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# Country report

## Gender equality



Poland  
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# **Country report**

## **Gender equality**

How are EU rules transposed into  
national law?

## **Poland**

Eleonora Zielinska

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## **1. Introduction**

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

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

The system of administration of justice in Poland consists of common courts (regional, district and appellate), and administrative courts and military courts. The Supreme Court performs supervision over the common and military courts (Article 183(1) of the Constitution). Together with the Constitutional Tribunal and the Tribunal of State those courts form a power that is independent from the other state powers (Article 173(1) of the Constitution). Legislative acts (laws and ordinances) can be subjected to constitutional control exercised by the Constitutional Court. The President of the Republic may, before signing a bill, refer it to the Constitutional Tribunal for adjudication upon its conformity to the Constitution. He is obliged to refuse to sign a bill which the Constitutional Tribunal has judged not to be in conformity to the Constitution (Article 122 of the Constitution). Also every citizen is empowered to lodge an individual constitutional complaint challenging the constitutionality of a law, yet only in the situation when this law was the base for an individual and final decision or verdict in his case (Article 79 of the Constitution). They may also refer to the Human Rights Defender (RPO) with a motion for assistance in protection of one's freedoms or rights infringed by organs of public authorities (Article 80 of the Constitution). In such cases, the RPO may initiate proceedings on behalf of the citizen in civil, penal or administrative matters, as well as join proceedings that are already on-going (Article 14 of the Law on the Human Rights Defender). Since 2010 the RPO also exercises the tasks of the equality body, responsible for equal treatment. Independent from the RPO's activities, responsible for the monitoring of equal treatment, is the Government Plenipotentiary for Equal Treatment, whose competences are defined by the Antidiscrimination Law. In January 2016, the Government Plenipotentiary for Equal Treatment was renamed to the Government Plenipotentiary for Civil Society and Equal Treatment as a result of additional duties being transferred to the plenipotentiary's office.

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

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

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<sup>1</sup> The Constitution of the Republic of Poland of 2 April 1997, published in Journal of Laws of the Republic of Poland (JoL No. 78, Item 483 with further amendments). For an English translation see: <http://www.sejm.gov.pl/prawo/konst/angielski/konse.htm>, accessed 29 May 2017.



- Labour Code Act of 26 June 1974 (hereafter - LC). Consolidated text JoL 2014, item 1502, with amendments;
- Amendments to LC implementing Equality Directives largely covered by: Law of 24 August 2001, JoL 2001 No. 128 Item 1405; Law of 21 December, JoL 2001 No. 154 Item 1805; Law of 14 November 2003, JoL No. 213 Item 2081; Law of 18 August 2006, JoL 2006 No. 217 Item 1587; Law of 21 November 2008, JoL 2008 No. 223, Item 1460; Law of 6 December 2008, JoL 2008 No. 234 Item 1654; Law of 28 May 2013, JoL 2013 Item 675, Law of 24 July 2015, JoL 2015 Item 1270; Law of 22 June 2016, JoL of 2016, Item 1053;
- Law of 20 April 2004 on the Promotion of Employment and Institutions of the Labour Market, hereafter Law on Promotion of Employment, JoL 2004 No. 99 Item 1001 with amendments;
- Law of 13 October 1998 on the Social Insurance System, consolidated text JoL 2016 Item 963
- Law of 17 December 1998 on Pensions from the Social Insurance Fund, consolidated text JoL 2009 No. 153 Item 1227 with amendments (hereafter Law on Pensions);
- Law of 20 December 1990 on Social Security for Farmers, consolidated text JoL 2016 Item 277;
- Law of 20 April 2004 on Occupational Pension Schemes JoL 2004 No. 116 Item 1207, with amendments;
- Law of 25 June 1999 on Cash Social Insurance Benefits in Respect of Sickness and Maternity, consolidated text JoL 2016 Item 372, with amendments (hereafter Law on Maternity Cash Benefits);
- Law of 30 October 2002 on Social Insurance in Respect of Accidents at Work and Occupational Diseases, JoL 2002 No. 199 Item 1673, with amendments;
- Law of 28 November 2003 on Family Benefits, JoL 2003 No. 228 Item 2255, with amendments;
- Law of 27 June 2003 on the Social Pension, JoL 2003 No. 135 Item 1268, with amendments;
- Law of 9 July 2003 on Employment of Temporary Workers, JoL 2003 No. 166 item 1608;
- Law of 21 November 2008 on Capital Pensions. Consolidated text JoL 2014 item 1097;
- Law of 3 December 2010 on the Implementation of (some) EU Provisions on Equal Treatment, unified text JoL 2016 Item 1219 (hereafter Antidiscrimination Law). It refers to the following Directives: 86/613/EEC, 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC. From 2016 it also refers to Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.

## **2. General legal framework**

### **2.1 Constitution**

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

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

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

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

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

Yes.

### **2.2 Equal treatment legislation**

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

Yes, it is provided for in the Antidiscrimination Law, which is complementary to the provisions on equal treatment of the LC and other laws (e.g. the Laws on Promotion of Employment, on the Social Insurance System and on Capital Pensions, and on Employment of Temporary Workers include the equal treatment rule). The principle of complementarity is expressed explicitly in Article 2 (2) of the Antidiscrimination Law which states that its chapter 1 (entitled: General provisions) and chapter 2 (The principle of equal treatment and legal measures aimed at its protection) do not apply to employees, as far as the subject matters are regulated by LC. In practice it means that different courts decide the case and partially different material and procedural rules apply. Namely, in cases the protection was ensured by provisions of the Labour Code, until special departments of district and regional courts were competent. In some courts there were two different departments: one for labour one for social insurance, in others there was only one department for both.<sup>2</sup> With the amendments introduced by the ordinance of the Minister of Justice of 27 June 2016,<sup>3</sup> those courts were there existed such differentiation, were formally transformed into one Department for Labour and Insurance matters, which in the labour related matters acts on the basis of special provisions of the Labour Code and of the Code of Civil Procedure. On the other hand when the Antidiscrimination law is applicable, jurisdiction is exercised by common civil departments of district and regional courts. In such situation, unless specifically regulated in this law, common provisions of Civil Code and Code of Civil Procedure have to be applied.

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<sup>2</sup> Ordinance of 18 December 2013 Dz. Urz. Min. Spr. (Official Journal of Ministry of Justice) 2014 Item 334.

<sup>3</sup> Dz. Urz. Min. Spr. (Official Journal of Ministry of Justice) 2016 Item 119. It is too early to decide what influence this structural change will have on the level of protection of employers rights.

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

Article 6 of the Antidiscrimination Law provides that unequal treatment of private persons with regard to sex (as well as race, ethnic origin or nationality) is prohibited only with respect to access and conditions of social insurance services, housing services, goods and acquiring rights and energy, if they are offered publicly.

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

### **3. Implementation of central concepts**

#### **3.1 Sex/gender/transgender**

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

No.

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

No. The term 'sex' in the Polish language has different meanings. From the linguistic point of view there are no reasons prohibiting such interpretation that the provisions of law provide protection also in the case of gender reassignment. Nevertheless, there is a legislative proposal amending the Antidiscrimination Law, which, in addition to sex and sex orientation (which already exist), explicitly introduces sex identity and sex expression as grounds of discrimination.<sup>4</sup>

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

3.2.1 Is direct sex discrimination explicitly prohibited in national legislation?

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

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

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

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

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

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

No, neither the Antidiscrimination Law nor any provision of the LC states *expressis verbis* that discrimination includes any less favourable treatment of a woman because of her pregnancy or childbirth-related leave. However, Article 12 of the Antidiscrimination Law, as modified by the Law of 24 July of 2015 (JoL 2015 Item 1268), stipulates that, in case of a breach of the equal treatment rule with regard to pregnancy or childbirth-related leave, such person has the right to damages, according to Article 13 (which refers to discrimination-related damages).<sup>5</sup> Also in the case law based on LC the discrimination with regard to pregnancy is considered to be sex-based.<sup>6</sup>

<sup>4</sup> Ref.: Sejm Print 1051 <http://www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?nr=1051>, accessed 29 May 2017. Hereafter: Draft Law amending the Antidiscrimination Law.

<sup>5</sup> The Draft Law amending the Antidiscrimination Law proposes to add the following provision: 'The violation of equal treatment rule ... in relation to pregnancy or maternity constitutes direct sex discrimination'. This

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

No specific difficulties have been identified.

### **3.3 Indirect sex discrimination**

- 3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?

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

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

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

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definition is broad enough to also cover the discrimination connected with breastfeeding in the context of equal access to services, which is not reflected in the regulation currently in force (see more in the next footnote). The Draft Law however was not passed by the previous parliaments and according to the rule of discontinuity of parliamentary works after the election (which took place in 2015) this draft will no longer be considered by the current parliament and no other draft amending the Antidiscrimination Law has been identified as having been presented to the current Parliament.

<sup>6</sup> The Supreme Court (SC) in the judgment of 8 January 2008, II PK 116/07, said that: 'the exercise of powers conferred by law in connection with the birth and upbringing of the child cannot be regarded as an objective reason for determining a lower remuneration compared to other employees'. The claimant (a mother of 5 children) claimed damages for discrimination based on gender, age and family status. In her opinion signs of discrimination included inter alia significant differences in remuneration between her and the other employees. The employer argued that unfavourable remuneration of the claimant was inter alia the result of her frequent use of maternity and parental leave. The courts of first and second instance found that, by differentiating the situation of the claimant in terms of pay, comparing to other employees, the defendant applied legally acceptable criteria. These judgments were set aside by the SC, recognizing a cassation claim.

As another example may serve the ruling of the SC of 8 July 2008, IPK 294/07, whose major point is as follows: 'Acceptance for the position that absence from work of a female-employee caused by endangered pregnancy, followed by miscarriage and health complications, may constitute justified grounds for terminating her employment contract and justify the refusal of accepting her back to work, due to its purposelessness, would violate the rules regarding protection of motherhood and may even be considered as discrimination with regard to sex'. In a first-instance ruling of 3 August 2016, the District Court for Wrocław Śródmieście found that immediate termination of employment of a pregnant woman, for alleged violation of her obligation of loyalty towards the employer, expressed in frequent use of legitimate and justified medical leaves, constituted an incompetent attempt of termination of the employment relation, violating Article 2 and Article 33 of the EU Charter of Fundamental Rights, as well as Article 2 Paragraph 1 and Article 8 Paragraph 1 of the 76/207 Council Directive. The court also referred to rulings of the Court of Justice in cases C-460/06 and C- 177/88.

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

No case law could be identified, openly using statistical evidence in order to establish a presumption of indirect evidence. Polish civil procedure, even if not mentioning directly the admissibility of such evidence, still does not exclude such possibility. In one of the cases (mainly related to discrimination on the ground of employment status, although claimant was a woman) it seems that the Supreme Court encouraged using statistics in order to prove the possibility of indirect discrimination. In the ruling of 18 April 2012 (Ref. II PK 197/11) the SC tackled the issue of wage discrimination of a woman employed for a trial period and decided to revert the case for reconsideration to the court of second instance, ordering it to examine if the employer took advantage of his contractual right to reduce the basic salary only (or mostly) with regard to trial-period employees. If this was true, it could constitute wage discrimination against this group of employees.<sup>7</sup>

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

There is no information that such test has been used to prove sex discrimination in court proceedings.<sup>8</sup>

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

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

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<sup>7</sup> In this case, the issue of remuneration was regulated by a collective agreement, which entitled the employer to reduce the basic salary (by one or two categories of classification). In the opinion of the court the provision of the collective agreement as such did not have a discriminatory character yet in respect to wages, especially given the fact that no premises were identified (hence none could be assessed as discriminatory) which would guide the employer by applying the provision. The court found, however, that discriminatory practice (direct or indirect) in respect to wages might be observed in the phase of application of the collective agreement by the employer.

<sup>8</sup> Although there was the case of the District Court of Warsaw of 22 December 2008, VII Pa 35/08 in which justification for refusal of a sex discrimination claim by courts of lower instance was the suspicion that the claimant (a man) called different employers who advertised in newspapers for a secretary position as only for women. He then recorded the conversation with them for evidence. Finally the District Court rejected this suspicion and awarded the damage for claimant recognising sex discrimination in access to employment, explaining that it did not share the opinion of the court of first instance, that the claimant has undertaken all actions, regarding the job application only with the objective of claiming respective damages. It rejected the opinion that proof of such intention was the fact that the defendant initiated court proceedings in two more cases, also claiming damages for violation of the equal treatment rule in employment. According to the court of second instance there was no evidence, that the claimant did not have the intention of initiating employment at the defendant. At the time the claimant conducted the telephone conversation with a representative of the defendant, he was not employed anywhere. He was a student and there were no reasons which would prevent him from commencing employment, if he had been offered one.

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

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

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

The draft law, mentioned in Section 3.1, amending the Antidiscrimination Law proposes to add a provision explaining that by 'multiple discrimination' is to be understood situations of unequal treatment, based on more than one of the grounds mentioned in Article 1. Additionally, in the same draft it is proposed to amend Article 13, which received the following wording 'By adjudicating on the amount of damages or compensation (...) the court takes into consideration their effectiveness, proportionality and severity. In particular the court adjudicates higher damages or compensation in the case of multiple discrimination'.

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

A simple yes or no answer is not possible here. In some court cases on sex discrimination other grounds (such as age, employment status, family status) are also mentioned. However, there is no clear evidence that it had legal consequences on respondent.

### **3.5 Positive action**

- 3.5.1 Is positive action explicitly allowed in national legislation?

Yes. Article 18<sup>3b</sup> (3) of LC and Article 11 of the Antidiscrimination Law.

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

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

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

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

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

There have been no legislative measures, only soft-law recommendations. In June 2010 the Warsaw Stock Exchange issued a document entitled: 'Good Practices of Stock Exchange Companies', which included a provision that public companies and their stakeholders are recommended to contribute to a balanced participation of women and men in their bodies. In 2016 the new document has been issued which instead of requirement of balanced representation recommends preservation of diversity with regard to sex (as well as age, education and professional expertise) (Recommendation II.R.2).<sup>9</sup> On 7 March 2013, the Minister of Treasury issued a document called 'Good practices with regard to ensuring balanced participation of women and men in bodies of companies with State Treasury participation', where he recommended an at least 30 % average participation of the underrepresented sex regarding all members of supervisory councils chosen and nominated by the Minister of State Treasury. It was estimated that in public companies this indicator should be reached by the end of 2015.<sup>10</sup> Currently the position of Minister of Treasury does not exist and its functions were delegated to Minister of Finance and no information has been identify as to the result of this policy after the change.<sup>11</sup>

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

Yes. The Electoral Code of 5 January 2011 introduced (in Article 211 (3) and Article 425 (3)) the requirement to include on electoral lists to the Sejm, the European Parliament and local elections for Community Councils at least 35 % of women and men, on pain of refusal to register the list. These quotas do not apply to elections to the Senate where single-member constituencies were introduced, since 2011, and to the council of the smallest localities, since 2014. The 2015 effort to broaden the scope of single-member constituencies failed.<sup>12</sup>

### 3.6 Harassment and sexual harassment

3.6.1 Is harassment explicitly prohibited in national legislation?

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

<sup>9</sup> The Good Practices forms an annex to the Resolution of the GPW Supervisory Board No 26/1413/2015 of 13 October 2015. This document, which substituted the previous one is in force since 1 January 2016, Published: [https://static.gpw.pl/pub/files/PDF/RG/Uch\\_RG\\_DB2016.pdf](https://static.gpw.pl/pub/files/PDF/RG/Uch_RG_DB2016.pdf) accessed 28 May 2017.

<sup>10</sup> The same goal was also included in the National Programme of Actions towards Equal Treatment for the years 2013-2016 prepared by the Government Plenipotentiary for Equal Treatment of the day, page 58. <http://www.spoleczenstwoobywatelskie.gov.pl/aktualnosci/krajowy-program-dzialan-na-rzecz-rownego-traktowania-na-lata-2013-2016>, accessed 30 July 2017.

In the report of Plenipotentiary for Equal Treatment on the realization of this Program in year 2014 there is the information that this declaration has been fulfilled already in 2014 ( See: Raport z realizacji krajowego programu działań na rzecz równego traktowania za 2014 , June 2015, p. 33 (<http://www.spoleczenstwoobywatelskie.gov.pl/raporty-z-realizacji-krajowego-programu-dzialan-na-rzecz-rownego-traktowania>, accessed 30 July 2017). No Reports for the next years are available.

<sup>11</sup> In the last report of the NGO called "Fundacja Liderów Biznesu" (Women's Business Leaders) of May 2016, which covered the statistics for year 2015, one can find the information that: 'In the largest listed in WIG30 index companies owned at least in ¼ by state treasure, which should be a role model for other participants of the capital market, the share of women in boards was lower throughout the period of research than the average indicator for the main market'. Agnieszka Słomka-Gołębiowska, Kobiety we władzach spółek w Polsce. 2016 (Women on companies boards in Poland .2016), [http://www.fundacjaliderowbiznesu.pl/pliki/Raport\\_FLB\\_20-05\\_Final.pdf](http://www.fundacjaliderowbiznesu.pl/pliki/Raport_FLB_20-05_Final.pdf), accessed 30 July 2017.

<sup>12</sup> Since the nation-wide referendum held on 6 September 2015 was invalid due to low turnout (below 10 %) <http://wiadomosci.radiozet.pl/Wiadomosci/Kraj/Oficjalne-wyniki-Referendum-niewazne-frekwencja-7-8-00010712> accessed 29 May 2017.



verbal, non-verbal or physical conduct (sexual harassment)'. Additionally, Article 18<sup>3a</sup> (5) Item 2 LC states that occurrences of discrimination are any unwanted conduct with the purpose or effect of violating the dignity of an employee and of creating an intimidating, hostile, degrading, humiliating or offensive environment (harassment).

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

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

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

3.6.3 Is sexual harassment explicitly prohibited in national legislation?

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

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

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

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

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

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

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

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

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

### 3.7 Instruction to discriminate

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

Yes.

According to the Antidiscrimination Law (Article 3(4)), a display of discrimination amounts to ordering it.

The LC stipulates (Article 18<sup>3a</sup> (5) point 1) that a display of discrimination is also an instruction (encouraging, ordering) to violate that principle.

#### 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.

There was one court judgment of the District Court in Gdansk (of 12 December 2016, IC 206/15) in which the claimant alleged that the waiter at the restaurant when prohibiting the woman from breastfeeding at the table, declared that he was acting by instruction of the owner (who was absent at the time). However, when during the proceedings the waiter denied that such instruction ever took place, the court decided that there was no sufficient evidence to confirm this fact. This case proves that proving such discrimination can be very difficult in practice, unless there is written evidence.

The matter of instruction to discriminate is also rarely examined in legal literature.<sup>13</sup>

### 3.8 Other forms of discrimination

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

No. The draft law on amending the Antidiscrimination Law, however, includes a definition of discrimination by association and assumed discrimination.<sup>14</sup>

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<sup>13</sup> Only one commentary to the LC includes an example of a Temporary Work Agency that encouraged employers to give a salary to temporary workers that was lower than that received by other employees. Gersdorf, M., Rączka, K., Skoczyński, J. Kodeks pracy. Komentarz [Labour Code. Commentary], ed. 6, Lexis Nexis, Warszawa 2004, p. 67. In more recent commentaries to the LC this issue is either completely omitted (see: commentary to Article 18<sup>3a</sup> (5)(1) LC: Świątkowski, A.M. Kodeks Pracy. Komentarz [Labour Code. Commentary], 4<sup>th</sup> edition, C.H. Beck, Warszawa 2012, p. 81-90 and Muszalski W. (in) Kodeks Pracy. Komentarz [Labour Code. Commentary] ed. Muchalski W. 8<sup>th</sup> edition. C.H. Beck, Warszawa 2011 p. 50), or limited to the general interpretation of this provision such as that the refusal of the employee to comply with the instruction has no significance for the responsibility of the instructor (Compare: Korus P. (in) Kodeks Pracy Komentarz [Labour Code. Commentary], ed. Sobczyk A., 2<sup>nd</sup> edition, C.H. Beck, Warszawa 2015, p. 69.

<sup>14</sup> Discrimination by association shall be understood as a situation where the person, referred to in Article 2 (1), is treated less favourably, than any other person is, was or would be treated in a comparable situation, due to association of this person with another person having one or more characteristics, referred to in Article 1'; Discrimination by assumption shall be understood as a situation where the person, referred to in Article 2 (1), is treated less favourably, than any other person is, was or would be treated in a comparable situation because of assigning to this person one or of a few characteristics referred to in Article 1 (Article 5b and 5c of the Draft Law).

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

##### **4.1 Equal pay**

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

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

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

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

Yes, in Article 18<sup>3c</sup> (2) LC. According to this provision 'The remuneration (...) includes all components of remuneration for work, irrespective of their name or nature, as well as other work-related monetary or non-monetary benefits granted to employees'.<sup>15</sup>

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

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

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

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

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

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

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<sup>15</sup> The literature mentions in this regard various allowances and so-called bonuses, such as company car, company flat, access to company medical services and paid voluntary medical (or other) insurance, as well as premiums, and severance pay. Gersdorf, M., Rączka, K., Skoczyński, J. Kodeks pracy. Komentarz [Labour Code. Commentary], ed. 6, Lexis Nexis, Warszawa 2004, p. 71. According to case law (of the Supreme Court in judgment of 22 February 2008, I PK 208/07) the reimbursement of travel costs from home to place of work or return of costs of apartment rental provided for in a work contract are part of remuneration.

possibility to point to real or hypothetical comparators. This means that the necessary condition for determining if a case of direct discrimination in employment has taken place is the comparison of the legal situation of employees placed in different social categories, which are distinguished according to legally forbidden criteria. Prevalent in case law is the view that a comparator may not be a person employed by another employer.<sup>16</sup> The legal definition of indirect discrimination does not mention a comparator, however. Nevertheless, commentaries to Article 18<sup>3a</sup> (4) LC, incorporating the definition of indirect discrimination, point out that 'any disparity in defining any of the conditions of employment between employees, encompassing one or a significant number of employees in a particular category, must be seen as displays of discrimination in employment'.<sup>17</sup> The word 'disparity' means that there must be comparator.

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

Yes. Article 18(3) LC stipulates that work of equal value is work which requires employees to have comparable professional skills and qualifications (certified by documents or by practice and professional experience), as well as comparable responsibility and effort.

It is worth noting that in a judgment of 2007,<sup>18</sup> the Supreme Court generally explained that if the employer takes into account such criteria as length of service and qualifications while establishing the remuneration, they must prove that the particular skills and professional experience have special significance for fulfilment of the obligations conferred on the employee.<sup>19</sup>

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

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

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<sup>16</sup> The problem of admissibility of indicating as a comparator a person employed by another employer, occurred in a case recognized by the Supreme Court on 18 April 2012, No. II PK 196/11. In this case the SC overruled the argument of the claimant, comparing his work position to similar positions at other employers, with the following reasoning: 'The ground for a claim for damages, according to Article 18<sup>3d</sup> LC cannot constitute the argument that other employers treat their employees more favourably. This however is precisely what the comparison conducted by the claimant, encompassing presidents of management boards employed in other regional broadcasting studios, is all about. With reference however to employees working for the same employer it is important to establish if they perform equal work, or work of equal value, hence only in this situation do they have the right to equal wages (Article 18<sup>3c</sup> § 1 and 2 LC)'. See also SC ruling of 7 March 2012, No. II PK 161/11.

<sup>17</sup> Świątkowski, A.M. Kodeks pracy. Komentarz [Labour Code. Commentary], 4th edition, C.H. Beck, Warszawa 2012, p. 85.

<sup>18</sup> SC judgment of 22 February 2007, I PK 242/06.

<sup>19</sup> The problem of comparing work of equal value was tackled by the Supreme Court in the ruling of 9 February 2007 (I PK 222/06), where it noted: '(...) it would be possible to compare the remuneration for the work of the claimant with another person employed on the position of an accountant, while taking into account many other circumstances (professional qualifications, previous work time, scope of tasks associated with the working position, responsibility, physical workload or amount of work) serving as criteria of evaluation of their work. It was not possible however to compare – with respect to the rule of equal treatment (Article 11<sup>2</sup> LC) and the prohibition of discrimination in employment (Article 18<sup>3a</sup> LC) – the remuneration of the claimant for work as an accountant with the remuneration of other employees, employed on the position of painters. A comparison of the wages of an accountant and a painter would be possible if there was a system of evaluating work, which currently does not exist in Poland. In such situation the fact that only the claimant's [in the cassation claim] remuneration has been raised, not that of persons employed on other positions, cannot be regarded in the terms of discrimination, if – as alleged by the claimant and omitted by the court of appeals – the defendant employer did not have another working position, which could be compared with the position of the claimant, according to the criterion of equal work or work of equal value.'

persons is public.<sup>20</sup> There are two important court judgments on this issue. The Constitutional Court judgment of 7 May 2001 (K 18/00) and The Supreme Court judgment of 25 May 2011 (II PK 304/10).

The Constitutional Court in its judgment of 7 May 2001 (K 18/00) found the provisions of the Act of 3 March 2000 on remuneration of persons in charge of legal entities owned by the State Treasury in at least 50 % to be compliant with the Constitution with regard to the regulations stipulating the obligation to disclose the remuneration of these persons, explaining that this information is not subject to protection in the same way as personal details or trade secrets. The Supreme Court in its judgment of 25 May 2011 (II PK 304/10), found that the fact that an employee disclosed to other employees information covered by the so-called salaries confidentiality clause, in order to prevent unfair treatment and wage-related forms of discrimination, cannot in any way serve as ground for dissolution of his contract of employment.<sup>21</sup>

The problem of transparency of wages still raises many controversies in the Polish legal literature and case law. On the one hand, part of the doctrine and some courts share the opinion of the employers, that such information constitutes trade secrets,<sup>22</sup> thus being subject to a confidentiality clause. As a result they approve various contract clauses prohibiting employees to disclose their wages, even with respect to their co-workers, thus allowing failures to comply with such clauses to be qualified as a severe violation of basic employee obligations, in the interpretation of Article 52(1) LC.<sup>23</sup> The employer is entitled to define the rules for safeguarding secrets regarding the enterprise. Enabling unauthorized persons to access company secrets may constitute a display of violation of the obligation to preserve secrets, the disclosure of which could expose the employer to damage.<sup>24</sup> The problem of disclosing wage information was also handled by the literature and case law in the context of protection of personal data of the employees. Provided that such information is considered as such data, the argument is raised that disclosure of salaries violates provisions of Article 26 of the Law of 29 August 1997 on Protection of Personal Data.<sup>25</sup> On the other hand, if information about the salary is to be qualified as personal goods of the employee, then he/she cannot be forbidden to disclose this information. It is the employer who is obliged to preserve secrecy not the employee. There is general consent, however, that the prohibition to disclose wage-related information does not include remuneration tables, which may determine the range of remuneration, depending on the position, rank or qualifications. In such case it is not the actual amount of salary of particular employees which is being disclosed, but rather the range of salary, within which their wages have to be.

#### 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?

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<sup>20</sup> As examples may be given certain groups of public servants or persons occupying decision-making positions, as provided for e.g. in the Law of 3 March 2000 on remuneration of person in charge of legal entities (JoL 2000 No. 26 Item 206).

<sup>21</sup> The Court additionally emphasised that 'the exercise by an employee of the rights resulting from violations of the principle of equal treatment in employment, including the attempt to investigate or to provide any form of support to other employees, aimed at preventing the potential application of wage discrimination by the employer, cannot constitute the reason for termination by the employer of the contract of employment, regardless of the way the employee accessed the information, that may indicate a violation of the principle of equal treatment in employment or application of wage discrimination. In this case the claimant received information concerning the pay of his co-workers by e-mail by mistake. Surprised by the large differences in the wages he decided to distribute this information among his colleagues, in order to clarify the situation.

<sup>22</sup> In the understanding of the Law of 16 April 1993 r. on Combating unfair Competition (consolidated text JoL 2003 No. 153 Item 1503, with amendments).

<sup>23</sup> Which allows dissolution of work contract without notice? Compare: Judgment of the SC of 5.03.2007, I PK 228/06, OSNP No. 7-8/2008, Item 100; judgment of SA in Krakow of 15.5.2002 r., I ACa 320/02, TPP No. 2/2003).

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

<sup>25</sup> JoL of 2002 No. 101 Item 926 with further amendments.

Not yet. In 2012 the Government Plenipotentiary for Equal Treatment announced an amendment to the Labour Code, which would impose an obligation on companies to report on differences with regard to the gender pay gap. Discovering such differences would result in the taking of preventive measures and monitoring of their implementation. Although this project has been supported by Supreme Audit Office (NIK) when the Office assessed the gender pay gap,<sup>26</sup> it has not yet turned into a concrete legislative proposal. The website of the Ministry of Family, Labour and Social Policy (the current name of the former Ministry of Labour and Social Policy) has a link to the EU Commission website where the Logib system, applied in several countries, is mentioned.<sup>27</sup> The same ministry also reported that work on a similar wage comparison tool, accommodated to Polish circumstances, called Logib-PL had been initiated in 2014 and completed in the middle of 2015. In September 2015, a training session promoting the new application was organised.<sup>28</sup> Those undertakings were all made by the previous Government. There is no information on new activities initiated by the current Ministry connected with Logib-PL. When asked by the Human Rights Defender on 6 December 2016 about progress in this regard, the Minister of Family Labour and Social Policy replied that works were in the final stages and the process of implementation will be initiated at the beginning of 2017.<sup>29</sup> A similar, though slightly more detailed answer was received from the Ministry of Family, Labour and Social Policy, at the end of March 2017. The Ministry supplied information about tests of the wage comparison tool, however without indicating the expected date of its implementation.<sup>30</sup> The Plenipotentiary for Civil Society and Equal Treatment replied that his Office does not undertake any activities and studies in this regard, because it lies within the competences of the above Ministry.<sup>31</sup>

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

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

The LC regulations in this respect may be criticised as being contradictory to CJEU case law, as its provisions make remuneration dependent on the length of employment, regardless of the type of work performed. Nevertheless, in the light of Supreme Court case law, an employer, arguing that different qualifications and lengths of employment were the grounds for differentiation of remuneration of employees performing equal tasks, should demonstrate that they are significant with regard to the performance of those tasks.<sup>32</sup> In the opinion of the Supreme Court,<sup>33</sup> 'equal work' in the meaning of Article 18<sup>3c</sup> of the LC refers to tasks actually performed by the employee, not to the description of the obligations of the employee deriving from the employment contract.

<sup>26</sup> Former English name of NIK was Supreme Chamber of Control. In 2014 NIK prepared the report on gender pay gap in public sector of employment that confirmed the differences in salaries of women and men. In conclusion it recommends to proceed with the project of Government Plenipotentiary for Equal Treatment <https://www.nik.gov.pl/aktualnosci/nik-o-wynagrodzeniu-kobiet-i-mezczyzn.html>, accessed 29 May 2017.

<sup>27</sup> [http://ec.europa.eu/justice/gender-equality/gender-pay-gap/national-action/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/gender-pay-gap/national-action/index_en.htm) accessed 29 May 2017.

<sup>28</sup> The application Logib-PL, together with information on pay gaps, is available on the webpage: <http://www.equal-pace.eu/polska/>, accessed 29 May 2017.

<sup>29</sup> Information received from the Office of the Human Rights Defender.

<sup>30</sup> Reply of the Ministry of Family Labour and Social Policy, of 30 March 2017, received within the framework of access to public information.

<sup>31</sup> Reply from the Plenipotentiary Office of 15 March 2017, received within the framework of access to public information.

<sup>32</sup> Ruling of the SC of 22 February 2007, I PK 242/06.

<sup>33</sup> Ruling of the SC of 12 January 2010, I PK 138/09.

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

Some of the Polish landmark cases have been described in Annex 3 of the Commission's staff working document accompanying the report of the Commission on the application of Directive 2006/54: see SWD (2013) 512 final. Among them worth mentioning is the Constitutional Tribunal judgment of 9 July 2012, P 59/11, initiated by a legal question of the District Court in Białystok; the Supreme Court judgment of 8 January 2008, II PK 116/07; the Supreme Court judgment of 25 May 2011, II PK 304/10, and the Supreme Court judgment of 22 February 2007, I PK 242/06. Additionally, two other rulings should be mentioned. The Supreme Court in the judgment of 2 February 2007<sup>34</sup> declared that raising remuneration of just one employee while omitting others, employed in different positions, does not constitute unequal treatment, and does not violate the prohibition to discriminate, if the employer has not implemented a system of work valuation (in extreme cases it may only be regarded as a violation of the principle of community coexistence as defined in Article 5 of the Civil Code).<sup>35</sup>

With respect to this ruling, the lack in many enterprises of a system of occupational classifications for the purpose of determining remuneration, as well as the lack of a universal system for valuing work and establishing criteria, allowing comparison of various kinds of work, causes difficulties in claiming damages resulting from wage discrimination, in case of work of similar value. Such job classifications apply in the public sector, according to Ordinance No. 1 of the Prime Minister, dated 7 January 2011, on the principles of description and job valuation in the civil service.<sup>36</sup> This ordinance *inter alia* regulates the procedures for conducting jobs valuation (by a specially designated team).<sup>37</sup> In the private sector, however, systems for evaluating work are applied only on a voluntary basis.<sup>38</sup>

Of importance is also Supreme Court ruling of 3 June 2014, III PK 126/13,<sup>39</sup> in which the Court decided that in case of wage-related discrimination, the claimant not only has to make it plausible that he is remunerated less favourably than other employees, performing the same work, or work of equal value, but also that the differentiation was based on an unlawful ground. Such opinion has been expressed when the failure to mention such ground of discrimination in the claim was one of the reasons for the loss of the claimant in this case, because the Court accepted the cassation arguments of the defendant.

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<sup>34</sup> Ruling of the SC of 2 February 2007, ref. I PK 222/06.

<sup>35</sup> Article 5 of the Civil Code that one may not use his right in a manner that would be contrary to its social and economic purpose or to the principles of community coexistence. Any such act or refraining from acting by the entitled person shall not be treated as the exercise of the right and shall not be protected.

<sup>36</sup> Monitor Polski ( Polish Monitor) 2011 No 5 Item 61.

<sup>37</sup> Annexes to the ordinance include model job descriptions, stating their place in the organisational infrastructure of the office, a description of the main tasks, authorisations and powers, description of the complexity of the work and creativity, the necessary independence and ability to show initiative, external contacts, factors hindering the performance of particular tasks, different from the ones traditionally occurring in typical administrative positions, as well as the required skills and professional experience.

<sup>38</sup> Different surveys have proved that the extent of work valuation practices is limited (involving only 7 % of small enterprises, 9 % of medium-sized enterprises and 33 % of large enterprises (having more than 250 employees)). In most of those cases simplified methods of evaluating were used. Worth noting is also the very low social awareness of the use of work valuation for the elimination of the gender pay gap.

<sup>39</sup> <http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/III%20PK%20126-13.pdf>, accessed 29 May 2017.

## 4.2 Access to work and working conditions

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

Yes, in Article 2 (1) and (2) of the Antidiscrimination Law and in Article 2 of the LC.

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

The LC defines the term 'employee', as an individual employed on the basis of a contract of employment, appointment, election, nomination or co-operative contract of employment (*'Pracownikiem jest osoba zatrudniona na podstawie umowy o pracę, powołania, wyboru, mianowania lub spółdzielczej umowy o pracę'*).

National law does not include a definition of a 'worker'. The notion of a worker is broader than that of an 'employee'. 'Employee' is a term limited to persons employed on the basis of a labour-law contract or other legal basis (for instance the appointment of academics or civil servants (public officers) who in addition to the protection guaranteed by the Labour Code also benefit from additional protection through special regulations).

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

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

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

The Constitution guarantees equal access of women and men to employment, promotion and positions. This principle is laid down in the Labour Code, underlining that it also covers equal access to vocational training, upgrading professional qualifications, regardless of whether the employment is full-time or part-time. This principle applies to every employee, regardless of the label of her/his employment contract; essential in this respect are the conditions in which the work has to be performed (under another person's guidance as to the place, time and conditions of work). Provisions of the Labour Code in this respect have been supplemented by the Antidiscrimination Law, which contains provisions specifying that, in relation to employment, the prohibition of unequal treatment of all workers inter alia on the ground of sex, shall apply to: access to and receiving of professional training, including additional education, proficiency courses and requalification training (vocational orientation and reorientation), as well as professional apprenticeships (practical training); conditions of undertaking and performing economic



or professional activities, in particular in the form of an employment relationship or work on the basis of civil-law and mandate contracts (including the so-called managerial contracts); unpaid employment in the form of voluntary work; access to the activities in trade unions, organisations of employers and professional corporations; and access to and conditions for the enjoyment of publicly available instruments and services of the labour market.

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

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

Yes, in in Article 5(6) of the Antidiscrimination Law and in Article 18<sup>3b</sup> (2) point 1 of the LC.

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

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

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

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

Yes. Until 3 August 2016 the LC did not generally permit women to be employed to perform work that was particularly arduous or harmful to their health (Article 176 LC). A list of such work has been determined in the Ordinance of the Council of Ministers of 10 September 1996.<sup>40</sup> The idea alone of a general exclusion of the possibility to employ women for particular work, irrespective of their health and physical condition, was considered obviously discriminatory. Therefore the parliamentary procedure to change this provision was initiated and finalized with the passing of the Law of 22 June 2016

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<sup>40</sup> JoL 1996 No. 114 Items 544 and 545. These prohibitions apply in particular to works involving physical effort, transportation of heavy loads and unnatural body positions. In comparison to its previous version from 1979, this list has been significantly reduced; nevertheless it still is quite extensive. In addition to this, the above provision has been incorrectly placed in Chapter 8 of the LC, regulating the rights of employees regarding parenthood, since it contains prohibitions which apply, not only to pregnant women, but to all women in general.

amending the Labour Code and some other laws (JoL of 19 June 2016, Item 1053), which entered into force on 3 August 2016. In the light of the introduced changes the provision of Article 176 LC, now applies only to women who are pregnant or breastfeeding (Paragraph 1).<sup>41</sup> The amended provision in Paragraph 2 also includes a legal delegation for the Council of Ministers to issue an Ordinance, specifying which works are to be encompassed by the prohibition, with specific instructions in this regard (the former wording of Article 176 did not include any instructions at all). The respective Ordinance was newly updated and entered into force on 1 May 2017.<sup>42</sup>

On the protection for women who are pregnant or breastfeeding, see more in Section 5 of this report.

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

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

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<sup>41</sup> The Law also modified respectively Article 179 LC, as well as Article 48 (9) of the Law of 21 November 1967 on the general obligation to protect the Republic of Poland (Unified text: JoL of 2015, item 827, with later amendments) and Article 65 (2) of the Law of 11 September 2003 on professional military service (Unified text: JoL of 2014, item 1414 with later amendments).

<sup>42</sup> Ordinance of 3 April 2017 of the Council of Ministers on the register of works strenuous, dangerous or detrimental to the health of pregnant and breastfeeding women. JoL of 2017 Item 796.

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

### **5.1 Pregnancy and maternity protection**

#### **5.1.1 Does national law define a pregnant worker?**

No. The LC only requires the condition of pregnancy to be confirmed by a medical certificate (Article 185 LC).

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

Yes, in Articles 176 (which applies to women in general without specific reference to protection in case of pregnancy or maternity), 178, 178<sup>1</sup> (and 179 of the LC, and in the Ordinance of the Council of Ministers of 10 September 1996, listing the work particularly arduous or harmful to the health of women in general or in particular to pregnant or breastfeeding women (JoL 1996 No. 114, item 544 and 545 with further changes). Polish law does not distinguish the category of women who have recently given birth. Such protection inter alia includes the prohibition to perform particular work. In the light of the above Ordinance, work particularly arduous or harmful to women includes work involving physical effort, work in cold, hot or changing microclimates, work involving noise and vibrations, work involving exposure to electromagnetic waves, ionizing and ultraviolet radiation and work at computer screens exceeding 4 hours daily, work underground, below the surface and at heights, work of divers and all work in environments involving higher or lower pressure. Also forbidden is work in contact with harmful biological substances (e.g. involving the danger of containing B-type hepatitis and HIV), and work involving exposure to harmful chemical substances. The prohibition also includes works involving risk of heavy physical or psychical injuries.

A pregnant woman is prohibited from performing any overtime or night work. She also cannot be posted to work outside of her permanent workplace or employed under the work split-up system, without prior consent (Article 178 LC).<sup>43</sup>

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

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

Yes, in Article 177 of the LC. An employer may not terminate a contract of employment with or without notice with a female employee who is pregnant or on maternity leave, unless there are grounds for contract termination without notice through the fault of the employee, and provided that the trade union representing this employee has consented thereto (Article 177(1)).<sup>44</sup>

<sup>43</sup> The work split-up system refers to work scheduled with interruptions (Article 139 LC).

<sup>44</sup> In the opinion of the Supreme Court, it is irrelevant for the protection of pregnant women from dismissal whether the employee was aware of her pregnancy, the employer had been informed about this fact, or that the pregnancy was terminated by miscarriage. The only thing that matters is the objective existence of pregnancy at the moment of dismissal.

Up to 22 February 2016, employment contracts with pregnant women, for a fixed-term or for the period necessary to perform a specific task or for a probationary period of more than one month, which would otherwise have been terminated after the third month of the employee's pregnancy, had to be extended until the date of childbirth.<sup>45</sup>

Since 22 February 2016 the amended LC<sup>46</sup> stipulates that the provision on extending such labour contracts cannot be applied to women employed for the period necessary to perform a specific task (Article 177 (3) LC). This provision also cannot be applied to fixed-term employment contracts concluded to replace an employee during a justified absence from work (Article 177(3<sup>1</sup>) LC). The dissolution of an employment contract with a pregnant woman or person (mother or father) on maternity leave may take place exclusively in case of the liquidation of the employer's enterprise or its bankruptcy, after consultations with a trade union representing that employee, as to the date of the dissolution of the contract and resulting financial conditions. The period of time during which an employee will receive financial benefits in relation to such dissolution will be counted into the duration of the employment period that entitles an employee to the various employment benefits (Article 177(4) LC).

National case law<sup>47</sup> proves that there are difficulties in understanding the exceptions from the prohibition of the release from work of pregnant women. One of these cases regarded a religion teacher at a public school who was laid off despite the fact that she was pregnant, because her permit to teach religion (*missio canonica*) had not been prolonged.<sup>48</sup> The diocesan bishop, responsible for the issuing of this document, refused to prolong it when he learned that the teacher was a divorcee and lived with the father of her unborn child outside marriage. The court of first instance found that the school was entitled to dissolve the employment contract with the woman after the refusal of the prolongation of the *missio canonica* since in the light of Article 23 (1) Item 6 of the Teacher's Charter,<sup>49</sup> such refusal constituted a lawful basis for the dissolution of the employment contract. In her appeal the teacher claimed that the court of first instance had violated material law, by refusing to assume that the case of dismissal of a pregnant religion teacher, whose *missio canonica* has not been prolonged, is not regulated by law. The court of second instance fully rejected the appeal. Although it found that in this case Article 177 LC should be applied, it nevertheless decided that this fact would not influence the direction of the ruling. The court noted that, in the case of the claimant, the exception from the general prohibition provided for in Article 177 (1) LC applied, namely the possibility to terminate the contract if the reason for termination resulted from a fault of the employee. The court interpreted her failure to formally obtain the prolongation of her *missio canonica* as a fault of the employee (by not lodging an official application for prolongation). The court failed to consider the circumstance, indicated by the teacher, that such official application was not required before and that she always obtained her prolongation (in practice a stamp in the teacher's book) automatically, upon her visit to the Curia. Exceptional in this ruling are the hypothetical considerations of the court, regarding what would have happened, if the teacher had submitted an official application for prolongation of the *missio canonica*. In the court's opinion, in such a situation the Bishop still be entitled to refuse a prolongation of the permit due to her personal situation, without discriminating against her. The court noted that 'such behaviour of the church authorities lies within the exceptions set forth in Article 18<sup>3b</sup> (4)

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<sup>45</sup> Since 22 February 2016, when the amendments of the LC, introduced by the Law of 25 June 2015 (JoL 2015 Item 1220) came into force, the provision on extending a labour contract, mentioned in Article 177 (2) LC, will not be applied to women employed for the period necessary to perform a specific task (Article 177 (3) LC).

<sup>46</sup> JoL 2015 Item 1220. The amendments to the LC, introduced by the Law of 25 June 2015; came into force on 22 February 2016

<sup>47</sup> Case no. VII Pa 326/15 Ruling of 20 October 2016 of the Regional Court in Kraków.

<sup>48</sup> The requirement to hold a valid permit is regulated in Section 12 (3) of the International Agreement between the Polish Government and the Vatican concluded in 1993 (so-called Concondat). Published: in JoL 1998 No. 51 Item 318.

<sup>49</sup> Unified text published in: JoL 2016 Item 1379 with amendments.

LC.<sup>50</sup> It also noted that the situation of the claimant was '(...) contrary to the religion of the Church which she was supposed to teach. Hence there was a collision between the claimant's right to protection of pregnancy and the right to decide upon her private life with the right to practice religion by church authorities'. The reference of the court to Article 18<sup>3b</sup> (4) LC was very superficial, without a deeper analysis of its wording, especially by conducting the obligatory proportionality test.

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

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

## 5.2 Maternity leave

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

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

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

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

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

Yes, in Articles 45(3), 56 and 67(2) and Articles 243 - 265 of the LC. In such cases general rules for resolving disputes deriving from employment agreements apply, with some modifications. These general provisions stipulate that disputes over claims arising from an employment relationship shall be settled by labour courts, which form separate organisational pillar of district courts (Article 262 LC). According to Articles 44 and 45(3) as well as Articles 56 and 67(2) of the LC, dissolution or termination of the employment agreement during pregnancy and maternity leave, which contradicts the rules defined in

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<sup>50</sup> This provision states that 'The principle of equal treatment is not violated where churches and other religious societies, as well as organisations the ethics of which are based on religion, belief or world view, deter access to employment on the grounds of religion, belief or world view provided the type or characteristics of the activity conducted by the churches and other religious societies, as well as organisations, causes that the religion, belief or world view are a real and decisive occupational requirement for the employee, proportional to reaching a lawful aim of the differentiation of the situation of such a person; it also concerns the requirement for the employed person to act in good faith and loyalty towards the ethics of the church, other religious society and organisation the ethics of which are based on religion, belief or world view.'

Article 177 of the LC, is not absolutely invalid *de iure*, but becomes relatively invalid. This means that only after a judgment from the Labour Court declaring the dissolution of labour contract unlawful can the employee return to work. If therefore a respective claim is not lodged by the employee within the specified period, the dissolution of employment contract will be valid. It should be noted that if the court finds the dissolution to violate the provisions on the protection of women during pregnancy and maternity leave, upon her bringing a claim, it is obliged to declare the dissolution invalid and, if the contract has already been terminated, it has to reinstate her to work on the previous conditions. Awarding damages instead of reinstitution to work is allowed only when the latter is not possible due to reasons listed explicitly in the law, namely in case of the employer's bankruptcy or liquidation (Article 41<sup>1</sup> LC), i.e. when the provisions about protection of employees during pregnancy and on maternity leave do not apply. With regard to other employees awarding damages instead of reinstitution to work (if postulated by the employee) is possible in cases when reinstitution is impossible, but in such cases the decision as to whether one of these conditions applies remains within the discretionary power of the court.

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

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

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

The allowances during pregnancy and maternity leave are higher than 'normal' sickness allowances, but equal to the sickness allowance to which women are entitled during pregnancy. The maternity allowances and sickness allowances during pregnancy amount to 100 % of the base for calculating the benefit, pursuant to Articles 31 and 11 of the Law on Maternity Cash Benefits (i.e. pursuant to Article 36 of this Law the average salary of the last 12 months).<sup>51</sup> The 'regular' sickness benefits amount to only 80 % of the above base. There is no ceiling in national law.

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

No, there is no such need.

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

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

The conditions for eligibility for maternity benefits differ from those related to sickness benefits. According to Article 29 of the above mentioned Law, the only condition for receiving maternity benefits, both by a person employed under an employment contract and by a self-employed person, is the existence of a valid sickness insurance in the meaning of the Law of 13 October 1998 on the System of Social Security Since 1

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<sup>51</sup> In addition if the sickness occurred during pregnancy the allowance is paid longer ('normally' max. 182 days, during pregnancy max. 270 days).

January 2016<sup>52</sup> new provisions regarding self-employed persons are to be applied, according to which the amount of maternity benefits while conducting commercial activity will depend on the period of paying contribution fees and on their amount. This change of the law, considered to be discriminatory for self-employed women (since employees still receive maternity benefits according to their actual average salary), was introduced by the Law of 15 May 2015 on the amendment of the Law on Maternity Cash Benefits and some other laws.

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

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

Yes, in Article 183<sup>2</sup> of the LC. According to this provision, after the end of a maternity leave the employer shall accept an employee to resume work in the previous position or, if this is not possible, in a position equivalent to the position held before the leave or in another position that corresponds to the employee's professional qualifications, against remuneration in the amount that would be due if the leave had not been used.<sup>53</sup> All changes in remuneration which occurred during this leave should be included.<sup>54</sup>

### 5.3 Adoption leave

5.3.1 Does national legislation provide for adoption leave?

Yes, in Article 183 of the LC in the wording introduced by the Law of 6 December 2008,<sup>55</sup> and modified by the Law of 24 July 2015.<sup>56</sup> The length of the leave depends on the number of children adopted at the same time and corresponds with the leave at childbirth. It amounts to 20 weeks (210 days) for one child and up to 37 weeks (258 days) for five or more children.

Such leave may be taken by the employee (adoptive mother or adoptive father) until the child is seven years old (10 for a child with disability) (Article 183(1) of the LC). If for example the child is to turn seven only a few weeks after being adopted, the employee is entitled to a minimum period of leave of 9 weeks (Article 183(3) LC). A condition for receiving leave in case of adoption is assuming the care of a child and applying to a family court for the adoption procedure or accepting the child for upbringing as foster family (with the exception of professional foster families, Article 183(1) LC).

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<sup>52</sup> The entering into force of these amendments has been postponed because of protests of self-employed mothers <https://lawsolutions.eu/swiadczenie-rodzicielskie-a-zasilek-macierzynski-dla-przedsiębiorczych-matek/>, accessed 29 May 2017.

<sup>53</sup> This means that if this time limit has been observed, the worker has the right to be admitted to work and to receive remuneration for the time of her/his readiness to perform work. See: Świątkowski, A.M. Kodeks pracy. Komentarz [Labour Code. Commentary], 4th edition, C.H. Beck S. Warszawa 2012, p. 860.

<sup>54</sup> Patulski, W. in: Kodeks pracy. komentarz [Labour Code. Commentary], ed. M. Muszalski, 8<sup>th</sup> edition, C.H. Beck. Warszawa 2011, p. 804.

<sup>55</sup> JoL 2008 No. 237, Item 1654 with amendments, in force since 1 January 2009.

<sup>56</sup> JoL 2015, Item 1268 and JoL 2015, Item 1735, in force since 2 January 2016. Further cited as amendments of the LC of 24 July 2015.

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

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

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

## 5.4 Parental leave

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

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

The formal amendment of the Labour Code with respect to childcare leave, implementing the provisions of Directive 2010/18, was made in the Law of 26 July 2013,<sup>57</sup> which entered into force on 1 October 2013.<sup>58</sup> The tables to illustrate the correlation between the above Directive and the transposition measures were an appendix to Parliamentary Document No. 909 of 21 November 2012, including the draft law.<sup>59</sup> Therefore, childcare leave (*urlop wychowawczy*) provided for in Article 186 of the LC, should be regarded beyond doubt as such leave. Other forms of childbirth-related leave introduced in 2010 and in 2013, such as additional maternity leave (*dodatkowy urlop macierzyński*)<sup>60</sup> and parental leave (*urlop rodzicielski*),<sup>61</sup> were also regarded as implementing Directive 2010/18. Despite the fact that the regulations introducing these types of leave mentioned neither the above Directive,<sup>62</sup> nor its predecessor, they have been considered as parental leave in the meaning of Directive 2010/18 due to the specific function of those types of leave. On 2 January 2016 amendments to the Labour Code of 24 July 2015 entered into force, according to which additional maternity leave and parental leave were combined together and named 'parental leave' (*urlop rodzicielski*). This leave is currently regulated in Articles 182<sup>1a</sup>, 182<sup>1c</sup>, 182<sup>1d</sup> - 182<sup>1g</sup> of the LC.

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

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<sup>57</sup> Law of 26 July 2013 amending Labour Code, JoL 2013 Item 1028. It should be added that Poland asked for the implementation deadline of this Directive to be postponed.

<sup>58</sup> With regard to these changes, on the basis of the authorisation included in Article 186<sup>6</sup> of the LC, a new ordinance of the Minister of Labour and Social Policy of 18 September was issued, regarding detailed conditions for granting childcare leave, JoL 2013, Item 1139.

<sup>59</sup> They were published together with the draft on the website: <http://www.sejm.gov.pl/sejm7.nsf/PrzebiegProc.xsp?nr=909>. It is worth noting that the *European trade union confederation (ETUC) interpretation guide to Directive 2010/18* has also been translated into Polish and published.

<sup>60</sup> Provisions regarding additional maternity leave as well as special paternity leave were introduced into the LC by the Law of 25 November 2010 (JoL 2010 No 294 pos. 1655). Paternity leave, at this time amounting to one week, has been available since 1 January 2011.

<sup>61</sup> The wording (parental leave: *urlop rodzicielski*) was introduced by the Law of 28 May 2013 on the amendment of the LC and other laws. JoL 2013 Item . 675, and Parliamentary Document No. 1310 with reasoning, <http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=1310>, accessed 29 May 2017. It is worth mentioning that by changing the regulation, the language of legal provisions regarding special parental rights was also changed, and became more inclusive with respect to men.

<sup>62</sup> It should be noted that the introduction of all childbirth-related leave was justified by the pro-natalist Government policy. At the same time the reasoning to the draft law of 2013 emphasised the fact that its contents lie outside the scope of EU law (See: Parliamentary Print No. 939, <http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=939>, accessed 29 May 2017).



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

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

Yes. The right to parental and childcare leave does not depend on the type of employment contract. This means that the leave is granted both to persons employed on the basis of an open-ended contract and to workers with a contract for a specified period, e.g. for a trial period, for a fixed-term period, or for the performance of a specific work. Temporary workers, both male and female, are entitled to childbirth-related leave and childcare leave according to the general rules stipulated in the LC.<sup>63</sup>

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

Since 2 January 2016, the duration of parental leave (*urlop rodzicielski*), which has to be taken directly after the end of the maternity leave, is 32 weeks (when giving birth to one child in one birth) and 34 weeks - when giving birth to more children in one birth (Article 182<sup>1a</sup> (1) of the LC). Both parents are entitled to parental leave (182<sup>1a</sup> (2) of the LC), which they can take simultaneously (182<sup>1a</sup> (3) of the LC). However in such a case the total duration of the leave may not exceed 32 (or 34) weeks. There is also an option that one parent takes the parental leave and another parent at the same time takes only benefit without leave (182<sup>1a</sup> (4) of the LC). In such case the total aggregated duration of leave and sole payment of benefits may not exceed 32 (or 34) weeks (Article 182<sup>1a</sup> (4) of the LC). The same durations for parental leave apply in case of adoption of one or more children at the same time<sup>64</sup> (Article 183(4) of the LC).

In addition, each parent is entitled to unpaid childcare leave (*urlop wychowawczy*) of a total aggregated duration which generally amounts to a maximum of 36 months (Article 186 (2) of the LC ) and in case of disabled child to a maximum of 72 months (Article 186 (3) of the LC), to be taken at any time, under the condition that it will be finished until the end of the calendar year in which the child reaches the age of 6 (Article 186 (2) of the LC) or 18 in case of a disabled child (Article 186 (3) of the LC).

There are no differences as to the duration of these types of leave between the public and the private sector.

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

The Polish legislator, while implementing the Framework Agreement on Directive 96/34/EC and eventually the present Directive, did not fully transfer the right to childbirth-related leave and childcare leave as an individual right of every parent. The major legislative change, adjusting Polish regulations in this respect to the requirements of the Directive resulted in the Law of 24 July 2015 on amendment of the Labour Code and some other laws. In particular, this Law introduced a new provision (Article 175<sup>1</sup> LC), stipulating that all rights guaranteed in this Code, related to protection of pregnancy

<sup>63</sup> Law of 9 July 2003 on the employment of temporary workers (JoL No. 166, Item 1608).

<sup>64</sup> With the exception of the case of adoption of a child up to 7 years when the duration of parental leave is 29 weeks. This unclear provision might be explained as guaranteeing adoptive parents the paternal leave of 29 weeks even when the child during this leave has already reached the age of 7 years. See: Sobczyk, A. (2015) in Sobczyk A. (ed.), *Kodeks pracy. Komentarz* [Labour Code. Commentary], 2<sup>nd</sup> edition, C.H. Beck, Warszawa, p. 773.

and childbirth, including parental leave, will apply to all insured persons (and not exclusively to employees in the meaning of the LC, as it was before). In practice this means that parents have the option to share childcare-related rights in situations where only one of them has employee status, while the other one is covered by insurance (in case of sickness or maternity) resulting from other sources (e.g. self-employment, civil law contract). Exceptionally, the employee-father may take childbirth related leave even if the woman is unable or unwilling to take care of the child and is not entitled to social security.<sup>65</sup>

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

Since 2 January 2016, parental leave (*urlop rodzicielski*) is to be taken in whole or in parts until the end of the calendar year in which the child reaches the age of 6 (Article 182<sup>1c</sup> (1) of the LC). Parental leave may be divided into a maximum of four parts, which have to follow each other directly (Article 182<sup>1c</sup> (2) of the LC). This rule does not apply in case of piecemeal parental leave up to 16 weeks (Article 182<sup>1c</sup> (3) of the LC), which may be taken later on, also after the break. Each part of parental leave may not (with some exceptions) be shorter than eight weeks (Article 182<sup>1c</sup> (4) of the LC).

Until 2 January 2016, a worker could combine parental leave with work for the same employer, not exceeding half of the regular working time. In such cases the leave was granted for the rest of the working time. In such a situation however, there was no possibility to extend the length of parental leave. For this reason, commencing employment during parental leave was very rare. Since 2 January 2016 this possibility exists with regard to parental leave. If such leave were to be combined with, for example, half-time employment, its length could thus be extended to 64 months (68 months in the case of multiple children at one birth) (Article 182<sup>1e</sup> (1-2) and 182<sup>1f</sup> (1-5) of the LC).

Unpaid child care leave (*urlop wychowawczy*) may also be taken by both parents at the same time, without any time restrictions, however the overall amount of the leave may not exceed the maximum amount of 36 months (72 months for a handicapped child).

At the same time each parent has exclusive right to one month of the child care leave, which expires if not taken. This does not apply to single parents, when the parent has died or has been deprived of custody over the child (Article 186 (4 and 9) of the LC). In such cases the other parent is entitled to the full 36 childcare leave. Childcare leave may be divided in up to five parts, (Article 186 (8) of the LC). In addition, the worker entitled to child care leave may file a written request to decrease their working time to a number of hours not less than half of full-time work (Article 186<sup>7</sup>(1) LC). The employer may not refuse such request.

The Polish regulations regarding teleworking and other flexible work arrangements are not explicitly related to better reconciliation, but remain available for parents returning from parental leave on a general basis (Articles 67<sup>5</sup> - 67<sup>18</sup> LC).<sup>66</sup>

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

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<sup>65</sup> In terms of the Law of 13 October 1998 on the system of social security.

<sup>66</sup> Law of 24 July 2015 on amendment of the Labour Code and some other laws. JoL 2015, Item 1268.

As of 2 January 2016 the notice period, both for the paid parental leave, and for unpaid childcare leave have been extended to 21 days in order to provide better protection for the employer.<sup>67</sup> Previously the fixed time limits for filing (or withdrawing) the request (seven or fourteen days) have been strongly criticised.<sup>68</sup>

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

No.

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

Such a requirement does not exist for parental leave (*urlop rodzicielski*) provided for in Article 179<sup>1</sup> of the LC, but exists for childcare leave (*urlop wychowawczy*) (Article 186(1) LC).

In order to be entitled to parental leave, it is enough to be insured by social insurance. The entitlement to the leave as well as the overall amount of parental benefits for employees does not depend on the length of service or length of insurance. The benefits for employees depend solely on the amount of salary. This was also the case of insured self-employed persons who are not employees. However, as of 1 January 2016 their situation has changed drastically. According to the Law of 15 May 2015 the initial amount of the parental benefits in case of self-employed persons depends on the length of payment and amount of insurance contributions. On the other hand, in the case of farmers, who are under the special system of insurance,<sup>69</sup> the entitlement to parental leave and benefits still do not depend on the length of insurance.

In respect of unpaid childcare leave, in order to obtain the right to childcare leave, a worker must be in service for at least six months. The six-month employment period includes previous employments (Article 186(1) LC), not necessarily with the employer where the request is submitted. This six-month period may include all previous employment periods on the basis of an employment relationship, regardless of the reason why those relationships were terminated and regardless of the length of gaps between subsequent employments (Article 186(1) LC). For citizens of EU and EEA Member States, the six-month period may also include employment periods on the territory of those countries.<sup>70</sup> The six-month employment period, according to case law, also includes registered unemployment periods for which the person had received unemployment benefits.<sup>71</sup>

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

No. The employer is obliged to allow the worker to take advantage of the leave during the period indicated in the request if it has been submitted within the prescribed time limits (since 2 January 2016 - 21 days). Should any of the requests be submitted

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<sup>67</sup> In order to allow the employer better planning of work and to eliminate possible negative effects resulting from employees taking advantage of their parenthood-related rights, as of 2 January 2016, the minimal length of one part of the leave will amount to eight weeks. Also earlier return to work by an employee, who stops the parental leave or childcare leave, will only be possible upon consent of the employer. Additionally, as a safeguard of the employer's interests, his consent will be required for any proportional extension of the parental leave, when it is to be combined with work.

<sup>68</sup> Świątkowski, A.M. Kodeks pracy. Komentarz [Labour Code. Commentary], 4<sup>th</sup> edition, C.H. Beck S. Warszawa 2012, p. 860.

<sup>69</sup> Provided by the Law of 20 December 1990 on Social Security for Farmers, unified Text JoL 2016 item 277.

<sup>70</sup> See: Świątkowski, A.M. Kodeks pracy. Komentarz [Labour Code. Commentary], 4<sup>th</sup> edition, C.H. Beck. Warszawa 2012, p. 862.

<sup>71</sup> See: Ruling of the Court of Appeals in Białystok of 18 June 1998, III AUa 296/98, OSA 1999/5/28.

without observing this deadline, the employer may delay the beginning of the leave, but by no longer than 21 days from the day on which the request has been filed (Article 179<sup>1</sup> Article 182<sup>1d</sup> (1), 182<sup>4</sup>). Similar notice of 21 days is provided in relation to childcare leave (186 (7 and 7<sup>1</sup> of the LC).

There are no other legal regulations regarding the possibility of the employer postponing childbirth and childcare-related leave.

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

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

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

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

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

Yes, in case of employee's parental leave (*urlop rodzicielski* - Article 182<sup>1g</sup> a refers to Article 177 of the LC) and childcare leave (*urlop wychowawczy*- Article 186<sup>8</sup> of the LC) as a rule<sup>72</sup> the employer may not terminate the contract, from the day that the worker submits the request for the leave (or reduced working time) until the last day of the leave (or the day of return to regular work). Article 12 of the Antidiscrimination Law,<sup>73</sup> which also applies to employees, is also relevant, because protection against less favourable treatment has not been regulated in the LC. In the case of violation of the equal treatment rule stipulated in this law, with regard to a natural person, among others with respect to pregnancy, maternity leave, additional maternity leave, leave granted under the terms and conditions of maternity leave, paternal leave, parental leave or childcare leave, this person has the right to claim damages, according to Article 13 of this law.

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

Yes. During parental leave and childcare leave (or requested shortening of working time) the LC provides for special protection of the employment relationship. According to

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<sup>72</sup> The LC allows some exceptions for the termination of the employment contract by the employer: in the case of bankruptcy or liquidation of the employer, and for reasons justifying termination of the employment contract without notice through the fault of the worker (disciplinary dismissal) (in Article 182<sup>19</sup> in reference to Article 177(4 and 5), as well as Article 186<sup>8</sup>(2) of the LC).

<sup>73</sup> Article 12(1) of the Antidiscrimination Law after amendments introduced by the Law of 28 May 2013 (JoL 23 Item 675). The amendment entered into force on 17 June 2013.

Articles 183<sup>2</sup> and 186<sup>4</sup> of the LC the employer has the obligation to readmit a worker at the end of the childbirth or childcare-related leave to her/his former position. If employment in the same position is not possible, the employer has the obligation to employ her/him in an equivalent position or on the same conditions at another job position, corresponding to the worker's professional qualifications, for remuneration not lower than the remuneration for work that the worker would have received if not having been on leave.<sup>74</sup>

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

Yes, the LC does not explicitly state that the rights acquired (or in the process of being acquired) by the worker on the date on which parental leave starts shall stand until the end of it. According to case law however, workers on childcare leave (*urlop wychowawczy*) e.g. have the right to a premium (jubilee) reward (*nagroda jubileuszowa*) for a long duration of work at the same employer (e.g. 15 years), if the time required for using it elapsed during the childcare leave.<sup>75</sup> They may also receive disability benefits if such a condition appears during childcare leave.<sup>76</sup> In case of privatisation of his enterprise, the employee is also entitled to buy shares on preferential conditions, just as the other employees.<sup>77</sup> However, during the 3 years of childcare leave they are not entitled to paid annual leave, which they only can take before the childcare leave starts.<sup>78</sup>

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

Parental and childcare leave are considered as justified interruption of work. The employment relationship is maintained during such leave. This results from the wording of Articles 177 and 186<sup>8</sup> of the LC, according to which the termination of the employment contract with an employee during such leave is prohibited.

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

An employee on childcare leave is covered by obligatory social and healthcare insurance.<sup>79</sup> Contributions to these insurances are paid to the Social Security Institution (*ZUS*) from the state budget.

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

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

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

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<sup>74</sup> In case of childcare leave the remuneration should be not lower than the remuneration on the day when the employee started work in the same position as before the leave (Article 186<sup>4</sup> LC).

<sup>75</sup> Resolution of Supreme Court of 3 June 1992, I PZP 33/92, OSN 1993, Nos 1-2 Pos. 10.

<sup>76</sup> Judgment of Supreme Court of 15 January 1987, II URN 289/86, PiZS 1987, No. 7 p. 62.

<sup>77</sup> Resolution of Supreme Court of 6 February, III ZP 14/96, OSNAPIUS 1997 No. 18 Pos. 334.

<sup>78</sup> See Patulski, W. in *Kodeks Pracy. Komentarz (Labour Code. Commentary)* ed. W. Muszański, C.H. Beck, Warsaw 2011, p. 895.

<sup>79</sup> A person on childcare leave is not covered by sickness and accidents insurance.

Yes. During maternity and paternity leave (*urlop ojcowski*) and six (or eight) weeks of parental leave, the employee receives an allowance equal to 100 % of the average salary from the last 12 months.<sup>80</sup> For the remaining part of parental leave (*urlop rodzicielski*) the allowance is 60 % of the salary. It may be 80% for the whole period of childbirth/care related leave if the woman declares after the child was born that she is going to take all such leave. The allowances are paid by ZUS, which receives the sickness insurance contributions. Since 1 January 2016, the allowance for self-employed women is calculated on the basis of the average of the premiums (contributions paid by insured workers to the Social Security Fund) for the last 12 months.<sup>81</sup>

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

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

The relatively long period of paid parental leave deserves a positive assessment. Currently not all requirements resulting from Directive 2010/18 have been implemented into the Polish legal system.<sup>82</sup> Most of the criticism refers to the lack of proper implementation of Clause 2 Section 1 of the Directive. Subject to criticism is also the multiplication of the various types of leave related to the birth of a child, each having different consequences and a different form, without any indication of the purpose that such differentiation is supposed to serve. The number of different types of leave has been reduced by the Law of 24 July 2015, which entered into force on 2 January 2016. However, the current regulation remains very unclear in certain points (e.g. in relation to adoption leave).<sup>83</sup> Still subject to criticism may be the lack of regulations regarding flexible working time in a situation when this occurs for family reasons.<sup>84</sup>

## 5.5 Paternity leave

5.5.1 Does national legislation provide for paternity leave?

Yes, in Article 182<sup>3</sup> of the LC. A male employee who is a father taking care of a child is entitled to paternity leave of 2 weeks, but in no case can it be taken after the child is 24 months old (until 2 January 2016 it was 12 months). In respect of adoption, the relevant period is 24 months, from the day when the adoption order becomes final, and until the child is 7 years old. For a child with disabilities the leave may be taken until the child is 10 years old.

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

Yes, in Article 182<sup>3</sup>(3) of the LC. Accordingly, with regard to the father, the provisions safeguarding the durability of the employment agreement during maternity leave

<sup>80</sup> Articles 31 and 36 in of the Law on maternity cash benefits; for the remaining 26 weeks of parental leave the allowance is 60 % of salary.

<sup>81</sup> The new rule in this respect has been introduced by the Law of 15 May 2015.

<sup>82</sup> The First President of the Supreme Court in his opinion about the draft law, adjusting the Polish Labour Code to Directive 2010/18 considered that this situation is not compliant with the Directive because if a Member State grants rights to leave exceeding the minimum length required by EU law, this means that EU regulations also apply to the part of these rights that exceeds this minimum. Compare: Opinion of 20 December 2012 to the draft Law. Parliamentary Document No. 909, p. 3.

<sup>83</sup> Ref.: Godlewska Bujok, B. 'Uprawnienia związane z rodzicielstwem. Nowa odsłona.' (Parenthood-related rights. A new construction) *Praca i Zabezpieczenie Społeczne* 2015 No. 9.

<sup>84</sup> Godlewska-Bujok, B. 'Implementacja dyrektywy 2010/18/UE dotyczącej urlopu rodzicielskiego' (Implementation of Directive 2010/18/EU on parental leave) *Prawo Europejskie w Praktyce* 2013 December pp. 52-53.

(reference to Article 177 LC) as well as the guarantees of coming back to the same position when returning from paternity leave should be applied. If employment in the same position is not possible the employer has an obligation to employ him in an equivalent position or, under the same conditions, in another position corresponding to the worker's professional qualifications, for remuneration not lower than the remuneration for work that the worker would have received if not having been on leave, (Article 183<sup>2</sup> LC explicitly mentions paternity leave *inter alia*).

## 5.6 Time off/care leave

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

Yes, in Article 188 of the LC as amended by the Law of 24 July 2015, and Articles 32(1) and 35(1) of the Law on cash maternity benefits. According to Article 188 of the LC, the employee taking care of at least one child under 14 is entitled to a break of 16 hours or 2 days off work in every calendar year while maintaining the right to remuneration.<sup>85</sup> The decision about which option to choose is left to the employee (Article 188 (2) of the LC). For part-time workers the hours of such a break are reduced proportionally to the established work time (Article 188 (3) of the LC). No evidence of the actual existence of urgent family reasons is required. This right is granted regardless of the number of children. When both parents work, the right to this two-day release from work is granted only to one person (Article 189<sup>1</sup> LC).

Other cases of time off from work on the grounds of force majeure are regulated in the Law on cash maternity benefits as modified by the Law of 15 May 2015<sup>86</sup> (changes in force since 1 January 2016). According to Article 32(1) of this Law, a care benefit is granted to the insured worker who has been released from the obligation to perform work due to the need to provide personal care for: a sick child, until it reaches the age of fourteen; or a child younger than eight, in the event of unforeseen closing of the nursery, kindergarten or school, as well as sickness of a contracted nanny<sup>87</sup> or family member who normally takes care of such child, or to take care of another family member in case of necessity. Article 32 (2) of the Law on cash maternity benefits understands as family members: spouse, parents, grandparents, parents in law, siblings and children over fourteen living together with the employee. By children the Law understands natural, adoptive children of both or one of the parents and other children being under their care (Article 32 (3)). Pursuant to Article 32<sup>1</sup>, if an insured mother remains hospitalised after giving birth to the child or where it is certain that she is not able to assure her independent existence or she decides to abandon the child, the insured father (or other family member) is entitled to additional care benefit of up to 8 weeks, if he decides to interrupt his employment to take personal care of the child. The monthly care benefits amount to 80 % of the base for calculating the benefits (Article 35(1) of the above law).

The care benefit will be granted for the period of release from work for up to 60 days per year when taking care of a child and, up to 14 days per year, when taking care of other family members. However it cannot be granted for longer than a total of 60 days per year, irrespective of the number of family members (Article 33 (3 and 4)). It will be refused if there are persons other than the employee living together, who may take care of the family member, with the exception of taking care of a child under the age of two (Article 34 of the above Law).

<sup>85</sup> The male employee taking care of a child under 14 is also entitled to this right. However if both parents are employed only one of them may benefit from this form of time off work (Article 189<sup>1</sup> LC).

<sup>86</sup> Jol 2015, Item 1066 and 1735.

<sup>87</sup> Employed on the basis of the Article 50 of the Law of 4 February 2011 on care of the child under age of three, JoL 2013, Item 1457.

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

### **5.7.1 Is parental leave available in case of surrogacy?**

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

## **5.8 Leave sharing arrangements**

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

Yes, in Article 180(4-17) of the LC, covering the conditions for, and limitations of, any rights to share maternity leave.

After having used at least 14 weeks of maternity leave the female employee may give up the unused part of the leave. In such cases this part will be granted to the employee-father taking care of the child, upon his written request. In some circumstances specified by law, when the mother is unable or unwilling to take care of the child, after 8 weeks of the maternity leave reserved for women to allow recovery after delivery, the remaining part of maternity leave may be transferred to the insured father (or other insured member of the family who interrupts professional activity in order to take care of the child). It should be noted that as of 2 January 2016, all limitations as regards the transfer of the remaining part of the maternity leave to the father (or transfer of maternity benefits) have ceased to apply. For instance the employed father may on his request take the maternity leave in circumstances where the mother died during delivery or afterwards, abandoned the child or is unable to sustain existence, even when she was not insured (Article 180 (15) of the LC). There is also a new possibility for the employee-father to take maternity leave, if the mother is not entitled to maternity benefits but starts to work at least for half of the working time (Article 180(17) LC).

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

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

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

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

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

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

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

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

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



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

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

Yes. Currently a part or the entire parental leave and childcare leave may be transferred to the other parent, provided that they have the status of employee or insured person e.g. as a self-employed person (Article 179<sup>1</sup>(2 and 3) of the LC, with regard to parental leave; and Article 186 of the LC, with regard to childcare leave).

Parents may share parental leave and the right to childcare benefits. The employee-mother may abstain from taking it entirely, or only use it in part, and return to work. Such leave may be divided: parental leave in up to four parts (taken in weeks, with no part be shorter than 8 weeks (Article 182<sup>1c</sup> (1, 2 and 4) of the LC );<sup>88</sup> childcare leave (*urlop wychowawczy*) may be divided in up to five parts (Article 186(8) LC). Parents and caretakers of a child may take parental leave simultaneously for its whole statutory duration (Article 179<sup>1</sup> (2) LC) and (Article 186(6) LC).<sup>89</sup>

The rule that the 'donor parent' must retain the right to at least one month of leave for his/hers own use applies with regard to childcare leave (*urlop wychowawczy*; Article 186(4) LC) only). In case of a violation of this rule, the total duration of childcare leave will be shortened by one month. There are legal exceptions to this rule.<sup>90</sup> In such a situation the second parent uses the childcare leave in full (36 months).

## 5.9 Flexible working time arrangements

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

Yes. The legal right of workers to reduce working time on request has been granted to persons entitled to, parental leave and childcare leave.

For parental leave, the combination of leave and work may only be made at the same employer and may not exceed half of the full working time (Article 182<sup>1e</sup>(1) LC). The commencement of work occurs upon written notification of the employee, filed not less than 21 days before the day of returning to work. The employer is under the obligation to accept this request unless it is not possible due to the organisation of work or the type of work performed. The employer shall inform the employee in writing of the grounds for rejecting the request ((Article 182<sup>1e</sup>(2) of the LC).

An employee entitled to childcare leave (*urlop wychowawczy*) may apply to the employer in writing for a reduction of his working time to no less than 50 per cent of his full working time in the period during which the leave could be taken. The employer is under the obligation to accept this request. There are no exceptions to this rule. If the application is filed less than 21 days before the commencement of work in the reduced working-time system, the employer shall reduce the employee's working time not later than 21 days after the application has been submitted (Article 186<sup>7</sup> (2) of the LC). In respect of childcare leave, the employment relationship enjoys special protection against termination until the date when the employee resumes work in accordance with the regular working time, but in any case the protection cannot be longer than 12 months (Article 186<sup>8</sup> (1) of the LC). During this period a contract of employment may be

<sup>88</sup> Until 2 January 2015 paternity leave could be divided into three parts only.

<sup>89</sup> The limitation that childcare leave could be shared for a period not exceeding four months has been abolished by the the Law of 25 July 2015.

<sup>90</sup> The exceptions are: when the second parent has died, has no parental rights (or those rights have been limited or suspended by a court) (Article 186(9) LC) or it is a single-parent family (Article 186(10)).

terminated only if the employer's bankruptcy or liquidation is declared, or if there are grounds for contract termination without notice through the fault of the employee (Article 186<sup>8</sup> (2) of the LC). This special protection does not apply to parental leave, which is protected on the same basis as maternity leave (Article 182<sup>1f</sup>, which refers *inter alia* to Article 177 of the LC).

Such a request might be submitted by the insured parents of a child or in cases indicated in the law<sup>91</sup> by insured close relatives (except childcare leave which may apply only to persons who have the status of employee (this relates to the fact that self-employed persons are not entitled to childcare leave).

5.9.2 In the case of parental leave there are no eligibility criteria for employees other than entitlement to sickness/maternity insurance benefits. In the case of childcare leave the employee has to meet certain requirements, in particular have 6 months of service (Article 186 LC). Does national law provide workers with a legal right to adjust working time patterns (temporarily or otherwise) on request?

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

There are no legal requirements for employees to be able to take advantage of these rights. At the same time, however, there are no legal guarantees of acceptance of the employee's request by the employer, nor are there any guarantees of the consistency of such flexible working-time pattern, once adopted. As mentioned above, a draft law on amending the Labour Code (Parliamentary Document no. 3288) provided for a particular legal regime for adjustment of working-time patterns in cases when the employee's request was justified by family obligations.<sup>92</sup> Ultimately these amendments have not been adopted.

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

Since 2010 such possibility is explicitly provided for by the LC (Chapter IIb Article 67<sup>6</sup> - 67<sup>17</sup> LC). Nevertheless it is not considered to be a legal right of worker to work from home or remotely.<sup>93</sup> As far as possible, the employer shall consider the employee's request to perform work in the form of telework (article 67<sup>7</sup> (3) LC).

The law does not provide for any time limits.

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

No.

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<sup>91</sup> The law of 15 May 2015 amending the Law on financial maternity benefits and some other laws (JoL 2015 Item 1066) in force since 14 August 2015.

<sup>92</sup> Ref.: Answer to 5.4.6, in particular: This results from Article 186 <sup>1</sup> LC, according to which the dissolution of the employment contract with an employee during childcare leave is prohibited.

<sup>93</sup> The terms and conditions of telework applied by an employer shall be defined in an agreement between the employer and a trade union, and if more than one trade union is active in the establishment in an agreement between the employer and those trade unions (Article 67<sup>6</sup> LC). During the employment, any change of the terms and conditions of work to those referred to in Article 67<sup>5</sup> may be introduced by agreement of the parties at the employer's or employee's initiative.

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

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

Not explicitly. The Law of 20 April 2004 on Occupational Pension Schemes (JoL 2004 No. 116 Item 1207) does not provide for a prohibition to discriminate (both directly and indirectly, on the ground of sex). Also the Antidiscrimination Law does not refer explicitly to occupational social security schemes but only to social security in general (Article 4 (4b) and Article 6). With regard to occupational social security schemes it seems that only the general prohibition of discrimination, provided for in Article 32(2) of the Constitution<sup>94</sup> may be applied.<sup>95</sup>

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

According to Article 2 (2) of the Law on Occupational Pension Schemes, which provides the definitions of the terms that are used, the 'employees' to which the system applies, means 'persons employed in full-time or part-time work, on the basis of a contract of employment, appointment, election, nomination, cooperative employment contract, a person employed under a contract as a result of appointment or election to a body representing a legal person and a member of an agricultural production cooperative or other cooperative of farmers'. The employment may be full-time or part-time,<sup>96</sup> for a period not less than three months unless it is otherwise stated in the enterprise contract (Article 5 (1) of the above Law). The category of employees entitled to this form of insurance also includes those employed in representative bodies of legal persons, on the basis of a contract, designation or election, as well as members of agricultural production cooperatives, or cooperatives of farmers' units. Participants in this scheme also include *expressis verbis* entitled natural persons conducting an economic activity (self-employed persons), as well as partners of commercial law companies, mentioned in this law, which are subject to mandatory retirement and disability insurance (Article 5(4) of the Law on Occupational Pension Schemes). The aforementioned Law explicitly prohibits a person older than 70 first entering into the system (Article 5 (1a)). However, the continuation of participation in the scheme by people older than 70 is authorised, even if they are receiving a retirement pension from the mandatory social security system. This right is granted to them for as long as they are employees.<sup>97</sup> The law does not explicitly refer to persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, but it seems that as long as they remain employees they are not excluded from the

<sup>94</sup> This provision reads: as follows: 'No one shall be discriminated against in political, social or economic life for any reason whatsoever'.

<sup>95</sup> Pursuant Article 8 (2) of the Constitution its provisions shall apply directly, unless the Constitution provides otherwise.

<sup>96</sup> The scheme does not apply to people working on the basis of civil law contracts such as a specific task contract, or a mandatory contract. See Krajewski M. (2014), *Pracownicze programy emerytalne Problematyka prawna*. [Occupational pension schemes. Legal aspects]. Doctoral thesis, p.223 <http://dSPACE.uni.lodz.pl:8080/xmlui/bitstream/handle/11089/11378/Doktorat%20nr%203.pdf?sequence=1&isAllowed=y>.

<sup>97</sup> Such prohibition (with the above-mentioned exception) - as explained by Krajewski- is a logical consequence of the regulation contained in Article 42 (1) point 3 of the Law on Occupational Pensions, according to which the payment of the money accumulated on the account of the programme has to be realised- as a rule- at the moment the employee reaches the age of 70 years. Therefore this prohibition can not be considered as age discrimination. Krajewski M. (2014), *Pracownicze programy emerytalne. Problematyka prawna*. [Occupational pension schemes. Legal aspects]. Doctoral thesis, p. 228 <http://dSPACE.uni.lodz.pl:8080/xmlui/bitstream/handle/11089/11378/Doktorat%20nr%203.pdf?sequence=1&isAllowed=y>.

programme. The personal scope of the Polish regulations seems to correspond with the Directive.

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

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

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

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

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

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

No case law could be identified. By adjusting the provisions of the Polish law to EU requirements, the requirements regarding the age of male and female employees who may access the programme have been equalised.

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

Not anymore. Article 18a of the Law of 22 May 2003 on insurance activity<sup>98</sup> currently provides explicitly that the application of the criterion of sex in calculating insurance premiums and benefits cannot result in differentiation of premiums and benefits of particular persons. It is also prohibited to differentiate premiums and benefits, as well as financial services connected with them, with regard to pregnancy and maternity (Article 18b of the Law mentioned above). The latter prohibition applies to life insurance, dowry insurance, childcare, accident pension insurance, sickness insurance as well as other personal and material insurances.

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<sup>98</sup> Consolidated text JoL 2013, pos. 950, with amendments.

**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.**

Occupational social security schemes in Poland are not popular, despite more than a decade of functioning occupational pension legislation.<sup>99</sup> This results from the fact that only rich firms may afford such programmes, and that Poles are rather reluctant to consent to additional 'deductions' from their pensions, as well as from the lack of particular incentives to additional insurances. It is indicated that tax deductions could be an effective incentive.<sup>100</sup> One of the obstacles is the relatively lengthy administrative process related to the creation of these occupational pension schemes.<sup>101</sup> Another concern relates to lack of promotional activities, such as information brochures. In order to take advantage of particular solutions, one first has to know they exist.<sup>102</sup> The situation in 2017 seems not to change since, according to the information from [Polish Financial Supervision Authority](#) (Komisja Nadzoru Finansowego), which is competent for registration of PPE programs, up to the end of April 2017 there were only 6 motions pending from the firms aimed at creation of such scheme, among which 4 have been lodged already in 2016.<sup>103</sup> After the pension reform planned for 2018 (aimed at the increase of additional pensions' insurances), the employers will have one from the two following options to choose from: to create the new form of compulsory employee capital plans (Pracowniczy Program Kapitałowy PPK) or to register its firm to existing voluntary employee retirement plan (PPE). Since there is no clarity what PPK will mean for employers, some specialists predict that in order to avoid the creation of PPK, the employers will apply for well known social security scheme in the form of PPS, what may contribute to the growth of its total of countrywide number.<sup>104</sup>

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<sup>99</sup> Even though their number is rising. For instance in 2012 in such programmes around 110 employers and 360 thousand workers participated <http://www.polskieradio.pl/42/259/Artykul/1005787,Dlaczego-Pracownicze-Programy-Emerytalne-nie-wypalily-w-Polsce>; in 2014 already 1064 employers. <http://www.polskieradio.pl/42/4393/Artykul/1440261,Poszukiwane-firmy-zapewniajace-Pracownicze-Programy-Emerytalne>, accessed 29 May 2017.

<sup>100</sup> They could have the form of progressive reliefs, where people earning less would qualify for higher relief and higher supplement from the State, than those earning more.

<sup>101</sup> In 2014, the average time of processing an application in the register administered by the Financial Supervisory Authority (KNF) amounted to 17 days, if there were no inconsistencies. If corrections were necessary, this period increased to 42 days.

<sup>102</sup> <http://www.polskieradio.pl/42/4393/Artykul/1440261>

<sup>103</sup> Przyszłość PPE (Pracowniczych Programów Emerytalnych, The Future of Occupational social security schemes) <http://www.rp.pl/Moja-Emerytura/304239943-Niejasna-przyszlosc-PPE.html#ap-1>, accessed 28 July 2017.

<sup>104</sup> Nowe programy pracownicze w 2018 r. ( New employees programs in 2018), <http://kadry.infor.pl/wiadomosci/758800,Nowe-pracownicze-programy-emerytalne-od-2018-r.html>.

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

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

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

The Law on the System of Social Insurance establishes the rule of equal treatment of all insured, without regard to sex.<sup>105</sup> This equal treatment rule refers in particular to conditions of the obligation to calculate and transfer social insurance contributions, calculate the amount of benefits, period of payments and the duration of the right to benefits, as elements of the system of social insurances (Article 2a(2)). An insured person who believes that the principle of equal treatment has been violated with regard to her, has the right to claim damages before a court (Article 2a(3)). Additionally the Antidiscrimination Law explicitly provides in Article 4(4)(b) that the horizontal protection enshrined in its provisions also applies to any violation of the principle of equal treatment in the access to the social security system.

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

The personal scope of the Law on the system of Social Insurance corresponds with requirements of the Directive after the reform carried out in 1998, which made the system more universal and uniform in the sense that the application of the Social Security Law was no longer limited to employees, but also covered persons performing work not based on an employment relationship (e.g. the self-employed, persons performing work on the basis of an agency contract or a contract of mandate, artists, priests, etc.). This reform also included into the system public servants remaining in service relationships.<sup>106</sup> The only group still to fall outside the scope of the Law are farmers, who are covered by a separate Law of 20 December 1990 on Social Insurance of Farmers. It should be however emphasized that the farmers insurance system is deemed to be a part of statutory social security system, hence the Directive 79/7 and equal treatment clause enshrined in Article 2a of the Law on the System of Social Insurance and Article (4)(4)(b) of the Antidiscrimination Law applies to it.

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

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

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<sup>105</sup> As well as race, ethnic origin, nationality, civil state, and family status.

<sup>106</sup> Such professions as judges and prosecutors are still governed by special regulations.

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

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

In Poland an exception used to apply with respect to the retirement age, which was traditionally different for women and men (respectively 60 and 65). This much-criticised differentiation of the retirement age for women and men was still in the process of equalization,<sup>107</sup> when the Law of 16 November 2016 reinstated different retirement ages for women (60) and for men (65).<sup>108</sup> The same law introduces an analogical change of retirement age for farmers. The law also introduces other changes, which are inseparably linked to the implementation of this regulation, among others has reinstated the compulsory contribution period (amounting to 20 years for women and 25 years for men) and abolishing early retirement. The new law will come into force on 1 October 2017.

The equalisation of retirement ages was considered as an opportunity in the pension gap between the women and men (according to estimations, without equalising the retirement age, the old-age pensions of women would be about 50 % lower). It has to be noted that although the different retirement ages had not previously constitutional concerns,<sup>109</sup> the full bench of the Constitutional Tribunal later found that the increase of the retirement age is constitutional.<sup>110</sup> The question remains whether the constitutional standards of the rule of law also allow to abort such reforms before their completion and before their impact becomes visible. The current parliamentary majority has reverted the reform for purely populist reasons (the majority of Poles was against the increase of the retirement age. The lowering and differentiation of the retirement age for men and women has important practical consequences due to the fact that the new retirement scheme (in contrast to the old system) is based on the ground rule that the amount of the future benefit is the direct derivative of the amount of paid contributions. The people demanding the return to the previous differentiated regulations, especially women, do not always understand that lowering the retirement age has a significant influence on the amount of their future monthly benefit, because it will cause the sum of accumulated contributions to be reduced, additionally increased by the extension of duration of life expectation of retired persons. This was among the reasons why the European Commission in 2012 recommended to change the retirement age according to the longer life expectation, as well as to introduce the equalization of the retirement age for women

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<sup>107</sup> The Law on pensions and disability allowances 17 December 1998, after amendments introduced in May 2012 (unified Text JoL 2013 Item 1440 with further amendments) provides that starting from 2013 the retirement age by one month every quarter of the year. This means that men would retire at the age of 67 in 2020 and women in 2040. The change of the retirement age in 2012 raised constitutional concerns. However Article 67 Paragraph 1 of the Constitution does not provide any requirements regarding the limits of the retirement age, which means it may be specified in a regular law. This was confirmed by the Constitutional Court in its ruling of 7 May 2014, case No. K 43/12. Nevertheless, in the authors opinion that the Constitutional Tribunal has overlooked the fact that the upraise of retirement age for both sexes which should eventually reach the age of 67, could be seen as the possible gender based discrimination since for men the time of obtaining retirement benefits was only delayed by two years, whereas for women this was supposed to be up to seven years.

<sup>108</sup> The Law of 15 November 2016 on amendment of the Law of 17 December 1998 on retirement and disabilities benefits from the Social Security Fund (JoL of 2016, pos. 887) and certain other laws, published in JoL 2017 Item 38.

<sup>109</sup> In the ruling, of 15 July 2010, in case No K 63/07, the Constitutional Tribunal confirmed that different retirement ages for women and men were considered in constitutional jurisprudence as so-called privileging compensation (affirmative action), aiming to reduce inequalities with regard to sex.

<sup>110</sup> Ruling of 7 May 2014, case No. K 43/12.

and men.<sup>111</sup> The amendments introduced in 2016 are contrary to those recommendations.

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

No.

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

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

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<sup>111</sup> PL || 15.1/ 19.5 || 61.4/ 57.5 ## || 65/60 || 65/60 (67/??) || (67/67) || 13.5 || CSR 3-(in ): WHITE PAPER An Agenda for Adequate, Safe and Sustainable Pensions /\* COM/2012/055 final L <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012DC0055> accessed 29 May 2017.



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

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

Yes, but not explicitly. Answering the question what legislation transposes the self-employment directives in Poland is not easy, since the laws regulating different aspects of the legal situation of self-employed persons seldom refer to EU directives. The implementation of Directive 86/613, in the areas requiring such actions, occurred in the Antidiscrimination Law.<sup>112</sup> As implementation of Directive 2010/41 with regard to childbirth-related leave, reference can be made to the Law of 28 May 2013 on amendment of the Labour Code and other laws, as well as the Law of 26 July 2013 on the amendment of the Law on the system of social security. Formally these laws do not refer to the Directive however, which should be considered as not fulfilling the obligation stipulated in Article 16(1) of the Directive, requiring the implementing provisions to contain a reference to the Directive.

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

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

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

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

The Polish legal system does not explicitly recognize life partnership institute as such.

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<sup>112</sup> This law was criticised inter alia because the legislators seem to have neglected the fact (in the law as well as in the reasoning) that, at the time of its adoption Directive 2010/41 (which repealed Directive 86/613), was already in force.

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

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

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

Although the Antidiscrimination Law provides in Article 11 for the possibility to take positive action in order to prevent unequal treatment or align disadvantages related with equal treatment, currently no such actions have been identified. Before, positive actions were taken in the form of micro loans for unemployed persons opening small businesses, in particular for women conducting commercial activities.<sup>113</sup>

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

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

Self-employed people have no choice of system.

As regards self-employed persons outside agriculture, in order to be covered by the insurance, the spouse and other family members must not only cooperate with the self-employed person, but must also share a common household with them. The system does

<sup>113</sup> Of some effectiveness was the project 'How good to be women with initiative'. The aim of this project was to assist unemployed women in starting up their own businesses by providing theoretical and practical guidance and small subsidies or loans. See more in Zielińska, E. 'Poland' in: European Network of Legal Experts in the Field of Gender Equality, Selanec, G., Senden, L. *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards*. European Commission 2011, 171-180, available at: <http://www.equalitylaw.eu/downloads/3864-positive-action-measures-to-ensure-full-equality-in-practice-between-men-and-women-including-on-company-boards-pdf-2-639-kb>, accessed 29 May 2017. See also: <http://cenabiznesu.pl/-przedsiebiorcze-kobiety-dostana-wsparcie-finansowe>, accessed 29 May 2017.

not refer to life partners. Both self-employed persons and persons cooperating with them are subject to compulsory old-age and disability insurance and insurance against accidents at work and occupational diseases (Article 6(1) Item 5). The insurance covering sickness and motherhood may be joined by these persons on a voluntary basis (Article 11(2)).

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

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

Formally yes<sup>114</sup>. According to the amendment introduced by the Law of 28 May 2013, a woman conducting an economic activity may collect paid maternity benefits, not only during maternity leave, but also during the entire parental leave (a total of 52 weeks), just like a person employed on the basis of a labour-law contract. In order to qualify for such benefits, until 1 January 2016 no minimum insurance period was taken into account for benefits calculation. Current rules<sup>115</sup> laying down a limitation of entitlement to maternity benefits with regard to women, who are non-agriculturally self-employed which may create the situation that the allowance may not meet the requirement of sufficiency.<sup>116</sup> The same may be said concerning maternity benefits for farmers. According to Article 15(1 1a) of the Law on social insurance of farmers, with amendments, as of 1 September 2013, an insured person (farmer or household member) is entitled to maternity benefits in case of the birth of a child, or adoption of a child up to 7 years old. These benefits amount to four times the basic retirement benefits (*emerytura podstawowa*) and, according to Article 6(7) of the Law on Social Insurance of Farmers, it is equal to the minimum old-age pension (which in 2015 amounted to EUR 250 (PLZ 1000)). The difference in the rules of establishment of the the maternity-related benefits which are not fully determined by amount of paid contributions by individual may, to a certain extent, be explained by relatively much lower insurance contributions paid by farmers in comparison with employees. However, the criterion of minimal benefits applied in Polish provisions does not correspond with indicators provided for in Article 8(3) of Directive 2010/41.

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<sup>114</sup> Article 48 of the Law on Maternity Cash Benefits; and Article 15(1 1a) of the Law on Social Insurance of Farmers.

<sup>115</sup> Article 48a of the Law on Maternity Cash Benefits.

<sup>116</sup> According to the amendments brought by the Law of 15 May 2015 ( which is in force from 1 January 2016 ) self-employed women are entitled to receive maternity benefits amounting to 100 % of the declared amount of income, only if they have paid the obligatory sickness insurance for a minimum of 12 months prior to commencing maternity leave. In other cases the maternity benefits will be calculated from the lowest amount of money that, according to the law, can be declared as the basis for calculating insurance premiums. The estimations as to the level of the maternity allowances prove that it may be as low as EUR 4 (PLZ 17). Although the Ministry of Labour and Social Policy explained that in such a case woman will receive EUR 250(PLZ 1000) (from social aid), however still such an allowance should be not considered as meeting the requirement of sufficiency since the minimum wage in Poland in 2015 is approximately 438 EUR (PLZ 1750). See Lasocki, T. in: <http://www.wysokieobcasy.pl/wysokie-obcasy/1,66725,18581779,do-zobaczenia-w-szarej-strefie.htm>, <http://niezalezna.pl/68363-rzad-wykiwal-przedsiębiorcze-matki-dostana-17-zl-i-77-groszy-zasilku-macierzynskiego>, [http://wyborcza.biz/biznes/1,100896,18219094,Minimum\\_1\\_tys\\_zl\\_zasilku\\_macierzynskiego\\_dla\\_matek.html?disableRedirects=true](http://wyborcza.biz/biznes/1,100896,18219094,Minimum_1_tys_zl_zasilku_macierzynskiego_dla_matek.html?disableRedirects=true), accessed 29 May 2017. The minimum wage was raised in 2016 to EUR 463 (PLZ 1850) (net: EUR 364, PLZ 1459).

A mother conducting an economic activity may combine running the company with taking care of a child, which will not result in losing the right to maternity benefits. While collecting maternity benefits, she will be released from the obligation to pay accident, sickness<sup>117</sup> insurance contributions and maternity insurance contributions as well as pension insurance contributions (which are paid by the State), yet she will have to pay health insurance contributions.<sup>118</sup> If however, after giving birth, the person decides to suspend her activity for the period of collecting the benefits, she will be released from health insurance e contributions as well.

A self-employed person in Poland also has the right to childcare leave (*urlop wychowawczy*).

During the period of time devoted to taking care of the child, the State pays the contributions for pension insurance as well as contributions for health and disability insurance. The basis for calculation of the contributions is the amount equal to 60 % of the expected remuneration in a given year. In order to be able to take childcare leave, persons conducting a professional activity have to meet the condition of having paid social insurance contributions for at least six months. This period may not be interrupted and must occur immediately before the childcare leave. If an entrepreneur has paid contributions for less than six months, the Social Care Institution (ZUS) only pays retirement contributions, meaning that in this period the entrepreneur loses his entitlement to health insurance. In order to obtain the benefits, a self-employed person must officially interrupt his or her professional activity, directly indicating that in this period he or she intends to provide personal care for a child.

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

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

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

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

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

No. The law explicitly states that with regard to persons conducting an economic activity, which participate in the programme, all provisions apply regarding employees (Article 5(5) of the Law on occupational pension schemes).

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

Yes, in Article 8 of the Antidiscrimination Law, in particular point 2. This provision stipulates that unequal treatment of private persons with regard to sex is prohibited

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<sup>117</sup> Related to the work performed during the activity.

<sup>118</sup> This type of obligatory insurance entitles the insured person to health services covered by the fund from public money. In case of farmers and registered unemployed person the contributions to health insurance are paid from the state budget.

inter alia in respect to: conditions of undertaking and performing commercial or professional activity, including such performed upon employment contracts or civil-law contracts.

## **9. Goods and services (Directive 2004/113)**

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

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

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

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

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

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

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

Yes, Article 5 (5) of the Antidiscrimination Law states that the law does not apply among others to different treatment with regard to sex in access, or conditions of provision of services, goods and acquiring rights or energy, if the limitation thereof only to representatives of one sex is objectively and rationally justified by a legitimate aim (goal) and the means used in order to implement this goal are appropriate and necessary.<sup>119</sup>

No case law on this provision has been identified.

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

Yes, in Article 18a of the Law of 22 May 2003 on insurance activity<sup>120</sup> after changes introduced by the Law of 14 December 2012 amending the insurance law;<sup>121</sup> and in

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<sup>119</sup> There is no case law to explain what in practice is meant or encompassed by the notion of 'legitimate aim' in this case (none of the 5 court cases based on the Antidiscrimination Law decided in the period of 2011-2014 concerned sex discrimination) - see: Kukowka, G. and Siekiera, A. (2014), *Monitoring funkcjonowania ustawy z 3 grudnia 2010 o wdrożeniu niektórych przepisów UE antydyskryminacyjnej* (Report on Monitoring of the the implementation of the Law of 3 December 2010 transposing certain provisions of EU law), Warsaw, Fundacja Równość, available at: [https://rownosc.info/media/uploads/raport\\_do\\_druku.pdf](https://rownosc.info/media/uploads/raport_do_druku.pdf). The official understanding of the relevant exceptions derive from the reasoning of the draft of the Antidiscrimination Law (p. 7), which reads as follows: 'These rules are designed to allow different treatment in a situation where due to the nature and conditions for the exercising of an activity or the nature of certain services no shutdown could lead to interference to the proper functioning of economic life'. <http://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/3386>. Both documents accessed 20 June 2017.

<sup>120</sup> Consolidated text JoL 2010 No. 11, Item 66 with amendments.

<sup>121</sup> JoL 2013 Item 53.

Article 18b added to the Law on insurance activity by the Law of 13 February 2009 on amendment of the Law on insurance activity and certain other laws.<sup>122</sup>

Article 18a of the Law on insurance activity stipulates that the use of the criterion of sex by insurance agencies while calculating insurance contributions and benefits may not lead to differentiation of insurance contributions and benefits of particular persons.<sup>123</sup> At the same time, Article 18b of this law, introduced in 2009, remained in force. It prohibits differentiating insurance premiums and benefits and insurance services connected with them, with respect to pregnancy and maternity.<sup>124</sup>

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

The existing legislation was adopted after the *Test-Achats* ruling.<sup>125</sup>

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

No.

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

There have been cases when women who were breastfeeding in public have been asked to leave the premises (e.g. shopping centres and restaurants). These cases have become the subject of interventions of the RPO and the Governmental Plenipotentiary for Equal Treatment. There were also reports of cases of refusals to rent flats to pregnant women.

One of such breastfeeding incidents became the subject of a court ruling.<sup>126</sup> It was the case of a woman who went to a restaurant with her family. When she wanted to feed her crying baby at the table, she was told by the waiter that the management of the restaurant did not allow clients to breastfeed at the tables, because this disturbed other

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<sup>122</sup> JoL 2009, No 42, Item 342.

<sup>123</sup> Interpretation of this provision in the reasoning of the draft law included in the Parliamentary Print No. 891 indicate that, according to the new wording of Article 18a of the draft law, the use of the criterion of sex by the insurance agency while calculating insurance contributions and benefits may not lead to differentiation of insurance contributions and benefits of particular persons. On the other hand however, such proposition will make it possible for insurance companies to apply the criterion of sex in calculating insurance contributions and benefits, on the condition that this will not lead to differentiation of those contributions and benefits with regard to particular persons.

<sup>124</sup> Differentiation of insurance contributions and benefits, for the purpose of insurances described in Section I (related to risk distribution in life insurances) and II of the appendix to the Law (which refers to other insurances, including health insurance) and the associated financial services regarding pregnancy and motherhood is forbidden.

<sup>125</sup> It should be noted that the Law of 13 February 2009 on amendment of the Law on insurance activities and certain other laws (JoL 2009 No. 42 Item 342) added to the Law on insurance activities the provisions of Article 18a and Article 18b as implementation of Article 5 of Directive 2004/113/EU. Poland preliminarily took advantage of the option (regulated in Article 5(2) of the Directive) to temporarily permit differences in individuals' premiums and benefits, hence to exclude insurance services from the obligation of equal treatment with regard to sex. See further: Więcko-Tułowiecka, M. *Dyskryminacja płciowa w ubezpieczeniach- wytyczne dotyczące stosowania dyrektywy 2004/113/ w zakresie ubezpieczeń majątkowych i osobowych w świetle wyroku Europejskiego Trybunału Sprawiedliwości w sprawie C 235/09 (Test Achats)* [Sex-related discrimination in insurances - Guidelines on the application of Council Directive 2004/113/EC to insurance in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (*Test-Achats*)], *Monitor Ubezpieczeniowy* 2012 No. 50, September.

<sup>126</sup> The already mentioned non-binding ruling of the District Court in Gdańsk, of 12 December 2016, case No. IC 206/15.

clients. She was advised to do this in the restrooms and when she refused, she was finally offered a chair located next to the restrooms. The woman, supported by an NGO, Polskie Towarzystwo Antydyskryminacyjne (Polish Anti-discrimination Society) submitted a claim against the owner of the restaurant, claiming that such conduct constituted direct discrimination in the access to a public service, with regard to maternity, i.e. sex. The claim was based on the provisions of Article 23 and 24 of the Civil Code, regarding violation of personal goods and Article 6 in connection with Article 13 of the so-called Anti-Discrimination law. The court dismissed the claim, not believing the claimant's statement that the waiter had initially proposed the restrooms as place for breastfeeding, before offering her a chair next to the restrooms. As 'contrary to life experience' the court found the possibility that a restaurant that had just opened and had to attract new clients would impose a total prohibition of breastfeeding, while having a family-oriented profile, e.g. giving the children colouring sheets while they waited for their meal. On the other hand the court did not doubt that a newly opened restaurant could have so many cases of breastfeeding mothers that it provided a special chair for this purpose. As a result the court ruled that the actions of the waiter were justified, because breastfeeding in public places should not violate the rights of other persons nor social and moral norms, which apply in this regard.



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

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

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

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

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

It has to be noted that, after the PiS party took over the government in November 2015, it started to fulfil its electoral promises and initiated preparations for the withdrawal of ratification documents (which is a fact, despite consequent denials of the Government). Such withdrawal has been announced by the President multiple times. A very intensive reaction from women's circles, as well as critical comments from abroad, caused the PiS Government to pause those actions, at least for now. However there is no political will to accept the basic principles of the Convention and to implement properly its provisions. Symptomatic is the interview given by Minister for Family, Labour and Social Policy-Ms Rafalska, who is responsible for the policy related to family violence, in which she in the context of the need for the modification of the Polish legislation after ratification of the Istanbul Convention said: "changes are needed which, on the one hand, will increase the safety of people suffering violence and, on the other hand allow to keep the subjectivity and autonomy of the family".<sup>127</sup> Such statement, being specific contradiction *in adiecto*, proves that she denies, to give the priority to the protection of the safety of the victim, which is one of the leading principles of the Convention.

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<sup>127</sup> Cited after A. Ambroziak. Konwencję przyjęto, ale PIS nie realizuje jej postanowień ( Convention is ratified but PIS-party does not implement its provisions". <https://oko.press/rafalska-trzeba-odroznic-konflikt-malzenski-przemocy-rodzinie-zapomina-o-konwencji-antyprzemocowej/>, accessed 27 July 2017 .

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

### **11.1 Victimisation**

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

Yes, in Article 17 of the Antidiscrimination Law and in Article 18<sup>3e</sup> of the LC;

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

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

Currently the protection against victimisation in both cases<sup>128</sup> complies with the equality directives.

### **11.2 Burden of proof**

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

Yes, in Article 14 of the Antidiscrimination Law and in Article 18<sup>3b</sup> of LC.

In both above acts the wording of regulations related to the shift of the burden of proof in discrimination cases is slightly different. In the Antidiscrimination Law Article 14 (1) stipulates that proceedings involving charges of violation of the equal treatment rule are covered by provisions of the Code of Civil Procedure. At the same time however, it changes the general rule of burden of proof in civil-law cases, regulated in Article 6 of the Civil Code.<sup>129</sup> According to this provision who charges another person with violation of the equal treatment rule shall make probable (*uprawdopodobnia*) that this violation took place (Article 14(2)). In such cases, the person accused shall prove that in spite of this probability he did not commit the violation (Article 14(3)). The intention of this provision was to shift the burden of proof to the defendant. However, the requirements for the person claiming to have been discriminated against go further than just a presentation of the basic facts. This provision has been understood by many courts as requiring them also to show probable the existence of discrimination, by indicating the

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<sup>128</sup> The LC was subjected in 2008 to important amendments which brought it in compliance with EU Directives (Law of 21 November 2008 (JoL 2008 No. 223 Item 1460) (in force since 18 January 2009).

<sup>129</sup> According to which the burden of proof of a fact shall lie with the person who asserts legal consequences arising from this fact.

grounds of it.<sup>130</sup> In the literature the argument has justly been raised that it is too much to expect the plaintiff to know the motivation of the defendant's alleged discriminatory behaviour. It therefore seems justified that the plaintiff should only be required to present basic facts of unequal treatment, creating a legal presumption of discrimination, whereas it should be the obligation of the defendant to provide evidence to the contrary.<sup>131</sup>

The provision of Article 18<sup>3b</sup> LC defines what kind of different treatment of an employee,<sup>132</sup> unless justified by a legitimate aim demonstrated by the employer, is to be considered as failure to apply the principle of equal treatment in employment, inter alia with regard to sex.

There is no legal provision referring to the refusal of the person claiming discrimination to grant access to information. In particular there is no legal provision or case law that would indicate that refusal of access to information has been considered as one of the factors in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination.

### 11.3 Remedies and Sanctions

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

Both the Antidiscrimination Law and Labour Code provide for the possibility to receive compensation for violation of the equal treatment rule. Both mentioned above acts use in this context the Polish word "odszkodowanie", which literally is understood as compensation of damages.

The possibility of compensation in case of discrimination occurring outside the employment relationship is provided in the Antidiscrimination Law (Article 13(1)). According to this provision, everyone affected by violation of the equal treatment rule, has the right to compensation. At the same time, this provision states that in such cases the provisions of the Civil Code shall apply. It should be noted that the Civil Code distinguishes between compensation for material loss (*odszkodowanie*) and satisfaction for immaterial injury (*zadośćuczynienie*). Hence, in the doctrine it is pointed out that in the current state of law, there are serious doubts as to whether granting satisfaction for moral injury, according to Article 13 of the Antidiscrimination Law, in case of discrimination is allowed.<sup>133</sup> It is noted that the term 'compensation', as used in the LC, is interpreted as encompassing satisfaction for moral injuries. For instance the Supreme Court in justification of the judgment of 7 January 2008 (III PK 43/08), which also contains general deliberations on the legal nature and functions of the compensation provided for in Article 18<sup>3d</sup> of the LC, stated that this compensation has two functions. Firstly, the reparations for material damage and secondly, compensation for non-material suffering of the employee. According to the Supreme Court, the existence of this second function is proved (evidenced) by the fact that the above-mentioned

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<sup>130</sup> Many courts, especially in work related cases required that the employees should not only provide the factst hat they were unequally treated in comparison to other employees, but also indicate the prohibited ground of this alleged unequal treatment. See inter alia judgments of Supreme Court of 17 February 2004 r., I PK 386/03, OSNP 2005, No. 1, poz. 6 and of 24 May 2005 r., II PK 33/05, LEX No. 184961, *Praca i Zabezpieczenie Społeczne* 2006, No. 7, s. 35.

<sup>131</sup> See Czarnecki, P., Rozkład ciężaru dowodu w sprawach na tle dyskryminacji (The burden of proof in discrimination cases), *Praca i Zabezpieczenie Społeczne* 2006, No. 3, p.11.

<sup>132</sup> The consequence of which is in particular the refusal to conclude or dissolve employment relation or unfavourable transfer to another position.

<sup>133</sup> See: Letter of the Human Rights Defender to Governmental Plenipotentiary for Equal Treatment of 28 May 2012 indicating the need of change of the Antidiscrimination Law.in this respect, p. 10 <http://www.sprawy-generalne.brpo.gov.pl/pdf/2011/10/687085/1647153.pdf>, accessed 29 May 2017.

provision of LC, while speaking that employee in case of discrimination against him is entitled to the compensation at least of the amount of the minimum wage, does not make it dependent on any damage. Moreover, the Supreme Court also draws attention to this aspect of the compensation, which gives a sense of satisfaction to the employee that employer is punished (sanctioned) for discriminatory behaviour.<sup>134</sup> Also, there are no arguments against similar interpretation of the sanction for discrimination, according to the Antidiscrimination Law, especially since it may also apply to workers who are not employed based on an employment agreement (e.g. on service contracts or contract work). Nevertheless, since the Antidiscrimination Law explicitly refers to the Civil Code, which clearly distinguishes these two types of harm (unlike the LC), one has to assume that the provision of Article 13 of the Antidiscrimination Law does not properly implement EU gender equality law.<sup>135</sup>

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

Additionally, in such cases there is also the possibility to notify the authorities about a contravention. According to article 138 of the Code of contraventions<sup>136</sup> a person active as a professional service provider, who intentionally and unjustified refuses access to such services, may be subject to a fine amounting from PLN 20 to 5000 (EUR 5-1250). Subject to the same fine may be a person selling in a professional retail enterprise or gastronomical enterprise who intentionally and unjustified refuses to sell a product (Article 135 of above Code).

As regards discrimination in employment, pursuant to Article 18<sup>3d</sup> of the LC, in case of alleged discrimination the person concerned may lodge a claim with the special labour court requesting compensation in an amount not less than the minimum remuneration for work, to be established according to separate provisions.<sup>137</sup> It is not clear what kind of damages may be covered on the basis of these provisions and what their relation is to the general civil-law provisions on damages. To some extent these concerns have been explained by the Supreme Court's case law. For example, in the judgment of 22 February 2007, I PK 242/06, the Supreme Court stated that, when the allegation concerns wage discrimination, in addition to punitive compensation for discrimination agreed on the basis of Article 18<sup>3d</sup> LC, the employee may also claim compensation, which ought to equal the difference between the wage received and that which should have been received, if the principle of equal treatment had not been violated, for the period during which the violation of the right occurred. In the light of the decision of the Supreme Court of 7 January 2009, IIIPK 43/08, the compensation resulting from Article

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<sup>134</sup> In the same sense see: the judgment of Supreme Court of 14 February 2013. (III PK 31/12) and P. Korus (in) *Kodek pracyt. Komentarz* (Labour Code Commentary) ed. A. Sobczak, 2<sup>nd</sup> edition, C.H. Beck, Warszawa 2015, p. 81.

<sup>135</sup> It is among others the opinion of Human Rights Defender who while requesting the revision of Antidiscrimination Law raised among others this issue. See: Appeal to Gornement Plenipotentiary for Equal Treatment of 28 May 2012, (<http://www.sprawny-generalne.brpo.gov.pl/pdf/2011/10/687085/1647153.pdf>, accessed 29 May 2017).

<sup>136</sup> *Kodeks wykroczeń* (Code of contraventions) of 20 May 1971, consolidated text: *JoL* 2013, Item 829 with amendments.

<sup>137</sup> The minimum remuneration in 2015 is approximately EUR 438 (PLZ 1750). Ordinance of the Council of Ministers of 11 September 2014, *JoL* 2014 Item 1220.

18<sup>3d</sup> of the LC includes compensation of personal damage to non-property assets. If however the compensation for discrimination, established according to general civil-law provisions (Article 361(2) of the Civil Code) are 'effective, proportionate and dissuasive' with respect to European labour-law standards, then there is no entitlement to additional satisfaction according to Article 18<sup>3d</sup> LC.

In addition to these labour-law remedies, the administrative monitoring body, the State Labour Inspectorate (*Państwowa Inspekcja Pracy*) may also initiate proceedings against a discriminating employer. The scope of action of this institution is defined by the Law of 13 April 2008.<sup>138</sup> This Law also regulates the way Inspectors are allowed to proceed with controls, as well as their obligations and competences. Only in matters not defined by law shall provisions of the Code of Administrative Procedure apply.

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

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

The labour courts properly indicate that the wording 'compensation in the amount of not less than', without setting an upper limit, allows for differentiation of the amount of compensation, depending on the type and severity of the discriminatory behaviour of the employer and its consequences. Unfortunately, there are no reliable data as to the level of compensation awarded in cases of gender discrimination. On the basis of some press information one may estimate that the average level of compensation in sex discrimination cases varies on average from 1 to 5 times the minimum monthly wage, and only tends to be higher in exceptional cases (the maximum amount awarded was approximately EUR 25 000 (PLN 100 000)). Compensation in the amounts usually awarded is not likely to have a dissuasive effect.

The administrative proceedings conducted by the State Labour Inspectorate (*Państwowa Inspekcja Pracy*) are considered to be effective. In April 2014, the Inspectorate published the results of its investigation into the layoffs of persons returning from maternity, paternity, and parental leave and the observance of other employee rights, including those related to childcare. This investigation covered 581 companies. Practice shows that one can often achieve more through direct contact between the Labour Inspectorate and the employer, than by going to court.<sup>139</sup>

The practical significance of penal-law sanctions in discrimination cases was minor, not least because all sexual crimes were traditionally prosecuted not ex officio, but at the victim's request only. In 2013, the situation changed insofar as that currently it is only

<sup>138</sup> The tasks have been defined in Article 10. JoL 2007 No. 89 item 589 (unified text 2015 Item 640). They were extended to citizens of other EU and EFTA countries in the field of elimination of the employee discrimination by the Law of 29 April 2016 on the amendment of the Law on the promotion of employment and institutions of labour market, the law on the State Labour Inspectorate and the Antidiscrimination Law, JoL 2016 Item 691. This change was connected with implementation by Poland of Directive 2014/54/EU.

<sup>139</sup> The report indicates inter alia that in cases of violation of the law, employees rarely go to court. Even in cases where the inspectors themselves referred matters to the court, the persons concerned often backed out of the proceedings and cases were frequently remitted. See: <https://www.pip.gov.pl/pl/f/v/100996/sprawozdanie2013.pdf>, accessed 1 June 2014.

stalking that is prosecuted at the victim's request. There are no data on the role of this provision in relation to fighting sexual harassment.

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

#### **11.4 Access to courts**

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

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

The above ruling (case No. VII Pa 326/15), regarding the reinstatement to work of a religion teacher, dismissed by the school because her *missio canonica* had not been prolonged due to her out-of-wedlock pregnancy, disclosed a dangerous tendency to burden the losing claimant with the obligation to reimburse the defendant with the costs of procedural representation. The claimant, being pregnant and unemployed, found herself in a difficult material situation and for such occasions, Article 102 of the Code of Civil Procedure provides for the possibility to relieve the claimant from those costs. In this case the costs were substantial, amounting to EUR 270 (PLZ 1080) (in the first instance and EUR 240(PLZ 960) in the appeal. The court's justification of this refusal was most bizarre: the court noted that the claimant should first have lodged a claim for reinstatement to work, for which the costs of representation are regulated at a fixed low level, and, depending on the result of these proceedings, subsequently decide if lodging a claim for compensation was reasonable. In that case, the costs of representation to be reimbursed would have been significantly lower. The court also took into consideration that the claimant was represented by a professional lawyer, who should have informed her of this fact. It is hard to say if this ruling constitutes a single incident, or if it is a sign of a broader tendency. Nevertheless, the court taking this position could effectively discourage persons claiming discrimination from bringing their cases to court. Given the generally negative attitude of the court towards the claimant, who took advantage of pro bono legal representation provided by a prominent NGO fighting discrimination, it is difficult not to get the impression that the court's secondary objective was to punish this NGO, and thus also the claimant, for bringing the case to court.

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

The law of 17 December 2009 on claims in group proceedings (JoL of 2010, No. 7, pos. 44), explicitly states that its scope of application does not encompass claims against employers. This limitation also applies to claims for violation of the equal treatment rule. According to some opinions, employees may pursue their claims together only according



to Article 72 of the Code of Civil Procedure. In such situation, however, each of them would have to appear in court (in person or represented by counsel). The above opinion is not entirely correct however, because the scope of application of the law on group proceedings *inter alia* includes claims resulting from delicts, with the exception of protection of personal goods. An employer violating the employee's right to equal treatment, which can be qualified as a misdemeanour or a crime, thus also commits an offence, in the understanding of the law on group proceedings. This provision however seems not to apply e.g. to health injuries, which occurred as a result of sex-based harassment or sexual harassment, hence those actions constitute violations of personal goods. Group proceedings cannot be used by an employee who lodges an individual claim after the group proceedings has been initiated. However, despite the fact that class actions in employment disputes are possible, in practice they are very hard to win. This is because in these cases the burden of proof lies with the employee (according to the general rule of Article 6 CC). It is however worth noting that in the judgment of 23 November 2001 (I PKN 678/00) the Supreme Court stated that e.g. in the case of disputes on working time, the burden of proof also lies with the employer, who is obliged to keep a record of working time. Additionally in the judgment of 5 May 1999 (I PKN 665/98) the Supreme Court decided that missing documentation, resulting from the fact that the employer failed to collect it, results in a shift of the burden of proof towards the employer.<sup>140</sup> The employer has the obligation to prove that the employee did not actually work during the working times claimed by him and, even more, working times that have been documented.<sup>141</sup>

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

There are no particular provisions regarding legal aid for alleged victims of gender discrimination. The general rules for providing unpaid legal assistance are defined in the Law of 4 August 2015 on unpaid legal assistance and education,<sup>142</sup> which is to enter into force on 1 January 2016, as to the majority of its provisions. This law, applying to pre-litigation *inter alia* indicates the group of persons entitled to such assistance (Article 4)<sup>143</sup> and also mentions what such assistance might include (Article 2).<sup>144</sup> In addition to the above, a victim of discrimination who decides to initiate legal proceedings may request a representative to be assigned by the court, according to the general provisions of the Code of Civil Procedure, modified by particular provisions regarding claims resulting from employment relationships,<sup>145</sup> as well as those specified in Article 87 CPC. A qualifying condition for a person applying for a court-appointed representative is the submitting of a declaration of inability to cover the costs of an attorney or legal counsel, without endangering the ability to provide for himself or his family. The form for this declaration is available free of charge in courts and on the website of the Ministry of Justice ([www.ms.gov.pl](http://www.ms.gov.pl)). The court will grant the request if it finds that participation of an attorney or legal counsel in the particular case is necessary. This should happen when the case is complicated and past behaviour of the party during proceedings indicates that she might be incapable.<sup>146</sup> This condition is applied by courts very restrictively. According to some case law, even discovering that the claimant has a mental disease of mild intensity or a psychological disorder does not constitute a precondition obliging the

<sup>140</sup> <http://www.rp.pl/artykul/335227.html> *W sądzie to szef udowadnia, że podwładny nie miał zbyt wielu zajęć* accessed 29 May 2017.

<sup>141</sup> <http://www.rp.pl/artykul/564086.html> *W procesie o nadgodziny liczą się argumenty obu stron.*

<sup>142</sup> JoL 2015 Item 1255.

<sup>143</sup> Such persons also include persons entitled to social aid, younger than 26 or older than 65, victims of natural disaster, veterans, members of large families.

<sup>144</sup> It consists of granting legal information, indicating how to solve a legal problem and preparing it, <http://pl.pons.com/t%C5%82umaczenie/angielski-polski/pleadings>, including application for the allocation of the legal representative.

<sup>145</sup> For example, pursuant to Article 465 of the Code of Civil Procedure, the plenipotentiary can be not only an attorney-at-law or a legal adviser but also a representative of trade unions, a labour inspector or an employee of the workplace, in which the claimant is or was employed.

<sup>146</sup> In the sense that if she is unable to properly prepare court documents, submit motions for evidence and observe deadlines, or is not active during the proceedings.

court to grant the motion for a court-appointed representative.<sup>147</sup> The court's decision on denying the above request might be subject to a formal complaint.

## **11.5 Equality body**

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

Yes. The Human Rights Defender (RPO) is designated as the equality body, according to Article 19 of the Antidiscrimination Law. This body covers all grounds, including sex. The purpose of the RPO in the light of Constitution is assistance in protection of one's freedoms or rights infringed by bodies of public authority, including the rule of equal treatment (Article 1 of the Law on RPO as amended by the Antidiscrimination Law). In such situation the RPO may examine the case or choose to address respective bodies with a request to examine the case (Article 12). In addition to the above he may also, acting on behalf of the citizen, initiate proceedings in civil, penal or administrative courts, as well as join proceedings that are already on-going (Article 14). Since 30 August 2015,<sup>148</sup> the Human Rights Defender may in addition to the right to initiate a case before the Constitutional Tribunal, also join and participate in any proceeding pending before this Tribunal. However, in cases where the infringement of citizen's rights occurs as a result of actions of individual persons or private entities, the competences of the RPO are limited to indicating the proper way of proceeding and examining whether the authorities responded properly to the citizen's claims (Article 11(2) of the Law on RPO). The RPO in such case may not request e.g. the initiation of proceedings or to be admitted as participant of the proceedings (which is possible when the violation has been caused by a public authority). This is a serious barrier to achieving effective protection from discrimination, which in most cases is committed by private actors. Tasks of the RPO also include analysing, monitoring and supporting equal treatment, as well as conducting independent studies and issuing of recommendations regarding equal treatment (Article 17b).

The Human Rights Defender takes proactive actions directed at combating discrimination. For example, he systematically addresses, among others, the Minister for Family, Labour and Social Policy with questions regarding her actions aimed at combating the gender pay gap (the last one was sent on 8 of December 2016, document No. XL816.9.2016). He also asked about the plans and actions regarding the withdrawal of ratification documents of the Istanbul Convention. The Defender also joins court proceedings regarding discrimination of transsexual persons, provided they are proceeding against public authorities. For example he joined the proceedings currently conducted before the District Court in Wrocław, regarding the determination of the sex of a transsexual man, based on the fact that, after having partial operation, he gave birth to a child.

## **11.6 Social partners**

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

According to the Law of 23 May 1991 (Consolidated text JoL 2001 r. No. 79, Item 854, with further amendments) trade unions may play a rather significant role with respect to protection from discrimination, both in and outside the judicial system.<sup>149</sup> In particular by

<sup>147</sup> SC ruling of 16 December 1997, II UKN 404/97, OSNP 1998/21/641.

<sup>148</sup> See Article 16 (2 point 3) of the Law on the Human Rights Defender, as amended by Article 130 of the Law of 25 April 2015 changing the Law on the Constitutional Tribunal. JoL 2015 Item 1064.

<sup>149</sup> In the scope of the protection of collective rights the trade unions represent all employees. However in matters of individual claims trade unions represent the interest of their members, however on request may



monitoring the application by employers of labour provisions with regard to employees.<sup>150</sup> The provision of Article 61 provides non-governmental organisations, as well as other social organizations, with the right to actively participate e.g. in proceedings regarding violations of the equal treatment and non-discrimination rules. They may in particular bring actions on behalf of their members, as well as join pending proceedings. If they do not participate in proceedings, they have the right to present opinions to the court (Article 63). However, this is only possible in cases which lie within the scope of their statutory duties and are subject to the written consent of an employee.

The possibility of participation of social organizations is covered by additional regulations in provisions on cases recognized by labour and social insurance courts. In such cases an employee or insured person may be represented e.g. by an agent of a trade union (Article 465 CPC). An NGO might also, subject to the written consent of an employee or insured person, bring actions on his behalf and join pending proceedings (Article 462 CPC). However, in practice these organisations do not play an important role. The first case where an NGO (Polskie Towarzystwo Andtydyskryminacyjne) lodged a claim in the name and upon the consent of a person who felt discriminated against, was the case of the woman breastfeeding in a public restaurant mentioned above. It is characteristic that in this case the court performed a very exhaustive examination of whether initiating a claim on behalf of citizens was within the statutory scope of the NGO's activities. In the above case the court accepted the NGO's procedural legitimation with regard to discrimination claims, while refusing it with regard to claims for damages for violation of personal rights regulated in the civil code.

## **11.7 Collective agreements**

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

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

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also defend the rights of non-members. Kęczkowski, M., *Związki zawodowe ich rola w polskich zakładach pracy* (The Trade Unions and their role in Polish enterprises), Płock 2005.

<sup>150</sup> The active participation of trade unions is explicitly required in the Labour Code inter alia in cases of dissolving a contract against without notice, reviewing appeals against imposing a disciplinary penalty. Every such situation can be viewed in a context of unequal treatment on the ground of sex.

## 12. Overall assessment

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

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

The Polish system of childcare-related leave has been developed over many years. Legal solutions regarding particular types of leave have been patched, which has caused them to become inconsistent and overly complicated. Until 2 January 2016 this complexity resulted both from the multiplicity of different types of leave (there were 7 types), as well as from diversified rules for granting them. This system has been significantly simplified by the Law of 24 July 2015, and has become more compatible with EU law. Nevertheless different terminology leads to numerous confusions and

misunderstandings. In addition, not all maternity benefits meet the sufficiency and the special procedure for granting a worker the possibility to perform work on conditions of flexible working time, for family reasons, has not been established yet. Also, certain solutions such as services supplying temporary replacements for self-employed women on parental leave should be introduced.

An important shift in social policy, unfavourable for equal treatment, took place with the change in Government after the 2015 election, in which the conservative party, Prawo i Sprawiedliwość-PiS (Law and Justice), gained a parliamentary majority. The declared priority of the current Government is the pronatalist traditional family policy, which is reflected in some practical financial moves, such as the introduction of Family 500 Plus, in a law introducing a new child-upbringing benefit.<sup>151</sup> The new benefit is intentionally more preferential for complete and functional families with two or more children. On the one hand, it discriminates against one-child and one-parent families, and on the other hand it effectively discourages mothers of several children from undertaking or interrupting their employment.<sup>152</sup> In addition, the antidiscriminatory institutional infrastructure has been limited (by the dissolution of the Council for the Prevention of Racial Discrimination, Xenophobia and Intolerance (*Rada do spraw Przeciwdziałania Dyskryminacji Rasowej, Ksenofobii i związanej z nimi Nietolerancji*),<sup>153</sup> the responsibilities of the former Plenipotentiary for Equal Treatment have been expanded in areas other than discrimination<sup>154</sup> and the office itself was renamed as the Plenipotentiary for Equal Treatment and Civil Society. The nomination for this post of already the second person who is not knowledgeable in equality is problematic<sup>155</sup> and the reduction in the number of staff of the former Office has resulted in the total marginalisation of sex equality and gender discrimination issues in its activities.<sup>156</sup> Furthermore, in 2016, the Ministry of Justice refused to provide financial support for one of the most active women's NGOs, *Centrum Praw Kobiet* (the Centre for Women's Rights) which, among other things, protects and helps victims of gender-based violence.<sup>157</sup> Additionally, draft laws prohibiting abortion are occasionally submitted to

<sup>151</sup> Law of 11 February 2016 on state aid in the upbringing of children (JoL 2016 item 195) in force from 1 April 2016. In November 2016 a new benefit for mothers of disabled children was introduced. The law of 4 November 2016 on support for women in pregnancy and delivery 'Pro life' (JoL 2016 Item 1860) introduces special rights for pregnant women with regard to access to medical care services, as well as several other instruments of family policy. In particular it guarantees a one-time benefit of approximately ER 900 (PLZ 4000), regardless of the income status, for every woman who gives birth to a child that has been diagnosed with severe, irreversible disability or incurable disease endangering the child's life, which materialised in the prenatal phase or during delivery. The benefit will be granted to the parents or care givers of the child, if a specialist doctor (gynaecologist, obstetrician, neonatologist, perinatologist) has diagnosed such disability or disease.

<sup>152</sup> See: Gazeta Prawna (2014), 'Samotny rodzic ma mniejsze szanse na 500 zł na dziecko' [Single parents with less chances for PLZ 500 for their child]. 9 December 2015 <http://praca.gazetaprawna.pl/artykuly/910063,samotny-rodzic-500-zl-na-dziecko-szanse.html>, Gazeta.PL (2016), 'Mieć więcej dzieci Rzecznik klubu PiS radzi samotnym matkom bez 500 plus' ['Have more children Chairmen of the PiS parliamentary club advises single mothers without 500 plus'], 03 February 2016.

<sup>153</sup> By Ordinance No 53 of the President of the Council of Ministers of 27 April 2016 published in the Polish Monitor (*Monitor Polski*) of 29 April 2016, Item 413).

<sup>154</sup> The new remit of the Plenipotentiary is provided for in the Regulation of the Council of Ministers of 8 January 2016, JoL 2016 Item 3.

<sup>155</sup> In the 2016 Congress of Women, the Plenipotentiary tried to explain to the audience that the, 'wage gap and glass-ceiling are only a figment of women's imagination' <http://wyborcza.pl/1,75398,20068732,pelnomocnik-rzadu-ds-rownego-traktowania-i-list-prezydenta.html>, accessed 29 May 2017.

<sup>156</sup> The latest evidence of it was the fact that the Plenipotentiary invited only male speakers to the conference to celebrate the 5th anniversary of the Antidiscrimination Law. Finally one woman was on the panel because the NGO, as a protest, sent the woman instead of the man who had originally been invited by the Plenipotentiary <http://wiadomosci.ngo.pl/wiadomosc/1916913.html>, accessed 29 May 2017.

<sup>157</sup> The refusal has been justified by alleged discriminatory activities of this centre and its local branches, which do not fulfill their tasks 'by diverting aid offers only to women'. This explanation constitutes clear evidence that the Ministry is not aware of the nature of the phenomena of gender-based violence. See: Gazeta.PL (2016), 'Rząd odmówił finansowania Centrów Praw Kobiet bo zawężają pomoc do określonej grupy' (The Government has refused financial support to Centers of Women's Rights because their aid was 'narrowed down to only a specific group of victims') 13 May 2016, available at

Parliament. The announcement that emergency contraceptives are to be sold only upon prescription, statements of the Minister of Health that may be considered as an incentive to doctors to refuse to issue such prescriptions on the basis of the conscience clause, and finally the threats to denounce the Istanbul Convention, have caused feelings of uncertainty and endangerment for many women, mobilizing them to participate in protest marches.

Most disturbing however is the dismantling of the democratic State performed by the Prawo i Sprawiedliwość (PiS) party since its electoral victory in October 2015. For the first time since 1989, one political party holds the majority of votes in Parliament. As a result, given the strict disciplinary rigour of its MPs, it is generally able to pass every law, except the Constitution. The PiS party takes very great advantage of this possibility, disregarding constitutional standards of proper legislation. In particular a series of changes of the Law on the Constitutional Tribunal, connected with personal changes in the composition of the Tribunal, has resulted in loss of independence of this institution. Currently there are no chances that the Tribunal will uphold any provision passed within the PiS party's programme of so-called 'good change', unless the party leadership approves it. The incapacitation of the Tribunal, in connection with propaganda actions discrediting the judicial community, has seriously undermined the rule of division of powers. Because of this situation, on 27 July 2016 the European Commission adopted a Rule of Law Recommendation on the situation in Poland, setting out the Commission's concerns and recommending how these can be addressed. In the opinion of the Commission 'recent events in Poland concerning in particular the Constitutional Court have led the European Commission to open a dialogue with the Polish Government in order to ensure the full respect of the rule of law. The Commission considers it necessary for Poland's Constitutional Tribunal to be able to fully carry out its responsibilities under the Constitution, and in particular to ensure an effective constitutional review of legislative acts'.<sup>158</sup> The new draft law amending the Law on the National Judicial Council,<sup>159</sup> still under parliamentary review, poses the risk of making this body more political, thus creating vast possibilities of influencing the appointment of judges and presidents of the courts by the ruling party. Members of the Council, who until now were appointed mainly by the judicial authorities, will be appointed by Parliament.

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<http://wiadomosci.gazeta.pl/wiadomosci/1.114871.20066209,rzad-odmowil-finansowania-centrow-praw-kobiet-bo-zawezaja.html>, accessed 29 May 2017.

<sup>158</sup> [http://europa.eu/rapid/press-release\\_IP-16-2643\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2643_en.htm)

<sup>159</sup> See: Governmental draft law amending the Law on the National Judicial Council (print of Sejm No. 1423).

## Annexes

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