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# Country report

## Gender equality



Portugal  
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# **Country report**

## **Gender equality**

How are EU rules transposed into  
national law?

## **Portugal**

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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**

The Portuguese legal system is mainly a statutory law system, headed by the Portuguese Constitution and developed by state legislation. Where employment and industrial relations are concerned, collective agreements are also a key element of the system but they cannot go against mandatory legal provisions. European Directives are generally transposed into national legislation by statutory law and not by collective agreements, which also goes for equality legislation.

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

- Constitutional grounds of equality rights and provisions: Portuguese Constitution (PC), of 1976.
- Non-discrimination principle in general and gender equality law in the field of employment and maternity, paternity and parental leave: Labour Code (LC), approved by Law No. 7/2009, of 12 February 2009. The LC and the complementary legislation to the LC have transposed all relevant Directives regarding sex discrimination and non-discrimination in general in the area of employment as well as the maternity and parental leave directives. Repealed Directives in this area were transposed at an earlier stage by the former LC (of 2003) and prior to this Code by specific Acts on the several issues (mainly the Gender Equality Act, of 1979, and the Maternity and Paternity Act, of 1984). With the publication of the first LC in 2003 these Acts were repealed and their provisions were integrated into the Code. The same system was kept by the LC of 2009 that is now in force. LC provisions in the area of non-discrimination in general, gender discrimination and maternity and reconciliation are applicable to employees of the private sector, but also to employees of the public sector (Law No. 35/2014, of 20 June 2014, called 'Public Servants General Law' – '*Lei Geral do Trabalho em Funções Públicas*', Article 4 No. 1 (c) (d)).
- Gender equality in occupational social security schemes: Decree-Law No. 12/2006 of 20 January 2006 (trust funds that deal with professional social security schemes) and Decree-Law No. 307/97 of 11 November 1997 that has transposed Directive 86/378/EEC, including the changes introduced by Directive 96/97/EC, into domestic legislation.
- Gender equality in statutory social security schemes: 'Social Security General Law' ('*Lei de Bases da Segurança Social*' - Law No. 4/2007 of 16 January 2007), 'Social Security Contribution System Code' ('*Código dos Regimes Contributivos de Segurança Social*' – CRCSS), approved by Law No. 110/2009, of 16 September 2009.
- The non-discrimination principle in self-employment, including gender equality: Law No. 3/2011, of 15 February 2011, which establishes the general frame for the protection of self-employed persons as regards the prohibition of discrimination in the access to and in the development of independent work in the private sector, in the public sector, and in the cooperative sector. This Act has transposed Directive 2000/43, Directive 2000/78 and (partially) Directive 2006/54.
- Gender equality in the access to and providing of goods and services: Law No. 14/2008, of 12 March 2008, which has transposed Directive 2004/113; this Law was amended by Law No. 9/2015, of 11 February 2015, in view of the *Test-Achats* judgment.



## **2. General legal framework**

### **2.1 Constitution**

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

Yes. The Portuguese Constitution (PC) establishes a general principle of non-discrimination on several grounds, and sex is explicitly indicated as a discriminatory ground (Article 13(2)). Sex discrimination is therefore prohibited.

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

Yes. Equality between men and women is addressed in several other provisions of the PC.

Article 9 of the PC, on the fundamental tasks and objectives of the Portuguese State, considers the active promotion of equality between men and women as a fundamental task and goal of the Portuguese State (Article 9(h)).

The PC develops the general prohibition of sex discrimination established in Article 13(2) in several areas: equal opportunities in access to employment (Article 58(2)(b)); equal pay (Article 59(1)(a)); reconciliation of work and family life (Article 59(2)(b) and Article 67(1)(h)); and protection of pregnancy, maternity and paternity (Article 68).

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

All provisions indicated are qualified as fundamental rights by the Constitution, i.e. they rank higher among the constitutional rights. In this capacity, these provisions prevail over other constitutional provisions and over any other legal provisions.

Nevertheless, some of these provisions are addressed to the State itself ('programmatic' provisions), while others are immediately applicable. Only the second category of provisions have horizontal effect, in the sense that they are immediately binding provisions and can therefore also be invoked between private parties. The non-discrimination principle (including on the ground of sex), the equality principle in the access to employment, or the equal pay principle are good examples of provisions that can be also invoked between private parties.

### **2.2 Equal treatment legislation**

#### **2.2.1 Does your country have specific equal treatment legislation?**

As regards employment and maternity and reconciliation issues, equal treatment provisions are integrated in the LC, although in autonomous sections, that address equality and non-discrimination in general (Articles 23 to 28), harassment (Article 29), gender equality (Articles 30 to 32), and maternity, paternity and reconciliation rights (Articles 33 to 65).

As regards other issues (self-employment, access to and supply of goods and services, and social security), there are specific Acts on equal treatment in each area. These Acts are listed above. Both in the LC and in the specific Acts on the several issues indicated above, sex discrimination is prohibited.

In addition to gender, the LC covers the following discrimination grounds: age, ancestry, sexual orientation, sexual identity and sexual reassignment, marital state, family

situation, economic situation, level of education, origin or social condition, genetic features, disability, chronic disease or reduced capacity for work, nationality, race or ethnic origin, place of birth, native language, religion, political or ideological convictions, and trade union affiliation (Article 24 No. 1 of the LC).

### **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?

Yes. In the area of employment, the Labour Code explicitly prohibits discrimination on the ground of gender identity and of gender reassignment in Article 24 No. 1.

There are no similar provisions in the Acts that address non-discrimination in general and gender equality in self-employment and in the access to and supply of goods and services, but the general clause on non-discrimination established in the Constitution (Article 13) can be invoked directly in such areas, since it is, as explained above, an immediately binding provision.

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

3.2.1 Is direct sex discrimination explicitly prohibited in national legislation?

Yes. Direct sex discrimination is explicitly prohibited in relation to employment (LC, Article 25 (1)), in relation to non-discrimination in self-employment (Article 5 of Law No. 3/2011, of 15 February), and in relation to gender equality in the access to and supply of goods and services (Article 1 of Law No. 14/2008, of 12 March 2008).

Direct discrimination is defined in general in the LC (Article 23 (1)(a)) as 'any situation where someone is submitted to a less favourable treatment than the treatment actually or virtually applied to someone else in a comparable situation, due to a discriminatory ground'.<sup>1</sup> Discriminatory grounds are indicated in the provision that prohibits this kind of behaviour (Article 24(1)). This notion applies to direct gender discrimination.

A similar general notion of direct discrimination can be found in Article 5(2)(a) of Law No. 3/2011, of 15 February 2011 (non-discrimination in self-employment). This notion applies to direct gender discrimination in this area.

Direct sex discrimination is defined in Article 3(a) of Law No. 14/2008, of 12 March 2008 (gender equality in the access to and supply of goods and services) as 'any situation where someone is submitted to a less favourable treatment than the treatment actually or virtually applied to someone else in a comparable situation, on the ground of sex'.<sup>2</sup>

In the author's view these notions are in line with EU definitions of direct sex discrimination.

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

Yes. Under Articles 24(1) and 25(6) of the LC discrimination on the ground of pregnancy and maternity is prohibited. However, in the author's opinion the compliance of national legislation with Article 2(2)(c) of Directive 2006/54 is not perfect, because there is no

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<sup>1</sup> This is a rough and non-official translation made by the author.

<sup>2</sup> This is a rough and non-official translation made by the author.

explicit mention in the law that pregnancy and maternity discrimination is to be qualified as direct sex discrimination.

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

Not in general, but some difficulties may arise as regards discrimination on the grounds of pregnancy, maternity and reconciliation.

Despite the practical recognition of these practices as discrimination, the absence of their clear qualification as direct sex discrimination may have a negative impact in the application of these provisions by the Courts, which do not always establish a clear link between the two issues, and therefore do not always apply the more favourable provisions on gender discrimination (for instance, provisions establishing a wide notion of pay, or the reversal of the burden of proof).

### 3.3 Indirect sex discrimination

3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?

Yes. Indirect sex discrimination is explicitly prohibited in relation to employment (LC, Article 25(1)) and in relation to self-employment (Article 5(1) of Law No. 3/2011, of 15 February 2011).

Indirect discrimination is defined in general in the LC (Article 23(1)(b)) as 'any situation where a rule, criterion, or practice apparently neutral can place someone, due to a discriminatory ground, in a disadvantaged position in comparison to others, unless that rule, criterion or practice is objectively justified by a legitimate goal and the means to reach that goal are adequate and necessary'.<sup>3</sup> This general notion applies to indirect gender discrimination.

As regards self-employment, a similar notion is established in Article 5(2)(b) of Law No. 3/2011, of 15 February 2011 (non-discrimination in self-employment). This notion applies to indirect gender discrimination in this area.

As regards gender equality in the access to and supply of goods and services, indirect discrimination is defined in Article 3(b) of Law No. 14/2008, of 12 March, as 'any situation where a rule, criterion, or practice, apparently neutral can place someone in a disadvantaged position in comparison to a person of the other sex, unless that rule, criterion or practice is objectively justified by a legitimate goal and the means to reach that goal are adequate and necessary'.<sup>4</sup>

In the author's view these notions comply with the EU definition of indirect gender discrimination.

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.

The author has no knowledge of the use of statistical evidence in order to establish a presumption of indirect sex discrimination.

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<sup>3</sup> This is a rough and non-official translation made by the author.

<sup>4</sup> This is a rough and non-official translation made by the author.

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

To the author's knowledge, there is no case law on this subject.

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.

To the author's knowledge, there are no specific difficulties in the application of the concept of indirect discrimination. Nevertheless, the absence of case law makes it difficult to assess how the concept is in fact interpreted and applied in practice.

### **3.4 Multiple discrimination and intersectional discrimination**

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

No. However, the absence of such concept does not prevent the use of more than one discrimination ground in a possible claim.

The author is not aware of any proposals in this area.

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)?

No.

### **3.5 Positive action**

3.5.1 Is positive action explicitly allowed in national legislation?

Yes. Positive action is indirectly allowed by the Portuguese Constitution, in Article 9(h). In fact, by considering the active promotion of equality between men and women as a fundamental task of the Portuguese State, this provision allows for positive action in view of the promotion of such goal.

As regards employment, the LC explicitly allows positive action, which is considered as non-discriminatory measures, provided that they are established on a temporary basis in order to correct a factual discrimination which already exists (Article 27).

Still in the employment area, it is also worth mentioning the rule of the LC regarding the content of collective agreements in the area of gender equality. Article 492(2)(d) of the LC states that collective agreements should establish 'measures that contribute to the effective implementation of equality and the non-discrimination principle'. According to this rule, equality plans and concrete measures for the promotion of equality (on several grounds, including sex) at professional or company level can be defined by collective agreements directly. These measures can include positive action and preferential treatment, if, in the concrete situation, they meet the legal requirements for such action measures. However, this rule is a non-binding recommendation, since there are no sanctions attached to the absence of such measures or plans.

In the area of access to and supply of goods and services, Law No. 14/2008, of 12 March 2008 (which transposed Directive 2004/113), allows for positive action measures in

Article 4(7), which states as follows: 'the guarantee of full equality between men and women does not prejudice specific positive measures, already in place or to be implemented in order to prevent or to compensate factual inequalities or disadvantages related to sex'.<sup>5</sup>

This rule formally complies with Article 6 of Directive 2004/113.

Positive action is defined by the Law (Article 27 of the LC) as 'a legal measure of limited duration in favour of a group, placed in a disadvantaged situation because of a discrimination ground, and aiming to grant equal conditions in the access to or in the exercise of legal rights or correcting a factual discrimination which already exists'.<sup>6</sup>

In the author's view, this definition of positive action complies with the EU definition found in Article 157(4) TFEU.

### 3.5.2 Are there specific difficulties in your country in relation to positive action?

To the author's knowledge, there are no specific difficulties in relation to positive action in Portugal.

In practice, positive action is often used to pursue specific goals in the area of employment and in relation to several grounds of discrimination. Some provisions of the LC are good examples of this specific use of positive action:

- a) In order to fight unemployment, which is consistently higher among the younger generation, and long-term unemployment, the LC facilitates the conclusion of fixed-term employment contracts with young persons and long-term unemployed persons (Article 140(4) of the LC). This provision also fights indirect age discrimination.
- b) In relation to discrimination on the grounds of maternity and parenthood, Article 30(3) of the LC states that, when professional training regards economic activities dominated by workers of one sex, workers of the under-represented sex have priority in the access to professional training; the same priority is generally granted to workers with low academic formation or no specific skills, as well as to workers responsible for single-parent families, and to those that have been on leave for reasons related to maternity, paternity or adoption. This provision may clearly favour women since they are more likely to be in the situations described by the rule.

In short, positive action is accepted as a normal tool in the Portuguese legal system, in the area of employment, in relation to non-discrimination in general and to gender discrimination.

In the area of goods and services the author has no information regarding the practical implementation of positive measures.

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

Yes. Intervention is increasing in the area of gender equality in decision making, especially as regards the presence of women in company boards.

In this area, the Government approved a Resolution in 2012 designed to promote the increased participation of women in the boards of public and private companies, and

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<sup>5</sup> This is a rough and non-official translation made by the author.

<sup>6</sup> This is a rough and non-official translation made by the author.

following this Resolution other legislative measures have been established. However, these measures have gone much further as regards public administration and state-owned companies than as regards private companies.

As regards public companies, Decree-Law No. 133/2013, of 3 October 2013 ('General Features of Public Companies' – 'Estatuto das Empresas Públicas'), establishes that the governance boards of public companies (administration board and surveillance board) must aim to have both men and women as members, and establishes the obligation of public companies to put in place equality plans. In the same sense, Law No. 67/2013, of 28 August 2013 ('General Features of Administrative Independent Agencies for the Monitoring of Economic Activity in the Private and in the Public Sector' – 'Lei-Quadro das Entidades Reguladoras'), establishes that the board of these agencies must include at least 33 % of the members of each sex, and that the presidency of this board must be occupied by persons from both sexes alternatively.

In contrast, there is no specific legislation concerning the members of the boards of private sector companies, from the perspective of gender. Nevertheless, there has been growing attention for this issue, in the successive National Plans for Gender Equality approved by the Governments over the years that repeatedly emphasise the importance of gender balance in the boards of private companies as a condition for good governance. Accordingly, several campaigns were developed by the Government targeting private companies in this sense.

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.

In the political area, gender quotas have been imposed for elections for the National Parliament, for the European Parliament and for local political representatives, by Law No. 3/2006, of 21 August 2006 (known as the 'Parity Law' – 'Lei da Paridade'). This Law establishes that the lists presented by political parties for these elections must include at least 33.3 % women, in eligible positions.

These rules are slightly binding, since if the list of candidates does not comply with the proportion requirements, the party responsible is officially notified and requested to correct the list. If such correction is not made, the list is accepted with reservations and the party responsible suffers a serious reduction of public subsidies for campaign expenses.

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

3.6.1 Is harassment explicitly prohibited in national legislation?

Yes. Harassment is explicitly prohibited in the area of employment (Article 29 of the LC, which is also applicable to civil servants), in the area of self-employment, but only in relation to discriminatory harassment and sexual harassment (Article 5(5) and (6) of Law No. 3/2011 of 15 February 2011) and in the area of access to and supply of goods and services also in relation to discriminatory harassment and sexual harassment (Article 3(c) and (d) and in Article 4(4) of Law No. 14/2008 of 12 March 2008).

Harassment and sexual harassment are defined in national legislation in line with the definitions given by Directive 2006/54 in Article 2(1)(c) and (d) and Directive 2004/113/EC in Article 2(c) and (d), with some small differences between them, according to the situation in question (employment, self-employment or goods and services) and in the case of employment with a scope wider than the concepts of the Directives.

In the employment area, these concepts are addressed in Article 29(1) (concept of harassment) and in Article 29(2) (concept of sexual harassment) of the Labour Code, as follows:

- (Article 29(1) of the LC): 'Harassment is the unwanted behaviour, based or not on a discrimination ground, adopted towards a candidate for a job, an employee or a trainee, that intends or results in personal constraint or in the breach of the person's dignity or in the creation of an intimidating, hostile, degrading or humiliating environment';
- (Article 29(2) of the LC): 'Sexual harassment is the unwanted sexual behaviour adopted towards a candidate for a job, an employee or a trainee, in a verbal, non-verbal or physical form, with the intention or the result indicated in the preceding concept'.<sup>7</sup>

These concepts have a wider scope than the concept of Directive 2006/54, since the national provision includes three forms of harassment: harassment in general (e.g. moral harassment or mobbing), which is not linked to a discrimination factor; harassment based on a discriminatory factor (including sex but also other discriminatory factors indicated in the law, such as age, race, disability, place of birth, religious or political convictions, etc.); and sexual harassment, which consists of sexual behaviour. In this context, the national definition of harassment in the area of employment is therefore not only in compliance with the Directive but even exceeds it.

In the area of self-employment and in the area of goods and services, the law only mentions discriminatory harassment and sexual harassment (Article 5(5) of Law No. 3/2011, of 15 February 2011 and Article 3(c) and (d) of Law No. 14/2008, of 12 March 2008, respectively). In addition to this difference, the legal concepts of harassment in these areas are similar to the concepts of the Labour Code, with small adaptations to the situation in question.

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

Yes. As indicated above, Portugal has transposed EU legislation on harassment on the ground of sex and sexual harassment not only in the field of employment, but also in the fields of self-employment and in relation to equality in the access to and supply of goods and services.

3.6.3 Is sexual harassment explicitly prohibited in national legislation?

Yes. Sexual harassment is explicitly prohibited in the employment area (Article 29(2) and Article 24(1) of the Labour Code), in the area of goods and services (Article 4(1) and (4) of Law No. 14/2008, of 12 March 2008) and in the area of self-employment (Article 5 (1), (5) and (6) of Law No. 3/2011, of 15 February 2011).

As indicated above, sexual harassment is defined by Article 29(2) of the Labour Code as the 'unwanted sexual behaviour adopted towards a candidate for a job, an employee or a trainee, in a verbal, non-verbal or physical form, that intends to or results in personal constraint or in the breach of the person's dignity or in the creation of an intimidating, hostile, degrading or humiliating environment'.<sup>8</sup>

In the author's view this definition complies with the EU definition in Article 2(1)(d) of Directive 2006/54.

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<sup>7</sup> This is a rough and non-official translation made by the author.

<sup>8</sup> This is a rough and non-official translation made by the author.



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. As indicated above, sexual harassment is also prohibited in the areas of self-employment and access to and supply of goods and services and the concepts are similar, although slightly adapted to each situation.

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)?

No, there is no specific provision in this sense in national legislation.

However, the specific section of the Labour Code that deals with the so-called personality rights of the parties to the employment contract (especially the provision regarding the rights of the parties to the employment contract to physical and moral integrity - Article 15 of the LC) combined with the provisions regarding the duties of the employer in relation to the employees (especially the duty to treat the employee respectfully and also the duty to grant adequate working conditions, not only from a physical point of view but also from a moral point of view - Article 127 (1)(a) and (c) of the LC) allow for the qualification of such behaviour as a severe breach of legal duties, with the adequate consequences in terms of damage compensation.

### **3.7 Instruction to discriminate**

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

Yes. In the employment area, under Article 23(2) of the LC 'the order or instruction intended to cause damage to someone on the ground of a discrimination factor is, *per se*, a discriminatory practice'.<sup>9</sup>

As regards goods and services, Article 4(3) of Law No. 14/2008, of 12 March 2008, also qualifies as discrimination any instruction or order intended to directly or indirectly discriminate against the other party. A similar provision is established in Article 5(3) of Law No. 3/2011, of 15 February 2011, as regards self-employment.

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

No.

3.7.3 Is incitement to discrimination explicitly prohibited in your country?

Yes. Since incitement to discriminate is explicitly qualified as discrimination (Article 23(2) of the LC), and such conduct immediately falls under the general prohibition of discrimination, established in Article 25(1) of the LC.

### **3.8 Other forms of discrimination**

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

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<sup>9</sup> This is a rough and non-official translation made by the author.

No. National legislation does not explicitly address these forms of discrimination. Nevertheless, these forms of discrimination can be invoked under the general prohibition of discrimination, established in Article 25 (1) of the LC.

#### **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 Portugal, a general right to equal pay for equal work is established in the Constitution (Article 59(1)(a)) as a fundamental right of workers and employees. The same general principle is established in the Labour Code (Article 270), and the Code applies this principle both to non-discrimination in general (Article 24(2)(c)) and to gender equality in employment (Article 31). The LC provisions on equal pay are applicable both in the private sector and in the public sector.

###### **4.1.2 Is the concept of pay defined in national legislation?**

Yes. In the LC, Article 24(1)(b) covers the principle of equal pay in reference to all grounds of discrimination and Article 31(1) and (2) covers this principle in relation to gender equality.

Article 24(2)(c) and Article 31(2) establish the concept of remuneration in a rather unclear way, since apparently this concept does not rely on the EU-law broad concept of equal pay for the purpose of gender equality but on the national concept of remuneration, the content of which is narrower (in the sense that it does not cover all financial advantages granted to the employee under an employment contract). Nevertheless, for the purposes of the equal pay principle, the LC explicitly states that this principle applies not only to remuneration but also to other financial benefits granted to the employee under an employment contract (Article 24(2)(c)). Therefore, national legislation meets the definition of pay in Article 157(2) TFEU, although in an indirect way.

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

Yes. Article 31(1) combined with Article 25 of the LC transpose Article 4 Paragraph 1 of Recast Directive 2006/54.

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

Yes. Under Article 25(4) of the LC, when invoking pay discrimination, the employee must indicate the worker(s) in relation to whom he/she considers to be discriminated against. In this sense, a comparator is required.

The law makes no mention of the possibility of a hypothetical comparator, so in the author's view it would be possible to indicate a hypothetical comparator, provided the employer is the same. In this sense, the claimant could invoke that a previous employee in the same exact job earned much more, but he/she could not invoke that he/she is paid less than another worker that performs a similar job for another employer. However, since there is no case law in this area, it is not possible to assess the practical difficulties of the invocation of a hypothetical comparator.

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

Yes. The legal definition of equal work establishes that there is equal work when the work is of a 'similar nature, quantity and quality' (Article 23 (1)(c) of the LC).

The legal definition of work of equal value considers that the work is to be considered equivalent 'taking into consideration the qualification or the experience of the worker, the level of responsibility involved, the physical and mental effort required and the working conditions in practise'<sup>10</sup> (Article 23 No. 1 (d) of the LC).

In the authors' view these definitions and criteria are in line with the concepts of EU law.

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

Yes. Several provisions of the LC on equal pay go in this direction, mainly by stipulating that remuneration is to be determined by criteria common to men and women (Article 31 (2)) and by stipulating that job description and job evaluation must rely on objective criteria, common to men and women and that such criteria must exclude all forms of sex discrimination (Article 31(5)).

Another provision intended to promote transparency in relation to gender equality in general (including wage transparency) is Article 32 of the LC, which imposes upon the employer the duty to keep sex-segregated records of recruitment forms and procedures, for a minimum period of 5 years. These records must also include information that allows for the research of wage discrimination.

#### 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?

Some of the points of the European Commission's Recommendation of 7 March 2014 are already integrated in Portuguese legislation.

As regards the information rights regarding wages, in view of point 3 of the Recommendation, information on wages in the companies separated by sex is already available to employees under Article 32(1)(g) of the LC.

As regards this topic in collective bargaining (thus in view of point 6 of the Recommendation) several provisions of the LC are worth mentioning:

- Article 492(2)(c) of the LC indicates the measures intended to promote gender equality (including equal pay) as one of the mandatory topics of collective agreements.
- Article 479 of the LC, regarding the content of collective agreements and discrimination, establishes the duty of the 'Gender Equality Agency in the Field of Employment' (CITE - 'Comissão para a Igualdade no Trabalho e no Emprego') to check all collective agreements just after their publication in order to see if they include discriminatory clauses. If this is the case, the Agency can present the case to the public attorney, who can take it to court in order to have these clauses declared null and void. This rule, introduced by the Labour Code of 2009 is in line with point 5 of the Recommendation.
- Finally, Article 26 of the LC establishes that whenever a collective agreement or internal provision of company regulations restricts a certain type of remuneration to men or to women, these stipulations are automatically applicable to employees of both sexes, provided they perform equal work or work of the same value. This provision of national legislation on equal pay can be very effective to promote the

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<sup>10</sup> This is a rough and non-official translation made by the author.

practical implementation of equal pay and goes beyond the requirements of EU rules regarding the sanctions applicable to collective agreements that do not comply with the equal pay principle.

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

Differences in pay are only allowed when based on objective criteria, common to men and women, which are productivity, seniority, and the lack of periods of absence. However, as regards the criteria of the lack of periods of absence, the law explicitly indicates that the exercise of maternity and paternity rights cannot justify different remuneration (Article 31(3) and (4) of the LC).

Nevertheless, despite the formal compliance with EU law, indirect discriminatory practices cannot be completely ruled out when considering the criteria related to the lack of periods of absence of the worker, because other situations of time off are included, including time off for reasons related to care for other relatives, which is more common among women than among men.

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

The author is not aware of specific difficulties in this area.

## **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 (Article 14 of Directive 2006/54)?

National legislation does not have a concept of worker, as such, but it does include a concept of employment contract that is established both in the Civil Code (Article 1157) and in the LC (Article 11). Under these concepts, an employment contract is the contract concluded between an employer and a worker in order for them to perform paid mental or manual activity within the employer's organisation and in a subordinate way (e.g. under the employer's supervision and subjected to the employer's disciplinary power). In the public sector, there is a similar concept of employment contract with a public employer (Article 6(2) of Law No. 35/2014, of 20 June 2014).

The concept of worker for the purpose of employment legislation both in the private and in the public sector comes out of these concepts of employment contract and the main aspect of the concept is the element of 'subordination'.

All subordinate workers in the private sector with an employment contract are covered by the LC and therefore by gender equality provisions, which are also applicable to workers in the public sector. Therefore, atypical subordinate workers (such as workers with fixed-term contracts or temporary contracts, part-time workers, or teleworkers) are all covered by these rules, since they all have (special) employment contracts.

'Quasi-subordinate' workers are a particular category of workers traditionally recognised in Portuguese legislation under the expression 'trabalhadores equiparados' ('equivalent workers') or 'trabalhadores com dependência económica' ('workers in economic dependence'). This category is now specifically dealt with in Law No. 101/2009, of 8 September 2009, and is recognised when, in the absence of an employment contract (for lack of subordination), the worker is economically dependent on the creditor of the work in a substantial way (mainly because he works only for him) – see Article 1 of Law No. 101/2009. If this is the case, the law extends some labour protection rules to this

category of workers, despite their formal qualification as independent workers.<sup>11</sup> In the LC, this extension is contemplated in Article 10, and includes the LC provisions in the area of equal pay. Therefore, in the private sector these workers are covered.

By contrast, there is no similar provision in the public sector, so in this area quasi-subordinate workers are not covered by gender equality rules.

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. Article 24 of the LC defines the scope of the non-discrimination principle (including on the ground of sex) in relation to access to employment, vocational training, working conditions, in line with Article 14 of Directive 2006/54. As regards sex, this provision is complemented by Article 30 of the LC.

The scope of Articles 24 and 30 of the LC are similar to the scope of Article 14(1) of Recast Directive 2006/54, except the reference to self-employment and occupation, since self-employment is out of the scope of the LC.

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

Yes. This exception is possible in relation to all discrimination grounds, so it includes gender and it was implemented in Article 24(2) and (3) of the LC.

The author is not aware of specific assessments led by the Portuguese State as regards these occupational activities.

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. Article 24(3) (b) of the LC explicitly indicates that the non-discrimination principle in the access to employment, in the course of an employment contract or in vocational training does not prevent the adoption of specific measures aiming to protect pregnancy, maternity, paternity, adoption and other situations related to the reconciliation of professional and family life.

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.?

No.

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<sup>11</sup> This is even though from an economic point of view, these workers seem to constitute a separate category between workers and independent persons.

## **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?**

Yes. The national implementing legislation regarding Directive 92/85 is the Labour Code (Articles 36 *et seq.*), which in this area applies not only to workers of the private sector but also to workers of the public sector (by way of Article 4(1)(d) of Law No. 35/2014, of 20 June 2014).

The concepts of 'pregnant worker', 'worker who has recently given birth' and 'worker who is breastfeeding' in national law are in Article 36(1)(a)(b) and (c) of the LC:

- A pregnant worker is a worker carrying a child that informs the employer of her situation, in writing and by presenting a medical certificate (a);
- A worker who has recently given birth is a worker in labour or during the period of 120 days after giving birth that informs the employer of her situation, in writing and by presenting a medical certificate or a birth certificate (b);
- A worker who is breastfeeding is a worker who breastfeeds her child and informs the employer of her situation, in writing and by presenting a medical certificate (c).

These concepts are in compliance with the concepts of Directive 92/85, in the sense that these workers must inform the employer of their situation in order to have access to the relevant protection rules. However, these concepts go a little beyond the concepts of the Directive, since it is established that the protection rules regarding maternity and paternity are applicable not only if the worker has formally informed the employer of her condition but also, regardless of that formal communication, whenever the employer has direct knowledge of the worker's condition (Article 36(2) of the LC).

Therefore, these concepts are wider in domestic law than in European law.

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

Yes. Pregnant women are protected as regards working conditions related to the activity performed, working-time arrangements, including night work, and pregnancy-related illnesses, including antenatal examinations.

In relation to working conditions, all types of work that may be dangerous either for the woman or for the baby are forbidden or restricted, and the woman is entitled to change to non-dangerous work, or, if such change is not possible, to go on leave, paid by social security (Article 62 of the LC).<sup>12</sup>

In relation to working-time arrangements, pregnant women are entitled to refuse night work, overtime work and flexible working-time arrangements and as regards night work they are entitled to be transferred to a day-time position, or, if such position is not available, to go on leave paid by social security (LC, Articles 60, 59 and 58, respectively).

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<sup>12</sup> The list of activities forbidden or restricted during pregnancy is part of the legislation concerning health and safety at the workplace: Law No. 102/2009 of 10 September 2009, Articles 51 *et seq.* The legislation regarding social security benefits related to all leaves regarding pregnancy, maternity and paternity is Decree-Law No. 91/2009 of 9 April 2009.

Finally, in relation to pregnancy-related illnesses, women have the right to go on paid leave in the event of pregnancy risks affecting their ability to work as well as in the event of abortion, and to normal sick leave in the event of other illnesses during pregnancy (LC, Articles 37 and 38). They also have the right to attend antenatal examinations, with no loss of salary (Articles 46 and 65(2) of the LC).

There are no problems in the implementation of EU law at national level in this area.

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. Dismissal during pregnancy and maternity leaves as well as during parental leave is unlawful and therefore forbidden (Article 53 of the Portuguese Constitution, and Articles 338 and 63(2) of the LC).

Plus, if the worker is dismissed on these grounds, the dismissal is null and void and he/she has the right to be reinstated, but if he/she decides not go back, he/she has the right to accrued damage compensation (calculated at double the basis of 15 to 45 days per year of the employment contract (Article 63(8) and Article 392(1) of the LC).

In addition to this general prohibition, if any form of dismissal occurs while the worker is pregnant or during any type of leave (e.g. collective dismissal or other objectively motivated dismissal), the dismissal is still presumed unlawful and has to follow a different procedure involving the CITE ('Gender Equality Agency in the Field of Employment'), which has to approve the dismissal in advance (Article 63 of the LC). If, in the end, an employee is made redundant during her maternity leave, the payment for maternity leave as such will cease, since this payment is granted by the public social security system to workers with an employment contract, but it will be replaced by unemployment allowance, also granted by the public social security system.

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 (Article 10(2) of Directive 92/85)?

Yes. Under the Portuguese Constitution and legislation all forms of dismissal (including disciplinary dismissal, collective dismissal or other objectively motivated dismissal) must have substantiated grounds, which need to be communicated to the worker in writing, and every form of dismissal must respect a specific and quite strict procedure. Either the absence of the adequate motive or of the adequate procedure, established by law, makes the dismissal null and void and grants the employee the right to reinstatement (Articles 351 *et seq.* and 381 *et seq.* of the LC).

This general rule also applies if the dismissed worker is pregnant, on maternity leave or on parental leave.

## 5.2 Maternity leave

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

Maternity leave (which is called 'initial parental leave' by the LC)<sup>13</sup> is granted to women and to men and is in fact divided into several leaves: 'initial parental leave just for the mother' with a minimum duration of 6 weeks after giving birth (Article 41 of the LC);

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<sup>13</sup> This specific type of leave corresponds to 'maternity leave', as regulated by EU law. The Portuguese term for this type of leave ('initial parental leave') intends to draw attention to the fact that both parents can enjoy it, alternatively, but the phrase can be misinterpreted.



'initial parental leave' for the remaining time until 120 days or 150 days according to the choice of the parents, which can be divided between both parents (Article 40 of the LC); and 'initial parental leave of one of the parents in replacement of the other parent' (e.g. leave for the father to replace the mother who died during the leave (Article 42 of the LC), which lasts for the remaining part of maternity leave. If after the initial period of maternity leave (e.g. 'initial parental leave') the other party of the couple takes the leave for 30 days or for 2 periods of 15 days, the total duration of maternity leave (120 or 150 days) is extended by 30 more days (Articles 40 and 41 of the LC).

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

Yes. The 'initial parental leave just for the mother' is obligatory and has a duration of 6 weeks after giving birth (Article 41 of the LC).

In contrast, there are no obligatory periods of maternity leave before giving birth, but in addition to maternity leave, there may be a 'special leave in case of medical risk during pregnancy', which is possible under Article 37 of the LC and the length of which is determined by medical examination.

#### 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. Article 65 of the LC states that all employment rights (except pay rights) are kept during maternity and parental leaves, as well as in other situations related to pregnancy and maternity, such as the need to change from night work to a day-time job, or the leave for safety reasons or for medical reasons due to pregnancy, and also abortion leave, or time off to attend antenatal examinations.

#### 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?

Yes. In Portuguese legislation, all leaves related to maternity (maternity leave, adoption leave, as well as pregnancy-related leaves, such as abortion leave, leave for pregnancy-related sickness and leaves related to night work and to dangerous work, when there is no alternative job available) are paid by the public social security system.

The exception is time off to attend antenatal examinations and for the purpose of breastfeeding, where the period of absence is paid by the employer.

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

The social security allowances concerning the leaves related to pregnancy, abortion and maternity are established by Decree-Law No. 91/2009, of 9 April 2009, and the amount paid varies according to the type of leave:

- Maternity leave (meaning 'initial parental leave', as it is called in Portugal), when taken in the 120-days option, as well as the leave due to pregnancy risks, and also adoption leave, are paid on a basis of 100 % of the average salary of the worker (Decree-Law No. 91/2009 of 9 April 2009, Articles 29, 30(a), 31 and 34);
- Maternity leave when taken in the 150-days option is paid on a basis of 80 % of the average salary of the worker (Decree-Law No. 91/2009 of 9 April 2009, Articles 30(b) and 34);
- Other pregnancy-related leaves, such as pregnancy-related sickness leave, leave in case of abortion, and leaves related to night work and to dangerous work, when

there is no alternative job available, are paid on the basis of 65 % of the salary, in line with the payment of sick leave (Decree-Law No. 91/2009 of 9 April 2009, Articles 18, 19 and 35).

There is no ceiling to the amount paid.

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

Employers may have to supplement the statutory maternity benefits up to the normal remuneration on the basis of a collective agreement stipulating such an obligation or if they have agreed to do so in the employment contract. However, this situation is rare.

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

Yes. A minimum period of six months of contributions to the public social security system is required to have access to the allowances (Article 25 of Decree-Law No. 91/2009, of 9 April 2009).

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

Yes. Article 65(6) of the LC determines that, at the end of the leave the woman, as does the man when he enjoys maternity, paternity or parental leave, has the right to return to her/his previous activity. If any improvement in working conditions to which she/he would have been entitled during her/his absence has occurred in the meantime, she/he is entitled to take advantage of it, since she/he cannot be damaged in any right attached to the employment contract due to the exercise of maternity/paternity rights (Article 61(1) of the LC).

### **5.3 Adoption leave**

5.3.1 Does national legislation provide for adoption leave?

Yes. Adoption leave is an autonomous leave but it follows the pattern of maternity leave (in Portuguese 'initial parental leave').

Adoption leave is granted to both parents on the same conditions as those established for the 'initial parental leave' (meaning for a period of 120 or 150 days and paid accordingly), provided the adopted child is younger than 15 and is not the son/daughter of the husband, wife or life partner of the adoptive parent.

The parents can divide the full period of the leave between them (Article 44 of the LC).

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

Yes. A specific measure addressed to adoptive parents is the right granted to candidates to become adoptive parents to three short leaves of absence for reasons linked to the adoption procedure (Article 45 LC).

However, this measure was not taken as a consequence of Directive 2010/18 because Portugal found it unnecessary to formally transpose this Directive.

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 (Article 16 of Directive 2006/54)?

Yes. Adoption leave is a maternity-related and paternity-related right so it is protected in the same way as maternity and parental leave.

Dismissal during this leave is unlawful and therefore forbidden (Article 53 of the Portuguese Constitution, and Articles 338 and 63(2) of the LC). Plus, if the worker is dismissed on the ground of applying for or using adoption leave, the dismissal is null and void and he/she has the right to reinstatement, but if he/she decides not go back, he/she has the right to accrued damage compensation (calculated at double the basis of 15 to 45 days per year of the employment contract (Article 63(8) and Article 392(1) of the LC).

In addition to this general prohibition, if any form of dismissal occurs while the worker is on adoption leave (e.g. collective dismissal or other objectively motivated dismissal), the dismissal is still presumed unlawful and has to follow a different procedure involving the CITE ('Agency for Gender Equality in Employment'), which has to approve the dismissal in advance (Article 63 of the LC). If, in the end, an employee is made redundant during adoption leave, the payment for adoption leave as such will cease, since this payment is granted by the public social security system to workers with an employment contract, but it will be replaced by unemployment allowance, also granted by the public social security system.

## 5.4 Parental leave

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

No. Directive 2010/18 has not been formally implemented in Portugal. Since national legislation already provides for several successive leaves that, if considered together, are more extensive than the EU provisions on parental leave, and because parental leave is already granted by the Labour Code on a non-transferable basis, this led the Portuguese authorities to consider that there was no need to formally transpose Directive 2010/18.

In national legislation, parental leave has a broad sense (that includes maternity leave) and a strict sense. In this strict sense (which corresponds to the EU concept of parental leave, e.g. the leave taken after maternity leave to take care of a child), there are several leaves for care purposes: the strict parental leave, which in Portuguese is known as 'additional parental leave' ('licença parental complementar'), taken after maternity leave (Article 51 LC), and several special leaves to take care of small children, disabled children or children with a long-term illness, which can be taken after strict parental leave (Articles 52 and 53 LC).

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

National legislation regarding parental leave is applicable to both the public and the private sector, according to the same terms. As regards private workers, this issue is dealt with in the LC (Articles 5, 52 and 53). The same provisions are directly applicable to public servants, based on a reference of Article 4 of Law No. 35/2014, of 20 June 2014, which regulates employment contracts of civil servants.

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?

Employment contracts and employment relationships related to part-time workers, fixed-term contract workers or persons with an employment relationship with a temporary agency are included in the scope of the national provisions in this area.

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

The total duration of parental leave in Portuguese legislation, which is the same in the public and the private sector, depends on whether the leave is taken on a full-time basis or on a part-time basis and also on whether we are thinking of the strict 'additional parental leave' (e.g. the leave that follows maternity leave and can be taken until the child is six years old - Article 51 of the LC) or of the extended concept of parental leave (thus including some of the period of the 'special leave' taken after 'parental leave in the strict sense' (Articles 40(2), 51(1) and 52 LC).

When taking into account the strict concept of parental leave, the total duration of the leave is 3 months (on a full-time basis) or 12 months (on a part-time basis), or a combination of the two (Article 51(1) LC). However, this period can be followed by the so-called 'special leave to take care of children', which can go up to two years, or three years for the third child and four years for disabled children or children with a long-term illness (Articles 52 and 53 LC), in successive periods of six months.

So when considering these two leaves together it is possible to say that Portuguese legislation complies with Clause 1(1) of the Agreement adopted by Directive 2010/18.

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

The right to parental leave is an individual right of each parent and the law does not allow for the transfer of the right from one parent to the other (Article 51(2) of the LC). This being the case, the right to retain a minimum period of the leave for the individual use of one of the parents (as prescribed in Clause 2(2) of the Agreement adopted by Directive 2010/18) does not apply in national law.

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 (Clause 3 of Directive 2010/18)?

Parental leave in the strict sense (meaning 'additional parental leave' – Article 51 LC) can be taken on a full-time or a part-time basis, or in a combined arrangement. When taken on a part-time basis, parental leave can go up to 12 months; when taken on a full-time basis, it can go up to 3 months. 'Special leave for the care of children' (or extended parental leave) can be taken on a full-time basis (Articles 52 and 53).

Parental leave can be taken in a piecemeal way, in a maximum of three periods (Article 51(2) of the LC).

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? (Clause 3 of Directive 2010/18)?

The right to parental leave depends on a notice period of 30 days prior to the leave (Article 51(5) LC, as regards parental leave in the strict sense, and Article 52(6), as regards 'special leave for the care of children'). The request must be made in writing and must indicate the form and the length of the leave required. There is no length of service requirement in order to benefit from parental leave or special leave, but only in order to benefit from the social security allowance attached to it.

Both additional parental leave and special leave for the care of children are a right of the worker that prevails over the needs of the employer, so the leave cannot be refused by the employer. Also, to ensure that the leave is taken for the right purpose, the law forbids the worker to perform another professional activity incompatible with care, while on leave (Article 51(4) LC).

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

No. There is only a minimum period of contributions of six months to the public social security system to have access to the allowance attached to the leave (but not to the leave itself), but this period of contributions may partially have been completed in a previous job.

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

The only situation where the granting of parental leave may be postponed for reasons related to the operation of the organization, is when both parents work for the same employer and both of them wish to enjoy the leave simultaneously. In this case, the employer can postpone the leave of one of the parents on the ground of imperative operational reasons of the business (Article 51(3) LC).

5.4.10 Are there special arrangements for small firms?

No.

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. As regards the adjustment of the leave to the needs of parents of children with a disability or a long-term illness, the parents can take advantage of parental leave in the strict sense ('additional parental leave'), under Article 51 LC, and after this leave they can take the 'special leave for the care of children', in the specific extended form that the LC establishes for those cases in Article 53 (this leave can go up to four years instead of two, and the age limit of the child is increased to twelve, and, on medical indication, can exceed that age).

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 (Clause 5 of Directive 2010/18)?

Yes. Parental leave is a maternity-related and paternity-related right so it is protected in the same way as maternity leave.

Dismissal during this leave is unlawful and therefore forbidden (Article 53 of the Portuguese Constitution, and Articles 338 and 63(2) of the LC). Plus, if the worker is dismissed on the ground of applying for or using parental leave, the dismissal is null and void and he/she has the right to be reinstated, but if he/she decides not to go back, he/she

has the right to accrued damage compensation (calculated at double the basis of 15 to 45 days per year of the employment contract (Article 63(8) and Article 392(1) of the LC).

In addition to this general prohibition, if any form of dismissal occurs while the worker is on parental leave (e.g. collective dismissal or other objectively motivated dismissal), the dismissal is still presumed unlawful and has to follow a different procedure involving the CITE (Agency for Gender Equality in the Field of Employment), which has to approve the dismissal in advance (Article 63 of the LC).

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. 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 at the end of the leave (Article 65(5) of the 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?

The rights acquired or in the process of being acquired by the worker on the date on which parental leave starts (again: not 'special leave to take care of a child') stand until the end of parental leave and the period of the leave is considered for all purposes, except pay, as effective working time (Article 65(1) of the LC).

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

While the worker is on leave, the employment contract is suspended.

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?

Yes. There is continuity of the entitlements to social security cover under the different schemes, in particular healthcare, during the period of parental leave.

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

Parental leave is not remunerated by the employer.

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?

The social security system provides for an allowance in the first three months of parental leave provided that the leave is taken immediately after the end of maternity leave by the other parent (Article 16 of Law No. 91/2009, of 9 April 2009). This allowance is granted in all sectors, provided the worker has a minimum of six months of contributions to the social security system (Article 25 of this Law). The amount of the allowance is 25 % of the average salary of the worker, with no upper limits.

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

Portuguese legislation is more favourable than Directive 2010/18 as regards parental leave when combining the various leaves and the other measures described above, since the extent of the leaves largely exceeds the minimum of four months of parental leave prescribed in the Directive.

The national legislation is also more favourable as regards some specific forms of assistance such as the 'grandparents leave' (e.g. the right to a leave of absence from work to assist a daughter younger than 16 who has given birth, for a maximum of 30 days - Article 50 of the LC), and finally as regards the control intervention of the CITE (Agency for Gender Equality in the Field of Employment) as in relation to dismissal during parental leave.

## **5.5 Paternity leave**

### **5.5.1 Does national legislation provide for paternity leave?**

Yes. National legislation provides for an autonomous paternity leave, which is called 'initial parental leave just for the father' (Article 43 of the LC).

This leave is divided into two periods, the first one with a compulsory nature and the second one with a non-compulsory nature. The length of this leave used to be 10 days when the mother gives birth, followed by 10 more days during maternity leave. However, the LC has just recently been changed in this respect, by Law No. 120/2015, of 1 September 2015, which established the following duration: 15 initial and compulsory days, five of each to be taken when the mother gives birth, and the other 10 days in the first month of the child; plus 10 more non-compulsory days, to be enjoyed while the mother is on maternity leave. In short, the change introduced in the LC has increased the duration of the compulsory part of paternity leave by five days.

Paternity leave is paid by social security on the basis of 100 % of the average salary of the father (Article 15 of Decree-Law No. 91/2009, of 9 April 2009).

### **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. Paternity leave is a paternity-related right so it is protected in the same way as maternity leave.

Dismissal during this leave is unlawful and therefore forbidden (Article 53 of the Portuguese Constitution, and Articles 338 and 63(2) of the LC). Plus, if the worker is dismissed on the ground of applying for or using paternity leave, the dismissal is null and void and he has the right to be reinstated, but if he decides not go back, he has the right to accrued damage compensation (calculated at double the basis of 15 to 45 days per year of the employment contract (Article 63(8) and Article 392(1) of the LC).

In addition to this general prohibition, if any form of dismissal occurs while the worker is on paternity leave (e.g. collective dismissal or other objectively motivated dismissal), the dismissal is still presumed unlawful and has to follow a different procedure involving the CITE (Agency for Gender Equality in the Field of Employment), which has to approve the dismissal in advance (Article 63 of the 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 (Clause 7 of Directive 2010/18)?

Yes. Workers are entitled to unpaid time off from work on grounds of *force majeure* for urgent family reasons in case of sickness or accident of the child for a maximum of 30 days per year, or a maximum of 15 days per year to take care of a child under 12 or over 12, respectively, and, regardless of age, for a disabled or chronically ill child. These time limits can be exceeded in case of hospitalisation of the child and also in case of a second (or further) child (Article 49 LC).

However, this right is conditioned on the requirement that the absence of the worker is inevitable, in the sense that he/she cannot be replaced in the care for the child.

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

- 5.7.1 Is parental leave available in case of surrogacy?

No. Surrogacy is not permitted in Portugal. This being the case, if the situation arises, all the rights attached to pregnancy and maternity, including the leaves would be recognised to the woman who gives birth.

## **5.8 Leave sharing arrangements**

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

Yes. Maternity leave (i.e. in national legislation 'initial parental leave') which can go up to 120 days or 150 days according to the choice of the parents, can be divided between both parents, with the exception of the first 6 weeks after giving birth that are reserved for the mother (Article 40 of the LC).

The sharing of leave between the parents is left up to them and supposes that the leave is taken either by the one or by the other. However, in a change just recently introduced into the LC by Law No. 120/2015, of 1 September 2015, when the parents choose to take the longer period of 150 days, the last 30 days of the leave can be taken simultaneously (Article 40(2) of the LC). In all other situations, the leave can be shared between the parents but is not to be taken at the same time.

Maternity leave is taken on a full-time basis and it is a right granted by the law, so it is not subject to negotiation between the employee and the employer.

Also, the right to the leave is not conditioned by the size of the enterprise and therefore the employer cannot refuse or postpone the leave on that ground. The sole exception to this rule is the situation where both parents wish to take the last 30 days of the extended maternity leave (i.e. the 150-day leave) simultaneously, recently introduced in Article 40(2) of the LC: in this situation, if both parents work for the same employer and the enterprise is a micro-company (i.e. a company with less than ten workers), the taking of that part of the leave by both parents together depends upon the agreement of the employer (Article 40 (6) of the LC, in the text introduced by Law No. 120/2015, of 1 September 2015).

Sharing arrangements for maternity leave are effective in addition to paternity leave.



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

No. Parental leave (which corresponds in national legislation to the so-called 'additional parental leave') is an individual right of each parent, which is not transferable at all to the other parent (Article 51(2) of the LC).

## 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. When returning from parental leave or from maternity leave, workers can request the following changes to their working hours and/or patterns for the purpose of reconciling work and family life:

- Working mothers that are breastfeeding (and also fathers if the baby is bottle-fed) have the right to refuse night work, overtime work and flexible working-time arrangements instated by the company on the ground of entrepreneurial reasons, while breastfeeding or until the child is one year old (Articles 58, 59 and 60 LC);
- The parent of a disabled child or child with a long-term illness under one has the right to a reduction of working time of five hours per week to take care of the child (Article 54 LC).

There are no specific eligibility criteria (e.g. a qualifying period of service or history of social contributions) or specific conditions to apply for these schemes.

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

Yes. The following possibilities are offered by the LC in this respect:

- The worker with family responsibilities has the right to change to a part-time job, for two years (three years for a third child and four years for a disabled child or child with a long-term illness) provided the child is under twelve or independently of that age limit for a disabled child or child with a long-term illness (Article 55 LC);
- The worker with a child under twelve (or independently of that age limit for disabled children or children with a long-term illness) has the right to perform the job under flexible working-time arrangements (Article 56 LC).

As regards the requests for part-time or flexible working-time arrangements for care purposes, they can be refused by the employer on the ground of compelling operational reasons or of the impossibility of replacing the employee, but this justification has to be considered valid by the CITE (Agency for Gender Equality in the Field of Employment) and if the CITE does not agree, the employer must challenge the decision of the CITE before the Court (Article 57 LC). There are no specific eligibility criteria (e.g. a qualifying period of service or history of social contributions) or specific conditions to apply for these schemes.

In addition to these schemes, some limitations to the application of flexible working-time arrangements on the ground of entrepreneurial reasons (such as adaptable working time and banking of hours established in collective agreement or by company regulation), which may have a negative impact on reconciliation of family and working life, are now imposed by the LC (in the changes introduced by Law No. 120/2015, of 1 September 2015): since then, these flexible working-time arrangements determined by collective agreements or by company regulations cannot be imposed on workers with children

under three without the specific and written consent of the working parent (Articles 206(4)(b) and 208-B(3)(b) of the LC).

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

Yes. Just recently the LC was changed by Law No. 120/2015, of 1 September 2015, in order to introduce the legal right to telework for reconciliation purposes.

In this sense, the worker with a child under three has the right to telework if the professional activity performed is compatible with this form of work and the employer can provide the necessary means to make that change possible (Article 166(3) of the LC).

There are no specific eligibility criteria (e.g. a qualifying period of service or history of social contributions) or specific conditions to apply for this scheme.

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. On the contrary, since in Portuguese legislation, flexible working-time arrangements are mostly adopted for entrepreneurial reasons (this is the case for adaptable working-time arrangements and banking hours), which may have a negative impact on reconciliation of family and working life, the law imposes more limitations on these schemes in their application to workers with young children as explained above (Articles 206(4)(b) and 208-B(3)(b) of the LC).

## **6. Occupational pension schemes (Chapter 2 of Directive 2006/54)**

A brief overview of the Portuguese social security system as regards occupational social security system is essential before answering the questions asked.

In Portugal, occupational social security schemes are rare, due to the universal scope of the general public social security system. In addition, over the years almost all specific social security schemes (some of which cover many benefits and others have a more limited scope) have been integrated into the public social security scheme.

The Portuguese legislation regarding occupational social security systems are Decree-Law No. 12/2006 of 20 January 2006 and Decree-Law No. 307/97 of 11 November 1997. The first law regulates the trust funds that deal with professional social security schemes. The second one has transposed Directive 86/378/EEC, including the changes introduced by Directive 96/97/EC, into national law.

Professional social security systems are intended either to complement or to replace the legal and public statutory social security system (Article 1 of Decree-Law No. 307/97, of 11 November 1997). Old-age pensions, as well as invalidity pensions and survivors' and other family-support pensions can integrate these systems (Article 4 of Decree-Law No. 307/97 and Article 6(1) of Decree-Law No. 12/2006, of 20 January 2006).

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

Yes. Article 6(1) of Decree-Law No. 307/97, of 11 November 1997, explicitly prohibits direct and indirect sex discrimination.

### **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.**

The personal scope of national legislation in this area is defined in Article 3 of Decree-Law No. 307/97 of 11 November 1997, completely in line with Article 6 of Directive 2006/54.

### **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 national legislation in this area is defined in Article 4 of Decree-Law No. 307/97, of 11 November 1997, completely in line with Article 6 of Directive 2006/54.

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

Yes. The exclusions from the material scope of this legislation are defined in Article 5 of Decree-Law No. 307/97, of 11 November 1997, completely in line with Article 6(1) of Directive 2006/54, the exclusions being exactly the same.

### **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?**

Article 7 of Decree-Law No. 307/97, of 11 November 1997, includes a list of discriminatory practices in the area of occupational social security schemes that meets the examples of discrimination stated in Article 9 of Directive 2006/54.

As regards case law, the author has no knowledge of actions brought before the courts to deal with these issues.

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

The author has no specific information regarding this topic.

As far as the author knows, the actuarial factors used by these schemes are the same as those used by statutory schemes. Nevertheless, Decree-Law No. 307/97, of 11 November 1997, establishes as a general principle that actuarial rules used to determine the amount of the benefit must not be discriminatory and must promote gender equality (Article 7).

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

The main difficulties regarding this area rely on the fact that, in addition to the general provisions on gender equality established by Decree-Law No. 307/97, of 11 November 1997 (i.e. the establishment of a gender equality principle in this area (Article 6) and the prohibition of discriminatory practices, complemented by the examples of discriminatory practices in this area (Article 7(1) (c) and (f)), the occupational social security systems differ significantly, due to their private nature and also depending on the complementary or replacing nature of each of them.

When they are complementary to the statutory social security system, professional occupational systems are based on the model of the statutory old-age pension system that they mean to complement. When they replace the legal system (which is very rare) they are based on private conditions, usually agreed upon in collective agreements or in private pension plans within companies, which are impossible to trace.

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

A brief overview of the Portuguese social security system is essential before answering the questions asked.

In Portugal, the right to social security is a universal and fundamental right (Article 63(1) of the Portuguese Constitution), which must be granted by the Portuguese State. Therefore, the social security system is a public statutory system.

The situations contemplated by Directive 79/7 are covered at national level by the Social Security General Law ('Lei de Bases da Segurança Social') (Law No. 4/2007 of 16 January 2007), but there is no specific legislation explicitly transposing this Directive.

The Social Security General Law establishes two social security systems. The first one is the 'system of social citizenship protection', which integrates three subsystems: the 'social action subsystem' (intended to promote actions in the social field), the 'solidarity subsystem' (intended to eradicate poverty in situations that do not fall under the 'contribution' system), and the 'family protection subsystem' (intended to compensate people for specific family charges). The second social security system is the 'contribution system', which is intended to compensate the social risks of persons with a professional activity, and is based on the contributions of employers and employees.

This second and more general system ('contribution system') integrates social protection related to sickness, invalidity and old-age pensions, family allowances (in situations related to maternity, paternity and adoption), involuntary unemployment, accidents at work and occupational diseases, in the sense of Article 3 of Directive 79/7.

The contribution system is developed by the 'Contribution System of the Social Security Code' ('Código dos Regimes Contributivos de Segurança Social' – CRCSS), approved by Law No. 110/2009, of 16 September 2009. This Code deals with the several benefits granted in the contribution system to employees, self-employed persons and other specific categories or workers, with the exception of public servants (who are covered by a specific regulation in the area of social security). Specific legislation related to each benefit complements this Code.

In short, the Portuguese legal system in this area is rather complex.

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

Yes. The principle of equal treatment for men and women in matters of social security is established by the Social Security General Law (Article 7). It is one of the so-called 'general principles' of the Portuguese social security system.

Another principle of this system with relevance to gender equality is the 'principle of positive differentiation' (Article 10 of the Social Security General Law), which allows for flexibility of the benefits taking into account a certain number of factors, including family and social factors.

### **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 national legislation in this area is defined in Article 51 of the Social Security General Law and in Article 24 of the CRCSS, which are in line with Article 2(1) of Directive 79/7.

**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.**

The material scope of national legislation in this area is defined in Article 52 of the Social Security General Law and in Articles 19 and 28 of the CRCSS, which are in line with Article 3(1) of Directive 79/7.

Family benefits are a specific subsystem under the above-mentioned 'system of social citizenship protection' (Article 44 *et seq.* of the Social Security General Law), which is regulated by specific legislation. The same applies to survivors' pensions.

**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 Portugal, the retirement age is the same for men and women (now 66). However, this is not a mandatory age as it depends upon the worker's intention to apply for retirement when he/she reaches this age, provided he/she meets the other requirements to have access to a pension (a minimum number of working years with paid contributions, for example). Only for public servants is there an age limit on continuing to work, which is fixed at 70 (Article 291 of Law No. 35/2014, of 20 June 2014).

Also, except in public service, a claimant can receive an old-age pension and still continue working, if he/she so wishes and the employer agrees to it.

In Portugal, the equalization of the pensionable age for men and women was approved in 1993. At the time, arguments were presented to the effect that the equalization had only taken place for economic reasons. Also, the application of this new rule during the transitory period resulted in some problems especially because there was an adjustment period to implement the new age limit, but the minimum period of contributions was also changed at the same time (from a minimum of 10 years of work with paid contributions to a minimum of 15 years) and the new rule on this minimum period had no transitory period. However, since this transitory period came to an end quite some time ago, this rule no longer gives rise to any problems.

In Portugal, maternity leave, paternity leave, parental leave and other special leaves for the purpose of care are credited as if they corresponded with professional activity for the purpose of the formation of pension rights (Article 22 of Decree-Law No. 91/2009, of 9 April 2009). Apart from these mechanisms there are no other crediting mechanisms in relation to the pensionable age for persons who have raised children or performed other care work within the family.

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

The author has no specific information regarding this topic.

Nevertheless, due to the gender equality principle established in Article 7 of the Social Security General Law, actuarial rules used to determine the amount of the benefit cannot be discriminatory and must promote gender equality.

**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.**

On the one hand, some difficulties in this area arise from the complexity of national legislation that makes it difficult to detect discriminatory situations.

On the other hand, the Portuguese social security system has been subject to an overall reform for the past decade, mostly for reasons related to the economic sustainability of the system itself.<sup>14</sup> In this sense, new principles on the subject have been developed by the law, such as reinforcing the economic strength of the system and promoting active ageing.

In the pursuit of these goals several legal measures regarding old-age pensions have been approved by Decree-Law No. 187/2007, of 10 May 2007, such as new rules to calculate the old-age pension, a maximum limit for this pension, a pension bonus for those who choose not to apply for their pension as soon as they fulfil the age requirement, and a reduction in the pension for those who apply for it before reaching that age because they comply with other alternative requirements (for instance, a certain number of working years).

In a global overview, these measures seem to be gender neutral, but some of them can in fact have discriminatory results against women. The best example of these discriminatory effects is the present rule regarding the formula to calculate the amount of old-age and invalidity pensions: unlike the previous rule, this rule takes into account not only the best ten years of the last fifteen years of contributions to the social security system, but all years of contributions to calculate the value of the pension.<sup>15</sup> This formula may have a disproportionate effect on women's and on men's pensions, since the salary gender gap is often more relevant at the beginning of one's career than in the final years of work. We have no information as to whether the gender factor was even taken into consideration when this measure was approved, but we cannot ignore this negative effect.

We think that, on the whole, the reform of the social security system in Portugal has not taken into consideration the fact that men and women have different working patterns, with women having lower participation rates in the formal labour market, lower pay and fragmented careers due to care activities. With the exception of leaves due to maternity and paternity reasons, which are taken into consideration for the purpose of building up pension rights as indicated above (Article 22 of Decree-Law No. 91/2009, from 9 April 2009), these reforms have not taken into account the issue of gender equality.

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<sup>14</sup> One must take into consideration that the system has a universal aspect, in the sense that every citizen has the right to social security protection, as well as a public nature, depending almost exclusively upon the National Budget for Social Security, which is part of the National Annual Budget. In this situation, the problem of the economic sustainability of the system is of major significance.

<sup>15</sup> This new formula to calculate the value of old-age pensions was introduced by Decree-Law No. 35/2005, from 19 February 2005, which changed Decree-Law No. 329/93, from 25 September 1993. The same rule is now established in Article 29 of Decree-Law No. 187/2007, from 10 May 2007.

## **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?**

No. Directive 2010/41 has not been formally transposed into Portuguese legislation, because national legislation was considered to already be in compliance with the Directive. Four Acts are to be taken into consideration for the several purposes of the Directive, in the area of employment and in the area of social security:

- Law No. 3/2011, of 15 February 2011, which establishes the general frame for the protection of the self-employed as regards the prohibition of discrimination in the access to and in the development of independent work in the private sector, in the public sector, and in the cooperative sector.
- Law No. 110/2009, of 16 September 2009, which approved the Social Security Contribution System Code ('Código dos Regimes Contributivos do Sistema Previdencial de Segurança Social' - CRCSS) which includes some provisions regarding social security for independent workers, including assisting spouses, and also separate provisions applicable to the members of company boards.
- The Labour Code (LC), which extensively regulates equality and non-discrimination in employment, which is important because these provisions are also applicable to the category of 'quasi-subordinate' workers (Article 10) and, under the new General Law for Civil Servants, also to workers of the public sector, including independent workers (Article 4(1)(c) and (d) of Law No. 35/2014, of 20 June 2014).
- Law No. 91/2009, of 9 April 2009, which establishes social security provisions attached to maternity and paternity rights. These provisions are applicable to subordinate workers in the private sector and in the public sector and to independent workers (Article 4(1)).

### **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 (Article 2 Directive 2010/41/EU)**

Portuguese legislation defines self-employment for the purposes of non-discrimination provisions in the access to and in the development of self-employment and also for the purpose of social security rights, but not exactly in the same sense.

For the purpose of non-discrimination in the access to and in the development of independent work, Law No. 3/2011, of 15 February 2011, defines independent work in accordance with Directive 2010/41/EU, in Article 2(2), as a professional activity developed outside an employment contract or a legally equivalent situation.

This concept is wide, accommodating very different situations, such as traditionally independent professions (doctor, attorney at law or architect), small entrepreneurs, independent workers in agriculture, in commerce or in services, members of the boards of companies, workers in cooperatives, etc. However, this concept does not explicitly mention assisting spouses.

For the purposes of social security, the Social Security Contribution System Code (CRCSS) defines independent worker as a person performing a professional activity outside an employment contract or a legally equivalent situation, or a person performing a professional activity for another person without being integrated in the social security scheme applicable to subordinate workers (Article 132 of this Code).



Following this general definition, this Code indicates several categories of independent workers (Articles 133 and 134), which include the following situations: persons pursuing a gainful activity for their own account; business partners; persons developing independent work in agriculture, including running a farm or operating a business in this area; small entrepreneurs; authors and artists. Other categories of independent workers are also considered under specific social security schemes – this applies to workers in the cooperative sector (Article 135 of the CRCSS), members of company boards (Article 61 of the CRCSS), and 'quasi-subordinate' workers (Article 71 of the CRCSS).

The CRCSS explicitly mentions the category of assisting spouses or life partners of independent workers, defining them as those who perform a regular and permanent (but not necessarily full-time) professional activity with their partners (Article 133(1)(c)). Under the category of independent workers for the purposes of social security, the Code also mentions independent workers in agriculture and small entrepreneurs and their spouses or life partners (Article 134(1)(a) and (b)).

As a general conclusion to this point, we would say that Portuguese legislation includes a wide concept of self-employment, but this concept and therefore the scope of the applicable rules are not the same for all purposes. Also, the category of assisting spouses or life partners is only explicitly recognized and covered for the purpose of social security provisions.

**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.**

As indicated above, the concept of self-employment is wide, so all categories are covered.

**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?**

Although Directive 2010/41 has not been transposed into national law, the principle of equal treatment in independent work is established in national law. Article 3 and Article 5(1) of Law No. 3/2011, of 15 February 2011, establish that no one can be subjected to different treatment in the access to and during the development of self-employment, due to a discriminatory ground.

This protection includes direct and indirect discrimination and discriminatory harassment (including sexual harassment) (Article 5(2), (3), (5) and (6)) and covers the access to self-employment (including advertisements, selection criteria and the affiliation of the worker to professional associations), and the development of independent work (including pay, access to vocational training and the conditions for the termination of the contract) – Article 3(2) and (3), and Article (4), specifically as regards equal pay. An instruction to discriminate is also qualified as discriminatory practice (Article 5(3)).

The main differences between national legislation and Article 4 of Directive 2010/41 regard two points.

On the one hand, national legislation considers all grounds of discrimination together, so sex discrimination is not treated separately.

On the other hand, the principle of non-discrimination in relation to self-employment makes no explicit reference to the launching or creation of a business or company by independent workers (as expressed in Article 4(1) of Directive 2010/41) since the

perspective of national law is more focused on the rights of the independent worker towards the counterparts of his/her work and the duties of the counterpart towards the independent contractor. From this perspective, under national law equality issues related to the creation of a business would be more likely dealt with by Law No. 14/2008, of 12 March (which transposed Directive 2004/113), for instance to deal with different conditions granted to a person in the access to financial credit to start a business or create a company. But apart from this issue, and to say the least, national legislation is not clear as to the extension of the protection to the creation of a company or the establishment of a new business.

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

Positive action is not dealt with by Law No. 3/2011, but is allowed by the Portuguese Constitution, especially in favour of women (since under Article 9(h) of the Constitution the active promotion of gender equality is a fundamental goal of the State), and by the Labour Code (Article 27).

In practice, several positive action measures have been approved in the last years in this area, as regards the participation of women in decision-making, by legally imposing a women's quota in the boards of companies in the public sector and in private companies subjected to public regulation (Law No. 67/2013, of 28 August 2013, Article 17(8)).<sup>16</sup> In view of the author, this kind of positive action is quite effective.

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

Yes. Social protection for self-employed is granted by the Social Security Contribution System Code (CRCSS) but the legal frame is complex.

Most categories of self-employed persons are covered by the social security scheme of independent workers (Articles 132 *et seq.* of the CRCSS). Some categories can choose their social security system - this is the case for workers in the cooperative sector, since the by-laws of the cooperative can choose to place their workers under the social security provisions applicable to subordinate workers or under the social security provisions applicable to self-employed (Article 135 of the CRCSS). Other categories of independent workers are subjected to the general social security scheme applicable to subordinate workers, with some specificities, as in the case of the members of company boards (Article 61 of the CRCSS), and in the case of 'quasi-subordinate' workers (Article 71 of the CRCSS). Finally, independent workers who perform at least 80 % of their activity for a sole beneficiary fall under a specific provision (Article 140 of the CRCSS).

The major difference in the social security protection granted under these various schemes regards the amount and the responsibility for the payment of contributions and the social benefits attached to each scheme. In the general social security scheme applicable to subordinate workers, both the employer and the employee pay the contributions to the public social security system at different rates that are much higher for the employer than for the employee (Article 53 of the CRCSS). As regards independent workers only the worker pays the contribution, at a variable rate determined on the basis of his medium income and variable according to the category of the independent worker (Article 168) – for instance, small entrepreneurs contribute at a higher rate than independent workers in agriculture. As regards 'quasi-subordinate'

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<sup>16</sup> As regards this particular point it is important to take into consideration that due to the wide notion of self-employed persons under national legislation, board members are to be qualified as a specific category of independent workers since they are not engaged under an employment contract.

workers, there is a contribution by both contractors but at a lower rate than the rate of the contribution in the general system for subordinate workers and their employers. Finally, the beneficiary of 80 % or more of the activity of an independent worker is also charged a small contribution to the social security system, despite the qualification of the worker as an independent worker (Article 168 of the CRCSS).

As to the social security benefits attached to this system, the major difference lies in the fact that, unlike subordinate workers, independent workers are not protected against involuntary unemployment. However, social benefits attached to sickness, including professional illnesses, invalidity and old-age pensions, survival pension, and maternity and paternity are granted (Article 141 of the CRCSS). Healthcare is granted to all persons under the National Health Care System.

In general, these schemes are mandatory.

Assisting spouses and life partners of independent workers are included in the scheme of their partner (Article 133(1)(c) and Article 134(1) (a) and (b) of the CRCSS), on a mandatory basis.

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

National legislation grants maternity and paternity benefits to independent workers not exactly by according the right to maternity or paternity leaves (since they do not have an employer as such) but by granting the right to social security allowances related to maternity, paternity and parental leaves. These issues are dealt with by Law No. 91/2009, of 9 April 2009, in a similar way for subordinate workers and for self-employed persons.

The amount of maternity allowance is calculated on the same basis for subordinate and independent workers, i.e. taking into account the salary/medium income of the worker and corresponding to an average of 100 % of the medium income of the worker – in this sense, the amount of the allowance is in accordance with the requirements of Article 8(3) of the Directive. Since the social security scheme of those workers is mandatory, the allowance is also granted on a mandatory basis.

The problem regarding this allowance comes from the fact that Portugal has not formally transposed Directive 2010/41. In fact, Article 40(b) of Law No. 91/2009, of 9 April 2009, grants to self-employed persons the right to maternity, paternity or parental allowances 'during the period in which the worker remains unfit to work' and Article 42 states that the allowance is incompatible with professional activity – in other words, as regards maternity, the minimum period of 14 weeks of time off established by Article 8(1) of the Directive is not formally forbidden but it is also not specifically addressed by national law.

Under these circumstances, but also due to the fact that self-employment is seldom compatible with long absences from work, independent workers tend to take advantage of the time off and of the correspondent allowances for much shorter periods than subordinate workers.

There are no specific provisions concerning assisting spouses or life partners in respect of time off on the grounds of maternity and inherent allowances.

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

Yes. National legislation implementing EU non-discrimination provisions on occupational social security schemes (Decree-Law No. 307/97, of 11 November 1997) is also applicable to self-employed persons (Article 3 of this law).

Therefore all considerations set out above under Point 6 also apply here.

**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.**

Yes. Article 5 of Decree-Law No. 307/97, of 11 November 1997 (which deals with gender equality in occupational social security, as indicated above) uses of the exceptions for self-employed persons regarding matters of occupational social security mentioned in Article 11 of Recast Directive 2006/54.

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

Yes. The protection in this area is laid down by Article 3(1), (2) and (3) of Law No. 3/2011, of 15 February 2011.

Non-discrimination in this area is directly related to equal opportunities, which must be granted in the access to independent work (including advertisements, selection criteria and the affiliation of the worker to professional associations), in professional training, and in the conditions in which the work is performed (including pay and the conditions for the termination of the contract) – Article 3(2) and (3), and Article 4, specifically as regards equal pay, of Law No. 3/2011, of 15 February 2011.

Any act that favours or causes damage to these workers, performed by the beneficiary of the work and based on any discriminatory factor, is prohibited, including direct and indirect discriminatory practices and harassment practices (Articles 3 and 5 of Law No. 3/2011, of 15 February 2011).

These principles are compatible with specific legal regulations concerning protection against discrimination of foreigners, which fall under the scope of Directive 96/71. In addition, the principles are also compatible with the regulations concerning the protection of pregnancy, maternity and paternity, adoption and other situations related to the reconciliation of professional and family life.

## **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. Directive 2004/113 has been transposed into national legislation by Law No. 14/2008, of 12 March 2008, which was changed later by Law No. 9/2015, of 11 February 2015, in view of the *Test-Achats* judgment.

Articles 1 and 4 of Law No. 14/2008 explicitly prohibit direct and indirect sex discrimination in the access to and supply of goods and services.

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

Yes. The material scope of national legislation in this area is defined in Article 2 of Law No. 14/2008, of 12 March 2008, which is completely in line with Article 3 of Directive 2004/113.

### **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. The exact same exceptions have been established in Article 2(2) (b) and (c) of Law No. 14/2008, of 12 March 2008.

### **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.**

No. Article 4(5) of the Directive has not been transposed as such into national legislation.

Only where insurance and financial contracts are concerned, and more specifically in what regards actuarial factors (Article 6 of Law No. 14/2008), the law allowed differences in individual obligations and prizes regarding these contracts, provided that they were based on objective and proportional criteria, which had to be confirmed by actuarial data certified by the Portuguese Assurance Institute ('Instituto de Seguros de Portugal') and should be reviewed every five years (Article 6(2), (3) and (4)). However, in the recent amendment introduced to Law No. 14/2008 by Law No. 9/2015, of 11 February 2015, in view of the *Test-Achats* judgment, Article 6 (2), (3) and (4) were eliminated.

### **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. Article 6(1) of Law No. 14/2008, of 12 March 2008, exactly includes such provisions.

**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.**

As indicated above, where insurance and financial contracts are concerned, and more specifically in what regards actuarial factors (Article 6 of Law No. 14/2008), Law No. 14/2008 allowed differences in individual obligations and prices regarding these contracts, provided that they were based on objective and proportional criteria, which had to be confirmed by actuarial data certified by the Portuguese Assurance Institute and should be reviewed every five years (Article 6 (2), (3), and (4)).

However, in the recent amendment introduced to Law No. 14/2008 by Law No. 9/2015, of 11 February 2015, in view of the *Test-Achats* judgment, Article 6 (2), (3) and (4) were eliminated.

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

Article 4(7) of Law 14/2008, of 12 March 2008, is equivalent to Article 6 of the Directive in the sense of allowing positive action in this area.

However, the Law does not indicate concrete situations in which positive actions may be taken, and until now the author has no knowledge of any positive action taken in the scope of this rule.

**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.**

Law No. 14/2008, of 12 March 2008, provides specific protection for pregnant women, for women who have recently given birth and for women who are breastfeeding, in Article 4(6) (in line with Article 4(2) of the Directive), in Article 7 (which corresponds to Article 5(3) of the Directive) and in Article 5. This last provision, which goes beyond the Directive, explicitly prohibits any request of information from a woman requiring access to goods and services concerning her possible state of pregnancy, except for reasons related to the protection of her own health.

However, Law No. 14/2008 includes no specific definition of pregnancy or maternity discrimination. As a matter of fact, in this respect, national legislation is not as clear as the Directive in what concerns the formal qualification of maternity and pregnancy discrimination as direct discriminatory practices, since the provisions of Article 4(1)(a) of the Directive (which establish this relation in a very clear way) have not been transposed with the exact same content into the correspondent national provision (Article 4(1) of Law No. 14/2008).

This being the case, one has to conclude that this specific Portuguese legislation relies on the general prohibition of sex discrimination in other national legislation (where the formal qualification of pregnancy/maternity discrimination as gender discrimination is established) for the purpose of this provision.

In this context, and even considering the other provisions of this legislation regarding the protection of pregnant women or women on maternity leave (Article 4(6), Article 5 and Article 7), in the author's view this issue should have been addressed more clearly in this law, mainly in the form of a general qualification provision as included in the Directive. The lack of this provision may even create the wrong impression that these women are only to be considered as discriminated against when treated differently in the

areas specifically covered by these provisions (information regarding pregnancy and clauses of insurance and financial contracts).

In the author's opinion, discrimination in relation to pregnancy and maternity in the goods and services context takes place mainly in the access to health services attached to insurance contracts, given the widespread practice of establishing an initial period during which the contract has no effect and this period may cover pregnancy time.

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

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

Yes. Portugal has approved and ratified the Istanbul Convention (IC), by Parliament Resolution No. 4/2013, of 14 December 2012, and President Decree No. 13/2013, both published in the Official Journal ('Diário da República') of 21 January 2013. Portugal was in fact the first country of the EU to ratify the IC.

In general, before the accession of Portugal to the IC, the topics of the Convention were already covered by the following national legislation: the Criminal Code (as regards most crimes against women indicated in the IC, although in some cases under a different name); the Civil Code (as regards non-consensual marriage and attacks to personal rights, like right to physical or moral integrity and right to privacy); the Labour Code (as regards discriminatory and sexual harassment); and more specifically in respect to domestic violence, Law No. 112/2009, of 16 September 2009, which establishes the legal framework regarding domestic violence and other specific legislation on the same topic, like Law No. 104/2009, of 14 September (right to damage compensation for the victims of domestic violence), and Law No. 107/2009, of 3 August 2009, Decree-Law No. 107/99, of 19 December 2009, and Act No. 1/2006, of 25 January 2006 (shelter homes for female victims of domestic violence). The issue of violence against women is also taken into consideration at a domestic level by the National Plans for Gender Equality and the National Plans for the Prevention and Combat to Domestic Violence.

In the author's view, the national legal framework is in compliance with the obligations under the Convention.

Since the accession no amendments to national legislation have been introduced but several proposals have been presented to Parliament regarding some of the issues covered by the IC.

Several parties have presented proposals concerning the crime of genital mutilation, intended to consider such crime as an autonomous offence (this crime now falls under the scope of the crime of 'Serious offence to physical integrity' ('Ofensa à integridade física grave') – Article 144(1) (a) of the Criminal Code.<sup>17</sup>

As regards the crime of sexual violence, including rape, a proposal has been presented to change the legal provisions of the Criminal Code concerning coercion to sex ('Coacção sexual' - Article 163) and rape ('Violação' - Article 164) as regards the notion of the victim's consent to these actions.<sup>18</sup> The direct criminalisation of forced marriage (which falls now under the crime of 'Coercion' - Article 154) and stalking is also under discussion in Parliament.

More recently, a proposal to amend Law No. 112/2009, of 16 September 2009, on domestic violence, was presented by the Government to Parliament and is now being discussed,<sup>19</sup> intending to make the administrative response to domestic violence more efficient and also specifically directed at preventing homicide in this context.

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<sup>17</sup> Several parties in the National Parliament have presented proposals in this sense: Projecto de Lei nº 504/XII/3ª (BE), Projecto de Lei nº 515/XII/3ª (CDS/PP) and Projecto de Lei nº 517/XII/3ª (PSD) ([www.assembleiadarpublica.pt](http://www.assembleiadarpublica.pt)).

<sup>18</sup> Projecto de Lei nº 522/XIII/3ª (BE).

<sup>19</sup> Proposta de Lei Nº 324/XII.



## **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?**

There is no explicit reference to the topic of victimisation in relation to discrimination in the Portuguese legal system.

However, in the employment area it is strictly forbidden for the employer to oppose in any way the exercise of the employee's rights and to react to such exercise with any sanction, dismissal or less favourable treatment of the worker. This strict prohibition is established in Article 129(1)(a) of the LC and includes the prohibition of victimisation on the grounds of applying for or exercising gender equality rights.

### **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. National legislation provides for a shift of the burden of proof in sex discrimination cases in the areas of employment, self-employment and access to and supply of goods and services.

As regards employment, the provisions on the burden of proof have been transposed into national legislation by the Labour Code (LC, Article 25(5) and (6)), which applies the rule of the shift of the burden of proof to all actions regarding discriminatory practices (gender included), maternity, paternity and reconciliation of work and family life, with the exception of actions based on harassment practices.

In relation to gender equality in the access to and supply of goods and services, the shift of the burden of proof in sex discrimination cases is established in Article 9 of Law No. 14/2008, of 12 March 2008, in accordance with EU law.

As regards self-employment, the shift of the burden of proof is established in Article 7 of Law No. 3/2011, of 15 February 2011.

The national provisions on the burden of proof comply with EU law.

### **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.**

National law establishes different types of sanctions for breaches of EU gender equality law, depending on the type and context of the breach. Since the criteria for the application of the sanctions differ according to the nature of the breach and the type of liability involved, the sanctions are not interrelated and the same breach can give ground to the application of more than one sanction.

When a breach of equality law involves a crime, a criminal sanction is applicable, under the Criminal Code.

When a breach of equality law causes economic or moral damage to the victim, damage compensation is applicable under the Civil Code (Article 483) and in the area of employment, also under the Labour Code (Article 28).

In the employment area, a breach of equality provisions can also give ground to the application of administrative fines by the Labour Inspection Service ('Autoridade para as Condições de Trabalho' - ACT). If a breach of equality law in employment relations results in dismissal, the dismissal is unlawful and therefore null and void, giving right to reinstatement or to damage compensation, according to the choice of the worker (Article 63, Article 381(b) and (d) and Article 391 LC).

A specific sanction for the breach of gender equality provisions in collective agreements is the remedy established in Article 26 of the LC: whenever a collective agreement or a company regulation restricts a certain type of remuneration or a certain professional category or activity only to men or to women, these stipulations are considered to be automatically applicable to employees of both sexes, provided they perform equal work or work of the same value. This provision can be very effective to promote the practical implementation of equal pay and equal treatment in the course of the employment contract, due to the immediate effect of this remedy, and goes beyond EU law.

Finally, a specific sanction has recently been established concerning the breach of maternity rights: under Law No. 133/2015, of 7 September 2015, companies convicted by the Court for having illegally dismissed pregnant workers, recent mothers or workers who were breastfeeding, cannot benefit from public allowances or public financial benefits of any kind for a period of two years after the court's judgment.

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.

Yes. In the author's view the remedies and sanctions meet the standards.

#### **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.

In Portugal, alleged victims of discrimination practices have free access to the courts.

Individual complaints can be brought directly before the courts (Labour Court for private employees, and Administrative Court for public employees) by the victim's attorney at law.

The alleged victims also have the right to seek counsel and to report discriminatory practices to the legal authorities in this area: the Labour Inspection Services ('Autoridade para as Condições de Trabalho' - ACT), and the 'Gender Equality Agency in the Field of Employment' ('Comissão para a Igualdade no Trabalho e no Emprego' - CITE).

Despite this general picture, judicial proceedings regarding discriminatory practices in Portugal are relatively rare<sup>20</sup>. In contrast, the number of situations where the CITE acts

<sup>20</sup> A complete overview of case law in this area can be traced at M. P. SÁ FERNANDES / R. A. MARTINS DA ROCHA / M. CERQUEIRA (2006), *22 Anos de Jurisprudência portuguesa sobre Igualdade Laboral em razão do Sexo (1979-2001)*, Lisboa, CITE, 2006 (this book is also available in [www.cite.gov.pt](http://www.cite.gov.pt)).

in this area (since this Commission has to give advice on several matters related to gender equality, like the dismissal of pregnant women, the refusal to give access to part-time work or the non-renewal of a fixed-term job for childcare reasons) is well documented<sup>21</sup> and can go up to dozens of written advisory reports per year in addition to support and counselling activities for discriminated workers.

The difference between the reduced number of actions brought before the courts and the intense work of the CITE gives ground to the conclusion that the practical implementation of gender equality provisions is still difficult and the more effective action in view of this practical implementation in fact takes place outside the courts.

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

In accordance with the Labour Code (Article 443(1)(d)), and, more in general, in accordance with the principles of civil procedural legislation (Labour Procedural Code, Article 31), class actions are possible to defend collective interests. Therefore, in the field of discrimination these actions are allowed in all cases where a collective interest regarding the promotion of equality is recognised to the entity that initiates the proceedings. Also collective representatives of a victim of discrimination (e.g. trade unions) can promote judicial actions on the victim's behalf or assist the victim in those actions.

The law establishes the rights and competences of other private and public organisations to assist victims of discrimination, including the right to intervene in judicial proceedings in the area of self-employment (Law No. 3/2011, of 15 February 2011, Articles 1 and 8) and as regards gender equality in the access to and supply of goods and services (Article 11 of Law No. 14/2008, of 12 March 2008).

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

As regards judicial proceedings, in case of economic difficulties the person has the right to a public attorney for this purpose and does not have to pay the costs of the proceedings.

Apart from judicial proceedings, the alleged victims also have the right to seek counsel and to report discriminatory practices to the legal authorities in this area: the Labour Inspection Services ('Autoridade para as Condições de Trabalho' - ACT), and the 'Gender Equality Agency in the Field of Employment' ('Comissão para a Igualdade no Trabalho e no Emprego' - CITE).

Outside the employment area, victims of discrimination can ask for legal support from the 'Commission for Equality and Citizenship' ('Comissão para a Cidadania e Igualdade de Género' - CIG).

## **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. In Portugal there are two official bodies that deal with gender discrimination: the 'Gender Equality Agency in the Field of Employment' ('Comissão para a Igualdade no

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<sup>21</sup> [www.cite.gov.pt](http://www.cite.gov.pt). (Pareceres).

Trabalho e no Emprego' - CITE); and the 'Agency for Gender Equality and Citizenship' ('Comissão para a Cidadania e Igualdade de Género' - CIG).

In addition, there are the Labour Inspection Services ('Autoridade para as Condições de Trabalho' – ACT), which have inspection powers over employers' activities and organisations and are competent to apply administrative fines in matters related to employment.

#### A. Gender Equality Agency in the Field of Employment (CITE)

The CITE ([www.cite.gov.pt](http://www.cite.gov.pt)) was created prior to the accession of Portugal to the European Union, by the Equality Act of 1979 (Decree-Law No. 392/79, of 20 September, Articles 14 and 15), which at the time was the general law regarding gender equality in the field of employment. Now, the by-laws of the CITE are established in Decree-Law No. 76/2012, of 26 March 2012.

As to the nature of this body, the CITE is a public body that depends directly on the Government and is financed by a public institution ('Institute for Employment and Professional Training' – 'Instituto do Emprego e Formação Profissional'). Despite its public nature, the CITE has the nature of a tripartite organisation, since it integrates members appointed by the Government, but also members appointed by the major unions and members appointed by the major employer's organisations.

This composition and the financing model give ground to the conclusion that the CITE cannot be considered as a completely independent board. However, it has some independency in its actions, given the fact that non-governmental organisations are represented at the Agency and, in fact, the decisions of this Agency are approved by voting in a council that includes the non-governmental organisations.

The general purpose of the CITE (described in Articles 2 *et seq.* of Decree-Law No. 76/2012, of 26 March 2012) is the promotion of gender equality in employment and in vocational training, to reinforce the protection of maternity and paternity and to promote the reconciliation of family and working life. This Agency deals both with the private and the public sector.

To achieve this purpose, the CITE has the following competences: promotional activities e.g. awareness raising, and dissemination of information in these areas; analysis and monitoring e.g. conducting or commissioning research and surveys, publishing reports and making legal recommendations to the Ministers in charge of employment and of civil servants in order to improve legislation in the areas indicated above; giving an opinion in several matters regarding gender equality, like dismissal of pregnant workers or workers on maternity, paternity or parental leave, part-time work for family reasons, and fixed-term contracts (in these cases employers are obliged to ask the opinion of the CITE before taking the measure, and a negative opinion is binding and can only be challenged before the courts); working with Labour Inspection Services in actions regarding discrimination at company level (such as visits, denouncing discriminatory practices, etc.), namely after receiving a complaint of a victim of discrimination; giving assistance to victims of discrimination, by providing advice; analysis of collective agreements after their publication to check whether they include discriminatory clauses (if this is the case, the Agency can present the case to the public attorney, who can take it to court in order to have these clauses declared null and void).

In practice, the role of the CITE has been very important over the years.

#### B. Commission for Citizenship and Gender Equality (CIG)

The second public body in the area of gender equality is the CIG. In Portugal, an official body with wide competences in the area of women's rights and gender equality has existed since 1977. This body has had different names over the years: 'Comissão da Condição Feminina', created in 1977 and replaced in 1991 by the 'Comissão para a Igualdade de Género e os Direitos da Mulheres' (CIDM), and again replaced, in 2006, by the present Agency, named 'Comissão para a Cidadania e Igualdade de Género' (CIG), which was created by Decree-Law No. 202/2006, of 7 October 2006.

The CIG ([www.cig.gov.pt](http://www.cig.gov.pt)) is a governmental body, directly depending on the Presidency of the Council of Ministers, so it is not an independent body. Nevertheless, The CIG has a scientific counselling body, where private experts in gender equality are represented and it works closely with private associations and NGOs in this area.

The goals of the CIG, as defined in Decree-Law No. 202/2006, of 7 October 2006, are the following: to contribute to the improvement of education regarding citizenship; to promote gender equality in all areas; to protect maternity and paternity; to promote equality in the participation of men and women in all areas of life; to promote reconciliation of family and working life; to fight domestic violence, gender violence and human trafficking and to give support to the victims of such practices.

In pursuit of these goals, the CIG has wide competences in relation to gender equality, including the areas of gender violence and domestic violence, reconciliation of family and professional life, women's studies, education and self-employment. In these areas, the Commission develops studies and performs research, provides legal information and counselling, edits publications and disseminates information, and works with NGOs in the several areas related to gender equality.

In practice the main role of this body has been in the area of legal counselling (especially as regards domestic violence, gender violence and maternity/paternity issues) and in the publication of gender studies.

## **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?

Social partners can play a major role in the enforcement of gender equality law since, under the Portuguese Constitution (Article 56(2) (a)) and the Labour Code (Article 470), all bills regarding employment and industrial relations issues must be presented to and have to be discussed with the social partners, and the breach of this stipulation makes the Act unconstitutional and therefore not applicable.

Due to this rule all legal provisions concerning labour law are, in fact, discussed with the social partners on a regular basis, and this includes provisions on gender equality. However, in practice gender equality is not traditionally considered an important subject by the social partners.

## **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).

As explained at the beginning of this report, EU gender equality law is transposed into domestic law by statutory law so collective agreements do not play a role there.

From another perspective, collective agreements can be a very important instrument to promote the practical implementation of legal provisions on gender equality. To this purpose, two provisions of the Labour Code are worth mentioning: the provision concerning the content of collective agreements; and the provision on the assessment of collective agreements by the CITE.

The LC establishes that collective agreements should implement the necessary measures to enforce equality (Article 492(2)(d)). However, this rule is not mandatory and equality issues are not an important issue in collective bargaining. This situation could change if these issues were to be considered as a mandatory content of collective agreements, since these agreements are binding and may be declared to be generally applicable.

The LC also establishes a system of assessment of the content of collective agreements by the CITE, performed during the first 30 days after the publication of these agreements and designed to check them for possible discriminatory clauses and promote elimination of such clauses by the court (Article 479). This system has already proved to be very efficient, either because the CITE convinces the social partners to change the clause in question, or, when this does not happen, because the court declares the clause null and void.

## **12. Overall assessment**

In the author's view, Portuguese legislation formally complies with EU law, although exceptions are apparent concerning some particular points, such as the concept of remuneration, the burden of proof rule in harassment situations and the extent of social protection regarding some professional categories.

However, when looking beyond the legal framework, the material weaknesses of the system are easily apparent, especially on four points.

First, although the law establishes many protective measures, the State does not always finance them where needed, and therefore some of these measures do not work in practice (this is true for some of the maternity and paternity measures). Second, there is no practical implementation of the legal measures by collective agreements, with or without the assistance of the State. Thirdly, there is no relevant case law regarding gender equality to describe (aside from those indicated in section 11 in relation to collective agreement provisions with a discriminatory content), since in Portugal hardly any cases have been decided in this area. Finally, the regular surveys conducted by the CITE in relation to pay show that the pay gap between men and women is still significant (still 18.5 % in 2014), thus allowing the conclusion that even regarding such a traditional issue like equal pay there is still a lot to be done.

This situation indicates a lack of practical implementation of the legal provisions in this area. The system exists in law, but its practical effectiveness is weak.

Finally, the author wishes to emphasise the negative impact of the financial and economic situation of Portugal with respect to the level of protection granted by legislation in the area of equality. The impact of this situation is enormous and seems to become structural.

## Annexes

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