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# Country report

## Gender equality



Poland  
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# **Country report**

## **Gender equality**

How are EU rules transposed into  
national law?

## **Poland**

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Reporting period 1 January 2014 – 1 July 2015

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## **1. Introduction**

### **1.1 Basic structure of the national legal system**

In Poland, the 1997 Constitution,<sup>1</sup> which contains general equality and antidiscrimination clauses, as well as a guarantee of equality between men and women is essential to the legal framework on gender equality. Other universal sources of law are laws, ordinances and ratified international agreements (Article 87 of the Constitution). According to Article 95 of the Constitution, legislative power in the Republic of Poland shall be exercised by the two Chambers of Parliament (the *Sejm* and the Senate). Legislative initiative is mostly exercised by the Government. Draft laws may also be presented by groups of 15 Deputies or 15 Senators, as well as the President and at least 100 000 citizens (Article 118 of the Constitution). In order for a draft law to become law, it has to be passed by a regular majority of votes by both Chambers of Parliament and receive the approval (signature) of the President, who is the body ordering its promulgation in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*). The President may refuse to sign the law and refer the bill with his reasoned objections back to the Sejm for reconsideration; such presidential veto might be overridden by the Sejm with a qualified majority. The Council of Ministers, (its President and particular ministers) are authorized to enact executive ordinances when there is a specific legal basis (delegation) for it in an act issued by Parliament (Article 92 of the Constitution).

The system of administration of justice in Poland consists of common courts (regional, district and appellate), and administrative courts and military courts. The Supreme Court performs supervision over the common and military courts (Article 183(1) of the Constitution). Together with the Constitutional Tribunal and the Tribunal of State those courts form a power that is independent from the other state powers (Article 173(1) of the Constitution). Legislative acts (laws and ordinances) can be subjected to constitutional control exercised by the Constitutional Court. The President of the Republic may, before signing a bill, refer it to the Constitutional Tribunal for adjudication upon its conformity to the Constitution. He is obliged to refuse to sign a bill which the Constitutional Tribunal has judged not to be in conformity to the Constitution (Article 122 of the Constitution). Also every citizen is empowered to lodge an individual constitutional complaint challenging the constitutionality of a law, yet only in the situation when this law was the base for an individual and final decision or verdict in his case (Article 79 of the Constitution). They may also refer to the Human Rights Defender (RPO) with a motion for assistance in protection of one's freedoms or rights infringed by organs of public authorities (Article 80 of the Constitution). In such cases, the RPO may initiate proceedings on behalf of the citizen in civil, penal or administrative matters, as well as join proceedings that are already on-going (Article 14 of the Law on the Human Rights Defender). Since 2010 the RPO also exercises the tasks of the equality body, responsible for equal treatment. Independent from the RPO's activities, responsible for the monitoring of equal treatment, is the Government Plenipotentiary for Equal Treatment, whose competences are defined by the Antidiscrimination Law.

### **1.2 List of main legislation transposing and implementing Directives**

- Constitution of the Republic of Poland of 2 April 1997 (see footnote 1), hereafter the Constitution;
- Law on the Human Rights Defender of 15 July 1987, consolidated text JoL 2014 item 1648;

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<sup>1</sup> The Constitution of the Republic of Poland of 2 April 1997, published in Journal of Laws of the Republic of Poland (JoL No. 78, Item 483 with further amendments). For an English translation see: <http://www.sejm.gov.pl/prawo/konst/angielski/konse.htm>, accessed 10 August 2015.



- Labour Code Act of 26 June 1974 (hereafter - LC). Consolidated text JoL 2014, item 1502, with amendments;
- Amendments to LC implementing Equality Directives largely covered by: Law of 24 August 2001, JoL 2001 No. 128 Item 1405; Law of 21 December, JoL 2001 No. 154 Item 1805; Law of 14 November 2003, JoL No. 213 Item 2081; Law of 18 August 2006, JoL 2006 No. 217 Item 1587; Law of 21 November 2008, JoL 2008 No. 223, Item 1460; Law of 6 December 2008, JoL 2008 No. 234 Item 1654; Law of 28 May 2013, JoL 2013 Item 675, Law of 24 July 2015, JoL 2015 Item 1270;
- Law of 20 April 2004 on the Promotion of Employment and Institutions of the Labour Market, hereafter Law on Promotion of Employment, JoL 2004 No. 99 Item 1001 with amendments;
- Law of 13 October 1998 on the Social Insurance System, consolidated text JoL 2015 Item 121;
- Law of 17 December 1998 on Pensions from the Social Insurance Fund, consolidated text JoL 2009 No. 153 Item 1227 with amendments (hereafter Law on Pensions);
- Law of 20 December 1990 on Social Security for Farmers, consolidated text JoL 1998 No. 7 Item 25, with amendments;
- Law of 20 April 2004 on Occupational Pension Schemes JoL 2004 No. 116 Item 1207, with amendments;
- Law of 25 June 1999 on Cash Social Insurance Benefits in Respect of Sickness and Maternity, consolidated text JoL 2014 Item 159, with amendments (hereafter Law on Maternity Cash Benefits);
- Law of 30 October 2002 on Social Insurance in Respect of Accidents at Work and Occupational Diseases, JoL 2002 No. 199 Item 1673, with amendments;
- Law of 28 November 2003 on Family Benefits, JoL 2003 No. 228 Item 2255, with amendments;
- Law of 27 June 2003 on the Social Pension, JoL 2003 No. 135 Item 1268, with amendments;
- Law of 9 July 2003 on Employment of Temporary Workers, JoL 2003 No. 166 item 1608;
- Law of 21 November 2008 on Capital Pensions. Consolidated text JoL 2014 item 1097;
- Law of 3 December 2010 on the Implementation of (some) EU Provisions on Equal Treatment, JoL 2010 No. 254 Item 1700 with amendments (hereafter Antidiscrimination Law). It refers to the following Directives: 86/613/EEC, 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC.

## **2. General legal framework**

### **2.1 Constitution**

#### **2.1.1 Does your national Constitution prohibit sex discrimination?**

Yes, but not explicitly. In Article 32 the Constitution generally provides that all persons shall be equal before the law and all persons shall have the right to equal treatment by public authorities. It also contains a broad antidiscrimination clause ('No one shall be discriminated against in political, social or economic life for any reason whatsoever'). This clause does not specify any ground of discrimination; nevertheless, it goes without saying that it forbids, inter alia, sex discrimination.

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

Yes. Article 33 of the Constitution addresses equality between men and women. This provision guarantees that in the Republic of Poland men and women shall have equal rights in family, political, social and economic life. It also specifies that men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations.

#### **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 Antidiscrimination Law, which is complementary to the provisions on equal treatment of the LC and other laws (e.g. the Laws on Promotion of Employment, on the Social Insurance System and on Capital Pensions, and on Employment of Temporary Workers include the equal treatment rule). The principle of complementarity is expressed explicitly in Article 2 (2) of the Antidiscrimination Law, which states that its chapter 1 (entitled: General provisions) and chapter 2 (The principle of equal treatment and legal measures aimed at its protection) do not apply to employees, as far as the subject matters are regulated by LC. In practice, this means that different courts decide the case and partially different material and procedural rules apply. Namely, if the protection is ensured by Labour Code, special Labour and Insurance Courts have jurisdiction, which act on the basis of special provisions of this Code and of the Code of civil procedure. On the other hand, when the Antidiscrimination law is applicable, the common civil courts exercise jurisdiction. Also in such situation unless specifically regulated in this law, common provisions of Civil Code and Code of Civil Procedure have to be applied.

The Antidiscrimination Law in Article 1 mentions sex, age, disability, race, religion, nationality, ethnic origin, belief, and sexual orientation as possible grounds of discrimination. However, at the same time it makes scope of the protection against discrimination in case of any of those grounds dependant on the fields in which discrimination might occur. In consequence, as in EU law, also in Poland according to the Antidiscrimination Law the protection against sex discrimination is narrower than the protection in case of racial discrimination.

Article 6 of the Antidiscrimination Law provides that unequal treatment of private persons with regard to sex (as well as race, ethnic origin or nationality) is prohibited only

with respect to access and conditions of social insurance services, housing services, goods and acquiring rights and energy, if they are offered publicly.

Such differentiation as to the grounds of discrimination does not apply to employment. In this field according to Article 11<sup>3</sup> LC discrimination is in any case prohibited on the ground of: age, disability, race, religion, nationality, political opinion, membership of a trade union, ethnic origin, belief, sexual orientation, and employment for a specified or unspecified period of time, and part-time employment.

### **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. The term 'sex' in the Polish language has different meanings. From the linguistic point of view there are no reasons prohibiting such interpretation that the provisions of law provide protection also in the case of gender reassignment. Nevertheless, there is a legislative proposal amending the Antidiscrimination Law which, in addition to sex and sex orientation (which already exist), explicitly introduces sex identity and sex expression as grounds of discrimination.<sup>2</sup>

#### **3.2 Direct sex discrimination**

3.2.1 Is direct sex discrimination explicitly prohibited in national legislation?

Yes. In Article 11<sup>3</sup> and Article 18<sup>3a</sup> (2) of Labour Code, as well as Article 3(3) of the Antidiscrimination Law.

The LC definition is: 'Direct discrimination occurs when an employee, as a result of one or more of reasons defined in paragraph 1, is or could be treated less favourably, in comparable situation, than other employees'.

The Antidiscrimination Law definition is: 'By direct discrimination is to be understood a situation in which, a natural person because of sex (....) is treated less favourably than another person in a comparable situation is, was or would be treated'.

Does this definition in your view comply with the EU definition?

The definition of direct discrimination in the Antidiscrimination Law corresponds with the one contained in the Recast Directive. The definition in the LC is not entirely correct, because it speaks of a comparable situation not in the context of another employee (as does the Recast Directive), but refers to the employee being discriminated against. In my view this inconsistency may be removed by proper interpretation applied by courts in their case law.

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

No, neither the Antidiscrimination Law nor any provision of the LC explicitly states that discrimination includes any less favourable treatment of a woman because of her pregnancy or childbirth-related leaves. However Article 12 of the Antidiscrimination Law stipulates that, in case of a breach of the equal treatment rule with regard to pregnancy or childbirth-related leaves, such person has the right to damages, according to Article

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<sup>2</sup> Ref.: Sejm Print 1051 <http://www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?nr=1051>, accessed 1 September 2015. Hereafter: Draft Law amending the Antidiscrimination Law.

13 (which refers to discrimination-related damages).<sup>3</sup> Also in the case law based on LC the discrimination with regard to pregnancy is considered to be sex based.<sup>4</sup>

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

Specific difficulties are not identified.

### **3.3 Indirect sex discrimination**

3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?

Yes, in Article 11<sup>3</sup> and Article 18 <sup>3a</sup> (2) LC, and in Article 3 (3) Antidiscrimination Law.

Article 18<sup>3a</sup>(4) LC reads as follows: Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice puts or would put all or a large number of employees belonging to a particular group in a particular disadvantageous situation or unfavourable disparity on one or more grounds referred to in Paragraph 1 as regards the establishment and termination of their employment relationship, terms and conditions of employment, promotion and access to training for the development of their professional qualifications, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Article 3(2) Antidiscrimination Law states: By indirect discrimination is to be understood a situation where a natural person with regard to sex (...) due to an apparently neutral provision, criterion or practice was or would be put in a particular disadvantage or a particularly unfavourable situation, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

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.

No case law could be identified, openly using statistical evidence in order to establish a presumption of indirect evidence. Polish civil procedure, even if not mentioning directly the admissibility of such evidence, still does not exclude such possibility. In one of the cases (mainly related to discrimination on the ground of employment status, although claimant was a woman) it seems that the Supreme Court encouraged using statistics in

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<sup>3</sup> The Draft Law amending the Antidiscrimination Law proposes to add the following provision: 'The violation of equal treatment rule ... in relation to pregnancy or maternity constitutes direct sex discrimination'.

<sup>4</sup> The Supreme Court (SC) in the judgment of 8 January 2008, II PK 116/07, said that: 'the exercise of powers conferred by law in connection with the birth and upbringing of the child cannot be regarded as an objective reason for determining a lower remuneration compared to other employees'. The claimant (a mother of 5 children) claimed damages for discrimination based on gender, age and family status. In her opinion signs of discrimination included inter alia significant differences in remuneration between her and the other employees. The employer argued that unfavourable remuneration of the claimant was inter alia the result of her frequent use of maternity and parental leave. The courts of first and second instance found that, by differentiating the situation of the claimant in terms of pay, comparing to other employees, the defendant applied legally acceptable criteria. These judgments were set aside by the SC, recognizing a cassation claim.

As another example may serve the ruling of the SC of 8 July 2008, IPK 294/07, whose major point is as follows: 'Acceptance for the position that absence from work of a female-employee caused by endangered pregnancy, followed by miscarriage and health complications, may constitute justified grounds for terminating her employment contract and justify the refusal of accepting her back to work, due to its purposelessness, would violate the rules regarding protection of motherhood and may even be considered as discrimination with regard to sex'.

order to prove the possibility of indirect discrimination. In the ruling of 18 April 2012 (Ref. II PK 197/11) the SC tackled the issue of wage discrimination of a woman employed for a trial period and decided to revert the case for reconsideration to the court of second instance, ordering it to examine if the employer took advantage of his contractual right to reduce the basic salary only (or mostly) with regard to trial-period employees. If this was true, it could constitute wage discrimination against this group of employees.<sup>5</sup>

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

There is no information that such test has been used to prove sex discrimination in court proceedings.<sup>6</sup>

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.

There are examples of legislation which discriminates against women indirectly. Some of them have been challenged by the Constitutional Court. However, indirect discrimination was not raised as the argument, although in the expert's view it applied.

### **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?

A simple yes or no answer is not possible here. The LC recognizes the possibility of discrimination based on 'one or multiple reasons' e.g. in Article 18<sup>3a</sup> (3) LC. However, in case of multiple discrimination it does not require the amount of damages to be raised.

Yes, the draft law amending the Antidiscrimination Law proposes to add a provision explaining that by 'multiple discrimination' is to be understood situations of unequal treatment, based on more than one of the grounds mentioned in Article 1. Additionally, in the same draft it is proposed to amend Article 13, which received the following wording 'By adjudicating on the amount of damages or compensation (...) the court takes

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<sup>5</sup> In this case, the issue of remuneration was regulated by a collective agreement, which entitled the employer to reduce the basic salary (by one or two categories of classification). In the opinion of the court the provision of the collective agreement as such did not have a discriminatory character yet in respect to wages, especially given the fact that no premises were identified (hence none could be assessed as discriminatory) which would guide the employer by applying the provision. The court found, however, that discriminatory practice (direct or indirect) in respect to wages might be observed in the phase of application of the collective agreement by the employer.

<sup>6</sup> Although there was the case of the District Court of Warsaw of 22 December 2008, VII Pa 35/08 in which justification for refusal of a sex discrimination claim by courts of lower instance was the suspicion that the claimant (a man) called different employers who advertised in newspapers for a secretary position as only for women. He then recorded the conversation with them for evidence. Finally the District Court rejected this suspicion and awarded the damage for claimant recognising sex discrimination in access to employment, explaining that it did not share the opinion of the court of first instance, that the claimant has undertaken all actions, regarding the job application only with the objective of claiming respective damages. It rejected the opinion that proof of such intention was the fact that the defendant initiated court proceedings in two more cases, also claiming damages for violation of the equal treatment rule in employment. According to the court of second instance there was no evidence, that the claimant did not have the intention of initiating employment at the defendant. At the time the claimant conducted the telephone conversation with a representative of the defendant, he was not employed anywhere. He was a student and there were no reasons which would prevent him from commencing employment, if he had been offered one.

into consideration their effectiveness, proportionality and severity. In particular the court adjudicates higher damages or compensation in the case of multiple discrimination’.

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)?

A simple yes or no answer is not possible here. In some court cases on sex discrimination other grounds (such as age, employment status, family status) are also mentioned. However, there is however no clear evidence that it has influenced the imposed sanction.

### 3.5 Positive action

3.5.1 Is positive action explicitly allowed in national legislation?

Yes. Article 18<sup>3b</sup> (3) of LC and Article 11 of the Antidiscrimination Law. The LC stipulates: ‘Measures introduced for a specified period of time and aimed at the creation of equal opportunities for all or a large number of employees that receive different treatment on one or more grounds referred to in Article 18<sup>3a</sup> Paragraph 1 by reducing the existing inequalities to the advantage of those employees, to the extent defined therein, are not contrary to the principle of equal treatment in employment’.

Article 11 of the Antidiscrimination Law has the following wording: ‘Measures aimed at preventing violations of the rule of equal treatment or balancing the inconveniences connected with unequal treatment, at the source of which lies one or more grounds for discrimination, referred to in Article 1, are not contrary to the principle of equal treatment in employment’.

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.

These measures do not play any practical role in the area of employment.

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

There have been no legislative measures, only soft-law recommendations. In June 2010 the Warsaw Stock Exchange issued a document entitled: ‘Good Practices of Stock Exchange Companies’,<sup>7</sup> which included a provision that public companies and their stakeholders are recommended to contribute to a balanced participation of women and men in their bodies (Item 9 of the Recommendations). Also, on 7 March 2013, the Minister of Treasury issued a document called ‘Good practices with regard to ensuring balanced participation of women and men in bodies of companies with State Treasury participation’, where he recommends an at least 30 % average participation of the underrepresented sex regarding all members of supervisory councils chosen and nominated by the Minister of State Treasury. It is estimated that in public companies this indicator should be reached by the end of 2015. The application of these recommendations is especially encouraged in companies with a State Treasury participation, which are listed on the Stock Exchange. Additionally, on 6 March 2013 the Minister of State Treasury issued an Order (No. 6), according to which the abovementioned ‘Good practices (...)’ have been amended with a provision regarding the recruitment of ‘respectively prepared members of supervisory boards, with a balanced

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<sup>7</sup> See the appendix to Resolution No. 19/1307/2012 of the Stock Exchange Council of 21 November 2012 [http://static.gpw.pl/pub/files/PDF/dobre\\_praktyki/dobre\\_praktyki\\_16\\_11\\_2012.pdf](http://static.gpw.pl/pub/files/PDF/dobre_praktyki/dobre_praktyki_16_11_2012.pdf), accessed 10 September 2015.

participation of women and men' in order to ensure the proper functioning of proprietary supervision.<sup>8</sup>

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.

Yes. The Electoral Code of 5 January 2011 introduced (in Article 211 (3) and Article 425 (3)) the requirement to include on electoral lists to the Sejm, the European Parliament and local elections for Community Councils at least 35 % of women and men, on pain of refusal to register the list. These quotas do not apply to elections to the Senate where single-member constituencies were introduced, since 2011, and to the council of the smallest localities, since 2014. The 2015 effort to broaden the scope of single-member constituencies failed.<sup>9</sup>

### **3.6 Harassment and sexual harassment**

3.6.1 Is harassment explicitly prohibited in national legislation?

Yes. Article 18<sup>3a</sup> (6) of LC and Article 3(3) of the Antidiscrimination Law. The wording of Article 18<sup>3a</sup> (6) LC is as follows: 'Discrimination on the grounds of sex is also taken to include any form of unwanted conduct of a sexual nature, or referring to a person's sex, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, including verbal, non-verbal or physical conduct (sexual harassment)'. Additionally, Article 18<sup>3a</sup> (5) Item 2 LC states that occurrences of discrimination are any unwanted conduct with the purpose or effect of violating the dignity of an employee and of creating an intimidating, hostile, degrading, humiliating or offensive environment (harassment).

Article 3(3) of the Antidiscrimination Law stipulates that harassment is taken to include any form of unwanted conduct the aim or result of which is violation of the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

3.6.2 Does the definition of harassment cover a broader scope than employment in your country?

Yes. The Antidiscrimination Law extends the possibility of applying the harassment provisions beyond the scope of employment, thus including all other areas where this law finds application, provided that the ground for discrimination is sex. In particular such possibility exists with regard to access to professional training, conditions of undertaking and performing commercial or professional activity, entering and participating in trade unions, employees' organizations and professional self-government, as well as taking advantage of the rights of the members of those organizations. The harassment provisions also apply with regard to access and conditions of use of labour-market instruments and services, as well as social insurances, including housing services, goods and acquiring rights and energy, if they are offered publicly.

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<sup>8</sup> Answer to the letter of the RPO asking for realization of equality policy in companies. [https://www.rpo.gov.pl/sites/default/files/Odpowiedz\\_Ministra\\_Skarbu\\_Panstwa.pdf](https://www.rpo.gov.pl/sites/default/files/Odpowiedz_Ministra_Skarbu_Panstwa.pdf); statistical data on the results of equality policy are included in the Report prepared in 2014 by the Ministry of Labour and Social Policy 2014, entitled 'More equality, more profits in economy' pp. 48-58. [http://rownoscwbiznesie.mpips.gov.pl/jdownloads/Pliki%20do%20pobrania/Kobiety%20w%20biznesie/wicej\\_rwnoci\\_wicej\\_korzyci\\_w\\_gospodarce.pdf](http://rownoscwbiznesie.mpips.gov.pl/jdownloads/Pliki%20do%20pobrania/Kobiety%20w%20biznesie/wicej_rwnoci_wicej_korzyci_w_gospodarce.pdf), accessed 10 September 2015.

<sup>9</sup> Since the nation-wide referendum held on 6 September 2015 was invalid due to low turnout (below 10 %) <http://wiadomosci.radiozet.pl/Wiadomosci/Kraj/Oficjalne-wyniki-Referendum-niewazne-frekwencja-7-8-00010712>, accessed 20 October 2015.



### 3.6.3 Is sexual harassment explicitly prohibited in national legislation?

Yes, in Article 18<sup>3a</sup> (6) LC and Article 3 (3) Antidiscrimination Law.

In the light of the Antidiscrimination Law, sexual harassment is taken to include any form of unwanted conduct of a sexual nature towards a natural person, or referring to a person's gender, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, including verbal, non-verbal or physical conduct.

The definition of sexual harassment in the LC is cited in point 3.6.1 of this questionnaire.

### 3.6.4 Does the definition of sexual harassment cover a broader scope than employment in your country? If so, please specify the scope.

Yes, see reply to point 3.6.2. of the questionnaire.

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

Yes, Article 18<sup>3a</sup> (7) LC stipulates that 'An employee's submission to harassment or sexual harassment or opposition to harassment or sexual harassment, as well as objection to any such conduct may not place that employee at any disadvantage'.

In the light of Article 3(5) of the Antidiscrimination Law, unequal treatment is taken to include inter alia less favourable treatment of a person, resulting from refusal of harassment or sexual harassment or submitting to any such conduct.

In contrast to the wording of the Directive the above provisions do not explicitly state that such actions amount to discrimination, although they are treated equally.

## 3.7 Instruction to discriminate

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

Yes, in Article 18<sup>3a</sup> (5) point 1 LC and Article 3(4) of the Antidiscrimination Law. The LC stipulates that display of discrimination is also an instruction (ordering) to violate that principle. According to the Antidiscrimination Law, a display of discrimination amounts to ordering it.

### 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 court judgments regarding such display of discrimination could be identified. This matter is also rarely examined in legal literature.<sup>10</sup>

<sup>10</sup> Only one commentary to the LC includes an example of a Temporary Work Agency that encouraged employers to give a lower salary to temporary workers than that received by other employees. Gersdorf, M., Rączka, K., Skoczyński, J. Kodeks pracy. Komentarz [Labour Code. Commentary], ed. 6, Lexis Nexis, Warszawa 2004, p. 67. In newer commentaries to the LC, this issue is either omitted (see: commentary to Article 18<sup>3a</sup> (5)(1) LC: Świątkowski, A.M. Kodeks Pracy. Komentarz [Labour Code. Commentary], 4<sup>th</sup> edition, C.H.Beck, Warszawa 2012, p. 81-90 and Muszalski W. (in) Kodeks Pracy . Komentarz [Labour Code. Commentary] ed. Muchalski W. 8<sup>th</sup> edition. C.H.Beck, Warszawa 2011 p. 50) or limited to the general interpretation of this provision such that the refusal of the employee to fulfil the instruction has no significance for the responsibility of the instructor (Compare: Korus P. (in) Kodeks Pracy Komentarz [Labour Code. Commentary], ed. Sobczyk A., 2<sup>nd</sup> edition, C.H. Beck, Warszawa 2015 p. 69).

### 3.7.3 Is incitement to discrimination explicitly prohibited in your country?

Yes, in Article 18<sup>3a</sup> (5)(1) LC and Article 3(4) and Article 9 of the Antidiscrimination Law. The LC stipulates that an instance of discrimination is any action that encourages another person to violate the principle of equal treatment in employment. The Antidiscrimination Law has similar wording. It prohibits encouraging violating the principle of equal treatment.

### 3.8 Other forms of discrimination

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

No. The draft law on amending the Antidiscrimination Law, however, included a definition of discrimination by association and assumed discrimination.<sup>11</sup>

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<sup>11</sup> Discrimination by association shall be understood as a situation where the person, referred to in Article 2 (1), is treated less favourably, than any other person is, was or would be treated in a comparable situation, due to association of this person with another person having one or more characteristics, referred to in Article 1'; Discrimination by assumption shall be understood as a situation where the person, referred to in Article 2 (1), is treated less favourably, than any other person is, was or would be treated in a comparable situation because of assigning to this person one or of a few characteristics referred to in Article 1 (Article 5b and 5c of the Draft Law).

#### **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, in Article 33(2) of the Constitution, and Article 18<sup>3c</sup> (1) and 18<sup>3b</sup> (1) point 2 of the LC. Article 33(2) of the Constitution stipulates that 'Men and women shall have (...) the right to equal remuneration for work of similar value'.

Pursuant to Article 18<sup>3c</sup> (1) of the LC 'employees have the right to equal remuneration for equal work or work of equal value'. Article 18<sup>3b</sup> (1) point 2 of the LC stipulates that failure to apply the principle of equal treatment in employment by an employer 'includes different treatment of an employee on one or more grounds (...) particularly with the effect of (...) unfavourable conditions of remuneration for work'.

4.1.2 Is the concept of pay defined in national legislation?

Yes, in Article 18<sup>3c</sup> (2) LC. According to this provision 'The remuneration (...) includes all components of remuneration for work, irrespective of their name or nature, as well as other work-related monetary or non-monetary benefits granted to employees'.<sup>12</sup>

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

Yes, in Article 18<sup>3b</sup> (1)(2) of the LC. However, the formulation differs from the one included in the Directive. In addition, Article 8 of the Antidiscrimination Law provides for a general prohibition of differentiation of conditions of employment, inter alia with regard to sex.

According to the LC, the failure to apply the principle of equal treatment in employment by an employer includes different treatment of an employee on one or more grounds (...) particularly with the effect of (...) unfavourable conditions of remuneration for work.

Article 8 of the Antidiscrimination Law stipulates that unequal treatment of natural persons with regard to sex "is prohibited (...) in respect to (...) conditions of undertaking and performing commercial or professional activity, including such performed upon employment contracts or civil-law contracts". According to this provision this principle should be applied in all employment relationships.

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

Yes, Article 18<sup>3c</sup> (1) LC, regarding the guarantee of equal pay for equal work or work of equal value, does not additionally mention the obligation to use a comparator. Nevertheless, a comparator is mentioned in the general provision regarding direct discrimination provided for in Article 18<sup>3a</sup> (3) LC, which also applies to wage discrimination on all grounds, including sex. This provision requires inter alia the

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<sup>12</sup> The literature mentions in this regard various allowances and so-called bonuses, such as company car, company flat, access to company medical services and paid voluntary medical (or other) insurance, as well as premiums, and severance pay. Gersdorf, M., Rączka, K., Skoczyński, J. Kodeks pracy. Komentarz [Labour Code. Commentary], ed. 6, Lexis Nexis, Warszawa 2004, p. 71. According to case law (of the Supreme Court in judgment of 22 February 2008, I PK 208/07) the reimbursement of travel costs from home to place of work or return of costs of apartment rental provided for in a work contract are part of remuneration.

possibility to point to real or hypothetical comparators. This means that the necessary condition for determining if a case of direct discrimination in employment has taken place is the comparison of the legal situation of employees placed in different social categories, which are distinguished according to legally forbidden criteria. Prevalent in case law is the view that a comparator may not be a person employed by another employer.<sup>13</sup> The legal definition of indirect discrimination does not mention a comparator, however. Nevertheless, commentaries to Article 18<sup>3a</sup> (4) LC, incorporating the definition of indirect discrimination, point out that 'any disparity in defining any of the conditions of employment between employees, encompassing one or a significant number of employees in a particular category, must be seen as displays of discrimination in employment'.<sup>14</sup> The word 'disparity' means that there must be 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. Article 18(3) LC stipulates that work of equal value is work which requires employees to have comparable professional skills and qualifications (certified by documents or by practice and professional experience), as well as comparable responsibility and effort.

It is worth noting that in a judgment of 2007,<sup>15</sup> the Supreme Court generally explained that if the employer takes into account such criteria as length of service and qualifications while establishing the remuneration, they must prove that the particular skills and professional experience have special significance for fulfilment of the obligations conferred on the employee.<sup>16</sup>

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

The Labour Law does not explicitly address wage transparency. There are however legal provisions that stipulate directly that the information about remuneration of certain

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<sup>13</sup> The problem of admissibility of indicating as a comparator a person employed by another employer, occurred in a case recognized by the Supreme Court on 18 April 2012, No. II PK 196/11. In this case the SC overruled the argument of the claimant, comparing his work position to similar positions at other employers, with the following reasoning: 'The ground for a claim for damages, according to Article 18<sup>3d</sup> LC cannot constitute the argument that other employers treat their employees more favourably. This however is precisely what the comparison conducted by the claimant, encompassing presidents of management boards employed in other regional broadcasting studios, is all about. With reference however to employees working for the same employer it is important to establish if they perform equal work, or work of equal value, hence only in this situation do they have the right to equal wages (Article 18<sup>3c</sup> § 1 and 2 LC)'. See also SC ruling of 7 March 2012, No. II PK 161/11.

<sup>14</sup> Świątkowski, A.M.. Kodeks pracy. Komentarz [Labour Code. Commentary], 4th edition, C.H. Beck, Warszawa 2012, p. 85.

<sup>15</sup> SC judgment of 22 February 2007, I PK 242/06.

<sup>16</sup> The problem of comparing work of equal value was tackled by the Supreme Court in the ruling of 9 February 2007 (I PK 222/06), where it noted: '(...) it would be possible to compare the remuneration for the work of the claimant with another person employed on the position of an accountant, while taking into account many other circumstances (professional qualifications, previous work time, scope of tasks associated with the working position, responsibility, physical workload or amount of work) serving as criteria of evaluation of their work. It was not possible however to compare – with respect to the rule of equal treatment (Article 11<sup>2</sup> LC) and the prohibition of discrimination in employment (Article 18<sup>3a</sup> LC) – the remuneration of the claimant for work as an accountant with the remuneration of other employees, employed on the position of painters. A comparison of the wages of an accountant and a painter would be possible if there was a system of evaluating work, which currently does not exist in Poland. In such situation the fact that only the claimant's [in the cassation claim] remuneration has been raised, not that of persons employed on other positions, cannot be regarded in the terms of discrimination, if – as alleged by the claimant and omitted by the court of appeals – the defendant employer did not have another working position, which could be compared with the position of the claimant, according to the criterion of equal work or work of equal value.'

persons is public.<sup>17</sup> There are two important court judgments on this issue. The Constitutional Court judgment of 7 May 2001 (K 18/00) and The Supreme Court judgment of 25 May 2011 (II PK 304/10).

The Constitutional Court in its judgment of 7 May 2001 (K 18/00) found the provisions of the Act of 3 March 2000 on remuneration of persons in charge of legal entities owned by the State Treasury in at least 50 % to be compliant with the Constitution with regard to the regulations stipulating the obligation to disclose the remuneration of these persons, explaining that this information is not subject to protection in the same way as personal details or trade secrets. The Supreme Court in its judgment of 25 May 2011 (II PK 304/10), found that the fact that an employee disclosed to other employees information covered by the so-called salaries confidentiality clause, in order to prevent unfair treatment and wage-related forms of discrimination, cannot in any way serve as ground for dissolution of his contract of employment.<sup>18</sup>

The problem of transparency of wages still raises many controversies in the literature and case law. On the one hand, part of the doctrine and some courts share the opinion of the employers, that such information constitutes trade secrets,<sup>19</sup> thus being subject to a confidentiality clause. As a result they approve various contract clauses prohibiting employees to disclose their wages, even with respect to their co-workers, thus allowing failures to comply with such clauses to be qualified as a severe violation of basic employee obligations, in the interpretation of Article 52(1) LC.<sup>20</sup> The employer is entitled to define the rules for safeguarding secrets regarding the enterprise. Enabling unauthorized persons to access company secrets may constitute a display of violation of the obligation to preserve secrets, the disclosure of which could expose the employer to damage.<sup>21</sup> The problem of disclosing wage information was also handled by the literature and case law in the context of protection of personal data of the employees. Provided that such information is considered as such data, the argument is raised that disclosure of salaries violates provisions of Article 26 of the Law of 29 August 1997 on Protection of Personal Data.<sup>22</sup> On the other hand, if information about the salary is to be qualified as personal goods of the employee, then he/she cannot be forbidden to disclose this information. It is the employer who is obliged to preserve secrecy not the employee. There is general consent, however, that the prohibition to disclose wage-related information does not include remuneration tables, which may determine the range of remuneration, depending on the position, rank or qualifications. In such case it is not the actual amount of salary of particular employees which is being disclosed, but rather the range of salary, within which their wages have to be.

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<sup>17</sup> As examples may be given certain groups of public servants or persons occupying decision-making positions, as provided for e.g. in the Law of 3 March 2000 on remuneration of person in charge of legal entities (JoL 2000 No. 26 Item 206).

<sup>18</sup> The Court additionally emphasised that 'the exercise by an employee of the rights resulting from violations of the principle of equal treatment in employment, including the attempt to investigate or to provide any form of support to other employees, aimed at preventing the potential application of wage discrimination by the employer, cannot constitute the reason for termination by the employer of the contract of employment, regardless of the way the employee accessed the information, that may indicate a violation of the principle of equal treatment in employment or application of wage discrimination. In this case the claimant received information concerning the pay of his co-workers by e-mail by mistake. Surprised by the large differences in the wages he decided to distribute this information among his colleagues, in order to clarify the situation.

<sup>19</sup> In the understanding of the Law of 16 April 1993 r. on Combating unfair Competition (consolidated text JoL 2003 No. 153 Item 1503, with amendments).

<sup>20</sup> Which allows dissolution of work contract without notice? Compare: Judgment of the SC of 5.03.2007, I PK 228/06, OSNP No. 7-8/2008, Item 100; judgment of SA in Krakow of 15.5.2002 r., I ACa 320/02, TPP No. 2/2003).

<sup>21</sup> Ruling of the SC of 6 June 2000, I PKN 697/99, OSNP No 24/2001, Item 709.

<sup>22</sup> JoL of 2002 No. 101 Item 926 with further amendments.

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?

Not yet. In 2012 the Government Plenipotentiary for Equal Treatment announced an amendment to the Labour Code, which would impose an obligation on companies to report on differences with regard to the gender pay gap. Discovering such differences would result in the taking of preventive measures and monitoring of their implementation. Although this project has been supported by Supreme Audit Office (NIK) when the Office assessed the gender pay gap,<sup>23</sup> it has not yet turned into a concrete legislative proposal.

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

According to Article 18<sup>3b</sup> (2) point 4 of the LC, application of the criterion of seniority in service, in the process of establishing and applying of rules of remuneration, if applied in a proportionate way, constitutes justified different treatment of employees on the grounds of their age.

The LC regulations in this respect may be criticised as being contradictory to CJEU case law, as its provisions make remuneration dependent on the length of employment, regardless of the type of work performed. Nevertheless, in the light of Supreme Court case law, an employer, arguing that different qualifications and lengths of employment were the grounds for differentiation of remuneration of employees performing equal tasks, should demonstrate that they are significant with regard to the performance of those tasks.<sup>24</sup> In the opinion of the Supreme Court,<sup>25</sup> 'equal work' in the meaning of Article 18<sup>3c</sup> of the LC refers to tasks actually performed by the employee, not to the description of the obligations of the employee deriving from the employment contract.

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 outsourcing?

Some of the Polish landmark cases have been described in Annex 3 of the Commission's staff working document accompanying the report of the Commission on the application of Directive 2006/54: see SWD(2013) 512 final. Among them worth mentioning is the Constitutional Tribunal judgment of 9 July 2012, P 59/11, initiated by a legal question of the District Court in Białystok; the Supreme Court judgment of 8 January 2008, II PK 116/07; the Supreme Court judgment of 25 May 2011, II PK 304/10, and the Supreme Court judgment of 22 February 2007, I PK 242/06. Additionally, two other rulings should be mentioned. The Supreme Court in the judgment of 2 February 2007<sup>26</sup> declared that raising remuneration of just one employee while omitting others, employed in different positions, does not constitute unequal treatment, and does not violate the prohibition to discriminate, if the employer has not implemented a system of work valuation (in extreme cases it may only be regarded as a violation of the principle of community coexistence as defined in Article 5 of the Civil Code).<sup>27</sup>

<sup>23</sup> Former English name of NIK was Supreme Chamber of Control. In 2014 NIK prepared the report on gender pay gap in public sector of employment which confirmed the differences in salaries of women and men. In conclusion it recommends to proceed with the project of Government Plenipotentiary for Equal Treatment <https://www.nik.gov.pl/aktualnosci/nik-o-wynagrodzeniu-kobiet-i-mezczyzn.html>, accessed 20 January 2016.

<sup>24</sup> Ruling of the SC of 22 February 2007, I PK 242/06.

<sup>25</sup> Ruling of the SC of 12 January 2010, I PK 138/09.

<sup>26</sup> Ruling of the SC of 2 February 2007, ref. I PK 222/06.

<sup>27</sup> Article 5 of the Civil Code that one may not use his right in a manner that would be contrary to its social and economic purpose or to the principles of community coexistence. Any such act or refraining from acting by the entitled person shall not be treated as the exercise of the right and shall not be protected.

With respect to this ruling, the lack in many enterprises of a system of occupational classifications for the purpose of determining remuneration, as well as the lack of a universal system for valuing work and establishing criteria, allowing comparison of various kinds of work, causes difficulties in claiming damages resulting from wage discrimination, in case of work of similar value. Such job classifications apply in the public sector, according to Ordinance No. 1 of the Prime Minister, dated 7 January 2011, on the principles of description and job valuation in the civil service. This ordinance inter alia regulates the procedures for conducting jobs valuation (by a specially designated team).<sup>28</sup> In the private sector, however, systems for evaluating work are applied only on a voluntary basis.<sup>29</sup>

Of importance is also Supreme Court ruling of 3 June 2014, III PK 126/13,<sup>30</sup> in which the Court decided that in case of wage-related discrimination, the claimant not only has to make it plausible that he is remunerated less favourably than other employees, performing the same work, or work of equal value, but also that the differentiation was based on an unlawful ground. Such opinion has been expressed when the failure to mention such ground of discrimination in the claim was one of the reasons for the loss of the claimant in this case, because the Court accepted the cassation arguments of the defendant.

## **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, in Article 2 of the LC, and in Article 2 (1) and (2) of the Antidiscrimination Law. The LC provides for a definition of the term employee, defining that it is an individual employed on the basis of a contract of employment, appointment, election, nomination or co-operative contract of employment (*Pracownikiem jest osoba zatrudniona na podstawie umowy o pracę, powołania, wyboru, mianowania lub spółdzielczej umowy o pracę*).

The Antidiscrimination Law (Article 2. (1)) stipulates that this act is applicable to natural and legal persons, as well as organizational units who are not legal persons, whom the law provides with legal capacity (*Ustawę stosuje się do osób fizycznych oraz do osób prawnych i jednostek organizacyjnych niebędących osobami prawnymi, którym ustawa przyznaje zdolność prawną*). According to Article 2(2) provisions of this law do not apply with regard to employees, in areas which are regulated in the LC. After the entering into force of the Antidiscrimination Law the personal scope of protection against discrimination, with regard to conditions of undertaking and performing economic and professional activities, has been significantly expanded and covers all categories of workers (thus e.g. self-employed persons, persons employed on the basis of civil-law contracts) in the meaning of the Directive.

National law does not have not include a definition of a 'worker'. The notion of a worker is broader than that of an 'employee'. 'Employee' is a term limited to persons employed

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<sup>28</sup> Annexes to the ordinance include model job descriptions, stating their place in the organisational infrastructure of the office, a description of the main tasks, authorisations and powers, description of the complexity of the work and creativity, the necessary independence and ability to show initiative, external contacts, factors hindering the performance of particular tasks, different from the ones traditionally occurring in typical administrative positions, as well as the required skills and professional experience.

<sup>29</sup> Different surveys have proved that the extent of work valuation practices is limited (involving only 7 % of small enterprises, 9 % of medium-sized enterprises and 33 % of large enterprises (having more than 250 employees)). In most of those cases simplified methods of evaluating were used. Worth noting is also the very low social awareness of the use of work valuation for the elimination of the gender pay gap.

<sup>30</sup> <http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/III%20PK%20126-13.pdf>, accessed 15 September 2015.

on the basis of a labour-law contract or other legal basis (for instance the appointment of academics or civil servants (public officers) who in addition to the protection guaranteed by the Labour Code also benefit from additional protection through special regulations.

'Workers' may be self-employed persons or those employed on civil-law contracts. The latter in principle enjoy only the rights guaranteed in individual contracts concluded with the employer, which means that contrary, for instance, to civil servants they are excluded from the general protection provided under the Labour Code. Those contracts are very favourable for employers since they do not have the obligation to pay most of the social security contributions for such workers.

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, in Article 33 (2) of the Constitution, in Article 18 <sup>3a</sup> (1), Article 18 <sup>3b</sup> (1) point 2 of the LC, and in Article 4 (1-4a) and Article 8(1) point 2 of the Antidiscrimination Law.

The Constitution guarantees equal access of women and men to employment, promotion and positions. This principle is laid down in the Labour Code, underlining that it also covers equal access to vocational training, upgrading professional qualifications, regardless of whether the employment is full-time or part-time. This principle applies to every employee, regardless of the label of her/his employment contract; essential in this respect are the conditions in which the work has to be performed (under another person's guidance as to the place, time and conditions of work). Provisions of the Labour Code in this respect have been supplemented by the Antidiscrimination Law, which contains provisions specifying that, in relation to employment, the prohibition of unequal treatment of all workers inter alia on the ground of sex, shall apply to: access to and receiving of professional training, including additional education, proficiency courses and requalification training (vocational orientation and reorientation), as well as professional apprenticeships (practical training); conditions of undertaking and performing economic or professional activities, in particular in the form of an employment relationship or work on the basis of civil-law and mandate contracts (including the so-called managerial contracts); unpaid employment in the form of voluntary work; access to the activities in trade unions, organisations of employers and professional corporations; and access to and conditions for the enjoyment of publicly available instruments and services of the labour market.

The scope of the protection is the same as that required by the Recast Directive.

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

Yes, in Article 18<sup>3b</sup> (2) point 1 of the LC, and in Article 5(6) of the Antidiscrimination Law. The Labour Code stipulates that proportionate actions aimed at the achievement of a legitimate aim of a different treatment of an employee are not contrary to the principle of equal treatment in employment. This includes inter alia a decision not to employ a person on one or more grounds referred to in Article 18<sup>3a</sup> (1) of the LC, if the nature or conditions of work would result in a situation where any of these grounds constitutes a genuine and determining occupational requirement for the employee.

Article 5 (6) of the Antidiscrimination Law stipulates that its provisions, in general, do not apply to cases of different treatment with regard to the possibility and conditions of undertaking and performing professional activity and undertaking, participating or finishing vocational training, including such performed in higher studies, if, due to the kind and conditions of the particular professional activity, the ground for unequal treatment constitutes a real and crucial professional requirement for a particular person,



which is proportional with respect to achievement of the lawful reason for discriminating against this person.

This definition includes a wider range of exceptions to the equal treatment rule than provided for in Article 14(2) of Directive 2006/54/EC. Firstly it speaks of exceptions not only in the context of undertaking, but also performing professional activity. Secondly, it provides for wider exceptions to the rule of equal treatment with regard to vocational training. They may include not only undertaking of the training, as is the case in the Directive, but also participating in such training and finishing it.

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)?

Yes. The LC does not permit women to be employed to perform work that is particularly arduous or harmful to their health (Article 176 LC). A list of such work has been determined in the Ordinance of the Council of Ministers of 10 September 1996.<sup>31</sup> The idea alone of a general exclusion of the possibility to employ women for particular work, irrespective of their health and physical condition, raises substantial doubts. In addition, the LC provides protection for women who are pregnant or breastfeeding. See more in Section 5 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.?

Not anymore, since the situation of civil servants, uniform servants, etc. has been clarified.

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<sup>31</sup> JoL 1996 No. 114 Items 544 and 545. These prohibitions apply in particular to works involving physical effort, transportation of heavy loads and unnatural body positions. In comparison to its previous version from 1979, this list has been significantly reduced; nevertheless it still is quite extensive. In addition to this, the above provision has been incorrectly placed in Chapter 8 of the LC, regulating the rights of employees regarding parenthood, since it contains prohibitions which apply, not only to pregnant women, but to all women in general.

## **5. Pregnancy and maternity protection; maternity, paternity, parental leave and adoption leave (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. The LC only requires the condition of pregnancy to be confirmed by a medical certificate (Article 185 LC).

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

Yes, in Articles 176 (which applies to women in general without specific reference to protection in case of pregnancy or maternity), 178, 178<sup>1</sup> and 179 of the LC, and in the Ordinance of the Council of Ministers of 10 September 1996, listing the work particularly arduous or harmful to the health of women in general or in particular to pregnant or breastfeeding women (JoL 1996 No. 114, item 544 and 545 with further changes). The Polish law does not distinguish the category of women who have recently given birth.

To particular protection are entitled women who are pregnant or breastfeeding (the Polish law does not distinguish a category of women who have recently given birth). This protection inter alia includes the prohibition to perform particular work. In the light of the above Ordinance, work particularly arduous or harmful to women includes work involving physical effort, work in cold, hot or changing microclimates, work involving noise and vibrations, work involving exposure to electromagnetic waves, ionizing and ultraviolet radiation and work at computer screens exceeding 4 hours daily, work underground, below the surface and at heights, work of divers and all work in environments involving higher or lower pressure. Also forbidden is work in contact with harmful biological substances (e.g. involving the danger of containing B-type hepatitis and HIV), and work involving exposure to harmful chemical substances. The prohibition also includes works involving risk of heavy physical or psychical injuries.

A pregnant woman is prohibited from performing any overtime or night work. She also cannot be posted to work outside of her permanent workplace or employed under the work split-up system, without prior consent (Article 178 LC).<sup>32</sup>

The employer is obliged to respectively modify her working-time pattern and, if this is impossible– assign her to another position. If such transfer is impossible or inadvisable, the women shall be released from the obligation to perform work (Article 179(1) LC, while retaining full pay (Article 179(5) LC). If her remuneration is reduced following the adaptation of working conditions in the current position, reduction of working time, or transfer to another position, the pregnant woman is entitled to compensatory pay (Article 179(4) LC. When the reasons for the above actions have ceased to exist, the employer shall employ this employee in accordance with the contract of employment as regards the type of work and working time (Article 178<sup>1</sup> and 179(6) LC).

#### **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, in Article 177 of the LC. An employer may not terminate a contract of employment with or without notice with a female employee who is pregnant or on maternity leave, unless there are grounds for contract termination without notice through the fault of the

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<sup>32</sup> The work split-up system refers to work scheduled with interruptions (Article 139 LC).

employee, and provided that the trade union representing this employee has consented thereto (Article 177(1)).<sup>33</sup>

Currently the contract with pregnant women concluded for a fixed-term employment contract or an employment contract concluded for the period necessary to perform a specific task or for a probationary period of more than one month that would otherwise be terminated after the third month of the employee's pregnancy, shall be extended until the date of childbirth (Article 177(3) LC.<sup>34</sup> This provision can not be applied to fixed-term employment contracts concluded to replace an employee during a justified absence from work (Article 177<sup>1</sup>LC) or an employment contract with a trade union representing that employee (Article 177(4) LC).

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, in Article 30(4) of the LC. This obligation results from general provisions of the LC. In any case of dismissal the employer is obliged to present the reasons for the dissolution or termination of the contract. These reasons should be precise and formulated in such a way that it is understandable to the employee, so that he/she himself is able to decide whether it is true or not. The employee must see and understand the reason for the dissolution or termination of the contract.

## 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 length of maternity leave depends on the number of children born from one pregnancy. Article 180 of the LC stipulates that a female employee is entitled to the following periods of maternity leave: 1) 20 weeks (140 days) when giving birth to one child in one birth; 2) 31 weeks (217 days) when giving birth to two children in one birth; 3) 33 weeks (231 days) when giving birth to three children in one birth; 4) 35 weeks (245 days) when giving birth to four children in one birth; 5) 37 weeks (259 days) when giving birth to five or more children in one birth.

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

No. Until 2009, the LC included the recommendation that 2 weeks of the leave should be taken before the childbirth. However, due to the fact that this provision was generally ignored, it has been abolished. Currently Article 180(3) of the LC provides that no more than 6 weeks of maternity leave may be used prior to the expected date of childbirth.

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

Yes, in Articles 45(3), 56 and 67(2) and Articles 243 - 265 of the LC. In such cases general rules for resolving disputes deriving from employment agreements apply, with

<sup>33</sup> In the opinion of the Supreme Court, it is irrelevant for the protection of pregnant women from dismissal whether the employee was aware of her pregnancy, the employer had been informed about this fact, or that the pregnancy was terminated by miscarriage. The only thing that matters is the objective existence of pregnancy at the moment of dismissal.

<sup>34</sup> Since 22 February 2016, when the amendments of the LC, introduced by the Law of 25 June 2015 (JoL 2015 Item 1220) came into force, the provision on extension of labour contract, mentioned in Article 177 (2) LC, will not be applied to women employed for the period necessary to perform a specific task (Article 177 (3) LC).

some modifications. These general provisions stipulate that disputes over claims arising from an employment relationship shall be settled by labour courts, which form separate organisational pillar of district courts (Article 262 LC). According to Articles 44 and 45(3) as well as Articles 56 and 67(2) of the LC, dissolution or termination of the employment agreement during pregnancy and maternity leave, which contradicts the rules defined in Article 177 of the LC, is not absolutely invalid *de iure*, but becomes relatively invalid. This means that only after a judgment from the Labour Court declaring the dissolution of labour contract unlawful can the employee return to work. If therefore a respective claim is not lodged by the employee within the specified period, the dissolution of employment contract will be valid. It should be noted that if the court finds the dissolution to violate the provisions on the protection of women during pregnancy and maternity leave, upon her bringing a claim, it is obliged to declare the dissolution invalid and, if the contract has already been terminated, it has to reinstate her to work on the previous conditions. Awarding damages instead of reinstatement to work is allowed only when the latter is not possible due to reasons listed explicitly in the law, namely in case of the employer's bankruptcy or liquidation (Article 41<sup>1</sup> LC), i.e. when the provisions about protection of employees during pregnancy and on maternity leave do not apply. With regard to other employees awarding damages instead of reinstatement to work (if postulated by the employee) is possible in cases when reinstatement is impossible, but in such cases the decision as to whether one of these conditions applies remains within the discretionary power of the court.

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

Not explicitly. However, Article 179 (4-6) of the LC guarantees for example that, if the women during the pregnancy will be transferred to another job or her work hours will be limited, or even when she will be released from performing the work, she should receive the same pay as it states in her employment contract and will be reinstalled at the previous workplace as soon as the reasons for change of employment cease to exist.

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

The allowances during pregnancy and maternity leave are higher than 'normal' sickness allowances, but equal to the sickness allowance to which women are entitled during pregnancy. The maternity allowances and sickness allowances during pregnancy amount to 100 % of the base for calculating the benefit, pursuant to Articles 31 and 11 of the Law on Maternity Cash Benefits (i.e. pursuant to Article 36 of this Law the average salary of the last 12 months).<sup>35</sup> The 'regular' sickness benefits amount to only 80 % of the above base. There is no ceiling in national law.

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

No, there is no such need.

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

Yes, in Articles 4 and 29 of the Law on Cash Maternity benefits.

The conditions for eligibility for maternity benefits differ from those related to sickness benefits. According to Article 29 of the above-mentioned Law, the only condition for

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<sup>35</sup> In addition if the sickness occurred during pregnancy the allowance is paid longer ('normally' max. 182 days, during pregnancy max. 270 days).

receiving maternity benefits, both by a person employed under an employment contract and by a self-employed person, is the existence of a valid sickness insurance in the meaning of the Law of 13 October 1998 on the System of Social Security. From 1 January 2016,<sup>36</sup> new provisions regarding self-employed persons are to be applied, according to which the amount of maternity benefits while conducting commercial activity will depend on the period of paying contribution fees and on their amount. This change of the law, considered to be discriminatory for self-employed women (since employees still receive maternity benefits according to their actual average salary), was introduced by the Law of 15 May 2015 on the amendment of the Law on Maternity Cash Benefits and some other laws.

As regards sickness benefits, if the worker is subject to obligatory insurance (as is the case with employees on an employment contract), then the required insurance period amounts to 30 days of uninterrupted sickness insurance (which does not have to be with the same employer). If the worker is insured on a voluntary basis (as e.g. self-employed persons), the minimum insurance period amounts to 90 days (Article 4 of the Law on Cash Maternity Benefits).

5.2.7 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, in Article 183<sup>2</sup> of the LC. According to this provision, after the end of a maternity leave the employer shall accept an employee to resume work in the previous position or, if this is not possible, in a position equivalent to the position held before the leave or in another position that corresponds to the employee's professional qualifications, against remuneration in the amount that would be due if the leave had not been used.<sup>37</sup> All changes in remuneration which occurred during this leave should be included.<sup>38</sup>

### 5.3 Adoption leave

5.3.1 Does national legislation provide for adoption leave?

Yes, in Article 183 LC in the wording introduced by the law of 6 December 2008.<sup>39</sup> The length of the leave depends on the number of children adopted at the same time and corresponds with the leave at childbirth. It amounts to 20 weeks (210 days) for one child and up to 37 weeks (258 days) for five or more children.

Such leave may be taken by the employee (adoptive mother or adoptive father) until the child is 7 years old (10 for a child with disability). If for example the child is to turn seven only a few weeks after being adopted, the employee is entitled to a minimum period of leave of 9 weeks (Article 183(2) LC). A condition for receiving leave in case of adoption is assuming the care of a child and applying to a family court for the adoption procedure or accepting the child for upbringing as foster family (with the exception of professional foster families, Article 183(1) LC).

<sup>36</sup> The entering into force of these amendments has been postponed because of protests of self-employed mothers <https://lawsolutions.eu/swiadczenie-rodzicielskie-a-zasilek-macierzynski-dla-przedsiębiorczych-matek/>, accessed 14 September 2015.

<sup>37</sup> This means that if this time limit has been observed, the worker has the right to be admitted to work and to receive remuneration for the time of her/his readiness to perform work. See: Świątkowski, A.M. Kodeks pracy. Komentarz [Labour Code. Commentary], 4th edition, C.H. Beck S. Warszawa 2012, p. 860.

<sup>38</sup> Patulski, W. in: Kodeks pracy. komentarz [Labour Code. Commentary], ed. M. Muszalski, 8<sup>th</sup> edition, C.H. Beck. Warszawa 2011, p. 8804.

<sup>39</sup> JoL 2008 No. 237, Item 1654 with amendments, in force since 1 January 2009.

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

No.

5.3.3 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. The protection of the employment relationship of foster parents is the same as that for natural parents.

Articles 183(1) and 183<sup>2</sup> of the LC apply here. According to Article 183(1) of the LC, several provisions regarding the protection of natural parents are to be applied accordingly, among others to the consequences of unlawful dissolution of employment relationship with foster parents (Articles 45 (3), 47, 50(5), 57(2) LC).

## 5.4 Parental leave

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

Yes. However, in the Polish legal system it is not clear which type of leaves should be considered as parental leave within the meaning of Directive 2010/18.

The formal amendment of the Labour Code with respect to childcare leave, implementing the provisions of Directive 2010/18, took place in the Law of 26 July 2013,<sup>40</sup> which entered into force on 1 October 2013.<sup>41</sup> The tables to illustrate the correlation between the above Directive and the transposition measures were an appendix to Parliamentary Document No. 909 of 21 November 2012, including the draft law.<sup>42</sup> Therefore beyond doubt regarded as such leave should be the childcare leave (*urlop wychowawczy*) provided for in Article 186 of the LC. As implementation of Directive 2010/18 may also be regarded other forms of childbirth-related leaves introduced in 2010 and in 2013, such as additional maternity leave (*dodatkowy urlop macierzyński*) (Article 182<sup>1</sup> LC)<sup>43</sup> and parental leave (*urlop rodzicielski*) (Article 182<sup>1a</sup> LC).<sup>44</sup> Despite the fact that the regulations introducing these types of leaves mention neither the above Directive<sup>45</sup>, nor its predecessor, they have been considered as parental leave in the meaning of Directive 2010/18 due to the specific function of those leaves. On 2 January 2016 will enter into force amendments to the Labour Code of 24 July 2015, according to which additional

<sup>40</sup> Law of 26 July 2013 amending Labour Code, JoL 2013 Item 1028. It should be added that Poland asked for the implementation deadline of this Directive to be postponed.

<sup>41</sup> With regard to these changes, on the basis of the authorisation included in Article 186<sup>6</sup> of the LC, a new ordinance of the Minister of Labour and Social Policy of 18 September was issued, regarding detailed conditions for granting childcare leave, JoL 2013, Item 1139.

<sup>42</sup> They were published together with the draft on the website: <http://www.sejm.gov.pl/sejm7.nsf/PrzebiegProc.xsp?nr=909>. It is worth noting that the *European trade union confederation (ETUC) interpretation guide to Directive 2010/18* has also been translated into Polish and published.

<sup>43</sup> Provisions regarding additional maternity leave as well as special paternity leave were introduced into the LC by the Law of 25 November 2010 (JoL 2010 No 294 pos. 1655). Paternity leave, originally at this time amounting to one week, has been available since 1 January 2011.

<sup>44</sup> The current wording (parental leave: *urlop rodzicielski*) was introduced by the Law of 28 May 2013 on the amendment of the LC and other laws. JoL 2013 Pos. 675, and Parliamentary Document No. 1310 with reasoning, <http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=1310>, accessed 5 April 2014. It is worth mentioning that by changing the regulation, the language of legal provisions regarding special parental rights was also changed, and became more inclusive with respect to men.

<sup>45</sup> It should be noted that the introduction of all childbirth-related leaves was justified by the pro-natalist government policy. At the same time the reasoning to the draft law of 2013 emphasized the fact that its contents lie outside the scope of EU law (See: Parliamentary Print No. 939, <http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=939>, accessed 5 April 2014).

maternity leave and parental leave will be combined together and named 'parental leave' (*urlop rodzicielski*). This leave will be regulated in Articles 182<sup>1a</sup>, 182<sup>1c</sup>, 182<sup>1d</sup> - 182<sup>1g</sup> of the LC.

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

Yes. The provisions of the LC, including those regarding parental leave (*urlop rodzicielski*) and childcare (*urlop wychowawczy*), apply both to the public sector and to the private sector and to both parents as well as adoptive parents are entitled to them.

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?

Yes. The right to parental and childcare leave does not depend on the type of employment contract. This means that the leave is granted both to persons employed on the basis of an open-ended contract and to workers with a contract for a specified period, e.g. for a trial period, for a fixed-term period, or for the performance of a specific work. Temporary workers, both male and female, are entitled to childbirth-related leaves and childcare leave according to the general rules stipulated in the LC.<sup>46</sup>

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.

Currently the additional maternity leave has the duration of six or eight weeks (depending on the number of children born from one pregnancy) and has to be taken directly after expiration of the obligatory maternity leave (Articles 179<sup>2</sup>(1) and 182<sup>1a</sup> LC). Working women are also entitled to 26 weeks of parental leave (*urlop rodzicielski*) irrespective of the amount of children born from one pregnancy. In addition, each parent is entitled to unpaid childcare leave (*urlop wychowawczy*) of a duration which generally amounts to a maximum of 36 months (Article 186 (2) LC).

As a result of the transposition of Directive 2010/18, the possibility to take childcare leave has been extended until the child reaches the age of five and a provision has been introduced to provide that parents (or adoptive parents) may share childcare leave for a maximum period of four months and that each of the parents is solely entitled to one month which may not be transferred to the other parent (Article 186(4) LC).<sup>47</sup> This last rule does not apply to parental leave (*urlop rodzicielski*).

There are no differences as to the duration of these leaves between the public and the private sector.<sup>48</sup>

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

The Polish legislator, while implementing the Framework Agreement on Directive 96/34/EC and eventually the present Directive, did not fully transfer the right to childbirth-related leaves and childcare leave as an individual right of every parent. Up to

<sup>46</sup> Law of 9 July 2003 on the employment of temporary workers (JoL No. 166, Item 1608).

<sup>47</sup> There are some exceptions to this rule. One parent is entitled to the entire childcare leave, if the other parent has died, is not entitled to parental powers or if these powers have been limited or suspended (Article 186(9) LC). A leave of 36 months also applies to single-parent families (Article 186(10) LC).

<sup>48</sup> Starting from 2 January 2016 the unified parental leave (*urlop rodzicielski*) will amount to 32 weeks in case of one child and 34 weeks in case of two or more children in one pregnancy (Article 182<sup>1a</sup> LC in the wording introduced by the Law of 24 July 2015).

recently the father generally only had a derived right to the leave, strictly connected with the right of the mother. Only paternity leave (and one month of childcare leave) was an exclusive right of the father. As a result, until May 2015 the working father was not entitled to any part of maternity leave, additional leave or parental leave, if the mother was not entitled to them, e.g. because she was not employed and therefore not subject to social security, irrespective of the fact that he contributed to the sickness insurance system from his salary. The same situation occurred if the mother died during delivery (before being able to take the maternity leave).<sup>49</sup> This situation was partially changed by the law of 15 May 2015 on the amendment of the Law on financial benefits from the social security insurance in case of sickness and maternity and some other laws.<sup>50</sup> The major legislative change, adjusting Polish regulations to the requirements of the Directive will enter into force on 2 January 2016 with the Law of 24 July 2015 on amendment of the Labour Code and some other laws.<sup>51</sup>

Until 2016 the parents can take childcare leave together only during four months. In addition each parent has to take one month of this leave. Even if these four months were qualified as individual rights of each parent, this is certainly not the case for the other 32 months of this leave. As a consequence only one of the parents or adoptive parents, eligible for childcare leave, may use this leave longer than four months. Also, only one of them has the right to shortened working hours.<sup>52</sup> As of 2 January 2016 Article 186(3<sup>1</sup>) LC entitles both parents or caretakers of the child together to childcare leave. Childcare leave may be taken by both parents or caretakers at the same time, without any time restrictions; however the overall amount of the leave may not exceed the maximum amount of 36 months (72 months for a handicapped child). This leave also has to be granted until the end of the calendar year in which the child reaches the age of 6 (18 for a handicapped child) (Article 186(6) LC).

<sup>49</sup> This inconsistency of the law was reported by academics and the subject of parliamentary interpellation No. 20171 in response to which the Ministry of Labour and Social Policy initially answered that this is indeed a legal gap, but there are no plans to fix it. However, after a tragic incident with a father of five children who was refused maternity leave after his unemployed wife died in childbirth, the Ministry changed its mind and promised to soon prepare a draft law in this respect; [http://wyborcza.pl/1,91446,16000256,MPiPS\\_gotowy\\_projekt\\_o\\_urlojach\\_rodzicielskich\\_m\\_in\\_.html](http://wyborcza.pl/1,91446,16000256,MPiPS_gotowy_projekt_o_urlojach_rodzicielskich_m_in_.html), <http://www.regiopraca.pl/porta/porady/mama-w-pracy/gotowy-projekt-o-urlojach-rodzicielskich-min-dla-samotnych-ojcow>, accessed 1 June 2015.

<sup>50</sup> JoL 2015, Item 1066. This Law gave the insured father (or the closest family member) entitlement to maternity benefits in case of the mother's death, the mother abandoning the child, or the mother's inability to live independently or to take care of the child. These amendments are already in force. However, those amendments while extending the rights of the insured father in cases when the insured mother did not use, for indicated reasons the maternity leave (or benefits) to which she was entitled failed to tackle the rights of the insured father, when the mother was not insured (ref.: Flash Report 2015/2 updating Flash Report 2015/1).

<sup>51</sup> Law of 24 July 2015 on amendment of the Labour Code and some other laws. The aim of this proposal was to facilitate reconciliation of work and family life. This aim was to be achieved by introducing legislative changes in two areas: organization of working time and parenthood-related leaves. Eventually however the Law did not include the amendments dealing with the organization of working time. In particular this Law introduces a new provision (Article 175<sup>1</sup> LC), amending the material scope of the regulation by adopting full interchangeability of rights, resulting from the labour law and social security regulations (This change resulted from the definition of insured person, provided for in the newly adopted Article 175<sup>1</sup> LC). In practice this means the possibility to share childcare-related rights by the parents, if only one of them has employee status, while the other one is covered by social security in case of sickness or pregnancy resulting from other sources (e.g. self-employment). Furthermore, subject to change were the rules for taking maternity leave in cases when the mother has been issued a decision on inability for independent existence (Article 180 (8) LC), remains at a hospital (Article 180(10 and 11) LC), passed away (Article 180 (13) LC) or abandoned her child (Article 180(14) LC). As a result of this change, in those situations the right to maternity leave transfers to the father of the child (employed or otherwise insured), also in the case when the mother was not insured (Article 180(15) LC) and Article 28(9) of the amended Law of 26 June 1999 on cash maternity benefits.

<sup>52</sup> The First President of the Supreme Court in his opinion about the draft law adjusting the LC to Directive 2010/18 considered that this situation is not compliant with the Directive, because if a Member State grants rights to leave exceeding the minimum length required by EU law, this means that EU regulations also apply to the part of these rights that exceeds this minimum. Compare: Opinion of 20 December 2012 to the draft Law. Parliamentary Document No. 909, p. 3.



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)?

At present all childbirth-related leaves have to be used one after the other.<sup>53</sup> As a result the paid parental leave may only be used during the first year of the child's life.<sup>54</sup> At a later time the parents may only use the unpaid childcare leave. There are also legal limitations as to the possibility to take those leaves in parts, which will cease to exist on 2 January 2016.<sup>55</sup>

Until 2016 a worker could combine the additional maternity leave or parental leave with work for the same employer, not exceeding half of the regular working time. In such case the leave is granted for the rest of the working time. Only in exceptional cases, with regard to problems with organisation of work, may the employer refuse to grant a request in this respect. He is obliged to submit the reasons for his refusal in writing (Article 182<sup>1</sup>(6) LC). Currently in such situation however, there is no possibility to extend the length of parental leave. For this reason, commencing employment during parental leave was very rare. After 2 January 2016 this possibility will be introduced with regard to the unified parental leave.<sup>56</sup>

In addition, the worker may file a written request to decrease his working time to a number of hours not less than half of full-time work in the period in which he would have been entitled to childcare leave (*urlop wychowawczy*) (Article 186<sup>7</sup>(1) LC). The employer may not refuse such request.

The Polish regulations regarding teleworking and other flexible work arrangements are not explicitly related to better reconciliation, but remain available for parents returning from parental leave on a general basis (Articles 67<sup>5</sup> - 67<sup>18</sup> LC).

The Law of 24 July 2015 on amendment of the Labour Code and some other laws<sup>57</sup> did not include all changes originally proposed in the draft. The amendments dealing with the organization of working time<sup>58</sup> were dropped by the initiators during the parliamentary debate.<sup>59</sup>

<sup>53</sup> The rule of direct use of all parts of the childbirth-related leave does not apply to childcare leave, which may be used at any time before the child reaches the age of 5 (Article 186(8) LC).

<sup>54</sup> In the light of the amendment of the Labour Code, by the Law of 24 July 2015 (JoL 2015, Item 1268) which will enter into force on 2 January 2016, also the elasticity of the unified parental leave will be enhanced, in particular by establishing of an alternative path allowing to use part (16 weeks) of the parental leave not during the first year of the child's life, but at later time, until the end of the calendar year in which the child finishes its 6<sup>th</sup> year of life.

<sup>55</sup> Additional maternity leave is granted as a whole, or divided into two parts. Parental leave is granted as a whole, or divided into up to three parts (not shorter than 8 weeks), which have to follow each other directly (Article 182<sup>2a</sup> (2) LC).

<sup>56</sup> Would such leave be combined e.g. with half-time employment, its length could thus be extended to 64 months (68 months in case of multiple children at one birth) (Article 182<sup>1e</sup> (2-5) and (7) LC).

<sup>57</sup> Law of 24 July 2015 on amendment of the Labour Code and some other laws. JoL 2015, Item 1268.

<sup>58</sup> The draft law proposed to amend the general legal instrument concerning shortened working time (Article 29<sup>1</sup> LC), the regulation of flexible working hours (Article 143 <sup>1</sup> LC) and shortened working week (Article 150 LC). According to the draft law the employer would be obliged to accept a respective request of the employee, justified by 'family obligations', unless it would not be possible for the work organization or the type of work performed by the employee (a similar solution is already in force with respect to combining additional maternity leave and parental leave with performing work). The employer would also be obliged to inform the worker in writing on the reasons for the rejection of the request, but only in enterprises employing at least 20 workers. Parliamentary Document No. 3288, available at: <http://www.sejm.gov.pl/sejm7.nsf/PrzebiegProc.xsp?nr=3288>, accessed 12 September 2015.

<sup>59</sup> As reason for this the drafters indicated a lack of consensus as to the wording of particular provisions during discussions with different ministries, as well as the fear, that further negotiations might delay works on the remaining part of the draft law, which should be adopted in this parliamentary period (the upcoming parliamentary elections are scheduled on 25 October 2015) Ref. Recording from the meeting of the permanent under-commission for amending the Labour Code and Code of Administrative Procedure of 24

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)?

At present there are short fixed time limits for filing (or withdrawing) the request (seven or fourteen days), which has been criticised.<sup>60</sup> In order to provide better protection for the interests of the employer, since 2 January 2016 the notice period, both for the unified paid parental leave, and for unpaid childcare leave will be prolonged to 21 days.<sup>61</sup>

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

Yes, but only in case of unpaid childcare leave (*urlop wychowawczy*; Article 186(1) LC). In order to obtain the right to childcare leave, a worker must be in service for at least six months. The six-month employment period includes previous employments (Article 186(1) LC), not necessarily with the employer where the request is submitted. This six-month period may include all previous employment periods on the basis of an employment relationship, regardless of the reason why those relationships were terminated and regardless of the length of gaps between subsequent employments (Article 186 (1)LC). For citizens of EU and EEA Member States, the six-month period may also include employment periods on the territory of those countries.<sup>62</sup> The six-month employment period, according to case law, also includes registered unemployment periods for which the person had received unemployment benefits.<sup>63</sup> In the case of parental leave, it is enough to establish the existence of the insurance. In case of employees also the overall amount of parental benefits does not depend on the length of services or length of insurance, but solely on the amount of salary.

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

No. The employer is obliged to allow the worker to take advantage of the leave during the period indicated in the request if it has been submitted within the prescribed time limits. Should any of the requests be submitted without observing this deadline, the employer may delay the beginning of the leave, but not longer than by two weeks from the day on which the request has been filed. There are no other legal regulations regarding the possibility of the employer postponing childbirth and childcare-related leaves.

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June 2015.

[http://www.sejm.gov.pl/Sejm7.nsf/transmisje\\_arch.xsp?unid=C310808F03A4FC0AC1257E68003A4369](http://www.sejm.gov.pl/Sejm7.nsf/transmisje_arch.xsp?unid=C310808F03A4FC0AC1257E68003A4369), accessed 12 September 2015.

<sup>60</sup> It is assumed that the two-week notice period is sufficient for the employer to be able to organize substitution for the employee taking advantage of the leave. However the opinion has been expressed that in fact it is too short. See: Świątkowski, A.M. Kodeks pracy. Komentarz [Labour Code. Commentary], 4<sup>th</sup> edition, C.H. Beck S. Warszawa 2012, p. 860.

<sup>61</sup> In order to allow the employer better planning of work and eliminating possible negative effects resulting from taking advantage of their parenthood-related rights by the employees, as of 2 January 2016 the minimal length of one part of the leave will amount to 8 weeks. Also earlier return to work by an employee, who stops the parental leave or childcare leave, will only be possible upon consent of the employer. Additionally, as a safeguard of the employer's interests, his consent will be required for proportional extension of the parental leave, when it is to be combined with work.

<sup>62</sup> See: Świątkowski, A.M. Kodeks pracy. Komentarz [Labour Code. Commentary], 4<sup>th</sup> edition, C.H. Beck. Warszawa 2012, p. 862.

<sup>63</sup> See: Ruling of the Court of Appeals in Białystok of 18 June 1998, III AUa 296/98, OSA 1999/5/28.

#### 5.4.10 Are there special arrangements for small firms?

Currently there are no special regulations regarding taking parental or childcare leave by workers of small firms.

#### 5.4.11 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, in Article 186(3), 183(1) and 182<sup>3</sup>(1) of the LC. According to Article 186(3) if, due to a health condition confirmed by a statement about disability, a child requires personal care by a worker, then, regardless of the 'regular' time limits of leaves the worker may take 36 additional months of childcare leave, and the additional childcare leave may be granted before the child reaches the age of 18, even if the worker has not previously used the first 36 months of childcare leave to which he is entitled before the child reaches the age of 5. In case of adoption of a child with disabilities, according to Article 183(1) LC, the leave on the conditions of the maternity leave may be taken until the child reaches the age of 10 (in other cases 7). The same time limits apply to paternity leave (182<sup>3</sup>(1) LC).

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

Yes, as a rule the employer may not terminate the contract, from the day that the worker submits the request for the leave (or reduced working time) until the last day of the leave (or the day of return to regular work).<sup>64</sup> Also relevant is Article 12 of the Antidiscrimination Law,<sup>65</sup> which also applies to employees, because protection against less favourable treatment has not been regulated in the LC. In the case of violation of the equal treatment rule stipulated in this law, with regard to a natural person, among others with respect to pregnancy, maternity leave, additional maternity leave, leave granted under the terms and conditions of maternity leave, paternal leave, parental leave or childcare leave, this person has the right to claim damages, according to Article 13 of this law.

#### 5.4.13 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?

Yes. During the childbirth and childcare-related leaves (or requested shortening of working time) the LC provides for special protection of the employment relationship. According to Articles 183<sup>2</sup> and 186<sup>4</sup> of the LC the employer has the obligation to readmit a worker at the end of the childbirth or childcare-related leave to her/his former position. If employment in the same position is not possible, the employer has the obligation to employ her/him in an equivalent position or on the same conditions at another job position, corresponding to the worker's professional qualifications, for remuneration not lower than the remuneration for work that the worker would have received if not having been on leave.<sup>66</sup>

<sup>64</sup> Not longer however, than during a period of twelve months. See: Articles 186.1 and 186.8 LC. Further however, the LC allows for termination of the employment contract by the employer in case of bankruptcy or liquidation of the employer, and - in the case of childcare leave - also reasons justifying termination of the employment contract without notice through the fault of the worker (disciplinary dismissal, Article 177(4)(5), 186.1(1) LC).

<sup>65</sup> Article 12(1) of the Antidiscrimination Law after amendments introduced by the Law of 28 May 2013 (JoL 23 Item 675). The amendment entered into force on 17 June 2013.

<sup>66</sup> In case of childcare leave the remuneration should be not lower than the remuneration on the day when the employee started work in the same position as before the leave (Article 186<sup>4</sup> LC).

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

Yes, the LC does not explicitly state that the rights acquired (or in the process of being acquired) by the worker on the date on which parental leave starts shall stand until the end of it. According to case law however, workers on childcare leave (*urlop wychowawczy*) e.g. have the right to a premium (jubilee) reward (*nagroda jubileuszowa*) for a long duration of work at the same employer (e.g. 15 years), if the time required for using it elapsed during the childcare leave.<sup>67</sup> They may also receive disability benefits if such a condition appears during childcare leave.<sup>68</sup> In case of privatisation of his enterprise, the employee is also entitled to buy shares on preferential conditions, just as the other employees.<sup>69</sup> However, during the 3 years of childcare leave they are not entitled to paid annual leave, which they only can take before the childcare leave starts.<sup>70</sup>

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

The childcare leave is considered as justified interruption of work. The employment relationship of persons on childbirth and childcare leaves is maintained.<sup>71</sup>

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

An employee on childcare leave is covered by obligatory social and healthcare insurance.<sup>72</sup> Contributions to these insurances are paid to the Social Security Institution (*ZUS*) from the state budget.

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

No. The sickness insurance contribution (amounting to 2.45 % of the remuneration) is financed entirely by the employee. The employer deducts it automatically from her/his salary and transfers it to *ZUS*.

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

Yes. During maternity, additional maternity, and paternity leave the employee receives an allowance equal to 100 % of the salary. In case of parental leave (*urlop rodzicielski*) the allowance is 60 or 80 % of the salary (depending on the time of the declaration about taking this leave).<sup>73</sup> The allowances are paid by *ZUS*, which receives the sickness insurance contributions.

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<sup>67</sup> Resolution of Supreme Court of 3 June 1992, I PZP 33/92, OSN 1993, Nos 1-2 Pos. 10.

<sup>68</sup> Judgment of Supreme Court of 15 January 1987, II URN 289/86, PiZS 1987, No. 7 p. 62.

<sup>69</sup> Resolution of Supreme Court of 6 February, III ZP 14/96, OSNAPIUS 1997 No. 18 Pos. 334.

<sup>70</sup> See Patulski, W. in *Kodeks Pracy. Komentarz (Labour Code. Commentary)* ed. W. Muszalski, C.H. Beck, Warsaw 2011, p. 895.

<sup>71</sup> In accordance with Article 186 <sup>1</sup> LC the termination of the employment contract with an employee during childcare leave is prohibited.

<sup>72</sup> A person on childcare leave is not covered by sickness and accidents insurance.

<sup>73</sup> The allowance for parental leave is 60% of the salary. However if the woman declares not later than 14 days after the child birth that she will take maternity, additional maternity and parental leaves the allowance in such a case will be 80% of the salary.

Childcare leave (*urlop wychowawczy*) is not remunerated. Allowances in the form of a special supplement for taking care of a child are provided within the social security system but only low-income families are entitled to these family benefits.

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

The relatively long period of paid parental leave deserves a positive assessment. Currently not all requirements resulting from Directive 2010/18 have been implemented into the Polish legal system.<sup>74</sup> Most of the criticism refers to the lack of proper implementation of Clause 2 Section 1 of the Directive. Subject to criticism is also the multiplication of the various leaves related to the birth of a child, each having different consequences and a different form, without indication of the purpose such differentiation is supposed to serve. The number of leaves is to be reduced by the law of 24 July 2015 entering into force on 2 January 2016, however where the current regulation in certain points remains (e.g. in relation to the leave in case of adoption) is very unclear.<sup>75</sup> Still subject to criticism may be the lack of regulations regarding flexible working time in a situation when this occurs for family reasons.<sup>76</sup>

## 5.5 Paternity leave

5.5.1 Does national legislation provide for paternity leave?

Yes, in Article 182<sup>3</sup> of the LC. A male employee who is a father taking care of a child is entitled to paternity leave of 2 weeks, but in no case later than when the child is 12 months old, or – in case of adoption – 12 months after the date when an adoption order has become final, and until the child is 7 years old. For a child with disabilities the leave may be taken until the child is 10 years old.<sup>77</sup>

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)?

Yes, in Article 182<sup>3</sup>(3) of the LC. With regard to father accordingly applied should be the provisions safeguarding the durability of the employment agreement during maternity leave (reference to Article 177 LC) as well as the guarantees of coming back to the same position when returning from paternity leave (reference to Article 183<sup>2</sup> LC).

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<sup>74</sup> The First President of the Supreme Court in his opinion about the draft law, adjusting the Polish Labour Code to Directive 2010/18 considered that this situation is not compliant with the Directive because if a Member State grants rights to leave exceeding the minimum length required by EU law, this means that EU regulations also apply to the part of these rights that exceeds this minimum. Compare: Opinion of 20 December 2012 to the draft Law. Parliamentary Document No. 909, p. 3.

<sup>75</sup> Ref.: Godlewska Bujok, B. 'Uprawnienia związane z rodzicielstwem. Nowa odsłona.' (Parenthood-related rights. A new construction) *Praca i Zabezpieczenie Społeczne* 2015 No. 9.

<sup>76</sup> Godlewska-Bujok, B. 'Implementacja dyrektywy 2010/18/UE dotyczącej urlopu rodzicielskiego' (Implementation of Directive 2010/18/UE on parental leave) *Prawo Europejskie w Praktyce* 2013 December pp. 52-53.

<sup>77</sup> It should be noted that as of 2 January 2016 this provision will be amended. The male employee will then be able to use the 2 weeks of paternity leave until the child is 24 months old (or 24 months from the date when an adoption order has become final). Additionally the possibility will be introduced to take this leave in parts (not shorter than 1 week). The employer will be explicitly obliged to approve the worker's request for such leave (Article 182<sup>3</sup> (1<sup>1</sup>) and (2) LC).

## **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, in Article 188 of the LC, and Articles 32(1) and 35(1) of the Law on cash maternity benefits. According to Article 188 of the LC, the employee taking care of at least one child under 14 is entitled to 2 days off work in every calendar year while maintaining the right to remuneration.<sup>78</sup> No evidence of the actual existence of urgent family reasons is required. This right is granted regardless of the number of children. When both parents work, the right to this two-day release from work is granted only to one person (Article 188<sup>1</sup> LC).

Other cases of time off from work on the grounds of force majeure are regulated in the Law on cash maternity benefits. According to Article 32(1) of this Law, a benefit is granted to the insured worker who has been released from the obligation to perform work due to the need to provide personal care for: a sick child until it reaches the age of fourteen; or a child younger than eight in the event of the unforeseen closing of the nursery, kindergarten or school; or due to sickness or childbirth of the spouse of the insured person. The monthly care benefits amount to 80 % of the base for calculating the benefits (Article 35(1) of the above Law).

The care benefit will be granted for the period of release from work in the cases mentioned above, due to the need to provide personal care, no longer however than 60 days per year.

## **5.7 Leave in relation to surrogacy**

- 5.7.1 Is parental leave available in case of surrogacy?

Surrogacy is not regulated in Poland. For this reason the issue of leaves connected with childcare in such situations has not been regulated separately either.

## **5.8 Leave sharing arrangements**

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

Yes, in Article 180(5) of the LC, covering the conditions for, and limitations of, any rights to share maternity leave.

After having used at least 14 weeks of maternity leave<sup>79</sup> the female employee may give up the unused part of the leave. In such case, this part will be granted to the employee-father taking care of the child, upon his written request. It should be noted that currently, in order to be able to transfer the remaining part of the leave to the father, the mother has to be entitled to the leave herself and at least start taking the leave. Additionally, when the mother is an employee, the father has to be one as well. As of 2 January 2016, these limitations will cease to apply. See point 5.4.5. of this report.

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<sup>78</sup> To this right is also entitled the male employee taking care of a child under 14. However if both parents are employed only one of them may benefit from this form of time off work (Article 189<sup>1</sup> LC).

<sup>79</sup> In some circumstances specified by law (e.g. in case of the death of a new-born, abandonment of the child after delivery) the required minimum period of time of maternity leave which exclusively may be used by women is 8 weeks. Since 2 January 2016 if the woman is unable to sustain existence after 8 weeks the maternity leave may be transferred to any insured family member, who interrupts their professional activity in order to take care of the child. It will also provide for the new possibility that the father being an employee would take the maternity leave if the mother not entitled to maternity benefits starts to work at least for half of working time ( Article 180(17) LC in the wording of the Law of 24 July 2015 ( JoL 2015 Item 1268).

Does the employee have a legal right to choose to take maternity leave on a part-time or full-time basis?

Yes. With the exception of the first weeks, which have to be taken by the employee-mother on a full-time basis.

Is the basis on which leave is taken imposed by law or collective agreement or subject to negotiation between the employee and the employer?

The basis is imposed by Article 180(5) of the LC.

Does the size of the employer play any role as a qualifying condition?

No. The size of the employer does not play any role.

Is whether and to what extent the nature of the entitlement modulated according to the size of the employer, and to what extent (e.g. whether the employer can refuse, postpone or modify requests for leave)?

No. the entitlement is not modulated by the size of the employer. In every case, if such request has been lodged in time, the employer cannot refuse, postpone or modify the request to take leave (or to return to work).

If national law specifically provides for paternity leave: is there a sharing arrangement for maternity leave in addition to a separate paternity leave, or is the father's only possibility of benefitting from childbirth-related leave to share the mother's maternity leave (in addition to the possibility of taking parental leave)?

There is a sharing arrangement for maternity leave in addition to a separate paternity leave.

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

Yes. Currently both a part and the entire additional maternity leave, parental leave and childcare leave may be transferred to the other parent: Article 179<sup>2</sup>(2) of the LC, with regard to additional maternity leave; Article 179<sup>3</sup>(3) of the LC, with regard to parental leave; and Article 186 of the LC, with regard to childcare leave.

In case of additional maternity leave and parental leave, the employee-mother may stop them entirely, or in part, and return to work. These leaves may be divided: the additional maternity leave into up to 2 parts (taken in one or multiple weeks); parental leave in up to 3 parts (taken in weeks, none of which may be shorter than 8 weeks). Childcare leave may be taken in up to 5 parts (Article 186(8) LC). Parents and carers of a child may take the additional maternity and parental leave simultaneously (Article 179<sup>5</sup> LC), only for childcare leave for a period not exceeding 4 months (Article 186(6) LC).<sup>80</sup>

The rule that the 'donor parent' must retain the right to at least one month of leave for his/hers own use applies with regard to childcare leave (*urlop wychowawczy*; Article

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<sup>80</sup> As for 2 January 2016 the rules for using those leaves will be changed. The Law of 24 July 2015 introduces the possibility for the mother and father to share, both parental leave (in its new form) and childbirth-related social security benefits (Article 179<sup>2</sup>-179<sup>5</sup> LC). As a result of this change an employee-mother could interrupt either her childbirth-related leave, or the collection of her maternity benefits, thus giving the father the opportunity to take over the care of the child, even if he was not employed. The father could then be entitled to maternity benefits, instead of the mother.

186(4) LC) only. To this rule there are legal exceptions.<sup>81</sup> In such situation the second parent uses the childcare leave in full (36 months).

## **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 legal right of workers to reduce working time on request has been granted to persons entitled to additional maternity leave, parental leave and childcare leave.

In the case of additional maternity leave and parental leave the combination of leave and work may only be made at the same employer and may not exceed half of the full working time (Article 182<sup>1</sup>(2) LC). This provision is to be applied accordingly to parental leave (Article 182<sup>1a</sup>(6) LC). The commencement of work occurs upon written notification of the employee, filed not shorter than 14 days before the day of returning to work. The employer is under the obligation to accept this request unless it is not possible due to the organisation of work or the type of work performed. The employer shall inform the employee in writing of the grounds for rejecting the request (Article 182<sup>1</sup>(6) and 182<sup>1a</sup>(6) LC). An employee entitled to childcare leave may apply to the employer in writing for a reduction of his working time to no less than 50 per cent of his full working time in the period during which the leave could be taken. The employer is under the obligation to accept this request. There are no exceptions to this rule. If the application is filed shorter than two weeks before the commencement of work in the reduced working-time system, the employer shall reduce the employee's working time not later than two weeks after the application has been submitted. In case of childcare leave the employment relationship enjoys special protection against termination until the date when this employee resumes work in accordance with the regular working time, but in any case the protection cannot be longer than 12 months. During this period a contract of employment may be terminated only if the employer's bankruptcy or liquidation is declared, or if there are grounds for contract termination without notice through the fault of the employee (Article 186<sup>8</sup> LC). This protection does not apply to other leaves (additional maternity and parental leave).

Such a request might be submitted by the insured parents of a child or in cases indicated in the law<sup>82</sup> by insured close relatives (except childcare leave which may apply only to persons who have the status of employee (this relates to the fact that self-employed persons are not entitled to childcare leave)).

In the case of additional maternity leave and parental leave there are no eligibility criteria for employees other than entitlement to sickness/maternity insurance benefits. In the case of childcare leave the employee has to meet certain requirements, in particular have 6 months of service (Article 186 LC). Currently the insured father or other close relatives may take maternity leave, additional maternity leave and parental leave when the insured mother dies, abandons the child or is unable to independently take care of the child (from 2 January 2016 such possibility will also exist when the mother is not entitled to sickness/maternity insurance benefits).

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<sup>81</sup> The exceptions are: when the second parent died, has no parental rights (or those rights have been limited or suspended by a court) (Article 186(9) LC) or it is a single-parent family (Article 186(10)).

<sup>82</sup> The law of 15 May 2015 amending the Law on financial maternity benefits and some other laws (JoL 2015 Item 1066) in force since 14 August 2015.



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

No. With the exception of the case mentioned above, workers do not have any particular legal right to adjust working-time patterns on request, with regard to performing family duties. Regular rules for all employees apply here. In particular the employer may specify flexible working-time patterns (Article 140 <sup>1</sup>LC) or, at the employee's written request, define an individual working-time pattern, (Article 142 LC); adopt a reduced working-week system (Article 142 LC); and adopt a working-time system that includes work only on Fridays, Saturdays, Sundays and holidays.

There are no legal requirements for employees to be able to take advantage of these rights. At the same time, however, there are no legal guarantees of acceptance of the employee's request by the employer, nor are there any guarantees of the consistency of such flexible working-time pattern, once adopted. As mentioned above, a draft law on amending the Labour Code (Parliamentary Document no. 3288) provided for a particular legal regime for adjustment of working-time patterns in cases when the employee's request was justified by family obligations.<sup>83</sup> Ultimately these amendments have not been adopted.

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

Since 2010 such possibility is explicitly provided for by the LC (Chapter IIb Article 67<sup>6</sup> - 67<sup>17</sup> LC). Nevertheless it is not considered to be a legal right of worker to work from home or remotely.<sup>84</sup> As far as possible, the employer shall consider the employee's request to perform work in the form of telework (article 67<sup>7</sup> (3) LC).

The law does not provide for any time limits.

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.

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<sup>83</sup> Ref.: Answer to 5.4.6, in particular: This results from Article 186 <sup>1</sup>LC, according to which the dissolution of the employment contract with an employee during childcare leave is prohibited.

<sup>84</sup> The terms and conditions of telework applied by an employer shall be defined in an agreement between the employer and a trade union, and if more than one trade union is active in the establishment in an agreement between the employer and those trade unions (Article 67<sup>6</sup> LC). During the employment, any change of the terms and conditions of work to those referred to in Article 67<sup>5</sup> may be introduced by agreement of the parties at the employer's or employee's initiative.

## **6. Occupational pension 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?**

Not explicitly. The Law of 20 April 2004 on Occupational Pension Schemes (JoL 2004 No. 116 Item 1207) does not provide for a prohibition to discriminate (both directly and indirectly, on the ground of sex). Also, the Antidiscrimination Law does not refer explicitly to occupational social security schemes but only to social security in general (Article 4 (4b)). This became inter alia the subject of a complaint to the Court of Justice of the EU asserting improper implementation of 2006/54/WE Directive by Poland (Case 2014/2230).<sup>85</sup> With regard to occupational pension schemes only the general prohibition of discrimination applies, provided for in Article 32(2) of the Constitution.

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

According to Article 1 Point 2 of the Law on Occupational Pension Schemes, this systems only apply to employees i.e. any person employed on the basis of a contract of employment (whether appointed, elected or nominated for the relevant contract, or concerning a cooperation contract) on a full-time or part-time basis for a period not shorter than three months. The category of employees entitled to this form of insurance also includes those employed in representative bodies of legal persons, on the basis of a contract, designation or election, as well as members of agricultural production cooperatives, or cooperatives of farmers' units. Participants in this scheme also include *expressis verbis* entitled natural persons conducting an economic activity (self-employed persons), as well as partners of commercial law companies, mentioned in this law, which are subject to mandatory retirement and disability insurance (Article 5(4) of the Law on Occupational Pension Schemes). The aforementioned Law also explicitly authorises participation in the programme of workers receiving a retirement pension from the mandatory social security system, even when they are older than 70. This right is granted to them for as long as they are employees. The law does not explicitly refer to persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, but it seems that as long as they remain employees they are not excluded from the programme. The personal scope of the Polish regulations seems to correspond with the Directive.

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

The material scope of occupational social security schemes in Poland seems to be more restricted than what is provided for in the Directive. The Law on Occupational Pension Schemes does not explicitly specify what particular risks are covered by its protection, because Article 7 of the Directive has not been transposed. Nevertheless, the name of this Law (including the term 'pensions'), as well as information included in handbooks regarding this security system, underline its supplementary role for the retirement system. With respect to Article 6 of this law one can also state that protection from the risk of death is included. This provision, speaking of forms in which such programmes may be introduced, mentions not only retirement funds, but also contracts of group life insurance of employees with an private insurance institution, in the form of group life

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<sup>85</sup> It should be noted that prohibition of sex discrimination is provided for in the Antidiscrimination Law, however only with regard to discrimination in the area of social insurance.

insurance in an insurance capital fund. Such contract may also include accident and sickness insurance if they supplement the life insurance.

#### **6.4 Have the exclusions from the material scope as specified in Article 8 of Directive 2006/54 been implemented in national law?**

The Law on occupational pension schemes does not include a provision transposing Article 8 of the Directive, and therefore it is hard to say if the scope of the exclusions is in line with the admissible range specified in the Directive.

The limitations related to the form of the employment contract and the minimum time limits for employment are the only legal requirements for participating in the system. There is no longer any possibility to participate in the programme by persons who are related to the employee by civil-law relationships, such as agency contracts, service contracts or contract work. The law also excludes the possibility to access the programme for an employee older than 70 (Article 5(1a)).

#### **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 case law could be identified. By adjusting the provisions of the Polish law to EU requirements, the requirements regarding the age of male and female employees who may access the programme have been equalised.

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

Not anymore. Article 18a of the Law of 22 May 2003 on insurance activity<sup>86</sup> currently provides explicitly that the application of the criterion of sex in calculating insurance premiums and benefits cannot result in differentiation of premiums and benefits of particular persons. It is also prohibited to differentiate premiums and benefits, as well as financial services connected with them, with regard to pregnancy and maternity (Article 18b of the Law mentioned above). The latter prohibition applies to life insurance, dowry insurance, childcare, accident pension insurance, sickness insurance as well as other personal and material insurances.

#### **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.**

Problematic is the low popularity of occupational social security schemes despite more than a decade of functioning occupational pension schemes.<sup>87</sup> This results from the fact that only rich firms may afford such programmes, that Poles are rather reluctant to consent to additional 'deductions' from their pensions, as well as from the lack of particular incentives to additional insurances. It is indicated that tax deductions could be an effective incentive.<sup>88</sup> A second issue is the problem of eliminating legal and

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<sup>86</sup> Consolidated text JoL 2013, pos. 950, with amendments.

<sup>87</sup> Even though their number is rising. For instance in 2012 in such programmes around 110 employers and 360 thousand workers participated <http://www.polskieradio.pl/42/259/Artykul/1005787,Dlaczego-Pracownicze-Programy-Emerytalne-nie-wypalily-w-Polsce>; in 2014 already 1064 employers. <http://www.polskieradio.pl/42/4393/Artykul/1440261,Poszukiwane-firmy-zapewniajace-Pracownicze-Programy-Emerytalne>, accessed 15 August 2015.

<sup>88</sup> They could have the form of progressive reliefs, where people earning less would qualify for higher relief and higher supplement from the State, than those earning more.

administrative barriers connected with creating these programmes.<sup>89</sup> A third concern relates to promotional activities, such as information brochures. In order to take advantage of particular solutions, one first has to know they exist.<sup>90</sup>

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<sup>89</sup> In 2014, the average time of processing an application in the register administered by the Financial Supervisory Authority (KNF) amounted to 17 days, if there were no inconsistencies. If corrections were necessary, this period increased to 42 days.

<sup>90</sup> <http://www.polskieradio.pl/42/4393/Artykul/1440261>, Poszukiwane-firmy-zapewniajace-Pracownicze-Programy-Emerytalne.

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

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

Yes, in Article 2a of the Law on the System of Social Insurance; Article 4(4)(b) of the Antidiscrimination Law and Articles 2a and 2b of the Law of 20 April 2004 on promotion of employment, which applies to benefits from social insurance in case of unemployment.<sup>91</sup>

The Law on the System of Social Insurance confirms the rule of equal treatment of all insured, without regard to sex.<sup>92</sup> This equal treatment rule refers in particular to conditions of the obligation to calculate and transfer social insurance contributions, calculate the amount of benefits, period of payments and the duration of the right to benefits, as elements of the system of social insurances (Article 2a(2)). An insured person who believes that the principle of equal treatment has been violated with regard to her, has the right to claim damages before a court (Article 2a(3)). Additionally the Antidiscrimination Law explicitly provides in Article 4(4)(b) that the horizontal protection enshrined in its provisions also applies to any violation of the principle of equal treatment in the access to the social security system.

### **7.2 Is the personal scope of national law relating to statutory social security schemes 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 the Law on the system of Social Insurance corresponds with requirements of the Directive after the reform carried out in 1998, which made the system more universal and uniform in the sense that the application of the Social Security Law was no longer limited to employees, but also covered persons performing work not based on an employment relationship (e.g. the self-employed, persons performing work on the basis of an agency contract or a contract of mandate, artists, priests, etc.). This reform also included into the system public servants remaining in service relationships.<sup>93</sup> The only group still to fall outside the scope of the Law are farmers, who are covered by a separate Law of 20 December 1990 on Social Insurance of Farmers. It should be however emphasized that the farmers insurance system is deemed to be a part of statutory social security system, hence the equal treatment clause enshrined in Article 2a of the Law on the System of Social Insurance and Article 4(4)(b) of the Antidiscrimination Law applies to it.

### **7.3 Is the material scope of national law relating to statutory social security schemes 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.**

All the social risks mentioned in the Article 3 (1) of the Directive 79/7, covered by the Polish statutory social insurance system seems to conform to the requirements of Directive 79/7. In the current system, contributions covered by the Law on the System of Social Insurance are divided into the following categories: old-age and disability pensions, sickness and maternity insurance, insurance against accidents at work and occupational diseases (Article 1 of the above Law). Protection against unemployment in the form of benefits paid from a special Labour Fund, where contributions transferred by the employers and workers are aggregated, for every salary exceeding the minimum salary is provided for in the Chapter 15 of the Law of 20 April 2004 on promotion of

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<sup>91</sup> In the footnote to this Law, which lists the implemented Directives, inter alia figures Directive 2006/54/.

<sup>92</sup> As well as race, ethnical origin, nationality, civil state, and family status.

<sup>93</sup> Still such professions as judges, prosecutors are governed by special regulations.

employment. It is also regulated in the Law of 12 March 2004 on Social Aid (unified text in JoL 2015, item 163, Article 7 4)).

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

In Poland an exception used to apply with respect to the retirement age, which was traditionally different for women and men (respectively 60 and 65). This much-criticised differentiation of the retirement ages of women and men has been in the process of being equalised since 2013.<sup>94</sup> There is hope that this change may lead to a future decrease in the gap between the old-age pensions of retired women and men (according to estimations, without equalising the retirement age, the old-age pensions of women would be about 50 % lower). Nevertheless, at the same time the general retirement age is being increased, to eventually reach the age of 67. It is therefore true that for men the time of obtaining retirement benefits will only be delayed by two years, whereas for women this may be up to seven years, which may be perceived as gender-based discrimination.<sup>95</sup> There is a legislative proposal to return to differentiated retirement ages.<sup>96</sup>

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

No.

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

There are no specific difficulties in relation to implementation of the Directive 79/7.

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<sup>94</sup> The Law on pensions and disability allowances 17 December 1998, after amendments introduced in May 2012 (unified Text JoL 2013 Item 1440 with further amendments) provides that starting from 2013 retirement age augments by one month every quarter of the year. This means that men will retire at the age of 67 in 2020 and women in 2040, [http://wyborcza.pl/1,91446,15897550,Kwestia\\_zrownania\\_wieku\\_emerytalnego\\_kobiet\\_i\\_mezczyzn.html#ixzz3kZjhNwNz](http://wyborcza.pl/1,91446,15897550,Kwestia_zrownania_wieku_emerytalnego_kobiet_i_mezczyzn.html#ixzz3kZjhNwNz), accessed 20 September 2015.

<sup>95</sup> The Constitutional Court however in the ruling of 7 May 2014 (K 43/12) decided that the rising of the retirement age remains in compliance with the Constitution. The claim was presented by Trade Union 'Solidarność' and deputies from opposition party PiS (Law and Justice).

<sup>96</sup> Such draft law was presented to Parliament by President A. Duda, elected in 2015. <http://info.wyborcza.pl/temat/wyborcza/projekt+nowej+ustawy+emerytalnej>.

## **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/no. Answering the question what legislation transposes the self-employment directives in Poland is not easy, since the laws regulating different aspects of the legal situation of self-employed persons seldom refer to EU directives. The implementation of Directive 86/613, in the areas requiring such actions, occurred in the Antidiscrimination Law.<sup>97</sup> As implementation of Directive 2010/41 with regard to childbirth-related leaves, reference can be made to the Law of 28 May 2013 on amendment of the Labour Code and other laws, as well as the Law of 26 July 2013 on the amendment of the Law on the system of social security. Formally these laws do not refer to the Directive however, which should be considered as not fulfilling the obligation stipulated in Article 16(1) of the Directive, requiring the implementing provisions to contain a reference to the 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)**

Polish legislation does not have an evident and common definition of self-employment. This term, however, is used to describe work activities performed individually or for commercial entities, based on grounds other than a labour contract. The definition nearest to self-employment is that of an entrepreneur. It exists in various legal acts and varies depending on the goal of those regulations. The most general one is contained in the Civil Code (Article 431), also being very similar to the definition included in the Law on freedom of economic activity. According to Article 4 of the latter Law, an entrepreneur is a natural person, legal person and/or organisational entity without legal personality, on which the special law confers legal capacity, pursuing the economic activity on their own behalf. Partners in a civil-law partnership (companies) are also considered as entrepreneurs, as far as their economic activity is concerned. This definition covers 'small entrepreneurs' or 'business persons'.

### **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.**

All self-employed workers are considered to be part of the same category, but some issues in the agricultural sector are regulated separately and partially differently (e.g. taxes and social insurance). The Law on freedom of economic activity does not directly refer to spouses of self-employed workers. The Law on System of Social Insurance provides for the same protection mechanisms for almost all social and professional groups, including self-employed workers and persons collaborating with them (Article 6(2), Point 5). The category of persons collaborating with self-employed persons includes not only the spouse, but also other persons (children, including adopted children; and parents, including step- and adoptive parents) (Article 6(11) of the Law on System of Social Insurance). Also the 1990 Law on the social insurance of farmers applies both to farmers themselves and to members of their household working with them, including their spouses.

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<sup>97</sup> This law was criticised *inter alia* because the legislators seem to have neglected the fact (in the law as well as in the reasoning) that, at the time of its adoption Directive 2010/41 (which repealed Directive 86/613), was already in force.

The Polish system of social insurance as well as the national law, in general, does not explicitly recognize life partners as such.

#### **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 more restricted or broader than specified in Article 4 Directive 2010/41/EU?**

The Law on freedom of economic activity generally stipulates that everyone has equal opportunities and rights to take up, pursue and terminate economic activity under the conditions provided for in the law (Article 6(1)). The Law further states that, with due respect to the principles of equality and fair competition, the State will provide state aid to entrepreneurs on terms and in the manner provided for in separate regulations (Article 7). Article 3(5) of the Antidiscrimination Law may be considered to have transposed Article 4 of the Directive. This Law, however, transposes various equality directives, including 86/613 and 2006/54, and therefore the wording of this provision is more general than that of Article 4, regarding self-employment. The Antidiscrimination Law specifies in Articles 4(2) and 8(2) that it is applicable to conditions of undertaking and performing commercial and professional activity, especially with regard to labour-code or civil-contract based employment. There is no prohibition, however, to discriminate with regard to equipment, or extending business activities. Also, it does not explicitly protect from discrimination with regard to terminating commercial activity. The issue of whether self-employed persons, in the event of direct or indirect discrimination, harassment or sexual harassment experienced with regard to the equipment or extension of business activities, will benefit from the horizontal protection provided for by the Antidiscrimination Law, depends on the interpretation by courts of the terms 'conditions of undertaking and performing (...) activity'.

#### **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?**

Although the Antidiscrimination Law provides in Article 11 for the possibility to take positive action in order to prevent unequal treatment or align disadvantages related with equal treatment, currently no such actions have been identified. Before, positive actions were taken in the form of micro loans for unemployed persons opening small businesses, in particular for women conducting commercial activities.<sup>98</sup>

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

Yes. As has been already mentioned this system covers: old-age insurance, disability insurance, insurance in case of sickness and maternity (sickness insurance) and insurance against accidents at work and occupational diseases (work accidents insurance) (Article 1 of the Law on the System of Social Insurance). Similar insurances, although on different conditions, apply to self-employed farmers.

Self-employed people have no choice of system.

<sup>98</sup> Of some effectiveness was the project 'How good to be women with initiative'. The aim of this project was to assist unemployed women in starting up their own businesses by providing theoretical and practical guidance and small subsidies or loans. See more in Zielińska, E. 'Poland' in: European Network of Legal Experts in the Field of Gender Equality, Selanec, G., Senden, L. *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards*. European Commission 2011, pp. 171-180, available at: [http://ec.europa.eu/justice/genderequality/files/gender\\_balance\\_decision\\_making/report\\_genderbalance\\_2012\\_en.pdf](http://ec.europa.eu/justice/genderequality/files/gender_balance_decision_making/report_genderbalance_2012_en.pdf), accessed 20 January 2016. See also: <http://cenabiznesu.pl/-przedsiębiorcze-kobiety-dostana-wsparcie-finansowe>, accessed 20 January 2016.



As regards self-employed persons outside agriculture, in order to be covered by the insurance, the spouse and other family members must not only cooperate with the self-employed person, but must also share a common household with them. The system does not refer to life partners. Both self-employed persons and persons cooperating with them are subject to compulsory old-age and disability insurance and insurance against accidents at work and occupational diseases (Article 6(1) Item 5). The insurance covering sickness and motherhood may be joined by these persons on a voluntary basis (Article 11(2)).

The Law on social insurance of farmers covers the farmers themselves, as well as members of their household working with them or in a farm directly connected with the farm of the farmer, including their spouses (Article 5). The social insurance for farmers includes insurance in case of accidents, sickness and maternity, as well as old-age and disability pensions (Article 1(2)). For farmers (and members of their households) operating an agricultural farm larger than one hectare, the insurance is obligatory. For other farmers or members of their households it is optional (Articles 7 and 16). The State provides support if the total amount of collected social insurance contributions is not sufficient to cover all benefits.

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

Yes, in Article 48 of the Law on Maternity Cash Benefits; and Article 15(1 1a) of the Law on Social Insurance of Farmers.

Currently yes, according to the amendment introduced by the Law of 28 May 2013, a woman conducting an economic activity may collect paid maternity benefits, not only during maternity leave, but also during additional maternity leave and parental leave (a total of 52 weeks), just like a person employed on the basis of a labour-law contract. In order to qualify for such benefits, until now no minimum insurance period is required even for the highest benefits. However, the Law of 15 May 2015 added Article 48a to the Law on Maternity Cash Benefits introducing a limitation of entitlement to maternity benefits with regard to women, who are non-agriculturally self-employed which may create the situation that the allowance may not meet the requirement of sufficiency.<sup>99</sup> The same may be said concerning maternity benefits for farmers. According to Article 15(1 1a) of the Law on social insurance of farmers, with amendments, as of 1 September 2013 an insured person (farmer or household member) is on an obligatory basis entitled to maternity benefits, with regard to the birth of a child, or accepting a child up to 7 years old for adoption. These benefits amount to four times the basic retirement benefits (*emerytura podstawowa*) and, according to Article 6(7) of the Law on Social Insurance of Farmers, it is equal to the minimum old-age pension (which in 2014 amounted to EUR 200 (PLZ 844)). The difference in maternity-related benefits may, to a certain extent, be explained by much lower insurance contributions paid by farmers.

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<sup>99</sup> According to the amendments self-employed women will be entitled to receive maternity benefits amounting to 100 % of the declared amount of income, only if they have paid the obligatory sickness insurance for a minimum of 12 months prior to commencing maternity leave. In other cases the maternity benefits will be calculated from the lowest amount of money that, according to the law, can be declared as the basis for calculating insurance premiums. The estimations as to the level of the maternity allowances prove that it may be as low as EUR 4 (PLZ 17). Although the Ministry of Labour and Social Policy explained that in such a case woman will receive EUR 250 (PLZ 1000) (from social aid), however still such an allowance should be not considered as meeting the requirement of sufficiency since the minimum wage in Poland in 2015 is approximately 438 EUR (PLZ 1750). See Lasocki, T. in: <http://www.wysokieobcasy.pl/wysokie-obcasy/1,66725,18581779,do-zobaczenia-w-szarej-strefie.htm>, <http://niezalezna.pl/68363-rzad-wykiwal-przedsiębiorcze-matki-dostana-17-zł-i-77-groszy-zasilku-macierzynskiego>, [http://wyborcza.biz/biznes/1,100896,18219094,Minimum\\_1\\_tys\\_zł\\_zasilku\\_macierzynskiego\\_dla\\_matek.html?disableRedirects=true](http://wyborcza.biz/biznes/1,100896,18219094,Minimum_1_tys_zł_zasilku_macierzynskiego_dla_matek.html?disableRedirects=true), accessed 5 October 2015.

However, the criterion of sufficiency applied in Polish provisions does not correspond with indicators provided for in Article 8(3) of Directive 2010/41.

A mother conducting an economic activity may combine running the company with taking care of a child, which will not result in losing the right to maternity benefits. While collecting maternity benefits, she will be released from the obligation to pay accident, sickness and maternity insurance contributions as well as pension insurance contributions (which are paid by the State), yet she will have to pay health insurance contributions.<sup>100</sup> If however, after giving birth, the person decides to suspend her activity for the period of collecting the benefits, she will be released from all of the above contributions.

A self-employed person in Poland has no right to childcare leave (*urlop wychowawczy*). However, during the period of time devoted to taking care of the child, the State pays the contributions for pension insurance for farmers or members of their household.

There are no services supplying temporary replacements or national social services.

With the exceptions mentioned above, legislation seems to be in compliance with the requirements laid down in EU law.

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

Yes, in Article 5(4) of the Law on occupational pension schemes. According to this provision persons conducting an economic activity are entitled to participate in the programme.

**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. The law explicitly states that with regard to persons conducting an economic activity, which participate in the programme, all provisions apply regarding employees (Article 5(5) of the Law on occupational pension schemes).

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

Yes, in Article 8 of the Antidiscrimination Law, in particular point 2. This provision stipulates that unequal treatment of private persons with regard to sex is prohibited inter alia in respect to: conditions of undertaking and performing commercial or professional activity, including such performed upon employment contracts or civil-law contracts.

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<sup>100</sup> This type of obligatory insurance entitles the insured person to health services covered by the fund from public money. In case of farmers and registered unemployed person the contributions to health insurance are paid from the state budget.

## **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, in Article 6 of the Antidiscrimination Law and in Article 4 of this Law while defining its scope of application.

### **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.**

It is exactly the same. It prohibits unequal treatment of natural persons inter alia with regard to sex, including access and conditions of social insurance services, housing services, goods and acquiring rights and energy, if they are offered publicly.

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

Yes, in Article 5 of the Antidiscrimination Law. According to this provision, the Law does not apply to content included in mass media and advertisements with regard to access and delivery of goods and services (Item 2); and educational services (Item 4), if they relate to different treatment with regard to sex.

### **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.**

Yes, Article 5 (5) of the Antidiscrimination law states that the law does not apply among others to different treatment with regard to sex in access, or conditions of provision of services, goods and acquiring rights or energy, if the limitation thereof only to representatives of one sex is objectively and rationally justified by a legal goal and the means used in order to implement this goal are proper and necessary.

No case law on this provision has been identified.

### **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, in Article 18a of the Law of 22 May 2003 on insurance activity<sup>101</sup> after changes introduced by the Law of 14 December 2012 amending the insurance law<sup>102</sup>; and in Article 18b added to the Law on insurance activity by the Law of 13 February 2009 on amendment of the Law on insurance activity and certain other laws<sup>103</sup>.

Article 18a of the Law on insurance activity stipulates that the use of the criterion of sex by insurance agencies while calculating insurance contributions and benefits may not lead to differentiation of insurance contributions and benefits of particular persons<sup>104</sup>. At

<sup>101</sup> (unified text JoL 2010 No. 11, Item 66 with amendments)

<sup>102</sup> (JoL 2013 Item 53)

<sup>103</sup> (JoL 2009, No 42, and Item 342)

<sup>104</sup> Interpretation of this provision in the reasoning of the draft law included in the Parliamentary Print No. 891 indicate that, according to the new wording of Article 18a of the draft law, the use of the criterion of sex by the insurance agency while calculating insurance contributions and benefits may not lead to differentiation of insurance contributions and benefits of particular persons. On the other hand however, such proposition

the same time, Article 18b of this law, introduced in 2009, remained in force. It prohibits differentiating insurance premiums and benefits and insurance services connected with them, with respect to pregnancy and maternity.<sup>105</sup>

**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.**

The existing legislation was adopted after the *Test-Achats* ruling.<sup>106</sup>

**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.**

There have been cases when women who were breastfeeding in public have been asked to leave the premises (e.g. shopping centres and restaurants). These cases have become the subject of interventions of the RPO and the Governmental Plenipotentiary for Equal Treatment. There were also reports of cases of refusals to rent flats to pregnant women. No such cases could be identified as having been brought to court, however.

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will make it possible for insurance companies to apply the criterion of sex in calculating insurance contributions and benefits, on the condition that this will not lead to differentiation of those contributions and benefits with regard to particular persons.

<sup>105</sup> Differentiation of insurance contributions and benefits, for the purpose of insurances described in Section I (related to risk distribution in life insurances) and II of the appendix to the Law (which refers to other insurances, including health insurance) and the associated financial services regarding pregnancy and motherhood is forbidden.

<sup>106</sup> It should be noted that the Law of 13 February 2009 on amendment of the Law on insurance activities and certain other laws (JoL 2009 No. 42 Item 342) added to the Law on insurance activities the provisions of Article 18a and Article 18b as implementation of Article 5 of Directive 2004/113/EU. Poland preliminarily took advantage of the option (regulated in Article 5(2) of the Directive) to temporarily permit differences in individuals' premiums and benefits, hence to exclude insurance services from the obligation of equal treatment with regard to sex. See further: Więcko Tułowiecka, M. *Dyskryminacja płciowa w ubezpieczeniach- wytyczne dotyczące stosowania dyrektywy 2004/113/ w zakresie ubezpieczeń majątkowych i osobowych w świetle wyroku Europejskiego Trybunału Sprawiedliwości w sprawie C 235/09 (Test Achats)* [Sex-related discrimination in insurances - Guidelines on the application of Council Directive 2004/113/EC to insurance in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats)], *Monitor Ubezpieczeniowy* 2012 No. 50, September.

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

### **10.1 Has your country ratified the Istanbul Convention?**

Yes, Poland has ratified the IC with the Law of 6 February 2015 (JoL 2015 Item 398).

The Law of 29 July 2005 on counteracting family violence (JoL No. 180 item 1493 with further amendments) generally is in compliance with the obligations under the IC. However, it does not include gender perspective and economic violence and still lacks certain legal solutions (e.g. emergency barring orders (Article 52) and state-wide, round-the-clock (24/7) telephone helplines (Article 24 IC)). Nevertheless, it has to be noted that this Law only refers to domestic violence. With regard to other forms of violence, general provisions of the Penal Code (PC) and Code of Criminal Procedure (CCP) have to be applied.

Since the Convention has only been in force since 7 April 2015, it is hard to associate any recent legal changes with this document, even if some of them meet the Convention's requirements. For example, Penal Code (PC) amendments anticipated the ratification of the Convention. In particular, the rape provisions of the PC, which previously provided that criminal prosecution could only be initiated following an explicit request from the victim, have been altered so that criminal proceedings can now be initiated ex officio (by the Law of 13 September 2013, JoL 2013 Item 849, amending Article 205 PC). This change has clearly been influenced by the Convention. At the same time in the Code of Criminal Procedure (CCP) special procedures of examining victims of sexual offences have been introduced, which are supposed to prevent secondary victimisation (Articles 185c, 185d CCP). The further changes in the Polish CCP were introduced among others by the Law of 28 November 2014 on protection and support for victims and witnesses (JoL 2015, Item 21), implementing EU Directives 2012/29/EC and 2011/99/EC, which provides for similar requirements with regard to protection of those persons as the Convention.

## **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, in Article 17 of the Antidiscrimination Law and in Article 18<sup>3e</sup> of the LC.

In the light of Article 17(1) of the Antidiscrimination Law, exercising by an employee of the right to compensation for failure to apply the principle of equal treatment may not constitute a basis for any unfavourable treatment, and may not place that employee at any disadvantage. The above provision also applies to persons who in any form supported such employee (Article 17(2)). In such cases also apply the provisions regarding: damages sought by means of a claim for discrimination (Article 13), the burden of proof, as regulated in the Code of Civil Procedure (Article 14) and - as in the case of discrimination claims periods of limitation (Article 15).

According to the Labour Code, the exercising by an employee of the right to compensation for failure to apply the principle of equal treatment in employment may not constitute a basis for any unfavourable treatment of that employee, and may not place that employee at any disadvantage, and in particular it may not constitute grounds for the termination of an employment relationship by the employer, either with or without notice. This provision shall apply accordingly to any employee who has provided any support in any form to another employee who exercised his rights in relation to a failure to apply the principle of equal treatment in employment.

Currently the protection against victimisation in both cases<sup>107</sup> complies with the equality 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, in Article 14 of the Antidiscrimination Law and in Article 18<sup>3b</sup> of LC.

In both above acts the wording of regulations related to the shift of the burden of proof in discrimination cases is slightly different. In the Antidiscrimination Law in Article 14 (1) stipulates that proceedings involving charges of violation of the equal treatment rule are covered by provisions of the Code of Civil Procedure. At the same time however, it changes the general rule of burden of proof in civil-law cases, regulated in Article 6 of the Civil Code<sup>108</sup>. According to this provision, a person who charges another person with violation of the equal treatment rule shall make probable (*uprawdopodobnia*) that this violation took place (Article 14(2)). In such cases, the person accused shall prove that in spite of this probability he did not commit the violation (Article 14(3)). The intention of this provision was to shift the burden of proof to the defendant. However, the requirements for the person claiming to have been discriminated against go further than just a presentation of the basic facts. This provision has been understood by many courts as requiring probable existence of discrimination, by indicating the grounds of

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<sup>107</sup> The LC was subjected in 2008 to important amendments which brought it in compliance with EU Directives (Law of 21 November 2008 (JoL 2008 No. 223 Item 1460) (in force since 18 January 2009).

<sup>108</sup> According to which the burden of proof of a fact shall lie with the person who asserts legal consequences arising from this fact.

it.<sup>109</sup> In the literature, the argument has justly been raised that it is too much to expect the plaintiff to know the motivation of the defendant's alleged discriminatory behaviour. It therefore seems justified that the plaintiff should only be required to present basic facts of unequal treatment, creating a legal presumption of discrimination, whereas it should be the obligation of the defendant to provide evidence to the contrary.<sup>110</sup>

The provision of the LC defines what kind of different treatment of an employee<sup>111</sup> unless justified by a legitimate aim demonstrated by the employer is to be considered as failure to apply the principle of equal treatment in employment, inter alia with regard to sex.

### 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.

Both the Antidiscrimination Law and Labour Code provide for the possibility to receive damages for violation of the equal treatment rule.

The possibility of damages in case of discrimination occurring outside the employment relationship is provided in the Antidiscrimination Law (Article 13). According to this provision, everyone affected by violation of the equal treatment rule, has the right to damages (Paragraph 1). At the same time, this provision states that in such cases the provision of the Civil Code shall apply. It should be noted that the Civil Code distinguishes between damages for material loss and satisfaction for immaterial injury. Hence, in the doctrine it is pointed out that in the current state of law, there are serious doubts as to whether granting satisfaction for moral injury according to Article 13 in case of discrimination is allowed. It is noted that the term 'damages' as used in the LC is interpreted as encompassing satisfaction for moral injuries. Also, there are no arguments against a similar interpretation of the sanction for discrimination, according to the Antidiscrimination Law, especially since it may also apply to workers who are not employed based on an employment agreement (e.g. on service contracts or contract work). Nevertheless, since the Antidiscrimination Law explicitly refers to the Civil Code, which clearly distinguishes these two types of harm (unlike the LC), one has to assume that the provision of Article 13 of the Antidiscrimination Law does not properly implement EU gender equality law.

In case of discrimination in access to goods and services, the general Civil Code provisions regarding the protection of personal goods may be applied. Article 23 CC explicitly protects such goods as health, freedom, honor, freedom of conscience, image, confidentiality of correspondence and inviolability of residence and scientific, art and innovative creativity (output). The list of goods protected in this provision does not have exclusive character, which means that a person, discriminated against (e.g. with regard to sex) may invoke this provision claiming that her dignity has been violated. According to those provisions, one can among others claim: abandonment of actions endangering personal goods, payment of monetary damages for moral injuries, or repairment of damages in cases when as a result of violation of a personal good, material damage has been caused.

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<sup>109</sup> Many courts, especially in work related cases required that the employees should not only provide the factst hat they were unequally treated in comparison to other employees, but also indicate the prohibited ground of this alleged unequal treatment. See inter alia judgments of Supreme Court of 17 February 2004 r., I PK 386/03, OSNP 2005, No. 1, poz. 6 and of 24 May 2005 r., II PK 33/05, LEX No. 184961, *Praca i Zabezpieczenie Społeczne* 2006, No. 7, s. 35.

<sup>110</sup> See Czarnecki, P., Rozkład ciężaru dowodu w sprawach na tle dyskryminacji (The burden of proof in discrimination cases), *Praca i Zabezpieczenie Społeczne* 2006, No. 3, p.11.

<sup>111</sup> The consequence of which is in particular the refusal to conclude or dissolve employment relation or unfavourable transfer to another position.

Additionally, in such cases there is also the possibility to notify the authorities about a contravention. According to Article 138 of the Code of contraventions<sup>112</sup> a person active as a professional service provider, who intentionally and without justification refuses access to such services, may be subject to a fine amounting from 20 to 5000,- PLN (EUR 5-1250,-). A person selling in a professional retail enterprise or gastronomical enterprise who intentionally and without justification refuses to sell a product (Article 135 of above Code) may be subject to the same fine.

As regards discrimination in employment, pursuant to Article 18<sup>3d</sup> of the LC, in case of alleged discrimination the person concerned may lodge a claim with the special labour court requesting compensation in an amount not less than the minimum remuneration for work, to be established according to separate provisions.<sup>113</sup> It is not clear what kind of damages may be covered on the basis of these provisions and what their relation is to the general civil-law provisions on damages. To some extent these concerns have been explained by the Supreme Court's case law. For example, in the judgment of 22 February 2007, I PK 242/06, the Supreme Court stated that, when the allegation concerns wage discrimination, in addition to punitive compensation for discrimination agreed on the basis of Article 18<sup>3d</sup> LC, the employee may also claim compensation, which ought to equal the difference between the wage received and that which should have been received, if the principle of equal treatment had not been violated, for the period during which the violation of the right occurred. In the light of the decision of the Supreme Court of 7 January 2009, IIIPK 43/08, the compensation resulting from Article 18<sup>3d</sup> of the LC includes compensation of personal damage to non-property assets. If however the compensation for discrimination, established according to general civil-law provisions (Article 361(2) of the Civil Code) are 'effective, proportionate and dissuasive' with respect to European labour-law standards, then there is no entitlement to additional satisfaction according to Article 18<sup>3d</sup> LC.

In addition to these labour-law remedies, the administrative monitoring body, the State Labour Inspectorate (*Państwowa Inspekcja Pracy*) may also initiate proceedings against a discriminating employer. The scope of action of this institution is defined by the Law of 13 April 2008.<sup>114</sup> This Law also regulates the way Inspectors are allowed to proceed with controls, as well as their obligations and competences. Only in matters not defined by law shall provisions of the Code of Administrative Procedure apply.

In addition, the employer violating an employee's rights resulting from an employment agreement, inter alia referring to working time, or parenthood-related rights, commits a misdemeanour (Article 281(5) LC). Additionally the Penal Code of 1997 provides, in case of very serious and notorious cases of violations of employees' rights, for a maximum penalty of up to 2 years' imprisonment (or a fine or restrictions to the convicted person's liberty) (Article 218 CC). Criminal punishment of a deprivation of liberty for up to 3 years may also be imposed in the most serious instances of sexual harassment (Article 199 CC). In 2011 the legal measures were supplemented by the criminalisation of stalking (Article 190a CC).

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.

The labour courts properly indicate that the wording 'compensation in the amount of not less than', without setting an upper limit, allows for differentiation of the amount of

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<sup>112</sup> Kodeks wykroczeń Code of contraventions ], of 20 May 1971 , consolidated text :Jol 2013 , Item 829 with amendments

<sup>113</sup> The minimum remuneration in 2015 is approximately EUR 438 (PLZ 1750). Ordinance of the Council of Ministers of 11 September 2014, JoL 2014 Item 1220.

<sup>114</sup> The tasks have been defined in Article 10. JoL 2007 No. 89 item 589 (unified text 2015 Item 640).



compensation, depending on the type and severity of the discriminatory behaviour of the employer and its consequences. Unfortunately, there are no reliable data as to the level of compensation awarded in cases of gender discrimination. On the basis of some press information one may estimate that the average level of compensation in sex discrimination cases varies on average from 1 to 5 times the minimum monthly wage, and only tends to be higher in exceptional cases (the maximum amount awarded was approximately EUR 25 000 (PLN 100 000)). Compensation in the amounts usually awarded is not likely to have a dissuasive effect.

The administrative proceedings conducted by the State Labour Inspectorate (*Państwowa Inspekcja Pracy*) are considered to be effective. In April 2014, the Inspectorate published the results of its investigation into the layoffs of persons returning from maternity, paternity, and parental leaves and the observance of other employee rights, including those related to childcare. This investigation covered 581 companies. Practice shows that one can often achieve more through direct contact between the Labour Inspectorate and the employer, than by going to court.<sup>115</sup>

The practical significance of penal-law sanctions in discrimination cases was minor, not least because all sexual crimes were traditionally prosecuted not ex officio, but at the victim's request only. In 2013, the situation changed insofar as that currently it is only stalking that is prosecuted only at the victim's request. There are no data on the role of this provision in relation to fighting sexual harassment.

It is difficult to say if the sanctions provided in the Code of contraventions for unjustified refusal to provide services or sell a product, as well as the provisions on protection of personal goods, provided for in the Civil Code meet the standards of effectiveness, proportionality and dissuasiveness in sex discrimination cases. Hence, they found application only exceptionally, even before the Antidiscrimination law entered into force.

## **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.

As has been already mentioned all disputes arising from employment relationships are decided by special labour and social security courts. Complaints asserting discrimination, according to the Antidiscrimination Law, are decided by regular civil courts. The access to labour courts used to be simple. However, since 2006, this access is no longer free of charge if the amount of the claim is higher than EUR 12 500 (PLN 50 000). In such cases, similar to all regular civil cases, the court fee amounts to 5 % of the claim. This has resulted in a decline in the number of individual claims, which may be a sign that the reduction in the level of judicial protection, e.g. against discrimination, is unjustified.

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

The law of 17 December 2009 on claims in group proceedings (JoL of 2010, No. 7, pos. 44), explicitly states that its scope of application does not encompass claims against

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<sup>115</sup> The report indicates inter alia that in cases of violation of the law, employees rarely go to court. Even in cases where the inspectors themselves referred matters to the court, the persons concerned often backed out of the proceedings and cases were frequently remitted. See: <http://finanse.wp.pl/kat,1013819,title,4-proc-kobiet-zwolnionych-w-ciagu-pol-roku-od-powrotu-z-macierzynskiego,wid,16495436,wiadomosc.html?ticaid=112bdd>, accessed 1 June 2014.

employers. This limitation also applies to claims for violation of the equal treatment rule. According to some opinions, employees may pursue their claims together only according to Article 72 of the Code of Civil Procedure. In such situation, however, each of them would have to appear in court (in person or represented by counsel). The above opinion is not entirely correct however, because the scope of application of the law on group proceedings *inter alia* includes claims resulting from delicts, with the exception of protection of personal goods. An employer violating the employee's right to equal treatment, which can be qualified as a misdemeanour or a crime, thus also commits an offence, in the understanding of the law on group proceedings. This provision however seems not to apply e.g. to health injuries, which occurred as a result of sex-based harassment or sexual harassment, hence those actions constitute violations of personal goods. Group proceedings cannot be used by an employee who lodges an individual claim after the group proceedings has been initiated. However, despite the fact that class actions in employment disputes are possible, in practice they are very hard to win. This is because in these cases the burden of proof lies with the employee (according to the general rule of Article 6 CC). It is however worth noting that in the judgment of 23 November 2001 (I PKN 678/00) the Supreme Court stated that e.g. in the case of disputes on working time, the burden of proof also lies with the employer, who is obliged to keep a record of working time. Additionally in the judgment of 5 May 1999 (I PKN 665/98) the Supreme Court decided that missing documentation, resulting from the fact that the employer failed to collect it, results in a shift of the burden of proof towards the employer.<sup>116</sup> The employer has the obligation to prove that the employee did not actually work during the working times claimed by him and, even more, working times that have been documented.<sup>117</sup>

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

There are no particular provisions regarding legal aid for alleged victims of gender discrimination. The general rules for providing unpaid legal assistance are defined in the Law of 4 August 2015 on unpaid legal assistance and education,<sup>118</sup> which is to enter into force on 1 January 2016, as to the majority of its provisions. This law, applying to pre-litigation *inter alia* indicates the group of persons entitled to such assistance (Article 4)<sup>119</sup> and also mentions what such assistance might include (Article 2).<sup>120</sup> In addition to the above, a victim of discrimination who decides to initiate legal proceedings may request a representative to be assigned by the court, according to the general provisions of the Code of Civil Procedure, modified by particular provisions regarding claims resulting from employment relationships,<sup>121</sup> as well as those specified in Article 87 CPC. A qualifying condition for a person applying for a court-appointed representative is the submitting of a declaration of inability to cover the costs of an attorney or legal counsel, without endangering the ability to provide for himself or his family. The form for this declaration is available free of charge in courts and on the website of the Ministry of Justice ([www.ms.gov.pl](http://www.ms.gov.pl)). The court will grant the request if it finds that participation of an attorney or legal counsel in the particular case is necessary. This should happen when the case is complicated and past behaviour of the party during proceedings indicates

<sup>116</sup> <http://www.rp.pl/artykul/335227.html> *W sądzie to szef udowadnia, że podwładny nie miał zbyt wielu zajęć* accessed 20 September 2015.

<sup>117</sup> <http://www.rp.pl/artykul/564086.html> *W procesie o nadgodziny liczą się argumenty obu stron.*

<sup>118</sup> JoL 2015 Item 1255.

<sup>119</sup> Such persons also include persons entitled to social aid, younger than 26 or older than 65, victims of natural disaster, veterans, members of large families.

<sup>120</sup> It consist of granting legal information, indicating how to solve a legal problem and preparing it, <http://pl.pons.com/t%C5%82umaczenie/angielski-polski/pleadings>, including application for the allocation of the legal representative.

<sup>121</sup> For example, pursuant to Article 465 of the Code of Civil Procedure, the plenipotentiary can be not only an attorney-at-law or a legal adviser but also a representative of trade unions, a labour inspector or an employee of the workplace, in which the claimant is or was employed.

that she might be incapable.<sup>122</sup> This condition is applied by courts very restrictively. According to some case law, even discovering that the claimant has a mental disease of mild intensity or a psychological disorder does not constitute a precondition obliging the court to grant the motion for a court-appointed representative.<sup>123</sup> The court's decision on denying the above request might be subject to a formal complaint.

## **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 Human Rights Defender (RPO) is designated as the equality body, according to Article 19 of the Antidiscrimination Law. This body covers all grounds, including sex. The purpose of the RPO in the light of Constitution is assistance in protection of one's freedoms or rights infringed by bodies of public authority, including the rule of equal treatment (Article 1 of the Law on RPO as amended by the Antidiscrimination Law). In such situation the RPO may examine the case or choose to address respective bodies with a request to examine the case (Article 12). In addition to the above he may also, acting on behalf of the citizen, initiate proceedings in civil, penal or administrative courts, as well as join proceeding which are already on-going (Article 14). However, in cases where the infringement of citizen's rights occurs as a result of actions of individual persons or private entities, the competences of the RPO are limited to indicating the proper way of proceeding and examining whether the authorities responded properly to the citizen's claims (Article 11(2) of the Law on RPO). The RPO in such case may not request e.g. the initiation of proceedings or to be admitted as participant of the proceedings (which is possible when the violation has been caused by a public authority). This is a serious barrier to achieving effective protection from discrimination, which in most cases is committed by private actors. Tasks of the RPO also include analysing, monitoring and supporting equal treatment, as well as conducting independent studies and issuing of recommendations regarding equal treatment (Article 17b).

## **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?**

According to the Law of 23 May 1991 (Consolidated text JoL 2001 r. No. 79, Item 854, with further amendments) trade unions may play a rather significant role with respect to protection from discrimination, both in and outside the judicial system.<sup>124</sup> In particular by monitoring the application by employers of labour provisions with regard to employees.<sup>125</sup> The provision of Article 61 provides non-governmental organisations, as well as other social organizations, with the right to actively participate e.g. in proceedings regarding violations of the equal treatment and non-discrimination rules. They may in particular bring actions on behalf of their members, as well as join pending proceedings. If they do not participate in proceedings, they have the right to present

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<sup>122</sup> In the sense that if she is unable to properly prepare court documents, submit motions for evidence and observe deadlines, or is not active during the proceedings.

<sup>123</sup> SC ruling of 16 December 1997, II UKN 404/97, OSNP 1998/21/641.

<sup>124</sup> In the scope of the protection of collective rights the trade unions represent all employees. However in matters of individual claims trade unions represent the interest of their members, however on request may also defend the rights of non-members. Kęczkowski, M., *Związki zawodowe ich rola w polskich zakładach pracy* (The Trade Unions and their role in Polish enterprises), Płock 2005.

<sup>125</sup> The active participation of trade unions is explicitly required in the Labour Code inter alia in cases of dissolving a contract against without notice, reviewing appeals against imposing a disciplinary penalty. Every such situation can be viewed in a context of unequal treatment on the ground of sex.

opinions to the court (Article 63). However, this is only possible in cases which lie within the scope of their statutory duties and are subject to the written consent of an employee.

The possibility of participation of social organizations is covered by additional regulations in provisions on cases recognized by labour and social insurance courts. In such cases an employee or insured person may be represented e.g. by an agent of a trade union (Article 465 CPC). An NGO might also, subject to the written consent of an employee or insured person, bring actions on his behalf and join pending proceedings (Article 462 CPC). However, in practice these organisations do not play an important role.

### **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).

The role of collective agreements in promoting equal treatment of women and men and preventing gender discrimination is insignificant. Such agreements can be concluded at the level of an individual enterprise or of a part of or the whole branch of an employment sector (Article 238-241 LC). An analysis of the collective labour agreements at enterprise level indicated that they very seldom include regulations which are more favourable for employees than the minimum stipulated in the provisions of labour law. More often they simply repeat the Labour Code provisions on equal treatment. This trend is coupled with an increased frequency of cases where the parties to collective labour agreements suspend the application of the entire agreement or a part thereof.

## 12. Overall assessment

The implementation of the EU gender equality acquis in Poland generally speaking is rather satisfactory, even if some provisions and solutions still require amendments. It should be noted, however, that the transposition process of various anti-discrimination directives at national level was long and arduous, and is still unfinished. The main source of the problems was the common conviction that such transposition in order to be complete, should not literally copy the formulations of the directives. It was believed that the adopted provisions, which were often too general in comparison with the directive and contained many possible legal gaps, could be supported by the application of general rules of interpretation of the law, in particular the rule that national law must be interpreted in conformity with EU law.

The process of the transposition of selected EU equality directives into the Polish Labour Code had already been initiated before Poland's accession and it had a progressive character: in 2001, a new Section called 'equal treatment of women and men in employment' was adopted. In 2003, this Section was renamed and modified so as to allow the application of its provisions also to instances of discrimination based on grounds other than gender. The Law of 2004 on the Promotion of Employment and Institutions of the Labour Market dealing with discrimination in the access to hiring or job training accomplished the process of the transposition of equality directives in the field of access to work. In 2006, 2008, 2013, 2014 and 2015 further amendments to the Labour Code were introduced, revising the central concepts and dealing mainly with the protection of women's health during pregnancy, extension of maternity and paternity leaves and also providing for different forms of flexible working-time arrangements. In 1998, the general reform of the mandatory social insurance system took place. The Law on Occupational Pension Schemes of 2004 to a certain extent achieved general compliance with EU directives, but failed to transpose many of its specific provisions. In 2011 the Antidiscrimination Law entered into force, supplementing labour-law provisions regulating access to employment and vocational training and providing for horizontal protection in case of violation of the principle of equal treatment in the access to goods and some services. As a result of these legislative changes, labour law as well as social security law and the regulation of access to goods and some services, correspond, in general, with the requirements of the EU gender equality directives. However, when it comes to the transposition of particular EU concepts and regulations, despite several consecutive amendments, legislation still shows some inadequacies and deficiencies. Sometimes, binding law provisions are overprotective, e.g. in the prohibition of the performance of certain activities by all women. At the same time other provisions, e.g. regarding sex-related harassment in the Labour Code, or damages in cases of discrimination according to the Antidiscrimination Law, do not implement the respective directives properly. In addition, the actions of the legislator aimed at applying the provisions on equal treatment in employment to instances of discrimination based on reasons other than gender resulted in some detrimental aspects in the field of protection against discrimination based on gender. For example, exceptions to the equal treatment principle provided in the Labour Code no longer refer to pregnancy, but to parenthood only. In addition, questions may be raised as to whether the equality body's mandate and resources are adequate for its activities.

The Polish system of childcare-related leaves has been developed over many years. Legal solutions regarding particular leaves have been patched, which has caused them to become inconsistent and overly complicated. Currently this complexity results both from the large number of such leaves (currently there are 7 types), as well as from diversified rules for granting them. This system will be significantly simplified after 2 January 2016, and become more compatible with EU law. Nevertheless different terminology leads to numerous confusions and misunderstandings. In addition, not all maternity benefits meet the sufficiency and the special procedure for granting a worker the possibility to perform work on conditions of flexible working time, for family reasons, has not been

established yet. Also, certain solutions such as services supplying temporary replacements for self-employed women on parental leave should be introduced.

## Annexes

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