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EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

The Personal Scope of the EU Sex Equality Directives

Nicola Countouris and Mark Freedland

European Commission
Directorate-General for Justice
Unit JUST/D1
Equal Treatment Legislation

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Part I

The Personal Scope of the EU Sex Equality Directives Executive Summary

Nicola Countouris* and Mark Freedland**

1. Introduction

1.a. Aims of the report

The primary aim of the present report of the European Network of Legal Experts in the Field of Gender Equality is to clarify how the personal scope provisions of the main EU sex equality directives,¹ and of the Pregnant Workers and Parental Leave Directives,² have been implemented in the national laws of the 27 EU Member States, Croatia (now an Acceding Country), EFTA countries (Liechtenstein, Norway, and Iceland) and the two EU candidate countries (FYR of Macedonia and Turkey). The secondary aim is to identify and analyse any inconsistencies and gaps in protection that may result from the national implementation of the personal scope of these instruments, in particular in respect of workers employed under non-standard contracts of employment or work. As such the report is not directly concerned with the substantive or procedural rights and entitlements conferred by these directives, and is only marginally concerned with their material scope of application (see below 1.b.). Similarly the report is not directly concerned with the personal scope of application of Directives 2000/43/EC and 2000/78/EC,³ although the personal scope provisions of those anti-discrimination directives are to some extent explored insofar as this can shed some light upon the personal scope of application of the instruments covered by the present report.

1.b. The personal and material scope of application of EU sex equality directives

While this report is primarily concerned with the personal scope of application of the Directives referred to above, some of the questions addressed to the national experts are, perhaps inevitably, concerned with matters that pertain more directly to the scope *ratione materiae* of the instruments in question. There is a simple explanation for this, but one that may need to be clarified at an early stage to avoid any confusion. The various instruments

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¹ 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), [2006] OJ L 204/23; 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, [2004] OJ L 373/37; and Directive 2010/41/EU 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, [2010] OJ L 180/1. For reasons of convenience, in the remainder of this document, these instruments will be occasionally referred to as ‘the Recast Directive’, ‘the Goods and Services Directive’, and ‘the Self-employed Directive’.

² Respectively 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), [1992] OJ L 348/1; 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, [2010] OJ L 68/13. For reasons of convenience, in the remainder of this document, these instruments will be occasionally referred to as ‘the Pregnant Workers Directive’ and ‘the Parental Leave Directive’.

³ Respectively Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22; and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

covered by this report are often shaped by reference to slightly different personal scopes. So, for instance, and to state the obvious, the personal scope of application of the Pregnant Workers Directive 92/85/EEC (Articles 1 and 2) differs from the one used in the Self-employed Directive 2010/41/EU (Articles 1 and 2). Perhaps most importantly, sometimes different rights or entitlements are conferred upon or accorded to different types and definitions of workers by different provisions within the same directive. For example, within Directive 2006/54/EC (the Recast Directive) the wording used to define the personal scope of application of the substantive protections in relation to ‘Equal pay’ (Title II, Chapter 1, Article 4), ‘Equal treatment in occupational social security schemes’ (Title II, Chapter 2, Article 6) and ‘Equal treatment as regards access to employment, vocational training and promotion and working conditions’ (Article 14) varies considerably depending on the subject and substantive rights covered by the provision in question. This is a peculiarity that has not escaped the attention of the European Court of Justice,⁴ and one that had to be reflected in the report’s questionnaire and the responses provided by the Network’s national experts (see for instance the comments in the introductory sections of the Belgian report). The remainder of this report provides a detailed and systematic assessment of the various provisions that define, or contribute to defining, the personal scope of application of the five aforementioned Directives and, broadly speaking, of EU sex equality law.

2. The personal scope of Directive 2006/54/EC (Recast Directive)

Directive 2006/54/EC prohibits discrimination on grounds of sex in matters of pay (Article 4), occupational social security schemes (Article 5), and access to employment, vocational training and promotion and working conditions (Article 14).⁵ As noted above, the personal scope of the protections applicable in each of these three fields or circumstances is cast in slightly different language and by reference to slightly different formulae. So for instance the right to equal pay for equal work or work of equal value is spelled out in very general terms, and has been so since the adoption of Directive 75/117/EEC,⁶ and it was not until the 2004 decision of *Allonby* that the Court of Justice clarified that it was applicable to all ‘workers’ (the term traditionally used in the Treaty provisions on equal pay since Article 119 of the Treaty of Rome) as broadly understood under its jurisprudence on free movement of workers.⁷

By comparison, the wording used in Article 14 appears to be more specifically articulated and is framed by reference to the material circumstances, listed under heads (a)-(d), to which the equal treatment obligation applies. However it is worth noting that, due to the heterogeneity of the circumstances and areas covered by these heads, this formula does not necessarily result in a coherent, let alone single or distinct, personal scope for these ‘equal treatment’ provisions of the Directive. For instance, as it will be further discussed below under subsections c. and e., Article 14(1)(a) refers to ‘conditions for access to employment, to self-employment or to occupation’, thus making an explicit reference to self-employed persons, whereas 14(1)(c) covers ‘employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty’ (now 157 TFEU), which at least in

⁴ See for instance Paragraph [63] of Case C-256/01, *Allonby v Accrington & Rossendale College* [2004] ECR I-873, ‘there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied’.

⁵ The Gender Equality Network has also produced an updated report on the transposition of Directive 2006/54/EC ‘The Transposition of the Recast Directive 2006/54/EC’ (2011), available on http://ec.europa.eu/justice/gender-equality/files/recast_update2011_final_en.pdf.

⁶ Article 1 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L 45/19.

⁷ Case C-256/01, *Allonby*, above, Paragraphs [66]-[72], and see the explicit references to ‘the context of free movement of workers, Case 344/87 *Bettray* [1989] ECR 1621, Paragraph 16, and Case C-357/89 *Raulin* [1992] ECR I-1027, Paragraph 10’, in Paragraph [70]. This ‘worker’ definition is extremely broad, and is based on a jurisprudence that covers atypical workers as long as their activity is subordinate and is not purely marginal or ancillary. See to that effect Case 53/81, *Levin*, [1982] ECR 1035, Paragraph [12].

the part referring to ‘pay’ is likely to be construed by reference to the *Allonby* concept of ‘worker’ referred to above, which does not cover the self-employed.

The provisions concerning equal treatment in occupational social security schemes apply, according to Article 6, to ‘members of the working population, including self-employed persons’ as well as to inactive ‘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’. But this generous scope, and the explicit coverage of self-employed persons, is diminished by the exclusions contained in Article 8 and the deferral options contained in Article 11.

When looking at the Recast Directive we are therefore confronted with a rather fragmented personal and material scope of application. This heterogeneity can in many ways be seen as a legacy of the distinct strands of EU equality law that the Recast Directive seeks to consolidate, although evidently in a less than complete way. It is also arguable that this fragmentation of scopes is at least in part due to the circumstance that, since the inclusion of what was then Article 13 in the EC Treaty at Amsterdam in 1997, the EU has made a conscious effort to streamline the personal scope of its ‘equal treatment’ instruments by reference to the formula first inaugurated in Directives 2000/43/EC and 2000/78/EC,⁸ whereas equal pay provisions have remained anchored to the ‘worker’ concept contained in what is now Article 157(1) TFEU. Unsurprisingly this complexity is in many ways reflected by the national implementing measures, as evidenced by the national reports appearing in Part II of the present work and as discussed in the following sections of this Executive Summary.

2.a. Equal pay provisions (Article 4)

National experts were asked to comment on the transposition of Article 4 in general, and on whether various typologies of ‘atypical’ or vulnerable and precarious workers (including, where present, ‘quasi-subordinate’ workers)⁹ are covered by the domestic equal pay provisions. No national expert (possibly with the exception of the German and Latvian experts) has raised any particular concern in respect of the adequacy of the national implementation of Article 4 of the Recast Directive. From the information gathered, it would appear that in all the systems surveyed, domestic provisions on equal pay apply – at the very least – to a suitably broad notion of (private or public sector) ‘worker’ or ‘employee’, which would cover a wide range of specifically regulated (e.g. France, Hungary) or generally defined categories of atypical employment or work contracts (cf. the reports from Denmark, Finland and Germany). So for instance the Czech Antidiscrimination Act of 2009 includes precarious or atypical workers employed under ‘agreements on work performance’ and ‘agreements on work activity’ (as per Articles 74-77 of the Czech Labour Code), the Polish Antidiscrimination Law of 2010 covers all kinds of ‘work performed on the basis of civil contracts’, while the Finnish Act on Equality between Women and Men includes, in its Section 3(1), a reference to ‘persons working in other legal relationships that are comparable to an employment relationship’. This broad scope of application appears to be in line with the jurisprudence developed since *Allonby*¹⁰ – an equal pay case – in which the notion of ‘worker’ for the purposes of what is now Article 157 TFEU was defined as mirroring the – notoriously broad – notion of ‘worker’ as developed by the Court of Justice in the context of ‘free movement of workers’.

⁸ The formula adopted in Article 14(1)(a) is for all purposes identical to the one displayed by Article 3(1)(a) of Directive 2000/43/EC, although this approximation had already taken place with the adoption of Directive 2002/73/EC which was adopted under what was then Article 141(3) to amend the Equal Treatment Directive 76/207/EEC (which did not cover access to self-employment, for instance) ‘with the explicit goal of bringing it into line with the employment aspects of the Article 13 Directives’, as noted in C. Barnard, *EC Employment Law* (OUP, Oxford, 2006), 383.

⁹ On the notion of ‘quasi-subordination’ and associated concepts, cf. A. Perulli, ‘Study on economically dependent work/parasubordinate (quasi-subordinate) work’ (2002) available on http://www.europarl.europa.eu/hearings/20030619/empl/study_en.pdf.

¹⁰ See above, notes 4 and 7.

It is also noteworthy that some systems (for instance Greece, Finland, and to some extent France and Italy, although the experts express some concerns in respect of the judicial enforcement of the provisions), appear to have extended the equal pay protections beyond the contract of employment – and beyond the *Allonby* requirements – to cover both contracts of self-employment and/or contracts or relationships for personal work or services. Where a legal system contemplates intermediate categories of quasi-subordinate workers (e.g. Portugal, Spain and the UK) the latter are often covered by equal pay provisions. The Croatian expert reported that domestic equal pay legislation is also applicable to ‘volunteering’.

2.b. Equal treatment in occupational social security schemes (Article 6, in light of Articles 10 and 8(1)a-b)

When originally enacted by Directive 86/378/EEC, the principle of equal treatment in social security applied to ‘the working population – including self-employed persons’ (Article 3). One would thus expect the personal scope of national anti-discrimination legislation implementing Article 6 of the Recast Directive – or in the alternative the personal scope of national social security and pension legislation – to be cast in an adequately generous manner in all the legal systems covered by the present report. In fact, some concerns have been raised in respect of the Hungarian, German, Spanish and Latvian situation, where self-employed workers appear to be excluded by social security schemes without any particular reference to one of the exemptions permitted under the Directive, or, if covered by social security provisions (as for instance in Finland, but also partly in Germany), their inclusion comes without the law being clear about the prohibition of discrimination on grounds of sex.

The Romanian expert has raised the concern that, at the time of writing (June 2012), the national authorities had yet to finalize arrangements for an adequate implementation of this part of the Recast Directive. Only the Irish, Greek, Dutch, Portuguese and Czech experts have expressly suggested that their respective national implementing legislation has expressly relied on the exclusions applicable to the self-employed under Articles 8(1)(a)-(b) when seeking to exclude some self-employed persons from the equal treatment principle in occupational social security schemes

2.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions (Article 14) and the self-employed

As noted above, Article 14 of the Recast Directive provides a fairly articulate set of material circumstances that, in effect, shape the personal scopes of application of this Chapter of the Directive. The fact that Article 14(1)(a) explicitly refers to both ‘employment’ and to ‘self-employment or to occupation’ has received a sufficient degree of recognition by national implementing legislation.

A comparative analysis of the reports received suggests the existence of at least three different models, or degrees, of implementation of this particular provision. Firstly, according to the reports received, the majority of the states covered by the survey (possibly with the exceptions of Estonia, Lithuania, Slovakia and Turkey, who do not seem to engage with the protection of self-employed workers) prohibit discrimination against the self-employed in the sense of protecting persons seeking to access a regulated liberal profession or trade (see in this respect the German report). Several countries in this first group appear to have implemented this provision of the Recast Directive *verbatim*, and we note that the Italian expert has expressed some concerns in this respect. Secondly, a relevant number of legal systems (Cyprus, France, Greece, Norway, Portugal, Italy and possibly Latvia) also understand this prohibition to include the conclusion of contracts for personal professional services between the self-employed and a professional user or client. A third group, which however only includes a minority of legal systems (Cyprus, Hungary, Portugal and possibly Belgium, France, Greece, the Netherlands and the Czech Republic), extends the protection of Article 14 to the termination of self-employment contracts. The fact that this third group only includes a handful of systems, should be seen as a rather problematic, if consistent, matter at least to the extent that the lack of protection from discriminatory contractual terminations

arguably frustrates the primary duty not to discriminate against a self-employed person when concluding a contract for services, since the latter, once concluded, could be rescinded on discriminatory grounds.

It would also appear that being employed under one of the main atypical contracts does not preclude the protections afforded by Article 14, and that access to vocational training and education in particular is suitably protected against discrimination on grounds of sex. It transpires however that volunteers and family workers may be particularly exposed to the risk of discrimination at work (see the comments made in the Greek, Italian, Portuguese and UK reports, with only Slovenia apparently having special provisions in place addressing the voluntary sector).

As for the question of who is a duty holder, national approaches appear to vary considerably and are often characterized by a high degree of uncertainty. Some states (e.g. Belgium, Croatia, Italy, Portugal) adopt an approach where ‘the duty holders may be ... public authorities (for professions or trades the access to which is regulated by statutes), professional councils (for professions such as physicians or barristers which respective statutes organised as self-regulating bodies), all partners of an association of professionals’, as reported by the Belgian expert. One would assume that the Greek approach where ‘[a]n employer/client (individual or legal person) may also be a ‘duty holder’ under the above provisions of the Act regarding discriminatory termination of a self-employment contract/relationship’ would prevail in all systems where this provision is understood as applying to the formation and termination of contracts between self-employed persons and professional users or clients. The Italian expert also noted that, in the absence of specific case law on this particular issue, the question of who is a duty holder is a particularly difficult one to address. Similarly, the Croatian expert reported that ‘there is scarce or no case law which would identify the scope of ... this provision in practice, or its extension to cover discriminatory termination of self-employment contracts by clients’. The Maltese expert pointed out that an EU-level clarification in respect of the ‘duty holder’ question may be necessary.

2.d. The role of the social partners and of national courts

Historically the equal treatment and equal pay provisions contained in this Directive (and its predecessor Directives) have been the object of considerable litigation. However, the only instances in which national case law appears to have affected the personal scope of application of the implementing instruments (including, in some Scandinavian systems, collective agreements) are some Finnish cases on the employment status of managing directors and their entitlement to damages in case of discrimination, a few (arguably inconsistent) German cases on professional pension funds and the applicability of anti-discrimination legislation, and some interesting Italian cases on the right of domestic workers and ‘training and work contract’ holders not to be discriminatorily dismissed on ground of pregnancy.

The Hungarian expert brought it to our attention that some collective agreements may appear to exclude part-time workers from certain aspects of remuneration, and may be contrary to the equal pay principle. The Croatian expert referred us to a 2009 report produced by the national Ombudsperson for Gender Equality suggesting that out of 120 collective agreements surveyed, only 7 contained provisions on equal pay. The Dutch expert noted that, when it comes to equal treatment, national courts tend to interpret the notion of ‘worker’ quite broadly. In the 1990s, the Netherlands, the UK and Norway had some landmark judgments on the indirectly discriminatory treatment of part-time workers.

We note that in 2010 the UK Supreme Court, in the case of *Jivraj v Hashwani*, provided an interpretation of Article 3(1)(a) of Directive 2000/78/EC (whose wording is similar to Article 14(1)(a) of the Recast Directive) as being ‘concerned with preventing discrimination from qualifying or setting up as a solicitor, plumber, greengrocer or arbitrator [and not] with discrimination by a customer who prefers to contract with one of their competitors once they

have set up in business'.¹¹ On the same occasion, the Supreme Court decided that the personal scope of application of the UK regulations prohibiting discrimination on grounds of religion or belief had to be shaped according to the notion of 'worker' introduced in *Allonby*,¹² and discussed in the opening paragraphs of this section.

Our Swedish expert has noted that some collective agreements cover, to a certain extent, self-employed/freelance journalists. But otherwise no national expert has referred to collective bargaining as a means to expand the personal scope of application of the Recast Directive.

2.e. Conclusions

The overall picture depicted by the responses contained in the national reports received is one which offers positive reassurances in respect of the impact of EU equality law on national legal systems, but also reveals a number of problematic aspects in terms of the consistency and effectiveness of its application at a domestic and comparative level. The equal pay provisions of the Directive appear to cover a fairly broad spectrum of work relationships, and can rely on the *Allonby* concept of 'worker' developed by the Court.¹³ Thus, both as a matter of EU and national law, a wide range of atypical and subordinate work relationships are likely to be covered. Some Member States appear to go beyond the level of coverage afforded by the *Allonby* 'worker' concept and even include autonomous workers within the reach of their equal pay provisions, but clearly the majority of Member States seem not to contemplate this further expansion. Considering the fact that a number of EU documents have often addressed 'bogus self-employment' as a problematic issue,¹⁴ the fact that the self-employed do not fall in the EU notion of 'worker' could be per se a matter of concern, although further research on this topic may be needed.

The overall picture offered by the responses received in respect of the Directive's provisions on social security schemes is however less reassuring. Three points in particular are worth mentioning. Firstly, the extent to which a total exclusion of the self-employed from (equal treatment in) occupational social security schemes can be justified on the basis of Article 8(1)(a)-(b), which at least on paper appears to be more narrowly worded and applying to individual contracts and single-member schemes. Secondly, some experts (especially those from the Baltic countries, Spain and the UK) have lamented what may be, in effect, a potential conceptual overlap and confusion between provisions regulating non-discrimination in general social security schemes (covered by Directive 79/7/EEC), occupational social security schemes (the present Directive and Article 157 TFEU), and private schemes (arguably covered by the Goods and Services Directive 2004/113/EC). These three tiers are regulated by separate, albeit arguably similar, EU instruments and for the sake of clarity and effectiveness national legislation ought to reflect that, especially considering that the exceptions contained in these instruments in respect of pension arrangements are quite different. The Dutch and the UK reports offer some interesting insights in respect of this set of complicated issues. Thirdly, while it is true that occupational social security arrangements can at least in part be interpreted as covered by equal pay legislation (at least to the extent that pensions are seen as a component of pay under the *Barber* line of reasoning),¹⁵ and thus benefit from a broad scope based on the notion of 'worker' discussed in the previous paragraph, this should not be a substitute for adequate implementation of Article 6, especially considering the variety of national notions of employment relationship that may, or may not, fall under the EU 'worker' concept (e.g. quasi-subordinate and economically dependent work relations).

The equal treatment provisions referred to in Article 14 appear to be implemented in an extremely fragmented and heterogeneous manner. Most legal systems appear to have a robust

¹¹ *Jivraj v Hashwani* [2011] UKSC 40, Paragraph 49.

¹² Above, especially Paragraphs 40-48.

¹³ See above notes 4 and 7.

¹⁴ On this concept, and on the concept of 'disguised employment', see Commission 'Green Paper Modernising labour law to meet the challenges of the 21st century', COM(2006) 708 final, pp. 10-11, and footnote 31.

¹⁵ Case C-262/88, *Barber v Guardian Royal Exchange* [1990] ECR I-1889.

approach in respect of covering a broad range of dependent employment contracts and relationships. However, in the majority of the systems surveyed, self-employed workers appear to be covered by the national provisions implementing Article 14(1)(a), only to the extent that discrimination from qualifying for, or setting up in, a particular type of profession or trade is prohibited, as opposed to the alternative and broader approach of prohibiting the concluding of any contract for services on the basis of a term that discriminates on the grounds of sex. This latter view however is adopted by a small but relevant number of European countries, while others extend the anti-discriminatory protection to the termination of contracts for services.

3. The personal scope of Directive 2004/113/EC (Equal treatment in access and supply of goods and services)

According to its Article 3(1), this Directive applies 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’. Both the preamble (see Paragraphs 14 and 15) and Article 3 of the Directive, try to disentangle the material and personal scope of this instrument from the material and personal scope of the other EU sex equality directives so as to avoid possible overlaps and conflicts. In this respect, the general idea underpinning this instrument is that in the presence of a number of other existing legal instruments for the implementation of the principle of equal treatment between men and women in matters of employment and occupation, as well as – more explicitly - in matters of self-employment, Directive 2004/113/EC should not apply in these fields (Article 3(4) and Paragraph 15 of the Preamble).¹⁶

The Directive also seeks to preserve the integrity of the freedom to contract principle, ‘including the freedom to choose a contractual partner for a transaction’ (Paragraph 14), as long as the choice of partner is not based on that person's sex (Article 3(2)). The Directive is thus designed, quoting from some of the examples referred to in the German and Irish reports, to cover the legal relationship between a wellness hotel, or a disco club, and its customers, or the relationship between a golf club and its members. On the other hand, nothing in the instrument suggests that its scope ought to be restricted to the legal relations existing between legal persons providing a good or service, and natural persons/individual consumers receiving it.

3.a. Personal scope (Article 3(1)) and the implications for the self-employed (Article 3(4) and Paragraph (15) of the preliminary observations)

The aforementioned attempt to clarify the various ambits of application of the different anti-discrimination instruments – and of the Goods and Services Directive in particular – is typically reflected in most legal systems by a punctilious (sometimes verbatim, as in the case of Greece, Italy, Luxembourg, Romania, Czech Republic and Spain) transposition of Article 3(1) and of the exclusions contained in Article 3(4) and Paragraph (15) of the preliminary observations of the Directive (regarding these exclusions, France, Italy, Luxembourg, Malta, Belgium, Portugal and the UK appear to confine the exception to employment and work, which may not include self-employment). This attempt to separate and disentangle the ambits of application of the ‘Goods and Services’ Directive, from the ‘Recast’ and the ‘Self-employed’ instruments, is often reinforced by implementing the provisions of the Goods and Services Directive 2004/113/EC through national provisions that are distinct, by being contained in distinct pieces of legislation (see the case of Cyprus, Estonia, Ireland, Latvia and Malta) or, at least, in different parts or chapters of general anti-discrimination acts or codes (the case of Belgium, France, Germany, Italy, Liechtenstein, Lithuania, the Netherlands,

¹⁶ In 2009, the Network produced a specific report ‘Sex Discrimination in the Access to and Supply of Goods and Services and the Transposition of Directive 2004/113/EC’ available on http://ec.europa.eu/justice/gender-equality/files/accesstogoodsandservicesfinal28may2009_en.pdf.

Norway, Poland, Sweden and the UK), from the employment and occupation anti-discrimination statutes implementing the other directives.

It must be noted however, that the purpose of this distinction between instruments covering employment and occupation (and self-employment) and access to goods and services is sometimes diminished, if not frustrated, by the fact that, in many national systems, the concept of self-employed person is not always distinguishable from or incompatible with that of ‘service/good provider’ or, crucially, that of ‘contractual partner for a transaction’, both of which may well be economically active under a self-employed status. So, perhaps inevitably, some national experts (Latvia, the Netherlands, Sweden and Lithuania, although in this case Section 5-1 of the implementing legislation explicitly reserves the protection to ‘consumers’ only) have indicated that, in their view, some overlaps between measures implementing this instrument and other sex equality directives covering the self-employed may well persist.

3.b. Personal scope and freedom to contract (Article 3(2) and Paragraph (14) of the preliminary observations)

A number of national reports (Bulgaria, Croatia, Denmark, France, Germany, Greece, Lithuania, FYR of Macedonia, Slovakia, Slovenia and Sweden) have expressly stated that domestic legislation has not sought to explicitly implement the provisions in question, although in most cases, national experts have expressed the view that discrimination on grounds of sex in the choice of a contractual partner would be unlawful due to the existence of general, sometimes constitutional (Greece) or penal (France), norms prohibiting discrimination in the broadest possible way. So, as a general statement, it is accurate to say that in the systems surveyed, the principle of anti-discrimination on grounds of sex appears to prevail over the one of freedom to contract, albeit at times in a less than explicit way.

3.c. The role of the social partners and national courts

There does not seem to be any collectively agreed term or provision affecting or clarifying the personal scope of application of the protections afforded by this Directive. Some case law has however directly or indirectly intersected with the issues raised by the personal scope provisions contained in Article 3 of the instrument. For instance, the Irish expert has reported the case of *The Equality Authority v Portmarnock Golf Club*,¹⁷ where the Supreme Court held by majority that it was not necessarily unlawful for a private members club to discriminate against its members on grounds of sex. This decision could be contrasted with the 2010 report by the Basque Ombudsman for Equality, noting that the exclusion of female members from the majority of local ‘gastronomic societies’ is discriminatory on grounds of sex. The German expert noted that a 2008 decision by the District Court of Hannover, where it was accepted that pregnant women could join a private health insurance scheme subject to the condition that the pregnancy and childbirth benefits of the scheme in question were excluded, may raise issues under the Goods and Services Directive.

3.d. Conclusions

Directive 2004/113/EC stems from a call by the European Council of Nice in 2000 to promote ‘gender equality in areas other than employment and professional life’ (see Paragraph 7 of the Directive’s Preamble), and from an effort to enhance the right to equality between men and women and put it (almost) on a par with the level of protection afforded by Directive 2000/43/EC in the context of racial and ethnic origin, which in Article 3(1)(h) explicitly referred to goods and services.¹⁸ Unsurprisingly its personal and material scopes have been shaped in a manner as to allude primarily to legal relations typically developing between ‘good/service providers’ and consumers, in the public sphere.

¹⁷ [2010] 1 IR 671.

¹⁸ COM(2003) 657 final, page 12. It should be noted, however, that Directive 2000/43/EC - in contrast to Directive 2004/113/EC - does not allow in its Article 4 for an objective justification in the context of good and services, reserving it instead to ‘occupational activities’ only.

However, from looking at the *travaux préparatoires* of the Directive, one has the sense that labour market considerations were not wholly outside the rationales underpinning this instrument. In justifying the application of the equal treatment principle to private insurance schemes, for instance, the Commission noted that ‘self-employed workers frequently have no option but to resort to the private market for pension coverage ... among them the proportion of women [is] steadily increasing’.¹⁹ Also, in many legal systems, the relationships put in place to access and supply goods and services which are available to the public, actually involve parties who perform their economic activities in a self-employed capacity.

It is therefore of little surprise that a number of Member States have implemented the various provisions that combine to shape the personal scope of the Goods and Services Directive without explicitly excluding persons operating under a self-employed capacity, which as we have seen in the previous section, and as we are about to suggest in the following one, are also expressly covered by the Recast Directive and (what is now) 2010/41/EU, the Self-employed Directive. While this state of affairs undoubtedly diminishes and frustrates the role and purpose of Article 3(4) in particular, it would not seem to conflict with the letter or spirit of the Goods and Services Directive.

It is worth noting that the German expert has explicitly stated that German legislation ‘falls short of the requirements’ of the Directive by limiting the prohibition of discrimination to ‘mass contracts’ and by not covering sexual harassment (other than in ‘employment’ context). Also, Iceland and Turkey do not appear to have engaged with the Directive or taken steps to implement it, while FYR of Macedonia appears to be in the process of transposing it. In 2009 the Commission started an infringement procedure against Estonia and Poland for failing to transpose the Directive correctly.²⁰

4. The personal scope of application of Directive 2010/41/EU (Equal treatment between those engaged in self-employed activities) (or, if not yet implemented, of Directive 86/613/EEC)

Directive 2010/41/EU, like its predecessor Directive, 86/613/EEC seeks to apply the principle of equal treatment between self-employed men and women, and to enhance the maternity protection for self-employed women and the spouses of self-employed men. Its personal scope of application is shaped primarily by Article 2(1)a-b, and also by Paragraph 9 of the Directive’s preliminary observations. Just as the previous instruments surveyed in the present report, Directive 2010/41/EU is also preoccupied with clarifying its relationship vis-à-vis the other EU equal treatment and equality directives applicable to self-employed workers. Thus Article 1 and Paragraphs 7 and 10 seek to clarify that its provisions do not apply to the matters covered by Directive 79/7/EEC, the Recast Directive, and the Goods and Services Directive. It should be noted that Directive 2010/41/EU whose transposition period expired in August 2012, that is to say a few months after the national reports annexed to the present Executive Summary were commissioned and produced by our national experts. That said, the wording of Article 2 of Directive 2010/41/EU is essentially equivalent to the one of Article 2 of Directive 86/613/EEC; the reference to ‘life partners’ instead of ‘spouses’ in Article 2(b) of the new Directive being the main substantive change.²¹

4.a. Personal scope (Article 2) and the relationship with Directive 2004/113/EC (Article 1 and Paragraphs 7, 9-10, and 13 of the Directive’s preliminary observations)

Article 2(1)(a) of the Directive covers ‘self-employed workers’ without defining the concept of self-employment other than by reference to the generic idea of ‘persons pursuing a gainful activity for their own account’ and adding the important caveat ‘under the conditions laid down by national law’. This caveat appears to be a peculiarity of the Self-employed Directive,

¹⁹ COM(2003) 657 final, page 8.

²⁰ Cases C-326/09 and C-328/09, not yet reported. Poland was eventually found to be in breach of the Directive.

²¹ Article 8 of the Directive also reinforces the right of self-employed women in relation to maternity benefits. In addition, the explicit reference to ‘farmers and members of liberal professions’ in Article 2(a) of the Directive 1986/613/EEC has been left out in the new Article 2(a).

especially when compared to the personal scope definitions of other equal treatment instruments, such as Recast Directive 2006/54/EC (especially post-*Allonby*) and Goods and Services Directive 2004/113/EC, which do not delegate their key ‘scope defining’ concepts to the national legal systems. It must be noted however that this delegation of the definition of the concept of self-employment to the national legal systems is in many ways less problematic than one would have thought, since the traditional pitfall of the binary divide between self-employment and employment is more than adequately covered by the fact that subordinate employees already fall within the scope of the instruments on equal treatment in employment and occupation. In any case, a particularly high number of national reports (from Austria, Belgium, Bulgaria, Germany, Greece, Iceland, Ireland, Lithuania and Luxembourg) have indicated that their respective legal systems have failed to provide an explicit instrument formally implementing this provision of the Directive (or its predecessor Directive 86/613/EEC).

However, it must also be noted that leaving the definition of self-employed person to the national legal systems engenders a different set of risks emerging from the – equally complex and insidious – distinction between ‘self-employed person’ on the one hand and ‘small entrepreneur’ or ‘business person’, on the other. As noted by the Italian expert, the notions of ‘autonomous work and entrepreneurship do not fully correspond’. The latter subjects may be seen as operating outside the realm of employment, self-employment and occupation (i.e. escaping the protection of the Recast Directive) and may not be seen as self-employed persons covered by Directive 2010/41/EU either.

If they are seen as operating exclusively in the realm of civil or commercial law, their best chance of being protected against discrimination on grounds of sex vis-à-vis another competitor would rest on a broad application of the Goods and Services Directive, but some national experts have clearly indicated the existence of persistent gaps in protection. The German report for instance indicates that ‘due to the lack of a “duty holder” on the one hand and the restriction of the protection under civil law to so-called mass contracts on the other, discrimination in access to self-employed activities and promotion cannot be effectively prevented’. Similar concerns are echoed by the Italian and UK reports. This can be contrasted with the Finnish, French, Greek, Polish and Slovak reports, which have explicitly suggested that entrepreneurs acting and performing their activities under civil-law arrangements would be covered by the equal treatment and equality provisions and norms of their respective legal systems.

As for the impact of Article 2(1)(b) (and bearing in mind that a number of Member States do not yet appear to have explicitly and sufficiently implemented this Directive, or its predecessor) it was expressly noted that the national transposition measures of (at least) Cyprus, Germany, Iceland, Ireland, Latvia, Lithuania, Portugal and Romania, may not provide for an adequate coverage of assisting spouses, let alone extend the protections to assisting life partners. Maltese and Spanish legislation would appear to cover spouses but not life partners.

4.b. The scope of the equal treatment provision (Article 4(1) and its relationship with Article 14(1)(a) of Directive 2006/54/EC

Our Danish expert expressly noted that ‘In my view, the scope of equal treatment contained in Article 4(1) does not add significantly to the “access to... self-employment or occupation” referred to in Article 14(1)(a) of Directive 2006/54/EC’. Her words were echoed by the French, German, Hungarian, Irish, Italian, Dutch, Norwegian, Slovenian, Swedish and arguably UK experts in respect of their respective national implementing measures.

4.c. The role of the social partners and national courts

According to our national experts there is no evidence of collective bargaining significantly expanding or clarifying the personal scope of application of the present instrument. As far as national courts are concerned, the Belgian expert has referred us to some jurisprudence from the 1990s on the entitlements of the assisting spouse of a self-employed worker, and the Cypriot expert has highlighted the unfair treatment received by widowers in social security schemes. Our Maltese expert has informed us that an important case (the *Psaila Savona* case)

on the employment status of senior lawyers (and their right not to be discriminatorily dismissed on grounds of pregnancy) is currently pending before domestic courts. The Spanish expert referred us to an interesting judgment of the Spanish High Court on discrimination against self-employed female fishers who were excluded from accessing the profession in the El Palmar island region.

4.d. Conclusions

It may be important to recognise that Directive 2010/41/EU has only recently come into force, and that for those Member States that have availed themselves of the extension period referred to in Article 16(2) further and more detailed implementing measures may still be forthcoming. However, on the basis of the information received by our national experts, and on the basis of the information pertaining to the implementation of its predecessor Directive 86/613/EEC, it is possible to state that its implementation is at best patchy and often convoluted, and the coverage of self-employed persons (let alone their spouses or partners) less than satisfactory. Several experts have also struggled to comprehend what the personal (and to some extent material) scope of this Directive adds to the provisions of the Recast Directive that cover access to self-employment. This is an important finding to the extent that despite the best efforts of the Directives' drafters to make sure that each instrument does not apply to 'areas covered by other directives' (Paragraph 7), the two instruments do appear to overlap. In addition, and in light of the consideration made in subsection 3.a, they also appear to fail to provide full coverage and protection of all the possible economic activity statuses (especially in conjunction with the Goods and Services Directive) from discrimination on grounds of sex, as the EU legislator may have envisaged.²² It should be noted that some of the substantive provisions of this instrument, for instance the ones pertaining to pregnancy leave entitlements, could be seen as being strictly connected with the health and safety of self-employed pregnant workers. Thus, a broad and EU-level meaning of self-employed worker may well be desirable on a par with what the Court of Justice has established in respect of Directive 92/85/EEC for 'workers'.²³

5. The personal scope of application of Directive 92/85/EEC (Pregnant Workers Directive)

At the time of writing, the pregnancy and maternity rights of European workers are regulated primarily by Directive 92/85/EEC. However, it must be noted that this instrument is currently the object of a revision proposal contained in COM(2008) 637 final which, among other things, would extend the period of maternity leave to 18 weeks from the current 14. The substantive provisions of Directive 92/85/EEC apply to three typologies of 'workers', defined under Article 2 as 'pregnant worker', 'worker who has recently given birth', and 'worker who is breastfeeding ... within the meaning of national legislation and/or national practice'. It should also be noted that self-employed workers have recently been granted a comparable period of leave under Article 8 of the Self-employed Directive (whose personal scope was analysed in the previous section), which is to come into force in August 2012. In this important respect Article 8 of Directive 86/613/EEC (the predecessor of Directive 2010/41/EU, the new Self-employed Directive) was merely exhortatory.

In spite of this distinction between the personal scopes of the Pregnant Workers Directive and Directives 86/613/EEC and 2010/41/EU, the national experts participating in the present project were asked whether, in their respective jurisdictions, quasi-subordinate (which in many jurisdictions are categorised as *sui generis* self-employed persons) pregnant workers, and quasi-subordinate workers recently having given birth, had obtained some substantive protections comparable to those offered to the 'workers' mentioned by the Pregnant Workers

²² On the development of this line of argument cf. C-104/09, *Roca Álvarez*.

²³ Cf. the Court's judgment in Case C-116/06, *Kiiski*, referred to below; and also on the personal scope of the Working Time Directive see Case C-428/09, *Union Syndicale Solidaires Isère*, Paragraphs [22]-[31].

Directive 92/85/EEC (including its Article 10 ‘Prohibition of Dismissal’ guarantee), prior to the entry into force of the obligations of Directive 2010/41/EU.²⁴

Finally it must be noted that, until recently, there was a persuasive view that ‘The question of whether a person ... must be considered a worker ... within the personal scope of Directive 92/85/EEC, crucially depends on the status of her employment contract during such a period of leave. [52]. That is a matter for national law to determine’.²⁵ This view was however abandoned by the European Court which, in its judgment in the case of *Kiiski*, opined that ‘the Community legislature, with a view to the implementation of Directive 92/85/EEC, intended to give the concept of “pregnant worker” a Community meaning’,²⁶ which is broad and comparable to the one developed in the context of EU case law concerning free movement of workers.

5.a. Personal scope (Articles 1 and 2)

A substantial proportion of national reports has indicated that their respective legal systems appear not to elaborate in any detail on the concepts of ‘worker’, as utilized by the Pregnant Workers Directive, in a way that would make it applicable to a particular typology of employment relationship (see for instance Cyprus, Denmark, Finland, France, Hungary, Liechtenstein and Poland). Some (Austria, Belgium, Ireland, Italy and Romania) have suggested that their definitions of ‘worker’ exclusively or mainly refer to subordinate employees.

Some legal systems appear explicitly to exclude from the scope of application of the rights afforded by the Pregnant Workers Directive a number of types of employment relationships and contracts. Some provisions, such as the Polish exclusion from the scope of the anti-dismissal protections of ‘employment contracts concluded for the purpose of substituting an employee during her/his excused absence from work’, or the Dutch exclusion of ‘domestic staff who work on less than four days a week for the same employer’ may be of dubious legitimacy. It is doubtful that these types of exclusions are compatible with the broad meaning of ‘worker’ endorsed by the European Court in *Kiiski*.

In light of the two seminal judgments of the European Court of Justice in the Cases C-232/09 *Danosa* and C-506/06 *Mayr*, our national experts were asked to report on whether managers and women whose ova have been fertilised in vitro, but not yet transferred to their uterus, are covered by the relevant measures implementing Directive 92/85/EEC. As far as managers are concerned, a number of national experts have suggested (see Belgium and Lithuania) that their national legal systems offer a narrow reading of the *Danosa* judgment, and that managers would only be protected if their work relationship was (re-)categorized as being one of subordinate employment (as ultimately the ECJ requalified Ms Danosa’s work relationship), or that senior and top managers are simply outside the scope of the protection (Estonia, FYR of Macedonia and to some extent Spain). The Croatian expert noted that the *Danosa* ruling is applied differently depending on the type of company, with members ‘of the board of a joint stock company’ being unable to fall within the worker definition contained in the Court’s judgment.

Some other experts (France and to a certain extent the UK), however, have suggested that their national systems offer a scope that implicitly endorses a broader reading of *Danosa*, and protect even self-employed managers. In this particular respect, a relevant and potentially important case is pending before the Maltese judiciary. It should be noted that the Court of Justice would seem to encourage the broader application of the protection afforded to pregnant women, with Paragraph 70 of *Danosa* reading

‘it is of no consequence whether Ms Danosa falls within the scope of Directive 92/85 or of Directive 76/207, or ... within the scope of Directive 86/613, which applies to

²⁴ Especially considering that none of the two instruments on the self-employed contains a provision similar to that of Article 10 of Directive 92/85/EEC, although Paragraph [70] of Case C-232/09 *Danosa*, could be interpreted as suggesting that this difference is, for all substantive purposes, immaterial.

²⁵ AG Kokott Opinion in Case C-116/06, *Kiiski*, Paragraphs [51]-[52].

²⁶ Case C-116/06, *Kiiski*, Paragraphs [24]-[25].

self-employed persons Whichever directive applies, it is important to ensure, for the person concerned, the protection granted under EU law to pregnant women in cases where the legal relationship linking her to another person has been severed on account of her pregnancy’.

The Bulgarian, Cypriot, Latvian, Lithuanian, Romanian and Slovenian experts have explicitly suggested that domestic legislation may fall short of the broad definition of ‘pregnant worker’ in *Mayr*.

5.b. The role of the social partners and national courts

The substantive rights included in this Directive are of course commonly referred to in collective agreements and are often the object of litigation before courts and tribunals. However only a few national experts (see for instance the German, Greek, Maltese, Slovak and Swedish reports) have referred us to particular instances where this may have had an impact on the personal scope of application of these provisions.

5.c. Rights and entitlements of self-employed/quasi-subordinate workers

With the new Self-employed Directive introducing a mandatory period of leave for self-employed workers as from August 2012, a considerable number of national experts have been keen to stress that (possibly with the exceptions of Bulgaria, Croatia, Greece, Hungary, Iceland, Luxembourg and, through case law, Malta), self-employed pregnant workers still do not receive such an entitlement by their national legislation. In effect, in a number of legal systems the self-employed remain excluded ‘due to the lack of a “duty holder” for the entitlement to maternity leave’ (as noted by our German expert).

Similarly in Finland (with the exception of agricultural entrepreneurs, regulated on an ad-hoc basis by the Act on Stand-in-Services for Agricultural Entrepreneurs 1996/1231) ‘the problem often is that female entrepreneurs do not have stand-in services during maternity leave, which makes it difficult to go on leave’. In Estonia, for instance, insured self-employed ‘are paid maternity benefits ... also without taking the pregnancy and maternity leave’. However, where this entitlement is extended to the self-employed, as in Greece for instance, ‘the “duty holder” can be their employer, if any, or their social security scheme’.

The notion of economically dependent work/para-subordinate or quasi-subordinate work refers to a grey zone between on the one hand work under an employment contract and on the other hand self-employment, a so-called grey area. In this form of work there is no subordinate status in the legal sense, while there exists a state of economic dependence. Criteria are for example primarily personal work, continuity over time and a single client.²⁷ As to quasi-subordinate pregnant workers, Austrian and German law do not appear to grant them any particular type of leave or protection, although Austrian ‘employee-like persons’ do seem to derive some protection from pregnancy discrimination from the Equal Treatment Act.. Quasi-subordinates in Italy, the Netherlands, Portugal and Spain appear to be faring much better, with Spanish legislation explicitly providing that ‘termination of the contract by the client, in these circumstances, constitutes a breach of contract, and economically dependent self-employed workers would be entitled to the corresponding compensation for harm caused’. The Italian expert has noted that while Decree 7 July 2007 extended to ‘quasi-subordinate’ female workers the period of mandatory maternity leave, this was not accompanied by any specific sanction in case of violation of the provision.

Interestingly, when it comes to the payment of allowances connected to maternity, self-employed persons are typically entitled to a maternity allowance on a voluntary and contributing basis (see Bulgaria, Estonia, Germany, Ireland, Latvia, which has already transposed 2010/41/EU, Poland and Slovakia). In Cyprus, Luxembourg and Sweden it appears that a system of mandatory social insurance for the self-employed is applicable, while

²⁷ A. Perulli, ‘Study on economically dependent work/parasubordinate (quasi-subordinate) work’ (2002), p. 3, available on http://www.europarl.europa.eu/hearings/20030619/empl/study_en.pdf, accessed 28 February 2013.

in Norway benefits are paid (to both employees and the self-employed) through the tax system. Quasi-subordinate workers, including in the UK, are also entitled to similar, if not equivalent, allowances.

5.d. Conclusions

Our national experts have suggested that, by and large, workers employed under a contract of subordinate employment are the main if not sole beneficiaries of the EU rules granting pregnancy and maternity leave, allowances, and other connected benefits and protections, including the right not to have one's employment relationship terminated on grounds of pregnancy. With the exceptions of a minority of national legal systems, most systems surveyed still do not appear to confer an adequate level of protection upon self-employed workers (who are now explicitly covered by Directive 2010/41/EU) and quasi-subordinate workers (who should either be considered as 'workers' or 'self-employed' and thus be covered by either Directive 86/613/EEC or 2010/41/EU, the Self-employed Directives, or the Pregnant Workers Directive), contrary to what both existing EU law instruments and the Court's case law (see the quotation above from the judgment in *Danosa*) envisage.

In this respect the only mitigating factor could be that some (although not all) of the most important provisions of Directive 86/613/EEC (such as Article 8) were of an exhortatory nature, and that at the time the national reports on the basis of which the present executive summary has been compiled, the implementation deadline for the new Self-employed Directive had yet to expire. It is worth noting that the lack of equal treatment of self-employed workers in respect of maternity entitlements has given rise to interesting disputes before the Court.²⁸

Some national experts (e.g. Poland and the Netherlands) have highlighted that their national legal systems appear to exclude some dependent employees in particular circumstances that would appear to be inconsistent with existing EU law requirements as transpiring from cases such as *Kiiski*, referred to above. Finally, six experts (i.e. the Bulgarian, Cypriot, Latvian, Lithuanian, Romanian and Slovenian ones) have explicitly suggested that their national legal systems still do not comply with the Court's ruling in *Mayr*.

6. The personal scope of application of Directive 2010/18/EU (Parental Leave Directive) (or, if not yet implemented, of Directive 96/34/EC)

The new Parental Leave Directive 2010/18/EU (just as its predecessor Directive 96/34/EC) applies to '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' (see Clause 1(2) of the Framework Agreement that the Directive incorporates). Clause 1(3) of the Directive also explicitly states that national implementation measures cannot exclude workers from the scope of the new Parental Leave Directive 'solely because they [are] part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency' (and this in contrast with Directive 96/34/EC, which was silent on this point).

Traditionally, the formula 'employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each Member State' has been interpreted as seeking to achieve 'partial harmonization' and 'not ... intended to establish a uniform level of protection throughout the [EU] on the basis of common criteria', with the explicit understanding that it is for Member States to decide, in respect of the instruments characterized by this personal scope formula, who is a worker.²⁹ However in recent times, the European Court has sought to clarify that in doing so, 'Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and,

²⁸ See Case C-104/09, *Roca Álvarez* [2010] ECR I-8661.

²⁹ Case 105/84, *Danmols Inventar* [1985] ECR 2639, Paragraph [26]; more recently Case C-313/02, *Wippel* [2004] ECR I-9483, Paragraph [40].

therefore, deprive it of its effectiveness'.³⁰ This is particularly so when the principle of equal treatment is at stake,³¹ and when, as in the case of the Parental Leave Directive, EU measures seeking to achieve substantive as opposed to formal equality are concerned.³²

6.a. Personal scope (Clause 1(2) and (3))

Once more, the majority of the national reports received (see Belgium, Bulgaria, France, Greece, Lithuania, Poland, Portugal, Spain and the UK) have suggested that, at a national level, the scope of application of this Directive is primarily linked to the existence of a subordinate employment contract or relationship. A considerable number of Member States appear to subject the enjoyment of the rights offered by this Directive to particular qualifying periods (Belgium, Cyprus, Liechtenstein, Luxembourg, Malta, the Netherlands, Poland, Romania and the UK), which, while in line with Clause 3(1)b, may be difficult to attain for some fixed-term or other atypical workers.

Some other countries, such as Germany, Ireland and Italy, while primarily addressing dependent employees, also appear to cover a considerable range of other subordinate work relations ranging from trainees to (in the case of Germany at least) volunteers and interns. The Belgian expert has pointed out that Belgium 'has failed to transpose the Framework Agreement as far as apprentices ... in small enterprises are concerned, given that they have no employment contracts'. The Croatian expert reported that the wide scope of beneficiaries of Articles 2(3) and 7 of the Act on Maternity and Parental Benefits includes self-employed persons, the unemployed, and pensioners.

6.b. Workers' entitlements and rights (Clause 2(1) and 3(1)(b))

The way these provisions are transposed at a domestic level appears to suggest a great variety of parental leave models, reflecting different national traditions and the considerable degree of flexibility afforded to implementing Member States by this Directive. For further information is it suggested that the individual national reports annexed to the present summary are inspected. No expert has suggested that its domestic legislation does not adequately implement the Directive's provisions. However, the point raised by the Hungarian expert that 'if both parents take the leave, only the mother enjoys protection against dismissal for this period of time' may require further investigation in light of Clause 5 of the Framework Agreement.

6.c. Rights and entitlements of the self-employed

The only countries that appear to extend the key rights and entitlements granted by the Parental Leave Directive beyond employment are Croatia, Denmark, Estonia, Latvia, Norway, Slovakia and, subject to some conditions and not without some restrictions, Italy, Slovenia and Romania. In Spain, the right to 13 days of paternity leave is extended to self-employed workers and 'quasi-subordinate' workers. In Germany, where the self-employed do not receive parental leave, 'quasi-dependent' workers can be entitled to it 'on the condition that they are de facto employees'. France, Germany, Finland, Sweden, and to a certain extent Poland, also appear to offer some form of the income replacement allowance to the self-employed.

6.d. Conclusions

The main beneficiaries of the rights and benefits provided by the Parental Leave Directive at a domestic level appear to be employees with a contract of dependent or subordinate employment. Self-employed and quasi-subordinate workers are only granted income replacement benefits in a minority of States, and even fewer than that appear to be willing to grant something equivalent to parental leave. The most common forms of atypical work (part-time, fixed-term and agency work) appear to be included in the various national scopes of

³⁰ In Case C-393/10, *O'Brien*, not yet reported, Paragraph [35].

³¹ In Case C-393/10, *O'Brien*, not yet reported, Paragraph [35].

³² Case C-104/09, *Roca Álvarez*, [2010] ECR I-8661, Paragraph [38].

application transposing the Directive. However, it goes without saying that fixed-term and agency workers are disproportionately affected by the existence of qualifying periods, which not all Member States appear to insist on.

7. Conclusions: including comments on the relationship between the scopes of application of the sex equality directives (Directive 2006/54/EC, Directive 2004/113/EC and Directive 2010/41/EU) and of Directives 2000/43/EC and 2000/78/EC

In this final section of the Executive Summary, some general conclusions are suggested from our survey of the national reports. These conclusions include some comments on the relationship between the personal scopes of the sex equality directives which are the subject of our Report and the personal scopes of Directives 2000/43/EC and 2000/78/EC, as respectively implemented in the Member States.³³ The evolutions in the personal scopes of the former Directives as implemented can usefully be evaluated by comparison and contrast with the corresponding evolutions in the personal scopes of the latter Directives as implemented.

The central question is whether EU law concerning equality between men and women is being effectively extended to all participants and potential participants in the labour market, irrespectively of the precise nature of the personal work relations under which they work or seek to work. This is one yardstick against which EU law concerning equality between men and women may appropriately be assessed. We suggest, accordingly, that it is useful to consider to what extent that goal or aspiration has been achieved or realised in or by the sex equality directives which are the subject of this Report, as implemented in the Member States, and to do so by comparison and contrast with the implementation in the Member States of Directives 2000/43/EC and 2000/78/EC.

It is useful briefly to recapitulate the definitions of the work relations which are included in the personal scope of the Directives in question. In this respect, the three principal and most recent sex equality directives, namely Directive 2006/54/EC, Directive 2004/113/EC and Directive 2010/41/EU, present us with quite a complex patchwork.

Recast Directive 2006/54/EC is expressed to have the purpose of ‘ensuring the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation’ (Article 1); and its Chapter 3 on equal treatment as regards access to employment, vocational training and promotion and working conditions makes use of what has become in effect the standard formula for making fully inclusive provisions in directives for non-discriminatory access to labour market opportunities, namely that:

‘There shall be no direct or indirect discrimination on the ground of sex in the public or private sectors, including public bodies, in relation to:

(a) conditions for access to employment, so 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’ (Article 14(1)).

However, Chapter 2 on equal treatment in occupational social security schemes is differently and somewhat more narrowly cast. Article 6 on personal scope extends its provisions to ‘members of the working population, including self-employed persons, ... in accordance with

³³ A detailed coverage of the personal scope of application of these two instruments is beyond the scope of the present report. For a comparative analysis of these two instruments see the ‘Country reports on measures to combat discrimination 2010’, published by the European Network of Legal Experts in the Non-Discrimination Field.

national law and/or practice’; but the ‘material scope’ of the Chapter is expressed to exclude ‘individual contracts for self-employed persons’ (Article 8(1)(a)).

Moreover, Chapter 1 on equal pay should probably be regarded as inherently limited, in its personal scope, to the ‘workers’ to whom Article 157 TFEU is applicable.

Hence there is perceived to be a continuing need for a distinct provision ‘on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity’ which will be the role of the new Self-employed Directive 2010/41/EU when it is implemented and replaces Directive 86/613/EEC. It is expressed to cover ‘(a) self-employed workers, namely all persons pursuing a gainful activity for their own account, under the conditions laid down by national law’ (Article 2).

The third of the sex equality directives to which we refer, Directive 2004/113/EC concerning the access to and supply of goods and services, is expressed not to apply to ‘matters of employment and occupation’ or to ‘matters of self-employment, insofar as these matters are covered by other Community legislative acts’ (Article 3(4)); but despite those rather intricate exclusions we have seen that the Directive may have some implications for relations within the labour market.

According to what some of our national experts have suggested, these implications tend to manifest themselves both in the form of ‘regulatory overlaps’, where for instance some self-employed persons appear to receive protections from both the Goods and Services Directive and the Recast Directive, and in the form of what we could refer to as ‘regulatory gaps’, where some goods and services providers operating through various types of personal work contracts or relationships may not receive any protection against discrimination.

If one considers the whole picture of personal scope concepts and definitions in EU sex equality law, it becomes apparent that there are still further unresolved complications. There appears, for example, to be a slight asymmetry between personal scope concepts that the CJEU has claimed as amounting to ‘EU definitions’ (‘worker’ in the equal pay context, ‘pregnant worker’ in the context of EU rules on pregnancy and, to a lesser extent, parental leave) and other framing concepts such as the one of ‘self-employed’ where the lack of an explicit EU-level definition only serves to reinforce the lack of clarity of the concept at national level.

Somewhat in contrast to the complexity of that picture of the personal scope of the sex equality directives, we find that the directives relating to other grounds of discrimination within (and, to a certain extent, beyond) the labour market, namely Directives 2000/43/EC and 2000/78/EC, take an essentially more unified approach to the question of personal scope; both of those Directives simply invoke the ‘standard formula’ which was set out above (Article 3(1) of each Directive). There is hardly any doubt that, abstractly speaking, these two instruments provide a clearer, more transparent and coherent model of regulation when compared to the more fragmented model offered by the three main sex equality instruments discussed in this report. As to whether this more unified approach has resulted into a clearer or broader personal scope of application of the national implementation of Directives 2000/43/EC and 2000/78/EC, the majority of our national experts appear to take a cautious view. However a small number of national experts have noted that the implementation of Directives 2000/43/EC and 2000/78/EC tends to occur on the basis of more generously and broadly phrased provisions. For instance our Bulgarian expert has reported that their ‘scope of protection is regulated more broadly, encompassing more areas, with references to general principles of anti-discrimination ... law’; the Cypriot expert noted that they ‘have a wider application’; the Italian expert has pointed out that the instrument implementing Directive 2000/43/EC relies on a personal scope that ‘is not necessarily linked to the existence of a work relationship’; and the Latvian expert has informed us that the national Government is contemplating a new implementation of Directive 2000/78/EC with a view to ‘protect self-employed persons against discrimination ... with regard to access to self-employment and with regard to access to goods and services necessary for the performance of activities of self-employed’.

Our general conclusion is that the somewhat complex and scattered definition of the personal scope of the sex equality directives, coupled with the uncertainties deriving from the

national definition of (and the rights attributable to) ‘self-employed workers’ at a national and EU level, have to some extent militated against their fully efficacious implementation in the Member States.

Part II

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

AUSTRIA – Neda Bei

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

In the private sector, the relevant provisions apply to ‘labour relationships of all kinds (*Arbeitsverhältnisse aller Art*) which are based on a civil contract’.¹ This wide definition has to be read in the conceptual framework of Austrian labour law and, in any case, implicitly includes apprentices, managerial staff (*leitende Angestellte*), employees in trial periods, and domestic workers.² The following groups are explicitly mentioned: homeworkers within the meaning of the Home Work Act 1960; employment relationships of ‘persons who, without being in an employment relationship, perform work by order and for account of certain persons and who are to be considered employee-like (*arbeitnehmerähnlich*) on grounds of economic dependence, or the lack of economic independence (*Unselbständigkeit*)’; and finally, employees who are posted, via personnel leasing or for the purpose of a continuous work performance, by businesses that do not have a seat in Austria.³ In individual labour contracts, the addressee of the principle of equal pay (the prohibition to discriminate) is the employer or a person acting on his/her behalf who is/might be responsible for contracting with an individual person on employment.⁴

Two groups of employees, or employment relationships, are explicitly excluded: those working in the public sector and those working in agriculture. Both groups are covered by specific legislation which includes provisions on equal pay.⁵

Equal treatment legislation for the public sector (Federal State, *Laender*) is moulded along the principles of the Federal Treatment Act, covering civil servants whose employment relationship is based on an administrative act under public law as well as contractual employees (*Vertragsbedienstete*) whose employment relationship is based on private law; as to equal pay, apprentices and trainees (*Verwaltungspraktikum*) are explicitly mentioned. As opposed to equal treatment legislation for the private sector, the Federal Treatment Act

¹ §1(1)1 Equal Treatment Act as recast by OJ No. I 2004/66, under the heading ‘Part One: Equal Treatment of Women and Men in the World of Work, Scope’; equal pay: §3.1 Equal Treatment Act under the heading ‘Principle of Equal Treatment in connection with a Labour Relationship’; for criteria in wage schemes and collective agreements see §11 Equal Treatment Act.

² Cf. Hopf et al. *GIBG* Vienna, Manz 2009, sub apostilles 4 and 5 to §1, p. 109; see furthermore additional information, i.e.

³ Apprentices: §1(1)1 Equal Treatment Act; homeworkers: §1(3)1 Equal Treatment Act, Home Work Act OJ No. 105/1960; ‘*Arbeitnehmerähnliche*’: §1(3)2 Equal Treatment Act; posted workers: §1(4)Equal Treatment Act (cf. Directive 96/71/EC).

⁴ §3.2 Equal Treatment Act, §3 defining the principle of equal treatment with reference to an employment relationship.

⁵ According to Hopf et al. *GIBG* Vienna, Manz 2009, p. 78, Directives 2000/43/EC, 2000/78/EC and 2002/73/EC have been transposed; see in this publication also a list of the most relevant *Laender* legislation.

explicitly mentions persons with a ‘free employment contract’ (*freier Dienstvertrag*).⁶

The basic principles of equal pay for agricultural and silvicultural workers are outlined by federal legislation in Part Four of the Equal Treatment Act.⁷

Self-employed persons are not covered by any legislation on equal pay.

It is clear that the Equal Treatment Act obliges the contractor to treat and pay contract workers (*überlassene Arbeitskräfte*) equally, but the obligations of the actual employer are controversial.⁸

1.b. Equal treatment in occupational social security schemes

Benefits based on an occupational social security scheme are considered as pay within the meaning of the Equal Treatment Act; a worker can fight discrimination on grounds of sex in the access to as well as in the extent of benefits under such a scheme.⁹

Occupational social security schemes and occupational pension schemes, the latter complementing legal pensions schemes, may cover old age, invalidity or surviving dependants’ pensions; principles and details are regulated in the Occupational Pensions Act. The latter applies to employers’ pledges and employees’ prospective entitlements within an employment relationship ‘based on civil law’; members of company boards are explicitly included.¹⁰ The principle of non-discrimination is stated in a general way, addressing the employer; there is, however, no explicit rule on the equal treatment of women and men.¹¹ According to more recent legislation applying to all types of insurance which includes pension funds, different contributions or benefits may be based on the factor of ‘sex’ only when this criterion constitutes a determining factor within a risk assessment, which is based on relevant and exact statistical data.¹²

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

The Equal Treatment Act (private sector) applies to the ‘world of work’, which is a wider notion than the ‘labour relationship’ and includes the access to employment. Both pieces of equal treatment legislation – for the private as well as for the public sector – comprise the discrimination of job applicants within the personal scopes as described under 1.a.; in the public sector the provisions on preferential treatment of women are to be taken into account.¹³ It is to be noted that equal treatment legislation for the private sector explicitly applies to ‘the

⁶ §1(1) Federal Treatment Act, OJ No. 100/1993 as last amended by OJ No. I 6/2011. On the employer’s side, the addressees respectively are the Federal State and the *Laender* as represented by the functionaries acting lawfully on their behalf.

⁷ Part IV Equal Treatment Act refers to workers within the meaning of the federal Rural Labour Code 1984; §1(1) Rural Labour Code, OJ No. 287/1984, defines agricultural and silvicultural workers as persons who, according to and on the basis of a contract, perform services in agri- and silvicultural establishments for value, regardless of whether they are integrated into the employer’s household or not. According to Article 12 Federal Constitution Act, the *Laender* have to transpose the principles outlined in Part IV Equal Treatment Act (as well as those outlined in the federal Rural Labour Code) into their labour codes.

⁸ Legislation to transpose Directive 2008/104/EC and hopefully able to clarify this point has been negotiated since April 2012, cf. http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00366/fname_243687.pdf, accessed 29 August 2012.

⁹ Hopf et al. *GLBG* Vienna, Manz 2009, sub apostilles 79s. to §3 number 2, pp. 169 s, with detailed references to the personal scope *ratione temporis*.

¹⁰ §1 Occupational Pensions Act (*Betriebspensionsgesetz*) OJ No. 282/1990 as amended by OJ No. I 22/2009.

¹¹ The employer is forbidden to make arbitrary distinctions between employees or groups of employees when restricting or revoking benefits, §18 *Betriebspensionsgesetz* OJ No. 282/1990.

¹² §9 *Versicherungsaufsichtsgesetz* OJ No. 569/178 as amended by OJ No. 95/2006, Article II. Risk assessment and actuarial factors have to be published in the business plan of the respective pension fund and have to be evaluated on a regular basis. Direct addressees of this provision are the competent monitoring authority (*Finanzmarktaufsicht*) and the respective insurance companies including pension funds. Insofar as pension schemes are the subject of collective agreements on enterprise level, employers’ and employees’ representatives will be well advised to take the admissibility of the criteria mentioned into account; thus they might be considered addressees in a wider sense.

¹³ §§11, 11a, 11b Federal Treatment Act OJ No. 100/1993 as amended by OJ No. 97/2008.

conditions of the access to self-employment’ without discrimination on grounds of gender.¹⁴

The provisions of the Equal Treatment Act (private sector) on the principle of equal treatment in the access to vocational counselling and training have a wide personal scope as described above, including explicitly all kinds of volunteers and trainees.¹⁵

Equal treatment legislation for the public sector including the Federal State and the *Laender* is moulded along the principles of the Federal Treatment Act, covering civil servants whose employment relationship is based on an administrative act under public law and contractual employees (*Vertragsbedienstete*) whose employment relationship is based on private law; this also covers apprentices, trainees (*Verwaltungspraktikum*) and applicants. Unlike equal treatment legislation for the private sector, persons with a ‘free employment contract’ (*freier Dienstvertrag*) are explicitly mentioned in the definition of the personal scope of the Federal Treatment Act.¹⁶

Protection against discrimination in working conditions is provided for in all pieces of equal treatment legislation mentioned.

1.d. Collective agreements and case law

The personal and material scope of collective agreements is regulated by legislation and essentially refers to ‘labour relationships of all kinds (*Arbeitsverhältnisse aller Art*) which are based on a civil contract’ with the exemption of the agricultural sector, homeworkers and public employees.¹⁷ The Equal Treatment Act (private sector) prescribes the principle of equal treatment for pay schemes in an enterprise and for collective agreements; here, the addressees are the contracting parties of such agreements, be it on enterprise or on branch level.¹⁸

In practice, many occupational social security schemes, especially pension schemes, are provided for by collective agreements on enterprise level.

Case law: When interpreting the personal scope of equal treatment legislation, the comprehensive case law focusing on the notions of ‘worker’ and ‘labour relationship’ in general has to be taken into account (see below 1.e.). In a recent case concerning sexual harassment, the Supreme Court clarified the shared responsibility of the employer and ‘third persons’ to provide sufficient redress according to the Equal Treatment Act. This responsibility, the Court stated, could not be understood in a formal way.¹⁹

1.e. Additional information

1. Perhaps it has become apparent so far that the provisions on the personal scopes of equal treatment legislation reflect the diversification if not fragmentation of Austrian labour law as to the notion of worker. Austrian labour law currently still comprises special legislation applying to certain groups of workers and defines the personal scope accordingly in a

¹⁴ §§1.4., 4(3) Equal Treatment Act; *Hopf et al*, GIBG (Vienna 2009), sub apostilles 5-9 to §4, pp. 229–232.

¹⁵ §§1(1)2, 4.1 Equal Treatment Act; *Hopf et al*, GIBG (Vienna 2009), sub apostille 3 to §4, p.228; for the public sector see under 1.a. above. It is uncontroversial that the prohibition of discrimination also includes the choice of type of contract.

¹⁶ §1(1) Federal Treatment Act, OJ No. 100/1993 as last amended by OJ No. I 6/2011. On the employer’s side, the addressees respectively are the Federal State and the *Laender* as represented by the functionaries acting lawfully on their behalf.

¹⁷ The contracts of public employees are regulated by compulsory statutory norms. The admissible content of a collective agreement are the ‘mutual rights and obligations of employers and workers’, §§1 and 2(2)2 Labour Constitution Act 1974; the notion of worker within the meaning of the Labour Constitution includes all workers who are employed in an establishment (*Betrieb*), see furthermore 1.e.

¹⁸ §11 Equal Treatment Act, contravening contents being null; as to the contracting parties, see §§4–7 Labour Constitution Act. In practice Austrian collective agreements, be it on branch, be it on enterprise level, focus on pay and working time.

¹⁹ Thus responsibility was not narrowed down to the fully liable partners of a limited partnership (*Kommanditgesellschaft*); on the contrary, it had to be taken into account that the alleged harasser had de facto acted as the defendant’s general manager and the claimant’s superior; Supreme Court 21 December 2011, 9 ObA 118/11k.

casuistic approach.²⁰ The difference between workers (*Arbeiter*) on the one hand, and employees (*Angestellte*) on the other hand is still effective.²¹ Furthermore, the competence for legislation on public employees and also agricultural workers is divided between the federal State and the *Laender*.

2. The systematic diversification of the notion of worker in other areas than labour law is always to be taken into account; the notions are not necessarily congruent.²² The most comprehensive notions are to be found in legislation on occupational safety and health (*OSH*) and on worker participation (Labour Constitution).²³

3. In labour law the basic challenge is the notion of the employment relationship. In the most general sense, a labour relationship is the legal relationship which obliges a person to perform labour for another on the basis of a labour contract within the meaning of §1151(1) Civil Code, in other words, if a person commits herself/himself to ‘services’ (*Dienstleistung*) for another over a certain period, there is a labour contract as opposed to producing a certain achievement for remuneration (work contract; *Werkvertrag*).²⁴ The basic and intentionally flexible §1151(1) Civil Code lacks precision, however, since it fails to define ‘services’. It was up to the courts and to legal scholars to develop the criteria of the typological dichotomy mentioned.²⁵ *Personal dependency* is considered the essential criterion for a labour relationship, a criterion which necessarily is to be understood as a flexible combination of other criteria according to the need for protection in individual cases.²⁶ Thus, being subject to instructions (*Weisungsgebundenheit*) and being part of an entrepreneurial hierarchy (subordination) are considered merely *derivative* criteria.²⁷ If there is no personal dependency, the Austrian legal system assumes a so-called free service contract (*freier Dienstvertrag*), an ‘in-between’ category regrettably not mentioned in §1151(1) Civil Code.²⁸ It is controversial whether such contractees are to be considered employee-like within the meaning of the Equal Treatment Act for the private sector.²⁹

4. Economic dependency (*wirtschaftliche Abhängigkeit*) on work to secure one’s livelihood is not unequivocally considered a decisive criterion for a labour relationship by the

²⁰ Cf. inter alia construction workers, special funds for paid leave, severance pay and out-of-work benefits due to weather, *Bauarbeiter-Urlaubs- und Abfertigungsgesetz (BUAG)*, OJ No. 1972/414, and related legislation; Country Estate Employees Act 1923, OJ No. 538/1923; Domestic Workers and Employees Act 1962, OJ No. 235/1962; Home Work Act OJ No. 105/1960; Actors Act 1922, OJ No. 441/1922; Journalists Act 1920; more recent special legislation on media workers in the Austrian Broadcast Foundation; Bakeries Act 1996.

²¹ On statutory level the most visible differences concern the termination of employment and entitlements vis-à-vis the employer in case of sickness.

²² So persons with a decisive influence on high-level management decisions (*leitende Angestellte*) are exempted from the legislation on working time or of parts of the Labour Constitution; still, they are workers within the personal scope of the Equal Treatment Act; Hopf et al. *GIBG* Vienna, Manz 2009, sub apostille 5 to §1, p. 109.

²³ Cf. §1(1) Workers’ Protection Act (*ArbeitnehmerInnenschutzgesetz – ASchG*), OJ No. 450/1994, referring to ‘workers’ (*Arbeitnehmer*);

²⁴ ‘§1151. (1) Wenn jemand sich auf eine gewisse Zeit zur Dienstleistung für einen anderen verpflichtet, so entsteht ein Dienstvertrag; wenn jemand die Herstellung eines Werkes gegen Entgelt übernimmt, ein Werkvertrag’, Imperial Regulation 19 March 1916, OJ No. 69/1916, entry into force 1 January 1917. This basic dichotomy is well known in many legal systems, cf. N. Countouris ‘The Employment Relationship: A Comparative Analysis of National Judicial Approaches’ pp. 38 ff, in: G. Casale (ed.) *The Employment Relationship. A Comparative Overview*. Geneva, International Labour Office, 2011.

²⁵ In addition to the temporal dimension inherent in the definition, the historical drafters of the Civil Code named six criteria to differentiate between the basic two forms of ‘contracts on exploiting human labour’ (*Verträge über die Verwertung menschlicher Arbeitskraft*), so heteronomy vs autonomy in performing or achieving, or at least personal and economic subordination to the employer’s entrepreneurial organism vs business of one’s own; further criteria – property of tools and means, mandatory personal performance vs possible performance by third parties, extent of liability for results – were not considered essential by the drafters, but only as ‘symptoms’, a differentiation which has influenced the discussion greatly, cf. T. Tomandl ‘Welchen Nutzen bringt ein neuer Dienstnehmerbegriff?’ *ZAS* 2008/16, pp. 100 s. with reference to 78 BlgHH 21. Sess. (1912).

²⁶ R. Strasser ‘Abhängiger Arbeitsvertrag oder freier Dienstvertrag’ *DRdA* 1994, p. 94.

²⁷ So according to G. Löschnigg *Arbeitsrecht*¹¹ Vienna, ÖGB-Verlag 2011, p. 159, referring to OGH 20.9.1983, 4 Ob 35/82, *ZAS* 1985, 18, personal dependency is considered the result of the performance of work being to the employer’s advantage and taking place in an organisational structure determined by him.

²⁸ For instance the services of a lawyer; G. Löschnigg *Arbeitsrecht*¹¹ Vienna, ÖGB-Verlag 2011, pp. 163 ss, with reference to case law of the Supreme Court and of the High Administrative Court.

²⁹ Hopf et al., *GIBG* (Vienna 2009) sub apostille 9 to §1(3) Equal Treatment Act, p. 111.

courts in the context of labour law.³⁰ It is, however, in social security legislation, and constitutes mandatory full insurance as dependent (*unselbständige/r*) worker (*Dienstnehmer/in*).³¹ In order to counteract tendencies to circumvent mandatory insurance by atypical constructions, especially by free service contracts, mandatory insurance was extended to employee-like work contracts (*dienstnehmerähnliche Werkverträge*) and certain forms of subcontracting in 1996. The Constitutional Court repealed parts of this legislation.³² What remained is the inclusion of persons, for whose employment the criteria of personal and economic dependency prevail over the criteria of self-employment, into the notion of dependent worker and thus into mandatory full insurance.³³ For the purposes of labour court procedure, again, persons working ‘at the behest and for account of a third party’ are considered employee-like ‘on grounds of economic independence’.³⁴

5. It should be noted that efforts to codify Austrian labour law go back to the 1960s; the goal was achieved only partially (labour constitution, leave, working time). Since 2002, these efforts have been renewed, in order to standardise the notion of worker within labour law.³⁵ Even if there have been no concrete results in legislation, there is still discussion, so also about revising social security legislation in this regard.³⁶ Some contributions include perspectives on the law of the EU, it being understood that there is not a Community notion of worker in EU legislation on the one hand and that the approach of the EU seems to be restricted to the formal criterion of subordination on the other hand.³⁷

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

The personal scope is provided for in the most inclusive and general way possible (‘nobody’, ‘a person’).³⁸

2.b. Freedom to choose contractual partners

The common understanding is that the principle of private autonomy includes the free choice of contractual partners and should not be meddled with as long as the choice does not depend on the gender of possible contractual partners, positive action notwithstanding.³⁹

2.c. Collective agreements and case law

As collective agreements are limited to employment relationships, and as employment relationships are not considered ‘services’ within the meaning of the Directive, they cannot be

³⁰ G. Löschnigg *Arbeitsrecht*¹¹ Vienna, ÖGB-Verlag 2011, pp. 159 s.

³¹ Cf. the definition of employee/worker ‘... who is employed in a relationship of personal and economic dependence ...’ in §4(4) General Social Security Act (*Allgemeines Sozialversicherungsgesetz – ASVG*) OJ No. 189/1955 as amended by OJ Nos. 201/1996, 411/1996, I 139/1997, I 138/1998, I 99/2001, and the comprehensive case law of the High Administrative Court.

³² Constitutional Court 14 March 1997, G 392/96, G 398/96, G 399/96, Slg 14802.

³³ I.e. into the personal scope/the definition of §4(4) General Social Security Act as quoted above.

³⁴ §51(2), (3) Labour and Social Court Act (*Arbeits- und Sozialgerichtsgesetz – ASGG*) OJ No. 194/1985 as last amended by OJ No. 135/2011.

³⁵ Equality directives have been stressed in this context to argue the necessity of doing so on national level, see R. Mosler ‘*Vorschläge für einen neuen ArbeitnehmerInnenbegriff*’ Salzburg 2003 [not published expert opinion at the request of the Chamber of Labour Vienna], pp. 19 s.

³⁶ Especially for ‘free employees’, see R. Mosler ‘*Die sozialversicherungsrechtliche Stellung freier Dienstnehmer*’ *Das Recht der Arbeit [DRdA]* 2005, pp. 487 ss.

³⁷ Cf. A. Gerhartl ‘*Grundlagen für eine Reform des Arbeitnehmerbegriffs*’ *DRdA* 2009, pp. 19 s., referring inter alia to the European Commission’s green paper on labour law (2006) and to Allonby; R. Rebhahn ‘*Der Arbeitnehmerbegriff in vergleichender Perspektive*’ *RdA* 2009 xx; R. Rebhahn ‘*Der Arbeitnehmerbegriff des Unionsrechts in der neueren Judikatur des EuGH*’ *EuZA* 2012/1 xx.

³⁸ §31, 32 Equal Treatment Act as amended by OJ No. I 7/2011. Restrictions derive essentially from the provisions on the material scope according to §30 Equal Treatment Act as amended by OJ No. I 7/2011 (formerly §40a).

³⁹ Hopf et al, *GlBG* (Vienna 2009), sub apostille 4 to §40a Equal Treatment Act, pp. 229–232; positive actions to achieve a legitimate aim are not to be considered discrimination.

the subject of collective agreements.⁴⁰ The case law of equality bodies essentially pertains to the material scope.⁴¹

2.d. Additional information

There has been a recent agreement in tripartite negotiations on extending the relevant provisions of the Equal Treatment Act to discrimination on grounds of religion or belief, age and sexual orientation.⁴²

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

With the exception of the provision in the Equal Treatment Act on the access to employment (see 1.c.), there is no special legislation on the equal treatment of self-employed persons. Moreover, there seems to be broad consensus among practitioners that further transposing legislation would not be necessary. However, it could be argued that it is necessary to expand existing equal treatment legislation to equal pay and to employment.⁴³

Self-employment (*Selbständigkeit, selbständige Erwerbstätigkeit*) is essentially defined by social security legislation. The general provisions in this field cover entrepreneurial activities in trade (industry), defining their personal scope inter alia by reference to the mandatory membership of the Chambers of Commerce and furthermore to tax legislation.⁴⁴ Special social security legislation covers certain free professions.⁴⁵

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

It seems that Directive 2006/54/EC is more open to the ambiguities of the different concepts of self-employment and employment, thus, in case of doubt, covering any type of contract.

3.c. Collective agreements and case law

The access to and the conditions of self-employment cannot, by legal definition of the Labour Constitution, be the subject of collective agreements. Case law pertinent to Directives 86/613/EC and 2010/41/EU could not be found. As for case law on the notion of self-employment in general, see 1.e.4. above.

3.d. Additional information

‘Free employees’ are subject to the mandatory social security provisions of the *GSVG* and considered self-employed by tax law. By definition they cannot be included into collective agreements, neither can they elect representatives on enterprise level.⁴⁶

In some free professions (attorneys) only full-time occupation qualifies for the practical training which is required to practise the profession.

⁴⁰ Hopf et al, *GIBG* (Vienna 2009), sub apostille 21 to §40a(3)2 Equal Treatment Act, p. 699; Hopf et al, *GIBG – Novelle 2011* (Vienna 2011), sub apostille 5 to §30 Equal Treatment Act, p. 184. As to admissible subjects of collective agreements see §2(2)2 Labour Constitution Act 1974.

⁴¹ See <http://www.frauen.bka.gv.at/site/6613/default.aspx>, accessed 5 August 2012, under ‘Diskriminierungsgrund Geschlecht’.

⁴² Oral communication courtesy of Ms M. Chlestil, Vienna Chamber of Labour. It is, however, open whether and when the negotiations on other topics will be concluded.

⁴³ Oral communication courtesy of Ms S. Piffl-Pavelec, Federal Ministry for Labour, Social Affairs and Consumer Protection.

⁴⁴ §2 Trade (Industry) Social Insurance Act (*Gewerbliches Sozialversicherungsgesetz – GSVG*) OJ No. 560/1978; membership of the Chambers of Commerce is based essentially on self-employed entrepreneurial and certain managerial activities, §2 Chambers of Commerce Act (*Wirtschaftskammergesetz 1998 – WKG*) OJ No. 103/1998 as amended. The most detailed, descriptive and comprehensive definition of self-employment is to be found in tax law, cf. §§22 Nos. 1 – 3, 5, 23 Income Tax Act OJ No. 400/1988.

⁴⁵ Social Insurance of Self-employed Persons in Free Professions Act (*Sozialversicherung freiberuflich selbständig Erwerbstätiger – FSVG*) OJ No. 624/1978.

⁴⁶ In practice, however, especially in the media sector, informally elected representatives of free employees are known who, for instance, conclude agreements with the management on paid leave.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

In the Maternity Protection Act⁴⁷ and related legislation (see 4.d.), neither ‘pregnant worker’ nor ‘pregnancy’ are defined (legal term: ‘*werdende Mutter*’).⁴⁸ Workers are not allowed to work within eight weeks after having given birth, and within twelve weeks in special cases (twins, caesarean section).⁴⁹ Breastfeeding is not defined by legislation, neither is a time limit mentioned. Employers are entitled to require a certificate that the worker is actually breastfeeding (legal term: ‘*stillende Mütter*’).⁵⁰

4.b. Collective agreements and case law

The maternity protection standards of federal legislation (labour law, *OSH*) are not extended by collective agreements. Case law directly regarding the personal scope could not be found.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

Unequivocally self-employed persons are entitled to benefits, designed as pay for a substitute (*Betriebshilfe, Wochengeld*), according to the legal social security scheme for self-employed persons, regularly for eight weeks before and eight weeks after birth.⁵¹

The Maternity Protection Act also applies to high-echelon managerial staff (employees with a decisive influence on high-level management decisions, *leitende Angestellte*, cf. 1.e.2.).⁵²

4.d. Additional information

1. The Maternity Protection Act fully applies to workers (within the meaning of labour law) and to homeworkers, employees of enterprises owned or run by the *Laender* or by municipalities, regularly to teachers including teachers in agriculture and forestry, and to apprentices.⁵³ Some modifications apply to public employees.⁵⁴ Certain restrictions apply to domestic workers living in the employer’s household.⁵⁵

2. Principles analogous to the Maternity Protection Act also apply to agricultural workers.⁵⁶

3. As mentioned, the provisions on maternity protection apply to workers within the

⁴⁷ Maternity Protection Act OJ No. 221/1979 as amended by OJ No. I 123/2004.

⁴⁸ Pregnancy begins with the coalescence of ovum and semen, OGH 12 April 1995, 9 ObA 23/95; for in-vitro-fertilisation the moment of transfer is decisive, OGH 16 June 2008, 8 ObA 27/08s in accordance with ECJ Case C-506/06 *Sabine Mayer*; G. Löschnigg *Arbeitsrecht*¹¹ Vienna, ÖGB-Verlag 2011, p. 919. 9 ObA 23/95 superseded previous case law which, in the context of protection against dismissal, had defined the (calculated) beginning of pregnancy by the date of the last regular menstruation.

⁴⁹ §5(1) Maternity Protection Act, OJ No. 221/1979 as amended by OJ No. 833/1992; for the definitions of live birth, stillbirth and miscarriage see §8(1) Midwife Act, OJ No. 310/1994 as amended by OJ No. 116/1999.

⁵⁰ Certificate of a medical practitioner or a family counselling centre; the worker is to notify her employer, when she stops breastfeeding, §4a Maternity Protection Act OJ No. 221/1979 as amended in 1995 and 2004.

⁵¹ This includes in principle ‘free employees’. In any case a substitute is to be employed; §102a Trade (Industry) Social Insurance Act (*Gewerbliches Sozialversicherungsgesetz - GSVG*) OJ No. 560/1978 as amended by OJ No. II 398/2011.

⁵² Cf. K. Burger-Ehrnhofer et al. *Mutterschutzgesetz und Väter-Karenzgesetz* Vienna, ÖGB-Verlag 2007, p. 38.

⁵³ §1(1)–(4) Maternity Protection Act.

⁵⁴ §2.1 and Section 8, §§18–20 Maternity Protection Act with regard to the federal Civil Servant Act, OJ No. 333/1979 as last amended by OJ No. I 87/2012, and the federal Contract Public Employees Act (*Vertragsbedienstetengesetz – VBG*), OJ No. 86/1948 as amended, cf. K. Burger-Ehrnhofer et al. *Mutterschutzgesetz und Väter-Karenzgesetz* Vienna, ÖGB-Verlag 2007, pp. 457 ss. The modifications essentially concern dismissal and transfer; the different OSH-structure in the public sector should always be noted in this context. The regulations on public employees of the *Laender*, municipalities and autonomous cities follow analogous principles.

⁵⁵ §25 Maternity Protection Act, allowing work on Sundays and holidays, will have to be repealed, when Austria ratifies, as planned, ILO-Convention (No. 189) on Decent Work for Domestic Workers.

⁵⁶ Cf. the principles laid down in §§96a - 108 Federal Rural Code, OJ No. 287/1984 (as amended), which have to be implemented by the *Laender* legislation.

meaning of labour law only; this concerns the *OSH* side of maternity protection, essentially various prohibitions of certain activities (*Verwendungsschutz*) as well as the contractual side, essentially the protection against notice and dismissal. Neither of these provisions apply to employee-like persons(!). Protection for employee-like persons against pregnancy discrimination is provided only in the scope of the Equal Treatment Act.⁵⁷

5. Directive on parental leave

5.a. Personal scope

The parental leave including parental part-time leave for mothers is provided for in the Maternity Protection Act (see 4.d.). The personal scope of the Fathers' Leave Act is regulated in an equally comprehensive manner and according to the same principles, applying to 'labour relationships of all kinds which are based on a civil contract' in the private and public sector, and furthermore to federal civil servants within the federal competences for legislation, while the corresponding legislative competence for public employees of the *Laender* and municipalities as well as for agricultural workers is the *Laender's*.⁵⁸ The legislation as described applies to adoptive and foster parents on the one hand, on the other hand it does not apply to employee-like persons or free employees.

5.b. Entitlement to parental leave

In principle, each parent is entitled to use parental leave until the child is 2 years old. The individual entitlement of fathers was explicitly provided in 2004.⁵⁹ There are various models of dividing parental leave between the parents as well as of combining parental leave with parental part-time leave. Parental leave can be extended by agreement with the employer until the child is 30 months old, but protection from dismissal is granted only until the child turns 2; within these limits, the protection of dismissal ends four weeks after the parental leave.⁶⁰ Mothers and fathers are entitled to postpone three months of their respective parental leave until the child turns 7.⁶¹

5.c. Rights of the self-employed and/or the quasi/para-subordinate

Legislation as described does not apply to employee-like persons or free employees. The Child Care Allowance Act provides for childcare benefits not only for employees or the self-employed but for all parents, regardless of whether or not they are or have been employed.⁶²

⁵⁷ §1(3)2 Equal Treatment Act; K. Burger-Ehrnhofer et al. *Mutterschutzgesetz und Väter-Karenzgesetz* Vienna, ÖGB-Verlag 2007, p. 38, with reference to Cases C-207/98 *Mahlburg* and C-320-01 *Busch*. A certain protection is provided for employee-like persons who are firmly integrated in an enterprise's organisational structure; in that case they can argue that they are workers, having redress to the labour courts and the social insurance institutions on the grounds that compelling legislation was contravened.

⁵⁸ §1 Fathers' Leave Act (*Väter-Karenzgesetz, VKG*) OJ No. 651/1989 as amended by OJ. No. I 124/2004.

⁵⁹ §2 Fathers' Leave Act as amended by OJ. No. I 124/2004, transposing Directive 96/34/EC; cf. K. Burger-Ehrnhofer et al. *Mutterschutzgesetz und Väter-Karenzgesetz* Vienna, ÖGB-Verlag 2007, p. 538.

⁶⁰ While mothers are protected from dismissal for four months after having given birth and then again when claiming parental leave from the employer, a father's protection from dismissal begins with claiming paternity leave from his employer, at the earliest eight weeks after the child concerned was born or, mostly in the case of a parental leave divided between mother and father, four months before the father's parental leave actually begins; §§10 and 15 Maternity Protection Act, §7 Fathers' Leave Act. The principles described apply also in the case of adoption, commencing on the date of the child's adoption, in the private as well as in the public sector; cf. §15c Maternity Protection Act; §5 Fathers' Leave Act.

⁶¹ §15b Maternity Protection Act; §4 Fathers' Leave Act.

⁶² On 1 January 2012 amendments to the Child Care Allowance Act, which in principle provides for a total of five models in the case of a person having an additional income while receiving the allowance, entered into force, OJ Nos. I 116/2009, I 11/2011 and I 139/2011. One of the objectives of the amendment was to simplify the hitherto rather complicated calculation of admissible additional income, and another objective was the harmonisation of eligibility criteria for employees, on the one hand, and for self-employed persons, on the other. That the new periods for receiving the benefit were not harmonised with the periods of parental leave currently provided for by labour law might be seen as a problem, however, cf. H. Hess-Knapp 'Die Novelle zum Kinderbetreuungsgeldgesetz', *infas* 2/2012 (February) pp. 53-57.

5.d. Additional information

During parental leave, private employees are entitled to regular advancement in their pay scheme, for instance bi-annually, only if a collective agreement provides so explicitly, for instance in the banking sector.⁶³

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC⁶⁴

As to Directives 2000/43/EC and 2004/113/EC, the approach of Austrian legislation to ethnic non-discrimination and gender equality is uniform in principle.⁶⁵ However, the material scope concerning gender equality explicitly refers to the different competences for legislation within the federal structure: the material scope of ethnic discrimination is wider, additionally comprising social protection and education. Positive action is provided for in the gender context only. As to Directives 2000/78/EC and 2006/54/EC: The provisions of the Equal Treatment Act (private sector) on the personal scope are essentially identically worded for equal treatment (gender) and anti-discrimination (all ‘other’ grounds) in the ‘world of work’. However, only the gender-related provisions explicitly refer to homeworkers and domestic workers. The material scope is identical to two important exceptions provided for exclusively in the context of gender-related discrimination, i.e. positive action and equal pay.⁶⁶ Occupational social security schemes are subject to separate legislation, non-discrimination is just one of the elements provided for. As to Directive 2010/41/EU, the notion of self-employment is essentially defined in social security and in tax law, including ‘free employees’. Self-employed persons are covered by equal treatment legislation as to the access to employment, but not as to other aspects, especially not equal pay.⁶⁷

BELGIUM – Jean Jacqmain

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

First, the expert must repeat that given the federal structure of Belgian institutions, implementing EU gender equality law falls within the respective jurisdictions of the State and its federate components. However, the legislation which the various Communities and Regions adopted in order to transpose Directive 2006/54/EC usually copy the federal provisions. Consequently, the present contribution will be limited to the latter, unless otherwise specified.

A second aspect must be clarified immediately. In 2007, the federal Government decided to replace all existing pieces of legislation concerning antidiscrimination with a coherent system of three Acts (on ‘Race’, ‘Gender’ and ‘Discrimination in general’) aimed at transposing Directive 2000/43/EC, all directives on gender equality and Directive 2000/78/EC. Those three Acts, all of 10 May 2007, were set up along identical lines, using the

⁶³ The situation in the public sector, especially of the *Laender*, could not be checked systematically for purposes of this report. For instance the employees of the municipality of Vienna are entitled to regular advancement in the pay scheme during parental leave.

⁶⁴ All in all, a most comprehensive question – especially given the fragmented and interwoven structures of Austrian labour law, social security legislation and tax law as described. Actually an answer might require a complete survey of Austrian equality treatment legislation, or at least a matrix thereof, which could occupy a research team for quite some time.

⁶⁵ Part Three (§§30 – 40c) Equal Treatment Act OJ No. 7/2011 under the heading ‘equal treatment without discrimination as to gender or ethnic origin in other areas’ (than the world of work).

⁶⁶ Cf. the specific provisions in the Equal Treatment Act (private sector) on collective agreements and income reports.

⁶⁷ While the explicit inclusion of assisting spouses into the personal scope of an equality directive seems to be unique, this corresponds with traditional provisions in Austrian social security legislation on self-employment.

same concepts and techniques as much as possible. Consequently, they have no proper personal scope, i.e. they are applicable to ‘anybody’ who find themselves in one of the situations mentioned in the material scope.

Thirdly, there is no debate in Belgium about ‘vulnerable/atypical/precarious work’ situations; any conceivable hypothesis of subordinate work can be construed to fall within the scope of the existing statutes (of which there is no dearth). The only recurring focus of debate concerns the subordinate or self-employed nature of a work relation. Consequently, there is no known case law in which the non-discrimination principle would have been found to be inapplicable because the disputed situation did not fall within the scope of any relevant statute. Indeed, even the crucial distinction between subordinate and self-employed has never been mentioned in any piece of litigation concerning gender equality.

Still, disputes concerning subordination or self-employment in work relations (i.e. usually concerning which statutory social security scheme is applicable) have become so frequent that the Multi-Purpose Act (I) of 27 December 2006 (Heading XIII: ‘Nature of work relations’) introduced a whole piece of legal machinery aimed at facilitating their solution, including lists of relevant criteria and an experts’ commission with powers of advice and even adjudication.

All this having been said, the personal scope of Article 4 of Directive 2006/54/EC seems to be adequately and exhaustively transposed in Articles 5, 1° (which defines ‘work relation’) and 6, Paragraph 2, 2° (which mentions ‘pay’) of the Gender Act of 10 May 2007.

1.b. Equal treatment in occupational social security schemes

In the same way, any person falling under the material scope of Article 12 of the Gender Act, which transposed both Article 7 and Article 10 of Directive 2006/54/EC, is covered. The possible exclusions permitted by Article 8(1) a and b of the Directive were not used, as individual contracts would be regarded as falling under Directive 2004/113/EC (and thus under Article 10 of the Act), and there are no one-person schemes.

The expert must report that Article 7(2) of Directive 2006/54/EC notwithstanding, pension schemes for civil servants are regarded as statutory social security schemes under Article 5, 14° of the Gender Act. However, the relevant legislation strictly complies with the Directive and the ECJ’s case law, including ‘survivor’s benefits’ which were made available to men as well as women by an Act of 15 May 1984.

The original formulation of Article 12 of the Gender Act was amended in 2008 in order to dissipate any doubts as to its application to self-employed persons as well as to paid workers.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

Article 14(1)(a) of the Directive is transposed with some wealth of detail by Article 6, Paragraph 2, 1° of the Gender Act. Given what has been explained under 1.a., this covers any possible form of subordinate work relation. In rather a vague way, the formulation ‘access to employment’ also covers self-employed workers; in particular, ‘admission as a partner in firms or associations of professionals’ is mentioned explicitly. In this respect, the duty holders may be various: public authorities (for professions or trades the access to which is regulated by statutes), professional councils (for professions such as physicians or barristers which respective statutes organised as self-regulating bodies), all partners of an association of professionals, etc.

Article 14(1)(b) is transposed by the respective provisions adopted by Regions and Communities. These are more or less detailed, but again any person applying for training and any person or organization proposing training are covered.

Article 14(1)(c) is transposed in great detail by Article 6, Paragraph 2, 2° of the Gender Act. As to working conditions, including remuneration, any form of subordinate work relation is covered, as well as contracts between a principal and a self-employed person. As to termination of the work relation, Article 6, Paragraph 2, 3° of the Gender Act again goes into some detail and applies to any form of subordinate work; combined with Article 5, 1° which contains the notion ‘work relation’ these provisions could be construed as also applicable to

the termination of a contract between a principal or client and a self-employed person, but this is certainly not the established interpretation of the relevant provisions (see below at 1.e.).

Article 14(1)(d) is transposed by Article 6, Paragraph 1, 7° of the Gender Act in a perfunctory manner (copying out).

1.d. Collective agreements and case law

Within the framework provided by the Act of 5 December 1968 concerning collective agreements and joint sector committees, a collective agreement is applicable to any subordinate work relationship falling under its material scope. As mentioned above, there is no case law at all which could be usefully quoted, except the following rather venerable decision. Until 1997, the legal age of retirement in the statutory pension scheme for self-employed persons was 60 for women and 65 for men. In 1987, the National Social Security Office decided that the annual contracts of its legal counsels would no longer be renewed when they reached the pensionable age. When a female barrister claimed that this was discrimination under the gender equality legislation applicable at the time (the Act of 4 August 1978), the Court of Appeal in Brussels⁶⁸ found that the disputed situation fell within the material scope of the Act because the new termination clause was specified in the Office's job advertisements, i.e. it was an element of the conditions of access to employment (now under Article 6, Paragraph 2, 1° of the Gender Act).

1.e. Additional information

In spite of the general wording of Article 5, 1°, the established interpretation considers that it is impossible to construe Article 6, Paragraph 2, 3° of the Gender Act so that it might apply to the termination of contracts between a principal/client and a self-employed person. Moreover, the expert is convinced that the same applies to Article 14(1)(c) of Directive 2006/54/EC, given its wording ('dismissal/licenciement/ontslag') and the reference to Article 141 EC (157 TFEU).

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

The whole scope (personal and material) of Directive 2004/113/EC is transposed in rather an offhand manner by the Gender Act. As the expert explained above in 1.a., the Act applies to any person involved in a situation which falls within the material scope. The latter is defined in the most general way in Article 6, Paragraph 1, 1° of the Act, and none of the exclusions provided in Article 3(1), (2) and (3) of the Directive is allowed by the Act.

As to Article 3(4) of the Directive, the architecture of the Gender Act precludes any confusion between access to and provision of goods and services (Article 6, Paragraph 1, 1°) and work relations (Article 6, Paragraph 2).

2.b. Freedom to choose contractual partners

See above in 2.a.

2.c. Collective agreements and case law

The expert cannot imagine how collective agreements could have any impact on a matter which is explicitly made distinct from work relations. As to case law, five years after the Gender Act came into force there are absolutely no known cases concerning goods and services, if one excepts the dispute concerning the use of gender-related actuarial factors in life insurance, on which the ECJ gave a preliminary ruling in Case C-236/09 *Test-Achats* [2011, unreported].

⁶⁸ Judgment of 21 December 1989, *Journal des tribunaux du travail*, 1990, p. 198, *Chroniques de droit social*, 1990, p. 164, *Jurisprudence de Liège-Mons-Bruxelles*, 1990, p. 938.

2.d. Additional information

There is no additional information to report.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

The answer is rather complex. The Gender Act is aimed at transposing Directive 86/613/EEC as well as Directive 79/7/EEC and Directive 2006/54/EC. However, apart from what has been mentioned above under 1(c), (d) and (e), it contains no provision specially dedicated to self-employed persons. The transposition of Directive 86/613/EEC was carried out through successive amendments of the statutory social security scheme for self-employed persons, the core of which is Royal Decree n°38 of 27 July 1967 (a ‘special powers’ instrument, equivalent to an Act of Parliament). This process finally led (as from 2005) to the compulsory affiliation of all assisting spouses to all branches of the scheme, including the ‘protection of maternity’ branch, so that Belgium found itself in a pioneer position within the EU and no additional step was considered necessary in order to implement Directive 2010/41/EU. As to assisting life partners other than spouses, no step at all had ever been required as they simply fell under the category ‘assistants’ whose affiliation to the whole social security scheme had always been compulsory.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

The Gender Act contains no reference at all to the hypotheses envisaged in Article 4(1) of Directive 2010/41/EU and previously in Article 4 of Directive 86/613/EEC. Indeed, Belgium never adopted any measure in order to implement the latter provision, probably because civil and commercial legislation was deemed to have been purged completely of any gender discrimination long before the Directive was adopted. No case law was ever reported in this respect; should any issue related to Article 4(1) of Directive 2010/41/EU arise, the only stopgap offered by the Gender Act would be Article 6, Paragraph 1, 8°, under which the principle of equal treatment applies to ‘access to, participation in and any other form of exercise of any economic activity ... which is open to the public’.

Again, this laboured answer concerning the material scope immediately transfers to the personal one (see above under 1.a.).

3.c. Collective agreements and case law

There is nothing to report as to collective agreements, an unknown figure where self-employed persons are concerned.

There is no known case law relating to the present state either of EU or of Belgian legislation. In one case,⁶⁹ the *Cour d’arbitrage/Arbitragehof* (now Constitutional Court), answering to a reference for a preliminary ruling, had decided that the general principle of equality under the law (Articles 10 and 11 of the Constitution) had not been breached when a woman who claimed to have assisted her self-employed husband (before they divorced) had been denied access to a personal retirement pension. At the time, assisting spouses were allowed to affiliate (on a voluntary basis) to ‘one’ branch of the statutory social security scheme (the Sickness Benefit Insurance, including the maternity allowance), which complied with the requirement of Article 6 of Directive 86/613/EEC. Thus, a Member State could comply with the latter directive while obviously breaching Article 4(1) of Directive 79/7/EEC (given that denying assisting spouses access to the retirement pension scheme was certainly indirect discrimination against women). However, such bizarre situations have now disappeared, considering the wording of Article 7(1) of Directive 2010/41/EU and the present national legislation (see above under 3.a.).

⁶⁹ Judgment n°44/97 of 14 July 1997, *Journal des tribunaux du travail*, 1997, p. 493; <http://www.const-court.be/>, accessed 12 April 2012.

3.d. Additional information

There is no additional information to report.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

The main instrument of transposition of Directive 92/85/EEC is the Working Conditions Act of 16 March 1971, Heading IV of which provides the legal protection of female workers during pregnancy and after giving birth, including breastfeeding. Under Articles 1 and 3 of the Act, Heading IV is applicable to any woman in a subordinate work relation, in the private as well as the public sector.⁷⁰

4.b. Collective agreements and case law

Given the very general scope of the Act of 16 March 1971, collective agreements could not possibly clarify or expand it.

As to Case C-232/09 *Danosa*, there is no case law that could be quoted usefully. As mentioned under 4.a., the Working Conditions Act only envisages subordinate work relations; thus, maybe after a debate concerning the genuine nature of the disputed relation (see above under 1.a.), either a female manager is a subordinate worker and falls within the scope of the Act, or she is self-employed and does not.

As to case C-506/06 *Mayr*, there is a single relevant known case.⁷¹ The court granted the protection of the Act to an employee who had been dismissed after taking sick leave in order to undergo an attempt at *in vitro* fertilisation (which failed). However, the common legal opinion is that the court overextended the scope of the Act and that the issue should have been treated as a case of discrimination under the Gender Act.⁷²

4.c. Rights of the self-employed and/or the quasi/para-subordinate

As to ‘quasi/para subordinate workers’, see above under 1.a. As to self-employed persons, the expert does not think that anybody in Belgium ever understood Directive 92/85/EEC as applicable to persons who are not in a subordinate work relation. Consequently, self-employed persons are certainly not covered by the Act of 16 March 1971, and the provisions concerning the protection of maternity which were developed in compliance with Directive 86/613/EEC (see above under 3.a.) do not deal in any way with the termination of a work relation. Any such possible dispute would have to be dealt with under the Gender Act (with doubtful results: see above under 1.c.).

4.d. Additional information

There is a persisting gap to be mentioned, although it has never given rise to any case law. While the Act of 16 March 1971 provides the right to ante and postnatal leave as well as to preventive leave in case of health hazards, no remuneration is owed by employers during those periods of absence (except for tenured staff members of the public services), but social security benefits are paid by the Maternity Insurance, a branch of the statutory Healthcare and Sickness Insurance scheme (governed by the Consolidated Act of 14 July 1994). Now, under the age of 18 apprentices in small enterprises (a category which falls within the respective jurisdictions of each of the three Communities) are regarded as dependents of their parents, thus not covered by the Maternity Insurance. Consequently, such a female apprentice is entitled to maternity leave under the Act of 16 March 1971, but does not receive any social security benefit in lieu of remuneration, a flagrant breach of Article 11 of Directive 92/85/EEC.

⁷⁰ The only exception concerns women in the armed forces, for whom the Act of 28 February 2007 contains provisions similar to those of the Act of 16 March 1971.

⁷¹ Labour Court of Appeal in Antwerp, 25 June 2004, *Chroniques de droit social*, 2009, p. 81.

⁷² See C. Lardin’s comment both of *Mayr* and of the Labour Court of Appeal’s decision, *Chroniques de droit social*, 2009, p. 86.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

Again, the Belgian situation is complex.

In the private sector, Directive 96/34/EC was first transposed by Collective Agreement n°64 of 29 April 1997 of the National Labour Council, which only provided the right to an unpaid parental leave. A Royal Decree of 29 October 1997 then entitled all workers making use of parental leave to a social security benefit financed (for historical reasons) by the statutory Unemployment Insurance scheme.⁷³ Those provisions meet Clause 1(2) of the Framework Agreement of 18 June 2009 adequately. As to Clause 1(3), both C.A. n°64 and the Royal Decree are only applicable when any employment contract exists. Consequently, Belgium has failed to transpose the Framework Agreement as far as apprentices (even over 18) in small enterprises are concerned, given that they have no employment contracts.

In the public sector, many institutions did already propose an unpaid parental leave, resulting from the conversion of an ancient ‘breastfeeding leave’ which was abolished in the nineteen eighties. A number of Royal Decrees then instituted a second form of parental leave, copied out from the Royal Decree of 29 October 1997 (see above). Thus Clause 1(2) of the Framework Agreement is met adequately in the public sector as well, given that those various Royal Decrees apply to all staff members, be they tenured or under employment contracts. As to Clause 1(3), there are gaps in the transposition: the most spectacular one concerns all members of the judiciary, i.e. judges, members of the public prosecution offices and court registrars, to whom no possibility of parental leave is offered.

5.b. Entitlement to parental leave

Clause 2(1) is met effortlessly, as all regulations mentioned above make the leave available until the child is 12 (since 2009) or 21 if he/she is handicapped (since 2011).

As to Clause 3(1)(b), in the private sector a worker must have been employed by the enterprise for a minimum of 12 months during the period of 15 months preceding the moment that he/she notifies that he/she will take parental leave. Such a condition does not exist in the public sector.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

None of the provisions mentioned above apply to self-employed persons.

5.d. Additional information

There is no additional information to report beyond what was mentioned under 5.a.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

It was mentioned above under 1.a. that the three Acts of 10 May 2007 aimed at transposing Directive 2000/43/EC (‘Race Act’), Directive 2000/78/EC (‘Discrimination in General Act’) and all gender equality directives (‘Gender Act’) were designed along the same architectural lines. Consequently, their material scope not only is as large as the sum of the scopes of all EU instruments (e.g. statutory as well as occupational social security schemes are included), but it also comprises some homemade elements (e.g. ‘access to, participation in and any other form of exercise of any economic activity ... which is open to the public’).

Given that the personal scope of the three Acts includes anyone involved in any situation which falls within the material scope, no problem of transposition of the various directives needs mentioning.

⁷³ The process of transposition of Directive 2010/18/EU started very belatedly because of disputes concerning the benefit which should be provided during the additional fourth month of parental leave as well as during the existing three.

BULGARIA – Genoveva Tisheva**1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation*****1.a. Equal pay***

Article 4 of the Recast Directive has been transposed in Bulgarian legislation through the provisions of the Labour Code and of the Law on Protection against Discrimination. Article 243 of the Labour Code covers the principle of equal pay between men and women. The Anti-Discrimination Law stipulates this principle for workers and employees not only based on sex but also on the other protected grounds (Article 14). The law applies to the relations of workers and employers under a labour contract. According to Article 14 of the Anti-Discrimination Law, the protection is also extended to civil servants under the special civil servants' contracts. The persons obliged to ensure equal pay are the employers. The coverage of the equal pay provision is in fact defined by the definition of this concept in the Additional Provisions of the Labour Code, Paragraph 1.1.: the term 'employer' is associated with any physical or legal person, or its branches, or any other unit which is autonomous from an organizational and economic point of view, and who/which hires workers and employees independently under a labour contract, including homeworkers or workers for distance working, as well as in the cases of sending a worker or employer for temporary work to another enterprise, called the beneficiary. It is to be noted that the definition of employer was extended for the categories of homeworkers, distance workers and temporary workers as a result of the amendments of the Labour Code in 2011 and 2012 (S.G. 33/2011, 82/2011 and 7/2012). The Bulgarian legal system does not explicitly include a 'quasi-subordinate' category of workers, so they are not covered. The alternative to the labour contract is to work on a civil contract but, as mentioned above, only those working under a labour contract are protected under the equal pay principle. As to the workers in vulnerable/atypical/precarious work, only those explicitly mentioned in the law are covered.

1.b. Equal treatment in occupational social security schemes

Insurance under occupational social security schemes is regulated in Bulgarian legislation as a form of additional voluntary social security and does not correspond to the typical insurance of that kind as provided in EU law and regulated as a second pillar of social insurance. Another difference is that also due to the relatively recent regulation, the occupational social security schemes are underdeveloped and no substantial practice exists. The personal coverage is in compliance with EU standards, also in relation to gender equality but nevertheless the schemes have no practical importance.

As to the personal coverage, Article 210 of the Code on Social Insurance (CSI) stipulates that every individual who has reached the age of 16 has the right to additional voluntary social insurance and also has the right to be insured under professional pension insurance schemes. Each insured person has an individual insurance number and an individual file. Article 231 of the CSI explicitly prohibits discrimination in the field of additional voluntary social security, including based on sex. In addition, discrimination based on sex, marital status and family status is explicitly forbidden in the insurance under professional schemes. Article 232 of the CSI provides that it is obligatory for insurance under professional schemes to be regulated with a collective agreement or in a collective labour agreement.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

The personal scope of the provision on non-discrimination in the field of employment is regulated in Chapter 2 Section 1 of the Law on Protection against Discrimination. This Section is entitled 'Protection in the sphere of the exercise of the right to work'.

As the majority of the provisions target the employers as duty holders, the definition of employer given by the Labour Code in its amended version is valid for discrimination in

employment conditions as well. So in all cases where we use the term ‘employer’, it should be understood according to the definition given in 1.a. above.

The law regulates the obligations of the employer to ensure non-discrimination, including on the ground of sex, in the sphere of access to employment (Article 12), employment conditions (Article 13), termination of the labour contract (Article 21) and ensuring opportunities for vocational training (Article 15). In all these areas, the personal scope should be understood as defined in Section 1.a. above. The category of ‘quasi-subordinate’ workers does not exist in Bulgarian law.

In addition to the detailed provisions which are related to the status of persons under a labour contract and employers under the LC, there is a separate provision in Article 26 of the Anti-Discrimination Law that stipulates that all persons have the right to equal conditions for access to a profession or activity, equal opportunity to exercise them and to development in this profession or activity, on the basis of all non-discrimination grounds, listed in Article 4 of the law, sex included. Here, self-employed persons are given the maximum guarantee. There is no precise clarity about who exactly is the duty holder and there is no specific guarantee in case of termination of contracts. There is no relevant case law but the general provision of Article 6 of the Anti-Discrimination Law can be invoked here, which states that the prohibition of discrimination is valid for all persons (*erga omnes*) in the exercise and protection of rights and freedoms, provided in the Constitution and the laws.

As to the field of membership in trade unions, employers’ organizations and other professional organizations, non-discrimination is guaranteed for all persons and all protected grounds, in relation to access, membership rights and participation. The organizations are obliged not to discriminate. The only exception is the requirements allowed for specific education in the case of professional organizations. (Article 36 of the Anti-Discrimination Law). This is regulated in a separate Section 3 of the Law, entitled ‘Protection in the exercise of other rights’.

1.d. Collective agreements and case law

No specific provisions and interpretations beyond the scope of the law are available.

1.e. Additional information

There is no additional information to report.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

There are no explicit definition of the personal scope of the provisions on equal treatment in the access to and supply of goods and services. It is clear that the obligations and the rights apply to the two main parties in the contractual relationship related to the concrete transaction.

There is a clear distinction between the protection against discrimination in employment and the protection in access to and supply of goods and services. As mentioned above in 1.a. and b., the first is regulated in Section 1 and the latter is in Section 3 of the Anti-Discrimination Law, where the protection in the exercise of other rights is ensured. Article 37 in Section 3 prohibits the refusal to provide goods or services, or the supply of goods or services of lower quality, or under less favourable conditions, based on the grounds indicated in Article 4 of the Law. This means that the guarantee covers both the private and the public sphere and that all fields of activities are covered. No exceptions to this principle are explicitly mentioned. As to the sphere of family relations: when regulated by the Family Code and related procedure, the principle that the special law overrules the general one applies.

2.b. Freedom to choose contractual partners

Article 3(2) is not explicitly transposed in Bulgarian legislation. Article 37 mentioned above as well as the general provision of Article 6 of the Anti-Discrimination Law on the scope of the prohibition of discrimination shall apply.

2.c. Collective agreements and case law

Collective agreements and/or case law do not contribute to clarifying or expanding the scope of application.

2.d. Additional information

There is no additional information to report.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity**3.a. Personal scope**

The area of equal treatment of men and women engaged in an activity in a self-employed capacity is not explicitly regulated in Bulgarian law. Directive 2010/41/EU is still to be transposed. The category of self-employed persons is not clearly defined and the principle of equal treatment of men and women is applied based on the general principles set out in the Anti-Discrimination Law.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

As mentioned in a. above, there is no explicit definition of the scope of application of the principle of equal treatment of self-employed persons. Article 26 of the Anti-Discrimination Law is in force for the right to equal conditions for access to a profession or an activity, for opportunities to exercise the activity or profession and for development. It covers the scope of the equal treatment principle in Article 4(1) of Directive 2010/41/EU: the establishment, equipment and extension of a business or the launching or expansion of any other form of self-employed activity, despite the different wording of the two provisions. The provision of Article 26 is broader and also covers the requirements of Article 14(1)a of Directive 2006/54/EC.

3.c. Collective agreements and case law

Collective agreements and/or case law do not contribute to clarifying or expanding the scope of application.

3.d. Additional information

There is no additional information to report.

4. Directive 92/85/EEC on pregnancy and maternity**4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding**

Bulgarian legislation covers the personal scope of the Directive without giving specific definitions of the terms. In a special section of the Labour Code dedicated to protection of pregnant women and women who are breastfeeding, the main protection provisions with regard to employment conditions are listed. There is an obligation for the woman to inform the employer about her condition. There is no specific definition of these conditions in the Labour Code. The LC does not distinguish a special category of workers who have recently given birth as distinct from breastfeeding workers, although the rights attached to this category are included in the protection. The category of 'women in an advanced stage of in-vitro treatment' has been included explicitly, along with pregnant women, since 29 December 2009 (S.G. No. 103/2009). The related protection is also subject to notification of the employer.

4.b. Collective agreements and case law

There is no available case law or information on collective agreements in this area. Concerning the extension of the personal scope in *Danosa*, Bulgarian legislation covers all cases where a labour contract is involved, no matter what the position of the person involved is. This means that if an employer (within the sense of the definition given in 1.a. above) has such a contract with a board member, the latter will be covered by the protection too.

In relation to the *Mayr* case, changes to the Labour Code and the Anti-Discrimination Law were introduced in late 2009, with the definition of a ‘woman worker or employee who is in an advanced stage of treatment through the methods of assisted reproduction’: a worker or employee who is in the process of such treatment for the period from the follicular puncture until the transfer of the embryo, but not exceeding 20 days. The definition is introduced in Paragraph 13 of the Additional Provisions of the Labour Code and in Paragraph 16 of the Additional Provisions of the Anti-Discrimination Law. In the Labour Code, the protection of women in this period is regulated in the same way as that of pregnant women: the adjustment of the conditions of work for pregnant women and for women in an advanced stage of such treatment is contained in the section for protection of pregnant and breastfeeding women. The Labour Code includes also guarantees against night and extraordinary work, and protection from dismissal.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

As mentioned above, Directive 2010/41/EU has not been transposed yet in Bulgarian legislation. In the absence of a labour contract, any self-employed who are insured for general sickness and maternity for the 24 months preceding the period of temporary inability to work have the right to pregnancy and maternity benefits for the term recognized as maternity leave for workers and employers in the Labour Code: up to 410 days (Articles 49-50 of the Code on Social Insurance (CSI)).

4.d. Additional information

It is worth mentioning the lack of full compliance of the protection of women in the process of *in vitro* fertilization in Bulgaria, compared to the personal scope of protection required by the *Mayr* case. The protection at work of women undergoing invasive fertility treatment, in Bulgarian law referred to as women in an advanced stage of in-vitro treatment, is regulated as an equivalent to the protection of pregnant women. In addition to this, the protection is valid for up to 20 days between the follicular puncture and the transfer of the embryo, while the cycle of the *in vitro* treatment is usually between 6 and 8 weeks. Finally, the protection does not cover all methods of assisted reproduction, but only the one using follicular puncture.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

Directive 2010/18/EU was transposed in Bulgarian law through the amendments of Article 167a and through the new Article 167b of the Labour Code. Parents/adoptive parents who work under a labour contract are entitled to use parental leave. This means that all men and women working under the conditions set by the Labour Code are covered. The types of labour contracts include all types of labour relationships, including the types explicitly indicated in Clause 1(3) of the Framework Agreement.

5.b. Entitlement to parental leave

The individual right to unpaid parental leave both applies on the grounds of birth and of adoption of a child. There are no requirements for any period of work qualification or length of service qualification.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

The self-employed and/or the quasi/para-subordinate are not covered.

5.d. Additional information

There is no additional information to report.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

Bulgarian legislation has transposed the provisions about the scope of these three Directives mainly in the Anti-Discrimination Law and in the Labour Code. The regulation concerning the scope of the sex equality directives is more detailed and fragmented, and to a lesser extent based on the general principles of law. The scopes of application of the last two Directives are related to the concept of labour contract and employer, as also defined for the gender directives, when it comes to regulation of anti-discrimination in employment. For the other areas, the scope of protection is regulated more broadly, encompassing more areas, with reference to general principles of anti-discrimination and general principles of law.

CROATIA – Nada Bodiroga-Vukobrat

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

Gender equality is referred to as one of the highest values of the constitutional order of the Republic of Croatia and as the basis for the interpretation of the Constitution (Article 3, Constitution of the Republic of Croatia).⁷⁴

The Anti-Discrimination Act⁷⁵ is a *lex generalis* in the field of anti-discrimination, since it regulates the prohibition of discrimination in a unique manner regarding various discriminatory grounds (race or ethnical background, colour of skin, gender, language, religion, political preferences, national or social background, material conditions, union membership, education, social status, family or marital status, age, health, disability, genetic inheritance, gender identity and sexual orientation).

As regards equal pay, Article 13 of the Gender Equality Act⁷⁶ prohibits discrimination in the field of employment and work in the public and the private sector, including state bodies, in relation to, among other things, employment and working conditions, rights from work and on the basis of work, including equal pay for equal work and work of equal value.

Article 83 of the Labour Act⁷⁷ implements the principle of equal pay in labour relations. In particular, pursuant to the first paragraph of the said Article, an employer shall pay equal pay to women and men for equal work and work of equal value. Paragraph 2 clarifies that two persons of different genders are deemed to perform equal work and work of equal value if:

1. they perform the same work under the same or similar conditions or they could substitute each other in relation to the work they perform;
2. the work one of them performs is of a similar nature to the work performed by the other and the differences between the work done and the conditions in which it is performed by each of them have no significance in relation to the overall nature of the work or they appear so rarely that they do not affect the overall nature of the work; and
3. the work one of them performs is of value that is equal to the work performed by the other, taking into account criteria such as professional qualifications, skills, responsibilities, conditions in which the work is performed or whether the work is of a manual nature.

⁷⁴ Official Gazette of the Republic of Croatia *Narodne novine* no. 85/10 – consolidated version.

⁷⁵ Official Gazette of the Republic of Croatia *Narodne novine* nos 85/08 and 112/12.

⁷⁶ Official Gazette of the Republic of Croatia *Narodne novine* no. 82/08.

⁷⁷ Official Gazette of the Republic of Croatia *Narodne novine* nos 149/09 and 61/11.

The definition of pay is provided in the third paragraph and complies with Article 157(2) TFEU and the definition of pay from Directive 2006/54/EC, in that it includes the basic wage and any other consideration in cash or kind, which the worker receives directly or indirectly in respect of his/her employment from the employer, based on the employment contract, collective agreement, employment rules or other regulations. Any provision of the employment contract, collective agreement, employment rules or other legal act which is contrary to the equal pay principle is automatically null and void.

There is no category of 'quasi-subordinate' workers in the Croatian labour law system. All workers are covered by the equal pay guarantee, including those in vulnerable/atypical/precarious work contracts, such as fixed-term contracts, part-time contracts, volunteering, agency contracts etc.

1.b. Equal treatment in occupational social security schemes

In the general provisions of the Anti-Discrimination Act and the Gender Equality Act, there is no differentiation between public social security systems and professional or occupational ones.

Article 111.a(7) of the Act on Compulsory and Voluntary Pension Insurance Funds⁷⁸ specifically prescribes that the statutes of the closed voluntary pension funds shall not directly or indirectly cause any differential treatment of their members, i.e. workers employed by the employer who is a patron of the fund, of members of a trade union which is a patron of the fund or of members of an association of self-employed persons which is a patron of the fund, regarding the rights to and from the voluntary pension insurance based on sex. Examples of differential treatment referred to in Article 111.a(8) of the Act include conditions for access to membership, compulsory or optional nature of participation, different rules regarding access to additional pension insurance and insurance periods suspending the retention or acquisition of rights during periods of maternity or parental leave, setting different conditions or rules applicable only to fund members of the same sex, regarding the expected benefits when a person leaves the scheme.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

Chapter IV of the Gender Equality Act (Official Gazette of the Republic of Croatia *Narodne novine* no. 82/08) transposes the scope of application of Article 14(1)(a)-(d) of Directive 2006/54/EC. Under the title 'Discrimination in the field of employment and work', Chapter IV includes Article 13 which prohibits discrimination on grounds of sex in the public and the private sector, including state bodies, in relation to:

1. conditions for access to employment, self-employment or occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy;
2. promotion at work;
3. access to all types and levels of vocational training and guidance, advanced vocational training and retraining;
4. employment and working conditions, rights from work and on the basis of work, including equal pay for equal work and work of equal value;
5. membership of, and involvement in, an organisation of workers or employers or any other professional organisation, including the benefits provided by such organisations;
6. the work-life balance; and
7. pregnancy, birth, parenting responsibilities and all forms of custody.

This prohibition covers all workers and self-employed persons. This general provision seems to cover gender equality issues in the field of self-employment in a satisfactory manner, since it can be interpreted to include an obligation for all bodies involved in the setting of

⁷⁸ Official Gazette of the Republic of Croatia *Narodne novine* nos 49/99, 63/00, 103/03, 177/04, 71/07, 124/10 and 114/11.

employment and working conditions for self-employment (primarily the State, but also other state and public authorities or associations of professionals and other subjects with conferred special rights). However, there is scarce or no case law which would identify the scope of interpretation of this provision in practice, or its extension to cover discriminatory termination of self-employment contracts by clients.

1.d. Collective agreements and case law

Article 11(6) of the Gender Equality Act⁷⁹ obliges social partners to comply with the provisions of that Act and measures to achieve gender equality when conducting collective negotiations and concluding collective agreements at all levels. However, the general conclusion from an analysis of the collective agreements in view of gender equality, equal opportunities and work-life balance conducted by the Ombudsperson for gender equality in 2009 is that social partners need further instructions regarding the legal framework for equal treatment and equal opportunities, given that many collective agreements themselves contain provisions which generate inequalities based on sex.⁸⁰ Out of the 120 collective agreements analysed, only 7 contained provisions on equal pay and only in a general manner. The monitoring mechanisms for this obligation are completely non-existent.

In an analysis of the Ombudsperson for Gender Equality on the causes of pay gap between men and women in the Croatian labour market conducted in 2010, several important areas were identified as deviating from the criteria developed in the case law of the Court of Justice of the EU.⁸¹ First, the basic salary in Croatian companies is often fixed in the employment contract for a defined job and working assignments, which includes rewarding the results achieved in the period before the definition of the basic pay, and not according to the degree of complexity of the job itself. Another area of inconsistency is in the fact that Croatian companies link the amount of pay to the years of service, which could be indirectly discriminatory for women in terms of equal pay for the work of equal value. If this practice were to lead to lower wages of a greater number of women than men, the employer should prove that it is necessary for the accomplishment of legitimate business goals. Another issue is the insufficiently transparent system of the job systematisation, i.e. the system of evaluation of complexity of the various jobs.

1.e. Additional information

Although Croatian legislation largely complies with regulations in the field of equal opportunities in general and with Directive 2006/54/EC in particular, national courts are still quite reserved regarding the interpretation and application of the anti-discrimination guarantees which arise from this legislation. An analysis of case law in the field of anti-discrimination protection conducted by the Ombudsperson for gender equality in 2010 shows that the courts are reluctant to link anti-discrimination protection with the proportionality test, that they tend to 'over-formalise' protection, confuse equal treatment with completely identical treatment and overemphasise the importance of a comparator, narrowly interpret the discriminatory grounds, inappropriately manage the burden of proof in court proceedings and pay little or no attention to the established case law of the Court of Justice of the EU.⁸² In addition, decisions on indirect discrimination are basically non-existent in practice.

⁷⁹ Official Gazette of the Republic of Croatia *Narodne novine* no. 82/08.

⁸⁰ <http://www.prs.hr/index.php/analize-i-istrazivanja/obrazovanje-3/180-analiza-kolektivnih-ugovora>, accessed 5 October 2012.

⁸¹ <http://www.prs.hr/index.php/analize-i-istrazivanja/obrazovanje-3/179-uzroci-jaza-u-placama-muskaraca-i-zena-na-hrvatskom-trzistu-rada-istrazivanje-u-2010>, accessed 3 October 2012.

⁸² <http://www.prs.hr/index.php/analize-i-istrazivanja/obrazovanje-4/181-istrazivanje-sudske-prakse-u-podrucju-antidiskriminacijske-zastite-2010>, accessed 1 October 2012.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

The provisions of Article 3(1) and (4) of Directive 2004/113/EC have been transposed in rather general terms, without specification in light of Paragraph (15) of the preliminary observations. The Anti-Discrimination Act⁸³ as *lex generalis* covers various discriminatory grounds (race or ethnical background, colour of skin, gender, language, religion, political preferences, national or social background, material conditions, union membership, education, social status, family or marital status, age, health, disability, genetic inheritance, gender identity and sexual orientation), as mentioned above in 1.a, and applies to all state bodies, units of local and regional self-government, legal persons vested with public authority, as well as any legal and natural person, in various areas, including the access to and supply of goods and services, and employment and self-employment and working conditions.

Article 6(4) of the Gender Equality Act⁸⁴ prohibits discrimination in the access to and supply of goods and services. Discrimination based on sex is defined in Paragraph 1 of the same Article as any differential treatment, exclusion or limitation based on sex with the result or purpose of rendering more difficult or denying the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social, cultural, civil, educational or any other sphere of life based on gender equality.

2.b. Freedom to choose contractual partners

There are no specific provisions regarding freedom of contract, including the freedom to choose a contractual partner. The general provisions of Article 6(4) of the Gender Equality Act⁸⁵ therefore apply.

2.c. Collective agreements and case law

There are no mechanisms to monitor the fulfilment of the compliance obligation of Article 13(a)-(b).

2.d. Additional information

The objective of the new Article 9 of the Anti-Discrimination Act⁸⁶ is to remove any existing conceptual inconsistencies with the EU *acquis* in the field of gender equality. Therefore, exceptions to the general prohibition of discrimination on particular discriminatory grounds have been redefined. In view of the decision of the Court of Justice of the EU in Case C-236/09 *Test-Achats*, differences in premiums and benefits where the use of sex was a factor of calculation (former Article 9(2)(6) of the Anti-Discrimination Act) are no longer regarded as excluded from discrimination. However, this particular provision shall only enter into force on 30 June 2013. In addition, any less favourable treatment in the access to and supply of goods and services and sports shall not be deemed discriminatory, if the provision of the goods and/or services is reserved exclusively or primarily to members of one sex or persons with disabilities, provided that such treatment is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

One of the purposes of the adoption of the Gender Equality Act⁸⁷ was to implement Directive

⁸³ Official Gazette of the Republic of Croatia *Narodne novine* nos 85/08 and 112/12.

⁸⁴ Official Gazette of the Republic of Croatia *Narodne novine* no. 82/08.

⁸⁵ Official Gazette of the Republic of Croatia *Narodne novine* no. 82/08.

⁸⁶ As amended by the Act on Amendments to the Anti-Discrimination Act, Official Gazette of the Republic of Croatia *Narodne novine* no. 112/12; these amendments entered into force on 19 October 2012.

⁸⁷ Official Gazette of the Republic of Croatia *Narodne novine* no. 82/08.

86/613/EEC. However, no specific provisions in that Act refer to the specific delimitation of the subject matter contained in Article 1(1) of Directive 86/613/EEC. The Act defines gender equality in general terms, as meaning that women and men are equally present in all spheres of public and private life, that they have equal status, equal opportunities to exercise all their rights and equal benefit from the achieved results (Article 5 of the Gender Equality Act).

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

The scope of equal treatment contained in Article 4 of Directive 86/613/EEC or Article 4(1) of Directive 2010/41/EU is covered in Croatian legislation by general referral to the prohibition of discrimination in the field of employment and work (Article 13 of the Gender Equality Act). Equal access to self-employment and occupation is guaranteed in the public and the private sector and in any branch or activity, without mentioning specific characteristics of the self-employment activity.

3.c. Collective agreements and case law

According to the analysis of the collective agreements in view of gender equality, equal opportunities and work-life balance conducted by the Ombudsperson for gender equality in 2009, collective agreements generally lack provisions on sex equality regarding access to employment and occupation.⁸⁸ Given that further improvement by developing a comprehensive system of monitoring discrimination cases in general is still needed, it is presently not possible to identify whether any case law on this specific subject matter exists.

3.d. Additional information

Given the general provisions of the Anti-Discrimination Act⁸⁹ and the Gender Equality Act,⁹⁰ improved monitoring of their practical application will show whether further implementation of Directive 2010/41/EU is needed.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

The legal definition of the terms ‘pregnant workers’, ‘workers who have recently given birth’ and ‘workers who are breastfeeding’ is provided in the latest amendments to the Act on Maternity and Parental Benefits,⁹¹ which entered into force on 31 March 2011. However, they only apply within the framework of the rights recognised under that Act. A ‘pregnant worker’ is a worker who has informed the employer of her condition in writing, unless otherwise prescribed. A ‘worker who has recently given birth’ is a worker who is mother of a child younger than 1, who has informed the employer of her condition in writing, at least 30 days prior to her return to work. A ‘worker who is breastfeeding’ is a worker who is mother of a child younger than 1, who is breastfeeding and has informed her employer of that condition at least 30 days prior to her return to work.

The Labour Act⁹² has not been amended to include the above definitions and still refers to the terms ‘pregnant women’ and ‘women who are breastfeeding’, without clarification of the scope of these terms. It contains a separate section on the protection of pregnant women, parents and adoptive parents (Section VIII, Articles 67-73) which prohibits dismissal on grounds of pregnancy or refusal to employ a pregnant worker. Pregnant women or women who are breastfeeding are entitled to protection in terms of a new or amended labour contract if the activities at the workplace present a risk to her or her child’s life or health. The prohibition of dismissal applies during pregnancy or maternity/parental/adoptive parental

⁸⁸ <http://www.prs.hr/index.php/analize-i-istrzivanja/obrazovanje-3/180-analiza-kolektivnih-ugovora>, accessed 5 October 2012.

⁸⁹ Official Gazette of the Republic of Croatia *Narodne novine* nos 85/08 and 112/12.

⁹⁰ Official Gazette of the Republic of Croatia *Narodne novine* no. 82/08.

⁹¹ Official Gazette of the Republic of Croatia *Narodne novine* nos 85/08, 110/08 and 34/11.

⁹² Official Gazette of the Republic of Croatia *Narodne novine* nos 149/09 and 61/11.

leave, part-time work, work with reduced working hours due to increased care, leave of absence of a pregnant woman or breastfeeding mother, leave of absence or work with reduced working hours due to care for a child with developmental disabilities, and during 15 days after termination of a pregnancy or any of those rights. However, all these circumstances do not prevent the expiration of a fixed-term contract.

The same terms ('pregnant women' and 'women who are breastfeeding') are used in the Occupational Safety and Health at Work Act.⁹³ Under this Act, the employer is obliged to take special prevention measures for workers who are minors, women or who have decreased work capacity and to define activities, in accordance with the law and collective agreements, which those workers must not perform (Article 37). Article 39(1) and (2) of the same Act defines jobs which pregnant women and women who are breastfeeding must not perform.

4.b. Collective agreements and case law

Pursuant to Article 7(2) of the Act on Maternity and Parental Benefits⁹⁴ a member of the management board of a company is deemed to be an employed person within the meaning of this Act, if she/he has the status of insured person in compulsory health and pension insurance. Similarly, under Article 3(2) of the Labour Act,⁹⁵ a natural person who is authorised to conduct the employer's business in the capacity of member of the management board or executive manager or other capacity, in accordance with the law may perform work for the employer as an employee in an employment relationship.

In practice, these provisions might lead to differentiated interpretations of the status of members of management boards, depending on the type of company. According to one interpretation, a member of the board of a joint stock company cannot be deemed a worker within the meaning of the case law of the Court of Justice of the EU. On the other hand, a member of the management board or executive director of a limited liability company is deemed to be a worker. In such case, the absolute prohibition of dismissal during pregnancy applies (even for reasons not related to pregnancy). If the member of the management board is not considered to be a worker, dismissal *during* pregnancy is possible, but not *on the ground* of pregnancy.⁹⁶

There is no available case law similar to Case C-506/06 *Mayr*.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

The right to maternity/parental/adoptive leave is recognised to self-employed persons who have the status of insured person in the compulsory health and pension insurance system, in the same manner as employed persons (Article 7(1)(2) of the Act on Maternity and Parental Benefits.⁹⁷

4.d. Additional information

According to the latest Monitoring Report,⁹⁸ legal alignment of the Occupational Safety and Health Act with Directive 92/85/EC still needs to be completed.

Despite the formally proclaimed right to return to their previous work and assignments, the position of women who return to work after having used maternity leave is in practice extremely insecure, especially in the private sector. There are many reported instances of transfer to a lesser-paid job or even termination of the employment relationship due to economic reasons shortly after returning to work. In many cases, women who have been transferred to lesser-paid jobs are reluctant to invoke institutional or court protection of their rights, in fear of further increasing their marginalisation.

⁹³ Official Gazette of the Republic of Croatia *Narodne novine* nos 59/96, 94/96, 114/03, 86/08 and 75/09.

⁹⁴ Official Gazette of the Republic of Croatia *Narodne novine* nos 85/08, 110/08 and 34/11.

⁹⁵ Official Gazette of the Republic of Croatia *Narodne novine* nos 149/09 and 61/11.

⁹⁶ I. Grgurev & P. Ceronja 'Opoziv imenovanja trudne članice uprave društva kapitala – spolna diskriminacija?' *Zbornik Pravnog fakulteta u Zagrebu* vol. 61, No. 6 (December 2011) pp. 1881-1919.

⁹⁷ Official Gazette of the Republic of Croatia *Narodne novine* nos 85/08, 110/08 and 34/11.

⁹⁸ Commission Staff Working Document, Comprehensive Monitoring Report on Croatia, Brussels, 10 October 2012, SWD(2012) 338, p. 30.

In addition, it is estimated that approximately 80 % of all employment contracts concluded in the last nine years in Croatia are fixed-term contracts, which means that there is no effective protection, i.e. they can expire regardless of the condition of the worker.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

The Act on Maternity and Parental Benefits⁹⁹ was last amended in 2011, mainly to ensure better implementation and correct transposition of Directive 92/85/EEC in Croatian legislation regarding the right to maternity leave. Article 2(3) and Article 7 of the Act on Maternity and Parental Benefits¹⁰⁰ define its personal scope of application. In line with the Croatian pro-natal family policies, the wide scope of beneficiaries under this Act includes employed persons, self-employed persons, farmers, persons with the recognised status of unemployed person and pensioners. All of these subcategories are broadly defined and Article 1(3) of the Framework Agreement is fully respected.

5.b. Entitlement to parental leave

With the purpose of protecting motherhood, care for children and achieving a good work-life balance, Croatian legislation grants several rights to the mother and father of a child, adoptive parent, guardian, caretaker or any other natural person entrusted by the competent authority to take care of a child. These rights take the form of time off from work and cash benefits and include e.g. maternity leave, parental leave, part-time work, breastfeeding leave, time off for ante-natal examinations, and adoptive parental leave.

Article 13(2) of the Act on Maternity and Parental Benefits¹⁰¹ transposes Article 2(1) of the Framework Agreement regarding leave on the grounds of the birth of a child, by granting the right to parental leave to employed and self-employed persons to take care of that child until the age eight. The right to leave which is granted on the grounds of the adoption of a child is regulated in Articles 34-40 of this Act. After expiry of the adoptive parental leave, whose duration is set taking into account the age of the adopted child and which can be compared to maternity leave, the adoptive parent is entitled to parental leave in accordance with the general provisions on parental leave.

There is no qualifying period for parental leave within the meaning of Article 3(1)(b) of the Framework Agreement.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

The Act on Maternity and Parental Benefits¹⁰² fully recognises the entitlements of the self-employed on an equal footing with employed persons.

5.d. Additional information

Bearing in mind the very broad personal scope of application of the Act on Maternity and Parental Benefits,¹⁰³ no additional alignment with Directive 2010/18/EU will be required.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

The Anti-Discrimination Act¹⁰⁴ combines various personal and material scopes of application of the three main sex equality directives and of Directive 2000/43/EC and Directive 2000/78/EC in one, general Act. However, the personal and material scope of the Act is even wider than the directives mentioned. There are seventeen different prohibited discriminatory

⁹⁹ Official Gazette of the Republic of Croatia *Narodne novine* nos 85/08, 110/08 and 34/11.

¹⁰⁰ Official Gazette of the Republic of Croatia *Narodne novine* nos 85/08, 110/08 and 34/11.

¹⁰¹ Official Gazette of the Republic of Croatia *Narodne novine* nos 85/08, 110/08 and 34/11.

¹⁰² Official Gazette of the Republic of Croatia *Narodne novine* nos 85/08, 110/08 and 34/11.

¹⁰³ Official Gazette of the Republic of Croatia *Narodne novine* nos 85/08, 110/08 and 34/11.

¹⁰⁴ Official Gazette of the Republic of Croatia *Narodne novine* nos 85/08 and 112/12.

grounds in this Act (race or ethnical background, colour of skin, gender, language, religion, political preferences, national or social background, material conditions, union membership, education, social status, family or marital status, age, health, disability, genetic inheritance, gender identity and sexual orientation). There is no hierarchy of grounds, but the national courts will nevertheless have to establish a carefully balanced approach in the application of the Act with regard to the specific circumstances of the relevant case. In addition, the courts will have to take account of the case law of the Court of Justice of the EU with a view to prohibited grounds from the EU directives. The material scope of application of the Act is defined in broad terms in its Article 8. The wording of this Article is such that the Act applies in practically every area of life and particularly in the regulatory areas expressly referred to in the Article itself.

CYPRUS – Lia Efstratiou-Georgiades

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

The following amendment laws and regulations transposed into national legislation the provisions of Recast Directive 2006/54/EC, which is related to the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation:¹⁰⁵

- a) the Equal Pay between Men and Women for the Same Work or for Work to which Equal Value is Attributed (Amendment) Law No. 38(I)/2009 (basic Law No. 177(I)/2002);
- b) the Equal Treatment of Men and Women as regards Access to Employment and Vocational Training (Amendment) Law No. 39(I)/2009 (basic Law No. 205(I)/2002);
- c) the Equal Treatment of Men and Women in Occupational Social Insurance Schemes (Amendment) Law No. 40(I)/2009 (basic Law No. 133(I)/2002); and
- d) Regulations 176/2009 for the Provision of Independent Assistance to Victims of Discrimination ‘under articles 23(2)(a) and 34 of Law No. 205(I)/2002 and Law No. 39(I)/2009 respectively’.

The purpose of the above Directive is to implement the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation in relation to a) access to employment, including promotion, and to vocational training, b) working conditions, including pay, and c) occupational social security schemes.

1.a. Equal pay

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

The Law covers all categories of employees, men and women, for all activities related to employment, who work or undergo training or work as apprentices on a full or a part-time basis for a fixed term or for an indefinite period, continuous or not, irrespective of the place of employment, including working from home, but not including the self-employed. The Law may cover vulnerable/atypical/precarious work contractors if the facts/conditions can be considered to fall under the definition of ‘worker’. The maximum rights enjoyed by one sex shall also apply to the other sex. In the public and semi-public sectors equal pay is applied to all jobs at all levels. Unfortunately, most employers in the private sector do not have job classification or job description schemes nor have they conducted an evaluation of every profession or post for the purpose of defining what is the same work or work of equal value.

¹⁰⁵ Also see: www.cygazette.com, accessed 23 April 2012.

Article 4 of Directive 2006/54/EC has been transposed by Article 5(1) and (2) of Law No. 177(I)/2002 as amended by No. 38(I)/2009.

1.b. Equal treatment in occupational social security schemes

The Equal Treatment of Men and Women in Occupational Social Insurance Schemes (Amendment) Law No. 40(I)/2009 (basic Law No. 133(I)/2002) aims to ensure effective application of the principle of equal opportunities and equal treatment of men and women in occupational schemes. Article 2(a) of the Law defines the ‘scheme’ as a scheme providing for benefits to employees in public and private sectors and to employers and self-employed persons in the same company or group of companies, which supplement or replace the benefits under the Social Insurance System.

The Law applies to the economically active population and covers all working persons including the self-employed, whose working activity is interrupted because of illness, maternity, accident or involuntary unemployment and also persons seeking employment, pensioners and disabled persons, as well as their dependents, and as stipulated in ‘articles 3(1A) and 3(1B)’. The Law applies: a) to occupational schemes which ensure protection against the following risks: i) illness, ii) invalidity, iii) old-age, including premature, retirement, iv) industrial accident and occupational diseases, v) unemployment; b) to occupational social security schemes which provide for other social benefits in kind or money, and especially benefits to survivors and family benefits as long as these are provided by the employer to the employee because of his work; and c) to pension schemes for a special category of workers, such as civil servants who are entitled to benefits because of their employment relationship with a public authority as their employer. Articles 6 and 10 and the proviso of Article 8 of Directive 2006/54/EC are included in the above Law. Under all occupational pension schemes men and women enjoy equal treatment, as required by the Law and there are no exceptions.

In Cyprus there is a clear distinction between statutory pension schemes and/or occupational pension schemes. More precisely, the General Social Insurance Scheme (GSIS) and the Social Pension Scheme (SPS) are considered to be statutory, whereas occupational pension schemes for employees in the public service and the broader public sector, the voluntary provident fund schemes and other similar pension schemes fall under the category of occupational pension schemes.

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

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

The current system comprises the GSIS, the SPS, the Special Allowance for pensioners and the Public Assistance Scheme, which provides financial assistance and social services to persons whose means are not sufficient to meet their basic and special needs. The pensionable age is the same for men and women.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

The Equal Treatment of Men and Women as regards Access to Employment and Vocational Training Law No. 205(I)/2002 as amended by Law No. 39(I)/2009 has provisions which ensure the implementation of the principle of equal treatment between men and women without direct or indirect discrimination on the ground of sex in the public or private sector, including public bodies, specifically a) in the field of access to employment, b) terms and conditions of employment, and c) dismissal and vocational training.

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

private security bodies, home care of old or disabled persons and artistic performers. The Law covers every man and woman who is an employed person on the basis of the definition of the term ‘employed person’ given in Law No. 205(I)/2002 as amended, but does not include volunteers and the self-employed. Therefore, if the actual facts of a case, which relate to vulnerable/atypical/precarious work contracts/relationships, justify and prove the assertion that he/she is an employed person, then the case is covered.

The above Law has the definition of the term ‘industrial dispute’, which means every dispute by reason of the application of the Law, as well as any supplementary or incidental issue, a) between employed persons or candidates for employment and employers or their successors, b) between employed persons and their colleagues, c) between trainees or candidates for occupational training and those providing occupational orientation, occupational training or in any manner taking part in organizing, providing or financing them or their successors, and d) between independent professionals or candidates for practising an independent profession and the legal persons or organizations of public or private law who regulate access to an independent profession, the terms and conditions of practising it or of termination of practising it or access to education, including any practical training necessary to have access to an independent profession and its practice.

Also, Article 10(1) expressly provides that ‘men and women enjoy equal treatment prohibiting any discrimination on the ground of sex as regards access to an independent profession, the terms and conditions for its practising or termination of its practising and access to education or training including practical training necessary for access to an independent profession and practising it’. Article 10 of Law No. 205(I)/2002 as amended by Law No. 39(I)/2009 is a transposition of Article 14(1)(a)-(d) of Directive 2006/54/EC.

The duty holder is the relevant competent authority and is obliged to recall or amend as necessary any individual or administrative act which is contrary to the Law.

The Law in question applies to all employed persons with regard to all activities.

In my opinion, if the real facts of a case are found to fall within the provisions of the Law, then a self-employed person may be covered.

1.d. Collective agreements and case law

Law No. 205(I)/2002 as amended provides that any parts of an existing collective agreement or individual agreement, internal regulation or rule of an independent profession or rule of an employers’ or workers’ organization, which are contrary to the provisions of the Law, are abolished if they contain direct or indirect discrimination against one sex (Article 18(4)). Article 18(5) provides for the abolition of any new provision in a collective or individual agreement, internal regulation of a business or rule of an independent profession, or rule of an employers’ or workers’ organization, which contains direct or indirect discrimination against one sex. Furthermore, Article 18(1)(a) of the law expressly provides that any existing provision of any law is abolished to the extent that it results in any direct or indirect discrimination against one sex. Furthermore it provides that if the discrimination is the award of a right or other advantage to persons of one sex only, this right or advantage is extended by automatic right to persons of the other sex (Article 18(a)(b)). The person who is subject to discrimination because of sex can have recourse to the court.

The Law provides that final court decisions are universally enforced. Any court decision relating to a collective agreement is communicated by the Court Registrar to the competent employers’ and workers’ organizations, which are obliged to note immediately in the relevant text the abolition or invalidity of the provision in question. In case a discrimination consists of granting a right or other advantage to persons of one sex, the court can order its extension to persons of the other sex.

In Cyprus collective agreements are gentlemen’s agreements and have no force of law for the time being. Collective agreements are used as a tool to promote gender equality, to comply with Community Law and to amend or eliminate any direct or indirect discrimination against one sex in existing provisions. Collective agreements are mainly drawn up as gender-neutral or gender-blind, with the exception of maternity provisions. There are no court decisions on this matter in Cyprus.

Any collective agreement or individual contract of employment, which is contrary to the provisions of the Law, is repealed. Law No. 205(I)/2002 as amended abolished all direct or indirect discrimination between men and women that appeared in collective agreements or individual contracts of employment. References to male-female positions in collective agreements and contracts have been abolished. Employers are obliged to protect all employees by taking all proper measures which promote the principle of equality between men and women and also promote social dialogue, provisions which are relevant to Article 17 TFEU.

1.e. Additional information

There is no additional information to report.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

The Law on Equal Treatment between Men and Women as regards access to and supply of goods and services No. 18(I)/2008 has incorporated all articles of Directive 2004/113/EC including Articles 3(1) and (4) and has also incorporated Paragraph (15) of the preliminary observations.

The Law applies to all persons who supply goods and services to the public, irrespective of the person concerned, both in the public and private sectors including public bodies and local authorities, and which are offered outside the area of private and family life and the transactions carried out in this context (Articles 3 and 4(1) of Law No. 18(I)/2008). Furthermore the Law applies to insurance and pensions which are private, voluntary and separate from the employment relationship (Article 7 of Law No. 18(I)/2008).

2.b. Freedom to choose contractual partners

Law No. 18(I)/2008 has transposed Article 3(2) of the Directive as well as Paragraph (14) of the preliminary observations. Article 4(2) of Law No. 18(I)/2008 provides that every person is free to choose with whom to enter into a contract, provided that the selection of the other contractual party is not made on the basis of sex. It also provides that the Law does not prejudice any more favourable provisions of any other law regarding pregnancy and maternity.

2.c. Collective agreements and case law

As mentioned in 1.d. above, collective agreements are gentlemen's agreements and have no force of law for the time being, but are used as a tool to promote gender equality, to comply with Community Laws and to amend or eliminate any direct or indirect discrimination against one sex.

Articles 15(1) and 15(5) of the above Law No. 18(I)/2008 expressly provide that after the commencement of the application of the Law, any existing provision of a law, regulation and administrative provision which has discriminatory provisions based on sex is revoked. Also, any contractual provisions, internal rules of businesses and rules governing profit-making or non-profit making associations which are contrary to the provisions of the Law are null and void if they have discriminatory provisions based on sex. Also, provisions of collective agreements which are contrary to the provisions of the Law are null and void.

2.d. Additional information

The Law does not apply in education, in the mass media and in advertisements, in employment and in vocational activities (Article 3(4) of Directive 2004/113/EC). Any discrimination on the ground of sex in applying the scope of the Law is forbidden, but the Law allows for different treatment in providing goods and services to persons of one sex if there is a good justification for this. Also, positive actions are allowed if they serve the purposes of the Law.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

Directive 2010/41/EU has not yet been transposed into national legislation in Cyprus. Directives 79/7/EEC and 86/613/EC have been transposed into national legislation by the Social Insurance (Amendment) Law No. 51(I)/2001.

In Cyprus the Social Insurance system is regulated by the Social Insurance Law No. 41/1980 as amended (last amendment Law No. 112(I)/2009).

3.a. Personal scope

The General Social Insurance Scheme (GSIS) falls under Directives 79/7/EEC and 86/613/EC and covers all persons gainfully occupied in Cyprus, either as employed or self-employed persons.

Self-employed persons enjoy all the benefits which the GSIS provides except unemployment and employment injury benefits. The GSIS provides the following benefits for self-employed persons: invalidity pension, old-age pension, widow's pension, sickness benefit, orphan's benefit, maternity grant, marriage grant, funeral grant, maternity allowance.

Helping spouses have no other rights except those deriving from their spouse's participation in the Social Insurance Scheme, i.e. marriage and maternity grants and a widow's pension which are payable to women from their husband's insurance.

Helping spouses who work together are considered to be self-employed persons and are compulsorily covered. Therefore he/she must pay contributions. The GSIS does not recognize helping spouses as a separate category. The Social Pension Scheme (SPS) closes the gap in accessibility to pensions by providing non-means-tested pensions to those residents who for any reason have not participated in the labour market and as a consequence have no pension income either from GSIS or from any other source. In other words, the SPS ensures universality in the provision of pensions. The beneficiaries are mostly women (about 95 %) who were urban housewives or non-insured wives or unmarried daughters of farmers engaged in family agricultural work. There is discrimination between unmarried and married women in cases in which both are not insured and give birth to one or more children. An unmarried woman does not receive a maternity grant whereas a married woman is entitled to this due to her husband's participation in GSIS.

Any person who has suffered loss or damage because of non-application of the principle of equal treatment has access to an administrative or court procedure, requesting reparation under Article 146 of the Constitution and legal damages. The provisions of Articles 2(1) a-b, 7, 9-10 and 13 of the Directive's preliminary observations exist in national legislation.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

The purpose of Directive 2006/54/EC is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. The personal scope of the above Directive is to apply to members of the working population including self-employed persons (Article 6).

In my opinion Article 4(1) of Directive 2010/41/EC adds significantly to the 'access to ... self-employment or occupation' referred to in Article 14(1)(a) of Directive 2006/54/EC because it adds 'The principle of equal treatment and that there shall be no discrimination whatsoever on grounds of sex, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any form of self-employed activity'. Therefore it widens the scope of application of the principle of equal treatment by extending it to self-employment.

3.c. Collective agreements and case law

Collective agreements are gentlemen's agreements and have no force of law for the time being. Collective agreements are drawn up as gender-neutral or gender-blind with the exception of maternity provisions. The Law abolished all direct or indirect discrimination

between men and women that appeared in collective agreements or individual contracts of employment as regards the Provident Fund (occupational security schemes).

Discrimination exists in relation to widowers under the GSIS. A widower's pension is not payable except where the widower is permanently incapable of self-support. The discrimination is accentuated by the fact that a woman who has paid insurance contributions is entitled to draw a widow's pension alongside her own social insurance pension.

3.d. Additional information

There is no additional information to report.

4. Directive 92/85/EEC on pregnancy and maternity

The Protection of Maternity (Amendment) Law No. 64(I)/2002 amended the Protection of Maternity Laws of 1997 to 2000. Its purpose was to harmonise the Law with Directive 92/85/EEC. The Safety and Health at Work Regulations 1996 to 2002 served the same purpose. The Protection of Maternity Laws of 1997 to 2002 provide for the application of measures which aim to improve the health and safety at work of pregnant workers, workers who have recently given birth and breastfeeding workers. The most recent amendment of the Law by the Protection of Maternity Law No. 70(I)/2011 was made in order: a) to harmonize Cypriot law with Article 10 of Directive 92/85/EC and the decision of the ECJ on 11 October 2007 in Case C-460/06 *Nadine Paquay v Société d'architectes Hoet + Minne SPRL* [2007] ECR I-8511 and *Dita Danosa v LEB Lizings SIA*, b) to provide that in the case of adopting a child under the age of five, the maternity leave is 16 weeks (for natural mothers it is 18 weeks), c) to provide that a pregnant woman is entitled to paid time off work for antenatal examinations, and d) to provide for extension of maternity leave in cases where the baby needs to stay in an incubator for additional days due to premature birth or any other health reason.

A woman whose ova have been fertilized in vitro but not yet transferred to her uterus is not covered.

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

The term 'pregnant workers' is defined as 'employed women' in the Protection of Maternity Law, the Social Insurance Law and the Protection of Maternity (Health and Safety at Work) Regulations and is the same as the definition given in Directive 92/85/EEC.

The term 'workers who have recently given birth' is defined in the Protection of Maternity (Health and Safety at work) Regulations as employed women who have given birth in the previous two months and informed their employer through a certificate by a registered doctor.

The term 'workers who are breastfeeding' is defined as employed women who breastfeed their child for a period not exceeding nine months from the date of birth or from the date that maternity leave begins in case of adoption.

4.b. Collective agreements and case law

Collective agreements expressly refer to the protection of pregnant workers and their rights before and after childbirth, under the Protection of Maternity Laws of 1997 to 2011. They also refer to the Regulations on Safety and Health at Work of 1996 to 2002.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

The Social Insurance Department of the Ministry of Labour and Social Insurance is the 'duty holder'.

Maternity allowance is payable to an insured employed woman, a self-employed woman or a voluntarily insured woman in the service of a Cypriot employer abroad, who is expecting a child or who has adopted a child herself or her husband, in the first twelve years from the child's birth.

The conditions for the payment of maternity allowance are: a) the insured woman is on maternity leave and she does not receive her whole salary or wages from her employer or any amount as self-employed person, b) the insured woman has been insured for at least 26 weeks and has paid, up to the day of maternity allowance, contribution on insurable earnings not lower than 26 times the weekly amount of the basic insurable earnings, c) the insured woman has paid or been credited with insurable earnings, in the previous contribution year not lower than 20 times the weekly amount of the basic insurable earnings.

Furthermore a maternity grant (one-off payment) is payable to the woman giving birth, either from her own or her husband's insurance, irrespective of her category of insurance (employed persons, self-employed persons or voluntary contributors). The mother should submit a claim on a specific application. In the case where the claimant submits an application form for a maternity grant on the basis of her husband insurance, the application form should be accompanied by the marriage certificate. A maternity grant is payable only once. There is discrimination between unmarried and married women in cases where both are uninsured and give birth to one or more children. An unmarried woman does not receive a maternity grant whereas a married woman is entitled to this due to her husband's participation in GSIS.

4.d. Additional information

There is no additional information to report.

5. Directive 2010/18/EU on parental leave

The Parental Leave and Time Off Work on Grounds of Force Majeure Law No. 69(I)/2002 as amended by Law No. 11(I)/2010 was enacted in order to transpose Directives 96/34/EC and 97/80/EC. Directive 2010/18/EC has not yet been transposed into national legislation.

5.a. Personal scope

The Law applies to all workers, men and women, who have completed six months of continuous employment with the same employer, including workers on a part-time basis, on fixed-term employment contracts or on a contract or employment relationship of a temporary nature. In case of successive fixed-term contracts, all such contracts with the same employer are taken into consideration for the calculation of the six-month period.

5.b. Entitlement to parental leave

Any worker (a man and a woman) who has been working for the same employer for a continuous period of six months can take unpaid parental leave after the maternity leave. Any employee parent is entitled to take unpaid parental leave for a maximum of thirteen weeks in total for the birth or adoption of a child, in order for the parent to take care of and participate in the raising of the child. This can be taken before the child's eighth birthday or, in the case of adoption, before eight years have expired after the adoption while the child is still under 12 and for a disabled child up to the age of 18, under the Persons with Disabilities Laws of 2000 to 2007 (Laws Nos. 127(I)/2000, 57(I)/2004, 72(I)/2007, 102(I)/2007. The minimum period of parental leave per year is one week and the maximum is five weeks in cases of one or two children and seven weeks in cases of three children and more. At the end of the parental leave, the worker is entitled to return to work in the same or similar post and all his/her rights are safeguarded. Also, the worker is entitled to seven days off work per year without pay on grounds of force majeure for urgent family reasons or accidents.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

The right to parental leave does not apply to self-employed persons. The employees who are eligible to parental leave are mentioned in 5.b. above.

5.d. Additional information

On 22 March 2012 the Government submitted to the House of Representatives a Bill entitled ‘The Parental Leave and Leave for Reasons of Force Majeure (Amendment) Law of 2012’. The purpose of the Bill is to harmonize national law with Directive 2010/18/EU. Among other provisions, the Bill regulates the right of working women and men to parental leave because of birth or adoption of a child.

The main provisions of the Bill are the following:

- The duration of parental leave is increased from three to four months, one of which is strictly non-transferable, and it covers all forms of employment, including part-time work, fixed-term contracts or temporary employment relationships.
- In case of successive fixed-term contracts with the same employer the sum of these contracts shall be taken into account for the purpose of calculating the qualifying period.
- There is an obligation on employers to take into consideration any needs of parents who return to work after parental leave for changes to their working hours for a set period of time.
- Social partners are recommended to assess the need to adjust the conditions of application of parental leave to the needs of parents of children with a disability or a long-term illness.

Further to the above provisions, the Bill includes some other changes which were found necessary, taking into account experiences and suggestions of users and beneficiaries of parental leave. More specifically, there is a provision for increased duration of parental leave to widow/widower parents to 23 weeks and the possibility for transfer of two weeks from one parent to the other (and not only from the father to the mother).

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

Law No. 177(I)/2002 as amended by Law No. 38(I)/2009, Law No. 205(I)/2002 as amended by Law No. 39(I)/2009 and Law No. 133(I)/2002 as amended by Law No. 40(I)/2009 transpose into national legislation Recast Directive 2006/54/EC. They relate to the application of the principle of equal opportunities of men and women in matters of employment and occupation and also the principle of equal treatment. They prohibit any direct or indirect discrimination on the ground of sex.

Law No. 18(I)/2008 transposed into national legislation Directive 2004/113/EC, which relates to the application of the principle of equal treatment between men and women in the access to and supply of goods and services prohibiting any direct or indirect discrimination on the ground of sex.

Law No. 51(I)/2001 amended the Social Insurance Laws of 1980-2009 and transposed into national legislation Directive 86/613/EEC.

As mentioned above, Directive 2010/41/EC has not yet been transposed into national legislation.

The above Laws prohibit any direct or indirect discrimination on the ground of sex at the workplace in the access to and supply of goods and services in the public and private sectors and in the protection of maternity and breastfeeding.

The Law that provides for persons with disabilities No. 127(I)/2000 as amended¹⁰⁶ transposed into national legislation Directive 2000/78/EC, which established a general framework for equal treatment in employment and occupation. The principle of equal treatment of persons with disabilities consists of the absence of any discrimination against any person because of disability and is stated in Article 3(1) of the Law. A disabled worker or self-employed person have the protection of the abovementioned Laws.

¹⁰⁶ Nos. 127(I)/2000, 57(I)/2004, 72(I)/2007, 146(I)/2009.

On 31 March 2004 the House of Representatives enacted the following four Laws to transpose Directive 2000/43/EC on the implementation of the principle of equal treatment irrespective of racial or ethnic origin:

- a) The Equal Treatment (Racial or Ethnic Origin Law) Law No. 59(I)/2004. This Law prohibits discrimination on any of the above grounds, in both the public and private sectors, in matters of social protection, health treatment, social services, training and access to goods and services.
- b) The Equal Treatment in Employment and Occupation Law No. 58(I)/2004. This Law prohibits discrimination specifically in the spheres of employment and occupation on any of the above grounds, and also on the grounds of religion, belief, sexual orientation, disability and age.
- c) The Commissioner of Administration (Amendment) Law No. 36(I)/2004. This Law expands the jurisdiction of the Ombudsman in order to deal with anti-discrimination and equality issues.
- d) The Combating of Racism and Other Discrimination (Commissioner) Law No. 24(I)/2004. This Law vests the Commissioner for Administration (Ombudsman) – an independent officer – with special competences, duties and powers for combating and eliminating discrimination in both the public and private sectors, and also the promotion of equal treatment of all persons regardless of racial or ethnic origin. The Law covers discriminatory provisions/terms/criteria/practice which may be found, inter alia, in contracts of employment, collective agreements, articles of association of legal persons, societies, bodies and institutions, contracts for the supply goods and services, and terms of membership of organisations, including professional ones.

It is noted that the scope of application of Directives 2000/43/EC (especially Article 3(1)a-h) and 2000/78/EC (Article 3(1) a-d) is wider than that of Directives 2006/54/EC, 2004/113/EC and 2010/41/EC. Directive 2006/54/EC applies the principle of equality and prohibits any discrimination on the ground of sex in employment and occupation, whereas Directive 2000/43/EC applies the principle of equal treatment irrespective of racial and ethnic origin and prohibits any discrimination in the public and private sectors regarding social protection, healthcare, social services, training and access to goods and services. Furthermore it prohibits any discrimination in the sphere of employment and occupation including discrimination on the grounds of religion, belief, sexual orientation, disability and age.

The Directives have a wider application in the private and public sectors and include the field of employment, access to and supply of goods and services and the application of the principle of equal treatment. The Ombudsman has examined complaints in regard to Directive 2000/43/EC (see www.ombudsman.gov.cy).

CZECH REPUBLIC – Kristina Koldinská

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

The definition of pay is provided by Act No. 262/2006 Coll., Labour Code, which states in Article 109 that a wage is a consideration, monetary and in kind, provided to an employee for work done. A salary is a wage provided to employees employed by publicly financed employers (see Article 109 Paragraph 2). The Antidiscrimination Act (Act No. 198/2009 Coll.) defines remuneration in Article 5 as ‘any performance, whether monetary or non-monetary, recurrent or one-off, which is directly or indirectly provided to a person in paid employment.’ According to the Antidiscrimination Act and also the Labour Code, all employees are entitled to receive equal pay (wage or salary) for the same work or work of equal value (see Article 110). Equal pay also includes equal remuneration pursuant to an agreement. According to Article 109, Paragraph 5, remuneration pursuant to an agreement

means a monetary consideration provided for work done on the basis of an agreement on work performance or an agreement on work activity (these are specified in Articles 74-77 of the Labour Code). Both types of agreement are used mostly as a legal form of performing precarious or atypical work. This means that the Labour Code also protects workers in atypical or precarious work relationships as regards equal pay. According to the information known to the national expert, no national case law has been developed as yet in this regard.

1.b. Equal treatment in occupational social security schemes

The Antidiscrimination Act (Act No. 198/2009 Coll.) implemented Article 6 of the Recast Directive in a special provision (Articles 8 and 9) on equal treatment in occupational social security schemes, which is not otherwise included in Czech legislation. The provisions under Article 8(1)a-b were copied word for word into Article 9(1)a-b of the Antidiscrimination Act. In the Czech situation, these provisions do not have special relevance and are not used very often, as the occupational social security schemes are still not much used in the Czech Republic. In fact, there is no special legislation regulating social security schemes (see also Case C-41/08 *Commission of the European Communities v Czech Republic* [2008] and pending case C-241/11 *Commission of the European Communities v Czech Republic* – non-implementation of the judgment of the Court of Justice of 14 January 2010 in Case C-343/08 *Commission v Czech Republic*).

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

Article 14(1)(a)-(d) is transposed by the Antidiscrimination Act. Article 1 states that the Act ‘defines more precisely the right to equal treatment and prohibition of discrimination with respect to the right to employment and access to employment, access to an occupation, business or other self-employment, employment contract, service and other paid employment, including remuneration, membership of and involvement in trade unions, workers’ councils or employers’ associations, including the benefits such associations provide to their members, and membership of and involvement in professional associations, including the benefits such legal persons governed by public law provide to their members.’

According to Article 5(3), ‘in matters of the right and access to employment and access to an occupation, business or other self-employment, working activities and other paid employment, including remuneration, employers shall be obliged to provide for equal treatment.’ The above means that self-employed persons are also protected and the duty holder is the employer.

As the Labour Code protects equal treatment for all employees (Article 16 and 17), employees in precarious work contracts are also covered by this protection.

1.d. Collective agreements and case law

Neither collective agreements nor national case law have contributed to clarifying or expanding the personal scope of application of the abovementioned national provisions.

1.e. Additional information

There is no additional information to report.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

Directive 2004/113/EC is implemented through the Antidiscrimination Act. This Act does not specify the persons obliged to respect the ban on discrimination. As it is clearly stated that the Act implements relevant EU legislation, it is clear that the personal scope is respected and for the purpose of the equal access to goods and services it applies to all persons who provide goods and services. Moreover, there is the Consumer Protection Act No. 634/1992 Coll.,

which states in its Article 6 that ‘no seller may discriminate against any consumer in any way.’ Any provider of goods and services is understood to be a seller.

2.b. Freedom to choose contractual partners

Czech legislation does not expressly define the right to choose a contractual partner so long as the choice is not based upon that person’s sex. This, however, may be deduced from the civil law together with the spirit of the Antidiscrimination Act. Unfortunately, there is no case law in this regard.

2.c. Collective agreements and case law

Neither collective agreements nor national case law have contributed to clarifying or expanding the personal scope of application.

2.d. Additional information

The lack of implementation of Directive 2004/113/EC was one of the reasons why it was so urgent to finally adopt the Antidiscrimination Act. On the other hand, the implementation of Directive 2004/113/EC is more formalistic than material, the provisions are quite scarce and often simply copy the exact wording of the relevant provisions of the Directive. The Consumer Protection Act hardly tackles the issue, not from the point of view of gender equality nor from the point of view of other discrimination grounds. The lack of attention for this issue also results in a lack of case law, which does not exist in the area of equal access to goods and services regardless of sex.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

The Antidiscrimination Act guarantees equal access to occupation, business and self-employment (Article 1(b) of Act No. 198/2009 Coll.). Article 5(4) of the same Act provides a legal definition of occupation, which also includes self-employment. It states: ‘an occupation shall mean the activities of a natural person performed for consideration in paid employment or self-employment, whose proper performance is made subject by special provisions to the fulfilment of qualification criteria, particularly completion of the required education and, if applicable, period of experience.’

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

As national legislation does not go into much detail, from the Czech point of view, the scope of equal treatment contained in Article 4(1) does not add significantly to access to self-employment or occupation as it is referred to in Directive 2006/54/EC.

3.c. Collective agreements and case law

Neither collective agreements nor national case law have contributed to clarifying or expanding the personal scope of application.

3.d. Additional information

There is no additional information to report.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

Special protection provided to pregnant workers, workers who have recently given birth and workers who are breastfeeding is provided by the Labour Code (Act No. 262/2006 Coll.), which protects the abovementioned categories in labour relationships, and also in Act No. 187/2006 Coll., on sickness insurance, according to which sickness benefits are provided

to pregnant workers and workers who have recently given birth. Neither of these specify in more detail who is a pregnant worker, a worker who has recently given birth or a worker who is breastfeeding.

4.b. Collective agreements and case law

Neither collective agreements nor national case law have contributed to clarifying or expanding the personal scope of application. None of the abovementioned issues have been assessed yet by any of the Czech courts. Managers would probably be covered however, as they usually are, by the Labour Code, with some specific provisions in their labour contract. As regards a woman whose ova have been fertilised in vitro but not yet transferred to her uterus, she would most probably not be covered, as her situation would not be defined as pregnancy. In this case, the national court would probably use the argumentation of the ECJ in the *Mayr* case.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

Social rights – rights to the abovementioned sickness benefits (even if not to both types, but only to the so-called maternity financial aid) – are also granted to self-employed persons. The duty holder is the competent district social security administration, which is the provider of all sickness insurance benefits.

As regards labour protection, self-employed persons are not covered by the Labour Code, but according to the Antidiscrimination Act they are entitled to equal access to employment and self-employed activity. This principle could in some specific situations also cover the protection provided under Directive 92/85/EEC. In practice however, such situations hardly occur.

4.d. Additional information

There is no additional information to report.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

The Labour Code provides all the relevant labour protection to parents, including the duty of the employer to provide the employee with parental leave until the child reaches the age of three. The protection also covers part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency.

5.b. Entitlement to parental leave

Article 196 of the Labour Code states that: ‘in order to extend the care being given to a child, the employer shall grant a female or male employee parental leave if so requested. Parental leave is granted to the mother of a child upon termination of her maternity leave and to the father of a child from the day when the child is born and it is granted within the scope as requested, but no longer than until the day when the child reaches the age of three years.’ Article 197 further guarantees the right to parental leave also to female or male workers who have taken a child into their care substituting for parental care.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

Self-employed persons are entitled to a social benefit – parental allowance – provided on the basis of Act No. 117/1995 Coll., on state social support. Parents in general are entitled to this allowance, regardless of their working status. Parental leave as such however is provided only to workers by their employer.

5.d. Additional information

The protection of parents in the Czech Republic is very generous and gender neutral. No specific gaps have been identified.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

The Czech national legal system has not encountered too many difficulties with the various personal and material scopes of application of the sex equality directives and Directives 2000/43/EC and 2000/78/EC. Czech legislation is quite general in the area of equality and prohibition of discrimination. The personal scope is not to a great extent specified by the relevant legislation, as explained above. As regards the scope however, there are some legal definitions contained in the Antidiscrimination Act. To the definitions as described above, the definition of disability for the purposes of equal treatment might be added. Article 5(6) states that: ‘disability shall mean a physical, sensory, mental, psychological or some other impairment which precludes or may preclude the right of persons to equal treatment in the areas defined by this act; it must be a long-term disability which lasts, or according to the findings of medical science should last, for at least one year.’

As already stated in many previous reports, the Antidiscrimination Act as such is a rather chaotic and not very well-elaborated piece of legislation. Therefore the issues of personal or material scope did not receive sufficient attention either.

DENMARK – Ruth Nielsen

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

Article 4 on equal pay in Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation has been transposed into Danish law by the Danish Equal Pay Act.¹⁰⁷ It places the duty to pay equal pay on the employer and grants the entitlement to receive equal pay to men and women doing work of equal value. There is no mention of specific categories of workers: it does not include a ‘quasi-subordinate’ category of workers, for example. Workers in vulnerable/atypical/precarious work contracts/relationships are covered by the Equal Pay Act.

The Part-Time Directive¹⁰⁸ has been transposed into Danish legislation by the Part-Time Act¹⁰⁹ and the Directive on Fixed-Term Contracts¹¹⁰ by the Act on Fixed-Term Employment.¹¹¹ Those Acts prohibit discrimination of part-time workers and workers on fixed-term contracts including unequal pay for those reasons.

1.b. Equal treatment in occupational social security schemes

Article 6 (Personal Scope of Title II, Chapter 2 ‘Equal Treatment in Occupational Social Security Schemes’: ‘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’) and Article 10 (Implementation as regards self-employed persons) have been transposed into Danish legislation by the Act on equal treatment of men and women in connection with insurance, pension and similar financial services.¹¹² Section 1 of that Act provides:

¹⁰⁷ Consolidation Act No. 899/2008.

¹⁰⁸ 97/81/EC.

¹⁰⁹ Consolidation Act No. 815/2002.

¹¹⁰ 1999/70/EC.

¹¹¹ Consolidation Act No. 907/2008.

¹¹² Consolidation Act No. 775 of 29 August 2001 as amended by Act No. 133 of 24 February 2009.

‘The Act shall ensure equal treatment of men and women

1) in the working population including self-employed persons, workers who are temporarily out of work due to illness, maternity, accident or involuntary unemployment and persons seeking employment, as well as retired and disabled workers and those claiming as relatives in occupational schemes,’

Denmark has not made use of the possible exclusions permitted by Article 8(1) a-b of the Directive.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

According to Article 14(1)(a)-(d) of Directive 2006/54/EC: 1. There shall be no direct or indirect discrimination on the grounds of sex in the public or private sector, including public bodies, in relation to: (a) 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; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty; (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

These provisions have been transposed into Danish legislation by the Act on Equal Treatment of Men and Women¹¹³ Sections 2-4, which provide:

‘§ 2. Any employer shall treat men and women equally in hiring, transfers and promotions

§ 3.

- (1). Any employer who employs men and women shall treat them equally as regards access to vocational guidance, vocational training, vocational further training and retraining.
- (2). Duty to equal treatment also applies to anyone engaged in vocational guidance and training as specified in subsection (1).

§ 4. Any employer who employs men and women shall treat them equally with regard to working conditions. This also applies to dismissal.’

There is no mention of specific categories of workers in the Equal Treatment Act: it does not include a ‘quasi-subordinate’ category of workers, for example. Workers in vulnerable/atypical/precarious work contracts/relationships are covered by the Equal Treatment Act. As set out above, the Part-Time Directive has been transposed into Danish legislation by the Part-Time Act and the Directive on Fixed-Term Contracts by the Act on Fixed-Term Employment. These Acts prohibit the discrimination of part-time workers and workers on fixed-term contracts.

Section 5 of the Equal Treatment Act provides:

- ‘(1).Duty to equal treatment also applies to anyone who sets rules and decide[s] on access to exercise[ing] an independent profession. This includes creating, establishing or expanding a business or the launch or extension of any other independent business, including its financing.
- (2). Duty to equal treatment applies to any person who shall provide and decide on training, etc. and provisions governing the exercise of that profession.’

¹¹³ Consolidation Act No. 645/2011.

The persons who have the duty to ensure equal treatment do not include private clients who choose an architect or a lawyer on the basis of sex. Private customers or clients are free to choose service providers on the basis of the service provider's sex; see also below under 2.

1.d. Collective agreements and case law

Danish equality legislation is subsidiary to collective agreements which guarantee the minimum of equality as required in Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation. In respect of the provisions above, collective agreements and/or case law do not contribute to clarifying or expanding their personal scope of application.

1.e. Additional information

There is no additional information to report.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

Article 3(1) of Directive 2004/113/EC stipulates that the Directive shall apply to all persons who provide goods and services that are available to the public irrespective of the person concerned, as regards both the public and private sectors, including public bodies, and that are offered outside the area of private and family life and the transactions carried out in this context. Article 3(4) stipulates that the Directive shall not apply to matters of employment and occupation. The Directive shall not apply to matters of self-employment, insofar as these matters are covered by other Community legislative acts.

These provisions are transposed into Danish legislation by the Equality Act¹¹⁴ Section 1a (1(2)) and 1a(3) which provides:

- ‘§ 1 a. Chapter 2 applies to
- (1(2)) authorities and organizations and all persons who provide goods and services that are available to the public in both the public and private sectors, including public bodies, which are offered outside of private and family life and transactions in this regard.
 - (3). The Act on equal treatment between men and women in employment, etc., the Maternity Act, the Act on equal pay for men and women and the Act on equal treatment between men and women in occupational social security schemes are used in the areas covered by these laws.’

2.b. Freedom to choose contractual partners

Article 3(2) of Directive 2004/113/EC stipulates that the Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex. There is no particular mention of this provision in the Danish Equality Act, but the Act only prohibits discrimination on the grounds of sex.

2.c. Collective agreements and case law

Section 3 Paragraph b of the Danish Equality Act provides that provisions contrary to Sections 2 and 2a, which are included in individual or collective contracts, internal rules of business organisations or rules governing associations and foundations, etc., are invalid. Provisions in the Equality Act may be waived by agreement, unless it would be prejudicial to the person discriminated against on the grounds of sex.

In my view, collective agreements and/or case law do not contribute to clarifying or expanding the scope of application of the Equality Act and/or Directive 2004/113/EC.

¹¹⁴ Consolidation Act No. 1095/2007.

2.d. Additional information

There is no additional information to report.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

Directive 2010/41/EU has not been implemented yet in Denmark.

3.a. Personal scope

Article 1 and Article 2(1)a-b of Directive 86/613/EEC have been implemented in Denmark by Section 5 of the Equal Treatment Act, see above in 1.c.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

In my view, the scope of equal treatment contained in Article 4(1) does not add significantly to the ‘access to ... self-employment or occupation’ referred to in Article 14(1)(a) of Directive 2006/54/EC. Article 4(1) of Directive 2006/54/EC, as set out above, provides that for the same work or for work to which equal value is attributed, direct and indirect discrimination on the grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

3.c. Collective agreements and case law

Collective agreements and/or case law, in my view, do not contribute to clarifying or expanding their scope of application.

3.d. Additional information

There is no additional information to report.

4. Directive 92/85/EEC on pregnancy and maternity**4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding**

Danish legislation does not define the terms ‘pregnant workers’, ‘workers who have recently given birth’ and ‘workers who are breastfeeding’, referred to in Articles 1 and 2 of the Directive 92/85/EEC on pregnancy and maternity.

4.b. Collective agreements and case law

According to case law, women undergoing fertility treatment are covered by the protection for pregnant workers. There is no case law on managers.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

The rights accorded by the Pregnancy Directive are not granted to the self-employed. There is no ‘quasi-subordinate’ category of workers in Danish law. As set out above, the Part-Time Directive has been transposed into Danish legislation by the Part-Time Act and the Directive on Fixed-Term Contracts by the Act on Fixed-Term Employment. These Acts prohibit discrimination of part-time workers and workers on fixed-term contracts.

4.d. Additional information

There is no additional information to report.

5. Directive 2010/18/EU on parental leave**5.a. Personal scope**

Clause 1(2) (‘This 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’) and Clause 1(3) (‘Member States and/or

social partners shall not exclude from the scope and application of this agreement workers, contracts of employment or employment relationships solely because they relate to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency’) of the Framework Agreement have been transposed into Danish law by the Maternity Act (*barselloven*).¹¹⁵

Section 2 of the Maternity Act provides under the title ‘Delineation of the group of people who have the right to absence and maternity benefits under this Act’:

‘§ 2 The right to absence under this Act shall include all parents.’

Benefits under this Act shall take the form of maternity benefits to employees and the self-employed.

A condition for entitlement to maternity benefits to the persons mentioned in Paragraph 2 is that the person must meet the employment requirement according to Paragraph 27 for employees or Paragraph 28 for the self-employed.

5.b. Entitlement to parental leave

Clause 2(1) (‘This agreement entitles men and women workers to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age up to eight years to be defined by Member States and/or social partners’) and Clause 3(1)(b) (‘Member States and/or social partners may, in particular ... (b) make entitlement to parental leave subject to a period of work qualification and/or a length of service qualification which shall not exceed one year; Member States and/or social partners shall ensure, when making use of this provision, that in case of successive fixed-term contracts, as defined in Council Directive 1999/70/EC on fixed-term work, with the same employer the sum of these contracts shall be taken into account for the purpose of calculating the qualifying period’) of the Framework Agreement have been transposed into Danish law by Sections 9 and 10 of the Maternity Act which provide:

‘§ 9 After 14 weeks after delivery or receipt of the child, each parent is entitled to parental leave of 32 weeks. The father has a right to commence parental leave within the first 14 weeks after birth.

§ 10 Each parent has the right to extend parental leave in accordance with § 9 of the 32 weeks to 40 weeks. Employees and self-employed workers have the right to extend parental leave in accordance with § 9 of the 32 weeks to 46 weeks.’

5.c. Rights of the self-employed and/or the quasi/para-subordinate

The rights accorded by the Directive on parental leave are granted to the self-employed as well.

5.d. Additional information

There is no additional information to report.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

In Danish law the prohibitions contained in Directive 2000/78/EC have only been implemented in relation to employment and occupation, not in respect of access to and supply of goods and services or other aspects of society. With regard to employment and occupation Directive 2000/78/EC has been transposed into Danish law by the Discrimination Act (*Forskelsbehandlingsloven*).¹¹⁶

¹¹⁵ Consolidation Act No. 1084/2009 on Maternity (*barselloven*).

¹¹⁶ Consolidation Act No. 1349/2008.

The prohibition against ethnic discrimination in Directive 2000/43/EC has been implemented with regard to all aspects of society. In respect of employment and occupation this is covered by the Discrimination Act (*Forskelsbehandlingsloven*) and in respect of all other aspects by the Ethnic Equality Act (*Den etniske ligebehandlingslov*).¹¹⁷

ESTONIA – Anu Laas

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

According to the Gender Equality Act (GEA) men and women in professional life, in education and in other areas of social life are entitled to equal rights, obligations, opportunities and liability. Prohibition of discrimination is applicable to all persons with an employment relation. The Employment Contracts Act (ECA), GEA and Equal Treatment Act (ETA) prohibit discrimination on the basis of sex, race, age, nationality, language skills, disability, sexual orientation, duty to serve in defence forces, family status, family-related duties, social position, representation of the interests of employees or membership of workers' associations, political views or membership of a political party, and religious or other beliefs. Article 12 of the Constitution of the Republic of Estonia states that everyone is equal before the law and prohibits discrimination on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds.

In the GEA and ETA, employees and employers are defined. 'Employee' means a person employed under an employment contract or a contract for the provision of services or a public servant within the meaning of the Public Service Act. Persons applying for employment or service are also considered employees. Only a natural person can be an employee. 'Employer' means a natural or legal person who provides employment on the basis of an employment contract or a contract for the provision of services, or a state agency or a local government agency. The Employment Contracts Act (ECA) states that on the basis of an employment contract a natural person (employee) performs work for another person (employer) in subordination to the management and supervision of the employer. The employer remunerates the employee for such work.

In Estonia the Wages Act was repealed in 2009 and there is not a separate Antidiscrimination Act. Protection against discrimination is provided for in two Acts – the GEA and the ETA. The Employment Contracts Act (ECA) stipulates the equal treatment principle that employers shall ensure the protection of employees against discrimination, and the ECA imposes the obligation to adhere to the principle of equal treatment and promote equality in accordance with the Equal Treatment Act and the Gender Equality Act.

In Estonia individual contracts are dominant and the unionisation rate is low. Employment contracts are expected to be in written form and should be entered into in accordance with the provisions concerning entry into contracts as provided by the Law of Obligations Act. The ECA stipulates a minimum information requirement for contracts, where also the agreed pay payable for the work and wage conditions should be included. As employment contracts are concluded on an individual basis and are confidential, it is often hard for a job applicant to agree on fair pay and equal opportunity employers are rare in Estonia.

A minimum wage corresponding to a specific unit of time is regulated by the Government of the Republic. In 2013 the monthly minimum wage was EUR 320.¹¹⁸ Wages below the minimum wage must not be paid to employees.

¹¹⁷ Act No. 374/2003.

¹¹⁸ Regulation of the Government of the Republic of 10 January 2013, No. 6 '*Töötasu alammäära kehtestamine*' ('The minimum rate of wages'), RT (State Gazette) I 2013, 7.

The Recast Directive (2006/54/EC) stipulates that for the same work or for work to which equal value is attributed, direct and indirect discrimination on the grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated. Estonia has a highly gender-segregated labour market and large numbers of women and men do different work. In Estonia there is little legal debate about the meaning of ‘same work’ and ‘work of equal value’.

1.b. Equal treatment in occupational social security schemes

Article 2(1)5) of the ETA prohibits discrimination of persons on the grounds of nationality (ethnic origin), race or colour in relation to social protection, including social security and healthcare, and social advantages. The GEA is applicable in areas of social protection, provision of goods and services, healthcare and housing.

The Occupational Health and Safety Act (OHSA) was amended in 2012 and has now been harmonised with Directive 2008/104/EC on temporary agency work. The personal and material scope of the OHSA covers health, safety and well-being of workers (*persons working on the basis of employment contracts and public servants*), pregnant and breastfeeding workers. The OHSA applies to the *conditions of service* of the members of the Defence Forces in active service and to the work performed by the employees of the Defence Forces, the National Defence League, police, border guard and the rescue service agencies insofar as not otherwise provided by specific laws or legislation established on the basis thereof. The Act applies also to *the work* of prisoners, pupils and students during internship, of members of the management board and sole traders.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

Article 28(2)5) stipulates that an employer is required, for the development of the professional knowledge and skills of employees, to provide the employees with training based on the interests of the employer’s enterprise, to bear the training expenses and to pay average wages during the training.

In January 2012 the ECA was amended. The amendments simplify the conclusion and extension of fixed-term contracts in the case of temporary agency work, enable employers to extend fixed-term contracts more easily or conclude them again in the case of a temporary agency work relationship, and provide equality of temporary agency workers working in several places and the user companies’ workers, establishing the right of temporary agency workers to the same occupational health and safety conditions, working hours and rest periods, and pay conditions. In addition, the same catering, transport and childcare services have to be guaranteed to them as those that are guaranteed to comparable user companies’ workers. The amendment of the ECA was due to the need to transpose the Temporary Agency Work Directive into Estonian law.

1.d. Collective agreements and case law

Article 4(1) of the Collective Agreements Act (CAA) states that a collective agreement applies to such employers and employees who belong to an organisation which has entered into a collective agreement, unless the collective agreement prescribes otherwise. In the event of a conflict between the provisions of different collective agreements applicable to employees, the provision which is more favourable to the employees applies.

In 2011 it was decided to establish the Estonian Collective Agreements Register,¹¹⁹ which could be a useful tool for promotion of good industrial relations and public awareness about employment conditions and fair treatment.¹²⁰ In 2011 and 2012, 47 agreements were added to the register. It lists agreements on working conditions and information about what is ‘more favourable than general law’ could also be included. It could be stated that working

¹¹⁹ <http://klak.sm.ee/>, accessed 23 April 2012.

¹²⁰ Regulation of the Minister of Social Affairs of 21 January 2011, No. 4, ‘Regulation of the Estonian Collective Agreements Register’, RT (State Gazette) I, 28 January 2011, 3.

conditions in the field of culture and education are more worker-friendly, in spite of the fact that their average salaries are quite low. However, blue-collar workers' collective agreements are very unpromising.

A discrimination and working conditions case was analysed in the Supreme Court in 2005.¹²¹ This is one of a small number of employment discrimination cases dealt with by the Supreme Court. Discrimination was not found. The judgment referred to the ILO Convention, the Treaty of Amsterdam, the Social Charter and to national legislation (EU anti-discrimination directives had not yet been transposed). The Court stated that any payment might be made for work agreed by a worker and an employer if their agreement did not violate the discrimination-related articles.¹²² It is important to note that in its analysis the Court did not apply Article 12 of the Constitution, with its open-ended list of grounds of discrimination to be deemed illegal.¹²³

1.e. Additional information

It is possible that the limited amount of case law concerning issues of discrimination and equal treatment is a result of the expensive fees charged by the state for proceedings in Estonia.¹²⁴ A Chief of the Supreme Court of Estonia, Märt Rask, several times expressed an opinion about high state fees as an obstacle to starting court proceedings. In 2009 when the general economic crisis was at its peak, the Estonian legislator decided to significantly increase state fees for legal proceedings. By the autumn of 2011, when the extremely high state fees had been applicable for two and a half years, the Supreme Court had raised the problem of these high prices repeatedly and the end of such judgments will be nowhere in sight as long as the legislator fails to bring the rates of state fees into line with the Constitution. The situation is extraordinarily serious and it may have serious legal and social consequences.¹²⁵

The rights of persons who should go to court but cannot afford to do so it are at risk. It should furthermore be studied whether people with a low social status and low income suffer from unequal treatment because they cannot exercise their right to claim damages. Discrimination cases in labour relations are applicable to persons on the basis of nationality (ethnic origin), race, colour, religion or other beliefs, age, disability or sexual orientation, but also in particular on the basis of family-related duties, social status, representation of the interests of employees or membership of an organisation of employees, level of language proficiency or duty to serve in defence forces in a framework of the ETA.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

Article 2(1)(7) of the ETA prohibits discrimination of persons on the grounds of nationality (ethnic origin), race or colour in relation to access to and supply of goods and services which are available to the general public, including housing. The concepts of 'goods' and 'services' are not defined by law.

Article 7¹ of the GEA stipulates that the supplier of goods or services is required to provide written explanation concerning his or her activities to the person who believes that he or she has been discriminated against in relation to the access to and supply of goods or services on the grounds of sex. This written explanation should be provided within fifteen

¹²¹ Supreme Court Civil Chamber judgment of 28 April 2005, No. 3-2-1-37-05, RT III 2005, 16, 166, <https://www.riigiteataja.ee/akt/896448>, accessed 5 April 2012.

¹²² To this case the ECA and the Wages Act (repealed in 2009) were applied.

¹²³ Listed in subchapter 1.a. of the given paper.

¹²⁴ Riigilõivuseadus (State Fees Act). RT I, 19.12.2012, 11.

¹²⁵ M. Rask 'Lessons Learnt During Crisis – Limited Access to Justice and Unconstitutional Court Fees'. *A speech on the 15th anniversary of the Constitutional Court of Latvia, 29 September 2011*; http://www.riigikohus.ee/vfs/1143/2011_09_29.Latvia_CC_15.pdf, accessed 3 April 2012.

working days after receiving a written application describing facts relating to a possible case of discrimination.

Incapacity pensions are applicable to all people in case of incapacity for work. Complete or partial permanent incapacity for work is injury or illness pertaining to work, profession, service, nuclear accident, traffic accident or as a result of violent crime. Permanent incapacity for work is certified by the expert commission or expert doctor of the Pension Board. In order to apply for medical expertise one needs to address the Pension Board. In case of permanent incapacity for work the person is paid an incapacity pension.

2.b. Freedom to choose contractual partners

Offers of employment and training that are directed at persons of one sex only are prohibited unless reasons are specified. Articles 5(2)4), 4)¹ and 5) of the GEA foresee different treatment in cases of certain occupational requirements, in cases of life and health insurance where 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 proportional to the aim and for development of temporary special measures which promote gender equality and grant advantages to the less-represented gender or reduce gender inequality. Before 20 December 2012, insurers were allowed to use sex as a risk-rating factor in life insurance.¹²⁶ In 2007-2012 Estonian insurance companies made use of this right in three types of insurance: life insurance, personal accident and health insurance. Since December 2012 this has ceased; insurance companies have taken the new ruling seriously. However, at the time of writing the Insurance Activities Act has still not yet been amended.

The principle of the shared burden of proof does not apply to the provision of goods and services in the GEA. However, during transposition it was mentioned in the Explanatory Memorandum.¹²⁷

Health services are accessible against payment or free of charge for the insured persons. The Health Insurance Act defines 'an insured person' as follows: a permanent resident of Estonia or a person living in Estonia on the basis of a temporary residence permit or right of residence, for whom a payer of social taxes is required to pay social taxes or who pays social taxes for himself or herself pursuant to the procedure, in the amounts and within the terms provided for in the Social Tax Act or a person considered equal to such persons (who have the European health insurance certificate). Social taxes could be paid by persons themselves, the employer (on the basis of a contract of employment), the State or a local government (for civil servants, etc.), or the Estonian Unemployment Insurance Fund (for persons receiving an unemployment insurance benefit). Persons for whom social taxes are not paid who are still considered as equal to insured persons are pregnant women, persons under 19 years of age, persons who receive a state pension granted in Estonia, persons with up to five years left until reaching the pensionable age who are maintained by their spouses who are insured persons, and students.

2.c. Collective agreements and case law

The European Court of Justice (CJEU) gave its judgment in the *Viking* case concerning the conflict between a fundamental right and a fundamental freedom.¹²⁸ The basis was a conflict of interests between the use of the freedom to provide services or the freedom of establishment on the one hand and the prevention of social dumping on the other hand, from the perspective of the protection of domestic workers as well as of (foreign) workers against discrimination. The Court recognised collective action as a fundamental right under the EU law.

¹²⁶ Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (*Test-Achats*).

¹²⁷ *Seletuskiri soolise võrdõiguslikkuse seaduse, avaliku teenistuse seaduse ja Eesti Vabariigi töölepingu seaduse muutmise seaduse eelnõu juurde* (321) (Explanatory Memorandum to the Gender Equality Act, Public Service Act and Employment Contracts Act (321)).

¹²⁸ Case C-438/05 *Viking* [2008] (OJ C 51 p. 11); <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:051:0011:0011:EN:PDF>, accessed 10 April 2012.

2.d. Additional information

On 25 June 2009 the Commission referred Estonia to the ECJ for non-transposition of EU rules prohibiting gender discrimination in the access to and supply of goods and services (Directive 2004/113/EC). Estonia has not yet adopted all the necessary measures to give effect to EU legislation in its national law, despite a 'reasoned opinion' (second-stage warning) sent by the Commission in February 2009.¹²⁹ Estonia made amendments to the GEA, ETA and ECA in 2009. On 20 November 2009 the Commission decided to withdraw the case against Estonia before the ECJ for non-transposition of EU rules prohibiting gender discrimination in the access to and supply of goods and services (Directive 2004/113/EC).¹³⁰

There are a few survey reports concerning the access to public goods and services. Local governments are responsible for organising provision of social services and emergency social assistance, but sometimes services are non-existent or are not accessible and affordable. Permanent residents of Estonia, foreign nationals living in Estonia on a legal basis and refugees in Estonia are entitled to social services.

In spite of these problems, well-organised information and e-services are available through the Estonian State Portal www.eesti.ee for citizens, entrepreneurs and officials. However, some age discrimination may exist. Various projects and about 500 Public Internet Access Points in libraries, cafés and in many other places should also diminish the digital generation gap.

There is a need to make a gender impact assessment of the Labour Market Services and Benefits Act. Labour market services and benefits should be more thoroughly analysed and access should be examined.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

Until 2003, the dependent spouse of an insured person was also considered equal to insured persons pursuant to law and social taxes were not paid for him or her. Today, persons for whom no social taxes are paid and who are considered as having a status equal to *the insured person* include an insured person's dependent spouse who is no more than five years away from reaching the age limit for old-age pension. If the dependent spouse in a self-employed person's household is younger than that, social taxes should be paid on an individual basis or employment relations should be established. The self-employed will then be expected to act as an employer.

Articles 12(7) and (8) of the OHSA apply to work of self-employed persons. A sole trader shall ensure the soundness and correct use of the work equipment, personal protective equipment and other equipment belonging to him or her in every work situation. If a sole trader works at a workplace concurrently with one or several workers of the employer, he or she shall notify the employer who organises the work or, in the absence of such employer, the other employers of the risks relating to his or her activities and shall ensure that his or her activities do not cause any risk to other workers. The employer who organises the work or, in the absence of such employer, the other employers shall inform the sole trader of the risks and the measures to avoid such risks.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

The tax burden for sole traders has increased over the last decade. The amount of the minimum advanced social taxes has increased.

To start as a sole trader is easy for everyone, registration can be made from home when using e-services. But in a situation of economic slowdown purchasing capacity is low and it is extremely complicated for a self-employed person to do good business. Self-employed people

¹²⁹ <http://ec.europa.eu/social/main.jsp?langId=et&catId=89&newsId=539>, accessed 5 April 2012.

¹³⁰ <http://ec.europa.eu/social/main.jsp?langId=et&catId=89&newsId=637&furtherNews=yes>, accessed 23 April 2012.

can maintain their self-esteem, but lose some of the social guarantees for unemployed persons. The European Commission suggests that the job-creating potential of key sectors needs to be explored, including the ‘green’ economy, the healthcare and social care sector and new technologies. However, for example, workers are needed in the care sector, but this work is so poorly paid that a self-employed service provider with the existing tax wedge on labour will fall into poverty.

3.c. *Collective agreements and case law*

There is nothing to report.

3.d. *Additional information*

The Chancellor of Justice has expressed an opinion regarding self-employed persons,¹³¹ stating that self-employed persons and employees (working under an employment contract or some kind of service contract) cannot be compared. The Chancellor did not find any contradiction between the social tax payments for employees working on a contractual basis (employer should pay social taxes within ten days after payment to employee) and advance payments of social taxes by the self-employed (paid by the self-employed person herself or himself). The Chancellor of Justice points out that weighing up helps assess whether less favourable treatment has taken place and persons, entities or situations should be comparable. Equal treatment should be granted only in cases of comparable situations and the equality principle is applicable only to equals.¹³²

Estonian health insurance relies on the *principle of solidarity*. If a self-employed person has paid social taxes (advance payment), her or his sick leave compensation is dependent on the amount paid. If payment was on minimum level, the compensation for sick leave is also very low. When a self-employed person needs a doctor and treatment, there is no need for additional payment, in spite of the fact that only a symbolic amount of money was paid to the social fund. The same treatment and procedures could be expected by an employee who has paid a lot. Significant differences will appear in the future, when tax policies and public pensions will be contrasted.

Self-employed persons are often engaged in different areas of activity with the same assets (could be seen as an advantage), but they are also liable with all their assets, while companies’ liability is limited to their shares.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. *Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding*

The protection of a pregnant woman is rather specifically addressed in the law but the protection of women who are breastfeeding is poor. A pregnant woman should inform her employer about her pregnancy. Regulation of the Government No. 50 regulates occupational health and safety requirements for work of pregnant and breastfeeding women, but a pregnant and breastfeeding woman is not defined. Pregnancy is better defined in case of abortion in the Abortion and Sterilisation Act, which states that abortion may be carried out not later than after 11 weeks of pregnancy. Later abortion is only allowed based on medical reasons.

¹³¹ Chancellor of Justice Position of 2 September 2011, No. 6-1/111225/1104379, ‘*Seisukoht vastuolu mittetuvastamise kohta*’ (‘Position about detection of non-contradiction’); http://oiguskantsler.ee/sites/default/files/field_document2/6iguskantsleri_seisukoht_vastuolu_puudumine_fuusi_lisest_isikust_ettevotja_sotsiaalmaks.pdf, accessed 10 April 2012.

¹³² Quote in Estonian: ‘*Selleks, et saaks rääkida eksimusest võrdse kohtlemise põhimõtte vastu, peavad situatsioonid olema võrreldavad. Riigikohtu praktika kohaselt peab ühetaoline kohtlemine olema tagatud üksnes ühesuguste asjaolude korral, st võrdsuspõhioigus kaitseb ebavõrdse kohtlemise eest ainult võrdseid.*’ The Chancellor of Justice referred to Judgment No. 3-3-1-61-01. *Riigikohtu halduskollegiumi otsus* 20 December 2001, No. 3-3-1-61-01, p. 5. (Supreme Court Administrative Law Chamber judgment of 20 December 2001, No. 3-3-1-61-01).

Since 2009 only a mother feeding a child younger than 18 months can use breaks to feed a child. Only breaks for breastfeeding are applicable (every 3 hours for 30 minutes). The mother should ask her employer for such extra breaks. An employer may ask a mother for a medical certificate regarding the need for breastfeeding. Breaks are paid from the state budget.

Women have the right to a pregnancy and maternity leave of 140 calendar days. Only insured women who were working prior to going on pregnancy and maternity leave have the right to the related benefits. A father has the right to receive a total of *ten working days* of paternity leave in the period of two months prior to the due date as determined by a doctor or midwife, and two months after the birth of the child. The applicant for the leave must inform the employer to that effect and write an application for receiving paternity leave. The compensation for the childcare leave on the basis of the minimum remuneration rate and compensation for the leave for fathers on the basis of the average remuneration from the state budget funds will be postponed until 1 January 2013.

The ECA regulates the number of days for pregnancy and maternity leave, and adjustments to working conditions are required. An employer cannot cancel an employment contract when an employee is pregnant or has the right to pregnancy and maternity leave, nor can an employer cancel an employment contract when an employee performs important family duties. This could also apply to a woman who is to undergo artificial insemination. National equality laws also require favourable treatment in case of family obligations.

Article 18 of the ECA stipulates requirements for working conditions of pregnant employees and employees entitled to pregnancy leave and maternity leave. Article 18(3) of the ECA requires that the employee shall submit to the employer a certificate of a doctor indicating the restrictions on work due to their state of health and, where possible, proposals regarding duties and working conditions corresponding to their state of health. The Health Insurance Act ensures insurance coverage for pregnant women whose pregnancy has been certified by a physician.

Social guarantees for pregnant women have been quite adequate and have improved in recent decades. Pregnant Workers Directive 92/85/EEC was taken into account in the Government's regulation on occupational health and safety requirements for the work of pregnant and breastfeeding women in 2001.¹³³ A new regulation was adopted in 2009.¹³⁴ The scope of the regulation is *work* and an employer is obliged to comply with the occupational health and safety requirements set in the regulation. The regulation applies to the work of pregnant and breastfeeding women (hereinafter *female worker*) to create a safe working environment for them. In 2001 only a doctor's written certificate presented by the pregnant employee was valid, but since 2009 also a midwife's written certificate should be accepted by the employer. To ensure a safe working environment for pregnant or breastfeeding women, the employer must ensure lighter working conditions, shortened workdays, suitable breaks, transfer to daytime work and, if necessary, a change in job duties.

4.b. Collective agreements and case law

Article 4(1) of the Artificial Insemination and Embryo Protection Act states that only adult women of up to 50 years of age who have active legal capacity are, at their own request, permitted to undergo artificial insemination. No one shall compel or persuade a woman to undergo artificial insemination. The woman's signed consent is needed and a married woman needs her husband's consent. This procedure is supported by the Estonian Health Insurance Fund.

According to the amended ECA from 2009, it is possible to establish specifications in the restrictions of night work only with the agreement of the employee or by collective agreement.

¹³³ Regulation of the Government of the Republic of 7 February 2001, No. 50. 'Occupational health and safety requirements for work of pregnant and breastfeeding women', RT (State Gazette) I 2001, 17, 81.

¹³⁴ Regulation of the Government of the Republic of 11 June 2009, No. 95. 'Occupational health and safety requirements for work of pregnant and breastfeeding women', RT (State Gazette) I 2009, 31, 197.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

Self-employed persons have the same rights as employees selling their work if they have applied for social security and have paid social taxes. Payment of social taxes is a precondition for being an insured person. The insured person is a permanent resident of the Republic of Estonia or a person living in Estonia by virtue of a temporary residence permit or by the right of permanent residence, who pays the social taxes for himself/herself.

In January 2012 the ECA was amended and it now stipulates that temporary agency workers have the same rights to occupational health and safety conditions, working hours and rest periods, and pay conditions.

A woman has the right to receive 140 calendar days of pregnancy and maternity leave. An exception has been established for pregnant women who are members of a management or supervisory body, who receive wages or income from provision of services on the basis of a contract under the law of obligations or who are sole proprietors (FIEs, self-employed) and have the right under the Health Insurance Act to receive benefits. They are paid maternity benefits and adoption benefits also without taking the pregnancy and maternity leave or without adoptive parents leave. To obtain benefits, the certificate for maternity leave or certificate for adoption leave must be submitted to the Health Insurance Board.

The Questionnaire for this report included a question on vulnerable groups. It is strange to think, but also members of management and advisory boards could be poorly protected. Board members are entitled to health insurance, but they do not have guarantees against dismissal in case of pregnancy. A board member of a company is not covered by the Employment Contract Act provisions. The Employment Contracts Act guarantees are not applicable in cases of dismissal of board members. In Estonia appointment and dismissal of board members is governed by the Commercial Law.

4.d. Additional information

The GEA was amended in 2009 and also redefined basic terms like ‘direct discrimination based on sex’, ‘indirect discrimination based on sex’, ‘sexual harassment’ and ‘harassment related to the sex of a person’. ‘Direct discrimination based on sex’ occurs where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation. Direct discrimination based on sex means less favourable treatment of a person in connection with pregnancy and childbirth, parenting, performance of family obligations or other circumstances related to gender, as well as harassment related to the sex of a person and sexual harassment and less favourable treatment of a person caused by rejection or submission to harassment.

A doctoral student receives a scholarship and in case of pregnancy a minimum maternity allowance and parental benefit is paid. For the years of parental leave parents have health insurance, but due to indexation of all pensions they suffer a disadvantage in their pensions.

For childcare only a minimum indexed amount per pension year is ‘earned’ (0.222). If somebody takes three years of job-protected parental leave, she or he has an applicable value of pensionable service worth only 0.666, which means that five years of childcare is valued with one pensionable service year. Social security schemes for maternity leave and parental leave should be further developed.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

Either the mother or the father may go on parental leave. There is no right to go on parental leave if the parent has lost parental rights or if the child resides in a social welfare institution. In January 2012 the ECA amendments increased parental leaves by granting both parents the right to parental leave without pay for up to 10 working days per calendar year.

Parental leave is job protected for three years: employment contracts are suspended for the term of the parental leave, meaning that the position is retained. Parental benefits are paid to permanent residents of Estonia, and to foreign nationals residing in Estonia on the basis of a temporary residence permit or right of residence in Estonia.

5.b. Entitlement to parental leave

In January 2012 the ECA was amended in order to transpose the Parental Leave Directive, and to introduce relevant amendments into Estonian law.

In Estonia women and men can both take parental leave, which is transferable between parents. The parental leave may be used all at once or in parts. The childcare allowance is paid to one parent or a person who uses the leave in place of the parent. Until the child is 70 days old, the mother raising the child has the right to the compensation; subsequently, both parents have the right to the benefit in turns. The amount of the benefit is 100 % of the average income for one calendar year and the benefit is calculated on the basis of the income in the calendar year prior to the day on which the right to the benefit arose. There is a monthly ceiling. The maximum amount of the parental benefit is three times the average wage approved by the Government of the Republic.

A parent may work or earn income during the period in which they receive the parental benefit, but if the income earned exceeds the rate of the benefit, the amount of the benefit for the month in question is reduced. The amount of the benefit is not decreased if the income is earned as a self-employed person.

Any form of time credit system, such as the career break system, is lacking in Estonian legal provisions. However, there are some regulated and limited unpaid leave provisions for childcare and studies.¹³⁵

Career breaks are possible on an individual basis and by agreement with the employer, and it is possible to use unpaid leave. In Estonia the majority of businesses are small enterprises, where the time credit system is complicated to introduce. Reduced working hours should be easier to apply, but due to low average salaries less pay is not desired.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

Self-employed people have the same rights as employees working on a contractual basis, but the question is whether they can cope economically. For example, the monthly parental benefit depends on the social taxes paid in the previous calendar year. If the income for the previous year was lower than the minimum monthly wage level established by the Government, the amount of the parental benefit shall be equal to the minimum monthly wage.

5.d. Additional information

There is no additional information to report.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

The objective of the ETA is to protect persons against discrimination. EC Directive 2000/78/EC requires Member States to implement laws to combat various forms of discrimination, including discrimination on the grounds of religion or belief, sexual orientation, disability and age. The personal scope of the ETA is broader. The purpose of the ETA is to ensure the protection of persons against discrimination on the grounds of nationality (ethnic origin), race, colour, religion or other beliefs, age, disability or sexual orientation. The ETA includes provisions on taking measures regarding disabled persons. The ETA has been amended several times to address other vulnerable groups of employees, who should not be treated in a less favourable manner in an employment relationship than a comparable employee. Vulnerable groups so far include part-time employees, employees who have concluded employment contracts for a specified term and temporary agency workers.

The Recast Directive also addresses persons whose activity is interrupted by illness and retired workers. It may be assumed that these two groups are fully covered and protected under equality laws, because they are not specifically addressed in Estonian legislation. National legal literature on discrimination is poor and only few court cases exist.

¹³⁵ Division 4 of the Employment Contracts Act.

Council Directive 2000/43/EC applies to all persons, in both the public and the private sector, including public bodies, in relation to many areas such as employment and working conditions, including dismissal and pay. The scope of the ETA is very similar, but wage discrimination is poorly covered, because discrimination based on pay is not addressed. The ETA includes a ‘mild’ prohibition of discrimination in employment relations; its personal scope is broader and several additional characteristics are included. Article 2(3) warns that the ETA does not preclude the requirements of equal treatment in labour relations on the basis of nationality (ethnic origin), race, colour, religion or other beliefs, age, disability or sexual orientation, but also in particular on the basis of family-related duties, social status, representation of the interests of employees or membership in an organisation of employees, level of language proficiency or duty to serve in defence forces.

The Gender Equality Act applies to all areas of social life, except when professing and practising faith or working as a minister of a religion in a registered religious association and in relations in family or private life. In addition to labour relations in the private and the public sector, the scope of the GEA includes education, social protection, provision of goods and services, healthcare and housing. The scope of the GEA is wider than the scope of the respective EU directives. The GEA stipulates the prohibition on discrimination based on sex in the private and the public sector and imposes the obligation on state and local government agencies, educational and research institutions and employers to promote gender equality of men and women. A principle of gender mainstreaming is expressed in the GEA, but a term and a separate article are lacking.¹³⁶ The principle of equal treatment is clearly expressed in the ECA. Article 3 of the ECA stipulates that employers shall ensure the protection of employees against discrimination, follow the principle of equal treatment and promote equality in accordance with the Equal Treatment Act and the Gender Equality Act.

In conclusion, the GEA transposed articles from Directives 2006/54/EC, 2004/113/EC, 86/613/EEC and 79/7/EEC in 2009. The ETA has transposed some articles from the Anti-Discrimination Directives (2000/43/EC and 2000/78/EC) and Directive 2008/104/EC on temporary agency work.

7. Relevant legislation and case law

- Collective Agreements Act (CAA), RT (State Gazette) I 1993, 20, 353
- Equal Treatment Act (ETA), RT (State Gazette) I 2008, 56, 315
- Employment Contracts Act (ECA), (State Gazette) I 10.02.2012, 2
- Gender Equality Act (GEA), RT (State Gazette) I 2004, 27, 181
- Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats)
- Occupational Health and Safety Act (OHSA), RT (State Gazette) I, 10.02.2012, 5
- ‘Occupational health and safety requirements for work of pregnant and breastfeeding women’ RT (State Gazette) I 2009, 31, 197
- The Regulation of the Government of the Republic of 7 February 2001, No. 50. ‘Occupational health and safety requirements for work of pregnant and breastfeeding women’, RT (State Gazette) I 2001, 17, 81
- The Regulation of the Government of the Republic of 11 June 2009, No. 95. ‘Occupational health and safety requirements for work of pregnant and breastfeeding women’, RT (State Gazette) I 2009, 31, 197
- Recast Directive 2006/54/EC, OJ L 204/23, of 5 July 2006
- Riigilõivuseadus (State Fees Act), RT (State Gazette) I, 19.12.2012, 11
- ‘Seletuskiri soolise võrdõiguslikkuse seaduse, avaliku teenistuse seaduse ja Eesti Vabariigi töölepinguseaduse muutmise seaduse eelnõu juurde (321)’. [‘Explanatory

¹³⁶ Article 29 in the Recast Directive. 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).

Memorandum to the Amendments of the Gender Equality Act, Public Service Act and Employment Contracts Act (321)]

Supreme Court Civil Chamber judgment of 28 April 2005, No 3-2-1-37-05, RT III 2005, 16, 166 available at : <https://www.riigiteataja.ee/akt/896448>

- The Regulation of the Government of the Republic of 11 June 2009, No. 95. ‘Occupational health and safety requirements for a work of pregnant and breastfeeding women’, RT (State Gazette) I 2009, 31, 197
- The Regulation of the Minister of Social Affairs of 21 January 2011, No 4, ‘Regulation of the Estonian Collective Agreements Register’. RT (State Gazette) I, 28.01.2011, 3
- Regulation of the Government of the Republic of 10 January 2013, No. 6 ‘*Töötasu alammäära kehtestamine*’ (‘The minimum rate of wages’), RT (State Gazette) I 2013, 7.

FINLAND – Kevät Nousiainen

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

An amendment was made in 2005 to the Act on Equality between Women and Men (1986/609) in order to implement Directive 2002/73/EC, concerning the personal scope of the Act. Before the amendment, the Act on Equality used a narrow definition of employment through a reference to the Employment Contracts Act (2001/55). The Act on Equality was amended in 2005 in order to transpose Directive 2002/73/EC. Under the amended Section 3, Subsection 1, an employee ‘means a person who, by contract, undertakes to perform work of another party (an employer) under the latter’s direction and supervision in return for pay or other remuneration, or who is in a public-service employment relationship or another comparable employment relationship with the State, a municipality or other public body (an authority). This Act’s provisions on employees also apply, as appropriate, to persons working in other legal relationships that are comparable to an employment relationship’.

The reference to ‘persons working in other legal relationships that are comparable to an employment relationship’ added to Section 3(1) includes, according to the preparatory works, forms of work that take place under similar circumstances as those under employment contracts. The provision e.g. refers to independent workers or entrepreneurs, freelancers, persons with their own professional practice, or persons who do care work in families for payment governed by a set of social welfare acts under an assignment agreement. A requirement for including independent workers and entrepreneurs is that they sell their own skills, even though they may act as entrepreneurs in the sense meant by unemployment or retirement legislation. The persons referred to by the amendment to the Act on Equality shall not engage in activities as an entrepreneur, which involve a proper enterprise risk, and they shall not employ others. These persons do not need to act under the direction and supervision of the employer, or work on the premises of the person who pays for the service, or use the equipment provided by that person. The actual nature of the activity, not its legal form, is the decisive factor. Relations between two entrepreneurs would generally not fall within the scope of the provision, nor would it cover hobbies or other free activity which is not remunerated. Activities based on family law are not covered.

Section 3, Subsection 2 of the Act on Equality, introduced in 2005, broadens the employer’s responsibility to include enterprises that use hired work, defined in similar terms as in the Act on Employment Contracts. An enterprise that uses hired work, when it uses the employer’s right to direct work, is responsible as an employer for working conditions and the way in which work is directed. This user enterprise is responsible, for example, for preventing harassment and directing the work so that persons are not treated unequally on the basis of gender, both among the hired workers and between its ‘own’ employees and hired workers. As to pay, the hiring enterprise is responsible for equal treatment.

These provisions under Section 3 define what is meant by ‘employer’ and ‘employee’ under Section 8 of the Act on Equality, which prohibits discrimination in employment. Thus, they are applied to pay discrimination, discrimination in the access to employment and discrimination concerning working conditions (see below).

The definition under Section 3(1) does not expressly exclude a managing director of a company. Managing directors do not work under employment contracts, according to Finnish case law. However, the amended Section 3(1) of the Act allows applying the prohibition of employment discrimination to relationships ‘comparable to an employment relationship as appropriate’. The reference to ‘as appropriate’ means, according to the preparatory works, that the wording of Section 8, for example of Subsection 1(3) on equal pay, does not as such necessarily apply to independent entrepreneurs or managing directors, who are responsible for arranging their own work, especially when the managing director is a shareholder and thus acts as an entrepreneur. Concerning discrimination in the access to employment, companies largely enjoy a right to choose their managing directors. The preparatory works state that illegal dismissal on the basis of sex, giving birth, parenthood or other family care responsibility could be considered as prohibited even where managing directors of companies are in question. The scope of the prohibition of discrimination under Section 7 of the Act on Equality is broader than that under Section 8, which covers discrimination in employment, and is also supported by sanctions in the form of compensation (while damages under tort law could also apply).

The contracts made for legal representation and various other tasks where one person authorizes another to perform a task as an agent, and the person thus authorized does not work under the supervision of the person giving the mandate or assignment, has not been discussed in the context of Section 8 of the Act on Equality. The Finnish legal tradition seems to consider such an assignment (*toimeksianto*) as a contract which may be terminated under very different rules from those that apply to employment, for example as to how the contract may be revoked. The provisions on *toimeksianto* are found in the general provisions of the Contracts Act (229/1929, Chapter 2), and in various acts that specify different types of assignments.

Section 8, Subsection 1(3) of the Act on Equality defines as pay discrimination that an employer ‘applies pay or other terms of employment in such a way that one or more employees find themselves in a less favourable position than one or more other employees in the employer’s service performing the same work or work of equal value’. Provisions for pay discrimination are under Section 11 and remedies under Section 12 of the Act. While the prohibition of pay discrimination thus covers different types of employment, the problem is that independent workers etc. are not specified in the wording of the prohibition itself, but clarified in the preparatory works only.

1.b. Equal treatment in occupational social security schemes

Articles 6 and 10 of Directive 2006/54/EC are not implemented by specific legal provisions. The Act on Equality contains a general prohibition of discrimination under Section 7 of the Act, with a very general material scope, including equal treatment in occupational social security schemes. The general prohibition of discrimination has legal effect in the sense that it is supervised by equality bodies, and may give rise to compensation under other pieces of legislation than the Act on Equality (e.g. under tort law). The material scope of the Act on Equality covers most areas of life, and thus the general prohibition of discrimination also prohibits discrimination in occupational social security schemes. Compensation and remedies under the Act on Equality (under Sections 11 and 12 of the Act respectively) only apply to certain types of discrimination, including ‘Discrimination in working life’ under Section 8. While Section 8, Subsection 3 defines pay discrimination, there is no indication that the provision should cover occupational social security schemes, regardless of whether they are based on a scheme paid to the worker by reasons of his/her employment, or are related to his/her pay. The preparatory works of Section 8, Subsection 3 do not refer to occupational social security schemes.

Occupational social security schemes for activity interrupted by illness and maternity is covered by Sickness Insurance Act (2004/1224), which has a broad personal scope. Under Section 2 of the Act, persons who reside in Finland are insured under the Act. The benefits under the Act are related to the income of the insured persons, so that the *per diem* benefits under Chapter 7 of the Act are defined on the basis of income from employment contract, entrepreneurship or agricultural entrepreneurship. Even persons without an occupational income are entitled to lowest rate benefit. In other words, the insurance scheme under the Sickness Insurance Act is both occupational and general.

As to invalidity and old age, the Act on Employees' Pensions (1295/2006) contains provisions on rehabilitation benefits and on invalidity pensions. There are several pieces of legislation concerning occupational pensions. Public employees are covered by the State Employees' Pension Act, the Municipal Employees' Pension Act, the Pension Acts of the Lutheran and Orthodox churches, and the pension rule of the Act on the Bank of Finland; state pension schemes are also implemented in the County of Åland. Most private sector employees are covered by the Act on Employees' Pensions. Sailors' pensions are under a separate piece of legislation. The Act on Entrepreneurs' Pensions and the Agricultural Entrepreneurs' Pension Act cover entrepreneurs. The entrepreneurial pension schemes are somewhat different from the employees' schemes. The main aspects of all employees' schemes are rather similar, even though they differ in detail. The former differences between the private and the public pension schemes have diminished and almost disappeared. All paid work must be insured under some statutory scheme. The invalidity provisions of the Act on Employees' Pensions even cover other pieces of legislation on occupational pensions.

Under the Act on Employees' Pensions, (Chapter 1, Section 7) a person in a managerial position is also covered, even when s/he is not under an employment contract, provided s/he is not a major shareholder in the company. Entrepreneurs are insured under the Entrepreneurs' Pension Act (1272/2006), and by an amendment made in 2010 (1190/2010) to the said Act, a definition of entrepreneur was added under Chapter 2, Section 3 of the Act (see below). If a person in a managerial position is not insured as an entrepreneur, s/he should be insured as an employee.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

Section 8, Subsection 1(1) defines as discrimination in working life a measure by an employer who, when recruiting a person or selecting a person for training, passes over a more qualified person of the opposite sex in favour of the person chosen, without an acceptable reason not due to gender, or unless the action was based on weighty and acceptable grounds related to the nature of the job or the task. Again, the personal scope is defined in Section 3 of the Act, which defines what is meant by an employer and an employee (or in this case, a person to be recruited). And, as explained above, the scope is broadened by reference to 'persons working in other legal relationships that are comparable to an employment relationship', and the explanation given in the preparatory works (see 1.a.).

Section 8, Subsection 1(1) contains provisions on training given, arranged or paid for by the employer. Other types of vocational training are covered by the prohibition of discrimination in educational institutions under Section 8b. The action of an educational institution or any other body providing training or education shall be deemed to constitute discrimination, if a person is treated less favourably than others on the basis of gender in student selections, organization of teaching, evaluation of study performance or in any other regulation of the educational institution or body. The provision covers institutions that give vocational training. Remedies and compensation under Section 11 apply to both cases. Section 8 Subsection 1(4) defines as discrimination by an employer that the employer manages work, distributes tasks or otherwise arranges working conditions in such a manner that one or several employees are put in a less favourable position than other employees on the basis of gender. Again, the general definitions of employer and employee under Section 3 apply to the provision in question. The prohibition carries remedies and compensation under Section 11 of the Act on Equality.

1.d. Collective agreements and case law

According to the information available, collective agreements do not contain provisions relevant to the personal scope of equal treatment.

There have been a number of cases which concern the position of managing directors, in relation to different aspects of whether they should be considered as employees or representatives of the enterprise. For example, the Supreme Court decided in KKO 1986 II 40 that a managing director is a body of the enterprise, not an employee. In 1986 II 167 the Supreme Court decided that, as a managing director (who was not a member of the board of directors, and did not own shares in the company in question) was a body of the enterprise and not an employee, s/he does not enjoy a position comparable to employees as privileged parties in a bankruptcy of the enterprise. The preparatory works of the Employment Contracts Act also state that the Supreme Court has consistently considered that managing directors of companies or cooperatives cannot be under an employment contract, as they are legal representatives and bodies of these enterprises. Managing directors in other types of communities, such as the managing director of registered associations, may be considered as employees, if the criteria for employment are fulfilled. Also where certain aspects of labour law are concerned, such as provisions on annual holidays, even a managing director of a company has been considered as an employee.

As to equality law, some aspects of the prohibitions of discrimination are applied to managing directors. The Supreme Court decided in KKO 1997:36, that a managing director could be entitled to damages, if s/he could show discrimination. Thus, whether the Act on Equality is applied to managing directors seems to depend both on the type of entity that is in question, and the aspect of the activity concerned.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

Directive 2004/113/EC was implemented by an amendment to the Act on Equality in 2008 (19.12.2008/1023). A new provision 8e was added to the provisions of specific types of discrimination which carry remedies and compensation under Sections 11 and 12 of the Act, similarly to sections that concern discrimination in working life, educational institutions and labour market organisations. Section 8e does not specify who is to be considered as a provider of goods and services, except that the prohibition of discrimination concerns provisions and services that are commonly available in the public and private sector (Subsection 1). Providing goods and services only or mainly to representatives of one sex is allowed, when required by a justified aim and appropriate and necessary measures are used for reaching the aim (Subsection 2).

2.b. Freedom to choose contractual partners

The preparatory works for the amendment (HE 153/2008 vp.) discuss the material scope of the Directive in terms of the goods and services that are meant, and the responsibility of the provider of such goods and services in terms of to what extent the provider is responsible for the behaviour of his/her representative. The preparatory works state that the Directive does not have an impact on the right of an individual to choose his/her contracting partner, provided that the choice is not based on his/her sex.

2.c. Collective agreements and case law

There seem to be no clarifying or expanding conditions in collective agreements, or case law concerning the personal scope of Directive 2004/113/EC.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

As noted above under 1.a., the Act on Equality now even defines as ‘employees’ persons who are in a ‘comparable employment relationship’, which according to the preparatory works also includes independent workers or entrepreneurs etc.. Thus, the provisions of the Act on Equality which protect against discrimination in working life apply to independent workers and entrepreneurs, provided they sell their own skills, even though they may act as entrepreneurs in the sense meant by unemployment or retirement legislation.

Further, the definition of entrepreneur, introduced into the Act on Entrepreneurs’ Pensions in 2010 as explained above under 1.b., defines an entrepreneur as a ‘person who pursues a gainful activity (*ansiotyö*) without being in a public or private employment relationship’. A partner in a company is an entrepreneur, if s/he has a leading position, or is a working shareholder who individually owns over 30 % of the votes, or together with family members over 50 % of the votes in the company. A leading position is defined as that of managing director, company board member or an equivalent position, or having a similar *de facto* power in the company. As explained under 1.b., persons who are not employees are thus insured under the Act on Entrepreneurs’ Pensions.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

The extension of the definition of ‘employee’ under Section 3 of the Act on Equality brings access to self-employment within the ambit of the Act, in situations where an employer seeks a self-employed person who sells his/her own skills. The fact that the definition of ‘employee’ is explained in these terms only in the preparatory works may lessen the impact of the amendment, however.

3.c. Collective agreements and case law

I have not found new case law that would clarify or expand the scope of application.

3.d. Additional information

The final consideration as to who is an entrepreneur and who is in a comparable employment relationship remains difficult and open to interpretation, especially taking into account the different definitions of these positions in social security legislation. It is probable that the application of the Act on Equality to entrepreneurs will not expand very much, although the preparatory works allow a very broad interpretation.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

Directive 92/85/EEC was implemented in Finland by amendments to the Employment Contracts Act, which contains provisions on family-related leaves, and to the Sickness Insurance Act, concerning the benefits during these leaves. As to the length of the leaves, the Employment Contracts Act refers to the benefit periods defined in the Sickness Insurance Act. Provisions on pregnant and breastfeeding mothers are found under the Occupational Safety Act (738/2002). While Finnish legislation fulfilled the requirements with respect to the right to maternity leave and pay during the leave, Article 8(2) required amendment, as Finnish legislation did not contain a mandatory maternity leave. The Employment Contracts Act was amended by inserting Section 4(2) into Chapter 4 of the Act in 2002 (1076/2002). Under this provision the employee, with the employer’s consent, is entitled to perform work that does not pose a risk to her or to the unborn or new-born child. Such work is not permitted during a period of two weeks before the expected time of birth and two weeks after giving birth. The Occupational Safety Act contains the provisions on the employer’s responsibility to take into account health hazards caused by pregnancy. The Act requires protection of the workers’

reproductive health as well as pregnant workers. Chapter 5, Section 48(2) provides that a pregnant woman and a breastfeeding mother shall be given the opportunity to rest in a suitable place during working hours. None of these provisions defines pregnancy or breastfeeding. In workplaces where there is one main employer and independent workers, they are all responsible to cooperate in such a manner that the workers' safety at work is ensured, under Chapter 6, Section 49 of the Act. The main employer is also responsible for informing independent workers on safety issues.

The provisions on pregnancy discrimination are placed in the Act on Equality. Treating someone differently for reasons of pregnancy or childbirth is defined as direct discrimination under Section 7, Subsection 2(2) of the Act on Equality. Employing a person, selecting her for a task or training, or deciding the duration of employment or pay or other terms of employment so that the person finds herself in a less favourable position on the basis of pregnancy or childbirth constitutes employment discrimination on the ground of gender, under Section 8, Subsection 1(2). Treating someone differently on the basis of parenthood is defined as indirect gender discrimination under Section 7, Subsection 3(2). The provision also protects men with family responsibilities. What is meant by an employer and an employee is discussed under 1.a. No definition of 'pregnant worker' or 'worker who has recently given birth' is provided.

Persons returning from family-related leave are entitled to return to former duties under the Employment Contracts Act, Chapter 4. If an employer terminates the job of a pregnant worker or a person on family-related leave, the termination is presumed to be on the ground of pregnancy or such leave.

4.b. Collective agreements and case law

Collective agreements often contain provisions on pay during maternity leave, but the leave system as such is highly uniform and special conditions about the length of the leave or similar issues are not in use, as far as I know. The legislation concerning family-related leaves has been negotiated between social partners, which may explain the uniform application of the legislation. As to occupational health hazards during pregnancy, collective agreements in branches where such hazards are common may contain specific conditions which define the employers' and employee's responsibilities in more detail than the Occupational Safety Act and the Employment Contracts Act.

Pregnancy discrimination cases are relatively common. Recently, there have been cases concerning pay during maternity leave under collective agreements. The Labour Court decided in 2010 (TT:2010-136) that an employee had the right to pay during maternity leave, although she had returned to work from family-related leave just before the maternity leave. The Equality Board also gave an opinion on a similar case, following a request by the Helsinki District Court, in 2010 (Opinion of the Equality Board 21.10.2010; 1/10).

4.c. Rights of the self-employed and/or the quasi/para-subordinate

Benefits for maternity leave (as well as other types of family leave) are paid to all mothers, regardless of their being gainfully employed or not. The level of benefits varies according to income from employment or entrepreneurship (including agricultural entrepreneurship). Thus, the self-employed and other similar groups are included. However, for these groups there are no mandatory or other provisions as to the leave as such. The problem often is that female entrepreneurs do not have stand-in services during maternity leave, which makes it difficult to go on leave, even when the leave carries a benefit. There is a stand-in system which provides a stand-in for agricultural entrepreneurs (Act on Stand-in-Services for Agricultural Entrepreneurs 1996/1231, Sections 7b and 7c) during maternity, paternity and parental leave periods.

4.d. Additional information

There is no additional information to be reported.

5. Directive 2010/18/EU on parental leave

5.a. *Personal scope*

Protection of employees against discrimination is provided by Section 7, Subsection 3(2) of the Act on Equality (see above). Section 8 contains provisions on discrimination in working life, and what is meant by ‘employer’ and ‘employee’ is defined under Section 3. Further, the Employment Contracts Act Chapter 2, Section 2 prohibits discrimination by the employer on the basis of the employee’s ‘family ties’, among other things.

5.b. *Entitlement to parental leave*

Mothers and fathers (including adoptive parents) are entitled to parental leave which carries an income-related benefit. The leave is fully transferable between parents. A ‘bonus month’ is received by a parent who takes up 12 parental benefit days at the end of the parental leave period. Thus, the normal parental leave period is shared among the parents thus far, the parental leave period is extended by an extra period, known as ‘the father’s month’ as usually fathers only use a short part of the parental leave. Mothers and fathers are entitled to further ‘home care leave’ until the child turns three, but the home care leave only carries a flat-rate benefit. Like maternity leave, parental leave is defined in the Employment Contracts Act as related to employment contracts and the relevant parties. The parental benefit, however, like the maternity benefit, is paid to all parents, at a level related to income from gainful occupation.

5.c. *Rights of the self-employed and/or the quasi/para-subordinate*

See above.

5.d. *Additional information*

In 2009, the Ministry of Social Affairs and Health installed a Working Group on Family Leaves to prepare proposals to reform the present parental leave system. The Group presented a report in 2011.¹³⁷ This report describes the requirements of the Parental Leave Directive, but seems to assume that Finnish legislation already fulfils its requirements. A reform of the present system of family-related leaves is discussed on the basis of a comparison between the Nordic countries, guidelines provided by the Finish Parliament and the need to simplify the present system.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

The Non-Discrimination Act 21/(2004), which transposed Directives 2000/43/EC and 2000/78/EC, prohibits discrimination regarding an open-ended list of prohibited grounds, in which the grounds prohibited by the Directives are expressly included (Section 6(1) of the Act). The material scope of the Act follows the provisions on the scope in the Directives (Section 2). There is no definition of what is meant by ‘employment’, ‘self-employment’ or the other activities mentioned. The Non-Discrimination Act is presently undergoing a reform, aimed at bringing it into line with the Finnish Constitution.

¹³⁷ For a summary of the report, see http://www.stm.fi/c/document_library/get_file?folderId=2872962&name=DLFE-15512.pdf, accessed 25 April 2012.

FRANCE – Sylvaine Laulom

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation***1.a. Equal pay***

Regarding the principle of equal pay, this first and foremost applies to employment relationships. The French Labour Code does not contain any definition of what is an employee or a definition of subordinate employment. However, criteria have been set by the *Cour de Cassation*, the French Supreme Court. An employment contract exists when a person undertakes to work in the name and under the supervision of another in return for remuneration. Three elements, required to prove the existence of an employment contract, emerge from this definition: the performance of an activity, in return for remuneration and the existence of a subordinate relationship between the parties (a link of legal subordination). This last criterion is the most important one. According to case law, the legal superior-subordinate relationship means that a job is performed under the authority of an employer, who has the power to give orders and instructions, supervise the performance of said job and apply sanctions in case of failure or breaches by their subordinate. This definition includes atypical work: part-time workers, fixed-term contract workers and agency workers.

The contract of employment does not include relationships of economic dependence and there is no category of ‘quasi-subordinate’ workers in the French system. However, Article L7111-1 of the Labour Code and following articles extend the application of labour law to ‘particular groups of workers’. It includes journalists (Article L7111-1), artists and models and more generally entertainment workers (L7121-1), caretakers (L7211-1), domestic employees (L7221-1), workers working at home (L7411-1), travelling salesmen and sales representatives (L7311-1) and finally those whose occupation mainly consists of selling all types of goods or products, supplied to them on an exclusive or quasi-exclusive basis by one industrial or commercial company, or by taking orders for or receiving the goods to be sold, moved or transported for the account of one industrial or commercial company, where such persons carry out their occupation in premises provided or designated by the aforementioned companies and under the conditions and for a price set by the latter (L7321-1). Some specific rules apply to each of these various categories of workers: sometimes there is a presumption of contract of employment (for the artists), sometimes most of the Labour Code applies to them. However, the rules on gender equality apply to all of them.

Public servants are also covered by the equal treatment principle (see *Loi n°83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires*).

Finally, the 2008 Act (*Loi n°2008-496 du 27 mai 2008 portant diverses dispositions d’adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*), which transposes Directive 2006/54/EC, states in its Article 5 that the law applies to every public and private person including those carrying out an independent activity.

1.b. Equal treatment in occupational social security schemes

As provided by the Directive, the prohibition of discrimination in occupational social security schemes applies to the working population including the self-employed. No references to the exceptions mentioned in Article 8(1)a and b have been found.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

Regarding Article 14 of Directive 2006/54/EC, the same principle applies as for equal pay. The scope of the provisions is the same, except that candidates for employment are also covered by the anti-discrimination principles. Thus according to Article L1132-1 of the Labour Code, the prohibition of discrimination in the access to employment concerns ‘every person’ applying for a job or for a training period. There is no category of ‘quasi-subordinate’ workers in French law, but workers in atypical relationships are covered (see 1.a.). As regards

the self-employed, the Labour Code does not apply to them. However, the Penal Code prohibits discrimination in very general terms. Thus, according to Article 225-1:

‘Discrimination comprises any distinction applied between natural persons by reason of their origin, sex, family situation, pregnancy, physical appearance or patronymic, state of health, handicap, genetic characteristics, sexual morals or orientation, age, political opinions, union activities, or their membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion.’

‘Discrimination also comprises any distinction applied between legal persons by reason of the origin, sex, family situation, physical appearance or patronymic, state of health, handicap, genetic characteristics, sexual morals or orientation, age, political opinions, union activities, membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion of one or more members of these legal persons.’

Article 225-2 adds :

‘Discrimination defined by article 225-1, committed against a natural or legal person, is punished by three years’ imprisonment and a fine of €45,000 where it consists:

- 1° of the refusal to supply goods or services;
- 2° of obstructing the normal exercise of any given economic activity;
- 3° of the refusal to hire, to sanction or to dismiss a person;
- 4° of subjecting the supply of goods or services to a condition based on one of the factors referred to under article 225-1;
- 5° of subjecting an offer of employment, an application for a course or a training period to a condition based on one of the factors referred to under article 225-1;
- 6 ° of refusing to accept a person onto one of the courses referred to under 2° of article L412-8 of the Social Security Code.’

Here, the protection against discrimination is largely defined and can include self-employed or other atypical workers. It may apply to discriminatory termination of self-employment contracts by employers/clients.

1.d. Collective agreements and case law

No collective agreements or case law on this issue are known.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

The provisions implementing Directive 2004/113/EC are part of a more general Act whose aim is to complete the implementation of all relevant EC Directives on discrimination (*Loi n° 2008-496 du 27 mai 2008, portant diverses dispositions d’adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*). The 2008 Act provides a general prohibition of direct or indirect discrimination based on sex in the access to and supply of goods and services. Article 5 of the Act simply states that the Act applies to every private and public entity, including those carrying out an independent activity. Article 4 has not been transposed as such. However, the specific provisions for the implementation of the principle of equal treatment between men and women in matters of employment and occupation will not apply to the access to and supply of goods and services.

2.b. Freedom to choose contractual partners

There has been no specific implementation of Article 3(2) in the 2008 Act, which does not mention the individual's freedom to choose a contractual partner. This principle may be guaranteed by the application of general principles of contract rules.

2.c. Collective agreements and case law

In France, the implementation of Directive 2004/113/EC has not given rise to any discussion or debate and until now the actual impact of the Directive seems to have been very limited. The Directive has been transposed but the enforcement of the principle of equal treatment between men and women in the access to and supply of goods and services does not seem to attract great interest. There have been no academic discussions for example on the scope of the exception and how courts are going to interpret it. Until now, no case law or collective agreements on this issue and specifically on the clarification or expansion of the scope of application of the principle of equal treatment has been found.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

Directive 2010/41/EU has not yet been implemented in France and it is therefore impossible to answer the question of how it has been transposed.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

Looking at the current French legislation, I would say that the transposition of Article 14(1)a will not add anything to the current protection. The Penal Code already stipulates similar protection (see 1.c.).

3.c. Collective agreements and case law

I am not aware of any collective agreements or case law on this issue.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

According to the Labour Code, there is no specific general requirement to inform the employer of the pregnancy, but the entitlement to maternity rights and protection depends on the employer having been informed. Women must produce a medical certificate attesting their pregnancy (Article L1225-4). Article L1223-5 also provides that the dismissal of a pregnant woman is null and void, if she informs the employer of her pregnancy (through a medical certificate) within 15 days following the dismissal. There is no specific definition of workers who have recently given birth and workers who are breastfeeding, the relevant protection just applies to women who are breastfeeding and sometimes to women after their pregnancy leave. The same principles apply in the public service.

4.b. Collective agreements and case law

Collective agreements and case law have not until now contributed to clarifying or expanding the scope of application of the legal provisions. There has been no specific case law similar to the *Mayr* case. However, in France, a dismissal of a pregnant woman is null and void if the worker informs the employer of her pregnancy within 15 days following the dismissal. This rule may prevent the difficulties revealed in the *Mayr* case. Regarding the *Danosa* case, there has been no case law on this issue and there are no similar rules in French law. In company law, the mandate of a director could be *ad nutum* (at will). Thus a commentator of the *Danosa* decision considers that it will now be up to the court to ascertain whether the removal has anything to do with the director's pregnancy (M. Roussille '*Révocation ad nutum*:'

incompatibilité avec la protection de la femme enceinte’ *Droit des sociétés* (janv. 2011), comm. 8).

4.c. Rights of the self-employed and/or quasi/para-subordinate

Under social security rules, the self-employed can receive an allowance during maternity leave. Otherwise the rights accorded by Directive 92/85/EEC do not apply to the self-employed.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

Directive 2010/18/EU has not been implemented in France yet.

Any worker under a contract of employment is entitled to parental leave (see the definition in 1.a.). Public servants are entitled to parental leave. Part-time workers, fixed-term contract workers and agency workers are also entitled to parental leave.

5.b. Entitlement to parental leave

Workers must work for the same employer for at least one year in order to be able to benefit from parental leave. As provided by the Directive, in case of successive fixed-term contracts with the same employer, the sum of these contracts shall be taken into account for the purpose of calculating the qualifying period.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

French law does not recognize a category of quasi/para-subordinate workers. However, it is possible for parents who stop their activity (independent or dependent) to have a specific allowance (*complément de libre choix d'activité*) every month for six months (it may be more, depending on the number of children). It is also possible to benefit from this allowance for former part-time workers.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

There has been no debate in France on the differences in personal and material scope between these various Directives. The Directives have mostly been transposed in keeping with the traditional scope of application of labour law. Parallel provisions exist in the public services. When necessary, a wider personal scope may be applied, as in the 2008 Act, without creating real debates on the novelties this could imply for the interpretation of the equality principles.

GERMANY – Ulrike Lembke

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

There is no specific legislation transposing Directive 2006/54/EC in Germany. Numerous issues contained in the Recast Directive are covered by the 2006 General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*). After that, no particular action was considered necessary to fully implement the Recast Directive.

1.a. Equal pay

The prohibition of discrimination with regard to pay is covered by Section 2(1)(2) of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*).¹³⁸

¹³⁸ *Allgemeines Gleichbehandlungsgesetz* of 14 August 2006, Official Journal (*Bundesgesetzblatt BGBI*), part I p. 1897.

Unfortunately, the AGG does not contain a definition of ‘pay’. Section 612a(3) of the Civil Code (*Bürgerliches Gesetzbuch, BGB*), which was repealed by the AGG, expressly prohibited sex discrimination through payment of a lower wage for the same work or work of equal value. The AGG, however, does not contain any provision indicating that wage discrimination also extends to work of equal value.¹³⁹ Moreover, the AGG does not contain an explicit prohibition of sex-discriminatory job classification systems as required by Article 4(2) of Directive 2006/54/EC. Most wages and job classification systems in Germany are determined by collective agreements under the Act on Collective Bargaining (*Tarifvertragsgesetz, TVG*);¹⁴⁰ the latter containing no provisions for equal pay. Although discrimination with regard to pay is prohibited in collective agreements as well, under Section 2(1)(2) of the AGG, it is generally known that collective agreements are a major cause of the considerable gender pay gap in Germany.¹⁴¹ Traditionally, the Trade Unions favoured the male breadwinner model and changing the systems is complicated and hard work.¹⁴² Whatever the personal scope, equal pay for equal work is a principle without broader application in Germany.¹⁴³

Section 6 of the AGG defines its personal scope concerning working life. The AGG is directly applicable to all employment relationships between private parties and for employees in the civil service who do not enjoy the special status of civil servants. Under Section 24 of the AGG, its provisions apply correspondingly to federal, state and local civil servants as well as federal and state judges. The protection against discrimination in working life under Sections 6-18 of the AGG covers all persons in dependent employment (salaried employees and workers, including part-time workers, ancillary work and employees in small work contracts, probationary or temporary¹⁴⁴ employment) as well as persons employed for the purposes of their vocational training, persons of similar status on account of their dependent economic status (‘quasi-subordinate’), including those engaged in home work and those equal in law to home workers, and persons applying for an employment relationship or whose employment relationship has ended. Volunteers might be covered by interpreting the section in the light of European Union law.¹⁴⁵ So-called one-euro-jobbers are not covered. According to Section 6(3) of the AGG, self-employed persons and freelancers and members of certain bodies of an enterprise (especially managing directors and executive board members) are covered insofar as the conditions for access to gainful employment and promotion are affected, not with regard to equal pay. Although externally hired managing directors are employees under European Union law, they are not covered by Section 6(1) of the AGG but they are supposed to enjoy only the reduced protection under Section 6(3) of the AGG.¹⁴⁶

¹³⁹ In 2008, the German Women Lawyers Association reminded the relevant ministries of this lack of legislative implementation of the provisions of Directive 2006/54, see http://www.djb.de/Kom/K1/St08-05_Richtlinie_2006_54_EG/#_ftn2, accessed 18 April 2012.

¹⁴⁰ *Tarifvertragsgesetz* of 25 August 1969, Official Journal (*Bundesgesetzblatt BGBI*), part I p. 1323.

¹⁴¹ See H. Pfarr ‘Entgeltgleichheit in kollektiven Entgeltsystemen’ in: H. Oetker et al. (ed.) *Festschrift 50 Jahre Bundesarbeitsgericht* pp. 779 ff., München 2004.

¹⁴² See H. Schwitzer ‘Der weite Weg zu ERA – Frauendiskriminierung in den Tarifverträgen der Metall- und Elektroindustrie’ in: C. Hohmann-Dennhardt et al. (ed.) *Geschlechtergerechtigkeit. Festschrift für Heide Pfarr* pp. 346-360, Baden-Baden 2010. Therefore, a broad alliance of social and political groups as well as single parliamentary groups demand for statutory provisions on equal pay, see: <http://www.frauenrat.de/deutsch/infopool/informationen/informationdetail/back/11/article/equal-pay-day-recht-auf-mehr-nur-mit-einem-gesetz.html> and <http://www.karin-tondorf.de/newsletter/>, both accessed 18 April 2012.

¹⁴³ In 2011, the State Labour Court of Hamburg, in its judgment of 1 March 2011, 2 Sa 56/10, stated that there is no rule in German law generally providing the same pay for the same work.

¹⁴⁴ However, the protection for temporary agency workers under the AGG is incomplete and ineffective in practice, see A. Rösch *Gleichbehandlung zum Nachteil des Leiharbeitnehmers?*, Hamburg 2009.

¹⁴⁵ A. Stein in: U. Wendeling-Schröder & A. Stein *Allgemeines Gleichbehandlungsgesetz. Kommentar* Section 6 paragraph 8, München 2008.

¹⁴⁶ See S. Hoentzsch *Die Anwendung der Benachteiligungsverbote des Allgemeinen Gleichbehandlungsgesetzes auf Organmitglieder*, München 2011, A. Liebhäuser *Die Bedeutung des Allgemeinen Gleichbehandlungsgesetzes für Organmitglieder*, Hamburg 2012, and V. von Alvensleben et al. ‘Der Fremdschäftsführer im Spannungsfeld zwischen Arbeitgeberposition und Arbeitnehmereigenschaft’, *Betriebsberater* 2012 pp. 774-778, with regard to ECJ decision C-232/09 *Danosa*.

The obligations with regard to pay under the AGG apply to employers, which can be natural or legal persons as well as unincorporated firms with legal capacity employing persons who are employees under Section 6(1) of the AGG. Moreover, ‘employer’ under Section 6(2) of the AGG refers to a third party to which employees are transferred for the performance of work or services and to the client or intermediary in case of persons engaged in home work and those equal in law to home workers.

1.b. Equal treatment in occupational social security schemes

The German social security system is somewhat complicated. Statutory social security schemes apply to all employees and persons in vocational training. They automatically fall under these schemes (unemployment, healthcare, work accidents, retirement). According to Social Code No. IV (*Sozialgesetzbuch IV*),¹⁴⁷ employees in small work contracts (*‘geringfügig Beschäftigte’*) especially those who work in private households are not covered by these social security schemes. They can voluntarily take part in the pension insurance system – which many choose not to because of the costs involved and the very small amounts they might be entitled to in the end.

Occupational pension schemes are primarily covered by the Act on Occupational Pension Schemes (*Betriebsrentengesetz*, BetrAVG)¹⁴⁸ and additionally by the AGG. Contrary to the explicit provision in Section 2(2) of the AGG which excludes the application of the AGG and is thus incompatible with European Union law, the Federal Labour Court decided that the AGG is applicable insofar as the BetrAVG does not contain special precedent provisions.¹⁴⁹ The BetrAVG applies to benefits for retirement, invalidity, or for surviving family members under occupational pension schemes set up by private employers. It does not contain a prohibition on sex discrimination and the courts are mainly concerned with age discrimination if any. The BetrAVG covers employees and workers and persons employed for the purposes of their vocational training under Section 17(1) of the BetrAVG as well as, under Section 18 of the BetrAVG, employees in the civil service who do not enjoy the special status of civil servants (with some restrictions and specialties). Persons who are not employees can invoke the BetrAVG under Section 17(1) when they were guaranteed benefits for retirement, invalidity, or for surviving family members on the occasion or as a result of their (self-employed) work for an enterprise. Since 2009, employees in small work contracts may benefit from occupational pension schemes by increasing their working hours and thus become members of private supplementary pension schemes, but they are not entitled to participation in occupational social security schemes.

For civil servants, the applicable law is the Act on Pensions for Civil Servants (*Beamtenversorgungsgesetz*, *BeamtVG*), which establishes the conditions for pensions.¹⁵⁰ The law does not contain a prohibition on sex discrimination, as discrimination based on sex is already covered by Article 3(3) of the German Constitution, which is directly applicable in the relationship between the State and a (former) civil servant.¹⁵¹

Self-employed persons (and freelancers) are not covered by the statutory social security systems and they cannot normally take part in occupational pension schemes. Self-employed persons can voluntarily become members of the statutory social security scheme (which is expensive) or they may be covered by Section 17(1) of the BetrAVG under rare and special

¹⁴⁷ *Sozialgesetzbuch (SGB) Viertes Buch* of 23 December 1976, Official Journal (*Bundesgesetzblatt BGBl*), part I p. 3845.

¹⁴⁸ *Gesetz zur Verbesserung der betrieblichen Altersversorgung (Betriebsrentengesetz)* of 19 December 1974, Official Journal (*Bundesgesetzblatt BGBl*), part I p. 3610.

¹⁴⁹ Federal Labour Court, judgment of 11 December 2007, 3 AZR 249/06, see also T. Cisch & V. Böhm ‘*Das Allgemeine Gleichbehandlungsgesetz und die betriebliche Altersversorgung in Deutschland*’, *Betriebsberater* 2007 pp. 602-610, and G. Hellkamp & B. Rinn ‘*Gleichbehandlung in der betrieblichen Altersversorgung nach dem AGG*’, *Betriebliche Altersversorgung* 2008, pp. 442-448.

¹⁵⁰ *Gesetz über die Versorgung der Beamten und Richter des Bundes (Beamtenversorgungsgesetz)* of 24 August 1976, Official Journal (*Bundesgesetzblatt BGBl*), part I p. 2485.

¹⁵¹ The Higher Administrative Court of Rhineland Palatinate, judgment of 15 April 2011, 10 A 11144/10, decided that parts of the Act on Pensions for Civil Servants are incompatible with the provisions of Directive 2006/54/EC; the possible incompatibility with constitutional law was not examined.

circumstances. Normally, neither of both systems applies. Some self-employed persons have private insurance, but most self-employed persons as well as nearly all members of the liberal professions are covered by one of the many professional pension funds (*berufsständische Versorgungswerke*) in Germany. Every liberal profession has its own pension fund in every German state which is authorised on the legal basis of its own state law. Only very few of these many special laws deal with questions of gender equality.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

The material scope of application of the AGG under Section 2(1) is identical to the scope of Article 14(1)(a)-(d) of Directive 2006/54/EC. The personal scope of application under Section 6 of the AGG covers employees, workers, trainees, ‘quasi-subordinate’ workers, home workers and others (see above).

Self-employed persons are covered by Section 6(3) of the AGG. Consequently, any gender-based discrimination with respect to access to self-employed activities and promotion is generally prohibited under the AGG. But this provision is of little relevance as the chapter referred to gives a right of action against private employers who discriminate, and hence does not apply to the situation of the self-employed. The provision is of importance only insofar as it grants protection against employers’ associations or professional organisations. Concerning working conditions or the discriminatory termination of self-employment contracts, the self-employed person may only invoke Section 19 of the AGG which covers the protection against discrimination in the area of civil law.¹⁵² This section transposes the requirements of Directive 2004/113/EC. Unfortunately, the AGG restricts the notion of a good or service ‘available to the public’ to so-called ‘mass contracts’, i.e. contracts which are typically concluded irrespective of the identity of the other contracting party, or where the identity of that person is of little importance. In consequence, a self-employed person is only protected against discriminatory working conditions or discriminatory termination of his or her contract when this contract meets the requirements of Section 19 of the AGG, which is not the rule because the identity of the contracting parties regularly is of some importance. Self-employed persons can only enjoy the full protection of the AGG if they are in fact ‘quasi-subordinates’.¹⁵³

1.d. Collective agreements and case law

The differentiation between dependent and ‘quasi-subordinate’ employees protected under Section 6(1) and self-employed persons or freelancers protected under Section 6(3) of the AGG can be difficult in individual cases and has been the subject of rather heterogeneous case law.¹⁵⁴ The main criteria are: decisive influence on working conditions, authority to give instructions, competence to delegate the performance of duties, contractual obligations to one or more employers or clients and the comparable need for social protection. To prevent abuse of the provisions of the AGG, the courts restricted the definition of persons applying for an employment relationship insofar as applicants with ‘lack of subjective seriousness’ concerning their application are not covered by the personal scope of the AGG.¹⁵⁵

As an exception to the exclusion of self-employed persons and freelancers from occupational social security schemes, most freelancers for public service broadcasting are entitled to sick pay due to the applicable collective agreements. The rare case law on professional pension funds is inconsistent: some courts even doubt that anti-discrimination

¹⁵² G. Thüsing *Arbeitsrechtlicher Diskriminierungsschutz*, München 2007, paragraph 94, emphasizes that the pursuit of self-employed activities or professions is only covered by Sections 19-21 of the AGG.

¹⁵³ See J.-H. Bauer et al. *Allgemeines Gleichbehandlungsgesetz. Kommentar* Section 2 paragraph 16, München 3rd ed. 2011.

¹⁵⁴ Examples given by H.J. Willemsen & M. Müntefering ‘*Begriff und Rechtsstellung arbeitnehmerähnlicher Personen*’ *Neue Zeitschrift für Arbeitsrecht* 2008 pp. 193-201.

¹⁵⁵ For example, State Labour Court of Hessen, judgment of 19 December 2011, 16 Sa 965/11; this question was deliberately left open by the Federal Labour Court, judgment of 19 August 2010, 8 AZR 530/09. Applicants with lack of objective suitability (e.g. because the applicant is overqualified) are not covered by Section 3 of the AGG because they are not in a ‘comparable situation’.

law can be applied to professional pension funds,¹⁵⁶ others examine the funds very carefully in the light of constitutional and/or European Union law.¹⁵⁷

1.e. Additional information

Contrary to expectations, the protection of the national implementing legislation transposing Directive 2006/54/EC is as well guaranteed for workers and employees in atypical, vulnerable or precarious work contracts – although they are not entitled to all benefits granted for ‘normal’ employees – but not for self-employed persons and freelancers. The latter are not entitled to equal pay, they are not sufficiently protected against discriminatory termination of their contracts and they may not enjoy the protection of European anti-discrimination law concerning their professional pension funds while having no legal rights to participate in occupational social security schemes.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

The provisions of Directive 2004/113/EC have been implemented by the 2006 General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*). The personal scope of application of Section 19 of the AGG is determined by its material scope. The AGG goes beyond the requirements of Directive 2004/113/EC in that it extends protection against gender discrimination also to the areas of social protection, including social security and health services, as well as social advantages and education. So basically, every person entering a contract or even trying to enter it is protected against gender discrimination and every (natural or legal) person offering goods or services or the conclusion of contracts under Sections 2 and 19 of the AGG is obliged to avoid gender discrimination.

Not every contract is covered by Section 19 of the AGG, however. First of all, the provisions of the AGG are restricted to contracts concluded under civil law. For the provision of goods and services under public law, the principle of equality contained in the German Constitution applies. Second, the AGG falls short of the requirements of Directive 2004/113/EC by containing several exceptions. Under Section 19(1)(1) of the AGG, the application is restricted to so-called mass contracts which are concluded in great numbers and typically irrespective of the identity of the other contracting party or where the identity is of small importance. Moreover, a landlord who rents out up to 50 apartments does not fall under the provision, as well as contracts which will bring the parties into close spatial contact or into relationships of trust or both parties being housed on the same piece of land under Section 19(5) of the AGG. Third, in violation of Directive 2004/113/EC, the prohibition of sexual harassment under Section 3(4) of the AGG is restricted to the area of employment.¹⁵⁸ In accordance with Directive 2004/113/EC, Section 19 of the AGG does not apply to contracts under family or inheritance law.

The scope of application of Section 19 of the AGG is restricted to persons who conclude a ‘mass contract’, a contract irrespective of the concluding parties or a contract concerning a private insurance under civil law with the exception of family and inheritance law, as long as the contract does not bring the parties into close spatial contact or a relationship of trust and as long as the sex discrimination in question is not committed by sexual harassment.

¹⁵⁶ The Federal Administrative Court, judgment of 25 July 2007, 6 C 27/06, as well as the Higher Administrative Court of Rhineland Palatinate, judgment of 26 May 2010, 6 A 10320/10, seriously questioned the applicability of the AGG, Article 141 of the EC Treaty and of the Anti-Discrimination Directives to the regulation of professional pension funds. Thus, the applicable higher law is reduced to the principle of equality as laid down in the German constitution.

¹⁵⁷ The Administrative Court of Hannover, judgment of 3 December 2008, 5 A 873/08, directly applied the Directive 79/7/EEC; the Administrative Court of Frankfurt, judgment of 23 October 2008, 12 K 1948/08F, examined the professional pension fund in question in the light of the German constitution, the ECHR and the Directive 79/7/EEC.

¹⁵⁸ According to the prevailing opinion of legal commentaries, this restriction is not applicable in the civil service and has to be eliminated for the provision of goods and services by directive-consistent interpretation.

2.b. Freedom to choose contractual partners

The AGG does not explicitly contain the freedom to choose contractual partners. But due to the legislative materials, the restriction of the scope of application to ‘mass contracts’ under Section 19(1) and the possibility to justify differences of treatment under Section 20 serve the purpose of striking the necessary balance between protection against discrimination and the principle of the freedom of contract, explicitly including the freedom to choose contractual partners.¹⁵⁹ The AGG does not provide for exceptions to these restrictions with regard to the sex of the potential contractual partner.

2.c. Collective agreements and case law

The Federal Court of Justice doubted that Section 19 of the AGG applies to the stay at a wellness hotel and confirmed that the protection against discrimination under this Section does not cover discrimination on the grounds of belief or political opinion.¹⁶⁰ Other courts decided that visiting discotheques is intended to result in a contract under civil law which is covered by Section 19 of the AGG.¹⁶¹ The Higher Administrative Court of Hessen considered the definition of indirect discrimination related to the provision of goods and services and the use of statistics.¹⁶² The State Social Court of North Rhine-Westphalia rejected an application for artificial insemination of a female applicant over the age of forty with the argument that the AGG is not applicable because its Section 2 refers to provisions of the Social Code whose regulations are exhaustive.¹⁶³

Under Sections 19(1) and 20(2)(2) of the AGG in the light of Article 14 of Directive 2004/113/EC, the Higher Regional Court of Hamm awarded compensations in the amount of EUR 2 000 for non-pecuniary harm suffered by the applicant whose health insurance was terminated due to her alleged concealing of pregnancy complications.¹⁶⁴ More difficult to understand is a decision of the District Court of Hannover rejecting the application for compensation by a female pregnant applicant whose application for membership in a private health insurance would only be accepted on the condition that benefits for pregnancy and childbirth were excluded.¹⁶⁵ The compatibility of this decision with Section 20(2)(2) of the AGG and the sex equality directives is at least questionable.

2.d. Additional information

The protection against gender discrimination under Sections 19-21 of the AGG is primarily inconsistent. In some aspects, the AGG goes beyond the requirements of Directive 2004/113/EC and in some other aspects it falls short.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

Directive 2010/41/EU has not yet been implemented into German law. The Federal Government and the Federal Council were averse to its contents and questioned its need as well as the competence of the European Union concerning social security law.¹⁶⁶

3.a. Personal scope

There is no explicit legislation providing the equal treatment of men and women engaged in a self-employed capacity other than the 2006 General Equal Treatment Act (*Allgemeines*

¹⁵⁹ Bundestags-Drucksache 16/1780 of 8 June 2006, pp. 39-40, <http://dipbt.bundestag.de/dip21/btd/16/017/1601780.pdf>, accessed 18 April 2012.

¹⁶⁰ Federal Court of Justice, judgment of 9 March 2012, V ZR 115/11. (The case becomes more understandable knowing that the leader of the German right-wing extremist party *NPD* booked the stay in question.)

¹⁶¹ Higher Regional Court of Stuttgart, judgment of 12 December 2011, 10 U 106/11; District Court of Bremen, judgment of 20 January 2011, 25 C 0278/10, 25 C 278/10.

¹⁶² Higher Administrative Court of Hessen, judgment of 14 September 2010, 2 A 1337/10.

¹⁶³ State Social Court of North Rhine-Westphalia, judgment of 14 February 2008, L 5 KR 93/07.

¹⁶⁴ Higher Regional Court of Hamm, judgment of 12 January 2011, 20 U 102/10, I-20 U 102/10.

¹⁶⁵ District Court of Hannover, judgment of 26 August 2008, 534 C 5012/08.

¹⁶⁶ See Bundestags-Drucksache 16/13830 of 20 July 2009, p. 149.

Gleichbehandlungsgesetz, AGG), which was not intended to implement the provisions of Directive 86/613/EEC. The group of self-employed persons and the group of helping spouses and other relatives are extremely heterogeneous and their social protection, which seems to be the most important field not covered by the other sex equality directives, is extremely heterogeneous as well. A major obstacle to effective implementation in this field might be the idea that men and women are only treated equally within these heterogeneous social security systems.¹⁶⁷ The concept of indirect discrimination especially related to the reconciliation of family and working life does not seem to be very widespread.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

The expansion of the scope of application by Article 4(1) is not significant. Due to the lack of a ‘duty holder’ on the one hand and the restriction of the protection under civil law to so-called mass contracts on the other, discrimination in access to self-employed activities and promotion cannot be effectively prevented. These problems will not be solved by extending the scope to a business or a self-employed activity. Maybe the public authorities can be influenced but they are already anxious to avoid discrimination, adhering to the principle of equality of the German Constitution.

3.c. Collective agreements and case law

The Federal Social Court decided that a statutory provision on the admission to the self-employed practise of psychotherapy does not include gender discrimination and therefore does not violate the provisions of Directives 76/207/EEC and 86/613/EEC when requiring working experience in the amount of less than half-day work.¹⁶⁸ The social protection of helping spouses and other relatives remains an unsolved problem. Due to their specific working conditions, they are regarded as employees within the statutory social security system or self-employed persons or just helping outside the statutory social security system. To provide social protection for helping spouses in the agricultural sector, the Statute on Agriculture Pension Schemes (*Gesetz über die Alterssicherung der Landwirte, ALG*) imposes compulsory insurance for farmers and helping relatives and spouses of farmers irrespective of whether the spouse actually does farm work or not.¹⁶⁹ The Federal Social Court held that there was no violation of Directive 86/613/EEC because the compulsory insurance of helping spouses is not covered by its scope of application and thus the question of ‘fictitious’ helping spouses could be left open.¹⁷⁰

3.d. Additional information

There is no additional information to report.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

The provisions of the Directive have mainly been transposed by the Maternity Protection Act (*Mutterschutzgesetz, MuSchG*).¹⁷¹ There are special regulations for the execution of the MuSchG and other regulations covering civil servants and female soldiers. The national law does not provide extended definitions of the protected workers but uses the terms ‘mother-to-be’ (*werdende Mutter*) and ‘breastfeeding mother’ (*stillende Mutter*). The date of childbirth is important for the calculation of certain periods of time but the law does not use the term ‘mother/woman/worker who has recently given birth’.

¹⁶⁷ P. Hanau et al. *Handbuch des europäischen Arbeits- und Sozialrechts* p. 1085, München 2002.

¹⁶⁸ Federal Social Court, judgment of 19 July 2006, B 6 KA 18/05 B.

¹⁶⁹ *Gesetz über die Alterssicherung der Landwirte (ALG)* of 29 July 1994, Official Journal (*Bundesgesetzblatt BGBI*), part I p. 1890.

¹⁷⁰ Federal Social Court, judgment of 12 February 1998, B 10/4 LW 9/96 R.

¹⁷¹ *Gesetz zum Schutz der erwerbstätigen Mutter (Mutterschutzgesetz)* of 24 January 1952, Official Journal (*Bundesgesetzblatt BGBI*), part I p. 2318.

4.b. Collective agreements and case law

There are some court decisions defining the personal scope of application of the MuSchG and similar regulations. The MuSchG covers all women in dependent employment¹⁷² (salaried employees and workers, including part-time workers, ancillary work and employees in small work contracts, probationary or temporary employment or fixed-term employment relationships, employees in the civil service who do not enjoy the special status of civil servants, and so-called one-euro-jobbers, and employees on parental leave¹⁷³) as well as women employed for the purposes of their vocational training,¹⁷⁴ trainees, volunteers and interns, women engaged in home work when working fulltime and those equal in law to home workers. A mother who is registered as unemployed and voluntarily insured under the statutory health insurance is entitled to maternity allowances under Section 200 of the Regulation on Social Insurance (*Reichsversicherungsordnung, RVO*) because her registration as unemployed constitutes a persistent relationship to the labour market.¹⁷⁵ The courts disagree on the question whether managing directors may be defined as employees¹⁷⁶ but have not yet been given the opportunity to decide on the issue related to maternity protection.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

Housewives, helping spouses (not regarded as employees), self-employed women and members of a body of an enterprise are not covered by the MuSchG.¹⁷⁷ These exclusions are due to the lack of a ‘duty holder’ for the entitlement to maternity leave concerning most of these groups. Moreover, maternity allowances are financed by sharing the costs between the statutory health insurance and all employing enterprises under a complicated contribution procedure.¹⁷⁸ Self-employed women who are voluntarily insured under the statutory health insurance including sickness benefits are entitled to maternal allowances in the amount of these sickness benefits.¹⁷⁹ The Federal Constitutional Court decided that the unequal treatment between employees and self-employed women related to maternal allowances is compatible with the general principle of equality under the German constitution.¹⁸⁰ According to the prevailing opinion of legal commentaries, quasi-subordinate workers are not entitled to maternity leave and maternity allowances under the MuSchG.¹⁸¹ With regard to the criteria of comparable need for social protection, these mothers(-to-be) should be covered as well. Quasi-subordinate workers for public service broadcasting are entitled to maternity leave and maternity allowances under the applicable collective agreements.

4.d. Additional information

There is no additional information to report.

¹⁷² Administrative Court of Bremen, judgment of 4 June 2009, 5 K 3468/07.

¹⁷³ State Labour Court of Düsseldorf, judgment of 30 June 2011, 5 Sa 464/11; Federal Labour Court, judgment of 25 February 2004, 5 AZR 160/03.

¹⁷⁴ The State Labour Court of Berlin-Brandenburg, judgment of 17 January 2007, 4 Sa 1258/06, decided that women participating in a qualification measure with no workload in their enterprise are not covered by the MuSchG.

¹⁷⁵ State Labour Court of Berlin-Brandenburg, judgment of 10 January 2012, L 1 KR 281/11.

¹⁷⁶ State Labour Court of Düsseldorf, judgment of 12 January 2011, 12 Sa 1411/10; Federal Social Court, judgment of 16 February 2005, B 1 KR 13/03 R.

¹⁷⁷ See G. Pepping in: F. Rancke (ed.) *Mutterschutz, Elterngeld, Elternzeit. Handkommentar* Section 1 MuSchG paragraph 26 ff., Baden-Baden 2007.

¹⁷⁸ In the past, the costs had been shared between the statutory health insurance and the concrete employer of the pregnant or breastfeeding worker until the Federal Constitutional Court (judgment of 18 November 2003, 1 BvR 302/96) declared this regulation to be unconstitutional due to its gender discriminatory effects.

¹⁷⁹ Concerning the problems involved see Social Court of Reutlingen, judgment of 24 June 2010, S 14 KR 3892/09.

¹⁸⁰ Federal Constitutional Court, judgment of 3 April 1987, 1 BvR 1240/86.

¹⁸¹ H. Buchner & U. Becker *Mutterschutzgesetz und Bundeselterngeld- und Elternzeitgesetz* Section 1 MuSchG paragraph 90, München 8th ed. 2008; P. Meisel & H.-H. Sowka *Mutterschutz und Erziehungsurlaub* Section 1 MuSchG paragraph 21, München 5th ed. 1999; G. Pepping in: F. Rancke (ed.) *Mutterschutz, Elterngeld, Elternzeit. Handkommentar* Section 1 MuSchG para 30, Baden-Baden 2007; B. Willikonsky *Kommentar zum Mutterschutzgesetz* Section 1 MuSchG para 17, Neuwied 2nd ed. 2007. For further information see M. Müller *Die Arbeitnehmerähnliche Person im Arbeitsschutzrecht*, Frankfurt 2009.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

Parental leave is provided under Sections 15-21 of the Federal Law on Parental Allowance and Parental Leave (*Bundeselterngeld- und Elternzeitgesetz, BEEG*).¹⁸² The personal scope of application covers all parents¹⁸³ in dependent employment (salaried employees and workers, including part-time workers, ancillary work and employees in small work contracts,¹⁸⁴ probationary or temporary employment or fixed-term employment relationships, employees in the civil service who do not enjoy the special status of civil servants, and employees on parental leave) under Section 15 of the BEEG as well as parents employed for the purposes of their vocational training, volunteers and interns,¹⁸⁵ and parents engaged in home work when working fulltime and those equal in law to home workers under Section 20 of the BEEG. So-called one-euro-jobbers are not covered because their employment relationship is a special one under public law.¹⁸⁶

5.b. Entitlement to parental leave

Mothers and fathers are entitled to parental leave up to three years after the child is born or, in the case of an (intended) adoption or full-time foster care, beginning with the child's entry into the household under Section 15 of the BEEG. The individual entitlement to parental leave cannot be excluded or restricted by individual or collective agreement or in any other way under Section 15(2)(6) of the BEEG. Parental leave requires that the child lives in the parent's household, that the parent cares for the child personally and that the parent does not work more than 30 hours a week during parental leave. The parents can take parental leave simultaneously or one after the other up to three years after the child is born or the child's entry into the household under Section 15(3) of the BEEG. With consent of the employer, a maximum of twelve months of parental leave can be saved and taken after the child's third birthday but before it has reached the age of eight under Section 15(2) of the BEEG. The parental leave can be taken by working part time if employer and parent agree on the relevant conditions under Section 15(5-7) of the BEEG. Seven weeks before taking parental leave, the parent has to inform her or his employer under Section 16 of the BEEG.

And finally: in addition to parenthood, the main condition for the entitlement to parental leave is the existence of an employment relationship. There is no minimum duration or extension of this relationship. If the employment relationship was terminated before the beginning of the parental leave, the entitlement is no longer applicable. If a temporary employment relationship ends within the three-year period of possible parental leave, the parental leave ends as well. If a parent is employed by more than one employer, each of these employers is legally obliged to grant parental leave.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

Self-employed parents are not entitled to parental leave because there is no employer to whom such a claim can be addressed. A major problem for members of the liberal professions is that child-raising periods are not taken into account by every professional pension fund.¹⁸⁷ Quasi-

¹⁸² *Gesetz zum Elterngeld und zur Elternzeit (Bundeselterngeld- und Elternzeitgesetz, BEEG)* of 5 December 2006, Official Journal (*Bundesgesetzblatt BGBl*), part I p. 2748.

¹⁸³ When parents are unable to care for their child e.g. due to grave illness, close relatives are entitled to parental leave. Grandparents are entitled to parental leave when one of the parents is under 18.

¹⁸⁴ See B. Willikonsky *Kommentar zum Mutterschutzgesetz* Section 15 BEEG paragraph 2, Neuwied 2nd ed. 2007.

¹⁸⁵ On the condition that the internship is qualified as an employment relationship, see the Federal Labour Court, judgment of 13 March 2003, 6 AZR 564/01.

¹⁸⁶ F. Rancke (ed.) *Mutterschutz, Elterngeld, Elternzeit. Handkommentar* Section 15 BEEG paragraph 27, Baden-Baden 2007. The Federal Labour Court, judgment of 8 November 2006, 5 AZB 36/06, decided that so-called one-euro-jobs do not constitute a 'normal' employment relationship.

¹⁸⁷ The Federal Constitutional Court, judgment of 5 April 2005, 1 BvR 774/02, decided that professional pension funds for lawyers have to offer non-contributory membership during child-raising periods for up to three years to meet the requirements of the gender equality principle under the German constitution.

subordinate workers are only entitled to parental leave on the condition that they are de facto employees.¹⁸⁸ In case of doubt, their status has to be defined by court before they can apply for parental leave. But quasi-subordinate workers as well as all members of the liberal professions and self-employed parents are entitled to parental allowance under Sections 1 and 2 of the BEEG.

5.d. Additional information

There is no additional information to report.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

Generally, the German legislator favours an integrated approach for combating discrimination under the 2006 General Equal Treatment Act (AGG). The personal scope of application covers discrimination on the grounds of racial or ethnic origin, sex, religion or belief, disability, age or sexual orientation under Section 1 of the AGG. The material scope of application is identical to the material scope of Article 3 of the sex equality and anti-discrimination directives under Section 2(1-4 and 8) of the AGG and even exceeds them by covering the areas of social protection, including social security and health services, as well as social advantages and education under Section 2(5-7) of the AGG. This sounds marvellous but the scope of application is not the scope of applicable entitlements. The intended protection is incomplete and ineffective in law and in practice.

Discrimination on the grounds of racial or ethnic origin, sex, religion or belief, disability, age or sexual orientation is prohibited with regard to employment or occupation under Sections 1 and 7 of the AGG. But as shown above, several matters of employment are regulated in other laws and statutes which do not include protection against discrimination.

Discrimination on the grounds of racial or ethnic origin, sex, religion or belief, disability, age or sexual orientation is prohibited with regard to contracts under civil law and private insurances under Section 19(1) of the AGG. The protection is restricted to so-called mass contracts. Only discrimination on the grounds of racial or ethnic origin is prohibited with regard to any contract under civil law under Section 19(2) of the AGG. But the public sector is not covered. And the prohibition of sexual harassment and of instruction to discriminate is restricted to the area of employment and occupation under Section 3(4-5) of the AGG.

The areas of social protection, including social security and health services, as well as social advantages and education as seemed to be covered under Section 2(5-7) of the AGG are subject to diverse (exhaustive or special precedent) legislation, partly with protection against discrimination and partly without. Only some civil-law mass contracts in these areas might be covered under Section 19 of the AGG. Most matters of social protection as well as of education are regulated by public law in Germany.

GREECE – Sophia Koukoulis-Spiliotopoulos

Introduction

In order to clarify the scope of gender equality in the Greek legal order, we must first refer to the constitutional gender equality norms. This is opportune because the Constitution (Articles 87(2) and 93(4)) requires that all courts review the constitutionality of the legislation applying to the case that they hear and to set aside those legislative provisions which they consider unconstitutional; they also interpret the legislation in light of the Constitution. All courts also review the conformity of legislation to EU law and set aside legislative provisions that they consider contrary thereto, while they interpret the legislation and the Constitution in light of

¹⁸⁸ See F. Rancke (ed.) *Mutterschutz, Elterngeld, Elternzeit. Handkommentar* Section 15 BEEG paragraph 26, Baden-Baden 2007.

EU law. As the Constitution (Article 28(2)) recognises the supra-legislative force of ratified treaties, all courts review the conformity of the legislation to such treaties, in particular human rights treaties, and set aside legislative provisions that they consider contrary thereto. They also interpret the legislation and the Constitution in light of ratified treaties.¹⁸⁹ The constitutional provisions proclaiming human rights, hence also those requiring gender equality, have direct vertical and horizontal effect (Article 25(1) of the Constitution).

Three articles of the Constitution require gender equality: Article 4(2): ‘Greek men and women have equal rights and obligations’; Article 22(1)(b): ‘All workers, irrespective of sex or other distinction, shall be entitled to equal pay for work of equal value’; Article 116(2): ‘Positive measures aiming at promoting equality between men and women do not constitute gender discrimination. The State shall take measures to eliminate inequalities existing in practice, in particular those affecting women’. Also, Article 21(1) requires that the State protect the family, marriage, motherhood and childhood, while Article 21(5) requires that the State ‘design and apply a demographic policy and take all the necessary measures’.

These provisions have a broader personal and material scope than EU gender equality law. Article 4(2) covers all sectors and areas, including, but not limited to those covered by the gender equality directives. Regarding social security it applies to both occupational and statutory schemes. Article 4(2) prohibits gender discrimination against any person, of any category or quality/capacity, and requires substantive gender equality.¹⁹⁰ Article 4(2), in conjunction with Article 116(2), requires positive measures, in particular in favour of women, in all areas, including but not limited to, those covered by EU law. Thus, quotas are required and have been introduced regarding parliamentary and local authority elections (at least one third of the candidates must belong to one of the sexes).¹⁹¹

Article 4(2) refers to ‘Greek men and women’, but Article 116(2) refers to ‘men and women’. We must therefore consider that the Constitution also requires gender equality for foreign, including third country, nationals. Article 22(1)(b) prohibits discrimination in pay for work of equal value on any grounds, including, but not limited to the grounds of sex, against any worker, whatever the legal nature of the employment relationship. The obligation to protect the family imposed by Article 21(1) also concerns all sectors and areas.

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

Directive 2006/54/EC has been transposed by Act 3896/2010 (OJ A 207/08.12.2010).

1.a. Equal pay

1.a.1. Article 4 of the Directive (equal pay, personal scope) has been transposed by Article 4(1) of Act 3896/2010: ‘Men and women are entitled to equal pay for the same work or work of equal value’. This provision, like Article 4 of the Directive, is not limited to ‘workers’.

1.a.2. Moreover, Article 17 of Act 3896/2010, under the title ‘Scope of application’, reads: ‘The provisions of this statute apply to persons who are employed or candidates for employment in the public and private sectors, on any employment relationship or form, including a contract for services and a remunerated mandate, irrespective of the nature of the services performed; to persons who exercise liberal professions, as well as to persons who receive or are candidates for vocational training.’ Thus, the personal scope of the Act in all

¹⁸⁹ E.g. Council of State (Supreme Administrative Court, CS) (Plen.) 1933/1998 held that the constitutional gender equality norm (Article 4(2)) requires substantive gender equality and upheld the necessity of positive measures in favour of women, interpreting Article 4(2) in light of Directive 76/207/EEC and the CEDAW. Supreme Civil and Penal Court (SCPC) Civil Section, Nos. 85/1995, 593/2006 and 496/2011 upheld the nullity of a discriminatory dismissal interpreting Article 4(2) of the Constitution and the statute transposing Directive 76/207/EEC in light of this Directive.

¹⁹⁰ E.g. CS (Plen.) 1933/1998 (see previous note), also invoking Article 4(1) of the Constitution, which more generally requires equality before the law, condemned discrimination against a ‘category of persons’.

¹⁹¹ CS 2832-2833/2003, 192/2004, interpreting Article 116(2) of the Constitution in light of the CEDAW.

areas and matters that it covers, including pay, is defined in the broadest possible way. It is not limited to employment under a formal contract and also covers *de facto* employment relationships (with or without a valid contract). In such cases, it is well established by long standing case law that pay is due according to the provisions on undue enrichment (Article 904 Civil Code),¹⁹² which must be interpreted in light of the Directive. This scope exceeds the scope of labour law, which only covers subordinate employment contracts or relationships, and includes, inter alia, the following forms of employment:

1.a.3. A contract of subordinate employment. This contract is governed by labour law. It is concerned with the performance of remunerated work, for a fixed or indefinite period of time, irrespective of the result. The employer is entitled to give binding instructions to the worker regarding the conditions of work (method, place and time) and to control his/her compliance with these instructions. These criteria determine the nature of the contract, irrespective of how the parties have termed it.¹⁹³

1.a.4. A contract of independent employment. This contract is also concerned with the performance of remunerated work for a fixed or indefinite period of time, but without subordination.¹⁹⁴ However, even in such cases, some kind of (loose) subordination is not excluded and therefore the decisive criterion is the extent of the subordination.¹⁹⁵ The distinction between subordinate and independent employment is not always easy. Its importance lies in that the former is covered by labour law, while the latter is not. However, this is irrelevant regarding gender equality, as the scope of Act 3896/2010 covers both.

1.a.5. A contract for services (contrat d'ouvrage). This contract is not concerned with work as such, but with its final result only, i.e. the accomplishment of a specific task (e.g. building, repair or maintenance of a building, drafting and/or execution of a project etc.), irrespective of the time and work needed for the result to be achieved. The decisive factor is that the person who undertakes to supply his/her services in order to achieve the result (contractor) is not subject to the employer's instructions and control. The contract or relationship ends as soon as the final result is delivered.¹⁹⁶ The task may be repeated for a specific or indefinite period of time.¹⁹⁷ The importance of the distinction between a contract or relationship of subordinate employment and a contract or relationship for services lies in that the former is covered by labour law, while the latter is not. However, this is irrelevant regarding gender equality, as the scope of Act 3896/2010 covers both.

1.a.6. A contract of remunerated mandate, under which lawyers offer legal advice and/or represent clients in courts for monthly or yearly wages, without subordination.¹⁹⁸

1.a.7. Employment under the above contracts or relationships is governed by private law, i.e. labour law or other, less protective private-law provisions, according to the nature of the contract or relationship (see above). Such contracts or relationships are found in both the private and the public sector.

The term 'quasi-subordinate' is not used in Greek law. Employment is classified as either subordinate or non-subordinate, for purposes of labour-law protection, as explained above. Act 3896/2010 covers subordinate and non-subordinate employment of any form.

Civil servants of the State, local authorities and other legal persons governed by public law are under a public-law relationship. They enjoy constitutional guarantees (in particular against dismissal, downgrading and transfer, Article 103 of the Constitution), as implemented

¹⁹² See e.g. SCPC Civil Section 390/2011.

¹⁹³ See e.g. SCPC Civil Section 1674/2010, 433/2011.

¹⁹⁴ SCPC Civil Section 229/2011, 433/2011.

¹⁹⁵ SCPC Civil Section 1898/1988, 800/1987.

¹⁹⁶ SCPC Civil Section 1674/2010, 223/2011, 77/2011, 433/2011.

¹⁹⁷ E.g. SCPC Civil Section 433/2011: a collector of insurance premiums is a contractor for services.

¹⁹⁸ SCPC Civil Section 302/2011, 229/2011.

by the ‘Code on the Status of Civil Servants and Employees of Legal Persons Governed by Public Law’ (CCS).¹⁹⁹ These guarantees also reflect on pay. The State, local authorities and other legal persons governed by public law also employ persons under a contract or relationship governed by private law in conjunction with public-law provisions providing guarantees similar to constitutional guarantees enjoyed by civil servants.²⁰⁰ All these employees also fall within the scope of Act 3896/2010.

1.a.8. It is clear from Article 4(1), in conjunction with Article 17 of Act 3896/2010, that all workers, including those in subordinate, quasi-subordinate or vulnerable categories or under atypical or precarious contracts or relationships, are covered by the equal pay rule. It is not clear how the courts will apply this broad scope. Until now, most judgments have concerned discrimination in pay on grounds other than gender, which are covered by Article 22(1)(b) of the Constitution (see Introduction). These judgments make no cross-category comparisons. Pay differences, even in the same establishment or service and for the same work, are deemed lawful, e.g. if the legal nature of the employment relationship of the workers compared is different (e.g. private-law v. public-law contract or relationship); if the workers are covered by different wage-fixing instruments (e.g. collective agreements, statutory or administrative provisions); or if one worker is covered by such an instrument, while another is not covered by any instrument.²⁰¹

1.b. Equal treatment in occupational social security schemes

Article 6 of the Directive has been copied in Article 5(1) of Act 3896/2010, which therefore includes the self-employed. *Article 10(1) and (2) of the Directive* has been transposed by Article 8 of Act 3896/2010, entitled ‘Implementation regarding the self-employed’. Moreover, *Article 8(1)(a) and (b) of the Directive* has been copied in Article 5(3.1.) (a) and (b); the exclusions allowed by these provisions of the Directive are also allowed by the Act. There is an important problem, however, which also reflects on the personal scope of these provisions: the chapter on occupational schemes merely copies the provisions of the Directive, without specifying which schemes are occupational or laying down any criteria for identifying such schemes. This results in there being no awareness of the existence of occupational schemes and great confusion regarding the transition periods for equalizing pensionable ages of men and women, all the more so since Act 3896/2010 does not refer to certain legislation adopted some months before its coming into effect which gradually equalizes pensionable ages in all schemes, without distinguishing between occupational and statutory schemes.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

1.c.1. *Article 14(1)(a) of the Directive* has been transposed in a broad way by Article 11(1) of Act 3896/2010: ‘1. Any form of direct or indirect discrimination on grounds of sex or *family status* regarding conditions for access to paid or non paid employment or to professional life in general, including selection criteria and hiring conditions, irrespective of sector of activity and at any level of professional hierarchy, is prohibited’. ‘Promotion’ is not mentioned in this provision, but in Article 12 (below 1.c.3). It may, however, be deemed to be included in ‘level of professional hierarchy’, so that discrimination in promotion may be covered by both Article 11(1) and Article 12 of the Act.

Article 11(2) of the Act, going further than the Directive, reads: ‘Any reference to sex or *family status* or any use of criteria or elements leading to direct or indirect discrimination on grounds of sex, as defined in Article 2’ (which transposes Article 2(1) of the Directive) ‘, in publications, advertisements, calls for candidacies, circulars and internal rules regarding

¹⁹⁹ Act 3528/2007, OJ A 26/09.02.2007.

²⁰⁰ Decree 410/1988, OJ A 191/18/30.08.1988.

²⁰¹ SCPC Civil Section 3/1997 (Plen.), 1451/2003, 1065/2002, 800/2002; 288/2003; 453/2002.

selection of persons for filling vacancies, providing vocational education or training or granting professional licences, is prohibited’.

1.c.2. Article 14(1)(b) of the Directive has been transposed broadly by Article 13 of Act 3896/2010: ‘Any form of direct or indirect discrimination on grounds of sex *or family status* is prohibited regarding: a) access to, content and application of programs or systems of vocational orientation and re-orientation of any kind and level, of vocational training and advanced training, apprenticeship, training for change of profession, popular further education, information of workers and their families and in general, programmes which contribute to their spiritual, economic and social development and advancement, including the acquiring of practical or work experience and trial service; b) the laying down of conditions for and the participation in competitive examinations for obtaining diplomas, certificates or other titles or licences for the exercise of a profession, as well as scholarships and educational leaves, student benefits or other related benefits’.

1.c.3. Article 14(1)(c) of the Directive has been transposed partly by Article 12 and partly by Article 14 of Act 3896/2010. Article 12 deals with employment and working terms and conditions (without reference to dismissal), as follows: ‘Any form of direct or indirect discrimination on grounds of sex *or family status* of the worker regarding employment and working terms and conditions, promotions as well as the drawing and application of systems of personnel evaluation is prohibited’. Let us note that this provision does not refer to Article 157 TFEU (ex Article 141 TEC) in the way that Article 14(1)(c) of the Directive does. However, in Greek law ‘employment and working terms’ cover pay. Moreover, by not referring to Article 157 TFEU, Article 12 of the Act is not limited to ‘workers’, in the same vein as Article 4(1), which refers to ‘men and women’ (see 1.a.1 above).

1.c.4. Regarding ‘dismissal’ (not mentioned in Article 12 of the Act), *Article 14(1)(c) of the Directive* has been transposed by Article 14 of the Act, which also transposes *Article 24 of the Directive* (victimisation), as follows: ‘The termination or dissolution in any way of the work or employment relationship and any other adverse treatment related to the application of this Act: a) on grounds of sex *or family status*; b) as an act of revenge due to the worker’s non submission to sexual or other harassment, according to Article 2’ (which transposes Article 2(1) of the Directive) ‘; c) as a reaction of the employer or the person responsible for vocational training to a protest, complaint, testimony or other action of a person who works or receives vocational training or a representative thereof, in the place of work or training or before a court or other authority, is prohibited’.

As already noted (see 1.a.7 above), the term ‘quasi-subordinate’ is not used in Greek law. However, the scope of Act 3896/2011, as provided by its Article 17 (see 1.a.2 above), encompasses any subordinate, non-subordinate or possibly ‘quasi-subordinate’ employment, as well as vulnerable, atypical or precarious work contracts/relationships.

1.c.5. Volunteer work is covered by Article 11(1) of Act 3896/2011 (access to any kind and form of employment), which mentions ‘*non paid*’ employment (see 1.c.1 above). However, since Article 17 of this Act (see 1.a.2 above) refers to employment in general, without specifying that it must be remunerated, we cannot exclude that discrimination in promotion and working terms and conditions (except pay) is also prohibited regarding non-paid or volunteer employment. This is all the more so as Articles 12 and 14 of the Act which transpose Article 14(1)(c) of the Directive (see 1.c.3 and 1.c.4 above) do not refer to remunerated work. Non-paid employment also concerns *family workers*. A non-paid person may claim damages for discrimination in working conditions, including promotion or dismissal. Such damages may be pecuniary and/or moral.

1.c.6. The self-employed seem adequately protected by Article 11(1) of Act 3896/2011 transposing Article 14(1)(a) of the Directive (conditions of access, see 1.c.1 above), in conjunction with Article 17 of the Act (see 1.a.2 above), which defines the scope of the Act in

all areas it covers. The ‘duty holder’ may, inter alia, be a professional body with which the self-employed person must register in order to be able to practise his/her profession (e.g. a lawyers’ bar, or chamber of industry or commerce) or a body which grants professional licences. Such bodies may also be ‘duty holders’ in cases of discrimination in promotion or work conditions (e.g. where a lawyer practising in lower courts seeks to be admitted to practise in higher courts). An employer/client (individual or legal person) may also be a ‘duty holder’ under the above provisions of the Act regarding discriminatory termination of a self-employment contract/relationship. This can be confirmed by interpreting the provisions in light of Article 4(2) of the Constitution (see Introduction).

1.d. Collective agreements and case law

Collective agreements do not address the above matters. No case law has relied on Act 3896/2011 yet. Some judgments, mostly of administrative courts of appeal, have invoked Act 3488/2006 (OJ 191/11.09.2006) transposing Directive 2000/73/EC. Article 2 of this Act defines the scope of the Act in the exact same way as Article 17 of Act 3896/2011 (see 1.a.2 above). The judgments mostly concern discrimination in the access to posts of professional soldiers or ‘special guards’ in the police force, who are employed under a fixed-term public-law contract. The judgments assume that these soldiers and guards fall within the scope of Act 3488/2006.

1.e. Additional information

Attention must be drawn to the fact that Act 3896/2011 prohibits discrimination on the grounds of sex *and family status* (see 1.c.1., 1.c.2., 1.c.3 and 1.c.4 above). This was included in Article 2(1) of Directives 76/207/EEC and 2002/73/EC, which prohibited direct or indirect discrimination on the grounds of sex, ‘by reference in particular to marital or family status’. It was consequently also included in the Acts transposing these Directives.

This reference does not appear in Directive 2006/54/EC. This must be due either to an oversight or to family status being implied or protected by other provisions of this Directive (e.g. those prohibiting discrimination on the grounds of maternity, paternity and adoption). These provisions are complemented by provisions of other Directives, such as Directives 92/85/EEC and 96/34/EC (now 2010/18/EU). Moreover, family protection is required by a general principle of EU law, which is expressed in Article 33(1) of the EU Charter of Fundamental Rights. Anyway, since the reference to family status was included in the Acts transposing Directives 76/207/EEC and 2002/73/EC, its inclusion in Act 3896/2011 was required by Article 21(1) of the Constitution (see Introduction).

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

Directive 2004/113/EC has been transposed by Act 3769/2009 (OJ A 105/01.07.2009). *Article 3(1) of the Directive* has been copied in Article 3(1) of the Act. *Article 3(4) of the Directive* has been implemented by Article 3(4) of the Act, which excludes the matters covered by Act 3488/2006 transposing Directive 2000/73/EC (see 1.d above). In implementing *Article 3(3) of the Directive*, Article 3(4) of the Act excludes media, advertising and education. However, gender discrimination in these areas is prohibited by Article 4(2) of the Constitution (see Introduction).

2.b. Freedom to choose contractual partners

Article 3(2) of the Directive has been copied in Article 3(2) of the Act.

2.c. Collective agreements and case law

Collective agreements do not deal with matters covered by Directive 2004/113/EC and there is no case law relating to this Directive.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

Directive 2010/41/EU has not yet been transposed, nor has there been any formal transposition of Directive 86/613/EEC.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

This is not clear from Act 3896/2011 transposing Directive 2006/54/EC. However, in the absence of transposition of either Directive 2010/41/EU or Directive 86/613/EEC, and in view of the broad scope of Act 3896/2011 (Article 17, see 1.a.2 above), this Act may well be used against discrimination affecting the self-employed. This can be confirmed by interpreting this Act in light of Article 4(2) of the Constitution (see Introduction).

3.c. Collective agreements and case law

Collective agreements do not cover the self-employed. There is no relevant case law.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

Directive 92/85/EEC has been transposed by Decree 176/1997, as amended by Decree 41/2003 (OJ A 150/15.07.1997 and A 44/21.02.2003), which contains minimum standards and applies to ‘all undertakings, installations, exploitations and works in the private and public sectors (industrial, agricultural, commercial, administrative, educational, cultural activities, activities of services’ supply, entertainment etc)’ and to the ‘uniformed military and security corps’ personnel and domestic workers’ (Article 1(3) and (5)). This broad scope must be deemed to cover all forms of (subordinate and non-subordinate) employment and self-employment in all sectors. It is complemented by Article 25(2) of Act 1483/1984 (OJ A 153/08.10.1984), which extends all maternity protection provisions to contracts of remunerated mandate (see 1.a.6 above). It is also complemented by Article 15 of Act 1483/1984 (prohibition of dismissal during pregnancy and one year after childbirth or longer in case of absence due to pregnancy or childbirth-related illness, save in cases unrelated to the worker’s condition), to which Article 10 of the Decree refers. In case of stillbirth, the woman is entitled to the same legal protection.²⁰² *De facto* employment (without or without a valid contract) is also covered.²⁰³ This scope therefore corresponds to the scope of Act 3896/2011 transposing Directive 2006/54/EC (Article 17, see 1.a.2 above).

A ‘pregnant worker’ is ‘any working woman who is pregnant and has informed her employer of her condition, when this is necessary for the employer to take a positive measure in her favour’. A ‘worker who has recently given birth’ is ‘any working woman for an up to two months period following confinement, if she has informed her employer of her condition, provided this is necessary for the employer to take a positive measure in her favour’. A ‘worker who is breastfeeding’ is ‘any breastfeeding working woman, for an up to one year period following confinement, if she has informed her employer of her condition, provided this is necessary for the employer to take a positive measure in her favour’ (Article 2 of Decree 176/1997). ‘Positive measures’ include health and safety measures or granting a leave. The definitions reflect and must be interpreted in the light of well-established case law, according to which disclosure by the woman of her condition is not a prerequisite of her protection.²⁰⁴ Moreover, by using the term ‘any working woman’, the definitions confirm that maternity protection covers any form of employment.

²⁰² SCPC Civil Section 1362/2009.

²⁰³ See e.g. SCPC Civil Section 892/2003.

²⁰⁴ SCPC Civil Section 205/1999, 1682/2010.

Female civil servants of the State, local authorities and other legal persons governed by public law are covered by both the above Decree and the CCS (see 1.a.7 above). Adoptive mothers are also covered, as Article 52(4) of the CCS grants a maternity leave to them, to which also policewomen,²⁰⁵ but not female military personnel, are entitled. Female judges are entitled to the same maternity leave as civil servants.²⁰⁶

4.b. Collective agreements and case law

National general collective agreements (n.g.c.a.) lay down minimum standards for all workers in the country under a subordinate employment relationship governed by private law, in the private and the public sector, including those employed in agriculture, cattle raising and similar work and domestic workers. Several of them expand pregnancy and maternity protection. Thus, the 2002-2003 n.g.c.a. extended this protection to adoptive mothers and the 2006-2007 n.g.c.a. to surrogate motherhood (the surrogate mother is entitled to maternity leave; both she and the woman for whom she has carried the baby are entitled to the reduced working day provided by law following maternity leave).

Case law: In spite of the broad wording of Decree 176/1997 and Act 1483/1984, the Supreme Civil and Penal Court (Civil Section), without referring to EU law, have ruled, in contrast to the CJEU, that the prohibition of dismissal (see 4.a. above) does not apply in case of a fixed-term contract which ends within the period of protection.²⁰⁷ The Council of State (Supreme Administrative Court, CS), relying on the Civil Code provisions (Articles 1560 et seq.) which treat adoptive children as equal to natural children, Directive 96/34/EC, ‘which reflects the EC law principle on the conciliation of family and professional life’ and the European Convention on the Adoption of Minors, has ruled that female parents who have adopted a child are entitled to the adoption leave provided for civil servants.²⁰⁸

As mentioned above, the broad wording of Decree 176/1997 must be deemed to include the self-employed. This means that managers, whether they perform subordinate or independent work, are protected by the Decree in conjunction with Act 3896/2011 (Article 17, see 1.a.2 above) and in light of Directive 2006/54/EC and Articles 21(1) and 4(2) of the Constitution (see Introduction). There is no relevant case law.

Mothers who have had a child following ova fertilisation in vitro are treated as equal to natural mothers by the Civil Code (Articles 1455 et seq.). Therefore, their pregnancy should be treated as equal to natural pregnancy. There is no case law on the protection of workers whose fertilised ova have been or have not been transferred to their uterus. The former is covered by pregnancy protection legislation (cf. the above CS judgment on adoptive parents); the latter should be deemed to be covered by Act 3896/2011, in light of Directive 2006/54/EC and Articles 21(1) and 4(2) of the Constitution.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

These categories should be considered to be covered by the broad wording of pregnancy and maternity protective legislation, although the terms ‘quasi’ or ‘para-subordinate’ do not exist in Greek law (see 4.a. above). The ‘duty holder’ in such cases is their employer. For the self-employed the ‘duty holder’ can be their employer, if any, or their social security scheme. Lawyers, for example, are therefore granted maternity benefits for not being able to work for the period during which they would be entitled to pregnancy and maternity leave if they had had an employer.

5. Directive 2010/18/EU on parental leave

Directive 2010/18/EU has been transposed by Articles 48-54 of Act 4075/2012 (OJ 89/11.04.2012).

²⁰⁵ Articles 10 and 10A of Decree 27/1986 (OJ A 11/1986), as amended.

²⁰⁶ Article 44 (20) of the Code for the Regulation of Courts and the Status of Judges (Act 1756/1988, OJ A 35/1988) (CSJ).

²⁰⁷ SCPC Civil Section 1341/2005, 317/2011.

²⁰⁸ CS 607/2007.

5.a. Personal scope

Clause 1(2) and (3) of the Framework Agreement (F.A.) has been transposed by Article 49(2) of the Act as follows: ‘Articles 49-54 of this Act apply to all working natural, adoptive or foster parents, which are employed in the private and public sectors, in legal persons governed by public law, local authorities ... in any relationship or form of employment, including part time and fixed term work contracts, contracts or relationships *via* temporary agencies governed by Article 115 of Act 4052/2012’ (these agencies ‘lend’ workers to other employers) ‘and remunerated mandate, irrespective of the nature of the services performed.’ Article 49(3) of the Act enables the competent ministers to issue a joint decree implementing the Directive for persons employed in the commercial marine.

5.b. Entitlement to parental leave

Clause 2(1) of the F.A. has been transposed by Article 50(1) of the Act, as follows: ‘The working parent is entitled to parental leave until the child reaches the age of six years, in order to fulfil the minimum obligations of care for this child’.

Clause 3(1)(b) of the F.A. has been transposed by Article 50(2) of the Act, as follows: ‘In order to be granted the parental leave, the working parents must have completed one year of continuous or interrupted work with the same employer, except for more favourable specific provisions of statutes, decrees, internal rules, collective agreements, arbitration decisions or agreements between employers and workers’.

Civil servants of the State, local authorities and other legal persons governed by public law are covered by the CCS (see 1.a.7 above) whose Article 53(2) grants to both parents a transferable reduced working day, or, alternatively, a transferable nine-month paid leave, until the child reaches the age of four. The military and police forces are also covered by this provision.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

The broad wording of Article 49(2) of the Act (see 5.a. above) should be considered to encompass the self-employed, but it is not clear who the ‘duty holder’ is when there is no employer. The term ‘quasi/para-subordinate worker’ does not exist in Greek law. Anyway, the broad wording of the above provision must be considered to include them. The ‘duty holder’ is the employer.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

Directives 2000/43/EC and 2000/78/EC have been transposed by Act 3304/2005 (OJ A 16/27.01.2005) The personal scope of this Act is defined in Article 4, which provides that it applies to ‘all persons in the public and private sectors’ regarding the areas and matters covered. This is repeated in Article 8 regarding the grounds in Directive 2000/78/EC in the field of employment and occupation. There is very little case law on this Act. The relationship between the scope of these Directives and the scope of the gender equality directives has not been an issue. This may be due to the Act not referring to multiple discrimination.

HUNGARY – Beáta Nacsa

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

The generally applicable rules on equal treatment are stipulated by Act *CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities* (abbreviated in Hungarian as: *Ebktv*), the purpose of which is to cover all aspects of equal treatment and equal opportunities, including matters of personal scope in employment and occupation. Certain aspects of equal treatment in employment, including certain matters of personal scope are

regulated by the Labour Code (*Munka Törvénykönyve*, abbreviated in Hungarian as: Mt.) in Act XII of 1992, until 1 July 2012 (hereafter: ‘old Mt.’) and now in Act I of 2012 (hereafter: ‘new Mt.’).

The General Provisions of the Ebktv contain regulations on the scope of the Act, establishing two partly overlapping and partly complementary definitions in this regard. On the one hand, the Ebktv lists numerous groups of legal entities which fall within the *institutional scope* of the Act.²⁰⁹ These legal entities are obliged to follow the rules on equal treatment in all their legal relationships, and (theoretically) any discrimination based on sex²¹⁰ in any legal relationships of these legal entities fall within the scope of the Ebktv and is therefore prohibited.²¹¹ Rules on the *relational scope* of the Ebktv are also established,²¹² which could be grouped into three subcategories: employment-related scope, subsidies-related scope and scope related to civil-law relationships. Details will be given below for all three subcategories.

1.a. Equal pay

The scope of equal pay is determined by the employment-related scope of the Ebktv (one subcategory of relational scope as mentioned above). This subcategory is formulated to cover all work-related relationships through which a person is obliged to do work, although there are some exceptions.

The rule of equal pay applies first of all to the *employment relationship (in the wide sense of the term) (foglalkoztatási jogviszony)*²¹³ which covers all relationships under which dependent work is performed:

- employment (in the private sector) (hereafter employment in the strict sense of the term);²¹⁴
- relationship of public servants;²¹⁵
- relationship of public employees;²¹⁶
- relationship of judges;²¹⁷
- relationship of other employees of the judiciary;²¹⁸
- relationship of public prosecutors;²¹⁹

²⁰⁹ The principle of equal treatment shall be observed by *a)* the Hungarian State, *b)* local and minority municipalities and the bodies thereof, *c)* authorities exercising state powers, *d)* armed forces and law enforcement bodies, *e)* public foundations, public corporations, trade unions and employers’ associations, *f)* public utility companies, *g)* institutions of public education and higher education, *h)* persons and institutions providing social care and child-protection services, as well as child-welfare services, *i)* museums, libraries, community centres, *j)* voluntary mutual insurance funds, private pension funds, *k)* healthcare institutions, *l)* political parties, and *m)* budgetary agencies that do not belong to points a)-l). Article 4. a-m. of the Ebktv.

²¹⁰ Article 8.a. of the Ebktv.

²¹¹ The legal entities listed in Article 4a-m. of the Ebktv are obliged to follow the rules of equal treatment in the course of establishing their relationships, in their relationships, and in the course of their procedures and measures. Article 4.a-m. of the Ebktv. (The dividing line between ‘relationships’, ‘procedures’ and ‘measures’ is not clear, but the Act is interpreted as covering all activities of the above-listed entities.)

²¹² The relational scope is used here as explained by M. Freedland & N. Kountouris ‘Employment Equality and Personal Work Relations – A Critique of *Jivraj v Hashwani*’, *Industrial Law Journal* Vol. 41. 1. March 2012.

²¹³ Article 3.a. of the Ebktv.

²¹⁴ Employment relationships in the private sector are regulated by the Labour Code (Act XXII. of 1992, ‘old Mt.’, and since 1 July 2012 Act I. of 2012 ‘new Mt.’).

²¹⁵ Act. CXCI. of 2011 on civil servants (*a közszerzők és tisztviselők 2011. évi CXCI. törvény*).

²¹⁶ Act XXXIII. of 1992 on public employees (*közalkalmazottak jogállásáról szóló 1992. évi XXXIII. tv.*) covering all employees who are employed by public institutions financed prevalingly from state or municipal budget.

²¹⁷ Act CLXII. of 2011 on judges and their remuneration (*a bírók jogállásáról és javadalmazásáról szóló 2011. évi CLXII. törvény*).

²¹⁸ Act LXVIII. of 1997 on employees of jurisdiction (*az igazságügyi alkalmazottak szolgálati jogviszonyáról 1997. évi LXVIII. törvény*).

²¹⁹ Act CLXIV of 2011 on chief prosecutors, prosecutors and other employees of the prosecution and careers of prosecutors (*a legfőbb ügyész, az ügyészek és más ügyészégi alkalmazottak jogállásáról és az ügyészi életpályáról szóló 2011. évi CLXIV. törvény*).

- professional and contractual service relationship in the armed forces;²²⁰ and
- professional foster parent relationship.^{221, 222}

As was indicated above, the rules of equal pay cover the *employment relationship (in the strict sense)* as regulated by the Mt. It goes back to the state-socialist times that the Labour Code governs all relationships of subordinate work. This governing principle was overridden neither by the Labour Code of 1992 nor by the new Labour Code of 2012. Among atypical forms of employment, the following ones are covered by equal pay regulations: part-time and fixed-term employment, home workers (piece-rate workers); telecommuting (since 2004), the employment relationship between the school co-operative²²³ and its members (since 2011), and temporary agency work (since 1 July 2012).²²⁴ The new Mt. which entered into force on 1 July 2012 establishes new types of atypical work which will fall under equal pay regulations: on-call work, job sharing, and employment relationships with multiple employers.

At the time of writing, Act LXXV of 2010 on simplified and occasional work was still in force, which reduced the minimum payment of employees employed under simplified and occasional contracts to 85 % of the otherwise applicable national minimum wage, and 87 % of the otherwise applicable guaranteed minimum salary of workers working in positions requiring at least secondary education.²²⁵ The idea behind this regulation could be the notion that the gross minimum wage could be reduced to below the national minimum wage due to the employers' obligation to pay only a very limited amount of (flat rate) rates and taxes for such workers. Still, the gross wage of workers in simplified and occasional employment was below other workers' minimum wage and guaranteed minimum salary until 1 July 2012.

At the time of writing, the rules of equal pay were applied to temporary agency workers in respect of basic wage, overtime and shifts allowance, etc. only if she or he had worked for the same employer continuously for more than 183 days, and in respect of all aspects of remuneration in case of a fixed-term contract following more than two years of service, and in case of an open-ended contract following more than one year of service.²²⁶ This discrimination has been rectified by the new Mt., effective since 1 July 2012.

Furthermore, theoretically, the regulations on employment relationships (including equal treatment and equal pay) are applied to further relationships if so stipulated by the specific Act governing that relationship, i.e.:

²²⁰ Act XLIII of 1996 on the service relationship of members of the armed forces (*a fegyveres szervek hivatásos állományú tagjainak szolgálati viszonyáról szóló 1996. évi XLIII. törvény*).

²²¹ Article 54-56. on foster parents in Act XXXI. of 1997 on the protection of children and on guardianship administration (*a gyermekek védelméről és a gyámügyi igazgatásról szóló 1997. évi XXXI. törvény*) and Government Decree 261/2002 (XII.18.) on foster parents, on professional foster parents, and surrogate parents (*a nevelőszülői, a hivatásos nevelőszülői és a helyettes szülői jogviszony egyes kérdéseiről szóló 261/2002. (XII. 18.) Korm. rendelet*).

²²² The relational scope of the Ebktv exclusively refers to the professional foster parents' relationship, (seemingly) leaving the non-professional foster parents' relationship out of the scope of the Act. This differentiation first of all violates the prohibition to differentiate between workers according to the length of their daily working time (full-time and part-time work) because the non-professional foster parents' relationship should be considered as a part-time job for foster parenting. Still, the non-professional foster parents would fall under the scope of the Act due to the regulation on Article 5.d.

²²³ Special type of private work agency which operates in a form of co-operative and offers work for pupils and students of second and higher education.

²²⁴ At the time of writing, homeworking is regulated by Gov. Decree 24/1994 (II.25.) on homeworkers (piece-rate workers) (*a bedolgozók foglalkoztatásáról szóló 24/1994. (II. 25.) Korm. rendelet*). For obligation of equal pay among homeworkers and employees see Article 17(3). Since 1 July 2012, homeworking has been regulated by the new Labour Code and the special rules on minimum wage as described above will have been repealed.

²²⁵ Until 1 July 2012 seasonal work in agriculture and tourism, and occasional work were regulated by Act LXXV. of 2010 on simplified employment relationships (*az egyszerűsített foglalkoztatásról szóló 2010. évi LXXV. törvény*). The relationship is called simplified because under this Act the employer is relieved of some obligations he or she should otherwise fulfil under employment, taxation and social security legislation. For the reduced level of minimum wage and guaranteed minimum salary, see Article 4(1a).

²²⁶ Article 193/H (9) and (10) of Act XXII of 1992 (old Mt.).

- professional sportspersons’ employment contract or contract of services²²⁷
- public work²²⁸
- performing artists’ employment relationship,²²⁹
- contract of apprenticeship,²³⁰
- work contract of members of co-operatives,²³¹ etc.

Equal pay regulations apply to all those relationships based on which the person is obliged to do work under *other relationship for work (munkavégzésre irányuló egyéb jogviszony)*.²³² The Hungarian term for ‘other relationships for work’ usually covers those relationships based on which the work is performed between independent parties. Such independent work is performed through agency contract (*megbízási szerződés*), contract for professional services (*vállalkozási szerződés*) and membership in private companies (*gazdasági társaság*), covered by Act No. IV of 1959 on the Civil Code. The above interpretation, however, cannot be fully applied to the Ebktv because under the term ‘other relationships for work’ two relationships of dependent work have also been listed in the Act: relationships of homeworkers (piece-rate workers) and the work relationship of members of co-operatives.²³³

1.b. Equal treatment in occupational social security schemes

For the personal scope of occupational social security schemes, please see 1.a. above.

The rules of equal treatment are followed for the persons indicated above in the course of claiming and providing benefits financed from the social security systems, and social benefits, financial and in-kind child protection or personal care. With respect to healthcare, the rules of equal treatment are applied with respect to participation in preventive programmes and medical check-ups, preventive medical care, use of premises for residence, the satisfaction of dietary and other needs.²³⁴

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

In this regard, for employees (typical and atypical) and quasi-subordinate workers, please see 1.a. above.

There are no express equal treatment rights for volunteers, although in theory they are also covered by Article 5.d.

According to Article 5d., the self-employed are also covered in theory, but as far as is known there is no case law in this regard.

As far as the ‘duty holder’ is concerned, Article 5.d. stipulates that in case of other relationships for work, the person who has the right to give orders to the self-employed person is supposed to follow the rules of equal treatment. This rule applies to all aspects of equal

²²⁷ Article 8. Act I. of 2004 on sport (*a sportról szóló 2004. évi I. törvény*).

²²⁸ Article 2. of Act. CVI. of 2011 on public employment (*a közfoglalkoztatásról szóló 2011. évi CVI. törvény*). Although public work programmes do not violate equal pay regulation according to the case law of European Social Charter, they are fiercely criticised for several aspects including the fact that the payment is far below the minimum subsistence figure. S. Hungler *The Poor, the Unemployed and the Public Worker – A Comparative Essay on National Unemployment Policies Contribution to Deepening Poverty* (Manuscript, 2012).

²²⁹ Fifth Chapter in Act XCIX. of 2008 on the support provided to organisations of performing arts and the employment relationship therein (*az előadó-művészeti szervezetek támogatásáról és sajátos foglalkoztatási szabályairól szóló 2008. évi XCIX. törvény*).

²³⁰ Article 26 in Act CLXXXVII. of 2011 on vocational training (*a szakképzésről szóló 2011. évi CLXXXVII. törvény*).

²³¹ Act X of 2006 on co-operatives (*a szövetkezetekről szóló 2006. évi X. törvény*), for regulation in regard to equal treatment see Article 56.

²³² Article 5.d.; 3.b. and 21.f. of the Ebktv.

²³³ For terminological clarity, homeworking and the work relationship of members of co-operatives have been dealt with above in relation to employment relationships. See also above, footnotes 192 and 198.

²³⁴ Articles 24 and 25 of the Ebktv.

treatment with respect to the self-employed.²³⁵

The self-employed (similarly to employees) have a right to equal treatment with respect to access to work, especially in public job advertisements, hiring, and regarding the conditions of employment; in establishing and terminating the employment relationship or other relationship for work; in relation to any training before or during the work; and in determining and providing working conditions.²³⁶

1.d. Collective agreements and case law

The Equal Treatment Agency interprets the regulation on the scope of the Ebktv in such a way that it covers all relationships for work, including situations when a private individual hires another private individual for two hours in order to water the garden.²³⁷

Collective agreements sometimes contain rules that violate equal pay regulations: e.g. part-time employees are excluded from certain types of remuneration. Workers on probation are usually paid less than other workers.

1.e. Additional information

The personal scope of the equal treatment regulations is extremely wide and since 1 July 2012 it covers all categories of workers examined, although the rules on exemptions are so general that it is rather difficult to enforce liability under the Ebktv. At the time of writing, the right to equal pay of temporary agency workers and workers of simplified and/or occasional employment were still violated by legislation, but this has been rectified by the new Mt., effective since 1 July 2012.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

One of the three subcategories of relational scope under the Ebktv (as mentioned in 1. above) covers all civil-law relationships related to any legally relevant activities open to the public. According to these rules, all legal relationships fall within the relational scope of the Act through which offers and calls for offers (tenders) are made to the public (preliminarily undefined persons); and through which services are provided and goods are sold at premises open to the public.²³⁸

Another subcategory of the above-mentioned relational scope is when the Act covers all legal relations related to public subsidies regardless of whether the public funding was provided to self-employed persons, legal entities or organisations without legal entity.²³⁹ In this regard the obligation to follow the rules on equal treatment is based on the fact that the original source of payment is some form of public budget.

²³⁵ Article 5.d of the Ebktv. However, the wording of the Act is rather confusing because it makes the false impression that (beyond the relationship between e.g. the agent and the principal) there would be a separate relationship between the person who has the right to give orders (within the organisation of the principal) and the agent. The proper interpretation of the rule is that the person who works for the principal and is in charge of giving orders to the agent falls under the scope of the Act as the one who acts on behalf of the principal.

²³⁶ Article 21 of the Ebktv.

²³⁷ This example was mentioned by an officer of ETA (Dr. Edit Gyarmati).

²³⁸ 'The principle of equal treatment is observed in respect of the relevant relationships: a) those who make a proposal to persons not defined preliminarily to enter into contract or those who invite such persons to tender, b) those who provide services or sell goods at their premises open to customers;' Article 5.a-b of the Ebktv.

²³⁹ 'The principle of equal treatment is observed by self-employed persons, legal entities and organisations without legal entity receiving state subsidies, in respect of their relationships established in the course of their utilisation of such state subsidies, from the time when the state subsidies are utilised, during the period while the competent authorities may audit the utilisation of the state subsidies in accordance with the regulations applicable to them;' Article 5.c. of the Ebktv.

2.b. Freedom to choose contractual partners

The freedom to choose contractual partners is not expressly mentioned in the Ebktv, but the freedom to enter into a contract is part of the dogmatic foundation of civil law, and therefore it applies to equal treatment cases as well. The Ebktv limits this freedom by listing protected characteristics (e.g. sex, family status, motherhood, fatherhood, pregnancy) and by prohibiting discriminatory actions on the basis of these characteristics.

The concept of freedom of contract might come up if someone defends him/herself against the charge of committing a discriminatory act. Article 7 of the Ebktv stipulates two rather widely worded rules for exemptions. The second one, which is related to freedom of contract, states that the principle of equal treatment is not violated ‘if the differentiation which is based on objective considerations leads to a reasonable explanation of the differentiation directly related to the relevant relationship’. In case law this paragraph opens up wide room for exculpation for employers as long as they can demonstrate that there is an objective and reasonable business or economic reason to differentiate between employees which otherwise could be considered illegal discrimination.

2.c. Collective agreements and case law

In 2006, the Advisory Board that operated alongside the Equal Treatment Authority (until 2012) published a decision that banks are also covered by equal treatment regulations while providing loans for private individuals and are therefore obliged to follow the rules of equal treatment (Opinion No. 10.007/2/2006. of Advisory Board).²⁴⁰

2.d. Additional information

The vast majority of case law in relation to equal access to goods and services is filed by people belonging to the Roma ethnic minority, so there hardly is any gender-related case law in this regard.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

For information regarding personal scope, please see 1, 1.a, 1.c and 2.a. The rules of equal treatment are not to be applied to relationships between relatives.²⁴¹

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

As was explained above in 1., 1.a, 1.c, 2.a. and 3.a, both Directives have been implemented by the same Act, and therefore no difference in scope can be indicated.

3.c. Collective agreements and case law

There is only sporadic case law in regard to sex discrimination among the self-employed and therefore no clarification is added by case law concerning the questions on personal scope.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

None of these terms are formally defined by law, although the regulations reflect the provisions of Article 2 of the Directive.

Pregnant women enjoy protection against dismissal from the date that they notify their employer about their pregnancy. If a woman is having human reproduction treatment (IVF treatment), she is also entitled to protection against dismissal for the duration of the treatment,

²⁴⁰ See http://www.egyenlobanasmod.hu/tt/TTaf_feb10, accessed 23 May 2012.

²⁴¹ Article 6(1)b. of the Ebktv.

with a maximum of six months. In this case, the protection is also activated by the notification of the employer about the treatment.

4.b. Collective agreements and case law

Managers do not enjoy any protection provided by law in respect of pregnancy, raising a child, taking care of a sick child, etc. The protection against dismissal in case of pregnancy and IVF treatment is not applicable to managers.

Women whose ova have been fertilised *in vitro*, but not yet transferred to their uterus would be covered by the protection against dismissal. See 4.a. above.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

Two contradictory answers could be given under this heading: one is based on the Labour Code, and the other is based on the Ebktv.

As pregnancy- and maternity-related matters are regulated by the Labour Code, and protection provided by the Labour Code is not applicable to self-employed and quasi-subordinate workers, these categories do not enjoy the protection mentioned above in 4.a.

On the other hand, however, as was explained in 1.c. above, the extremely wide scope of the Ebktv covers this aspect as well. According to Article 5.d., the self-employed are covered in theory, but as far as is known there is no case law in this regard.

As far as the ‘duty holder’ is concerned, Article 5.d. stipulates that in case of other relationships for work, the person who has the right to give orders to the self-employed person is supposed to follow the rules of equal treatment. This rule applies to all aspects of equal treatment with respect to the self-employed.²⁴²

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

Rules on parental leave cover all employees regardless of the nature of their relationship. For more details, see 1.a. above.

5.b. Entitlement to parental leave

Both parents are entitled to unpaid leave until the child reaches the age of three.²⁴³ If both parents take the leave, only the mother enjoys protection against dismissal for this period of time.²⁴⁴

Upon the birth of his child, the father is entitled to five days of extra vacation time (seven working days in the case of twins), until the end of the second month from the date of birth, which is allocated on the days requested by the father. The leave is provided regardless the child is stillborn or dies.²⁴⁵

Every calendar year both parents are entitled to extra vacation time after their children less than sixteen years of age: two working days for one child; four working days for two children; a total of seven working days for more than two children.²⁴⁶

5.c. Rights of the self-employed and/or the quasi/para-subordinate

Please see the information given in 4.c. and 1.c. above.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

As was explained above in more detail, the institutional and relational scope of the equal treatment regulations (Ebktv) is extremely wide. This extremely comprehensive cover is

²⁴² In this regard see also footnote 202 above.

²⁴³ Article 128.§ of new Mt.

²⁴⁴ Article 65.§(3)c and (6) of new Mt.

²⁴⁵ Art. 118 (4) of new Mt.

²⁴⁶ Art. 118 (1) of new Mt.

counterbalanced by extremely wide terms for exemptions. According to Article 7 of the Ebktv the principle of equal treatment is not violated by any legal act ‘*a*) which limits a basic right of the entity brought into a disadvantageous position in order to enforce another basic right in an unavoidable situation, assuming that such a limitation is suitable for this purpose and is also in proportion to it; *b*) which is found by objective consideration to have a reasonable explanation directly related to the relevant relationship’.

Consequently, despite the extremely wide scope of the Act, the protection is weak because the accused could exculpate him/herself almost any time,²⁴⁷ at least in sex-discrimination cases.

More specifically targeted legislation, which weighs the interests of the parties more cautiously and reflectively for specific situations of infringements of equal treatment rights would provide women, mothers and fathers with much more reliable and solid legal protection than this boundary-free, highly general legislation, which in theory covers (with little exaggeration) any kind of differentiation committed by any legal entity and any person, but is rarely enforced in practice due to its vague and unspecific content and extremely wide terms of exemptions.

ICELAND – *Herdís Thorgeirsdóttir*

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

Both employers and trade unions are under the obligation to guarantee non-discrimination on the basis of gender and other factors that do not concern qualifications or value of work on the labour market.

Trade unions are bound by this principle and must not discriminate on grounds of gender and other factors which do not pertain to workers’ situation on the labour market. The Working Terms and Pension Rights Insurance Act no. 55/1980 confirms the principle of non-discrimination in its Article 1 stating: ‘Wages and other working terms agreed between the social partners shall be considered minimum terms, independent of sex, nationality or term of appointment, for all employees in the relevant occupation within the area covered by the collective agreement. Contracts made between individual employees and employers on poorer working terms than those specified in the general collective agreement shall be void’.

The aim of Gender Equality Act No. 10/2008 (hereinafter GEA) is to establish and maintain equal status and equal opportunities for women and men and thus promote gender equality in all spheres of society. All individuals shall have equal opportunities to benefit from their own enterprise and develop their skills irrespective of gender. Fighting wage discrimination and other forms of gender-based discrimination on the employment market is one of the means to achieve gender equality.

According to the GEA, employers and trade unions are obliged to work deliberately to help men and women achieve equal footing on the labour market. Employers shall work specifically to put women and men on an equal footing within their enterprises or institutions and to take steps to avoid jobs being classified as specifically women’s or men’s jobs. There is a prohibition of discrimination as regards wages.

The GEA applies to other legislation on the labour market regarding rights of employees.

Employers of foreign companies that are sent to Iceland are subject to the Act on the rights and obligations of foreign businesses that post workers temporarily in Iceland and on their workers’ terms and conditions of employment, No. 45/2007, as amended by Act No. 88/2008 and Act No. 96/2010. These workers are accordingly covered by Working Terms and Pension Rights Insurance Act No. 55/1980 as well as Gender Equality Act No. 10/008,

²⁴⁷ A.K. Kádár *Az egyenlő bánásmódról szóló törvény kimentési rendszere a közösségi jog elveinek tükrében*, <http://www.egyenlobanasmod.hu/tanulmanyok/hu/kimentesirendszer.pdf>, accessed 23 May 2012.

Act on Maternity/Paternity Leave and Parental Leave No. 95/2000, and Act on the Working Environment, Health and Safety in Workplace No. 46/1980.

The abovementioned Act on the rights and obligations of foreign businesses No. 45/2007 applies to Act on Temporary Work Agencies No. 139/2005, which is directed at temporary work agencies on the domestic labour market that according to a contract and in return for a fee hires out its workers to perform work assignments at the workplace of a user company under the supervision of the latter. All employers are bound by the basic principle stipulated in Working Terms and Pension Rights Insurance Act No. 55/1980, where contracts between individual employees and employers on poorer working terms than those specified in a general collective agreement shall be void.

The self-employed are entitled to unemployment benefits, on the condition that they have complied with the requirement stipulated in Act on unemployment benefits No. 54/2006 to pay taxes and the required insurance fee and that they are not registered on the list of wage payers of the Internal Revenue Directorate.

1.a. Equal pay

Women and men who are employed by the same employer are entitled to equal pay and equal terms for equal-value and comparable work. 'Equal wages' means that wages shall be determined in the same way for women and men. The criteria on the basis of which wages shall be determined shall not involve gender discrimination.

'Wages' are defined as ordinary remuneration for work and further payments of all types, direct and indirect whether they take the form of perquisites or other forms, paid by the employer to the employee for his work. 'Terms' is defined as wages together with pension rights, holiday rights and entitlement to wages in the event of illness and all other terms of employment or entitlements that can be evaluated in monetary terms.

'Equal value' has been interpreted by the Supreme Court as applying to different types of jobs depending on a contextual evaluation.

1.b. Equal treatment in occupational social security schemes

Pension Act No. 129/1997 provides for compulsory pension fund membership of all employed persons from the ages of 16 to 70, employers or self-employed persons. No one must be refused membership of a pension fund for reasons of health, age, marital status, family size or gender. According to the Pension Act all employees receive the same benefits for equal contributions independent of the longer life expectancy of women compared to men. Individuals receive payments throughout their lives.

The minimum pension fund contribution is calculated on top of total wages and compensation for any kind of work, job or service. The minimum contribution is 10 % of the contribution base of which 2 % is deducted from the worker's wages and 8 % is added by the employer. In addition to this a worker may pay 2 % into a supplementary contribution scheme (public or private pension fund) and in that case the employer's counter-contribution is 2 %.

In the last decade the by far most negative measure affecting the pension rights of women has been the adoption of the age-related pension scheme. This system was adopted around 2006 by most occupational pension funds. Prior to that, equal accrual of rights prevailed, i.e. fund members accrued the same entitlement for the same contribution, regardless of their age when the contribution was paid. Since the age-related scheme was adopted by the occupational funds, the rights accrued are now determined by the age of the fund member when the contribution is made. Younger fund members thus accrue more rights than older members for the same contribution. Some funds reasoned that linking entitlement to age ensured equality between fund members in their accrual of entitlement over their working life. The system appears gender neutral when looking simply at the laws or pension schemes but when viewed in societal context it is not in the favour of women, who often have interrupted careers because of having children. Only by not having children could women enjoy the same security in their old age as men.

The changes in the pension system in the first decade of the 21st century are all geared towards the individual. The influence of marriage and co-habitation has been diminished in

this context. When the occupational funds were initially established, married couples were considered as a unit accruing mutual savings and security. If a spouse died, the surviving spouse got half of his (her) pension during the rest of her (his) life. Now, occupational funds pay standard spouse pension on average for two years, three years at most.²⁴⁸

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

Vacant positions that are open for application shall be equally accessible to women and men, as provided for in Article 20 of the GEA. Employers are obliged to take the measures necessary to ensure that women and men have equal opportunities regarding retraining, continuing education (lifelong learning) and vocational training, and to attend courses held to enhance vocational skills or to prepare for other assignments/occupations.

Employers are prohibited from discriminating between applicants for jobs on grounds of their gender, as stipulated in Article 26 of the GEA. The same applies regarding promotion, changes of position, retraining, continuing education and employees' working conditions.

It is prohibited to allow maternity/paternity or parental leave, or other circumstances relating to pregnancy and childbirth, to have a negative effect on decisions regarding the above.

It is prohibited to advertise, or publish an advertisement for, a vacant position indicating that an employee of one sex is preferred over the other. This does not apply if the aim of the advertiser is to promote more equal representation of women and men within an occupational sector, in which case this shall be stated in the advertisement. The same applies if there are valid reasons for advertising for a man or a woman only.

Employers must not dismiss employees for demanding redress on the basis of the GEA and no person may waive the rights set forth in the GEA.

If employers or others deliberately or through negligence violate the GEA they shall be liable to pay compensation for non-financial loss, if appropriate, in addition to compensation for financial loss.

1.d. Collective agreements and case law

Trade unions enter into collective bargaining agreements regarding the wages and other working conditions for wage earners on the labour market. Collective agreements concluded between trade unions and employers provide for the minimum working conditions in the industry in question throughout the district in question. The provisions of collective agreements regarding issues such as wages, working hours, paid sickness and accident leave, maximum working hours and daily rest, holiday allowance accounts, notice of termination, contribution to union sickness funds, pension funds etc., are minimum working conditions, irrespective of gender, nationality or period of employment for all wage earners in that particular industry. Contracts of employment between individual wage earners and employers stipulating worse working conditions than those provided for in the collective agreements are void.

The trade unions are independent and not subject to government authority. The trade union shop stewards have the task to oversee that employers abide by the collective agreements and that the social and civil rights of employees are not violated. All communication between employees and the shop steward is confidential.

1.e. Additional information

There is no additional information to report.

²⁴⁸ <http://www.live.is/english/pension>, accessed 12 June 2010.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

Directive 2004/113 on equal treatment of men and women in the access to and supply of goods and services has not been incorporated into the EEA Treaty by the EEA Joint Committee and hence has not been implemented directly into domestic law. On 16 May 2012 the National Parliament (the *Althing*) granted the Government permission to confirm decision No. 147/2009 of the EEA Joint Committee to incorporate Directive 2004/113/EC into the EEA Treaty. It is therefore to be expected that this incorporation will take place in the coming months and will subsequently be implemented into domestic law.

2.a. Personal scope

There is nothing to report.

2.b. Freedom to choose contractual partners

There is nothing to report.

2.c. Collective agreements and case law

There is nothing to report.

2.d. Additional information

There is no additional information to report.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

Directive 2010/41 was incorporated into the EEA Treaty on 2 February 2012. The deadline to implement the Directive has not expired yet.

3.a. Personal scope

The principle of equal treatment that there shall be no discrimination whatsoever on grounds of sex in 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 is guaranteed in the GEA where equal opportunities for women and men shall prevail in all spheres of society. Article 1 of the GEA states: All individuals shall have equal opportunities to benefit from their own enterprise and to develop their skills irrespective of gender.

Self-employed individuals who pay withholding tax and social security contribution on one fixed occasion annually are not entitled to unemployment benefits. Self-employed persons aged 16-70 are entitled to unemployment benefits on the condition that they have the right to unemployment insurance and: (1) are unemployed; (2) have their residence in Iceland; (3) are actively seeking work; (4) are able for work and ready to be hired for all general work; (5) are ready to accept work in any location in Iceland (cf. Act on unemployment insurance No. 54/2006). Self-employed persons and those who work for their own limited company must have deregistered from the payroll of the Internal Revenue Directorate and must have terminated their company's operation. They must also have confirmation from the tax authorities of payment of calculated earnings and payment of social security contribution and withholding tax.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

There is nothing to report.

3.c. Collective agreements and case law

There is nothing to report.

3.d. Additional information

Women in farming, i.e. the wives of self-employed farmers, are often not on a payroll but work hard on the farms. Furthermore, these women are not members of any the farmer's associations, which are the trade unions of farmers, and in many cases the farm and its possessions are registered as the property of the husband.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

Act on Maternity/Paternity Leave and Parental Leave No. 95/2000 with later amendments applies to the rights of parents working in the domestic labour market to be granted maternity/paternity leave and parental leave. It shall apply to parents who are employed by others or are self-employed.

For the purposes of this Act, maternity/paternity leave and parental leave refers to leave from salaried employment that is occasioned by the birth or primary adoption of a child under the age of eight or permanent foster care of a child under the age of eight.

'Employee' in the above Act refers to anybody who is employed in a salaried position in the service of others amounting to at least 25 % of a full-time position each month. A woman shall be considered as having recently given birth to a child if the child is 14 weeks old or younger.

4.b. Collective agreements and case law

Collective agreements must be in accordance with the Act on Maternity/Paternity Leave and Parental Leave. Each parent has an independent right to maternity/paternity leave of up to three months due to the birth, primary adoption or permanent foster care of a child. This right shall not be transferable. In addition, parents shall have a joint right to three additional months, which may either be taken entirely by one of the parents or divided between them. This right lapses when the child reaches the age of 36 months, so it is left to the parent, the mother or the father, when they choose to take their leave (Article 9) apart from one exception: a woman is obliged to take maternity leave for at least the first two weeks after the birth of her child (Article 8, Paragraph 3).

Article 10 of Act No. 95/2000 covers the structure of the leave. Employees have the right to take maternity/paternity leave in one continuous period. The parent also has the right to make arrangements with her/his employer for the maternity/paternity leave to be divided into a number of periods and/or that it will be taken concurrently with a reduced working hours ratio (cf. Article 8, Paragraph 3). However, maternity/paternity leave must never be taken in periods of less than one week at a time. The employer shall make efforts to meet the wishes of the employee regarding the structure of maternity/paternity leave under Article 10.

During maternity/paternity/parental leave the accumulated rights of workers remain intact as they would during normal work periods. They will continue to accumulate rights while on maternity/paternity leave such as their right to leave and the prolongation of leave according to collective agreements, rights to a pay rise linked to work experience, the right to sick leave, the right to termination notice and the right to unemployment benefits.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

'Self-employed' in respect of the above Act refers to anybody who works for himself, irrespective of the type of company, to the effect that she/he is obliged to pay an insurance levy every month, or in another manner decided by the tax authorities.

4.d. Additional information

There is no additional information to report.

5. Directive 2010/18/EU on parental leave

Directive 2010/18/EU has been incorporated into the EEA Treaty and implemented by Act No. 136/2011 amending Act No. 95/2000 on Maternity/Paternity Leave and Parental Leave, accordingly.

Further national measures to implement the Directive include Act No. 22/2006 on payments to parents of chronically ill or severely disabled children was adopted to implement provisions of Directive 2010/18/EU. Gender Equality Act No. 10/2008 is already viewed as containing many of the provisions of Directive 2010/18/EU.

The framework agreement of Directive 96/34/EC has been implemented by the above Acts. Both male and female workers are individually entitled to parental leave on the grounds of the birth or adoption of a child or permanent foster care, enabling them to take care of the child for at least three months each. This entitlement shall not be transferable. In addition, the parents shall have a joint entitlement to an additional three months, which either parent may use in its entirety or the parents may divide between them (Act No. 95/2000).

Maternity/paternity leave shall count as working time for the purposes of assessing work-related rights. At the end of the leave, these rights shall be valid, as shall any changes which may have been made on the basis of the law or wage agreements (Articles 14 and 28 of Act No. 95/2000).

Parents who are not active on the labour market, or who are employed in less than 25 % of a full-time employment position, each have a separate entitlement to a maternity/paternity grant for up to three months in connection with the birth, primary adoption or permanent foster care of a child. This entitlement is not transferable. In addition, parents shall have a joint entitlement to a maternity/paternity grant for an additional three months, which either parent may use or they may divide between them. The right to a maternity/paternity grant shall lapse when the child reaches the age of 18 months.

Should a child need to stay in hospital for more than seven days directly following the birth, it is permitted to extend the parents' joint right to maternity/paternity grant by the number of days the child has to stay in hospital, prior to its first homecoming, by up to four months. It is also permitted to extend the parents' joint right to maternity/paternity grant by up to three months in the case of a serious illness of the child which requires more intensive parental attention and care. It is also permitted to extend the mother's right to a maternity grant by up to two months due to a serious illness suffered by her in connection with the birth.

There is protection against dismissal due to the fact that an employee has given notice of intended maternity/paternity or parental leave, without reasonable cause. The same rule applies to pregnant women, and women who have recently given birth (Article 30 of Act No. 95/2000).

The employment relations between an employee and her/his employer shall remain unchanged during maternity/paternity leave and parental leave. The employee shall be entitled to return to her/his job upon the completion of maternity/paternity leave or parental leave. Should this not be possible, she/he shall be entitled to a comparable position with the employer according to a contract of employment.

Should an employer violate the provisions of Act No. 95/2000, she/he is liable under general rules.

5.a. Personal scope

There is nothing to report.

5.b. Entitlement to parental leave

There is nothing to report.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

There is nothing to report.

5.d. Additional information

There is no additional information to report.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

There is nothing to report.

IRELAND – Frances Meenan**1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation****1.a. Equal pay**

The Employment Equality Acts 1998 to 2011 apply. Discrimination is prohibited on nine grounds: gender, civil status, family status, sexual orientation, religion, age, disability, race and being a member of the Traveller Community. There are two forms of ‘quasi-subordinate’ categories of workers, namely those working under a contract for services and agency workers. A contract of employment is defined²⁴⁹ as including a contract of service or apprenticeship or

‘any other contract whereby –

- (i) an individual agrees with another person personally to execute any work or service for that person, or
- (ii) an individual agrees with a person carrying on the business of an employment agency within the meaning of the Employment Agency Act 1971 to do or perform personally any work or service for another person (whether or not the other person is a party to the contract),

whether the contract is express or implied and, if express, whether oral or written’.

Persons holding office under or in the service of the State (including members of the *Garda Síochána* (police force), the Defence Forces or civil servants shall be deemed to be employees employed by the State or Government as the case may be under a contract of service. There is likewise provision for officers or servants of a local authority, a harbour authority, the Health Service Executive, or a vocational education committee to be deemed as employees of the relevant authority. In relation to an agency worker, the person who is liable for the pay of the agency worker shall be deemed to be the employer. A person who agrees personally to execute the work or service is deemed to be an employee and references to an employer are references to the person for whom the work or service is to be executed. Any comparison to be made between persons ‘shall be between persons personally executing work or service for the same person or an associated person under such a contract or contracts.’ The Act states that this provision particularly applies to equal remuneration claims on the basis of indirect discrimination on the gender ground.²⁵⁰ In other words, if a person personally executes a work or service their comparator shall be a person who provides such similar work or service. A member of the national parliament, *Oireachtas*, has been considered to be employed for the purposes of the Anti – Discrimination (Pay) Act 1974 which has since been repealed and replaced by the Employment Equality Act 1998 and the Pensions Acts.²⁵¹ The Employment

²⁴⁹ Section 2 as amended by the Equality Act 2004. The extended definition of ‘employee’ was included in the Equality Act 2004 amending the Employment Equality Act 1998 when Ireland transposed Directives 2000/43/EC and 2000/78/EC.

²⁵⁰ Section 19(4) – Entitlement to equal remuneration on the gender ground.

²⁵¹ *Department of the Public Service v Robinson* EP 36/1978; DEP 7/1979. The claimant/ appellant in this case was Mary Robinson, President of Ireland 1990 – 1997. In another case, the husband of a deceased female

Equality Acts apply to a partner in a partnership as it would apply to an employee. A claim of discrimination can survive the claimant's death and could be pursued by his widow.²⁵²

The second category of 'quasi-subordinate' worker is the agency worker. In the event that the agency worker brings an equal pay claim, under the definition of 'like work' agency workers may only compare themselves with other agency workers. This applies in respect of all discriminatory grounds under the Acts and not just gender. Directive 2008/104/EC has been transposed into Irish law through the Protection of Employees (Temporary Agency Work) Act 2012. Section 9 of the Act of 2012 provides that the provision in the Employment Equality Acts, insofar only as it is inconsistent with the Act of 2012, shall not apply to an agency worker to whom the 2012 Act applies.

1.b. Equal treatment in occupational social security schemes

The Social Welfare (Miscellaneous Provisions) Act 2004 provides the relevant legislation to ensure compliance with the various EU Directives.²⁵³ The drafting in this legislation is somewhat different. Persons working under a contract of service or apprenticeship fall within the scope of the legislation. Persons holding office under or in the service of the State and officers or servants of various state bodies and authorities are deemed employees. Agency workers also fall within the scope of the Act, however, agency workers can only compare themselves with other agency workers. However, note the comments above about the transposition of Directive 2008/104/EC. Self-employed persons fall within the scope of the Act in relation to an 'occupational benefit scheme',²⁵⁴ which definition excludes individual contracts, a scheme for a self-employed person where there is only one member or any scheme where the benefits are financed by contributions paid by members on a voluntary basis. In considering any rule of a scheme in relation to the gender ground, account shall not be taken of any difference of treatment for self-employed persons in relation to any optional provisions.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

Employees, agency workers and persons working under a contract for services are entitled to equal treatment in respect of access to employment, vocational training and promotion and working conditions as above with the following exception: in respect of access to employment persons employed in another person's home for the provision of personal services for persons residing in that home where the services affect the private life or family life of those persons. As stated above the Acts apply to 'a partner in a partnership' as if the partner was an employee. There has been no case law on this issue but one wonders as to the realism of accessing an equity partnership.²⁵⁵

1.d. Collective agreements and case law

There is no specific case law on excluded groups under the Acts.

employee was entitled to the same benefits as those enjoyed by the survivors of married male employees (*University College Galway v EEA* EP 18/1984; DEP 2/1985).

²⁵² *Ibidunni v Boston Scientific (Ireland) Ltd.* [2011] E.L.R. 158.

²⁵³ Part VI of the Pensions Act 1990 was repealed by the 2004 Act.

²⁵⁴ 'Any occupational scheme or arrangement which is comprised in one or more instruments or agreements and which provides, or is capable of providing, occupational benefits in relation to self-employed persons in any description of self-employment within the State, but does not include ...' 'Occupational benefits' mean pensions, payable in cash or in kind in respect of termination of service, retirement, old age or death, interruptions by reason of sickness or invalidity, accidents, injuries or illnesses arising from employment, unemployment or expenses incurred in connection with children or other dependants.

²⁵⁵ However, note that recently a salaried partner in a law firm was held to be an employee under the Unfair Dismissals Acts 1977 – 2007, *Casey v LK Shields, Solicitors* [2012] E.L.R. 144.

1.e. Additional information

It would appear that volunteers are excluded from the scope of the legislation. There should be an amendment to the Directive to the effect that personal representatives can continue or bring proceedings in the event of the death of the complainant.

It is important to note that an employment relationship can have a wide range of possibilities,²⁵⁶ for example a person might work under a single contract that is a contract of service or a contract for services; on each occasion of work they may work under a new contract of service or a contract for services and in time this latter arrangement can become ‘hardened or refined’ into an ‘umbrella’ contract which arrangement has featured in cases concerning outworkers, casual workers and piece workers²⁵⁷ or there may be a contract *sui generis*.²⁵⁸ In short, each case has to be considered on its own merits. Overall the Irish courts and employment tribunals have tended to consider that there is a contract of service as opposed to a contract for services (self-employment) and there is a Code of Practice for Determining Employment or Self-Employment Status of Individuals.

The Act also provides²⁵⁹ for the liability of the employer for anything done by a person in the course of their employment. This provides for a broad concept of employer liability and in practice extends vicarious liability (i.e. the liability of an employer for the acts of his employees) to potentially criminal acts by an employee or a self-employed person or possibly an agency worker. The principal of an agent who does anything with the authority of the principal (whether express or implied, precedent or subsequent) is liable. The issue of the liability of a principal is less clear cut as the act must be with the authority of the principal. If the employer is liable for the payment of an agency worker then the employer is vicariously liable for the acts of the agency worker.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

The Equal Status Acts 2000–2008 specifically exclude pension rights or a service or facility to which the Employment Equality Acts 1998–2011 applies. The Employment Equality Acts concern employment and vocational training whilst the Equal Status Acts relate to the provision of services to the public generally.

2.b. Freedom to choose contractual partners

The Acts prohibit discrimination on the gender ground in the provision of goods or services²⁶⁰ with the exception that the Irish legislation has been interpreted as allowing private member clubs which may discriminate on grounds of gender.

2.c. Collective agreements and case law

The case of *The Equality Authority v Portmarnock Golf Club*²⁶¹ concerned the issue of a male-only golf club and as to whether it is a discriminating club. The Supreme Court held by majority that it was not a discriminating club within the constitutional right to freedom of association but also that it was not a requirement to show a logical connection between the principal purpose of the club and the category of person to which the club was limited.

²⁵⁶ *The Minister for Agriculture and Food v Barry* [2009] IR 215, where veterinary surgeons worked as temporary veterinary inspectors and the above range of contractual arrangements were considered; see generally B.A. Hepple *Restructuring Employment Rights* (1986) 15 I.L.J. 69. *Henry Denny & Sons (Ireland) limited t/a/ Kerry Foods v The Minister for Social Welfare* [1998] IR 34 is the key Irish case as to the differences between a contract of service and a contract for services.

²⁵⁷ *Airfix Footwear v Cope* [1978] ICR 1210; *Nethermere (St. Neots) Ltd. v Gardiner* [1984] ICR 612.

²⁵⁸ *Brightwater Selection (Ireland) Ltd. v Minister for Social and Family Affairs* [2011] IEHC 27 27 July 2011

²⁵⁹ Section 15 of the 1998 Act.

²⁶⁰ The Equal Status Acts 2000 to 2008 have the same grounds of discrimination as under the Employment Equality Acts 1998 to 2011.

²⁶¹ [2010] 1 IR 671.

2.d. Additional information

None

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

Directive 2010/41/EU had not been transposed into Irish law as of April 2012. Family members working together are generally not insurable under the social welfare legislation. However, spouses who are partners²⁶² in a family business, or who work together in a legally incorporated company can be insurable as self-employed persons. Self-employed partners have protection under the Employment Equality Acts 1998 to 2011 and self-employed women have maternity and adoptive leave benefits. However, such benefit is not applicable to assisting spouses.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

As stated above self-employed persons fall within the scope of the legislation prohibiting discrimination in employment and in relation to pensions. Self-employed persons are entitled to a contributory widow(er)'s/ civil partner pension. There is no provision for jobseekers', dental or optical benefits.

3.c. Collective agreements and case law

The author is not aware of case law. Collective agreements usually relate to employees only.

3.d. Additional information

Self-employed persons contribute to Class S Pay Related Social Insurance which does not count for many benefits such as jobseeker's and disability benefits. The self-employed are entitled to contributory state pensions, maternity and adoptive benefits.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

The Maternity Protection Acts 1994 and 2004 implement Directive 92/85/EEC. The Acts have a broad definition of 'employee' to include those working under a contract of service or apprenticeship. Persons holding office under or in the service of the State (including members of the *Garda Síochána* (police force), the Defence Forces or civil servants) are deemed to be employees for the purposes of the Acts. Agency workers are also included. A 'pregnant employee' means 'an employee who is pregnant and has informed her employer of her condition'; an employee who has recently given birth means 'at any time an employee whose date of confinement was not more than 14 weeks earlier and who has informed her employer of her condition'; 'employee who is breastfeeding' means 'at any time an employee whose date of confinement was not more than 26 weeks earlier, who is breastfeeding and who has informed her employer of her condition'.

4.b. Collective agreements and case law

The provisions of the Maternity Acts are applied generally but in some employments employers provide enhanced benefits for employees in relation to payment during maternity leave, i.e. the employers top up the employees' state maternity benefit to their normal remuneration (or as agreed). There is no specific case law in respect of the scope of the legislation. There is no case law in respect of the self-employed and maternity benefits. If an employee is undergoing fertility treatment and in the event that there was discriminatory

²⁶² This definition is interpreted broadly.

treatment towards her, her claim would more properly fall under the Employment Equality Acts 1998–2011 and the author would be of the view that she would be so protected.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

The self-employed do not fall within the scope of the Maternity Protection Acts 1994 and 2004. However, self-employed persons are entitled to state maternity benefit at the same rate as an employer, provided of course they have made the necessary contributions in respect of Pay Related Social Insurance payments. However, the self-employed mother has no other protections. A self-employed adopting mother is entitled to adoptive leave benefit in the same manner as an adopting mother who is an employee.

4.d. Additional information

Whilst self-employed mothers are entitled to maternity or adoptive leave benefit, the provisions of the Acts²⁶³ do not apply i.e. time off for ante and post-natal care and more importantly the entitlement to health and safety benefit in the event that it is unsafe for the pregnant mother or the mother who has recently given birth and is breastfeeding to work in the employment concerned. It should be noted that in the event of a mother or an adopting mother that all entitlements transfer to the father of the child for any balance period of leave and therefore should be entitled to all balance state benefit.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

The relevant legislation are the Parental Leave Acts 1996 and 1998. Directive 2010/18/EU has not been transposed yet but the new Clause 1(3) is applicable. The Parental Leave Act 1996 has a broad definition of ‘employee’ to include those working under a contract of service or apprenticeship. Persons holding office under or in the service of the State (including members of the *Garda Síochána*, the Defence Forces or civil servants) are deemed to be employees for the purposes of the Acts. Agency workers are also included. Clause 3(1) is effectively transposed as there is no hourly threshold to fall within the scope of the Act, therefore part-time workers are included. Persons employed under fixed-term contracts are also included. Self-employed persons are excluded.

5.b. Entitlement to parental leave

An employee is entitled to parental leave as provided for in Clause 2(1) when they have one year’s continuous employment with their employer. Natural and adoptive parents²⁶⁴ are entitled to parental leave for their children up to the age of eight years and up to the age of 16 years if the child has a disability (or a person who is *in loco parentis*). The Acts are silent about the application of Directive 99/70/EC on fixed-term work, but in the event that an issue of continuity of service is questioned application may be made to the rights commissioner for an appropriate declaration as regards continuity of service.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

Self-employed persons have no entitlements. Agency workers have entitlements to parental leave either through the agency if they have contracts with the agency or with the employer they are placed with if the alternative applies.

5.d. Additional information

Parental leave is unpaid. It should also be noted that these Acts provide for employees only and therefore the self-employed have no entitlement to paid *force majeure* leave.

²⁶³ Maternity Protection Acts 1994 and 2004; Adoptive Leave Acts 1995 and 2005.

²⁶⁴ To include a sole male adopter.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

Directive 2006/54/EC, 2000/43/EC and 2000/78/EC are transposed by the Employment Equality Acts 1998–2011 (except for the pension provisions which are contained in the Social Welfare (Miscellaneous Provisions) Act 2004 (as amended)).

There is no difference in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC.

As a general comment there is reference in the questionnaire to the outsourcing of activities. In such circumstances, more usually such employees are employees of the new provider of the service or may be deemed to be an agency worker and fall within the protection of Irish employment legislation and now in addition Directive 2008/104/EC. The case of *Rooney v Diageo Global Supply*²⁶⁵ considered that an agency worker was employed by the company in which she was placed. It should be noted that that the vast majority of cases which are brought to test as to whether there is a contract of service or a contract for services is brought by the Minister for Social Protection more usually challenging the rate of Pay Related Social Insurance contributions, claiming that the individuals are employees as opposed to self-employed and have been successful in a number of cases.²⁶⁶

ITALY – Simonetta Renga

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

The principles stated by Directive 2006/54/EC have been fully implemented by the Code of Equal Opportunities (Decree no. 198/2006, as modified by Decree no. 5/2010 to implement the Recast Directive), which combined and rationalised different previous provisions on this issue in different fields, including employment and occupation. The Code applies to all persons employed in any sector (both public and private), irrespective of the length of the employment relationship, including part-timers, fixed-term workers, apprentices, employees on education contracts, homeworkers, working spouses or relatives, as well as persons working in cooperatives, and irrespective of the size of the enterprise/employer.

1.a. Equal pay

The Code transposes Article 4 of the Directive almost literally. Like labour law in general, the ban on gender pay discrimination provided by Article 28 of the Code is meant to apply to subordinate workers, who are all covered, regardless of the type of contract that they have. This means that categories such as part-time work, on-call work, fixed-term contracts etc. are all included. The material scope of this provision encompasses all aspects or conditions of the remuneration for equal work or work of equal value, as well as job classification systems.

The text of the law does not expressly refer to non-subordinate or quasi-subordinate workers, so it could also be applied to these forms only by way of interpretation, but no specific case law is to be recorded on this point.

1.b. Equal treatment in occupational social security schemes

Decree no. 5/2010 to implement the Recast Directive also addresses occupational pension schemes. This Decree, however, does not include any provisions on the personal and material scope of the principle of non-discrimination and on its implementation as regards self-employment. Despite the silence of the legislator as regards personal scope of equality principle in this area, occupational pension schemes are generally available to all workers in

²⁶⁵ [2004] ELR 358.

²⁶⁶ E.g. *Henry Denny & Sons (Ireland) limited t/a/ Kerry Foods v The Minister for Social Welfare* [1998] IR 34 is the key Irish case as to the differences between a contract of service and a contract for services.

Italy. There are no sectors of employment not covered by occupational schemes. The legislative framework leaves the definition of membership up to the funds' statutes. As far as we can see, some statutes exclude managers from their membership, whereas some others are reserved to managers; still other funds exclude short-term employees with contracts of less than three months.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

The broad definition of Article 27 Paragraph 1 of the Code implements the ban on discrimination as regards access to employment, including selection criteria, recruitment conditions at all levels of the professional hierarchy and promotion. It applies to all sectors and encompasses all types of work relationship, subordinate, autonomous or 'any other'. The same provision is enforceable, under Paragraph 3, for vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience and also the membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry out a particular profession (here including the benefits provided for by such organisations).

Article 29 includes the ban on gender discrimination as regards the awarding of duties and career; Article 3 of Act no. 108/1990 provides that discriminatory dismissal on the ground of gender is null and void and gives right both to the reinstatement of the worker and to the refund of damages; Article 25 of the Code equals to gender discrimination all detrimental treatment grounded on pregnancy, motherhood or fatherhood, including adoptive parenthood, or caused by using the respective rights; Article 32 of the Code provides for the sanction of nullity for a female worker's resignation in the period from the banns of matrimony until one year after its celebration if they are not confirmed before an official of the Minister of Labour; Article 32 provides for the presumption that a dismissal that took place in the same period is grounded on marriage and allows the employer to give evidence to the contrary; Articles 54 and 55 of the Code on the Protection of Motherhood and Fatherhood states similar provisions in case of resignation or dismissal during the period from the beginning of pregnancy until the child is one year old (or from the date the child entered the family until one year after in case of adoption or fosterage): in general terms, we can state that all these rules are fully enforceable for all subordinate workers irrespective of the length of service or of the kind of contract and also in case of atypical jobs (with the sole exception of domestic workers, mentioned further on).

As regards access to work, Article 27, as mentioned above, provides for a very broad personal scope as it refers to subordinate, autonomous or 'any other' type of work relationship and this covers all forms of quasi-subordinate jobs as well, such as for instance the so-called *lavoro a progetto* (Article 61 *et seq.* of Decree No. 276/2003, which is very widespread in Italy). Also training and membership of, and involvement in, an organisation of workers or employers as regulated by Paragraph 3 of Article 27, seem to encompass the same categories, as this provision is an exact extension of the content of Paragraph 1. Nevertheless, volunteers may be included in the personal scope of Article 27 only if the words 'any other' is given a very broad interpretation, totally independent on the condition of *job seeker* or worker. In fact, under Article 2 of Act no. 266/1991, a volunteer cannot work under a subordinate nor under an autonomous contract for the organization, and cannot receive any kind of remuneration whatsoever. So voluntary activities are not 'work' in the meaning of the law. Actually a broad interpretation of Article 27 may rise from Paragraph 3 which encompasses membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry out a particular profession, including the benefits provided for by such organisations, which seems to include in the scope of Article 27 the mere 'membership or involvement in', regardless of the possible nature of its work. But the content of this provision is not clear at all and it offers a perfect example of the problems which can arise from the bad habit of implementing an EU directive by the mere translation of its words.

Moreover, no case law or debate on the enforcement of this rule with respect to volunteers or the self-employment sector can be recorded. This makes the problem of the

possible ‘duty holder’ even more difficult. We can only underline that some professions are strictly ruled by the law, and that the *professional associations* still have a remarkable role in governing both access to certain jobs and training. As a result, they may be considered responsible for possible cases of discrimination if, for instance, they use unlawful criteria for the qualifying examination or for the compulsory training.

As regards the termination of the work relationship, in the private employment sector, only domestic workers are not fully covered by the protection as is granted to other employees in case of marriage and pregnancy. In particular, resignation does not need to be registered before an official of the Minister of Labour and the ban on dismissal provided by Article 54 of the Code on the Protection of Motherhood and Fatherhood is not enforceable. This interpretation has been deemed consistent with equality principles by the Constitutional Court, which underlined the special nature of the employer in question (a family), which cannot be burdened with the obligation to substitute the worker for a long period.

As regards both autonomous and quasi-subordinate workers, no express rules are provided to protect them against a discriminatory termination of the work relationship. Still, a Decree of the Minister of Labour of 7 July 2007 extended the ban on work during the period of compulsory maternity leave (provided by Article 16 of the Code on the Protection of Motherhood and Fatherhood) and during the period of extension of the leave in case of risks for the health of the worker (Article 17) to both quasi-subordinate workers and to other similar categories which are registered at the same compulsory pension scheme at the INPS (the National Social Welfare Institute). The ban on work also covers professionals registered at the latter compulsory pension scheme in case of certified serious complication of pregnancy but the provision does not clearly state whether the co-signing party is the duty holder.

Moreover, as regards the regulation of the so-called project job contract (*lavoro a progetto*) specifically, Article 66 of Decree no. 276/2003 only states that in case of pregnancy the termination of the work relationship is postponed by 180 days. As regards autonomous workers, in this particular case RAI journalists, recently some newspapers and websites reported on a series of individual contracts providing for the termination of the work relationship in case pregnancy, illness, accident or other *force majeure* events would hamper its regular and continuous performance.²⁶⁷ This situation is the exact opposite of the condition of employees whose dismissal is banned from the beginning of pregnancy until one year after the child is born, as it is presumed to be grounded on sex and therefore discriminatory. Actually, it is consistent with the respective obligations arising from an autonomous work relationship, but the problem is that many autonomous work relationships are the only or the major source of income for the worker or disguise the really subordinate nature of the work relationship, and still this type of situation is not protected. In the same way, the effectiveness of the right to voluntarily use maternity leave can be jeopardised by the lack of protection as regards the termination of the work relationship. In any case, after a parliamentary questioning carried out by a few deputies, the RAI clause has been repealed by a more general one referring to a generic impediment that would hinder the normal execution of the job.

1.d. Collective agreements and case law

As regards subordinate employment, the protection against discriminatory termination of the work relationship grounded on pregnancy is particularly strong and depends on the objective state of pregnancy, irrespective of whether both the employer and the worker are aware of it. This interpretation was also confirmed by case no. 2244 of 1 February 2006 of the Court of Cassation,²⁶⁸ which regarded the dismissal of a woman who worked under a fixed-term contract of vocational training and employment (so-called *contratto di formazione e lavoro*).

As regards the termination of the work relationship of domestic workers in case of pregnancy, the Court of Cassation no. 199/1998 ruled that a ban on discrimination is enforceable also for this category, considering that the domestic work relationship, like all

²⁶⁷ *La Repubblica* of 21 February 2012, <http://nuvola.corriere.it/2012/03/09/lettere-alla-nuvola-la-clausola-di-gravidanza-e-labuso-del-datore-di-lavoro/>, accessed 13 April 2012.

²⁶⁸ Published in *Massimario di Giurisprudenza del Lavoro* 2006 no. 12, p. 920.

other subordinate relationships, is suspended under Article 2110 of the Civil Code on the ground of maternity.²⁶⁹ Nevertheless, as the ban on dismissal expressly provided by the law is not enforceable for this category, the court has to establish by equity the term of the ban and the rights and duties of the parties during the period for which it operates. To this end, if the collective agreement is not enforceable either, a fair parameter can be considered the period of compulsory leave where also domestic workers are obliged to stop working and are covered by an allowance paid by the INPS (the National Social Welfare Institute). Actually, a better protection of maternity for domestic workers is provided by collective agreements: Article 24 of CCNL of 01 February 2007 provides that from the beginning of pregnancy, occurring after the start of the work relationship, until the end of the compulsory leave dismissal can be grounded only on serious cause and resignation must be registered.

As regards gender-related issues, considering that few collective agreements on *lavoro a progetto* have actually been published, we can only refer to the collective agreement ASSIRM Cgil Cisl Uil of 2004, where a specific clause expressly provided that the co-signing party is to ensure the removal of all factors of discrimination in access to work, change of workplace or termination of the work relationship, but no cases of enforcement of this rule can be recorded.

1.e. Additional information

Some Bills have been presented in the last three years as regards the extension of the protection of some fundamental rights, including the suspension of the work relationship in case of maternity to autonomous workers which are in a condition of economic dependence.²⁷⁰ Nevertheless, the Bill for the reform of the labour market as is under discussion in Parliament at present does not encompass such specific measures. It mainly provides for some amendments to the regulation of *lavoro a progetto* and self-employment, which are aimed at reducing cases of disguised subordinate work, which are very widespread in Italy. The proposal also links the legitimate cases of termination of *lavoro a progetto* to the existence of a just cause or to the inadequacy of the worker to achieve the project. Moreover it provides the sanction of the conversion of the autonomous work relationship into a quasi-subordinate one (except if the employer gives evidence of the really autonomous nature of the work relationship) in case at least two of the following criteria are fulfilled: the work activity is performed for a period longer than six months per year; the remuneration is higher than 75 % of the total annual income of the worker and the worker uses a workplace at his employer's. This intervention could slightly improve women's circumstances as well (even if it is not directly meant to cover female workers) as it tries to counteract precariousness of the work relationship which particularly affects the quality of women's participation in the labour market.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

Directive 2004/113/EC has been implemented by Decree no. 196/2007, which adds nine new articles to the Code of Equal Opportunities, from 55-*bis* to 55-*decies*. The Decree literally repeats the text of the Directive, including Article 3 on its personal scope and on the exceptions allowed.

2.b. Freedom to choose contractual partners

As regards Article 3(2) of the Directive, implementation has also been achieved by pure repetition of the words of the European legislator.

²⁶⁹ Published in *Foro it* 1998, I, 2375.

²⁷⁰ Bill for a regional act of Veneto no. 433 of 15 October 2009; Bill no. 2145 of 2010 and Bill no. 1873 of 2009.

2.c. Collective agreements and case law

From a general point of view, we can underline that in Italy there is not any debate at all as regards differences in access or prices of services grounded on sex, and that such differential treatments are, as far as we know, very rare. Actually, no cases of gender discrimination had been reported as regards goods and services before the implementation of the Directive and also at present we have no cases whatsoever related to Decree no. 196/2007, although it has been in effect for four years now. There has been no record of any debate among scholars or initiatives aimed at spreading knowledge of this Directive. This could probably be both a cause and an effect of the purely formal implementation of the Directive, which can definitely be regarded as a bad practice, certainly failing to ensure the necessary coordination with other existing provisions.

2.d. Additional information

There is no additional information to report.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

Italy has not yet implemented Directive 2010/41/EU, but the level of protection granted by the Code of Equal Opportunities already covers men and women engaged in a self-employed capacity thanks to its broad personal and material scope and it fully enforces Directive 86/613/EEC. In fact, it encompasses all categories of workers and covers all steps of the work relationship from the very beginning, i.e. from selection and training, to starting the job. It even goes beyond EU provisions in the field of entrepreneurial activity. In fact, the Code implements the principle of substantial equality, providing for the promotion of female self-employment through preferential measures meant to favour access to bank credits and public funds, to improve professional training and qualifications for women in this field, and to promote the presence of businesses owned or managed by a high percentage of women in the most innovative sections of different production sectors.

In any case, the actual impact of Directive 86/613/EEC itself on national regulations has been very weak also because the regulations on access to professions, self-employment, the establishment of companies, small entrepreneurs (including farmers), family enterprises, agrarian families and conjugal enterprises were not discriminatory and did not require any specific intervention.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

The implementation of Article 14 of Directive 2006/54/EC is provided by Article 27 of the Code of Equal Opportunities, which refers to all forms of work, employment, self-employment or any other. Probably this broad notion can be deemed to already encompass the reference made by Article 4(1) to ‘the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity’. In fact, as we reported above, the Code also provides a rule on the promotion of equal opportunities in the field of entrepreneurial activity. Nevertheless, autonomous work and entrepreneurship do not fully correspond and an express provision could be useful so as to ensure more effective implementation of the Directive with respect to promoting real awareness of possible problems of discrimination in the establishment, equipment or extension of a business, which is not perceived at all in Italy. In fact, we totally lack cases of discrimination on the ground of sex as regards self-employment.

3.c. Collective agreements and case law

Collective agreements do not contribute at all to clarifying or expanding the scope of application of the directives on men and women engaged in a self-employed capacity. There is no case law on these issues.

3.d. Additional information

There is no additional information to report.

4. Directive 92/85/EEC on pregnancy and maternity**4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding**

Directive 92/85/EEC has been implemented by Decree No. 645/1996, then transposed in the Code for the Protection of Motherhood and Fatherhood (Decree no. 151/2001), which applies to pregnant workers and to workers who have recently given birth until the child is seven months old, on the condition that they gave notice of the pregnancy/birth to the employer. The period after the birth is therefore protected, although breastfeeding is not directly mentioned.

4.b. Collective agreements and case law

Collective agreements do not contribute to expanding or clarifying the personal scope of application of Directive 92/85/EEC. There is no mention in collective agreements regarding the application of the Directive to top managers and women whose ova have been fertilised in vitro but not yet transferred to their uterus. There is no case law on these issues.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

Decree no. 151/2001 – the Code for the Protection of Motherhood and Fatherhood – applies to all subordinate workers, including apprentices, both of the private and the public sector, and working members of cooperatives. The specific provisions of the Decree that implement Directive 92/85/EEC do not provide a broader definition of ‘worker’, so its personal scope is not extended to self-employment. More in general, as reported in l.c., subsections 7-8 of the Decree of the Minister of Labour of 7 July 2007 extended the five months’ mandatory maternity leave provided by Decree no. 151/2001 to quasi-subordinate workers, although no specific sanctions are provided in case of violation. This category is also entitled to an allowance (of 80 % of the average income earned in the previous year) paid by the National Insurance System, on the condition that at least three months of contribution have been paid in the last twelve months and that the parent using the leave actually refrains from working.

4.d. Additional information

There is no additional information to report.

5. Directive 2010/18/EU on parental leave**5.a. Personal scope**

Decree no. 151/2001 provides for the regulation of parental leave and applies to all subordinate workers, including apprentices, both of the private and the public sector, and working members of cooperatives, unless otherwise specified. All atypical but subordinate workers, such as part-timers, fixed-term contract workers or persons with a contract or employment relationship with a temporary employment agency are therefore included.

As regards the agricultural sector, fixed-term contract workers are entitled to parental leave on the condition they have worked at least 51 days before using it; days of compulsory maternity leave are to be included, following case law such as judgment of the Court of Cassation no. 24634/2009.²⁷¹

Decree no. 151/2001 does not cover domestic workers and homeworkers.

5.b. Entitlement to parental leave

Decree no. 151/2001 gives both parents the right to a six-month parental leave to be used within the first eight years of the child (or within eight years after the child entered the family and until his/her coming of age in case of adoptive or foster parents), both as a whole or in

²⁷¹ Published in *Giust. civ. Mass.* 2009, p. 11.

parts. The leave is covered by notional contributions during up to six months and it is paid by an allowance of 30 % of the remuneration; this until the child is three years old or up to three years from when he/she entered the family.

A notice of at least fifteen days must be given to the employer in order to benefit from this right, with the exception of cases of objective impossibility.

The parent is entitled to parental leave irrespective of whether the other parent is entitled or not.

Fixed-term contract workers are entitled to the same rights as mentioned above, without any express limit of work qualification or length of service as regards the access to this right. This should avoid all problems regarding possible successive fixed-term contracts with the same worker.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

Under Article 69 of the Code on Protection of Motherhood and Fatherhood, autonomous workers, such as craftswomen, traders, shopkeepers and farmers, are entitled to a three-month parental leave to be used, as a whole or in parts, within the first year of the child's life or within the first year after entering the family in case of adoption. Autonomous workers are entitled to parental leave on the condition that they are covered by a pension scheme and that they actually do not perform any work. They receive a fixed amount from the INPS (the National Social Welfare Institute) which corresponds to 30 % of the so-called conventional remuneration and this period is also covered by notional contributions. Self-employed fathers are not have this right.

Article 1 Paragraph 788 of Act no. 296/2006 (as integrated by Article 24 Paragraph 26 of Decree no. 201/2011 as converted by Act no. 214/2011) provides that female workers, who are registered in the compulsory pension scheme covering quasi-subordinate workers and similar categories (including professionals who do not have their own pension scheme), are entitled to the same parental leave as described above on the condition that they have paid at least three months' contribution during the previous year, that the work relationship is still ongoing but that they do not perform any work. The quasi-subordinate working father has the same right on the condition that he fulfils the same work and contribution requirements mentioned above and that the mother is seriously ill or deceased or he has been given exclusive custody of the child. The daily amount of the allowance both for the mother and the father is 30 % of 1/365 of the income of the previous year.

In general, as regards self-employment, including the so-called 'workers on project', who are self-employed and temporarily working in close coordination with a company, the main problem is the precariousness of the job: all these workers do not tend to exercise their rights as they are afraid that their contract will not be renewed. In the end, conciliation between professional life and childcare is actually impossible. Another problem for 'workers on project' could also arise from the limited length of the period of suspension of the work relationship provided by Act no. 276/2003 in case of pregnancy. In fact, the period of suspension is only 180 days; considering that five months must already be used by the working mother for the compulsory maternity leave, then only the one month left can actually be used for parental leave.

5.d. Additional information

There is no additional information to report.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

As we reported in previous paragraphs, in Italy the implementation of the obligations imposed by the three main gender equality directives (Directive 2006/54/EC, Directive 2004/113/EC and Directive 2010/41/EC) is ensured by Legislative Decree no. 198/2006, i.e. the Code for Equal Opportunities.

Directive 2000/43/EC has been implemented by Legislative Decree no. 215/2003 and Directive 2000/78/EC by Legislative Decree no. 216/2003.²⁷² The two Decrees basically follow the wording of the directives; they also repeat the same scheme of protection provided by anti-discrimination regulation and the same personal and material scope as described at EU level.

In particular, Decree no. 215/2003 has a very broad material scope, which encompasses all areas falling within the scope of the three gender directives plus education, which is not included in the material scope of the Code for Equal Opportunities. The personal scope of this Decree is not necessarily linked to the existence of a work relationship, at least for issues such as social protection, healthcare, social advantages, access to and supply of goods and services which are available to the public, including housing. As regards other issues we can make the same observation as we made on the implementation of Directive 2006/54/EC, and precisely that the ban on dismissal grounded on race or ethnic origin (as well as on any other discriminatory factor) is enforceable for all categories of subordinate workers.

Decree no. 216/2003 and the respective national implementing provisions cover the same material scope as Directive 2006/54/EC. Nevertheless, as regards gender discrimination possible justification is very strict and is allowed where the requirements are essential for the job and the objective is legitimate and the means are proportionate and necessary. Also, exceptions are limited to the sector of art, fashion and show, when gender is essential to the job. As regards discrimination grounded on disability, sexual orientation, age and religion and personal opinion, an amendment of Decree no. 216/2003 implemented Article 6 of the Directive and provided that some differences grounded on age can be allowed. To this end, it exactly repeated the wording of the EU directive by allowing all cases. As regards personal scope, the Decree expressly mentions self-employment only in the paragraph on access to job and career, so it could be enforced for other issues only by way of interpretation, while it is quite clear that it can be applied to all subordinate workers in all sectors, regardless of the length of the work relationship or the type of contract signed by the worker.

LATVIA – *Kristīne Dupate*

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

In general there are two categories of workers: workers in the private sector covered by the Labour Law²⁷³ and civil servants and officials in the public sector covered by several special laws.

Articles 7(2) and 29(1) prohibit differential treatment based on sex. Article 29(1) explains that differential treatment is prohibited with regard to access to employment, during the employment relationship, in particular, regarding working conditions, pay, vocational training or improvement of professional skills, and also in case of giving notice of dismissal.

In principle, the provisions of the Labour Law are applicable to all workers in the private sector and also to workers in the public sector who are not subject to the special laws on civil service or officials. The Labour Law also covers all groups of atypical workers like fixed-term, part-time, agency work, telework etc. Consequently all groups of workers irrespective of the type of employment are covered by the provisions of the Labour Law.

Employment conditions of civil servants and officials are regulated by several special laws. Article 2(4) of the Law on the State Civil Service,²⁷⁴ Article 3(2) of the Law on Service

²⁷² Legislative Decree 9 luglio 2003, No. 215, published in O.J. No. 186 of 12 August 2003; Legislative Decree 9 luglio 2003, No. 216, published in O.J. No. 187 of 13 August 2003.

²⁷³ Official Gazette No. 105, 6 July 2001.

²⁷⁴ *Valsts civildienesta likums*, Official Gazette No. 331/333, 22 September 2000, with respective amendments on equal treatment, Official Gazette No. 180, 9 November 2006.

in the System of the Interior and Imprisonment System,²⁷⁵ Article 12(2) of the Military Service Law²⁷⁶ and Article 6(8) of the Home Guards of the Republic of Latvia Law²⁷⁷ provide that the provisions of the Labour Law on equal treatment are applicable. At the same time, the Law on Judicial Power²⁷⁸ does not contain any provisions on equal treatment in occupation nor any reference to the respective provisions of the Labour Law. Consequently, Directive 2006/54/EC has not been implemented with regard to judges.

Equal access to self-employment is provided by the Law on Prohibition of Discrimination of Natural Persons – Performers of Economic Activity.²⁷⁹ No law grants protection to self-employed persons with regard to service provision conditions or termination of service agreement, although the aforementioned Law grants the non-discrimination right with regard to access to and supply of such goods and services which are necessary for performance of self-employed economic activities.

Latvian law does not contain any legal norms referring to equal opportunities of men and women in employment. Such legal regulation exists neither with regard to private or public employers, nor with regard to executive and legislative powers when they adopt normative acts or policy measures.

Article 14(1)(d) of Directive 2006/54/EC has been implemented partially. There is no complete protection against discrimination with regard to access to membership of workers', employers' or professional organisation. The establishment and functioning of associations (non-governmental organisations) and foundations is regulated by the Association and Foundation Law.²⁸⁰ This Law is silent with regard to non-discriminatory selection of founders, members or executives. At the same time, if membership is a precondition for the access to self-employment, the non-discrimination obligation deriving from the Law on Prohibition of Discrimination of Natural Persons – Performers of Economic Activity is applicable. However, employees are not protected. The same problem arises for legal regulations with regard to membership of trade unions. The Trade Unions Law²⁸¹ does not contain any non-discrimination clause. Articles 10 and 11 of the Labour Law implementing Directive 2002/14/EC²⁸² also fail to explicitly stipulate the right to equal access or treatment with regard to the right to workers' representation (as an employee represented by others or an employee representing others). Although it may be claimed that the respective provisions must be interpreted in conjunction with other norms of the Labour Law, in particular Article 29, this may not work either, because the obligations of Article 29 are directed at employers while workers' representation is carried out via self-organisation of the employees themselves.

1.a. Equal pay

The structure of personal scope with regard to equal pay is the same as with regard to personal scope of the implementing measures of Directive 2006/54/EC in general: the Labour Law defines a general obligation of equal treatment in employment (Article 29) and an obligation of equal pay (Article 60). Such provisions are applicable to all employees, including employees with atypical employment agreements, and persons employed in the public sector as civil servants or officials, where special laws refer to the respective Labour Law provisions.

²⁷⁵ *Iekšlietu ministrijas sistēmas iestāžu un Ieslodzījuma vietu pārvaldes amatpersonu ar speciālajām dienesta pakāpēm dienesta gaitas likums*, Official Gazette No. 101, 30 June 2006.

²⁷⁶ *Militārā dienesta likums*, Official Gazette No. 91, 18 June 2002.

²⁷⁷ *Latvijas Republikas Zemessardzes likums*, Official Gazette No. 82, 26 May 2010.

²⁷⁸ *Likums "Par tiesu varu"*, Official Gazette No. 1, 14 January 1993.

²⁷⁹ *Fizisko personu – saimnieciskās darbības veicēju – diskriminācijas aizlieguma likums*, Official Gazette No. 89, 9 June 2006.

²⁸⁰ *Biedrību un nodibinājumu likums*, Official Gazette No. 161, 14 November 2003.

²⁸¹ *Likums "Par arodbiedrībām"*, Official Gazette No. 3, 31 January 1991.

²⁸² Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation, *Official Journal L 080*, 23/03/2002 P. 0029 – 0034.

At the same time, the wording of Article 60 of the Labour Law is to be considered problematic. The provision simply states that the employer is under the obligation to define equal pay between men and women for equal work or work of equal value. From the point of view of wording, it may be argued that Article 60 does not correspond with EU law, because it requires ‘to define equal pay’ not ‘to provide or pay equal pay’. In addition, none of the normative acts provide for criteria for the assessment of equal pay for work of equal value and none of the normative acts provide for the concept of pay within the meaning of EU law. This concern has already caused problems in practice in the context of the calculation of average pay for different purposes, e.g. compensation for unfair dismissal or unused paid annual leave, in cases where an employee had been absent from work on account of pregnancy, maternity, paternity or childcare.²⁸³ This demonstrates that incomplete wording with regard to material scope may lead to breach of the equal pay obligation with regard to personal scope.

Even though in the public sector with regard to equal pay Article 60 of the Labour Law applies, it is doubtful whether such principle is effectively applied in practice. This is because the determination of the amount of pay in the public sector is regulated by separate normative acts.²⁸⁴ Such normative acts provide for a gender-neutral system of definition of the amount of pay according to the post, qualification, length of service and other factors, but the legislator has never analysed such legislation from the perspective of gender equality which may lead to unequal pay on account of horizontal segregation of the labour market and subjective assessment of performance within administrative institutions.

1.b. Equal treatment in occupational social security schemes

Formally equal treatment in occupational social security schemes in general is covered by the same Articles 29 and 60 of the Labour Law and they cover all employees, including state officials and civil servants (except judges).

At the same time, more detailed regulation and its effect in practice is more complicated. First, this is because occupational social security schemes in Latvia in the classical sense only exist with regard to old-age pensions (insurance) and they are scarcely practised. Social security in Latvia is predominantly based on statutory social security schemes, which covers traditional social risks. Second, this is due to the lack of awareness and uncertainty regarding what constitutes social security schemes, taking into account the absence of classical ones (Western European practice). Third, there is uncertainty regarding the relationship between measures implementing provisions on occupational social security schemes under Directive 2006/54/EC and insurance products provided by insurance companies within the scope of Directive 2004/113/EC.

Regarding the first point: the provisions of Directive 2006/54/EC covering occupational pension funds have been implemented by the Law on Private Pension Funds.²⁸⁵ In particular, Article 11(2) provides that if an employer decides to provide participation in private pension plan in favour of its employees it must apply such benefit to all employees according to profession, length of service, post and other objective criteria. Further, Article 11(3) stipulates that participation of persons in a private pension plan must be provided on equal terms taking into account objective criteria irrespective of sex. It is the only piece of legislation explicitly implementing matters of equal treatment in occupational social security schemes in Latvia.

The second problem relates to the fact that Article 60 of the Labour Law only refers to equal pay without any further explanation on what elements pay within the meaning of equal pay embraces, thus employers as well as employees are not aware of the fact that all benefits connected with employment are included. In practice, some employers provide health, travel and life insurance to their employees, but they are not aware of the fact that all of such benefits fall under the equal pay obligation. Nor are employers aware of the obligation to

²⁸³ Decision of the Supreme Court (15 December 2010) in case No. SKC-694/2010, available in Latvian on <http://www.at.gov.lv/files/archive/departments/2010/694-10.pdf>, accessed 12 April 2012.

²⁸⁴ Remuneration Law of Officials and Employees of State and Municipal Institutions (*Valsts un pašvaldību amatpersonu un darbinieku atlīdzības likums*), Official Gazette No. 199, 18 December 2009.

²⁸⁵ *Likums par privātajiem pensiju fondiem*, Official Gazette No. 150/151, 20 June 1997.

retain rights under occupational social security schemes during family-related leaves such as pregnancy, maternity and paternity leave.

The third problem is the most complicated: how to distinguish between occupational social security scheme and related obligations of equal pay and insurance products offered by insurance companies within the framework of Directive 2004/113/EC. In reality in Latvia there is a considerable problem with health insurance provided by employers. This is because in general, health services are provided to all residents of Latvia by the state under the statutory health service scheme which is fully financed by the State and no contribution of any natural person (resident of Latvia) is required (except co-payment for a visit to doctor). State-paid medical services are not always accessible on account of insufficient state funding and state-paid medical services do not include all types of medical manipulation necessary. Also, they may be provided at a much lower level of quality than private medical services, and therefore it is considered to be a good benefit for an employee if a private health insurance giving the right to access to private medical services is provided by an employer. The range of medical services included in private health insurance and financial coverage of such services is defined by each separate private health insurance plan offered by an insurance company and depends on the financial means that an employer is able to allocate for the purpose of private health insurance to its employees. This leads to the situation where medical services included in private health insurance plans do not provide equal treatment with regard to sex. This especially concerns medical services relating to pregnancy and maternity. Usually such services are excluded. The same applies to travel insurance. To justify such situation, insurance companies rely on the provision of the Law on Insurance Companies and Their Supervision²⁸⁶ stipulating that insurance premiums and benefits may not differ on account of pregnancy and maternity. Namely, they insist on the fact that particular private health or travel insurance plans do not include pregnancy and maternity risks and therefore the aforementioned norm is not breached, because since such risk is not included there are no unequal premiums and benefits on account of pregnancy and maternity.

There may also be problems with life insurance, which is frequently used instead of a private pension plan. There are no effective mechanisms for employers to ensure that contributions required by an insurance company in order to get equally defined benefits for employees are based on objective criteria not taking into account sex. The same problem applies to private health insurance. Since each plan is exclusively prepared by the insurance company for each separate employer, the employer cannot be sure that the price proposed is not calculated on the basis of the composition of its employees by sex.

There are no occupational social security schemes for the self-employed. They have access to private insurance in the same way as any other natural person outside the employment relationship, i.e. within the framework of Directive 2004/113/EC.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

Article 29 of the Labour Law requires observance of the principle of prohibition of differential treatment on the basis of sex in the establishment of an employment relationship. Article 32(1) of the said law prohibits requiring workers of a particular sex in job advertisements and Article 33(2) prohibits asking discriminatory questions in job interviews, especially on pregnancy, family or marital status. Article 2¹ of the Law on Support of Unemployed and Jobseekers provides for the right to non-discriminatory access to recruitment services.

The same Article 29 of the Labour Law prohibits differential treatment with regard to promotion. No other legal norm provides for any more detailed regulation on what situations and what obligations such obligation involves and therefore it may still be unclear in practice for many employers.

There is no separate legislation dealing with issues of vocational training: the obligation of non-discrimination on the grounds of sex is provided by several laws relating to all kinds of

²⁸⁶ *Apdrošināšanas sabiedrību un to uzraudzības likums*, Official Gazette No. 188/189, 30 June 1998.

education and training. In that respect the Labour Law covers obligations of employers, the Law on Support of Unemployed and Jobseekers covers obligations of the State Employment Agency providing special training programmes to the unemployed, jobseekers and persons at risk of unemployment, the Education Law covers obligations of providers of official educational services and the Law on Protection of Consumer Rights covers obligations of providers of any other educational services. Formally Article 29 of the Labour Law provides for the prohibition of differential treatment on the basis of sex in the provision of vocational training or an improvement of professional skills by an employer. It is worth mentioning that there is no special legal regulation stipulating the employer's obligation to provide any vocational training to its employees at all. So, if such training is provided it is based on the free will of the employer, but it must comply with the principle of prohibition of differential treatment.

Article 2¹ of the Law on Support of Unemployed and Jobseekers²⁸⁷ requires observance of the principle of prohibition of differential treatment on the basis of sex. The same provision however allows differential treatment on the basis of sex if such differential treatment is based on a legitimate aim and the measures are proportionate. The latter provision was adopted to justify vocational training courses provided by the State Employment Agency to special target groups.

Article 3¹ of the Education Law²⁸⁸ requires provision of the right to education irrespective of sex. This means that all establishments providing official education – basic, secondary, professional or academic on the basis of programmes accredited by the State – are covered. With regard to other educational services, provisions on the prohibition of differential treatment of the Law on Protection of Consumer Rights²⁸⁹ are applicable.

The main problem with regard to equal access to employment and vocational training is that there are no legal norms requiring an institutional assessment of measures taken with regard to the labour market and the educational system from the perspective of the principle of gender equality. Provision of equal access to education and employment in Latvia is regulated only formally and does not provide substantial equal opportunities. It does not allow the introduction of substantive changes in either education or employment, and consequently there still is a very explicit horizontal segregation of the labour market in Latvia.

Self-employed persons only enjoy the right to equal access to self-employment.²⁹⁰

1.d. Collective agreements and case law

Collective rights and consequently collective agreements are not very well developed in Latvia and therefore do not contribute to clarifying personal scope.

The only relevant national court decision known and published by the Supreme Court of Latvia is the *Danosa* case.²⁹¹ The problem concerned the status of executives. Article 44(3) of the Labour Law allows definition of the type of contract of an executive by mutual agreement between parties. This means that this particular provision does not require the conclusion of an employment agreement even if the respective relationship corresponds with the characteristics of an employment relationship. In the dispute between Ms Danosa and her employer the question arose if rights on special protection during pregnancy were applicable to her, i.e. whether she could be considered as an employee within the meaning of Directive 92/85/EEC. The CJEU in substance found that Ms Danosa's status corresponded with the criteria of an employee under EU law, meaning that the rights provided by Directive 92/85 were fully applicable to her.

²⁸⁷ *Bezdarbnieku un darba meklētāju atbalsta likums*, Official Gazette No. 80, 29 May 2002.

²⁸⁸ *Izglītības likums*, Official Gazette No. 343/344, 17 November 1998.

²⁸⁹ *Patērētāju tiesību aizsardzības likums*, Official Gazette No. 104/105, 1 April 1999.

²⁹⁰ Law on Prohibition of Discrimination of Natural Persons – Performers of Economic Activity (*Fizisko personu – saimnieciskās darbības veicēju – diskriminācijas aizlieguma likums*), Official Gazette No. 89, 9 June 2006.

²⁹¹ *C-232/09 Dita Danosa v LKB Līzings SIA*. OJ C 13 of 15 January 2011, p.11; Decision of the Senate of the Supreme Court of Latvia of 19 January 2011 in Case SKC-1/2011. Available in Latvian on <http://www.at.gov.lv/files/archive/departments/2011/1-11.pdf>, accessed 12 April 2012.

1.e. Additional information

The main problem with regard to application of EU gender equality law in employment is the blurred distinction between an employee and a self-employed person. First, in practice almost throughout the EU there is a general problem regarding the distinction between these two forms of work.²⁹² Second, in the Latvian context it is more problematic because there are only two forms of work – employment and self-employment – without any other forms in between (like dependent self-employment) and legal regulation with regard to certain occupations and professions is unclear. This particularly concerns certain professions that are included in the Regulation of the Cabinet of Ministers on patent fees for natural persons who perform economic activities.²⁹³ This means that persons working in such professions are presumed to be self-employed and are protected only under the regime of discrimination protection applicable to the self-employed.²⁹⁴ These regulations, among other professions, include babysitters and personal carers of the sick. In many cases, activities of performers of these professions correspond with characteristics of employment relationships that are defined by Article 8(2²) of the Law on Income Tax.²⁹⁵ In this light it is unclear whether if characteristics of the duties performed by a babysitter correspond with that of an employment relationship she/he will still be considered as self-employed. Looking at this problem from the perspective of the hierarchy of legal norms, Article 8(2²) of the Law on Income Tax prevails over the Regulations on patent fees, because these Regulations were adopted on the basis of the Law on Income Tax and are consequently lower in hierarchy.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

The official point of view is that Directive 2004/113/EC has been implemented by the Law on Protection of Consumer Rights with regard to goods and services that are offered to the public, and by the Law on Insurance Companies and Their Supervision with regard to the access to and supply of insurance products and services.

There are some laws that overlap with the implementing measures of other gender equality directives: (1) the Law on Support of Unemployed and Jobseekers covers the access to services concerned with employment (job offers, training, re-training, private recruitment services (Directive 2006/54/EC)); (2) the Education Law covers the access to public and private official (accredited) basic, secondary, professional and academic education (vocational training (Directive 2006/54/EC)); (3) the Law on Prohibition of Discrimination of Natural Persons – Performers of Economic Activity covers the access to goods and services necessary for the performance of self-employed activities (Article 4(1) of Directive 2010/41/EU); (4) the Law on Social Security²⁹⁶ covers the access to and supply of any services under the statutory social security system including education, statutory medical care, state and municipal social services and social allowances and the statutory social insurance system (Directive 97/7/EC).

At the same time, not all goods and services publicly available are covered by non-discrimination rights. Firstly, Latvian law does not cover goods and services that are publicly offered by natural persons outside commercial activities, e.g. if a natural person publicly advertises the sale of his/her own apartment, because the Law on Protection of Consumer

²⁹² Thematic Report 2009: Characteristics of the Employment Relationship, European Labour Law Network, available in English on http://www.labourlawnetwork.eu/publications/prm/73/size_1/index.html, accessed 12 April 2012.

²⁹³ Procedure in which patent fees are applicable to economic activities of natural persons in a particular profession and their amount (*Kārtība, kādā piemērojama patentmaksa fiziskās personas saimnieciskajai darbībai noteiktā profesijā, un tās apmēri*), Official Gazette No. 206, 31 December 2009.

²⁹⁴ In particular, only with regard to access. Law on Prohibition of Discrimination of Natural Persons – Performers of Economic Activity (*Fizisko personu – saimnieciskās darbības veicēju – diskriminācijas aizlieguma likums*), Official Gazette No. 89, 9 June 2006.

²⁹⁵ Official Gazette No. 32, 1 June 1993.

²⁹⁶ *Likums "Par sociālo drošību"*, Official Gazette No. 144, 21 September 1995.

Rights only applies to transactions provided within the scope of commercial activities.²⁹⁷ Secondly, contrary to Article 13(b) of Directive 2004/113/EC, non-profit associations are not covered by the Law on Protection of Consumer Rights because they are precluded from providing any goods and services in return of pay, and consequently their activities are not considered as commercial. There is no legislation covering this situation.

2.b. Freedom to choose contractual partners

Under Latvian legal regulations, contractual freedom is not restricted at all if the supply of services or goods takes place outside public space, i.e. if they have not been offered publicly, in particular, without having been offered to an abstract group of persons. If, however, goods and services are offered publicly, the freedom to choose a contractual partner by a provider is restricted with regard to the sex of a person (consumer). Such an explicit provision, however, only ‘appears’ in the Law on Protection of Consumer Rights and in the Law on Prohibition of Discrimination of Natural Persons – Performers of Economic Activity.²⁹⁸ The Civil Law²⁹⁹ that provides the basic regulations of contract law does not contain any provisions on the principle of non-discrimination.

2.c. Collective agreements and case law

Neither collective agreements nor case law provide any clarifications or extensions of the personal scope of Directive 2004/113/EC.

2.d. Additional information

Article 4(2) of the Advertisement Law includes a prohibition of discriminatory expressions on the grounds of sex in commercials.³⁰⁰

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

The only law providing protection against discrimination on the grounds of sex in self-employment is the Law on Prohibition of Discrimination of Natural Persons – Performers of Economic Activity. This Law protects self-employed persons from discrimination with regard to access to self-employment and with regard to goods and services necessary for the performance of economic activities of the self-employed.

Self-employed persons have access to the statutory social security scheme. They are obliged to pay contributions to cover them against risks of old age, disability, sickness, maternity and parenting once their annual income reaches a certain level.³⁰¹

Spouses of self-employed persons in general do not have any protection in their capacity of spouse, except the unemployed married spouse of a self-employed person, who on a voluntary basis may participate in the statutory social insurance system to be insured against risks of old age, disability, maternity, sickness and parenting.³⁰² Married spouses may only enjoy the other rights (under the Law on Prohibition of Discrimination of Natural Persons – Performers of Economic Activity and in the field of statutory social insurance) on an

²⁹⁷ Article 1(4).

²⁹⁸ Articles 3¹(3) and 3(2) respectively.

²⁹⁹ *Civillikums. Ceturtā daļa. Saistību tiesības*, 28 January 1937.

³⁰⁰ *Reklāmas likums*, Official Gazette No. 7, 10 January 2000.

³⁰¹ The self-employed are subject to mandatory participation in statutory social insurance schemes if their monthly income reaches the amount of the statutory minimum salary, which is currently EUR 285 (LVL 200). The Cabinet of Ministers Regulations No. 992 ‘Regulations on minimum contribution object amount and procedure of definition of such amount for self-employed’ (*Noteikumi par valsts sociālās apdrošināšanas obligāto iemaksu objekta minimālo apmēru un tā noteikšanas kārtību pašnodarbinātajam*) adopted on 2 December 2008, Official Gazette No. 190, 5 December 2008.

³⁰² Article 5(3) of the Law on Statutory Social Insurance (*likums “Par valsts sociālo apdrošināšanu*), Official Gazette No. 274/276, 21 October 1997.

individual basis – as employees of a self-employed person or as a self-employed person themselves.

The main problem in practice is that the majority of partners/spouses do not enjoy protection, because they are either unmarried or married spouses working for the husband without having the official status of employee or self-employed person themselves, because that is expensive. The right to participate in statutory insurance schemes is also rarely used, because it is also expensive for persons with an average income.

Latvian family law does not recognize partnership outside marriage. In addition, there might be problems in case of divorce if the married couple had a common business. Although the Civil Law requires that matrimonial property be divided into equal shares, shares may still not be equal if one of the spouses proves that a particular part of the matrimonial property was earned with his/her own efforts only. Regarding the right to shares of a business undertaking or the relevant ownership rights, national court practice is that if the business belongs to only one of the spouses it is considered as his/her separate property and the other spouse has no rights, even if he/she proves having invested personal work in it. For example, in 2011 the Supreme Court found that the wife was not entitled to any property or share of an agricultural farm enterprise, because according to Latvian commercial law such form of business undertaking – agricultural farm – may only belong individually (i.e. it is an individual enterprise). Consequently, according to the decision of the Supreme Court in Latvia, commercial law prevails over reality – work input and financial investments provided by the wife during long years of marriage do not give her any rights to the business undertaking but just the right to claim back financial investments.³⁰³ It follows that in reality in Latvia assisting spouses of self-employed persons are not protected.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

In the Latvian context, Directive 2010/41/EU adds to the requirements of Directive 2006/54/EC only the right to be protected against discrimination with regard to access to and supply of goods and services necessary for the performance of economic activities in the capacity of self-employed person as provided by the Law on Prohibition of Discrimination of Natural Persons – Performers of Economic Activity.

3.c. Collective agreements and case law

Neither collective agreements nor case law provide any clarifications or extensions of the personal scope of Directive 2010/41/EU.

3.d. Additional information

Unfortunately Directive 2010/41/EU does not completely cover issues concerning discrimination in self-employment. In order to provide effective protection in Latvian context, the Directive should have to deal with discriminatory termination of service contracts, and provide a common concept of ‘helping spouse’ instead of the current system which allows the Member States an overly wide margin of appreciation to define ‘helping spouse’ from the perspective of both family law and commercial law.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

As provided in Section 1, the general provision prohibiting discrimination on the grounds of sex is Article 29 of the Labour Law, which applies to all employees. Further special laws regulating services in the public sector refer to respective provisions of the Labour Law on prohibition of differential treatment. Although Article 29(5) expressly stipulates that direct discrimination arises in case of less favourable treatment on the grounds of pregnancy,

³⁰³ Decision of 12 January 2011 in Case No. SKC-14/2011, available in Latvian on <http://www.at.gov.lv/lv/info/archive/departments1/2011/>, accessed on 13 April 2012.

maternity or paternity leave, some of such special laws especially stress the application of non-discrimination rights provided by the Labour Law with respect to pregnancy, maternity and paternity leave.³⁰⁴

No definition of a pregnant worker is provided expressly, although it follows from Article 37(7) of the Labour Law that a pregnant worker is a worker who informs the employer on her pregnancy for the purposes of demanding working conditions that are safe and healthy for the child and herself.

There is no explicit norm providing a definition of a worker in her period of maternity, although all norms providing special rights in connection to this (health and safety, adjustment of working time (Article 99), written consent for being sent on business trips (Article 53(3)), written consent for overtime (Article 136(7)), dismissal protection (Article 109(1))) define the period of maternity as one year after giving birth or the entire period of breastfeeding, which means that under Latvian law maternity is defined quite extensively. However, it is argued that such a long period providing special protection and special rights may lead to discrimination against women in the labour market in general.

4.b. Collective agreements and case law

There is no other national case law than the decision in the *Danosa* case, which is discussed in 1.d. of this country report.

Women whose ova have been fertilised in vitro, but not yet transferred to their uterus do not enjoy special protection under Latvian law.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

No rights are provided to the self-employed under Directive 92/85/EEC (the concepts of quasi/para-subordinate workers do not exist under Latvian law). The self-employed enjoy individual rights to maternity allowance under the statutory social insurance scheme, but such rights derive from Directive 2010/41/EU.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

The right to an 18-month childcare leave is stipulated by Article 156 of the Labour Law. Consequently, such right is provided to all employees employed in both the private and the public sector (also to atypical workers) and to civil servants and officials respectively via the special laws listed in 1. of this country report.

5.b. Entitlement to parental leave

Article 156 of the Labour Law grants the right to childcare leave on an individual basis. So, both parents (natural or adoptive) are entitled to it irrespective of each other. Such right may be used with interruptions until the child reaches/the children reach the age of 8. Employees (and civil servants and officials) in order to be entitled to such right are not required to have any qualification period. In addition, time spent on childcare leave must be fully taken into account for the purposes of calculation of the employment period (seniority). At the same time, the possibility of both parents to take childcare leave simultaneously in practice is restricted by statutory social insurance provisions providing the right to childcare allowance to only one parent at the same time, and such right is granted until the child reaches the age of 12 months.³⁰⁵

³⁰⁴ Article 3(2) of the Law on Service in the System of the Interior and Imprisonment System (*Iekšlietu ministrijas sistēmas iestāžu un ieslodzījuma vietu pārvaldes amatpersonu ar speciālajām dienesta pakāpēm dienesta gaitas likums*), Official Gazette No. 101, 30 June 2006; Article 12(2) of the Military Service Law (*Militārā dienesta likums*), Official Gazette No. 91, 18 June 2002; Article 6(8) of the Home Guards of the Republic of Latvia Law (*Latvijas Republikas Zemessardzes likums*), Official Gazette No. 82, 26 May 2010.

³⁰⁵ Article 10⁴ of the Law on Maternity and Sickness Allowances (*likums "Par maternitātes un slimības pabalstiem"*), Official Gazette No. 182, 23 November 1995.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

Self-employed persons are free to take parental leave of course, and if their income reaches a certain level, they are subject to mandatory statutory social insurance and are therefore entitled to childcare allowance until the child reaches the age of 12 months.

5.d. Additional information

The main problem relates to the right to combine childcare with active employment from the perspective of the right to childcare allowance under the statutory social insurance scheme. The requirement is that the parent is not allowed to work at all in order to be entitled to childcare allowance. Such rigid legal regulation especially endangers work opportunities of the self-employed after childcare leave.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

The protection against discrimination on other grounds than sex is provided by the Labour Law and by special laws regulating service in the public sector respectively.

The personal scope of the implementation measures of Directive 2000/43/EC is the same as that for gender equality directives.

Directive 2000/78/EC has not been implemented with regard to access to self-employment but the Ministry of Welfare has prepared respective amendments and these are currently in the legislative procedure on the way to the Cabinet of Ministers and further on to Parliament. The amendments envisage the inclusion of other discrimination grounds (provided by Directive 2000/78/EC) in the Law on Prohibition of Discrimination of Natural Persons – Performers of Economic Activity, which will then protect self-employed persons against discrimination on the respective grounds with regard to access to self-employment and with regard to access to goods and services necessary for the performance of activities of self-employed. The draft proposal also includes respective amendments to the Law on Protection of Consumer Rights³⁰⁶ which will then provide equal access rights to all publicly available goods and services outside the capacity of self-employed person. This extended version of amendments for the purpose of proper implementation of Directive 2000/78/EC was proposed in order to avoid contradictory situations where, for example, a natural person in a self-employed capacity would be protected against discrimination on the grounds of sexual orientation when buying goods in retail but not in a private capacity. In addition, the fact is that a self-employed person is allowed to use many goods and services for the purpose of economic activity only partially, e.g. only 70 % of telecommunication services and only 70 % of transportation (expenses relating to the use of a car) expenses.

It may be presumed that protection against discrimination on the grounds provided by Directive 2000/78/EC is formally granted in the field of social security (including education, statutory healthcare system, statutory social insurance schemes, state and municipal social services and allowances), because Article 2¹ of the Law on Social Security stipulates all relevant grounds except sexual orientation (however, the list of grounds is non-exhaustive due to the words ‘and other circumstances’).

From the perspective of Directive 2000/78/EC, the Education Law provides protection against discrimination on the grounds of religious or other beliefs. The Law on Support of Unemployed and Jobseekers does not provide protection against discrimination on any of the grounds stipulated by Directive 2000/78/EC. Both laws – the Education Law and the Law on Support of Unemployed and Jobseekers – contain a prohibition of discrimination on the grounds of sex, race and ethnic origin, because they are considered as the appropriate ones to cover regarding equal access to vocational training. It follows that since the said laws do not include all grounds provided by Directive 2000/78/EC the Directive has not been implemented with regard to access to vocational training.

³⁰⁶ In addition to the discrimination grounds of sex, race and ethnic origin the law already stipulates disability as a ground.

LIECHTENSTEIN – Nicole Mathé

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation***1.a. Equal pay***

National implementing legislation transposes the personal scope of application of Article 4 of Directive 2006/54 by norms of the Civil Code³⁰⁷ (ABGB) and the Gender Equality Act³⁰⁸ (GLG). Pursuant to Article 2 GLG gender equality applies to all private and public work contracts as well as other work environments. Article 3 GLG prescribes the prohibition of discrimination based on gender. Paragraph 1173(a) Article 9(3) ABGB provides for non-discrimination based on gender concerning equal pay. Paragraph 1173(a) Article 8 (b) ABGB regulates equal treatment of full-time and part-time workers as well as workers with temporary contracts and unlimited contracts. Whether other vulnerable or precarious work contracts are covered by Liechtenstein legislation is not explicitly regulated. Whether the law also covers such work contracts cannot be said with certainty, as case law on gender equality topics is still lacking in Liechtenstein.

1.b. Equal treatment in occupational social security schemes

Implementing national norms are Article 3(2)(e) and (f) GLG. According to these norms, non-discrimination is laid down with regard to the access to and the leaving of social security systems. Furthermore the following topics are covered by the non-discrimination rule: obligation to contribute, calculation of contributions, calculation of payments including additional fees for spouses and persons entitled to maintenance, as well as the conditions concerning the validity period and the perpetuation of the claim of benefits in social security systems. However, case law is again lacking.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

National implementing legislation transposes the personal scope of application of Article 14(1)(a)-(d) of Directive 2006/54 by norms of the Civil Code³⁰⁹ (ABGB) and the Gender Equality Act³¹⁰ (GLG). In Article 3(2)(a)-(d) GLG the wording has actually been copied from the Directive. Regarding atypical work contracts, Paragraph 1173(a) Article 8(b) ABGB regulates equal treatment of full-time and part-time workers as well as workers with temporary contracts and unlimited contracts. However, case law is again lacking in this field.

1.d. Collective agreements and case law

Collective agreements do not contribute to clarifying or expanding the personal scope of application of the provisions mentioned above and case law is completely lacking.

1.e. Additional information

There is no additional information.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services***2.a. Personal scope***

National implementing legislation transposes the personal scope of application of Article 3(1) and (4) of Directive 2004/113/EC by Article 4a(2) and 4a(4)(d) and (e) GLG. Pursuant to

³⁰⁷ Official Gazette, LGBI. 1967/34, last update 2011/366. Legislation is published on the Internet, see <http://www.gesetze.li>, accessed 17 April 2012.

³⁰⁸ Official Gazette, LGBI. 1999/96, last update 2011/212.

³⁰⁹ Official Gazette, LGBI. 1967/34, last update 2011/366. Legislation is published on the Internet, see <http://www.gesetze.li>, accessed 17 April 2012.

³¹⁰ Official Gazette, LGBI. 1999/96, last update 2011/212.

these provisions, the personal scope as well as the exceptions correspond to those prescribed by Directive 2004/113/EC.

2.b. Freedom to choose contractual partners

Pursuant to Article 4a(6) GLG the freedom to choose contractual partners is implemented as long as the decision is not only based on the sex of the contractual partner.

2.c. Collective agreements and case law

Collective agreements do not contribute to clarifying or expanding the personal scope of application of the provisions mentioned above and case law is completely lacking.

2.d. Additional information

There is no additional information.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

In Liechtenstein Directive 2010/41/EU has not yet been implemented. Therefore national implementing norms refer to Directive 86/613/EEC. Article 2(3) Commercial Code³¹¹ (*Gewerbegesetz*) regulates the activity of the self-employed. The first equality report of the Liechtenstein Government in 1997 stated that the legislation concerning commerce had to be free from any gender-based discrimination and had to be construed as gender-neutral from a material point of view. Provisions in the former Commercial Code were not allowed to have any gender-discriminatory effects. It was also stated in the report that Article 30 Section 2 of the former Commercial Code had been amended in 1996 so as to allow widows and widowers to continue a business enterprise based on the trading licence of the deceased spouse. Now it has been replaced by a new Commercial Code that no longer contains such a specific norm.

Article 46a of the Marriage Act³¹² (*Ehegesetz*) regulates the compensation for participating spouses of self-employed workers in the enterprise and entered into force on 1 April 1993. If one spouse performs work in the enterprise of the other spouse, he or she is entitled to compensation for this work. The amount of the compensation is calculated on the basis of the nature of the work and the period during which it is or was performed. The standard of living of the spouses in general and the maintenance allowance are also taken into consideration in this calculation.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

Concerning the principle of equal treatment, Directive 2010/41/EU confirms in its Article 4(1) the non-discrimination rule of Article 14(1)(a) of Directive 2006/54/EC. In my personal opinion it is very important to add the principle of gender equality explicitly in the context of Directive 2010/41/EU regarding the self-employed.

3.c. Collective agreements and case law

Collective agreements do not contribute to clarifying or expanding the personal scope of application of the provisions mentioned above and case law is completely lacking.

3.d. Additional information

There is no additional information.

³¹¹ Official Gazette, LGBI. 2006/184, last update 2011/307.

³¹² Official Gazette, LGBI. 1974/20, last update 2010/459.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

Several laws contain norms which are relevant to the subject: the Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*), the Labour Code³¹³ (*Arbeitsgesetz*) and the Sickness Insurance Act³¹⁴ (*Krankenversicherungsgesetz, KVG*). These implementing norms do not include definitions of the terms in Article 2 of Directive 92/85/EEC.

4.b. Collective agreements and case law

Collective agreements do not contribute to clarifying or expanding the personal scope of application of the provisions mentioned above and case law is lacking.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

In general the rights accorded by this Directive are granted to employed persons on certain conditions, such as a minimum period of insurance. If self-employed people or workers with atypical work contracts have been insured with an insurer for that specified period – because they have taken out insurance on a voluntary basis – it shall be possible to get allowance under the maternity insurance scheme.

4.d. Additional information

There is no additional information.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

Directive 2010/18/EU has not yet been implemented in Liechtenstein but the implementing legislative process is underway. The following information is therefore based on Directive 96/34. If the employee has been employed for more than a year or if the contract is concluded for more than one year, the employee is entitled to three months' parental leave. The right to parental leave is established upon the birth of a child and leave can be taken until the child is three years old. In the case of adoption or the permanent care of a foster child, leave can be taken until the child is five years old (Paragraph 1173a Article 34 (a)-(c) ABGB).

5.b. Entitlement to parental leave

See above under 5.a.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

To my knowledge there are no rights concerning parental leave granted to self-employed people. Workers with atypical work contracts only have such rights if they fulfil the conditions mentioned above under 5.a.

5.d. Additional information

There is no additional information.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

Directives 2000/43/EC and 2000/78/EC were not introduced into the EEA Treaty. Therefore Liechtenstein is not obliged to implement these two Directives. The differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC are therefore not relevant with respect to the national legal system.

³¹³ Official Gazette, LGBI. 1967/6, last update 2011/387.

³¹⁴ Official Gazette, LGBI. 1971/50, last update 2011/392.

LITHUANIA – Tomas Davulis

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

In Lithuania there are three acts of legislation dealing with the transposition of European gender equality law:

1. The Labour Code of 4 June 2002³¹⁵ mentions, among the principles of labour law, the general principle of the equality of subjects of labour law irrespective of, *inter alia*, their gender. It consolidates the principle of fair remuneration for work and provides for guarantees to pregnant women, breastfeeding women and women having recently given birth;
2. The Equal Opportunities Act for Women and Men (hereinafter: EOAWM)³¹⁶ aims at transposing gender equality directives, as provided in the Annex to this Act; and
3. The Equal Opportunities Act of 18 November 2003 (hereinafter: EOA),³¹⁷ as amended on 17 July 2008, which aims to transpose EU Equality Directives 2000/43/EC and 2000/78/EC, as provided in the Annex to this Act. The existence of the EOA has created a large number of problems with respect to clarity and legal certainty, as the two laws (EOAWM and EOA) regulate the issue to different extents and in different ways. The problem lies in the fact that with the amendments of 16 December 2008³¹⁸ sex was added to the list of grounds of the Equal Opportunities Act, thus formally creating a double coverage of discrimination on the ground of sex. The EOAWM is a *lex specialis* but the later Equal Opportunities Act is more advanced in terms of coverage because it addresses the public services *expressis verbis*. The Equal Opportunities Act is also more precise as far as obligations of persons are concerned but the competences of the Equal Opportunities Ombudsperson are regulated by the EOAWM in a more precise way.

In this country report the personal scope of the EOAWM will be explored because the EOAWM, and not the EOA, is seen as the transposition law for gender equality directives. In addition, the EOA has never been applied to solve gender discrimination problems because the EOAWM has a special character.

1.a. Equal pay

Under the Labour Code, men and women shall receive equal pay for equal or equivalent work (Section 186 Labour Code). The Labour Code is applicable to all employees, i.e. persons involved in a relationship based on a contract of employment. The employee and employer are parties to the employment contract. Section 94 of the Labour Code establishes three main criteria for this kind of relationship: remuneration, subordination and provision of services. In particular Section 94 of the Labour Code defines an employment contract as an agreement between an employee and an employer whereby the employee undertakes to perform work of a certain profession, speciality or qualification, or to perform specific duties in accordance with the work regulations established at the workplace, whereas the employer undertakes to provide the employee with the work specified in the contract, to pay him the agreed wage and to ensure working conditions as set in labour laws, other regulatory acts, the collective agreement and by agreement between the parties.

All persons bound by a contract of employment fall under this provision (e.g. trainees, heads of companies, temporary workers). However, there are similar relationships which due to special statutory regulations are not seen as employment under a contract of employment: professional sportsmen, public servants, members of the administrative or supervisory boards

³¹⁵ State Gazette, 2002, no. 64-2569.

³¹⁶ State Gazette, 1998, no. 112-3100.

³¹⁷ State Gazette, 2003, no. 114-5115.

³¹⁸ State Gazette, 2008, no. 76-2988. Translation into English is available on the Internet site of the Lithuanian Parliament: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=389500, accessed 1 September 2011.

of companies, judges, politicians, prosecutors, as well as advocates, assistants to advocates, bailiffs, assistants to bailiffs, notaries and assistants to notaries. Those persons are not considered employees and therefore they do not fall under labour legislation. Public servants are the only category which does fall under labour legislation by way of analogy of law: Section 5 of the Act on Public Service states that labour legislation shall be applied if there is a lack of legal stipulations in the Act on Public Service. Said provision has never been used to fill the gap of non-application of the principle of gender equality.

In accordance with Section 5 point 3 of the EOAWM, when implementing equal rights the employer must provide equal pay for the same work or work of equal value. The EOAWM refers to the employee-employer relationship, but gives no special definition thereof. This essentially means that only employees within the meaning of the Labour Code are covered by Section 5 of the EOAWM. Other persons having a relationship that is not formally considered as an employment relationship under the Labour Code are not covered by the EOAWM. Public servants are covered by way of analogy of law. However, in the case of application of the EOAWM to the public services by way of analogy, it is very doubtful whether administrative sanctions for violations of the EOAWM will be applicable in the same way as to employment relationships. The self-employed may be addressed indirectly when the EOAWM prescribes general duties of non-discrimination for public institutions and bodies.

There is no ‘quasi-subordinate’ category of workers in the Lithuanian legal system. Employees in atypical/precarious work relationships are covered because they are considered as employees.

1.b. Equal treatment in occupational social security schemes

On 19 June 2008 the EOAWM was supplemented to include the new provisions on the prohibition of discrimination based on sex in social security schemes, including those which aim to supplement or replace the state social security system. All schemes for sickness, invalidity, old-age pension, early retirement, accidents at work, occupational diseases, unemployment and social protection are covered by the principle of non-discrimination, including survivors’ pensions, allowances and other benefits.

The non-discrimination provisions in social security schemes are applicable to ‘employed persons’, including self-employed persons, persons who terminate their employment due to sickness, maternity, an accident at work or forced unemployment as well as persons looking for employment, disabled workers and persons who are entitled to receive the benefits on their behalf (Section 5(3) EOAWM). This means that public servants and other categories of state employees who are covered by the system of state pensions (military personnel, scientists and judges) fall under the principle of non-discrimination to this extent.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

The Labour Code expressly prohibits the rejection of job applications and the termination of employment contracts on the ground of sex (Articles 96(1) and 129(3)(3) of the Labour Code). The Labour Code contains no further provisions expressly prohibiting direct or indirect discrimination as regards access to employment, working conditions, and vocational training and promotion, but they are consolidated in the EOAWM. According to Section 5 of the EOAWM, the employer is obliged to apply gender-neutral recruitment and promotion criteria and conditions, except where the work can only be performed by persons of a particular sex where the necessity of a particular sex may be grounded on the nature of the activity or the context in which it is carried out, provided that the objective sought is legitimate and complies with the principle of proportionality. Furthermore, compulsory military service is reserved exclusively for men. As far as working conditions are concerned, the EOAWM obliges employers to provide equal working conditions and equal opportunities to improve qualifications, to provide equal benefits, to apply the principle of equal pay for equal work, including all payments. The special protection of women during pregnancy, childbirth and nursing as well as requirements for safety at work which are applicable to women and aimed at protecting women’s health have been withdrawn from the scope of

application of the principle of non-discrimination.

Persons that under Lithuanian law have a relationship other than an employment relationship are not explicitly covered by said provisions. Only public servants are covered by way of analogy of law. Self-employed persons (e.g. persons engaged in individual economic activity, professional sportsmen) are not covered, i.e. they receive no protection when it comes to conclusion or termination of a contract for professional services.

1.d. Collective agreements and case law

Collective agreements and/or case law do not contribute to clarifying or expanding the personal scope of application.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

Section 5-1 of the EOAWM is called ‘Implementation of Equal Opportunities for Women and Men in the Field of Protection of Consumers’ Rights’. It states that salespersons, producers and service providers: (1) must apply equal conditions of payment and guarantees for the same products, goods and services or those of equal value to *all consumers* irrespective of their sex; (2) when providing information on their products, goods and services or advertising them must ensure that there is no expression of humiliation, scorn or any restriction of rights or extension of privileges based on sex and public attitudes that one sex is superior to another. In addition, Article 7(1) of the EOAWM lists the actions of a seller or producer of goods or a provider of services that shall be treated as a violation of equal rights for women and men, thus subject to possible administrative sanctioning.

This means that the norm addressee is defined in a very broad way, covering each salesperson, producer and services provider. As possible exceptions employment and self-employment are not mentioned here.

However, the persons benefitting from these provisions are consumers only. In Section 5-1 of the EOAWM ‘Implementation of Equal Opportunities for Women and Men in the Field of Consumer Protection’ the term ‘consumer’ plays a central role. In accordance with Section 6.350 of the Civil Code, the consumer is always perceived as a physical person only. The supply of goods or provision of services can be denied to legal persons who are represented by physical persons of a certain sex.

2.b. Freedom to choose contractual partners

There are no stipulations to be mentioned here.

2.c. Collective agreements and case law

Collective agreements and/or case law do not contribute to clarifying or expanding the personal scope of application.

2.d. Additional information

The EOAWM does not explicitly cover transsexual people, pregnant women or women who have recently given birth.

The principle of non-discrimination applies to all private and public educational establishments and institutions of sciences or education. Pursuant to Section 4 of the EOAWM, they must ensure equal conditions for women and men when: (1) admitting to vocational education institutions and schools of higher education, improving qualifications, developing professional skills and acquiring practical work experience; (2) awarding grants and granting loans for studies; (3) selecting curricula; and (4) assessing knowledge.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

The transposition of Directive 2010/41/EU is very minimal. Section 3 of the EOAWM is called ‘The Duty of State and Municipal Institutions and Agencies to Implement Equal Rights between Women and Men’. It has been amended to introduce the new obligation of the State and municipal authorities and institutions to prevent sex discrimination and supplemented with the new obligation to not violate the equal rights of women and men while providing administrative or public services. The transposition of this Directive seems merely technical if we accept that it imposes obligations on the State and municipal authorities only. However, the Directive tends to govern all relations of self-employed persons and their spouses with third persons, and therefore we can argue that in Lithuanian law any relationships with state companies (e.g. the State Enterprise ‘Centre of Registries’ in Lithuania), public institutions having no tasks of public administration (e.g. the public body ‘Export Lithuania’), and private persons (notaries)³¹⁹ etc. are not covered.

Self-employed persons and their spouses (Article 2(1) a-b of the Directive) are not specifically mentioned in Section 3 of the EOAWM or other provisions of the EOAWM.

3.b. Relation between Directives 2006/54 and 2010/41

The EOAWM does not cover ‘the access to ... self-employment or occupation’ referred to in Article 14(1)(a) of Directive 2006/54/EC because there is no single provision in the EOAWM or other laws on the prohibition of discrimination of self-employed persons.

3.c. Collective agreements and case law

Collective agreements and/or case law do not contribute to clarifying or expanding the personal scope of application.

3.d. Additional information

There is no additional information to report.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

In accordance with Article 2(18) of the Law on Health and Safety of Workers of 1 July 2003³²⁰ ‘a worker who is breastfeeding’ shall mean a worker who provides the employer with a certificate issued by the health institution that she is raising and breastfeeding her child.

In accordance with Article 2(23) of the Law on Health and Safety of Workers ‘pregnant worker’ shall mean a pregnant worker who provides the employer with a certificate of pregnancy issued by the health institution.

In accordance with Article 2(24) of the Law on Health and Safety of Workers ‘worker who has recently given birth’ shall mean a worker who provides the employer with a certificate of having given birth and being raising a child until it reaches the age of one.

4.b. Collective agreements and case law

Generally, collective agreements and/or case law do not contribute to clarifying or expanding the personal scope of application.

Heads of companies are covered by labour legislation because they work under a contract of employment (except members of supervisory boards and administrative boards who work on the basis of a civil-law relationship). Women whose ova have been fertilised in vitro, but not yet transferred to their uterus will be not considered pregnant women.

³¹⁹ Of course, some of them will fall under the transposition provisions of Directive 2004/113/EC.

³²⁰ State Gazette, 2003, no. 70-3170.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

The Lithuanian legal system grants no rights to self-employed persons. The category of quasi/para-subordinate workers is unknown in the Lithuanian system.

4.d. Additional information

There is no additional information to report.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

Parental leave is granted by Article 180 of the Labour Code and is applicable to all employees having a contract of employment. No groups of employees are excluded from the scope of application of Article 180 of the Labour Code. Leave shall be granted to the mother (adoptive mother), father (adoptive father), grandmother, grandfather or any other relative who is actually raising the child, and also to the employee who has been recognised as the guardian of the child.

5.b. Entitlement to parental leave

Parental leave is granted until the child reaches the age of three (Article 180 of the Labour Code). No period of work, qualification or length of service is required to apply for parental leave.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

The Lithuanian legal system grants no rights to self-employed persons. The category of quasi/para-subordinate workers is unknown in the Lithuanian system.

5.d. Additional information

Case law extends the prohibition of dismissal and the right to apply for parental leave which would be longer than the relationship of employment itself.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

The transposition law, i.e. the EOAWM, uses the term ‘employee’ which is not further defined. Therefore the definition from the Labour Code is used, which means that only persons having a contract of employment are covered by the EOAWM. This has created a major problem of compliance with EU gender equality legislation, because public servants and the self-employed are not explicitly covered.

The EOA, which transposes Directives 2000/43/EC and 2000/78/EC, covers not only employees but also public servants and their employers. However, the self-employed are not covered by the EOA.

LUXEMBOURG – Anik Raskin

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

On 10 July 1974 the principle of equal pay for women and men for the same work or for work to which equal value is attributed was introduced by Grand Duchy Regulation. No changes to the initial version have been made since then. There has been no specific implementation of Directive 2006/54 at all.

According to Article 3 of the Regulation, the elements of pay, the categories and classification criteria for promotion as well as all elements taken into account for calculating

pay must be based on the same criteria for both men and women. However, the Regulation does not specify that these criteria shall be drawn up in such a way as to exclude any discrimination on grounds of sex.

As the Regulation refers to the general term of ‘workers’, one has to assume that vulnerable, atypical and precarious work contracts are also covered.

1.b. Equal treatment in occupational social security schemes

The legal framework for occupational pension schemes is provided by the Law of 8 June 1999. Self-employed workers are not covered by the Law. No legislative framework exists for this category which, however, has to subscribe to the Social Security Schemes.

The personal scope of Articles 6 and 10 is covered by Luxembourg legislation.

Occupational pension schemes that contain regulations which are contrary to the principle of equal treatment between women and men are declared null and void. Article 16 of the Law reproduces Article 6 of Directive 96/97/EC on the implementation of the principle of equal treatment for men and women in occupational social security schemes in its integral form. So, different levels of benefits are allowed, insofar as they may be necessary to take account of actuarial calculation factors which differ according to sex.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

The Law to implement Directive 2002/73/EC was adopted by Parliament on 30 April 2008. Since no national law aimed specifically at the self-employed existed before, this Law has been divided into two parts, the first of which creates a general framework of non-discrimination between women and men, whereas the second deals exclusively with aspects of work and employment.

The first part constitutes an autonomous Law applicable to all categories of workers (self-employed, employees and civil servants). Excepting the provisions on sexual harassment, Article 2 of the Directive is reproduced word by word. It includes definitions of direct and indirect discrimination as well as of harassment. Harassment within the meaning of the Law is deemed to be discrimination on the grounds of sex and is prohibited, and a person’s rejection of such conduct cannot be used as a basis for a decision affecting that person. This Law applies to both public and private sectors in relation to employment, to self-employment, occupation, vocational guidance and training, practical work experience, employment and working conditions and dismissal. It also applies to membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided by such organisations.

Associations and organisations that have a legitimate interest in ensuring that the provisions of the law are complied with may engage, with the approval of the complainants, in any judicial and administrative procedure on the condition that they receive ministerial approval.

Provisions concerning the protection of pregnancy and maternity are not considered as discrimination but as a condition for equal treatment between men and women. Specific measures may be adopted in order to ensure full equality in practice between men and women.

The second part of the Law contains provisions modifying existing specific legislative instruments (labour law and public service).

There are no precise provisions regarding the ‘duty holder’ of the protection of the self-employed, so that one can consider that this protection is more formal than real. Neither is there any specification on whether this protection covers self-employment contracts by employers/clients.

As the Regulation refers to the general term of ‘worker’, one has to assume that vulnerable, atypical and precarious work contracts are covered. This might be less clear regarding volunteers who may not be considered as ‘workers’ in the generally accepted meaning.

1.d. Collective agreements and case law

Regarding collective agreements, there is a legal provision consisting of an obligation to refer to the results of negotiation on different matters such as the application of equality plans of women and men. However, as there is no obligation to implement any specific measures, the social partners mostly respond to the law by mentioning that the matters have been discussed.

There is no case law accessible to the public to clarify or expand the personal scope.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

The Law implementing Directive 2004/113/EC entered into force on 21 December 2007.

Article 3 of this Law reproduces Articles 3(1) and (4) of the Directive. Thus, the Law applies to all persons (moral and physical) who provide goods and services which are available to the public and which are offered outside the area of private and family life and transactions carried out in this context. It applies both to the public and the private sector, including public bodies.

Furthermore, this Law does not apply to matters of employment and occupation, or to matters of self-employment, insofar as these matters are covered by other national law.

2.b. Freedom to choose contractual partners

Article 3(3) of this national Law specifies that it does not prejudice individuals' freedom to conclude a contract as long as the choice of contractual partners is not based on that person's sex.

2.c. Collective agreements and case law

As social partners usually do not include the area of goods and services in negotiations on collective agreements, there is no clarification or expansion related to this area.

There is no case law available.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

Directive 2010/41/EU has not been implemented yet. Directive 86/613/EEC has not been implemented by any specific legislation either. Social security contributions are mandatory for independent workers. Helping spouses may participate in the social security system on a voluntary basis.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

Neither of these two Directives has been implemented yet.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

The protection of pregnant workers and workers who have recently given birth or are breastfeeding was reformed by the Law of 1 August 2001.

According to Article 2(2), a 'pregnant worker' is a worker who has informed her employer of her condition by sending him/her a medical certificate. This Law does not give any definition of 'workers who have recently given birth'. However, in order to determine the period of maternity leave, the worker has to send a medical certificate stating the date on which the worker gave birth. Concerning the term 'workers who are breastfeeding', Article 2(3) only refers to workers who are breastfeeding longer than 8 weeks after having given birth, which is when the period of maternity leave ends. Workers who continue to

breastfeed after this period are entitled to two 45-minute breaks per working day, on the condition that they produce a medical certificate.

4.b. Collective agreements and case law

Collective agreements and case law do not contribute to clarifying or expanding the legal scope.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

The national social security system includes self-employed workers on a mandatory basis. Thus, self-employed workers enjoy protection regarding maternity, pregnancy and breastfeeding which is identical to that of employees.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

Directive 2010/18 has not been implemented yet.

Parental leave was introduced by law in 1999. According to this Law, workers who have worked in Luxembourg for at least twelve months for the same employer at the time of the birth or the adoption of the child are entitled to parental leave.

Part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationships with a temporary agency are not expressly excluded from the benefit of parental leave. However, the obligation of having worked for the same employer for at least twelve months may be an obstacle for many workers of that category.

5.b. Entitlement to parental leave

Parental leave is an individual right and cannot be transferred from one working parent to the other. It has to be used in order to take care of a child of up to 5 years of age.

As specified above, workers have to work for the same employer for at least twelve months before becoming entitled to parental leave. The Law specifies that a worker can use parental leave if this is not the case, but the new employer will have to agree to this. This applies to the paid six-month parental leave. However, in case of non-compliance with the twelve-month clause, workers only have a right to three months of unpaid parental leave.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

Self-employed workers have the same rights regarding parental leave as employees.

5.d. Additional information

After having announced a possible reduction of the duration of parental leave from six to four months, the Government decided to perform a detailed analysis of the results of the measure before any reform. The analysis will be carried out in 2012. A reduction of the duration of parental leave by the implementing law may result in a reduction of the protection afforded to workers in the field of parental leave.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

Currently the protection against discrimination in the field of access to and supply of goods and services does not include media, advertising and education regarding gender. However, the protection against discrimination on the other five grounds does include these areas.

Regarding employment and occupation, the protection is the same for the six protected grounds of discrimination. However, the sanctions differ concerning the prohibition of discrimination in job vacancy announcements. The national employment administration can only sanction job vacancy announcements that are discriminatory on the ground of sex.

FYR of MACEDONIA – Mirjana Najcevska

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation***1.a. Equal pay***

The Labour Law,³²¹ both in the context of antidiscrimination stipulations (Article 6) as well as in the part on salaries (Article 108), clearly states that for equal work male and female workers should be equally paid.

The Law on Civil Servants has a whole range of provisions introducing so-called salary scales. Salaries are elaborated in detail, but no specific category of employees is mentioned by name.³²²

The Law on Agencies for Temporary Employment, recently amended,³²³ has a provision (Article 14) declaring that the ceded employee (employees hired via the agency; subcontractor) cannot be paid less than non-agency employees for the same or similar work.

It is different for seasonal and part-time workers and for homeworkers.³²⁴ 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.

1.b. Equal treatment in occupational social security schemes

There are three laws dealing with pensions in Macedonia.³²⁵ There are no articles on discrimination or equality in the framework Law on Pensions and Disability Insurance.³²⁶ The Law on Mandatory Fully Funded Pension Insurance (last amended in 2009), in its Article 59 says: 'The form of contract for membership under paragraph (1) of this Article is the same for all members of the pension fund that manages the company'. Only the Law on Voluntary Fully Funded Pension Insurance explicitly mentions the prohibition of discrimination (in Article 3).

In addition, Article 6 of the Labour Law specifically declares that men and women have equal possibilities and treatment related to professional insurance schemes.

The Law on Agencies for Temporary Employment has no provisions specifically on professional insurance schemes concerning the ceded employees. However, Article 6 Paragraph 4 gives priority to 'payment of the unsettled contributions for pension and disability insurance, when activating the bank guarantee', while Article 11 envisages that the manner and period of providing 'contributions for social insurance' is an obligatory element of the agreement between the agency and the employer-user. However, Article 15 of this Law envisages that the employer-user shall be the 'duty holder' (active identification) in respect of health and protection during work.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

In view of the need to transpose Directive 2006/54/EC, the Law on Employment and Insurance against Unemployment was amended in 2010.³²⁷ A new provision (Article 1-a) was introduced according to which everyone has the right to access to employment without any restrictions according to the principle of equal treatment stipulated in the Labour Law and

³²¹ Labour Law, Official Gazette, No. 62/2005 (last amendment: No. 39/2012).

³²² Law on Civil Servants (revised), Official Gazette, No. 108/2005 (last amendment: No. 24/2012).

³²³ Law on Agencies for Temporary Employment, Official Gazette, No. 49/206 (last amendment: No. 136/2011).

³²⁴ Labour Law, Official Gazette, No. 62/2005 (last amendment: No. 39/2012).

³²⁵ Law on Pension and Disability Insurance, Official Gazette, No. 80/93, Law on Voluntary Fully Funded Pension Insurance, Official Gazette, No. 7/2008, Law on Mandatory Fully Funded Pension Insurance, Official Gazette, No. 29/2002.

³²⁶ Law on Pension and Disability Insurance, Official Gazette, No. 80/93 (in the period 1993-2009, 19 amendments were made to this law).

³²⁷ Law on Employment and Insurance Against Unemployment, Official Gazette No. 50/2010.

other laws. Furthermore, Article 1-b equals EU citizens to Macedonian nationals in this area, while Article 1-c introduces the possibility to request compensation in case of discrimination, as well as shifting the burden of proof.

The Labour Law itself stipulates that women and men have to have equal opportunities and equal treatment related to access to employment including promotion and vocational training, and working conditions.³²⁸

The prohibitions against discrimination in the access to vocational guidance, professional training, continuing professional training and practical work experience are stipulated in the general prohibition on discrimination in the Labour Law (Articles 6 and 7), as well as in the laws on different stages of education. In the area of higher education, it is envisaged that everyone has equal rights to acquire higher education and to be educated throughout their lives, and everyone has equal rights to lifelong learning.³²⁹

The Law on Agencies for Temporary Employment,³³⁰ in its Articles 3-b, 3-c and 3-d, stipulates non-discrimination and equality between regular and temporary employees in all of the above-mentioned aspects, except promotion, which is not mentioned at all.

1.d. Collective agreements and case law

The existing collective agreements do not cover these issues. No cases of discrimination have been reported in this area.

1.e. Additional information

The amendments to the Law on Agencies for Temporary Employment and the Law on Employment and Insurance against Unemployment, in theory, prevent cases as described in C-320/00 *Lawrence* and C-256/01 *Allonby* or C- 357/89 *Raulin*. Yet, it may have been exactly this that in practice has led to cases where temporary employees (subcontractors) are engaged on junior levels of hierarchy, while doing more complex work tasks (e.g. engaged as junior researcher while actually working as senior researcher).

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

The Law on Antidiscrimination³³¹ prohibits discrimination in the supply of goods and services.³³² This Law does not specify the duty holder or the party whose obligation it is to implement this Article.

Transposition of Directive 2004/113/EC is mentioned in the proposal for adoption of the new Law on Equal Opportunities for Women and Men.³³³ Its Article 3 (Implementation of the law) Paragraph 2 specifies as the subjects responsible for implementation of equal treatment of men and women in the access to and supply of goods and services all state, public and private subjects providing goods and services. Paragraph 4 of the same Article ‘prohibits discrimination based on sex in access to goods and services in public and private sector, including discrimination in premiums from insurance schemes.’ The personal scope related to the access to and supply of goods and services can be found in Chapter 4 (Entities responsible for adoption and implementation of measures in establishing the equal opportunities of women and men, and their duties) of this Law.

Article 3 of the Law on Voluntary Pension Insurance³³⁴ prohibits discrimination on the basis of sex. This general clause is not explained further in the text. Even more, Article 86 stipulates that the ‘Insurer can determine which employees or members can participate in an

³²⁸ Article 6, Labour Law, Official Gazette, No. 62/2005 (last amendment: No. 39/2012).

³²⁹ Article 3, Law on University Graduate Education, Official Gazette, No. 35/08.

³³⁰ Law on Agencies for Temporary Employment, Official Gazette, No. 49/206 (last amendment: No. 136/2011).

³³¹ Law on Prevention and Protection from Discrimination, Official Gazette No. 50/2010.

³³² Article 11, Law on Prevention and Protection from Discrimination, Official Gazette No. 50/2010.

³³³ Law on Equal Opportunities for Women and Men, Official Gazette No. 6/2012.

³³⁴ Law on Voluntary Pension Insurance, Official Gazette No. 7/2008 (last amendment: No. 17/2011).

occupational pension scheme and determine the contribution rate which will be paid for each'. Also, according to Article 85, the 'Insurer may cancel an occupational pension scheme, modify the rules of occupational pension scheme or change the voluntary pension fund which is included in an occupational pension scheme.' This implies that arbitrary decisions of employers are possible concerning the participation of employees in occupational pension schemes.

For better understanding of the matter, the transposition of the Directive could also be detected in the Law on Institutions³³⁵ (where the way to perform services of public interest is regulated, but discrimination or gender/sex dimension is not mentioned) and in the Law on Health Insurance³³⁶ (where compulsory health insurance covers employees, the self-employed, beneficiaries of retirement pensions, permanent financial assistance clients, independent farmers, the temporarily unemployed, and family members of employee).

2.b. Freedom to choose contractual partners

The general ban on discrimination on the basis of sex, stipulated both in the Law on Equal Opportunities for Women and Men and in the Antidiscrimination Law, implies that the choice of contractual partners is covered. However, there are no specific articles that address the issue of discrimination in the process of choosing this partner.

2.c. Collective agreements and case law

So far, collective agreements and other bylaws have not dealt with these issues or contributed to clarifying or expanding the scope of application of the laws, and there is no case law related to the implementation of this Directive.

2.d. Additional information

There is no additional information to report.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

Directive 2010/41/EU has not been transposed in Macedonian legislation. However, in the proposal for amendments to the Law on Employment and Insurance against Unemployment³³⁷ the transposition of Directive 86/613/EEC is given as one of the reasons for proposing the change of law.

The general anti-discriminatory principle is part of this Law (Article 1-a) and so is the right to request compensation, in case of discrimination (Article 1-c). The burden of proof is on the employer. The proposal states that the definition of 'self-employed person' complies with Directive 86/613/EEC: a 'self-employed person is a natural person that performs an independent economic activity or renders expert or other intellectual services thus generating income for his/her own benefit, under the conditions determined by law'. Regarding personal scope, there is no precise definition related to an obligation for implementation of anti-discriminatory activities.

In the articles of the Law on Employment and Insurance against Unemployment, where the mandate of the employment agency is explained, there are no activities to ensure or promote equality between women and men or to enable equal treatment of women and men. Article 28 stipulates that 'During employment intermediation, the employment agency and the employment intermediation agency shall be obliged to be particularly guided by: the indicated manpower needs of employers and the special requirements determined in the indicated needs; the unemployed person cannot be forced to accept the job offered; the employer cannot be forced to hire the offered work force; ...'. According to these provisions, the agency has no

³³⁵ Law on Institutions, Official Gazette No. 32/2005 (last amendment: No. 51/2011).

³³⁶ Law on Health Insurance, Official Gazette No. 25/2000 (last amendment: 26/2012).

³³⁷ Law on Employment and Insurance Against Unemployment, Official Gazette No. 50/2010.

responsibilities regarding discrimination, gender issues and the principle of equal treatment. Yet, the provision in Article 29 stating that ‘Employment intermediation which is not in accordance with the provisions of this Law shall be prohibited’ could be interpreted as an obligation on the employment agency to ensure equal treatment. Men and women engaged in an activity in a self-employed capacity have the same protection as others under this Law.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

Since the Law on Employment and Insurance against Unemployment does not transpose Directive 2010/41, there is no basis to assess whether the scope of equal treatment contained in Article 4(1) adds anything to the ‘access to ... self-employment or occupation’ referred to in Article 14(1)(a) of Directive 2006/54/EC.

3.c. Collective agreements and case law

There is no further clarification or explanation in collective agreements or in case law.

3.d. Additional information

There is no additional information to report.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

The Macedonian Labour Law does not define (Article 5) workers in accordance with the phases of maternity, although it uses the very same terms. It insists in its Article 163(1) that the employer must not require any data on pregnancy of a female employee, unless she submits them herself for the purpose of using her rights during pregnancy. However, it indirectly defines ‘female worker’ during the maternal phase as a category of worker that enjoys both ‘Special Protection’ (Chapter XII, Articles 160-171) and regular protection (ban on dismissal due to or during one of the maternity phases; ban on overtime). Maybe the most distinctive characteristic is that in any dispute between the employer and the pregnant employee, the opinion of the appointed doctor, i.e. the medical commission, shall prevail (Article 163(3)).

According to Article 8(2), the measures referring to special protection and assistance to pregnant women and women exercising any of the rights to motherhood protection are neither considered discrimination nor may they be considered a ground of discrimination.

4.b. Collective agreements and case law

On the one hand, the issues of special protection to which a female worker during a maternal phase is entitled are not envisaged as issues that collective agreements could deal with (Article 136), thus preventing any interference in this area.

On the other hand, the issue of maternity of managers is not dealt with by the laws in force. However, it should be noted that the Labour Law does not give any ground for distinguishing between a female manager and a female worker during any maternal phase, except that the employer shall not be obliged to take into account the restrictions on working hours, night work, annual leave, daily and weekly rest (Article 135).

In court practice, there have been no notable problems in the implementation of the protection of female workers during maternal phases (pregnant workers, workers who have recently given birth and workers who are breastfeeding).

4.c. Rights of the self-employed and/or the quasi/para-subordinate

The Labour Law has no restrictions or specific rules for the self-employed and/or the quasi/para-subordinate concerning maternity leave. However, neither is there any clarification regarding the exercise of the rights of these categories of employees. There are no other data or court cases which will confirm the implementation of the general rules for maternity leave related to part-time work, voluntary work or trial periods.

According to the Law on Health Insurance, those who have a right to salary compensation during pregnancy, childbirth and maternity leave (Article 14) are: 1) workers employed at a legal entity, self-employed persons, persons employed in an institution, in another legal entity performing public service activity, state body and body of the units of the local self-government and the City of Skopje; 2) citizens of the Republic of Macedonia who on the territory of the Republic of Macedonia are employed in foreign or international bodies, organizations and institutions, in foreign diplomatic and consular offices, in the personal service of foreign diplomatic and consular offices or in personal service of foreigners, unless otherwise determined by international agreement; 3) self-employed persons. Among those who are not entitled to salary compensation during maternity leave are: individual farmers and religious official persons.

4.d. Additional information

Although the protection of female workers during maternal phases is in line with Directive 92/85, the situation with the protection of female managers during maternal phases is questionable, considering that the employer is not obliged to take into account the restrictions on working hours, night work, annual leave, daily and weekly rest (Labour Law, Article 135). Such lifting of this ban on the one hand means that the situation as described in C-232/09 *Danosa* is not possible, yet. On the other hand, it means that the employer can put certain pressure on pregnant managers, and informally there have been such cases. However, no court cases have arisen from these situations.

There are many women working as unpaid labour (in agriculture, craftsmanship, trade)³³⁸ who are invisible and cannot use the benefits granted by law.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

Under the Labour Law (Article 8) ‘(3) In regard to employment requirements, the employees employed for a definite period of time shall not be treated less favourably than the employees for an indefinite period of time just because they have an employment contract for a definite period of time, unless the different treatment is justified by objective reasons.’ The employer is obliged to ensure equal treatment and the burden of proof in cases of discrimination is on the employer. Employment for an indefinite period of time and employment for a definite period of time both yield the same rights.

Rights related to seasonal work and part-time work depend on the number of hours for which the employee is engaged. As there is no further explanation, this can be interpreted as a different approach related to parental leave for different categories of employees. Concerning the different types of leave (among which we assume also parental leave) Article 49 states that ‘Employers employing the part-time employee shall be obliged to ensure the employee simultaneously using the annual leave and other absences from work, unless it would cause them harm.’ As there is no further explanation of ‘harm’, this leaves great room for different interpretations. Also, there is no clarification on the issue of parental leave related to Article 50 ‘Employment contract for work at home’ and Article 53 ‘Employment contract with housekeepers’. On the other hand, there is clarification on the rights of employees under Article 54 ‘Employment contract with managerial persons (managerial contract)’: Article 55 ‘Exercising the rights and obligations under employment of the management body (manager)’ states that ‘The management body (manager), during the period for which he is appointed, i.e. elected for that position, shall exercise the rights and obligations arising from employment at the employer where he is appointed, i.e. elected, in accordance with the provisions of this or another law, collective agreement and employment contract.’

As a general rule, under Article 25 ‘(2) When concluding an employment contract, the employer must not require provision of data about family, i.e. marital status and family

³³⁸ <http://www.mtsp.gov.mk/WBStorage/Files/Rodova%20Analiza%20Makedonski%2023%2002%202010.pdf>, accessed 19 April 2012.

planning, i.e. submission of other documents and proof that are not connected directly to the employment.’ However, regarding more than 30 % of unemployment in Macedonia, unemployment very often (just anecdotal data) arises from women having to sign an agreement for termination of employment in case of pregnancy.

As a general rule, Article 77 states that ‘Unfounded reasons for dismissal will be ‘approved leave of absence due to illness or injury, pregnancy, childbirth and parenthood and care for a family member’. We can only assume that this general rule applies to all categories of employees. The same assumption applies to Article 101: ‘The employer must not terminate the employment contract of the employee during pregnancy, childbirth and parenthood and absence for the purpose of taking care of children’. However, there are indications that part-time work may affect the rights related to paternal leave (Article 122 about part-time hours in exceptional cases very explicitly mentions that only ‘The employee referred to in Paragraph (1) of this Article who works less than the full-time hours shall have the same right to remuneration in accordance with the actual working duties, as well as to other rights and obligations arising from employment as the employee who works full time, unless otherwise defined by this Law’. This could mean that other employees will not have the same rights.

5.b. Entitlement to parental leave

The articles that refer to parental leave (Articles 161-171 of the Labour Law) give no further clarification on the issue of different categories of employees.

Furthermore, despite the existence of parental leave as a notion in the Labour Law, several articles connect parenting to women only instead of to both parents. Article 165 uses mixed grammatical determinations of gender (in most of the paragraphs, instead of using the neutral form, rights are related only to women).

5.c. Rights of the self-employed and/or the quasi/para-subordinate

In several laws (Labour Law, Law on Health Insurance, Law on Health Protection)³³⁹ parental leave is not related to the self-employed or to quasi/para- subordinate workers. Article 14 of the Law on Health Insurance only refers to women (‘Right to salary compensation during pregnancy, childbirth and maternity leave’). Furthermore, in the Law on Health Insurance even individual women farmers are excluded from the rights granted by Article 14.

5.d. Additional information

There is no additional information to report.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

The relation between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC is covered only by general antidiscrimination articles in several laws (Antidiscrimination Law, Law on Equal Opportunities and Labour Law).

MALTA – Peter G. Xuereb

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

Article 27 of the Employment and Industrial Relations Act 2002 (EIRA) provides as follows: ‘Employees in the same class of employment are entitled to the same rate of remuneration for work of equal value: Provided that an employer and a worker or a union of workers as a result of negotiations for a collective agreement, may agree on different salary scales, annual

³³⁹ Law on Health Protection, Official Gazette No. 43/2012.

increments and other conditions of employment that are different for those workers who are employed at different times, where such salary scales have a maximum that is achieved within a specified period of time; and Provided further that any distinction between classes of employment based on discriminatory treatment otherwise than in accordance with the provisions of this Act or any other law shall be null and of no effect.’ Then, further, according to Regulation 3A of the Equal Treatment in Employment Regulations³⁴⁰ (ETE Regulations), as amended in 2007, it is provided that: ‘3A. (1) It shall be the duty of the employer to ensure that for the same work or for work to which equal value is attributed there shall be no direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration. (2) The employer shall ensure, in particular, that where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.’ This effectively repeats Article 4 of the Directive. Curiously, the Regulations themselves do not define ‘remuneration’ but do define ‘pay’ as follows: ‘pay’ means the ordinary basic salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his or her employment from his or her employer. This repeats Article 2(e) of the Directive. Nor does the EIRA itself define ‘remuneration’, although it defines ‘wages’ as including ‘remuneration or other earnings’.

‘Vulnerable workers’ in Malta include those who are not registered as employed (informal work), are in casual or seasonal employment, are on short-term contracts, or are forced by their employers to work on a ‘self-employed’ basis, ‘own account workers’, and unpaid family workers. These and others are open to exploitation by their ‘employer’ through poor working conditions, including remuneration, which do not reflect the law as to minimum working conditions, payment of national insurance or fair wages. Immigrants tend to fall within the first two categories. A recent research study³⁴¹ focused on ‘vulnerable workers’ in entrepreneurship and employment in three industries: tourism, cleaning and language schools. It found that the problem was essentially one of lack of monitoring and non-enforcement of existing laws and regulations, as well as lack of awareness and empowerment on the part of the victims. It also found that women were predominantly the victims in many cases.

Part-time workers are governed by Article 25 EIRA and the Part-time Employees’ Regulations.³⁴² The obligation to ensure equal treatment is on the employer. Pay is governed by Regulations 3 and 4.

As to those who fall outside the formal designation of ‘employee’ as it emerges from the definitional scope of the EIRA (see 1.c. below), they would have to turn to human rights legislation in the case of discrimination, including the European Convention Act 1987 or special legislation such as the Equality for Men and Women Act 2002³⁴³ (EMWA). However, the concept of employee in the legislation is broad and is being broadened.³⁴⁴

1.b. Equal treatment in occupational social security schemes

The extension of the material scope to occupational social security schemes is, it is thought, reflected in Maltese law. However, there are some discrepancies in the wording of the main applicable legislation, namely the Equal Treatment in Occupational Security Schemes Regulations (Legal Notice 317 of 2005),³⁴⁵ especially Regulation 4 thereof. Article 6 of the Directive is textually transposed by Regulation 1(4) (a) of the Regulations.

³⁴⁰ SL 452.95 (where ‘SL’ stands for ‘subsidiary legislation’) Legal Notice 461 of 2004 as amended, available on <http://www.doi.gov.mt/en/legalnotices/2004/default.asp>, accessed 4 April 2012.

³⁴¹ *Research report: Unlocking the Female Potential* National Commission for the Promotion of Equality 2012. Available on https://secure2.gov.mt/socialpolicy/SocProt/equal_opp/equality/resources/research_outcomes.aspx, accessed 10 April 2012.

³⁴² Legal Notice 427 of 2002, as amended by Legal Notices 140 of 2007, 240 of 2008 and 117 of 2010, available on <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11213&l=1>, accessed 16 April 2012.

³⁴³ Chapter 456 of the Laws of Malta, available on <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8922&l=1>, accessed 4 April 2012.

³⁴⁴ See Section 1.c. below.

³⁴⁵ Available on <http://www.doi.gov.mt/EN/legalnotices/2005/09/LN317.pdf>, accessed 13 April 2012.

Now in force is the Retirement Pensions Act, Act XVI of 2011, which in part implements the Occupational Pensions Directive, Directive 2003/41/EC and related measures. It is to be construed accordingly. It regulates occupational retirement schemes and funds. Licensing is conditional upon satisfaction of stipulated conditions including those set out in relevant Union law, including the Occupational Pensions Directive.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

The main provisions as current at the time of writing are to be found in EIRA, as ‘supplemented’ however by other legislation, in the main by the Equal Treatment in Employment Regulations. The latter amplify the provision of the Act itself in places. For example, they apply the non-discrimination rules more widely to cover discrimination on the ground of sexual orientation, *inter alia*.

The scope of the anti-discrimination provisions in EIRA is determined in the first place by the definition provision, Article 2, which defines: (a) the ‘employee’ as ‘any person who has entered into or works under a contract of service, or any person who has undertaken personally to execute any work or service *for, and under the immediate direction and control of another person*, including an outworker, but excluding work or service performed in a professional capacity or as a contractor for another person when such work or service is not regulated by a specific contract of service’; (b) the ‘contract of service’ and ‘contract of employment’, which are defined together, mean an agreement, (other than service as a member of a disciplined force) whether oral or in writing, in any form, whereby a person binds himself to render service to or to do work for an employer, in return for wages, and, insofar as conditions of employment are concerned, includes an agreement of apprenticeship; (c) ‘conditions of employment’ is defined as meaning ‘wages, the period of employment, the hours of work and leave and includes any conditions related to the employment of any employee under a contract of service including any benefits arising therefrom, terms of engagement, terms of work participation, manner of termination of any employment agreement and the mode of settling any differences which may arise between the parties to the agreement; but it does not include professional ethics arising from any professional relationship between an employer and an employee’. ‘Apprentice’ has the meaning ascribed to it in the Employment and Training Services Act (Chapter 343 Laws of Malta) namely, ‘apprentice’ means a person over the age of fifteen years who is bound by a written agreement to serve an employer for a determined period with a view to acquiring knowledge, including theory and practice, of a calling in which the employer is reciprocally bound to instruct that person and ‘apprenticeship’ shall be construed accordingly.

Clearly, the key criterion as to personal scope of the principal employment discrimination law (EIRA) is the criterion of ‘immediate direction and control’. In the absence of such condition as embodied in a contract of service, written or oral, the anti-discrimination provisions of EIRA will not apply. A recently tabled Bill,³⁴⁶ if passed, will amend the definitions of contract of service and contract of employment in Article 2 of EIRA as follows: ‘contract of service’ and ‘contract of employment’ mean an agreement, (other than service as a member of a disciplined force) whether oral or in writing, in any form, whereby a person binds himself to render service to or to do work for an employer, in return for wages, and, insofar as conditions of employment are concerned, includes an agreement of apprenticeship: *Provided that unless otherwise specifically referred to in another law, in this Act or in any regulations made under this Act, irrespective of the declared nature of the relationship, whenever the employer exercises effective direction, control and choice over the nature of the work or the tasks being or to be performed by a person for the employer, that relationship shall be considered to be one of a contract of service and the person carrying out the work shall be deemed to be an employee of the employer;* (author’s italics show the proposed

³⁴⁶ Bill No.103 of 2012. The objects and reasons of the Bill are stated to be to clarify a number of provisions of the Employment and Industrial Relations Act. The Bill is available on <http://www.doi.gov.mt/EN/bills/2012/Bill%20103.pdf>, accessed 6 April 2012.

insert). It is thought that this amendment emphasises the element of ‘effective direction and control’ as the key element in the applicability of Part I of EIRA (including the anti-discrimination provisions).

Under the ETE Regulations, referred to above, and which can be considered as expanding upon EIRA, ‘employment’ is defined as meaning ‘employment *under a contract of service*³⁴⁷ and includes an apprentice as defined by Article 29 of the Employment and Training Services Act as well as the process of recruitment or training of any person with a view to engagement in employment, and in regard to a person already in employment, includes also a promotion to a higher grade or engagement in a different class of employment or appointment to an office or post’. It was the purpose of these Regulations to bring Maltese law into line with the Directive(s), at some cost to legal certainty insofar as the more comprehensive rules are to be found in these Regulations rather than in the EIRA itself as the parent Act under which the Regulations are adopted. It is clear, however, that the emphasis in terms of personal scope remains the existence of a contract *of service*.

Article 14 is implemented via Article 26 of EIRA. This is supplemented by the ETE Regulations, S.L.452.95), and in particular by Regulation 1(3)-(5) of these Regulations.

The scope of these measures has been extended to the public service under power given to the Minister by Article 48 of EIRA, through the Extension of Applicability to Service with Government (Equal Treatment in Employment) Regulations (SL 452.100), and in particular the Equal Treatment in Employment Regulations (S.L.452.95, Regulation 1(2). Also relevant are SL 452.97 (re part-time employees), S.L.452.99 (fixed-term contracts).

The recently promulgated Employment Status National Standard Order³⁴⁸ (Legal Notice 44 of 2012) goes some way to setting out the approach to the making of the distinction between employment and self-employment by establishing a presumption in favour of there being a relationship of employment should five out of eight listed criteria occur, with the result that the EIRA and Regulations made thereunder will apply. This offers an increased measure of protection to vulnerable workers.

The ETE Regulations refer only to ‘employment’. However, the Equal Treatment in Self-Employment and Occupation Order 2007³⁴⁹ further implemented the provisions of Directives 2000/43/EC and 2000/78/EC, and generally extended the applicability of provisions of the Equal Treatment Regulations to self-employment also in relation to conditions for access to self-employment or occupation. In the absence of case law it is not clear exactly how these provisions would be applied in all cases. Further, the Equality for Men and Women Act of 2003 (Chapter 456 Laws of Malta) contains provisions in similar terms to the EIRA and legislation made thereunder, and while saving such legislation, defines employment more widely in Article 2 as: “‘employment’ means *any gainful activity including self-employment* and includes promotion and transfer to another post, as well as access to vocational or professional training, the duration of the employment or its extension or termination’ (author’s italics). It is not clear who would be regarded as the duty holder, and clarification at EU level might be indicated.

1.d. Collective agreements and case law

There would appear to have been no extension by collective agreement or case law.

1.e. Additional information

It is expressly provided in Regulation 12A of the ETE Regulations of 2004, as amended in 2007, that: ‘It shall be *the duty of the employer* to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion.’

³⁴⁷ Author’s italics.

³⁴⁸ Legal Notice 44 of 2012, available on <http://www.doi.gov.mt/EN/legalnotices/2012/01/LN%2044.pdf>, accessed 13 April 2012.

³⁴⁹ Legal Notice 86 of 2007. The Regulations were made under the European Union Act, Chapter 460 of the Laws of Malta. See <http://www.doi.gov.mt/EN/legalnotices/2007/04/LN%2086.pdf>, accessed 13 April 2012.

A further point of additional information relates to a potentially important case, in the current context, of alleged unfair dismissal on grounds of pregnancy. It is currently pending in the Maltese Courts. It concerns a senior in-house lawyer in a major corporate group and may turn on the question as to whether she was or was not an ‘employee’. It is further dealt with in 4 below.

2. Directive 2004/113/EC on equal treatment for men and women in the access to and supply of goods and services

2.a. Personal scope

The EMWA itself provides for non-discriminatory advertising, and access to banking, financial services and insurance services and educational and training opportunities, and for fair compensation for spouses participating in the activities of a self-employed partner (with an exception where a community of property regime exists between the spouses).

The Access to Goods and Services and their Supply (Equal Treatment) Regulations (SL 456.01) (henceforth the Access Regulations), made under EMWA, implement Directive 2004/113 (Regulation 1(2)). Article 3(1) of the Directive is implemented by repetition in Regulation 1(3), while Article 3(4) of the Directive is rendered in Regulation 1(5) as: ‘These regulations shall not apply to matters of employment and occupation, nor to matters of self-employment, insofar as these matters are covered by other laws and regulations.’ This potentially creates borderline issues and puts an onus on Malta to continue to ensure that such other EU instruments as apply to employment, occupation and self-employment are properly implemented or amended in a timely manner.

2.b. Freedom to choose contractual partners

Article 3(2) of Directive 2004/113/EC is implemented by Article 1(4) of the Access Regulations where it is provided that the regulations do not prejudice the freedom of an individual to choose a contractual partner as long as such choice of a contractual partner is not based on the gender of that person.

2.c. Collective agreements and case law

There has been no elaboration or clarification through collective agreement or case law.

2.d. Additional information

Article 13(a)-(b) of the Directive has been rendered as follows by Regulation 10 of the Access Regulations: ‘10. (1) Persons and organisations to whom these regulations apply shall take the necessary measures to ensure that the principle of equal treatment is respected in relation to the access to and supply of goods and services within the scope of these regulations, and in particular that administrative provisions contrary to the principle of equal treatment are abolished and that any contractual provisions, internal rules of undertakings and rules governing profit-making or non-profit-making associations contrary to the principle of equal treatment are abolished or amended. (2) In any case, any provision or practice contrary to the principle of equal treatment shall be null and void.’

While the Access Regulations therefore appear through Regulation 10(1) to place the onus on the persons and organisations concerned to ‘take the necessary measures’, it remains overridingly the case that any contractual provision, internal rules or governing rules that persist – possibly even owing to any failure on the part of Government or Parliament – are rendered null and void *ipso jure*, and unenforceable, in virtue of Regulation 10(2). Enforcement of good practice, for example with regard to exclusion from places of leisure and entertainment for reasons of race, is another matter.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

The EIRA and the ETE Regulations made thereunder refer only to ‘employment’. As to self-employment and occupation, the Equality for Men and Women Act of 2003 (Chapter 456 Laws of Malta) as it stands (since no specific attempt has been made to amend it in light of Directive 2010/41/EU) contains provisions in similar terms to the EIRA and legislation made thereunder, and while saving such legislation, defines employment more widely in Article 2(1) as: “‘employment’ means *any gainful activity including self-employment* and includes promotion and transfer to another post, as well as access to vocational or professional training, the duration of the employment or its extension or termination’ (author’s italics). The language of Article 2(1) EMWA is not a restatement of Article 2(a) of Directive 2010/41/EU but can arguably be regarded as sufficiently in line, in that the key concept of gainful activity is stated to include ‘self-employment’ which, albeit not itself defined in EMWA, would most likely be taken to include the concept of ‘for their own account’. However, the fact remains that Article 1 of the Directive (subject matter) is not clearly and expressly re-stated in EMWA as it stands. While Article 2(3) prohibits discrimination, whether direct or indirect, and lists the four forms of prohibited discrimination, the later specific provisions that prohibit and attempt to define direct and indirect discrimination and harassment appear, as currently drafted, to feature in the Act in the particular context of true ‘employment’ in the sense of the employer/employee relationship (Articles 4, 5, and, but perhaps to a far less extent, Article 9 EMWA).

What might be said is that Article 2(1), definition of ‘employment’, and Article 2(3), definition of discrimination by listing the four cases of prohibited discrimination, when combined, substantially re-state the broad principle that is the subject matter of the Directive (Article 1), and bring the self-employed within the scope of the Act (EMWA) as required by Article 2 of the Directive.³⁵⁰ Perhaps less than ideally, harassment is prohibited not by Article 2(3) but by its own provision (Article 9 of the Act). As to participating spouses (note: *not* life partners), Article 7 of EMWA gives them the right to fair compensation for their activity commensurate with their contribution where they participate in the self-employed activities of their spouse and perform the same or ancillary tasks as their spouse’. This does not apply where the matrimonial regime of community of acquests or community of residue applies, as here there is an equally shared right to earnings. This substantially implements Article 2(b) of the Directive at least as far as ‘remuneration’ is concerned.

The way EMWA has been drafted also calls into question whether Article 4(2) of the Directive can be said to be *clearly* implemented by EMWA, since the definition of ‘discrimination’ in Article 2(3) does not cover harassment, for example. *Sexual* harassment is treated (prohibited) in Article 9 of EMWA in what appears to be a wider than ‘employment *ut sic*’ context. However, there is no mention of harassment in Article 9, nor is there direct mention of harassment *or* sexual harassment in Article 6 of EMWA, which is the provision that expressly prohibits discrimination in the contexts (‘areas covered’) referred to by way of example (banks etc.) in Article 4(1) of the Directive. Nor does the EMWA refer to instructions to discriminate, as would be required by Article 4(3).

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

My comment would be that while Articles 6, 7 and 8 of Directive 2010/41/EU are relatively specific, Article 4(1) is so broadly conceived that it is unclear how far it is intended to operate as a stand-alone provision. Further, the example given in Article 4(1) is already catered for in specific terms in the EMWA. It may be that national law will continue to be reflected for self-employed women and spouses in specific legislation based on more specific provisions in other Directives so that it is unclear what our national law has considered as having been

³⁵⁰ But not necessarily within the scope of employment legislation, which will depend also on the application of the Employment Status National Order 2012 (Legal Notice 44 of 2012). See Section 1 above.

added by the general part of Article 4(1) of Directive 2010/41 to Article 14(1)(a) of Directive 2006/54/EC, which latter provision is reproduced in Regulation 1 of the ETE Regulations – which in turn have been extended to the self-employed *mutatis mutandis* by the Equal Treatment in Self-Employment and Occupation Order 2007.³⁵¹

3.c. Collective agreements and case law

No clarification has been provided by these sources.

3.d. Additional information

The primary gap at the moment appears to be the failure as yet to implement Article 8 of Directive 2010/41/EU regarding maternity benefits. One might expect this to be done by amendment or extension of the Equal Treatment in Self-Employment and Occupation Order of 2007³⁵² as necessary.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding.

EIRA empowers the Minister to make regulations governing minimum periods of maternity leave, as well as parental and urgent family leave (Article 10). The relevant definitions are to be found in the Regulations so made. According to the Protection of Maternity (Employment) Regulations 2003 (S.L.452.91, Legal Notice 439 of 2003).³⁵³ “pregnant employee” means an employee who informs her employer in writing of her pregnancy and who subsequently, within fifteen days, formally informs her employer of her pregnancy and of the expected date of confinement by means of a certificate issued by a registered medical practitioner or midwife; “employee who has recently given birth” means an employee who has formally informed her employer of her condition by means of a certificate issued by a registered medical practitioner or midwife, and whose date of confinement was: (a) not more than fourteen weeks before in the case of a stillborn child, and (b) not more than twenty-six weeks before in the case of a live birth; “breastfeeding employee” means an employee who is breastfeeding during a period of up to twenty-six weeks after her date of confinement and who has informed her employer of her condition by means of a certificate issued by a registered medical practitioner or midwife’. These Regulations were made applicable to the public service by S.L.452.102.

Also according to Article 3(1) of the ETE Regulations, it is unlawful for a person to subject another person to discriminatory treatment, whether directly or indirectly, on the grounds of (inter alia) sex, including discriminatory treatment related to pregnancy or maternity leave as referred to in the Protection of Maternity (Employment) Regulations.

4.b. Collective agreements and case law

Collective agreements do not generally cover the matter. There is no relevant case law as yet. The subject of in vitro fertilisation as such is contentious in Malta and is not currently regulated by law. Although legislation is proposed, no Bill has been published as yet. It is not clear whether any proposed law will cover questions of employment at all.

On the other hand, an interesting case³⁵⁴ (the *Psaila Savona* case) may be in the offing in connection with alleged unfair dismissal on grounds of pregnancy by a high-flying in-house

³⁵¹ Legal Notice 86 of 2007. The Regulations were made under the European Union Act, Chapter 460 of the Laws of Malta. See <http://www.doi.gov.mt/EN/legalnotices/2007/04/LN%2086.pdf>, accessed 13 April 2012.

³⁵² Legal Notice 86 of 2007. The Regulations were made under the European Union Act, Chapter 460 of the Laws of Malta. See <http://www.doi.gov.mt/EN/legalnotices/2007/04/LN%2086.pdf>, accessed 13 April 2012. See further Section 4.c. below.

³⁵³ Available on <http://www.justiceservices.gov.mt/lom.aspx?pageid=27&mode=chrono&gotoid=452>, accessed 10 April 2012.

³⁵⁴ This report is based on the filing of a judicial protest as a prelude to possible court action. There is as yet no case reference on the Courts’ official website.

lawyer in a leading corporate group. She claims to have been unfairly dismissed on grounds of pregnancy. Her employer has argued that she is not an employee and is not covered by the relevant legislation, as well as that she was not dismissed on grounds of pregnancy. The case is currently proceeding. It might possibly test the limits of the anti-discrimination provisions of the EIRA and the Protection of Employment (Maternity) Regulations by reference to the definitions of ‘employer’, ‘employee’, ‘contract of service’, ‘contract of employment’. The proviso to be added to the definitions of contract of service and contract of employment by the Bill currently before Parliament³⁵⁵ might indicate an outcome in favour of the claimant if the facts show that she acted under instruction to a high degree, as the Bill is meant to ‘clarify’ certain provisions of the EIRA, and the claimant is likely to argue that irrespective of profession and designation she was ‘employed’ at the time of the occurrence of her dismissal, albeit as a highly qualified professional. The case might possibly give rise to the sort of preliminary reference that some academics and others hope will bring before the Court of Justice the issue of the personal (and/or relational) scope of EU anti-discrimination employment law.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

The *Psaila Savona* case referred to above may well prove to be an important case in this respect. It may also present an opportunity for the testing of the application of the Employment Status National Order 2012.³⁵⁶

It might possibly be argued that Maltese law has already implemented Article 8 of Directive 2010/41/EU regarding maternity benefits for the self-employed by Legal Notice 86 of 2007³⁵⁷ which extends the ETE Regulations to the self-employed. Regulation 2(1) of the ETE Regulations defines ‘discrimination’ as including any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC. Regulation 3(1) provides that it shall be unlawful for *a person*³⁵⁸ to subject another person to discriminatory treatment, whether directly or indirectly, on the grounds, inter alia, of sex, including discriminatory treatment related to pregnancy or maternity leave as referred to in the Protection of Maternity (Employment) Regulations. Further, Regulation 12A, *to be read mutatis mutandis*, provides that it shall be the duty of the employer to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion. However, it is also arguable that this does not make for sufficiently clear implementation, in that it does not of itself clearly grant an individual substantive right to maternity benefits, nor indicate the ‘duty holder’ with sufficient clarity. In general, the piecemeal and cross-referencing approach does not provide for clarity, or certainty for the self-employed. One may note firstly that Regulation 15 of the ETE Regulations provides that ‘These regulations shall be without prejudice to the Protection of Maternity (Employment) Regulations, the Parental Leave Entitlement Regulations,³⁵⁹ and the Urgent Family Leave Regulations’, and secondly that the Equal treatment in Self-Employment and Occupation Order 2007 (Legal Notice 86 of 2007 on which the first possible argument made in this section is premised) provides in Regulation 3 that the object of the Order is to ‘further implement the provisions of Directives 2000/43/EC and 2000/78/EC’.

4.d. Additional information

There is no additional information to report.

³⁵⁵ See Section 1.c. above.

³⁵⁶ See Section 1. above.

³⁵⁷ See Section 3.d. above.

³⁵⁸ Author’s italics.

³⁵⁹ This is relevant for Section 5.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

The relevant law is contained in the Parental Leave Entitlement Regulations (S.L.452.78, henceforth the PLE Regulations) made under the EIRA. The Regulations were made applicable to ‘service with government’ by S.L.452.102.

Clause 1(2) and Clause 1(3) of the Agreement are implemented through Regulation 3, which provides as follows: ‘3(1) These regulations shall apply to all employees, whether whole-time or part-time, and whether they are employed on an indefinite or a fixed term contract: Provided that in all cases the employee has been in the employment of the same employer for a continuous period of at least twelve months: Provided further that for the purpose of calculating the twelve month qualifying period in case of employees with a fixed term contract: (a) when there are successive fixed term contracts with the same employer, the sum of these contracts shall be taken into account, and (b) when there is a fixed term contract which is renewed within a six month period from its termination, the said period between the two contracts shall also be taken into account. (2) The minimum periods of entitlement mentioned in the preceding subregulation shall be applicable unless a shorter period of entitlement has been established in the contract of service of the employee or in a collective agreement applicable to the employee. (3) These regulations shall be applicable without prejudice to the introduction and implementation of more favourable provisions in collective agreements or other agreements entered into between the employer and the employee.’

It is provided that in the absence of specific provisions in the Regulations, words shall have the meanings attributed to them in the Act, i.e. the EIRA. Therefore terms such as contract of service, contract of employment, employment, employee, and employer are to be interpreted as indicated in Section 1.c. above.

5.b. Entitlement to parental leave

Clause 2(1) is implemented as follows by PLE Regulation 4(1): It shall be the individual right of both male and female workers to be granted unpaid parental leave on the grounds of birth, adoption, fostering or legal custody of a child to enable them to take care of that child for a period of four months until the child has attained the age of eight years: Provided that this right shall be granted on a non-transferable basis: Provided further that parental leave shall be availed of in established periods of one month each.

Clause 3(1)(b) is implemented through Regulation 3(1) (see above in 5.a.).

5.c. Rights of the self-employed and/or the quasi/para-subordinate

The PLE Regulations are drafted in terms of the employment relationship. The Employment Status National Standard Order (Legal Notice 44 of 2012) could have a bearing also in this context.³⁶⁰ It may be necessary for some amendment to be made to Legal Notice 86 of 2007 (the Equal Treatment in Self-employment and Occupation Order 2007),³⁶¹ in order to clearly establish rights to parental leave for the self-employed.

5.d. Additional information

Directive 96/34/EC was implemented by the PLE Regulations³⁶² whose applicability was in turn extended to ‘service with government’ by a further Regulation (S.L.452.102), as permitted by Article 10 and Article 48 of EIRA. It is not explicitly stated whether and to what extent they apply to employees in the wider public service, e.g. with public bodies, although it is thought that they are covered by the general context and by virtue of the wording ‘all employees’ in Regulation 3(1) of the PL Regulations. By contrast, for example, the ETE Regulations expressly provide that they: ‘apply to all persons *as regards both the public and*

³⁶⁰ See Section 1.c. above.

³⁶¹ See Section 4.c. above.

³⁶² Amended after commencement of infringement proceedings by the Commission. The Commission then closed the proceedings. See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1238&format=HTML&aged=0&language=EN&guiLanguage=en>, accessed 16 April 2012.

private sectors and including service with the Government in accordance with the Extension of Applicability to Service with Government (Equal Treatment in Employment) Regulations.’ (Author’s italics). No such express language is used in the Parental Leave Entitlement Regulations (which are ‘not prejudiced’ by the ETE Regulations).³⁶³

6. Differences in the personal and material scope between Directive 2006/54/EC, 2000/43/EC and 2000/78/EC

The ETE Regulations, and in particular Regulations 1 to 4, effectively implement Directives 2000/43 (and in particular Article 3(1)(a)-(d)) and 2000/78 (and in particular Article 3(1)(a)-(d)), as regards employment. In effect, the ETE Regulations created a more or less homogenous framework prohibiting discrimination in employment matters in the respective fields.³⁶⁴ A minimum transposition approach, reflecting the Directives, was taken, so that the differences between Directive 2006/54/EC and the other Directives were reproduced in the ETE Regulations. However, later revisions of the ETE Regulations remedied certain omissions or deficiencies of the EIRA or other legislation in implementing the former as regards discrimination on grounds of sex (for example, re equal pay, Regulation 3A added in 2007; and clearly imposing a duty on the employer to take effective measures to prevent discrimination on grounds of sex, Regulation 12A, also added in 2007)), or on the ground of disability (for example, on reasonable accommodation, Regulation 4A, added in 2007).

One major difference still outstanding is the fact that the national equality body (the NCPE) was not designated as the equality body regarding race or ethnic origin in all matters covered by the ETE Regulations. Instead this role was given to a government department, namely the Department of Industrial and Employment Relations, by Regulation 5A, added in 2011. It has recently been announced that the brief of the NCPE is to be widened (the last extension was to race and ethnic origin by the Equal Treatment of Persons Order of 2007)³⁶⁵ to include discrimination on grounds of sexual orientation, gender identity, religion and belief, and age, but Regulation 5A remains in place for the time being, although it is possible that responsibility in the area of employment discrimination on the ground of race or ethnic origin will also be transferred to the NCPE. Discrimination on grounds of disability is likely to remain the brief of the National Commission for Persons with a Disability established under the Equal Opportunities (Persons with a Disability) Act 2000.³⁶⁶

The ETE Regulations only deal with employment issues. As to Article 3(1)(e) to (h) of Directive 2000/43/EC, the Equal Treatment of Persons Order of 2007³⁶⁷ (ETP Order) is the main piece of implementing legislation.³⁶⁸ It vested the National Commission for the Promotion of Equality with the power to investigate complaints of discrimination on the ground of racial or ethnic origin, particularly in relation to: social protection, including social security and healthcare; social advantage; education; access to and supply of goods and services which are available to the public, including housing; and access to any other service as may be designated by law. The Legal Notice includes a clarification with regard to discrimination by banks, financial institutions and insurance companies.³⁶⁹ Moreover, the

³⁶³ Regulation 15 of the ETE Regulations.

³⁶⁴ The ETE Regulations were extended to access to self-employment and occupation by Legal Notice 86 of 2007 available on <http://www.doi.gov.mt/en/legalnotices/2007/04/LN%2086.pdf>, accessed 12 April 2012.

³⁶⁵ Legal notice 85 of 2007 available on: <http://www.doi.gov.mt/en/legalnotices/2007/04/LN%2085.pdf>, accessed 12 April 2012.

³⁶⁶ Chapter 413 of the Laws of Malta, available on <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8879&l=1>, accessed 11 April 2012.

³⁶⁷ Legal Notice 85 of 2007.

³⁶⁸ For a fuller review see T. Ellul, ‘Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC – Country Report 2010: Malta’ (European Network of Legal Experts in the non-discrimination field) at pp. 4-8 available on http://www.non-discrimination.net/content/media/2010-MT-Country%20Report%20LN_final.pdf, accessed 11 April 2012.

³⁶⁹ Article 5 of the Equal Treatment of Persons Order 2007 provides that no bank or financial institution or insurance company shall discriminate against any person in the grant of any facility in respect of the establishment, equipment or in the launching or extension of any business or the launching or extension of any form of self-employment or the insurance of that business or the person in self-employment.

Order went beyond the basic requirements of the Race Directive in the area of discriminatory advertising. However, it appears that the prohibition of instruction to discriminate under the Equal Treatment of Persons Order is more restrictive than under the provisions of the Directive,³⁷⁰ and it has been noted that the duty to provide reasonable accommodation only arises out of the Equal Opportunities (Persons with Disability) Act 2000 and only applies to the field of employment and hence only applies to employees to the exclusion of job applicants.

As for Directive 2006/54/EC, it is clear that the law does not adequately protect against discrimination in relation to gender reassignment at least when it comes to the provision of a public service in the matter of the issue of marriage banns, permitting a person whose gender has been reassigned to marry accordingly. This right has been denied at the highest level, that of the Constitutional Court, and the matter is now pending before the European Court of Human Rights in Strasbourg.

THE NETHERLANDS – Rikki Holtmaat

Introduction³⁷¹

Relevant legislation/abbreviations used in this country report

The following Dutch legislation implements the Directives that are mentioned in the questionnaire for this report. In this Introduction, some general features are described in relation to their personal scope, in order to avoid repetition when answering the individual questions for this country report.

The *Civil Code* (Book 7 on Labour Law) (CC) prohibits sex discrimination in private employment relations (Articles 7:646 and 7:647 CC). The Civil Code also prohibits termination of an employment relationship with a worker *because* he/she marries or enters into a registered partnership and with a female worker *because she is pregnant* (Article 7:667(7) and (8) CC). The Civil Code also provides for protection against dismissal *during* pregnancy or illness after the delivery (Article 7:670(1) and (2)).³⁷² It is equally prohibited to terminate an employment relationship *because* someone has used his/her right to parental leave or other forms of care leave (Article 7:670(7) CC). The *norm addressee*³⁷³ of these provisions is *the employer*. Implicitly, it follows from this that *rights holders* are all persons who qualify as a ‘worker’ under Article 7:610 CC. This means that the employee must have agreed to do the work personally (a) for a certain period of time (b) for payment and (c) in the service of the employer. The latter criterion refers to the right of the employer to give binding instructions about how, when and where the work should be done (the element of authority or subordination). In 1999, for ‘vague’ situations (homeworkers, persons who work on 0-hour contracts, flexible work contracts, long-standing freelance contracts, etc.) a presumption of an employment relationship was added in the law: Article 7:610a CC states that if someone works for someone else for at least three months on a weekly basis or for at least 20 hours a month, it is assumed that there is an employment relationship. According to a recent Act, the director of a listed company cannot be qualified as a worker in the sense of Article 7:610 CC. The Act has not entered into force yet.³⁷⁴

³⁷⁰ The scope of Article 2(2)(d) of the ETP Order is unclear in that it appears to operate by reference to harassment.

³⁷¹ For the topics of pregnancy and maternity protection and parental leave, I have had the assistance of Willemijn Roozendaal (PhD Nijmegen 2011, currently lecturer at the VU University Amsterdam), for which I am most grateful.

³⁷² In addition, the Civil Code also contains provisions prohibiting discrimination on the ground of the number of working hours (part-time/full-time; in Article 7:648) and the type of employment relation (fixed-term or permanent; in Article 7:649).

³⁷³ In this report, the term ‘norm addressee’ is used as a synonym for ‘duty bearer’ because it is the useable terminology in Dutch law.

³⁷⁴ Act of 6 June 2011, *Srb.* 2011, 275; the date of coming into force has been postponed for technical reasons (see *Kamerstukken II* 2010-2011, 32 873, no. 3).

The *Equal Treatment Act* for men and women in employment relations 1989 (ETA) prohibits discrimination in employment relations other than private employment relations.

According to *Article 1b(1) ETA* the *norm addressees* are ‘the competent authority’ of all public institutions (defined in Article 1b(2) ETA as ‘all institutions, services or enterprises that are under the direct authority of the State or any other public body’). *Rights holders* under Article 1b ETA are all civil servants who have a civil servants contract under public law or an employment relation under civil law.

Under *Article 1c ETA* the *norm addressees* are all ‘natural persons’, ‘legal persons’ and any ‘competent authority’ that has someone do work ‘under his authority’ on another basis than the civil code provisions or on a civil servants contract. ‘Under his authority’ has the same meaning as ‘in the service of’ in the Civil Code (‘subordination’). This is called the category of *gelijkgestelden*, i.e. persons who are *treated as if* they have a regular employment contract under the Civil Code or a civil service contract’, i.e. quasi/para-subordinate persons. *Rights holders* under Article 1c ETA are all persons who ‘work’ on another basis than what is covered in Article 7:646 CC or Article 1b ETA, e.g. volunteers, apprentices, persons working in sheltered employment, homeworkers, teleworkers, persons employed/paid by a manpower agency but actually working under the authority of another employer, persons who have been delegated to/stationed at another organisation, persons who are assigned to do community work while receiving a social security or welfare benefit and persons who follow an in-house training (intern or traineeship).

Article 2 ETA prohibits discrimination in the ‘liberal professions’. This provision does not mention any norm addressees or rights holders. Its *material scope* concerns ‘the conditions for access to and the possibilities to exercise and to develop oneself within a liberal profession’.

The term ‘liberal profession’ (*vrij beroep*: literally ‘free occupation’) might appear to be slightly narrower in scope than ‘self-employment’ (the term used in the Directives). However, in the Dutch interpretation of this concept, not only doctors, architects etc. are covered by it, but also freelancers, sole traders, entrepreneurs, etc.³⁷⁵ The ETC has attached a very broad meaning to this concept.³⁷⁶ Discrimination is therefore also prohibited in such working relationships where the hierarchy between the ‘organisation who gives an assignment to do the work’ and the ‘worker’ is absent, i.e. in fact with respect to all self-employed work. No *norm addressees* are mentioned in Article 2 ETA. Anyone who wants to conclude a contract with someone who works in a ‘liberal profession’ or who wants to engage into a kind of permanent co-operation with such a ‘worker’ (e.g. in an association of lawyers or notaries working together in one office), or who is involved in a professional organisation (*beroepsorganisatie*) of these workers has to refrain from discrimination. *Rights holders* are all persons who (offer to) do work for someone else outside the scope of what is defined as an employment relationship under civil or public labour law. Here the distinction with the access to goods and services sometimes becomes blurred. The latter area is covered under Article 7 GETA (see below.)

Article 4 ETA covers professional education. The personal scope of this provision is discussed in 1.c. (vocational training).

The ETA is specifically important for the right to equal pay (Articles 7-12) and the right to equal treatment in the area of occupational pension schemes (Articles 12a-12f).

The *General Equal Treatment Act* 1994 (GETA) covers (a) all employment relations, (b) the liberal professions,³⁷⁷ and (c) access to and supply of goods and services (including providing education, housing and healthcare).³⁷⁸ However, this Act explicitly provides that it

³⁷⁵ Insofar as this cannot be read in the provision itself, this interpretation has been deduced from the definition of ‘vrije beroepsbeoefenaren’ in the *Wet Arbeidsongeschiktheidsverzekering Zelfstandigen* (WAZ). See *Kamerstukken II* 1995-1996, 24 758, no. 3, p. 2.

³⁷⁶ Lastly confirmed in Opinion 2012-43 of 5 March 2012, where a franchiser was considered to fall under this provision. The ETC here refers to the Parliamentary Papers with respect to the Age Discrimination Act, where a similar provision is included: *Kamerstukken II* 2001-2002, 28 170, no. 3, p. 22.

³⁷⁷ See above under Article 2 ETA for the meaning of this concept.

³⁷⁸ In respect of the ground of race: this also covers social security and other forms of social protection.

leaves the provisions of the ETA intact (Article 4 GETA). Therefore, especially as concerns equal pay and occupational pensions, the ETA prevails over the GETA.

Article 5 GETA prohibits discrimination in *employment relations*. No *norm addressees* are explicitly mentioned here. However, the *material scope* of this provision is considered to cover all possible contractual relations where ‘work’ (in the widest possible sense) is involved, including situations where the ‘instruction element’ or ‘subordination element’ might not be clearly established. This may be deduced from the parliamentary discussions about the GETA.³⁷⁹ Article 5 GETA therefore also covers all possible kinds of ‘flexible work’ and all situations that fall under Article 1c ETA (see above). It also covers membership of supervisory boards of institutions or even persons who are representatives in a public body (members of local councils, Members of Parliament, etc.). The latter is controversial, but the Equal Treatment Commission (ETC)³⁸⁰ and most academic commentators have accepted this interpretation on the basis of an a-contrario interpretation of Article 5(4) GETA, where for the category of advisory or administrative functions an exception is made with respect to selection procedures and appointments that are based on political convictions. This means that for all other aspects of such functions or positions (promotion, pay, dismissal, etc.) the prohibition of discrimination is indeed applicable and that persons who fulfil such functions or positions fall under the personal scope of the GETA. The *norm addressees* of Article 5 GETA are not only employers themselves, but also all other organisations that are involved in recruitment or selection of workers, the establishment of the rules or practices concerning access to employment, employment conditions, promotion, vocational training and dismissal. This includes ministerial regulations, and regulations made by way of collective agreements or in pension schemes. This means that public administrators, social partners and boards of pension funds are also norm addressees. If a collective agreement contains a discriminatory provision, the employer is (also) personally accountable/liable for implementing such a provision. Persons who act on behalf of an employer (be it in the private or in the public employment area), i.e. directors and management staff, are held accountable as well: they also belong to the group of norm addressees. Behaviour of colleagues, co-workers, or clients that amounts to discrimination or (sexual) harassment does not fall under the personal scope of the GETA (or ETA), i.e. these persons are not norm addressees under this legislation. However, victims (as rights holders) can hold the employer accountable/vicariously liable. This is because there is a duty for the employer to safeguard working conditions that are free from any discriminatory behaviour. The *rights holders* under Article 5 GETA are all persons who perform ‘work’ for the norm addressees mentioned above. This involves not only persons who have an employment relation under civil labour law or public labour-law provisions, but also other categories of ‘workers’ (see Article 1c ETA).

Article 6 GETA covers the self-employed. The personal scope of this provision is the same as Article 2 ETA. It was the legislator’s aim that with the combination of Article 5 and 6 GETA, all ‘workers’ (all persons who offer their labour for payment) are covered under this law.³⁸¹

Article 7 GETA covers the area of goods and services. See under 2. of this country report.

The *Work and Care Act 2001* (*Wet Arbeid en Zorg*; WACA) regulates the right to maternity leave, parental leave and adoption leave. In general, this law applies to workers in a civil- or public-law employment relation (Article 1:1b and b WACA). In 2004, this Act was amended in order to (re)include a right for self-employed women to pregnancy and maternity leave benefits.

The *Working Time Act* (*Arbeidstijdenwet*, WTA) inter alia regulates working time for pregnant workers. The WTA applies to broader categories of workers than only those who have employment relations under civil and public law (including quasi/para-subordinate workers).

³⁷⁹ See *Kamerstukken II 1996-1997*, 25 006, no. 9, p. 6 and *Kamerstukken II 2001-2002*, 28 481, no. 1, p. 44-45.

³⁸⁰ E.g. Equal Treatment Commission (ETC) Opinion 1994-16, 1994-17 and 1998-105.

³⁸¹ *Kamerstukken II 1991-1992*, 22 014, p. 79.

The *Working Conditions Act* (*Arbeidsomstandighedenwet*, WCA), inter alia regulates the health and safety of pregnant workers. This Act has the same personal scope as the WTA.³⁸²

Personal scope: some general remarks

In many instances the personal scope is not explicitly defined in the law, i.e. neither a norm addressee nor a rights holder is mentioned. This must then be derived from the description of the material scope of a particular provision or Act. Therefore, some attention is given to the material scope of the relevant provisions and Acts.

Although this is not made explicit in any of the relevant laws, it follows from the system of these laws that in fact it is employees as well as consumers who are protected and not the employers or the providers of education or goods and services. (Equal treatment legislation is asymmetric in this respect.) This means that if an employee discriminates against his/her employer, he/she could possibly be held liable e.g. under tort law or criminal law, but not under equal treatment legislation as such.

The definitions of direct discrimination on the ground of sex in Article 7:646(5) sub b CC and in Article 1(2) ETA include direct discrimination on the grounds of *pregnancy, giving birth/delivery and maternity* into this concept. This means that pregnant workers and women who have (recently) given birth are explicitly protected. Under the ETA, this is not only applicable to women with a civil-law or public-law employment relation, but also to other categories of persons doing work (Article 1c ETA) and to self-employed persons (Article 2 ETA). This provision is lacking in the GETA. However, Article 4 of the GETA stipulates that it leaves the provisions of the Civil Code and the ETA intact.

For purposes of protection against discrimination *only natural persons* are considered to be rights holders. This follows from the Memorandum of Reply to the GETA, where the Government explained that the definition of ‘distinction’ in Article 1 GETA refers to making a distinction *between persons*.³⁸³ However, where a group of natural persons is a collective victim of discrimination (e.g. an association of female doctors or a church is refused a contract for hiring a meeting room in a hotel) their organisation may be seen as the rights holder, according to the Equal Treatment Commission (ETC).³⁸⁴ These decisions all concerned access to and supply of goods and services. In one case, the ETC allowed a company to submit a complaint against a customer, but this decision met with some (academic) criticism.³⁸⁵ In fact it is commonly held that legal persons (e.g. an association, an institution or an enterprise) do not fall under the personal scope (in the sense of being rights holders). As far as *liability* for discrimination is concerned (i.e. the personal scope in the sense of who is the norm addressee) *both natural and legal persons* can be held accountable.

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

Article 7:646 CC, Articles 1b and 1c ETA and Article 5(1)e GETA prohibit discrimination as regards (inter alia) ‘the conditions of the employment relation’ (or employment conditions). This includes pay. In the ETA, the right to equal pay has been elaborated in Articles 7-12. Article 7 ETA mentions Article 7:646 CC and Articles 1b and 1c ETA, meaning that these equal pay provisions cover all contracts concluded under civil and administrative labour law and also the ‘equated’ employment relations of Article 1c ETA. Article 7 ETA does not

³⁸² See for an extensive description of the right to various kinds of ‘care leave’ in the CC, WACA, WTA and WCA the PhD thesis of Willemijn Roozendaal: *Werk en Privé; de strijd om tijd in het arbeidsovereenkomstenrecht* University of Nijmegen 2011. See Chapter 11 on the personal scope of pregnancy- and maternity-related provisions and all types of care leaves (including parental leave).

³⁸³ *Kamerstukken II* 1991-1992, 22 014, no. 5, p. 87-88. Also, the new definition (as of November 2011 (Wet van 7 November 2011, Stb. 2011, 554) of a distinction in the GETA reads ‘if a person is treated less...’ etc.

³⁸⁴ See e.g. ETC Opinions 96-110, 98-31 and 98-45. In addition to this there is a possibility for associations to act on behalf of victims of discrimination if they have this as a (statutory) goal of their organization.

³⁸⁵ ETC Opinion 2003-142. See the contribution of Peter Rodrigues in: D. de Wolff (ed) *Gelijke behandeling, Oordelen en Commentaar 2003* Deventer, Kluwer 2004.

mention Article 2 ETA, and therefore self-employed persons are not covered under the equal pay provisions.

1.b. Equal treatment in occupational social security schemes

It is important to note that some aspects of occupational pensions may be regarded as ‘pay’. In that case, what is stated above (in 1.a.) is applicable. Other aspects of an occupational social security scheme may be seen as a condition of the employment relation more generally. In that case Article 7:646 CC, Articles 1b. and 1c ETA or 5(1)e GETA may be applicable.

Norm addressees:

Article 12a ETA covers *occupational pensions* and contains a wide definition thereof, i.e. defines a wide material scope, including pension arrangements both in the private and in the public sector of the labour market, and arrangements or regulations for organisations of professionals (liberal professions). *Article 12b(1) ETA* explicitly states that not only the employer (as addressed in Article 7:646 CC) and the competent authorities (as addressed in Article 1b ETA) must not discriminate on the grounds of sex in respect of occupational pensions, but that ‘others’ are also bound to this norm. According to the literature, this refers to the (boards of) pension funds or other parties that set the conditions for participation or benefiting from a fund (e.g. social partners who conclude collective agreements to that effect). The ETC has indeed heard cases that were directed against boards of pension funds or social partners.

It is important to note that Article 12b ETA does not mention the category of the ‘equated’ (*gelijkgestelde*) employers of Article 1c ETA. This means that these employers are not bound by the equal treatment norm under the ETA insofar as occupational pensions are concerned, unless the provision or practice that is contested also qualifies as a condition of the employment relation. Any discrimination in that respect is prohibited in Article 1c ETA. These employers/such provisions or practices might also fall under the wide provision of Article 5 (1) sub e GETA (see 1.a. above).

Article 2 ETA (concerning the liberal professions) prohibits discrimination in relation to inter alia ‘arrangements or regulations *between professionals*’³⁸⁶ (*beroepsgenoten*) ‘in the area of *social security*, not being occupational pensions in the meaning of Article 12a ETA’. If such an arrangement is about illness or disability to work, it is not allowed to make an exception for pregnancy and confinement. Article 2 ETA does not explicitly mention a norm addressee. It is taken that the provision in this regard pertains to organisations of professionals (e.g. an association of lawyers or medical doctors) who make an arrangement for their members and conclude contracts with insurance companies in that regard.

Rights holders:

All employees and civil servants who fall under the civil code provisions and Article 1b ETA (see the Introduction) have a right to equal treatment as regards occupational pension schemes. Persons whose activity is interrupted by pregnancy or maternity leave are explicitly covered under Article 12b(2) ETA. This Article states occupational pension schemes must not provide that the participation in the fund is interrupted during such leave. Other categories that are mentioned in Article 6 Recast Directive are not explicitly mentioned in the ETA. When seen as a ‘condition of the employment relation’ regulations or practices that concern occupational pensions may also be contested by persons who fall under Article 1c ETA or Article 5(1)e GETA.

³⁸⁶ ‘*Between professionals*’: this means that (in accordance with Article 8 Recast Directive) individual contracts and single-member schemes for self-employed persons are not covered! However, access to and supply of goods and services is covered under Article 7 GETA. This means that whenever such a contract is offered to an individual self-employed person under discriminatory conditions, this may fall under that provision.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

Access to employment:

Three stages are distinguished in this regard: (1) the recruitment; (2) the selection procedure; and (3) the drafting and concluding of a contract in which the conditions are specified.

Stages 1 and 2:

Article 3(1) ETA specifies that discrimination is not allowed as regards ‘offering a post or position’ and as regards ‘the treatment when filling in an open post or position’. This Article does not include a specific norm addressee or group of norm addressees. However, it must be presumed that they are the same as those covered under Article 7:646 CC and Article 1b and 1c ETA. In addition, a recruitment agency, a manpower agency or a head-hunter agency (that works on assignment of an employer or a public institution) may (also) be held accountable for the way it conducts the recruitment or selection of possible candidates.³⁸⁷ The wording of Article 3 (5) ETA is also indicative that a wide personal scope is meant: ‘If *someone* is liable under tort law, in relation to offering a post or position ... etc.’.

Article 5(1)a GETA prohibits discrimination when offering a post or position. The expression ‘offering a position or post’ (*het aanbieden van een betrekking*) in Article 5(1)a GETA and Article 3(1) ETA has a wide meaning. It includes all employment relations mentioned in the Civil Code (Article 7:610/7:610a in conjunction with 7:646) and in the ETA (Article 1b and 1c). However, since the Civil Code and the ETA require that there is a relationship of authority/subordination, the word ‘*betrekking*’ has a somewhat restricted content in Article 3(1) ETA. This is not so in Article 5(1)a GETA, which may also be applied in situations where a position in e.g. a supervisory board or board of directors of a large company or institution is offered.

Article 5(1)b GETA concerns job placement. Any kind of agency that assists in placing persons with employers is the norm addressee here.

Article 2 ETA and *Article 6 GETA* do not mention recruitment or selection of self-employed persons. However, this is covered under Article 5(1)a GETA and/or Article 7 GETA (access to/offering goods and services; see below in this country report).

Stage 3:

Article 7:646 (1) CC, *Article 1b ETA*, *Article 1c ETA*, *Article 5 (1) sub c and d GETA* all prohibit discrimination as regards concluding an employment contract.

Article 2 ETA and *Article 6 GETA* prohibit discrimination in relation to inter alia the conditions for access to the liberal professions. Insofar as self-employed work does not fall under Article 2 ETA and/or Article 6 GETA, it is covered under the wide concept of a position or post in Article 5(1)a GETA.

Employment and working conditions and promotion, including dismissal:

Article 7:646 (1) CC, *Article 1b ETA* and *Article 1c ETA* prohibit discrimination in respect of inter alia employment conditions, promotion and termination of the employment relation.

Article 7:667(7) and (8) CC prohibit dismissal of a woman *because* she marries and *during* pregnancy.

Article 7:670(7) CC prohibits dismissal *because* someone has used his/her right to parental leave.

Article 5(1)c-h GETA prohibits discrimination as regards employment conditions, promotion, and working conditions and the termination of an employment relation under the Civil Code or under a civil service contract.

Article 2 ETA and *Article 6 GETA* prohibit discrimination in relation to inter alia the possibilities to exercise a liberal profession and to develop oneself within such a profession.

³⁸⁷ If the employer or public service or institution has given an instruction to recruit or select in a discriminatory way, this also falls under the prohibition of giving an ‘instruction to discriminate’ in Article 1 sub a GETA.

It is important to note that the scope of the latter two provisions does not explicitly cover discriminatory termination of self-employment contracts by employers/clients. However, one could interpret ‘possibilities to exercise a liberal profession’ as including discriminatory termination or not re-concluding a contract on discriminatory grounds.³⁸⁸

Vocational training

Vocational training offered/paid for by the employer:

Article 7:646 CC and *Article 1b ETA* both cover ‘providing education’.

Article 5(1)f GETA covers ‘providing education, training or cultivation of skills before or during the employment relationship’.

It is important to note that *Article 1c ETA* does not mention education or vocational training. This means that ‘equated employers’ are not obliged to provide this on a basis of equality. However, such facilities could be captured under the wide term ‘employment conditions’ of *Article 5(1)e GETA*.

Article 2 ETA and *Article 6 GETA* capture education and training under the term ‘opportunities to develop oneself within the liberal profession’. In that case, the norm addressee would most probably be professional organisations or associations of (groups of) self-employed workers that offer such facilities for their members.

Rights holders are those falling under the scope of these provisions (see the Introduction).

Vocational education:

Article 4 ETA covers education that is a last step prior to entering the labour market including re-training and further education courses. This includes practical education (*praktijkonderwijs*, which forms part of secondary education); technical and vocational training for 16-18 year-olds (*middelbaar beroepsonderwijs*); higher technical and vocational training for 18+ (*hoger beroepsonderwijs*) and university education (*universitair onderwijs*). Apart from this, any vocational training course or practical training that is offered on the education market is covered. The scope extends from admission, through the treatment and applicable regulations during the education or course, to the examination. The *norm addressees* are ‘natural persons or legal persons who offer any such professional education or training facilities’ or ‘natural or legal persons who conduct the exam(s)’.

*Article 7(1) GETA*³⁸⁹ prohibits discrimination in respect of access to and supply of goods and services. Offering vocational training or education is seen as offering a service. In addition to education itself, the Article also covers ‘providing educational or career guidance’. The Article mentions as *norm addressees* ‘institutions which are active in the field of education’. All forms of professional education as described under *Article 4 ETA* (see above) are covered by this provision.

Every (aspiring/ex) student of any such institution that experiences/has experienced discrimination may bring a complaint under these provisions and is therefore a rights holder.

1.d. Collective agreements and case law

The author of this country report has no information about collective agreements possibly containing additional (clarifying) clauses concerning the personal scope of equality legislation.

In case law, especially that of the ETC, there are many cases in which the relevant provisions are interpreted as regards their personal scope. Often, the scope is interpreted in a wide sense. This especially goes for the GETA, where the concept of ‘work’ (i.e. who is a ‘worker’ or who can be seen as a norm addressee) is interpreted leniently by the ETC.

1.e. Additional information

There is no additional information available.

³⁸⁸ This interpretation is confirmed inter alia in ETC Opinion 2005-49, 2011-153 and 2012-27.

³⁸⁹ The norm addressees of *Article 7 GETA* are described in detail in 2.a. of this country report.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

Discrimination as regards access to and supply of goods and services is prohibited in *Article 7(1) GETA*. The following *norm addressees* are mentioned in this provision:

Article 7(1)a: in the course of carrying on a business or practising a profession. This expression is the same as in the criminal-law provisions (Article 429quater Criminal Code). It is clearly directed at all ‘business contracts’, i.e. contracts aiming for some kind of profit. Both natural and legal persons are covered.

Article 7(1)b: by the public sector. This expression has a wide meaning. Any organization that somehow operates under public authority or is providing a public service is covered. This may even include power stations or railway services as long as it is ‘governed’ by a public authority (which may be the case when such a company’s shares are in majority owned by the (local or national) government). However, unilateral governmental decisions and acts (e.g. a decision not to grant a subsidy) do not fall under the scope of Article 7.

Article 7(1)c: by institutions which are active in the fields of housing, social services or welfare, healthcare, cultural affairs or education. This includes a very wide range of organisations that need not have any commercial aims but that nevertheless offer publicly available services or goods. They need not be an officially registered or acknowledged ‘legal person’. The terms social affairs and welfare cover inter alia sports, childcare, care for elderly persons and social counselling. Culture covers inter alia museums, concerts, theatres and libraries. As far as education is concerned: this covers not only vocational education (see 1.c. above), but all forms of education and training that are offered by public or private institutions.

In respect of education, Article 7(2) states that educational institutions may restrict access to educational activities that are necessary for the realisation of the institution’s founding principles, unless this leads to discrimination on the sole ground of (inter alia) sex. Discrimination on the ground of sex is only allowed when required by the ‘particular nature’ of the institution and when for pupils of both sexes equivalent facilities are available.

Article 7(1)d: by private persons not engaged in carrying on a business or practising a profession, insofar as the offer is made publicly. This is a ‘remaining category’, i.e. covering everyone that is not covered in the first three sections. The restriction that ‘an offer is made publicly’ is made in order to exclude purely private matters. According to the drafters of the Act, this exclusion is necessary with a view to Article 10 of the Constitution (establishing the right to privacy). Another exception may be found in Article 7(3) where purely private relationships are excluded. This makes it possible for e.g. a single woman to offer a room in her house for rent to ladies only.

The *rights holders* are all natural persons who want to gain access to/conclude a contract with respect to goods and services, unless one of the exceptions in the scope or one of the justification grounds is applicable. This includes self-employed persons who are seeking to conclude a contract with someone who offers certain services or goods.

2.b. Freedom to choose contractual partners

In the GETA there is a closed system of justifications, as far as direct discrimination is concerned. Therefore, personal freedom to select a contractual partner on the basis of sex is limited by the prohibition to discriminate under Article 7(1) GETA, unless one of the exceptions mentioned above is applicable.

2.c. Collective agreements and case law

As to collective agreements, see 1.d. above.

The personal scope of Article 7 GETA has been under consideration by the ETC on many occasions, especially where the norm addressees were concerned and interprets the provisions widely (see 1.d. above).

2.d. Additional information

There is no additional information available.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity**3.a. Personal scope**

The right to equal treatment of self-employed persons, as defined in this Directive, is covered under the existing equal treatment legislation (see the Introduction), most importantly in Articles 2 ETA and 6 GETA. It is commonly held that spouses of self-employed persons who work with/for their partner are covered by these provisions. Other provisions that cover self-employed persons are *Article 12a-f ETA* (concerning occupational pensions) and *Article 7 GETA* concerning goods and services. The latter provision can be used by self-employed persons (or spouses of self-employed persons) who feel discriminated against, e.g. when trying to obtain a bank loan or an insurance policy.

Together these provisions form the implementation of several Directives mentioned in Article 1 Directive 2010/41/EU and in Paragraphs 7, 9-10, and 13 of the Directive's preliminary observations, as well as the former Directive 86/613/EEC. To this author's knowledge, the Dutch Government has not taken any action to implement this new Directive.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

The aspects of access to self-employment that are mentioned in Article 4(1) Directive 2010/41/EU are already covered by the provisions that implement Article 14(1)(a) of Directive 2006/54/EC (see 1.c. above). In terms of *personal scope*, I see no discrepancies between the two Directives or lacunas in the way that they have been implemented in the Netherlands. There may be a problem insofar as the *material scope* is concerned. Insofar as licenses and subsidies are needed to (re)start a business, it could be a problem that Article 7(1)b GETA (providing goods and services by public authorities) does not cover unilateral decisions by governmental organisations or institutions.³⁹⁰ However, any governmental body is also bound to Article 1 of the Constitution in which discrimination on the ground of (inter alia) sex is prohibited. Any such decision, if suspected to be discriminatory, may be appealed in an administrative court.

3.c. Collective agreements and case law

As to collective agreements, see 1.d. above.

The ETC has issued many decisions in which it has clarified (and widened) the personal scope of provisions protecting self-employed persons from discrimination (Article 2 ETA or Article 6 GETA and Article 7 GETA).

3.d. Additional information

There is no additional information available.

4. Directive 92/85/EEC on pregnancy and maternity**4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding**

Directive 92/85/EEC is implemented in a number of Acts as described below.

– The *Working Time Act (WTA)* contains a prohibition of night work, the right to resting time (Article 7 of the Directive) and the right to leave for medical examination (Article 9 of the Directive).

³⁹⁰ See ETC Opinion 2008-107 for a case where a woman complained that she had been discriminated against in the context of a local government social assistance regulation for persons who want to start their own company. Social assistance regulations (and unilateral decisions based on them) are only covered when it concerns the ground of race. A similar case can be found in ETC Opinion 2007-12, where the applicant was not given a permit by the local authorities to open a café.

The WTA has a definition of a ‘worker’, the scope of which is broader than the definition in the Civil Code (see the Introduction). A worker is someone who has a duty to work according to a civil- or public-law employment relation (Article 1:1(1) sub b in conjunction with sub a WTA), and the person who is working under the authority of someone else (Article 1:1 lid 2 sub b in conjunction with sub a WTA). Hence, the WTA is also applicable to temporary agency workers, internships, teleworkers, homeworkers, etc.³⁹¹ (quasi/para-subordinate workers). The norm addressee in the case of a temporary agency worker is the company on behalf of which the work is performed. Pregnancy is not defined, but the employer has the right to ask for a written declaration of a medical doctor or obstetrician to confirm the pregnancy (Article 4:5.1 WTA).

– The *Working Conditions Act (WCA)* and Governmental Decrees on the basis of the WCA: protection of health and safety of the pregnant worker (Articles 4, 5 and 6 of the Directive).

The personal scope of the WCA is similar to the personal scope of the WTA. Volunteers are explicitly excluded (Article 2.b WCA), which is not the case in the WTA. The *Arbeidsomstandighedenbesluit* (Working Conditions Decree)³⁹² contains definitions: a pregnant worker is a worker who is pregnant and has informed the employer of this fact (Article 3.5.b); a worker who is breastfeeding is a worker who is breastfeeding and has informed the employer of this fact (Article 3.5.c).

– The *Work and Care Act (WACA)* covers pregnancy leave (Article 8 of the Directive), income during pregnancy leave (Article 11(2)(b) of the Directive) and the right to leave for medical purposes, including IVF treatment.

The WACA is applicable to workers who have an employment relation under civil or public law (Article 1:1a and b WACA), except for explicit extensions or restrictions. In case of the right to a social security benefit during pregnancy leave, the personal scope of the WACA is extended to the *gelijkgestelden*, i.e. workers who do not qualify as worker in the sense of Article 7:610 CC, but who work under similar conditions (quasi/para-subordinate workers). This type of extension is regular in the Dutch social security insurance laws.³⁹³ The regulations are too complicated to describe them in detail in this overview. We will give some broad outlines. The extension is applicable to employment relations characterized by a certain dependency of the worker.³⁹⁴ Examples are various types of flex-workers or homeworkers. For some of the *gelijkgestelden* a threshold applies: their employment relation must have lasted for at least 30 days, and the income must amount to at least 40 % of the minimum income as regulated by law. Also, for some employment relations the possibility of being covered under the social security schemes is restricted to those who work at least two days a week.³⁹⁵ Excluded from the scope of social security schemes are, among others, directors of a company who own a majority of the shares of the company and domestic staff that works on less than four days a week for the same employer.³⁹⁶ According to the Central Court of Appeal, the interpretation of ‘domestic staff’ includes not only persons cleaning the house or childminding and likewise, but also ‘professional carers’ such as trained nurses giving medical care at home in the service of an individual employer.³⁹⁷

The employer has the right to ask for a written declaration of a medical doctor or obstetrician to confirm the expected delivery date (Article 3:1 WACA). The same declaration has to be provided to the social security fund (Article 3:8 WACA).

³⁹¹ *Kamerstukken II* 1994-1995, 23 646, no. 6, p. 69-70.

³⁹² *Arbeidsomstandighedenbesluit*, *Stb.* 1997, 273, most recently amended *Stb.* 2012, 127.

³⁹³ S. Klosse & F.M. Noordam, *Socialezekerheidsrecht*, Kluwer 10th ed., 2010, Paragraph 2.2.4. In the WACA, there is a reference to the personal scope of the Sickness Act (*Ziektewet*) (Article 3:6 WACA).

³⁹⁴ See Article 4 Sickness Act and Article 8 *Besluit aanwijzing gevallen waarin arbeidsverhouding als dienstbetrekking wordt beschouwd* (*Rariteitenbesluit*), *Stb.* 2008, 574.

³⁹⁵ See Article 1 and 5 *Besluit aanwijzing gevallen waarin arbeidsverhouding als dienstbetrekking wordt beschouwd* (*Rariteitenbesluit*), *Stb.* 2008, 574.

³⁹⁶ Article 6 Sickness Act.

³⁹⁷ CRvB 29 April 1996, RSV 1996/247.

– The *Civil Code* includes protection against dismissal during pregnancy (Article 10 of the Directive).

The Civil Code provides for protection against dismissal during pregnancy or illness after the delivery (Article 7:670.1-2).

– The *Civil Code* and the *Sickness Act* (SA) include income protection of pregnant workers outside the period of pregnancy leave (Article 11.2b of the Directive).

Pregnant workers who are absent because of pregnancy outside the official period of pregnancy leave enjoy income protection for two years on the basis of Article 7:629 CC and Article 29a SA (see for the personal scope, the discussion of the WACA, above). Domestic workers who work on less than four days a week for the same employer, only enjoy income protection for six weeks under Article 7:629 CC.

4.b. Collective agreements and case law

Relevant case law has been mentioned in 4.a. above. No woman whose ova have been fertilised in vitro, but not yet transferred to her uterus has as yet filed a lawsuit claiming the same rights as pregnant women, as far as we know.

As far as we know, the personal scope or definitions of pregnancy etc. are not clarified in collective agreements.

4.c. Rights of the self-employed and/or the quasi/para-subordinate.

The rights of quasi/para-subordinate persons have been described above, insofar as they exist (the category of quasi/para-subordinate persons in the WTA and the WACA; the *gelijkgestelden* in the WACA).

The WTA provides for the possibility to include self-employed persons (Article 2:7 WTA). This inclusion is applicable in some sectors.³⁹⁸ However, the section of the WTA on pregnant workers is not applicable to these self-employed persons.

The WACA grants a social security benefit during pregnancy leave to ‘independent’ or self-employed workers (Article 3:17 WACA). This benefit is much lower than for employees. This concerns workers who are fiscally regarded as enjoying profit from a business (Article 1:1 sub c WACA and Income Tax Act 2001). A rights holder of this benefit is, among others, the director/owner of a business. The domestic worker working on less than four days a week for the same employer is explicitly mentioned as rights holder in this regard (Article 3.17.1.a WACA). The duty holder is the social benefits fund.

4.d. Additional information

The reduced protection of domestic workers in social security regulations and in the Civil Code has been criticized, most recently by the European Commission and CEDAW. According to them, there is no objective justification for the indirect discrimination of (mostly female) domestic workers.³⁹⁹

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

The right to parental leave is provided for in the Work and Care Act (WACA) Chapter 6. The right exists for all workers who have an employment relationship under civil or public law (Article 1:1 a and b WACA). This includes part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency.

³⁹⁸ *Kamerstukken II* 1994-1995, 23 646, no. 3, p. 84-85; see e.g. Working Time Regulation of 4 December 1995, *Stb.* 1995, 599; Working Time in the Transport Sector, Regulation of 14 February 1998, *Stb.* 1998, 125.

³⁹⁹ L. Bijleveld & E. Cremers *Een baan als alle andere?: De rechtspositie van deeltijd huishoudelijk personeel* Leiden, Vereniging voor Vrouw en Recht Clara Wichmann 2010.

5.b. Entitlement to parental leave

The worker must be a parent recognized as such by law of a child under the age of eight and/or a permanent carer (e.g. foster parent) of a child under the age of eight and living at the same address as the child according to the municipal administration (Clause 6:1(1) and 6:4 WACA). Adoptive parents are parents by law.

According to Article 6:3(1) WACA the right to parental leave only exists if the labour relation has existed for at least one year. This waiting period can be extended by collective agreement (Article 6:8 WACA). According to Article 6:3(2), in the calculation of this term, successive periods in which work is performed for the same employer or for different employers who can be regarded as each others' successor can be taken into account, as long as these periods were not interrupted for longer than three months. Employers can be regarded as each other's successor for example if the same work is first performed as temporary agency worker and then on a regular contract. There is a Bill pending in Parliament that proposes to withdraw the waiting period of one year.⁴⁰⁰

5.c. Rights of the self-employed and/or the quasi/para-subordinate

None of the rights described above are granted to the self-employed. The relevant Chapter on parental leave in the WACA does not cover the category of the quasi/para-subordinate workers (*gelijkgestelden*) as defined in Article 3:6 WACA. This extension of the WACA is only applicable for the right to social security benefits during pregnancy leave.

5.d. Additional information

There is no additional information available.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

In the Netherlands, apart from the civil code provisions, we have four different equal treatment laws, each of which have their own explicit or implicit personal scope. In addition to the ETA and GETA (which also cover, in addition to sex, inter alia the grounds of religion, race/ethnicity and sexual orientation), this concerns the Disability Discrimination Act (DDA) and the Age Discrimination Act (ADA). Insofar as the personal and material scope in the area of employment relations and self-employment is concerned, all four Acts have the same cover. The Government is in the process of integrating these laws into one single new GETA.

NORWAY – Helga Aune

Introduction

Norway has a system that includes different Acts regarding different grounds of discrimination. The 1978 Gender Equality Act of 9 June 1978 no. 45 (GEA) covers all areas of society, not limited to issues of employment. This is also the Act implementing all sex equality directives. In addition there are provisions regarding parental leave, maternity and paternity leave, pregnancy and a right to leave for nursing/breastfeeding a baby in the National Insurance Act of 28 February 1997 no. 19 (NIA) as well as the Working Environment Act of 17 June 2005 no. 62 (WEA). Provisions in the NIA and the WEA must be interpreted in accordance with the provisions in the GEA. The Norwegian labour market is to a great extent covered by collective agreements, both for the public and the private sector. Collective agreements are only binding upon the unions and employers (organisations) entering into the agreements and their members. Collective agreements are not universally applicable generally apart from some Wage Agreements and these do not so far cover gender equality issues. The GEA also applies to collective agreements. When agreements refer to

⁴⁰⁰ *Kamerstukken II* 2010-2011, 32 855, no. 1-3.

gender equality issues this mostly relates to general issues regarding equal pay principles and policy aims. Some high-level employees will have private agreements with their employer ensuring that they receive full payment while on maternity/parental leave to ensure that their employer covers the gap between the benefits provided by the NIA and their personal salary.

Individuals who claim violation of their rights may present their complaint to the Equality and Anti-Discrimination Ombud for a decision. This is a free, low-threshold system. After having heard the parties through written statements, the Ombud will decide whether or not the GEA has been violated. The Ombud is not competent to award damages, but will recommend the violating party to pay compensation. If the alleged violating party does not want to comply with the decision of the Ombud, this party may present the complaint to the Norwegian Equality Tribunal. The Tribunal will give a binding decision, but still the courts have sole competence to award damages. The other option for the party is to file a claim with the general court or through membership of a union so that the union may bring the claim to the Labour Dispute Court. In practice very few cases regarding sex discrimination are handled by the courts, as the majority of cases are dealt with in the Ombud system.

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

Article 4 of Directive 2006/54/EC is transposed in GEA Section 5 which is generally applicable to all types of employees and applicants for a job. In regard to the general application of the GEA not only employers, but all people acting on behalf of the employer or a Temporary Work Agency are bound by the equal pay regardless of sex provisions. According to the Norwegian employment system, a worker is either a worker (employee) or a self-employed person, there is no ‘third category’ of workers. The courts apply an overall evaluation process to the various elements of the work carried out and the related arrangements when assessing whether a relationship is that of an employee or of a self-employed person. If a self-employed person hires another person, the self-employed person will in turn become an employer and thus fall under the obligation to respect Section 5 in the GEA.

1.b. Equal treatment in occupational social security schemes

Article 6 of Directive 2006/54/EC is transposed in GEA Section 2 which stipulates applicability of the Act to all areas of society not limited to employment. There are no parallel exclusions in the GEA as mentioned in article 10 of the Directive, in conjunction with Article 8 a) and b).

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

Article 6 of Directive 2006/54/EC is transposed in GEA Sections 3 and 4 which are generally applicable to all types of employees as well as self-employed persons. Duty holder is anyone performing an ‘act’ that may have consequences for anyone at all. A company may enter into a contract or terminate a contract with a self-employed person based on objective (business) reasons, but not related to any of the protected anti-discrimination grounds, such as sex, ethnic background etc. See in comparison the UK case *Jivraj v Hashwani*.⁴⁰¹

1.d. Collective agreements and case law

Collective agreements contribute to enforcing the provisions of the GEA by stating rights and principles in the collective agreements. In addition, unions have contributed to clarification by bringing equal pay cases to the Labour Disputes Court, see for instance ARD 1997-253 concerning the application of the seniority pay principle with regard to part-time workers. The employer claimed that the employees working in a 50 % position had to work for 8 years

⁴⁰¹ *Jivraj v Hashwani* (2011) UKSC 40, (2011) 1 W.L.R. 1872.

before they were to qualify for the 4-year seniority pay rise. The employer lost the case. See also ARD 1990 – 148 regarding equal pay to two different types of engineers, bio-engineers and department engineers. After a detailed evaluation of work tasks and responsibilities attached to the relevant positions, the bio-engineers were found to be victims of unequal pay and thus were to receive compensation and a pay rise.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

The Directive is transposed in GEA Section 2 which provides applicability of the Act to all areas of society not limited to employment. The only small exception is for especially religious interpretations of rituals in this respect. The GEA is enforced by the Gender Equality and Anti-Discrimination Ombud, which in her work over decades has ensured that the GEA is now applicable also in the field of goods and services.

2.b. Freedom to choose contractual partners

GEA Section 3 is applicable and in line with the requirements of Section 3(2) of the Directive.

2.c. Collective agreements and case law

Collective agreements may frequently state the rights/principles of equal treatment.

The Norwegian Equality Tribunal, previously Board of Equal Treatment, in two decisions decided that sex had been used as a variable for actuary calculations in violation with the prohibition against direct discrimination because of gender in GEA Section 3, see LKN-2004-1 regarding premiums for sickness and accident insurance and LKN-2001-10-29 regarding gender being used as a factor in risk evaluation of creditability.

2.d. Additional information

I suspect that in the insurance sector there may be inconsistencies and gaps in protection that deserve attention. Some terms of contract may be in need of some attention in relation to the requirements of the GEA. As far as school services and education are also covered by the GEA (in a broader sense than the EU/EEA prescribes), research shows that there is a need to carry out controls in regard to the efficiency of fulfilling the requirements of the GEA. This is especially clear as boys' scores are systematically poorer than those of girls.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

Directive 2010/41/EU was implemented by the EEA Committee and included in the EEA Agreement by decision no. 84/2011 of 1 July 2011. Directive 86/613/EC was removed from the EEA Agreement effective since 5 August 2012 on the same date as Directive 2012/41/EU entered into force.

In a Norwegian context the GEA already covers the situations as described in the Directive as the GEA covers all areas of society with few exceptions of interpretations of religious matters/texts. No one granting money, funds or support to e.g. a self-employed person may discriminate because of gender. The Directive has in practice contributed to legislative amendments to the National Insurance Act of 28 February 1997 no. 19 increasingly resulting in additional rights to self-employed persons in relation to parental leave etc. In the debate, this has also been a product of increased awareness to stimulate more women to start their own businesses and become self-employed.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

The GEA already covers the situations specified in the Directives.

3.c. Collective agreements and case law

Collective agreements and case law do not contribute to clarifying or expanding the scope of application.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

The definitions under Norwegian law are in line with the requirements in the Directive following Section 3 in the GEA and WEA Sections 12-1 (right to ante-natal examinations), 12-2 (parental leave), 12-3 (fathers; care leave in relation to birth), 12-4 (maternity leave), 12-5 (parental leave), 12-8 (time off, 1 hour per day for nursing/breastfeeding a child). In addition there are provisions in National Insurance Act of 28 February 1997 no. 19, Chapter 14, which apply to the right to payments/benefits during the aforementioned leave.

4.b. Collective agreements and case law

Collective agreements are obliged to follow the provisions in the GEA and actually do so in practice. Since the GEA, WEA and NIA are so detailed in their legislation there is no need for collective agreements to provide for additional provisions.

Case law from the EU has contributed to the development of legal protection. For instance, the protection against pregnancy discrimination was initially considered as indirect discrimination in the GEA, while it has been defined as direct discrimination since 2002. Case C-506/06 *Mayr* is another example where EU case law has contributed to clarifying the length of the protection.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

Self-employed persons are entitled to benefits during leave because of birth or adoption, maternity, parental and fathers' quota, with a coverage that is equal to that of employees according to NIA Chapter 14, following amendment to the NIA by an Act of 27 June 2008. Benefits from the NIA are paid by the NIA and are financed through the Norwegian tax system. Payments are limited to 6 G (the basic amount for the calculations for benefits according to the National Insurance System) (EUR 59 412 per annum). Norwegian law does not include the term 'quasi/para-subordinate'.

4.d. Additional information

Even though the protection against discrimination because of pregnancy and maternity is well known to the public now that the GEA has been in force since 1978, there is a number of complaints presented to the Equality and Anti-Discrimination Ombud each year. These cases regard a variety of situations: e.g. denial of work because of pregnancy, discontinuity of temporary contracts and failing to provide pay rise to employees on maternity/pregnancy leave.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

The Directive was enacted by the EEA Committee on 1 April 2011 and has been in force since 2 April 2011. Together with the discrimination prohibition in the GEA (gender) and the provisions in the Working Environment Act of 17 June 2005 no. 62 (WEA), the Directive ensures equal treatment of temporary workers, part-time workers and persons employed through a temporary agency, providing protection for all categories of workers listed in the Framework Agreement Clause 1. Employees and the self-employed are ensured equal rights to benefits according to the NIA.

5.b. Entitlement to parental leave

The Framework Agreement Clause 2(1) is reflected in the provisions of the WEA Section 12-3 (care leave) which provides adoption parents or foster care parents the right to two weeks of leave in relation to the immediate taking over of the care of the child. This right does not apply to adoption of stepchildren or if the child is older than 15. A father is also entitled to two weeks of care leave in relation to the birth of a child.

Parental leave is provided for in WEA Section 12-5(4), which provides the parents altogether a right to leave for a period of 12 months in total from the time the child is adopted. The same rules apply as those that apply to the birth of a child. The NIA provides for the right to benefits during the leave period, see Chapter 14. NIA Section 14-9 provides 47 weeks with 100 % pay (limited to a maximum of 6 G (the basic amount for the calculations for benefits according to the National Insurance System) (EUR 59 412 per annum) or 57 weeks of 80 % pay (limited to 6 G). In relation to adoption there is a leave of 44 weeks with full pay and 54 weeks with reduced pay. With the birth or adoption of more than one child the leave is extended by an additional 5 weeks per child for the second and following children. If a leave with reduced pay is chosen the extension of the leave is 7 weeks per child. The leave period may be split between the parents as long as they both fulfill the requirements for receiving the benefits, i.e. employment for at least 6 of the last 10 months before the birth or adoption (NIA Section 14-6). The only time that may not be shared between the parents as they like is the 3 weeks before the birth and the 6 weeks after the birth, which are reserved for the mother. Also non-transferrable are the 12 weeks reserved for the father (fathers' quota) (NIA Section 14-12).

Under the present legislative system, men are provided with 6 weeks more than women (after birth) as non-transferrable time of leave. This is peculiar and direct discrimination because of gender in violation of GEA Section 3. In practice most of the leave is taken by the mothers. The fathers' quota has played a decisive role in changing the way both parents as well as employers regard parental leave, now considered as something that regards parents and is not merely a women's issue.

On 17 February 2012 the Government proposed to amend the parental leave to a leave divided into three parts:

	Mothers' quota	Fathers' quota	'Shared leave'
100 % pay	12 weeks	12 weeks	20 weeks
80 % pay	12 weeks	12 weeks	30 weeks

Only 'shared leave' may be divided between the parents as they see fit. The proposal is scheduled for discussions in Parliament on 10 May 2012.

The Framework Agreement 3(1)(b) is respected through the provisions in NIA Section 14-6 stating a condition to receiving benefits that includes employment for at least 6 of the last 10 months before the birth or adoption. The type of contract is not of importance.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

Employees and self-employed people are ensured equal rights to benefits according to the NIA. Norwegian law does not use the term 'quasi/para-subordinate'.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

The general application of the GEA exceeding the areas covered by EU legislation provides room for active and creative measures to push the gender equality project forward. However, stuck as the gender stereotypical ways of thinking are in practice, the directives have still proved helpful in ensuring effective enforcements of the relevant rights. Noteworthy is also that Norway has a strong welfare state system through the NIA and the national insurance/social welfare benefits. This has allowed for a strong development of parental leave, including the fathers' quota which has been in force since 1993 and with a gradual

increase of the time of leave. The fathers' quota has proved to be an important instrument in changing the ideas of both parents and employers as to who takes care of the children.

POLAND – Eleonora Zielińska

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

In order to describe the personal scope of protection against wage discrimination, the most relevant are the following two legal acts: the Labour Code⁴⁰² (LC), which in Article 18^{3c} guarantees equal pay, and the so-called Antidiscrimination Law (AL),⁴⁰³ which admittedly does not explicitly mention the requirement of equal pay, although in Article 4(2) it provides for its general application to the conditions of undertaking and performing economic and professional activities. It seems that the term 'conditions of performing' is broad enough to also cover the issue of equal pay. It should be noted that the AL, in general, has a subsidiary character in relation to the LC, since it does not apply to employees regarding matters regulated by provisions of the Labour Code (Article 2(2) AL).

The LC may be applied exclusively to the parties of a labour relation (Article 1), i.e. employee and employer. Pursuant to Article 3 of the LC the employer shall be any organizational unit, even if it has no legal personality, and any natural person, if they employ the employees.⁴⁰⁴ Defining the term 'employee' in this Code is done by indicating the nature of the acts that create employment relations. So, according to Article 2 of the LC, an employee is a person employed on the basis of a work contract, designation, election, nomination or cooperative labour contract. It may happen, however, that a mere indication of the grounds of employment is not sufficient in order to establish whether a person qualifies as an employee or not. The designation or nomination for example may occur not only on the basis of an employment relationship, but also in an administrative-law relation, as is the case for uniformed services,⁴⁰⁵ who have their own service regulations, which exclude application of the LC, unless stipulated otherwise. It is worth noting that the list of persons qualified as employees included in Article 2 LC is exhaustive. Therefore, as a rule,⁴⁰⁶ the LC's protection does not cover forms of employment such as civil contracts (meaning contracts concluded under civil law),⁴⁰⁷ nor does it apply to outworkers, members of agricultural production cooperatives,⁴⁰⁸ or volunteers.⁴⁰⁹

⁴⁰² Labour Code Act of 26 June 1974, unified text: *Dziennik Ustaw* (Journal of Laws, hereafter Dz.U.), 1998 No. 21 item 92, with amendments.

⁴⁰³ Law of 3 December 2010 implementing several EU directives on equal treatment, Dz.U. 2010 No. 254, item 1700. It refers to the following directives: 86/613/EEC, 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC.

⁴⁰⁴ Article 3¹(1) LC explains that any act concerning any matter within the scope of the LC shall be performed on behalf of an employer being an organizational unit by a person or an authority managing such unit or a person designed for that purpose. (2) This rule applies accordingly to an employer being a natural person, who does not act personally.

⁴⁰⁵ According to jurisprudence of the Chief Administrative Court (NSA), service relations of professional soldiers, officers of the Internal Security Agency, Central Intelligence Agency, Police and Prison Guards, employed upon nomination, are not employment relations, within the meaning of Article 2 of the Labour Code (see: judgment of the NSA of 5 June 1991 (II SA 35/91.), quoted after K. Rączka (in:) M. Gersdorf, K. Rączka, J. Skoczyński, *'Kodeks Pracy. Komentarz'* (Labour Code. Commentary), 6th edition, Warsaw 2004, Lexis Nexis, s. 15.

⁴⁰⁶ In practice it occurs that people formally employed on civil-law contracts are actually in an employment relation. In such a situation, according to Article 22 Paragraph 1¹ LC, employment with conditions characteristic of labour relations is to be treated as such, regardless of the actual name of the contract.

⁴⁰⁷ Under Polish law, civil contracts may have the form of a defined work contract (*umowy o dzieło*), a mandate contract (*umowa zlecenia*), and an agency contract (*umowa agencyjna*).

⁴⁰⁸ W. Muszalski (in:) *'Kodeks Pracy. Komentarz'* (Labour Code. Commentary), ed. W. Muszalski, 8th edition. Warsaw 2011 CH Beck, p. 8.

The Polish legal system does not distinguish a quasi-subordinate category of workers. It often happens in practice, however, that the project or work programme determined by the employer is managed autonomously by employees. In this case, most often the person realizing this project (and usually paid from its resources) is not related to the employer by a contract of employment, but by a civil-law contract, such as a contract of mandate.

Such agreements may also include so-called managerial contracts, which cause much controversy in Polish labour-law literature. In particular the question arises, whether board members of companies should be considered as employees in the meaning of the LC. The opinion prevails that the essence of membership of a company board lacks the essential feature of an employment relationship, which is performance of subordinated work under direction of the employer. Members of the board (with some exceptions) more often perform the role of employers, which implies that employing them in the form of an employment relationship is not appropriate. The contract of such persons should also be considered as a civil-law mandate contract.⁴¹⁰ Hence LC provisions should not apply to this category.

The personal scope of the protection against discrimination, with regard to conditions of undertaking and performing economic and professional activities, was significantly expanded after the entry into force of the Antidiscrimination Law (i.e. after 1 January 2011). In its Article 4(2) and Article 8(1.2) it is emphasized that the provisions of the Law ‘shall apply to economic or professional activity, carried out under an employment relationship and work performed on the basis of a civil contract’.

In connection with the aforementioned subsidiary character of this Law, its provisions apply to all categories of persons who are not considered as employees under the LC.

The use, in addition, in both of these rules of the phrase ‘in particular’ means that this listing is not exhaustive. It encompasses, for example, not only mandate contracts (including the so-called managerial contracts), but also covers other forms of professional performance, such as broadly defined self-employment and performance of public trust professions (such as attorneys or doctors).

Protection under this Act is also provided for unpaid employment in the form of voluntary work.

1.b. Equal treatment in occupational social security schemes

The Law of 20 April 2004 on Occupational Social Security Schemes,⁴¹¹ by defining in Article 2(2) the category of employees entitled to this form of insurance, reproduces the definition contained in Article 2 of the LC. But this Law goes further, listing as employees, in the meaning of this Law, also those employed in representing bodies of legal persons, on the basis of contract, designation or election, as well as members of agricultural production cooperatives, or cooperatives of farmers’ units.⁴¹²

To participation in these schemes are also entitled *expressis verbis* natural persons, conducting economic activities (self-employed persons), as well as partners of commercial law companies,⁴¹³ mentioned in this Law, which are subject to mandatory retirement and disability insurance. Of course this only applies if such persons or companies operate a occupational pension scheme for their employees (Article 5(4) of the Law on Occupational Social Security Schemes).

⁴⁰⁹ Employment of volunteers is regulated in the Law of 23 April 2003 on Public Service Activity and Volunteerism, unified text: Dz.U. 2010, No. 234 item 1536 with amendments.

⁴¹⁰ W. Muszalski (in:) *‘Kodeks Pracy. Komentarz’* (Labour Code. Commentary) ed. W. Muszalski, 8th edition Warsaw 2011 CH Beck, p. 13.

⁴¹¹ Dz. U. 2004 No. 116 item 1207 with amendments.

⁴¹² It is worth mentioning that the right to participate applies to every employee who works for a particular employer for a period not shorter than 3 months, except for situations when the collective agreement provides otherwise. The programme is open to every employee who is younger than 70 (Articles 5(1 and 2) of the Law on Employee Pension Schemes).

⁴¹³ This provision lists the following types of companies: civil partnership (*spółka cywilna*), uncovered partnership (*spółka jawna*), private partnership (*spółka partnerska*), limited joint-stock partnership (*spółka komandytowo-akcyjna*), unlimited joint liability company (*spółka komandytowa odpowiadająca bez ograniczeń*).

The aforementioned Law also explicitly authorizes participation in the programme of workers receiving a retirement pension from the mandatory social security system, even if their age exceeds 70. This right is granted to them for as long as they are employees (Article 42 of the Law on Occupational Social Security Schemes).

The Polish Law on Occupational Social Security Schemes does not provide special protection against the risks of sickness, invalidity, accidents, occupational diseases and unemployment.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

The personal scope of application of equality provisions contained in the LC in relation to access to employment, vocational training and working conditions (including dismissal) is the same as that of those that apply to equal pay (see 1.a.).

The AL, as already mentioned, applies *inter alia* to conditions of undertaking and performing economic and professional activities, regardless of their form. It does not provide clear protection from termination of economic or professional activities. At the same time, one may have doubts as to whether the term ‘conditions of performing’ can be interpreted more broadly, as including protection from termination of activity as well, especially given the fact that the LC in the context of work performance explicitly mentions the prohibition of discriminatory dismissal from work.

It is worth noting that, with regard to termination of economic and professional activities, two situations can be distinguished. The first one refers to termination of such activity by an authorized body completely forbidding a person to perform it. The prohibition of discrimination related to this situation has been transposed in Article 6 of the Law on Freedom of Economic Activity of 2 July 2004,⁴¹⁴ which states that ‘undertaking, performing and termination of economic activity is free for everyone on equal footing, under conditions specified by provisions of law’. This situation should probably be considered in the context of Directive 2010/41/EU, unless the result of discriminatory deprivation of one's right to pursue such activity/profession would be the termination of employment (see 3.a.).

The second case concerns termination of employment by a particular employer with regard to a person conducting economic or professional activity, who still enjoys the right to perform economic activity or the right to practise a profession. This situation seems to fall under Directive 2006/54/EC. In relation to this situation it has to be stressed that the lack of *explicit* reference in the AL to the termination of economic and professional activities, evidences that transposition of Directive 2006/54/EC in this respect is not fully correct.

The AL characterizes the prohibition of discrimination in relation to access to training more broadly than the LC.⁴¹⁵ This means that the AL will not only apply to persons engaged in economic or professional activities (including in particular activities conducted in employment relationship or under civil-law contracts), but also, to the extent not covered by the LC, to employees within the meaning of this Code.

It should be noted that the AL also guarantees equal access to instruments and services of the labour market specified in the Act of 20 April 2004 on Employment Promotion and Labour Market Institutions,⁴¹⁶ including trainings for raising qualifications, retraining courses, etc.

The prohibition of unequal treatment provided for in this Act is addressed to provincial and district employment authorities exercising supervision over labour offices (i.e. heads of provinces and districts). It is worth noting that in the event of violation of the principle of equal treatment in access to institutions and labour market services, the horizontal protective

⁴¹⁴ Unified text: Dz.U. 2010 No. 220 item 1447 with amendments..See 3.a.

⁴¹⁵ The LC only mentions bypassing by the employer of an employee in nominating for participation in trainings raising professional qualifications (Article 18^{3b} 1.3). Article 4(1) and Article 8(1) of the Antidiscrimination Law indicates more precisely that it applies to vocational training, including achieving additional qualifications and improving qualifications, professional requalification as well as to professional internships.

⁴¹⁶ Law of 20 April 2004. Dz.U. 2004.

provisions of the AL (e.g. the rules on reversed burden of proof or damages) should be applied (as explicitly provided for in Article. 2a of the Act on Employment Promotion).

1.d. Collective agreements and case law

The collective agreements frequently tend to simply repeat the equality provisions contained in the Labour Code, without however providing for any clarifications. No case law expanding the personal scope of application of the LC and the AL in relation to the issues regulated by this Directive (with the exception of the protection of maternity and paternity, see 5.d. and 6.d.) has been identified.

1.e. Additional information

It is worth noting that the Antidiscrimination Law also guarantees equal treatment in access and activity within trade unions, employers' organizations and professional associations, as well as for members of such organizations when exercising their powers (Article 8(1)3).

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

In accordance with Article 2 of the AL the regulation applies to all natural and legal persons, as well as to organizational entities without legal personality on which the law confers legal capacity.

This provision, combined with Article 4(4)'e', means that the AL applies to all providers of services, including accommodation services, as long as they are offered to the general public. It further applies, on the same conditions, to suppliers of goods and to acquisition of rights and energy.

At the same time the AL also stipulates in Article 6 that it does not apply to the sphere of private and family life or to 'legal actions in connection with these spheres'.

2.b. Freedom to choose contractual partners

According to Article 5(3) of the AL, its provisions do not apply to freedom to choose a contractual partner as long as such choice is not based on sex, race, ethnicity or nationality.

2.c. Collective agreements and case law

So far, neither collective agreements nor case law have contributed to clarifying or expanding the scope of application of this provision.

2.d. Additional information

The provision of the AL concerning freedom of contract does not list sexual orientation as a prohibited grounds for limiting access to goods and services. It is not certain whether the Antidiscrimination Law's mentioning of 'sex' also provides for protection in this respect.

One can also argue, that the exception relating to family and private life, provided for in this Act, is regulated more widely than the exception provided in Article 3 of Directive 2004/113/EC. The Directive limits its application to the 'goods and services ... which are offered outside the area of private and family life and the transactions carried out in this context'⁴¹⁷ and it seems that it would be not possible to exclude the application of the rule of equal treatment in the access to transactions that are only 'connected with the sphere of private or family life' as the Polish regulation states.

⁴¹⁷ 'Context' is to mean the circumstances in which a particular transaction occurs, i.e. the transaction between family members or private persons.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

Directive 2010/41/EU has not yet been implemented in Poland⁴¹⁸

The aforementioned Law on the Freedom of Economic Activity⁴¹⁹ contains a broad definition of ‘entrepreneur’. According to Article 4 of this Law, an entrepreneur is a natural person, legal person and/or organizational entity without legal personality, on which the separate law confers legal capacity- pursuing economic activity on its own behalf. Partners in a civil-law partnership (companies) are also considered as entrepreneurs, as far as their economic activity is concerned. In general, such a partner may also be the spouse of a self-employed person. The Law does not include any restrictions in this respect. The Law on Freedom of Economic Activity generally stipulates that undertaking, performing and terminating of economic activity is free to anyone on an equal basis, as long as the necessary conditions laid down in the Law are observed (Article 6(1)). The Law further states, that, with respect to the principles of equality and competition, the State shall provide entrepreneurs with public aid, according to the rules and forms specified in the respective regulations (Article 7). The Law on Freedom of Economic Activity provides antidiscriminatory rules that are similar to those provided for in AL as regards the protection against discrimination in undertaking and performing of economic activities. This means that self-employed persons, in the event of direct or indirect discrimination, harassment or sexual harassment, experienced with regard to the establishment, equipment or extension of a business, or with regard to initiation or extension of any other form of self-employed activity, will benefit from the horizontal protection provided for by the Antidiscrimination Law. As mentioned above, contrary to the AL, the Law on the Freedom of Economic activity also explicitly provides for the prohibition of discriminatory termination of somebody’s activity or profession. However, it seems that since the AL does not mention ‘termination’ the horizontal protection of the AL does not apply in such case. This conclusion may be drawn *inter alia* on the basis of a systemic interpretation of the law: *a contrario* to the fact that in relation e.g. to the aforementioned Law on Employment Promotion such possibility is explicitly mentioned, in the Law on Freedom of Economic Activity it is not. The requirement of equal treatment in economic activity is addressed mainly to the local public authorities of territorial self-government, competent to register such activity. As regards undertaking and performing of professional activity, the duty holders of the antidiscrimination norms are the authorities competent to grant licenses to practise a particular profession,⁴²⁰ i.e. professional associations (e.g. Chamber of Physicians, Council of Attorneys, etc.).

The Law on Freedom of Economic Activity does not directly refer to spouses of self-employed workers. The same is true for the Social Welfare Act of 12 March 2004,⁴²¹ which explicitly extends the benefits of the social welfare system only to self-employed persons, granting them the same protection as other employees. Spouses, or other persons associated with the self-employed person, will be able to take advantage of the protection provided for by: Act on Social Welfare according to general principles, in particular if they meet the per family income criterion. The notion of persons collaborating with the entrepreneur is known

⁴¹⁸ At the same time, the Antidiscrimination Law mentions as one of the implemented directives the old Directive 86/613/EEC, despite the fact that the new one has already been adopted.

⁴¹⁹ The provisions of Article 2 of this Law define ‘economic activity’ as commercial activity in production, construction, trade or services and searching, exploration and exploitation of minerals from deposits, as well as professional activity carried out in an organized and continuous manner.

⁴²⁰ Such competences are provided for in special laws governing the performance of particular professions of public trust and/or in the laws on self-government’s organizations of those professions: e.g. the Law on Executing of the Professions of Physician and Dentist of 5 December 1996, Dz.U. 1997 No. 28 item 152 with amendments and the Law on Physicians Chamber of 2 December 2009, Dz.U.2009 No. 219 item 1708 with amendments.

⁴²¹ Dz.U. 2009, No. 175 item 1362 with amendments.

to the Polish system of social security. The Law on Statutory Social Security⁴²² provides for the same protection mechanisms for almost all social and professional groups, including self-employed workers and persons collaborating with them. The category of persons collaborating with the self-employed person includes not only the spouse, but also other persons (children, including adopted children, parents, including step- and adoptive parents) (Article 8(11) of the Law on Statutory Social Security).⁴²³ The only group still falling outside the scope of the Law on Statutory Social Security are farmers, who are covered by a separate Act from 1990.⁴²⁴ This regulation applies both to farmers themselves, as well as to members of their household working with them, including their spouses. In most general terms, within the common system, the insurance in case of motherhood may be joined by those persons on a voluntary basis (just like the insurance against sickness). In the case of farmers or members of their households,⁴²⁵ such insurance is mandatory if the size of their agricultural enterprise exceeds one hectare. Significant differences however may be indicated in case of maternity allowances awarded to members of each of these groups. In case of non-agricultural occupations in accordance with the Act on Financial Insurance Allowances in Case of Sickness and Maternity,⁴²⁶ the maternity allowance (equal to 100 % of the monthly wage, usually paid for 5 months),⁴²⁷ will be granted to an insured person, who, during the duration of sickness insurance, or during parental leave, gave birth to a child or accepted a child to raise (adoption). An insured person within the meaning of the Act is a person insured, irrespective of the title of this insurance: that is both: employment which creates the obligation of insurance against sickness or conducting other activities, the performance of which gives a right to acquisition of such insurance on a voluntary basis (Article 3(1) of the above Act).⁴²⁸ There are no legal objections preventing an insured person from doing business, while collecting maternity allowance at the same time.⁴²⁹ However, according to Article 15 of the Act on Social Insurance of Farmers, in case of giving birth to a child or adopting a child, the insured person is entitled to a one-time maternity allowance in the amount equal to four basic pensions (currently approximately EUR 750, or PLN 3196.72). Hence, the situation of women farmers, farmers' wives and women remaining in the same household with a farmer or woman farmer in terms of benefit payments and the time of their

⁴²² Law on Statutory Social Security (*Ustawa o systemie ubezpieczeń społecznych*) of 13 October 1998, unified text: Dz.U. 2009 No. 205 item 1585, with amendments.

⁴²³ However, in order to be covered by the insurance, the spouse and other persons mentioned above must not only collaborate with the self-employed person, but must also share a common household with them. Such a precondition is not included in the Directive.

⁴²⁴ Law on Social Security System of Farmers (*Ustawa o ubezpieczeniu społecznym rolników*) of 20 December 1990, unified text: Dz.U. 98.No 7 item 25 with amendments.

⁴²⁵ See Article 11(2) of the Law on Social Security System. We generally will not refer to this system or to the Law on Social Insurance of Farmers, as they are mainly covered by Directive 79/7/EEC.

⁴²⁶ Article 29 of Law of 25 June 1999, unified text: Dz.U. 2010 No. 77 item 512 with amendments.

⁴²⁷ The duration of maternity benefit is governed by provisions of the LC and, e.g. in case of giving birth to a single child, amounts to 20 weeks.

⁴²⁸ After termination of the insurance against sickness, a woman may receive maternity benefits for giving birth to a child only if the insurance has been terminated as a result of liquidation of the employer, or his bankruptcy. Such allowance shall not be granted in case of giving birth during interruption of the insurance, when caused by suspension of the economic activity. The right to maternity allowance does not include the period of suspension of the economic activity or the period after resuming this activity; <http://zatrudnienie.wieszjak.pl/samozatrudnienie/216808.Zasilek-macierzynski-osoby-prowadzacej-dzialalnosc-gospodarcza.html#ixzz1sTqCTV12>, accessed 20 April 2012.

⁴²⁹ According to the Law of 24 April 2009 on Amendment of the Law on the System of Social Security of 13 October 1998 and Some Other Laws, Dz.U. 2009 No.71 item 609,⁴²⁹ employed persons are allowed to continue self-employment (or occasionally performed work) while on maternity leave (or maternity-like leave), without the risk of losing social insurance related to maternity benefits, deriving from an employment contract. The employer must however mandatorily be notified about such activity, as employees performing economic activity during maternity leave are not subject to pension and disability insurance, with regard to collecting maternity allowance. Before the above amendments entered into force, if a woman on maternity leave remained e.g. self-employed, the payment of insurance contributions from the State Budget had to be terminated, even if her earnings at that time were insignificant.

duration, is less favourable⁴³⁰ in comparison to self-employed persons, or their collaborators in the sphere of non-agricultural activity. One of the reasons for this is the lower insurance premiums paid by farmers and women farmers. The Polish legal system does not provide for a substitution mechanism allowing self-employed persons or their collaborators to interrupt their work activities.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

The personal scope of both Directives has been transposed uniformly. The legal construction provided for in Article 4(1) of the discussed Directive allows its application not only to access to self-employment but also outside the ‘establishment’ of an enterprise, including its equipment and extension (which roughly corresponds to the term ‘access’ used in Directive 2006/54). Its scope is therefore wider in comparison with Directive 2006/54/EC.

3.c. Collective agreements and case law

Neither provisions of collective agreements nor case law on this issue have been identified.

3.d. Additional information

There is no additional information to report.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

The Labour Code does not define the concept of pregnant workers. It merely states that pregnancy should be confirmed by a physician’s certificate (Article 185(1)). Neither is there a definition of breastfeeding workers, although this term is used in the LC in the context of protection of health of such employees (Article 179 LC) and in relation to their entitlement to additional breaks for breastfeeding their children (187(1) LC).⁴³¹

Articles 180¹ and 182 of the LC provide for an eight-week period of maternity leave to every employee who has recently given birth (confinement period), not depending on whether the child is alive or whether the mother wishes to take care of the newborn child or has relinquished this right.⁴³²

The LC provisions regarding special protection of the employment relation of pregnant women (e.g. protection against dismissal) apply to all employees (as defined in 1.a.), with the exception of female workers employed for a probationary period not exceeding one month, as well as to employment contracts concluded for the purpose of substituting an employee during her/his excused absence from work (Article 177(2 and 3¹) LC). However, an employment contract for a probationary period exceeding one month or concluded for a fixed

⁴³⁰ Compared to a total sum of EUR 4500 in maternity allowances, received by a woman earning an average monthly salary (in 2011 circa EUR 800 – PLN 3438) for performing a non-agricultural occupation.

⁴³¹ The problem of granting special breaks for self-employed breastfeeding women, remaining in an employment relationship, was only in Polish literature for the purpose of discussing the aforementioned decision of the Court of Justice of the European Union of 30 September 2010 (C-104/09). The same is true for the question whether an additional break during working hours to feed the child should also be granted to the child's father. Although the LC specifically refers to ‘employees’ in the female gender and to breastfeeding, until this provision is amended, the EU-law friendly interpretation may be applied in this respect. See M. Madej, ‘Zorzecznictwa Trybunału Sprawiedliwości Unii Europejskiej. Równe traktowanie kobiet i mężczyzn w dziedzinie zatrudnienia i zabezpieczenia społecznego’ (From case law of the CJEU. Equal treatment of women and men in the field of employment and social security). *Praca i Zabezpieczenie Społeczne*, 2011 No. 9 pp. 35-36, W. Wróbel. ‘Przerwa na karmienie piersią dla pracowników najemnych bez dyskryminacji ze względu na płeć’ (The break for breastfeeding for hired workers without sex discrimination) *Europejski Przegląd Sądowy* 2010, December.

⁴³² It has been pointed out that the LC introduces in this respect the legal presumption of incapacity for work, which means that no confirmation of this incapacity by a physician’s certificate is needed, but the certificate of the birth of child is sufficient. T. Lasocki ‘Zasada równości płci w dostępie do zasiłku macierzyńskiego’ (The principle of sex equality in access to maternity allowance), *Praca i Zabezpieczenie Społeczne* 2011 No. 6 p. 9.

term or for the duration of a specific job, which otherwise would be terminated after the third month of pregnancy, is extended until the date of delivery. (Article 177(3) LC).

4.b. Collective agreements and case law

No information is available as to provisions of collective agreements or case law that would expand the scope of application of the mentioned Directive, e.g. to women whose ova have been fertilized in vitro, but not yet transferred to their uterus. As concerns other issues, case law has clarified and expanded the personal scope of application of the provisions protecting pregnancy and maternity contained in the Labour Code, primarily with regard to certain groups of persons not considered as employees in the meaning of this Code. For instance, the Supreme Court in its judgment of 19 October 2010 decided that provisions of the Teachers' Charter of 26 January 1982 (which do not provide for special protection against dismissal during pregnancy) had to be interpreted in such a way as to allow Article 177 LC (prohibiting dismissal of pregnant women) to apply to appointed teachers. This means that conformity between Polish law and Directive 92/85/EEC may have been achieved.

Also, literature is dominated by the view that provisions protecting pregnant workers, or protecting the durability of their employment relations, should apply to other employment relations as well, especially those arising from appointment or election. Indeed, not all service regulations provide for regulation of such a situation. In addition to the aforementioned Teachers' Charter, such provisions are also lacking e.g. in the Act on Employees of State Offices of 16 September 1982).⁴³³ This also applies to a number of rights related to maternity or paternity provided in specific laws on various uniformed services, e.g. the police.⁴³⁴

4.c. Rights of the self-employed and/or the quasi/para-subordinate

None of these rights, except for maternity leave (see above), has been explicitly granted to self-employed persons or quasi/para- subordinate workers.

4.d. Additional information

The introduction of the possibility for the father to use part of the mother's maternity leave, on the condition that she first uses 14 weeks of this leave herself (Article 180 (5)), has led to the existence of two periods of confinement in the Labour Code (8 and 14 weeks), which is hard to explain rationally.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

The right to parental leave (*urlop wychowawczy*) is mainly granted to employees, i.e. persons who have signed an employment contract. In their case the entitlement to parental leave is, in general, not connected with the type of employment contract (i.e. whether they were employed under the contract for a specified or unspecified period of time). The same applies to employment under an employment contract for 'substitution', which, according to the legal qualification contained in the LC (Article 25(1), is merely a particular form of contract of employment for a specified period. However, there are differences as to the length of such leave (see below).

5.b. Entitlement to parental leave

Parental leave is available to any worker, employed for at least 6 months, with respect to giving birth or adoption of a child, for a period of up to 3 years), in order to be able to take care of that child until it reaches the age of 4 (Article 186 LC). It is worth noting that the mother and father are both equally entitled to this leave. If both parents are employees, they may benefit from the parental leave together, for a period of up to 3 months.

⁴³³ Unified text: Dz.U.2001, no. 86, item 953 with amendments.

⁴³⁴ W. Patulski (in:) 'Kodeks Pracy. Komentarz' (Labour Code. Commentary), ed. W. Muszalski, 8th edition. Warsaw 2011 CH Beck, p. 8. s. 860.

For workers employed under a contract on probationary terms, for a specified period, or for the duration of a particular project, the duration of the parental leave cannot exceed the time for which the agreement (work contract) was concluded. The same applies for granting such leave to an employee upon his request if made after terminating the employment contract by giving notice, where the parental leave may last only until the day of termination of the contract, indicated in the notice.⁴³⁵

5.c. Rights of the self-employed and/or the quasi/para-subordinate

For self-employed persons, parental leave is granted only to persons in an employment relationship. This entitlement does not apply to any person performing work under a civil-law contract. This exception those persons who provide outwork (work at home – praca nakładcza), who may use such leave with regard to special provisions.⁴³⁶ While officially justifying the refusal of parental leave to self-employed individuals, it has been emphasized that those performing work under civil contracts are free to organize their work, deciding the way, place and time of its performance. They are therefore capable of organizing their professional duties in such a way as to reconcile professional performance with their parental tasks. In addition, an entrepreneur not employing any other workers has the possibility to suspend the performance of his or her economic activity for a period from 1 month to 24 months (Article 14a(1) of the Law on Freedom of Economic Activity). This suspension may be applied e.g. in order to provide personal care for the child.⁴³⁷

It is worth noting that a person on parental leave, combining her employment with the management of her own enterprise, still has to pay insurance premiums for her economic activity. A woman in the same situation, when taking her maternity leave, has no obligation to pay social security premiums for her economic activity (during this period the premiums are paid by the State Treasury). The Constitutional Tribunal in its judgment of 13 April 2011 (SK 33/09) decided that the differentiation by the legislator of the rights of insured persons benefiting from maternity and parental leaves with respect to paying their insurance premiums, in case of confluence of the titles of insurance (due to combining economic activity with an employment relationship), raises no constitutional doubts.⁴³⁸

5.d. Additional information

Recently the media have reported on plans of the Government to change the Labour Code with respect to parental leave, aimed at implementing Directive 2010/18/EU. The purpose of the change is to introduce for all employees a special parental leave of 1 month for fathers (from within the regular duration of the leave), which would forfeit if the father decides not to use it. The subject of criticism is that in cases where the mother is the sole caregiver of the child⁴³⁹ the father's failure to use the non-transferable part of the leave would result in automatic reduction of the total parental leave available with respect to the particular child.

⁴³⁵ If an employer granted an employee parental leave for a period that is longer than what would follow from the period for which a particular contract was concluded, then it could be assumed that the parties concluded a contract for an unspecified period of time. See the judgment of the Supreme Court of 21 November 1978, I PZP 28/78, OSN 1979 No. 5 item. 92.

⁴³⁶ Paragraph 18 of the Order of the Council of Ministers of 31 December 1975 on employee rights for persons performing outwork, Dz.U. 1976 No. 3, item 19, with amendments.

⁴³⁷ The reply of former Minister of Labour and Social Policy J. Fedak to a deputies' interpellation, given during a parliamentary session, http://stanislawszwed.pl/index.php?option=com_content&view=article&id=240:prawo-do-urlopu-wychowawczego-interpelacja&catid=43:aktualnoci-n&Itemid=214, accessed 20 April 2012.

⁴³⁸ The Constitutional Tribunal considered the differences between maternity leave and parental leave, with regard to constitutional protection. It also pointed out that 'the legislator has left the insured a choice of title, with regard to which he wants to pay premiums (e.g. by introducing into the legal order the institution of suspension of the economic activity). There is a solution, provided for by law, allowing entrepreneur mothers to avoid paying premiums for economic activity for a period of their choice. This ruling has met very critical comments, see <http://www.polskieradio.pl/42/273/Artykul/350548.Masz-firme-Zapomnij-o-urlopie-wychowawczym>, accessed 20 April 2012.

⁴³⁹ It is estimated that today every tenth Polish family lives in the 1+1 model, as well as about one million women and about 15 % of the children, <http://www.wprost.pl/ar/?O=9215>, accessed 24 April 2012.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

As already mentioned, the Antidiscrimination Law, which implements the five EU equality directives, in Articles 6-8 provides for a prohibition of unequal treatment of individuals. Each of these provisions indicates one protected area and lists the recognized grounds of discrimination. Sex as a ground for discrimination appears in all protected areas with the exception of healthcare, education and higher education.

The AL also includes provisions transposing Article 3(2) of Directive 2000/43/EC and Article 3(2) of Directive 2000/78/EC. Article 5(9) of this Law states that it does not cover differences in treatment, with regard to nationality, in particular in connection with entry and residence in the territory of Poland and the differences related to legal status of natural persons not being citizens of EU countries, member states of the EFTA or the Swiss Confederation.

It should, however, also be noted that, in terms of nationality or citizenship, labour law makes no distinction between employees and employers. Its provisions apply to all persons working legally, under a contract of employment, within the jurisdiction of Polish courts.⁴⁴⁰

Until 2011, the provision of Article 6 LC was in force, which enforced application of Polish Labour Code provisions to relations between Polish citizens and Polish representatives, missions or institutions abroad.⁴⁴¹

Recital 16 of Directive 2000/43/EC has been transposed in the Antidiscrimination Law.

Pursuant to Article 10, with respect to goods and services, healthcare, education and higher education, as well as to widely interpreted labour and employment relations, the object of the prohibition is unequal treatment of legal persons and organizational units, on which the law confers legal capacity, if violation of the principle of equal treatment occurs with regard to race, ethnic origin or nationality of its members.

PORTUGAL – *Maria do Rosário Palma Ramalho*

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

In Portugal all directives are transposed by law. In relation to equal pay and gender, national provisions are to be found in the Portuguese Constitution, which affirms the right to equal pay for equal work or for work of equal value as a fundamental right of all subordinate workers (Article 59 No. 1a)), as well as in the Labour Code,⁴⁴² applicable to subordinate workers in the private sector (Articles 24 No. 1 and No. 2c), Article 31 and Article 26 No. 2), and finally in Law No. 59/2008, of 11 September 2008, regarding subordinate workers with a labour contract in the public sector (Article 19).

In relation to the transposition of Article 4 of Directive 2006/54/EC, national legislation develops the equal pay principle both in relation to equal work and to work of equal value, has a broad definition of remuneration for gender equality purposes, prohibits both direct and indirect discrimination in this area, and establishes the obligation of enhancing gender-neutral

⁴⁴⁰ This means citizens of the EU and EFTA, and others being able to benefit from the free circulation of persons according to contracts signed with the EU, persons with refugee status, or applying for such status, persons having temporary permits to reside or live in the territory of Poland, and family members of such foreigners, foreigners having permission for a tolerated stay or being under temporary protection, resulting from the Law on Foreigners or the Law on Granting Protection to Foreigners (both laws of 13 June 2003 r., Dz. U. 2003, No. 128 items 1175 i 1176 with later amendments).

⁴⁴¹ As well as to relations between Polish citizens and agencies, missions or post of the Polish State abroad, or international organizations operating in Poland (unless an agreement provided otherwise). This provision was repealed by the Act of 4.02.2011 Dz.U. 2011 No. 80 item 432.

⁴⁴² The Labour Code (LC) that is now in force was approved by Law No. 7/2009, of 12 February 2009.

job evaluation systems (LC, Article 23 No. 1a) and b), Article 24 No. 1 and No. 2c) and Article 31, for workers of the private sector; Law No. 59/2008, of 11 September 2008, Article 14 No. 1 and Article 19 for civil servants).

These provisions are applicable to subordinate workers in the private and in the public sector, respectively, provided they have a labour contract. Therefore, atypical subordinate workers (such as workers with fixed-term contracts or temporary contracts, part-time workers, or teleworkers) are all covered by these rules. The same goes for civil servants with a non-contractual labour relation, since the provisions of Law No. 59/2008 also apply to this specific category in this respect (Article 8 b) of the Preamble of this Law).

‘Quasi-subordinate’ workers are a particular category of workers traditionally recognised in Portuguese legislation under the expression ‘*Trabalhadores equiparados*’ (‘equivalent workers’) or ‘*Trabalhadores com dependência económica*’ (‘workers in economic dependence’). This category is now specifically dealt with in Law No. 101/2009, of 8 September 2009 and is recognised when, in the absence of a labour contract (for lack of subordination), the worker is economically dependent on the creditor of the work in a substantial way (mainly because he works only for him) – Article 1 of L. No. 101/2009. If this is the case, the law extends some labour protection rules to this category of workers, despite their formal qualification as independent workers. In the present LC, this extension is contemplated in Article 10, and includes the LC provisions in the area of equal pay. Therefore, in the private sector these workers are covered.

By contrast, there is no similar provision in the public sector, so in this area quasi-subordinate workers are not covered by gender equality rules.

Where independent workers are concerned, the equal pay principle has also been established in a broad sense, by Law No. 3/2011, of 15 February 2011. For the purposes of its application, this Law defines independent work as a professional activity developed outside a labour contract or a legally equivalent situation (Article 2). The legal protection regarding pay, in this context, is extended both to equal work and to work of equal value, and covers both direct and indirect discrimination (Article 4).

1.b. Equal treatment in occupational social security schemes

In the area of occupational social security schemes, gender issues are covered by Decree Law No. 307/97, of 11 November 1997. There has been no formal transposition of Directive 2006/54/EC, in this respect, but the national provisions already comply with Articles 6, 8 and 10 of the Directive.

In this sense, the personal scope of application of Title II, Chapter 2 of the Directive (Article 6) is the same at national level (Article 3 of Decree Law No. 307/97). As for the implementation of the Directive as regards self-employed persons (Article 10) and in light of the possible exclusions permitted by Article 8(1)a-b, national legislation establishes the exact same rules (Article 5 of Decree Law No. 307/97).

Therefore, the personal scope of national rules in relation to equal treatment in occupational social security schemes is in accordance with Directive 2006/54/EC.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

In relation to equality in access to employment, vocational training and promotion and working conditions, Portuguese legislation complies with Directive 2006/54/EC, and more specifically with Article 14 of this Directive.

In this respect, equal treatment rules are established in the LC as regards private subordinate workers (Article 24 No. 1 and No. 2a), b), and d), and Article 30) and in Law No. 59/2008, of 11 September 2008, as regards subordinate workers in the public sector (Article 13, Article 14 No. 1, and Article 18). These rules, which are more developed in the LC than in Law No. 59/2008, cover gender equality in access to employment and in promotion, gender equality in professional training, gender equality in working conditions, and gender equality in the affiliation to labour organisations of all kinds.

These provisions are applicable to subordinate workers in the private and in the public sector, provided they have a labour contract. Therefore, atypical subordinate workers (such as workers with fixed-term contracts or temporary contracts, part-time workers, or teleworkers) are covered. The same goes for civil servants with a non-contractual labour relation, since the provisions of Law No. 59/2008 in this respect also apply to this specific category (Article 8b) of the Preamble of this Law).

These provisions also apply to quasi-subordinate workers in the private sector due to an extension introduced by Article 10 of the LC, which includes all provisions related to equality. Therefore, these workers are covered. However, since there is no similar provision in the public sector, quasi-subordinate workers in this area are not covered by these provisions.

Volunteers are not covered by these rules, since they have no professional relationship with the beneficiary of their work.

Where self-employed persons are concerned, Article 14 No. 1a) of Directive 2006/54/EC has been transposed into national law by Law No. 3/2011, of 15 February 2011. This Law prohibits discrimination on any ground in the areas of access to work, professional training and working conditions (Article 3). This rule is directed to the beneficiary of the work (Article 5) and its violation gives right to damage compensation (Article 6). This law also covers discriminatory termination of self-employment contracts by employers/clients (Article 3 No. 3c)). This Law is applicable both in the private sector and in the public sector (Article 2 No. 1).

1.d. Collective agreements and case law

In respect of the provisions above, neither collective agreements nor case law substantially contribute to clarifying or expanding their personal scope of application. To our knowledge, there is no case law regarding the personal scope of these rules. Where collective agreements are concerned, either they do not refer to these issues, or they repeat the law.

1.e. Additional information

We have no information to add here, apart from the lower protection of the quasi-subordinate workers in the public sector, as mentioned above, since in this area this specific category is not covered by gender equality rules

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services has been transposed into national legislation by Law No. 14/2008, of 12 March 2008.

The personal scope of this Law is established in accordance with Article 3 No. 1 and 4, and in light of Paragraph 15 of the preliminary observations of the Directive. In this sense, the Law is applicable to all public or private entities supplying goods or services, either paid or unpaid (Article 2 No. 1). However, the Law is not applicable in the following situations or fields, indicated in Article 2 No. 2: goods or services provided in the context of family or private life; media and publicity context; education; employment and the professional area, including both dependent and independent work.

2.b. Freedom to choose contractual partners

Where Article 3 No. 2 and Paragraph 14 of the preliminary observations of Directive 2004/113/EC are concerned, the Portuguese law made the transposition in a negative sense, and not by directly recognising the freedom to choose contractual partners.

In this sense, Article 4 No. 1 of Law No. 14/2008 prohibits direct and indirect discrimination practices resulting from actions, omissions or contractual clauses in the access to and supply of goods and services.

However, this rather vague and soft transposition of the Directive does not prevent the interpreter of the law to call upon the general principle of freedom of contract, which is explicitly affirmed in the Civil Code and whose content also includes the freedom to choose contractual partners, even on subjective grounds (Article 405 of the Civil Code).

2.c. Collective agreements and case law

In respect of the provisions above, neither collective agreements nor case law substantially contribute to clarifying or expanding their personal scope of application. To our knowledge, there is no case law regarding the personal scope of these rules.

2.d. Additional information

We have no additional information to report.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

Directive 2010/41/EU has not yet been formally transposed into Portuguese legislation, but some of its content is already applicable at national level, under national legislation. Two Acts are to be taken into consideration for this purpose, in the area of employment and in the area of social security: Law No. 3/2011, of 15 February 2011, which prohibits discrimination in the access to and in the development of independent work, and Law No. 110/2009, of 16 September 2009, which approved the new Code on Social Security (*‘Código dos Regimes Contributivos do Sistema Previdencial de Segurança Social’*) that has some provisions regarding social security for independent workers, including assisting spouses.

The personal scope of Law No. 3/2011, of 15 February 2011, which prohibits discrimination in the access to and in the development of independent work, is dealt with in Article 2 No. 2. This Article defines independent work, in accordance with Directive 2010/41/EU, as a professional activity developed outside a labour contract or a legally equivalent situation. However, this legislation does not mention assisting spouses.

For the purposes of social security, Law No. 110/2009, of 16 September 2009, defines an independent worker as a person performing a professional activity outside a labour contract or a legally equivalent situation (Article 132). The Law specifically considers as independent worker assisting spouses of independent workers, defined as those who perform a regular and permanent (but not necessarily full-time) professional activity with their partners (Article 133 No. 1c)). Under the category of independent workers for the purposes of social security, the Law also mentions independent workers in agriculture and their spouses (Article 134 No. 1a)).

These definitions comply with Directive 2010/41/EU. However, this Act does not mention an equality principle regarding the category of spouses.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

As regards the scope of equal treatment rules contained in Article 4 No.1 of Directive 2010/41/EU, in relation to Article 14 No. 1a) of Directive 2006/54/EC, we cannot answer the question, since Directive 2012/41/EU has not yet been transposed.

So far, under national legislation (Law No. 3/2011, of 15 February 2011), independent workers are protected against discrimination in the access to work, in working conditions, in the access to professional training, in the termination of the contract and in the affiliation to professional organisations (Article 3).

3.c. Collective agreements and case law

There are no collective agreements regarding independent workers, so there can be no contribution in this area. We are also not aware of any case law in this area.

3.d. Additional information

The main gap in this protection regards the category of assisting spouses, who are protected for social security purposes only, as described above.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

The national implementing legislation regarding Directive 92/85/EEC is the Labour Code, in relation to workers of the private sector (Article 36), and Law No. 59/2008, of 11 September 2008 (Article 25), regarding workers of the public sector.

The notions of ‘pregnant workers’, ‘workers who have recently given birth’ and ‘workers who are breastfeeding’ in national law are in compliance with the notions referred to in Articles 1 and 2 of the Directive, in the sense that these workers must inform the employer of their situation to have access to the relevant protection rules. National legislation requires a written communication from the worker, accompanied by a medical certificate or, in case of birth, by a birth certificate.

In the case of the Labour Code, these notions even go a little beyond the notions of the Directive, since it is established that the protection rules regarding maternity and paternity 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 No. 2 of the LC).

Therefore, for workers of the private sector, the notions of ‘pregnant workers’, ‘workers who have recently given birth’ and ‘workers who are breastfeeding’ are wider than in European law.

4.b. Collective agreements and case law

Collective agreements often repeat the legal notion of ‘pregnant workers’, ‘workers who have recently given birth’ and ‘workers who are breastfeeding’ and the same goes for case law. So there is no contribution of these sources to the expansion of these concepts.

Where ‘managers’ are concerned, this practice is forbidden under national law, since profitable contracts regarding one’s body are considered to go against basic values of the State (*ordem pública*) and are therefore prohibited by the Civil Code (Article 280). Since the law does not recognise these practices as such, if the woman gets pregnant in result of this arrangement she will be treated as any pregnant woman, for the purposes of all rights related to pregnancy and maternity including equality rights.

In relation to women whose ova have been fertilised *in vitro*, but not yet transferred to their uterus, under national legislation, they would be covered only if a medical certificate would state their pregnancy state but not otherwise. Along different lines, the LC grants women and men the right to be absent from work on account of a process of medically assisted attempt to get pregnant (Article 249 No. 2d) if this process makes it impossible for the worker to attend work. This may occur, of course, before or after the fertilisation and transfer of ova to the uterus.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

Not all rights granted by Directive 92/85/EEC are extended to self-employed nor to quasi-subordinate workers, because they presuppose a labour contract and do not apply to independent work (even if in a quasi-subordination situation). This is the case for absence from work to attend pre-natal examinations and protection regarding dismissal.

In relation to leaves related to pregnancy and maternity, these leaves can be taken by independent workers and give right to public allowances, granted by the public social security system, in the following situations: in case of medical risk during pregnancy, if the worker is forced to suspend her activities; in case of miscarriage; in case of birth; in case of adoption; and in case of specific risks related to pregnancy or maternity (e.g. in case of night shifts or dangerous work or in case of hospitalisation or sickness during pregnancy – Article 3 and

Article 5 No. 2 of Decree Law No. 91/2009, of 9 April 2009). Some of these allowances depend on economic conditions.

4.d. Additional information

We have no additional information to report.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

Portugal has not yet implemented Directive 2010/18/EU. The personal scope of the rules regarding parental leave is defined in the Labour Code for workers of the private sector and in Law No. 59/2008, of 11 September 2008, for workers of the public sector, and is in compliance with Directive 96/34/EC.

5.b. Entitlement to parental leave

In relation to Clause 1(2) and (3) of the Framework Agreement, national law recognises the right to parental leave for all workers with a labour contract, including atypical workers, like part-time workers and temporary workers or workers with fixed-term contracts (Articles 35 et seq. of the LC and, in relation to the public sector, Articles 27 et seq. of Law No. 59/2008).

5.c. Rights of the self-employed and/or the quasi/para-subordinate

Under national legislation, some parental rights are granted only to subordinate workers and not to independent workers or to quasi/para-subordinate workers, because they presuppose the existence of a labour contract. This is the case for more flexible working-hours arrangements or absences from work for reasons related to maternity and paternity.

As regards parental leaves, these workers are entitled to the relevant public allowances, on the conditions defined by Decree Law No. 91/2009, of 9 April 2009.

5.d. Additional information

We have no additional information on this subject.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

Directives 2000/43/EC (esp. Article 3(1)a-h) and 2000/78/EC (Article 3(1)) have been transposed into national legislation by Law No. 18/2004, of 11 May 2004, and by the Labour Code (Articles 22 et seq.).

In the transposition of Directive 2000/43/EC, Law No. 18/2004 has limited its scope to areas other than employment (e.g. social security and health, social benefits, education, access to and supply of goods and services, including housing): Article 2 No. 1. Non-discrimination issues related to employment and professional training are dealt with by the Labour Code (Articles 22 et seq.), in rules dedicated to non-discrimination based on several grounds, which include race and ethnic origin among many others and also include sex discrimination. Finally, general non-discrimination issues in employment in the public sector are dealt with in Law No. 59/2008, of 11 September 2008 (Articles 13 et seq.), which governs labour contracts in this sector.

The fact that Portuguese employment legislation, both in the private sector and in the public sector, deals comprehensively with gender discrimination and other sources of discrimination, apart from some specific provisions regarding gender, tends to eradicate or elude the various personal and material scopes of application of the three main sex equality directives (Directive 2006/54/EC, Directive 2004/113/EC and Directive 2010/41/EU) and the scope of application of Directive 2000/78/EC.

The same joint approach to general non-discrimination directives and to gender equality directives, in the course of their transposition into national law, was observed in relation to independent workers in Law No. 3/2011, of 15 February 2011, which has transposed all

provisions of Directives 2000/43/EC, 2000/78/EC and 2006/54/EC regarding independent workers.

This being the case, the different personal scopes of the various directives mentioned is not a real problem in Portugal.

ROMANIA – Roxana Teşiu

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

Article 4 of Directive 2006/54/EC has been transposed by the legal provisions of Article 6(3) of the Romanian Labour Code that provides for the principle of equal pay: ‘For the same work or for work to which equal value is attributed, discrimination on grounds of sex with regard to all elements and conditions of remuneration is forbidden.’

On the basis of legal provisions⁴⁴³ a salary grid is established at national level, applicable to all employees hired in public units whose salaries are paid from public funds. For private companies, although there is a functional job classification system, this is not used for determining pay, but only for determining job positions. In practice, private companies use their internal salary grids based on the job content and the skills required for the respective job. In setting up the levels of salaries, private companies must adhere to the principle of equal pay as stipulated by the Labour Code.

1.b. Equal treatment in occupational social security schemes

In 2007, the Romanian Government adopted Governmental Ordinance No. 67 on the application of the equal treatment principle between men and women in professional social security schemes.⁴⁴⁴ While this legal norm set up the frame of equality between women and men in the relevant field, further implementation was to be ensured through the provisions of the Law on occupational pensions’ schemes. The draft of this law has been pending for adoption for almost two years. The draft law even entered public debate in February 2011 and the adoption was claimed to be due by the end of 2011. Due to the significant number of changes in the structure of the political programme assumed by the recently dismissed Government the law is still pending for adoption.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

Provisions of Article 6 of Directive 2006/54/EC have been transposed into Romanian legislation through the provisions of Law No. 202 of 2002 on Equal Opportunities. According to Article 2 of the Equal Opportunities Law, the measures to promote equal opportunities and treatment between men and women and to eliminate all forms of discrimination based on gender apply to the areas of employment, education, health, culture and information, participation in decision making, supply of and access to goods and services, and other areas regulated by special laws.

Furthermore, with regard to equal treatment in access to employment, vocational training and promotion, and working conditions, the Equal Opportunities Law provides that any form of discrimination is forbidden and equal treatment and equal opportunities must be ensured. While the provisions of the Labour Code are applicable to all employees hired on the basis of an individual employment contract, excepting public officers from the applicability of general

⁴⁴³ Law No. 284 of 2010 on the Framework of the Salary Grid applicable to employees whose salary is paid from public funds, published in Official Gazette No. 877 of 28 December 2010.

⁴⁴⁴ Emergency Governmental Ordinance No. 67 of 27 June 2007 on the application of the principle of equal treatment between men and women in professional social security schemes, published in Official Gazette No. 443 of 29 June 2007.

non-discrimination principles as provided by the Labour Code, the Equal Opportunities Law mentions in Article 7(3) that the scope of application of its provisions covers all persons, public officers or employees hired based on an employment contract, from both the private and the public sectors, including civil servants from public institutions. Article 7(2) of the Equal Opportunities Law extends the scope of application to all works, by specifically including self-employed workers and independent workers from the agricultural sector.

1.d. Collective agreements and case law

With regard to assessing whether collective bargaining agreements contribute to clarifying or expanding the Directive's scope of application, it is impossible to carry out such analysis. This is mainly due to the reorganisation of the legal framework in this area. The Collective Bargaining Agreement at national level was abolished through the provisions of the new law on Social Dialogue that was adopted in May 2011. A complementary legal framework for reorganising the new sectors of activity in Romania is still pending in Parliament. Former branch collective bargaining agreements have gradually expired and new agreements are expected to be concluded at sector level in the near future. With regard to collective bargaining agreements concluded at unit level, an assessment cannot be made in relation to the personal scope application as defined by Article 14 of Directive 2006/54/EC.

Case law in Romania is poorly developed and it is therefore impossible to assess to which extent case law contributes to extending the personal scope as provided for by the Directive.

1.e. Additional information

While the personal scope of Directive 2006/54/EC is present and has been transposed into Romanian legislation through the provisions of the Equal Opportunities Law, it is not clear how it is applicable to self-employed workers. Self-employed workers are viewed as entrepreneurs, and therefore it is impossible to assess the level of protection regarding access to employment, pay or dismissal, according to what the Directive provides for in Article 14.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

National legislation addressing equal access to goods and services is rather recent in Romania and reflects the standards as provided for by Directive 2004/113/EC, including by exactly reproducing the scope and all the exceptions as provided for in the European Directive. On 14 May 2008 the Romanian Government adopted Governmental Ordinance No. 61 transposing EU legal standards with regard to equal access to goods and services.

Although the Romanian legal framework already included the concepts of direct and indirect discrimination, equal treatment and less favourable treatment of women for reasons of pregnancy and maternity before the adoption of the Governmental Ordinance on equal treatment with regard to access to goods and services, the latter again provided for the same concepts. Its legal provisions are applicable to all persons who provide goods and services available to the general public irrespective of the persons concerned, with regard to both the public and the private sector, including public bodies.

The related goods and services are offered outside the area of private and family life. The non-discrimination principle is not applicable to the content of media and advertising, education and employment, including independent professions.

2.b. Freedom to choose contractual partners

Governmental Ordinance No. 61 of 2008 does not explicitly provide for the transposition of Article 3(2) of Directive 2004/113/EC with regard to the individual's freedom to choose a contractual partner, as long as that choice is not based on that person's sex.

It could therefore be construed that, in the absence of an explicit transposition, the respective provisions could be considered as transposed on the basis of the combination of the general civil law principle of freedom of contract and the provisions of the Equal

Opportunities Law that would prevent any form of sex-based discrimination in the area of access to and supply of goods and services.

2.c. Collective agreements and case law

With regard to assessing whether collective bargaining agreements contribute to clarifying or expanding the Directive's scope of application, it is impossible to carry out such analysis.

Case law in Romania is poorly developed and it is therefore impossible to assess to which extent case law contributes to extending the personal scope as provided for by the Directive.

2.d. Additional information

As per the provisions of Governmental Ordinance No. 61 of 2008 on equal treatment with regard to access to and supply of goods and services, the former National Agency on Equal Opportunities for Women and Men (NAEO) was the body legally responsible for informing the European Commission on the level of implementation of the provisions regarding the area concerned, as well as on the derogations that Romania intended to apply in the relevant area. Currently, as NAEO has ceased to exist, it is not clear which public institution now has this task.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

Directive 2010/41/EU has not been transposed yet into Romanian legislation. The main obstacle is the lack of financial resources to enable and ensure its transposition.

The aspect of the recognition of the work of assisting spouses has not been adequately implemented in Romania with regard to the equal opportunities principle and represents one of the weak points in transposing EU legal standards into the national legal framework, as well as in implementing it in the sense as provided for.

The issue of recognising the situation of assisting spouses does not receive any public attention: neither of the authorities that are in charge of equal opportunities policies and the mass media covers it at all. The concept of 'assisting spouses' does not have a proper equivalent in the Romanian legal framework. Therefore, this category of persons is not expressly dealt with within the national legal framework.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

There is nothing to report.

3.c. Collective agreements and case law

With regard to assessing whether collective bargaining agreements contribute to clarifying or expanding the Directive's scope of application, it is impossible to carry out such analysis.

Case law in Romania is poorly developed and it is therefore impossible to assess to which extent case law contributes to extending the personal scope as provided for by the Directive.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

- a) A *pregnant employee* is the woman who has notified her employer in writing with regard to her physical condition of pregnancy and submitting a medical document delivered by her family doctor or by the specialist doctor certifying her condition;
- b) an *employee who recently gave birth* is the woman who has resumed her work after having taken maternity leave (pregnancy and childbirth) and has requested her employer in writing for the protective measures stipulated by the law by submitting a medical document delivered by the family doctor, but no later than six months after the child-bearing date; and

- c) an *employee who is breastfeeding* is the woman who has resumed her work after having taken maternity leave, who breastfeeds her child and has notified her employer in writing about the beginning and the presumed end of the breastfeeding period, by enclosing medical documents delivered by the family doctor in this regard.

4.b. Collective agreements and case law

With regard to assessing whether collective bargaining agreements contribute to clarifying or expanding the Directive's scope of application, it is impossible to carry out such analysis.

Case law in Romania is poorly developed and it is therefore impossible to assess to which extent case law contributes to extending the personal scope as provided for by the Directive.

With regard to women whose ova have been fertilised in vitro, but not yet transferred to their uterus, such cases are not currently covered by Romanian legislation, as the medical certificate required by law to be submitted to the employer with regard to the employee's condition of pregnancy shall attest to the physical condition of pregnancy that in this case does not exist.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

The concepts of pregnant workers, workers who have recently given birth and workers who are breastfeeding have been transposed into Romanian legislation by the Governmental Ordinance on maternity protection at the workplace.⁴⁴⁵ The personal scope of the Governmental Ordinance on maternity protection is limited to women employees who are employed on the basis of an employment agreement. Consequently, self-employed women are not covered by the protective measures offered by the law in this area. Romanian legislation does not recognise the concept of 'quasi/para-subordinate workers'.

4.d. Additional information

Maternity leave can be granted to self-employed women on the same conditions as the women workers who are employed on the basis of an individual employment contract, providing that they meet the conditions of paying the contributions for self-employed persons and all other eligibility criteria as defined by the law.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

Romania has transposed the provisions of Directive 2010/18/EU through the provisions of Social Benefits Emergency Ordinance No. 124 of December 2011⁴⁴⁶ and Emergency Ordinance No. 111 of December 2010⁴⁴⁷ on child-raising leave and the corresponding allowance. Clause 1(2) of the Framework Agreement has been adequately transposed into national legislation. Both of these legal norms include into their scope all persons who meet the eligibility criteria for being granted parental leave, without any distinction between male or female employees. Furthermore, Clause 1(3) has also been adequately transposed, as the provisions of the Labour Code forbid any differentiation between employees on the grounds of being employed based on a part-time or full-time employment agreement, or based on the duration of the employment contract (permanent or fixed-term).

5.b. Entitlement to parental leave

Clause 2(1) of the Framework Agreement has been transposed into Romanian legislation through the combined legal provisions of the 2010 Child Raising Emergency Ordinance and

⁴⁴⁵ Governmental Ordinance No. 96 of 2003 of 14 October 2003 regarding the protection of maternity at the workplace, published in Official Gazette No. 750 of 27 October 2003, adopted through Law No. 25 of 5 March 2004, with all subsequent amendments.

⁴⁴⁶ Emergency Ordinance No. 124 of 27 December 2011 on amending and completing certain legal norms granting social assistance benefits, published in Official Gazette No. 938 of 30 December 2011.

⁴⁴⁷ Emergency Ordinance No. 111 of 8 December 2010 on child-raising leave and the corresponding monthly allowance, published in Official Gazette No. 830 of 10 December 2010.

of the 2011 Social Benefits Emergency Ordinance. Both birth and adoption are covered by the law. The length of the child-raising leave may be for a period of up to one or two years of age of the respective child, or three years of age, in the case of disabled children. The employee who applies for such leave shall indicate which option he/she chooses regarding the duration of the child-raising leave.

Before the adoption of the Social Benefits Emergency Ordinance in December 2011, such leave and the corresponding allowance were entirely and for the entire chosen period granted to only one parent. The parent had to exercise such right before both his/her employer, thus causing a voluntary suspension of the individual employment contract, and before the local public authorities in charge of the payment of the child-raising allowance.

Following the applicability of the Social Benefits Emergency Ordinance, in line with the provisions of the Parental Leave Directive, at least one month of the child-raising leave must be allotted to the other parent, namely the one not having exercised his/her right to apply for child-raising leave.

Clause 3(1)(b) of the Framework Agreement has been transposed into Romanian legislation through the provisions of the 2010 Child Raising Emergency Ordinance. According to the provisions of Article 2(1) and 2(5), child-raising leave and the corresponding allowance may be granted to persons who have earned an income for twelve months prior to the child's birth or adoption. Incomes are represented by salary amounts, income from independent activities or from agricultural activities, post-income tax. The length of service qualifies with no distinction between permanent or fixed-term employment contracts, as long as the income calculation basis can be determined for each month of the twelve-month period required to qualify for child-raising leave. Interestingly enough, in case of fixed-term contracts, the Romanian Labour Code stipulates that a contract that is concluded within three months after the termination of the previous one is considered as a successive contract. Such time gap is then included into the twelve months required for being granted parental leave.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

Self-employed workers are entitled to parental leave on the same conditions as those applicable to employees hired on the basis of an individual labour agreement on the condition that they contribute to the social security system on a voluntary basis.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

The Romanian national legal framework proves to be a coherent structure with regard to the various personal and material scopes of application of the three main sex equality directives (Directive 2006/54/EC, Directive 2004/113/EC and Directive 2010/41/EU) and the scope of application of Directives 2000/43/EC and 2000/78/EC.

SLOVAKIA – Zuzana Magurová

Introduction

The Antidiscrimination Act⁴⁴⁸ (*Antidiskriminačný zákon*) is a general Act on equal treatment and protection against discrimination. The grounds on which discrimination is prohibited are: sex, religion or belief, race, national or ethnic origin, disability, age, sexual orientation, marital or family status, colour, language, political or other opinion, national or social origin, property, ancestry or other status. The amendment to the Antidiscrimination Act that entered into force on 1 April 2008 extended the protection against discrimination in the areas of social

⁴⁴⁸ Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination and on amendment of certain Acts (Antidiscrimination Act), as amended.

protection, healthcare, education, as well as in the access to goods and services, including housing, that are provided to the public by legal entities and individuals (entrepreneurs). In previous legislation, the only grounds on which discrimination was prohibited in these areas were sex, race and national or ethnic origin.

As regards the personal scope the Antidiscrimination Act only specifies persons who act as ‘obliged parties’ (duty holders) in legal relations within the scope of this Act. According to the principle of equal treatment the obliged party means ‘every person’. This means that the persons who are obliged to apply the principle of equal treatment include individuals, legal persons, state authorities, self-governing bodies and interest self-governing bodies. Persons protected against discrimination are all parties to legal relations in which these rights are exercised.

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

The Labour Code (*Zákoník práce*)⁴⁴⁹ regulates individual labour relations, the subject of which is always dependent work. Only work of the employee for the employer that is carried out personally, according to instructions of the employer, on behalf of the employer, for pay or consideration, in working hours, at the expense of the employer, using production means of the employer and on the responsibility of the employer is regarded as dependent work performed in a relationship of superiority of the employer and subordination of the employee.

The Labour Code also contains regulations of employment relationships with reduced working hours (part-time work)⁴⁵⁰ including job sharing⁴⁵¹ and special types of employment relationship – ‘home work’ and ‘telework’.

The principle of non-discrimination for the purpose of protection of part-time workers⁴⁵² and workers who performs home work or telework,⁴⁵³ as expressed in the Labour Code, reflects a notion of rather formal equality.

The Labour Code also subsidiarily applies to employment relations of civil servants and public servants, unless stipulated otherwise by a special regulation.

In the employment relationship employees are protected against discrimination by the employer and vice versa. The Labour Code imposes on each employer the obligation to apply to its employees the principle of equal treatment as defined in the Antidiscrimination Act which has the character of *lex specialis* in relation to the Labour Code.

In addition to employment, the Labour Code also allows agreements on work performed outside the employment relationship for atypical forms of participation in the performance of dependent work, for which the existence of a hierarchy of superiority and subordination are common features. They are ‘work performance agreements’ (the work is defined by its expected result and its scope does not exceed 350 hours in one calendar year), ‘agreements on work activities’ (this occasional activity is defined by the type of work and its scope does not exceed 10 hours per week) and ‘agreement on temporary work of students’. Only the general provisions of the Labour Code on safety and protection of health at work and prohibitions of performance of certain work by women apply to the relations existing under these agreements. However, the provisions on the employment relationship (start and end, notice periods), working hours (continuous rest, overtime work, night work, leave), pay (including

⁴⁴⁹ Act No. 311/2001 Coll. Labour Code, as amended.

⁴⁵⁰ According to Article 49 of the Labour Code an employer may agree with an employee reduced weekly working hours that differ from the determined weekly working hours. Reduced working hours need not be distributed evenly over all working days.

⁴⁵¹ According to Article 49a of the Labour Code job sharing refers to a job in which employees in an employment relationship with reduced working hours themselves distribute amongst themselves the working hours and the job description pertaining to the job.

⁴⁵² According to Article 49(5) of the Labour Code an employee in an employment relationship with reduced working hours must not be advantaged nor limited in comparison to a comparable employee.

⁴⁵³ According to Article 52(4) of the Labour Code working conditions for employees who work from home or telework may not disadvantage such employees in comparison with comparable employees who work at the employer's workplace.

equal pay), obstacles at work and corporate social policy (meals for employees) do not apply to these relations. The employee working under one of these agreements is not entitled e.g. to a paid leave or meal tickets.

The self-employed worker is an individual who does business as an entrepreneur according to the Commercial Code (*Obchodný zákonník*)⁴⁵⁴ or who pursues self-employment activities according to the Small Business Act (*Živnostenský zákon*)⁴⁵⁵ and who cannot acquire or have the legal status of employee during the performance of one of these activities.

1.a. Equal pay

The Antidiscrimination Act contains a general provision that the principle of equal treatment in labour relations also applies to remuneration. The principle of equal pay for equal work and work with equal value is embodied in the Labour Code. According to Section 6 of the Labour Code, women and men have the right to equal treatment with regard to access to employment and remuneration. Article 13 contains a general prohibition of discrimination and Article 119a includes a definition of equal pay. The principle of equal pay covers employees, part-time workers (including job sharing), and workers who perform home work or telework.

The Act on State Service (*Zákon o štátnej službe*)⁴⁵⁶ provides that the rights contained therein are guaranteed equally to all civil servants and that the provisions of the Labour Code on equal treatment including remuneration apply to them. The Act on Works Performed in the Public Interest (*Zákon o výkone práce vo verejnom záujme*)⁴⁵⁷ explicitly lacks an established principle of equal pay for men and women, as well as the employer's duty to inform employees about the prohibition of discrimination and their rights to equal treatment.

1.b. Equal treatment in occupational social security schemes

In Slovakia, there is no specific regulation of occupational social security schemes.⁴⁵⁸ The Act on Social Insurance (*Zákon o sociálnom poistení*)⁴⁵⁹ covers employees: public servants, civil servants, constitutional representatives, the public guardian of rights (ombudsman), employees in a labour relation according to the Labour Code, members of co-operatives, etc. This Act does not relate to the so-called 'power branches', i.e. specific groups of civil servants, such as the members of the Police Corps, the Slovak Intelligence Service, the Bureau of National Security, the Corps of Prison and the Judicial Guard, the Railway Police, custom officers and professional soldiers. The schemes for these groups of professionals are regulated by separate laws. Their employer (the Ministry of Defence/Ministry of the Interior) pays contributions to special funds associated with ministerial budget chapters.

The principle of equal treatment in social security schemes that is regulated in the Antidiscrimination Act applies to all of the abovementioned employees (covered by the Act

⁴⁵⁴ Act No. 513/1991 Coll. Commercial Code, as amended.

⁴⁵⁵ Act No. 455/1991 Coll. on Licensed Trades (Small Business Act), as amended.

⁴⁵⁶ Act No. 400/2009 Coll. on State Service, as amended, covers *civil servants*: court clerks, judicial trainees of courts and judicial trainees of the prosecution service. This Act does not relate to the constitutional representatives – Members of Parliament, the President, members of the Government, the president and vice-president of the Supreme Audit Office, judges of the Constitutional Court, judges, prosecutors, the public guardian of rights (ombudsman) and the director of the Bureau of National Security, for whom remuneration is regulated in separate laws.

⁴⁵⁷ Act No. 552/2003 Coll. on Works Performed in the Public Interest, as amended, covers *public servants*: employees of state administration authorities (except those falling under the civil service), municipalities, regional bodies, legal entities set up by any of the previous bodies, etc.

⁴⁵⁸ The social security system is based on three schemes: *social insurance*, which covers old age, invalidity, survivor, pregnancy, disease; *state social benefits*, which are direct financial contributions by the State to aid in overcoming an undesirable fall in the population's standards of living due to the occurrence or continuation of certain events in the lives of families (dependent children) and citizens; and *social assistance*, which is the approach of the State to the citizen in need, where the role of the State is only to assist the citizen in overcoming his/her crisis situation. *Social insurance* consists of a mandatory public insurance component (based on mandatory contributions and defined benefit) governed by the Act on Social Insurance, a mandatory/voluntary saving component governed by the Act on Old-age Pension Saving and a voluntary private saving component, which is a supplementary component governed by the Act on Additional Pension Saving.

⁴⁵⁹ Act No. 461/2003 Coll. Act on Social Insurance, as amended.

on Social Insurance) and self-employed persons, because these persons are mandatorily insured under health and pension insurance schemes according to the Act on Social Insurance.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

General regulations regarding access to employment, occupation, self-employment, vocational training and promotion and working conditions are contained in the Antidiscrimination Act, and more detailed regulations in the Labour Code and the Act on Services of Employment (*Zákon o službách zamestnanosti*)⁴⁶⁰ and the Small Business Act (*Živnostenský zákon*).

In conformity with the principle of equal treatment, the Antidiscrimination Act covers prohibition of discrimination on the grounds of sex in the field of access to employment, to occupation, to self-employment and to functions, including job requirements (which also encompasses job advertisements), and of conditions and means of performing employee selection. The Act also provides for general prohibition of discrimination in the access to vocational training and job selection consultancies. Prohibition of discrimination in terms of promotion is contained in the Antidiscrimination Act as well.

The Labour Code already contains more detailed regulations of the access to employment. Apart from the general equal treatment clause in Article 13 that applies to all employment relationships (including part-time work, job sharing, home work and telework) from the beginning until the end of employment, it contains a special article on so-called ‘Pre-contractual Relations’ (Article 41). This Article contains a specific prohibition for a future employer to require information on pregnancy and family relationship and a prohibition against violating the equal treatment principle. This Article also applies to the relations of civil servants and public servants.

In Article 14(1) of the Act on Services of Employment, the right to access to employment is defined as the right to be provided with help either in case of searching for an appropriate job, or in case of vocational training and preparation for the labour market. The right to access to employment is guaranteed in accordance with the principle of equal treatment.

In order to achieve the application of the equal treatment principle in the access to employment, the Act also contains a provision in Article 13 z/aa about the duty of labour offices to inform job applicants about their right to equal treatment in access to employment. Moreover, the Act contains a specific prohibition in Article 62 that prohibits job advertisements with job offers that would contain any restrictions or discrimination on the grounds inter alia of sex, marital or family status or social origin. According to this Article, the criteria for selection of employees must guarantee equal opportunities for all citizens.

According to Article 5a of the Small Business Act, the rights provided for under this Act are guaranteed equally to all persons in conformity with the principle of equal treatment in employment and similar legal relations provided for under the provisions of the Antidiscrimination Act.

1.d. Collective agreements and case law

No analysis of collective agreements is available. There is no systematic monitoring of these agreements, which means that there is a lack of information concerning their concrete provisions. According to the available information, collective agreements usually contain provisions concerning cooperation and communication between the trade union and the organisation’s management, employment and working conditions, wages and remuneration including pay increases, remuneration based on work performance, paid leave, redundancy payments, payment of special bonuses, supplementary pension contributions and payment of 13th and 14th month’s wages. Trade unions primarily try to negotiate the highest possible increase in wages and the greatest job security for employees. Reconciliation issues, which have been included in collective agreements, mostly concern the working conditions of pregnant women and employees taking care of young children.

⁴⁶⁰ Act No. 5/2004 Coll. Act on Services of Employment, as amended.

The Labour Code provides that specific conditions for remuneration of employees may only be agreed in a collective agreement with the competent trade union or in an individual employment contract with the employee.

If remuneration of employees is agreed in the collective agreement it is sufficient to include in the employment contract references to the relevant provisions of the collective agreement. The whole pay scheme, including the number of tariff groups, amount of wage tariffs, form of wages and other rights of the employees, e.g. to meals etc., are usually agreed in the collective agreement. None of the collective agreements (available on the relevant websites) specifies the equal pay control mechanism.

Home work and telework is not very widespread and has not been a subject of collective bargaining. Some collective agreements also contain provisions related to flexible organisation of working hours, but they are very general and mostly relate to weekly or daily flexible working hours.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

Whereas in case of application of the principle of equal treatment, the obliged party means ‘every person’, in specific legal relations a doctor or healthcare facility is obliged to apply the principle of equal treatment to a patient and vice versa, a teacher towards a student and vice versa, and so on. The prohibition of discrimination also applies to mutual relations of patients in healthcare facilities, fellow students at school and fellow workers at work.

2.b. Freedom to choose contractual partners

The issue of freedom to choose contractual partners has not been discussed so far.

2.c. Collective agreements and case law

The issue of the supply of goods and services outside the employment relationship has not been a subject of collective bargaining.

In particular, situations have occurred where providers (especially in restaurants and shops) have refused to provide services to members of the Roma ethnic minority for racial reasons.

No cases of discrimination directed against a service provider are known.

2.d. Additional information

Directive 2004/113/EC was transposed within the required term by a second major amendment to the Antidiscrimination Act in 2008 and also partially by the Insurance Act⁴⁶¹ (*Zákon o poisťovníctve*) and the Consumer Protection Act⁴⁶² (*Zákon o ochrane spotrebiteľa*).

Prohibition of discrimination in the access to goods and services is limited to the sale of goods and supply of services carried out in public and targeted at the public. The provisions of the Antidiscrimination Act do not apply to goods and services offered or provided on a private basis (e.g. providing and offering goods to the members of a private association, family, etc.)

Under the Consumer Protection Act (Article 4(3)) when providing goods and services to consumers, the seller has the obligation to comply with the principle of equal treatment stipulated in the Antidiscrimination Act.

⁴⁶¹ Act No 8/2008 Coll. Insurance Act.

⁴⁶² Act No 250/2007 Coll. Consumer Protection Act.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

A special law regulating only issues regarding self-employed persons does not exist in Slovakia. The term ‘self-employed person’ was regulated by several Acts⁴⁶³ which, however, provided different definitions of this term. The definition of this term was unified in 2011. The Act on Social Insurance defines a self-employed person as an individual who has achieved the age of 18 years and is registered in accordance with tax regulations as: an entrepreneur who earns income from agricultural production, forestry and water management, an entrepreneur who conducts business on the basis of a trade licence (trader), an entrepreneur who conducts business on the basis of an authorisation other than a trade licence (e.g. auditor, tax consultant, notary public), a partner in a public company, an active partner in a special partnership, an entrepreneur who earns income as an author, or earns income from industrial or other intellectual property, an expert and interpreter, or an entrepreneur who earns income from intermediary business according to other regulations.

According to the Small Business Act, the rights provided for under this Act shall be guaranteed equally to all persons in conformity with the principle of equal treatment in employment and similar legal relations provided for under the Antidiscrimination Act.

The definition of a co-operating person (contributing partner) was part of the previous Act on Social Insurance, which was abolished by the current Act on Social Insurance in 2003. The new Act on Social Insurance⁴⁶⁴ lacks any regulation concerning contributing partners.

Only a very weak version of a category that could be considered as an assisting spouse can be found in Article 11(1) of the Small Business Act, which states that the deputy responsible for performing the trading activities of the trader must be in an employment relationship, unless this responsible person is the trader’s spouse. However, this type of engagement in trader’s activities is not explicitly called a cooperative partnership, and the statutory social insurance does not recognise such concept either.

There are no limitations contained in the Commercial Code that would prevent or restrict setting up a commercial company between spouses.

The spouses of self-employed workers, not being their employees or partners in the business, are not protected under the social security scheme for self-employed persons. They are, however, allowed to join the social security scheme voluntarily.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

The terms of pregnant or breastfeeding worker and worker who has recently given birth are defined in accordance with the Directive in the Labour Code and in the Act on Civil Service. For an employer, a pregnant woman or breastfeeding worker is only a worker who has notified this fact in writing, whereby a pregnant worker is also obliged to submit the required medical certificate of her pregnancy. The term ‘worker who has recently given birth’ is specified ‘until the end of the ninth month after the delivery’. The employer can only provide increased protection to pregnant women and breastfeeding mothers from the moment that such worker has informed him about her condition.

The employer has the right to terminate the employment relationship with a woman or man in specified cases by giving such worker his/her notice only in exceptional cases. But if the worker does not inform the employer about her pregnancy, the employer ‘does not know’ about it and can terminate the employment relationship with such worker in spite of her condition.

⁴⁶³ Act No. 461/2003 Coll. Act on Social Insurance, as amended, Act No. 5/2004 Coll. Act on Services of Employment, as amended.

⁴⁶⁴ Act No. 461/2003 Coll. on Social Insurance, as amended.

The employment relationship of pregnant women, breastfeeding mothers and women until the ninth month after the delivery in the trial period can only be terminated in writing and in exceptional cases that are not related to pregnancy or maternity and the employer is obliged to properly justify the termination of employment relationship in the trial period in writing, otherwise it is invalid.

The Labour Code provides women with a right to maternity leave for 37 weeks and a woman who has given birth to two or more children simultaneously is entitled to a maternity leave of 43 weeks. In connection with caring for a newborn baby the father is also entitled to a parental leave of the same duration if he takes care of the newborn baby. During the maternity leave, the woman shall be provided with a social maternity allowance amounting to 65 % of her daily ‘calculation basis’ (which is based on her income/wage before the maternity leave). Maternity allowance is provided under Articles 48–53 of the Act on Social insurance. However, maternity allowance shall be provided only if the woman has been socially insured for a minimum of 270 days in the two years before the birth. The maternity allowance can also be provided to a man who takes care of a newborn child, but only for a maximum of 22 weeks or 31 weeks.

4.b. Collective agreements and case law

In some cases working conditions of pregnant women, breastfeeding mothers and women until the ninth month after the delivery are also specified in collective agreements in provisions on workers taking care of children.

Only two decisions of the Supreme Court concerning discrimination of workers on maternity leave and one decision concerning discrimination of a worker on the ground of pregnancy are known to date.

The first two cases involved the same two workers whose employment relationships were terminated by the employer, because they had not sworn an oath at the specified date in accordance with the Act on Civil Service (adopted at that time) which changed the employment relationship into civil service. The affected workers were on maternity leave at the time of this change. The employer informed their workers about the date of swearing the oath on a notice board installed at the workplace. As the workers on maternity leave had not been informed of this date, in the employer’s opinion they had not fulfilled the obligation laid down by the law and their employment relationship had to be terminated. The Court declared this conduct of the employer as discriminatory because the employer had discriminated against his workers on maternity leave by not having informed them, unlike his other workers, about the date of swearing the oath and about the change of their employment relationship into civil service.

In the second case, the Court decided in an action filed by a worker who had been dismissed as director deputy and whose wages had been decreased after the employer had learnt about her pregnancy. The Court declared the conduct of the employer as inadequate and ordered him to pay the affected worker compensation for immaterial harm caused by indirect discrimination related to pregnancy in the amount of EUR 1 330(SKK 40 000).

4.c. Rights of the self-employed and/or the quasi/para-subordinate

Rights of the self-employed in relation to pregnancy and breastfeeding are not regulated by any law. The Social Security Act regulates the conditions on which self-employed persons are entitled to a maternity allowance, which is sickness benefits provided on the ground of pregnancy or taking care of a live-born child. During the maternity leave, the woman shall be provided with a maternity allowance in the amount of 65 % of her daily calculation basis (which is based on her income/wage before the maternity leave). However, maternity allowance shall be provided only if the woman has been socially insured for a minimum of 270 days in the two years before the birth.

Spouses of self-employed workers are entitled to maternity allowance only if they have joined the social security scheme voluntarily and have been socially insured for a minimum of 270 days in the two years before the birth.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

The entitlement to parental leave applies to all workers covered by the Labour Code, workers who perform work in the public interest and civil servants.

5.b. Entitlement to parental leave

In addition to maternity leave, the employer is also obliged to grant parental leave to the woman or the man who requests it. Parental leave shall be granted up to the child's third year of age and in case of ill health of a child up to the child's sixth year. During the parental leave, the parent is entitled to receive a parental allowance, which is provided under Act no. 571/2009 Coll. on Parental Endowment (*Zákon o rodičovskom príspevku*). The parental allowance is a state social benefit, which the State pays to the parent to provide proper care for the child.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

Self-employed persons are also entitled to parental leave and parental allowance. The right to parental allowance applies to the child's parent (i.e. father or mother) who cares for a child under three (or six) years of age and has suspended operation of the business.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

Directives 2006/54/EC, 2000/43/EC and 2000/78/EC were specifically transposed by the Antidiscrimination Act, which provides that every person is obliged to apply the principle of equal treatment, so it covers both the personal and material scope of all directives.

7. Relevant legal acts and case law

All these acts are available on the website www.zbierka.sk

- Act No. 365/2004 Coll. of Laws on equal treatment and protection from discrimination in some areas, changing and amending other laws (Anti-discrimination Act) (*Antidiskriminačný zákon*)
- Act No. 311/2001 Coll. on the Labour Code (*Zákonník práce*)
- Act No. 5/2004 Coll. on employment services (*Zákon o službách zamestnanosti*).
- Act No. 552/2003 Coll. on Works Performed in the Public Interest (*Zákon o výkone práce vo verejnom záujme*)
- Act No. 312/ 2001, on State Service (*Zákon o štátnej službe*)
- Act No. 461/2003 Coll. on Social Insurance ([*Zákon o sociálnom poistení*](#))
- Act No. 5/2004 Coll. Act on Services of Employment (*Zákon o službách v zamestnanosti*)
- Act No. 455/1991 Coll. on licensed trades (Small Business Act) (*Živnostenský zákon*)

SLOVENIA – Tanja Koderman Sever

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

The equal pay principle is part of the constitutional gender equality clause embedded in Article 14 of the Constitution of the Republic of Slovenia⁴⁶⁵ and is indirectly regulated by

⁴⁶⁵ Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia, Nos 33/91-I, 42/97, 66/2000, 24/03, 69/04 and 68/06.

some other general provisions in the ERA, the Act on Equal Opportunities for Women and Men⁴⁶⁶ and the Act Implementing the Principle of Equal Treatment⁴⁶⁷ (hereinafter the AIPET) when prohibiting discrimination on grounds of gender. The principle of equal pay plays a role in the Employment Relationship Act⁴⁶⁸ (hereinafter the ERA) and in the Act on the System of Salaries in the Public Sector⁴⁶⁹ (hereinafter the ASSPS). According to Article 133 of the ERA, workers must be paid equally for equal work and for work of equal value regardless of their sex. Any provisions in individual employment contracts or collective agreements or any rules adopted by the employer that breach this principle are void. As far as the public sector is concerned, Article 1 of the ASSPS lays down the principle of equal pay for male and female workers for work in comparable posts, titles and functions in the public sector.

The above-mentioned provisions cover all workers who have entered into an employment relationship on the basis of an employment contract.⁴⁷⁰ According to the ERA an employment relationship is a relationship between the worker and the employer, whereby the worker is voluntarily included in the employer's organised working process, in which he or she in return for remuneration continuously carries out work in person according to the instructions and under the control of the employer.⁴⁷¹

In addition to standard employment relationships, the ERA also applies to non-standard, 'atypical' employment, which has grown significantly over the last two decades. It involves new forms of work involving fixed-term contracts, temporary agency workers, unemployed persons performing public works, part-time workers and homeworkers.

1.b. Equal treatment in occupational social security schemes

Participation in the Slovene occupational old-age pension schemes is voluntary. The only exception envisaged is for people performing particularly hard work and work which is harmful to health. The list of those jobs is determined by the Minister for Labour, Family and Social Affairs with the consent of the relevant trade unions and employers' associations. For the relevant workers, a mandatory funded pension scheme has been set up. Otherwise, supplementary pension and disability insurances are divided into compulsory and voluntary pension insurances. Compulsory supplementary pension insurance is compensation for the insurance period with an increase and is intended for people performing particularly hard work and work which is harmful to health or work which cannot be performed successfully after a certain age. Self-employed persons are therefore obliged to join the scheme if they perform such work. Voluntary supplementary pension insurance is the insurance where the insured persons pay amounts into their accounts in order to obtain a supplementary pension after retiring. Only persons included in the compulsory statutory pension insurance scheme or persons already exercising rights deriving from this insurance may join the voluntary supplementary pension insurance scheme. Since self-employed persons are included in the compulsory statutory pension insurance scheme according to Article 15⁴⁷² of the Pension and

⁴⁶⁶ Act on Equal Opportunities for Women and Men, Official Gazette of the Republic of Slovenia No. 93/2007.

⁴⁶⁷ Act Implementing the Principle of Equal Treatment, Official Gazette of the Republic of Slovenia, No. 61/2007.

⁴⁶⁸ Employment Relationship Act, Official Gazette of the Republic of Slovenia, Nos 42/02, 103/07.

⁴⁶⁹ Act on the System of Salaries in the Public Sector, Official Gazette of the Republic of Slovenia, Nos 95/2007, 69/2008, 107/2009.

⁴⁷⁰ Article 5 of the ERA.

⁴⁷¹ Article 4 of the ERA.

⁴⁷² Compulsory insurance shall cover persons who, as their sole or principal occupation in the Republic of Slovenia:

- as independent contractors, engage in gainful activity according to the Companies Act, including natural persons who are considered to be craftsmen or private traders pursuant to the legislation applicable prior to enactment of the Companies Act;
- contributing their personal labour, engage in artistic or any other cultural activity or an activity in the field of media, and are, in accordance with law, entered in the Register of Independent Activities, if such a Register is stipulated;
- engage in an independent activity in the field of healthcare or social security: medical, clinical or specialist psychological activity, private veterinarian or any other private activity in the field of healthcare, social security or pharmacy in accordance with the law;
- engage in clerical or any other religious office;

Invalidity Insurance Act⁴⁷³ (hereinafter the PIIA) they may join the voluntary supplementary pension insurance scheme if they want to.

Conditions for the acquisition of rights under the voluntary supplementary insurance do not vary according to the gender of the insured person.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

Common starting points and premises for ensuring equal treatment of all persons as regards access to employment, vocational training and promotion and working conditions are stipulated by the AIPET, whereas concrete provisions are included in the ERA and in the Public Servants Act (hereinafter the PSA). In addition to the general prohibition of discrimination concerning job applicants and employees on the ground of gender in the ERA, there are also some special provisions: the provision of equal treatment for job applicants when advertising a vacancy and during the selection procedure; protecting workers from harassment and sexual harassment and obliging employers to take measures to prevent harassment, sexual harassment and bullying, and protecting workers against unfair dismissal due to gender, pregnancy etc. In addition, the principle of equal access to work positions is defined by the PSA. Those provisions cover all workers who have entered into an employment relationship on the basis of an employment contract and workers in 'atypical' employment such as fixed-term employment, temporary agency workers, unemployed persons performing public works, part-time workers and homeworkers.

Self-employed persons are protected by provisions of the AIPET. According to Article 2, equal treatment shall be ensured irrespective of sex, nationality, racial or ethnic origin, religious or other belief, disability, age, sexual orientation or other personal circumstance, in relation to conditions for access to self-employment, including selection criteria and recruitment conditions irrespective of the type of activity and at all levels of the occupational hierarchy. This protection does not cover discriminatory termination of self-employment contracts by employers or clients.

Volunteers are also specifically protected against discrimination in Article 10 of the Act on Volunteering.⁴⁷⁴ According to this provision, volunteers must be treated equally at their entry into the organization and when performing voluntary work, irrespective of personal circumstances such as gender, ethnicity, race or ethnic origin, invalidity, age, sexual orientation and other personal circumstances.

1.d. Collective agreements and case law

Collective agreements and case law do not contribute to clarifying or expanding the personal scope of application of the above-mentioned provisions.

1.e. Additional information

There is no other relevant information with respect to the personal scope of Directive 2006/54.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

Article 3(1) of Directive 2004/113/EC has been transposed by Article 2 of the AIPET. According to this provision equal treatment shall be ensured irrespective of sex, nationality, racial or ethnic origin, religious or other belief, disability, age, sexual orientation or other

– have their own private practice as lawyers or notaries public in accordance with law;
– engage in any other permitted activity as their sole or principal occupation.

⁴⁷³ Pension and Invalidity Insurance Act, Official Gazette of the Republic of Slovenia, No. 109/2006.

⁴⁷⁴ Act on Volunteering, Official Gazette of the Republic of Slovenia, No. 10/2011.

personal circumstance in relation to access to and supply of goods and services, which are available to the public, including housing.

2.b. Freedom to choose contractual partners

Apart from the general principle of free regulation of obligation relationships, including freedom to choose a contractual partner in the Code of Obligations, and the above-mentioned general provision on equal treatment in the AIPET,⁴⁷⁵ Slovene legislation has no other specific provisions implementing Article 3(2) of Directive 2004/113/EC.

2.c. Collective agreements and case law

Collective agreements and case law do not contribute to clarifying or expanding the personal scope of application of the above-mentioned provisions.

2.d. Additional information

There is no other relevant information with respect to the personal scope of Directive 2004/113/EC.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

Directive 2010/41/EU has been transposed by the AIPET, the Companies Act,⁴⁷⁶ the Institutes Act,⁴⁷⁷ the PIIA and Parental Care and Family Benefits Act⁴⁷⁸ (hereinafter the PCFBA). As mentioned in 1.c., self-employed persons are directly protected by Article 2 of the AIPET as regards access to self-employment. In addition, there are general provisions in the AIPET prohibiting discrimination in any area of social life, provisions on ensuring legal protection in cases of violations of the ban on discrimination and compensation for loss or harm suffered. The Companies Act and the Institutes Act are neutral as regards gender and therefore provide equal opportunities for women and men in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity. In the social security area, self-employed persons are covered by mandatory social security schemes (the health insurance scheme, the pension and invalidity insurance scheme and the unemployment insurance scheme). Regarding help provided by spouses, only Article 34 of the PIIA and Article 6 of the PCFBA are relevant since other laws do not regulate this issue. Article 34 of the PIIA provides for voluntary membership in the mandatory pension and invalidity insurance for persons (usually the spouses of farmers) engaged in an independent agricultural activity who do not meet the conditions for mandatory insurance and Article 6 of the PCFBA provides for mandatory insurance covering parental care leave for persons engaged in an independent agricultural activity in the Republic of Slovenia as their sole or principal occupation who are already included in the mandatory pension and disability insurance scheme.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

The scope of equal treatment contained in Article 4(1) does not add significantly to the ‘access to... self-employment or occupation’ referred to in Article 14(1)(a) of Directive 2006/54/EC.

3.c. Collective agreements and case law

Collective agreements and case law do not contribute to clarifying or expanding the personal scope of application of the above-mentioned provisions.

⁴⁷⁵ Article 2 of the AIPET.

⁴⁷⁶ Companies Act, Official Gazette of the Republic of Slovenia, No. 65/2009.

⁴⁷⁷ Institutes Act, Official Gazette of the Republic of Slovenia, Nos 12/1991, 17/91, 5/92, 13/93, 66/93, 45/94, 8/96, 31/00, 36/00.

⁴⁷⁸ Parental Care and Family Benefits Act, Official Gazette of the Republic of Slovenia, No. 110/2006.

3.d. Additional information

There is no other relevant information with respect to the personal scope of Directive 2010/41/EU.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

Articles 1 and 2 of Directive 92/86/EEC have been transposed by the Regulation on the protection of health in the workplace of pregnant workers and workers who have recently given birth or are breastfeeding (hereinafter the Regulation).⁴⁷⁹ According to the Regulation ‘a pregnant worker’ shall mean a pregnant worker who has informed her employer of her condition with a medical certificate; ‘a worker who has recently given birth’ shall mean a worker who gave birth less than twelve months ago and who has informed her employer of her condition with a medical certificate; and ‘a worker who is breastfeeding’ shall mean a worker who is breastfeeding and has informed her employer of her condition with a medical certificate.

4.b. Collective agreements and case law

Collective agreements and case law do not contribute to clarifying or expanding the personal scope of application of the above-mentioned provisions.

Regarding ‘managers’, they should be covered by Directive 92/85/EEC. However, women whose ova have been fertilized in vitro, but not yet transferred to their uterus would not be covered.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

All relevant rights, such as the right to maternity leave, parental leaves and a right to safe and healthy working conditions, are ensured for self-employed persons as well. The implementation of laws and other regulations implementing Directive 92/85/EEC is supervised by the Labour Inspectorate of the Republic of Slovenia.

These rights are not recognized for quasi/para-subordinate workers because our system does not include this category of workers.

4.d. Additional information

There is no other relevant information with respect to the personal scope of Directive 92/85/EEC.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

According to Article 6 of the Parental Care and Family Benefits Act⁴⁸⁰ (hereinafter the PCFBA), the following persons are insured for parental care leaves: persons employed in the territory of the Republic of Slovenia, persons who are employed with an employer established in the Republic of Slovenia and who have been seconded to work or professional training abroad, unless they are covered by compulsory insurance in the country to which they have been seconded; persons who independently carry out a gainful activity or occupation of a professional nature as their sole and principal occupation; managers of companies and directors of private institutes in the Republic of Slovenia who are not insured on any other basis; farmers, members of their agricultural holdings and other persons engaged in an independent agricultural activity in the Republic of Slovenia as their sole or principal

⁴⁷⁹ Regulation on the protection of health in the workplace of pregnant workers and workers who have recently given birth or are breastfeeding, Official Gazette of the Republic of Slovenia, No. 82/2003.

⁴⁸⁰ Articles 13 to 37 define different types of parental leave, their duration and detailed rules for their application; Articles 38 to 47 define the conditions for obtaining leave, its duration and the amount of the allowance for all types of leave for childcare purposes.

occupation and are already included in the mandatory pension and disability insurance scheme; unemployed persons who receive unemployment benefits or unemployment assistance; and some others.

5.b. Entitlement to parental leave

The ERA contains some general provisions regarding the right to parental leave,⁴⁸¹ the obligation to inform an employer of the commencement and the distribution of parental leave,⁴⁸² the benefits during periods of parental and sickness leave⁴⁸³ and the protection against unlawful dismissal due to pregnancy, breastfeeding and absence from work due to taking sickness or parental leave. However, the most important provisions are found in the PCFBA. According to the PCFBA there are four different types of parental leave: maternity leave, paternity leave, parental leave on the ground of the birth of the child and adoption. Female workers are entitled to a period of full-time maternity leave of 105 days, commencing at least 28 days before the date of confinement. Male workers are entitled to a period of full-time paternity leave of 90 days, out of which 15 days must be used before the baby is 6 months old and 75 days before the child turns three. The right to parental leave on the ground of the birth of the child is granted to one of the parents directly after the end of maternity leave to take care of the child during a period of 260 days for one child (which can be extended by up to 90 days for each additional child) on a full-time or part-time basis. A worker who adopts a child between the age of one and four is entitled to parental leave of 150 days or of 120 days if the child is aged between four to ten. During these periods of leave, insured persons are entitled to benefits which are equal to 100 % of their average salary over the 12 months immediately prior to the date on which the benefit was claimed. The exception is paternity leave where only 15 days are paid.

During parental leave, workers remain employed under the terms of the existing employment agreement and are therefore generally entitled to return to the same job at the end of the leave. In case of urgent family reasons (sickness, accidents etc.), workers are entitled to time away from work. The duration of the sickness leave is limited to 7 or 15 days, depending on the age of the child and on whether the leave is needed for a child with special needs. The benefit is equal to 70 % of the average salary during the preceding year.⁴⁸⁴

5.c. Rights of the self-employed and/or the quasi/para-subordinate

Rights accorded by Directive 2010/18/EU are ensured to self-employed persons who are included in the system of insurance for parental care leaves. The implementation of provisions of the PCFBA regarding the use of parental leave and the right to part-time work due to parenthood is supervised by the Labour Inspectorate of the Republic of Slovenia. In addition, the supervision of the implementation of provisions of the PCFBA on the granting of parental benefits and family benefits is carried out by the Ministry of Labour, Family and Social Affairs.

These rights are not recognized for quasi/para-subordinate workers because our system does not include this category of workers.

5.d. Additional information

There is no other relevant information with respect to the personal scope of Directive 2010/18/EU.

⁴⁸¹ Article 191(1) of the ERA.

⁴⁸² Article 191(2) of the ERA.

⁴⁸³ Article 137 of the ERA.

⁴⁸⁴ Article 29 of the Health Protection and Insurance Act (Official Gazette of the Republic of Slovenia, Nos 9/92, 13/93, 9/96, 29/98, 77/98, 6/99, 56/99, 99/2001, 42/2002, 60/2002).

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

In addition to relatively well-elaborated constitutional provisions, the adoption of the AIPET and ERA are relevant for the implementation of the above-mentioned directives. The AIPET is the basic and general antidiscrimination act, prohibiting discrimination of all persons in exercising their rights and duties and in implementing human rights and fundamental freedoms. Article 2 of the AIPET is in fact a ‘copy out’ of Article 3(1) of the Race Directive and prohibits discrimination irrespective of gender, nationality, racial or ethnic origin, religious or other belief, disability, age, sexual orientation or other personal circumstance. It does not only cover the area of employment, but also the area of education, social advantages, social protection, including social security and healthcare, membership of and involvement in an organization of workers or employers, or any organization whose members practise a particular profession, including the benefits provided for by such organizations, access to and supply of goods and services, which are available to the public, including housing etc. In addition, certain other areas, like the area of employment, are further regulated by specific legislation. Article 6 of the ERA prohibits discrimination in matters of employment on various grounds (including race, ethnic origin, nationality, gender, disability, age, family status etc.).

SPAIN – Berta Valdés de la Vega

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

The personal scope of the principle of equal pay is mainly expressed through the Workers’ Statute (WS), and is applicable, therefore, to employees. This regulation is applicable to workers, where a worker is a person who ‘voluntarily renders a service for which he or she is paid. These services exist under another person’s or company’s management and guidance’ (Article 1.1 WS). Civil servants and government employees are excluded when their employment is regulated by administrative laws. Certain activities that do not meet the requirements established in Article 1.1 WS are also excluded, including self-employed workers and ‘quasi-subordinate’ workers. Article 2 of the WS includes a number of relationships under the term ‘special employment relationship’, including top management personnel, domestic workers, disabled workers employed in special centres, etc. These activities are regulated by a specific law, and are beyond the scope of the Workers’ Statute, unless otherwise established in the applicable law in question.

The prohibition on wage discrimination applied to workers regulated under the WS is stipulated in Articles 28, 22, 24 and 17 of the WS. These regulations are also applicable to workers under fixed-term and part-time contracts. Article 28 of the Workers’ Statute states that ‘the employer is obliged to pay the same amount for work of equal value, rendered directly or indirectly, whichever is its nature, salary or different from salary, without discrimination on grounds of sex or for any other reason, element or condition in this work relationship’. The prohibition of discrimination in labour relations is also stated in Article 17 of the Workers’ Statute, indicating that any rule, individual clause, clause of collective agreements or unilateral decisions of the enterprise containing direct or indirect discriminations on grounds of ... sex related to salary will be null and void. The classification systems are fixed in the collective agreements for each sector or enterprise. In this respect, the use of common rules for both sexes and neutral criteria to elaborate the different professional groups integrating the classification systems is stated in Article 22 of the Workers’ Statute. The same rule is applied to the promotion scales in Article 24 of the Workers’ Statute.

The most important law regulating the civil service is Act 7/2007, the Basic Statute of Public Employees. The personal scope of this law mainly includes employees of the General

State Administration, together with those of the Autonomous Community administrations, local authorities and other entities. Article 1.3(d) of the Statute establishes equal treatment for men and women as a fundamental premise. While the criteria used for establishing remuneration do not specifically prohibit discrimination on the grounds of sex, the formula used to determine salaries is designed to guarantee equality between men and women. Said salaries are established in the State Budget Act, which is drawn up each year. Salaries are linked to the occupational classification system (for basic remuneration) and performance assessment (for salary supplements). The criteria for drawing up the occupational classification system are established through collective bargaining with unions (Article 37), which are subject to the principle of equality and non-discrimination. Procedures for evaluating civil servant job performance must be based on the principles of equality, objectivity and transparency. The principle of equality of treatment and opportunities between women and men should be guaranteed both in private and in public employment referring to all working conditions, including remuneration (Article 5 LOI).

The prohibition of discrimination in the context of the earnings of economically dependent self-employed workers ('quasi-subordinate' category of workers) has been transposed in Act 20/2007, the Self-Employed Workers' Statute. These regulations define economically dependent self-employed workers (TRADE in its Spanish acronym) as 'workers who engage in an economic or professional activity for gain habitually, personally, directly and predominantly for one individual or legal entity known as the 'client', on which they are economically dependent since they receive from that client at least 75 % of their income from economic or professional activities'. Article 6.2 of Act 20/2007, the Self-Employed Workers' Statute, establishes that public authorities and anyone engaging the professional services of TRADEs are prohibited from discriminating both directly and indirectly on a number of grounds (birth, sex, ethnicity or race, disability, age, sexual orientation, language, civil status, beliefs or other personal or social circumstances). This prohibition affects 'both free enterprise and contracted labour, as well as working conditions', where the latter aspect includes payment for services rendered as agreed in the TRADE contract. In addition to the above, Act 3/2007 for effective equality between men and women is also applicable to TRADEs (Article 6.5).

1.b. Equal treatment in occupational social security schemes

Occupational social security schemes are private, free and voluntary and are totally separate from the social security system (which is public and compulsory). Act 20/2007, the Self-Employed Workers' Statute, regulates mandatory social protection of self-employed workers within the social security system, but not supplementary social protection (occupational social security schemes). Insurance is mainly regulated by Act 30/1995 on Private Insurance Organisation and Supervision, and by Royal Legislative Decree 1/2002 on Pension Plans and Funds. In both cases, the law is aimed at individuals, irrespective of their economic activity, except for occupational schemes (when the sponsor is the employer). Self-employed workers, like other individuals, are free to take out insurance or subscribe to pension plans.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

The personal scope and general substance of Article 14(1) of the Directive is transposed in Article 5 of Act 3/2007 for the effective equality between men and women, which states the following: 'The principle of equal treatment and opportunities for men and women, applicable in the domain of public and private employment, will be guaranteed as provided in the applicable legislation in: access to employment, including self-employment, vocational training and promotion; working conditions including remuneration and dismissal; and affiliation with and participation in trade unions and employers' organisations or any association whose members practise a specific profession, including the benefits granted thereby.' The equal treatment referred to here is aimed specifically at employees regulated under the Workers' Statute, and includes fixed-term and part-time employees. The regulation applied to self-employed workers in Act 20/2007 of the Self-Employed Workers' Statute is

general with regard to the principle of equality (see 4.b. below), and does not adequately address equal access to jobs for self-employed workers.

1.d. Collective agreements and case law

Salaries are usually fixed in the collective agreements, and during the late eighties some of them excluded fixed-term employees from its personal scope. The Constitutional Court (STC 136/1987 and 177/1993) considered this exclusion as discriminatory.

1.e. Additional information

There is no additional information to report.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

Articles 3(1) and (4) of the Directive have been transposed almost verbatim into Article 69 of Act 3/2007 for effective equality between men and women. The subjective scope of application of the Act includes both state-owned institutions and private persons, be they individuals or companies. Article 69.1 states:

‘All individuals or legal entities in the public or private sector supplying goods or services to the public outside the scope of private and family life must honour the principle of equal treatment for women and men in their business transactions, avoiding any direct or indirect discrimination on the grounds of sex.’

2.b. Freedom to choose contractual partners

Article 3(2) is also transposed practically verbatim in Article 69.2 of Act 3/2007 for effective equality between men and women. In this Article, the Act states that the principle of equal access to goods and services ‘has no effect on the freedom to contract, including the freedom to choose a contractual partner, providing such choice is not based on sex’.

2.c. Collective agreements and case law

In the *Comunidad Autonoma Vasca* there are the so-called ‘gastronomic societies’ that are quite important from a social and cultural point of view. They have various purposes but they are all a meeting place with kitchen and dining room for the exclusive use of their members. They are created under the protection of the right of Association but 58.5 % of the 323 associations exclude women as members. According to the report of the Ombudsman for equality of women and men of the Basque Government (2010), the statutes of these gastronomic societies discriminate against women directly and indirectly.

2.d. Additional information

There is no additional information to report.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

Act 20/2007, the Self-Employed Workers’ Statute, regulates self-employment, defining it as ‘an individual who habitually, personally and directly engages, on his or her own account and outside another person’s organisation or sphere of management, in a business or professional activity for a profit, irrespective of whether or not he or she has any employees’. This Act also applies to family members of the self-employed worker who habitually, personally and directly work with the self-employed person, but are not registered as employees. Such family members would include the spouse and relatives in the descending or ascending line, provided they live with the worker in question. Act 20/2007 makes no reference to unmarried couples,

although this kind of partnership has legal standing in other laws such as, for example, recognition of the entitlement to receive a survivor's pension (Article 174 of the General Social Security Act). Article 4.3a) of Act 20/2007, the Self-Employed Workers' Statute, establishes the self-employed worker's right to equality before the law and to non-discrimination on the grounds of sex. Article 6 addresses the right to non-discrimination applied to free enterprise and contracted labour, and the conditions for professional occupation.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

Article 4(1) has been transposed in Articles 4.3a) and 6 of Act 20/2007, the Self-Employed Workers' Statute. Paragraph 6(5) establishes that the provisions of Constitutional Act 3/2007 of 22 March 2007 for effective equality between men and women shall apply to the right to equality and non-discrimination on the grounds of sex. This reference means that Act 3/2007 is applicable to self-employed workers, including the requirement of non-discrimination in the access to jobs for self-employed workers.

3.c. Collective agreements and case law

El Palmar has been an island in Valencia's Albufera lagoon until the 20th century which mainly derives its income from fishing. The El Palmar Fishing Community is in charge of regulating permanent fishing rights in Albufera. For over 200 years, power was held by those in control of the resources, and was passed from father to son. The El Palmar Fishing Community had its own customary laws governing fishing rights in Albufera, and only admitted as members the male descendents of fishing captains already members of the Community. In the 1990s, several women, being daughters of fishermen, asked to be accepted as members of this Community, which request was refused. In its judgment of 8 February 2001, the High Court ruled that the exclusion of the women constituted sexual discrimination.

3.d. Additional information

There is no additional information to report.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

Regulations protecting pregnancy, maternity and breastfeeding do not include an express definition of the terms of Articles 1 and 2 of Directive 92/85/EEC. The obligation to notify employers of pregnancy, recent birth or breastfeeding is not expressly established. This has given rise to some problems of interpretation when applying occupational hazard prevention measures or protection against dismissal. Article 25.1 of Act 31/1995 on Prevention of Occupational Hazards includes an indirect reference to knowledge of the female worker's condition by establishing the obligation to provide specific protection for workers who, 'due to their known biological condition.... are particularly sensitive to work-related hazards'. Employers can be made aware of such situations through various channels, even in the absence of an official notification by the worker in question. Proof of knowledge is sufficient to create hazard prevention or dismissal protection obligations, and such knowledge can equally be gained from the situation being common knowledge among the woman's colleagues (Constitutional Court judgment 17/2003). Application of the guarantee established in Article 10 of Directive 92/85/EEC and Article 55(5.b) of the Workers' Statute does not require the worker in question to inform anyone of her pregnancy, nor the employer to be aware of her condition. Constitutional Court judgment 92/2008 ruled that mere proof that the worker is pregnant is sufficient to bring protection against dismissal into force, in which case dismissal is null and void. Protection of women against occupational hazards during lactation only applies to natural breastfeeding, not to cases where the infant is given artificial food (Article 26.4 of Act 31/1995 on Prevention of Occupational Hazards). Article 26 of Act 31/1995 on Prevention of Occupational Hazards transposes prevention measures in situations

of maternity-related hazard into Spanish law. These measures (Article 3 of Act 31/1995) are applied to female workers under contract, female public servants, female workers employed in an administrative or statutory capacity by government organisations, female self-employed workers, female members of cooperatives and female employees of military establishments or offices (with certain provisos). Certain civil service duties are excluded from the scope of Act 31/1995 when their specific circumstances preclude application (in the case of police officials, armed forces, and military activities undertaken by the Civil Guards), although they are subject to their own particular hazard prevention rules.

4.b. Collective agreements and case law

Collective agreements can specify certain aspects of occupational hazard prevention that further enhance legal regulations. Some collective agreements refer to the need to notify the employer of the pregnancy for the purpose of arranging hazard prevention measures, although this is not usually made obligatory. With regard to Case C-232/09 *Danosa*, Spanish law differentiates between the special employment relationship for members of senior management (who exercise powers inherent to legal ownership of the company in question, and work under conditions of autonomy and full responsibility, only limited by criteria or instructions issued by the governing bodies of said company) and a self-employed worker occupying a managerial post in a trading company (with directive or managerial duties or similar services for which they personally and directly receive a regular salary, and when they have effective control over the company). Each of these circumstances is regulated individually, but most of the rights established in Directive 92/85 are applicable to both cases (see 4.c. below). The same is not true of women filling the post of director or member of the board of directors of a company when their activities are limited to the duties inherent to such positions. In these cases, the relationship is not one of (special) employment, and these workers are not included in the scope of Act 20/2007, the Self-Employed Workers' Statute.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

Self-employed workers and economically dependent self-employed workers have the following rights: to suspend their activity during maternity or paternity, risk during pregnancy or risk during breastfeeding (Article 4(3g) of Act 20/2007, the Self-Employed Workers' Statute). When activity has been suspended for these reasons, self-employed workers are entitled to receive social security benefits (Articles 4(3g) and 26 of Act 20/2007, the Self-Employed Workers' Statute and Royal Decree 295/2009 of 6 March 2009, regulating economic social security benefits in cases of maternity, paternity, risk during pregnancy and risk during breastfeeding). In the case of economically dependent self-employed workers, maternity or paternity are considered justified grounds for interruption of occupational activity. Termination of the contract by the client, in these circumstances, constitutes a breach of contract, and economically dependent self-employed workers would be entitled to the corresponding compensation for harm caused (Articles 15 and 16 of Act 20/2007, the Self-Employed Workers' Statute).

Self-employed workers are entitled to adequate protection of their health and safety in the workplace (Article 4 (3e) of Act 20/2007, the Self-Employed Workers' Statute). However, these health and safety regulations are not easily applied in the case of work done without the supervision of an employer being applicable. Unless the self-employed worker employs, in turn, workers under contract (in which case they become employers for all hazard prevention purposes), it can be difficult to enforce the obligation to draw up a health and safety plan, carry out hazard evaluation and plan preventive action, particularly for workers with no business organisation. Article 8 of Act 20/2007 regulates the prevention of occupational hazard for self-employed workers and assigns government organisations an active role in promoting health and safety, providing technical advice, offering supervision and enforcing compliance with health and safety rules on the part of self-employed workers. It also establishes specific obligations in three cases: a) The obligation to cooperate, provide information and instruction established in Paragraphs 1 and 2 of Article 24 of Act 31/1995 when the self-employed worker is occupied in the same workplace as that used by workers

from other companies or from the company engaging his or her services; b) Companies engaging self-employed workers to carry out works or services in their own workplace must ensure that said workers comply with rules governing occupational hazards; c) Companies supplying self-employed workers with machinery, equipment, products, material or tools to carry out their work outside said company's workplace are subject to various hazard-prevention obligations.

4.d. Additional information

There is no additional information to report.

5. Directive 2010/18 on parental leave

5.a. Personal scope

Parental leave is applicable to all employed workers, both men and women, whose jobs are regulated by the Workers' Statute (WS). Part-time workers have the same rights as full-time workers (Article 12 (4d) WS); on this subject there are no provisos. Fixed-term contract employees have the same rights as those under open-ended contracts (Article 16(6) WS). Employment contracts signed with a temporary employment agency are fixed-term contracts, and as such have the same right as the latter.

5.b. Entitlement to parental leave

Parental leave after birth or adoption for the purpose of caring for the child is regulated under Articles 46.3 (for leave of absence to care for the child) and 48b (paternity leave). In neither case is this leave of absence subject to or dependent on a prior period of employment, length of service or other factors. Leave of absence to care for a child has a maximum duration of three years for each child, although it can be split up; leave is not limited to the age of the child, but the three years are counted from the day of the birth or the adoption date. The child in question can be natural or adopted, and leave can also be taken for the purpose of caring for a child in the case of pre-adoption or permanent foster care. This leave of absence is the individual right of every worker. However, if both parents work for the same company, their employer may restrict simultaneous leave for justified operational reasons. The period during which the worker is on leave is included when calculating length of service, and during their leave they are still entitled to attend vocational training courses. The employer is obligated to inform them of any such activities. For the first year (or the first fifteen to eighteen months in the case of a family consisting of two spouses and three or more children), the worker is entitled to a leave that guarantees return to the same position, after which the guarantee is only for a position within the professional group.

Paternity leave currently in force for the birth, adoption or fostering of a child consists of the right to suspend the employment contract for thirteen consecutive days (or twenty in the case of a family consisting of two spouses and three or more children), that can be extended for two additional days for each child, starting from the second child. The following workers are entitled to this leave: a) in the case of the birth of a child, the leave can only be taken by the other parent; b) in the case of adoption or fostering, the leave can only be taken by one of the parents, freely chosen between them; c) in the case of adoption or fostering, and when the entire sixteen weeks of maternity leave have been taken by one of the parents, paternity leave may only be taken by the other parent.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

The right to thirteen days of paternity leave is extended to self-employed workers and 'quasi-subordinate' workers. The conditions under which this right can be exercised are described in 4.c. above. These workers are not entitled to the three-year parental leave.

5.d. Additional information

There is no additional information to report.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

Directives 2000/78/EC and 2000/43/EC were both transposed in 2003 through Law 62/2003 de *medidas fiscales, administrativas y de orden social* (of fiscal, administrative and social measures). This Law deals with many different measures and it is in Chapter III where the transposition takes place. This Chapter is to be applied to ‘all the persons, both in the public sector or in the private sector’, so the personal scope is a general one with no specific definition. The material scope in Law 62/2003 has transposed in almost the same way Article 3(1)a-h of Directive 2000/43/EC and Article 3(1)a-d of Directive 2000/78/EC.

SWEDEN – Ann Numhauser-Henning

Introduction

On 1 January 2009 the former non-discrimination legislation in Sweden was ‘merged’ into the new (2008:567) Discrimination Act, covering discrimination on the grounds of gender, transsexual identity/expression, ethnicity, religion and other belief, sexual orientation, disability and age. In the following, when referring to the 2008 Discrimination Act or the Discrimination Act this is the Act that I am referring to. The Act is truly ‘horizontal’ in character in that the general definitions cover all grounds of discrimination within the scope of the Act, which thereafter states, in principle also common for all grounds, the prohibitions of discrimination in employment, education, etc., area by area. This is also the Act implementing all directives referred to in this questionnaire. Some additional regulation in the areas of pregnancy, maternity and paternity is contained in the (1995:584) Parental Leave Act, however. Of relevance is also the (2010:110) Social Security Code.

The Equality Ombudsman (*Diskrimineringsombudsmannen*, DO) is the new equality body covering all groups within the scope of the Discrimination Act (Chapter 4). This new body is ‘a merger’ of the former four different ombudsmen, among them the Equal Opportunities Ombudsman (*Jämställdhetsombudsmannen*, JämO). It has the task of monitoring compliance with the Act generally, but may also bring an action on behalf of an individual claiming discrimination of any type. Alleged discrimination in working life is dealt with according to the Labour Disputes Act, which means that it is the Swedish Labour Court that rules in the last instance – and usually also the first. Only when an individual who is not a member of any trade union and is not represented by the DO brings a claim, does he or she start out in the general District Court, the Labour Court serving as the appeal court. As regards discrimination in any other area of society, claims are brought to the general court system. Case law is still scarce as regards the areas outside working life.

The Swedish labour market – both the public and the private sector – is to a great extent covered by collective agreements. However, there is no such thing as generally applicable collective agreements; from a legal point of view collective agreements are only binding on the employers/unions entering into them and their members. On the other hand, there is an obligation for the employer bound by a collective agreement to apply the conditions of the applicable agreement to all employees in the activities covered. Collective agreements are not known to contain general regulations on gender discrimination but frequently address gender as regards wage-setting principles, additional wages during parental leave, etc.

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

This Directive in the main has been implemented by the 2008 Discrimination Act. The personal coverage of the Discrimination Act as well as the duty holder must be deduced from the actual ban concerned as regulated in Chapter 2 of the 2008 Discrimination Act. Community law as regards working life and thus Directive 2006/54/EC has mainly been

implemented by Chapter 2 Sections 1-4 of the 2008 Discrimination Act. The bans on gender discrimination in vocational training, etc., were additionally implemented by Chapter 2 Section 5 on education whereas Chapter 2 Sections 9, 10 and 11 implement the discrimination bans on labour-market political activities, professional activities and membership of trade unions and other professional organisations, respectively.

An *employer* (and thus the duty holder) – whether in the public or the private sector – is prohibited from discriminating against (1) an employee, (2) somebody making a request regarding employment or who is applying for employment, (3) somebody applying for or performing a practice/training period, or (4) somebody who is available as or performing work as a temporary agency worker with the employer (despite the formal employer being another party, i.e. a temporary employment agency). Therefore, these are the persons protected. The Act relates to *any decision* made by the employer or ‘a person who has the right to make decisions on the employer’s behalf in matters concerning someone referred to (under 1-4, my remark)’ and thus ‘equated with the employer’. The protection therefore applies to all kinds of workers – whether in the private or the public sector and under whatever type of employment contract/relationship, however flexible. On the one hand, the Swedish concept of ‘employee’ is broad and uniform in character and generally speaking the same rules apply regardless of whether the employee is working in the public or in the private sector. On the other hand, Swedish law does not contain any third category of workers. The division is binary and a worker is either an employee or a self-employed entrepreneur. Where the concept of ‘employee’ is concerned, Swedish labour law does not contain any statutory definition – instead the concept has developed through a combination of judicial interpretation and instructions by the legislators in preparatory works. The courts use a multi-factor test applied in a ‘holistic’ and also rather flexible manner.⁴⁸⁵ The Swedish legislator has concluded that EU non-discrimination law does not require the Member States to protect legal persons.⁴⁸⁶

Vocational training may therefore also concern Chapter 2 Section 5 and then the natural or legal person conducting the educational activities is the duty holder whereas the personal scope covers any student participating in or applying for the activities. If we turn to Sections 9, 10 and 11 the duty holders are the natural or legal persons concerned with the activities in question including authorities and organisations.

1.a. Equal pay

The 2008 Discrimination Act does not contain an express ban on pay discrimination – it is implicitly and tacitly covered by the ban on discrimination in working life or Chapter 2 Section 2 of the 2008 Discrimination Act, including pay and other conditions. In the application of the law the parties and the courts are presumed to interpret the concept of pay in accordance with the CJEU’s case law. The personal scope is therefore the same as indicated above, i.e. all kinds of workers whether flexible or not, and also temporary workers. Where the latter group is concerned, however, wages are not paid by the user but by their employer proper. There is no such thing as quasi-subordinate workers in Sweden but rather, as already indicated, a fairly broad and comprehensive concept of ‘employee’. The system is a binary one however: either you are considered an employee (and are covered) or you are a self-employed person (and are not covered).

1.b. Equal treatment in occupational social security schemes

There is no express legislation as regards occupational schemes and gender (or any other ground of) discrimination. In practice, occupational social security schemes concern pensions in addition to the public pension scheme. Some sectors also offer the possibility of private occupational sickness insurance but this is then designed as an individual insurance, meaning that the employer is not a party (compare Article 8.c-e of the Directive).

Legally speaking, in accordance with the CJEU’s case law occupational schemes are seen

⁴⁸⁵ See further, for instance, S. Engblom 2008.

⁴⁸⁶ Government Bill 2007/2008:95, Stronger protection against discrimination, p. 91.

as pay and are covered by the general ban on discrimination in working life as described above. Occupational pension schemes are known to be gender neutral in their design and limited to employed persons.

There are, to my knowledge, no special occupational schemes for the self-employed, but only additional private pension insurances at individual level. In other situations – such as additional ‘parental wages’ according to collective agreements – the non-coverage of self-employed persons can be considered to fall under the exception for individual contracts in Article 8.a-b of the Directive.

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

The general ban on discrimination in employment – including access to employment, vocational training, promotion and working conditions – is included in Chapter 2 Section 2 of the 2008 Discrimination Act. An *employer* – whether in the public or the private sector – is prohibited from discriminating against (1) an employee, (2) somebody making a request regarding employment or who is applying for employment, (3) somebody applying for or performing a practice/training period, or (4) somebody who is available as or performing work as a temporary agency worker with the employer (despite the formal employer being another party, i.e. a temporary employment agency). Therefore, these are the persons protected. The Act relates to *any decision* made by the employer or ‘a person who has the right to make decisions on the employer’s behalf in matters concerning someone referred to (under 1-4, my remark)’ and thus ‘equated with the employer’. The protection therefore applies to all kinds of workers – whether in the private or the public sector and under whatever type of employment contract/relationship, however flexible.

The 2008 Discrimination Act does not contain an express ban on vocational training – it is implicitly and tacitly covered by the ban on discrimination in working life or Chapter 2 Section 2 of the 2008 Discrimination Act, and particularly Paragraph 3. The bans on gender discrimination in vocational training, etc., are additionally implemented by Chapter 2 Section 5 on education.

As regards access to self-employment according to Article 14.a there is no other ban on discrimination than the one contained in Chapter 2 Section 10 of the Discrimination Act containing the ‘starting or running a business and professional recognition’ where discrimination is prohibited with regard to ‘1. Financial support, permits, registration or similar arrangements that are needed or can be important for someone to be able to start or run a business, and 2. Recognition, certification, authorisation, registration, approval or similar arrangements that are needed or can be important for someone to be able to exercise a certain profession’. The duty holder is anyone in the position of granting – or setting the rules of granting – such supports, permits, etc. This is a ban covering the conditions for having access to self-employment as such rather than covering the actual choice of an entrepreneur, compare the UK case *Jivraj v Hashwani*.⁴⁸⁷ The distinction between employees and the self-employed is decided in the context of general employment law and by the (in principle broad) concept of ‘employee’. If we are dealing with a self-employed person there is no discriminatory ban applicable as regards the choice of, as it is, a business partner. This means that legislation does not cover the termination of contractual relationships with a self-employed person.

1.d. Collective agreements and case law

Occasionally, Swedish trade unions do accept self-employed persons as members and collective agreements may also cover these categories. One such example is the Swedish Union of Journalists categorizing itself as both a trade union and a professional organisation.⁴⁸⁸ To become a member an individual ‘must be employed or work as a freelancer and their work must primarily comprise journalistic activities ...’. There are special

⁴⁸⁷ *Jivraj v Hashwani* [2011] UKSC 40, [2011] 1 W.L.R. 1872.

⁴⁸⁸ See www.sjf.se, accessed 27 April 2012.

collective agreements regarding freelancers, entered into in 1994, 1997 and 2010. In these agreements a freelancer is clearly defined as an independent contractor (see, for instance Section 4 of the 1994 Agreement). The agreements cover certain issues such as a duty for the participant to pay social contributions, ‘vacation compensation’, etc. This agreement would not be enough to make the 2008 Discrimination Act applicable to those workers who are really considered independent self-employed workers. A freelancer is not covered by the occupational pension scheme for journalists but must enter into an individual private pension contract.

As regards case law: in relation to the rule concerning the duty holder in Chapter 2 Section 2 of the 2008 Discrimination Act being the employer or ‘a person who has the right to make decisions on the employer’s behalf’, Labour Court Case 2007 No. 16 is of some interest. It concerned ethnic discrimination in the process of appointment. Interviews with applicants were carried out in three separate groups – one constituted by local trade union representatives. The alleged discrimination consisted in harassing questions during the interview in this latter group. The Labour Court found that the trade union representatives were acting as such (in response to legal requirements on co-determination) and not as representatives for the employer. The situation was thus not covered by the discriminatory ban, as this applied to the employer or his/her representatives.

Another case of some interest is AD 2011 No. 19. Here an applicant for a traineeship was denied such a position. The alleged discrimination on the grounds of sex and religion was rejected as the claimant could not prove that the person accused of discrimination actually represented the employer in the sense of being entitled to decide on the subject.

2. Directive 2004/113 on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

The implementation of this Directive basically took place by introducing the rule in Chapter 2 Section 12 of the 2008 Discrimination Act. The *duty holder* is any natural or legal person who ‘1. supplies goods, services or housing to the general public, outside the private and family sphere, or 2. organises a meeting or event that is open to the public’ or any person who represents a person referred to in the first paragraph in relation to the public, for instance a self-employed person carrying out certain tasks on behalf of the owner. There are some exceptions to the rule; concerning age, (until now)⁴⁸⁹ insurance services and sex discrimination as well as sex discrimination and ‘other services or housing if there is a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose’. As regards *personal scope* the prohibition covers – also potential – clients concerning the activities in question.

2.b. Freedom to choose contractual partners

There is no express exception implementing Article 3(2) apart from the exemption from the general rule already referred to regarding ‘other services and housing’ and preferential treatment.

⁴⁸⁹ There is now a Government Bill 2011/12:122, ‘Discrimination related to sex in insurance services’, presenting the Swedish Parliament with a proposal to eliminate the current exception in Chapter 2 Section 12 of the (2008:567) Discrimination Act for insurance services as a response to the CJEU’s judgment in Case C-236/09, *Test-Achats*. The current rule on explicit exceptions from the ban on sex discrimination regarding access to and supply of goods and services in Chapter 2 Section 12 Paragraph 2 of the 2008 Discrimination Act will be amended and transferred to a new Paragraph 12 a. The reform is suggested to enter into force on 21 December 2012 and the requirement on gender-neutral calculations only applies to insurance contracts entered into after that date. (The new rules do not apply to an inherent prolongation of an insurance contract entered into before 12 December 2012).

2.c. Collective agreements and case law

To my knowledge there is absolutely nothing of relevance in collective agreements nor is there any case law on the subject.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

3.a. Personal scope

The 2010 Directive has not explicitly been implemented. The general assessment is that current legislation – i.e. mainly the 2008 Discrimination Act, but also the regulation in the (2010:110) Social Security Code – also meets the requirements of the new Directive.

In the Swedish system, people are either self-employed or they are employees (compare above), and this also goes for spouses and cohabitants, which means that helping spouses – if not a business partner proper or running a business of their own – are considered an employee in the business. (There is no exception or special treatment for family members in this regard. Taxation in Sweden is individual and any person has his/her individual rights to social security, etc.) Of course, as an employee they are covered by the general rules on employees including those regarding non-discrimination referred to in the sections above. (There is, however, an exemption for the right to employment protection – i.e. just cause requirements – with regard to family members.)⁴⁹⁰ They are also entitled to social security benefits as employees or (under various schemes such as sickness benefits, parental benefits and unemployment insurance) in their self-employed capacity.

There also is the special regulation, already referred to in Section 1.c., in Chapter 2 Section 10 of the Discrimination Act regarding the ‘starting or running a business and professional recognition’ where discrimination is prohibited with regard to ‘1. Financial support, permits, registration or similar arrangements that are needed or can be important for someone to be able to start or run a business, and 2. Recognition, certification, authorisation, registration, approval or similar arrangements that are needed or can be important for someone to be able to exercise a certain profession’. The duty holder is anyone in the position of granting – or setting the rules of granting – such supports, permits, etc.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

The scope contained in Article 4(1) does not significantly add to that of Article 14(1)(a). The rules already referred to in Chapter 2 Section 10 can be said to – simultaneously – implement both Directives in this regard.

3.c. Collective agreements and case law

Collective agreements and/or case law do not contribute to clarifying or expanding the scope of application.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

Generally speaking, there are no explicit definitions of these concepts: they are taken literally. ‘Workers who have recently given birth’ or are ‘breastfeeding’ are explicitly addressed by the 1995 Parental Leave Act, thus dealing with the right to leave from work. Both situations refer to the concept of ‘maternity rights’ and in Section 4 it is said that there is an entitlement to full leave during a continuous period of at least seven weeks prior to the estimated time of delivery and seven weeks after delivery. According to Paragraph 2 there also is an entitlement to use leave for breastfeeding the child. This concerns the right to leave as such – *benefits* are regulated in the (2010:110) Code on Social Security as well as, to some extent, in collective

⁴⁹⁰ Section 1 of the (1982:80) Employment Protection Act.

agreements.⁴⁹¹ When it comes to discriminatory behaviour the general ban on discrimination on the ground of sex in working life, contained in Chapter 2 Section 2 of the Discrimination Act applies. This provision is in accordance with the CJEU's case law, tacitly covering maternity as direct sex discrimination. Special rules protecting employees on social security benefits for parental leave (whether maternity leave, paternity leave or parental leave) against 'disfavouring' for reasons related to this apply according to Section 16 in the Parental Leave Act – a rule parallel to the prohibition of sex discrimination in the 2008 Discrimination Act. There is no strict prohibition against dismissal during pregnancy or leave for unrelated reasons, but the notice period cannot be made effective until the worker is actually back at work.

4.b. Collective agreements and case law

To my knowledge, there is no regulation of relevance for these concepts in collective agreements, nor in case law really.

However, Labour Court Case AD 2011 No. 2 may be of some interest as regards the personal scope of the ban on sex discrimination related to pregnancy. The case concerned a woman (E.N.) who worked as an apprentice on a Swedish farm in the spring of 2009. Having told the employer that she had had a miscarriage in May 2009 she was denied further employment and the apprenticeship expired on 15 May 2009. The farmer later on employed another woman. The Court stated that it was clear that in May 2009 E.N. was an applicant for further employment at the farm. The fact that the farmer had only just been informed about the miscarriage and that he – according to the recording of a conversation between himself and E.N. – had told E.N. that a future pregnancy would be very inconvenient for his business amounted to a *prima-facie* case of discrimination/disfavouring. Despite the fact that the Court was convinced that her failing abilities for the work in question were an important factor when denying E.N. further employment, a possible future pregnancy was also found to be part of the decision not to further employ her and this was enough to make it discriminatory. The farmer therefore had not proved that his decision was not related to pregnancy and both discrimination on the grounds of sex and disfavouring on the grounds of (expected) maternity leave were found to be at hand. Indemnification was set quite low, however, at approximately EUR 3 000 (SEK 30 000). The judgment is of great interest for the careful treatment of the burden of proof on behalf of the employer once we have a *prima-facie* case of discrimination and for the fact that discrimination was found to be at hand despite the fact that the claimant was not pregnant nor entitled to maternity leave at the time of the refusal.

There is also another recent development in case law of special interest to pregnant workers that deserves to be mentioned here. In Newsflash 2009-5-SE I described four cases from the Stockholm District Court (judgments T 10670-07, 10671-07, 10702-07 and 15410-07 of 3 November 2009) concerning four pregnant women with pregnancy-related physical problems who were denied sickness benefits with reference to pregnancy being 'a natural state' and not an illness. The Stockholm District Court found for the claimants. These cases were later appealed at the *Appeal Court Svea Hovrätt*, which delivered its judgment in 2011 (reported in EGELR-2011-01). The Appeal Court also found direct discrimination on the grounds of sex to be at hand. The Appeal Court began by stating that the underlying cause of the symptoms amounting to an illness is of no relevance for the application of sickness-benefit insurance. The mere fact that *Försäkringskassan* took into account that, in these cases, the symptoms were pregnancy-related implied that it had applied a special and more severe reference norm than the one used for the relevant comparator – a 'non-pregnant' man. It is 'obvious that the four women due to their pregnancies were treated worse than a man with similar symptoms', said the Appeal Court and this amounts to a *prima facie* case of direct discrimination. *Försäkringskassan* had not been able to show that the denial of sickness benefits was not related to pregnancy, nor that a man with equivalent symptoms would also have been denied benefits. Indemnification was, however, restricted to EUR 1 500

⁴⁹¹ Such regulations mostly concern additional pay during maternity, paternity and/or parental leave, compare for instance L. Carlson 2007.

(SEK 15 000) each, taking into account that the discrimination was ‘unintentional’ and that the consequences were limited (sickness benefits were later on approved). The fact that this judgment now stands proves very important for pregnant women in Sweden in that pregnancy-related symptoms will qualify for sickness benefits to the same extent as other, non-pregnancy related symptoms. Until now, women had to use their limited days of parental leave benefits in this situation.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

There are no rules on a right to ‘leave’ for the self-employed in these situations since they are not employed. Nor are there specific regulations on a right to breach a contractual relationship of another kind. The right to benefits, however, is regulated in social security regulations as indicated above and those also apply to the self-employed. There is an explicit ban on discrimination in social security benefits in Chapter 2 Section 14 of the Discrimination Act. The duty holder then is the National Insurance Board (*Försäkringskassan*).

5. Directive 2010/18/EU on parental leave

5.a. Personal scope

There is no explicit implementation of the 2010 Directive. The old directive was mainly implemented by the (1995:584) Parental Leave Act but also – as regards situations concerning pregnant workers and maternity – by the 2008 Discrimination Act. Both Acts apply to all employees regardless of whether they are in public or in private employment and regardless of the type of employment contract (flexible or permanent, including temporary workers). The duty holder is always the employer as regards leave, whereas benefits are paid out under the public social security scheme. (To the extent that it concerns additional parental pay according to collective agreements, the employer naturally is the duty holder as well, in accordance with the rules under Chapter 2 Section 2 of the Discrimination Act.) It is of interest here that the Discrimination Act, concerning all grounds (including sex) but age, in Chapter 2 Section 14 prohibits discrimination with regard to social insurance and related benefit systems, unemployment insurance, and state financial aid for studies. The duty holders are the relevant authorities or private entities set up to administrate these systems.

5.b. Entitlement to parental leave

The right to *leave* is regulated by the (1995:585) Act on Parental Leave, whereas the right to parental *benefits* is regulated in Section B Chapters 11-14 of the Social Security Code (2010:110). There are six different types of *leave*: maternity leave, full-time leave with or without parental benefits until the child is 18 months old (or 18 months after having received a child in adoption until the child is 8 years old), part-time leave with parental benefits and part-time leave without parental benefits, respectively, leave with occasional parental benefits and leave with municipal care benefit. There is always a right to leave when there is a right to social security parental benefits whatever the type (see below). Parental *benefits* are paid out as *parental benefits* following birth or adoption of a child (Chapter 11-12 of the Social Security Code) and as *occasional parental benefits* (Chapter 13). *Parental benefits* are paid for a maximum of 480 days for each child until the child is 8 years old. 390 days are paid out at income-replacement level and 90 days at minimum level (if there is no income to replace, parental benefits are paid for 480 days at minimum/basic level). Parental benefits are paid to the parent – whether mother or father – who is actually absent from work to take care of the child and are therefore, generally speaking, transferable between parents. *60 days* at income-replacement level are, however, non-transferable and *reserved* for the mother and *the father* respectively. *Occasional parental benefits* are paid out as a *special paternity benefit* for a *maximum of ten days* related to the birth or adoption of a child. (This can be taken out despite the mother being on maternity leave). Occasional parental benefits are also paid out to the parent – whether the mother or the father – who is actually caring for a sick child. As regards the first 180 days on income-replacement level there is a qualification requirement of 240

days of continuous employment before the child is born – otherwise benefits are paid out at basic level.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

There is a right to parental benefits under the public social security parental benefits scheme for anyone resident in Sweden. As regards the right to benefits at income-replacement level (see above) these rules also apply to the self-employed with a right to income-replacement sickness benefit. All self-employed persons are covered by the sickness social benefit scheme. The duty holder is the National Insurance Board (*Försäkringskassan*).

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

As already indicated, in Sweden there is a ‘single’ non-discrimination Act for all protected grounds and areas: the (2008:567) Discrimination Act. The Act is horizontal in character and therefore does not mention the ground (personal category) protected in each rule on prohibition in Chapter 2 of the Discrimination Act – as a general rule each ban on discrimination tacitly covers all persons implied. There are some differences with regard to the explicit exceptions, however, e.g. with regard to the scope of positive action. Generally speaking, age as a ground of discrimination is less protected than other grounds. All grounds, however, are generally protected in excess of EU law requirements to some extent. Swedish legislation goes beyond the requirements of Community law with its prohibition on discrimination regarding basic schooling and higher education. The rules on rights to parental leave are quite extensive and to a great extent related to social security benefits and are protected by a general prohibition on unfair treatment for reasons connected with *parental* leave. It is also worth mentioning that according to Chapter 2 Section 13 of the 2008 Discrimination Act, gender discrimination is outlawed concerning healthcare and social services, which goes beyond the requirements of Community law. The technique of letting every ban on discrimination tacitly cover all discrimination grounds, and, at the same time requiring discrimination to be merely ‘associated with’ (possibly one or more) such a ground may relatively easily allow multiple discrimination claims. So far, we have seen none or only few of these, however.

TURKEY – Nurhan Süral

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

The principle of equal pay is reflected in the Labour Law;⁴⁹² there is no specific anti-discrimination legislation. Article 5 of the 2003 Labour Law regulates the principle of equal treatment including pay. There are no exclusions from the equal pay principle e.g. based on the size of a company, reasons in connection with the health and safety of workers, national security, religion, benefits under statutory social security schemes, or a particular category of worker (vulnerable/atypical/precarious work contracts/relationships; ‘quasi-subordinate’ workers). So far, the attempts to establish temporary employment agencies have been fruitless due to harsh reactions from trade unions but a new draft law on temporary employment agencies has recently been presented. The employer/employer’s representative is the duty holder. A worker is a person employed under a labour contract. A labour contract implies dependency. The three essential elements inherent in a labour contract are work, wage, and subordination.

⁴⁹² *İş Kanunu*, Official Gazette 10 June 2003, no. 25134.

1.b. Equal treatment in occupational social security schemes

Occupational pension schemes correspond with the personal scope of application of Article 6. Self-employed persons are covered by the compulsory state social security scheme (*Bağ-Kur*) and the 2001 Private Pension Savings and Investment System Act.⁴⁹³ A self-employed person is not considered a worker but a service provider. Once they start employing others, even a single worker, they have the status of ‘employer.’

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

Article 14(1)(a)-(d) is applicable to all workers. No particular category of worker is excluded. The employer/employer’s representative is the duty holder. The self-employed are not covered because they are not considered workers but service providers.

1.d. Collective agreements and case law

Legislation is the major initiative. Collective agreements and/or case law do not contribute to clarifying or expanding the personal scope of application.

1.e. Additional information

There is no additional information.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services**2.a. Personal scope**

Women wearing a headscarf are denied access to public sector employment and this is a potential deterrent for women’s entry into the workforce. Women wearing a headscarf used to be denied access to university education but there is now a gradual lifting of this prohibition through practices of the Higher Education Council. There is no specific piece of legislation implementing this Directive and interpreting Paragraph (15) of the preliminary observations and therefore the provision of both public and private sector services is covered.

2.b. Freedom to choose contractual partners

As regards employment of workers, the employer/employer’s representative is the duty holder and there is a prohibition of discrimination but in cases where a self-employed person is contracted as a service provider, the principle of prohibition of discrimination does not apply.

2.c. Collective agreements and case law

Legislation is the major initiative. Collective agreements and/or case law do not contribute to clarifying or expanding the personal scope of application.

2.d. Additional information

There is no additional information.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity**3.a. Personal scope**

The term ‘self-employed worker’ does not exist. This term implies dependency and independency at the same time. In Turkey, the term ‘worker’ implies subordination (dependence) whereas the term ‘self-employed’ implies independency. A self-employed person is a service provider and service providers are considered independent. In contrast with the terminology, there is compatibility with Articles 1, 2(1)a-b, and also Paragraphs 7, 9-10, and 13 of Directive 2010/41.

⁴⁹³ *Bireysel Emeklilik Tasarruf ve Yatırım Sistemi Kanunu*, Official Gazette 7 April 2001, no. 24366.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

Rules on ‘access to occupation’ apply to workers, whereas rules on ‘access to self-employment’ apply to the self-employed.

3.c. Collective agreements and case law

Legislation is the major initiative. Collective agreements and/or case law do not contribute to clarifying or expanding the personal scope of application.

3.d. Additional information

There is no additional information.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

The rules on pregnancy and childbirth in the Labour Law and the By-Law on the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries,⁴⁹⁴ draw almost completely on Directive 92/85/EEC, and especially the part on risks repeats the text of the Directive almost word for word. Definitions given for a ‘pregnant worker’, a ‘worker who has recently given birth,’ and a ‘breastfeeding worker’ are the same as in Directive 92/85/EEC (By-Law, Article 4) and so are the rules on pregnancy accommodation. The employed and the self-employed enjoy the same benefits under the Social Insurances and General Health Insurance Law.⁴⁹⁵

4.b. Collective agreements and case law

Collective agreements and/or case law do not contribute to clarifying or expanding their scope of application. Collective agreements may contribute to the extension of several types of leave. In vitro fertilization is covered; the expenses are paid by the Social Security Organization, where it is irrelevant whether the one involved is a worker or a self-employed person.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

For quasi/para-subordinate workers, the duty holder will be their employer. For the self-employed, they themselves are the duty holder. In both cases, there will be the requirement of payment of maternity contributions for a certain time period.

4.d. Additional information

There is no additional information.

5. Directive 2010/18/EU on parental leave

5.a. Personal scope and 5.b. Entitlement to parental leave

In the Labour Act and the Civil Servants Act,⁴⁹⁶ no leave is included under the title of ‘Parental leave’.

For workers: The issue is left to individual/collective labour agreements. A worker may request leave for a valid reason and this may be a family-related reason.

For civil servants and workers with a permanent employment contract in the public sector: In the Civil Servants Act, no leave is included under the title of ‘Parental leave.’ In the Civil Servants Act, there are forms of leave entitled ‘excuse leave’ (justified leave) and ‘sickness and patient companionship leave’ that may be used for family-related reasons. An

⁴⁹⁴ *Gebe veya Emziren Kadınların Çalıştırılma Şartlarıyla Emzirme Odaları ve Çocuk Bakım Yurtlarına Dair Yönetmelik*, Official Gazette 14 July 2004, no. 25522.

⁴⁹⁵ *Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu*, Official Gazette 10 June 2006, no. 26200.

⁴⁹⁶ *Devlet Memurları Kanunu*, Official Gazette 23 July 1965, no. 12056.

‘excuse leave’ is a ten-day paid leave to which a second ten-day paid leave may be added in a period of one year. A ‘sickness and patient companionship leave’ is a 3 months’ paid leave plus 3 months’ paid leave plus 18 months’ unpaid leave. An unpaid sabbatical leave of one year to be used altogether or in two parts is granted to civil servants who have completed five (previously ten) years of service. The sabbatical leave can only be taken once throughout the entire period of service. It cannot be used when the civil servant is serving in a region which is subject to martial law, a state of emergency or a disaster. Permanent workers employed in the public sector are entitled to an unpaid patient companionship leave of 6 months plus 6 months. Workers permanently employed in the public sector are also entitled to an unpaid sabbatical leave of 6 months upon the completion of ten years of employment. This sabbatical leave can only be taken once throughout the entire period of employment.

5.b. Entitlement to parental leave

There is nothing to report.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

None of the rights accorded by this Directive are granted to the self-employed and/or the quasi/para-subordinate.

5.d. Additional information

There is no additional information.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

There is a clear-cut distinction between ‘workers’ and the ‘self-employed.’

UNITED KINGDOM – Aileen McColgan

1. The personal scope of Directive 2006/54/EC on equal opportunities and equal treatment of men and women in employment and occupation

1.a. Equal pay

Part 5 of the Equality Act 2010 governs employment, including equal pay issues. Section 83 of the Act provides that, for the purposes of Part 5 ‘employment’ means ‘employment under a contract of employment, a contract of apprenticeship or a contract personally to do work’ and includes ‘Crown employment’, ‘employment as a relevant member of the House of Commons staff’ and ‘employment as a relevant member of the House of Lords staff’. Section 64 of the Act provides that the equal pay provisions ‘apply where (a) a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does’ (‘employed’ to be interpreted in accordance with ‘employment’ as defined in Section 83). They also apply where (Section 64(b)) ‘a person (A) holding a personal or public office does work that is equal to the work that a comparator of the opposite sex (B) does’.

It follows that, as long as they have the same or an associated employer as their comparator (as required other than in claims of direct discrimination), workers in vulnerable/atypical/precarious work contracts/relationships are covered. Quasi-subordinate workers will be covered as long as they are regarded as being under a ‘contract personally to do work’. The contrast is with a contract where the undertaking is merely to ensure that the work is performed by managing the performance of the service by others. The limitations of this concept can be seen in *Mirror Group Newspapers v Gunning* [1986] ICR 145. The claimant was refused a distributorship for newspapers which had been held by her father, and which involved the purchase of newspapers in bulk and resale and delivery of newspapers to 90 retail outlets, including direct supervision of the collection of the newspapers and their loading onto delivery vans. She claimed that she had been subject to sex discrimination. The Court of Appeal ruled that she was not seeking employment under a contract of employment

or a contract personally to execute any work or labour, the latter ‘contemplat[ing] a contract whose dominant purpose is that the party contracting to provide services under the contract performs personally the work or labour which forms the subject matter of the contract’.

More recently, the Supreme Court considered the concept of employment under the discrimination provisions in *Jivraj v Hashwani* [2011] UKSC 40 in which Lord Clarke, with whom the majority agreed, differentiated between [34] a person who ‘performs services for and under the direction of another person in return for which he or she receives remuneration’ and ‘an independent provider of services who is not in a relationship of subordination with the person who receives the services’.

Lord Clarke went on to suggest that the ‘dominant purpose’ test adopted in *Gunning* was not consistent with the later CJEU jurisprudence, stressing subordination as a characteristic of employment and stating that, even where ‘the dominant purpose of the contract may be personal work, it may not be personal work under the direction of the other party to the contract’ (as required in his view by the *Allonby* decision [39]). He also cast doubt on whether the anti-discrimination provisions would apply to ‘the choice of a solicitor [or] plumber’ [47], [48].

1.b. Equal treatment in occupational social security schemes

Discrimination in relation to occupational social security schemes will fall within Part 5 of the Equality Act 2020 (‘work’) either by virtue of Section 39(2)(a) or (b) ‘terms of employment’ or ‘any other benefit, facility or service’ or the equivalent provisions in Section 41 (contract workers, see 1.c. below), Section 44 or 45 (partnerships, see 1.c. below), Section 47 or 48 (barristers/ advocates, see 1.c. below), or Section 49 or 50 (personal/public offices, see 1.c. below), or by virtue of Section 61, which applies the requirement for equal pay regardless of sex in the context of occupational pension schemes. Not all self-employed persons would (see 1.a. and 1.c.) fall within the category of ‘workers’ covered by Part 5 of the Act. Discrimination on grounds of sex in relation to individual contracts providing for occupational social security, or single-member schemes for self-employed people, would fall to be regulated in my view by Section 29 of the Act (provision of services). That Section does not apply (Schedule 3 Part 5 Paragraph 20) to the provision of insurance or a related financial service or a service relating to membership of or benefits under a personal pension scheme ‘in pursuance of arrangements made by an employer for the service-provider to provide the service to the employer’s employees, and other persons, as a consequence of the employment’ (in which case it is governed by Part 5 of the Act).

1.c. Equal treatment as regards access to employment, vocational training and promotion and working conditions

Section 83 of the Act provides that, for the purposes of Part 5 (which regulates discrimination, including sex discrimination, in ‘employment’), ‘employment’ means ‘employment under a contract of employment, a contract of apprenticeship or a contract personally to do work’ and includes ‘Crown employment’, ‘employment as a relevant member of the House of Commons staff’ and ‘employment as a relevant member of the House of Lords staff’. As above, this terminology captures workers in vulnerable/atypical/precarious work contracts/relationships and quasi-subordinate workers as long as they are regarded as being under a ‘contract personally to do work’. Such workers are protected as regards (Sections 39 and 40) discrimination in access to employment, the terms on which employment is offered or enjoyed, access ‘to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service’, dismissal or other detriment. In addition, the Act prohibits, in materially similar terms,⁴⁹⁷ discrimination against ‘contract workers’ (that is, workers supplied by their employer to a contractor), police officers (Section 42), partners in firms (Sections 44, 45), barristers and (in Scotland) advocates (Sections 47, 48), those holding personal and public offices (Sections 49-51) and local authority elected representatives (Section 58). It also prohibits discrimination by bodies conferring work-related qualifications

⁴⁹⁷ Section 41.

(Section 53), providers of employment services (Section 55), trade unions and employers' organisations (Section 57).

It appears that volunteers are not covered (*X v Mid Sussex Citizens Advice Bureau*), although the Supreme Court decision on this case is awaited. As to the question whether the self-employed are adequately protected as regards conditions for access, the Equality Act will provide protection as regards the gaining of qualifications and access to trade organisations (defined to include 'an organisation of workers ... or any other organisation whose members carry on a particular trade or profession for the purposes of which the organisation exists'). It will not, however, apply to the decisions made (for example) by individuals or organisations as regards which truly 'self-employed' plumber, caterer or consultant to select for a piece of work, or whether to terminate a contract with a plumber, caterer or consultant, if and insofar as the contract is not (*Gunning*) one whose 'dominant purpose is that the party contracting to provide services under the contract performs personally the work or labour which forms the subject matter of the contract'.

1.d. Collective agreements and case law

Collective agreements do not clarify or expand the personal scope of application of the provisions. The relevant case law is mentioned above.

1.e. Additional information

Not applicable.

2. Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services

2.a. Personal scope

The relevant provision of the Equality Act 2010 (Section 29) prohibits sex discrimination by 'service providers' (i.e., those 'concerned with the provision of a service to the public or a section of the public (for payment or not)' against any 'person requiring the service by not providing the person with the service', or in relation to the terms on which the service is provided, or by terminating the service or subjecting the person to any other detriment. The provision also prohibits discrimination by those exercising public functions. As far as Recital 15 is concerned, Section 28(2) of the 2010 Act provides that Part 3 ('services and public functions'), in which Section 29 is found, 'does not apply to discrimination ... that is prohibited by Part ... 5 (work) ... or that would be so prohibited but for an express exception'.

2.b. Freedom to choose contractual partners

The prohibition on sex discrimination trumps considerations of freedom of contract where Section 29 applies. Parties remain free to discriminate on any ground not protected by the Equality Act 2010.

2.c. Collective agreements and case law

Collective agreements do not assist but there is case law on the application of the prohibition on discrimination (including, but not limited, to sex discrimination) in the context of services. In my view the case law is not directly relevant to the questions raised here.

2.d. Additional information

Not applicable.

3. Directive 2010/41/EU on equal treatment of men and women engaged in a self-employed capacity

On 23 January 2012 Chris Grayling (Minister of State (Employment, Work and Pensions)) stated in answer to a parliamentary question that the Government was 'considering the date

for implementation’ of Directive 2010/41/EU. I have not been able to find any subsequent mention of the Directive so no steps appear to have been taken towards implementation. I do my best below although it is not possible as requested to deal with Directive 86/613/EEC as the questions raised refer exclusively to the later Directive.

3.a. Personal scope

Self-employed people are covered by the prohibitions on work-related discrimination only to the extent that they fall within Part 5 of the Equality Act 2010 (whether by virtue of employment under a contract personally to execute any work or service, as barristers or advocates, etc.) (see 1.a. and 1.c.). The life partners of self-employed people would not, by virtue of that status, fall to be protected by Part 5 except in the (unusual) case in which they were employed by or business partners etc. of their life partners, although they would be protected by (for example) the service-related provisions of the Act were they to be discriminated against on grounds of sex by a service provider.

3.b. Relation between Directives 2006/54/EC and 2010/41/EU

It is difficult to provide information on this point in the absence of any self-conscious engagement with the provisions of the self-employed workers directives by the UK legislatures. Many acts of sex-based discrimination which might fall within Article 4(1)(a) would be caught by a provision of the Equality Act 2010 (Section 29, which prohibits sex discrimination by providers of services and by public authorities in the exercise of their functions, for example). I am not clear what the gaps are which would be filled by the implementation of Article 4(1)(a) as such.

3.c. Collective agreements and case law

In my view, collective agreements and case law do not clarify or expand the scope of application.

3.d. Additional information

It is difficult to speculate on possible gaps in advance of implementation, although the most obvious areas of non-coverage at present would relate to life partners.

4. Directive 92/85/EEC on pregnancy and maternity

4.a. Definitions of pregnant workers, workers who have recently given birth and workers who are breastfeeding

In relation to protection from discrimination this is provided by the Equality Act 2010 and in this context the same answers on personal scope apply. In addition, pregnant workers who are employed under a contract of employment are protected from dismissal by the Employment Rights Act 1996. (Dismissal for a reason related to pregnancy is automatically unfair and pregnant employees are entitled to various time-off rights including maternity leave.) At present only employees (those employed under a contract of employment) have the right to statutory maternity leave and pay, but all those protected under Part 5 of the Equality Act 2010 would also be protected from work-related discrimination related to pregnancy. Self-employed women are entitled to 39 weeks’ maternity allowance (paid by the State) which is the same as the lower rate of maternity pay (that is, it does not provide for the higher 90 % of salary for the first six weeks).

No specific protection is provided for breast-feeding workers, the theory being that they will be on maternity leave during the period of breastfeeding. The exception to this is that a woman who notifies her employer in writing that she is breastfeeding is entitled, under the Management of Health and Safety at Work Regulations 1999, as amended, to have a specific risk assessment conducted and, if necessary, to have her working conditions or hours of work altered, or to be suspended, to avoid ‘risk, by reason of her condition, to [her] health and safety ... or to that of her baby, from any processes or working conditions, or physical,

biological or chemical agent'. The right applies to women who are expectant, new mothers, or are breastfeeding, and applies to both employees and agency workers.

4.b. Collective agreements and case law

Managers would be covered as employees/workers employed under contracts personally to execute any work or labour. Women whose ova have been fertilised would not in my view be regarded as pregnant prior to implantation although discrimination against such women could of course breach the Equality Act 2010 as sex discrimination.

4.c. Rights of the self-employed and/or the quasi/para-subordinate

As above. To the extent that these workers are regarded as employed they will fall within the Equality Act 2010 and have the benefits of that (specifically prohibitions on work-related discrimination). To the extent that they are 'employees' (i.e., employed *under a contract of employment*) they will, additionally, benefit from the Employment Rights Act's provisions. Most such workers will in any event qualify for maternity allowance which is broadly similar to maternity pay (although less generous as far as the first six weeks are concerned).

4.d. Additional information

Not applicable.

5. Directive 2010/18/EU on parental leave

Directive 2010/18/EU will not be implemented in the UK until March 2012.

5.a. Personal scope

UK law at present provides rights to parental leave as such only to employees (those employed under a contract of employment) who have at least one year's continuous service with the employer. Part-time as well as full-time employees are eligible for such leave and fixed-term employees who have the requisite period of continuous employment as well, but persons having an employment relationship (whether with a temporary agency or otherwise) which does not amount to a contract of employment are not.

5.b. Entitlement to parental leave

At present qualifying employees are entitled to 13 weeks' parental leave if they have parental responsibilities for a natural or adopted child who is under five years of age, or in the case of an adopted child if the child is under 18 and has been placed for adoption within the preceding five years. Leave in respect of disabled children may be taken until the child's 18th birthday and the total entitlement is increased to 18 weeks. As above, employees must have at least one year's continuous service with the employer.

5.c. Rights of the self-employed and/or the quasi/para-subordinate

Such rights are at present granted to such workers only if they are recognised as 'employees' as set out above.

5.d. Additional information

Not applicable.

6. Differences in personal and material scope between Directives 2006/54/EC, 2000/43/EC and 2000/78/EC

The Equality Act applies in broadly similar terms to discrimination on grounds of sex, race (ethnicity), disability, sexual orientation, religion/belief and age, except that the provisions regulating age discrimination outside the employment context have not yet been implemented and protection from harassment relating to sexual orientation and religion/belief is relatively narrow outside the context of employment. The material scope of the Equality Act 2010

extends beyond that of Directive 2000/43/EC. Difficulties as regards differences in personal and material scope do not really arise.

Annex I

Questionnaire

Questionnaire for the report *The Personal Scope of the EU Sex Equality Directives* (working title)

European Network of Legal Experts in the Field of Gender Equality

Introduction

The issues of who is covered by the gender equality directives and who is the ‘duty holder’ – i.e. who has obligations under the law implementing the directives – are the central themes of this thematic report. The purpose of this report is to explore the differences in personal scope between the 33 European countries covered by the European Commission’s European Network of Legal Experts in the Field of Gender Equality. The report should more specifically highlight inconsistencies and gaps in protection, in particular of vulnerable groups of workers, such as workers with atypical employment relationships (see for example Cases 53/81 *Levin*, 66/85 *Lawrie-Blum*, 171/88 *Rinner-Kühn* and C- 357/89 *Raulin*) or workers employed by a new employer due to outsourcing of activities (see for example, in relation to pay, Cases C-320/00 *Lawrence* and C-256/01 *Allonby*).

This report will focus on the most recent gender equality directives, in particular Directives 2006/54/EC, 2004/113/EC and 2010/41/EU (which repeals Directive 86/613/EEC). In addition, attention will be paid to the personal scope of the Pregnancy and Maternity Directive (92/85/EEC, see for example Cases C-506/07 *Mayr* and C-232/09 *Danosa*) and the Parental Leave Directive (2010/18/EU, which repeals Directive 96/34/EC, see for example Case C-149/10 *Chatzi*). Attention will also be paid to other areas where relevant, in particular when problematic issues arise and in the light of relevant case law of the Court of Justice. The relation between interpretation of the concept of worker under the gender equality directives and the Anti-Discrimination Directives (2000/43/EC and 2000/78/EC) will also be explored insofar as it is relevant in national case law.

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QUESTIONNAIRE

1. As regards **Directive 2006/54/EC**:
 - a. How does your national implementing legislation transpose the personal scope of application of Article 4 (equal pay)? If your system encompasses a ‘quasi-subordinate’ category of workers, are they covered? Are workers in vulnerable/atypical/precarious work contracts/relationships covered?
 - b. How does your national implementing legislation transpose the personal scope of application of Articles 6 (Personal Scope of Title II, Chapter 2 ‘Equal Treatment in Occupational Social Security Schemes’) and 10 (Implementation as regards self-employed persons) in light of the possible exclusions permitted by Article 8 (1) a-b?
 - c. How does your national implementing legislation transpose the scope of application of Article 14(1)(a)-(d)? If your system encompasses a ‘quasi-subordinate’ category of workers, are they covered? Are workers in vulnerable/atypical/precarious work contracts/relationships (including volunteers) covered? Also, are the self-employed adequately protected by Article 14(1)(a) (conditions for access), and if so who is the

- ‘duty holder’? Does this protection cover discriminatory termination of self-employment contracts by employers/clients?
- d. In respect of the provisions above, do collective agreements and/or case law contribute to clarifying or expanding their personal scope of application?
 - e. Is there any additional information that you consider relevant with respect to the personal scope of Directive 2006/54, highlighting inconsistencies and gaps in protection, in particular of vulnerable groups of workers?
2. As far as **Directive 2004/113/EC** is concerned:
 - a. How does your national implementing legislation transpose Article 3(1) and (4), also in light of Paragraph (15) of the preliminary observations?
 - b. How does your national implementing legislation transpose Article 3(2), also in light of Paragraph (14) of the preliminary observations?
 - c. In respect of the provisions above, and of the ones contained in Article 13 (a)-(b), do collective agreements and/or case law contribute to clarifying or expanding their scope of application?
 - d. Is there any additional information that you consider relevant with respect to the personal scope of Directive 2004/113/EC, highlighting inconsistencies and gaps in protection, in particular of vulnerable groups?
 3. In respect of **Directive 2010/41/EU**¹ (or, if not yet implemented, of Directive 86/613/EEC):
 - a. How does your national implementing legislation transpose Article 1 and Article 2(1)a-b, also in light of Paragraphs 7, 9-10, and 13 of the Directive’s preliminary observations?
 - b. Does the scope of equal treatment contained in Article 4(1) add significantly to the ‘access to ... self-employment or occupation’ referred to in Article 14(1)(a) of Directive 2006/54/EC?
 - c. In respect of the provisions above do collective agreements and/or case law contribute to clarifying or expanding their scope of application?
 - d. Is there any additional information that you consider relevant with respect to the personal scope of Directive 2010/41/EU, highlighting inconsistencies and gaps in protection, in particular of specific and/or vulnerable groups of self-employed?
 4. In respect of **Directive 92/85/EEC**:
 - a. How does your national implementing legislation transpose the terms ‘pregnant workers’, ‘workers who have recently given birth’ and ‘workers who are breastfeeding’, referred to in Articles 1 and 2 of the Directive?
 - b. In respect of the provisions above do collective agreements and/or case law contribute to clarifying or expanding their scope of application? Would ‘managers’ (see Case C-232/09 *Danosa*) and women whose ova have been fertilised in vitro, but not yet transferred to their uterus (see Case C-506/06 *Mayr*) be covered?
 - c. Are any of the rights accorded by this Directive granted to the self-employed or, if your national system recognises them, to quasi/para-subordinate workers? And if so, who is the ‘duty holder’ and under what conditions are these rights enjoyed?
 - d. Is there any additional information that you consider relevant with respect to the personal scope of Directive 92/85/EEC, highlighting inconsistencies and gaps in protection, in particular of specific and/or vulnerable groups of workers?

¹ The Articles below refer to Directive 2010/41/EU.

5. In respect of **Directive 2010/18/EU**² (and, if not yet implemented, of Directive 96/34/EC):
 - a. How does your national implementing legislation transpose Clause 1(2) and (3) of the Framework Agreement?
 - b. How does your national implementing legislation transpose Clause 2(1) and 3(1)(b) of the Framework Agreement?
 - c. Are any of the rights accorded by this Directive granted to the self-employed and/or, if your national system recognises them, to quasi/para-subordinate workers? And if so, who is the ‘duty holder’ and under what conditions are these rights enjoyed?
 - d. Is there any additional information that you consider relevant with respect to the personal scope of Directive 2010/18/EU, highlighting inconsistencies and gaps in protection, in particular of specific and/or vulnerable groups of workers?
6. How does your national legal system cope with the various personal and material scopes of application of the three main sex equality directives (Directive 2006/54/EC, Directive 2004/113/EC and Directive 2010/41/EU) and the scope of application of **Directives 2000/43/EC** (esp. Article 3(1) a-h) and **2000/78/EC** (Article 3(1) a-d)?

Please list relevant literature if any.

² The clauses below refer to the revised Framework Agreement of 18 June 2009, which is put into effect by Directive 2010/18/EU.

Annex II

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