of women in relation to maternity shall not be affected by the principle of equal treatment.

Directive 92/85/EEC

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992L0085

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, 28.11.1992, p. 1–7 (ES, DA, DE, EL, EN, FR, IT, NL, PT)
Special edition in Finnish: Chapter 05 Volume 006 P. 3 - 10
Special edition in Swedish: Chapter 05 Volume 006 P. 3 - 10
Special edition in Czech: Chapter 05 Volume 002 P. 110 - 117
Special edition in Estonian: Chapter 05 Volume 002 P. 110 - 116
Special edition in Latvian: Chapter 05 Volume 002 P. 110 - 117
Special edition in Lithuanian: Chapter 05 Volume 002 P. 110 - 117
Special edition in Hungarian Chapter 05 Volume 002 P. 110 - 116
Special edition in Maltese: Chapter 05 Volume 002 P. 110 - 116
Special edition in Polish: Chapter 05 Volume 002 P. 110 - 117

Special edition in Slovak: Chapter 05 Volume 002 P. 110 - 117
Special edition in Slovene: Chapter 05 Volume 002 P. 110 - 117
Special edition in Bulgarian: Chapter 05 Volume 003 P. 3 - 10
Special edition in Romanian: Chapter 05 Volume 003 P. 3 - 10
Special edition in Croatian: Chapter 05 Volume 004 P. 73 - 80

Directive 92/85/EEC regulates the basic rights of workers during pregnancy and after childbirth. It lays down protective measures in relation to hazardous or risky working conditions, nightwork, mandatory maternity leave, ante-natal examinations, protection from dismissal from employment and the maintenance of employment rights.

Directive 2004/113/EC

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0113

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, 21.12.2004, p. 37–43 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV)
OJ L 153M, 7.6.2006, p. 294–300 (MT)
Special edition in Bulgarian: Chapter 05 Volume 007 P. 135 - 141
Special edition in Romanian: Chapter 05 Volume 007 P. 135 - 141
Special edition in Croatian: Chapter 05 Volume 001 P. 101 - 107

This Directive prohibits direct and indirect discrimination based on sex, as well as harassment and sexual harassment, in the provision of goods and services within the European Union. The Directive applies to anyone who provides goods and services that are publicly available. This includes public bodies and covers the public and private sphere in the case of any goods and services that are offered beyond transactions carried out in the context of private and family life.

Directive 2006/54/EC

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054

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, 26.7.2006, p. 23–36 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, SK, SL, FI, SV)
Special edition in Bulgarian: Chapter 05 Volume 008 P. 262 - 275
Special edition in Romanian: Chapter 05 Volume 008 P. 262 - 275
Special edition in Croatian: Chapter 05 Volume 001 P. 246 - 259

Directive 2006/54, also known as the Recast Directive, implements the principle of equal treatment between women and men in the domain of European Union labour law. The Directive has brought together some older directives and requires the implementation of the prohibition of direct and indirect sex discrimination, harassment and sexual harassment in pay, (access to) employment and in occupational social security schemes.

Directive 2010/18/EU

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010L0018

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, 18.3.2010, p. 13–20 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV)
Special edition in Croatian: Chapter 05 Volume 003 P. 276 - 283

This Directive concerns the basic right of all parents in the European Union to parental leave. It also provides for the right to return to the original job after the leave (or a similar position) and to maintain any previously acquired employment-related rights, determines the kind of conditions employers may apply to the leave, and addresses the needs of adoptive parents. Moreover, it provides for the right to time off for urgent family reasons, sickness or accidents.

Directive 2010/41/EU

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32010L0041

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, 15.7.2010, p. 1–6 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV)
Special edition in Croatian: Chapter 05 Volume 002 P. 245 – 250

Directive 2010/41/EU implements the principles of equal treatment and non-discrimination with respect to self-employment. It sets out provisions in relation to matters such as maternity benefits and social protection.

Directive 2019/1158/EU

https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1587715419893&uri=CELEX:32019L1158

Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU

PE/20/2019/REV/1
OJ L 188, 12.7.2019, p. 79–93 (BG, ES, CS, DA, DE, ET, EL, EN, FR, GA, HR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV)

The new Directive 2019/1158/EU concerns anyone who has an employment contract or is in an employment relationship defined by law, and lays down minimum requirements with respect to paternity leave, parental leave, carers leave and flexible working arrangements, to apply across all EU Member States. It also contains provisions on acquired employment rights, as well as protection from dismissal and adverse treatment or consequences.

Annex 2 – Equality bodies[418]

Albania
– Commissioner for the Protection from Discrimination

Austria
– Ombud for Equal Treatment
– Austrian Disability Ombudsman

Belgium
– Unia (Interfederal Centre for Equal Opportunities)
– Institute for the Equality of Women and Men
– Federal Centre for Migration (Myria)

Bulgaria
– Commission for Protection Against Discrimination

Croatia
– Office of the Ombudsman
– Ombudsperson for Gender Equality
– Ombudswoman for Persons with Disabilities

Cyprus
– Office of the Commissioner for Administration and the Protection of Human Rights (Ombudsman)

Czech Republic
– Public Defender of Rights

Denmark
– Board of Equal Treatment
– Danish Institute for Human Rights

Estonia
– Gender Equality and Equal Treatment Commissioner
– Chancellor of Justice

Finland
– Ombudsman for Equality
– Non-Discrimination Ombudsman

France
– Defender of Rights

Germany
– Federal Anti-Discrimination Agency – FADA

Greece
– Greek Ombudsman

418 See also https://equineteurope.org/what-are-equality-bodies/.

Hungary
– Equal Treatment Authority
– Office of the Commissioner for Fundamental Rights

Iceland
– Centre for Gender Equality

Ireland
– Irish Human Rights and Equality Commission

Italy
– National Equality Councillor
– National Office against Racial Discrimination – UNAR

Latvia
– Office of the Ombudsman

Liechtenstein
– Office for Social Services
– Association for Human Rights

Lithuania
– Office of the Equal Opportunities Ombudsperson

Luxembourg
– Centre for Equal Treatment

Malta
– Commission for the Rights of Persons with Disability - CRPD
– National Commission for the Promotion of Equality – NCPE

Montenegro
– Protector of Human Rights and Freedoms of Montenegro (Ombudsman)

Netherlands
– Netherlands Institute for Human Rights (formerly Equal Treatment Commission)

North Macedonia
– Commission for Protection against Discrimination

Norway
– Equality and Anti-Discrimination Ombud – LDO
– Equality and Anti-Discrimination Tribunal

Poland
– Commissioner for Human Rights

Portugal
– High Commission for Migration
– Commission for Citizenship and Gender Equality - CIG
– Commission for Equality in Labour and Employment – CITE

Romania
– National Council for Combating Discrimination – CNCD

Serbia
– Commissioner for the Protection of Equality

Slovakia
– National Centre for Human Rights

Slovenia
– Advocate of the Principle of Equality

Spain
– Institute of Women and for Equal Opportunities
– Council for the Elimination of Racial or Ethnic Discrimination

Sweden
– Equality Ombudsman

Turkey
– Human Rights and Equality Institution

United Kingdom
– Great Britain - Equality and Human Rights Commission (EHRC)
– Northern Ireland - Equality Commission for Northern Ireland

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