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Country report

Gender equality



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Country report

Gender equality

How are EU rules transposed into
national law?

Hungary

Beáta Nacsa

Reporting period 1 July 2015 – 1 April 2016

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Contents

1.	Introduction	6
1.1	Basic structure of the national legal system	6
1.2	List of main legislation transposing and implementing Directives	7
2.	General legal framework.....	9
2.1	Constitution	9
2.2	Equal treatment legislation	9
3.	Implementation of central concepts	11
3.1	Sex/gender/transgender.....	11
3.2	Direct sex discrimination.....	11
3.3	Indirect sex discrimination	12
3.4	Multiple discrimination and intersectional discrimination	13
3.5	Positive action	13
3.6	Harassment and sexual harassment	14
3.7	Instruction to discriminate	15
3.8	Other forms of discrimination	16
4.	Equal pay and equal treatment at work (Article 157 TFEU and Recast Directive 2006/54).....	17
4.1	Equal pay	17
4.2	Access to work and working conditions	20
5.	Pregnancy, maternity, and leave related to work-life balance (Directive 92/85, relevant provisions of the Directives 2006/54 and 2010/18)	22
5.1	Pregnancy and maternity protection.....	22
5.2	Maternity leave.....	24
5.3	Adoption leave	26
5.4	Parental leave	26
5.5	Paternity leave	32
5.6	Time off/care leave	32
5.7	Leave in relation to surrogacy	33
5.8	Leave sharing arrangements	33
5.9	Flexible working time arrangements.....	33
6.	Occupational social security schemes (Chapter 2 of Directive 2006/54)	35
6.1	Is direct and indirect discrimination on grounds of sex in occupational social security schemes prohibited in national law?	35
6.2	Is the personal scope of national law relating to occupational social security schemes the same, more restricted, or broader than specified in Article 6 of Directive 2006/54? Please explain and refer to relevant case law, if any.	35
6.3	Is the material scope of national law relating to occupational social security schemes more restricted or broader than specified in Article 7 of Directive 2006/54? Please explain and refer to relevant case law, if any.	35
6.4	Has national law applied the exclusions from the material scope as specified in Article 8 of Directive 2006/54?	35
6.5	Are there laws or case law which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54?	36
6.6	Is sex used as an actuarial factor in occupational social security schemes? ..	36
6.7	Are there specific difficulties in your country in relation to occupational social security schemes, for example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.	36
7.	Statutory schemes of social security (Directive 79/7)	37
7.1	Is the principle of equal treatment for men and women in matters of social security implemented in national legislation?.....	37
7.2	Is the personal scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 2 of Directive 79/7? Please explain and refer to relevant case law, if any.	37

7.3	Is the material scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 3 par. 1 and 2 of Directive 79/7? Please explain and refer to relevant case law, if any.	37
7.4	Has national law applied the exclusions from the material scope as specified in Article 7 of Directive 79/7? Please explain (specifying to what extent the exclusions apply) and refer to relevant case law, if any.	37
7.5	Is sex used as an actuarial factor in statutory social security schemes?	38
7.6	Are there specific difficulties in your country in relation to implementing Directive 79/7? For example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.	39
8.	Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)	40
8.1	Has Directive 2010/41/EU been explicitly implemented in national law?.....	40
8.2	What is the personal scope related to self-employment in national legislation? Has your national law defined self-employed or self-employment? Please discuss relevant legislation and national case law (see Article 2 Directive 2010/41/EU).....	40
8.3	Related to the personal scope, please specify whether all self-employed workers are considered part of the same category and whether national legislation recognises life partners.	40
8.4	How has national law implemented Article 4 Directive 2010/41/EU? Is the material scope of national law relating to equal treatment in self-employment the same, more restricted, or broader than specified in Article 4 Directive 2010/41/EU?.....	41
8.5	Has your State taken advantage of the power to take positive action (see Article 5 Directive 2010/41/EU)? If so, what positive action has your country taken? In your view, how effective has this been?.....	41
8.6	Does your country have a system for social protection of self-employed workers (see Article 7 (Directive 2010/41/EU)?	41
8.7	Has Article 8 Directive 2010/41/EU regarding maternity benefits for self-employed been implemented in national law?.....	42
8.8	Has national law implemented the provisions regarding occupational social security for self-employed persons (see Article 10 of Recast Directive 2006/54)?	42
8.9	Has national law made use of the exceptions for self-employed persons regarding matters of occupational social security as mentioned in Article 11 of Recast Directive 2006/54? Please describe relevant law and case law.....	42
8.10	Is Article 14(1)(a) of Recast Directive 2006/54 implemented in national law as regards self-employment?.....	42
9.	Goods and services (Directive 2004/113)	43
9.1	Does national law prohibit direct and indirect discrimination on grounds of sex in access to goods and services?.....	43
9.2	Is the material scope of national law relating to access to goods and services more restricted or broader than specified in Article 3 of Directive 2004/113? Please explain and refer to relevant case law, if any.....	43
9.3	Has national law applied the exceptions from the material scope as specified in Article 3(3) of Directive 2004/113, regarding the content of media, advertising and education?	43
9.4	Have differences in treatment in the provision of the goods and services been justified in national law (see Article 4(5) of Directive 2004/113)? Please provide references to relevant law and case law.	43
9.5	Does national law ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial	

	services shall not result in differences in individuals' premiums and benefits (see Article 5(1) of Directive 2004/113)?.....	43
9.6	How has the exception of Article 5(2) of Directive 2004/113 been interpreted in your country? Please report on the implementation of the C-236/09 <i>Test-Achats</i> ruling in national legislation.	44
9.7	Has your country adopted positive action measures in relation to access to and the supply of goods and services (see Article 6 of Directive 2004/113)? 44	
9.8	Are there specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in your country in relation to access to and the supply of goods and services? Please briefly describe relevant case law.	44
10.	Violence against women and domestic violence in relation to the Istanbul Convention	46
10.1	Has your country ratified the Istanbul Convention?	46
11.	Enforcement and compliance aspects (horizontal provisions of all directives).....	47
11.1	Victimisation	47
11.2	Burden of proof	47
11.3	Remedies and Sanctions	48
11.4	Access to courts	49
11.5	Equality body	50
11.6	Social partners	51
11.7	Collective agreements	51
12.	Overall assessment.....	52

1. Introduction

1.1 Basic structure of the national legal system

The ruling FIDESZ-KDNP right-wing permanent party alliance (*Fiatal Demokraták Szövetsége – Kereszténydemokrata Néppárt*: Alliance of Young Democrats – Christian Democratic People's Party) has structurally reorganised the Hungarian state organisation and fundamentally modified the Hungarian legal system since 2010. The previous Constitution was also replaced on 25 April 2011 with a new Fundamental Law¹ by the representatives of the ruling permanent party alliance which has a two-thirds majority in Parliament.² The Fundamental Law has been modified five times within a two and half years following its adoption by the same Coalition in order to solve domestic political problems by means of legislation; none of them was related to gender equality issues. From a gender point of view, the most important feature is that the fifth modification did not alter the notion of the family, which was introduced by the fourth modification of the Fundamental Law, and which established that a family is based on a marriage between a man and a woman, thereby excluding heterosexual cohabiting couples and same-sex couples from the concept of the family.

The excessive alterations to the legal system could only be followed with great difficulty by legal professionals and citizens, which profoundly increased the unpredictability of the case law and uncertainty in everyday legal practice.

As will be discussed in detail below, gender equality is guaranteed by Article XV (2) and (3) of the new Fundamental Law. The framework rules on equal treatment are regulated by the 'Equality Act' (Act CXXV of 2003, on Equal Treatment and Promotion of Equal Opportunities (abbreviated in Hungarian as: *Ebktv.*)), which defines the 20 grounds of discrimination (including sex and motherhood) and the basic concepts of equality law, and are to be applied in the entire legal system.

Claims arising from gender equality cases may be adjudicated by the Equal Treatment Authority (ETA) and/or by the civil and labour courts,³ depending upon the merits of the case and the aims of the claimant. As the most dissuasive sanction that the ETA can apply is a fine, the claimant who wants financial compensation or reinstatement in the original job must proceed in the court system. The court system is organised on four levels: the courts of first instance (with separate courts for employment and administrative claims); two levels of appellate courts; and the *Kúria* (which is the new name of the Supreme Court).⁴ The Constitutional Court adjudicates issues in relation to conformity with the Fundamental Law and constitutional complaints.⁵

¹ <http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf>, accessed 1 November 2015. The national legal database indicates the 92 articles of the Fundamental Law which have been modified since its adoption:

http://www.njt.hu/cgi_bin/njt_doc.cgi?docid=140968#foot1.

² On the legislative process which requires a two-thirds majority: <http://www.parlament.hu/en/web/house-of-the-national-assembly/laws-requiring-a-two-thirds-qualified-majority>.

³ During the reorganization of the judiciary, which took place three years ago, the labour courts had been integrated with the administrative courts. According to a recently published plan, the Government seeks to reorganize the system of administrative courts again. The side-effect of the new reorganization might be the abolition of labour courts as special courts. The draft is available in Hungarian: <https://d2qvief1bcth7.cloudfront.net/wp-content/uploads/sites/7/2016/08/normaszoveg.pdf> (6 October, 2016).

⁴ On the organization of the court system: <http://birosag.hu/birosagi-szervezetek>.

⁵ On the competences of the Constitutional Court: <http://www.alkotmanybirosag.hu/constitutional-court/about-the-constitutional-court/competence>.

1.2 List of main legislation transposing and implementing Directives

Fundamental Law of Hungary, 25 April 2011 (*Magyar Kozlony* (MK), 2011/43 p. 10656) (and its five modifications)

- Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (hereinafter: Equality Act) transposing and implementing: Council Directive 75/117/EEC of 10 February 1975, Council Directive 76/207/EEC of 9 February 1976, Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, Council Directive 79/7/EEC of 19 December 1978, Council Directive 86/378/EEC of 24 July 1986, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, Council Directive 86/613/EEC of 11 December 1986, Council Directive 92/85/EEC of 19 October 1992, Council Directive 96/34/EC of 3 June 1996, Council Directive 97/80/EC of 15 December 1997, Council Directive 2004/113/EC of 13 December 2004, Council Directive 2010/18/EU of 8 March 2010.
- Act I of 2012 on the (new) Labour Code (MK 2012/2 p. 257) transposing and implementing: Council Directive 75/117/EEC of 10 February 1975, Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, Council Directive 76/207/EEC of 9 February 1976, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, Council Directive 92/85/EEC of 19 October 1992, Council Directive 96/34/EC of 3 June 1996, Council Directive 2010/18/EU of 8 March 2010)
- Act CXCV of 2011 on Public Servants (MK 2011/164 p. 40622) transposing and implementing: Council Directive 75/117/EEC of 10 February 1975, Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, Council Directive 92/85/EEC of 19 October 1992, Council Directive 96/34/EC of 3 June 1996, Council Directive 2010/18/EU of 8 March 2010)
- Act CCV of 2012 on soldiers transposing and implementing: Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, Council Directive 92/85/EEC of 19 October 1992, Council Directive 96/34/EC of 3 June 1996, Council Directive 2010/18/EU of 8 March 2010)
- Act XXXIII of 1992 on public employees transposing and implementing: Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, Council Directive 96/34/EC of 3 June 1996, Council Directive 2010/18/EU of 8 March 2010)
- Act C of 2012 on Criminal Code transposing and implementing: Council Directive 76/207/EEC of 9 February 1976)
- Act LXXXI of 1997 on Social Security Pensions transposing and implementing: Council Directive 79/7/EEC of 19 December 1978)
- Act LXXXIII of 1997 on Compulsory Health Insurance transposing and implementing: Council Directive 86/613/EEC of 11 December 1986; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010,
- Act LXXXII of 1997 on Private Pensions transposing and implementing: Council Directive 79/7/EEC of 19 December 1978 Act CXVII of 2007 on the Employers' Pension Scheme transposing and implementing: Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, Council Directive 2004/113/EC of 13 December 2004,
- Act XCVI of 1993 on Voluntary Mutual Insurance Funds transposing and implementing: Council Directive 2004/113/EC of 13 December 2004
- Act LXXXVIII of 2014 on insurance transposing and implementing: Council Directive 2004/113/EC of 13 December 2004
- Act CXXXIX of 2013 on Hungarian National Bank transposing and implementing: Council Directive 2004/113/EC of 13 December 2004

- Act CXCI of 2011 on allowances for persons with altered working ability transposing and implementing: Council Directive 79/7/EEC of 19 December 1978, Council Directive 96/34/EC of 3 June 1996, Council Directive 2010/18/EU of 8 March 2010
- Act CXL of 2004 on general rules on administrative proceedings and services transposing and implementing: Council Directive 79/7/EEC of 19 December 1978, Council Directive 2004/113/EC of 13 December 2004.
- Act XLII of 2015 on service relationship of professional members of law enforcement transposing and implementing: Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, Council Directive 92/85/EEC of 19 October 1992, Council Directive 96/34/EC of 3 June 1996, Council Directive 2010/18/EU of 8 March 2010
- Act LXVIII of 1997 on the service relationship of employees in the judiciary transposing and implementing: Council Directive 96/34/EC of 3 June 1996, Council Directive 2010/18/EU of 8 March 2010
- Act CLXII of 2011 on the legal status and remuneration of judges transposing and implementing: Council Directive 96/34/EC of 3 June 1996, Council Directive 2010/18/EU of 8 March 2010.
- Act CLXIV of 2011 on the service relationship of the attorney general, the prosecutors, and other employees of prosecution transposing and implementing: Council Directive 96/34/EC of 3 June 1996, Council Directive 2010/18/EU of 8 March 2010

2. General legal framework

2.1 Constitution

2.1.1 Does your national Constitution prohibit sex discrimination?

Yes. The issue of gender equality is discussed in Article XV of the new Fundamental Law, which regulates equality before the law.⁶ Article XV (2) guarantees that fundamental rights are enjoyed by everyone without discrimination and in particular without discrimination on grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status.

2.1.2 Does the Constitution contain other Articles pertaining to equality between men and women?

Yes. Article XV (3) of the Fundamental Law states that 'women and men shall have equal rights.' Article XV (5) is considered to be controversial because of the paternalistic approach that it adopts: 'By means of separate measures, Hungary shall *protect* families, children, women, the elderly and persons living with disabilities.'

2.1.3 Can the Article(s) mentioned in the two previous questions be invoked in horizontal relations (between private parties)?

Yes.

2.2 Equal treatment legislation

2.2.1 Does your country have specific equal treatment legislation?

Yes. The framework rules on equal treatment are included in the 'Equality Act' (Act CXXV of 2003). This Act plays a central role in equal treatment legislation because it defines the 20 grounds of discrimination and the basic concepts of equality law, which are to be applied in the entire legal system. It also regulates the mission, the structure and the roles of the most important equality body, the Equal Treatment Authority (ETA).

The evaluation of the Equality Act has changed since its enactment when it was considered (at least by the wider public) to be a breakthrough that would lead to a legal system in which equal treatment would be not only a mere legal principle (as it was in the socialist era) but a collection of rules that are intended to be implemented. An association of the leading women organisations produced a lengthy in-depth analysis of the draft act, which was ignored during the legislative process.⁷ The past 12 years have substantiated the original critics of the substance of the legislation and nowadays the Equality Act is considered to be a not too successful outcome of good intentions. On the face of it, in many regards, the act transposed the EU *acquis* (and some international law norms), however, as the harmonization of the laws had been executed only in a very formal manner and the principles of equal treatment did not permeate the legal system, not enough substantial protection originated from the new rules.

Even the formal transposition could be criticized, because it uses unclear terms and definitions, has established a weak ETA and has regulated sanctions that are not sufficiently dissuasive. Consequently the legal protection provided by the Equality Act is rather limited.

⁶ <http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf>.

⁷ <http://www.nokjoga.hu/sites/default/files/filefield/2003-eselyegy-tv-kritikaja-noierdek.pdf> (9 October, 2016)

As far as the implementation of EU definitions is concerned, the Hungarian concepts in some respects go beyond the relevant EU regulations, for example, with regard to how the definitions of direct and indirect discrimination and unlawful segregation protect groups (and not only individuals) against unequal treatment,⁸ while in many other contexts the concepts elaborated by the Hungarian equality law are more limited than those in Directive 2006/54/EC, as will be explained below.

In the Equality Act sex is just one among the 20 legally prohibited discriminatory grounds. Article 8 of the Equality Act prohibits discrimination on the following grounds:

a) sex, b) racial origin, c) colour, d) nationality, e) origin of national or ethnic minority, f) mother tongue, g) disability, h) state of health, i) religious or ideological conviction, j) political or other opinion, k) *family status*, l) *motherhood (pregnancy) or fatherhood*, m) sexual orientation, n) *sexual identity*, o) age, p) social origin, q) financial status, r) the part-time nature or fixed term of the employment relationship or other relationship aimed at work, s) membership of a trade union, t) any other status, characteristic feature or attribute (hereinafter collectively: characteristics). Consequently the prohibited grounds are much wider than that which is required by the EU *acquis*, although in such legislation the issue of sex discrimination is less emphatic and the transposition of gender equality directives is less rigorous than they could be in a separate law.⁹

⁸ This difference had some impact on jurisdiction in the case of the unlawful segregation of Roma children in schools, but not in gender equality case law.

⁹ Consequently the number of sex or sex-related cases is rather low. In 2014, the Equal Treatment Authority, which is the main administrative body for implementing equality legislation, proceeded in 432 cases, out of which 47 were related to motherhood (pregnancy) and fatherhood; 17 to sex; and 9 to family status. http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/8745bda54b1ed94d06475af17cb3a40f/EB_H_besz%C3%A1mol%C3%B3_2014_angol.pdf. Accessed 28 November 2015.

3. Implementation of central concepts

3.1 Sex/gender/transgender

3.1.1 Are the terms gender/sex defined in your national legislation?

Not specifically.

3.1.2 Is discrimination due to gender reassignment explicitly prohibited in your national legislation?

Yes. Article 8 n) prohibits discrimination on the basis of sexual identity. This point is interpreted as to provide protection against discrimination based on gender/sexual identity regardless of whether gender reassignment has taken place.

3.2 Direct sex discrimination

3.2.1 Is direct sex discrimination explicitly prohibited in national legislation?

Direct discrimination is defined in the Hungarian law, but not specifically direct sex discrimination.

Direct discrimination occurs if a person or a group is/are treated less favourably on the ground of his/her/their protected characteristic than any other person or group of persons in a comparable situation (Article 8 of Equality Act).

According to Article 7 (2) of the Equality Act, in alleged direct discrimination cases the principle of equal treatment is not violated by an action 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 thereto; b) which is found by an objective consideration to have a reasonable explanation directly related to the relevant relationship in cases not referred to in the above point a). Similar exemptions are allowed in the Recast Directive only in relation to indirect discrimination. Consequently, the definition of direct discrimination does not comply with the EU definition because it is much narrower by allowing the possibility of an exemption.

Furthermore, Article 6 excludes certain relationships from the scope of the Act (family law relationships; relationships between relatives; relationships of ecclesiastical entities directly connected with the activities of the religious life of churches; and relationships in respect of membership between members of NGOs, and relationships in political parties) and therefore further narrows the terrain of situations to which the definitions of Directive 2006/54 applies, including direct discrimination. The case law on this Article is discussed below in point 3.2.3.

3.2.2 Are pregnancy and maternity discrimination explicitly prohibited in legislation as forms of direct sex discrimination?

Yes. Article 8 l) of the Equality Act prohibits direct discrimination on grounds of *motherhood (pregnancy) or fatherhood*.

3.2.3 Are there specific difficulties in your country in applying the concept of direct sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant

The courts tend to interpret broadly the provisions which narrow the scope of the Act, or establish an exemption from the definitions of the basic concepts of equal treatment. For

example, Article 6 (1) c of the Equality Act states that relationships of ecclesiastical entities directly connected with the activities of the religious life of churches do not fall under the scope of the Act. According to the interpretation of the Supreme Court, a church-financed university could exclude homosexual students from the religious training provided to future members of the clergy (but not from the study of theology, which may be studied by laypersons, as well as) because the churches may regulate expectations related to the lifestyle of pastors and ministers, as long as they are in relation to their religion, and therefore the university which provides education for future pastors and ministers may also establish such criteria (*Legf. Bír. Pfv. IV. 20.678/2005*, published as case BH 14/2006).

Furthermore, the unspecific, all-embracing nature of the Equality Act provides a false impression that it is enough to refer to discrimination in general without indicating the protected ground on which basis legal redress is claimed. There are still many cases being adjudicated by the *Kúria* and the Equal Treatment Authority where the claimant has not indicated the protected ground on which his/her claim is based during the procedure at first instance.¹⁰

3.3 Indirect sex discrimination

3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?

Yes. Indirect discrimination is defined in the Hungarian law, but not specifically indirect sex discrimination.

Article 9 of the Equality Act states that when a provision that is not considered to be direct discrimination and apparently complies with the principle of equal treatment puts any person or group having a protected characteristic, as defined in Article 8, at a considerably larger disadvantage compared with other persons or groups in a similar situation, then this is considered to be indirect discrimination. The concept of indirect discrimination is narrower in the Equality Act because it stipulates a 'considerably larger disadvantage' compared to a 'disadvantage' as mentioned in Directive 2006/54.

The exemption laid down in the Equality Act makes the scope of indirect discrimination in the Equality Act even narrower compared to the Directive. As is regulated in Article 7 (2), if the Equality Act does not provide any differently, the principle of equal treatment is not violated by such conduct, measure, condition, omission, instruction or practice (hereinafter called collectively: disposition), a) which limits a basic right of someone in order to enforce another person's basic right in an unavoidable situation, assuming that such a limitation is suitable for this purpose and is also in proportion thereto; b) which is found by an objective consideration to have a reasonable explanation directly related to the relevant relationship in cases not referred to in the above point a). The exemption stipulated in point a) is narrower than the objective justification test as it refers to the constitutionally protected basic rights, but the exemption described in point b) is far wider than the objective justification test, therefore all in all the definition of indirect discrimination is considerably narrower than in Article 2 (1) b of Directive 2006/54.

3.3.2 Is statistical evidence used in your country in order to establish a presumption of indirect sex discrimination? Please provide some examples of cases, if available.

Statistical evidence is discussed in legal textbooks, nonetheless it has only marginally become a part of the sex discrimination litigation.

¹⁰ For example *Kúria Pfv.20351/2014/6*.

3.3.3 Is in your view the objective justification test applied correctly by national courts? Please provide some examples of cases, if available.

Article 7 (2) allows for much wider exemptions so that the objective justification test has been applied very liberally by the courts.

3.3.4 Are there specific difficulties in your country in applying the concept of indirect sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

The case law on Article 7 (2) b allows defendants to justify almost any indirect discrimination.

It is rather widespread practice that certain elements of wages are only paid to employees who have not been on sick leave at all or have been on sick leave for only a limited period of time. In the case published in BH 253/2008, the employer did not pay any bonuses and did not provide wage increases to employees who had been on sick leave for longer than 15 days in the year in question. The plaintiff argued that this policy indirectly discriminated against mothers with young child(ren), and especially single mothers, who might be away from work for longer periods due to the illness of their child compared to other employees. The employer argued that it had to keep its manpower low and had to meet its deadlines in order to remain competitive on the market. According to the court, this argument provided a reasonable explanation which was directly related to employment and this therefore objectively justified the policy.

3.4 Multiple discrimination and intersectional discrimination

3.4.1 Is multiple discrimination – i.e. discrimination based on two or more grounds simultaneously – and/or intersectional discrimination – i.e. discrimination resulting from the interaction of grounds of discrimination which interact to produce a new and different type of discrimination – explicitly addressed in national legislation?

No. And there are no proposals pending.

3.4.2 Is there any case law that addresses multiple discrimination and/or intersectional discrimination (where gender is one of the grounds at stake)?

The report of the ETA for the year 2014 states briefly that a complaint may refer to more than one protected characteristic, but no further thoughts are given on this subject. Hungarian case law has not yet recognised the specialist nature of cases when multiple discrimination and/or intersectional discrimination occurs.¹¹

3.5 Positive action

3.5.1 Is positive action explicitly allowed in national legislation?

Yes. Positive action is mentioned in the fourth modification of the Fundamental Law, stating that 'equal opportunities and social convergence shall be promoted by introducing special measures.'¹² The rules on such measures are regulated by Article 11 of the Equality Act, stating that positive action might be implemented by an Act, by a

¹¹ Report on the activities of the Equal Treatment Authority in 2014 and on the experiences gathered in the context of applying Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, 2015. P. 7

http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/8745bda54b1ed94d06475af17cb3a40f/EB_H_besz%C3%A1mol%C3%B3_2014_angol.pdf, (accessed 16 November, 2015).

¹² Article XV (4) of the Fundamental Law.

Government decree based on the Act, or by a collective agreement; and that such positive action must not violate fundamental rights must not grant an unconditional preference and must not exclude the consideration of individual aspects.

In my view this definition complies with Article 157 TFEU (4).

3.5.2 Are there specific difficulties in your country in relation to positive action? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

With regard to gender inequality, no positive action has so far been laid down by law in Hungary, beyond the (questionable) specific pension entitlements of women after 40 years of service, which is discussed below in point 7.4.

3.5.3 Has your country adopted measures that aim to improve the gender balance in company boards?

No. There are no proposals or policy measures pending.

3.5.4 Has your country adopted other positive action measures to improve the gender balance in some fields, e.g. in political candidate lists or political bodies? If so, please describe these measures.

The idea of establishing a quota system for political elections has been firmly rejected by the political parties (with the exception of the LMP (*Lehet Más A Politika*: Politics Can Be Different)), despite the fact that women's participation in elected bodies is extremely low in Hungary. The new parliamentary elections held in 2014 resulted in a 9.5 % participation rate for women. The ruling FIDESZ-KDNP permanent party alliance has the lowest participation rate: out of the 133 MPs only 9 are women, which equals 6.7 %.¹³ The Cabinet only has male members.¹⁴ The participation of women in municipalities ranges from 5-19 %.¹⁵

3.6 Harassment and sexual harassment

3.6.1 Is harassment explicitly prohibited in national legislation?

Yes. Harassment is conduct of a sexual or other nature violating human dignity related to the relevant person's protected characteristics with the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment faced by the person in question (Article 10 (1) Equality Act).

This definition is in compliance with Directive 2006/54.

3.6.2 Please specify the scope of the prohibition on harassment (e.g. does it cover employment and access to goods and services; is it broader?).

The scope of the prohibition of harassment is identical to that of the Equality Act.

The institutional scope of the Act covers: a) the Hungarian State, b) local and minority municipalities and the bodies thereof, c) authorities exercising state powers, d) the armed forces and law enforcement bodies, e) public foundations, public corporations, trade unions and employers' associations, f) public utility companies, g) institutions of

¹³ Author's calculations on the basis of data published by the National Election Office http://www.valasztas.hu/hu/ogyv2014/858/858_0_index.html (accessed 29 May, 2014).

¹⁴ <http://www.kormany.hu/en/members-of-the-government> (accessed 28 November, 2015).

¹⁵ *Women and Men in Hungary 009-22010* (2011), Central Statistical Office, Budapest, pp. 216-17.

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).¹⁶ The relational scope of the Act¹⁷, which specifies the legal relationships to which the prohibition of harassment is to be applied, could be grouped into three subcategories: its employment-related scope (covering work related legal relationships), its public subsidies-related scope (covering all legal relations related to public subsidies) and its scope with regard to civil-law relationships (covering legal relationships through which tenders are made, services are provided and goods are sold to the public).¹⁸

3.6.3 Is sexual harassment explicitly prohibited in national legislation?

Yes and no. The original text of the Equality Act contained only the definition of harassment, which was slightly modified in 2006 in order to include cases of sexual harassment as well by inserting into the definition of harassment that a violation of the dignity of the person occurs as a result of conduct 'of a sexual or other nature.' Consequently, the content of sexual harassment must be developed through the jurisdiction of the ETA and the courts. Up to now the case law of the ETA has properly transposed the content of sexual harassment laid down in the Directive: for example, the ETA has imposed a fine for habitually making remarks about the attractive appearance of a female co-worker, using a very intimate tone (calling her 'puppy' or 'piglet'), and repeatedly offering himself as her sexual partner publicly.¹⁹ Similarly the court of second instance has considered it to be sexual harassment when a public servant received text messages of a sexual and threatening nature from his superior (BH 347/2011).

3.6.4 Please specify the scope of the prohibition on harassment (e.g. does it cover employment and access to goods and services; is it broader?).

See the answer given to question 3.6.2.

3.6.5 Does national legislation specify that harassment and sexual harassment as well as any less favourable treatment based on the person's rejection of or submission to such conduct amounts to discrimination (see Article 2(2)(a) of Directive 2006/54)?

Yes. Harassment (including harassment of a sexual nature) is defined as a violation the principle of equal treatment in Article 7.1 of Equality Act. .

3.7 Instruction to discriminate

3.7.1 Is an instruction to discriminate explicitly prohibited in national legislation?

Yes. Article 7 (1) of Equality Act states that direct and indirect discrimination, harassment (including sexual harassment), unlawful segregation, retaliation, and also the order to do so is considered to be a violation of the principle of equal treatment.

3.7.2 Are there specific difficulties in your country in relation to the concept of instruction to discriminate? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

No.

¹⁶ Article 4 of the Equality Act.

¹⁷ The relational scope is used here as explained by Freedland M., Kountouris, N. (2012), 'Employment Equality and Personal Work Relations – A Critique of *Jivraj v Hashwani*', 41 *Industrial Law Journal*, March.

¹⁸ Article 5 of the Equality Act.

¹⁹ 365/2011 EBH.

3.8 Other forms of discrimination

Are any other forms of discrimination prohibited in national law, such as discrimination by association or assumed discrimination?

Yes. Unlawful segregation is conduct that separates individuals or groups of individuals from other individuals or groups of individuals in a similar situation on the basis of their protected characteristics, without any law expressly allowing for this (Article 10 (2) of the Equality Act).

Retaliation is conduct that causes an infringement, is aimed at an infringement, or threatens an infringement, against the person making a complaint or initiating procedures because of a violation of the principle of equal treatment, or against a person assisting in such a procedure, in relation to these acts (Article 10 (3) of the Equality Act).

4. Equal pay and equal treatment at work (Article 157 TFEU and Recast Directive 2006/54)

4.1 Equal pay

4.1.1 Is the principle of equal pay for equal work or work of equal value implemented in national legislation?

Yes. The previous Constitution of 1948 expressly guaranteed equal pay for equal work, which is no longer included in the new Fundamental Law. The Fundamental Law widened the equality rule and now declares that 'Women and men shall have equal rights' (Article XV (3)). This wider wording could be considered to be legislative progress, however, in the view of the author the frequent ultraconservative political statements by the governing political elite about the role of women in society²⁰ and the lack of supporting equal treatment policies, lessens the theoretical positive effect of this paragraph. Furthermore, the omission of the equal pay rule sends the political message, along with other measures on the 'protection' of women (see point 2.1.2. and 7.4.), that the participation and equal treatment of women in the labour market has decreasing importance. Consequently, the gender pay gap is considerable in every age group, especially among the middle-aged.²¹

Opposition members of the Parliament proposed repeatedly during 2015 and 2016 that the rule on equal pay for equal work should be re-enacted in the Fundamental Law. The Business Development Committee voted down all the proposals and therefore the Parliament did not discuss any of them in plenary session.²²

The rules on equal pay are very briefly regulated in Hungary. Only one article in Act I of 2012 on the Labour Code is dedicated to the issue of equal pay. Article 12 (1) states that in connection with the remuneration of work, the principle of equal treatment must be strictly observed. Remedying the consequences of any breach of this requirement may not result in any violation of, or harm to, the rights of other workers. The further two subparagraphs deal with the definition of pay and work of equal value, which are discussed below.

Article 21 f) of the Equality Act also prohibits direct and indirect wage discrimination and refers to the above-mentioned article in the Labour Code.

4.1.2 Is the concept of pay defined in national legislation?

Yes. In Article 12 (2) of the Labour Code a wage is defined as any remuneration provided directly or indirectly in cash or in kind, based on the employment relationship; this definition is in compliance with the definition in Article 157(2) TFEU.

4.1.3 Does national law explicitly implement Article 4 of Recast Directive 2006/54 (prohibition of direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration)?

Yes. In the Equality Act Article 8 defines direct discrimination and establishes sex as a protected characteristic; Article 9 defines indirect discrimination; Article 4 regulates the

²⁰ Laszlo Kover, the Speaker of the Parliament on the Congress of FIDESZ held on 13 December 2015 explained that, "we want our daughters to believe that it is the highest level of self-realization that they give birth to our grandchildren". <http://www.origo.hu/itthon/20151215-kover-laszlo-fontos-kozbeszed-resze-legyen-demografia.html> (October 7, 2016)

²¹ In May 2014, the average wage in the age group 36-40 was approximately EUR 760 for men and EUR 627 for women. <http://nfsz.munka.hu/sysres/adattar2015/index.html> (October 7, 2016)

²² <http://www.parlament.hu/irom40/06925/06925.pdf> and <http://www.parlament.hu/irom40/03844/03844.pdf>

institutional scope; and Article 5 lays down the relational scope of the Act, resulting in the fact that all elements of Article 4 are transposed into Hungarian law. Furthermore, Article 21 f) of the Equality Act also prohibits direct and indirect wage discrimination and refers back to Article 12 of the Labour Code.

4.1.4 Is a comparator required in national law as regards equal pay?

No. In Hungary neither the legislation nor the case law requires the claimant to point to a comparator.

At present, in most of the published cases the arguments are phrased in general terms,²³ e.g. the claimant argues that a preference is given to employees in a discriminatory fashion, without referring to one particular employee as a comparison. Sometimes the employer uses the pay of other employees to exempt itself from legal liability by demonstrating a lack of discrimination. Usually the arguments on both sides remain at the level of general arguments, even if a list of employees' pay is sent to the court. Nonetheless, the review of the published cases reveals that taking, elaborating, and contrasting the actual pay of the claimant with another concrete employee significantly improves the claimant's chances of winning the case. In ETA case No. 117/2010 the monthly wages of two male storekeepers were 45-110 % more than those of their two female colleagues during a longer period of time. The detailed data on monthly wages enabled the claimant (one of the female storekeepers) to prove direct wage discrimination.²⁴ In a recent case a pregnant employee argued that other employees who were hired later than she was, got a higher initial base wage and therefore she was directly discriminated against due to her pregnancy. The data collected during the proceeding, however, showed that all employees who were hired later than she was, got higher base wage, even before she got pregnant.²⁵ Therefore the ETA concluded that her pregnancy was not the reason for the difference in wages.²⁶

The comparator could also be a hypothetical comparator because the notion of both direct and indirect discrimination use the phrase 'would be'. According to the knowledge of the expert, none of the published case law was based on a hypothetical comparison of wages.

4.1.5 Does national law lay down parameters for establishing the equal value of the work performed, such as the nature of the work, training and working conditions?

Yes. For the purposes of equal pay, the equal value of work is determined on the basis of the nature of the work performed, its quality and quantity, the working conditions, the required vocational training, physical or intellectual efforts, experience, responsibilities and labour market conditions.²⁷ The latter criterion, which was inserted into the paragraph by the new Code, according to the intentions of the drafters, opens up the possibility for nationwide employers to provide different wages in different parts of the country. This criterion fits somewhat oddly within this subsection, as all the other criteria deal with the individual, while the labour market condition reflects the local or national labour market data. According to the views of the author, this added criterion mitigates the effectiveness of the article and provides leeway for employers.

²³ EBD 214 M 22.

²⁴ <http://www.egyenlobanasmod.hu/jogesetek/hu/117-2010.pdf>, accessed 15 February 2014.

²⁵ We can assume that all the employees involved were female, although it is not stated in the case.

²⁶ EBH/19/2016, <http://egyenlobanasmod.hu/article/view/ebh-19-2016> (October 7, 2016).

²⁷ Article 12(3) of the LC.

4.1.6 Does national (case) law address wage transparency in any way?

Yes and no. In the public sector the performance or job classification is widespread which in theory would create a high level of transparency in wages. According to the Act on public servants, the director of the state administrative organ may increase the basic wage of the public servant by 50 %, or may reduce it by 20 %.²⁸ The wage adjustment is linked to the result of an evaluation of the performance or the quality of the work done in the previous year, although no detailed regulations exist in this regard. Although equal pay rules are applicable to public servants, the possibility of a severe wage adjustment reduces the transparency of wages, and may also result in a gender-based wage gap in the public sector.²⁹

It is fairly frequent in both the private and public sector that the employer arbitrarily provides better wage conditions for some individuals or some groups of workers. For example, in one case some groups of nurses working in different departments of the same hospital were entitled to receive hazard bonuses, while other groups of nurses were not, despite working under identical or very similar conditions. *Kúria, Kfv. III. 39 148/2011*. Published: EBH 2011/2424. During the litigation, the employer stopped paying the hazard bonus to all its nurses, and therefore the claimants' reference point ceased to exist and their claim was dismissed. Nonetheless, the *Kúria* concluded that as long as the bonus is paid to a group of employees, all groups who are in a comparable situation may request the same remuneration. In a more recent case, EBH 2014 M 19, the *Kúria* decided that a public servant cannot claim a higher wage by referring to equal pay regulations if that wage was established by the violation of the applicable wage law.

4.1.7 Is the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency applied in your country? If so, how?

No.

4.1.8 Which justifications for pay differences are allowed in legislation and/or case law?

Since 2007, in direct wage discrimination cases exemptions are no longer possible (Article 22 (2) of Equality Act).

In indirect wage discrimination cases, however, Article 22 (1) applies (see in more detail in 4.2.3), which provides a wider range of justifications than Article 14 of the Recast Directive. Despite the fact that other elements of equal wage regulations are in place, as long as this subsection which allows exemptions based on 'proportional discrimination, justified by the characteristics or nature of the work, and is based on all relevant and legitimate terms and conditions of employment' remains in force the equal pay legislation is not in accordance with the EU acquis. It is not surprising that the pay gap is still wide, especially among university/college graduates and managerial employees.³⁰

²⁸ Article 133(3) of Act CXCV of 2011 on public servants.

²⁹ According to a recent study based on microeconomic data, 8 % of the gender wage gap in the public sector does not result from any observed factor, e.g. education, segregation, etc., so it might be the result of unlawful wage discrimination (but also from unobserved personal features of public servants: e.g. decision-making capacity). Lovász, A. (2013), *Jobbak a nők esélyei a közszférában? A női-férfi bérkülönbség és a foglalkozási szegregáció vizsgálata a köz- és magánszférában* (Do women have better opportunities in the public sector? The gender wage gap and occupational segregation in the public and the private sector), Budapest Working Papers on the Labour Market BWP No. 2, Centre for Economic and Regional Studies, Hungarian Academy of Sciences, Budapest, Hungary.

³⁰ In 2010, the ratio of women having a university/college degree was only 71 % of that of comparable men, while the same ratio in the case of lowly work was 96 %. See Central Statistical Office (2011), *Women and Men in Hungary 2009-2010*, Budapest, p. 167.

In the case law, when attempting to justify wage differences employers frequently refer to their freedom of contract, and/or the differences in the bargaining power of different employees. This argument usually does not save the employers from being liable for wage discrimination, as occurred in a case in which female storekeepers earned 70-100 % less than their male colleagues.³¹ If, however, the employer invests some effort in fabricating an argument about the necessity of the challenged policy because of competitiveness, or applying preferential treatment on behalf of the comparator, the employer has a good possibility of winning the case.

- 4.1.9 Are there specific difficulties related to the application of the principle of equal pay for equal work and work of equal value in practice? For example in case of out-sourcing?

The Hungarian courts are excessively strict when determining the amount of compensation to be paid to victims of sex discrimination. In the case BH 311/2008, when the directly discriminated female bus driver was not employed because of her sex, only the lost wages up to the day she found employment somewhere else were awarded and no further financial compensation (non-pecuniary damages) was awarded to her, although the Supreme Court referred to ECJ case C-14/83 and noted that persuasive sanctions should be applied to serve the purpose of a general deterrent.

4.2 Access to work and working conditions

- 4.2.1 Is the personal scope in relation to access to employment, vocational training, working conditions etc. defined in national law (see Article 14 of Directive 2006/54)?

Yes. It covers the employment relationship and other relationships aimed at work. According to Article 3 of the Equality Act, an 'employment relationship' covers employment in the private sector; public servants; public employees; judges; other employees of the judiciary; public prosecutors; professional and contractual service relationship in the armed forces; and professional foster parents . The 'other relationships aimed at work' cover homeworkers (piece-rate workers); contracts for work and to work; the working relationship of members of co-operatives; and partnership activities under civil law involving a personal contribution and aimed at work.³²

The concept of a worker covers all employees in typical and all atypical forms of employment: part-time and fixed-term employment, home workers (piece-rate workers); telecommuting (since 2004), the employment relationship between the school co-operative and its members (since 2011), and temporary agency work (since 1 July 2012). The new Labour Code 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.

- 4.2.2 Is the material scope in relation to (access to) employment defined in national law (see Article 14(1) of the Recast Directive 2006/54)?

Yes.

Is this scope broader or more limited than the scope of Article 14(1) of Recast Directive 2006/54?

³¹ <http://www.egyenlobanasmod.hu/jogesetek/en/117-2010-en.pdf>, accessed 23 September 2015. The decision of the ETA was confirmed by the Supreme Court in published decision No. KGD 2013/5.

³² The Hungarian term for 'other relationships for work' usually covers those relationships based on which the work is performed between independent parties. Here, however, two relationships of dependent work have also been listed: relationships of homeworkers (piece-rate workers) and the working relationship of members of co-operatives.

Article 21 a) – i) of the Equality Act provide protection against any direct and indirect discrimination listed in the Recast Directive³³ in relation to access to work and working conditions. Article 21 of the Equality Act names the employment and working conditions, which are mentioned in Article 14.1.c in a summary form (e.g. compensatory and disciplinary responsibility).

4.2.3 Has the exception on occupational activities been implemented into national law (see Article 14(2) of Recast Directive 2006/54)?

Yes. The exception on occupational activities is regulated by Article 22 of the Equality Act, which lays down: (1) The principle of equal treatment shall not be considered violated if *a)* the discrimination is proportional, justified by the characteristics or nature of the work and is based on all relevant and legitimate terms and conditions considered during the hiring, or *b)* the discrimination arises directly from a religious or other ideological conviction or national or ethnic origin fundamentally determining the nature of the organisation, and it is proportional and justified by the nature of the employment activity or the conditions of its pursuit.

The exceptions regulated by Article 22 of the Equality Act go somewhat further than the Recast Directive and offer the employer some leeway not only in the cases listed in Article 14 (access to employment, including the training leading to it) but also regarding any other terms and conditions of employment.

Furthermore, in Hungarian law the need to differentiate between the sexes should only be 'substantial' instead of 'genuine and determining' as is stipulated in the Directive.

Due to these minor differences, all in all, the Hungarian legislation has gaps in the implementation in this regard.

4.2.4 Has the exception on protection for women, in particular as regards pregnancy and maternity, been implemented in national law (see Article 28(1) of Recast Directive 2006/54)?

Not specifically.

4.2.5 Are there particular difficulties related to the personal and/or material scope of national law in relation to access to work, vocational training, employment, working conditions etc.?

All elements taken together, the Equality Act provides weaker protection to women by making the differentiation between workers justifiable by the employer with a much wider scope than is provided by the Recast Directive. The wider margin for sex-based differentiation under Hungarian law may be illustrated by an earlier decision of the ETA where a lower-ranking clerical job requiring some physical work (sometimes lifting weights of ten kilos) was qualified as being 'preferably for males,' on this ground rejecting a female applicant.³⁴

³³ Directive 2006/54/EC OJ L 204/23 of 5 July 2006.

³⁴ ETA Decision No. 441/2008.

5. Pregnancy, maternity, and leave related to work-life balance (Directive 92/85, relevant provisions of the Directives 2006/54 and 2010/18)

5.1 Pregnancy and maternity protection

5.1.1 Does national law define a pregnant worker?

Yes. A pregnant worker is defined in relation to protection against dismissal during pregnancy in the Labour Code. Article 65 (5) of the Labour Code states that protection against dismissal only applies if the expectant employee informs her employer of her condition (the Labour Code uses the word expectant instead of pregnant). Previously the definition requested the employee to inform her employer of her condition before the dismissal was delivered to her. On 30 May 2014 the Constitutional Court nullified the 'preliminary' phrase because it unnecessarily interfered with the private sphere of pregnant women.³⁵ If the notification is given following the delivery of the letter of dismissal, the dismissal may be withdrawn by the employer.

The definition is consistent with the definition in Article 2 of Directive 92/85.

5.1.2 Are the protective measures mentioned in the Articles 4-7 of Directive 92/85 implemented in national law?

Yes. According to Article 60 of the Labour Code, the pregnant employee shall be offered a job which is suitable for her state of health if it is considered that she is unable to work in her original position according to a medical opinion from the time her pregnancy is diagnosed until her child reaches one year of age. If a job which is suitable for her state of health cannot be found, the pregnant worker shall be discharged from her obligation to do the work. The worker will be paid the basic wage which is normally paid for the job offered, which may not be less than her basic wage in her employment contract. The basic wage is also payable for the duration of the time during which she has been discharged for her obligation to do the work, except if the job offered is refused without good reason.

In case No. EBH/189/2014 the ETA established that the employer had not renewed the employee's contract following the employee asking for a physically less demanding job due to her pregnancy. The employer could not exempt its liability by arguing that there was no need for more cashiers and the termination was due to the seasonal fluctuation of workforce demand, because during the same period of time the employer placed a job advertisement seeking cashiers and the workforce statistics did not show any seasonal pattern either. As the dismissal was based on the pregnancy of the employee, it constituted direct sex discrimination and the employer was obliged to pay a fine of EUR 2 000.

Section 59 of the Labour Code clearly indicates that the employer is obliged 'to make an offer to the employee to have his/her wage adjusted' at the end of any leave; consequently, the offer of a modification must address only the wage of the returning parent and not any other working conditions, which creates a gap in the Hungarian implementation.

5.1.3 Is dismissal prohibited in national law from the beginning of the pregnancy until the end of the maternity leave (see Article 10(1) of Directive 92/85)?

Mainly yes. A dismissal with notice is prohibited during pregnancy, maternity leave and parental leave (Article 65 (3) a – c). Executive employees are only protected during

³⁵ 17/2014. (V. 30.) AB határozat;
<http://public.mkab.hu/dev/dontesek.nsf/0/869799353AB65B33C1257ADC002103AE?OpenDocument>

pregnancy and maternity leave, but not during parental leave (Article 209 (1) (2) b). A dismissal with immediate effect, which is discussed below, is allowed as an exception during these periods of time.

If the mother or the *single* father returns to work before the child reaches the age of three, instead of protection, a restriction on dismissal is applicable. The form of such a restriction varies according to the actual reason for the dismissal. If the reason for the dismissal is related to the employee's behaviour, it must be so serious that it could serve as a basis for dismissal with immediate effect. If the reason for the dismissal is related to either the capabilities of the employee or the operation of the employer, the employee can only be dismissed if there is no vacancy at the employer's premises where (s)he was employed before, which corresponds to the capabilities, practice and qualification used by the employee in his/her current job.³⁶

According to Article 78 of Labour Code, a dismissal with immediate effect could be applied during any period of the employment relationship, including during pregnancy, and while being on leave, or having returned from leave until the child reaches the age of three, if the employee a) wilfully or by gross negligence commits a grave violation of any substantive obligations arising from the employment relationship; or b) otherwise engages in conduct that would render the employment relationship impossible.

When an employee is made redundant during her maternity leave, the payment for maternity leave does not cease.

5.1.4 In cases of dismissal from the beginning of pregnancy until the end of maternity leave, is the employer obliged to indicate substantiated grounds for the dismissal in writing (see Article 10(2) of Directive 92/85)?

Yes. All employment terminations must be put in writing, and a dismissal with notice and with immediate effect must be justified by the employer (Article 22 (5) of the Labour Code). No justification is needed for terminating the employment during the probationary period. Under the case law, however, if the termination during the probationary period is discriminatory, the reasons must be given and be proved by the employer.

In case EBH/379/2014 the ETA established that the employer could not prove a legitimate reason for terminating a pregnant employee's employment relationship during her probationary period; therefore this amounted to direct sex discrimination. It was proved that first the employer decided to continue the employment relationship of the claimant until the end of the 6-month probationary period. This decision, however, was overturned two days after the claimant had been placed on sick leave due to her pregnancy and she was duly dismissed with immediate effect. It is long-established case law of the ETA that the employer must prove the legitimate reason for the dismissal if the employee claims that the dismissal during the probationary period was discriminatory, even though the general rules relating to the probationary period do not require the employer to include any justification in the letter of dismissal. As in this case no legitimate reason could be found to support the dismissal of the claimant, the action of the employer therefore amounted to direct sex discrimination and the ETA applied sanctions against the employer (a fine equalling EUR 4 000 and a prohibition on any further infringement of equal opportunities laws; these sanctions being issued under the Act on Administrative Procedure).

³⁶ Article 66(6) of the Labour Code.

5.2 Maternity leave

5.2.1 How long (in days or weeks) is maternity leave? Please specify the relevant legislation and Article(s).

Mothers are entitled to twenty-four weeks of maternity leave (Article 127 (1) of the Labour Code).

5.2.2 Is there an obligatory period of maternity leave before and/or after birth?

Yes. At least two weeks from the 24 weeks (Article 127 (1) of the Labour Code).

In the absence of an agreement to the contrary, maternity leave shall be allocated so as to commence four weeks prior to the expected date of confinement (Article 127 (3) of the Labour Code).

5.2.3 Is there a legal provision insuring that the employment rights relating to the employment contract are ensured in the cases referred to in Articles 5, 6 and 7 of Directive 92/85?

Yes. In cases of a mandatory transfer due to the health risk for the pregnant or nursing mother (of a child up to the age of one) the employee is entitled to the basic wage associated with the new job title, if it is at least equal to her original basic wage. If no adequate work can be found for the employee in the organization, she is exempted from work and still receives her basic pay.³⁷

5.2.4 Is there a legal provision that ensures the employment rights relating to the employment contract (including pay or an adequate allowance) during the pregnancy and maternity leave?

Yes. According to Article 59 of the Labour Code, upon the employee's return from maternity and parental leave, the employer is obliged to offer the employee a modification of his/her wage, consistent with the increase in the average annual wage for employees in the same position. In the absence of employees who work in the same position, the rate of actual annual wage increases implemented by the employer will apply.³⁸

5.2.5 Is pay or an allowance during the pregnancy and maternity leave at the same level as sick leave or is it higher?

The allowance paid for maternity leave is equal or higher than the payment during sickness leave.

For maternity leave, the infant care fee is paid by the social security system, the amount of which is equal to 70 % of the average daily pay of the woman in question (with no ceiling on payments).³⁹

During sick leave (the first 15 days of sickness) the employer pays 70 % of the absentee payment (Article 146 (5) Labour Code). Afterwards, the social security system pays 60 or 50 % of the salary depending upon the circumstances.⁴⁰

³⁷ Labour Code, Article 60.

³⁸ Article 59 of the Labour Code.

³⁹ Articles 40-42 of Act LXXXIII of 1997 on the provision of mandatory health insurance (on confinement benefits).

⁴⁰ Act LXXXIV of 1997 on Mandatory Health Insurance Benefits. The amount was decreased from the former 70 % and 60 % in 2009.

5.2.6 Are statutory maternity benefits supplemented by some employers up to the normal remuneration?

Statutory maternity benefits can be supplemented by the employer, but it is quite rare in practice.

5.2.7 Are there conditions for eligibility for benefits applicable in national legislation (see Article 11(4) of Directive 92/85)?

Yes. Mothers (both natural and adoptive) are entitled to 24 weeks of maternity leave. Different types of benefits are available during maternity leave and the subsequent parental leave (up to when the child reaches 3 years of age) depending upon whether the mother (parent) was insured or not. A mother (parent) is considered to be insured if she has had insurance cover for 365 days over a period of two years.⁴¹

During maternity leave an infant care fee is paid to *insured* mothers, the amount of which is equal to 70 % of the average daily pay (with no ceiling on payments).⁴² For *non-insured* mothers, provided they attended prenatal care at least four times during the pregnancy, child care assistance is paid, the amount of which is equal to the minimum amount of old age pension, which is approximately EUR 90 per month.⁴³

The maternity allowance, which is a once-only benefit, is paid to every mother who has attended prenatal care at least once. The allowance amounts to 225 % of the minimum amount of old-age pension, which in 2016 is approximately EUR 200.⁴⁴

Following maternity leave, up until the child reaches the age of two, a child care fee is paid to the insured parent, which is equal to 70 % of the average daily pay, with a ceiling of twice the minimum wage, which is approximately EUR 500 per month.⁴⁵

5.2.8 In national law, is there a provision that guarantees the right of a woman to return after maternity leave to her job or to an equivalent job, on terms and conditions that are no less favourable to her, and to benefit from any improvement in working conditions to which she would have been entitled during her absence (see Article 15 of Directive 2006/54)?

Tentatively yes. The new Hungarian Labour Code (unlike the previous Labour Code) does not expressly guarantee the right to return to the original job or an equivalent job at the end of maternity/parental leave. A cumulative interpretation of the following regulations leads, however, to the conclusion that such a right is ensured by the Hungarian labour regulations:

- 1) taking maternity/parental leave does not terminate the employment relationship, therefore the employment contract remains in force during the leave (Sections 127, 128 and 130);
- 2) the employee has to inform the employer at least 30 days in advance of the intention to return to work (Section 133 (2));
- 3) it is an obligatory content of the employment contract to specify the job of the employee (Section 45(1));
- 4) the employment contract may only be modified with the mutual consent of the parties (Section 58);

⁴¹ Articles 40 and 42/A of Act LXXXIII of 1997.

⁴² Articles 40-42 of Act LXXXIII of 1997.

⁴³ Articles 20-28 of Act LXXXIV of 1998.

⁴⁴ Articles 29-33 of Act LXXXIV of 1998.

⁴⁵ Articles 42/A-D of Act LXXXIII of 1997.

- 5) a dismissal is prohibited during maternity/parental leave (Section 65 (3) b and c). According to a cumulative interpretation of these sections, the employee has the right to return to work with the same employer, and in the absence of a mutually agreed modification of the employment contract, the employee has the right to return to his/her original job. Nonetheless, the lack of an expressis verbis obligation to employ the employee in the original job obviously widens the employer's room for manoeuvre which might lead to situations where the parent is unable to return to the original job. It is openly discussed in labour law seminars and conferences that as maternity/parental leave usually lasts for years (two or three years per child), in the extremely rapidly changing economic and market environment employers could not be expected to re-employ the parent in the same job.

Anecdotal evidence suggests that many women are unable to return to their original employment at the end of their maternity leave,⁴⁶ although an increasing portion of them would like to do so (77 % in 2016).⁴⁷ Usually the employer offers a termination by mutual consent and pays equal to or slightly above the amount that would be due in the case of a dismissal with notice. If the employer dismisses the parent unlawfully, the employee may claim his/her reinstatement in his/her original job, according to Article 83 (1)b of the Labour Code.

5.3 Adoption leave

5.3.1 Does national legislation provide for adoption leave?

Yes. Adoptive parents enjoy the same rights to maternity, parental and paternal leave as natural parents. Article 294 (1) c of the Labour Code states that a 'child' shall mean any child raised or cared for in one's own household according to the regulations on the support of families. According to Act CCXI of 2011 on the Protection of Families natural, adopted, step and foster children and parents enjoy the same rights.

5.3.2 Does national legislation provide for protection against dismissal of workers who take adoption leave and/or specify their rights after the end of adoption leave (see Article 16 of Directive 2006/54)?

Yes. Adoptive parents enjoy the same rights to protection against dismissal as natural parents. See 5.3.1. above.

5.4 Parental leave

5.4.1 Has Directive 2010/18 been explicitly implemented in your country?

Yes. The regulations designed to transpose the Directive on parental leave are contained in Act I of 2012 on the Labour Code. In this regard, the personal scope of the Labour Code covers employees in the private sector, and also public employees of hospitals, schools, universities, museums, etc.⁴⁸ For public servants, the implementing regulations are contained in Act CXIX of 2011 on public servants. The regulations are substantively identical in these Acts.

5.4.2 Is the national legislation applicable to both the public and the private sector (see Clause 1 of Directive 2010/18)?

⁴⁶ Koncz, K. (2006), 'Munkahelyi diszkrimináció' ('Discrimination at the workplace'), *Munkaügyi Szemle*, Part I, pp. 11-14 and Part II, pp. 16-19.

⁴⁷ A kisgyermeket nevelő nők és a munkaerőpiac (Women raising small children and the labour market) http://www.ksh.hu/docs/hun/xftp/stattukor/kisgyerm_nok_mpiac.pdf (7 October, 2016)

⁴⁸ Public employees are employees who work for municipalities and the Government, but who are not entitled to act on behalf of the State.

Yes.

5.4.3 Does the scope of the national transposing legislation include contracts of employment or employment relationships related to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency?

Mainly yes, with considerable exceptions, which are discussed below.

The transposing regulations cover full-time and part-time employees, fixed-term contract workers and also persons with a contract of employment with a temporary agency.

Since 2009, however, Hungarian labour law has recognised a special category of fixed-term employment, 'simplified employment',⁴⁹ to which the parental leave regulations do not apply. The 'simplified employment relationship'⁵⁰ is regulated by paragraphs 201-203 of the Labour Code and Act LXXV of 2010 on simplified employment. Simplified employment covers agricultural and seasonal tourist work (which does not exceed 120 days per calendar year), and short-term fixed-term contracts (which do not exceed five consecutive days, or 15 days in a month or 90 days in a calendar year). These employees are not entitled to maternity leave or parental leave,⁵¹ and are not considered to be an 'insured' person by the healthcare regulations, with the exception of work-related accidents.⁵² Consequently, employees in a simplified employment relationship do not accrue healthcare service time, and are not eligible for certain services to which other employees would be entitled (financial and in-kind healthcare services alike). The regulation on simplified employment is not compatible with Clause 1(3) of Directive 2010/18/EU because these specifically defined part-time workers are excluded from the coverage of the parental leave regulations. The regulation does not specify any period of time following which workers with simplified employment have a right to parental leave.

Executive employees are not entitled to parental leave either.⁵³ Mothers employed in an executive position are entitled to take maternity leave for 24 weeks, but neither male nor female executive employees are entitled to take parental leave. The definition of executive employees in Hungary is much wider than usual; the notion of executive employees covers a wide range of employees: any worker could be considered to be an executive employee if his/her work is directly controlled by the CEO and all those who may replace the CEO fully or partly. Furthermore, the employee and the employer may agree in the employment contract that the rules relating to executive employees will be applied to any employee if he/she has 'a job of great importance with regard to the employer's operation,' or has 'a job of greater confidentiality' provided that his/her basic salary is at least seven times the applicable minimum wage (seven times EUR 335 = approximately EUR 2 350 per month).

The law on executive employees was modified by Article 175 of Act CCLII of 2013 on the modification of certain Acts due to the entry into force of the new Civil Code. Article 175(21) (which modified Article 209 of the Labour Code, discussed below) entered into force on 15 March 2014. According to Article 209 of the LC, the employment contract of executive employees is no longer allowed to deviate from Article 127, which provides mothers with 24 weeks of maternity leave. Consequently, after 15 March 2014 female

⁴⁹ The first regulation related to this issue was Act CLII of 2009, which was replaced by Act LXXV of 2010.

⁵⁰ The number of workers employed in simplified employment is growing dynamically. Between 2010 and 2013 the number of workers in simplified employment increased two and a half times, and reached almost 200 000 by June 2013. Data published by the Ministry of National Economy.

<http://www.munkajog.hu/rovatok/hirek/nepszeru-az-egyszerusített-foglalkoztatás>, accessed 10 November 2014. They are 5 % of the total working population.

⁵¹ Article 203 j of the Labour Code.

⁵² Paragraph (1) a of Act LXXV of 2010 on simplified employment (*egyszerűsített foglalkoztatásról*).

⁵³ Article 208 of the new Labour Code.

executives became entitled to the four months of leave by this modification. If the executive is male, he is entitled to only five days (seven days in the case of twins) of paternity leave. But he is not entitled to a one-month leave because, first, he cannot take maternity leave under the Article 127 as he is not a 'mother', and second, he has no right to parental leave (following the mother's maternity leave until the child reaches the age of three). This is because Article 128, which prescribes this leave, is not applicable to his employment relationship. This regulation violates Clause 1 of the Framework Directive.

5.4.4 What is the total duration of parental leave? If the provisions regarding duration differ between the public and the private sector, please address the two sectors separately.

Parental leave can be taken until the child reaches the age of three, or the age of ten for a seriously sick child.⁵⁴ There is no case law on whether or not surrogate parents are entitled to parental leave. The duration of parental leave has not been modified in relation to the transposition of the Directive. Employees in the public and the private sectors are entitled to parental leave of the same duration. The same rules are applicable to native, adopted, foster and step children alike. In principle, parental leave lasts for three years.

5.4.5 Is the right of parental leave individual for each of the parents?

Yes. Both parents have an individual right to take parental leave, although only one of them is entitled to social security payments and *only mothers* are entitled to job protection, if both parents were to take the parental leave.⁵⁵

The child care beneficiaries are mostly women, due to many incremental elements of the Hungarian legal system (like the example above), the gender wage gap, the increasingly conservative tone of public statements (4.1.1 above) and also to public opinion, according to which it is in the best interest of the child to stay at home with the mother until the age of three.⁵⁶ The Central Statistical Office published the number of those beneficiaries for both sexes who did not have paid employment along with the benefits: 231 600 women and 2 700 men.⁵⁷

5.4.6 What form can parental leave take (full-time or part-time, piecemeal, or in the form of a time-credit system)? Do the various available options allow taking into account the needs of both employers and workers and if so, how is that done (see Clause 3 of Directive 2010/18)?

According to the Hungarian labour legislation, the working-time patterns of the employees are determined by the workforce demand of the employer. In the event of scheduling the working time, the employer is legally obliged to take into account the requirements of workplace safety and the nature of the work,⁵⁸ but not the employees`

⁵⁴ Articles 128 and 130 of the Labour Code.

⁵⁵ Article 65 (3) c and (6) of the Labour Code.

⁵⁶ Z. Blaskó 'Három évig a gyermek mellett – de nem minden áron. Közvélemény a kisgyermekes anyák munkába állásáról' (Stay at home for three years – but not at all costs. Social values on employment of mothers of young children in Hungary), *Demográfia*, 2011/1: 23-45 (2011) and Z. Spéder 'Ellentmondó elvárások között. Családi férfiszerepek, apaképek a mai Magyarországon' (Between contradictory expectations: Family-related male and father roles in contemporary Hungary) in: I. Nagy & T. Pongrácz (eds.) *Changing roles, report on the status of women and men*, 2011 Budapest: TÁRKI-NEFMI 207-229 (2011).

⁵⁷ Further 22 700 people had paid employment along with the benefits, the proportion of which broken down by sex is not published. 'A kisgyermeket nevelő nők és a munkaerőpiac' (Women raising small children and the labour market) http://www.ksh.hu/docs/hun/xftp/stattukor/kisgyerm_nok_mpiac.pdf (7 October, 2016) [It is increasingly difficult to find statistical data which is broken down by sex in Hungary. Beyond the yearly booklet of the Central Statistical Office about women and men in society, published only in hard copy, statistical data broken down by sex is barely available on the website of the Central Statistical Office.]

⁵⁸ Article 97 (1) of the Labour Code.

time-related needs. A combination of part-time work and the childcare benefit or childcare fee (both paid by the social security system) is allowed under social security law, but the employee – beyond requesting a modification of the contract to part-time employment – has no right to claim a specific work schedule under the Labour Code. It is the right of the employer to decide on the duration of the working-time account and its scheduling.⁵⁹ The employee has the right to request a modification of the employment contract from full time to part time (equal to half of the normal working hours) when (s)he returns to work from maternity/parental leave before the child reaches the age of three years. See also 5.9.1. and 5.9.4.

5.4.7 Is there a notice period and if so, how long is it? Does the national legislation take sufficient account of the interests of workers and of employers in specifying the length of such notice periods and how is that done? (see Clause 3 of Directive 2010/18)?

The employee must convey the request for parental leave in writing, at least fifteen days in advance. The parental leave ends at the time when the employee has indicated, or at the earliest on the 30th day from the date of delivering the legal act for the termination of the leave.⁶⁰

These regulations are applicable to all firms, regardless of their size. The 15-day and 30-day periods of notice are considered to be long enough so as to enable the employer to adjust its workforce requirements to the request of the employee.⁶¹

In cases BH 314/2013 and Mfv.11134/2010/4 the *Kúria* concluded that it is the employee who is entitled to decide the day when he/she will return to work.

5.4.8 Did the Government take measures to address the specific needs of adoptive parents (see Clause 4 of Directive 2010/18)?

Yes. Adoptive parents enjoy the same rights as natural parents. See 5.3.1. above.

5.4.9 Is there a work and/or length of service requirement in order to benefit from parental leave?

Not with regard to labour law, partly yes with regard to social security law.

In order to be eligible for the childcare fee, at least 365 service days must be collected during the preceding two years. No insurance time is required for being eligible for childcare benefits.⁶² See also 5.4.18.

In the case of successive fixed-term contracts with the same employer (as defined in Council Directive 1999/70/EC on fixed-term work), the sum of these contracts is taken into account for the purpose of calculating the qualifying period, unless it is simplified employment. See 5.4.3.

5.4.10 Are there situations where the granting of parental leave may be postponed for justifiable reasons related to the operation of the organisation?

No. It is an individual right of the employee, which must be granted if requested.

⁵⁹ Articles 93 (1) and 96 (1) of the Labour Code.

⁶⁰ Article 133 of the Labour Code.

⁶¹ Article 133 of the Labour Code.

⁶² Articles 42/A-42/E of Act LXXXIII of 1997 on the provision of mandatory health insurance (on the childcare fee); Articles 20-22 of Act LXXXIV of 1998 on the support provided for families (on childcare benefit).

5.4.11 Are there special arrangements for small firms?

No. Small and medium-sized employers frequently argue that they are not able to meet these legal expectations as no job vacancy could be kept open until the parent's return to the original job after three years of parental leave. The short duration of the period of notice makes the problem even more acute. Still, these firms are bound to adhere to the obligations. If the employer and the employee cooperate during the parental leave and the employee participates in retraining programmes the re-employment could be made much smoother.

5.4.12 Are there any special rules/exceptional conditions for access and modalities of application of parental leave to the needs of parents of children with a disability or a long-term illness?

Yes. Parental leave can be taken until the child reaches the age of ten for a seriously sick child.⁶³

5.4.13 Are there provisions to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave (see Clause 5 of Directive 2010/18)?

Yes. Articles 8(1) point I and 9 of Equality Act prohibits direct and indirect discrimination, harassment, and unlawful segregation on the basis of pregnancy, motherhood and fatherhood. Consequently, the law provides legal protection for employees against unlawful actions due to the taking of parental leave. Sporadic data suggest, however, that in practice it must be fairly frequent that parents (usually mothers as they are the ones who more often take parental leave) are discriminated against because of taking parental leave.⁶⁴

5.4.14 Do workers benefitting from parental leave have the right to return to the same job or, if this is not possible, to an equivalent or similar job consistent with their employment contract or relationship?

Tentatively yes. The new Hungarian Labour Code does not expressly guarantee the right to return to the original job or an equivalent job at the end of maternity/parental leave. A cumulative interpretation of certain Articles of the Labour Code does lead to this conclusion, however, as was explained in 5.2.8. Eligible parents often cannot enforce their rights before the courts of first and second instance, but have to turn to the *Kúria* to find legal redress. In the case discussed in BH 1439/2006 the female employee wanted to return to her original job after taking maternity/parental leave for taking care of three children. The employer made an offer to terminate the employment relationship with mutual consent (as dismissal was prohibited by the Labour Code during parental leave), but they could not agree on the monthly wage to be paid following the legally stipulated increase. The employee resigned with immediate effect and sued the employer for compensation. The employee finally only won her case before the Supreme Court. The courts of first and second instance had concluded that the employer did not breach the law so severely that it would entitle the employee to resign with immediate effect. The Supreme Court established, however, that as the employer had not adequately increased the wage of the employee, and had not provided employment for the returning parent, it had breached its core and fundamental obligations which entitled the employee to resign with immediate effect.

⁶³ Articles 128 and 130 of the Labour Code.

⁶⁴ Koncz, K. (2006), 'Munkahelyi diszkrimináció' (Discrimination at the workplace), *Munkaügyi Szemle*, Part I, pp. 11-14 and Part II, pp. 16-19.

According to the case in Mfv. 10036/2012/3 the employer did not provide employment for the employee in her original or similar job and instead she was given a job at a much lower level. The employee worked in this position for one day and the following day she explained in a letter that this job was not equivalent to the job that she had left at the beginning of her maternity leave, so therefore she was not willing to continue working there in the future. The employer considered this behaviour to be a serious omission and dismissed the employee with immediate effect. The employee sued the employer and lost her case before the courts of first and second instance. The *Kúria* concluded that as the employer had unilaterally modified the employment contract, the employee's omission could not be considered to be sufficiently serious so as to lawfully justify the dismissal with immediate effect.

5.4.15 Are rights acquired or in the process of being acquired by the worker on the date on which parental leave starts maintained as they stand until the end of the parental leave?

Yes.

5.4.16 What is the status of the employment contract or employment relationship for the period of the parental leave?

The employment contract remains in force, only its execution is suspended.

5.4.17 Is there continuity of the entitlements to social security cover under the different schemes, in particular healthcare, during the period of parental leave?

Yes.

5.4.18 Is parental leave remunerated by the employer? If so, how much and in which sectors?

No.

5.4.19 Does the social security system in your country provide for an allowance during parental leave? If so, how much and in which sectors?

Yes, in all sectors. The employer does not pay for maternity and parental leave, but one of the parents is entitled to social security allowances.⁶⁵ For parental leave, two types of parental benefits are provided: childcare assistance and childcare fee. For *non-insured* mothers, provided they attended prenatal care at least four times during the pregnancy, child care assistance is paid until the child reaches the age of three, and amounts to the minimum old age pension, which is equal to approximately EUR 90 EUR per month.⁶⁶ The childcare fee is paid to insured parents only, from the end of the maternity leave until the child reaches the age of two. It is equal to 70 % of average daily earnings, with a ceiling of twice 70 % of the minimum daily wage, which is approximately EUR 500 EUR per month.⁶⁷

5.4.20 In your view, regarding which issues does the national legislation apply or introduce more favourable provisions (see Clause 8 of Directive 2010/18)?

⁶⁵ Article 25 (1) – (2) of Act LXXXIV of 1998 on the support provided for families (one parent may receive one form of allowance after one child).

⁶⁶ Articles 20-28 of Act LXXXIV of 1998.

⁶⁷ Article 42/A-42/E of Act LXXXIII of 1997 on the provision of mandatory health insurance (on the childcare fee).

With regard to the length of maternity and parental leave and with regard to the corresponding protection against dismissal.

5.5 Paternity leave

5.5.1 Does national legislation provide for paternity leave?

Yes. Upon the birth of his child, the father is entitled to five days of paternity leave (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 as requested by the father (paternity leave). The leave is paid from the central budget.⁶⁸

5.5.2 Does national legislation provide for protection against dismissal of workers who take paternity leave and/or specify their rights after the end of paternity leave (see Article 16 of Directive 2006/54)?

There is no protection against dismissal for paternity leave. Fathers who take parental leave along with mothers are not protected against dismissal either. For more see 5.4.5 above.

5.6 Time off/care leave

5.6.1 Does national legislation entitle workers to time off from work on grounds of force majeure for urgent family reasons in case of sickness or accident (see Clause 7 of Directive 2010/18)?

Yes. Hungarian law accommodates the needs of workers to be away from work on grounds of force majeure for urgent family reasons. Article 55(1) point j. of the Labour Code exempts the employee from the requirement of availability and from work due to personal or family reasons. The application of this article is not limited in terms of time.

Short-term leave is also granted for the period of receiving IVF treatment in a healthcare institution, for the duration of mandatory pregnancy-related medical examinations, and for nursing the child until the end of the ninth month for one or two hours daily (in the case of one child and twins).

Unpaid leave of between 30 days and two years is available to care for relatives subject to medical certification that this is necessary. The term relative covers spouses, direct descendants and ascendants, adopted, step and foster children, adoptive parents, step-parents, foster parents, siblings, and domestic partners, spouses of the direct descendants and ascendants, a spouse's direct descendants and ascendants and siblings, and the spouses of siblings. The employee is legally entitled to full-time leave, but the employer must be informed 15 days in advance and in writing. The leave ends on the day determined by the medical certification, or earlier if the employee so wishes, but at least 30-days' notice must be given to the employer. Entitlement for the leave does not vary according to the size of the employer. Part-time leave could be taken on the basis of an agreement with the employer. An application may be made for a care allowance for the duration of the unpaid leave from the social security system, the amount of which could vary between EUR 95 and 170 per month depending upon the condition of the person being cared for. Four hours of daily work is allowed while receiving this care allowance.

In addition, employees are entitled to two days' paid leave on the death of a relative.

⁶⁸ Article 118 (4) of the Labour Code.

5.7 Leave in relation to surrogacy

5.7.1 Is parental leave available in case of surrogacy?

For the time being, surrogacy is not regulated by Hungarian law, and the author is not aware of any case law in this regard, either.

5.8 Leave sharing arrangements

5.8.1 Does national law provide a legal right to share (part of) maternity leave?

No, both parents have their own right to take the total amount of parental leave.

5.8.2 Is there a possibility for one parent to transfer part of the parental leave to the other parent?

No, both parents have their own right to take the total amount of parental leave. Paradoxically, however, the idea of a non-transferable one-month period of leave is lacking in the regulation. See also 5.4.5 above.

5.9 Flexible working time arrangements

5.9.1 Does national law provide workers with a legal right (temporarily or otherwise) to reduce working time on request?

Yes. The employer is obliged to amend the employment contract from full time to part time (equal to half of the normal working hours) at the employee's request: when the parent returns to work from maternity/parental leave before the child reaches the age of three years and (s)he requests the modification of the employment contract to a part-time job (Article 61 (3) of the Labour Code). This is considered to be reduced working time.

The Act refers to an 'employee' without specifying whether it is the parent of the child or some other relatives. There are no specific eligibility criteria or any limitations on its purpose; the size of the employer is of no relevance. The employee may request a modification until the child reaches the age of three years, which is equal to the period of time when the parental leave ends (unless the child is permanently ill). The part-time work and the childcare benefit or childcare fee (both paid by the social security system) may be combined. This combined amount of income is below the amount that could be earned in a full-time job and usually does not cover the shortfall in salary. The right to return to the prior working arrangement is primarily dependent upon the content of the agreement between the parties, unless the case falls under Article 61 (3) which tentatively implies that the employee has a right to return to his/her full-time job when the child reaches three years of age, or five years of age if the employee has three or more children. There are no specific regulations which would encourage a man to make use of part-time work in order to participate in caring for his child.

5.9.2 Does national law provide workers with a legal right to adjust working time patterns (temporarily or otherwise) on request?

No. According to the Hungarian labour legislation, the working-time patterns of employees are determined by the workforce demand of the employer. The employer decides on the duration of the working-time account and its scheduling.⁶⁹ In the event of scheduling the working time, the employer is legally obliged to take into account the

⁶⁹ Articles 93 (1) and 96 (1) of the Labour Code.

requirements of workplace safety and the nature of the work,⁷⁰ but not the employees' time-related needs.

5.9.3 Does national law provide workers with a legal right to work from home or remotely (temporarily or otherwise) on request?

No. Working from home is based on the decision on the employer, which in practice is based on the mutual agreement of the parties. In this case, the rules on maximizing the working time do not apply and no overtime payments are due after working long hours.⁷¹

Working remotely is allowed for part-time workers whose contractually agreed daily working time is no longer than six hours. The employer calls them to work at times deemed necessary to best accommodate the function of their jobs, upon at least three days' warning in advance.⁷²

5.9.4 Are there any other legal rights to flexible working arrangements, such as arrangements by which workers can "bank" hours to take time off in the future?

No. The banking of working hours at the request of the employee is not allowed. The approach embraced by the legislation is: the employee either works or stays at home. If (s)he returns from work, the demands of the employer prevail. On the other hand, the law generously provides leave for workers when they need free time to attend private and family duties. Beyond these legally stipulated forms of leave, individual workers have very limited legal rights to be able to influence their working patterns. The only exception is the right to request a modification of the contract to half-time employment, as was discussed in 5.9.1.

⁷⁰ Article 97 (1) of the Labour Code.

⁷¹ Article 96 (2) and (3) of the Labour Code.

⁷² Article 193 (1) of the Labour Code.

6. Occupational social security schemes (Chapter 2 of Directive 2006/54)

6.1 Is direct and indirect discrimination on grounds of sex in occupational social security schemes prohibited in national law?

Yes. Direct and indirect discrimination are defined in Articles 8 and 9 of the Equality Act and they are applicable to occupational social security schemes, which fall under the relational scope of the Equality Act, as regulated in Article 5.

Detailed regulations on social security are included in Articles 24 and 25 of the Equality Act.

The legal framework for occupational pension schemes was established by Act CXVII of 2007.

6.2 Is the personal scope of national law relating to occupational social security schemes the same, more restricted, or broader than specified in Article 6 of Directive 2006/54? Please explain and refer to relevant case law, if any.

The rules on the personal scope of the Equality Act and the Act CXVII of 2007 are the same as the personal scope specified in Article 6 of Directive 2006/54. Due to an amendment that came into force on 1 July 2016, Article 2.23 of Act CXVII of 2007 now expressly lists all forms of employment relationship that fall under the scope of the Act, which are: Act I of 2012 on the (new) Labour Code, Act CXCIX of 2011 on Public Servants, Act XXXIII of 1992 on public employees, Act CCV of 2012 on soldiers, Act XLII of 2015 on service relationship of professional members of law enforcement, Act LXVIII of 1997 on the service relationship of employees in the judiciary, Act CLXII of 2011 on the legal status and remuneration of judges, and Act CLXIV of 2011 on the service relationship of prosecutors and the attorney general. This year a new law was enacted on a state service relationship, which also falls under the scope of this act (Act LII of 2016), which also includes clergymen.

6.3 Is the material scope of national law relating to occupational social security schemes more restricted or broader than specified in Article 7 of Directive 2006/54? Please explain and refer to relevant case law, if any.

Equally wide, but differently worded. The rules on equal treatment are followed in the course of claiming and providing benefits financed from the social security system, and social benefits, financial and in-kind child protection or personal care. With respect to healthcare, the rules on equal treatment are applied with respect to participation in preventive programmes and medical check-ups, preventive medical care, the use of residence premises, and the satisfaction of dietary and other needs (Articles 24 and 25 of the Equality Act).

The relational scope of the Equality Act must also be applied: according to the Equality Act, the principle of equal treatment has to be observed in all public services, including public and higher education, social care, child welfare, healthcare services, public utilities, etc. Private services are also covered by the Equality Act if they concern offers and calls for offers (tenders) presented to the public (preliminarily undefined persons), and if they concern services that are provided and goods that are sold at premises which are open to the public (Articles 4 and 5 Equality Act).

6.4 Has national law applied the exclusions from the material scope as specified in Article 8 of Directive 2006/54?

No.

6.5 Are there laws or case law which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54?

No.

6.6 Is sex used as an actuarial factor in occupational social security schemes?

No, not anymore.

6.7 Are there specific difficulties in your country in relation to occupational social security schemes, for example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.

In 2007 legislation established the possibility of occupational pension schemes, as a new element, along with the statutory social security system.

After a slow start in 2011, when only one investment company provided occupational pension services for employers, there are now more competitors in the market. The widening scope of the Act CXVII of 2007, which was enacted in the 2016 amendment, signals that the state intends to utilize occupational pension schemes to reward its key personnel in the different service relationships that are attached more closely to the state.

The terms and conditions of occupational pension schemes are to be decided by the employer within the framework of the investment companies' manual. The more selective the terms and conditions of the scheme as set up by the employer are, the more likely it is that some gender-related indirect discrimination might occur, because men are significantly overrepresented in managerial and key positions in Hungary. It will take years before some case law may develop in this regard.

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

7.1 Is the principle of equal treatment for men and women in matters of social security implemented in national legislation?

Yes. Article 24 of the Equality Act prescribes that the requirement of equal treatment is applied with respect of social security, particularly in the course of claiming and ensuring benefits financed from the social security scheme, and social benefits, financial and in-kind child protection or personal care.

7.2 Is the personal scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 2 of Directive 79/7? Please explain and refer to relevant case law, if any.

The rules on the personal scope of the Equality Act are applicable in this regard, which are as wide as the personal scope specified in Article 6, although they are worded differently. Article 4 c and j. of the Equality Act oblige state authorities (including state social security schemes) and private pension schemes to follow the rules of equal treatment in all their activities and legal relationships.

7.3 Is the material scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 3 par. 1 and 2 of Directive 79/7? Please explain and refer to relevant case law, if any.

There is no difference in the material scope. See 6.3.

7.4 Has national law applied the exclusions from the material scope as specified in Article 7 of Directive 79/7? Please explain (specifying to what extent the exclusions apply) and refer to relevant case law, if any.

Article 1 of Act CLXX of 2010 which came into force on 1 January 2011 modified Article 18 (2) of Act LXXXI of 1997 on social security pensions and introduced an early retirement option which is only available for women who have gained 40 years of eligibility. The calculation of eligibility is different from the general rules on eligibility, because in the eligibility for early retirement all periods to which any kind of child-related social security payment was paid is taken into consideration. (General rules on eligibility: Articles 37-41 Act LXXXI of 1997, special eligibility rules for early retirement for women: Article 18 2b).

This statutory regulation directly discriminates against men on the basis of sex because it excludes men from being eligible for early retirement.

Furthermore, this regulation is detrimental to women, as well, because it strengthens the stereotype that it is the role of women to take care of children, and that the labour market values the work carried out by men more than that of women. Also, this rule contributes to the poverty of older women, and to the widening of the wage (pension) gap between men and women by allowing women to retire with a lower level of income.

The regulation was challenged by a trade union leader as a private individual who initiated a referendum in order to allow men to retire under the same conditions as women. The referendum was refused by the National Election Committee on the basis of two justifications: 1. the question was not sufficiently clear; 2. the question was in relation to the central budget while no question could be asked in a referendum which is related to the central budget, according to Article 11 of Act CCXXXVIII of 2013 on

referendums.⁷³ The *Kúria* (Supreme Court) altered the decision of the National Election Committee and allowed the question to be asked in a referendum because the question was clear and the matter of the referendum was related to the national budget only in an indirect manner.⁷⁴ The trade unions and the opposition parties who joined the initiative quickly gathered together more than 100 000 supporters out of the required 200 000. Three petitioners challenged the decision of the *Kúria* before the Constitutional Court which were adjudicated in an unprecedentedly rapid, combined procedure.

The referendum was refused by a deeply divided Constitutional Court. Out of 13 judges three did not agree with certain points of the justification, and a further four judges dissented.⁷⁵ The majority of the Constitutional Court agreed that the referendum cannot be allowed because it violates Article 8(3) of the Fundamental Law (which replaced the Constitution), which prohibits the holding of any referendum on issues which are related to the central budget and the laws regulating it.

Point 34 of the reasoning briefly reflects upon the merits of the issue: what are the fundamental legal grounds for regulating differently the rights for early retirement of women and men. The Constitutional Court emphasised that according to Article XV of the Fundamental Law, fundamental rights must be enjoyed by all without differentiating on the basis of sex (Article XV (1)) and men and women are equal before the law (Article XV(2)).⁷⁶ Specific rules, however, allow Parliament to adopt laws which protect families, children, women, the elderly and persons living with disabilities (Article XV (5)). The last sentence of Article XIX (4) of the Fundamental Law specifically allows Parliament to enact regulations on statutory pensions which provide 'stronger protection' for women. The Constitutional Court argued that the suggested referendum could not be allowed because it aims to eliminate the specific protection that women enjoy with regard to early retirement, thereby it attempts to make the two subsections of the Fundamental Law empty and meaningless, although their aim is to provide further and stronger protection for women. The reasoning does not investigate the issue from the angle of equal treatment; it merely relies upon the need to provide stronger protection for women as is articulated by the Fundamental Law. No reference was made to any European or international sources of law on equal treatment or equal pay either.

The Constitutional Court 'protected' the Fundamental Law regardless of the fact that its controversial content is deeply rooted in gender stereotypes (women, as a weaker party, have to be protected; women are in charge of raising children; the role of men is to work, etc.). As one of the judges of the Constitutional Court explained in a conference shortly after the decision was delivered: the Constitutional Court as the main body entrusted with the protection of the Fundamental Law had to stop the referendum on men's early retirement, because that would endanger the enforcement of the Fundamental Law which provides preferential treatment for women with regard to the right to a statutory pension.⁷⁷

7.5 Is sex used as an actuarial factor in statutory social security schemes?

No, it is no longer allowed.

⁷³ The decision of the National Election Committee is available online in Hungarian.

<http://valasztas.hu/hu/nvb/hatarozatok/2015/2015-5657.html> (all websites accessed December 21, 2015).

⁷⁴ The decision of the *Kuria* is available online in Hungarian: <http://valasztas.hu/hu/nvb/content/lb-kuria/2015/knk467.pdf>.

⁷⁵ The summary of the procedure of the Constitutional Court is available online, including the decision and the link to one of the motions of the petitioners:

<http://public.mkab.hu/dev/dontesek.nsf/0/9DCFF70D6D9D6B67C1257EB300585871?OpenDocument>.

⁷⁶ Fundamental Law in English: <http://www.mfa.gov.hu/NR/rdonlyres/0CAE4095-4432-46CB-8A97-59599053CE0A/0/THEFUNDAMENTALLAWOFHUNGARY.pdf>.

⁷⁷ Press release on the conference on the referendum: <http://www.origo.hu/itthon/20150924-ferfiak-kedvezmenyes-nyugdija-alkotmanybirosag.html>; <http://www.boon.hu/nepszavazasi-konferencia-alkotmanybiro-az-alaptorveny-vedelmeben-meg-kellett-akadalyozni-a-nepszavazast/2922387>.

7.6 Are there specific difficulties in your country in relation to implementing Directive 79/7? For example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.

There is no such structural difficulty.

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

8.1 Has Directive 2010/41/EU been explicitly implemented in national law?

Tentatively yes. Two Acts contain references to the transposition of Directive 2010/41/EU: the often modified Act LXXXIII of 1997 on the services provided by compulsory health insurance and Act CCXII of 2012 on the modification of different acts regulating health issues both contain a reference to the Directive. However, no specific Act has been enacted in order to transpose Directive 2010/41/EU.

8.2 What is the personal scope related to self-employment in national legislation? Has your national law defined self-employed or self-employment? Please discuss relevant legislation and national case law (see Article 2 Directive 2010/41/EU)

The concept of 'self-employed' is elaborated in Hungarian law in a rather formal and ambiguous way. Article 17 of Act IV of 1991 on the Promotion of Employment and Benefits for the Unemployed (hereinafter: *Flt*) define the self-employed as one 'who provides employment for him/herself outside of a dependent employment relationship, including starting up a new business, or joining an existing business.'

According to Act CXVII of 2007 on occupational pensions, the notion of self-employed covers both private and corporate entrepreneurs. These subcategories are further defined by other pieces of legislation. Article 2 (1) of Act CXV of 2009 on private entrepreneurs and private entrepreneurship defines the private entrepreneur (*egyéni vállalkozó*) as a natural person who carries out an economic activity on a regular basis for the purpose of acquiring assets and profits, and through undertaking economic risks. Corporate entrepreneurs are the owners of businesses (legal entities).

The Equality Act (Act CXXV of 2003) defines self-employment through the legal relationships in which the self-employed are usually engaged: 'other relationships for work' (*munkavégzésre irányuló egyéb jogviszony*).⁷⁸ The Hungarian term for 'other relationships for work' usually covers relationships where the work is performed between independent parties. Such independent work is performed through an agency contract (*megbízási szerződés*), a contract for professional services (*vállalkozási szerződés*), and membership of private companies (*gazdasági társaság*).

8.3 Related to the personal scope, please specify whether all self-employed workers are considered part of the same category and whether national legislation recognises life partners.

Hungarian legislation has not created a well-developed, thorough definition of a self-employed person. In both legal and statistical systems, the definition of self-employed relies on formal criteria (being an owner of a business, being registered as a private entrepreneur in the taxation system, etc.) and disregards the fundamental difference between 'the owner of the business' and 'the self-employed', who needs specific legal protection because of being economically vulnerable. With such a formal approach, the owner of a highly capitalised business employing a few hundred employees and the owner of a corner shop, in which the owner and his/her family work, , will both fall within the category of being self-employed if they operate their businesses as a private entrepreneurship.⁷⁹

⁷⁸ Articles 5.d, 3.b and 21.f Equality Act.

⁷⁹ Central Statistical Office, *Statistikai Tükör* (Statistical Mirror), Demography of entrepreneurship, 12 June 2013, available at: <http://www.ksh.hu/docs/hun/xftp/idoszaki/valldemog/valldemog11.pdf>, accessed 16 September 2014.

Agricultural businesses are also covered by the notion of self-employed.

The life partner relationship is legally recognised by civil law. The life partner relationship is established by the fact that two persons live in the same household, in an emotional and economic community.⁸⁰ The life partners may register their relationship in an administrative procedure. Following the registration, the life partners' rights and obligations are equal to those of spouses.⁸¹ The Equality Act also includes in the lists of relatives the life partner and the registered life partners. The legal relationships of life partners of the self-employed are, however, not regulated from the angle of gender equality.

8.4 How has national law implemented Article 4 Directive 2010/41/EU? Is the material scope of national law relating to equal treatment in self-employment the same, more restricted, or broader than specified in Article 4 Directive 2010/41/EU?

The self-employed 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.⁸² See also the general rules on the relational scope, (6.3 above). All in all, the material scope is almost the same, but differently worded.

8.5 Has your State taken advantage of the power to take positive action (see Article 5 Directive 2010/41/EU)? If so, what positive action has your country taken? In your view, how effective has this been?

None.

8.6 Does your country have a system for social protection of self-employed workers (see Article 7 (Directive 2010/41/EU)?

Yes, as a part of the national social security system. The Hungarian social security system covers those who perform work, receive income and/or pay contributions (the concept of 'insured', possibly covering spouses and life partners) on a mandatory basis. The scope of the legislation covers sickness, invalidity, old age, industrial accidents and occupational diseases and unemployment, and ensures equal treatment with regard to access to, contributions to and benefits from insurance covering these risks. Voluntary systems are also available for both healthcare services and pensions.

Article 24 of the Equality Act prescribes that the requirement of equal treatment is applied with respect to social security, particularly in the course of claiming and ensuring benefits financed from the social security schemes, and social benefits, financial and in-kind child protection or personal care. According to the personal scope of this Article, this rule covers the self-employed but not their spouses and life partners. However, the spouse and/or life partner is free to establish a social security contract and to pay contributions in his or her personal capacity. In this case the spouse's or life partner's equal treatment is safeguarded by Article 4 of the Equality Act, which obliges the authorities to follow the rules on equal treatment in all their legal relationships, and also by Article 24 (as explained above).

⁸⁰ Article 6:514 (1) Act V of 2013 on the Civil Code.

⁸¹ Act XXIX of 2009 on registered life partner relationships.

⁸² Article 21 Equality Act.

Equal treatment is formally safeguarded by the Equality Act, though no tailor-made legal machinery has been established in order to address the specific issues of social protection and the unequal treatment of self-employed women.

8.7 Has Article 8 Directive 2010/41/EU regarding maternity benefits for self-employed been implemented in national law?

Tentatively yes. The general rules apply to self-employed mothers with regard to the maternity benefit. See 5.2.7.

The infant care fee and childcare assistance meet the legal criteria of sufficiency established by Article 8 (a) and (c) of Directive 2010/41/EU, respectively. While equal treatment is formally guaranteed, no attention is paid to the disproportionately disadvantaged position of self-employed women in reality. For example, in the case of pregnancy and childbirth, although an individual entrepreneur is formally entitled to the same benefits as other women in employment relationships, in reality she can rarely enjoy them because of being unable to stay away from her business for a longer period, and usually no supportive childcare services are available either.⁸³ No temporary replacement services are provided by national legislation.

Equal treatment of the self-employed and that of their spouses and life partners is a rather neglected field in all areas of legal proceedings, academic research, and statistical data collection.

8.8 Has national law implemented the provisions regarding occupational social security for self-employed persons (see Article 10 of Recast Directive 2006/54)?

No. The self-employed are covered only by general rules.

8.9 Has national law made use of the exceptions for self-employed persons regarding matters of occupational social security as mentioned in Article 11 of Recast Directive 2006/54? Please describe relevant law and case law.

No.

8.10 Is Article 14(1)(a) of Recast Directive 2006/54 implemented in national law as regards self-employment?

Tentatively yes. With some gaps, especially with regard to the legal protection of spouses and life partners, Hungarian law has formally transposed Directive 2010/41/EU. It does not provide real life protection to the self-employed due to the lack of tailor-made regulations addressing the special regulatory needs of this group.

No regulations are in force which would be more favourable than those stipulated in the Directive.

⁸³ The Government plans to provide 17 000 more places for children below the age of three in childcare institutions by the end of December 2018. <http://mno.hu/belfold/tobb-szaz-bolcsodet-kell-letrehozni-1310126> (9 October, 2016)

9. Goods and services (Directive 2004/113)

9.1 Does national law prohibit direct and indirect discrimination on grounds of sex in access to goods and services?

Yes, through the generally applicable Articles 8 and 9 of the Equality Act.

9.2 Is the material scope of national law relating to access to goods and services more restricted or broader than specified in Article 3 of Directive 2004/113? Please explain and refer to relevant case law, if any.

Comparably wide, but differently worded. According to the Equality Act, the principle of equal treatment has to be observed in all public services, including public and higher education, social care, child welfare, healthcare services, public utilities, etc. Private services are also covered by the Equality Act if they concern offers and calls for offers (tenders) presented to the public (preliminarily undefined persons), and if they concern services that are provided and goods that are sold at premises open to the public (Articles 4 and 5 Equality Act).

9.3 Has national law applied the exceptions from the material scope as specified in Article 3(3) of Directive 2004/113, regarding the content of media, advertising and education?

No, in as much that the issues of discrimination in education are specifically addressed in the Equality Act (Articles 27-29.)

9.4 Have differences in treatment in the provision of the goods and services been justified in national law (see Article 4(5) of Directive 2004/113)? Please provide references to relevant law and case law.

An identical rule is included (as a generally applicable rule) in Article 7 (2) Equality Act.

9.5 Does national law ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits (see Article 5(1) of Directive 2004/113)?

Yes. These rules were transposed in Article 30/A of Equality Act, while the general legal framework of the Equality Act remained unchanged with regard to the definitions of different forms of discrimination, the procedure of the Equal Treatment Agency, etc. Following the *Test-Achats* Ruling, Article 30/A of the Equality Act had to be changed.

Currently Article 30/A allows for a deviation from the unisex rule in two respects:

First of all, the group life, accident and sickness insurances, as a general exemption, do not fall under the unisex rule. According to my understanding, following the *Test-Achats* ruling, such a general exemption cannot be made by national legislation.

Secondly, it allows further derogations from the unisex rule if they are regulated by the separate Act on insurance that is currently Act LXXXVIII of 2014 on insurance (hereinafter: (new) *Bit* – the Hungarian abbreviation of the Act).

Although the transposition of Directive 2004/113 and the Ruling does not seem to be logical and thorough in every respect, a violation of the *acquis* could only be concluded with regard to Article 30/A of Equality Act in which the group life, accident and sickness insurances are generally exempt from the unisex rule.

Due to an amendment that came into force on 1 January 2016, the Equality Act now refers to the new Act on insurance companies, which was enacted in 2014.

9.6 How has the exception of Article 5(2) of Directive 2004/113 been interpreted in your country? Please report on the implementation of the C-236/09 *Test-Achats* ruling in national legislation.

Bit provides us with the specific regulation on insurance with regard to the transposition of the unisex rule. Article 134 (1) of (new) *Bit* specifies cases in which sex-related data and information might be stored, managed and used. These cases are in line with 2.2. of the 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*) Text with EEA relevance⁸⁴ (hereinafter: COM Guidelines).

Article 134 (2) specifies cases in which a differentiation among the members of the two sexes does not constitute unlawful discrimination. Point a. is in relation to indirect discrimination, and is reflected upon in points 16 and 17 in the COM Guidelines. Point b. allows preferential treatment as long as it does not constitute unlawful discrimination against other persons or groups of persons who are in a comparable situation. If the application of this point remains within the boundaries of the case law of the CJEU, as was also reflected upon by Article 16 of the Directive, it does not constitute unlawful discrimination. Point c. is allowed by Article 4 (5) of the Directive, and point 15 in the COM Guidelines.

The regulation in *Bit* correctly follows the timing provided by the EU acquis:

The unisex rule does not apply to contracts concluded before 21 December 2007 (Article 447 of (new) *Bit*). However, there is no rule on what qualifies as an 'old' and 'new' contract in this regard.

There are specific rules for new (or modified) contracts concluded between 21 December 2007 and 21 December 2012 in Article 447 of (new) *Bit*, stating that Article 134 of (new) *Bit*, which lists the only allowed differentiation (derogations from the unisex rule) is not to be applied to those specific cases listed in points a-c. For other cases the restrictive rules of Article 96/B are to be applied.

Article 447 specifies that only derogations which are allowed from the unisex rule set up in Article 134 are to be applied if the last legal statement was delivered to the other party following 21 December 2012 (which establishes a 'new contract').

9.7 Has your country adopted positive action measures in relation to access to and the supply of goods and services (see Article 6 of Directive 2004/113)?

No.

9.8 Are there specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in your country in relation to access to and the supply of goods and services? Please briefly describe relevant case law.

Moving around with a pram seems to be a challenge for parents, especially in the countryside. There have been numerous cases before the ETA in which claimants complained about being discriminated against because of trying to use services with small children sitting in a pram. In one case a mother initiated a procedure against a

⁸⁴ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2012.011.01.0001.01.ENG (accessed 15 November 2015).

public transportation bus company which regularly caused hardship for her when she travelled with her child who used a pram.⁸⁵ In another case, the pharmacist requested the parents to leave the pram outside the pharmacy and referred to non-existent hygienic regulations when was asked about the reason to do so.⁸⁶ In both cases, the ETA concluded that the parents suffered direct discrimination because of their motherhood / parenthood. The violators were prohibited from the continuation of their discriminatory behaviour and were issued a fine.

⁸⁵ EBH/161/2014. http://egyenlobanasmod.hu/article/view/161_2014. Accessed 12 January 2016.

⁸⁶ EBH/873/2009 http://www.egyenlobanasmod.hu/article/view/873_2009. Accessed 12 January 2016.

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

10.1 Has your country ratified the Istanbul Convention?

No. The Istanbul Convention was signed on March 14, 2014, but has not yet been ratified.⁸⁷ In March 2016, women's organisations launched a petition for the ratification of the Convention.⁸⁸

In 2015 there was a heated debate within and outside of Parliament about the ratification of the Convention and the actions and measures to be taken in order to prevent and remedy domestic violence and how to support victims. Independent MPs (especially Zsuzsanna Szelenyi),⁸⁹ and MPs from the liberal-green party called Politics Can Be Different (especially Bernadett Szel)⁹⁰ and that of the Hungarian Socialist Party argue for the ratification of the Convention and emphasize that Hungary is far behind the Western EU Member States with regard to both infrastructure and law in the field of domestic violence. The MPs and other representatives of the ruling conservative party (FIDESZ-KNDP) take a much understated approach and are reluctant to accept the need for a fundamental change in the relevant law. The need for action is denied and this is rooted in stereotypical gender roles; the scarce budgetary resources might also play a role in the governmental hesitation. There have been no preparatory plans for the ratification of the Convention.

In June 2015 *Zoltan Balog*, the Minister of Human Resources, submitted to Parliament a Proposal for a Parliamentary Resolution on the establishment of national strategic objectives in order to promote effective actions against domestic violence.⁹¹ This proposal has been highly criticized by the Hungarian Women's Lobby and other women's organisations because it lags behind compared to the provisions outlined in the Istanbul Convention.⁹²

The ruling parties put great emphasis on the exceptional occurrence of violence against men and on the need for the equal treatment of men and women in the legal system. The importance of conflict resolution methods like mediation are emphasised in order to prevent and solve cases of domestic violence. To a certain extent, the popular approach that the issue of domestic violence is a 'feminist' topic is also reflected upon in the ruling parties' statements.

⁸⁷ <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?PO=Hun&MA=999&SI=3&CM=3&CL=ENG> and http://www.coe.int/en/web/conventions/search-on-states/-/conventions/treaty/210/signatures?p_auth=g5heQwLX (9 October 2016)

⁸⁸ http://www.peticiok.com/hatekony_fellepest_a_nok_elleni_es_csaladon_beluli_eroszak_ellen

⁸⁹ <http://www.parlament.hu/irom40/02390/02390.pdf>.

⁹⁰ http://www.parlament.hu/folyamatban-levo-torvenyjavaslatok?p_auth=v69GOpqJ&p_p_id=pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=1&pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcpqlsqi%2Ffogynaplo.altnaplek%3FP_CKL%3D40%26P_STILUS%3D%26P_Frak%3Dnull%26P_Kepv%3Dnull%26P_Kepv%3Ds136%26P_Szerep_Csop%3Dnull%26P_Szerep_Csop%3Da%26P_Szerep_Csop%3Di%26P_Szerep_Csop%3Dn%26P_Szerep_Csop%3Dp%26P_Szerep_Csop%3Du%26P_Szerep%3Dnull%26P_Aktus%3Dnull%26P_Tech_Szerep%3Dnull%26P>Ifotip%3Dnull%26P_Itipus%3Dnull%26p_skip_rec%3D1

⁹¹ <http://www.parlament.hu/irom40/05048/05048.pdf>.

⁹² <http://nokjoga.hu/sites/default/files/filefield/2015-06-11-noi-erdek-nane-patent-mona-sajtokozlemen-ygyh-javaslatra.pdf> (9 October, 2016)

11. Enforcement and compliance aspects (horizontal provisions of all directives)

11.1 Victimisation

11.1.1 Are the provisions on victimisation implemented in national legislation and interpreted in case law?

Yes.

Retaliation is conduct that causes an infringement, is aimed at an infringement, or threatens with an infringement, against the person making a complaint or initiating procedures because of a violation of the principle of equal treatment, or against a person assisting in such a procedure, in relation to these acts (Article 10 (3) of Equality Law).

11.2 Burden of proof

11.2.1 Does national legislation and/or case law provide for a shift of the burden of proof in sex discrimination cases?

Yes. The rule of the shared burden of proof applies. The complainant has to demonstrate that it is probable that she/he suffered a disadvantage, and that she/he actually or, as assumed by the respondent, possessed any of the protected characteristics listed in Article 8 of the Equality Act at the time of the accused violation of unequal treatment. In case of *actio popularis*, if the disadvantage has not yet occurred, the direct danger of its occurrence has to be demonstrated. Then the burden of proof shifts to the complainant who has to prove that the circumstances rendered probable by the petitioner are not true; the principle of equal treatment was not violated because there is no causality connection between the protected characteristic and the disadvantage; or that the complainant was not obliged to follow the principle of equal treatment because the case falls under one of the several exemptions stipulated in the Equality Act. This procedure is in compliance with EU law.

The first reverse discrimination case in Hungary provides a good example of the regulation of the shared burden of proof and how it is applied in the legal practice of the ETA. The case revolved around the issue that men had to pay a fee for services which were provided free of charge for women. The decision of the Equal Treatment Authority became final and binding on 15 January 2014.

A male activist from 'Haha', a progressive student organisation, filed a complaint against a bar which offered free entrance for women until midnight, while male patrons would have paid approximately EUR 0.96 (HUF 300) as an entrance fee. He argued that he was discriminated against because of his sex.

In its defence the bar used the following arguments: (1) it wanted to balance the wage discrimination that women suffer in the labour market; (2) it is a societal expectation that men pay for women in bars, clubs and restaurants, so the free entrance for women was a gesture to both sexes; (3) the free entrance for women was a business necessity for the bar. It argued that without providing free entrance for women, women would not attend the club in sufficient numbers and that would contribute to the reduction of male patrons. So as to remain profitable, it had to provide free entrance for women for some of the events, while other events were free for both sexes, and on other occasions both sexes had to pay an entrance fee.

The ETA established that the claimant suffered direct discrimination because of his sex. The ETA dismissed all defences raised by the bar. The first defence, based on the preferential treatment of women reflecting the wage pay gap was refused because the

bar's pricing policy did not fulfil the legal criteria of preferential treatment laid down in Art 11 of Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities. The second and third arguments of the bar were dismissed by the authority because the legal criteria of lawful exemptions from antidiscrimination regulations were not fulfilled as laid down in Article 7 (2) of *Ebktv*. The Authority stressed that the bar is free to decide whether it requires entrance fees from its patrons, though the rules must be the same for both sexes. Occasionally, the bar could provide free entrance to one sex or the other but it must be clearly linked to certain holidays (no example was given in this regard in the decision).

The bar was banned from imposing such a policy, although - as was proposed by the claimant - it was not fined.

In an interview given to a major Internet news site, the claimant explained that he believed that the treatment of women by most of the bars and clubs in Budapest is alarming. The women, who enter the bar seemingly free of charge, but in fact at the expense of men, seem to be treated as a 'reward', provided by the bar for solvent men. The claimant's interpretation of the case in the interview points to the Janus-faced nature of his legal and ethical position. Legally he argued that he, as a man, was discriminated against, but in fact he wanted to raise awareness of the increasingly degrading treatment of women in Hungary. In this particular context, women seem to be a 'special service' of the bar for the men, ultimately placing women in a position of being a 'sexual object'.⁹³

11.3 Remedies and Sanctions

11.3.1 What types of remedies and sanctions (e.g. compensation, reinstatement, criminal sanctions, administrative fines etc.) exist in your country for breaches of EU gender equality law? Please specify the applicable legislation.

The Equal Treatment Agency (ETA) is an administrative body, the role of which is to safeguard the enforcement of equal treatment laws, but it is not authorized to apply dissuasive sanctions.

The Agency can only establish an infringement of the law, issue fines and order the publication of its decision on its own website and that of the violator,⁹⁴ but the ETA is not authorised to impose sanctions that could repair the harm suffered by the petitioner (e.g. the payment of compensation or reinstatement in a job). Of ETA's clients, 32.9 % are completely dissatisfied with the outcome of the proceedings (giving a rating of 0 out of 10). This is a higher proportion of the total clients than that of completely satisfied clients (29.5 %).⁹⁵

For the application of such sanctions, the applicant has to submit the case to a court of law (instead of or after the procedure at the ETA). Hungarian anti-discrimination legislation makes it rather difficult and time-consuming for women to seek effective, proportionate and dissuasive penalties under the Equality Act.

11.3.2 In your opinion, do the remedies and sanctions meet the standards of being effective, proportionate and dissuasive? Please explain, if possible referring to relevant legislation or case law.

⁹³ <http://www.origo.hu/itthon/20131122-a-noknek-is-fizetniuk-kell-a-belepojegyert-a-dobozban.html>. Accessed 8 March 2016.

⁹⁴ Article 17/A of the Equality Act.

⁹⁵ http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/5d532f8b1a4e8ee3d447f1a2c63a7d34/%C3%BCgyf%C3%A9lel%C3%A9gedetts%C3%A9g_2014.pdf (accesses October 10, 2016)

No. The sanctions which can be applied by the ETA cannot be considered to be effective, proportionate and dissuasive. Furthermore, in the last few years the ETA has been reluctant to use even the weak sanctions that it has at its disposal. One of the most deterrent sanctions of the ETA is its ability to impose a fine, the amount of which ranges from EUR 165 (HUF 50 000) to EUR 20 000 (HUF 6 million).⁹⁶ The number of cases in which a fine was imposed decreased from 20 to 2 during the years 2010-2012, although the total number of cases and the total number of cases in which unequal treatment was established did not decrease correspondingly. Since 2013, the number of cases in which a fine was imposed has been no longer published. In 2013 only the total amount of fines was published (EUR 10 000; HUF 3 million), which did not even reach the maximum threshold that can be imposed in one single case.⁹⁷ In 2014 a violation of equal treatment was established in 23 cases, out of which 30 % led to a fine.

In 2015, out of the 240 adjudicated cases, the ETA established the violation of equal treatment in 33 cases (approximately 14 %). A fine was applied in 27 cases (82 % of the violation cases), amounting to EUR 26 000 in total, which is just slightly higher than the maximum threshold that can be imposed in one single case.⁹⁸

Even though sanctioning practice hardened slightly in the last year, the ETA still does not use the weak measures that it is entitled to: in recently published cases, in which a camerawoman's and a driver's employment application were refused because of their sex, the fine was only EUR 310 (HUF 100 000) in both cases.⁹⁹

The amendment to the rules on non-material damages might lead to more effective, proportionate and dissuasive sanctions in the future. Article 2:52 of Act V of 2013 on the new Civil Code introduced the new rule on compensation for violation of personality rights (non-material damages, compensation for pain and suffering) including infringement of equality treatment. The amount of the non-material damages is decided by the courts on the basis of the totality of the facts, such as the gravity and the repetitive nature of the infringement, the degree of culpability, the effect of the infringement on the victim and on the environment, but the claimant is not requested to prove the exact amount of damages suffered. The amount must be enough to compensate the non-material damage suffered and to prevent similar occurrences in the future, according to the opinion of the Advisory Committee on the application of the new Civil Code.¹⁰⁰

11.4 Access to courts

11.4.1 In your opinion, is the access to courts safeguarded for alleged victims of sex discrimination? Please explain and discuss particular difficulties and barriers victims of sex discrimination have encountered. Refer to relevant legislation and case law.

Access to the courts is safeguarded by the legislation, although the case law of the lower level courts proves the considerable gaps in the legal practice in four areas: the wide interpretation given to the legislatively very broadly worded exemption from the scope of the Equality Act (see 3.2.3., 3.3.4); being reluctant to apply dissuasive compensation (see 4.1.9); minimising the weight of violations against women (see 5.4.13); and not correctly applying the rules on the burden of proof.

⁹⁶ Article 17/A (5) of the Equality Act.

⁹⁷ See: <http://www.egyenlobanasmod.hu/article/view/tajekoztato-az-egyenlo-banasmod-hatosag-2013-evi-tevekenysegerol>, accessed 26 January 2015.

⁹⁸ http://www.egyenlobanasmod.hu/article/view/taj2015_1#szamok (9 October 2016)

⁹⁹ <http://egyenlobanasmod.hu/article/view/ebh-218-2015-1> (accessed 10 November 2015) and

<http://egyenlobanasmod.hu/article/view/ebh-280-2015> (9 October 2016)

¹⁰⁰ http://kuria-birosag.hu/hu/ptk?tid%5B%5D=344&body_value=

The Supreme Court in the M 22 theoretical guidelines on employment cases pointed out the difference between the burden of proof in cases on the misuse of the law (direct burden of proof) and equal treatment cases (shared and reversed burden of proof). Regardless of the constant discussion on the unusual burden of proof it is still rather frequent that the lower level courts request the claimants to prove the occurrence of discrimination. In the case of Mfv.I.10.630/2014 it was claimed that the employee, upon returning from maternity/parental leave, was discriminated against upon her dismissal and with regard to pay. The court of first instance dismissed the case because the employee could not prove that she was discriminated against during the dismissal; and that when the employer increased her salary following her return from parental leave, it was not equal to the salary of a male employee in the same job title, which was partly upheld by the court of second instance. The Supreme Court overturned the decision of the court of second instance, because the court did not correctly apply the rules on the burden of proof in discrimination cases. The Court pointed out that the employer must prove that it adhered to the rules on equal treatment and on equal pay for equal work. The Court also stated that in cases in which the employer fails to provide proper evidence, the claimant's claim must be upheld.¹⁰¹

11.4.2 In your opinion, is the access to courts safeguarded for anti-discrimination/gender equality interest groups or other legal entities? Please explain and refer to relevant legislation and case law.

Interest groups may represent the claimant¹⁰² and may also initiate proceedings before the ETA or the courts in the interest of a large group with a protected characteristic in the case of an infringement or the imminent danger thereof (*actio popularis*).¹⁰³

11.4.3 What kind of legal aid is available for alleged victims of gender discrimination?

The procedure before the ETA is free of charge. In the case of court proceedings, a tax exemption / postponement, charge exemption / postponement (covering not only the duty to be paid for the court, but other expenses like the fees of experts) could be applied for, provided that the claimant cannot meet the expenses of litigation.

11.5 Equality body

11.5.1 Does your country have an equality body that seeks to implement the requirements of EU gender equality law?

Yes. The Equal Treatment Authority, ETA (*Egyenlő Bánásmód Hatóság, EBH*) is the central administrative body which is dedicated to implementing the requirements of all equal treatment laws, including gender equality law. Its website is www.egyenlobanasmod.hu.

The ETA administers cases of equal treatment involving all 20 characteristics protected by the Equality Act.

The Authority's scope of activity is the following:

- a) conducting ex officio investigations and deciding on violations of equal treatment;
- b) initiating lawsuits;
- c) reviewing and commenting on legislative drafts on equal treatment;

¹⁰¹ <http://www.lb.hu/hu/sajto/tajekoztato-kuria-mi-tanacs-a-altal-targyalason-kivul-elbiralt-mfvi106302014-szamu-ugyrol>, accessed 23 July 2015.

¹⁰² Article 18 of the Equality Act.

¹⁰³ Article 20 of the Equality Act.

- d) making proposals concerning governmental decisions and legislation pertaining to equal treatment;
- e) regularly informing the public and the Government about the situation concerning the enforcement of equal treatment;
- f) in the course of performing its duties, co-operating with the social and representative organisations and the relevant state bodies;
- g) continually providing information to those concerned and offering assistance in acting against a violation of equal treatment;
- h) assisting in the preparation of governmental reports to international organisations, especially to the Council of Europe concerning the principle of equal treatment;
- i) assisting in the preparation of the reports for the Commission of the European Union concerning the harmonisation of directives on equal treatment.

11.6 Social partners

11.6.1 What kind of role do the social partners in your country play in ensuring compliance with and enforcement of gender equality law? Are there any legislative provisions in this respect?

The social partners have the right to provide legal representation to a member; to file an *actio popularis*; and also to participate in different policy-making bodies.

11.7 Collective agreements

11.7.1 To what extent does your country have collective agreements that are used as means to implement EU gender equality law? Please indicate the legal status of collective agreements in your country (binding/non-binding, usually declared to be generally applicable or not).

Collective agreements are not used as a means to implement EU gender equality law; implementation is intended to be carried out through legislation. Although collective agreements are legally binding, they would not serve as a proper means for the transposition of the *acquis* because they are concluded almost exclusively at company level. Furthermore, since the new Labour Code has widened the possibility of derogating from the legislation in collective agreements, the contents of collective agreements have been altered in order to favour regulations that reduce the rights of employees.

Furthermore, collective agreements may contain rules that violate equal treatment legislation. In a case recently published by ETA, a collective agreement contained the rule based on which the employer did not provide a voucher (a form of benefit) for the employee while she was on maternity leave. The ETA and the labour court established that this violated the regulations on equal pay and the employer was obliged by the court to pay the wage difference to the employee. No further sanctions were applied.¹⁰⁴

¹⁰⁴ EBH/19/2016, <http://egyenlobanasmod.hu/article/view/ebh-19-2016> (9 October, 2016)

12. Overall assessment

With some gaps, Hungarian law formally transposed the majority of EU *acquis communautaire*. In 2014 - 2015) the formal adequacy of Hungarian law was improved with regard to some details of the legislation (such as the equal treatment rights of executive employees), while the structural problems remained untouched.

The major structural shortcoming of the Hungarian legislation (dating back to the original adoption of the Equality Act) is that in many regards the transposition is only formal and the law has never been scrutinized and modified in order to support the substantial and genuine equality of women (for example, in the case of self-employed women and spouses of the self-employed). The rough regulation on equal wages has not had a substantial effect on the considerable gender wage gap, which is one of the widest in the EU.

The major theoretical shortcoming of the Hungarian legislation (also dating back to the original adoption of the Equality Act) is that the excessively wide scope of the Equality Act is counterbalanced by the similarly excessively wide terms for exemptions (Articles 7 (2) b and 22 of the Equality Act). Consequently, protection is weak because the accused could exculpate him/herself in many 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 the extremely wide terms of the exemptions.

The enforcement of the equal treatment legislation is extremely weak in Hungary. The sanctions that can be applied by the ETA cannot be considered to be effective, proportionate and dissuasive, as it cannot order civil compensation or reinstatement in the original job. Furthermore, in the last few years the ETA has been fairly reluctant to apply the weak sanctions that it has at its disposal (such as fines and the publication of its decisions), although there has been a slight improvement in this regard.¹⁰⁵ The case law of the courts reveals that there are considerable gaps in legal practice in four areas: the wide interpretation given to the legislatively very broadly worded exemption from the scope of the Equality Act; being reluctant to apply dissuasive compensation (this might change in the future due to the new rules on non-material damages); minimising the weight of violations against women; and the courts of first and second instance frequently not correctly applying the rules on the burden of proof.

The idea that the equal sharing of family responsibilities is the key to combating gender discrimination is still not widely accepted either by the general public or by the legislator. The societal norms that women are responsible for family matters (which are strengthened by the ruling political forces) are contrary to the ideas on the balanced participation of women and men in family and working life. The regulations regarding generous maternity and parental leave combined with public opinion that it is in the best interest of the child to stay at home with the mother until the age of three, mutually reinforce each other in Hungary, which hinders women's equal participation in many aspects of life.

Despite all the criticism, the ruling political elite has continued with its neo-conservative discourse (and corresponding policies) which emphasise women's caring roles in the family by repeatedly glorifying childbirth as the ultimate means of self-realization for

¹⁰⁵ In 2015 the ETA applied a fine in 27 cases, the sum of which was only slightly higher than the amount that could be applied in one single case. See 11.3.2.

women (see section 4.1.1 above) instead of embracing women's full participation in all areas of life.

The alarmingly low or non-existent participation of women in the leading political institutions of the county (in Parliament and the Government, respectively) hinders considerably the probability of a change towards a more equal society with regard to gender.

Annexes

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