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Country report

Gender equality



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Country report

Gender equality

How are EU rules transposed into
national law?

France

Sylvaine Laulom

Reporting period 1 July 2015 – 1 April 2016

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1. Introduction

1.1 Basic structure of the national legal system

France has a long-standing tradition of legislating in favour of gender equality in the domain of employment and professional life. The principle of equality between men and women was first recognized in 1946 in the Preamble to the French Constitution. The law of 11 February 1950 first regulated the principle of equal pay between men and women and states that this principle has to be inserted in collective agreements. In 1972, in order to integrate the ILO Convention into the French system, the principle of equal pay for work of equal value for men and women was introduced into the Labour Code. Since then, at least 12 laws have been adopted dealing with gender equality. Despite this important legislative framework, the implementation of the European Directives on equality has had a very deep influence in pushing the French legislature to address new issues and to adopt new measures, sometimes with some important delay. For example, until May 2008, the main concepts of EU gender discrimination law had not been properly implemented in France, as French legislation included no legal definition of the concepts of direct and indirect discrimination, although the courts have applied the European definitions in some gender case law.

If we look at the basic structure of the French legal system, it is important to note that the principle of equality between women and men has a constitutional value. In the field of employment and professional life, most of the rules can be found in the Labour Code in the part dealing with discrimination in general (Art. L 1132-1 et seq. of the Labour Code) and in the part specifically dealing with gender equality at work (Art. L 1141-1 et seq. of the Labour Code). The Labour Code only applies to private employment relationships. In the public sector, specific regulations apply, usually with a similar content. Therefore the two supreme courts in France, the *Cour de cassation* for private law and the *Conseil d'Etat* for public law, apply the rules on gender equality and sometimes with slightly different assessments of cases. It seems, for example, much more difficult for the *Conseil d'Etat* to integrate the concept of indirect discrimination than for the *Cour de cassation*. An important piece of this legislative framework is the Act adopted on 15 May 2008 (Act. No 2008-496) implementing the various directives on discrimination. Among other elements, the Act finally defines direct and indirect discrimination and it applies to public and private relationships. Some provisions of the Criminal Code also deal with penal sanctions for discrimination.

Outside the influence of the European Union, gender equality policies in France could also follow their own agenda. For example, various acts have been adopted with the aim of implementing parity in politics and other decision-making bodies. One of the most important and recent developments in gender equality policy is the adoption of Act No. 2014-873, 4 August 2014, on real equality between men and women. This law promotes an 'integrated and transversal approach to sex equality.'

1.2 List of the main legislation transposing and implementing Directives

The following texts are available on the Legifrance website.¹

- Act No. 2014-873, 4 August 2014, on real equality between men and women, JO No. 179, 5 August 2014, p. 12949;
- Act No. 2012-954, 6 August 2012, on sexual harassment, JO No. 182, 7 August 2012, p. 12921;

¹ <http://www.legifrance.gouv.fr/> accessed 10 June 2016.

- Decree No. 2012-1061, 18 September 2012, modifying the rules on parental leave applicable to public servants, contractual civil servants, JO No. 218, 19 September 2012, texte n°26;
- Act No. 2011-103, 27 January 2011, relating to a Balanced Participation Between Men and Women on Company Boards, JO No. 23, 28 January 2011, p. 1680;
- Act No. 2011-334, 29 March 2011, on the Defender of Rights, JO No. 75, 30 March 2011, p. 5504;
- Act No. 2010-1330, 9 November 2010, on the Reform of Pensions, JO No. 261, 19 November 2010, p. 20034;
- Act No. 2008-496, 27 May 2008, implementing the various directives on discrimination, JO No. 123, 28 May 2008, p. 8801;
- Act No. 2007-1774, 17 December 2007, implementing various European provisions in economic and financial fields, JO No. 293, 18 December 2007 p. 20354;
- Act No. 2006-340, 23 March 2006, on Equal Pay between Men and Women, JO No. 71, 24 March 2006 p. 4440;
- Act No. 2004-1486, 30 December 2004, creating the High Authority Against Discrimination and for Equality, JO No. 304, 31 December 2004, p. 22567;
- Act No. 2003-775 of 21 August 2003, Reforming Pensions, JO No. 193, 22 August 2003, p. 14310;
- Act No. 2001-1066, 16 November 2001, concerning the fight against discrimination, JO No. 267, 17 November 2001, p. 18311;
- Act No. 2001-397, 9 May 2001, on Equality Between Men and Women, JO No. 108, 10 May 2001, p. 7320;
- Act No. 83-635, 13 July 1983, the 'Roudy' Act, JO 14 July 1983, p. 2176;
- See also the Labour Code, Articles L.1131-1 to L.1134-4 concerning discrimination; Articles L.1141-1 to L.1144-3 concerning equality between men and women; Articles L.1151-1 to L.1155-4 concerning harassment; Articles L.1225-1 to L.1225-72 concerning pregnancy, maternity protection, and maternity, parental and paternity leave; and Articles L.3221-1 to L.3222-2 concerning equal pay between women and men;
- See also the Criminal Code, Articles 225-1 to 225-4; Article 222-32; Article 222-33-2; and Article 432-7.

2. General legal framework

2.1 Constitution

2.1.1 Does your national Constitution prohibit sex discrimination?

Yes. According to the Preamble to the Constitution of 27 October 1946, 'The Law guarantees women equal rights to those of men in all spheres.'

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

Yes. According to Article 1 of the Constitution 'Statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions.' This paragraph of the Constitution was first introduced in 1999 and later modified in 2008 to allow positive actions in political elections (gender quotas in political decision making) and also in the professional sphere.

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 Labour Code explicitly prohibits sex discrimination and provides for equal treatment between men and women (Article L1132-1 and Articles L1142-1 et seq.).

Other discrimination grounds are covered. Article L1132-1 of the Labour Code prohibits discrimination based on origin, sex, morals, sexual orientation and identify, age, family situation or pregnancy, genetic characteristics, membership or non-membership, real or supposed, of an ethnicity, a nation or a race, political opinions, union activities, religious convictions, physical appearance, family name, place of residence, state of health or disability. This list is regularly modified in order to add new prohibited grounds. For example, in 2014 the 'place of residence' was added to the list.

3. Implementation of central concepts

3.1 Sex/gender/transgender

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

No.

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

No. Discrimination based on gender reassignment is not explicitly prohibited in French Law. However, the Labour Code prohibits discrimination based on the grounds of sexual identity. In a decision concerning gender reassignment discrimination (a worker was dismissed immediately after he informed his employer of his intention to undergo gender reassignment surgery), the High Authority for combating discrimination and for equality (now the Defender of Rights), referring to Directive 2006/54 and to its Recital 3, stated that discrimination based on gender reassignment is discrimination on the ground of sex and should be prohibited (deliberation No. 2008-29 of 18 February 2008).²

3.2 Direct sex discrimination

3.2.1 Is direct sex discrimination explicitly prohibited in national legislation?

Yes. Article 1 of the Act adopted on 15 May 2008 defines direct discrimination in accordance with the European definition. The Act applies to public and private relationships. According to this Act, there is direct discrimination where one person is, has been or will be treated less favourably than another on the grounds of sex. The only difference between the French and the European definition is the use of 'will be' and not 'would be.' However, this difference does not seem to be significant: the Courts interpret the French definition in compliance with its European counterpart and French judges find the existence of discrimination even with no comparator.

Curiously, the definition itself has not been integrated into the Labour Code and this could damage its visibility.

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

Yes. Article L. 1132-1 of the Labour Code explicitly prohibits discrimination on the grounds of pregnancy. Specific articles of the Labour Code also prohibit this discrimination (see Article L 1225-1 and L. 1225-2). These provisions comply with Article 2(2)(c) of Directive 2006/54.

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

No.

² http://www.defenseurdesdroits.fr/decisions/halde/HALDE_DEL_2008-29.pdf, last accessed 25 October 2015.

3.3 Indirect sex discrimination

3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?

Yes. Article 1 of the Act adopted on 15 May 2008 defines indirect discrimination in accordance with the European definition. According to this Act, the following constitute indirect discrimination: a provision, a criterion or a practice which is apparently neutral, but which could disadvantage a person on the grounds of sex (and other prohibited criteria) compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The French definition is similar to the European one.

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.

Until recently (2012), there have been very few cases on indirect sex discrimination. Statistical evidence can be used and is sometimes used in order to establish a presumption of indirect sex discrimination. This has been done, for example, in Case no. 10-2310 decided by the *Cour de cassation* on 3 July 2012, where the French Supreme Court noted that in the company in question, the percentage of women working part time was about 81.45 %, while only 40 % of men were working part time. Of course, in this case, statistical evidence on part-time work was not difficult to establish.

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

Here again, as there are few cases on indirect discrimination, it is difficult to analyse how judges apply the objective justification test. It seems that they are applying it correctly (see, for example, Cass. Soc. 3 July 2012, no. 10-23013 and Cass. Soc. 6 June 2012, no. 10-21489).

However, the interpretation by the Council of State can be questionable when dealing with pension rights. Following the CJEU decision in July 2014 (Case C-173/13 Leone and Leone), the *Conseil d'Etat* has reached an unexpected decision (27 March 2015, Quintanel, no. 372426). As in the Leone case, the decision concerned a service credit, which is determined during four trimesters and awarded for the calculation of the pension of any civil servant, for each child born or adopted prior to 1 January 2004, or taken into care before that date and nurtured for at least nine years, provided that the civil servant can demonstrate that he or she has taken a career break for a continuous period of at least two months, in the form of maternity leave, adoption leave, parental leave, parental care leave or leave in order to be available to bring up a child of less than eight years of age. The *Conseil d'Etat* used the same terms as the European Court and stated that if the CJEU could provide guidance to enable the national court to give a judgment, it is exclusively for the national judge to determine whether and to what extent the national provisions could be justified by a legitimate social policy. The *Conseil d'Etat* then proceeded to analyse the justification for and the proportionality of the measure at stake. The French Government considers that the scheme reflects a legitimate aim as the purpose of the service credit in question is to compensate for the career-related disadvantages resulting from career breaks for reasons of birth, the arrival of an adoptive child in the home, or the raising of children. The CJEU rejected this argument notably because maternity and adoption leave are accompanied by the maintenance of acquired pension and promotion rights. However, according to the *Conseil d'Etat*, even if women maintained their pension and promotion rights during maternity leave, the fact remains that women with one or more children progress slower in their careers than men, and their pensions are lower. Statistics were used in the decision to support this argument: without the service credit for a pension the difference

in the level of pensions between men and women would increase from 9.8 % to 12.7 % for one child; from 11.5 % to 17.3 % for two children; from 13.3 % to 19.3 % for three children; and from 23 % to 30 % for 4 children. The measure does not aim to prevent unequal treatment but to partially compensate the damage and harm to the careers of women. Another important element in the decision is the fact that the measure at stake is temporary as it is applied concerning children born, adopted, or taken into the home before 1 January 2004. Thus the service credit scheme for pensions can be objectively justified by a legitimate social policy aim, and it is both appropriate and necessary to achieve that aim. The *Conseil d'Etat* then analysed the scheme for early retirement with the immediate payment of a pension. Following exactly the same reasoning, the *Conseil d'Etat* came to the same conclusions on the early retirement scheme.

Up until now, the *Conseil d'Etat* has generally avoided considering or referring to the applicability of indirect discrimination. In this regard, this decision is important as the *Conseil d'Etat* directly refers to this concept, and analyses it using the same terms as the CJEU. If the decision does not formally contradict the decision of the CJEU and remains within the limits which the CJEU defined, the question is still open as to whether it is a correct application of the objective justification test. The *Conseil d'Etat* is very careful when justifying unequal treatment between men and women. The use of statistics clearly shows that the differences in pensions between men and women are still very high. Paradoxically, the consequence of the Leone decision was to call into question those few rights that could improve the position of women. This is why at the conclusion of the reasoning it seems that the *Conseil d'Etat* reached a balanced solution.

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 *Conseil d'Etat* has only applied the concept of indirect sex discrimination very recently and in a way which may seem to contradict the CJEU (see point 3.3.3).

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. Legal scholars and also the Defender of Rights could refer to multiple discrimination but there are no pending proposals which aim to incorporate the concept of multiple discrimination. However, it seems that 'there is scarce research and no specific policy targeting women who face multiple discrimination and their access to employment and economic independence. France seems to be lagging behind with respect to the analysis of intersectional discrimination that has been developed at the European level' (Lépinard, E., Lieber, E. (2015), *The Policy on Gender Equality in France, in depth analysis*, European Parliament, Directorate General for Internal Policies department C PE 510.024)

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)?

Yes. As such, there is no relevant case law referring to multiple discrimination or intersectional discrimination. However, French law prohibits many grounds of discrimination and it is possible to combine them and some grounds also include an overlap. For example, the Court of Appeal of Paris has recognized discrimination based on one's state of health, disability and trade union discrimination (19 March 2015, n°12/10164, 12/10370) Thus some case law could be interpreted as dealing with

multiple discrimination (see Cour de cassation Soc. 3 Nov. 2011, no. 10-20765 as interpreted by Mercat-Bruns, M. (2015), 'Les discriminations multiples et l'identité au travail au croisement des questions d'égalité et de libertés' *Revue de droit du travail*, p. 28).

3.5 Positive action

3.5.1 Is positive action explicitly allowed in national legislation?

Yes. The Labour Code recognises the possibility to take positive action through temporary measures laid down by decree or by collective agreements at sectoral levels or by the employer when establishing a plan for equality between men and women. Positive actions are defined as temporary measures which only benefit women with the aim of establishing equal opportunities between men and women in particular in remedying existing inequalities in opportunities between men and women (Article L 1142-4 of the Labour Code). The reform of the Constitution, adopted at the end of July 2008, includes an amendment which facilitates positive actions and makes it possible to adopt the bill on the representation of women on company boards. Article L 1142-4 of the Labour Code seems to comply with the EU definition.

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.

No.

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

Yes. The Bill aiming at improving gender balance on company boards was adopted on 27 January 2011 (Act No 2011-103). The bill intends to improve the representation of women on company boards and it imposes a quota. Firms which have more than 500 employees and revenue of over EUR 50 million have to ensure that each sex has at least 20 % of boardroom seats by 2014, and 40 % by 2017.

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.

France has adopted various provisions in order to improve gender balance in political elections and also in various other fields. Regarding political candidate lists, the rules depend on the type of elections. For example, for the departmental elections, for the first time this year the law states that there must be two candidates for each departmental district, a man and a woman. Since 2000, the law states that all political parties should include equal numbers of men and women on party lists for those elections conducted via proportional representation (European Parliament, municipal and regional elections). For elections to the National Assembly, political parties shall also present the same number of candidates for each sex and non-compliance with that rule will result in a financial penalty. The problem here is that it does not impede political parties from providing women with unwinnable seats.

In 2012, a new law was also introduced imposing a 40 % gender quota to be reached by 2018 for nominations to executive functions in the public service. This quota applies to administrative and supervisory boards of public institutions, high councils, juries and selection committees in public service procedures.

The 2014 Act for real equality has extended quotas to civil society organizations such as sport federations.

Finally, Act No. 2015-994, of 17 August 2015 on social dialogue and employment also contains some provisions regarding parity in the elections of workers' representatives. The lists of candidates being proposed for these representative positions should reflect the gender balance of the employees represented. Thus the list should represent the same proportion of men and women as the proportion of the electoral college.

3.6 Harassment and sexual harassment

3.6.1 Is harassment explicitly prohibited in national legislation?

Yes. At first, harassment was not defined in relation to discrimination. Thus, according to Article L.1152-1 of the Labour Code, employees shall not be subjected to repeated actions constituting moral harassment the aim or effect of which may result in a deterioration of their working conditions and which are likely to violate their rights and dignity, impair their physical or mental health, or jeopardize their professional future.

Article 1 of the 2008 Act adds a new definition, as required by EU law. According to this Article, discrimination includes 'any action relating to one of the reasons mentioned in the first paragraph (including sex) and any action with a sexual connotation, to which a person is subjected, with the purpose or effect of violating their dignity or creating a hostile, degrading, humiliating or offensive environment.' This definition complies with the EU definition. The 2008 Act has not repealed the existing definition. As a result, there are now two different definitions of moral harassment under French law, which are applicable in different circumstances.

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?).

Article 1 of the 2008 Act has the same scope as Directives 2006/54/EC and 2004/113/EC. It covers working conditions (including access to employment, vocational training and promotion), the private and the public sector, and it now also covers access to and the supply of goods and services. Otherwise moral harassment (not defined in relation to sex discrimination) has a broader scope and is prohibited in general (Article 222-33-2-2 of the Criminal Code) and in particular in family relationships (Article 222-33-2-1).

3.6.3 Is sexual harassment explicitly prohibited in national legislation?

Yes. A first definition of sexual harassment was found to be unconstitutional by the French Constitutional Court, which stated that the definition was not sufficiently clear or precise (CC 4 May 2012, QPC, No. 2012-240). This decision came as a bombshell, as it removed the prohibition on sexual harassment from the French Criminal Code. This decision and more importantly its consequences were clearly unexpected, as the decision left a legal vacuum in the Criminal Code, given its immediate effect. The main consequence of this decision was that as from the date of its publication no one could be convicted or punished on the ground of sexual harassment, as the offence no longer existed, and alleged offenders were systematically discharged. The new French legislature quickly addressed this issue and a new law was adopted in August 2012. It includes a new definition of sexual harassment which is very similar to the European one (see Article 222-33 of the Penal Code and Article L. 1153-1 of the Labour Code). The new law defines harassment as imposing on someone, in a repeated manner, words or actions that have a sexual connotation and either affecting the person's dignity because of their degrading or humiliating nature or putting him or her in an intimidating, hostile or offensive situation. One single act can also give rise to prosecution where someone is

using any kind of serious pressure, with the real or visible goal of obtaining an act of a sexual nature.

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

The Criminal Code prohibits sexual harassment in general and not only in employment relationships (see Article 222-33) and therefore it also covers access to goods and services.

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)?

Article 3 of the 2008 Act states that any less favourable treatment cannot be based on the person's rejection of or submission to such conduct.

3.7 Instruction to discriminate

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

Yes. Article 1 of the 2008 Act states that discrimination includes instructing someone to discriminate.

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.

3.8 Other forms of discrimination

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

Discrimination by association or assumed discrimination are not explicitly prohibited, but the list of prohibited grounds is long and can be used to prohibit these types of discrimination.

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. Article L. 3221-2 of the Labour Code provides for equal pay for men and women 'for the same job or a job of equal value.'

4.1.2 Is the concept of pay defined in national legislation?

Yes. Article L. 3221-3 of the Labour Code provides exactly the same definition of pay as Article 157(2) TFEU. According to the Labour Code, pay means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his or her employment, from his or her employer.

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. Article L 1132-1 of the Labour Code prohibits direct and indirect discrimination on the grounds of sex in all aspects of employment and professional life, explicitly including remuneration. Article L3221-6 of the Labour Code also states that a job classification system shall be based on rules allowing for the implementation of the equal pay principle.

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

No. For the Cour de cassation, 'the existence of discrimination does not necessarily imply a comparison with other workers.'³ Therefore, there is not really any need for a hypothetical comparator.

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. According to Article L3221-4 of the Labour Code, in order to establish the equal value of a job the parameters which could be taken into account are the following: a title, diploma, professional experience, responsibilities, physical or mental stress. This list is not exhaustive.

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

Yes. One of the most important measures obliging employers to address the issue of equal pay is the information they have to give to workers' representatives (works councils and trade union representatives) on equality. Businesses employing 50 or more staff have to produce a written annual report for the works council comparing the situation of men and women in the company. This must comprise a comparative analysis in terms of recruitment, training, qualifications, pay, working conditions and a balance between professional and private life, supported with relevant statistically-based indicators (Article L2323-17 and Article L2323-8 of the Labour Code).

³ See, for example, Cass. Soc. 12 June 2013, no. 12-14153, <http://www.legifrance.gouv.fr/> accessed 19 October 2015.

The employer has to record measures taken in the company over the previous year to attain employment equality, and an outline of the objectives for the year ahead. The publication of relevant indicators in the workplace is mandatory according to the law, so as to enable the report to be analysed in detail. Employees have the right to consult the report directly (Article R2323-57 of the Labour Code).

Employers also have to provide information on equality in annual negotiations. They have to give month-by-month data on trends regarding the number of staff and their qualifications according to sex, and to state the number of employees on permanent contracts, the number of fixed-term contracts and the number of part-time employees (Article L2242-5 of the Labour Code).

At the first meeting in compliance with the annual obligation for unions and employers to negotiate at enterprise level, the employer has to provide trade union representatives with information that enables them to carry out a comparative analysis of the situation of men and women in jobs, qualifications, pay, the hours worked and the organisation of working time. The accompanying information has to explain the situation reflected in the statistics. Companies with fewer than 300 employees can conclude an agreement with the State to receive financial assistance to carry out a study of their employment equality situation and of the measures they would need to take to ensure equal opportunities between men and women (Article R 1143-1 of the Labour Code).

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?

Most of the recommendations of the European Commission have been adopted by France (see point 4.1.6.). Therefore there was no need to revise the law in order to implement it.

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

Pay differentials can only be justified if the work is not of the same value. Therefore judges concentrate on the value of jobs and not really on the justification in the context of sex discrimination.

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?

Of course, the application of the principle of equal pay for equal work is difficult in general and a very limited number of victims actually lodge complaints for various reasons.

Judgment of the Cour de Cassation of 12 February 1997, No. 95-41694: The Court was faced with an equal pay claim from a female mushroom packer comparing her work with more highly paid male packers. The Court stated that it was clear that women packers were systematically paid less than their male counterparts. For the Cour de cassation, men and women were doing the same work and the employer could not give any objective reasons for paying them differently.

Judgment of the Cour de Cassation of 6 July 2010, No. 09-40021: In this case, a female employee held the position of 'Human Resources, Legal and Office Department Manager.' Following her dismissal, the employee decided to file a claim for back pay on the grounds that there had been sexual discrimination against her. The employee provided evidence that her salary, despite an equal classification, and more seniority than her direct male

colleagues, was substantially lower than that of her male colleagues. For the French Supreme Court, the functions of the employee and those of her direct colleagues were identical as to their hierarchical level, classification and responsibilities. Moreover, their importance was comparable with regard to the functioning of the company, as each of the managerial positions required comparable qualifications and involved a comparable level of stress. The French Supreme Court concluded that the employees performed work of equal value.

Judgment of the Cour de Cassation of 22 October 2014, No. 13-18362. Here again, the decision concerned a female employee who held the position of 'Human Resources Manager' and who claimed that she was paid less than male colleagues, who were members of the executive board. The Cour de Cassation decided that the decision of the Court of Appeal was not well founded and it did not compare the situation of the woman in terms of functions and responsibilities to find that the jobs compared were not of equal value (also see Cour de Cassation of 25 March 2015, No. 14-10149). The case was then referred back to the Court of Appeal.

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. Article 5 of the 2008 Act states that the Act applies to all private and public bodies.

Traditionally, there is no legal definition of a worker.

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. The protection of employees from sex discrimination covers every aspect of working life. Article L1131-1 of the Labour Code covers hiring practices, training, remuneration, appointment, promotion, transfer, classification of qualifications, the renewal of contracts, redeployment and dismissals

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

Yes. Article L.1142-2 states that the prohibition of discrimination does not apply when the sex of the worker constitutes a determining factor in employment and that the objective sought is proportionate and the exception is also proportionate. Article R1142-1 of the Labour Code has also defined the types of employment concerned: it only covers actors and models. Some other exceptions existed on submarines and in some specific police forces. These jobs have finally been opened to women.

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)?

The exception as such has not been implemented but, of course, it does not impede the definition of some specific rules for pregnant women (see 5.1.2 of this report).

- 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.?

There are no particular difficulties related to the personal or material scope of French Law.

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?

No.

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

Yes. Article L 1225-7 of the Labour Code states that a pregnant woman can be temporarily assigned to another job if this is necessary. Article L1225-9 of the Labour Code also provides that a pregnant woman can be asked to work during the day, during her pregnancy and after her maternity leave. She has to be transferred to day work if the company doctor states that night work is incompatible with her pregnancy. This protection can be extended after her maternity leave when required and for a maximum of one month. This change cannot have any consequences for her wages. According to Article L1225-6, when this transfer is not possible, the employer must inform her and the company doctor about this impossibility and the reasons why it is not possible to transfer her. In this case, the contract of employment is suspended with no modification of her remuneration. Article L1225-12 also provides for specific protection in the case of exposure to specific risks. The principles are the same as for night work. The protection granted by French law complies with the requirements of the Directive.

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)?

Yes. Article L 1225-4 of the Labour Code prohibits the dismissal of an employee when she has been medically certified as being pregnant. The dismissal will also be null and void if the employee sends a certificate proclaiming her pregnancy in the two weeks following the notification of her dismissal. The prohibition on dismissing a pregnant employee also applies during maternity leave and during the following four weeks. A dismissal is only possible in the case of gross misconduct which is not connected to her condition or if the employer cannot maintain the contract of employment for a reason not connected to her condition. In any case, the dismissal cannot be notified during the periods of the suspension of the contract of employment. Thus an employee cannot be made redundant during maternity leave.

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. According to the general and procedural rules on dismissal, the employer is obliged to indicate the grounds for the dismissal in the letter notifying the employee of the dismissal (Article L1232-2).

5.2 Maternity leave

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

The period of maternity leave is six weeks before the presumed date of confinement and ten weeks thereafter (Article L 1225-17); the same provisions apply to civil servants (Article 34 of the 1984 Act, No. 84-16).

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

Yes. The obligatory period of maternity leave is eight weeks, with a minimum of six weeks after the birth (L1225-29 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. According to Articles L1225-7, L1225-9, L1225-10 and L1225-13, in the case of the suspension of the contract of employment or a change of job during the pregnancy, the wage should be maintained.

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. During pregnancy Articles L1225-7, L1225-9, L1225-10 and L1225-13 of the Labour Code ensure the employment rights of a pregnant woman. During her maternity leave, the worker is entitled to maternity benefits subject to the condition that she has been registered under the social security system for at least ten months on the presumed date of confinement (Article L331-3 of the Social Security Code). The amount of the maternity benefit is calculated on the basis of the average salary received over the last three months. Many collective agreements nevertheless provide that the worker receives full pay during maternity leave. The wages must be increased after the maternity leave in order to follow any general increases received by individual co-workers of the same category during the period of the employee's leave. In general, the worker is also entitled to all the advantages which have occurred during her leave that she would have been entitled to if she had not taken maternity leave. She is entitled to normal paid leave and to the normal rights to vocational training as if she had not been absent.

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 during pregnancy is higher than the allowance in the case of sick leave, as the amount of the maternity benefit is based on the average salary (with a ceiling). Thus the maternity leave is 100 % of the average wage of the woman concerned up until the ceiling of EUR 82.32 per day.

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

Yes. Many collective agreements provide that the worker receives full pay during maternity leave. In this case, wages are paid directly by the employer to the worker, and the social security system reimburses the employer.

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

Yes. In order to be eligible for benefits, pregnant women have to be registered under the social security system for at least ten months on the presumed date of confinement and have worked at least 150 hours during the last three months before the beginning of the pregnancy or have paid social contributions on a wage of at least equal to 1015 times the minimum hourly wage (R. 313-2 et seq. of the Social Security Code).

- 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)?

Yes. According to Article L 1225-25 of the Labour Code the employee has the right to return to the same or similar job after maternity leave with at least a similar remuneration. The wages must also be increased after the maternity leave in order to follow any general increases received by individual co-workers of the same category during the period of the employee's leave. In general, the worker is also entitled to all the advantages which have occurred during her leave that she would have been entitled to if she had not taken maternity leave. She is entitled to normal paid leave and to the normal rights to vocational training as if she had not been absent.

5.3 Adoption leave

- 5.3.1 Does national legislation provide for adoption leave?

Yes. Adoption leave is 10 weeks, or 22 weeks for the adoption of more than one child (Article L1225-37 of the Labour Code). The allowance is the same as in the case of maternity leave and the conditions are the same.

- 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. According to Article L1225-38, the parents have the same protection against dismissal as women on maternity leave and they also have the same right to return to the same or similar job (L.1225-43). The same rules also apply to wages. The parent shall benefit from any improvement in working conditions to which she or he would have been entitled during her or his absence.

5.4 Parental leave

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

Yes. The only measure implementing Directive 2010/18 is a Decree adopted on 18 September 2012, No. 2012-1061, which modifies the rules for parental leave for public servants. The Decree recognises parental leave as an individual right. Before this, in the case of public servants the mother and the father could take the parental leave or could share it but could not take it simultaneously. This is now possible.

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

The national legislation applies to both the public and the private sector.

- 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?

French legislation applies to part-time workers, fixed-term contracts and temporary workers (but there is a condition of seniority which makes it difficult for them to exercise this right).

- 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.

The duration of parental leave is the same in the public and in the private sector even if two different types of legislation are applicable. The initial period of parental leave is one year and it can be renewed twice until the child is three years old. In the case of adoption, parental leave can also last for a maximum of three years after the child's arrival if the child was younger than three when adopted. In other cases, parental leave is for a maximum of one year.

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

The right to parental leave is an individual right and it can be taken by both parents. Parental leave is not available in the case of surrogacy, as surrogacy is not legal in France.

- 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)?

Parental leave can be granted on a full-time or part-time basis, although part-time leave must allow for at least 16 working hours per week.

- 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 inform her/his employer of the starting date and the intended duration of the period during which he/she intends to benefit from the parental leave either on a full-time or part-time basis. When parental leave is taken immediately following the maternity or adoption leave, the employee shall provide this information at least one month before the beginning of the leave (two months for public servants), otherwise this information must be given at least two months beforehand. When an employee wants to extend her/his parental leave or to take it full time (if the parental leave was initially part time) or part time, he/she must inform the employer one month before the initial term. When the parental leave is on a part-time basis, the number of hours worked per week cannot be modified without the employer's approval unless this is explicitly provided by a collective agreement (Article L.1225-51 of the Labour Code). Determining the work schedule is a task for the employer which is a way to take into account the needs of both employers and workers.

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

The Government did not take any specific measures but the adoption leave is very similar to maternity leave.

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

Yes. The length of service requirement in order to benefit from parental leave is one year before the birth of a child. In the case of successive fixed-term contracts with the same employer, the sum of these contracts is taken into account for the purpose of calculating the qualifying period. For public servants, there is no length of service condition.

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?

Parental leave cannot be refused on any grounds, and there are no specific provisions for small firms.

5.4.11 Are there special arrangements for small firms?

No.

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. If a child is seriously ill or disabled, parental leave can be extended by a year (Article L1225-48 of the Labour Code).

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)?

No. During parental leave, the employment contract is suspended. The employer cannot dismiss a worker because he/she is on parental leave. Even if this right is not expressly recognized in the Labour Code, the *Cour de cassation* uses the articles of the Labour Code on parental leave to state that the reason to dismiss should not be linked to parental leave. It could also be possible to consider that being on parental leave could not be considered as a genuine and serious reason for dismissal (Cass. Soc. 18 October 1989, No. 87-45724, and Cass. Soc. 12 February 1997, No. 93-42510).

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?

After parental leave, the worker has the right to return to the same job or, if this is not possible, to an equivalent or similar job, where the same advantages apply as before. She/he also has the right to training if working techniques or methods have changed. The employer should offer the possibility of a special interview after the period of leave in order to discuss the worker's career path.

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?

The rights acquired or in the process of being acquired by the worker on the date on which parental leave starts are maintained as they continue to apply until the end of the parental leave. During the leave, half of the seniority rights will accumulate. This measure intends to limit some of the consequences of the suspension of the contract of employment during parental leave.

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

The contract of employment is suspended during the period of the parental leave.

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?

There is a continuity of the entitlements to social security cover, in particular healthcare and maternity during the parental leave. During parental leave, workers are still covered by the social security system for healthcare and maternity.

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

Parental leave is not remunerated by the employer. However, there are some mechanisms that could help finance some of the leave. For example, some 'time-saving schemes' which are widely included in collective agreements allow for blocks of time off to be saved up which may be used as parental leave (in this case a short one).

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?

The social security system provides for an allowance during some of the period of parental leave. A childcare allowance called the 'supplement for free choice of working time' (Complément de libre choix d'activité; here referred to as the 'CLCA'), paid by the National Family Allowance Fund, is available to parents who choose to take partial or full leave during these three years. The CLCA is paid for six months for a family's first child. This CLCA is paid for a further six months for a family's first child if the other parent takes this extension of the parental leave. So, a period of one year of paid parental leave is recognised for the first child if both parents share parental leave. For later children, the CLCA is now two and a half years and it will be paid for three years, if the parental leave is shared. CLCA payments vary depending on how much a parent works during this time. Parents receive EUR 576.83 per month if they take full leave, EUR 438.62 per month if they work no more than 50 %, and EUR 331.35 per month if they work between 50 and 80 % of a full work schedule (the allowance is less important if parents receive the general family allowance paid for children under the age of three whether the parents are working or not, in this case: EUR 390.92, EUR 252.71 and EUR 145.78).

Finally, parents of at least three children who take full-time leave to care for them may opt to receive the 'optional supplement for free choice of working time' (Complément optionnel de libre choix d'activité; COLCA) instead of the CLCA. The COLCA pays a higher rate (EUR 819.14 per month) than the CLCA, but only lasts for one year. This is a way to encourage shorter parental leave (only one year but with higher payments). To receive CLCA or COLCA payments, parents must first meet a job tenure requirement: two years of continuous employment for a parent's first child, two years of employment over the previous four years for a parent's second child, or two years of employment over the previous five years for a parent's third child and beyond.

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)?

French parental leave is much longer than the one provided by the Directive, as it can last for three years. Moreover, this is an unrestricted right and the social security systems provide for an allowance for the parents to be able to take this parental leave. However, some of the detrimental effects of the parental leave scheme have been demonstrated. The argument is well known: an extended leave, especially for unskilled women, may have a negative impact on women's careers and earning profiles. For this reason, there is a growing debate in France as to whether parental leave should not be shorter and better paid.

5.5 Paternity leave

5.5.1 Does national legislation provide for paternity leave?

Yes. Since 2001, paternity leave has been recognised for all fathers who are employees and civil servants. Since 2013, this leave can also be taken by the husband of the mother (even if he is not the father) and by the spouse or the partner of the mother. This leave is now called 'Paternity leave and settling-in leave' (Article L 1225-35 of the Labour Code). Paternity leave is eleven consecutive days for the birth of a single baby. Paternity leave is paid by the social security scheme up to a ceiling and could therefore be unattractive for executives. Some companies have adopted full pay for fathers in terms of a 'parent-friendly' measure. There is no condition as to the length of service.

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)?

No. There is no specific protection against dismissal but the reason to dismiss should not be linked to the paternity leave. After paternity leave, the worker has the right to return to the same job or, if this is not possible, to an equivalent or similar job, where the same advantages apply as before (Article L 1225-36 of the Labour Code).

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. Parents are entitled to three days per year to take care of sick children who are less than 16 years old. They are entitled to five days if the child is aged less than one year or if they have at least three children (Article L 1225-61 of the Labour Code).

In cases of the serious disability or illness of a child under 20, every employee with at least one year of employment with an employer is entitled to unpaid leave to care for his/her child or to work part time for a period of up to three years (Article 1225-61 of the Labour Code). A period of leave for six months is possible for employees who need to care for a relative (either a child or a parent living in the same house) who is at the end of his or her life. In this case, the Labour Code explicitly provides that this leave can be taken in the form of part-time working, with the agreement of the employer (Article L.3142-16 of the Labour Code).

Since 2014, employees can also donate their day off to a parent of a seriously ill child (Article L1225-65-1).

5.7 Leave in relation to surrogacy

5.7.1 Is parental leave available in case of surrogacy?

No. Surrogacy is not legal in France, so parental leave could not be available.

5.8 Leave sharing arrangements

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

No.

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

Parental leave is an individual right and there is no transfer of part of the parental leave to the other parent.

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 Labour Code recognises the right for a worker to work part time (Article L.3123-5 and L3123-6 of the Labour Code). That right should preferably be organised by a collective agreement (Article L.3123-5 of the Labour Code), but in the absence of any such agreement the law prescribes the procedure to be followed (Article L.3123-6 of the Labour Code). This right is recognized for every worker without any specific condition being attached. The employee concerned initiates the procedure by informing the employer in writing of his or her wish to transfer to a part-time job, stating in that letter the desired working hours and the date envisaged for their introduction. The letter of request must be sent at least six months in advance. The employer is required to reply within three months and can refuse such a request on two grounds: either because no comparable job exists in the company, or because he or she can demonstrate that the transfer requested will have harmful consequences for production and the company's satisfactory operation. The decision of an employer to refuse the request can be challenged in court, but there have been no known decisions by the Cour de cassation on this issue. It is difficult to ascertain whether this right is actually being used by workers or not. For public servants this right is also recognized and seems to be more effective. Public servants can ask to work part time and the administration can only refuse if such a refusal is based on the needs of the service; a refusal can be challenged before a joint administrative committee (Article 24, Law no. 84-16).

Workers can also request annualised part-time hours (Article L. 3123-7 of the Labour Code). On the basis of their family commitments, employees can request a reduction in their working hours in the form of a leave of absence for one or more weeks. This offers employees with dependent children, for example, the opportunity to reduce their working time to correspond with the dates of the school year.

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

No. French law does not provide workers with a legal right to adjust working time patterns on request; however, collective agreements could provide some specific rights.

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

No. French law does not provide workers with a legal right to work from home or remotely on request.

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.

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, Article L.913-1 of the Code of Social Security ensures the implementation of Recast Directive 2006/54/EC and states that any clauses in agreements, decisions, and contracts which are in breach of the principle of non-discrimination are null and void.

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.

As provided by the Directive, the prohibition of discrimination in occupational social security schemes applies to the working population including the self-employed.

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

The material scope of French law is the same as Article 7 of the Directive.

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, men and women pay the same contributions and receive the same benefit.

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.

The Griesmar case (C-366/99) and now the Leone case (C-173/13) clearly highlight some of the French difficulties in implementing the Directive in occupational pension schemes (see point 3.3.3. of the report). See further the answer to 3.3.3 of this report, above.

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?

As such, the principle of equal treatment for men and women in matters of social security is not expressly implemented. For example, there is no such principle in the Social Security Code. However, the general principle is recognized in the Constitution and it directly applies.

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 personal scope of national law is the same.

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.

The material scope is the same.

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.

Yes. For a long time the French legislator has chosen to implement the exception in Article 7(b) of Directive 79/7/EEC according to which Member States can exclude from the scope of their legislation the advantages in respect of old-age pension schemes granted to persons who have brought up children and also the exceptions in Article 7(c) (see Article L351-4 of the Social Security Code before 2010).

7.5 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.

The French legislator has chosen to implement the exception in Article 7(b) of Directive 79/7/EEC according to which Member States can exclude from the scope of their legislation the advantages in respect of old-age pension schemes granted to persons who have brought up children. However, a new provision included in the law to finance social security in 2010 was adopted in December 2009. As for civil servants, a specific right for women linked to maternity has been maintained: increased insurance coverage for pensions in the private sector for a maximum of one year for women who have given birth to one or more children. For the second year, the mother will continue to benefit from another increase in insurance coverage for children born before 1 January 2010, except if fathers can prove, in the year following the publication of the law, that they have raised their children on their own. For children born after 1 January 2010, the mother will continue to benefit from increased insurance coverage for a second year, if there is agreement between the father and the mother, expressed in the six months following the child's fourth birthday. If there is a disagreement between the parents, the advantage will be granted to the parent who can prove that he/she has contributed more and for a longer period to the education of the child. If both parents have contributed equally to the child's education, the benefit will be divided into two.

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?

Yes. France has requested an additional period as mentioned in Article 16(2) of the Directive to comply with Article 7. The transposition was made by Decree No. 2014-20 of 9 January 2014. It is not clear why France needed this additional period. The Decree is just about a very specific problem (health insurance of a specific regime of the collaborating partner of independent workers). Except for this Decree, France has not provided any explicit instruments formally implementing the Directive. The Act of 27 May 2008, no. 2008/496, implementing the various directives on discrimination, transposes both Directive 2006/54/EC and Directive 2004/113. It states in its Article 5 that the law applies to every public and private person including those carrying out an independent activity. It seems that this provision could also be analysed as implementing Directive 2010/41. This could explain the absence of any formal transposition of this Directive.

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)

There has been no explicit transposition of Article 2(a) in France. There is no legal definition of a self-employed person or self-employment in France. Similar to many labour laws in other countries, the French Labour Law is built around the 'binary divide' between employment and self-employment, between subordinated labour and independent or autonomous work, while a self-employed person can be defined as a person who is not a worker. The French Labour Code does not contain any definition of what is an employee or a definition of subordinate employment. However, certain criteria have been determined by the Cour de Cassation, the French Supreme Court.⁴ An employment contract exists when a person undertakes to work in the name and under the supervision of another in return for remuneration. Three elements, which are required to prove the existence of an employment contract, emerge from this definition: the performance of an activity, in return for remuneration and the existence of a hierarchical relationship between the parties (a link of legal subordination). This last criterion is the most important one. According to the case law, the legal superior-subordinate relationship means that a job is performed under the authority of an employer, who has the power to give orders and instructions, to supervise the performance of the said work and to impose sanctions in case of a failure or breaches by its subordinate. A self-employed person can therefore be defined as a person who provides services to another party in an independent and non-subordinate manner.

As regards the application of the principle of non-discrimination, the absence of a definition of self-employed does not seem to be a problem and it seems that there is no risk that people like 'small entrepreneurs' or 'business persons' will not be covered.

Indeed, Directive 2004/113/EC was implemented in France by the 2008 Act. This Act provides a general prohibition of direct or indirect discrimination based on sex in access to and the supply of goods and services. Article 5 of the Act simply states that the Act applies to every private and public entity, including those carrying out an independent activity. This Article therefore makes no distinction between self-employed persons and workers.

⁴ For instance, see for example, Cass. Soc. 13 Nov. 1996, Dr. Soc. 1996. 1067.

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.

If self-employed workers can be considered part of the same category, the social protection of self-employed workers is subject to separate regulations (even if they are very similar, see point 8.6).

For social protection issues, life partners are recognised. French law recognises persons engaged in a civil union (PACS) and people with a conjugal relationship living together as life partners.

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?

As such, Article 4 of the Directive has not been implemented. However, it seems that the same result is reached with Article 5 of the 2008 Act which states that the Act applies to every private and public entity, including those carrying out an independent activity. Moreover, the Penal Code prohibits discrimination in very general terms. Article 225-1 states the following:

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

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

Article 225-2 adds:

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

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

Here, the protection against discrimination is largely defined and can include self-employment.

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?

Even if they are not specifically related to Directive 2010/41, some policies regarding equal treatment for self-employed persons exist in France. For example, a fund for women's initiatives was created in 1989 to support the setting up of businesses by women.⁵ Today, this fund can guarantee loans for women for the creation or the development of their business.

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

Yes. France has social protection for the self-employed. This social protection is subject to separate regulations (even if they are very similar). Farmers come under the agricultural system. Craftsmen, retailers and manufacturers fall within the scope of the Social Protection Scheme for the Self-employed (RSI), while practitioners of the liberal professions are covered by separate schemes. However, liberal professionals also come under the RSI insofar as sickness insurance is concerned. The schemes are funded by social contributions and they cover benefits and pensions related to sickness, maternity, invalidity, survivors' benefits, accidents at work and occupational diseases. The schemes are mandatory and most of them are complemented by compulsory supplementary systems governed by the same funds.

Spouses and life partners (registered by a Pacte Civil de Solidarité: PACS, the contract of civil union) can choose between three different statuses: a dependent worker, a partner or a collaborating spouse. Since 2005, there is an obligation to choose one of these three options. Spouses or life partners who have chosen the status of a collaborating spouse will benefit, on an obligatory basis, from social protection: old age, maternity and invalidity. Since 1 January 2014, the right to sickness benefits in cash has been improved in order to implement Directive 2010/41. Collaborating spouses and life partners will now contribute and have the right to sickness benefits in cash in the case of sickness, which was not previously the case. However, this provision does not seem to apply to spouses and life partners in the liberal professions. Partners who are not married or registered by a PACS, if they participate in the activity of the business, can voluntarily benefit from social protection.

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

Yes. There are some minor differences between the schemes and as a consequence the whole system is complex. For farmers, benefits for replacement may be paid to compensate the fees paid to ensure the replacement of the woman farmer in farm work (Articles L732-10 et seq. of the Rural Code). The duration of the payment of the benefits for replacement is the same as the period of maternity leave for employees (16 weeks).

For crafts, commerce and manufacturing as well as the liberal professions, self-employed women have a right to a lump-sum payment for resting, which is aimed at compensating the decrease in their activity (Articles L. 611-1 et seq.; L. 615-19 et seq.; and D. 615-4 et seq. of the Social Security Code). The first half of this allowance is paid at the end of the seventh month of pregnancy and the second half after the birth of the child. Its amount for 2014 is EUR 3 129. Furthermore, self-employed women have a right to daily maternity benefits for a period of 44 days, a period which can be extended on two occasions at most, for 15 days each. The maximum period for these benefits is therefore

⁵ <http://femmes.gouv.fr/fqif/>, accessed 9 November 2015.

74 days, which is less than the 14 weeks provided by Directive 2010/41/EU. The amount of these benefits for 2016 is EUR 2 237.60 for 44 days, EUR 3 121.10 for 59 days and EUR 3 914.60 for 74 days.

Spouses and life partners also have a right to a lump-sum payment for resting which is aimed at compensating the decrease in their activity and the duration of the payment of these benefits is 16 weeks.

Some specific rules can also apply to various categories of self-employed workers. Lawyers and advocates have concluded an agreement in order to extend the right to maternity leave to 16 weeks (as opposed to 12 weeks previously). The extension of this period is a result of Directive 2010/41.

Even if the French maternity allowances meet the requirement of sufficiency under the Directive (as it is at least equivalent to the allowance which the person concerned would receive in the event of a break in her activities or grounds connected with her state of health), in practice the main problem for self-employed women is the fact that the benefits do not amount to much and are only paid during a short period. Therefore, many self-employed women do not interrupt their activities for pregnancy or maternity-related reasons (the interruption is not mandatory) or do so only for a very short period of time, even if temporary replacements are available. For example, if women are craftspersons, retailers or manufacturers, 90 % of the cost of hiring a person to replace the pregnant woman will be covered.

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, but the principle of equality applies.

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?

Yes. Act No. 2008-496 of 27 May 2008, implementing the various directives on discrimination, provides a general prohibition of direct or indirect discrimination based on sex in access to and the supply of goods and services. Article 5 of the Act simply states that the Act applies to every private and public entity, including those carrying out an independent activity. This Article therefore makes no distinction between self-employed persons and workers.

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. The 2008 Act provides a general prohibition of direct and indirect discrimination based on sex in access to and the supply of goods and services.

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.

The material scope of national law is broader as the exceptions have not been strictly implemented. Thus, the Act does not exclude, as the Directive does, the non-discrimination principle for the content of media or advertising. Concerning public or private education, the Act merely states that the non-discrimination principle does not prohibit the organisation of non-mixed schools.

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?

Not entirely (see point 9.2). However, the Act does not exclude, as the Directive does, the non-discrimination principle for the content of media or advertising. Concerning public or private education, the Act merely states that the non-discrimination principle does not prohibit the organisation of non-mixed schools.

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.

Article 4 (2) of the 2008 Act states that differences based on sex can be admitted when the provision of goods and services to one sex is justified by a legitimate aim and the means for achieving that aim are appropriate and proportionate. Apparently there has been no case law on the interpretation of this article.

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. See Section 9.6 of this report, below.

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.

French legislation has made use of the exemption from the principle of equal treatment allowed by Article 5 Paragraph 2 of Directive 2004/113/EC. The *Test-Achats* ruling was enforced in December 2012. A ministerial order adopted on 18 December 2012 states that gender differentiations can only apply to insurance contracts concluded before 20 December 2012 or those which are tacitly renewed (Order of 18 December 2012 on equality between men and women in insurances, JO 20 December 2012). The implementation of the *Test-Achats* ruling occurred at the last possible moment. Several months later, a Bill was adopted (Act No. 2013-672, July 2013, on the regulation of banking activities) thereby modifying Article L 111-7 of the Insurance Code, in order to delete any reference to gender differentiations. The implementation of Directive

2004/113/EC seems to be satisfactory and the Test-Achats ruling has been taken into account.

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.

No.

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

10.1 Has your country ratified the Istanbul Convention?

Yes. France has ratified the IC with Law no. 2014-476 of 14 May 2014 authorizing the ratification of the Convention. Before the adoption of the IC, two laws from 2006 (Law no. 2006-399) and 2010 (Law no. 2010-769) had been adopted to protect women against violence and this pre-existing legal framework was considered to be partly in compliance with the obligations under the Convention. Before the ratification, Law no. 2013-711 of 5 August 2013 was adopted notably to ensure compliance with the Convention. Just after the ratification, Law no. 2014-873 for Real Equality between Women and Men was adopted and it also contains some provisions dealing with violence against women in order to complete the transposition of the Convention. The Penal Code was modified in order to implement Article 37 § 2 of the Convention (the criminalisation of the intentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage), Article 38 c (inciting, coercing or procuring a girl to undergo sexual mutilation), Article 39 (performing an abortion on a woman without her prior and informed consent) and Article 41 § 1. The legal framework is completed by an active state policy, expressed by the adoption of plans of action since 2004. The 4th inter-ministerial governmental plan to prevent and combat violence against women, 2014-2016, was adopted in 2013 and it doubles the budget for policies against gender-based violence.

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. Concerning victimisation, the Labour Code states that no employee can be the subject of disciplinary action, be dismissed or be subject to a discriminatory act for having testified to having witnessed discrimination or having talked about this (Article L 1132-3) and the 2008 Act has extended the scope of this provision to the public sector. The protection against victimisation complies with the Directives.

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. Employees or job applicants who feel that they have been discriminated against must present the court with evidence 'that leads one to believe that direct or indirect discrimination has taken place.' In the light of this evidence, it is up to the defendant to 'prove that the decision taken was justifiable according to objective facts that had no connection with any form of discrimination' (Article L1132-3-3). Article 4 of the 2008 Act extends the application of this principle to civil and administrative procedures. Thus the same rules apply in the administrative courts (see, for example, Conseil d'Etat, 10 January 2011, No. 325268). The Cour de cassation has heard a case which is very similar to the Meister case (Cass. Soc. 19 December 2012, No. 10-20526). Two employees asked the judges to oblige the employer to provide the information needed about the remuneration of other employees in order to establish a case of discrimination. The legal basis of their claim was Article 145 of the Code of Civil Procedure which states that 'If there is a legitimate reason to preserve or to establish, before any legal process, the evidence of the facts upon which the resolution of the dispute depends, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of a petition or by way of a summary procedure'. In applying this article, the Court of Cassation stated that respecting an employee's personal life and respecting the employer's business secrets are not in themselves an obstacle to the application of this article when a national Court finds that the requested measures are legitimate and are necessary for the protection of the rights of the party who has requested them. The Court of Appeal was right in deciding that the employees had a legitimate aim in demanding the communication of information necessary for the protection of their rights, information that only the employer had access to and that he refused to communicate.

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.

Any discriminatory actions by employers are regarded as null and void, and the employee retains all previously held rights. In the context of a dismissal, this means that any dismissal on discriminatory grounds could be annulled and a worker dismissed on a discriminatory ground can claim her/his reinstatement and he/she is regarded as never having left the job. This is a specific sanction for discriminatory acts. In a case where the employee does not want to continue the employment relationship, he or she is eligible for a compensatory payment which is equal to at least the previous six months' wages as well as compensation granted for unlawful dismissal. In situations other than

dismissal the sanction is compensation that should entirely compensate the damage. Penal sanctions are also possible even if they are rarely used. Under the Labour Code the employer risks a maximum of one year imprisonment and a fine of EUR 3 750 (Article L 1146-1 of the Labour Code).. Under the Criminal Code (Article 225-2), any discrimination can be punished with a maximum of three years' imprisonment and a fine of EUR 45 000.

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.

As for remedies and sanctions, in France these meet the European standards and they are proportionate and effective.

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.

Victims of sex discrimination have 'normal' access to the courts. Moreover, representative trade unions can also act for an employee who claims to be the victim of discrimination without having to have a mandate to that effect. This trade union right of action is subject only to the condition that the employee is given written notification of the action and does not oppose the union action within a 15-day period. Furthermore, associations legally established for at least five years, and whose purpose is combating discrimination, may bring legal proceedings on behalf of an employee. In such cases, unlike those brought by trade unions, the employee concerned must give her written consent. Victims can also present their case directly to the Defender of Rights. Despite these rights, it is always difficult for alleged victims to go to Court. The introduction of a class action in France, without resolving all the problems, could nevertheless improve the situation.

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.

There are some differences between trade unions and associations in their right of action (see 11.4.2). The condition of having existed for five years is supposed to guarantee the seriousness of the association, but this could be considered as being too long.

There are actually some debates in France in order to introduce a specific type of class action in matters of discrimination. Its aim would not be compensatory but to establish discrimination in the workplace and to order the employer to take the necessary steps to put an end to these practices. Workers could always bring their claims before the labour courts to obtain compensation (see Pécaut Rivolier, L. (December 2013), *Rapport sur les discriminations collectives en entreprise: lutter contre les discriminations au travail: un défi collectif*, available at: <http://www.justice.gouv.fr/publication/rap-l-pecaut-rivolier-2013.pdf>, accessed 15 September 2015). A proposal to introduce such action for trade unions and associations registered for at least five years is currently being discussed in Parliament.

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

Alleged victims of gender discrimination can benefit from trade union support, association support, and support from the Defender of Rights. They can also benefit from

legal aid if they lack sufficient resources. The maximum net income in 2015 which is the cut-off point in order to qualify for legal aid at the rate of 100% for a single person is EUR 941 per month.

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

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?

There has been a long tradition in France of involving the social partners mainly through the obligation to annually negotiate on equality and on the gender gap (Article L2242-5-1 of the Labour Code). The legislator intends to induce the social partners to play an active role in the implementation of gender equality law. Since 2012, sanctions are also possible if companies do not respect their obligation to negotiate and to conclude agreements on gender equality. As a consequence, gender equality has become an issue of negotiation at plant and at sectoral level.

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 have been used as a means to implement EU gender equality principles. Collective agreements have an erga omnes effect in France. At branch level they are mostly generally applicable to all companies in the sector. However, even if some collective agreements contain innovative measures, some are merely formal. They refer to the principle of non-discrimination and declare their willingness to respect the law without any concrete measures having been taken.

12. Overall assessment

Although the process of implementing the directives has been a long one, the overall implementation seems to be satisfactory. In some respects, French law goes further than the European obligations, for example in providing for longer parental leave, for paternity leave, or by obliging the social partners to negotiate on the pay gap. However, even if the situation is formally satisfactory, for years there has been very little litigation on equality issues and, moreover, most of the litigation has concerned men claiming the same rights as women (see, for example, the Griesmar and Leone cases in section 3.3 of this report, above). But some elements reveal a certain evolution. Generally, the number of cases on discrimination brought before the courts is increasing. Lawyers, judges and the legal literature are becoming more familiar with the instruments on regulating discrimination and this will have consequences for sex discrimination.

Annexes

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