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# Country report

## Gender equality



Croatia  
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# **Country report**

## **Gender equality**

How are EU rules transposed into  
national law?

### **Croatia**

Adrijana Martinović

Reporting period 1 January 2018 – 31 December 2018

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# 1 Introduction

## 1.1 Basic structure of the national legal system

Croatia is a unitary and indivisible democratic and welfare state (Article 1 of the Constitution). The Croatian legal system is a civil law system, and the government is organised according to the principle of the separation of powers into legislative, executive and judicial branches, but is also limited by the constitutionally guaranteed right to local and regional self-government. The legal system is characterised by a hierarchy of legal norms, whereby laws must comply with the Constitution, and other regulations must comply with laws and the Constitution. International agreements that have been concluded and ratified and that have been published and entered into force are part of the internal legal order and have primacy over laws. The Croatian Parliament adopts laws, usually by a majority vote, provided that a majority of its representatives are present at the session. Organic laws regulating the rights of minorities are adopted by a two-thirds majority of all representatives and other organic laws, for example those elaborating constitutionally established human rights and fundamental freedoms (including anti-discrimination laws) are adopted by a majority vote of all representatives. Organic laws are thus laws whose adoption requires a special majority of votes. Adoption of this category of laws is stipulated in the Constitution (Article 83). Anti-discrimination legislation is organised around three main levels of protection: the Constitution (the prohibition of discrimination and the guarantee of gender equality), special horizontal anti-discrimination (organic) laws and other laws containing anti-discrimination provisions. Anti-discrimination laws in general and gender equality legislation in particular are adopted at national level.

The general and special jurisdiction of the courts is prescribed in the Judiciary Act and other special laws (such as the Civil Procedure Act, the Criminal Procedure Act, etc.). Judicial powers in the Republic of Croatia are exercised by regular and special courts (Article 14(1) and (2) of the Judiciary Act). The regular courts are the municipal and county courts. The highest judicial authority is the Supreme Court of the Republic of Croatia. The municipal courts are vested with a general and broad open-ended catalogue of competences. In civil proceedings, they adjudicate in the first instance in disputes relating to civil, family, labour, housing and other areas of law, which are not part of the first instance jurisdiction of other courts in accordance with special laws (Article 34(2) Civil Procedure Act). Pursuant to the Anti-Discrimination Act, municipal courts have subject-matter jurisdiction in litigation based on special legal action for protection against discrimination (Articles 17(1) and 18(1) of the Anti-Discrimination Act).<sup>1</sup> County courts adjudicate in the first instance in disputes prescribed by law and decide on appeal against decisions of the municipal courts. In the field of equality law, county courts have subject-matter jurisdiction regarding joint legal actions (representative actions) for protection against discrimination.<sup>2</sup> The Supreme Court is the highest judicial authority, and is responsible for ensuring the uniform application of laws and the equality of all before the law (Article 116 of the Constitution of the Republic of Croatia).

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<sup>1</sup> Apart from the special legal action for protection against discrimination, the Anti-Discrimination Act authorises any person who claims that her/his rights have been violated as a result of discrimination to seek protection in proceedings dealing with that right as the main issue (Article 16(1) Anti-Discrimination Act). The Gender Equality Act authorises any party who considers that her/his rights have been violated due to discrimination as described in that act to file a legal action with the regular court of general jurisdiction (Article 30(1) Gender Equality Act); in other words, to initiate litigation before a municipal court.

<sup>2</sup> Pursuant to Article 24(1) of the Anti-Discrimination Act, associations, bodies, institutions or other organisations established in line with the law and having a justified interest in protecting the collective interests of a certain group, or those which within their scope of activities deal with the protection of the right to equal treatment, may bring a legal action against a person that has violated the right to equal treatment. Representative action is a form of collective redress available under the Gender Equality Act as well, but the general conditions are prescribed in the Anti-Discrimination Act.

In civil proceedings, the Supreme Court's competences include deciding on appeals against first-instance decisions of county courts and revisions as extraordinary legal remedies against (final and binding) second-instance decisions, in cases prescribed by law.

The Constitutional Court of the Republic of Croatia decides on the compliance of laws with the Constitution, the compliance of other regulations with the Constitution and laws, and on constitutional claims against individual decisions taken by government agencies, bodies of local and regional self-government and legal persons vested with public authority where such decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia (Article 125 of the Constitution of the Republic of Croatia). Every individual or legal person has the right to propose the initiation of proceedings to review the constitutionality of the law and the legality and constitutionality of other regulations (Article 38(1) of the Constitutional Act on the Constitutional Court of the Republic of Croatia).<sup>3</sup> Everyone may lodge a constitutional complaint with the Constitutional Court if he/she deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority that decided on his/her rights and obligations, or on the suspicion or accusation of a criminal act, has violated his/her human rights or fundamental freedoms guaranteed by the Constitution, or his/her right to local and regional self-government guaranteed by the Constitution (Article 62(1) of the Constitutional Act on the Constitutional Court of the Republic of Croatia).

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

- The Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*) *Narodne novine* (NN; Official Gazette of the Republic of Croatia) Nos. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14;
- Anti-Discrimination Act (*Zakon o suzbijanju diskriminacije*), NN Nos. 85/08 and 112/12;
- Gender Equality Act (*Zakon o ravnopravnosti spolova*) NN Nos. 82/08, 125/11, 20/12, 138/12 and 69/17;
- Same-Sex Life Partnership Act (*Zakon o životnom partnerstvu osoba istog spola*) NN No. 92/14;
- Labour Act (*Zakon o radu*) NN Nos. 93/14 and 127/17;
- Act on Maternity and Parental Benefits (*Zakon o roditeljskim potporama*) NN Nos. 85/08, 110/08, 34/11, 54/13, 152/14 and 59/17;
- Safety at Work Act (*Zakon o zaštiti na radu*) NN Nos. 71/14, 118/14, 154/14, 94/18 and 96/18;
- Act on Pension Insurance Companies (*Zakon o mirovinskim osiguravajućim društvima*) NN Nos. 22/14, 29/18 and 115/18;
- Act on Voluntary Pension Funds (*Zakon o dobrovoljnim mirovinskim fondovima*) NN Nos. 19/14, 29/18 and 115/18.

## **1.3 Sources of law**

The main sources of gender equality law in Croatia are the Constitution, international treaties that have been signed and ratified in accordance with the Constitution, EU law and national legislation. Laws have to comply with the Constitution. International treaties that are in force are part of the internal legal order and have primacy over laws, but are subordinate to the Constitution. EU legal acts and decisions are applied in accordance with the *acquis communautaire*.

Decisions of national courts are binding only upon the parties to the proceedings (*intra partes* effect). Constitutional Court decisions are binding for all natural and legal persons

<sup>3</sup> Croatia, Constitutional Act on the Constitutional Court of the Republic of Croatia (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*), *Narodne novine* (NN; Official Gazette of the Republic of Croatia) Nos. 99/99 and 29/02.



(*erga omnes* effect) and are published in the *Official Gazette*. The Supreme Court is required to convene a meeting with the presidents of county courts at least once every six months, in order to discuss current legal issues important for appellate courts, with the aim of preventing discrepancies in case law.<sup>4</sup> Conclusions from the meeting are published on the internet site of the Supreme Court. However, these conclusions should not in any way affect the independence and freedom of lower courts to adjudicate in individual cases. Legal reasoning adopted at the session of all judges or a certain department at the Supreme Court or other higher courts, including county courts is binding for all appellate chambers or individual judges of that court or department.<sup>5</sup>

Opinions and recommendations of the Ombudsperson for gender equality (as well as all other ombudsmen) do not have a binding effect.

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<sup>4</sup> Croatia, Judiciary Act (*Zakon o sudovima*), Article 27(3), NN Nos. 28/13, 33/15, 82/15, 82/16 and 67/18.

<sup>5</sup> Croatia, Judiciary Act, Article 40(2). The session is convened if it is established that there are discrepancies in interpretation of a particular legal issue or if a judge or chamber departs from the previously adopted legal reasoning.

## **2 General legal framework**

### **2.1 Constitution**

#### **2.1.1 Constitutional ban on sex discrimination**

Gender equality, along with freedom, equal rights, national equality, peace-making, social justice, respect for human rights, the inviolability of ownership, the conservation of nature and the environment, the rule of law and a democratic multiparty system, is one of the highest values of the Croatian constitutional order and a ground for the interpretation of the Constitution (Article 3 of the Constitution).

A general equality provision with a non-exhaustive list of prohibited discriminatory grounds is contained in Article 14(1) of the Constitution. It stipulates that everyone in Croatia shall have rights and freedoms, regardless of race, skin colour, sex, language, political or other opinion, national or social origin, property, birth, education, social status or other characteristics.

#### **2.1.2 Other constitutional protection of equality between men and women**

Apart from Articles 3 and 14, the only remaining constitutional provision protecting the equality between men and women is to be found in Article 17, which regulates the restrictions of fundamental rights and freedoms in extraordinary situations. Individual constitutionally guaranteed rights and freedoms may be restricted during a state of war or any clear and present danger to the independence and unity of the Republic of Croatia, or in the event of any natural disaster (Article 17(1) of the Constitution). The extent of such restrictions must be proportionate to the nature of the threat, and may not result in the inequality of citizens with respect to race, colour, sex, language, religion, national or social origin (Article 17(2) of the Constitution).

However, protection of equality between men and women, even though it is not expressly mentioned, is inherent in the constitutional protection of the right to personal and family life, as well as human dignity, as guaranteed under Article 35 of the Constitution.

### **2.2 Equal treatment legislation**

In Croatia, there are two main equal treatment legislative acts: the Gender Equality Act and the Anti-Discrimination Act. Both acts explicitly prohibit sex discrimination. The Gender Equality Act is specifically aimed at the protection and promotion of gender equality as a fundamental value of the Croatian constitutional order and defines and regulates methods of protection against discrimination based on sex, while also creating equal opportunities for men and women (Article 1, Gender Equality Act). The Anti-Discrimination Act is a horizontal, 'umbrella' act in the field of the prohibition of discrimination and the creation of equal opportunities, and includes an exhaustive list of 21 prohibited discriminatory grounds: sex, race, ethnic origin, skin colour, language, religion, political or other opinion, national or social origin, property, trade union membership, education, social status, marital or family status, age, health, disability, genetic heritage, gender identity and expression and sexual orientation (Article 1(1) Anti-Discrimination Act).

### 3 Implementation of central concepts

#### 3.1 General (legal) context

##### 3.1.1 Surveys on the definition, implementation and limits of central concepts of gender equality law

The 2017 'Analysis of case law in anti-discrimination claims before the Croatian courts' reveals the main challenges in the implementation of anti-discrimination legislation.<sup>6</sup> It is focused on the implementation of the Anti-Discrimination Act in practice, but the findings concerning the understanding of the main concepts may apply in the field of gender equality law as well. In the early years of the application of the anti-discrimination legislation, many claims were dismissed because the parties misunderstood or misapplied the definition of discrimination, wrongly identified the discriminatory ground or changed it during the proceedings, or did not even specify the discriminatory grounds. Among the outstanding issues, the shifting of the burden of proof is still problematic: many claims were dismissed because the claimant either did not offer any proof of probability of discrimination or the court misapplied the rules by putting too much burden on the claimant to prove the existence of *prima facie* discrimination. The researchers have also noticed that there is no uniform understanding among lower courts of discriminatory intent, since many of them required the parties to show such intent on part of the defendant. Finally, the Supreme Court has taken a clear stand that discriminatory intent is irrelevant for the existence of discrimination.<sup>7</sup>

The majority of research on discrimination and gender equality is concerned with the public perception of discrimination and not with the legal definitions and issues of implementation. For example, in research conducted by the Ombudswoman in 2016, the participants were presented with a multiple-choice question 'What does discrimination mean for you personally?'. The results found that differentiation based on sex was recognised as discrimination by 16.9 % of participants. Other, 'more important' grounds for discrimination recognised in the Croatian society included differentiation based on religion, skin colour and nationality.<sup>8</sup> The same research found that about one fifth of participants either fully or mostly agreed with the statement that women and men are not equal by nature, so they cannot have equal roles in the society.<sup>9</sup>

One of the most valuable sources for evaluation of the implementation of central concepts of gender equality are annual reports by the Ombudsperson for Gender Equality, an independent body set up under the Gender Equality Act to monitor the application of the gender equality legislation and to act in cases of individual sex discrimination complaints. The reports are concentrated on particular fields and present the work of the body in the preceding calendar year, including some practical cases handled by the Ombudsperson. The Ombudsperson for Gender Equality periodically conducts more comprehensive research on certain issues. However, the most recent general surveys on the implementation and application of gender equality in case law date back to 2012 and

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<sup>6</sup> Kesonja, D., Šimonović Einwalter, T. (2017), *Analysis of case law in anti-discrimination claims before the Croatian courts (Analiza sudske prakse u postupcima pred hrvatskim sudovima pokrenutima zbog diskriminacije)* CES, pp. 18-20, available at [https://www.cms.hr/system/publication/pdf/104/Analiza\\_sudske\\_prakse\\_u\\_postupcima\\_pred\\_hrvatskim\\_sudovima\\_pokrenutima\\_zbog\\_diskriminacije.pdf](https://www.cms.hr/system/publication/pdf/104/Analiza_sudske_prakse_u_postupcima_pred_hrvatskim_sudovima_pokrenutima_zbog_diskriminacije.pdf).

<sup>7</sup> Supreme Court, GŽ-21/2013.

<sup>8</sup> Ombudswoman of the Republic of Croatia (2017), 'Survey on attitudes and perception of discrimination and its forms' (*Istraživanje o stavovima i razini svijesti o diskriminaciji pojavnim oblicima diskriminacije*), available at <https://ombudsman.hr/attachments/article/1147/Istraživanje%20-%20diskriminacija%202016.pdf>.

<sup>9</sup> For an older study on perception of gender equality in discrimination, see Kamenov, Ž., Galić, B. (2011), *Rodna ravnopravnost i diskriminacija u Hrvatskoj* (Gender equality and discrimination in Croatia) Ured za ravnopravnost spolova Vlade Republike Hrvatske.

2010,<sup>10</sup> so it is high time for a new survey, especially as the Croatian courts are starting to get more involved in anti-discrimination and gender equality cases. Currently, the Ombudsperson for Gender Equality is conducting a more specialised research study concentrated on case law in the field of domestic violence.<sup>11</sup>

### 3.1.2 Other issues

The fact that there are two acts explicitly prohibiting sex discrimination (the Anti-Discrimination Act and the Gender Equality Act) and the fact that they contain definitions of the same central concepts causes some confusion. The wording of the definitions of, e.g., direct and indirect discrimination, harassment or sexual harassment in these two acts is overlapping but not entirely identical. It seems that the judiciary 'prefers' the application of the Anti-Discrimination Act and the legal concepts defined therein, even where it is quite obvious that they are dealing with a case of gender equality.<sup>12</sup> It is very hard to find a reasonable explanation for such a situation. Although it would be legally correct and more precise to use and refer to the specific legal basis for gender discrimination, the existing practice has not caused substantial differences as to the outcome or finding of discrimination. In any case, the two acts have to be combined, because the Anti-Discrimination Act contains more elaborate provisions on judicial protection, especially concerning the possibility to file a representative (associational) action;<sup>13</sup> or concerning justified exceptions from discrimination.

### 3.1.3 General overview of national acts

The Anti-Discrimination Act and the Gender Equality Act both prohibit discrimination based on sex and contain definitions and provisions on direct and indirect discrimination, harassment and sexual harassment and positive action. In addition to sex discrimination, the Gender Equality Act explicitly prohibits and includes discrimination based on family and marital status, pregnancy and maternity and sexual orientation under the definition of sex discrimination. The Anti-Discrimination Act also includes sex, family and marital status and sexual orientation in the list of its prohibited discriminatory grounds. In addition, the Anti-Discrimination Act expressly includes gender identity and expression. Other central concepts of gender equality and anti-discrimination law, such as instruction to discriminate, segregation, multiple discrimination, and repeated or continued discrimination are regulated in the Anti-Discrimination Act. The Labour Act regulates labour law protections for pregnant workers, parents and adoptive parents (Articles 30-36; 68; 86; 134 of the Labour Act), as well as the guarantee of equal pay for equal work or work of equal value between men and women (Article 91 of the Labour Act).

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<sup>10</sup> Ombudsperson for Gender Equality (2012), 'Prevalence of Anti-Discrimination Case Law' (*Učestalost antidiskriminacijskih predmeta u sudskoj praksi*), available at <https://www.prs.hr/attachments/article/728/Učestalost%20anti-diskriminacijskih%20predmeta%20u%20sudskoj%20praksi.pdf>; Ombudsperson for Gender Equality (2010), 'Analysis of anti-discrimination case law' (*Istraživanje sudske prakse u području antidiskriminacijske zaštite*), available at <https://www.prs.hr/attachments/article/181/Istraživanje%20sudske%20prakse%20u%20području%20anti-diskriminacijske%20zaštite.pdf>.

<sup>11</sup> The research is conducted within the EU funded project 'Building more effective protection: transforming the system for combating violence against women', No. JUST/2016/RGEN/AG/VAWA/9940, more information available at <http://www.vawa.prs.hr>.

<sup>12</sup> See, for example, Supreme Court, Revr-384/2017 and County court in Zagreb, Gž-1225/2015.

<sup>13</sup> Associations, bodies, institutions or other organisations established in line with the law and having a justified interest in protecting the collective interests of a certain group, or those which within their scope of activities deal with the protection of the right to equal treatment, may bring a legal action against a person who has violated the right to equal treatment, which is known by the name 'representative' or 'associational' action (Article 24(1) of the Anti-Discrimination Act). If the existence of discrimination is determined in a judgment rendered in this type of proceedings, that determination and judgment are binding for all courts in any subsequent litigation initiated by natural persons and legal entities for the compensation of damages (Article 502.c of the Civil Procedure Act).

### 3.1.4 Political and societal debate and pending legislative proposals

There are no recent legislative proposals concerning the central concepts of gender equality, but there is a recurring public and political debate on the concepts of sex and gender. For example, the central argument of the forces against the ratification of the Istanbul Convention was that it introduces 'gender ideology' into the Croatian legal framework and political discourse, which is, according to this line of thought, bound to destroy the traditional family and Catholic values inherent in the Croatian society.

## 3.2 Sex/gender/transgender

### 3.2.1 Definition of 'gender' and 'sex'

Although the Constitution, as well as a wide variety of national legislative acts, by-laws and other regulations refer to gender and/or sex, there is no legislative definition of either concept. Actually, the more widely used term in the Croatian legislation is 'sex' (*spol*), but the understanding of the term is very wide, which is why the majority of translations to English refer to 'gender' (*rod*).<sup>14</sup> For example, the Constitution and the Croatian Gender Equality Act refer mainly to 'sex' (*spol*), not 'gender' (*rod*).<sup>15</sup> A literal translation of the Gender Equality Act (*Zakon o ravnopravnosti spolova*) would be 'Sex Equality Act', although that would not adequately transfer the meaning and scope of this act. There is a specific mention of gender identity and expression as a protected ground under the Anti-Discrimination Act (Article 1(1)). Given this broad understanding of both terms, the Constitutional Court also explicitly states that

'sex and gender diversity are protected by the Constitution in the Republic of Croatia. The rights of all persons, regardless of sex or gender, concerning respect and legal protection of their personal and family life and human dignity are guaranteed (Article 35 of the Constitution). These legal facts are today considered to be an enduring value of the Croatian constitutional state.'<sup>16</sup>

Since the entry into force of the Istanbul Convention,<sup>17</sup> the definition of gender for the purposes of the application of this convention has entered into the Croatian domestic legal order. Gender is defined in Article 3(1)(c) to mean 'the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men'.

The definition of the terms sex and gender can be found in the 'Professional guidelines for elaboration of opinion of health workers and psychologists on the establishment of conditions and requirements for sex change and living in another gender identity', adopted by the Ministry of Health in 2016.<sup>18</sup> The definition used in the guidelines is not a legal definition, but a restatement of standard definitions of these two concepts used in scientific literature. It refers to sex as a set of biological features (chromosomal, gonadal, phenotypic) that a person is born with. The legal category of sex is ascribed at birth, based

<sup>14</sup> See, for example, the English translation of the Gender Equality Act by the Office for Gender Equality (Ured za ravnopravnost spolova), available at <https://ravnopravnost.gov.hr/UserDocsImages//dokumenti/Zakoni/2018//Act%20on%20Gender%20Equality%20ENG.pdf>) and Ombudsperson for Gender Equality, available at [https://www.prs.hr/attachments/article/2126/Act%20on%20Gender%20Equality%20\(Official%20Gazette%202082\\_08\)%20web.pdf](https://www.prs.hr/attachments/article/2126/Act%20on%20Gender%20Equality%20(Official%20Gazette%202082_08)%20web.pdf)).

<sup>15</sup> The only explicit mention of gender in the Gender Equality Act is in Article 14(3), which requires the elimination of gender stereotypes in education at all levels and promotion of gender aspects in education.

<sup>16</sup> Constitutional Court of the Republic of Croatia, Communication on the People's Constitutional Referendum on the definition of marriage, SuS-1/2013 of 14 November 2014, para 7.2.

<sup>17</sup> Croatia, Act on Ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence, NN No. 3/2018. In accordance with the rules of the Convention, for Croatia, it entered into force on 1 October 2018.

<sup>18</sup> Croatia, *Stručne smjernice za izradu mišljenja zdravstvenih radnika i psihologa o utvrđivanju uvjeta i pretpostavki za promjenu spola i životu u drugom rodnom identitetu*, NN No. 7/16.

on the appearance of external genital organs. Gender is referred to as a complex psychological and social category that includes gender identity, gender expression and gender roles.

### 3.2.2 Protection of transgender, intersex and non-binary persons

The non-discrimination and equality law framework protects transgender, intersex and non-binary persons from discrimination under the categories of gender identity and expression, and sex. There is no differentiation of these categories for transgender, intersex and non-binary persons. The Constitution contains an open anti-discrimination clause in its Article 14(1), guaranteeing equal rights and freedoms to every person, regardless of race, skin colour, sex, language, political or other opinion, national or social origin, property, birth, education, social status or other characteristics. One of the discriminatory grounds explicitly listed in Article 1(1) of the Anti-Discrimination Act is gender identity and expression. Although there is no explicit mention of transgender, intersex and non-binary persons, both the Anti-Discrimination Act and the Gender Equality Act are the legislative instruments for their protection from discrimination.

Sex discrimination is defined in Article 6(1) of the Gender Equality Act in very broad terms, so as to include any difference, exclusion or restriction on the grounds of sex with the effect or purpose of jeopardising or frustrating the recognition of, benefit from or exercise of human rights and fundamental freedoms in the political, economic, societal, educational, social, cultural, civil or other area on the grounds of equality between men and women. Discrimination due to gender reassignment is not expressly covered by the legislative framework, but it is also incorporated under the same protected categories.

### 3.2.3 Specific requirements

Non-discrimination laws protect all individuals, without having to satisfy any specific requirement. Transgender persons are not required to undergo gender confirmation or sterilisation surgery, nor to change their legal gender before they are protected by non-discrimination laws. Conditions for the change of legal gender are prescribed in the Ordinance on collection of medical documents and establishing conditions for change of gender and life in another gender identity.<sup>19</sup> The ordinance was adopted in 2014 by the Minister of Health, based on Article 9a of the State Registries' Act<sup>20</sup> and following a Decision of the Constitutional Court of 18 March 2014 and a report of the Constitutional Court of 8 April 2014.<sup>21</sup> The same conditions apply to any person who applies for the legal change of gender, regardless whether it is a transgender or intersex individual. The competent state administration office in the county issues a decision on registration of sex change in birth records, based on the opinion of the National Health Council. The opinion of the National Health Council is based on medical documentation required under the ordinance (i.e. opinions of a psychiatrist, psychologist and in certain cases endocrinologist, as well as the report of the competent Social Welfare Centre about personal and family circumstances).

No person shall be forced to undergo medical procedures, including gender reassignment surgery, sterilization, or hormonal therapy, as a condition for recognition of change of sex or living in a different gender identity (Article 2(2) of the 2014 ordinance).

There is no minimum age requirement, which means that minors are allowed to change legal gender. The 2014 ordinance requires only that the medical documentation/opinions substantiating the application submitted by applicants who are minors, or their parents or caretakers should be issued by psychiatrists, psychologists and endocrinologists

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<sup>19</sup> Croatia, Ordinance on collection of medical documents and establishing conditions for change of gender and life in another gender identity (*Pravilnik o načinu prikupljanja medicinske dokumentacije te utvrđivanju uvjeta i pretpostavki za promjenu spola ili o životu u drugom rodnom identitetu*), NN No. 132/14.

<sup>20</sup> Croatia, State Registries Act (*Zakon o državnim maticama*), NN Nos. 96/93 and 76/13.

<sup>21</sup> Constitutional Court of the Republic of Croatia, Decision U-IIIIB/3173/2012 and Report U-XA/1367/2014.

specialising in paediatric psychiatry, psychology and endocrinology. In addition, an opinion of the paediatrician is required as well.

### **3.3 Direct sex discrimination**

#### **3.3.1 Explicit prohibition**

Direct sex discrimination is not explicitly prohibited in the Gender Equality Act. However, the Anti-Discrimination Act contains a specific provision (Article 9(1), Anti-Discrimination Act) stipulating that discrimination in all its forms is prohibited. Articles 2-6 of the Anti-Discrimination Act define forms of discrimination (direct, indirect, harassment, sexual).

Article 7(1) of the Gender Equality Act defines direct discrimination as any treatment where, on the ground of sex, one person is treated, has been treated or would be treated less favourably than another in a comparable situation. This definition applies within the scope of the Gender Equality Act.

Another definition of direct discrimination is provided within the scope of the Anti-Discrimination Act. Article 2(1) of the Anti-Discrimination Act defines direct discrimination as any treatment where, based on one of the discriminatory grounds covered by that act (21 discriminatory grounds, see section 2.2.1 above), one person is treated, has been treated or would be treated less favourably than another in a comparable situation.

Both definitions of direct discrimination (from the Gender Equality Act and the Anti-Discrimination Act) comply with the EU definition.

#### **3.3.2 Prohibition of pregnancy and maternity discrimination**

Article 6(2) of the Gender Equality Act prescribes that any less favourable treatment of a woman related to pregnancy or maternity is discrimination. This definition is not confined to maternity leave, but to maternity as such, and is therefore even wider in scope than Article 2(2)(c) of Directive 2006/54. There is no explicit prohibition of pregnancy and maternity discrimination as a form of direct sex discrimination.

#### **3.3.3 Specific difficulties**

For a long time, the standard approach of the Croatian courts in anti-discrimination cases in general was to literally repeat the definition of direct and indirect discrimination from the relevant legislation, without really explaining which definition applied to the facts of the case in question and why.<sup>22</sup> However, this approach seems to be changing. In a decision of the Supreme Court, the concept of direct discrimination (based on sexual orientation) was interpreted to include the 'claimant's statement that homosexuals are persons who are unable to successfully play professional football due to their lack of aggression and devotion', because such a statement is 'liable to place one (homosexual) person in a less favourable position than another (male heterosexual) person in a comparable situation (the hiring of professional footballers)'.<sup>23</sup> This is a much more elaborate and facts-based approach to defining and applying this concept in the context of a particular case. In another decision from 2015 (also involving sexual orientation) the Supreme Court analyses at length the relevant provisions of the Anti-Discrimination Act on direct discrimination and concludes that the defendant 'could not have put anyone into less favourable position', because the 'discriminatory activity' (calling homosexuals sick)

<sup>22</sup> See, e.g. U-III-7490/2014; U-III-1016/2011; VSRH Revr-277/2007; VSRH Revr-650/2008; VSRH Revr-350/2009; VSRH Revr-856/2012; VSRH Revr-1051/2013. In all of these cases the courts reached the conclusion that there had been 'no discriminatory behaviour' on any ground whatsoever.

<sup>23</sup> VSRH Rev-300/13. See also the Decision of the Constitutional Court of 22 March 2017, U-III-872/2016, where the Court held that the constitutionally guaranteed freedom of expression also entails duties and responsibilities and could not 'exonerate' the claimant from his directly discriminatory statement.

was confined to the teaching of the Catholic religion in a school class, and based on religious and moral convictions, as well as the system of values of the Catholic church, which considers homosexuality to be contrary to nature and a sin. The Court considered this to be an expression of religious freedom and not direct discrimination. Furthermore, the Court reasoned that this activity could fall under the category of harassment but discarded such a conclusion on the facts of the case, because there was no aim or effect of violating human dignity.<sup>24</sup> There are further inconsistencies in case law, due to the fact that the Gender Equality Act and the Anti-Discrimination Act contain similar provisions and both cover discrimination based on sex. The existing case law on direct discrimination is more frequently based on the provisions of the Anti-Discrimination Act, even where the Gender Equality Act could have applied instead. In a decision from 2017 involving sexual harassment, the Supreme Court reversed the lower court's decision that there was no discrimination, and ruled that the extraordinary dismissal of a claimant (in this case the harasser) was legal, because his behaviour towards his female co-worker amounted to sexual harassment in the form of direct discrimination.<sup>25</sup> This was established on the facts of the case and application of the relevant provisions of the Anti-Discrimination Act, even though the provision of the Gender Equality Act on sexual harassment would have been a more obvious choice of applicable substantive law.

### **3.4 Indirect sex discrimination**

#### **3.4.1 Explicit prohibition**

Indirect sex discrimination is not explicitly prohibited in national legislation. However, Article 9(2) of the Anti-Discrimination Act prohibits all forms of discrimination. The definition of indirect discrimination is provided in the Anti-Discrimination Act and the Gender Equality Act.

Under Article 7(2) of the Gender Equality Act, indirect discrimination occurs where a neutral legal provision, criterion or practice puts persons of one sex at a disadvantage compared to persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Under Article 2(2) of the Anti-Discrimination Act indirect discrimination occurs where a neutral legal provision, criterion or practice puts or would put persons at a disadvantage based on any discriminatory ground listed in that act compared to other persons in a comparable situation, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The two definitions seem to be equal, except that the definition from the Anti-Discrimination Act is grammatically more precise ('puts or *would* put'), which also includes future hypothetical situations within the definition of indirect discrimination, whereas the Gender Equality Act refers to the present condition ('puts'). Although there has been no case law that specifically addresses this issue, it is highly unlikely that the courts would adhere to the strict grammatical interpretation of the provision from the Gender Equality Act.

To prevent any potential deviant interpretation, it would be better to amend the provision of Article 7(2) of the Gender Equality Act to include the conditional ('would put').

#### **3.4.2 Statistical evidence**

So far, there has not been any case law referring to or using statistical evidence for establishing a presumption of indirect discrimination.

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<sup>24</sup> Supreme Court, Gž-10/2015.

<sup>25</sup> Supreme Court, Revr-384/2017.



### 3.4.3 Application of the objective justification test

County court in Osijek, GŽ R-519/2017: the court applied the objective justification test for indirect discrimination by referring to Article 2(5) of Directive 2000/78/EC. In this case, the appellate court confirmed the first instance court's judgment that there was no indirect discrimination on the ground of age or sex. The dispute involved the application and interpretation of a decision on the severance pay for public servants and employees. The female claimant was denied the more advantageous severance pay for workers who terminate their employment relationship due to business rationalisation, because she had reached the statutory pensionable age for women (which is lower than that for men, so a male worker of the same age would be entitled to the first option, while she was not). Consequently, she fell under a more limited category of severance pay for workers who have reached retirement age. The court referred to Article 2(5) of Directive 2000/78/EC by stating that it applies without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. It further referred to the objective justification test from Article 6(1) of Directive 2000/78/EC and Article 9(1)(8) of the Anti-Discrimination Act and found the fact that the claimant fulfils the conditions for retirement are not discriminatory on grounds of age or sex, because they do not impede or limit the right acquired under the law. The employer's objective of rationalising their business by decreasing the number of public servants and employees, regardless of their sex, is legitimate, and determining different amounts of severance pay for workers who have not yet reached retirement age and for those who have, is a measure that is justified and necessary to achieve a legitimate goal, i.e. rationalisation of business. The court also denied comparison with the *Hlozek* case (C-19/02), because, according to the court, *Hlozek* was about the bridging allowance guaranteeing minimum social security to workers who lose their jobs, while this case is about additional rights, which the worker may or may not decide to draw on. Consequently, rationalisation of business is a legitimate aim, and the measure is objectively justified.

### 3.4.4 Specific difficulties

For many years after the adoption of the first non-discrimination legislation in Croatia, legal claims involving indirect discrimination were practically non-existent in the Croatian courts, as shown in a research conducted by the Ombudsperson for Gender Equality in 2012.<sup>26</sup> The situation is slightly improving. Sex discrimination complaints to the Ombudsperson for Gender Equality involving indirect discrimination have minimally increased in 2018 as compared to the year before. In 2018, 1.5 % of sex discrimination complaints to the Ombudsperson for Gender Equality concerned indirect discrimination (seven complaints), whereas there were no such complaints in 2017.<sup>27</sup> Despite the regular public awareness campaigns (mostly by the Ombudsperson for Gender Equality), the concept of indirect discrimination is still not widely recognised in Croatian society. There is only sporadic case law on indirect discrimination. There was a case involving a claim by a woman whose work performance was rated negatively in a profitability evaluation by her employer, because the evaluation took account of her earnings during sick leave to take care of a small child as an expense, while at the same time counting the hours that she was absent from work due to sick leave as non-profitable hours.<sup>28</sup> Consequently, she was

<sup>26</sup> See the Ombudsperson for Gender Equality (2012), *Special Report of the Ombudsperson for Gender Equality: Prevalence of anti-discrimination case law*, <http://www.prs.hr/attachments/article/728/U%C4%8Destalost%20anti-diskriminacijskih%20predmeta%20u%20sudskoj%20praksi.pdf>.

<sup>27</sup> Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, p. 8, available at: <https://www.prs.hr/attachments/article/2645/Izvjeste%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu%20~.pdf>. In 2017, no indirect discrimination complaints were recorded. See Ombudsperson for Gender Equality (2018), *Annual Report for 2017*, <http://www.prs.hr/attachments/article/2404/IZVJE%C5%A0%C4%86E%20O%20RADU%20ZA%202017.pdf>.

<sup>28</sup> County Court in Zagreb, GŽ-1225/2015.

the first in line for dismissal after the performance and profitability evaluation. She claimed discrimination based on family status and maternity, and indirectly based on sex, 'because it is customary for women to take sick leave to care for a child in our society' (apparently, no statistical evidence was put forward). The appellate county court in Zagreb set aside the judgment of the first instance court and referred the case back to the first instance municipal court for a new procedure, because it did not apply the rules on indirect discrimination and reversal of the burden of proof correctly when it dismissed the claim. The county court pointed to the provisions on indirect discrimination from the Anti-Discrimination Act,<sup>29</sup> and explained that 'the effects of such discrimination consist of indirect, covert application of a seemingly neutral and legally correct norm, criteria or practice'. The court emphasised that the first instance court erred in judgment when it required the claimant to show the probability of the defendant's intent to discriminate. The county court explained that intent is irrelevant for direct, 'and especially indirect discrimination'. The standard of probability required for the shifting of the burden of proof to the defendant is the existence of the 'reasonable suspicion that the potential motive of the defendant's behaviour lies in one of the discriminatory grounds'. This was shown through the undisputed fact that the claimant was on sick leave more often due to their child's illness, but also through witness testimonies, even though the court held that the testimonies represent subjective assessments of the witnesses. This was enough to shift the burden of proof to the defendant, to prove that no discrimination had taken place.

### **3.5 Multiple discrimination and intersectional discrimination<sup>30</sup>**

#### **3.5.1 Definition and explicit prohibition**

Multiple discrimination is defined in Article 6(1) of the Anti-Discrimination Act as discrimination against an individual on multiple grounds enumerated in the Anti-Discrimination Act. It is stipulated that multiple discrimination constitutes one of the severe forms of discrimination. Other severe forms of discrimination mentioned in the same provision include repeated discrimination (discrimination committed several times); continued or prolonged discrimination (discrimination occurring over a longer period of time) or discrimination with severe impact on the victim. A finding of multiple discrimination (or other previously mentioned forms) will be considered as a relevant circumstance when the court determines the amount of compensation for damages and the penalty for misdemeanours established under that act.

There is no mention of intersectional discrimination in legislation, nor are there any proposals pending to incorporate the concept of intersectional discrimination in national legislation. Given that there are still practical inconsistencies and other difficulties concerning the conceptual understanding of the main gender equality concepts, it can be imagined that the concept of intersectional discrimination would be very difficult to implement in the national legal framework. It is not inconceivable to invoke such a claim even at this time, but it would mean entering into a completely uncharted legal territory with little ability to predict the outcome.

#### **3.5.2 Case law and judicial recognition**

In 2017, there was one reported case of multiple discrimination, involving gender and nationality.<sup>31</sup> It involved a woman of Serbian nationality who was sexually abused in 1993

<sup>29</sup> The county court did not even mention that the same provisions exist in the Gender Equality Act, even if the Gender Equality Act is specifically aimed at sex discrimination, discrimination based on family status and maternity.

<sup>30</sup> See for more information Fredman, S. (2016) 'Intersectional discrimination in EU gender equality and non-discrimination law', European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb>.

<sup>31</sup> Ombudsperson for Gender Equality (2018), *Annual Report for 2017*, [http://www.prs.hr/attachments/article/2404/IZVJE%C5%A0%C4%86E\\_O\\_RADU\\_ZA\\_2017.pdf](http://www.prs.hr/attachments/article/2404/IZVJE%C5%A0%C4%86E_O_RADU_ZA_2017.pdf).

while being detained in a military facility during the Croatian War of Independence.<sup>32</sup> A special committee set up under the Act on the rights of victims of sexual violence during armed aggression against the Republic of Croatia in the Homeland War<sup>33</sup> denied her the status of a victim of sexual violence during the Homeland War. The competent administrative court set aside the disputed decision in 2018 and instructed the ministry to repeat the procedure for the recognition of the status of a victim of sexual violence during the Homeland War. Eventually, the case was decided in favour of the claimant, and she was granted the status with all the rights pertaining thereto.<sup>34</sup> However, the decision of the competent administrative court is not publicly available, so it is impossible to comment on whether the court actually discussed or investigated the possibility that multiple discrimination occurred. In a case involving female worker who claimed that she was paid less for the same work performed in the same duration than her younger male colleague, the courts found no discrimination based on sex and age.<sup>35</sup>

The gender equality bodies (the Ombudsperson for Gender Equality and the Office for Gender Equality) are active in promoting awareness about the categories of women who are especially at risk of multiple discrimination. These categories include women with a disability, women in rural areas, women of Roma ethnic origin, female victims of sexual violence during the Croatian War of Independence, and women in prostitution or victims of sex trafficking.<sup>36</sup> One case reported by the Ombudsperson for Gender Equality shows how fragile the position of persons exposed to multiple discrimination is. It concerned a deaf-mute woman from the Roma minority, who was subject to physical domestic violence by her husband.<sup>37</sup> The Ombudsperson established that there were many omissions on the part of the competent centre for social welfare, issued a recommendation to remedy these deficiencies and instructed the centre to take into account that the woman was a victim of multiple discrimination.

In cases where there are multiple grounds of discrimination, the Ombudsperson for Gender Equality cooperates with other special ombudsmen or the Public Ombudsman, where necessary, based on a cooperation agreement among those bodies from 2013.

### 3.6 Positive action

#### 3.6.1 Definition and explicit prohibition

Positive action is explicitly allowed in Croatian legislation. The legal term used instead of 'positive action' (which is used informally) is 'special' or 'specific'<sup>38</sup> measures. 'Special

<sup>32</sup> In Croatia this is referred to as the Homeland War.

<sup>33</sup> Croatia, Act on the rights of victims of sexual violence during armed aggression against the Republic of Croatia in the Homeland War (*Zakon o pravima žrtava seksualnog nasilja za vrijeme oružane agresije na Republiku Hrvatsku u Domovinskom ratu*), NN No. 64/15.

<sup>34</sup> Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, pp. 236-237, available at <https://www.prs.hr/attachments/article/2645/Izvješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravost%20spolova%20za%202018.%20godinu%20~.pdf>.

<sup>35</sup> However, none of the court decisions in the proceedings elaborate or interpret the concept of multiple discrimination. See Municipal Labour Court in Zagreb, Pr-1433/12, County Court in Zagreb, Gžr-2213/14; Constitutional Court of the Republic of Croatia, U-III-1711/2015.

<sup>36</sup> Ombudsperson for Gender Equality (2016), *Annual Report for 2015* <http://www.prs.hr/attachments/article/1923/Izvje%C5%A1%C4%87e%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravost%20spolova%20za%202015.pdf>; Office for Gender Equality (2016), *Report on the Activities of the Office in 2015*, available at <https://ravnopravnost.gov.hr/UserDocsImages/dokumenti/Izvje%C5%A1%C4%87a%20URS/2017/Izvje%C5%A1%C4%87e%20o%20radu%20Ureda%20za%20ravno%20pravost%20spolova%20Vlade%20RH%20u%202015.%20godini.pdf>.

<sup>37</sup> Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, pp. 131-132, available at <https://www.prs.hr/attachments/article/2645/Izvješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravost%20spolova%20za%202018.%20godinu%20~.pdf>

<sup>38</sup> The term 'specific' measures appears in unofficial English translations of the Gender Equality Act published by the Office for Gender Equality (available at <https://ravnopravnost.gov.hr/UserDocsImages//dokumenti/Zakoni/2018//Act%20on%20Gender%20Equality%20ENG.pdf>) and Ombudsperson for Gender Equality (available at

measures' are legally defined in the Gender Equality Act and the Anti-Discrimination Act. However, the differences in terminology do not result in any substantive differences between two terms. The regulatory bases for special measures are contained in the Gender Equality Act and the Anti-Discrimination Act.

Special measures under the Gender Equality Act are specific benefits for people of a certain gender that enable their equal participation in public life, eliminate existing inequalities or ensure rights they were previously denied.<sup>39</sup> Special measures can be enacted in laws and other regulations that regulate specific fields of public life.<sup>40</sup> They are introduced on a temporary basis with a view to achieving the genuine equality of women and men and they are not deemed as discrimination.<sup>41</sup>

The Anti-Discrimination Act introduces special measures in its provision regulating exceptions from discrimination.<sup>42</sup> Pursuant to this provision, unequal treatment as a result of special measures is not deemed as discrimination. A special measure is any temporary measure, which is necessary and appropriate for achieving real equality of societal groups suffering from adverse treatment based on any discriminatory ground covered by the act. It has to be based on laws, by-laws, programmes, measures or decisions with a view to improving the situation of ethnic, religious, linguistic or other minorities or other groups of citizens or persons discriminated under any ground covered by the act.

The definitions in the Croatian legislation are broader in scope than Article 157(4) TFEU, because they can be implemented in every sphere of public life, not just in vocational activity or professional careers.

### 3.6.2 Conceptual distinctions between 'equal opportunities' and 'positive action' in national law

The term 'equal opportunities' is used in legislation as a standalone legal concept. It is not used as a synonym for positive action. Among the overarching aims of the Gender Equality Act (set out in Article 1), is the establishment of equal opportunities for women and men. The definition of gender equality from Article 5 of the Gender Equality Act refers to 'equal opportunities': gender equality means that women and men have equal status and equal opportunities to realise all their rights. Although it is not explicitly prescribed, given that the term equal opportunities is predominantly used in the relevant legislation, positive action is also considered as a method of achieving 'equal opportunities'.

### 3.6.3 Specific difficulties

There is a rather elaborate legislative framework for positive measures in the Croatian legislation, but many of those measures have never actually been tested in practice. The Gender Equality Act provides a specific legal basis for the introduction of special measures in legislative, executive and judicial bodies, as well as public services, when one sex is significantly underrepresented. Significant underrepresentation exists where the representation of one sex in political and public decision-making bodies is less than 40 %.<sup>43</sup> Measures are aimed at increasing the share of the underrepresented sex until it reaches the level of its share in the overall population.<sup>44</sup> However, this is just one expression of

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[https://www.prs.hr/attachments/article/2126/Act%20on%20Gender%20Equality%20\(Official%20Gazette%202082\\_08\)%20web.pdf](https://www.prs.hr/attachments/article/2126/Act%20on%20Gender%20Equality%20(Official%20Gazette%202082_08)%20web.pdf)). The term 'special' measures will be used in this report to translate the Croatian term '*posebne mjere*' because it better conveys the meaning of the term.

<sup>39</sup> Croatia, Gender Equality Act, Article 9(1).

<sup>40</sup> Croatia, Gender Equality Act, Article 10.

<sup>41</sup> Croatia, Gender Equality Act, Article 9(2).

<sup>42</sup> Croatia, Anti-Discrimination Act, Article 9(2)(2).

<sup>43</sup> Croatia, Gender Equality Act, Article 12(3).

<sup>44</sup> Croatia, Gender Equality Act, Article 12(1). According to a recent Constitutional Court decision, where there is a collision between the rule of law and gender equality, which are both equal values of the constitutional order of the Republic of Croatia, the rule of law takes precedence (when it comes to the gender composition

the obligation to apply special measures, which falls on specific public sector bodies. There is no similar obligation for private sector entities. Under Article 10 of the Gender Equality Act, special measures may be enacted in any sphere of public life, but they are based on a decision adopted by public decision-making bodies (i.e. laws or other regulations).

Given the unused potential of the legislative basis, positive action seems to be, at least to some extent, implemented through various policy measures and activities, especially through active labour market policy measures. The basic strategic documents for the elimination of discrimination against women and the establishment of true gender equality in practice are national policies for gender equality, which are periodically drawn up by the Office for Gender Equality and adopted by the Croatian Parliament. However, after the *National Policy for Gender Equality for the Period 2011-2015*,<sup>45</sup> the new policy for the current period has not yet been prepared and adopted. Generally, all national policies so far have established key priority areas for action and prescribed the tasks of the competent institutions and bodies as well as time limits for their implementation. Reporting and monitoring mechanisms are also prescribed. Although most of the activities within the policy relate to education and awareness-raising, some fit the description of 'special measures' from the Gender Equality Act, although they are not referred to as such in the policy.<sup>46</sup>

As there are no examples of special measures in relation to gender equality being contested before national courts, it is not possible to assess the specific difficulties that may arise from the perspective of a judiciary. So far, there are only two Constitutional Court decisions that indirectly touch upon the issue of special measures in the field of gender equality.<sup>47</sup> Both of them seem to confirm that any special measure aimed to ensure the equal representation of both sexes can be weighed against other equally important values of the Croatian constitutional order, such as the rule of law or respect for a multi-party democratic system, and that those values can outweigh gender equality under certain circumstances.<sup>48</sup>

Public administration bodies and legal persons that are majority-owned by the state are required to analyse the position of women and men within their establishment and adopt action plans every four years to promote and establish gender equality, which may include positive action measures if necessary (Article 11(1) and (2) of the Gender Equality Act). The Office for Gender Equality has to approve the action plan before it is implemented. Failure to adopt the action plan may lead to financial sanctions for a misdemeanour offence. However, these plans, even when they exist, may do little to improve the individual situation of a job applicant from the underrepresented sex. There was an older case in which a male applicant for the job of kindergarten teacher complained that he was discriminated against on the ground of sex, because a female applicant was employed, even though male teachers were underrepresented at the establishment.<sup>49</sup> The court found

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of members of the State Judicial Council). See Constitutional Court, Decision U-III-248/2018 of 22 May 2018, para. 25.

<sup>45</sup> Croatia, *Nacionalna politika za ravnopravnost spolova, za razdoblje od 2011-2015*, NN no. 88/2011, unofficial English translation available at:

<https://ravnopravnost.gov.hr/UserDocsImages/arhiva/images/pdf//National%20Policy%20for%20Gender%20Equality%202011-2015.pdf>.

<sup>46</sup> E.g. under the heading 'Strengthen women's entrepreneurship', one of the activities is to increase the funds within the appropriate programmes and budgets earmarked for financing women's entrepreneurship.

<sup>47</sup> Constitutional Court, Decision U-III-248/2018 of 22 May 2018, para. 25 and Decision U-I-1397/2015 of 24 September 2015, paras. 123-124.

<sup>48</sup> In the Decision U-III-248/2018, out of 11 members of the State Judicial Council, a body responsible for the appointment of judges, 10 were men. According to the Constitutional Court, that fact did not violate the principle of equality. The role of the State Judicial Council is to ensure the rule of law, and this value takes precedence over gender equality. Similarly, in the Decision U-I-1397/2015, the Court annulled the provision in the legislation on elections, which provided for automatic invalidity of gender imbalanced election lists (i.e. those where one sex is represented at less than 40 %). When weighing two equally important constitutional values, such as gender equality and a multi-party democratic system, the latter takes precedence.

<sup>49</sup> Bjelovar County Court, GŽ-493/07.



that this circumstance by itself is not sufficient to conclude that the male applicant was discriminated against on the ground of sex. The claimant also argued that he should have had an advantage in applying for the job because the respondent's establishment had adopted a plan for the promotion of gender equality. However, the court concluded that the plan was invalid, because, at the time of the application, it had not been confirmed by the Office for Gender Equality.

#### 3.6.4 Measures to improve the gender balance on company boards

Currently, there are no binding measures in Croatia aimed at improving the gender balance in company boards and there are no legislative proposals pending.

The majority of efforts in this area consist of non-binding, awareness-raising and situation monitoring activities by the Ombudsperson for Gender Equality. A project conducted by the Ombudsperson for Gender Equality between 2013 and 2015 focused on equal access opportunities to the positions of economic decision-making, and it included a public awareness-raising campaign and a research component.<sup>50</sup> The research and the resulting publications represent the most valuable contribution and starting point for informed discussions and decisions about the possibility of improving the gender balance on Croatian company boards. During 2015, the Ombudsperson for Gender Equality conducted four studies within this project, investigating the participation of men and women in managerial positions, employers' perception of the importance of gender-balanced business decisions and women's perception of the barriers that they encounter in their business surroundings. The research included both joint stock companies and limited liability companies with public authority and without public authority, but the segregated data is not based on the public/private divide, but rather the structure of the company's management (i.e. a limited liability company with a management board and a supervisory board or without a supervisory board; joint stock companies with one or more members of the management board/supervisory board).<sup>51</sup> The majority of women who took part in the survey and who are members of company boards and/or hold managerial positions stated that women are exposed to discriminatory barriers in business surroundings, but are not in favour of binding legal instruments enacting a certain gender quota on company boards. Instead, they believe that such acts should be adopted at company level to reflect the commitment and will of employers.<sup>52</sup> The public campaign also included the launch of a special website<sup>53</sup> and media advertising, as well as various educational seminars and the public promotion of gender equality on company boards.

#### 3.6.5 Positive action measures to improve the gender balance in other areas

Positive action measures exist in the field of political participation. The Gender Equality Act prescribes that political parties and other candidates in elections for the European Parliament, the Croatian Parliament, as well as local and regional elections must gradually be obliged to establish gender-balanced election lists where candidates of one sex are underrepresented (less than 40 % of candidates) (Articles 12(3), 15(1) and (2) Gender Equality Act) until the third set of elections after the act's entry into force at the latest (counting the elections regardless of their level, this would have meant the local elections in 2013). However, the prevailing opinion was that an election at each level should be considered separately, so this obligation started with the local elections in May 2017. Monetary fines for a misdemeanour (a minor offence) of up to HRK 50 000 (EUR 6 730)

<sup>50</sup> PROGRESS project 'Removing the glass labyrinth – equal access opportunities to the positions of economic decision-making', available at <http://staklenilabirint.prs.hr/>.

<sup>51</sup> The results are available in the publication on the following link: [http://staklenilabirint.prs.hr/wp-content/uploads/2014/08/PRSRH\\_Izvjescje\\_muskarci-zene500\\_web.pdf](http://staklenilabirint.prs.hr/wp-content/uploads/2014/08/PRSRH_Izvjescje_muskarci-zene500_web.pdf).

<sup>52</sup> Ombudsperson for Gender Equality (2016), *2015 Annual Report*, available at <http://www.prs.hr/attachments/article/1923/Izvjescje%20C5%A1%C4%87e%20o%20radu%20Pravobraniteljice%20za%20ravnopravnost%20spolova%20za%202015.pdf>. All publications are available in the Croatian language at <http://staklenilabirint.prs.hr/publikacije/>.

<sup>53</sup> Stakleni labirint, available at <http://staklenilabirint.prs.hr/>.

(Article 35, Gender Equality Act) apply for violations of this obligation, but sanctioning will heavily rely on the readiness of the State Attorney's Office to prosecute political parties. Data provided by the State Election Committee shows a 41.67 % share of women in the total number of candidates in local elections in May 2017, which is a significant improvement compared to the local elections held in 2013, when the share of women candidates was 28.24 %.<sup>54</sup>

In 2015, there was an attempt to change the parliamentary electoral law to secure more balanced gender representation, but it was struck down by the Constitutional Court. On 13 February 2015, the Croatian Parliament adopted amendments to the Act on Parliamentary Elections,<sup>55</sup> which, inter alia, included the obligation to comply with the gender quota, with the objective of achieving balanced participation of women and men in political and public life. Article 21a of the amended Act on Parliamentary Elections<sup>56</sup> stipulated that political parties and independent candidates in parliamentary elections are obliged to comply with the principle of gender equality and to ensure a balanced representation of male and female candidates on their election lists. Independent candidates are also obliged to have election lists. In this case, the independent list has the same number of candidates as any party list, so the same percentage as a guarantee of a balanced representation of male and female candidates applies. According to the provision, the election list would be deemed to comply with these principles if it contained at least 40 % of candidates of both sexes. The implementation of this provision was guaranteed by clear sanctions for its violation: any election list not complying with the required 40 % gender quota would be deemed invalid and would not be accepted by the State Election Committee. However, in its Decision U-I-1397/2015 of 24 September 2015, the Constitutional Court of the Republic of Croatia annulled this provision of the Act on Parliamentary Elections, holding that the sanction of automatic invalidity is unacceptable and not proportionate in a democratic society. According to the Constitutional Court, there should not be two types of sanctions for lists that do not comply with the gender quotas (i.e. automatic invalidity, which is unconstitutional per se, and the monetary fines prescribed in the Gender Equality Act).

The current gender composition of the Croatian Parliament is not satisfactory, because women are underrepresented, with a share of only 18.66 %, compared to men who make up 81.34 % of members of Parliament.<sup>57</sup>

The Ombudsperson for Gender Equality has conducted an independent analysis of the local elections that took place in 2017 (the latest elections held in Croatia). According to her findings, the gender quota was not respected in 14 % of all election lists and 49 out of a total of 126 political parties participating at those elections had at least one election list that did not comply with the gender quota.<sup>58</sup> However, it seems that not all of them were sanctioned. The Ombudsperson has received information from only 22 out of 49 political parties in default of this obligation. Out of those 22, only 10 were subject to misdemeanour proceedings in court. A total of 30 misdemeanour proceedings were instituted by the competent state attorney's office, 11 of which ended in a conviction to pay monetary fine.

<sup>54</sup> Državno izborno povjerenstvo (State Election Committee), Local elections 2017, available at [https://ravnopravnost.gov.hr/UserDocsImages/arhiva/preuzimanje/izbori-2017/statistika\\_kandidature\\_2017.pdf](https://ravnopravnost.gov.hr/UserDocsImages/arhiva/preuzimanje/izbori-2017/statistika_kandidature_2017.pdf). See also Ombudsperson for Gender Equality, *Istraživanje: Lokalni izbori u Republici Hrvatskoj 2013. godine u odnosu na promicanje načela ravnopravnosti spolova* (Analysis: 2013 Local elections in the Republic of Croatia in view of the principle of gender equality), p. 7, available at <https://www.prs.hr/attachments/article/997/Izvj%C5%A1%C4%87e%20za%202013%20-%20Istra%C5%BEivanje%20-%20Lokalni%20izbori%202013.pdf>.

<sup>55</sup> Croatia, Act on Parliamentary Elections (*Zakon o izborima zastupnika u Hrvatski Sabor*), NN Nos. 116/99, 109/00, 53/03, 167/03, 44/06, 19/07, 20/09, 145/10, 24/11, 93/2011, 120/11 and 19/2015.

<sup>56</sup> Croatia, Amended Act on Parliamentary Elections (*Zakon o izmjenama i dopunama Zakona o izborima zastupnika u Hrvatski sabor*), NN No. 19/15.

<sup>57</sup> Data from 1 March 2017, available at <https://www.sabor.hr/hr/zastupnici/statisticki-pokazatelji>.

<sup>58</sup> Ombudsperson for Gender Equality (2019), *2018 Annual Report*, pp. 285-289, available at <https://www.prs.hr/attachments/article/2645/Izvj%C5%A1%C4%87e%20o%20radu%20Pravobraniteljice%20za%20ravnopravnost%20spolova%20za%202018.%20godinu~.pdf>.

There were two acquittals<sup>59</sup> due to the fact that the court concluded that public order was only insignificantly affected and that there was no need for sanctions. This evidence shows that public prosecution authorities do not pay much attention to these cases and that the sanctioning mechanism is not efficiently implemented in practice.

### **3.7 Harassment and sexual harassment**

#### **3.7.1 Definition and explicit prohibition of harassment**

The Gender Equality Act provides that harassment and sexual harassment will be considered as discrimination within the meaning of that act (Article 8(1), Gender Equality Act). Harassment is any unwanted conduct related to the sex of a person that occurs with the purpose or effect of violating the dignity of a person and which creates an unpleasant, hostile, degrading or offensive environment (Article 8(2), Gender Equality Act).

The Anti-Discrimination Act defines harassment as any unwanted conduct caused by any of the discriminatory grounds within the scope of that act with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading or offensive environment (Article 3(1), Anti-Discrimination Act). Both definitions comply with Directive 2006/54, but there is a slight grammatical and linguistic discrepancy. Whereas the Gender Equality Act refers to 'unpleasant', the Anti-Discrimination Act (following Directive 2006/54) mentions 'intimidating' environment. This implies that the definition in the Gender Equality Act could be interpreted even more extensively.

#### **3.7.2 Scope of the prohibition of harassment**

The Gender Equality Act applies in practically all spheres of public life (the media, employment, political participation, education, access to goods and services) and the definition of harassment therefore covers a broader scope than employment.

#### **3.7.3 Definition and explicit prohibition of sexual harassment**

The Gender Equality Act provides that harassment and sexual harassment will be considered as discrimination within the meaning of that act (Article 8(1), Gender Equality Act). Sexual harassment is any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that occurs with the purpose or effect of violating the dignity of a person, in particular when creating an unpleasant, hostile, degrading or offensive environment (Article 8(3), Gender Equality Act).

The Anti-Discrimination Act contains practically the same definition of sexual harassment (Article 3(2), Anti-Discrimination Act), with the difference that it refers to an 'intimidating' rather than an 'unpleasant' environment (see the explanation under section 3.6.1 above).

Both definitions comply with Directive 2006/54, but the definition in the Gender Equality Act may be interpreted even more extensively.

#### **3.7.4 Scope of the prohibition of sexual harassment**

The Gender Equality Act applies in practically all spheres of public life (the media, employment, political participation, education, access to goods and services) and the definition of sexual harassment therefore covers a broader scope than employment.

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<sup>59</sup> Other proceedings were pending at the time of the Ombudsperson's report. See Ombudsperson for Gender Equality (2019), *2018 Annual Report*, pp. 285-289, available at <https://www.prs.hr/attachments/article/2645/Izvješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu~.pdf>.



### 3.7.5 Understanding of (sexual) harassment as discrimination

Harassment and sexual harassment are explicitly considered as discrimination (Article 8(1), Gender Equality Act). There is no mention in the Gender Equality Act of 'any other less favourable treatment based on a person's rejection or submission to such conduct', but the act contains a non-regression clause in Article 4, guaranteeing that provisions of the act 'shall not be interpreted or implemented so as to restrict or diminish the content of warranties on gender equality enshrined in the universal rules of international law [and] the *acquis communautaire* of the European Community, [...]'. The Labour Act contains a specific provision which guarantees that the worker's rejection of harassment or sexual harassment does not represent a violation of the employment relationship and that it cannot be considered as a ground for discrimination (Article 134(10) of the Labour Act).

### 3.7.6 Specific difficulties

The protection against sexual harassment is fragmented and regulated in various legislative instruments, and it can be subject to several types of proceedings: misdemeanour proceedings, criminal proceedings, discrimination proceedings, labour dispute proceedings for the protection of worker's dignity or subject to an out-of-court complaint mechanism before the Ombudsperson for Gender Equality. This has a negative impact on the protection mechanisms and their efficiency, not least because there is no standing case law and sanctions are often too light to have a deterring effect. The majority of complaints to the Ombudsperson for Gender Equality concerning sexual harassment are submitted by women.<sup>60</sup> In four complaints about sexual harassment, the Ombudsperson filed a criminal complaint to the competent public prosecutor, since sexual harassment is also a criminal offence under the Criminal Code (Article 156 of the Criminal Code).<sup>61</sup> The most alarming element of sexual harassment cases is that in many cases the victim suffers even more if she/he decides to start a formal procedure. In cases of sexual harassment at work, it is the victim who is moved to another work location, if possible, and not the perpetrator.<sup>62</sup> Another trend is that most sexual harassment cases before the Ombudsperson relate to sexual harassment in educational facilities, police, units of local and regional self-government and public entities in general. It shows that there is no coherent action in public bodies to stop and prevent such cases from occurring. However, the lower level of sexual harassment reported in private employers or companies does not mean that they are better at preventing such cases. Quite the contrary, it could be that there are even more such cases in private employment, but the victims feel more reluctant to report them, out of fear that they will be stigmatised and lose their jobs. Public sector employment offers a bit more security in that regard.

## 3.8 Instruction to discriminate

### 3.8.1 Explicit prohibition

An instruction to discriminate is regulated in Article 6(5) of the Gender Equality Act as a broader 'incitement' (*poticanje*) of another person or other persons to discriminate, and is considered as discrimination if this is done with intent. On the other hand, the Anti-Discrimination Act also prohibits incitement to discriminate, but does not include intent as a constituent part of the definition (Article 4(1), Anti-Discrimination Act).

<sup>60</sup> In 2018, all sexual harassment claims were filed by women. Out of 485 complaints received in total during 2018, 26.4 % or 121 claims were concerned with sex discrimination in the field of employment and work, and almost a third of those complaints were about harassment or sexual harassment. See Ombudsperson for Gender Equality (2019), *2018 Annual Report*, available at pp. 51-53, available at: <https://www.prs.hr/attachments/article/2645/Izvješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu~.pdf>.

<sup>61</sup> Croatia, Criminal Code, (*Kazneni zakon*), NN Nos. 125/2011, 144/2012, 56/2015, 101/2017 and 118/2018.

<sup>62</sup> Ombudsperson for Gender Equality (2019), *2018 Annual Report*, p. 52, available at <https://www.prs.hr/attachments/article/2645/Izvješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu~.pdf>.

### 3.8.2 Specific difficulties

Given the conceptual differences between the terms 'incitement' and 'instruction', this provision is likely to lead to diverging interpretations by the courts. Coupled with the fact that the scope and meaning of an 'instruction to discriminate' are still unclear in the CJEU's case law, the different treatment of an incitement to discriminate in various Croatian laws could become an issue. However, no national case law on this issue has yet been reported. It is interesting to note that the provision of Article 4(1) of the Anti-Discrimination Act originally contained intent as a constitutive element of an incitement to discriminate, but this was erased by amendments to the act in 2012, with the explanation that the amendment was necessary to align the legislation with Directives 2000/78 and 2000/43. Any existing case law where an incitement to discriminate was asserted within the framework of the Anti-Discrimination Act refers to the period prior to the amendments, where intent was necessary (see the decisions of the Supreme Court of the Republic of Croatia in cases GŽ-38/11 and GŽ-12/11).

### 3.9 Other forms of discrimination

Article 1(2) of the Anti-Discrimination Act prohibits discrimination by association: the placing of any person, or a person related to that person by kinship or other relationship, in a less favourable position on discriminatory grounds within the meaning of the act.

Article 1(3) of the Anti-Discrimination Act prohibits assumed discrimination: the placing of a person in a less favourable position based on a misconception of the existence of discriminatory grounds within the meaning of the act.

Article 5(1) of the Anti-Discrimination Act prohibits segregation, as a forced and systematic separation of persons, on any of the discriminatory grounds listed in that act.

Article 6(1) of the Anti-Discrimination Act covers severe forms of discrimination. Apart from multiple discrimination, severe forms of discrimination also include repeated discrimination (discrimination committed on several occasions), continued discrimination (discrimination lasting for a longer period of time), or discrimination whose consequences are particularly harmful for the victim.

### 3.10 Evaluation of implementation

In general, it is hard to provide a comprehensive evaluation of implementation based on sporadic cases involving gender equality. It can be observed that the Anti-Discrimination Act predominates in case law, even where gender equality is clearly at stake and where a more specific provision of the Gender Equality Act can be applied. The Croatian gender equality and anti-discrimination legislation has been moulded in accordance with EU law right from the start, because it was previously non-existent. However, it is also affected by the tendency of the Croatian legislature to regulate certain issues in an incomplete and fragmentary manner, or to multiply certain definitions in various legislative instruments, but without an overall strategy and without trying to predict in advance the possible consequences of such an approach. It should also be pointed out that the continuous education of the judiciary in the field of gender equality and non-discrimination has yielded many positive effects in case law. However, as can be seen in the annual reports of the Ombudsperson for Gender Equality, there is a long road ahead of the state and public bodies (e.g. centres for social welfare, various ministries, etc.) in accepting and fully comprehending the basic legal concepts in the field of gender equality.

### 3.11 Remaining issues

Nothing further to report.

## **4 Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54)**

### **4.1 General (legal) context**

#### **4.1.1 Surveys on the gender pay gap and the difficulties of realising equal pay**

The Croatian Bureau of Statistics publishes annual publication on Women and Men in Croatia, with gender segregated data in different fields, including employment and earnings.<sup>63</sup> Based on this information, as well as the statistic available in the Eurostat database, the Ombudsperson for Gender Equality analyses the gender pay gap and other difficulties linked to equal pay in her annual reports. A more detailed survey of the causes for the gender pay gap was conducted by the Ombudsperson for Gender Equality in 2010.<sup>64</sup> The gender pay gap in Croatia in 2018 amounted to 13.19 %, which is lower than the EU average; however, contrary to EU trends, the gender pay gap in Croatia has been continuously on the rise since 2010. One of the main causes for the gender pay gap, as identified by the Ombudsperson for Gender Equality, lies in the strong horizontal and vertical segregation of the Croatian labour market, with economic sectors that are predominantly female or male. Women usually form the majority in those sectors with overall lower earnings. There are only two (out of 20 sectors) in which women earn more than men on average, and those are the sectors of mining and quarrying, and construction. The reason for this probably lies in the gender stereotypes associated with lower paid physical work, which in those sectors is performed almost entirely by men, and better paid administrative work, which in those sectors is where women are predominantly employed.<sup>65</sup>

#### **4.1.2 Surveys on the difficulties of realising equal treatment at work**

In 2017, research was conducted on the impact of family obligations and domestic work on the professional careers of employed women.<sup>66</sup> It revealed that 83 % of household work and 60 % of care for children is regularly performed exclusively by women.<sup>67</sup> One third of participants in the survey declared that the care of children significantly slowed down their careers. One fourth of participants declared that they had to give up their desired career because of family obligations, and one in five employed women had to turn down a promotion at work due to family obligations. At least 13 % of women had received a lower salary at least once, due to inability to perform work obligations alongside their family and household obligations.

This survey shows that women often have a hard time achieving a positive work-life balance, which has a negative impact on their work performance and consequently, equal treatment at work. There are occasional public debates on difficulties in realising equal treatment at work, but they tend to fade away without instigating any particular legislative or policy action.

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<sup>63</sup> Publications available at <https://www.dzs.hr/default.htm>.

<sup>64</sup> Ombudsperson for Gender Equality (2011), *Analysis of the gender pay gap in the Croatian labour market (Istraživanje uzroka jaza u plaćama između muškaraca i žena na hrvatskom tržištu rada)*, available at <https://www.prs.hr/attachments/article/179/Istraživanje%20jaza%20u%20placama%202010.pdf>.

<sup>65</sup> Ombudsperson for Gender Equality (2019), *2018 Annual Report*, pp. 28-29, available at <https://www.prs.hr/attachments/article/2645/Izvešće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu%20~.pdf>.

<sup>66</sup> The research was conducted within the framework of the EU-funded project managed by the Ombudsperson for Gender Equality 'In pursuit of full equality between men and women: reconciliation between professional and family life'.

<sup>67</sup> Klasnić, K. (2017) *Impact of gender division of family and household obligations on professional life of employed women (Utjecaj rodne podjele obiteljskih obveza i kućanskih poslova na profesionalni život zaposlenih žena)*, Ombudsperson for Gender Equality, available at [http://rec.prs.hr/wp-content/uploads/2018/01/Brosura\\_prijelom\\_finalno\\_web.pdf](http://rec.prs.hr/wp-content/uploads/2018/01/Brosura_prijelom_finalno_web.pdf).

Another research study shows that highly educated women suffer less inequality in the workplace, and that gender segregation is less present among highly educated women.<sup>68</sup> At the same time, around a third of participants admit that 'glass ceiling' effect has either extremely negatively influenced (11.7 %) or negatively influenced (24.7 %) their career prospects. Roughly the same proportion of women believes that traditional roles and stereotyping have either extremely negatively or negatively influenced their career development. Furthermore, 40.2 % of participants said that the most negative social factor affecting their career is the perception that women are less capable of performing the most demanding jobs. Almost half of all female participants report that they have experienced being paid a lower salary for the same job as that of their male colleagues (47.3 % of women, as opposed to only 29.9 % of men who claim that they had had this experience).

#### 4.1.3 Other issues

The wording of Article 91 of the Labour Act on equal pay provides for actual comparators, i.e. the comparator should be a person employed by the same employer (currently or in the past). Theoretically, when a collective agreement is applicable to more than one employer, a comparator could be an employee of another employer. In practice, it would be extremely hard, if not impossible, to find a suitable comparator working for another employer, because every employer may further elaborate the requirements for a certain position to suit the needs of that particular employer, which could overturn comparability. Collective agreements are more common in the public sector, and factors for determination of salaries of public sector employees are public, determined in laws, by-laws and other legal acts. Collective agreements in the public sector can contain the determination of basic salary in a fixed amount, and they define salary increments (e.g. incentives, increments for special conditions of work, rank and similar increments). Basic parameters may be provided in the basic collective agreement, and further elaborated in branch collective agreements or employment rules. So, even in the public sector, salaries are hardly comparable between different employers. In the private sector, although branch and individual collective agreements may also contain provisions on the determination of basic salary and increments, comparability would be even more difficult, because salaries are not public. In addition, there are only a few collective agreements covering more than one employer in the private sector (e.g. construction, hospitality industry, etc.). Even where a collective agreement covers only one employer, it is generally considered that it is not prohibited to determine different amounts of salaries for workers employed in the same jobs, but in different organisational units of the same employer, provided that the differentiation is objectively justified (e.g. for waiters in a five-star or a two-star hotel). Nonetheless, this cannot lead to differences in salary based on sex.<sup>69</sup>

One exception is for a person employed by different employers in the event of temporary agency work (with the agency and user as employers). Article 46(5) of the Labour Act (on employment contracts for temporary work) provides that the amount of the agreed salary of the assigned employee should not be '...lower and less favourable, respectively, than the salary (...) of an employee who is employed with the user in the same job, to which the assigned employee would have been entitled if he or she had entered into a contract of employment with the user.' This provision is broad because it prohibits different salaries for the assigned employee and the employee working with the user irrespective of gender, i.e. it also applies to employees of the same gender.

#### 4.1.4 Political and societal debate and pending legislative proposals

There are no meaningful political and societal debates, nor legislative proposals concerning the issue of equal pay.

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<sup>68</sup> Pološki Vokić, N., Sinčić Ćorić, D., and Obadić, A. (2017) 'To be or not to be a woman? - Highly educated women's perceptions of gender equality in the workplace', *Rev.soc.polit.* (2017) 24(3): 253-276.

<sup>69</sup> See Opinion of the Ministry of Labour and Pension System of 14 July 2014.

## 4.2 Equal pay

### 4.2.1 Implementation in national law

The principle of equal pay for equal work or work of equal value is implemented in national legislation. Under Article 91(1) of the Labour Act,<sup>70</sup> an employer must pay equal remuneration to women and men for equal work and work of equal value. Paragraph 2 of the same article clarifies and describes what is understood by the concepts of equal work and work of equal value.

Article 13(1)(4) of the Gender Equality Act prohibits discrimination based on sex in the field of employment, in relation to conditions of employment and work, and rights from and based on employment, including equal pay for equal work or work of equal value.

### 4.2.2 Definition in national law

The notion of 'pay' in Croatian labour legislation is defined in the context and for the purposes of the implementation of the equal pay principle. It includes the basic or minimum wage and any other consideration in cash or kind, which the worker receives directly or indirectly in respect of his/her employment from the employer, based on the employment contract, a collective agreement, employment rules or other regulations (Article 91(3), Labour Act). This definition complies with the definition of Article 157(2) TFEU.

Article 90 of the Labour Act regulates the issue of salary determination. The employer is obliged to pay the salary stipulated by regulations, a collective agreement, employment rules or an employment contract. If the basis and parameters for the determination of salary are not stipulated in a collective agreement, any employer employing more than 20 employees will stipulate them in employment rules. If there is neither a collective agreement nor employment rules on salary determination, and the employment contract does not provide sufficient information to determine the salary, the employer must pay the employee an 'adequate salary'. An adequate salary is a salary that is usually paid for equal work, and if it cannot be determined, the court will decide thereon in accordance with the given circumstances. The term 'adequate salary' is different from the term 'minimum salary'. An adequate salary is understood as salary paid for work of equal or similar competence performed within the employer's economic branch of activity or a similar branch (County Court in Split, GŽ-19903/97).

### 4.2.3 Explicit implementation of Article 4 of Recast Directive 2006/54

Article 13(1)(4) of the Gender Equality Act prohibits any discrimination in the field of employment and occupation in the public or private sector, including public bodies, in relation to employment and working conditions, all occupational benefits and benefits resulting from occupation, including equal pay for equal work and work of equal value. This provision explicitly implements Article 4 of Recast Directive 2006/54.

### 4.2.4 Related case law

There is no ground-breaking national case law on equal pay. There is only evidence of sporadic cases involving equal pay claims at an individual level, within a single company or employer. Very few equal pay cases are actually based on claims of sex discrimination.<sup>71</sup> The majority of case law concerns equal pay cases in public services and administration. However, they are not based on sex discrimination, but rather involve complaints

<sup>70</sup> Croatia, Labour Act (*Zakon o radu*), NN Nos. 93/14 and 127/17.

<sup>71</sup> See, for example unsuccessful equal pay claim alleging discrimination based on sex and age: Municipal Labour Court in Zagreb, Pr-1433/12, County Court in Zagreb, GŽr-2213/14 and Constitutional Court of the Republic of Croatia, U-III-1711/2015.

concerning the formal salary classification system and the actual tasks performed by the worker. Although the same guarantee of equal pay applies in public services as in private employment relationships, the formalistic approach of courts to the rigid system of job classification in public services renders almost impossible any unequal pay claim. This can be concluded indirectly, from a line of cases involving claims of public servants that they should be paid more because they actually perform the tasks of higher skilled workers or work classified in another job category. Any formal difference in professional classifications will overturn comparability, as well as the fact that the public servant performs tasks of a higher paid job category without any formal decision of the public body, even where his/her superiors have given informal orders to perform those tasks (see, for example, Supreme Court of the Republic of Croatia, Revr-1952/09; Revr-196/10; Revr-201/11).

#### 4.2.5 Permissibility of pay differences

Justifications for pay differences include salary classification systems prescribed by law (in the public sector), which apply irrespective of gender, as well as differences in formal qualifications (an educational degree) for the job.

#### 4.2.6 Requirement for comparators

The Croatian judiciary takes a predominantly formalistic approach in equal pay cases and overemphasises the importance of a comparator. Under Article 20(1) of the Anti-Discrimination Act, a party claiming a violation of his/her right to equal treatment shall make it plausible that discrimination has taken place. In that case, it will be for the defendant to prove that there has been no discrimination. However, a claimant will be required to refer to a comparator if he/she is to succeed in an equal pay case. According to the current Croatian case law, a party will have to refer to an actual comparator. For example, the claimant will be required to prove that the defendant should have treated him/her equally in comparison with another person in a comparable situation, whereby any difference in formal requirements overturns comparability (e.g. where a job classification system exists, any formal difference might exclude comparability).<sup>72</sup> The performance of actual tasks by the claimant will be relevant only where there is no legally prescribed salary classification system. Otherwise, employers will be found in breach of a specific obligation arising out of binding legislation or subordinate regulations if they disregard the salary classification system.

The wording of Article 91 of the Labour Act (on equal pay) provides for actual comparators. The comparator should be a person employed by the same employer (currently or in the past), even though, theoretically, where the same collective agreement applies to more than one employer, it can be an employee of another employer. There is no equal pay case law concerning this issue, which is not surprising given the probable difficulties that could arise in finding a suitable comparator and proving differences in pay in practice. A more likely situation to arise in practice is that an employee could sue his/her employer, claiming a difference in pay, if it was not calculated in accordance with the parameters provided in collective agreement itself, but there would probably not be a sex discrimination element involved.

As an exception, a comparator may be a person employed by different employers in the event of temporary agency work (where the agency and user are employers). Article 46(5) of the Labour Act (on employment contracts for temporary work) provides that the amount of the agreed salary of the assigned employee should not be '...lower and less favourable, respectively, than the salary (...) of an employee who is employed with the user in the same job, to which the assigned employee would have been entitled if he or she had

<sup>72</sup> See, for example, Supreme Court cases VS RH Revr-1676/09 (salary in public services; the determination of salary prescribed by law) and VS RH Revr-135/09 (even where a job classification system exists, the pay should be based on actual work and tasks performed by a particular worker, not the job title and description).

entered into a contract of employment with the user.' This provision is broad because it prohibits different salaries for the assigned employee and the employee working with the user irrespective of gender, i.e. it also applies to employees of the same gender.

Examples of case law in the field of equal pay for men and women are the following. In a Supreme Court case,<sup>73</sup> the female claimant asserted that she had been paid less for work of equal value, when she actually performed tasks of a higher skilled worker. The Court concluded that since the determination of salaries in the public services is prescribed by law (categories and coefficients), the defendant could only pay the claimant in accordance with her qualifications, because it would otherwise contravene the explicit and legally binding rule (in the end, her claim failed). In a case with a similar factual background, the Constitutional Court in decision U-III/579/2008 of 15 April 2010 confirmed that it involved neither discrimination nor a breach of the constitutional guarantee of equality before the law. In one judgment of the Supreme Court, the formal job classification was deemed to be crucial for denying comparability.<sup>74</sup> In another ruling in an equal pay case, the Supreme Court adopted a contradictory approach, concluding that the title of the job and its classification do not automatically give the right to be paid equally compared to another worker with the same job title, but that the pay depends on the actual work and tasks performed by a particular worker.<sup>75</sup> However, a difference in formal qualifications will overturn comparability and justify a difference in pay.

#### 4.2.7 Existence of parameters for establishing the equal value of the work performed

Article 91(2) of the Labour Act provides that two persons of a different gender perform equal work and work of equal value if:

- they perform the same work in the same or similar conditions, or they could substitute one another at the workplace;
- the work which one of them performs is of a similar nature to that performed by another, and the differences between the work performed by them and the conditions under which it is performed have no significance in relation to the overall nature of the work or they appear so rarely that they have no significance in relation to the overall nature of the work;
- the work which one of them performs is of equal value to that performed by another, if one takes into account the criteria such as qualifications, skills, responsibilities, the conditions under which the work is performed and whether the work is of a manual nature or not.

Any provision of employment contract, collective agreement, employment rules or any other legal act that is contrary to the principle of equal pay is deemed invalid. Consequently, even when a prescribed salary system exists, it has to be in accordance with this principle and parameters.

#### 4.2.8 Other relevant rules or policies

Croatia is a party to the ILO Convention No. 100 – The Equal Remuneration Convention by succession.<sup>76</sup> It requires the implementation of the principle of equal pay but does not set any particular parameters. Furthermore, many collective agreements in Croatia include a general provision on equal pay for equal work, also without further explanations or parameters.

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<sup>73</sup> VS RH Revr-1676/09.

<sup>74</sup> VS RH Revr-246/10.

<sup>75</sup> VS RH Revr-135/09.

<sup>76</sup> Convention concerning equal remuneration for men and women workers for work of equal value, Official Gazette *Narodne novine* – *International agreements* No. 3/2000.

#### 4.2.9 Wage transparency

There is no legislation or case law addressing wage transparency.

#### 4.2.10 Implementation of the transparency measures set out by European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women

There are still no legislative acts or proposals to address wage transparency, in either the public or private sectors. The initiative launched in July 2015 and the adoption of the *Action Plan for the determination and regulation of the salary system in the Republic of Croatia 2015-2016*,<sup>77</sup> which included the adoption of the new Act on Salaries in the Public Sector, came to an end with the change of Government in January 2016. There has been no further legislative activity in this area.

#### 4.2.11 Other measures, tools or procedures

One tool that indirectly serves to enhance pay transparency is the gender segregated monitoring of earnings. The Croatian Bureau of Statistics publishes an annual publication 'Men and Women in Croatia' (from 2006 onwards), which contains a separate chapter with gender segregated data on employment and earnings. The publication is easily accessible online, on the Bureau's website, and is published in Croatian and English. Although it is a helpful, reliable and informative publication, the published data concerning pay and earnings do not offer a complete picture concerning the gender pay gap, because only earnings of persons employed in legal entities are included. Only employers who are legal entities are required to report to the Croatian Bureau of Statistics the average remuneration by category of employee or position, broken down by gender annually.

### 4.3 Access to work, working conditions and dismissal

#### 4.3.1 Definition of the personal scope (Article 14 of Recast Directive 2006/54)

The personal scope in relation to access to employment, vocational training, working conditions etc. (in accordance with Article 14 of the Recast Directive 2006/54) is defined in national law in terms of prohibition of discrimination in the public and private sector, including public bodies (Article 13(1)(1) to (7) of the Gender Equality Act). The wording of this provision is identical to Article 14 of the Recast Directive 2006/54 as the prohibition of discrimination covers employed and self-employed persons, as well as job applicants, but it also expressly mentions pregnant women, women who have recently given birth, parents and guardians. However, no definitions of these categories are provided in this or other provisions of the Gender Equality Act.

'Employee' or 'worker' is defined as any natural person performing certain tasks in an employment relationship for an employer (Article 4(1), Labour Act). 'Employer' is any natural or legal person who employs an employee and for whom the employee in an employment relationship performs certain tasks (Article 4(2), Labour Act). An employment relationship is based on an employment contract (Article 10(1), Labour Act). The employer shall assign the worker to a job and pay him or her for the work carried out, whereas the worker shall personally perform the job assigned, following the employer's instructions given in accordance with the nature and type of work (Article 7(1), Labour Act). The term 'work' is not expressly defined in any legislation, but the criteria for its definition may be inferred from legislative definitions of the terms 'worker' (employee), 'employer' and 'employment relationship', as well as from the definition of essential rights and obligations in an employment relationship.

<sup>77</sup> Government of the Republic of Croatia, <https://vlada.gov.hr/UserDocsImages//2016/Sjednice/2015/241%20sjednica%20Vlade//241%20-%2008.pdf>.



Therefore, work is performed in an employment relationship and is defined by it. The focus is on the employment agreement, rather than on the activity performed. If the employer and the worker conclude a contract for the performance of work which, in view of the nature and type of the work to be carried out and the employer's powers in respect of this work, has the characteristics of a type of work for which an employment relationship should be established, the employer will be deemed to have concluded an employment agreement with the worker, unless the employer proves the contrary (Article 10(2), Labour Act).

The definition of a worker or an employee complies with the relevant case law of the CJEU.

#### 4.3.2 Definition of the material scope (Article 14(1) of Recast Directive 2006/54)

Article 13(1)(1) to (7) of the Gender Equality Act prohibits any discrimination in the field of employment and occupation in the public or private sector, including public bodies, in relation to conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity, and at all levels of the professional hierarchy, promotion, access to all types and to all levels of education, professional guidance, vocational training, advanced vocational training and retraining, employment and working conditions, all occupational benefits and benefits resulting from occupation, including equal pay for equal work and work of equal value, membership of, and involvement in, organisations of workers or employers, or any professional organisation, including the benefits provided for by such organisations, the balance between professional and private life, and pregnancy, giving birth, parenting and any form of custody. The scope is broader than the scope of Article 14(1) of Recast Directive 2006/54, because it includes discrimination in relation to the work-life balance, as well as pregnancy, giving birth, parenting and any form of custody.

#### 4.3.3 Implementation of the exception on occupational activities (Article 14(2) of Recast Directive 2006/54)

This exception has been implemented in Article 9(1)(4) of the Anti-Discrimination Act. It stipulates that the placing of a person in a less favourable position shall not be considered to be discrimination in relation to a particular job when the nature of the job is such or the job is performed under such conditions that its characteristics related to any of the discriminatory grounds in the act (gender included) present an actual and decisive condition for performing that job, provided that the purpose to be achieved is justified and the condition is appropriate.

There is no information available on an assessment in relation to Article 31(3) of Recast Directive 2006/54.

#### 4.3.4 Protection against the non-hiring, non-renewal of a fixed-term contract, non-continuation of a contract and dismissal of women connected to their state of pregnancy and/or maternity

National law or case law do not provide adequate protections against non-hiring, non-renewal of a fixed-term contract, and non-continuation of a contract for women who are pregnant and/or have given birth. It is true that there is an absolute ban on dismissing pregnant workers and those on maternity or parental leave, during this time and 15 days after returning to work, which covers collective redundancy as well, even though it is not explicitly mentioned.<sup>78</sup> On the other hand, pregnancy and other maternity related reasons do not prevent the expiration of a fixed-term contract, or dismissal in the insolvency

<sup>78</sup> The termination of an employment contract within a collective redundancy procedure includes business-related dismissal and consensual termination of contract. The prohibition of dismissal of pregnant workers is not limited to any particular type or category of dismissal that is prohibited (e.g. business related or based on personal conduct, or extraordinary dismissal).

procedure, or the procedure for winding-up of a company. Even when a woman is pregnant, the employer is under no obligation to offer a renewal of a fixed-term employment contract, and this would not be an issue if the non-renewal were completely unrelated to the worker's pregnancy. However, non-renewal of fixed-term contracts for pregnant workers is very common and in the majority of cases it is openly related to the pregnancy. Nevertheless, this common practice remains unsanctioned, because women are not inclined to seek justice in court, being pregnant, out of work, without financial resources and with the outcome of any court proceedings uncertain.

#### 4.3.5 Implementation of the exception on the protection for women in relation to pregnancy and maternity (Article 28(1) of Recast Directive 2006/54)

Articles 30-36 of the Labour Act regulate the employment protection of pregnant women, women who have recently given birth or women who are breastfeeding. These provisions include a guarantee of equal treatment, safe working conditions, employment rights and protection from dismissal, as well as the right to return to the previous or an equivalent job after making use of some of the rights and benefits associated with pregnancy and maternity.

#### 4.3.6 Particular difficulties

Legal provisions regarding protection for women, especially the right to return to the previous or an equivalent job after making use of some of the rights and benefits associated with pregnancy and maternity (Articles 30-36 Labour Act) are quite clear. However, in practice it is not always easy to realise this guarantee, especially if a reorganisation of work has led to a change in or the termination of the job previously performed by a woman returning from maternity leave. For example, one employer (a government agency) offered a female worker who wanted to work half-time after returning from parental leave the option to stay at home (i.e. not to come to work, but still receive the stipulated salary), because a work reorganisation had led to the abolition of her job while she was on parental leave, and there was no other equivalent job that she could perform.<sup>79</sup> In other words, the employer wanted to comply with its legal obligations, but failing to find any adequate job, offered the worker the option to stay at home, while still receiving her salary. The female worker found this option offensive because she wanted to return to work. This is of course an extreme example, which received a lot of media attention, but the reality of unfavourable economic trends in Croatia could lead to a worsening of the work position of people returning from maternity or parental leave, despite the clear legislative provisions.

#### 4.3.7 Positive action measures (Article 3 of Recast Directive 2006/54)

There is a legislative framework for implementation of the positive action measures in the field of employment in the Gender Equality Act and in the Anti-Discrimination Act. However, it has not been used in practice.

### 4.4 Evaluation of implementation

The national legal framework concerning equal pay is satisfactory, but is often not applied in practice, due to various reasons. One of the reasons for this is that wage transparency is not regulated in a satisfactory manner. This issue is not on the political agenda. Although wages in the public sector are heavily regulated and subject to coefficients based on level

<sup>79</sup> This story was reported in the media in 2015, and the employer even explicitly confirmed its accuracy; see e.g. <http://www.jutarnji.hr/vijesti/hrvatska/druga-strana-price-o-zeni-koja-je-odbila-placu-za-neradprocitajte-hakom-ovu-istinu/373726/>. However, the employer (a state agency) subsequently sued the employee for slander and damage to reputation, and the case was closed when the employee publicly apologised to the employer in court, see <http://net.hr/danas/hrvatska/samo-u-hrvatskoj-drzavna-agencija-zeni-daje-placu-da-ne-dolazi-na-posao-pa-zavrsili-na-sudu/>. There is no further follow-up to this unusual saga.

of education and experience, etc., there is no actual transparency in practice concerning additional payments that are also considered as remuneration. In the private sector, these issues are complicated further by the confidentiality clauses, which make it very hard to discover whether there are differences in pay at an individual level, as well as at the level of the company.

On equal treatment in access to employment and working conditions, the current guarantees and protection against dismissal, as well as the guarantee of return to the previous or equal level post are not enough to guarantee full equality in practice. Short-term engagements, fixed-term contracts and other atypical forms of work are often used in practice to circumvent these explicit guarantees. So far, there have been no cases before courts concerning non-renewal of fixed-term contracts for pregnant workers, even though it has become a standard practice and there are many such cases reported to the Ombudsperson for Gender Equality, who has only limited tools to react to such occurrences.

#### **4.5 Remaining issues**

Nothing further to report.

## 5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54 and 2010/18)<sup>80</sup>

### 5.1 General (legal) context

#### 5.1.1 Surveys and reports on the practical difficulties linked to work-life balance

A survey on work-life balance and the impact of gender division of family and household obligations on professional life of employed women was conducted in 2017.<sup>81</sup> The aims of the survey were to investigate the division of family and household obligations within the family, as well as the main determinants for such division, and to investigate the impact of this division on women's professional careers and on work-life balance. Unsurprisingly, the survey has revealed that the majority of household and family obligations fall upon women: 83 % of household work and 60 % of care for children is regularly performed exclusively by women.<sup>82</sup> These findings correspond with an earlier survey on the division of household and family tasks.<sup>83</sup> Statistics reveal that the share of women taking maternity leave until the child reaches six months of age is 99.71 %, while that share slightly drops for parental leave (after the child's sixth month) to 92.44 %.<sup>84</sup> As a result, many women suffer adverse consequences in their careers. One third of participants in the survey declared that caring for children significantly slowed down their careers. Highly educated women are five times more prone to career slowing due to child-raising obligations, than women with primary level of education, and for every child born, the chances of their career slowing down grows by 21 %. One fourth of participants declared that they had had to give up their desired career because of family obligations, and one in five employed women had had to turn down a promotion at work due to family obligations. Women working in the private sector are particularly vulnerable: they are up to 2.6 times more likely to have to terminate or change their job due to their child-raising obligations than women in the public sector. At least 13 % of women have received a lower salary at least once, because they were unable of performing their work tasks due to family and household obligations. Adverse effects of the conflict between work and family are more pronounced in the private sector.

These analyses have also revealed a strong link between time spent on routine household work and the negative consequences for women's professional careers. The survey also investigated the effect of work flexibility on achieving work-life balance. More than two thirds of women claim that they have the possibility to get time off from work, if necessary, for family reasons. Around one third of women are able to resort to flexible working hours, whereas roughly one fifth of women are allowed to switch from full to part-time work and

<sup>80</sup> See Masselot, A. (2018) *Family leave: enforcement of the protection against dismissal and unfavourable treatment* European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb> and McColgan, A. (2015) *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway* European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/3631-reconciliation>.

<sup>81</sup> The research was conducted within the framework of the EU funded project managed by the Ombudsperson for Gender Equality 'In pursuit of full equality between men and women: reconciliation between professional and family life'. See Klasnić, K. (2017) *Impact of gender division of family and household obligations on professional life of employed women (Utjecaj rodne podjele obiteljskih obveza i kućanskih poslova na profesionalni život zaposlenih žena)*, Ombudsperson for Gender Equality, available at [http://rec.prs.hr/wp-content/uploads/2018/01/Brosura\\_prijelom\\_finalno\\_web.pdf](http://rec.prs.hr/wp-content/uploads/2018/01/Brosura_prijelom_finalno_web.pdf).

<sup>82</sup> Klasnić, K. (2017) *Impact of gender division of family and household obligations on professional life of employed women (Utjecaj rodne podjele obiteljskih obveza i kućanskih poslova na profesionalni život zaposlenih žena)*, Ombudsperson for Gender Equality, pp. 38-39, available at [http://rec.prs.hr/wp-content/uploads/2018/01/Brosura\\_prijelom\\_finalno\\_web.pdf](http://rec.prs.hr/wp-content/uploads/2018/01/Brosura_prijelom_finalno_web.pdf).

<sup>83</sup> See Bertek, I., Dobrotić, I. (2016), *Woman, mother, worker. Family-work balance in Croatia (Žena, majka, radnica. Usklađivanje obiteljskih obaveza i plaćenog rada u Hrvatskoj)*, B.a.B.e.

<sup>84</sup> Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, p. 61, available at <https://www.prs.hr/attachments/article/2645/Izvješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu~.pdf>.

vice versa, as well as to work from home. Given that the Croatian legislative framework for flexible working arrangements is rather rigid, these findings are probably based more on an informal recognition and flexibility of employers, rather than regulatory provisions. The survey supports this conclusion, as it was established that these flexibility measures are more accessible to highly educated women, those working at the highest company levels and women who are self-employed (even though this is the most precarious category) or have an open-ended employment contract and consequently, better protection.<sup>85</sup>

#### 5.1.2 Other issues

Another issue that is relevant to work-life balance is the job requirements. For example, the 2017 work-life balance survey has investigated the impact of shift work, on working at weekends and in the evening or night, business trips and taking work home.<sup>86</sup> It was established that roughly one third of participants in the survey had worked in shifts, and about one fifth work on weekends all the time, with an additional 10 % working on weekends often. Around one fifth of women carry their workload home often or all the time. These findings are very important for the creation of sustainable and comprehensive work-life policies, which are currently insufficient. Even though roughly one third of women work in shifts and on weekends, childcare facilities in the afternoon or weekends are very rare, and exist only rarely in larger cities.

#### 5.1.3 Overview of national acts on work-life balance issues

The most important legal acts on work-life balance issues include the Labour Act, the Safety at Work Act and the Act on Maternity and Parental benefits. The Labour Act contains provisions on flexible working arrangements and protection of employees who are parents of have specific family related care obligations. The Safety at Work Act includes provisions on the protection of pregnant workers, workers who have recently given birth or are breastfeeding, and the Act on Maternity and Parental Benefits regulates the conditions for granting maternity and parental benefits, as monetary and temporal benefits.

#### 5.1.4 Political and societal debate and pending legislative proposals

There are no pending legislative proposals, but the political and societal debate is concentrated more on demographic policy measures, than on work-life balance issues as a way to promote gender equality and equal opportunities in general. For example, the increase or delimitation of parental benefits received after the child turns six months is on the table quite often, with no visible results. Currently, parental benefit amounts to 100 % of the previous salary, but it is limited to 120 % of the budget calculation base (currently EUR 536 (HRK 3 991.20) per month). Given that the average net salary in Croatia is currently EUR 844 (HRK 6 226), an increase of the amount of parental benefit is seen as one of the areas that could potentially boost demographic changes. Given these circumstances, there is very little debate on the real work-life balance issues, such as improving access to more flexible working arrangements for parents or improving access to childcare facilities.

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<sup>85</sup> Klasnić, K. (2017) *Impact of gender division of family and household obligations on professional life of employed women (Utjecaj rodne podjele obiteljskih obveza i kućanskih poslova na profesionalni život zaposlenih žena)*, Ombudsperson for Gender Equality, pp. 43-44, available at [http://rec.prs.hr/wp-content/uploads/2018/01/Brosura\\_prijelom\\_finalno\\_web.pdf](http://rec.prs.hr/wp-content/uploads/2018/01/Brosura_prijelom_finalno_web.pdf).

<sup>86</sup> Klasnić, K. (2017) *Impact of gender division of family and household obligations on professional life of employed women (Utjecaj rodne podjele obiteljskih obveza i kućanskih poslova na profesionalni život zaposlenih žena)*, Ombudsperson for Gender Equality, p. 44, available at [http://rec.prs.hr/wp-content/uploads/2018/01/Brosura\\_prijelom\\_finalno\\_web.pdf](http://rec.prs.hr/wp-content/uploads/2018/01/Brosura_prijelom_finalno_web.pdf).

## 5.2 Pregnancy and maternity protection

### 5.2.1 Definition in national law

The national law provides definitions of a pregnant worker, a worker who has recently given birth, a worker who has given birth, and a worker who is breastfeeding.

The definition of a pregnant worker is provided in Article 6(1)(10) of the Act on Maternity and Parental Benefits<sup>87</sup> and Article 3(1)(31) of the Safety at Work Act.<sup>88</sup> Both acts define a pregnant worker as a worker who has informed their employer of her condition in writing. Both definitions comply with Directive 92/85.

The definition of a worker who is breastfeeding is provided in Article 6(1)(12) of the Act on Maternity and Parental Benefits and Article (3)(1)(22) of the Safety at Work Act to include a worker who is a mother of a child up to one year of age who is breastfeeding her child and has informed her employer about it in writing at the latest within 30 days before returning to work.

The definition of a worker who has given birth differs in these two acts. The concept of a worker who has given birth provided in Article 6(1)(11) of the Act on Maternity and Parental Benefits includes a worker who is a mother of a child up to one year old who has informed her employer about it in writing at the latest within 30 days before returning to work. On the other hand, Article (3)(1)(22) of the Safety at Work Act refers to the concept and definition of a worker who has *recently* given birth to include a worker who is a mother within six months following a child's birth, who has informed her employer about it in writing.

### 5.2.2 Obligation to inform employer

A pregnant worker or worker who has given birth or worker who is breastfeeding has to inform the employer about her condition in writing, within the time limits (if applicable) for a certain category.

### 5.2.3 Case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding

There is no case law concerning the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding.

### 5.2.4 Implementation of protective measures (Article 4-6 of Directive 92/85)

Article 31 of the Labour Act provides that employers are obliged to offer pregnant workers, workers who have recently given birth and workers who are breastfeeding, and who are working in jobs that represent a risk to their health and life or to the baby's health and life, an annex to their employment contract, stipulating a transfer to other adequate jobs for the duration of this condition. If a transfer to another adequate job is available, the annex to the employment contract should not result in a decrease in the salary of the worker. If no adequate job is available, such a worker is entitled to paid leave at the employer's expense (Article 20(4) and (5) of the Act on Maternity and Parental Benefits). Article 39 of the Safety at Work Act lays down the obligation of the employer to implement special protection for these categories of workers from risks associated with pregnancy and maternity.

<sup>87</sup> Croatia, Act on Maternity and Parental Benefits (*Zakon o roditeljnim i roditeljskim potporama*), NN Nos. 85/2008, 110/2008, 34/2011, 54/2013, 152/2014 and 59/2017.

<sup>88</sup> Croatia, Safety at Work Act (*Zakon o zaštiti na radu*), NN Nos. 71/2014, 118/2014, 154/2014, 94/2018 and 96/2018.

#### 5.2.5 Case law on issues addressed in Articles 4 and 5 of Directive 92/85

There is no case law concerning the specific risk of exposure addressed in Articles 4 and 5 of Directive 92/85.

#### 5.2.6 Prohibition of night work

Article 20(6) of the Act on Maternity and Parental Benefits stipulates that a pregnant worker, or worker who has given birth or worker who is breastfeeding is not obliged to work at night until the child turns one year or in the period while she is breastfeeding. In that case, a worker will have to provide a certificate from her gynaecologist, or paediatrician, or a specialist in occupational medicine, which confirms that the abstention from night work is necessary for the mother's or child's health. This provision is a correct implementation of Article 7 of Directive 92/85.

#### 5.2.7 Case law on the prohibition of night work

There is no available case law on the prohibition of night work.

#### 5.2.8 Prohibition of dismissal

Article 34(1) of the Labour Act prohibits dismissal during pregnancy, during the use of maternity, parental, adoption leave and other types of leave in relation to pregnancy and maternity, including 15 days following the last day of the use of those rights. However, the employment contract of such workers ends with the death of the employer (if this is a natural person), the cessation of a craft by virtue of the law and the deletion of an individual trader from the official registry (Article 34(3), Labour Act). In exceptional cases, a dismissal due to business reasons is allowed in the procedure for the winding-up of a company, in accordance with special regulations (Article 34(4), Labour Act). Although this is not explicitly mentioned in the Labour Act, pregnancy and maternity do not prevent an expiration of a fixed-term employment contract.

However, when it comes to employment contracts with a probationary period, there is no express protection in relation to parenthood. Failure of the worker to fulfil the position requirements during the probationary period (if contracted, up to six months) shall constitute a just cause for terminating the employment contract (Article 53(3), Labour Act). However, the prevailing opinion is that it would be contrary to Article 8 of the European Social Charter to dismiss a worker during maternity leave or if a notice period would expire during maternity leave.<sup>89</sup> Croatia has ratified the European Social Charter, but not the revised European Social Charter, which accords the same right during pregnancy. According to Article 10(1)(1) of Directive 92/85, a dismissal of a pregnant worker would be possible during probationary work, for reasons unrelated to her pregnancy, but only related to her performance during the probationary period. In one case involving a woman who took pregnancy-related sick leave during the probationary period, as well as maternity, parental and annual leave after that, the employer's decision to dismiss her after she finally returned to work, due to unsatisfactory performance during the probationary period was deemed to be in accordance with the law.<sup>90</sup> The employer was not required to substantiate the reasons why the employee's work was considered unsatisfactory. The employer's negative assessment and written formal dismissal are sufficient.

Article 191(3) of the Insolvency Act<sup>91</sup> stipulates that the insolvency administrator and worker are entitled to terminate employment contract after the commencement of the

<sup>89</sup> See also the Opinion of the Ministry of Labour and Pension System of 29 April 2019 that the protective character of the dismissal ban for pregnant workers and workers on maternity leave takes precedence.

<sup>90</sup> VSRH, Revr-889/17.

<sup>91</sup> Croatia, Insolvency Act (*Stečajni zakon*), NN Nos. 71/2015 and 104/2017.

insolvency proceedings, regardless of its duration and regardless of the legal or contractual provisions on the protection of workers. Notice period is one month, unless otherwise prescribed. Although the Labour Act stipulates that the notice period is suspended during the use of any maternity, parental or adoption-related rights (Article 121(2) of the Labour Act), in practice, dismissal due to an employer's insolvency may have an immediate effect, where the insolvency procedure is opened and closed on the same day (when the debtor has no assets).

Only the above-mentioned cases of dismissal are allowed during pregnancy and the use of maternity and parental rights. If the employment status of a person changes due to one of these reasons, or, for example, due to the expiration of a fixed-term employment contract, the basis for the recognition of maternity and parental benefits under the Act on Maternity and Parental Benefits also changes. Under Article 52(1) of the Act on Maternity and Parental Benefits, a beneficiary is required to inform the competent body (the Croatian Health Insurance Institute) of any change that affects the recognition of a right under that act, within eight days. Since all rights arising from the Act on Maternity and Parental Benefits are recognised in accordance with a formal decision of the competent body (Article 44(1), Act on Maternity and Parental Benefits), in such a case the competent body will have to issue a new decision, taking into account the changed circumstances, i.e. the change of the basis for the recognition of rights.

#### 5.2.9 Redundancy and payment during maternity leave

An employee cannot be made redundant during maternity or parental related leave. However, where an employer becomes insolvent, the insolvency administrator may terminate all employment agreements, regardless of the legal and contractual provisions on the protection of workers (Article 191(3) of the Insolvency Act). In practice, when the insolvent debtor has no assets, the insolvency procedure may be opened and closed on the same day, with the result that the employer is deleted from the registry of companies. From that day, the employee's status as an insured person in the mandatory health insurance, which is a prerequisite for the payment of maternity and parental benefits, is also automatically terminated. During 2018, there were seven cases reported to the Ombudsperson for Gender Equality, in which employees who were using one of the rights under the Act on Maternity and Parental Benefits and whose employment relationship was terminated due to their employer's insolvency, were not even aware that they had lost this status. Consequently, they continued to receive maternity and parental benefits. However, when the Croatian Health Insurance Institute discovered that there was no basis for the payment, since they were not employed and had not changed their status of insured person in health insurance otherwise (e.g. to unemployed persons) it tried to recover all payments retroactively, from the day the insured person lost this status.<sup>92</sup> Following the intervention of the Ombudsperson, the Government has also recognised this problem and has adopted a decision to remedy the situation, which was caused by different interpretations of the powers of insolvency administrators.<sup>93</sup> The decision covers the period from 1 September 2015 (date of entry into force of the Insolvency Act) to the date of the decision (14 September 2019). The decision also requires the Ministry of Justice to issue a formal notice to all commercial courts in Croatia that they should not close insolvency proceedings if there is no proof that all workers have been formally deregistered from the mandatory insurance registers.

<sup>92</sup> Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, pp. 68-69, available at: <https://www.prs.hr/attachments/article/2645/Izvješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravost%20spolova%20za%202018.%20godinu~.pdf>.

<sup>93</sup> Croatia, Decision on termination, non-commencement of damages recovery procedures and on writing-off of claims for damages based on undue maternity and parental benefits and on settlement of damages from mandatory health insurance (*Odluka o obustavi, nepokretanju postupaka naknade štete i o otpisu tražbina na ime naknade štete po osnovi nepripadno ostvarenih prava na roditeljne i roditeljske potpore te o podmirenju naknade štete iz obaveznog zdravstvenog osiguranja*), NN No. 16/2019.



#### 5.2.10 Employer's obligation to substantiate a dismissal

A dismissal during the period of pregnancy, or the use of maternity or parental or other related leave is only allowed in the procedure for the winding-up of a company.

In cases of dismissal for business reasons in the procedure for winding-up, the dismissal has to be in writing and must contain a statement of the reasons (Article 34(4) in conjunction with Articles 115(1) and 120 of the Labour Act). Article 121(2) of the Labour Act could affect the realisation of the dismissal because it states that the obligatory notice period must be suspended during pregnancy or during the use of any maternity, parental or adoption-related rights. However, there is no case law interpreting the combined application of these provisions.

#### 5.2.11 Case law on the protection against dismissal

Non-renewal of a fixed-term contract due to pregnancy has become the usual practice of employers in Croatia. On the one hand, there exists a practically absolute ban of dismissal of pregnant workers or workers using some type of maternity related leave. On the other hand, pregnancy or the use of any maternity related right does not prevent the expiration of a fixed-term contract. One of the usual reasons for the termination of an employment contract is the expiration of a fixed-term employment contract (Article 112(1)(3), Labour Act). There is no obligation on the employer to offer another contract. So, even when it is evident that, for example, the employer has not offered the continuation of the employment relationship, i.e. conclusion of another fixed-term or even open-ended contract, due to pregnancy or maternity, there are no court claims, because women are in such a vulnerable position and employers go by unsanctioned.

The Ombudsperson for Gender Equality reports a complaint filed by a female worker due to less favourable treatment on the ground of pregnancy.<sup>94</sup> She was employed by a temporary employment agency for three years, during which time she was placed at the disposal of another business that was content with her work. When she went on pregnancy related sick leave, the temporary agency decided not to extend the contractual relationship with her, although all of her colleagues who started work at approximately the same time as she did were offered open-ended contracts. Failing to offer any plausible explanation for this decision, the only conclusion was that employer decided not to extend the contractual relationship precisely because of her pregnancy. The employer did not accept the recommendation of the Ombudsperson for Gender Equality to reconsider such actions, and instead stated that if the need for work arises in the future, it was ready to offer the complainant a new contract. Thus, the employer actually reaffirmed that the only reason for not offering the open-ended contract was the worker's pregnancy. This is a standard practice in Croatia, despite the fact that there are available remedies (such as a discrimination claim). Workers are not willing to initiate discrimination claims before courts (due to associated costs, length of procedure, uncertain prospects of success, etc.), even when the facts of the case are such that the existence of direct discrimination based on pregnancy is fairly obvious.

### 5.3 Maternity leave

#### 5.3.1 Length

Article 12(1) to (5) of the Act on Maternity and Parental Benefits regulates the duration of maternity leave for employed and self-employed mothers. Maternity leave consists of two parts: non-transferable compulsory maternity leave and additional maternity leave which is transferable to the father. Compulsory maternity leave lasts for 98 days: 28 days before confinement and 70 days after confinement. The day of the expected confinement is

<sup>94</sup> Ombudsperson for Gender Equality (2018), *Annual Report for 2017*, pp. 40-41, available at [http://www.prs.hr/attachments/article/2404/IZVJE%C5%A0%C4%86E\\_O\\_RADU\\_ZA\\_2017.pdf](http://www.prs.hr/attachments/article/2404/IZVJE%C5%A0%C4%86E_O_RADU_ZA_2017.pdf).

determined by the woman's chosen gynaecologist. In exceptional cases, compulsory maternity leave may start 45 days before confinement, depending on the health condition of the pregnant woman, which is determined by the gynaecologist. Additional maternity leave starts after the expiry of the compulsory maternity leave and lasts until the child is six months old. Additional maternity leave may be entirely transferred to the father or used on a part-time basis.

#### 5.3.2 Obligatory maternity leave

Article 12(2) and (4) of the Act on Maternity and Parental Benefits regulates compulsory maternity leave. It is non-transferable and lasts for 98 days: 28 days before confinement and 70 days after confinement. In exceptional cases, depending on the health condition of the pregnant woman, compulsory maternity leave may start 45 days before confinement.

#### 5.3.3 Legal protection of employment rights (Article 5, 6 and 7 of Directive 92/85)

Article 31 of the Labour Act prescribes that employers are obliged to offer pregnant workers, workers who have given birth and workers who are breastfeeding, and who are working in jobs which represent a risk to their health and life or to the baby's health and life an annex to their employment contract, stipulating a transfer to other adequate jobs for the duration of this condition. If no adequate job is available, such a worker is entitled to paid leave. The transfer to another job is stipulated in the annex to the employment contract, and it should not result in a decrease in the worker's salary. Article 39 of the Safety at Work Act lays down the obligation of the employer to implement special protection for these categories of workers from risks associated with pregnancy and maternity (including a transfer to another appropriate job, or paid leave). Article 20(1) of the Act on Maternity and Parental Benefits guarantees the right of pregnant workers, workers who have given birth and workers who are breastfeeding to be protected from exposure to health and safety risks at work, in accordance with the provisions on labour protection and safety at work.

Article 20(6) of the Act on Maternity and Parental Benefits stipulates that pregnant workers, workers who have given birth and breastfeeding workers are not obliged to perform night work during these periods, provided that they present a certificate issued by a competent gynaecologist stating that this is necessary for their health and safety or for the health and safety of the baby. This period is limited by the definition of these concepts provided in Article 6(1)(10)-(12) of the Act on Maternity and Parental Benefits until a child turns one year of age.

#### 5.3.4 Legal protection of rights ensuing from the employment contract

Article 30(1) of the Labour Act prohibits the employer from offering a pregnant worker, a worker who is breastfeeding or has recently given birth a modified labour contract on less favourable conditions. Article 32 of the Labour Act stipulates that if the prior duration of employment is important to acquire specific rights arising from employment or related to employment, the periods of maternity, parental or adoption leave, and the use of other related rights will be considered as work in full-time working hours. Article 24(1) of the Act on Maternity and Parental Rights guarantees the right of an employed or self-employed parent to salary compensation during maternity and parental leave.

#### 5.3.5 Level of pay or allowance

Maternity benefits (paid during maternity leave) for employed or self-employed people amount to 100 % of the monthly earnings of the insured person, calculated on the basis of the average salary received in the six months preceding the maternity leave (Article 24(1), Act on Maternity and Parental Benefits). There is no ceiling. The allowance is higher

than the average pay during sick leave. The average amount of salary remuneration during sick leave is around 70 % of the previous salary, depending on the reason for sick leave and duration of sick leave. It cannot be lower than 70 % of the calculation base (average salary during six months prior to sick leave), and in any case cannot be lower than 25 % of the budget calculation base<sup>95</sup> for full-time work (Article 55(1) of the Mandatory Health Insurance Act). Maternity benefits are paid at the expense and from the budget of the statutory health insurance fund.

#### 5.3.6 Additional statutory maternity benefits

Statutory maternity benefits are not supplemented by some employers up to the normal remuneration, because the amount of statutory maternity benefits is 100 % of the previous monthly earnings of the insured person, calculated on the basis of the average salary received in the six months preceding the maternity leave.

#### 5.3.7 Conditions for eligibility (Article 11(4) of Directive 92/85)

A minimum period of insurance is required for the payment of maternity benefits in the full amount corresponding to 100 % of the prior average wage. The required minimum period of insurance is 12 months of consecutive insurance or 18 months with interruptions in the last two years. The prescribed insurance period is the period that the person has accumulated on the basis of his/her employed or self-employed activity or on the basis of salary compensation after the termination of employment. If this condition is not fulfilled, the insured person is entitled to salary compensation amounting to 70 %<sup>96</sup> of the budget calculation base (70 % is currently equal to EUR 312 (HRK 2 328.20) per month) (Article 24(7), Act on Maternity and Parental Benefits).

#### 5.3.8 Right to return to the same or an equivalent job (Article 15 of Directive 2006/54)

Article 36(1) and (2) of the Labour Act guarantees the right of workers returning from maternity, parental, adoption leave or other types of leave associated with childcare responsibilities to return to the same job as they performed before exercising one of those rights. If the need for that job no longer exists, the employer must offer the worker an employment contract for another appropriate job, and the conditions of that job must not be less favourable than the conditions of the previous job. The decision to allocate the worker to another post cannot be made unilaterally by the employer - an offer for the conclusion of the employment contract for another appropriate job has to be made. However, if there are no equivalent jobs, the employer would be entitled to dismiss the worker, with the prescribed or agreed notice period and severance pay. This would be considered a regular dismissal for which the employer has to have a justifiable reason, and the decision on dismissal has to be in writing and contain a statement of reasons.<sup>97</sup>

Article 36(3) of the Labour Act stipulates that a worker who has used some of the maternity and parental rights is entitled to additional professional training if there has been a change in working techniques or methods during the use of one of those rights, and is entitled to any other benefit arising from improved working conditions.

#### 5.3.9 Legal right to share maternity leave

Compulsory maternity leave (98 days: 28 days before confinement and 70 days after confinement) is non-transferable (Article 12(2), Act on Maternity and Parental Benefits).

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<sup>95</sup> The budget calculation base is currently EUR 448 or HRK 3 326.

<sup>96</sup> The percentage of compensation was increased from 50 % to 70 % of the budget calculation base from 1 July 2017, in accordance with the Act on Amendments to the Act on Maternity and Parental Benefits, NN No. 59/17.

<sup>97</sup> Opinion of the Ministry of Labour and Pension System, 7 July 2015, available at <http://www.mrms.hr/pitanje/pravo-povratka-na-prethodne-ili-odgovarajuće-poslove/>.

Additional maternity leave (from the 71<sup>st</sup> day after confinement until a child is 6 months old) is transferable to the father. All rights are prescribed by law, although the rights of employed parents may be extended in collective agreements, an agreement between the works council and the employer, in employment rules or in employment contracts, at the expense of employers and subject to the conditions and methods determined in employers' statutes (Article 26, Act on Maternity and Parental Benefits). The size of the employer is neither a qualifying condition, nor does it affect the nature of the entitlement.

#### 5.3.10 Case law

Supreme Court of the Republic of Croatia, Revr-1150/12 – the right to return to the same or equivalent post is violated when the employer hires another worker on an open-ended contract to replace the worker on maternity/parental leave. After the worker returned from parental leave, she was given the same job (sales clerk), but one month after that she was dismissed for business reasons, because the employer did not need two workers for the same job. The dismissal was outside the protective period of 15 days following the return to work, but the lower and revision courts found that it was illegal because it violated the right to return to the same or equivalent post.

Supreme Court of the Republic of Croatia, Revr-211/06 – protection against dismissal does not cover other cases of termination of employment relationship, notably expiration of a fixed-term employment contract. The fact that a worker is on maternity leave does not prevent the expiration of a fixed-term employment contract.

Supreme Court of the Republic of Croatia, Revr-1642/14 – a worker's request for the protection of rights has to be made to the employer within 15 days following the receipt of a decision violating the worker's right, or following the day when the worker gained knowledge of such a violation. If the employer does not meet the worker's request, the worker is entitled to initiate court proceedings within another 15 days. Failure of a worker to request protection of rights within the prescribed period results in the fact that the worker loses the right to initiate court proceedings. Direct court action does not replace the worker's request for the protection of rights.

Supreme Court of the Republic of Croatia, Revr-1227/09 – dismissal given on the first day after the worker returned from maternity leave is contrary to the prohibition of dismissal. The worker notified the employer of the fact that she is on maternity leave within the prescribed period of 15 days, and filed a law suit within another 15 days from the day of notification, thereby complying with all procedural requirements. The fact that the employer claims not to have been aware of that condition cannot be taken against the worker, because the employer did not pick up the registered mail sent by the worker informing the employer about the condition and containing the decision of the competent Croatian Health Insurance Institute about the recognition of maternity leave.

Supreme Court of the Republic of Croatia, Revr-1381/12 – notice of dismissal given to the worker on the first day that she was supposed to come back to work after maternity leave, with an indication that the employment relationship would terminate 15 days thereafter: dismissal is nevertheless prohibited.

Supreme Court of the Republic of Croatia, Revr-1553/12 – employed or self-employed mother who gives birth to a stillborn child before she starts using maternity leave, or if a child dies before the end of maternity or parental leave is entitled to maternity leave, or continuation of maternity leave for an additional three months, following the death of a child (Article 17, Act on Maternity and Parental Benefits). A worker who had a miscarriage was on sick leave for two weeks, following which she returned to work and one month after that was dismissed due to business reasons. Such a dismissal is not prohibited, because the worker did not use the right guaranteed under the Act on Maternity and Parental Benefits (even though she would have been entitled to it).

Supreme Court of the Republic of Croatia, Revr-1314/10 – dismissal is prohibited if the employer was aware and notified of the pregnancy and sick leave due to complications with the pregnancy, even if the employee fails to deliver the formal notice of incapability for work issued by the employee's doctor.

Ombudsperson for Gender Equality, PRS-01-06/17-03 – the usual practice is for junior resident doctors to be obliged to continue working for a certain period after completion of their specialisation in the same institution that financed their specialisation. However, one hospital required junior residents to sign a contract, undertaking the obligation to extend the period of work obligation, if during that time they were absent from work more than 30 days per year, due to 'maternity, parental leave or other circumstances'. Thus, junior resident doctors were practically 'punished' for using some of their pregnancy/maternity/parental related rights, which is clearly an example of unfavourable treatment based on pregnancy and maternity and as such prohibited. After the recommendation of the Ombudsperson for Gender Equality, the hospital changed this practice.

Ombudsperson for Gender Equality, PRS-01-03/17-24 – the question of recognising the time spent on pregnancy related sick leave, maternity and/or parental leave as necessary work experience (*not* the service period) required for promotion in certain professions is often misused by employers. This case concerned a police worker, who was on maternity/parental leave during which time she was not able to take a specific exam that would enable her to be promoted to senior police officer and receive a higher salary. The applicable regulation prescribed that the year in which a police officer 'was absent from work longer than six months' is not calculated in the required period, which is obviously detrimental to people on family related leave, especially women. Consequently, the necessary time period for promotion is in fact longer for workers (usually women) on pregnancy and maternity related leave, which is contrary to the principle of equal treatment. The Ministry of the Interior has acknowledged the recommendation of the Ombudsperson for Gender Equality on including the time spent on pregnancy related sick leave, maternity/parental leave in the period required for promotion.

The Ombudsperson for Gender Equality also reports a complaint about the dismissal of a pregnant worker who was on a fixed-term contract (PRS-01-06/16-07). After the employer denied discrimination and refused to comply with the Ombudsperson's recommendations, the Ombudsperson reported the case to the Labour Inspectorate, which has instituted several court proceedings for misdemeanour against the employer.<sup>98</sup>

## **5.4 Adoption leave**

### **5.4.1 Existence of adoption leave in national law**

The extent of the rights granted to adoptive parents depends on their employment status and the age of the adopted child (Article 34(2), Act on Maternity and Parental Benefits). If both parents jointly adopt a child, they are both entitled to adoption-related rights and to make use of them, typically, in equal parts, unless they declare in writing that only one parent will use the adoption-related rights (Article 34(3), Act on Maternity and Parental Benefits). However, this does not exclude other sharing possibilities. An employed or self-employed adoptive parent is entitled to adoption leave, subject to the condition that the other parent is not a biological parent of the child (Article 35(1), Act on Maternity and Parental Benefits). The right to adoption leave is acquired on the day that the adoption decision becomes final. The duration of adoption leave is six months for a child younger than 18. In the event of the adoption of twins or the simultaneous adoption of two or more children or if the adopted child is a third or consecutive child in the family, or in the event

<sup>98</sup> Ombudsperson for Gender Equality (2017), *Annual Report for 2016*, pp. 46-47, available at [http://www.prs.hr/attachments/article/2188/IZVJESCE\\_2016\\_Pravobraniteljica\\_za\\_ravnopravnost\\_spolova\\_CJELOVITO.pdf](http://www.prs.hr/attachments/article/2188/IZVJESCE_2016_Pravobraniteljica_za_ravnopravnost_spolova_CJELOVITO.pdf).

of the adoption of a child with a developmental disability, the adoption leave of six months is prolonged by 60 days (Article 36(2), Act on Maternity and Parental Benefits). Adoption leave is regarded as an equivalent of maternity leave, so there is no change in length if only one parent takes adoption leave. The allowance for adoption leave is the same amount as for maternity leave. After the expiry of the adoption leave, the adoptive parent is entitled to parental leave as stipulated for biological parents, in accordance with the Act on Maternity and Parental Benefits.

#### 5.4.2 Protection against dismissal (Article 16 of Directive 2006/54)

Article 34(1) of the Labour Act prohibits dismissal during pregnancy and during the use of maternity, parental, adoption and other types of leave in relation to pregnancy and maternity, including 15 days following the last day of the use of those rights.

#### 5.4.3 Case law

There is no available case law concerning issues related to adoption leave.

### **5.5 Parental leave**

#### 5.5.1 Implementation of Directive 2010/18

The Labour Act and the Act on Maternity and Parental Benefits implement Directive 2010/18. The Labour Act guarantees the return to the same or equivalent post after parental leave (Article 36(1)) and the right of a worker to additional vocational training and all other benefits arising from improved working conditions (Article 36(3)). A worker is entitled to paid leave in the case of urgent family reasons, up to seven days per year if not otherwise agreed in a collective agreement, employment rules or an employment contract (Article 86(2)). In the context of flexible working arrangements, the Labour Act only requires the employer to consider the worker's request to change from full-time to part-time work or vice versa if the possibility for such change exists (Article 86(7)). This provision applies generally to all workers. The Act on Maternity and Parental Benefits contains various detailed provisions on the methods of realisation of the right to parental benefit, e.g. on the duration of parental leave (Article 14), leave-sharing arrangements (Article 13), part-time parental leave (Article 15(4)) and salary compensation during parental leave (Article 24(2)-(10)).

#### 5.5.2 Applicability to public and private sectors (Clause 1 of Directive 2010/18)

National legislation on parental leave is applicable equally to public and private sector employment. Article 6(1) of the Act on Maternity and Parental Benefits defines the term 'employment' for the purposes of the application of that act as 'work of a natural person performed for an employer in return for remuneration, based on an employment contract or work performed by a natural person appointed or elected for a permanent post in a certain governmental, local or regional body'.

#### 5.5.3 Scope of the transposing legislation

The scope of transposing legislation includes employment relationships relating to part-time workers, fixed-term contract workers or temporary agency workers. There is no specific provision on this, as it would be superfluous: 'employed parent' within the meaning of the Act on Maternity and Parental Benefits (Article 7(1)(1)) is a person 'in an employment relationship with a domestic or foreign employer having its registered seat in Croatia'. An employment relationship is based on an employment contract (Article 10(1), Labour Act) (regardless of whether it is fixed-term or open-ended, part-time or full-time, etc).

#### 5.5.4 Length of parental leave

Parental leave is an individual right of each employed or self-employed parent, which they cannot use simultaneously. The duration of parental leave is eight months combined (for the first and the second child), or 30 months combined (for the third and each child thereafter, or for twins). Article 14(3) of the Act on Maternity and Parental Benefits seems to suggest that it would be usual for both parents to use parental leave each in duration of 4 or 15 months (depending on the number of children).<sup>99</sup> Two months are granted on a non-transferable basis, but this is not expressly provided in the act itself. This conclusion arises from interpretation of the provision (Article 14(4), Act on Maternity and Parental Benefits) stating that the duration of parental leave is 6 or 30 months if only one parent uses the leave. Parental leave may be used until the child turns eight.

If only one parent uses parental leave, its duration is six months (for the first and the second child). The same applies for single parents. If both parents take the leave, its duration is eight months combined (i.e. usually four months for one parent, and four months for the other parent, out of which two months are supposed to be non-transferable).<sup>100</sup>

There is no differentiation between the public and the private sector.

#### 5.5.5 Age limits

Parental leave can be taken until the child's eighth birthday (Article 13(2) of the Act on Maternity and Parental Benefits).

#### 5.5.6 Individual nature of the right to parental leave

Article 13(3) of the Act on Maternity and Parental Benefits states that the right to parental leave is an individual (personal) right of both employed or self-employed parents. Thus, parental leave is considered a personal right of each parent, even though the total duration of the leave is understood as combining each parent's leave. Two months are reserved for each parent on a 'take it or leave it' basis.

#### 5.5.7 Transferability of the right to parental leave

One parent is entitled to transfer part of the parental leave to the other parent. Parental leave is transferable, in its entirety or in parts (Article 14(4), Act on Maternity and Parental Benefits). If only one parent uses parental leave, its duration is six months for the first and second child, and 30 months for twins, the third and each consecutive child. If parents share parental leave, its duration is eight months for the first and second child, and 30 months for twins, the third and each consecutive child. This provision is implemented and interpreted so that two months of parental leave are granted on a non-transferable basis (i.e. if a mother uses six months of parental leave, the father is entitled to the remaining two months or vice versa. If the other parent does not use the two months, the duration of parental leave for the first and second child is six months). In the case of twins, or for the third child and each child thereafter, the law in respect of the transferable period is quite ambiguous and the provision of at least one month that is non-transferable under Clause 2(2) of Directive 2010/18 is not so clearly implemented.

Parental leave may be used as a right to work half of the full working time (Article 15(4) Act on Maternity and Parental Benefits), but not simultaneously by both parents.

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<sup>99</sup> This provision reads 'The right to parental leave [...] *as a rule* is used by both parents [...] each in duration of 4 or 15 months.' (emphasis added).

<sup>100</sup> These non-transferrable two months are non-transferrable because in practice they do not exist if only one parent uses the leave. Consequently, the other parent has to take at least two months of parental leave.

#### 5.5.8 Form of parental leave

Employed or self-employed parents are entitled to use parental leave in its entirety or in parts, either full-time or part-time. In the latter case it can be used in up to two periods per year, each time for at least 30 days. Parental leave may be used until the child turns eight. Parental leave may be used as a right to work half of the full working time (Article 15(4), Act on Maternity and Parental Benefits), which is basically a form of part-time parental leave. However, there is no other flexibility in deciding how to use part-time parental leave (e.g. to work only some days a week).

#### 5.5.9 Work and/or length of service requirements (Clause 3(1)(b) of Directive 2010/18)

The prior length of service is only taken into account for the calculation of salary compensation during parental leave. The required minimum period of insurance is 12 months of consecutive insurance or 18 months with interruptions in the last two years. The prescribed insurance period is the period that the person has accumulated on the basis of his/her employed or self-employed activity or on the basis of salary compensation after the termination of employment. If this condition is not fulfilled, the insured person is entitled to salary compensation amounting to 70 % of the budget calculation base (currently this amounts to EUR 312 (HRK 2 328.20) per month) (Article 24(7) Act on Maternity and Parental Benefits).

#### 5.5.10 Notice period

Both the Labour Act and the Act on Maternity and Parental Benefits are silent on the question of a notice period in relation to the employer when a worker takes parental leave for the first time. The only notice period that is stipulated is the one in relation to the Croatian Health Insurance Fund (15 days before the starting date of the leave, Article 44(4), Act on Maternity and Parental Benefits). Employed parents who intend to change the modality of their use of parental leave or to take up the unused part of parental leave are obliged to notify their employer at least 30 days in advance and obtain the employer's written consent. The employer is entitled to deny or postpone the employee's intended change for up to a maximum of 30 days (Article 47(1) and (2) of the Act on Maternity and Parental Benefits), in accordance with the provisions on labour relations. This is a rather vague provision, because the only situation in which the employer will be required to provide an alternative is in connection with the protection of health and safety at work in relation to a woman who has recently given birth or is breastfeeding. In other cases, a worker who is not satisfied with the employer's decision and believes that his or her labour rights have been violated has no other option but to request the protection of his or her rights and initiate legal proceedings in a labour dispute before the competent court.

#### 5.5.11 Postponement of parental leave (Clause 3(1)(c) of Directive 2010/18)

Only when employed parents intend to change the modality of their use of parental leave or to take up the unused part of parental leave are they obliged to notify their employer at least 30 days in advance and obtain the employer's written consent. The employer is entitled to deny or postpone the employee's intended change for up to a maximum of 30 days (Article 47(1) and (2), Act on Maternity and Parental Benefits).

#### 5.5.12 Special arrangements for small firms (Clause 3(1)(d) of Directive 2010/18)

There are no special arrangements for small firms.



#### 5.5.13 Special rules and exceptional conditions for parents of children with a disability or long-term illness (Clause 3(3) of Directive 2010/18)

There are special leave options for parents of children with a disability or a long-term illness. They are separate from maternity and parental leave and include:

1. part-time work (half of the full working time) due to increased care for a child under three years of age: after parental leave, one of the employed or self-employed parents is granted this right if a child needs increased care for health and developmental reasons, according to the professional opinion of and an assessment by the family physician and the competent committee of physicians designated by the Croatian Health Insurance Institute (Article 16, Act on Maternity and Parental Benefits);
2. leave of absence due to care for a child with severe developmental disabilities until the child turns eight: after maternity or after/during parental leave, one employed or self-employed parent of a child with a severe physical or mental impairment or severe mental illness is granted this right based on the findings and professional opinion of the competent body for medical expertise in accordance with the rules of the mandatory health insurance system. Both parents have to be employed or self-employed before taking up this right and for its entire duration (Article 23(1), Act on Maternity and Parental Benefits);
3. part-time work (half of the full working time) due to care for a child with severe developmental disabilities until the child turns eight, and after that time for as long as the need exists: after maternity or after/during parental leave, one of the employed or self-employed parents of a child with a severe physical or mental impairment or severe mental illness is granted this right based on the findings and professional opinion of the competent body for medical expertise in accordance with the rules of the mandatory health insurance system. Both parents have to be employed or self-employed before taking up this right and for its entire duration. This right may be granted for a certain period of time, depending on the findings of the competent body for medical expertise (Article 23(2), Act on Maternity and Parental Benefits). The employer and employee may agree to rearrange working time patterns on an individual basis (i.e. to work some days a week), but working time always has to correspond to 50 % of the full working time.

Remuneration during these types of leave is granted in the form of salary compensation payable from the state budget, based on the prescribed parameters of calculation in Article 24(4) and Article 24a of the Act on Maternity and Parental Benefits.

#### 5.5.14 Measures addressing the specific needs of adoptive parents (Clause 4 of Directive 2010/18)

Other than the rules on adoption leave, there are no other measures addressing the specific needs of adoptive parents.

#### 5.5.15 Provisions protecting workers against less favourable treatment or dismissal (Clause 5(4) of Directive 2010/18)

Article 34(1) of the Labour Act prohibits dismissal during pregnancy and during the use of maternity, parental, adoption and other types of leave in relation to pregnancy and maternity, including 15 days following the last day of the use of those rights. The worker returning from parental leave is entitled to additional vocational training and all other benefits resulting from improvement of working conditions during his absence (Article 34(3) of the Labour Act).

#### 5.5.16 Right to return to the same or an equivalent job (Clause 5(1) of Directive 2010/18)

Article 36(1) and (2) of the Labour Act guarantee the right of workers returning from maternity, parental, adoption or other types of leave associated with childcare responsibilities to return to the same job as that performed before exercising one of these rights, and if the need for that job no longer exists, the employer must offer the worker an employment contract for another appropriate job, with conditions no less favourable than the conditions of the previous job.

#### 5.5.17 Maintenance of rights acquired or in the process of being acquired by the worker (Clause 5(2) of Directive 2010/18)

Article 32 of the Labour Act stipulates that if the prior duration of employment is important to acquire specific rights arising from employment or related to employment, the periods of maternity, parental or adoption leave, and the use of other related rights shall be considered as work in full-time working hours. Therefore, all rights also accrue during parental leave. Article 84(4) and (5) of the Labour Act stipulate that an employee who has not used annual leave in the calendar year in which it was acquired due to maternity, parental, adoption leave or similar rights is entitled to use that leave upon a return to work, but no later than the end of the calendar year of her/his return to work. This is an example of an explicit provision guaranteeing the maintenance of acquired rights prior to taking parental leave.

#### 5.5.18 Status of the employment contract or relationship during parental leave

Parental leave is treated as a special type of leave, which does not affect the status and duration of an employment contract.

#### 5.5.19 Continuity of entitlement to social security benefits

During parental leave, the employment relationship is maintained and the worker retains the status of insured person in mandatory health and pension insurance (Article 25 of the Act on Maternity and Parental Benefits).

#### 5.5.20 Remuneration

Parental leave is not remunerated by the employer. Parental benefits are paid from the state budget (Article 24b of the Act on Maternity and Parental Benefits).

#### 5.5.21 Social security allowance

Parental benefits (allowance or salary compensation) for employed and self-employed parents are paid at the expense of the state budget. Parental benefit (paid during parental leave) for employed or self-employed persons is 100 % of the monthly earnings, but cannot exceed a maximum of 120 % of the budget calculation base (currently EUR 536 (HRK 3 991.20) per month) (Article 24(2), Act on Maternity and Parental Benefits). It cannot be lower than 70 % of the budget calculation base (70 % currently amounts to EUR 312 (HRK 2 328.20) per month) (Article 24(3) Act on Maternity and Parental Benefits).<sup>101</sup> The sector of employment or self-employment is irrelevant.

#### 5.5.22 More favourable provisions (Clause 8 of Directive 2010/18)

More favourable conditions than those envisaged in Clause 2(2) of Directive 2010/18 are prescribed with a view to promoting gender equality in the use of parental leave, in that two months of the parental leave are non-transferable. Also, the fact that there is no

<sup>101</sup> The percentage of compensation was increased from 1 July 2017 onwards in accordance with the Act on Amendments to the Act on Maternity and Parental Benefits, NN No. 59/17.

postponing of parental leave due to justifiable reasons related to the operation of the organisation (Clause 3(1)(c) of Directive 2010/18) can be considered more favourable for workers.

#### 5.5.23 Case law

The majority of complaints to the Ombudsperson for Gender Equality in the field of parental leave relate to the actions of the Croatian Health Insurance Fund.<sup>102</sup> For example, when a person returns to work from a maternity or parental leave, and has to take sick leave, the salary compensation during sick leave is calculated on the basis of the average amount of parental benefit in the period preceding sick leave, which is lower than the average salary that the employee would have received had there been no parental leave. Other complaints concern the fact that the Health Insurance Fund does not take into account the time spent on vocational training without conclusion of the employment contract as the length of service required for the recognition of the higher amount of maternity or parental benefit, or sick leave. Vocational training without conclusion of the employment contract is sometimes the only way in which young people who have finished education, but have no work experience, are able to enter the labour market. The Mandatory Health Insurance Act (Article 7(1)(5))<sup>103</sup> grants them the status of insured persons in health insurance, but the duration of vocational training is not calculated in the length of service (Article 56(3)). On the other hand, under the Act on Maternity and Parental Benefits they are considered as employed persons with all rights pertaining thereto under that act (Article (2)(3)). There was a case in which a father was denied the option to take additional maternity and parental leave because his wife, the child's mother, was a foreign citizen with private health insurance and was not registered as an insured person with the Croatian Health Insurance Fund.<sup>104</sup> He was denied this right by referring to the status of his wife, despite the fact that he was a Croatian citizen and an insured person in health insurance and despite the fact that maternity and parental leave are deemed as personal rights of both parents. The appellate body annulled this decision, but there is no further available information as to the outcome of the case.

### 5.6 Paternity leave

#### 5.6.1 Existence of paternity leave in national law

Croatian legislation does not provide for paternity leave.

#### 5.6.2 Protection against unfavourable treatment and/or dismissal (Article 16 of Directive 2006/54)

Not applicable.

#### 5.6.3 Case law

Not applicable.

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<sup>102</sup> Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, p. 65, available at <https://www.prs.hr/attachments/article/2645/Izvješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu~.pdf>.

<sup>103</sup> Croatia, Mandatory Health Insurance Act (*Zakon o obveznom zdravstvenom osiguranju*), NN Nos. 80/13 and 137/13.

<sup>104</sup> Ombudsperson for Gender Equality, case PRS-01-06/18-10, Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, p. 72, available at <https://www.prs.hr/attachments/article/2645/Izvješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu~.pdf>.

## **5.7 Time off/care leave**

### **5.7.1 Existence of care leave in national law (Clause 7 of Directive 2010/18)**

Under Article 39(1)(5) of the Mandatory Health Insurance Act,<sup>105</sup> a worker is entitled to paid leave to take care of a close family member (a child or spouse). The beneficiary is entitled to salary compensation for the duration of 60 days per illness for a child younger than 7, 40 days per illness for a child from 7-18 and 20 days per illness for a child older than 18 years and for a spouse. Leave is taken on a full-time basis, and the salary compensation is paid by the employer, at the expense of the Croatian Health Insurance Fund (i.e. the employer is reimbursed for the full amount by the Croatian Health Insurance Fund). The amount of compensation is 100 % of the calculation base (the average salary in the six months preceding the care leave) if a child is younger than three, and 70 % of the calculation base in all other cases. Salary compensation may not exceed EUR 561 (HRK 4 257.28). The size of the employer is irrelevant.

### **5.7.2 Case law**

The majority of complaints to the Ombudsperson for Gender Equality in this area concern the amount of salary compensation during sick leave. When a person returns to work from maternity or parental leave, and has to take sick leave, the salary compensation during sick leave is calculated on the basis of the average amount of parental benefit in the period preceding sick leave, which is lower than the average salary that the person would have received, had there been no parental leave.<sup>106</sup>

## **5.8 Leave in relation to surrogacy**

Surrogacy is not legally regulated in Croatia. Consequently, only legally recognised types of leave (such as adoption leave following legal adoption of a child) would be possible here. All maternity and parental benefits and leave are granted to a child's parents (mother or father, including adoptive parents), guardian or foster parent (Article 7 of the Act on Maternity and Parental Benefits). There is a legal presumption that a child's mother is a woman who gave birth to the child (Article 58 of the Family Act),<sup>107</sup> and a child's father is a woman's husband, if a child was born during marriage or within 300 days after its termination (Article 61(1) of the Family Act). Otherwise, parenthood has to be determined by a court decision and/or recognition and surrogacy would cause a multitude of legal issues, not least concerning the possibility of leave. There exists no legally regulated possibility of leave in relation to surrogacy.

## **5.9 Flexible working time arrangements**

### **5.9.1 Right to reduce or extend working time**

Right to reduce or extend working time exists only in relation to maternity and parental leave.

Additional maternity leave may be used by a mother as a right to work half of the full working time, which does not affect the right to transfer additional maternity leave to the father (Article 15(1) and (3), Act on Maternity and Parental Benefits), i.e. these two arrangements can be used simultaneously. Parental leave may be used as a right to work half of the full working time (Article 15(4), Act on Maternity and Parental Benefits), but

<sup>105</sup> Croatia, Mandatory Health Insurance Act (*Zakon o obveznom zdravstvenom osiguranju*), NN Nos. 80/13 and 137/13.

<sup>106</sup> As reported by the Ombudsperson for Gender Equality, see Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, p. 67, available at: <https://www.prs.hr/attachments/article/2645/Izvješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu%20~.pdf>.

<sup>107</sup> Croatia, Family Act (*Obiteljski zakon*), NN No. 103/2015.

not simultaneously by both parents. This right can be used until the child is eight years old. Its duration is twice as long as any remaining unused parental leave. Other forms of the legal right to work half time are designed for parents of children with a disability or long-term illness.

### 5.9.2 Right to adjust working time patterns

The possibility of flexible working-time arrangements is prescribed for certain categories of workers and it is unrelated to maternity or parental responsibilities.

Workers have no right to adjust and establish their working time patterns. On the other hand, employers have the authority to readjust working time patterns if the nature of the work so requires (Article 67 of the Labour Act). The average working time during readjustment may not be longer than full or part-time work (i.e. 40 hours per week or less if agreed upon in the employment contract). The duration of the readjustment is limited to 12 consecutive months. This readjustment of working hours is either agreed in the employment contract or in a collective agreement, or in an agreement concluded between the employer and the works council. If the readjustment is not agreed in any of these agreements, the employer determines the readjustment in the working plan, which must be submitted to the labour inspectorate.

Flexible working-time arrangements are available for certain categories of workers under Article 88(3) of the Labour Act. Where working time is impossible to measure or set in advance or where workers determine working hours independently due to the specific nature of the work (managers, employed family members living in a joint household with the employer etc.), the provisions of the Labour Act regulating working time, night work, daily and weekly rest are not applicable, provided that such provisions are inserted in the employment contract. The categories of workers falling under this provision are listed in an exemplary, non-exhaustive manner. This provision relates to the issue of working hours. The preconditions for its application are that working time is impossible to measure or set in advance or that workers determine working hours independently. Consequently, the part-time/full-time work distinction is not directly relevant for its application.

Another option, which in practice allows for more flexibility in working time arrangements, is the breastfeeding break, pursuant to Article 19 of the Act on Maternity and Parental Benefits. A female worker who is breastfeeding her child is allowed a two-hour break per working day, regardless of whether the child's father is using any of the rights guaranteed under the same act. However, this right only applies to female workers on full-time contracts, until the child reaches the age of one year. It can be used on a one-time basis or two times per day (in the latter case, the duration of the break is one hour per break). The break is remunerated by the Croatian Health Insurance Fund (at 100 % of the budget calculation base, recalculated on an hourly rate) and is included in the duration of the working time. Recent analysis shows that only a marginal number of women use this option and it is usually used at the end of the working time, so in effect it shortens the full working time by two hours.<sup>108</sup> However, this right (or its equivalent) is not recognised for adoptive mothers or male workers in general.

### 5.9.3 Right to work from home or remotely

There is no legal right for workers to request to work from home or remotely.

Article 17(1) of the Labour Act prescribes the obligatory content of the employment contract, where the location of the workplace is at the worker's home or another location

<sup>108</sup> In 2018, 109 women used this right. For more details, see Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, p. 61, available at <https://www.prs.hr/attachments/article/2645/Izvjeste%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu%20.pdf>.

other than the employer's premises. Apart from this obligatory content prescribed for general employment contracts, such contracts must include provisions on working time, machinery or equipment which the employer is liable to provide, install and maintain, the use of the worker's own equipment and tools and the compensation of costs for that purpose, the compensation of other costs in connection with the performance of the work and provisions on the professional training and development of workers. There is no guarantee of a return to prior working arrangements. Working from home or remotely is based on an agreement between the employer and the employee. Where no consent on either side exists, no such working arrangement can apply.

The salary of a worker who works from home or remotely must not be lower than the salary of a worker who works at the employer's premises and performs the same or similar work (Article 17(3), Labour Act).

#### 5.9.4 Other legal rights to flexible working arrangements

Article 66(9) of the Labour Act, which regulates the distribution of working time, opens up the possibility of 'banking' hours. It can only be regulated by collective agreements, as a total fund of working hours during a period of an uneven distribution of working hours (up to four or six months). The total working hour fund during this period cannot exceed an average of 45 hours per week, including overtime.

#### 5.9.5 Case law

Given the rather rigid legislative framework for flexible working arrangements, in many cases it all depends on the goodwill of the employer and agreement between the employer and employee to readjust working patterns within the limits of the law. Some larger companies, especially in the IT sector, implement flexible working policies or pilot projects during which time they monitor the effects of such flexible working arrangements,<sup>109</sup> but in general flexible working arrangements are rare. There is no particular case law to mention here, since the majority of flexible working arrangements are not tied to the fact that a worker is returning from maternity or parental leave, and are not adapted to the needs of parents returning to work after maternity or parental leave.

### 5.10 Evaluation of implementation

Overall, the pregnancy and maternity legislation is based on high standards of protection and implements the relevant directives in a satisfactory manner. However, the work-life balance policies and measures are lagging and should be improved. Formally, the requirements from directives have been implemented. In practice, flexible working arrangements for parents boil down to the possibility to take part-time maternity or parental leave. Even so, there is no special provision allowing employees to request part-time work only on certain days during the week or month, or to adjust working time patterns in some other way. Furthermore, there is no provision requiring or even motivating the employer and employee to communicate and make arrangements that could facilitate the reintegration of the employee returning from parental leave, in accordance with Article 6 of Directive 2010/18. Other than within the framework of maternity and parental leave, workers have no possibility to request more flexible working arrangements after these rights have been exercised. Workers are only entitled to ask for the switch from full-time to part-time work and vice-versa, and the employer is only obliged to consider such requests. This possibility is unrelated to parenting responsibilities. Consequently, there is not much hope for workers returning after parental leave to benefit or use flexible working arrangements that would allow them to reconcile private and professional life more efficiently.

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<sup>109</sup> See, for example, <http://www.poslovnj.hr/hrvatska/raste-interes-poslodavaca-za-fleksibilnim-oblicima-rada-predvodnici-ina-rba-i-ent-348890>.

### **5.11 Remaining issues**

Nothing further to report.

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

### **6.1 General (legal) context**

#### **6.1.1 Surveys and reports on the practical difficulties linked to occupational and/or statutory social security issues**

Comprehensive research specifically on various gender equality issues in occupational and/or statutory social security schemes has not been carried out. To a limited extent, the findings of other, more general surveys are relevant from a gender equality perspective.

In order to properly understand the gender dimension of the pension system in Croatia, a brief overview of the system is required. The pension system in Croatia is based on three pillars: the first pillar is a public mandatory pension insurance based on inter-generational solidarity (PAY-G), the second pillar is a private mandatory pension insurance based on capitalisation, with individual savings accounts and defined contributions, and the third pillar is based on private voluntary pension saving accounts. The initial pension reform and introduction of the three-pillar system started in 1998, and the pillar structure became operational from 2002. At that time, all people under 40 were required to join the second pillar, whereas those between 40 and 50 could choose whether to join. People over 50 remained insured in the first pillar only. The scope of insured persons in mandatory pension insurance is very broad (Articles 9-23 of the Pension Insurance Act), covering the working population, but also other categories (such as students and pupils on traineeships or registered unemployed persons) to a limited extent and under specific circumstances.

The pension reform was implemented in the period after the Homeland War, when the country began to recover from the war and the negative effects of the transition to a market economy. Many companies and businesses were destroyed, and many workers were forced to retire early, with relatively lenient conditions. This 'culture' of early retirement is still present, although to a lesser extent, and is liable to produce gender inequality because of its link to unequal pension ages for men and women. The most obvious example is the issue of incentive severance pay that certain employers offer, described below, which is forfeit when a person reaches retirement age (even for early old-age pension). Since that age is lower for women, women and men are placed in an unequal position.

Current data shows that women retire, on average, three years earlier than men, but due to differences in life expectancy, women are expected to receive pension benefits four years longer than men.<sup>110</sup>

#### **6.1.2 Other issues related to gender equality and social security**

The gender pension gap (i.e. the difference in level of pensions between men and women) stands around 20 %, and women are more often exposed to poverty in old age than men.<sup>111</sup> The gender pay gap is reflected in the gender pension gap. However, the gender pension gap is even wider than the pay gap, due to the fact that women retire earlier than men (different retirement and early retirement age is permissible during the transition period), which means that they have paid pension contributions during a shorter period than men. In addition, women take longer and more frequent career breaks as a result of family and child-caring responsibilities. Another factor that contributes to the pension gap

<sup>110</sup> In 2018, the average retirement age for old-age pensions was 63 years and 5 months for men and 60 years and 11 months for women. See Bejaković P. (2019), 'The causes of problems in the public pension system and reasons why funded pension insurance should be preserved in Croatia' (*Uzroci poteškoća u mirovinskom sustavu i razlozi zašto treba očuvati kapitalizirano mirovinsko osiguranje u Hrvatskoj*), *Rev.soc.polit.* 26 (1):37-53, p. 42.

<sup>111</sup> Croatian Bureau of Statistics, 'Women and Men in Croatia 2018', available at [https://www.dzs.hr/Hrv\\_Eng/menandwomen/men\\_and\\_women\\_2018.pdf](https://www.dzs.hr/Hrv_Eng/menandwomen/men_and_women_2018.pdf); Indicators of poverty and social exclusion – First results; available at [https://www.dzs.hr/Eng/system/first\\_results.htm](https://www.dzs.hr/Eng/system/first_results.htm).



lies in the structure of the pension system itself. A survey from 2012 predicted the potential difference in pensions between men and women, by applying a model of calculation that considers the situation of a hypothetical male and female in a hypothetically identical situation and having the same characteristics. The only different parameter in calculation was the statutory retirement age. During the prescribed transition period for the gradual equalisation of retirement ages between men and women, which extends until 31 December 2018, women are able to retire at an earlier age than their male colleagues until the year 2029.<sup>112</sup> Women who decide to retire within this period, and who are insured under both pension pillars, may expect to receive a lower pension than their male counterparts with identical characteristics (length of service, amount of salary, etc).<sup>113</sup> On the other hand, if the same model is applied, but the woman is insured only within the first pillar, the amount of pension would be identical to the amount of pension of a typical hypothetical male worker. This shows a systemic inequality that is linked to the different retirement age of women, and not to the actuarial calculations, because they are not linked to sex.<sup>114</sup>

### 6.1.3 Political and societal debate and pending legislative proposals

There is a recurring political debate on the position of the second (mandatory) pillar of pension insurance, which is based on capitalisation of the personal assets of the insured person. The pension contribution is 20 %, with 15 % paid to the first pillar and 5 % to the second pillar. Given that the second pillar started to operate relatively recently, participants cannot yet have accumulated sufficient savings, resulting in the fact that the amount of pension from both pillars is still much lower than the amount of pension for those remaining under the first pillar only. Consequently, there are frequent debates whether to abolish the pillar system and transfer all assets back to the original first pillar. This pension issue is linked to gender equality issues, because the retirement age for women is still lower than that for men, and it is more likely that women would be more affected by the lower pensions. The recent legislative amendments to the Pension Insurance Act<sup>115</sup> are meant to compensate (predominantly) women, who are more likely to take career breaks and maternity and parental leave (which in the end may lead to lower pensions as well) by introducing a new legal concept of added pension service time for the calculation of the amount of pension. Upon reaching a pensionable age, a parent – mother or adoptive mother – has the right to six months of added pension service time for the calculation of the amount of pension (not for the right to pension) for each child she has given birth to or has adopted. Exceptionally, a father or adoptive father can make use of this entitlement, if he was the one to use maternal leave in accordance with the rules on maternity and parental leaves. This amendment will enter into force as of 1 January 2019.

## 6.2 Direct and indirect discrimination

Article 8(1)(3) of the Anti-Discrimination Act includes in its field of application the area of social security, including social welfare, pension, health and unemployment insurance. It does not differentiate between statutory and occupational social security schemes. Occupational social security schemes in Croatia are rare. The legal possibility of establishing occupational pension schemes exists within the framework of the Act on Voluntary Pension Funds. This act regulates both open-ended and closed voluntary pension funds. Voluntary closed pension funds (part of the third or voluntary pension pillar) are

<sup>112</sup> The transition period is shortened to year 2027, from 1 January 2019.

<sup>113</sup> Nestić D., Tomić I. (2012), 'Adequacy of Pensions in Croatia: What can tomorrow's pensioners expect?' (*Primjerenost mirovina u Hrvatskoj: što mogu očekivati budući umirovljenici?*) PKIEP 130 (2012) 61-99; pp. 74-75, available at <https://hrcak.srce.hr/83125>.

<sup>114</sup> Nestić D., Tomić I. (2012), 'Adequacy of Pensions in Croatia: What can tomorrow's pensioners expect?' (*Primjerenost mirovina u Hrvatskoj: što mogu očekivati budući umirovljenici?*) PKIEP 130 (2012) 61-99; p. 75, available at <https://hrcak.srce.hr/83125>.

<sup>115</sup> Croatia, Pension Insurance Act, NN Nos. 153/2013, 151/2014, 33/2015, 120/2016, 18/2018, 62/2018 and 115/2018, Article 32a.

financed by employers, unions or associations of independent or occupational activities.<sup>116</sup> The act specifically refers to the transposition of Recast Directive 2006/54 and Directive 2010/41 (Article 2). Article 183 of the act requires that the application of the statutes of the closed voluntary pension funds will not directly or indirectly cause any differential treatment of men and women or allow inequalities in rights from the voluntary pension insurance based on gender. Examples of prohibited differential treatment are listed in a non-exhaustive manner and include: access to membership; the compulsory or optional nature of participation; laying down different rules regarding access to membership or the minimum period of membership required to obtain the benefits; setting different conditions in the event of the suspension of rights during maternity leave or taking care of children; and different conditions applicable only to members of one sex upon the termination of membership.

The Act on Pension Insurance Companies<sup>117</sup> also transposes Directive 2006/54 and Directive 2010/41 in its field of application (the establishment and operation of statutory and voluntary pension insurance companies and the regulation of statutory and voluntary pension schemes). It contains a specific clause on gender equality (Article 105), which specifies that the calculation of the pension paid under the act must not, directly or indirectly, result in inequality or a denial of rights based on gender. It further states, in a non-exhaustive manner, what is understood under 'inequality or a denial of rights' (different conditions for calculating qualifying periods, different ages as a condition for the recognition of rights, unless otherwise prescribed, and different amounts of pension due to diverging conditions that are applicable solely to persons of one sex).

### **6.3 Personal scope**

Closed voluntary pension funds financed by employers, unions or associations of independent or occupational activities by their legal definition can accept only workers employed by the employer, members of the union or members of the association and self-employed persons as their members (Article 120, Act on Voluntary Pension Funds). The personal scope is in line with the personal scope of the act and of Directive 2006/54. There are open voluntary pension funds, where membership is not limited to a certain branch or profession, but these are not considered as occupational social security schemes.

### **6.4 Material scope**

Since there are practically no other occupational social security schemes apart from closed voluntary pension funds in Croatia, the material scope of the national law is more restricted than specified in Article 7 of Directive 2006/54.

### **6.5 Exclusions**

There are no exclusions from the material scope as specified in Article 8 of Directive 2006/54.

### **6.6 Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54**

There are no laws or case law falling under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54. Article 183 of the Act on Voluntary Pension Funds almost literally transposes Article 9(1)(a) to (k) of Recast Directive 2006/54. As always when such an approach in transposition is used, there are discrepancies in the wording, which may be unintentional results of translation and simplification. In any case,

<sup>116</sup> Croatia, Act on Voluntary Pension Funds (*Zakon o dobrovoljnim mirovinskim fondovima*), NN Nos. 19/14 and 29/18.

<sup>117</sup> Croatia, Act on Pension Insurance Companies (*Zakon o mirovinskim osiguravajućim društvima*), NN Nos. 22/14 and 29/18.

only practice will show whether true compliance with Article 9 of Recast Directive 2006/54 has been achieved. What was 'lost' in translation should be interpreted in line with the recast directive. For example, different rules for the 'reimbursement of contributions' from Article 9(1)(d) of the recast directive are transposed as different rules in relation to 'expected rights' upon the termination of membership in Article 183(2)(1) of the Act on Voluntary Pension Insurance Funds, which is a rather vague term and it is questionable whether it includes the reimbursement of contributions as well. However, since Article 183 of the Act on Voluntary Pension Funds, like Article 9(1) of Recast Directive 2006/54, contains 'examples' of discrimination, it calls for the widest possible interpretation. This means that other discriminatory behaviour, which is not expressly mentioned, could be sanctioned as well.

## **6.7 Actuarial factors**

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

## **6.8 Difficulties**

There are no difficulties concerning gender equality in relation to occupational social security schemes.

## **6.9 Evaluation of implementation**

Occupational social security schemes are relatively underdeveloped in Croatia, because they include only closed pension insurance funds financed by employers, unions or associations of independent or occupational activities. They accept only workers employed by the employer, members of the union or members of the association and self-employed persons as their members. However, the closed voluntary pension funds seem to have rapidly expanded over recent years. Out of 30 registered voluntary pension funds, 21 are closed voluntary pension funds. In the majority of cases, they are established by relatively successful private and public companies, as well as certain trade unions. Their membership has almost doubled in the last five years, from around 23 000 members in 2014 to 42 000 in the beginning of 2019. This is still relatively modest in comparison with the membership of the open voluntary pension funds (close to 300 000 in 2019) and, of course, mandatory pension funds (1 947 656 in 2019).<sup>118</sup>

Given this recent expansion of the closed voluntary pension schemes, there will probably be more examples from practice that would enable the evaluation of the implementation of the gender equality standards in the upcoming period. So far, the legislative framework is satisfactory.

## **6.10 Remaining issues**

There are no further issues to report.

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<sup>118</sup> Croatian Financial Services Supervisory Agency (HANFA), Statistics, available at <https://www.hanfa.hr/publikacije/statistika/#section4>.

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

### **7.1 General (legal) context**

#### **7.1.1 Surveys and reports on the practical difficulties linked to statutory schemes of social security (Directive 79/7)**

Voluntary and involuntary early retirement seems to be a recurring problem of the Croatian public pension insurance. The link between the traditional role of women, who are expected to take primary responsibility for family members (children, grandchildren, parents and other close relatives), and early retirement has not been investigated enough. There is a perception that women are more likely to retire early, because of these responsibilities and because of the fact that the transition period for gradual equalisation of (early) retirement age between men and women is still on-going. Early retirement implies that they will have lower pensions. However, one recent study shows that early retirement in Croatia is perceived as a shelter for people who work in tougher working conditions with lower economic security, mostly in the private sector, who have a poor quality of life and are less educated or in poor health.<sup>119</sup> There was no particular link to gender concerning the personal intention to retire early. In fact, males were more likely to report the intention to take early retirement, whereas no statistically significant difference was discovered for participants who were looking after grandchildren or living in the same household with minor children.<sup>120</sup> This finding seems surprising, given the prevailing perception. Further investigation is needed before definite conclusions can be reached.

#### **7.1.2 Other relevant issues**

Family members for the purposes of application of the Pension Insurance Act include not just a spouse, or a former spouse (if a maintenance obligation exists), but also an extramarital partner, registered life partner or informal life partner, and even children or parents of deceased registered or informal life partners, who are supported by the insured person (Articles 22 and 22a of the Pension Insurance Act). Extramarital and informal life partnerships have to have lasted at least three years, and this fact has to be proven in a non-contentious court procedure. The Mandatory Health Insurance Act, on the other hand, only recognises extramarital partners as the insured person's family members (Article 10(1)(1) of the Mandatory Health Insurance Act). However, more specific provisions regulating the status of registered life partners in pension insurance, health insurance and social welfare are contained in the Same-Sex Life Partnership Act (Articles 61-68). Under Article 4(2) of the Same-Sex Life Partnership Act, informal same-sex life partners have the same status as extramarital partners in the field of inheritance, tax system, pension and mandatory health insurance, rights and obligations arising from employment relations, etc.

#### **7.1.3 Overview of national acts**

The relevant national acts include the Pension Insurance Act,<sup>121</sup> the Mandatory Health Insurance Act,<sup>122</sup> and the Labour Market Act.<sup>123</sup>

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<sup>119</sup> Bađun M., Smolić Š. (2018), 'Predictors of early retirement intentions in Croatia', Društvo.istraž.Zagreb (2018)7(4):671-690, p. 684.

<sup>120</sup> Bađun M., Smolić Š. (2018), 'Predictors of early retirement intentions in Croatia', Društvo.istraž.Zagreb (2018)7(4):671-690, p. 679.

<sup>121</sup> Croatia, Pension Insurance Act (*Zakon o mirovinskom osiguranju*), NN Nos.157/2013, 151/2014, 33/2015, 93/2015, 120/2016, 18/2018, 62/2018 and 115/2018.

<sup>122</sup> Croatia, Mandatory Health Insurance Act (*Zakon o obveznom zdravstvenom osiguranju*), NN Nos. 80/2013 and 137/2013.

<sup>123</sup> Croatia, Labour Market Act (*Zakon o tržištu rada*), NN No. 118/2018.

#### 7.1.4 Political and societal debate and pending legislative proposals

On 7 December 2018 the Croatian Parliament adopted the Act on Amendments to the Pension Insurance Act.<sup>124</sup> This act entered into force on 1 January 2019. The act has shortened the transition period for the equalisation of pensionable age between male and female workers by the year 2027 (under previous provisions, it was by 2030). However, an issue that provoked much public debate even before the adoption of these amendments is the shortening of the transition period for the increase of retirement age from 65 to 67 (for both men and women), from the year 2038, which was previously prescribed, to the year 2033.<sup>125</sup>

The Act on Amendments to the Pension Insurance Act includes a new legal concept of added pension service time for the calculation of the amount of pension. Upon reaching a pensionable age, a parent – mother or adoptive mother – has the right to six months of added pension service time for the calculation of the amount of pension (not for the right to pension) for each child she has given birth to or has adopted. Exceptionally, a father or adoptive father can make use of this entitlement, if he was the one to use maternal leave in accordance with the rules on maternity and parental leave.<sup>126</sup> This provision serves the aims of demographic policies.

### 7.2 Implementation of the principle of equal treatment for men and women in matters of social security

Although there are no specific guarantees of equal treatment in legislative instruments regulating social security benefits (i.e. the Pension Insurance Act, the Mandatory Health Insurance Act, the Labour Market Act, etc.), the general provisions of the Gender Equality Act and the Anti-Discrimination Act cover this field and fully implement Directive 79/7. For example, Article 8(1) of the Anti-Discrimination Act defines its field of application, explicitly referring to social security, including the areas of social welfare, pensions, health and unemployment insurance (Article 8(1)(3), Anti-Discrimination Act).

### 7.3 Personal scope

Article 2 of Directive 79/7 covers all statutory social security schemes. The personal scope of the national statutory social security schemes is broader than specified in Directive 79/7, because it covers the working population, but also other categories of the otherwise non-active population (e.g. students on traineeship, unemployed persons during professional rehabilitation or vocational training, etc.) under specific circumstances and with a more limited coverage.

### 7.4 Material scope

Statutory social security schemes cover all schemes that provide protection against the risks listed in Article 3 of Directive 79/7.

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<sup>124</sup> Croatia, Act on Amendments to the Pension Insurance Act (*Zakon o izmjenama i dopunama Zakona o mirovinskom osiguranju*), NN No. 115/2018.

<sup>125</sup> In the period from 27 April to 11 May 2019 (after the cut-off date for this report), the trade unions are organising action to collect signatures by voters to instigate a referendum on the issue of the increase of the pensionable age from 65 to 67. For a referendum initiative to succeed, 373 568 valid signatures (10 % of the total number of voters) from the voting age population needs to be collected. In that case, the Croatian Parliament will have to call a referendum. The referendum initiative is highly politicised, since the increase of the pensionable age to 67 has been already been prescribed since 2013, with a transition period from 2031 to 2038.

<sup>126</sup> Croatia, Pension Insurance Act, Article 32a.

## 7.5 Exclusions

Under the provisions that were in force until 31 December 2018, the different pensionable ages for male and female workers and self-employed persons were to be gradually equalised between 2010 and 2030, and the retirement age was to be gradually increased from 65 to 67 (for both sexes) by 2038. Under the Act on Amendments to the Pension Insurance Act, which enters into force on 1 January 2019, the pace for equalisation and increase of the pensionable age has accelerated, so that the transition period will end in 2027, and the increase of pensionable age will start from 2028 and will finish by 2033.

The right of women to continue working even after reaching the currently prescribed retirement age for women (until reaching the retirement age currently prescribed for men) has been confirmed in a judgment of the County Court in Varaždin.<sup>127</sup>

## 7.6 Actuarial factors

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

## 7.7 Difficulties

Statutory health insurance: An example of the less favourable position of women in statutory health insurance in practice includes lower salary compensation for sickness when a woman takes sick leave (e.g. to take care of a sick child) in the six months after her return from parental leave. This is because sickness benefits are calculated in the range of 100 % to 70 % of a calculation base, which is the average salary paid in the six months prior to the month in which sick leave is taken, depending on the reason for sick leave. However, the calculation base for the sickness benefits of a woman who returns from parental leave and who takes sick leave to take care of a sick child under the age of three will include the average amount of cash allowances received during parental leave (which cannot be more than 120 % of the calculation base, i.e. currently around EUR 536 (HRK 3 991.20)), resulting in much lower sickness benefits than those calculated from the average salary. Since only around 4-5 % of fathers take parental leave, female workers are usually more severely affected by this provision. The adverse consequences of the rule on calculation of sickness benefit can only be remedied by legislative intervention, and so far, there have been no proposals to this effect.

Statutory pension insurance: Different pensionable ages for men and women causes difficulties in practice concerning severance pay. Due to the on-going transition period for the gradual equalisation of the pensionable age between men and women, if a person decides to terminate her employment relationship and take severance pay, the amount of severance pay may be lower for women than for men. This applies particularly where the employer links the amount of severance pay with the legally prescribed pensionable age. The Ombudsperson for Gender Equality reports that she has intervened in court proceedings concerning this issue, where the county court reversed the finding of the municipal court that there was discrimination. The county court's reasoning is that the employer has not discriminated against the claimant in establishing that she is entitled to a lower amount of severance pay, because the fact that 'the applicable Croatian legislation leaves a possibility of discriminatory interpretation towards insured persons – women – cannot be interpreted at the defendant's expense, nor should the defendant bear adversary consequences' of such an interpretation. The Ombudsperson instigated the revision procedure against this judgment in 2018 and the case is pending before the

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<sup>127</sup> Varaždin County Court, GŽ-473/03 of 20 December 2002. A female worker reaching the statutory prescribed retirement age for women (which is gradually to be equalised with that of men) is entitled to retire when she reaches the currently applicable retirement age for women, but may not be forced to do so by the employer (as is often the case in practice).

Supreme Court of the Republic of Croatia.<sup>128</sup> In a similar case involving severance pay for public servants and employees, the county court in Osijek decided that the claimant was not discriminated against on the ground of age or sex. Under the disputed decision on the severance pay for public servants and employees, the claimant was not entitled to severance pay for the termination of employment in a case of restructuring and downsizing that was more advantageous because it represents a certain percentage of the previous salary, but only to an amount of severance pay limited to three budget calculation bases. So, the female worker was denied the more advantageous option, even though her male colleagues of the same age would still be able to use it. This is the direct result of the fact that female workers reach the prescribed pensionable age earlier than male workers. The court found that the limited severance pay applies to all persons who have reached pensionable age, as prescribed by law, regardless of whether they are male or female. The more advantageous severance pay is aimed only at those persons who have not reached pensionable age, and it is more advantageous because its aim is to rationalise business. The court established that this was a legitimate aim, and that the difference in treatment was objectively justified and proportionate by referring to Article 2(5) of Directive 2000/78/EC.<sup>129</sup> This case also shows that there is a pressing need for the highest court to take a stand on this issue and end discriminatory interpretations by lower courts.

A mother who was recognised as having the status of a parent-caregiver of a child with severe disability could not simultaneously continue to receive pension, because she gains a separate status in the pension insurance system as a parent-caregiver in accordance with the rules on social welfare. The court ruled that her constitutional rights were not violated as a result of the automatic suspension of the payment of pension.<sup>130</sup>

## **7.8 Evaluation of implementation**

In many gender equality aspects, especially concerning the scope of insured persons and their family members and their social security status, the Croatian legislation is rather advanced, because it includes extramarital partners, as well as registered and informal same-sex life partners. However, a requirement to prove the existence of extramarital or informal life partnerships before court may discourage, or at least make it more difficult for those persons to acquire and realise their rights.

The overall comment on the field of social security is that there are no comprehensive publicly available surveys or research concentrated on the gender equality aspects of the current legislative framework. Existing inequalities in the social security system cannot be ascribed solely to legislation or lack of adequate legislative provisions, but to the lack of overall policy approach to certain issues, absence of a constructive public debate and low public awareness and interest in those issues.

## **7.9 Remaining issues**

Nothing further to report.

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<sup>128</sup> As reported in the *Annual Report for 2018* of the Ombudsperson for Gender Equality (2019), pp. 30-32, available at <https://www.prs.hr/attachments/article/2645/Izvjješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu~.pdf>.

<sup>129</sup> Osijek County Court, GŽ R-519/2017.

<sup>130</sup> Constitutional Court, U-III-B-170/2015.

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

### **8.1 General (legal) context**

#### **8.1.1 Surveys and reports on the specific difficulties of self-employed workers**

The position of women entrepreneurs has been the subject of occasional interest and surveys. A recently published survey by the World Bank reveals the overall low self-employment rate. In 2016, the self-employment rate was 11.8 % compared to the EU-28 average of 14 %. The rate was 8.1 % for women. The total early stage entrepreneurial activity rate for women (5.9 %) was half the rate of men (11 %) from 2012 to 2016.<sup>131</sup>

Women are underrepresented in the ownership structures of companies and craft businesses. The share of women owners of companies is less than 20 %, the share of craft businesses owned by women is about 30 %.<sup>132</sup> In general, companies owned by men employ twice as many workers, generate more income and have more valuable assets.<sup>133</sup>

The Croatian Strategy of Development of Women Entrepreneurship<sup>134</sup> reveals many obstacles that women face in self-employment and entrepreneurial activities, including structural problems (i.e. stereotypes, traditional views on the role of women in society, absence of support for balancing work and family life and insufficient social support) and economic obstacles concerning access to financing and business networking. Women are less likely to participate in various financial incentive projects. The analysis of the share of women in programmes of incentives to SMEs and craft businesses from 2010 to 2013 shows that although women accounted for 41.1 % of the total number of grants, their share in the total amount of grants awarded was only 19.4 %.<sup>135</sup> Further analysis is needed to establish whether the situation has improved since 2013.

#### **8.1.2 Other issues**

The status of self-employed workers is equal to the status of employed persons for the application of social security law and benefits, as well as maternity and parental benefits. The only difference concerns the calculation basis for the payment of contributions in the social security schemes. There are no special social security schemes for self-employed workers.

#### **8.1.3 Overview of national acts**

Apart from the social security and gender equality legislation which concerns employed and self-employed workers in the same manner, other national legislation regulating the position of self-employed workers includes the Income Tax Act,<sup>136</sup> the Act on Contributions,<sup>137</sup> Crafts Act,<sup>138</sup> as well as other acts regulating certain professions.

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<sup>131</sup> World Bank (2019) *Investing in opportunities for all. Croatia Country Gender Assessment*, p. 10, available at <http://pubdocs.worldbank.org/en/695541553252905811/WB-Croatia-gender-equality-22032019.pdf>.

The total early stage entrepreneurial activity indicator measures the number of newly started business ventures, not older than 42 months, per 100 adult citizens, 18 – 64 years of age.

<sup>132</sup> For a more detailed analysis of women entrepreneurship see Bodiřoga-Vukobrat N., Martinović A. (2017), 'Gender Equality Policies in Croatia – Study for the FEMM Committee', available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596803/IPOL\\_STU\(2017\)596803\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596803/IPOL_STU(2017)596803_EN.pdf).

<sup>133</sup> Croatian Financial Agency (FINA) (2016) *Analysis of share of women entrepreneurs in ownership structures of companies*, <http://www.fina.hr/Default.aspx?sec=1800>.

<sup>134</sup> Strategy of Women Entrepreneurship Development in the Republic of Croatia 2014-2020 and Action Plan for Implementation of the Strategy, NN No. 77/2014.

<sup>135</sup> Strategy of Women Entrepreneurship Development in the Republic of Croatia 2014-2020.

<sup>136</sup> Croatia, Income Tax Act (*Zakon o porezu na dohodak*), NN Nos. 115/2016 and 106/2018.

<sup>137</sup> Croatia, Act on Contributions (*Zakon o doprinosima*), NN Nos. 84/2008, 152/2008, 94/2009, 18/2011, 22/2012, 144/12, 148/2013, 41/2014, 143/2014, 115/2016 and 106/2018.

<sup>138</sup> Croatia, Crafts Act (*Zakon o obrtu*), NN No. 143/2013.



#### 8.1.4 Political and societal debate and pending legislative proposals

There were no political and societal debates or pending legislative proposals concerning gender related aspects in connection with self-employed workers.

### 8.2 Implementation of Directive 2010/41/EU

Directive 2010/41/EU is implemented in the Croatian legal system through the Gender Equality Act (prohibition of gender discrimination in the field of employment, self-employment and professions – Article 13(1)(1) of the Gender Equality Act); the Anti-Discrimination Act (field of application – Article 8); the Act on Maternity and Parental Benefits (provisions on the right to maternity and parental benefits and the calculation of benefits for self-employed people are regulated in the same way as for those who are employed – Articles 16 – 26), the Act on Pension Insurance Companies (included in the definition of key concepts for the application of that act – Article 3), and the Act on Voluntary Pension Funds (definition of self-employed persons for the purposes of application of that act - Article 3; and provision on membership in closed pension funds – Article 120(1)).

### 8.3 Personal scope

#### 8.3.1 Scope

National legislation covers the personal scope of Directive 2010/41/EU, with several acts containing references to self-employed persons or self-employed activities. It is not customary to use the term self-employed 'workers' in the Croatian language and legislation, because the term 'worker' implies dependent work.

#### 8.3.2 Definitions

The Income Tax Act provides the most detailed description of self-employed activities for the purposes of the taxation of income from those activities. Article 29 specifies that self-employed activities are the activities of craftsmen, four categories of independent activities performed by 1. health workers, veterinarians, lawyers, notaries, auditors, engineers, architects, tax advisers, insolvency managers, court interpreters, translators, tourist guides, and similar; 2. freelance scientists, writers, innovators, and similar; 3. freelance teachers and similar; 4. freelance journalists, artists and sportsmen; and persons employed in agriculture and forestry.

The Act on Maternity and Parental Benefits defines self-employment as 'work of a natural person by which he/she independently performs gainful economic or professional activity as his/her only or main occupation, and is subject to an obligation to pay income or profit tax, in accordance with tax laws and regulations' (Article 6(1)(2), Act on Maternity and Parental Benefits).

The Act on Voluntary Pension Funds defines self-employed persons as those who 'perform independent work, for example crafts or similar activity, freelancers, people employed in agriculture and others, or a self-employed person in accordance with the regulations of another Member State' (Article 3(1)(9), Act on Voluntary Pension Funds).

#### 8.3.3 Categorisation and coverage

Croatian law mainly defines self-employment in terms of tax obligations and not so much in terms of the beneficiaries of employment rights. Due to several categories of self-employment in the Republic of Croatia, there is still some confusion about the precise definition of self-employment. A positive development is that social protection legislation uses the term 'self-employed persons', which is broader and can encompass all sub-

categories of self-employed persons, thus minimising the risk of exclusion from coverage. Agricultural and forestry sectors are included in the definition of self-employment. Life partners enjoy the same scope of social rights as spouses and the legal effects of long-term cohabitation (longer than three years) are the same as the legal effects of marriage. Social legislation explicitly includes partners within the personal scope.

#### 8.3.4 Recognition of life partners

The status of life partners of self-employed persons is regulated in the same manner as those of employed persons.

### 8.4 Material scope

#### 8.4.1 Implementation of Article 4 of Directive 2010/41/EU

Article 8(1)(1) of the Anti-Discrimination Act regulates its field of application in a broad manner by stating that it applies to all conduct by state authorities, local and regional authorities, legal persons with public prerogatives and the conduct of all legal and natural persons in various areas, including the possibility of performing self-employed activities. This field of application is broad enough to include the widest possible cases of discrimination in the area of self-employment.

#### 8.4.2 Material scope

The material scope of gender equality protection of self-employed persons is the same as that specified in Article 4 of Directive 2010/41/EU.

### 8.5 Positive action

The Government's 'Guidelines for the development and implementation of active employment policy measures in the period 2018 to 2020'<sup>139</sup> is a national strategic document that sets priorities and goals in the overall employment policy. It contains three types of activities (services, measures and subsidies) aimed at labour market intervention and the majority of those activities are implemented by the Croatian Employment Service. The promotion of gender equality in employment and self-employment is one of the underlying elements of all activities.

According to the analysis of the Ombudsperson for Gender Equality, active labour market policy measures (ALMPs) specifically targeting women, such as programmes for employment and self-employment of women, or loans with special conditions for women entrepreneurs were implemented in 2018. For example, the Ministry of Labour and Pension System currently administrates the project financed from the European Social Fund targeted at the employment of vulnerable groups, which includes women.<sup>140</sup> However, it does not encompass all women, but only those above 50 years of age, those with secondary level of education, women with disability, women victims of trafficking, former addicts, women victims of domestic violence and homeless women.

The evidence concerning ALMP measures aimed at the employment of women is mixed.<sup>141</sup> For example, in 2018, 54.3 % of beneficiaries of ALMP measures implemented by the Croatian Employment Service were female. When it comes to the measures in the field of

<sup>139</sup> Government of the Republic of Croatia (2017) 'Guidelines for the development and implementation of active employment policy measures in the Republic of Croatia in the period from 2018 – 2020'.

<sup>140</sup> More information available at <http://www.esf.hr/natjecaji/socijalno-ukljucivanje/poziv-na-dostavu-projektnih-prijedloga-zazeli-program-zaposljavanja-zena/>.

<sup>141</sup> The information provided is based on the analysis of the Ombudsperson for Gender Equality for 2018. See Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, pp. 80-83, available at <https://www.prs.hr/attachments/article/2645/Izvešće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu~.pdf>.

development of SMEs and craft businesses, which are implemented by the Ministry of Economy, Entrepreneurship and Crafts, evidence shows that women are less likely to apply for financial incentives (the share of women applicants is 40.9 %), although the share of women who received incentives was on the rise (46.7 %). However, when the total amount of incentives is analysed, only 33.9 % of the total was granted to women. This evidence shows that women are still hesitant when it comes to applying for certain grants, and that they apply for lower value grants than men do. Consequently, the measures should be modified to achieve their aim.

The Croatian Bank for Reconstruction and Development (HBOR) implements the programme of subsidised loans for female entrepreneurs (companies, craft businesses, natural persons, cooperatives and institutions in which women hold at least 51 % of ownership or in which women are head of the management board).

## **8.6 Social protection**

There is no special system of social protection for self-employed persons (i.e. they are covered by the same legislation that applies to employed workers). The social protection system in the Republic of Croatia is available to all workers, including self-employed workers. It covers mandatory pension, social and health insurance. Self-employed workers are entitled to the following benefits in the public social protection system: disability, survivor's, sickness, work injury, occupational disease, unemployment, maternity and parental benefits, new-born child assistance, income-based child allowance and social welfare. Self-employed workers can also establish or join closed (occupational) voluntary pension insurance funds. Spouses and life partners are eligible to benefit from social protection in accordance with relevant national law. This is a mandatory requirement: for example, the health or pension insurance of the main beneficiary covers spouses, minor children and life partners.

Self-employed persons are entitled to same rights as employed persons concerning all maternity and parental benefits. There are some differences concerning the base for calculation of salary compensation during maternity, parental or related types of leave, but in any case, the Croatian Health Insurance Institute bears these costs. For employed workers, the basis for calculation of salary compensation during maternity and parental leave, for example, is the average salary received in the six months before take up of maternity or parental leave (a ceiling applies for parental leave). For self-employed workers, the basis is the monthly insurance base for calculation and payment of mandatory health insurance contributions in the last six months before the take up of leave, minus the amount of mandatory contributions, taxes and surcharges (a ceiling also applies for parental leave). The salary compensation during carers' leave (leave to take care of a sick child or spouse) is covered by the self-employed for the first 42 days of leave, and afterwards at the expense of the Croatian Health Insurance Fund.

## **8.7 Maternity benefits**

The status of self-employed parents regarding maternity/parental rights is equal to that of parents who are employees (Article 9(1) of the Act on Maternity and Parental Benefits), provided that they have the status of an insured person in the compulsory health and pension insurance. Self-employed parents within the meaning of the Act on Maternity and Parental Benefits include persons who themselves perform certain activities. Consequently, the position of the female spouses of self-employed workers (including non-marital spouses) is determined according to their own employment, self-employment, unemployment or other status within the meaning of the Act on Maternity and Parental Benefits. Under the Crafts Act<sup>142</sup> (Article 30) members of the craftsman's family (spouse, children, parents, adoptive parents, adopted children, children of a spouse and other

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<sup>142</sup> Croatia, Crafts Act (*Zakon o obrtu*), NN No. 143/2013.

dependent family members) are entitled to assist the craftsman in the performance of his activities (without having to be employed by him). However, there is no provision granting the spouses of self-employed workers social protection or maternity benefits based exclusively on this family relationship. These entitlements are provided in accordance with their personal status in the statutory insurance (i.e. pension, sickness, unemployment).

The maternity allowance meets the requirement of sufficiency because it covers the total amount of previous remuneration as stipulated in Article 8(3) of Directive 2010/41/EU. The criterion used in Croatian legislation is the one stipulated in subparagraph (b), i.e. the average loss of income in relation to a comparable preceding period. The maternity allowance is granted on a mandatory basis but is based on the request of the applicant. There is no available choice of systems. The Croatian Health Insurance Fund pays the allowance. In relation to Article 8(4), there are no existing services supplying temporary replacements or access to services as an alternative to or part of the allowance.

## **8.8 Occupational social security**

### **8.8.1 Implementation of provisions regarding occupational social security**

The principle of the equal treatment of self-employed persons in occupational pension schemes is implemented through the gender equality clause in the Act on Pension Insurance Companies (Article 105), which specifies that the calculation of a pension paid under that act will not, directly or indirectly, result in inequality or a denial of rights based on gender. It further states, in a non-exhaustive manner, what is understood under 'inequality or a denial of rights' (different conditions for calculating qualifying periods, different ages as a condition for the recognition of rights, unless otherwise prescribed, and different amounts of pension due to diverging conditions applicable solely to persons of one sex). Closed pension funds financed by associations of independent or occupational activities are obliged to accept all members of the association and self-employed persons as their members (Article 120, Act on Voluntary Pension Funds).

### **8.8.2 Application of exceptions for self-employed persons regarding matters of occupational social security (Article 11 of Recast Directive 2006/54)**

No use made of this possibility.

## **8.9 Prohibition of discrimination**

Article 8(1)(1) of the Anti-Discrimination Act prescribes its field of application in broad areas of private and public life. It is applicable to the conduct of all state authorities, local and regional authorities, legal persons with public prerogatives and to the conduct of all legal and natural persons in relation to the possibilities for the performance of self-employed activities.

## **8.10 Evaluation of implementation**

National law implements the gender equality protection of self-employed workers in a satisfactory manner. The realisation of all gender equality standards is guaranteed in the same manner for self-employed workers and dependent workers. There is no denying that the status of self-employed persons may be more precarious in practice, due to economic and financial risks inherent in the performance of self-employed activities.

## **8.11 Remaining issues**

Nothing further to report.

## 9 Goods and services (Directive 2004/113)<sup>143</sup>

### 9.1 General (legal) context

#### 9.1.1 Surveys and reports about the difficulties linked to equal access to and supply of goods and services

The area of access to and supply of goods and services seems to be the least explored topic in relation to gender quality. There are no particular surveys concerning gender equality to report in this area. The annual reports by the Ombudsperson for Gender Equality seem to corroborate the conclusion that recipients and providers of services are generally ignorant of their rights/obligations under Directive 2004/113/EC. For example, in 2018, the share of complaints concerning access to goods and services received by the Ombudsperson was 1.9 % (9 complaints),<sup>144</sup> in 2017 it was 2.6 % (11 complaints),<sup>145</sup> in 2016, it was 2.4 % (13 complaints).<sup>146</sup> In 2015, the share of such complaints in the overall number of cases was somewhat higher at 4.5 %, <sup>147</sup> and in 2014 it stood at 2.5 %.<sup>148</sup> The relatively low number of complaints in this field should not be interpreted to mean that there are no cases of discriminatory treatment, but rather that neither recipients nor providers of services are aware of their rights and obligations. The commonly reported cases of discriminatory treatment in access to and provision of services involve, for example, access to health services, different prices for women and men at gyms or night clubs, as well as sporadic cases of difficulties and differences in granting loans by the banks to pregnant women or women on maternity leave.

The results of a research concerning awareness of and attitudes towards discrimination and its forms conducted by the Public Ombudswoman in 2016 reveal that almost 50 % of respondents are not even aware of the existence of the Anti-Discrimination Act.<sup>149</sup> Furthermore, 67.6 % of respondents do not know which public body is a central body for combating discrimination, and 41.9 % do not know how to file a discrimination complaint with the Public Ombudsman. However, 16.7 % of respondents have a perception that discrimination is present in commerce and other service activities, although only one fifth of all respondents claim that they have actually experienced discrimination in any field. Out of those respondents, 1.4 % report discrimination in the field of commerce and provision of services. Although this research does not concentrate solely on sex discrimination, the relatively limited perception of discrimination in the field of access to and provision of goods and services could be interpreted to mean that there is a lot to be done to raise public awareness about discrimination and the legal instruments to combat it in this field.

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<sup>143</sup> See e.g. Caracciolo di Torella, E. and McLellan, B. (2018), *Gender equality and the collaborative economy* European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>.

<sup>144</sup> Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, pp. 80-83, available at <https://www.prs.hr/attachments/article/2645/Izvjeste%20o%20radu%20Pravobraniteljice%20za%20ravnopravnost%20spolova%20za%202018.%20godinu~.pdf>.

<sup>145</sup> Ombudsperson for Gender Equality (2018), *Annual Report for 2017*, available at [http://www.prs.hr/attachments/article/2404/IZVJE%C5%A0%C4%86E\\_O\\_RADU\\_ZA\\_2017.pdf](http://www.prs.hr/attachments/article/2404/IZVJE%C5%A0%C4%86E_O_RADU_ZA_2017.pdf).

<sup>146</sup> Ombudsperson for Gender Equality (2017), *Annual Report for 2016*, available at [http://www.prs.hr/attachments/article/2188/IZVJESCE\\_2016\\_Pravobraniteljica\\_za\\_ravnopravnost\\_spolova\\_CJELOVITO.pdf](http://www.prs.hr/attachments/article/2188/IZVJESCE_2016_Pravobraniteljica_za_ravnopravnost_spolova_CJELOVITO.pdf).

<sup>147</sup> Ombudsperson for Gender Equality (2016), *Annual Report for 2015*, available at <http://www.prs.hr/attachments/article/1923/Izvjete%20o%20radu%20Pravobraniteljice%20za%20ravnopravnost%20spolova%20za%202015.pdf>.

<sup>148</sup> Ombudsperson for Gender Equality (2015), *Annual Report for 2014*, available at [http://www.prs.hr/attachments/article/1555/01\\_IZVJESCE\\_2014\\_CJELOVITO.pdf](http://www.prs.hr/attachments/article/1555/01_IZVJESCE_2014_CJELOVITO.pdf).

<sup>149</sup> Research results are available at <http://ombudsman.hr/attachments/article/1147/Istra%C5%BEivanje%20-%20diskriminacija%202016.pdf>.

### 9.1.2 Specific problems of discrimination in the online environment/digital market/collaborative economy

There are no specific problems in connection with discrimination in the online environment, or digital market, or collaborative economy reported so far. The Gender Equality Act and the Anti-Discrimination Act have very broad fields of application, covering both the private and public spheres. This means that gender equality issues arising in the online environment/digital market/collaborative economy are implicitly covered. For example, regardless how we treat the individual specific relations between three key actors in a collaborative economy (i.e. service provider – intermediary – client), the general prohibition of gender discrimination applies. However, given the specificities associated with online and digital environments, the application of new technologies results in many, so far unobserved legal and practical issues (such as algorithm bias). Therefore, this area needs further in-depth investigation and research, not just at national level, which would enable the establishment of appropriate responses and mechanisms to remedy potential shortcomings and inequality.

### 9.1.3 Political and societal debate

There are no political and societal debates on the issue of access to and supply of goods and services.

## 9.2 Prohibition of direct and indirect discrimination

Both the Anti-Discrimination Act and the Gender Equality Act implement Directive 2004/113 in their respective fields of application. Both acts also go beyond the scope of application of the directive. Article 6(4) of the Gender Equality Act explicitly prohibits any discrimination in relation to access to and the supply of goods and services. Article 8(1)(8) of the Anti-Discrimination Act specifies its field of application in the area of access to and the supply of goods and services. Both acts explicitly mention that they are aligned with Directive 2004/113 (Article 1a of the Anti-Discrimination Act; Article 1a of the Gender Equality Act).<sup>150</sup>

## 9.3 Material scope

The material scope of national law is broader, because it covers the content of media, advertising and education. Article 14 of the Gender Equality Act obliges all educational authorities and facilities to ensure equal access to all levels of education and vocational training, as well as to promote gender equality contents in their curricula. Article 16 of the Gender Equality Act obliges the media to use their programmes, programme framework, programme guidelines and self-regulating acts to promote awareness of the equality of women and men. It also prohibits any public display of women and men in an insulting, degrading or demeaning manner, based on sex or sexual orientation.

## 9.4 Exceptions

There are no exceptions from the material scope of Directive 2004/113.

## 9.5 Justification of differences in treatment

Under Article 9(2)(7) of the Anti-Discrimination Act, any less favourable treatment in access to and the supply of goods and services and sports shall not be deemed discriminatory if the provision of the goods and/or services is reserved exclusively or primarily to members of one sex or persons with disabilities, provided that such treatment

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<sup>150</sup> Article 1a was inserted in the Gender Equality Act with the Act on Amendments to the Gender Equality Act (NN No. 69/17). It contains the list of all EU directives in the field of gender equality with the statement that the provisions of Gender Equality Act are aligned therewith.

is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Cases involving different prices for men and women for entering certain events, bars and clubs are not uncommon in Croatia.<sup>151</sup> In 2018, the Ombudsperson for Gender Equality received a complaint involving different prices for using the services of a sports centre.<sup>152</sup> The same sports centre was subject to a complaint concerning the identical issue in 2016, when it was determined that there was no discrimination.<sup>153</sup> After receiving the relevant information on the structure of membership from the sports centre, the analysis revealed that the majority of members are women, and concluded that even if in the earlier case there were objective reasons to motivate more women and female students to join the programmes in the sports centre, that reason has been accomplished. The Ombudsperson for Gender Equality has warned the sports centre that different prices in this case represent direct discrimination in access to services, and recommended the sports centre remedy this situation by charging the same prices. The important thing about this decision is that the Ombudsperson for Gender Equality has clearly stated that special measures, as envisaged under Article 9(2)(2) of the Anti-Discrimination Act, may be established only in laws and other regulations, and certainly not in a unilateral decision by a private company.

Although sexual harassment in the field of access to services, in the form of sexist statements or conduct is not uncommon, it is rarely sanctioned. In many situations it is considered to be part of the folklore. Even where such cases are reported to the Ombudsperson for Gender Equality, the victim does not pursue the claim further.<sup>154</sup>

## **9.6 Actuarial factors**

Exceptions to the general prohibition of discrimination on particular discriminatory grounds (Article 9, Anti-Discrimination Act) were amended and redefined in 2012. A provision which stipulated that the differences in premiums and benefits where the use of sex was a factor of calculation was not deemed to be discrimination was removed with effect from 30 June 2013, in view of the decision of the Court of Justice of the EU in the *Test-Achats* case. Age as a factor in calculation still remains an acceptable exception (Article 9(2)(6), Anti-Discrimination Act).

## **9.7 Interpretation of exception contained in Article 5(2) of Directive 2004/113**

Following the *Test-Achats* ruling of the CJEU, the use of sex as a factor in the calculation of premiums and benefits was removed from the list of acceptable exceptions to the prohibition of discrimination listed in Article 9 of the Anti-Discrimination Act with effect from 30 June 2013.

## **9.8 Positive action measures (Article 6 of Directive 2004/113)**

There are no positive action measure adopted in relation to access to and the supply of goods and services.

## **9.9 Specific problems related to pregnancy, maternity or parenthood**

There are two specific fields in which problems regarding discrimination on the grounds of pregnancy, maternity or parenthood persist in relation to access to and the supply of goods and services: the first is the field of health services, notably reproductive health; and the second is the field of banking and financial services.

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<sup>151</sup> See, for example, Ombudsperson for Gender Equality, PRS-20-01/17-9 – free access to ice-skating parlour for women and girls.

<sup>152</sup> Ombudsperson for Gender Equality, PRS-18-01/18-06.

<sup>153</sup> Ombudsperson for Gender Equality, PRS-18-01/16-04.

<sup>154</sup> Ombudsperson for Gender Equality, PRS-18-01/18-3.

In the field of reproductive health, the issues primarily concern access to a legally induced termination of pregnancy, the accessibility of modern forms of contraception and different standards for the care and protection of women during delivery (giving birth). Regarding the first issue, health workers in many health institutions in Croatia refuse to perform abortions, based on an 'appeal to conscience' or a 'conscientious objection'. This is a personal right of health workers, but health institutions are nevertheless obliged to engage a qualified person to perform the procedure. However, a study conducted by the Ombudsperson showed that abortions could not be performed in 20 % of health institutions because all the health workers at those institutions had a conscientious objection to abortion. Many of these hospitals are in rather remote areas, meaning that women in need of such a service have to travel to another facility far from their place of residence.<sup>155</sup> More than half of all health workers who are authorised to perform medical termination of pregnancy procedures apply their conscientious objection.<sup>156</sup> In addition, the Croatian Health Insurance Fund does not cover the cost of performing such procedures, unless an abortion is necessary due to medical reasons. The Ombudsperson for Gender Equality reported several complaints during 2017 concerning the denial by certain health institutions to perform abortions, and the difficulties experienced by women in such cases.<sup>157</sup>

In February 2017, the Constitutional Court of the Republic of Croatia adopted a decision in the matter of reviewing the constitutionality of an act regulating the right to freedom of choice regarding childbirth.<sup>158</sup> The court rejected the request for a review of the constitutionality of this act, which was adopted in 1988, confirming that the right of a woman to mental and physical integrity, including the choice of whether or not to conceive a child and how to develop the pregnancy, is inherent in the constitutionally guaranteed right to privacy. The right to privacy includes self-determination, freedom of choice and dignity. It has therefore confirmed the existing freedom of women to decide on the termination of their pregnancy (within the legally prescribed limits), but has instructed the Croatian legislature to adopt a new act regulating the freedom of choice, because the old 1988 act was adopted before Croatian independence and contains some formal inconsistencies with the Croatian Constitution. However, any new legislative instrument could not prohibit the termination of pregnancy, as it would be contrary to the Constitution. The new legislation is still in its early preparatory phase (the working group for drafting the new act was formed at the beginning of 2018). In parallel, the activities of civil society organisations and other interest and religious groups (both for and against the freedom of choice) are intensifying.

The second issue regarding access to healthcare concerns the accessibility of modern forms of contraception, in particular the EllaOne emergency contraceptive (the morning after pill). Although this pill has been made available in pharmacies without a prescription (following a decision taken by the European Commission), the pharmacies in Croatia have to follow the guidelines issued by the Croatian Ministry of Health, which require that anyone buying this contraceptive must fill in a form and provide certain information about their sexual behaviour and reproductive health. Pharmacies are instructed not to issue the contraceptive if certain answers are given. The third issue concerns unequal standards for

<sup>155</sup> Ombudsperson for Gender Equality (2015), *Annual Report for 2014*, available at [http://www.prs.hr/attachments/article/1555/01\\_IZVJESCE\\_2014\\_CJELOVITO.pdf](http://www.prs.hr/attachments/article/1555/01_IZVJESCE_2014_CJELOVITO.pdf). See also Ombudsperson for Gender Equality (2016), *Annual Report for 2015*, available at <http://www.prs.hr/attachments/article/1923/Izvjeste%20C5%A1%C4%87e%20o%20radu%20Pravobraniteljice%20za%20ravnopravnost%20spolova%20za%202015.pdf>.

<sup>156</sup> According to the Ombudsperson for Gender Equality, 58.8 % of health workers in this area are using this right. See Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, pp. 80-83, available at <https://www.prs.hr/attachments/article/2645/Izvjeste%20o%20radu%20Pravobraniteljice%20za%20ravnopravnost%20spolova%20za%202018.%20godinu%20~.pdf>.

<sup>157</sup> Ombudsperson for Gender Equality (2018), *Annual Report for 2017*, available at <http://www.prs.hr/index.php/izvjesca/2017>.

<sup>158</sup> Constitutional Court of the Republic of Croatia, Decision of 21 February 2017, U-I-60/1991.



the care and protection of women giving birth, depending on the hospital in question.<sup>159</sup> For example, maternity units in several clinical hospitals do not comply with the required quality standards, the practice of organising and charging for maternity courses differs, the possibility of a partner being present during childbirth is limited in some hospitals, the fees for voluntary abortions may vary significantly from hospital to hospital, etc. These standards and prices should be equalised to ensure equal quality and standards of care.

In the field of banking and financial services, there were no recent reports of discriminatory behaviour, other than a complaint concerning beneficial loans granted by one bank to women entrepreneurs only.<sup>160</sup> The Ombudsperson established that the bank was majority owned by the state, and that it was implementing the Government strategy aimed at boosting women entrepreneurship. Since such conduct represents a positive action measure, based on a public decision and implemented on a temporary basis, there was no discrimination. Other reports of discriminatory treatment in relation to the granting of loans to pregnant women, or to persons (of both sexes) who take maternity and parental leave were more frequent before 2015. Some banks have unjustifiably categorised clients on maternity and parental leave as an excessive risk and have assessed their lending capacity according to their income during parental leave, which is lower than their usual salary. The situation of pregnant women asking for loans was analysed in a study conducted by the Ombudsperson for Gender Equality in 2013,<sup>161</sup> and following recommendations issued by the Ombudsperson for Gender Equality, many banks changed their practices. However, there were still reports throughout 2015 that male clients have been treated less favourably by the banks because they were on parental leave or were not recognised by insurance companies as eligible for certain compensation in life insurance policies for newborn children, with the explanation that such compensation is only for mothers who have such policies.<sup>162</sup>

## **9.10 Evaluation of implementation**

Access to and supply of goods and services represents uncharted territory, with very little practical examples of sex discrimination being reported in this field. This can be ascribed to the low level of public awareness about these issues and the fact that a certain degree of discriminatory behaviour or harassment and sexual harassment (especially sexist statements) is accepted or at least tolerated as part of traditional societal patterns of communication.

## **9.11 Remaining issues**

There is nothing further to report.

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<sup>159</sup> See also United Nations Committee on the Elimination of Discrimination against Women (2015), *Concluding observations on the combined fourth and fifth periodic reports of Croatia*, 28 July 2015, CEDAW/C/HRV/CO/4-5.

<sup>160</sup> Ombudsperson for Gender Equality, PRS-18-01/17-05.

<sup>161</sup> Ombudsperson for Gender Equality (2014), *Annual Report for 2013*, available at <http://www.prs.hr/index.php/izvjesca/izvjesce-o-rad-u-za-2013>.

<sup>162</sup> Ombudsperson for Gender Equality (2016) *Annual Report for 2015*, available at <http://www.prs.hr/attachments/article/1923/Izvj%C5%A1%C4%87e%20o%20radu%20Pravobraniteljice%20za%20ravnopravnost%20spolova%20za%202015.pdf>.

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

### 10.1 General (legal) context

#### 10.1.1 Surveys and reports on issues of violence against women and domestic violence

The prevalence of domestic violence is evident from the number of misdemeanour and criminal offence cases before Croatian courts. The misdemeanour court cases have slightly decreased in 2018 as compared to 2017 (10 272 persons were prosecuted in 2018 as opposed to 11 506 cases in 2017, which is a 10.7 % decline).<sup>163</sup> The majority (77.7 %) of perpetrators were men, and in 30 % of cases they were repeat offenders. According to the available data, the effectiveness of sanctioning in cases of domestic violence is highly questionable. It is reported that out of 505 perpetrators who were ordered to undertake a protection measure of mandatory psychosocial treatment, only 6 of them complied. Another protective measure, mandatory rehabilitation from addiction, was implemented in only 10 out of 653 cases.<sup>164</sup> The only explanation is that sanction implementation mechanisms and capacities are deficient. In contrast to misdemeanour cases, which are declining, the analysis of criminal court cases shows the rising trends, and increasing brutalisation of such violence. In 2018, there were 5.5 % more criminal offences with the characteristics of domestic violence, predominantly committed by men (91 %).<sup>165</sup> Femicide Watch is an observatory of female homicide cases, established in 2017 in a partnership between the Ombudsperson for Gender Equality, Directorate of Police, Ministry of Justice and other stakeholders, with the task of monitoring and analysing female homicide cases.<sup>166</sup> It was observed that the share of women victims in the total number of homicides in the period from 2013 – 2018 was more than 50 %. The majority of women victims of homicide between close persons (76 %) are killed either by their partner, or another relative. The Ombudsperson has analysed five cases of homicide where women were killed by their partner in 2016, and has discovered that in all cases there was a history of violence, which was either reported (in some cases sanctioned to no effect) or was otherwise known to relatives, neighbours or friends who did not react.<sup>167</sup> This reveals a broader issue and culture of tolerance towards violence, and not just institutional failure.

A quantitative analysis of final and binding judgments in criminal and misdemeanour proceedings in the period from 2012 to 2016 reveals that almost half of all perpetrators in misdemeanour cases were sanctioned by monetary fine (48.6 %), whereas 16.36 % of perpetrators were sentenced to prison (lasting, on average, 20 days).<sup>168</sup> When it comes to criminal offences, suspended prison sentences were applied in more than half of cases (56.29 %), whereas unconditional prison sentences were given in 30 % of cases (with an

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<sup>163</sup> Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, p. 92, available at <https://www.prs.hr/attachments/article/2645/Izvješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu~.pdf>.

<sup>164</sup> Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, p. 92, available at <https://www.prs.hr/attachments/article/2645/Izvješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu~.pdf>.

<sup>165</sup> Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, p. 98, available at <https://www.prs.hr/attachments/article/2645/Izvješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu~.pdf>.

<sup>166</sup> Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, pp. 100-102, available at <https://www.prs.hr/attachments/article/2645/Izvješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu~.pdf>.

<sup>167</sup> Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, pp. 103-104, available at <https://www.prs.hr/attachments/article/2645/Izvješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu~.pdf>.

<sup>168</sup> Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, p. 200, available at <https://www.prs.hr/attachments/article/2645/Izvješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu~.pdf>.

average prison time of almost four years).<sup>169</sup> A further, qualitative analysis of these findings is expected in 2019.

#### 10.1.2 Overview of national acts on violence against women, domestic violence and issues related to the Istanbul Convention

The new Act on Protection against Domestic Violence has entered into force on 1 January 2018.<sup>170</sup> It sets aside and replaces the previous Act on Protection against Domestic Violence.<sup>171</sup> The new Act was adopted to bring the regulatory framework on domestic violence in line with the Criminal Code, which entered into force in 2013,<sup>172</sup> especially concerning categorisation of domestic violence offences. The Act implements Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315/57), as well as some of the rights and standards guaranteed under the Istanbul Convention.<sup>173</sup> The Criminal Code introduced a definition of family members and close persons, relevant for the application of that code, and, after the amendments in 2015, re-introduced the criminal offence of family violence into the Criminal Code. In practice, this meant that some acts were prosecuted partly as minor and partly as criminal offences. The European Court of Human Rights has already found that Croatia has violated the principle *ne bis in idem* in such cases (e.g. case *Maresti v. Croatia*, no. 55759/09). Criminal law experts warn that violation of the principle *ne bis in idem* is still possible even under the new legislative framework, because of inherent difficulties in defining and classifying a certain act of domestic violence as a criminal offence. The main problem lies in the legal description of domestic violence as a criminal offence, and its delimitation in relation to other criminal offences which prescribe qualified sanctions if committed against family members or close persons (e.g. qualified bodily injury against a family member). Another important problem is the disaggregation of domestic violence as a criminal offence in relation to domestic violence as a misdemeanour offence.

The personal scope of application of the Act on Protection against Domestic Violence is rather limited and prescribed in Article 8(1) and (2) and defined in line with the Criminal Code (Article 87(8-11)) to include a spouse, extramarital partner, same-sex life partner, informal same-sex life partner, joint children or children of each partner, lineal blood relative, collateral blood relative up to the third degree of kinship, in-laws in a marital or extramarital community up to the second degree, adopter and adoptee. It also applies to former spouse, extramarital partner, same-sex life partner, informal same-sex life partner, persons who have a mutual child and persons who live in the same household. Extramarital partner is defined as a person who lives in an extramarital relationship of a longer duration or shorter duration if a mutual child is born (Article 8(4) of the act). The problem with these definitions is that the act will not apply to all cases of intimate-partner violence, e.g. partners who fail to satisfy the definition of 'extramarital partners' and who do not live together are not covered by this act. The statement of reasons accompanying the Draft Act No. 67<sup>174</sup> states that this solution is 'in accordance with the definition of domestic violence in the Istanbul Convention' and that it is 'even wider than what the Convention requires' because it protects 'all spouses, extramarital and same-sex life partners (even where the relationship no longer exists), as well as persons who are not or were never in

<sup>169</sup> Ombudsperson for Gender Equality (2019), *Annual Report for 2018*, p. 202, available at <https://www.prs.hr/attachments/article/2645/Izvjescje%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravnost%20spolova%20za%202018.%20godinu%20.pdf>.

<sup>170</sup> Croatia, Act on Protection against Domestic Violence (*Zakon o zaštiti od nasilja u obitelji*), NN No. 70/2017.

<sup>171</sup> Croatia, Act on Protection against Domestic Violence (*Zakon o zaštiti od nasilja u obitelji*), NN Nos. 137/2009, 14/2010 and 60/2010.

<sup>172</sup> Croatia, Criminal Code (*Kazneni zakon*), NN Nos. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017 and 118/2018.

<sup>173</sup> Since the act was adopted ahead of the ratification of the Istanbul Convention, it will have to be amended in the upcoming period.

<sup>174</sup> Draft Act No. 67 [https://www.sabor.hr/sites/default/files/uploads/sabor/2019-01-18/081205/PZE\\_67.pdf](https://www.sabor.hr/sites/default/files/uploads/sabor/2019-01-18/081205/PZE_67.pdf).

this status, but have a mutual child or live in the same household'. However, deliberately or not, it seems that this solution is based on an erroneous reading of the *Explanatory Report CETS 210* accompanying the Istanbul Convention. The statement of reasons actually contains a 'citation' of Article 41(3) of the Istanbul Convention, which according to the statement contains a definition of domestic violence (it is actually Paragraph 41 of the Explanatory Report that explains the definition of domestic violence provided in Article 3(b) of the Convention). The statement of reasons translates part of the sentence from Paragraph 41 of the *Explanatory Report* stating that domestic violence includes 'intimate partner violence between current or former spouses or *extramarital partners* and intergenerational violence which usually occurs between parents and children'. This is clearly a case of mistranslation, because the English version of the *Explanatory Report* actually states that 'domestic violence includes mainly two types of violence: intimate-partner violence between current or former spouses or *partners* ...' [Paragraph 41, emphasis added]. The definition of domestic violence is provided in Article 3(b) of the Convention, and official language versions (i.e. English and French), as well as the Croatian text of the Istanbul Convention,<sup>175</sup> also mention only 'spouses or *partners*', not 'extramarital' partners. This qualification is important because the term 'extramarital partner' in the Croatian legal system implies some element of longer duration or mutual children. Another significant problem is that the act covers persons 'who live in the same household' (Article 8(2)). According to the statement of reasons accompanying the act, the intention is to cover all persons whether or not they were or are in any sort of previously mentioned relationships, if they are living in the same domestic unit. Potentially, this could mean that a landlord and a tenant living in the same house are covered by the Act on Protection against Domestic Violence, whereas people in an intimate relationship, but not falling under the definition of 'extramarital partners' and not living together are not. This focus on the place of residence (although it is not required if persons fall under the category of spouse, extramarital partner etc.), rather than on the fact that violence is occurring in an intimate-partner relationship is not in accordance with the Istanbul Convention, so the act will probably have to be amended.

The act prescribes rights of victims of domestic violence, defines protected persons and forms of domestic violence, sets sanctions for misdemeanours, procedures for data gathering and rules of operation for a special committee for follow-up and improvement of work of bodies involved in criminal or misdemeanour prosecution of domestic violence offences. Special protection is guaranteed for persons with disabilities and the elderly. Sexual harassment is defined as a form of domestic violence (Article 10(1)(4) of the Act on Protection against Domestic Violence).

#### 10.1.3 National provisions on online violence and online harassment

There are no special provisions on online violence and harassment, meaning that standard guarantees apply.

#### 10.1.4 Political and societal debate

The issue of domestic violence and violence against women is one of the most debated topics in the Croatian society. Roughly one third of the *Annual Report for 2018* of the Ombudsperson for Gender Equality is concerned with various issues in connection with domestic violence.<sup>176</sup> There is a lot of media coverage, and sensationalist reporting is not uncommon. In many cases, the failure of competent authorities and institutions to protect the victim, especially where there was a history of violent behaviour, which was known and reported to authorities, is reported. This is often ascribed to the fact that the authorities responsible, such as the police, state attorney's offices, centres for social

<sup>175</sup> Croatia, Act on the Ratification of the Istanbul Convention (*Zakon o potvrđivanju Konvencije Vijeća Europe o sprečavanju i borbi protiv nasilja nad ženama i nasilja u obitelji*), NN – International Treaties No. 3/2018

<sup>176</sup> Almost the entire chapter on 'Family' (pp. 86-202) deals with domestic violence and violence against women.

welfare and courts, need to have more specialised training and sensitivity to these issues. The situation is complicated by the existence of an elaborate but dispersed and often contradictory legislative and policy framework for the protection against violence, especially concerning domestic violence as a misdemeanour offence and as a criminal offence. Another, very important problem is the escalation of violence, with sometimes fatal consequences for the victim, which is partly due to institutional failure. In many cases where there was a history of violent behaviour, the competent authorities failed to recognise the violent pattern, resulting in lenient sanctions - if any - being imposed on the perpetrator.<sup>177</sup>

It is interesting to note the climate surrounding the debates on the ratification of the Istanbul Convention: opponents have tried to shift the focus from the Convention's main objective - the protection of women against violence - to gender ideology issues. Considering the relatively wide public support they managed to rally for their cause, they were very successful in imposing this discourse. Consequently, even experts and proponents of the ratification were caught in the absurd situation where they had to explain and justify the meaning of 'gender' and its application in the Croatian legislative framework and practice, instead of concentrating on the real necessity for the Convention's ratification, which consists in creating a coherent framework and reinforcing existing mechanisms for the eradication and prevention of domestic violence and violence against women.

## **10.2 Ratification of the Istanbul Convention**

Five years after the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) was signed by the Croatian Government, the process of its ratification was finally completed on 13 April 2018. The Act on the Ratification of the Istanbul Convention entered into force on 24 May 2018. Following the deposition of the instruments of ratification on 12 June 2018 in Strasbourg, the Convention entered into force in Croatia on 1 October 2018 (Article 76(2) of the Convention). Croatia was the 31<sup>st</sup> State to ratify the Convention. This ratification represents an important step forward in enforcing the legal framework for the protection of women against violence and domestic violence.

Ratification of the Istanbul Convention was a matter of fierce political debate and civil activism. Conservative interest groups have organised numerous rallies against the ratification, culminating in a massive rally in the capital of Croatia on 24 March 2018. The majority party in the governing coalition was split over the issue, but with the support of the Prime Minister, who is also the head of the majority party, the forces for ratification have prevailed, and the vote in Parliament went smoothly. In addition, other political parties in Parliament have announced their support for the ratification.

The Convention was ratified in the Parliament with 110 votes for, 30 against and 2 abstentions.<sup>178</sup> The major concern of the forces against ratification is that the Convention introduces 'gender ideology' to the Croatian legal and educational system.

The Government has therefore decided to attach the following 'interpretative statement' with the ratification instrument:

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<sup>177</sup> Sometimes the courts state the fact that the defendant 'has shown sincere remorse' for his actions as the ground for lighter punishment. See for example, presentation of the cases PRS-03-02/16-50, PRS-03-02/17-9 and PRS-03-04/17-01 in Ombudsperson for Gender Equality (2019), *Annual Report for 2018* available at <https://www.prs.hr/attachments/article/2645/Izvjješće%20o%20radu%20Pravobraniteljice%20za%20ravno%20pravost%20spolova%20za%202018.%20godinu~.pdf>.

<sup>178</sup> The vote took place on 13 April 2018. See <https://www.sabor.hr/prijedlog-zakona-o-potvrdivanju-konvencije-vijeca-europe-o-sprecavanju-i-borbi-protiv-nasilja-nad-0?t=45512&tid=205582>.

'The Republic of Croatia considers that the aim of the Convention is to protect women against any form of violence and to prevent, prosecute and eliminate any form of violence against women and domestic violence.

The Republic of Croatia considers that the provisions of the Convention do not contain the obligation to introduce gender ideology in the Croatian legal and educational system, nor the obligation to change the constitutional definition of marriage.

The Republic of Croatia considers that the Convention is in line with the provisions of the Constitution of the Republic of Croatia, especially with the provisions on the protection of human rights and fundamental freedoms, and that the Convention shall be applied in accordance with the said provisions, principles and values of the constitutional order of the Republic of Croatia.'

In accordance with Article 78(2) of the Convention, Croatia has also reserved the right to apply Article 30(3) of the Convention solely in relation to victims who are claiming compensation in accordance with the national legislation regulating the issue of compensation for victims of criminal offences.

The ratification was fiercely opposed by clerical and conservative right-wing circles, formally represented through the citizens' initiative 'The truth about the Istanbul Convention', who have turned their forces to organising an initiative for a referendum against the Convention. According to the prescribed procedure, the signatures for initiation of a referendum to denounce the Convention were gathered in the period from 13 to 27 May 2018. The Croatian Parliament calls a referendum when so requested by 10 % of the total electorate in the Republic of Croatia (at that point in time, 374 740 valid signatures were needed). Claiming to have successfully gathered the required number of signatures, the initiative has submitted them to the Croatian Parliament, which requested the Croatian Government (Ministry of Administration) to count and verify them. This has taken several months, and the procedure of verification was finished in October of 2018.<sup>179</sup> It was established that the initiative did not collect the sufficient number of valid signatures, since about 11.5 % of signatures were invalid. However, there were 345 942 valid signatures, which shows that almost 10 % of the voting population is against the Convention (since otherwise they would not have supported the initiative). Had the number of signatures been sufficient, the Parliament or the Government could have asked the Croatian Constitutional Court to rule whether the referendum question was in accordance with the Croatian Constitution.

In view of these political controversies, nobody seems to have paid attention to the financial implications of the Convention's implementation. The statement containing the reasons accompanying the draft Act on Ratification states that in addition to the existing annual financial resources from the state budget which have been earmarked for combating domestic violence (around HRK 70 million (EUR 950 000) annually), an additional HRK 1 490 000 (EUR 200 000) will be designated in 2018 for the implementation of the Convention. However, no financial analyses have confirmed whether this amount is appropriate.

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<sup>179</sup> Report available at <https://uprava.gov.hr/vijesti/izvjesce-povjerenstva-o-provjeri-broja-i-vjerodostojnosti-potpisa-biraca-iz-zahtjeva-za-raspisivanje-drzavnog-referenduma-gradjanskih-inicijativa-narod-odlucuje-i-istina-o-istanbulskoj/14813>.



## 11 Compliance and enforcement aspects (horizontal provisions of all directives)

### 11.1 General (legal) context

#### 11.1.1 Surveys and reports about the particular difficulties related to obtaining legal redress

The survey of anti-discrimination cases from 2017 is based on 420 court cases involving discrimination conducted before the competent Croatian courts, including civil, criminal, misdemeanour and administrative cases.<sup>180</sup> The most relevant characteristic of civil litigation is that it is instigated exclusively by the victim of discrimination, at least when it comes to individual claims. From the perspective of the victim, this type of legal action is beneficial, because it can bring financial satisfaction. Another benefit is based on the reversal of the burden of proof, because this principle applies solely in civil, and not in criminal and misdemeanour proceedings. However, victims often avoid litigation, out of fear of victimisation and stigmatisation, and because of the notorious length of proceedings before Croatian courts. The researchers conclude that the costs of litigation, especially if the claimant loses the dispute, are also among the most important deterring factors. This is evident from the fact that the number of civil actions is extremely low compared to the number of reported complaints to the ombudsmen bodies.<sup>181</sup> In addition, it is observed that only a small share of all discrimination claims to courts end up in a judgment adopting the claim.<sup>182</sup>

There are several misdemeanour offences that are punishable under the Anti-Discrimination Act as well as the Gender Equality Act - harassment, sexual harassment and victimisation - which could cause overlapping. More specific misdemeanour offences under the Gender Equality Act include failure by the state or other bodies, political parties, media or local and regional units of self-government to comply with specific obligations prescribed under the Gender Equality Act.<sup>183</sup> There are also many other acts that prescribe misdemeanour sanctions, especially in connection with public disturbance offences. The most common confusion in practice arises in connection with the proper legal basis for the procedures, i.e. when misdemeanour could fall under the provisions of the Anti-Discrimination Act, or the Gender Equality Act or other acts sanctioning misdemeanour offences. Another problem lies in lenient sanctioning, which has a negative impact on the effectiveness and dissuasiveness of the sanction.<sup>184</sup> It has been observed that in many discrimination and harassment misdemeanour cases, the courts apply the legal ability to lower the punishment, to even less than the statutory minimum.<sup>185</sup>

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<sup>180</sup> Kesonja, D., Šimonović Einwalter, T. (2017) *Analysis of case law in anti-discrimination claims before the Croatian courts (Analiza sudske prakse u postupcima pred hrvatskim sudovima pokrenutima zbog diskriminacije)* CES, available at [https://www.cms.hr/system/publication/pdf/104/Analiza\\_sudske\\_prakse\\_u\\_postupcima\\_pred\\_hrvatskim\\_sudovima\\_pokrenutima\\_zbog\\_diskriminacije.pdf](https://www.cms.hr/system/publication/pdf/104/Analiza_sudske_prakse_u_postupcima_pred_hrvatskim_sudovima_pokrenutima_zbog_diskriminacije.pdf).

<sup>181</sup> Researchers state as an example that there were 975 new complaints in 2016 to various ombudsmen bodies in Croatia, however, only 53 new court cases concerning discrimination were instituted. See Kesonja, D., Šimonović Einwalter, T. (2017) *Analysis of case law in anti-discrimination claims before the Croatian courts*, CES, p. 58.

<sup>182</sup> In 2016, there were 53 new discrimination cases in civil proceedings, but given the claims filed in the preceding period, overall of 200 court cases were pending. Out of them, only 22 % were completed in that year, and there was only one judgment adopting the claim. See Kesonja, D., Šimonović Einwalter, T. (2017) *Analysis of case law in anti-discrimination claims before the Croatian courts* CES, p. 12.

<sup>183</sup> The Ombudsperson for Gender Equality has analysed the misdemeanour offences instituted against political parties for failing to comply with the gender quota, and found many difficulties in the implementation of Article 35 of the Gender Equality Act which prescribes sanctions, mostly concerning lack of information, slowness, lenient sanctioning and divergences in application. See Ombudsperson for Gender Equality (2019) *Annual Report for 2018*, pp. 286-289.

<sup>184</sup> Kesonja, D., Šimonović Einwalter, T. (2017) *Analysis of case law in anti-discrimination claims before the Croatian courts* CES, p. 61.

<sup>185</sup> Kesonja, D., Šimonović Einwalter, T. (2017) *Analysis of case law in anti-discrimination claims before the Croatian courts*, CES, p. 40.

The number of criminal court proceedings in the observed period was relatively low, so it was not possible to assess whether the effects of general and special prevention were achieved.<sup>186</sup> The researchers determined the need for further education and training of judges, but also public prosecutors in this respect. The role of administrative courts in the enforcement of protection against discrimination is extremely important, since they are competent to review the legality of acts adopted by the state administration and other bodies that directly decide about the rights and obligations of citizens. However, in administrative disputes, discrimination is rarely argued by parties, and if it is, it is rather vague and general.<sup>187</sup>

#### 11.1.2 Other issues related to the pursuit of a discrimination claim

A general and prevailing lack of confidence in the judiciary system is one of the most important societal aspects in pursuing discrimination claims. Only 18 % of citizens have some trust in the independence of the judiciary, and would rate it as either very good or good.<sup>188</sup> The main reason for the perceived lack of independence lies in the suspicion that the judiciary is influenced by the Government and politicians (64 %). This perception is exacerbated by sensationalist media coverage of some cases, while positive practice examples tend to go unnoticed. It is also due to a long history of distrust in institutions, which has been passed on to the younger generations and which was amplified during the period after Croatia gained independence from the former Yugoslavia and was transforming into a market economy, when even the most blatant examples of criminal activities in the economic sphere went unpunished.

#### 11.1.3 Political and societal debate and pending legislative proposals

There were no recent political and societal debates and pending legislative proposals on compliance and enforcement aspects.

### 11.2 Victimisation

Victimisation in relation to sex discrimination and other discriminatory grounds is prohibited within the material scope of application of the Gender Equality Act and the Anti-Discrimination Act. Article 2 of the Gender Equality Act was amended in 2017 to include a more detailed legal description of victimisation.<sup>189</sup> Whereas the previous provision provided that no one should suffer adverse consequences for providing a statement before competent bodies as a witness or a victim of sexual discrimination or for alerting the public to sexual discrimination, the new provision includes all persons, not just victims or witnesses of discrimination, and all complaint procedures, formal or informal, in which such persons participated. The new provision of Article 2 now contains two paragraphs with a broad description of actions that should not serve as a basis for victimisation. It states that no one should be put at a disadvantage or suffer adverse consequences, including being prosecuted or exposed to other legal proceedings, as a result of reporting discrimination either officially or unofficially in good faith, witnessing discrimination, refusing an instruction to discriminate, testifying in any way in a procedure for protection against sex discrimination, or in any other manner participating in any proceedings conducted because of sex discrimination. No one should be put at a disadvantage or suffer

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<sup>186</sup> The survey was concentrated on the period 2012-2016, and did not cover domestic violence cases. The latest available data on domestic violence criminal cases show an increasing trend. See Ombudsperson for Gender Equality (2019), *Annual Report for 2018* p. 99.

<sup>187</sup> Kesonja, D., Šimonović Einwalter, T. (2017) *Analysis of case law in anti-discrimination claims before the Croatian courts*, CES, pp. 53-55.

<sup>188</sup> Flash Eurobarometer 474 (2019), 'Perceived independence of the national justice systems in the EU among the general public – Croatia', available at <http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2199>.

<sup>189</sup> Croatia, Act on Amendments to the Gender Equality Act, NN No. 69/17. The amendments entered into force on 22 July 2017.



adverse consequences, including being prosecuted or exposed to other legal proceedings for having alerted the public about sex discrimination in good faith.

The new provision on victimisation in the Gender Equality Act is now even wider in scope than Article 7 of the Anti-Discrimination Act because it also includes protection against victimisation for alerting the public about sex discrimination. However, there is still no domestic case law on victimisation.

### 11.3 Access to courts

#### 11.3.1 Difficulties and barriers related to access to courts

Under the Anti-Discrimination Act, municipal courts have subject-matter jurisdiction in litigation based on a special legal action for protection against discrimination (Articles 17(1) and 18(1) of the Anti-Discrimination Act). County courts adjudicate in the first instance in disputes prescribed by law and decide on appeal against the decisions of the municipal courts. In the field of equality law, county courts have subject-matter jurisdiction for joint legal actions (representative actions) regarding protection against discrimination. The Supreme Court is the highest judicial authority and is responsible for ensuring the uniform application of laws and the equality of all before the law (Article 116 of the Constitution of the Republic of Croatia). In civil proceedings, its powers include deciding on appeals against the first-instance decisions of county courts and revisions as extraordinary legal remedies against (final and binding) second-instance decisions, in cases prescribed by law.

Apart from the special legal action for protection against discrimination, the Anti-Discrimination Act authorises any person who claims that her/his rights have been violated as a result of discrimination to seek protection in proceedings deciding upon that right as the main issue (Article 16(1) Anti-Discrimination Act). The Gender Equality Act authorises any party who considers that her/his rights have been violated due to discrimination described in that Act to file a legal action at the regular court of general jurisdiction (Article 30(1) Gender Equality Act), in other words, to initiate litigation before a municipal court. Despite the relatively satisfactory normative basis, victims of discrimination are often reluctant to initiate court proceedings, given their expected length, cost and the 'stigma' associated with such cases.<sup>190</sup>

An analysis of case law on discrimination (covering all grounds) reveals that the efficiency of court proceedings is very low, as the majority of court proceedings on discrimination take longer than 12 months.<sup>191</sup> Longer court proceedings imply higher costs for the claimants, which represents a serious impediment for the protection of their rights. The same analysis also warns that victims of discrimination are highly exposed to further victimisation during court proceedings and the fact that the courts are unable to adhere to the legally prescribed principle of urgency of proceedings further aggravates the efficiency of enforcement. The burden of proof rules are especially problematic in labour disputes, where testimony of co-workers is needed to establish the facts. Fear of victimisation often influences the reliability of testimony, but some courts take into account

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<sup>190</sup> Almost 40 % of respondents in a survey on gender equality and discrimination in Croatia conducted in 2010 replied that they would not report gender discrimination by any of the institutional means (i.e. a complaint to the Ombudsperson for Gender Equality, a court, etc.). See Kamenov, Ž., Galić, B. (2011), *Rodna ravnopravnost i diskriminacija u Hrvatskoj* (Gender equality and discrimination in Croatia), Ured za ravnopravnost spolova.

<sup>191</sup> Kesonja, D., Šimonović Einwalter, T. (2017) *Analysis of case law in anti-discrimination claims before the Croatian courts (Analiza sudske prakse u postupcima pred hrvatskim sudovima pokrenutima zbog diskriminacije)* CES, available at [https://www.cms.hr/system/publication/pdf/104/Analiza\\_sudske\\_prakse\\_u\\_postupcima\\_pred\\_hrvatskim\\_sudovima\\_pokrenutima\\_zbog\\_diskriminacije.pdf](https://www.cms.hr/system/publication/pdf/104/Analiza_sudske_prakse_u_postupcima_pred_hrvatskim_sudovima_pokrenutima_zbog_diskriminacije.pdf).

the fact that such witnesses of discrimination are also in the position of financial and occupational subordination towards the employer, which can affect their testimony.<sup>192</sup>

### 11.3.2 Availability of legal aid

Many civil society organisations involved in protection against discrimination offer free legal advice to victims of gender discrimination. The Ombudsperson for Gender Equality receives claims of discrimination, and many victims feel more confident when complaining to the Ombudsperson in out-of-court, less formalistic proceedings at no cost. Persons of low income may obtain professional free legal aid in accordance with the procedure envisaged under the Act on Free Legal Aid.<sup>193</sup>

## 11.4 Horizontal effect of the applicable law

### 11.4.1 Horizontal effect of relevant gender equality law

So far, there have been no particular problems in connection with the lack of horizontal effect of EU directives. Lower or appellate courts do not seem to mind invoking gender equality directives in their reasoning, even in horizontal situations.<sup>194</sup> However, regardless of the fact that directives are sometimes mentioned in the courts' reasoning, the decision itself is always based on national legislative provisions.

### 11.4.2 Impact of horizontal direct effects of the charter after *Bauer*

The impact of *Bauer* or the recognition of horizontal direct effects of the Charter provisions is not expected to have much influence on the enforcement of the gender equality provisions in Croatia. This conclusion arises from the fact that the national gender equality law standards and obligations apply to public and private spheres equally and Charter rights are already guaranteed in the Constitution and various pieces of legislation, such as the Labour Act or the Act on Maternity and Parental Benefits. In addition, the Croatian Constitution contains an open-ended anti-discrimination clause (Article 14(1) of the Constitution), which can be invoked in discrimination claims.

## 11.5 Burden of proof

The wording of the two main anti-discrimination laws in Croatia, the Anti-Discrimination Act and the Gender Equality Act, on the burden of proof differs slightly, which may lead to an inconsistent interpretation. Under Article 20 of the Anti-Discrimination Act, a party claiming discrimination does not have to prove it with any degree of certainty – it suffices to establish a probability (*učiniti vjerojatnim*) that the discrimination occurred ('shall make it plausible that discrimination has taken place'), while the respondent has to prove the opposite with a sufficient degree of certainty. Failing this, it is considered that the right to equal treatment has been violated.<sup>195</sup> In two Supreme Court cases, Gž-25/11 and Gž-41/11 (involving discrimination based on sexual orientation), the rules on the burden of proof from the Anti-Discrimination Act were interpreted so as to shift the burden of proof to prove that there had been no discrimination to the respondent, when the meaning of

<sup>192</sup> Kesonja, D., Šimonović Einwalter, T. (2017) *Analysis of case law in anti-discrimination claims before the Croatian courts*, CES, p. 20.

<sup>193</sup> Croatia, Act on Free Legal Aid (*Zakon o besplatnoj pravnoj pomoći*), NN No. 143/2013.

<sup>194</sup> See, for example, Osijek County Court, Gž R-519/2017 (described in section 3.4.3 of this report).

<sup>195</sup> Whereas the first instance court in this case found that the probability of discrimination requirement had not been satisfied, the appellate court was of the opinion that it was enough for the claimant in a representative action to present the respondent's statement to the court and concluded that the 'purposive meaning of that statement was evident in itself: humiliation and degradation of that category of persons'. The claimant showed with probability that discrimination against the target group had occurred as a result of that statement, which was enough for the burden of proof to shift to the respondent.

the statements made was obvious in itself (degradation and humiliation).<sup>196</sup> In another case dealing with the burden of proof from the Anti-Discrimination Act, the court interpreted the 'standard of probability' to mean that a party claiming discrimination has to prove that 'he/she was placed in a less favourable position which might be a consequence of direct or indirect discrimination' on any of the grounds listed in the act.<sup>197</sup> This interpretation seems to come close to the burden of proof provision in the Gender Equality Act, although the wording is formulated much more broadly. According to Article 30(4) of the Gender Equality Act, a party claiming that his/her right has been violated has to present facts that raise the suspicion that discriminatory behaviour has occurred and the burden of proof then shifts to the opposing party who has to prove that there has been no discrimination. Theoretically, this is an even lighter burden than proving a probability under the Anti-Discrimination Act. The application of the rules on the reversal of the burden of proof is a challenging task for the Croatian judiciary.

Case law involving sex discrimination dealing with the interpretation of the burden of proof from the Gender Equality Act is still non-existent. Several discrimination cases interpreting the burden of proof rules deal with factual situations that occurred prior to the coming into force of the Gender Equality Act, and apply the burden of proof rules that were at that time contained in the old Labour Act (2004).<sup>198</sup> These rules were worded similarly to Article 30(4) of the Gender Equality Act ('raise a suspicion').<sup>199</sup>

## 11.6 Remedies and sanctions

### 11.6.1 Types of remedies and sanctions

A victim of discrimination is entitled to seek damages in accordance with the general provisions for the compensation of damages. The Gender Equality Act and the Anti-Discrimination Act set out sanctions for violations of its provisions (punishable as a misdemeanour) in the form of monetary fines. Sexual harassment is also punishable under the Criminal Code (Article 156).<sup>200</sup>

The Gender Equality Act authorises any party who considers that her/his rights have been violated due to discrimination described in that act to file a legal action before the regular court of general jurisdiction (Article 30(1), Gender Equality Act), in other words, to initiate litigation before a municipal court. The Anti-Discrimination Act prescribes the main features of the special legal action for protection against discrimination (Article 17(1), Anti-Discrimination Act): an action for the determination of discrimination, an action for the prohibition or elimination of discrimination, an action for damages and a request to publish in the media the ruling establishing a violation of the right to equal treatment, at the respondent's cost. In addition, the Anti-Discrimination Act authorises any person who claims that his/her rights have been violated as a result of discrimination to seek protection

<sup>196</sup> In both cases, which share the same factual background, the first instance courts concluded that the claimants had not made discrimination plausible, i.e. they did not show a probability that the respondent's statement had caused direct discrimination. See the judgments of the Zagreb County Court Pnz-8/10 and Pnz-7/10. There are no similar reported cases on the burden of proof involving gender discrimination.

<sup>197</sup> Bjelovar County Court, Gž-458/2012.

<sup>198</sup> The anti-discrimination case law in general is still rather confusing, partially because the claimants themselves claim that discrimination has occurred, without specifically stating on which grounds; or even change the grounds of discrimination during court proceedings. See, e.g. cases VSRH Revr-856/2012; VSRH Revr-650/2008.

<sup>199</sup> In one case involving a claim of sexual harassment at work (Bjelovar County Court, Gž-2000/2012), the court found that the standard for shifting the burden of proof had been satisfied, because the claimant had substantiated her claim with written proof from a third party (a telecom operator), warning her employer that his company was not registered to provide telephone sex services. In one decision of the Croatian Constitutional Court (U-III-7490/2014), the Constitutional Court found that a 'subjective assessment' of the claimant that she deserved promotion does not suffice to prove that she had been placed in a less favourable position.

<sup>200</sup> Croatia, Criminal Code (*Kazneni zakon*), NN Nos. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017 and 118/2018.

in proceedings deciding upon that right as the main issue (Article 16(1), Anti-Discrimination Act).

Under Article 24(1) of the Anti-Discrimination Act, associations, bodies, institutions or other organisations set up in accordance with the law and having a justified interest in protecting the collective interests of a certain group, or those which within their scope of activities deal with the protection of the right to equal treatment, may bring a legal action against a person that has violated the right to equal treatment. Representative action is a collective remedy available under the Gender Equality Act as well, but the general conditions are prescribed in the ADA. So far, it has predominantly been used by associations fighting against discrimination based on sexual orientation.<sup>201</sup>

#### 11.6.2 Effectiveness, proportionality and dissuasiveness

The legislative framework regarding the remedies and sanctions is satisfactory, but practice and case law are still scarce.

### 11.7 Equality body

The most important body entrusted with the implementation of gender equality requirements is the Ombudsperson for Gender Equality (<http://www.prs.hr>). This is an independent body charged with combating discrimination in the field of gender equality. Its tasks include: receiving complaints from and providing assistance to natural persons or legal entities in the field of gender discrimination; investigating individual complaints prior to legal proceedings and conducting mediation processes with the consent of the parties; collecting and analysing statistical data on cases of sexual discrimination; conducting independent surveys concerning discrimination; publishing independent reports; and exchanging available information with corresponding European bodies. The increasing workload of the Ombudsperson for Gender Equality (especially regarding individual complaints, which amount to about 300–400 annually) shows the relevance of this office. In addition, the Ombudsperson for Gender Equality issues numerous recommendations and warnings *ex officio*, and conducts research in various fields of gender equality, the results of which serve as a valuable contribution to and a platform for the promotion of gender equality in Croatia and encourage change in discriminatory practices.

### 11.8 Social partners

Social partners are obliged to comply with the provisions of the Gender Equality Act and measures for the achievement of gender equality when conducting collective negotiations and concluding collective agreements at all levels (Article 11(6), Gender Equality Act). Under the Anti-Discrimination Act (Article 15), the Public Ombudsman must consult the social partners (representative associations of trade unions and employers of a higher level) and civil society organisations when drawing up regular reports, opinions and recommendations on the occurrence of discrimination. The Ombudsperson for Gender Equality has no equivalent obligation.

Collective agreements are binding on their parties, but also on all persons who, at the time of the conclusion of such an agreement, were or subsequently became members of the association that is a party to the collective agreement (Article 194, Labour Act). The competent minister has the authority to extend the application of a collective agreement to other employers, if there is a public interest for such an extension and if the collective agreement was concluded with unions that have the largest number of members and employers' associations with the largest number of workers at that level of application (Article 203, Labour Act).

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<sup>201</sup> See for example Zagreb County Court Pnz-8/10 and Pnz-7/10.

The general conclusion from the analysis of the collective agreements in view of gender equality, equal opportunities and a work-life balance conducted by the Ombudsperson for Gender Equality in 2009 was that the social partners need further instructions regarding the legal framework for equal treatment and equal opportunities, given that many collective agreements themselves contain provisions that generate inequalities based on sex.<sup>202</sup> Out of 120 collective agreements analysed, only 7 contained provisions on equal pay and only in a general manner. There are no monitoring mechanisms for this obligation whatsoever. To date, this is the only comprehensive analysis of the gender equality provisions in Croatian collective agreements and it is high time for new empirical research on this subject.

### **11.9 Other relevant bodies**

Other authorities entrusted with the enforcement of the Gender Equality Act include the Office for Gender Equality, as well as other bodies at regional and local levels. The Office for Gender Equality (<https://ravnopravnost.gov.hr/>) is a technical service of the Government for the implementation of activities related to the enforcement of gender equality. State administrative bodies are obliged to appoint a gender equality coordinator. Local and regional self-government units are required to establish committees for gender equality.

### **11.10 Evaluation of implementation**

Effective enforcement of the existing gender equality guarantees continues to be one of the weakest links of the Croatian gender equality legislation. Officially, all standards concerning access to courts and pursuing discrimination claims are implemented in the legislation correctly. However, problems arise in connection with interpretation and application of those standards in individual cases. There is a need for more involvement by the higher courts, especially the Supreme Court, which has to ensure the uniform application of laws and the equality of all before the law. There is also a shortage of scholarly papers and articles on key concepts of discrimination in general, including on enforcement and procedural issues, which could assist the courts in substantiating their reasoning. Nevertheless, it is hard to draw more definite conclusions on the enforcement and compliance issues based on a scarce and sporadic case law.

### **11.11 Remaining issues**

Nothing further to report.

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<sup>202</sup> Ombudsperson for Gender Equality (2010) *Analysis of collective agreements (Analiza kolektivnih ugovora)*, <http://www.prs.hr/index.php/analize-i-istrazivanja/obrazovanje-3/180-analiza-kolektivnih-ugovora>.

## 12 Overall assessment

The EU gender equality *acquis* in general has been correctly transposed in the existing legislative instruments. However, the two horizontal acts (the Gender Equality Act and the Anti-Discrimination Act) may cause confusion, since both of these normative instruments prohibit gender discrimination and contain overlapping provisions. There are some discrepancies in the wording of certain provisions (e.g. concerning burden of proof or victimisation), which so far have not had adverse consequences in practice. This is a result of the well-established tendency of the Croatian legislature to regulate certain issues in an incomplete and fragmentary manner, or to multiply similar definitions in various legislative instruments, but without an overall strategy and without trying to predict in advance the possible consequences of such an approach.

It helps that the Croatian gender equality and anti-discrimination legislation has grown directly from EU law and the equal treatment directives, and many gender equality standards were implemented even before Croatia joined the EU. No society is immune to gender stereotyping and the traditional division of roles and tasks between men and women, and Croatia is no exception. However, there is also a strongly rooted sense of equality in Croatia, inherited from a socialist tradition of equality before the law in general. This has had a mixed influence on the development and implementation of gender equality legislation. On the one hand, many longstanding guarantees of workers' rights and protection were already in existence, as well as a relatively developed system of maternity and parental benefits (primarily concerning their temporal dimension, but also concerning their financial aspects). On the other hand, many new and unknown concepts (such as direct and indirect discrimination, harassment and sexual harassment) were introduced, and it took some time for all stakeholders to learn, understand and familiarise themselves with them. This process is still on-going. Furthermore, the society as a whole needs to understand the proper meaning of gender equality and recognise what constitutes discrimination.

The coexistence of the Anti-Discrimination Act and the Gender Equality Act in case law shows that the Anti-Discrimination Act predominates, even where gender equality is clearly at stake and where a more specific provision of the Gender Equality Act can be applied. Proper implementation in actual practice takes time. Continuous education and training of the judiciary in the field of gender equality and non-discrimination has yielded many positive effects in case law. Other stakeholders, primarily public bodies and authorities, should follow this effort.

A persistent issue associated with the implementation of the Croatian gender equality legislation concerns its effective enforcement. Despite the fact that all standards concerning access to courts and pursuing discrimination claims are correctly implemented, case law is still scarce, which means that individual claimants rarely seek remedy in the courts. Associational or representative action is an additional available tool for combating sex discrimination, but it is mostly used in cases of discrimination based on sexual orientation. The existing case law reveals that interpretation and application of gender equality standards in individual cases may be problematic, even when cases reach the Supreme Court.

In the last decade, a significant normative expansion of anti-discrimination legislation has occurred, introducing new legal terminology and standards, which were more often than not left undefined, open to interpretation, indeterminate and sometimes inconsistent with other laws. The weakness of the Croatian judicial system is poor accessibility and the non-publication of case law, which transfers across to the application of anti-discrimination legislation and is the likely cause of inconsistent interpretation, inefficiency and the low visibility of decisions in this field. Specifically regarding gender equality, the public perception of inequality seems to exceed by far the actual case law on gender equality and related issues. For example, gender discrimination is considered the third most

common ground of discrimination in the labour market by employed and unemployed persons.<sup>203</sup> However, case law specifically relating to gender discrimination is extremely hard to come by, not just because there are not many such cases that actually make it to courts. The crucial reason for incoherent and sporadic case law in anti-discrimination cases is the fact that decisions are not published and updated regularly and they are very hard to research. Media attention is reserved for high-profile cases (such as those in the field of discrimination based on sexual orientation, usually involving civil society organisations). Furthermore, media coverage of certain cases may not always be accurate. For a researcher or even lawyers outside the court system and without access to the enhanced case law database of the Supreme Court, the examination of the case law of lower courts often boils down to personal contacts and collegial assistance by judges. The published case law (judgments of the Supreme Court, judgments of the Constitutional Court, selected judgments of the county courts) is classified in a non-transparent manner and case law search engines are far from user-friendly. Perhaps these hurdles might not appear so difficult for a seasoned researcher or other persons skilled and trained to investigate different areas of anti-discrimination protection, but to an average user and to those who should benefit from it the most - the victims of discrimination - they might be insurmountable. It also has a negative impact on the uniformity and efficiency of judicial protection throughout Croatia, because until the Supreme Court takes a position on a certain issue (which may not necessarily happen), the courts are basically left without the possibility of knowing the positions and interpretations of other courts. Their only points of reference are internal interpretations by that particular court, provided that they exist. There is no legal obligation for courts to publish final and binding judgments, or judgments pending appeal. Although courts at all levels have their own websites where, applying the rules on anonymisation, case law could be published, in most cases this is not done at all.

There are several other areas that need to be improved. One gender equality issue that deserves further attention and improvement is the question of wage transparency. This issue is not on the political agenda. Although wages in the public sector are heavily regulated and subject to coefficients based on level of education and experience, etc., there is no transparency in practice concerning the additional payments that are also considered as remuneration. In the private sector, confidentiality clauses make it very hard to discover whether there are differences in pay at an individual level, but also at company level.

Another area in need of improvement or at least development of a coherent strategy and evaluation is equal treatment in access to employment and working conditions. The current guarantees and protection against dismissal, as well as the guarantee of return to the previous or an equal level post are not enough to guarantee full equality in practice. Short-term engagements, fixed-term contracts and other atypical forms of work are often used in practice to circumvent these explicit guarantees. In Croatia, non-renewal of a fixed-term contract for pregnant workers or workers on maternity/parental leave has become a standard practice. Only a strongly reasoned judgment could potentially alter this practice, but so far, there have been no court cases concerning this issue.

The work-life balance policies and measures are not satisfactory. The requirements of the directives have been formally implemented, but in practice, flexible working arrangements for parents boil down to the possibility to take part-time maternity or parental leave and even so, there is no special provision allowing employees to request part-time work only on certain days during the week or month, or to adjust to working time patterns in some other way. Other than within the framework of maternity and parental leave, workers have no possibility to request more flexible working arrangements after these rights have been exercised. Workers are only entitled to ask for the switch from full-time to part-time work and vice-versa, and the employer is only obliged to consider such requests. Consequently, there is not much hope for workers returning after parental leave to benefit from or use

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<sup>203</sup> Franc R. (ed.) (2010), *Prevalence and characteristics of discrimination in the Croatian Labour Market (Raširenost i obilježja diskriminacije na hrvatskom tržištu rada)*, Zagreb, Institut Ivo Pilar.

flexible working arrangements that would allow them to reconcile private and professional life more efficiently.

Several fields, such as social security and access to and supply of goods and services, are in desperate need of more research on gender equality aspects. Such research could serve as a basis for the evaluation of implementation and the need to introduce or adapt certain measures and the legislative framework. Current inequalities in the social security system cannot be ascribed solely to legislation or a lack of adequate legislative provisions, but relate to the lack of an overall policy approach to certain issues, the absence of a constructive public debate and low public awareness and interest in these issues. Access to and supply of goods and services represents an uncharted territory, with very little practical examples of sex discrimination being reported in this field. It appears that a certain culture or level of discriminatory behaviour or harassment and sexual harassment (especially sexist statements) is accepted or at least tolerated as part of traditional societal patterns of communication.

The overall public discourse on gender equality issues in Croatia took a wrong turn around the time of the ratification of the Istanbul Convention, although a negative trend had been developing for a couple of years before that. 'Gender ideology' is the buzzword that seems to have overtaken and killed off any meaningful debate about the improvement of gender equality issues in society.



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