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# Country report

## Gender equality



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# **Country report**

## **Gender equality**

How are EU rules transposed into  
national law?

### **Spain**

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Reporting period 1 January 2017 – 31 December 2017

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## **1. Introduction**

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

Spain recognizes certain legislative autonomy in its Autonomous Communities for the execution of legislation but anti-discrimination legislation is an exclusive task of the central Government. However, some Autonomous Communities have strategies or plans for the equality of women and men that serve the objective of promoting equality at the local level (for instance Andalucía, Galicia and Catalonia).<sup>1</sup> Moreover, some Autonomous Communities establish benefits such as subsidies for the employment of women, for childcare etc.<sup>2</sup> Residences for the elderly and small children are also supported, in whole or in part, by the Autonomous Communities. The scope of these subsidies is different in each Autonomous Community although, in general, the economic crisis has led to a decline in this respect. Some municipalities also invest in measures for equality between men and women, for example by means of childcare services, training workshops for women, etc.

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

The main pieces of legislation transposing the gender equality directives in Spain are the following:

- Law 3/2007 of 22 March 2007, on effective equality between women and men;<sup>3</sup>
- Article 28 of the Workers' Statute (Royal Legislative Decree 2/2015, of 23 October 2015);<sup>4</sup>
- Article 26 of the Prevention of Labour-Related Accidents Law (Law 31/1995 of 8 November 1995);<sup>5</sup>
- Article 37 of the Workers' Statute (Royal Legislative Decree 2/2015, of 23 October 2015);
- Article 179 of the General Law of Social Security (Royal Legislative Decree 8/2015 of 30 October 2015).<sup>6</sup>

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<sup>1</sup> For instance, Law 17/2015, of 21 July 2015, sets out a strategy for the equality of women and men in Catalonia.

<sup>2</sup> For instance, Resolution of 28 March 2016 of the Government of Galicia has created an allowance for working parents who go on part-time leave, [http://www.xunta.gal/doq/Publicados/2016/20160331/AnuncioG0244-220316-0004\\_es.html](http://www.xunta.gal/doq/Publicados/2016/20160331/AnuncioG0244-220316-0004_es.html), accessed 6 March 2018.

<sup>3</sup> Law 3/2007 can be found at <http://www.boe.es/buscar/doc.php?id=BOE-A-2007-6115>, accessed 6 March 2018.

<sup>4</sup> Royal Legislative Decree 2/2015 can be found at, <https://www.boe.es/buscar/act.php?id=BOE-A-2015-11430>, accessed 6 March 2018.

<sup>5</sup> Law 31/1995 of 8 November 1995 is available at <http://www.boe.es/buscar/act.php?id=BOE-A-1995-24292&tn=2>, accessed 6 March 2018.

<sup>6</sup> Royal Legislative Decree 8/2015 of 30 October 2015 is available at <https://www.boe.es/buscar/doc.php?id=BOE-A-2015-11724>, accessed 6 March 2018



## **2. General legal framework**

### **2.1 Constitution**

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

A general prohibition of discrimination on grounds of sex is established in Article 14 of the Spanish Constitution.<sup>7</sup> This article establishes, first, the principle of equality before the law and, second, a general principle of non-discrimination on the grounds of birth, race, sex, religion, opinion, and any other personal or social condition or circumstance.

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

Article 35 of the Spanish Constitution expressly refers to the right to an equal salary without discrimination on the grounds of sex.

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

Articles 14 and 35 of the Spanish Constitution can be invoked in horizontal relations.

### **2.2 Equal treatment legislation**

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

Law 3/2007 of 22 March 2007, on Effective Equality between women and men (Law on Effective Equality), is the specific law on gender equality. This Law is applicable in all contexts, especially in political, civil, labour, socio-economic and cultural areas. Before Law 3/2007 entered into effect, the legislation on gender equality was scattered between different texts. In addition, some of the basic principles of gender equality such as indirect discrimination or affirmative action did not exist expressly in written legislation. The Law on Effective Equality has had significant impact in Spain, as it expressly established and clarified the content of the right to non-discrimination on the ground of sex, and established concrete strategies to achieve effective equality. Other discrimination grounds covered by Spanish equal treatment legislation are racial or ethnic origin, religion or belief, disability, age or sexual orientation (Part 2 of Law 62/2003, of 30 December 2003).<sup>8</sup> The grounds of discrimination prohibited in Law 62/2003 are exactly the same as those in Directives 2000/43 and 2000/78 except gender, which is addressed in the Law on Effective Equality. The scope of protection is the same as that established in those directives.

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<sup>7</sup> The Constitution of Spain was adopted on 28 December 1978. It is available at <http://www.boe.es/buscar/act.php?id=BOE-A-1978-31229>, accessed 6 March 2018.

<sup>8</sup> Law 62/2003 of 30 December 2003 can be found at <https://www.boe.es/buscar/act.php?id=BOE-A-2003-23936>, accessed 6 March 2018.

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

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

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

The terms gender/sex are not defined in national legislation.

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

Discrimination due to gender reassignment is not explicitly prohibited in national legislation. There are no court judgments about this subject, either in favour or against. However, there are no reasons to believe that Spanish courts would not consider discrimination on the grounds of gender reassignment as sex discrimination, in the way that it has been established in the Recast Directive and recognized by the CJEU.

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

The concept of direct sex discrimination is expressly prohibited in Spanish legislation. The Spanish concept of direct sex discrimination is set out in Article 6 of the Law on Effective Equality and is exactly the same as the definition found in Article 2(1)(a) of the Recast Directive.

##### **3.2.1 Are pregnancy and maternity discrimination explicitly prohibited in legislation as forms of direct sex discrimination?**

Article 8 of the Law on Effective Equality establishes that any 'less favourable treatment of a woman related to pregnancy or maternity leave will be a direct discrimination on the grounds of sex'. This legislation complies with Article 2(2)(c) of the Recast Directive.

##### **3.2.2 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**

There are no specific difficulties in Spain in applying the concept of direct sex discrimination. However, although in theory Spanish legislation allows for the use of a hypothetical comparator, to date no case law has dealt with it. It is therefore not known if the judiciary are prepared to deal with this new concept.

#### **3.3 Indirect sex discrimination**

##### **3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?**

Article 6(2) of the Law on Effective Equality contains the exact same definition of indirect discrimination as found in Article 2(1)(b) of the Recast Directive.

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

Statistical evidence is used in Spain in order to establish a presumption of indirect sex discrimination. In 1991 the Spanish Constitutional Court recognised the application of the concept of indirect discrimination in relation to a remuneration system contained in a collective agreement that did not adequately value the conditions in which the jobs done

mostly by women were developed.<sup>9</sup> More recently, the concept of indirect discrimination has been applied by the Constitutional Court in relation to the pejorative treatment given by the social security system to part-time workers.<sup>10</sup> In both cases the Courts applied the presumption of indirect sex discrimination after it was shown that the majority of the people affected were women. Although most of the cases related to indirect sex discrimination have had to do with equal pay there have been some cases related to other issues. For instance, the Supreme Court has established that a system of promotion, with minimal transparency, that causes stagnation of women in lower positions (according to statistical analysis) constitutes indirect discrimination.<sup>11</sup> The statistical evidence was also used here to establish a presumption of indirect sex discrimination.

In the view of the author the objective justification test is correctly applied by national Courts. Three examples are the Judgment of the Constitutional Court 145/1991 of 1 July 1991, the Judgment of the Constitutional Court 61/2013 of 14 March 2013 and the Judgment of the Supreme Court of 18 July 2011, appeal number 133/2010.

3.3.3 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.

One of the most significant problems with implementing the prohibition of indirect sex discrimination relates to the deficiencies that exist in Spanish law when challenging collective agreements. There are few cases on indirect discrimination in relation to wrong job evaluations in collective agreements, probably because Spanish legislation does not facilitate the challenging of illegal collective agreements. There are two ways to challenge an illegal collective agreement. First, the labour authority can start a judicial procedure against the illegal collective agreement. Second, the social partners with an interest in the subject can start a judicial procedure. However, the labour authority rarely starts any judicial procedures against any collective agreements. This has been highly criticised. In addition, the social partners with an interest in the subject are basically the same social partners that have agreed with the collective agreement, or that could have agreed with the collective agreement. In practice, it is usually trade unions that have not signed the collective agreement that challenge the illegal agreements. If those trade unions do not exist or do not have an interest in challenging the collective agreement, it remains unchallenged. In theory, an individual could request the judge to reject a clause of the collective agreement on the ground that it is discriminatory (indirect discrimination). However, because that individual cannot access sex-disaggregated data, he/she would encounter problems when trying to make a *prima facie* case of indirect sex discrimination.

Another important problem in relation to indirect sex discrimination has to do with the fact that the Constitutional Court has ruled that the male applicant in a case of indirect discrimination against women did not have the right to request nullification of a social security provision. This judgment has created quite a paradoxical situation since, if at any time a woman raised a legal claim for the same reason, the provision could be declared null and void due to discrimination and it could no longer be applied to anyone, men or women, but it would be too late for the original male claimant.<sup>12</sup>

### 3.4 Multiple discrimination and intersectional discrimination

<sup>9</sup> Judgment of the Constitutional Court 145/1991 of 1 July 1991, <http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/SENTENCIA/1991/145>, accessed 6 March 2018.

<sup>10</sup> Judgment of the Constitutional Court 61/2013 of 14 March 2013, <http://hj.tribunalconstitucional.es/docs/BOE/BOE-A-2013-3797.pdf>, accessed 6 March 2017.

<sup>11</sup> Judgment of the Supreme Court of 18 July 2011, appeal number 133/2010, <http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&database=TS&reference=6134165&links=&optimize=20111003&publicinterface=true>, accessed 6 March 2018.

<sup>12</sup> Judgment of the Constitutional Court 156/2014, of 25 of September 2014, [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2014-11052](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-11052), accessed 6 March 2018.

- 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?

Multiple discrimination and/or intersectional discrimination are not explicitly addressed in Spanish national legislation, and there are no proposals pending aiming at incorporating them.

- 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)?

There have not been any cases on multiple discrimination. Cases involving several grounds of discrimination are not treated as multiple discrimination.

### **3.5 Positive action**

- 3.5.1 Is positive action explicitly allowed in national legislation?

Positive action measures are recognised as legitimate in Article 9.2 of the Spanish Constitution, which expressly refers to the obligation of public authorities to remove the obstacles to achieve real equality. Article 11 of the Law on Effective Equality and Article 17 of the Workers' Statute recognise the legal possibility of measures to achieve real equality between women and men. In this way Spain complies with the EU definition found in Article 157 TFEU. Positive action measures can be implemented in the public as well as in the private sector, and can consist of the preferential hiring of women in professions in which they are under-represented (quota). However, according to Article 17(4) of the Workers' Statute, the preference for female candidates will only be applied when they are equally suitable as the male candidate ('equal conditions of suitability'). The preference can be given by the collective agreement to the 'less represented sex in the concrete group or category'. In this way, Spanish Law respects the CJEU doctrine on the quota.

- 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.

There are no specific difficulties in Spain in relation to positive action, although the instrument of a quota is not common in Spanish collective bargaining or in companies' equality plans.

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

Article 75 of the Law on Effective Equality states that the companies that are obliged to submit a non-abbreviated profit and loss account will have to include on their Company Boards a number of women that will allow them to reach a balanced presence of women and men over a period of eight years from the date of entry into force of the Law. The obligation refers to very large companies, since the only companies that can submit abbreviated profit and loss accounts are those with more than 250 workers that have a turnover exceeding EUR 22 million a year. The concept of a balanced presence of women and men is contained in Additional Provision 1 of the Law on Effective Equality. According to this provision, the presence of women and men is well-balanced when the number of people of one sex does not exceed sixty percent of the overall membership of the company board. The deadline established in Article 75 of the Law on Effective Equality was March 2015, but the objective was not reached by far, since recent studies show that in 2017

only 20.31% of the members of company boards in Spain were women.<sup>13</sup> Article 540.6.6 of the Law of Corporations (as amended by Royal Decree 18/2017 of 24 November 2017) introduces a kind of comply-or-explain obligation in the form of a duty for companies to refer any measure taken with a view to ensuring gender balance on their board of directors (*Consejo de Administración*). If no such policy is applied, a company must submit an explanation as to why this is the case. The enforcement of rules aiming to ensure a gender balance on company boards is thus limited by the absence of sanctions in the case of non-compliance.

- 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.

Spain has adopted other positive action measures to improve the gender balance in some fields. The Law on Effective Equality recommends a balanced presence of women and men (at least 40% women) in the following fields: political candidate lists and decision-making bodies (Article 14 of the Law on Effective Equality); members of the governing bodies of the General Administration of the State and of the public entities linked to or dependent on it (Article 52 of the Law on Effective Equality); and tribunals and bodies for the selection of the staff of the General Administration of the State and public entities linked to or dependent on it (Article 53 of the Law on Effective Equality). In addition, Article 60 of the Law on Effective Equality stipulates that at least 40 % of the training places for promotion in the Public Administration must be reserved for women.

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

- 3.6.1 Is harassment explicitly prohibited in national legislation?

According to Article 7 of the Law on Effective Equality sexual harassment is 'Any verbal or physical conduct of a sexual nature, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, offensive or degrading environment'.

The concept is almost the same as that in Article 2(1)(c) of the Recast Directive. The only difference is that in Spanish legislation the term 'undesired' behaviour does not appear to define gender harassment. The undesired nature of the behaviour does not appear in the Spanish legislation in relation to sexual harassment either.

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

The concept of gender-related harassment does not refer only to employment in Spain but to any aspect of life. This is because it is contained in the Law on Effective Equality which is not only related to employment and labour relations but to any aspect of life.

- 3.6.3 Is sexual harassment explicitly prohibited in national legislation?

According to Article 7 of the Law on Effective Equality, harassment because of gender is 'any conduct related to the sex of a person that occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, degrading, or offensive environment'.

The Spanish concept of sexual harassment is contained in Article 7 of the Law on Effective Equality. In contrast to the concept contained in Directive 2006/54/EC, Spanish legislation does not expressly require that harassment should be undesired behaviour. However, the

<sup>13</sup> According to the report drawn up by ATREVIA and IESE (2017) V *Informe de las mujeres en los Consejos del IBEX*, <http://women.iese.edu/wp-content/uploads/sites/2/2017/03/MUJERES-IBEX-35.pdf>, accessed 6 March 2018.

omission from Spanish law of the 'undesired' nature of harassment does not make much difference, because if this behaviour creates an intimidating, degrading or offensive situation, it will be equally 'undesired' by the victim. The Spanish Constitutional Court has interpreted that certain conduct may be considered as sexual harassment although there is no expressed and categorical opposition on the part of the victim, if there is evidence of the victim's opposition and always if the behaviour concerned is serious enough to be considered offensive.<sup>14</sup>

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?).

The concept of sexual harassment does not refer only to employment in Spain but to any aspect of life. This is because it is contained in the Law on Effective Equality which is not only related to employment and labour relations but to any aspect of life.

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

Article 7 of the Law on Effective Equality expressly states 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.

### **3.7 Instruction to discriminate**

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

Article 6(3) of the Law on Effective Equality explicitly states that any order to discriminate, directly or indirectly, on the ground of sex, will be considered discriminatory.

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 are no specific difficulties in Spain in relation to the concept of instruction to discriminate

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

Discrimination by association or assumed discrimination is not expressly prohibited in Spanish legislation. There have been no cases on this issue but there are no reasons to believe that it would not be applied by the Spanish Courts in the sense established by the CJEU in *Coleman*.

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<sup>14</sup> Judgment of the Constitutional Court 224/1999 of 13 December 1999, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/3966>, accessed 6 March 2018.

## **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?**

Article 28 of the Workers' Statute states that 'The employer is obliged to pay for a work of equal value the same remuneration, paid directly or indirectly, and whatever the nature of the work including the remuneration that is not considered salary by Spanish legislation, without discrimination on the basis of sex in any of its items or conditions'. The Spanish Constitutional Court has issued several rulings,<sup>15</sup> pointing out that systems of professional classification and promotion must rely on criteria which should be neutral and not result in indirect discrimination, e.g. using 'physical effort' or 'arduous work' as a reason to give higher value to men's activities.<sup>16</sup> The Supreme Court has also established that workers at the same company doing different work deserve the same payment when the difference relies on the fact that the kind of jobs done mostly by women are undervalued in relation to the jobs occupied mostly by men.<sup>17</sup>

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

The concept of pay defined in Spanish legislation complies with the definition of Article 157(2) TFEU since Article 28 of the Workers' Statute considers as pay anything received from the employer, whatever its nature.

#### **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)?**

Article 28 of the Workers' Statute adequately implements Article 4 of Recast Directive 2006/54 since it lays down the prohibition of any discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

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

Article 28 of the Workers' Statute does not make any reference to the 'would be' expression, as referred in the Recast Directive, although Article 6 of the Law on Effective Equality contains this expression when defining direct discrimination, in the same way that it is referred to in the Recast Directive. However, the issue of a hypothetical comparator has never arisen in Spain.

The first thing that should be highlighted is the low number of judicial judgments on equal pay that to date have been issued in Spain, particularly in the Supreme Court, and none of them have raised the topic of a hypothetical comparator. The courts often resolve these cases by analysing the identity of functions or their equal value, without considering the possibility of introducing the concept of a hypothetical comparator. In the years of the Spanish transition to democracy the Central Labour Court (*Tribunal Central de Trabajo*) allowed the possibility of applying hypothetical comparators in equal pay cases.<sup>18</sup> This interpretation had a strictly historical explanation: since back then it was lawful that some

<sup>15</sup> For instance, Judgment of the Constitutional Court 58/1994 of 28 February 1994, <http://hj.tribunalconstitucional.es/es/Resolucion/Show/2575>, accessed 6 March 2018.

<sup>16</sup> For instance, Judgment of the Constitutional Court 145/1991, of 1 July 1991, <http://hj.tribunalconstitucional.es/es/Resolucion/Show/1784>, accessed 6 March 2018.

<sup>17</sup> Judgment of the Supreme Court of 14 May 2014, appeal number 2328/2013, <http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&database=TS&reference=7084867&links=&optimize=20140602&publicinterface=true>, accessed 6 March 2018.

<sup>18</sup> For instance, Central Labour Court Judgment of 6 June 1984.



jobs were occupied exclusively by men or exclusively by women, the equal pay cases by reason of sex could only be resolved if hypothetical comparators were applied. However, the situation in Spain has fortunately changed, so it is difficult to know whether the hypothetical comparator would be applied by the Spanish Courts in the present. The best way to ensure its application would be a regulatory reform that expressly includes the hypothetical comparator in Article 28 of the Workers' Statute.

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?

Spanish legislation does not lay down parameters for establishing the equal value of the work performed. The bill on equal pay states that the value of the work must be evaluated and compared using objective criteria such as educational requirements, professional training, qualifications, effort and responsibility as well as any other factor strictly related to the skills of the worker and the conditions under which the work is performed.

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

Current Spanish legislation does not address wage transparency in any way. The bill on equal pay presented on 24 October 2017 foresees three systems for wage transparency: (i) Each worker in companies of more than 10 workers would have the right to be informed about average remuneration according to the category of employees or positions, broken down by gender, including all kinds of payments (even complementary or variable components). The employer would have to provide this information to the workers in their wage documents; (ii) the employer would have to inform the company representatives about average remuneration according to the category of employees or positions, broken down by gender including all kinds of payments; (iii) companies of more than 250 workers would be obliged to conduct pay audits.

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?

Currently Spain has not implemented the Recommendation of the European Commission of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency. If the Recommendation were to be implemented in Spain, many of the current problems regarding the identification and suppression of indirect discrimination would probably be eliminated or diminished. On 24 October 2017 a bill on equal pay for men and women was presented to Parliament. The bill was presented by a political party that does not belong to the governmental coalition so the development of the draft bill and the ways it would be amended during the process of legislative approval are uncertain. If approved, the bill presented on 24 October 2017 would be a satisfactory implementation of the European Commission Recommendation of 7 March 2014.

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

Spanish legislation does not make any express reference to the justifications for pay differences. Justifications are either allowed or not allowed by the Courts considering all circumstances. For instance, the Constitutional Court has considered that there is justification for pay differences when the jobs occupied mostly by men require more responsibility and a higher degree of concentration than the jobs occupied mostly by women.<sup>19</sup> The Courts are free to establish justifications as they see fit. There is no further case law that has developed accepted justifications.

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<sup>19</sup> Judgment of the Constitutional Court 286/1994, of 27 October 1994, <http://hj.tribunalconstitucional.es/HJ/es-ES/Resolucion/Show/SENTENCIA/1994/286>, accessed 6 March 2018.



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?

In the view of the author, the main problem related to the application of the principle of equal pay for equal work and work of equal value is linked to the fact that employers are not obliged to disclose to employees the data on salaries or promotions disaggregated by sex. In general, employees are not entitled to access any of the employer company's information related to sex. Trade unions could have access to this information because they must have a copy of each of the contracts signed in the company. However, they are not entitled to reveal information on the individual conditions that could have been imposed by the company on the employee after he/she has been contracted. The Labour Inspectorate can access this data, and if the Inspectorate finds elements for a *prima facie* case of indirect discrimination, judicial procedures against the employers have sometimes, but not always, been initiated. Occasionally other matters take priority.

Some relevant cases are the following:

Judgment of the Constitutional Court 145/1991 of 1 July 1991: The Constitutional Court considered that certain professional classifications constituted indirect discrimination on grounds of sex because, although the collective agreement had valued the physical effort required in the category occupied mostly by men, it did not value other factors which were required in the category occupied mostly by women in the same way. This interpretation has been followed in other subsequent judgments of the Constitutional Court itself (e.g. Judgment 58/1994, 28 February 1994).

Judgment of the Supreme Court of 18 July 2011, appeal number 133/2010: One of the factors that has most influenced the difference in pay between men and women is discrimination in career development. The Supreme Court established that a system of promotion that lacked even minimal transparency led to women stagnating in lower ranks, according to statistical analysis, and that this constituted indirect discrimination.

Judgment of the Supreme Court of 14 May 2014, appeal no. 2328/2013: The Supreme Court considered, in relation to a hotel, that the maids (predominantly women) were performing work of equal value to that of the bartenders (mostly men), on the ground of which they deserved equal pay. The jobs were considered to be of equal value because both were on Level IV of the wage structure set out in the applicable collective agreement.<sup>20</sup>

## 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)?

Article 5 of the Law on Effective Equality expressly states that equal opportunities must be guaranteed between women and men in the public or private sector in relation to conditions for access to employment or to self-employment, access to all types of vocational training, employment and working conditions (including payment and dismissals), membership of an organisation of workers or employers or any organisation whose members carry on a particular profession. Article 5 of the Law on Effective Equality adequately transposes Article 14 of the Recast Directive.

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<sup>20</sup> Judgment of the Supreme Court of 14 May 2014, appeal no. r 2328/2013, <http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7084867&links=&optimize=20140602&publicinterface=true>, accessed 11 March 2018.

In the view of the expert, the definition of a worker reflects the relevant caselaw of the CJEU. The definition of 'worker' is given in Article 1 of the Workers' Statute. According to this Article a worker is a person who voluntarily provides paid services for an employer, being within the area of organization and direction of such employer. This definition complies with the relevant case law of the CJEU.

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)?

Article 5 of the Law on Effective Equality basically reproduces Article 14 of the Recast Directive, meaning that their material scopes are the same. However, there are other articles in Spanish legislation that broaden the scope of the general principle of equal treatment in employment, particularly in relation to access to employment. For instance, Article 22 (*bis*) of the Employment Law<sup>21</sup> stipulates that the Public Employment Agency has the obligation to monitor all job offers so that they do not contain discriminatory criteria of access to employment. In addition, Article 51 of the Law on Effective Equality requires that the composition of women and men in staff recruitment and evaluation bodies for the access to public sector employment is well-balanced.

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

Article 5 of the Law on Effective Equality defines the exception regarding occupational activities in the same way and in the same words as Article 14(2) of the Recast Directive. There are no occupational activities as referred to in Article 14(2) of the Recast Directive in Spain.

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)?

In Spain it is impossible to prohibit women from performing certain professional activities. In fact the Constitutional Court has declared some cases to be non-constitutional where women had been denied access to certain jobs based on the risks that there could be to their health, if those working conditions could be equally hazardous to men.<sup>22</sup> However, the general maternity protection measures exist in Spanish legislation (e.g. maternity leave, right to be transferred to a safe job in the case of pregnancy, etc.). In addition, the Courts have established that the employment conditions have to be adjusted to the state of pregnancy. For instance, the Supreme Court has ruled that, if possible, the time and/or place of a written test for the access to a position in the public sector must be adapted to the particular circumstances of a female candidate who has just given birth.<sup>23</sup>

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

There are no particular difficulties related to the personal and/or material scope of Spanish legislation in relation to access to work, vocational training, employment, working conditions etc.

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<sup>21</sup> Law 56/2003 of 16 December 2003, available at <http://www.boe.es/buscar/act.php?id=BOE-A-2003-23102>, accessed 6 March 2018.

<sup>22</sup> For example, Judgment of the Constitutional Court 229/1992 of 14 December 1992, in relation to the access of women to work activities in mines, <http://www.boe.es/boe/dias/1993/01/19/pdfs/T00058-00063.pdf>, accessed 6 March 2018.

<sup>23</sup> Judgment of the Supreme Court of 14 March 2014, appeal number 4371/2012, <http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&database=TS&reference=7010892&links=&optimize=20140402&publicinterface=true>, accessed 6 March 2018.

## **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?**

There is no definition of pregnant worker in Spanish legislation. It is not compulsory for a pregnant woman to inform her employer about her pregnancy.

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

Protection during pregnancy, after a recent birth and during breastfeeding periods is regulated in Article 26 of the Prevention of Labour-Related Accidents Law and includes adapting working conditions or changing the job or function when there is a health or safety risk. Previously the employer had the obligation to assess the nature, degree and duration of exposure to any risk that could have any possible effects on pregnancy or breastfeeding. If these measures are not possible or adequate, according to Article 48(4) of the Workers' Statute, the employee affected can be put in a situation where the contract is suspended (which will last as long as is necessary for health or safety protection or until maternity leave starts) on account of risk during pregnancy or natural breastfeeding (for children younger than nine months), with the right to a social security payment equivalent to 100 % of the previous contribution base, which basically equals her previous salary (Article 186 of the General Law of Social Security). Given that, in the case of breastfeeding, the paid leave will last only until the child is nine months old, if the mother decides to continue breastfeeding and the risk has not disappeared, she will have to ask for unpaid parental leave. These articles appeared to adequately implement Articles 4-7 of Directive 92/85. However, in the *Otero Ramos* case the CJEU stated that, in the case of a risk to pregnancy in the workplace, Spain must adequately guarantee the reversal of the burden of the proof in case a worker has provided evidence suggesting that the risk assessment of her work had not been conducted in accordance with the requirements of Article 4(1) of Directive 92/85.<sup>24</sup>

#### **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)?**

Dismissal during maternity leave or during the leave because of risk during pregnancy or breastfeeding, as well as dismissal of pregnant women, from the start of the pregnancy to the start of maternity leave, will be considered null and void except when the reason for the dismissal is a serious fault on the part of the worker or when the dismissal is objectively necessary for reasons not linked to pregnancy and maternity, such as economic or technical reasons.<sup>25</sup> The Constitutional Court has established that dismissal in these situations is automatically nullified if there is no just cause for dismissal, even if the employer has no knowledge of the pregnancy.<sup>26</sup> However, the Constitutional Court has also ruled that the dismissal of a pregnant woman during the probationary period is not automatically considered null and void if the employer argues that he/she did not have knowledge of the pregnancy.<sup>27</sup> The main problem with this interpretation of the Constitutional Court is that the claim of lack of knowledge on the part of the employer in cases where there has been no communication on the part of the pregnant worker about her condition could be virtually uncontested. This could result in ineffective protection

<sup>24</sup> Case 531/15 *Otero Ramos*, [2017]. Judgement of the CJEU of 19 October 2017

<sup>25</sup> Article 55(5) of the Workers' Statute.

<sup>26</sup> Judgment of the Constitutional Court 92/2008 of 21 July 2008, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/6324>, accessed 11 March 2018.

<sup>27</sup> Judgment of the Constitutional Court 173/2013 of 10 October 2013, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23619>, accessed 11 March 2018.

against contractual termination of pregnant women during their probationary period, which could potentially counteract the principles laid down in Directives 92/85 and 2006/54.

In the case of dismissals for redundancy the Supreme Court has ruled that the employer must justify the specific reason for including a pregnant woman in the group of persons dismissed. When the employer fails to do so, the dismissal of the claimant must be declared null and void.<sup>28</sup> When an employee is dismissed during her maternity, for redundancy or for any other reason, the social security payment for maternity leave will continue until the end of the maternity leave period.<sup>29</sup> This also applies if it is possible to start receiving the maternity leave social security payment when receiving the unemployment insurance payment, in which case the unemployment coverage will be suspended until the maternity leave social security payment finishes.<sup>30</sup> This is a benefit for the worker since the social security payment during maternity leave is higher than the unemployment insurance payment, especially considering the fact that the duration of the unemployment insurance coverage will not be affected.

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)?

In cases of dismissal from the beginning of pregnancy until the end of maternity leave the employer is obliged to substantiate the reasons for the dismissal in writing, as established in Article 10(2) of Directive 92/85. This applies because in Spanish legislation the employer is obliged to indicate in writing the reasons for any dismissal.<sup>31</sup> However, given that the Constitutional Court has ruled that the dismissal of a pregnant woman during the probationary period is not automatically considered null and void,<sup>32</sup> and given that according to Article 14 of the Workers' Statute during the probationary period the employer does not have to give a reason for dismissal, this could result in ineffective protection against the termination of the employment contracts of pregnant women.

## 5.2 Maternity leave

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

Article 48(4) of the Workers' Statute states that maternity leave lasts for 16 continuous weeks with 2 further weeks for each child, in the event of multiple births. The duration of the maternity leave will be increased by 2 weeks as well if the child has a disability.

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

Article 48(4) of the Workers' Statute stipulates that 6 of the 16 continuous weeks of the maternity leave must be taken by the mother immediately following the birth.

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?

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<sup>28</sup> Judgment of the Supreme Court of 14 January 2015, appeal number 104/2014, <http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=7324092&links=&optimize=20150313&publicinterface=true>, accessed 11 March 2018.

<sup>29</sup> Article 8(1) of the Royal Decree 295/2009, of 6 March 2009, [http://www.seg-social.es/Internet\\_1/Normativa/116462?ssSourceNodeId=1139#A10](http://www.seg-social.es/Internet_1/Normativa/116462?ssSourceNodeId=1139#A10), accessed 11 March 2018.

<sup>30</sup> Article 10(1) of the Royal Decree 295/2009.

<sup>31</sup> Articles 51, 52 and 55 of the Workers' Statute.

<sup>32</sup> Judgment of the Constitutional Court 173/2013 of 10 October 2013.

Article 26 of the Prevention of Labour-Related Accidents Law expressly states that if a pregnant or breastfeeding woman is transferred to another position because the initial one was hazardous for her pregnancy or breastfeeding, the employer will have to respect the provisions established in Spanish legislation on transferrals, which is basically what is regulated in Article 39 of the Workers' Statute. This establishes that the transferral will have to be to an equivalent position. In this case, the woman will have the right to have, at least, the same salary that she was receiving before the transferral took place. If the paid leave for risk during pregnancy or breastfeeding applies, the mother will have the right to return to the previously held post according to Article 48(1) of the Workers' Statute. In addition, Article 48(4) of the Workers' Statute expressly ensures that any employment rights relating to the employment contract will be guaranteed to the worker during her leave for risk during pregnancy or breastfeeding.

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?

Article 48(4) of the Workers' Statute expressly ensures that any employment rights relating to the employment contract will be guaranteed to the worker during maternity leave. The Supreme Court has pointed out that women on maternity leave cannot suffer any decrease in their annual salary as a consequence of their absence, not even if a concrete amount of their salary was variable in relation to the effective working days during the year.<sup>33</sup> The Constitutional Court has established as well that motherhood and pregnancy must not pose any prejudice in a woman's career, including the woman's seniority, which means that the initial date of the contract must be the one that she would have had if she had not been pregnant.<sup>34</sup> In another judgment, the Constitutional Court has also established that delaying the promotion of a female worker to a full-time position due to her maternity leave is unconstitutional.<sup>35</sup> The Supreme Court has equally guaranteed that when a pregnant woman has to be transferred to a safer workplace because of a risk to her pregnancy, the entirety of her previous pay has to be maintained including the overtime that she could not do in the new workplace.<sup>36</sup>

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?

There are two kinds of maternity leave: the contributory maternity leave and the non-contributory maternity leave. Contributory maternity leave is a social security benefit, so it is paid by the State. Pay during contributory maternity leave is higher than during sick leave, since employees will be entitled to remuneration equivalent to 100 % of the previous month social security contribution base (*base de cotización*).<sup>37</sup> The contribution base of the previous month is usually the same amount as the salary of the previous month, so workers on contributory maternity leave basically receive the same amount as that which they received when they were actively working. Theoretically no ceiling is applied, although given that the contributory maternity leave payment depends on the previous social security contribution base and given that this base has a maximum, the maximum monthly amount that a beneficiary of maternity leave could receive in 2017 was EUR 3 751.

<sup>33</sup> Judgment of the Supreme Court of 27 May 2015, appeal number 103/2014, <http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=7418210&links=%22103/2014%22&optimize=20150626&publicinterface=true>, accessed 6 March 2018.

<sup>34</sup> Judgment of the Constitutional Court 66/2014, of 5 May 2014, [http://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2014-5868](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-5868), accessed 6 March 2018.

<sup>35</sup> Judgment of the Constitutional Court 2/2017, of 16 January 2017, <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/25231>, accessed 11 March 2018

<sup>36</sup> Judgment of the Supreme Court of 24 January 2017, appeal no. 1902/2015, <http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7950828&links=&optimize=20170306&publicinterface=true>, accessed 11 March 2018

<sup>37</sup> Article 179 of the General Law of Social Security.

A non-contributory maternity leave is established by the social security system if a working mother does not comply with the minimum requirements that apply to the contributory maternity leave (basically, the previous working time). In this case she would receive a unique payment for the amount equivalent to 42 days of her previous social security contribution base, with a ceiling: 42 times a daily indicator called the Public Indicator of Multiple Effects Income. For 2015 this ceiling amounted to EUR 753.<sup>38</sup> This payment guarantees that the mother receives a certain amount during the compulsory six weeks after the birth when she has not worked long enough to qualify for the contributory maternity leave. That is why the unique payment guarantees only 42 days (six weeks) of the previous social security contribution, with the maximum of 42 times the daily minimum salary. In any case, this unique payment will always be higher than the payment that the mother would receive if she was on sick leave, since she would not have access to sick leave payment for not having worked long enough. The beneficiary of non-contributory maternity leave would be allowed to continue on maternity leave until completing the 16 weeks established in Article 48 of the Workers' Statute, although she would not receive the social security payment established for the contributory maternity leave. However, she could go back to work after the six compulsory weeks after birth and transfer the remaining ten weeks of the contributory maternity leave to the father, who could receive the corresponding maternity leave payment if he fulfilled the requirements. This system formally complies with Directive 92/85 since this allows a period of previous working time to be required in order to receive the maternity leave payment, but it creates a difficult situation for the mother since she will be forced to go back to work right after the six compulsory weeks after birth if she has not sufficiently contributed for the contributory maternity leave.

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

Statutory maternity benefits are not supplemented by employers since workers, in most of the cases, usually receive the same amount as when they are actively working. The possibility of supplements by the employer in the case of non-contributory maternity leave is not usually established by collective bargaining.

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

There are conditions for eligibility in the case of the contributory maternity leave but there are no conditions of eligibility for the access to the non-contributory maternity leave. For the contributory maternity leave a minimum period of previous working time is required, which varies depending on the age of the beneficiary at the age of the birth. If the worker is younger than 21, no previous working time will be required to have access to the contributory maternity leave. If the worker is between 21 and 26 years old the working time required will be 90 days in the previous seven years or 180 days at any time. If the worker is older than 26 the working time required to have access to the contributory maternity leave will be 180 days in the previous seven years or 360 days at any time.

#### 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)?

Article 48(1) of the Workers' Statute expressly stipulates that the worker on maternity leave has the right to return to the same job as the one she had before maternity leave. Article 48(4) of the Workers' Statute expressly ensures that any employment rights

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<sup>38</sup> Article 182 of the General Law of Social Security.



relating to the employment contract will be guaranteed to the worker on maternity leave, which means that she will also benefit from any improvement in working conditions to which she would have been entitled during her absence.

### **5.3 Adoption leave**

#### **5.3.1 Does national legislation provide for adoption leave?**

In cases of adoption or fostering of a child younger than 6 the workers will have the right to 16 weeks of contributory maternity leave. The duration will be increased by 2 weeks for each additional child adopted at the same time. The duration of the maternity leave will be increased by two weeks as well if the adopted child has a disability. The same contributory maternity leave will apply if the adopted or fostered child is older than 6 but she/he has special difficulties regarding adaptation to the new social environment.<sup>39</sup> The amount of the payment will be the same as that in the case of general contributory maternity leave and the conditions in relation to previous working time are the same as well.<sup>40</sup>

#### **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)?**

Adoptive parents on maternity leave have the same protection against dismissal as parents on ordinary maternity leave.<sup>41</sup> As a consequence the dismissal of an adoptive parent on maternity leave will be considered null and void except when the reason for the dismissal is a serious fault on the part of the worker or when the dismissal is objectively necessary for reasons not linked to pregnancy and maternity, such as economic or technical reasons.

### **5.4 Parental leave**

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

Directive 2010/18 has not been specifically implemented in Spain, but the previous Directive 96/34 was implemented by Law 39/1999 to promote the reconciliation of family and work responsibilities and by the Law on Effective Equality.<sup>42</sup>

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

Spanish legislation on parental leave is applicable to both the public and the private sector.

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

The scope of Spanish legislation covers all types of contracts, including part-time contracts, fixed-term contracts and employment relationships with a temporary agency.

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<sup>39</sup> Article 48(4) of the Workers' Statute.

<sup>40</sup> Articles 178 and 179 of the General Law of Social Security.

<sup>41</sup> Article 55(5) of the Workers' Statute.

<sup>42</sup> Law 39/1999, of 5 November 1999, [http://www.boe.es/diario\\_boe/txt.php?id=BOE-A-1999-21568](http://www.boe.es/diario_boe/txt.php?id=BOE-A-1999-21568), accessed 6 February 2017.

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

The four types of parental leave established in Spain have different features and durations. They have been not revised with the entry into force of Directive 2010/18 since this was not considered necessary. There are some differences between the parental leave granted to workers and civil servants. The four Spanish forms of parental leave are the following:

- First, workers with children younger than nine months, including adopting and fostering parents, and civil servants with children younger than twelve months have the right to a paid leave of an hour a day.<sup>43</sup> There will be a one-hour permission for each of the children born or adopted, in the case of multiple births or multiple adoptions. Even though this permission is called 'breastfeeding permission' (*permiso de lactancia*) its objective is not only to breastfeed but also, more generally, to take care of the child;
- Second, workers and civil servants have the right to an unpaid leave (*excedencia*) that can last until three years after the child's birth or after the adoption and fostering decision;<sup>44</sup>
- Third, parents (both workers and civil servants), including adopting and fostering parents, of children younger than twelve can ask for a reduction in working time, in which case their salary is reduced proportionally;<sup>45</sup>
- Fourth, parents, including workers and civil servants, can ask for a reduction in working time for the purpose of taking care of a child that is seriously ill, in which case the social security system guarantees that the worker receives 100 % of his/her previous full-time contribution base, which basically amounts to the full-time previous salary. However, this social security payment will only apply if both parents work.<sup>46</sup>

5.4.5 Is the right of parental leave individual for each of the parents, a family entitlement or a combination of the two? How many months are reserved for each parent on a take-it or leave it basis?

All Spanish possibilities for parental leave are granted individually, for each of the parents. By Law 3/2012, of 6 July 2012, Article 37(4) of the Workers' Statute was modified according to the *Roca Alvarez Case*<sup>47</sup> so working parents (fathers or mothers) have equal access to the so-called breastfeeding permission, given that this permission is in reality a parental leave. Even though civil servants' breastfeeding permission is still recognized in Spanish Law preferentially to mothers in Article 30(1)(f) of Law 30/1984 Spanish Courts have interpreted it according to the *Roca Alvarez Case*, so the access to it is granted to fathers on the same conditions as to mothers for civil servants as well.<sup>48</sup> The only parental leave that must be taken, either by the father or by the mother according to their choice,

<sup>43</sup> The breastfeeding permission for workers is established in Article 37(5) of the Workers' Statute and the breastfeeding permission for civil servants is established in Article 30(1)(f) of Law 30/1984, of 2 August 1984. Law 30/1984 can be found at <http://www.boe.es/buscar/act.php?id=BOE-A-1984-17387>, accessed 11 March 2018.

<sup>44</sup> The unpaid leave for workers is established in Article 46(3) of the Workers' Statute. The unpaid leave for civil servants is established in Article 29(4) of Law 30/1984, of 2 August 1984.

<sup>45</sup> The reduction of working time for workers is established in Article 37.5 of the Workers' Statute. The reduction of working time for civil servants is established in Article 30.1.g of Law 30/1984, of 2 August 1984.

<sup>46</sup> The reduction of working time for the purpose of taking care of a seriously ill child for workers is established in Article 187 of the General Law of Social Security. The reduction of working time for the same purpose for civil servants is established in Article 49 of the Basic Statute of Civil Servants, Law 7/2007 of 12 April 2007.

<sup>47</sup> Case C-104/09 *Roca Alvarez*, [2010] ECR I-08661. In this judgment the CJEU established that the so-called breastfeeding permission in Spain was contrary to the Recast Directive because it constituted an ordinary parental leave. By establishing it as a preferential leave for mothers it had a discriminatory effect against women.

<sup>48</sup> Judgment of the Central Court (administrative section) of the National Court of 4 April 2013, judgment number 203/2012.



is the so-called breastfeeding permission. The rest of the parental leave can be taken indistinctly and in full by women or men, without any possibility of a total or partial transfer to the other parent.

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

Parental leave can take the following forms: a) According to Article 37(4) of the Workers' Statute the breastfeeding permission (*permiso de lactancia*) can be used in three possible ways: first, the worker may be absent from work during each working day for an hour (or in two periods of half an hour each); second, the worker can get to work each day half an hour later or, alternatively, leave half an hour earlier; third, the hours of the breastfeeding permission corresponding to the worker until the child is nine months old can be added up and taken in complete days if the worker so requests and as long it is established by collective agreement or accepted by the employer. The same applies to civil servants; b) According to Article 46(3) of the Workers Statute the unpaid leave (*excedencia*) has to be taken full time. The same applies to civil servants; c) According to Article 37(5) of the Workers' Statute the reduction of working time has to be taken daily. It can be determined by the worker, from a minimum of one eighth and a maximum of one half of his/her working day. No minimum or maximum applies to civil servants.; d) According to Article 37(5) of the Workers' Statute the reduction in working time for the purpose of taking care of a child that is seriously ill can be determined by the worker. In this case the reduction has to be at least half of the ordinary working day. The same applies to civil servants.

The unpaid leave (*excedencia*) can be freely taken when and in the period that the worker decides. Since the right exists until the child reaches the age of three, the worker can apply for it on several occasions, returning to work between them. The concrete form of the breastfeeding permission or of the corresponding reduction of working time is also up to the worker, whose preferences take priority over the organizational needs of the employer. Only in extreme cases, of disproportionate harm to the company, could the employer alter this right. However, the 2012 law reform<sup>49</sup> has decreased the scope of this employees' right since the unremunerated reduction of working time that can be asked for based on parental reasons has to be on a daily basis, which means that it is no longer allowed to apply for longer periods of a reduction of working time. In addition, the reform has introduced, for the first time, the possibility that collective agreements can establish concrete criteria for working time reduction. Before the 2012 reform there was a wide and almost absolute employees' right to establish the concrete time in which they wanted to take it. The new legislation means that the negotiators can decide the timing in which the reduction of work time has to take effect.

- 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)?

According to Article 46(3) of the Workers' Statute there is no legally established notice period when applying for unpaid leave (*excedencia*), but it can be established by collective agreement. According to Article 37(5) of the Workers' Statute there is a notice period of fifteen days if the worker applies for breastfeeding permission, ordinary reduction in working time or reduction in working time for the purpose of taking care of a child that is seriously ill. The legal notice period seems reasonable but it does not consider the possibility of force majeure. There is also a problem in relation to the possibility that the

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<sup>49</sup> Law 3/2012, 6 July 2012, of Urgent Measures for the Reform of the Labour Market, <http://www.boe.es/boe/dias/2012/07/07/pdfs/BOE-A-2012-9110.pdf>, accessed 11 March 2018.

collective agreement establishes a different notice period, since it could be shorter than what is legally stipulated and might also fail to take into account the situation of force majeure. Spanish legislation does not consider the interests of workers in relation to notice periods so it could be in violation of Clause 3(2) of Directive 2010/18.

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

Article 48(4) of the Workers' Statute states that future parents of adoptive children who have to travel to other countries to formalize the adoption have the right to start the maternity leave four weeks before the formal moment of the adoption. Civil servants have the same right when going through a process of international adoption but, in addition, civil servants can have access to permission for partially paid leave of two months with the same objective (with a variable ceiling depending on the kind of work).<sup>50</sup>

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

No length of work and/or length of service are required in order to benefit from parental leave. However, the social security payment established to guarantee 100 % of the worker's salary in the case of working time reduction for the purpose of taking care of a child that is seriously ill requires the same previous working time as that established to have access to maternity leave.<sup>51</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?

Article 46(3) of the Workers' Statute stipulates that if both parents are workers of the same company and wish to take the unpaid parental leave (*excedencia*) simultaneously the employer can establish limitations for organizational reasons. According to Article 37(5) of the Workers' Statute the same applies to the reduction of working time.

5.4.11 Are there special arrangements for small firms?

There are no special arrangements for 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?

In Spanish legislation, the only exceptional rule for access to parental leave to accommodate the needs of parents of children with a disability or a long-term illness is the reduction in working time for the purpose of taking care of a child that is seriously ill.<sup>52</sup>

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)?

There are at least four provisions in Spanish legislation that aim to protect workers who make use of parental leave: First, if a dismissal takes place during any parental leave, under Article 108 of the Act Regulating Social Jurisdiction the dismissal will be considered

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<sup>50</sup> Article 49 of the Basic Statute of Civil Servants, Law 7/2007 of 12 April 2007, <http://www.boe.es/buscar/act.php?id=BOE-A-2007-7788>, accessed 11 March 2018.

<sup>51</sup> Article 190 of the General Law of Social Security and Article 49 of the Basic Statute of Civil Servants, Law 7/2007 of 12 April 2007.

<sup>52</sup> Article 187 of the General Law of Social Security and Article 49 of the Basic Statute of Civil Servants, Law 7/2007 of 12 April 2007.

null and void unless there is a justified cause, in the same terms as those governing pregnancy or maternity leave. The period of nine months after a child's birth is also protected by the nullity of the dismissal.<sup>53</sup> Second, under the same Act there is a shorter judicial procedure that aims to guarantee that any conflict between employee and employer about parental leave is solved as soon as possible, so the worker can have access to his/her right immediately (Article 139.1.b). Third, the worker can ask for compensation of damages under the same Act (Article 139.1.a). Fourth, under Articles 7(5) and 40(1)(b) of the Law of Offences and Penalties in the Social Order, the employer could be considered guilty of serious misconduct, in which case he/she could be ordered to pay an administrative sanction of EUR 626 to EUR 6 250.<sup>54</sup>

Theoretically, this frame of protection is adequate but, in some particular cases, effective reparation of damages may not be guaranteed. This was true for a case that gave rise to the judgment of the European Court of Human Rights in *Garcia Mateos v. Spain*, in which the Court established that Spain had to pay compensation of damages of EUR 16 000 to the worker who was unable to benefit from the parental leave that had been recognised by a Spanish Court since the child was too old to allow the working time reduction.<sup>55</sup>

5.4.14 Do workers benefiting 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?

Workers benefiting from any parental leave in Spain 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. The situation of workers returning from an unpaid leave is ambiguous in legislation: if a worker returns within one year of unpaid leave he or she has the right to return to the same job. If a worker returns after one year of unpaid leave he or she only has the right to 'similar' work. However, an employer has the right to move an employee to similar work, so long as the employee does not have to change residence, and may, for example, move an employee to similar work the day after he or she has returned from unpaid leave. In practice, there is no difference in returning within or after one year of unpaid work. Also, the Supreme Court has expressly recognised that they have the right to the same or a similar job upon return as well.<sup>56</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?

Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts are maintained as they stand until the end of the parental leave. In particular, during the unpaid leave the worker will maintain and increase his/her seniority.<sup>57</sup> In addition, Spanish legislation establishes the presumption that during unpaid leave there has been effective contribution to the social security system.<sup>58</sup> It is also established that during the two first years of the working time reduction the contribution to the system will be considered as if the work had been done full time. If the working

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<sup>53</sup> Article 108 of the Act Regulating Social Jurisdiction, Law 36/2011 of 10 October 2011, available at: <http://www.boe.es/buscar/act.php?id=BOE-A-2011-15936&tn=2&p=20120714>, accessed 11 March 2018.

<sup>54</sup> Royal Legislative Decree 5/2000, of 4 August 2000, available at <http://www.boe.es/buscar/doc.php?id=BOE-A-2000-15060>, accessed 11 March 2018.

<sup>55</sup> Judgment of the European Court of Human Rights of 19 February 2013, application number 38285/09, available at: <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-116739>, accessed 11 March 2018.

<sup>56</sup> Judgment of the Supreme Court of 21 February 2013, appeal number 740/2012, <http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&database=TS&reference=6667409&links=&optimize=20130402&publicinterface=true>, accessed 11 March 2018.

<sup>57</sup> Article 46(3) of the Workers' Statute.

<sup>58</sup> Article 237 (1) of the General Law of Social Security.

time reduction is asked for the care of a seriously ill child the whole time of the situation will be considered as full-time contributed.<sup>59</sup>

There are other benefits for workers with children in order to compensate for the damages to their careers that the care of children may produce: First, Articles 236 and 237 of the General Law of Social Security state a benefit of at least 112 additional days of contribution to social security when parents accede to pensions. In order to have access to this special benefit it is necessary that the workers did not work for childcare reasons during a certain period. Only one parent is entitled to this. The benefit established in Article 235 of the general Law of Social Security applies only to mothers. Article 236 applies to both mothers and fathers. Second, Additional Provision 18 of the Workers' Statute stipulates that, in the case of dismissal of a worker who was working part time for family care reasons, a dismissal indemnification will be calculated as if the worker was working full time. Article 278 of the General Law of Social Security also states that his/her unemployment insurance payment will be paid as if the last job was full time. These two benefits give the worker the right to a higher dismissal indemnification and to a higher unemployment insurance payment.

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

The status of the employment contract during unpaid leave is similar to a contract suspension. The status of the employment contract during breastfeeding permission does not change. The status of the employment contract during the reduction of working time, including the one for the purpose of taking care of a seriously ill child, is similar to that of a part-time employment contract.

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

There is general continuity of the entitlements to social security cover during the period of unpaid leave. Workers in this situation have the right to apply for pensions if they fulfil the requirements. Workers have the right to healthcare as well. However, they cannot apply for maternity leave, paternity leave, unemployment or sickness leave.<sup>60</sup> For example, if a child is born during parental leave, this leave does not automatically turn into maternity leave for the mother; she would have to return to work for at least one day and then take maternity leave. Beneficiaries of breastfeeding permission and reductions in working time are active workers, so their social security rights are maintained.

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

The only parental leave remunerated by the employer (in the public as well as the private sector) is the breastfeeding permission.

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

The only parental leave that is covered by a social security allowance is the reduction in working time for the purpose of taking care of a seriously ill child (in the public and the private sector): social security guarantees that workers receive 100 % of their previous contribution base, which basically amounts to the previous salary. This benefit lasts until the end of the illness or until the child turns eighteen.

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<sup>59</sup> Article 237 (3) of the General Law of Social Security.

<sup>60</sup> Additional Provision 4 of Royal Decree 295/2009, of 6 March 2009.

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)?

In the author's point of view, Spanish legislation fails to comply with the minimum requirements of Directive 2010/18 in the following respects: a) Nothing has been established in order to guarantee that employers shall consider and respond to requests for changes to parents' working hours and/or patterns for a set period of time when they come back to work after a parental leave. This could be in violation of Clause 6 of Directive 2010/18. Certainly, in the *Rodriguez Sanchez Case*<sup>61</sup> the CJEU did not expressly recognize what the claimant was requesting (a schedule adjustment), but the CJEU considered that the case submitted could not be considered to be included within the scope of the Directive since the worker did not ask for the adjustment after returning from parental leave (as required by the Directive) but rather after returning from maternity leave. It could thus be said that the CJEU has not yet been confronted with this issue; b) Time off from work on the grounds of *force majeure* cannot be considered as completely guaranteed by Spanish law, at least as required by Clause 7 of Directive 2010/18, because there is no general permission applicable in cases of sickness or accident 'that makes the immediate presence of the worker indispensable'; and c) Spanish legislation does not consider the interests of workers in specifying the length of notice periods for parental leave as required by Clause 3.2 of Directive 2010/18, since nothing is established in this respect and collective agreements can freely establish them.

In the author's point of view, Spanish legislation exceeds the minimum requirements of Directive 2010/18 in the following respects: a) The possibility for one parent to transfer part of the parental leave to the other parent does not exist in Spain. Breastfeeding permission has to be taken fully by the mother or by the father. The remaining forms of parental leave can be taken fully by the mother and the father, even accumulatively; b) Spanish legislation establishes the presumption that during unpaid leave there is effective contribution to the social security system. It is also established that during the time reduction the contribution to the system is considered as if the work is done full time.

## 5.5 Paternity leave

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

Until 31 December 2016 paternity leave, independent of whether maternity leave was shared with the mother, lasted for 13 continuous days, extended by 2 more days for each child, for adoption or for fostering, with the right to 100 % of the previous contribution base.<sup>62</sup> From 1 January 2017 paternity leave has been extended to four weeks. Paternity leave can be taken part time if so established by collective agreement or if the employer accepts it, but the worker has to reduce his previous working hours by at least half. Although this leave is intended for the father, the provision is drafted in neutral terms so as to be compatible with family structures where both parents are of the same sex. For public-service employees, the leave period is 15 days.<sup>63</sup> The aim of the Law on Effective Equality (which first introduced paternity leave in Spain) was to gradually extend the leave to 4 weeks, over a 6-year period, although the promised extension of the paternity leave was postponed year after year until 2017. A minimum period of previous working time is required in order to have access to the related social security compensation: 180 days during the previous seven years or 360 days at any time.

### 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)?

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<sup>61</sup> Case C-351/14 *Rodriguez Sanchez*, [2016] ECR not available. Judgement of the CJEU of 16 June 2016.

<sup>62</sup> Article 48 7 of the Workers' Statute.

<sup>63</sup> Article 49(f) of the Basic Statute of Civil Servants, Law 7/2007 of 12 April 2007.

Spanish legislation establishes the same protection against dismissal for workers who take paternity leave as that established for workers who take maternity leave.<sup>64</sup>

## **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)?

Article 37(3)(b) of the Workers' Statute establishes a two-day paid leave when a second-degree relative dies, has an accident, becomes seriously ill, needs to be hospitalised or undergoes a surgical intervention that does not require hospitalisation. All of them are quite serious situations. This paid leave is four days if the worker needs to travel to another town. The entitlement to such time off from work has not been limited to a certain amount of time per year and/or per case. However, time off from work on the grounds of *force majeure* cannot be considered fully guaranteed, at least as required by Clause 7 of Directive 2010/18, because there is no general permission applicable in cases of sickness or accident 'that makes the immediate presence of the worker indispensable' if they are not as serious as Article 37.3.b. of the Workers' Statute requires.

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

- 5.7.1 Is parental leave available in case of surrogacy?

Any of the existing types of parental leave is allowed in case of surrogacy if the workers or civil servants have adopted or foster the child. This possibility is expressly referred to in the legislation applicable to all types of parental leave.

## **5.8 Leave sharing arrangements**

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

Maternity leave can be taken part time if there is an agreement with the employer or if this right is referred to in a collective agreement, so part-time maternity leave is not really an employee's right.<sup>65</sup> There are two possibilities to share maternity leave: first, if the mother dies her remaining maternity leave is transferred to the father; second, if both parents work, the mother may choose to transfer the part of the maternity leave exceeding the 6 compulsory weeks after birth to the other parent. The other parent has access to the maternity leave if he fulfils the requirements (minimum previous working time as established for the mother). The other parent's maternity leave benefit will amount to 100 % of his previous contribution base. Spanish legislation does not promote that fathers use part of the maternity leave, since the father only has access to it if the mother dies or if the working mother transfers it to him. As a consequence, the father has no access to maternity leave if the mother does not work and he has no access to it either if the working mother does not make the transferral at the beginning of her maternity leave. Paternity leave and maternity leave are not related and compatible in the same person.<sup>66</sup>

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

The possibility for one parent to transfer part of the parental leave to the other parent does not exist in Spain. Breastfeeding permission has to be taken fully by the mother or by the father. The remaining forms of parental leave can be taken fully by the mother and the father, even accumulatively.

<sup>64</sup> Article 55(5) of the Workers' Statute and Articles 183, 184 and 185 of the General Law of Social Security.

<sup>65</sup> Article 48(4) of the Workers' Statute and Article 49(a) of the Basic Statute for the Civil Servants.

<sup>66</sup> Article 48(7) of the Worker's Statute and Article 49(c) of the Basic Statute for Civil Servants.

## 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?

Parents (both workers and civil servants), including adopting and fostering parents, of children younger than twelve can ask for a reduction in working time, in which case their salary is reduced proportionally. A person who takes direct care of a child can use the reduction in working time as well, even if he/she is not the father, the mother or the foster parent.<sup>67</sup> The reduction in working time also applies to the care of first and second degree relatives who are dependent on the worker. In this case the working time reduction can last a maximum of two years, unless otherwise stipulated in the collective agreement.<sup>68</sup> The reduction of working time for the care of children or dependents is not tied to any specific trigger. Once the working time reduction expires, the worker has the right to return to the same working conditions that he/she had before.

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

Nothing has been established in Spanish legislation in order to guarantee that employers consider and respond to requests for changes to parents' working hours and/or patterns for a set period of time when they come back to work after a parental leave. The current Article 34(8) of the Workers' Statute only recognises the worker's right to working time adjustments for family care reasons if this is expressly stipulated in a collective agreement or if it is accepted by the employer. This is why Spanish legislation could be in violation of Clause 6 of Directive 2010/18/EC.

Theoretically the Spanish Constitutional Court has reinforced workers' parental rights by linking them to the Spanish Constitution and by declaring that an effective balance between working and family life is an aim of constitutional importance that must be taken into account when interpreting and applying the law. In this way the Spanish Constitutional Court has established that the right to reconciliation of working and family life is a fundamental right.<sup>69</sup> But, at the same time, the Constitutional Court has established that employees do not have any right to request to adjust their working time patterns for family care reasons, not even after returning from a parental leave as stated in Clause 6 of Directive 2010/18, unless this is established by collective bargaining or allowed by the employer.<sup>70</sup> The Supreme Court has expressly established that the employees' right to choose the concrete time for the working time reduction and/or the breastfeeding permission as established in Article 37(6) of the Workers' Statute does not apply when the worker asks for an adjustment to his/her working time patterns.<sup>71</sup> The concept of an adjustment referred to in Clause 6 of Directive 2010/18 is broader than the right to a reduction of working time or to a breastfeeding permission in the terms established in Spanish legislation. The right to time adjustment does not necessarily involve a reduction of working time, so it is more convenient for the employee, not only because he/she keeps his/her whole salary but also because it has less effect on his /her professional career development.

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<sup>67</sup> The reduction of working time for workers is established in Article 37.5 of the Workers' Statute. The reduction of working time for civil servants is established in Article 30.1.g of Law 30/1984, of 2 August 1984.

<sup>68</sup> Article 46(3) of the Workers' Statute.

<sup>69</sup> Judgment of the Constitutional Court 26/2011 of 14 March 2011, available at <http://www.boe.es/boe/dias/2011/04/11/pdfs/BOE-A-2011-6541.pdf>, accessed 11 March 2018.

<sup>70</sup> Judgment of the Constitutional Court 24/2011 of 14 March 2011 available at <http://www.boe.es/boe/dias/2011/04/11/pdfs/BOE-A-2011-6539.pdf>, accessed 11 March 2018.

<sup>71</sup> Judgment of the Supreme Court of 20 July 2000, appeal number 3799/1999, <http://www.poderjudicial.es/search/doAction?action=contentpdf&datasematch=TS&reference=2386345&links=&optimize=20040515&publicinterface=true>, accessed 11 March 2018.

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

Spanish law does not provide workers with a legal right to work from home or remotely.

There are no relevant measures at national level to promote a more balanced share of family responsibilities between both parents in relation to parental leave. An increase of one week in the duration of paternity leave has been announced by the government but no bill has been passed as yet. In addition, none of the types of parental leave currently applicable in Spain contains any measures to promote its use by men.

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?

There is no legal right to flexible working arrangements in Spanish legislation. Article 34(8) of the Workers' Statute stipulates that certain ways of flexible time arrangements will be promoted such as the continuous day of work (without lunch interruption), the flexible working hours or other kinds of working time organization in order to improve employees' work compatibility with their personal and family life. However, the Article does not contain any obligations or rights in this respect, so it cannot be used by the employee to support any time adjustment.



## **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?**

Occupational pension schemes are private, free and voluntary and are totally excluded from the social security system (which is public and compulsory). They are regulated by collective agreements as improvements to the basic statutory schemes and therefore they are not used in all sectors of the economy or in all companies. Collective agreements must respect the constitutional principle of equality and the prohibition of discrimination on grounds of gender. The compromise (pension obligations) established in the collective agreement should be guaranteed through collective insurances or occupational pension schemes. All employees, including those with a special labour contract, can participate in occupational pension schemes, as one of the principles on which the occupational pension schemes are based is a general prohibition of discrimination in the access to them.

### **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.**

There is no Spanish legislation on occupational social security schemes.

### **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.**

There is no Spanish legislation on occupational social security schemes.

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

There is no Spanish legislation on occupational social security schemes.

### **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?**

There is no Spanish legislation on occupational social security schemes.

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

There is no Spanish legislation on occupational social security schemes.

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

There is no Spanish legislation on occupational social security schemes. Examples of occupational social security in Spain are rare, and there are therefore no cases to discuss.

## **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?**

Spain has no specific legislation that expressly transposes Directive 79/7, not even an article that expressly stipulates the prohibition of gender discrimination in statutory social security schemes. However, Article 14 of the Constitution, which generally prohibits gender discrimination, applies to social security as well. Apparently, Spanish legislation complies with Directive 79/7. However, the existence of indirect discrimination in Spain was detected by the CJEU in the *Elbal* case in relation to the requirements regarding contributory pensions that apply to part-time workers.<sup>72</sup> Spanish legislation has been changed in accordance with the CJEU's ruling, so currently the minimum time of work required for the access to pensions must be reduced proportionally depending on the duration of the work day of each part-time worker.<sup>73</sup> In the *Espadas Recio* case the CJEU also stated that the way in which unemployment insurance was determined for part-time workers in Spain constituted indirect discrimination on grounds of sex.<sup>74</sup> So far the Spanish legislation has not been amended in this respect. Besides, the recently enacted Article 60 of the General Law of Social Security currently establishes a specific benefit (described below in 7.4) that exclusively applies to mothers and not to fathers when acceding to a pension.

### **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.**

There are no specific references to gender discrimination in social security.

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

There are no specific references to gender discrimination in social security.

### **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.**

There are some legal mechanisms in favour of people who have taken care of children that could be within the scope of Article 7(1)(b) of Directive 79/7, in the sense that they are advantages in respect of old-age pension schemes granted to persons who have brought up children. They are the following: (i) Article 237 of the General Law of Social Security establishes that during unpaid leave there is effective contribution to the social security system; (ii) It is also established in Article 237 of the General Law of Social Security that during the first two years of working time reduction for family care the contribution to the system is considered as if the work is done full time; (iii) Article 236 of the General Law of Social Security lays down a benefit of at least 112 additional days of contribution to social security when parents accede to pensions. This benefit can apply to mothers or fathers; (iv) Article 235 of the General Law of Social Security also lays down a benefit of at least 112 additional days of contribution when acceding to a pension, that applies only

<sup>72</sup> Case 385/11 *Isabel Elbal Moreno v. Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)* [2012] Judgement of the CJEU of 22 November 2012.

<sup>73</sup> Royal Legislative Decree 11/2013, of 2 August 2013, [http://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2013-8556](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-8556), accessed 6 February 2017.

<sup>74</sup> Case 98/15 *Espadas Recio v. Servicio Público de Empleo Estatal (SPEE)* [2017] Judgment of the CJEU of 9 November 2017

to women who have given birth; (v) Article 60 of the General Law of Social Security lays down a pension supplement exclusively applicable to mothers of at least two children. The supplement also applies to the mothers of adopted children. No equivalent measure is available to fathers who were responsible for taking care of the children. The supplement is an increase of between 5 and 15% of the pension and may exceed the maximum pension established in the social security system.

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

Sex is not used as an actuarial factor in Spanish statutory social security schemes.

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

There is an obvious problem in Spain in relation to the implementation of Directive 79/7 given that there is no express legislation in this respect at all. There is also a concrete problem in relation to the supplement of pensions that was established in Article 60 of the general Law of Social Security in 2015.<sup>75</sup> This supplement is not really intended to compensate for the damage in social security for women as a result of the birth of children. The supplement is, instead, a benefit established to compensate for the losses in their professional careers that women suffer as a result of caring for their children. Spanish legislation has not considered that these losses can also occur for men who are dedicated to the care of their children. Certainly Article 7 of Directive 79/7 allows member States *to exclude from its scope ... (b) advantages in respect of old-age pension schemes granted to persons who have raised children*. But Article 7.2 of Directive 79/7 establishes that *Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is a justification for maintaining the exclusions concerned*. The pension supplement implies a difference between mothers and fathers that take care of children that could be in violation of Article 7.2 of Directive 79/7, since these differences should tend to disappear, not to be newly established.

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<sup>75</sup> It was established by the General State Budget Act for 2016 (Law 48/2015, of 29 October 2015).

## **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?**

There is no legislation in Spain that expressly refers to itself as the transposition of Directive 2010/41 or as the transposition of the previous Directive 86/613. The legislation that regulates the situation of self-employed workers in Spain is the Self-Employed Worker Statute (*Estatuto del Trabajador Autónomo*)<sup>76</sup> whose preamble makes express reference to Directive 86/613, which allows one to presume that this Directive was taken into account in its elaboration. In fact, the non-discrimination obligation on the ground of sex is expressly contained in Articles 4 and 6 of the Self-Employed Worker Statute. Article 6 of the Self-Employed Worker Statute establishes that the provisions of the Law on Effective Equality shall apply to the right to equality and non-discrimination on the grounds of sex in relation to self-employed workers.

### **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)**

Article 1 of the Self-Employed Worker Statute defines a self-employed worker as 'an individual who habitually, personally and directly engages, on his or her own account and outside another person's organisation or sphere of management, in a business or professional activity for a profit, irrespective of whether or not he or she has any employees'. This definition is the same for any legal purpose.

### **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.**

There are two kinds of self-employed workers in Spain: the ordinary ones (who are called *Autónomos*), and the economically dependent self-employed workers (who are called *Trabajadores Autónomos Económicamente Dependientes* or *TRADE*). According to Article 11 of the Self-Employed Worker Statute, *TRADE* are those self-employed workers that obtain at least 75 % of their income from one of their clients. The Self-Employed Worker Statute grants to *TRADE* some rights also granted to ordinary workers but they do not enjoy the full protection as provided to employees by labour law. For example, the contract with a *TRADE* cannot be terminated by the client without good reason, since if it were, the *TRADE* would have the right to a generic compensation of damages. However, the *TRADE* would not have the right to receive the compensation as established for employees in labour law. The concept of *TRADE* has raised much criticism in Spain, stating that a person with such a high level of economic dependence from only one client should not be considered as a self-employed person but as an ordinary worker.

The group of agricultural self-employed workers has certain idiosyncrasies in social security protection, but they do not seem to have any direct or indirect discriminatory effect.

The Self-Employed Worker Statute also applies to family members of the self-employed worker who habitually, personally and directly work with the self-employed person, but are not registered as employees. Such family members would include the spouse and relatives in the descending or ascending line, provided they live with the self-employed person. The Self-Employed Worker Statute makes no reference to unmarried couples,

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<sup>76</sup> Law 20/2007, of 11 July 2007, available at [http://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2007-13409](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2007-13409), accessed 11 March 2018.

although this kind of partnership has legal standing in other laws, such as recognition of the entitlement to receive a survivor's pension (Article 174 of the General Law of Social Security).

#### **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?**

It could be considered that Article 4(1) has been correctly transposed in Spain. Article 4(3)(a) of the Self-Employed Worker Statute establishes the self-employed worker's general right to equality before the law and to non-discrimination on the grounds of sex. More specifically, Article 6 of the Self-Employed Worker Statute establishes the following: 'The public authorities and those who hire the professional activity of self-employed workers are subject to the prohibition of discrimination, both direct and indirect, of those workers, for the reasons outlined in Article 4(3)(a) of this Law. The prohibition of discrimination will affect free economic initiative and recruitment, as well as the conditions for the exercise of professional activities'.

#### **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?**

There are several benefits that could be considered positive action since they intend to promote women's self-employment. One of them is the Programme of corporate support for women, funded by the European Social Fund and the Ministry of Equality. It is a programme aimed at women who want to run a business, or who, having already started activities, are looking for support for its implementation and/or consolidation. Most of the services offered by the programme are primarily dedicated to give free advice to self-employed women.<sup>77</sup> Some regions have also established benefits for the promotion of female self-employment, including subsidies and access to credits.<sup>78</sup>

Another positive action measure for self-employed women in Spain is the establishment of reductions regarding their social security contribution: a) self-employed workers who during the period of maternity leave, adoption, foster care, parenting, risk during pregnancy or risk during breastfeeding have been replaced in their activity by an unemployed worker are entitled to a reduction of 100 % in their monthly contribution to social security. The self-employed worker has the right to a 100 % reduction in the social security contribution of the replacement as well. Both reductions apply only if the self-employed person is replaced, since one of the objectives of this measures is to generate employment, so it has a very limited application;<sup>79</sup> and b) A reduction in self-employed persons' contribution to social security (50 % first and 25% afterwards) applies to the family members of the self-employed worker who habitually, personally and directly work with the self-employed person if they live with him/her. The reduction applies during the first 18 months after the start of the activity of the family member. The purpose of this measure is to encourage the contribution of those family members of the self-employed person, primarily spouses and children, who are currently not registered despite working in the family business due to the economic difficulties that the crisis has caused in many small businesses. However, this benefit has not served to significantly increase the number of collaborating relatives that are registered. This is probably because the benefit has a very limited duration (18 months).

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<sup>77</sup> See [www.e-empresarias.net](http://www.e-empresarias.net), accessed 11 March 2018.

<sup>78</sup> For instance, in Andalucía, see <http://www.juntadeandalucia.es/institutodelamujer/index.php/empleo-y-empresas/actuaciones-dirigidas-a-emprendedoras-y-empresarias>, accessed 11 March 2018.

<sup>79</sup> Article 30 of the Self-Employed Worker Statute.

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

Self-employed workers are included in the Spanish system of social security. The way in which the contributions are made is quite peculiar since self-employed workers are free to declare the income which will be relevant in determining their monthly contribution. This declared income will determine the amount of future benefits (including pensions). It is quite usual for self-employed persons to declare the minimum wage, so their monthly contribution will be lower, although this means that their future benefits will be lower as well. Most of the self-employed chose to declare the minimum wage. The self-employed have the following social security benefits: healthcare (including medical and pharmaceutical coverage), sick leave (which guarantees between 60 and 75 % of the previous declared income), maternity leave, paternity leave and leave due to risk during pregnancy and/or breastfeeding (which guarantees 100 % of the previous declared income), pension due to permanent disability (which guarantees a percentage of the previously declared average income depending on the degree of disability), retirement pension (which guarantees a percentage of the previously declared average income depending on the number of years of contribution to the system of social security), widow's or widower's pension (which guarantees to the widow or widower –including life partners– of a deceased self-employed a percentage of his/her previously declared average income) and unemployment insurance (only if the self-employed chose to include this voluntary benefit and made the relevant contributions).

There is only one system of social protection for self-employed persons, although some slight idiosyncrasies have been established for agricultural workers and for maritime workers, which are basically related to organisational and bureaucratic matters.

It is mandatory for spouses and life partners who work in the family business to be included in the social security system as self-employed persons and to contribute to it. Only occasional work by spouses or life partners is excluded from the system of social security. In order to encourage the contribution by family members which are currently not registered despite working in the family business, a temporary reduction in their social security contribution has been established.

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

The maternity benefit for self-employed women is recognised in Spain in the same way as it is recognised for employees (100 % of the previous contribution base during 16 weeks). The coverage and contribution are compulsory for self-employed women, but only the first 6 weeks after the birth have to be taken by the mother. The allowance can be considered sufficient, since theoretically it would be at least of the same amount as that which she would receive in the event of a break in her activities on grounds connected with her state of health. However, given that self-employed women usually declare a lower income than the real income, the maternity allowance hardly serves to replace the loss of the previous income. In fact, self-employed women tend to go back to work immediately after the compulsory six weeks after birth, discarding the rest of the maternity leave. There are no services supplying temporary replacements or other kinds of social services, other than the reductions in the social security contribution if the self-employed woman hires someone to replace her during her maternity leave or during the time devoted to the care of children. For instance, Article 30 of the Statute for the Self-Employed establishes that, for a maximum of 12 months, and as long as he/she hires a worker, a self-employed person with family responsibilities will be entitled to a reduction in his/her monthly contribution to social security payments. Spain has not used the option, as provided for in the last sentence of Article 8(4) of Directive 2010/41, to provide for access to those services to be an alternative or part of the allowance.

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

Given that occupational social security is not regulated in Spain, there are no provisions regarding occupational social security for self-employed persons either.

**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.**

Spanish law has not 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.

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

Article 14(1)(a) of the Recast Directive has been adequately implemented in Spanish legislation. On the one hand, Article 6(2) of the Self-Employed Worker Statute expressly stipulates that the prohibition of discrimination will affect free economic initiative, recruitment and the conditions for professional practice. On the other hand, Article 6(4) states that any contractual clauses that violate the right to non-discrimination or a fundamental right will be null and void.

## **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?**

Article 69(1) of the Law on Effective Equality expressly prohibits direct and indirect discrimination on grounds of sex in access to goods and services. Articles 69, 70, 71 and 72 of the Law on Effective Equality transpose Directive 2004/113. The Directive can be said to have been correctly implemented, at least from a formal point of view, as the most relevant provisions of the Directive have been transposed almost literally. However, the Directive's impact has been rather limited despite its proper implementation. This is probably due to the lack of initiative on behalf of the authorities, the lack of specific regulations outlining the rights and obligations in the various areas and in contractual agreements, as well as the lack of court claims concerning specific discrimination issues.

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

The material scope of Spanish legislation relating to access to goods and services is the same as that in Article 3 of Directive 2004/113.

### **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?**

The exceptions regarding the material scope as specified in Article 3(3) of Directive 2004/113, with respect to the content of media, advertising and education, have not been implemented in Spanish legislation. Spanish legislation includes no provisions to exclude media, advertising and education from the material scope of the principle of non-discrimination in the access to goods and services, so the principle of gender equality fully applies in these areas as well.

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

Article 69(3) of the Law on Effective Equality almost literally reproduces Article 4(5) of Directive 2004/113. It states that the differences in the access to goods and services will be allowed if they are justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. However, there is no other reference to this possibility in Spanish legislation and there have not been any cases regarding the subject.

### **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)?**

Article 71(1) of the Law on Effective Equality expressly prohibits the conclusion of contracts of insurance, and financial or other services that, when considering sex as a factor for calculating premiums and benefits, generate differences in premiums and benefits of the persons insured.

### **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.**



Spanish legislation has been modified in order to be adapted to the *Test-Achats* ruling. Final Provision 14 of Law 11/2013, of 26 July (*Disposición Final 14 de la Ley 11/2013*)<sup>80</sup> modifies the consolidated text of the Law of management and supervision of private insurance, approved by Royal Legislative Decree 6/2004, of 29 October 2004, adding a new twelfth additional provision with the following wording: 'Equality of treatment between women and men. Within the scope of Directive 2004/113/EC, of the Council of 13 December 2004, concerning the application of the principle of equality of treatment between women and men in access to and supply of goods and services, may not be established, in the calculation of the rates of insurance contracts, differences in treatment between women and men in the premiums and benefits for insured persons, when those consider the sex as a factor of calculation.' The most immediate consequence of the new legislation was an increase in car insurance costs for women, since it was quite common before that for insurance companies to establish better prices for women.<sup>81</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)?**

Positive action measures in relation to access and supply of goods and services are scarce in Spain. However, some public measures can be found in relation to the access to certain goods when women are in special situations of risk. For example, Article 31 of the Law on Effective Equality states that the Government will promote the access of women to housing when they are in a situation of need or in risk of exclusion, and when they have been victims of gender-based violence.

**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 are two specific provisions in Spanish legislation that refer to maternity and pregnancy in relation to the access to goods and services: First, Article 71(2) of the Law on Effective Equality states that the costs related to pregnancy and childbirth do not justify differences in premiums and benefits of individual persons. Second, Article 70 of the Law on Effective Equality stipulates that in the access to goods and services, it is not allowed to inquire about the pregnancy of a woman, except for health protection. There are no other provisions about discrimination on the grounds of pregnancy, maternity or parenthood in the access to goods and services and there have not been any relevant cases about the issue either.

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<sup>80</sup> Additional Provision 12 of Law 11/2013 <http://www.boe.es/boe/dias/2013/07/27/pdfs/BOE-A-2013-8187.pdf>, accessed 11 March 2018.

<sup>81</sup> See [http://cincodias.com/cincodias/2012/12/10/mercados/1355358410\\_850215.html](http://cincodias.com/cincodias/2012/12/10/mercados/1355358410_850215.html), accessed 11 March 2018.

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

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

Spain ratified the Istanbul Convention on 27 May 2014. The pre-existing legal framework in Spain is Law 1/2004, of 23 December 2004, for comprehensive protection against gender-based violence.<sup>82</sup> This legislation is in compliance with the obligations under the Convention so no legal provisions have been introduced or are planned to be introduced in the near future.

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<sup>82</sup> Law 1/2004, of 23 December 2004: <http://www.boe.es/buscar/doc.php?id=BOE-A-2004-21760>, accessed 11 March 2018.

## **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?

According to Article 9 of the Law on Effective Equality, all decisions taken by the employer which amount to victimisation of an employee for making an internal complaint or submitting a judicial claim seeking compliance with the principle of equal treatment and non-discrimination will be considered as discrimination on the grounds of gender and the effects will be null and void. This legislation complies with the directives.

### **11.2 Burden of proof**

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

Article 96 of the Law Regulating Social Jurisdiction establishes the reversal of the burden of proof in a manner similar to Article 7 of Directive 97/80. According to this Article, when evidence of a violation is presented, the defendant must demonstrate the existence of reasons unrelated to the intention to discriminate to objectively justify the conduct. The Spanish rules comply with EU law and with CJEU jurisprudence on the subject.

### **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.

Article 10 of the Law on Effective Equality states that acts that constitute or cause discrimination by reason of sex are null and void, and give rise to liability through a system of compensation that must be real, effective and proportionate to the injury suffered, as well as, in applicable cases, through a system of effective and deterrent sanctions that prevent discriminatory behaviour.

There are several possible sanctions against the employer that fails to respect employees' rights not to be discriminated against. They are all compatible: First, if a dismissal takes place on grounds of sexual discrimination, the employer's decision is declared null and void, with the immediate effect of reinstatement in the post and on the same conditions as previously applied.<sup>83</sup> Second, the worker can ask for a compensation of damages that includes moral damages.<sup>84</sup> Third, according to Articles 7(5) and 40(1)(b) of the Law of Offences and Penalties in the Social Order, the employer could be considered guilty of a serious misconduct, in which case he/she could be ordered to pay an administrative sanction of EUR 626 to EUR 6 250.

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.

In the author's opinion the remedies and sanctions are theoretically proportionate, but they are not always effective and dissuasive because of the following reasons: First, moral damages are difficult to prove and even when they are recognized by the courts, they

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<sup>83</sup> Article 55(5) of the Workers' Statute.

<sup>84</sup> Article 183 of the Act Regulating Social Jurisdiction.

cover quite low amounts. Second, the sanctions established in the Law of Offences and Penalties can only be imposed by the Labour Inspectorate, which does not always have gender discrimination as a priority.

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

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

In equal treatment cases, the persons affected have standing before the courts and, if the victim so authorises, so do trade unions and associations for the promotion of equality. When the victims are a group of unspecified persons or if they are difficult to identify, the following entities will have standing before the courts: public entities that have as an objective the equality between women and men, and most representative unions and national associations that have amongst their objectives the equality between women and men.<sup>85</sup> Theoretically there are many mechanisms for the intervention by interest groups and legal entities for the defence of victims of discrimination. However, these actions are quite rare and most cases of gender discrimination submitted to the courts are pursued by individual victims.

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

In the author's opinion the intervention by interest groups and legal entities for the control and sanction of gender discrimination is unsatisfactory. First, the Women's Institute for the equality of opportunities theoretically has the possibility to initiate proceedings against offenders in cases of discrimination but it rarely does so. The same happens with the most representative trade unions. Second, the Labour Inspectorate theoretically has the possibility to investigate employers who discriminate against women but its intervention depends on the instructions and preferences given by the Labour Authorities, which do not always take a sufficient interest in the subject. Third, the way in which vacancies are announced in mass media or directly by employers is frequently discriminatory. Theoretically, the Labour Inspectorate can intervene and impose sanctions but it rarely does so. Fourth, the Labour Authority could theoretically check collective agreements for illegal provisions in relation to gender discrimination, but it rarely does so. Fifth, employers do not have a legal obligation to disclose gender-disaggregated information on payment at the company, as established in the European Commission Recommendation on transparency of 7 March 2014. This makes legal claims of payment discrimination particularly complex.

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

Alleged victims of gender discrimination have access to legal aid provided by public entities (the Women's Institute for the equality of opportunities, and equality entities in the Autonomous Communities and municipalities). If the victim does not have sufficient economic resources to initiate judicial proceedings against the offender she can benefit from the programme of free legal assistance that, in addition to legal assistance, provides exemption from payment of attorney's fees, of costs of expert testimony, of judicial fees, etc.<sup>86</sup>

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<sup>85</sup> Article 11 of the Law of Civil Procedure, Law 1/2000 of 7 January 2000, [http://noticias.juridicas.com/base\\_datos/Privado/l1-2000.l1t5.html](http://noticias.juridicas.com/base_datos/Privado/l1-2000.l1t5.html), accessed 11 March 2018.

<sup>86</sup> Law 1/1996, of 10 January 1986, of free legal assistance.

## 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?

The Spanish entity that seeks to implement the requirement of European Union gender equality law is the Women's Institute for the equality of opportunities.<sup>87</sup> Law 15/2014 of 16 September 2014 transformed the old Women's Institute into the Women's Institute for the equality of opportunities.<sup>88</sup> The current Institute for Women and for equal opportunities has as its objective the fight against discrimination on the grounds of birth, sex, racial or ethnic origin, religion or ideology, sexual identity, sexual orientation, age, disability or any other personal or social condition or circumstance. The Women's Institute for the equality of opportunities is formally an 'autonomous body' attached to the Ministry of Health, Social Services and Equality. However, the fact that it is defined as an 'autonomous body' does not refer to its independence since its staffing and by-laws are those of a Spanish government body. Its Director General is appointed by the Council of Ministers and hierarchically reports to the Minister. The Women's Institute for the equality of opportunities is not independent from the Government because it is part of the Government.

In relation to gender discrimination the general function of the Women's Institute for the equality of opportunities is the promotion and encouragement of conditions that produce social equality of the sexes and allow women's participation in political, cultural, economic and social life. Additional Provision 27 of the Law on Effective Equality establishes that the Institute has the following competences: a) providing independent assistance to victims of discrimination in pursuing their complaints; b) conducting studies on discrimination; c) publishing reports and making recommendations regarding any issue relating to discrimination. A more detailed list of its competences can be found in Article 3 of Law 16/1983, of 24 October 1983 on the Women's Institute as amended by Law 15/2014, of 16 September 2014.

## 11.6 Social partners

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

Social partners theoretically have certain prerogatives to reinforce the principle of gender equality although their attitude in this respect is quite reticent. For example, Article 85(1) of the Workers' Statute states that social partners have the obligation to include in collective agreements provisions to promote the equality of opportunities between women and men. However, collective agreements usually simply include very general statements about gender equality, without taking any concrete measures.

## 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 the development of equality issues was not really relevant before the Law on Effective Equality entered into effect. Since then, there is a general obligation for the social partners to negotiate, in collective agreements, measures

<sup>87</sup> Its website is <http://www.inmujer.gob.es/>, accessed 11 March 2018.

<sup>88</sup> Law 15/2014, of 16 September 2014, available at <http://boe.es/boe/dias/2014/09/17/pdfs/BOE-A-2014-9467.pdf>, accessed 11 March 2018.

promoting the equality of treatment and opportunities for women and men.<sup>89</sup> In addition, some companies have the obligation to negotiate and implement equality plans. The implementation of an equality plan is compulsory in the following cases: when the company has more than 250 workers; when it is established by collective agreement; or when the Labour Authority imposes the plan as part of an administrative sanction.<sup>90</sup> Some of the provisions about gender equality established by collective agreements and even in equality plans are mere formalities but others have served to increase gender equality in such companies.

In Spain collective agreements are binding. If the negotiators have the subjective legitimacy as established in the Workers' Statute the collective agreements will have a 'general' effect, which implies that it will be applicable to every employer and employee included in its scope, independently of his/her union affiliations, if any. If the negotiators do not have this subjective legitimacy the collective agreement will not have general effect, but it will be applicable to the employers and employees affiliated to the unions and associations that signed the collective agreement.

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<sup>89</sup> Article 45(1) of the Law on Effective Equality.

<sup>90</sup> Article 46 of the Law on Effective Equality.

## 12. Overall assessment

In general the implementation of the gender discrimination directives in Spain is satisfactory. However, it has to be highlighted that most of the transpositions have been done in a formal way, simply reproducing literally the text of the directives. For instance, the concepts of direct discrimination, indirect discrimination, gender harassment and sexual harassment in the Spanish Law on Effective Equality are almost identical to Article 2 of the Recast Directive. In the same way, Articles 69, 70, 71 and 72 of the Spanish Law on Effective Equality simply reproduce the text of Directive 2004/113 about access to goods and services. There are many other examples of this phenomenon in Spanish legislation. This way of transposing European Union legislation is formally adequate but shows a certain lack of interest of the Spanish institutions in effectively removing the obstacles for real equality between women and men by adapting the European Union's instructions to the particularities of Spanish society.

There are certain aspects of the gender discrimination directives that have not been properly transposed into Spanish legislation. In relation to Directive 2010/18, on parental leave, there are several deficiencies: First, nothing has been established in order to guarantee that employers consider and respond to requests for changes to parents' working hours and/or patterns for a set period of time when they come back to work after a parental leave as established in Article 6 of Directive 2010/18; second, time off from work on the grounds of *force majeure* cannot be considered as completely guaranteed by Spanish law, at least as required by Clause 7 of Directive 2010/18, because there is no general permission applicable in cases of sickness or accident 'that makes the immediate presence of the worker indispensable'; and third, Spanish legislation does not consider the interests of workers in specifying the length of notice periods for parental leave as required by Clause 3.2 of Directive 2010/18. In relation to the Recast Directive, the Institute for Women and equal opportunities is not independent from the Government because it is part of the Government, so it does not guarantee the independence that the Directive requires. It has to be noted as well that Spanish legislation has not transposed the Recommendation of the European Commission of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency.

Generally, the ordinary Spanish Courts of Justice adequately apply Spanish and European Union legislation on gender discrimination. In fact, it is quite common for the judgments of the Spanish courts to contain references to the judgments of the CJEU. It is also interesting to note that the number of preliminary rulings at the CJEU being asked for by the Spanish judges is particularly high. However, the position in respect of the current Constitutional Court is not as it used to be in the past, especially during the years of transition to democracy, when it vigorously reinforced the protection against gender discrimination. The reason for the change of attitude of the Constitutional Court can be found in the current composition of the High Tribunal, whose members are appointed by the Government and by political parties. Two examples of this new attitude are the following: 1) The Judgment of the Constitutional Court 154/2014 of 25 September 2014 ruled that the male applicant in a case of indirect discrimination against women did not have the right to request the nullification of a certain discriminatory social security provision. The judgment ignored that a provision that is discriminatory (directly or indirectly) is null and void for everyone, i.e. both women and men. 2) The Judgment of the Constitutional Court 173/2013 of 10 October 2013 ruled that the dismissal of a pregnant woman during the probationary period is not automatically considered null and void if the employer argues that he/she did not have knowledge of the pregnancy. The main problem with this interpretation of the Constitutional Court is that the claim of lack of knowledge on the part of the employer in cases where there has been no communication on the part of the pregnant worker about her condition could be virtually uncontested. This could result in ineffective protection against contractual termination of pregnant women during their trial period, which could potentially counteract the principles laid down in Directives 92/85 and 2006/54. Spanish legislation has not expressly transposed some

gender discrimination directives because this was considered unnecessary. For example, in Spain there is no specific legislation that expressly transposes Directive 79/7. Apparently, Spanish legislation complies with Directive 79/7. However, the existence of indirect discrimination in Spain was detected by the CJEU in the *Elbal* case in relation to the requirements to accrue contributory pensions that apply to part-time workers and also in the *Espadas Recio* case. Spanish legislation had to be changed in accordance with the CJEU's ruling. The issue that arises is that there could be many other provisions in Spanish social security legislation that could constitute indirect discrimination. In fact, there have been several preliminary rulings recently submitted to the CJEU by Spanish courts on this subject.<sup>91</sup> There is also a concrete problem in relation to the pension supplement that was established exclusively for mothers in Article 60 of the general Law of Social Security in 2015, given that it implies a difference between mothers and fathers that take care of children that could be in violation of Article 7.2 of Directive 79/7, since these differences should tend to disappear, not to be newly established.

However, the main problem of Spanish legislation on gender discrimination is its lack of efficiency. Theoretically, there are many mechanisms for the intervention by interest groups and legal entities for the defence of victims of discrimination. However, these actions are quite rare and most cases of gender discrimination submitted to the courts are pursued by individual victims. The Institute for Women and equal opportunities theoretically has the possibility to initiate proceedings against offenders in cases of discrimination but it rarely does so. The same happens with the most representative trade unions. The Labour Inspectorate theoretically has the possibility to investigate employers who discriminate against women but its intervention depends on the instructions and preferences given by the Labour Authorities. The Labour Authority does not take action to identify collective agreements with discriminatory provisions as expressly stipulated in Article 90(6) of the Workers' Statute.

There are, however, some interesting measures that have been implemented in Spanish legislation that could be examples of good practices, although many of them are already quite old. One example is Article 75 of the Law on Effective Equality, which states that companies that are obliged to submit a non-abbreviated profit and loss account will have to include on their Company Board a number of women that allows them to reach a balanced presence of women and men in a period of eight years from the date of entry into force of the Law (at least 40 % women). The deadline for this was March 2015 and the objective was not reached. However, from 2007 until 2015 the participation of women on the Company Boards has increased significantly. The Law on Effective Equality also recommends a balanced presence of women and men (at least 40 % women) in the following fields: political candidate lists and decision-making bodies (Article 14); members of the governing bodies of the General Administration of the State and of the public entities linked to or dependent on it (Article 16); tribunals and bodies of selection of the staff of the General Administration of the State and public entities linked to or dependent on it (Article 53). Moreover, Article 60 of the Law on Effective Equality stipulates that at least 40 % of the training places for promotion in public administration will be reserved for women. Some of these recommendations of the Law on Effective Equality have been followed to a satisfactory degree.

Article 55(5) of the Workers' Statute is another example of good practice. It establishes that if a dismissal takes place during any parental leave, it is considered null and void unless there is a justified cause, in the same terms as those governing pregnancy or maternity leave. The period of nine months after a child's birth is also protected by the nullity of the dismissal. In relation to parental leave, it is also quite interesting to note that, in Spanish legislation, the possibility for one parent to transfer part of the parental

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<sup>91</sup> For instance, judgement of the CJEU of 14 of April 2015, Case 527/13 *Cachaldora Fernandez* [2015] ECR n.y.r.; or judgement of the CJEU of 17 November 2015, Case 137/15 *Plaza Bravo* [2015] ECR n.y.r. In these Cases, however, the CJUE did not consider that Spanish legislation violated Directive 79/7.



leave to the other parent does not exist. Parental leave can be taken fully by the mother and the father, even accumulatively in certain cases.

## Annexes

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