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# Country report

## Gender equality



Portugal  
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# **Country report**

## **Gender equality**

How are EU rules transposed into  
national law?

## **Portugal**

Maria do Rosário Palma Ramalho

Reporting period 1 January 2018 – 31 December 2018

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## **1 Introduction**

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

The Portuguese legal system is mainly a statutory law system, headed by the Portuguese Constitution (PC) and developed by state legislation. Where employment and industrial relations are concerned, the Labour Code (LC) is the essential statutory piece of legislation and it also integrates the main provisions in the field of gender equality and non-discrimination principle on other grounds related to employment.

In the field of employment and industrial relations (including in relation to gender equality and non-discrimination principles in this field), collective agreements are also a key element of the system, but they cannot go against mandatory legal provisions.

European Directives are generally transposed into national legislation by statutory law and not by collective agreements, which also applies to equality legislation.

Apart from the area of employment, gender equality provisions are found in several acts, according to the various fields.

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

The main legislation in the field of gender equality and non-discrimination on other grounds, is dispersed in several sources, which have transposed European Directives where appropriate and necessary. Among those sources, the following pieces of legislation, presented according to the subjects dealt by each one of them, are worth mentioning:

- Constitutional grounds of equality rights and provisions: Portuguese Constitution (PC), of 1976.
- Non-discrimination principle in general and gender equality law in the field of employment and industrial relations and as regards maternity, paternity and parental leave and other measures related to the reconciliation of professional and family life: Labour Code (LC), approved by Law No. 7/2009, of 12 February 2009. The LC and the complementary legislation to the LC have transposed all relevant Directives regarding sex discrimination and non-discrimination in general in the field of employment and industrial relations, as well as the maternity and parental leave directives. Repealed Directives in this area were transposed at an earlier stage by the former LC (of 2003) and prior to this Code by specific Acts on the several issues (mainly the Gender Equality Act, of 1979, and the Maternity and Paternity Act, of 1984). With the publication of the first LC in 2003 these Acts were repealed, and their provisions were integrated into the Code. The same system was kept by the LC of 2009 that is now in force.  
LC provisions in the field of non-discrimination in general, gender discrimination and maternity and reconciliation are applicable to employees of the private sector, but also to employees of the public sector (Law No. 35/2014, of 20 June 2014, called '*Lei Geral do Trabalho em Funções Públicas*' – LGTFP ('Public Servants General Law'), as indicated in Article 4 No. 1 (c) and (d) of this Law).  
In the field of equal pay, the LC rules are complemented by Law No. 60/2018, of 21 August 2018, which has approved a number of measures for the active promotion of equal pay of men and women for equal work or work of the same value.
- Gender equality and occupational social security schemes: Decree-Law No. 12/2006 of 20 January 2006 (trust funds that deal with professional social security schemes) and Decree-Law No. 307/97 of 11 November 1997 which has transposed Directive 86/378/EEC, including the changes introduced by Directive 96/97/EC, into domestic legislation.
- Gender equality in statutory social security schemes: '*Lei de Bases da Segurança Social*' ('Social Security General Law') – Law No. 4/2007 of 16 January 2007) and

- Código dos Regimes Contributivos de Segurança Social'* (CRCSS) ('Social Security Contribution System Code'), approved by Law No. 110/2009, of 16 September 2009.
- Non-discrimination principle in self-employment, including gender equality: Law No. 3/2011, of 15 February 2011, which establishes the general framework for the protection of self-employed persons as regards the prohibition of discrimination in the access to and in the development of independent work in the private sector, in the public sector, and in the cooperative sector. This Law has transposed Directive 2000/43, Directive 2000/78 and (partially) Directive 2006/54.
  - Gender equality in the access to and provision of goods and services: Law No. 14/2008, of 12 March 2008, which has transposed Directive 2004/113; this Law was amended by Law No. 9/2015, of 11 February 2015, in view of the *Test-Achats* judgment.
  - Gender equality in decision-making: Law No. 3/2006, of 21 August 2006 (known as '*Lei da Paridade*' – 'Parity Law'), imposing quotas for national Parliamentary elections, for European Parliamentary elections and for local political representatives; Law No. 62/2017, of 1 August 2017, regarding women on boards, imposing a minimum representation of the less represented sex on executive boards and surveillance boards of public companies and private listed companies.



### 1.3 Sources of law

The main source of gender equality law in Portugal is national legislation.

Under the condition that they are ratified by Portugal, international treaties are also integrated into the national legal system, and placed directly under the Portuguese Constitution and above other internal legislation (Article 8(2) of the PC). EU Law is also applicable at domestic level either directly (as in the case of EU Treaties and EU Regulations) or by way of transposing the Directives into national legislation (Article 8(3) of the PC).

The Portuguese legal system is a statutory system, so case law is important, because previous court decisions are taken into account, but it does not stand as an autonomous source of law, as judgments do not form legal precedent.

In exceptional situations, called '*Uniformização de Jurisprudência*' (Judgments of the Supreme Court solving differences of opinion coming from prior judgments in relation to the interpretation of a specific legal provision), the jurisprudence of the Supreme Court forms judicial precedent.

Also, judgments with general binding value issued by the Constitutional Court, where a specific provision is declared unconstitutional, are a substantive source of law, in the sense that the specific provision is no longer applicable and must be changed.

In short, only in these specific and exceptional situations is case law more than an indirect source of law.

Opinions of equality bodies or quasi-judicial bodies and authoritative scholarly interpretations ('*doutrina*') are not a source of law but play an important role as non-binding opinions and are often quoted in judicial action.

In the field of employment and industrial relations, collective agreements at branch or at company level are an autonomous source of law, and the same goes for administrative regulation of employment relations – the '*Portaria de Extensão*' ('Extension Regulation'), that extends the scope of collective agreements to employers and employees not covered initially, and the '*Portaria de Condições de Trabalho*' ('Employment Conditions Regulation') that regulates employment relations in the absence of a collective agreement. Finally, company regulations issued by the employer ('*Regulamento interno de empresa*') and common practices within the companies or related to a specific profession ('*usos laborais*') are also autonomous sources of law in this field (Article 1 and Article 2 of the LC).

These sources cannot go against imperative legal provisions (Article 3 of the LC), but in practice they play a very important role, especially collective agreements.

## **2 General legal framework**

### **2.1 Constitution**

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

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

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

As well as the explicit prohibition of sex discrimination in Article 13(2), equality between men and women is addressed in several other provisions of the PC.

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

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

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

Some of these provisions are addressed to the State itself ('programmatic' provisions), while others are immediately applicable. Only the second category of provisions have horizontal effect, in the sense that they are immediately binding provisions both to public and to private entities and can therefore also be invoked between private parties (Article 18(2) of the PC). The non-discrimination principle (including on the ground of sex), the equality principle in the access to employment, or the equal pay principle are good examples of immediately binding provisions that can also be invoked between private parties.

### **2.2 Equal treatment legislation**

In Portugal, equal treatment legislation is dispersed in several pieces of legislation, relating to different fields.

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

In certain areas, the LC is complemented by more specific legislation, as in the case of equal pay, where the LC regulation is complemented by Law No. 60/2018, of 21 August 2018, and in the case of maternity, paternity and reconciliation rights, where the LC regulation is complemented by Law No. 91/2009, of 9 April 2009 (social protection attached to these rights) and by Law No. 102/2009, of 10 September 2009 (special health and safety measures for pregnant working women and women who have given birth).

As regards other issues (self-employment, access to and supply of goods and services, social security and gender-balance in company boards), there are specific Acts on equal treatment in each area. These Acts are listed above.

Both in the LC and in the specific Acts on the several issues indicated above, sex discrimination is prohibited.

In addition to sex, the LC covers the following discrimination grounds: age, ancestry, sexual orientation, sexual identity and sexual reassignment, marital status, family situation, economic situation, level of education, origin or social condition, genetic features, disability, chronic disease or reduced capacity for work, nationality, race or ethnic origin, place of birth, native language, religion, political or ideological convictions, and trade union affiliation (Article 24(1) of the LC).

### **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 author is not aware of surveys or reports published in Portugal over the last five years that provide insights into the legal definition, implementation and limits of central concepts of gender equality law, i.e. sex/gender/transgender, direct and indirect sex discrimination, multiple and intersectional discrimination, positive action, harassment and sexual harassment, instruction to discriminate.

##### **3.1.2 Other issues**

Despite the lack of studies in relation to the central concepts of gender equality law, it is commonly recognised that some concepts linked to sex discrimination are more difficult to understand and may give ground to different interpretation.

This is the case of the notions of indirect discrimination, work of the same value, positive action, intersectional discrimination and harassment. Despite being well established in the law, these notions do not seem clear to the various stakeholders, when it comes to their practical implementation in case law, by the employers in company regulations, by the social partners in collective agreements and even by the labour inspection services.

##### **3.1.3 General overview of national acts**

All acts dealing with gender equality prohibit direct and indirect sex discrimination and (sexual) harassment, but not all of them define such notions. Central concepts in this field – such as direct and indirect sex discrimination or harassment or positive action – are defined in the LC, but also in the legislation concerning gender equality in independent work, and in the legislation on gender equality in the access to and provision for goods and services.

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

In recent years, two central concepts of gender equality law have been widely debated in Portugal not only at a political level but in several other forums: the notion of harassment and the notion of positive action.

In relation to harassment, this debate gave ground to the change of the LC, by Law No. 73/2017, of 16 August 2017, which introduced several measures intended to promote a more active fight against harassment practices in employment relations and to protect harassment victims from retaliation.

The debate relating to the notion and justification of positive action was produced in the context of the approval of quota legislation in company boards and company plans for gender equality in promotion and in the access to management positions (Law No. 62/2017, of 1 August 2017). This piece of legislation is being applied now, within the time limits established to make the necessary changes, especially on company boards, so it is still too soon to assess the practical implementation of the changes introduced in the legislation.

## **3.2 Sex/gender/transgender**

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

In Portugal, there is traditionally no definition of sex or gender in the law nor in case law, nor in the opinions of equality bodies, and including the legislation on self-determination of gender and change of legal sex (Law No. 38/2018, of 7 August 2018).

The only exception is the new legislation on equal pay and pay transparency (Law No. 60/2018, of 21 August 2018), which defines sex in Article 2(1)(a) as follows: 'sex are the biological characteristics that distinguish humans as woman or man, used as a demographic criteria'.<sup>1</sup> However, it is important to point out that this definition is strictly valid for the purposes of equal pay and pay transparency, as indicated in the same article of Law No. 60/2018.

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

In the field of employment, the Labour Code explicitly prohibits discrimination on the ground of gender identity and of gender reassignment, in Article 24(1).

There are no similar provisions in the acts that address non-discrimination in general and gender equality in self-employment and in the access to and supply of goods and services. However, the general clause on non-discrimination established in the Constitution (Article 13), which expressly mentions sex and sexual orientation as grounds for discriminatory practices and prohibits such practices, can be invoked directly in such areas, since it is, as explained above, an immediately binding provision.

Also, it is to be noted that once established that the questions related to transgender, intersex and non-binary persons are gender equality issues, the legislation that deals with sex discrimination in different areas (social security, access to and provision for goods and services, or self-employment) is to be considered applicable to those issues.

### **3.2.3 Specific requirements**

In Portugal, transgender, intersex and non-binary persons are protected from discrimination under the categories of gender identity, sex characteristics and gender expression.

In this sense, Law No. 38/2018, of 7 August 2018, on the right to the self-determination of gender identity and to the protection of the sexual characteristics (Article 1), establishes a general prohibition of direct or indirect discrimination on the grounds of gender identity, gender characteristics and gender expression (Article 2 No. 1).

Prior to Law No. 38/2018, of 7 August 2018, the change of legal gender was dealt with by Law No. 7/2011, of 15 March 2011. Under this legislation, the medical confirmation of the specific gender status of transgender, intersex and non-binary persons was necessary for the purpose of the change of the legal gender, as this situation was viewed as a health issue. Therefore, the evidence of a 'gender identity disorder', should be declared by a medical and psychological evaluation (Articles 2 and 3).

However, this Act was repealed by Law No. 38/2018, of 7 August 2018. This Law establishes a civil procedure for the recognition of gender identity that includes the change of the legal gender and of the name (Articles 6 to 10), that is much simpler than the previous procedure. In the course of this procedure, a medical evaluation is not required except in the case of minors who may start the procedures after reaching the age of 16,

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<sup>1</sup> This is a rough and unofficial translation by the author.

with the assistance of their parents (as legal representatives of the minors, under Articles 122 and 123 of the Civil Code).<sup>2</sup>

Also, during this procedure, it is strictly forbidden to ask the person for any proof of having been submitted to sterilisation, sex-change surgery, hormonal treatment or any other medical or psychological treatment as a condition to the change of legal sex (Articles 7 and 9 of Law No. 38/2018, of 7 August 2018).

As to the marital status of the person, marriage per se is no obstacle to the procedure of changing the legal gender status, but the change of sex is a legal ground for divorce or for the annulment of marriage.

### **3.3 Direct sex discrimination**

#### **3.3.1 Explicit prohibition**

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

Direct discrimination is defined in general in the LC (Article 23(1)(a)) as:

'any situation where someone is submitted to a less favourable treatment than the treatment actually or virtually applied to someone else in a comparable situation, due to a discriminatory ground'.<sup>3</sup>

Discriminatory grounds are indicated in the provision that prohibits this kind of behaviour (Article 24(1)). This notion applies to direct gender discrimination.

Still in the field of employment relations, discrimination is also defined in Law No. 60/2018, of 21 August 2018 (Article 2(1)(c)), for the purposes of gender discrimination in pay.

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

Direct sex discrimination is defined in Article 3(a) of Law No. 14/2008, of 12 March 2008 (gender equality in the access to and supply of goods and services) as:

'any situation where someone is submitted to a less favourable treatment than the treatment actually or virtually applied to someone else in a comparable situation, on the ground of sex'.<sup>4</sup>

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

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<sup>2</sup> This is another difference between this legislation and Law No. 7/2011, of 15 March 2011, as in the former legislation the civil procedure to change the legal gender was forbidden for minors (i.e., young persons under 18 years old). The extension of the right to start the civil procedure intended to change the legal gender of minors over 16 was the most debated issue of the new law, as, in its first version, the legal provision indicated that minors could start the procedure without the knowledge or consent of their parents and even without a medical evaluation. However, the Portuguese President exercised his veto powers to stop the law from entering into force and the provision was changed as indicated above and entered into force in this corrected version.

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

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

### 3.3.2 Prohibition of pregnancy and maternity discrimination

Under Articles 24(1) and 25(6) of the LC, discrimination on the ground of pregnancy, maternity, paternity and the exercise of parenthood rights is prohibited. However, in the author's opinion the compliance of national legislation with Article 2(2)(c) of Directive 2006/54 is not perfect, because there is no explicit mention in the law that pregnancy and maternity discrimination is to be qualified as direct sex discrimination.

### 3.3.3 Specific difficulties

The prohibition of direct sex discrimination is generally well understood and causes no special problem in Portugal. However, some difficulties may arise as regards discrimination on the grounds of pregnancy, maternity and reconciliation issues.

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

## 3.4 Indirect sex discrimination

### 3.4.1 Explicit prohibition

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

Indirect discrimination is defined in general in the LC (Article 23(1)(b)) as:

'any situation where a rule, criterion, or practice apparently neutral can place someone, due to a discriminatory ground, in a disadvantaged position in comparison to others, unless that rule, criterion or practice is objectively justified by a legitimate goal and the means to reach that goal are adequate and necessary'.<sup>5</sup>

This general notion applies to indirect gender discrimination.

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

As regards gender equality in the access to and supply of goods and services, indirect discrimination is defined in Article 3(b) of Law No. 14/2008, of 12 March, as:

'any situation where a rule, criterion, or practice, apparently neutral can place someone in a disadvantaged position in comparison to a person of the other sex, unless that rule, criterion or practice is objectively justified by a legitimate goal and the means to reach that goal are adequate and necessary'.<sup>6</sup>

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

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

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

### 3.4.2 Statistical evidence

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

### 3.4.3 Application of the objective justification test

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

### 3.4.4 Specific difficulties

The absence of case law relating to indirect discrimination makes it difficult to assess how the concept of indirect discrimination is interpreted and applied in practice.

Also, at the level of companies and in collective bargaining, the very notion of indirect discrimination seems difficult to understand, so its practical use to disclose discriminatory practices is limited.

## 3.5 Multiple discrimination and intersectional discrimination<sup>7</sup>

### 3.5.1 Definition and explicit prohibition

Multiple discrimination (i.e. discrimination based on two or more grounds simultaneously) and intersectional discrimination (i.e. discrimination resulting from grounds of discrimination which interact to produce a new and different type of discrimination) is not explicitly addressed and defined in Portuguese legislation.

The author is not aware of any proposals aiming to incorporate the concept of multiple discrimination and/or the concept of intersectional discrimination in the legislation.

However, the absence of such notions in the law do not prevent the use of more than one discrimination ground in a possible claim. In the author's opinion, the legislative architecture of the protection against discrimination in Portugal already allows for the judicial recognition of multiple/intersectional discrimination, especially in the area of employment, because the LC treats the several discriminatory grounds all together, and only afterwards further elaborates on gender equality provisions.

Nevertheless, the absence of case law with this scope makes it hard to assess if such a difficulty would arise in practice or not.

### 3.5.2 Case law and judicial recognition

As already indicated, there is no case law addressing multiple discrimination and/or intersectional discrimination, where gender is one of the grounds at stake.

## 3.6 Positive action

### 3.6.1 Definition and explicit prohibition

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

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<sup>7</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>.



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

Positive action is defined by Article 27 of the LC as:

'a legal measure of limited duration in favour of a group, placed in a disadvantaged situation because of a discrimination ground, and aiming to grant equal conditions in the access to or in the exercise of legal rights or correcting a factual discrimination which already exists'.<sup>8</sup>

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

In the area of access to and supply of goods and services, Law No. 14/2008, of 12 March 2008 (which transposed Directive 2004/113), allows for positive action measures in Article 4(7), which states as follows:

'the guarantee of full equality between men and women does not prejudice specific positive measures, already in place or to be implemented in order to prevent or to compensate factual inequalities or disadvantages related to sex'.<sup>9</sup>

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

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

In the Portuguese legal system, the equality principle and the non-discrimination principle are viewed as the general principles in this area, and positive action is viewed as a development of such principles. There is no vertical relationship between the two concepts, as positive action is an instrument intended to implement the goal of equal opportunities.

### 3.6.3 Specific difficulties

To the author's knowledge, there are no specific difficulties in relation to positive action in Portugal. In practice, positive action is often used to pursue specific goals in the field of employment and in relation to several grounds of discrimination. Some provisions of the LC are good examples of this specific use of positive action:

- In order to fight unemployment – which is consistently higher among the younger generation – and long-term unemployment, the LC facilitates the conclusion of fixed-term employment contracts with young persons and long-term unemployed persons (Article 140(4) of the LC). This provision also fights indirect age discrimination.
- In relation to discrimination on the grounds of maternity and parenthood, Article 30(3) of the LC states that, when professional training regards economic activities as being dominated by workers of one sex, workers of the under-represented sex have priority in access to professional training; the same priority is generally granted to workers with low academic training or no specific skills, as well as to workers responsible for single-parent families, and to those who have been on leave for reasons related to maternity, paternity or adoption. This provision may clearly favour women, since they are more likely to be in the situations described by the rule.
- In relation to discrimination and collective agreements, Article 492(2)(d) of the LC states that collective agreements should establish 'measures that contribute to the

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

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

effective implementation of equality and the non-discrimination principle'. According to this rule, equality plans and concrete measures for the promotion of equality (on several grounds, including sex) at professional or company level can be defined by collective agreements directly. These measures can include positive action and preferential treatment, if, in the concrete situation, they meet the legal requirements for such action measures. However, this rule is a non-binding recommendation, since there are no sanctions attached to the absence of such measures or plans.

Also, outside the LC but with a direct impact in employment relations, it is worth mentioning the recent legislation on quotas for company boards (Law No. 62/2017, of 1 August 2017), where a specific provision (Article 7) imposes upon employers the duty to instate gender equality plans intended to promote gender-balanced access to leadership positions in the company. Given the fact that women are less represented in those positions, this provision is a positive action in the sense of positive action as in Article 27 of the LC.

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

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

In Portugal, intervention has increased in recent years in the field of gender equality in decision making, especially as regards the presence of women on company boards.

In this area, the Government approved a Resolution in 2012 designed to promote the increased participation of women on the boards of public and private companies, and following this Resolution other legislative measures have been established. However, for some years, these measures have gone much further in relation to public administration and state-owned companies than in relation to private companies.

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

In 2017, a major development occurred in this area, with the approval of Law No. 62/2017, of 1 August 2017, regarding women on boards. This Law, applicable to public companies and other public entities (at the central, regional or local level), and to private listed companies, establishes a minimum representation of women on executive boards and on surveillance boards: 33.3 %, as regards public companies, from January 2018 onwards; and, as regards private listed companies, 20 % from January 2018 onwards but increasing to 33.3 % from January 2020 (Articles 4 and 5 of Law No. 62/2017). These provisions are binding and if the set levels are not achieved within the indicated time-limits, the act nominating the members of the executive and/or surveillance boards may be declared null and void, and the company in question may be subjected to fines and other administrative sanctions until a valid nomination is produced (Article 6 of Law 62/2017).

Despite the fact that this piece of legislation is only applicable to listed companies (and not many Portuguese companies are listed), this is an important step in the direction of more gender-balanced participation in decision-making.

At another level, over the years the successive National Plans for Gender Equality approved by the governments have repeatedly emphasised the importance of a gender balance on the boards of private companies as a condition for good governance. Accordingly, several campaigns were developed by the Government targeting private companies in this sense.

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

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

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

In fields other than employment, company boards and political representation, and including the area of goods and services (where, as indicated above, positive action is expressly mentioned in the law) the author has no information regarding the practical implementation of positive measures.

## 3.7 Harassment and sexual harassment

### 3.7.1 Definition and explicit prohibition of harassment

In Portugal, harassment is explicitly prohibited in the area of employment (Article 29(1) of the LC, which is also applicable to civil servants), in the area of self-employment, but only in relation to discriminatory harassment and sexual harassment (Article 5(5) and (6) of Law No. 3/2011 of 15 February 2011) and in the area of access to and supply of goods and services, also in relation to discriminatory harassment and sexual harassment (Article 3(c) and (d) and in Article 4(4) of Law No. 14/2008 of 12 March 2008). It is important to point out that in the LC (Article 29) there is a broader notion of harassment, which also includes moral harassment practices that are not based on a discriminatory ground. On the contrary, in relation to self-employment and access to and supply of goods and services, since the legislation specifically addresses gender equality, the notion of harassment is narrower, in the sense that it is explicitly linked to discrimination and to sexual harassment.

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

In the employment area, these concepts are addressed in Article 29(2) (concept of harassment) and in Article 29(3) (concept of sexual harassment) of the Labour Code (as amended by Law No. 73/2017, of 16 August 2017) as follows:

- (Article 29(2) of the LC): 'Harassment is the unwanted behaviour, adopted towards a candidate for a job, an employee or a trainee, that intends or results in personal constraint or in the breach of the person's dignity or in the creation of an intimidating, hostile, degrading or humiliating environment';
- (Article 29(3) of the LC): 'Sexual harassment is the unwanted sexual behaviour adopted towards a candidate for a job, an employee or a trainee, in a verbal, non-

verbal or physical form, with the intention or the result indicated in the preceding concept'.<sup>10</sup>

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

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

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

### 3.7.2 Scope of the prohibition of harassment

As indicated above, in Portugal, harassment is explicitly prohibited in the area of employment (Article 29(1) of the LC, which is also applicable to civil servants), in the area of self-employment, but only in relation to discriminatory harassment and sexual harassment (Article 5(5) and (6) of Law No. 3/2011 of 15 February 2011) and in the area of access to and supply of goods and services, also in relation to discriminatory harassment and sexual harassment (Article 3(c) and (d) and in Article 4(4) of Law No. 14/2008 of 12 March 2008).

As regards harassment practices in employment relations, the Labour Code and the General Law for Civil Servants and other public employees (*Lei Geral do Trabalho em Funções Públicas* (LGTFP), approved by Law No. 35/2014, of 20 June 2014), have been amended by Law No. 73/2017, of 16 August 2017. The changes introduced – which are related not only to discriminatory and sexual harassment but to all forms of harassment – are intended to reinforce the protection of harassment victims in employment, by reinforcing the duties of the employer in this area (including imposing or approving a code of conduct in this area in companies with more than seven employees, and the duty to start a disciplinary procedure against the author of harassment practices), by increasing damage compensation rights and by granting protection against victimisation and dismissal to the victims and to witnesses of harassment practices.

### 3.7.3 Definition and explicit prohibition of sexual harassment

As already indicated, sexual harassment is explicitly prohibited in the Portuguese legislation in the area of employment (Articles 29(1) and (3) of the LC, as amended by Law No. 73/2017, of 16 August 2017) and Article 24(1) of the Labour Code), in the area of goods and services (Article 4(1) and (4) of Law No. 14/2008, of 12 March 2008) and in the area of self-employment (Article 5(1), (5) and (6) of Law No. 3/2011, of 15 February 2011).

In employment relations, Article 29(3) of the LC, defines sexual harassment as:

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

'the unwanted sexual behaviour adopted towards a candidate for a job, an employee or a trainee, in a verbal, non-verbal or physical form, with the intention or the result indicated in the preceding concept'.<sup>11</sup>

In the field of self-employment and in the field of goods and services, the notion of sexual harassment (Article 5(5) of Law No. 3/2011, of 15 February 2011 and Article 3(c) and (d) of Law No. 14/2008, of 12 March 2008, respectively) is similar to the concept of the Labour Code, with small adaptations to the situation in question.

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

As indicated above, sexual harassment is prohibited in the areas of employment, self-employment and access to and supply of goods and services and the concepts are similar, although slightly adapted to each situation (Article 29(1) and (3) of the LC, Article 5(5) of Law No. 3/2011, of 15 February 2011 and Article 3(c) and (d) of Law No. 14/2008, of 12 March 2008, respectively)

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

Portuguese legislation does not specify that harassment and sexual harassment as well as any less favourable treatment based on the person's rejection of, or submission to, such conduct amounts to discrimination, in the sense of Article 2(2)(a) of Directive 2006/54.

This question is especially important as regards employment relations, since harassment is dealt with in a specific section of the LC, aside from the provisions relating to discrimination in general and to sex discrimination in particular. This systematic approach to the subject alongside the broad notion of harassment, as indicated above, makes the link between the two subjects less clear, even when harassment practices are based on a discrimination ground.

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

#### 3.7.6 Specific difficulties

There are several difficulties as regards the practical implementation of gender equality and the non-discrimination principle in relation to harassment and sexual harassment.

The first difficulty comes from the notion of harassment. The fact that this notion is extremely wide and somewhat 'subjective', makes it hard in the Portuguese legal system to distinguish real harassment practices from stress situations or a stressful environment at the workplace or in the course of employment relations. The unclear line between these two situations may result in increased difficulties in the protection of the victims of real harassment practices.

Another difficulty comes from the fact that harassment victims often choose not to disclose harassment practices, especially in the case of vertical harassment (i.e., when the perpetrator is the employer or a more senior employee), in fear of losing their job.

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<sup>11</sup> This is a rough and unofficial translation made by the author.

Finally, a technical difficulty comes from the fact that harassment is dealt with in a specific section of the LC, aside from the provisions relating to discrimination in general and aside from the provisions relating to sex discrimination in particular, as indicated above. This systematic approach to the subject alongside the broad notion of harassment, makes the link between the two subjects less clear, even when harassment practices are based on discrimination and must therefore be treated as such, for all purposes.

### **3.8 Instruction to discriminate**

#### **3.8.1 Explicit prohibition**

In Portugal, instruction to discrimination is, *per se*, discriminatory conduct both in the area of employment and in the area of goods and services and with regard to self-employment.

In the area of employment, under Article 23(2) of the LC 'the order or instruction intended to cause damage to someone on the ground of a discrimination factor is, *per se*, a discriminatory practice'.<sup>12</sup>

As regards goods and services, Article 4(3) of Law No. 14/2008, of 12 March 2008, also qualifies as discrimination any instruction or order intended to directly or indirectly discriminate against the other party.

A similar provision is established in Article 5(3) of Law No. 3/2011, of 15 February 2011, as regards self-employment.

#### **3.8.2 Specific difficulties**

There are no specific difficulties in relation to this topic.

### **3.9 Other forms of discrimination**

In Portugal, there are no other forms of discrimination prohibited in national law, including discrimination by association or assumed discrimination, since national legislation does not explicitly address these notions.

Nevertheless, these forms of discrimination can be invoked under the general prohibition of discrimination, established in Article 25(1) of the LC and, aside from the field of employment relations, under the general principle of equality and non-discrimination established by Article 13 of the Constitution, which is a directly binding provision.

### **3.10 Evaluation of implementation**

In the author's view, the EU notions attached to gender equality and the non-discrimination principle were adequately transposed into national legislation, and the scope of the protection against discriminatory practices in domestic legislation is wide and in line with EU law.

The main problem in Portugal is the practical implementation of the legislation and the lack of case law in this field, that makes any assessment impossible to do.

#### **3.11 Remaining issues**

There are no remaining issues to report on this topic.

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<sup>12</sup> This is a rough and unofficial translation made by the author.

## **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**

In Portugal, there are periodical studies and surveys on equal pay, conducted by the CITE – ‘*Comissão para a Igualdade no Trabalho e no Emprego*’ (‘Gender Equality Agency in the Field of Employment’). In this respect, the more recent general survey published by the CITE and relating to 2017<sup>13</sup> indicates that the gender pay gap is still high (17.5% in favour of men, reported to 2017 and according to Eurostat data, as the national numbers are a bit lower), and that the pay gap is more severe in higher positions (26.2% in favour of men) despite the fact that women have better qualifications than men.<sup>14</sup>

This information allows for the conclusion that the practical implementation of the ruling in this field is still weak.

To a certain extent, the persistence of a high gender pay gap justifies the new piece of legislation, approved in 2018 (Law No. 60/2018, of 21 August 2018), that directly focuses on the pay gap and on wage transparency, which we describe below. Under Article 3 of this law, every year, the Ministry of Employment and Social Affairs will publish detailed statistical data on the salary gap between men and women, at general and sectorial levels; and statistical data by company, profession and qualification level, based on the annual balance sheet provided by the companies. In this sense, updated information will be produced yearly on the subject of equal pay.

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

The periodical studies and surveys on equal pay, conducted by the CITE – ‘*Comissão para a Igualdade no Trabalho e no Emprego*’ (‘Gender Equality Agency in the Field of Employment’), mentioned just above, also deal with gender equality in access to employment and equal treatment at work. In this respect, the more recent general survey published by the CITE, relating to 2017, has the following information:

- the number of Portuguese women with a professional activity almost matches the number of men (48.9 % of women compared to 51.1 % of men);<sup>15</sup>
- Portuguese women reach higher levels of education and qualification than men but there are fewer women than men in high-ranking and managerial positions (34.3 % compared to 65.7 % in favour of men);<sup>16</sup>
- most Portuguese women work full-time (88.6%).<sup>17</sup>

#### **4.1.3 Other issues**

Not applicable.

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<sup>13</sup> The more recent general report of the CITE (‘Relatório sobre o Progresso da Igualdade entre Homens e Mulheres 2017’ – ‘Report on the Progress of Equality between Men and Women 2017’) relates to 2017 and is available at [http://cite.gov.pt/asstscite/downloads/2017\\_Relatorio\\_Lei\\_10\\_2001.pdf](http://cite.gov.pt/asstscite/downloads/2017_Relatorio_Lei_10_2001.pdf). This Report will be mentioned hereafter as *CITE 2017 Report*.

<sup>14</sup> *CITE 2017 Report*, pages 33, 35 and 26.

<sup>15</sup> *CITE 2017 Report*, page 20.

<sup>16</sup> *CITE 2017 Report*, pages 26 to 29.

<sup>17</sup> *CITE 2017 Report*, page 68.

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

Equal pay is a subject that always arises in political and social debate. This was also the case in Portugal, in 2018, in the context of the discussion and approval of Law No. 60/2018, of 21 August 2018), which directly focuses on the gender pay gap and on wage transparency.

At another level, there is a social debate on this subject in the context of the campaigns launched by the CITE as well as the Government in favour of equal pay and directed at employers, employers associations and trade unions. For instance, for some years now, the CITE launches a campaign on the precise day of the year where, according to statistical data, women meet the pay rate of men (until now, this day has been set somewhere in November, thus indicating that the pay gap corresponds to more than a month salary in favour of men), which is intended to raise awareness of the annual evolution of the pay gap. Other more substantive actions directed at the stakeholders involved also take place, as well as the publication of studies and other data in this area.

These campaigns often involve the media, and the activity of the CITE in this area is regularly published on the CITE's website ([www.cite.gov.pt](http://www.cite.gov.pt)).

## 4.2 Equal pay

### 4.2.1 Implementation in national law

In Portugal, a general right to equal pay for equal work or work of the same value is established in the Constitution (Article 59(1)(a)) as a fundamental right of workers and employees.

The same general principle is established in the Labour Code (Article 270), and the Code applies this principle both to non-discrimination in general (Article 24(2)(c)) and to gender equality in particular (Article 31). The LC provisions on equal pay are applicable both in the private sector and in the public sector.

Recently, a new piece of legislation was approved in this field, complementing the Labour Code: Law No. 60/2018, of 21 August 2018, on equal pay between men and women and pay transparency.

### 4.2.2 Definition in national law

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

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

The new legislation of pay transparency (Law No. 60/2018, of 21 August 2018), has made the notion of remuneration clearer and therefore in line with the Article 157(2) TFEU. This notion of remuneration (Article 1(1)(b)), that is valid specifically for the purposes of equal pay, is broader than the notion of the LC, as it explicitly includes other financial advantages aside from the strict notion of salary, as in the case of the payment of travel expenses and other expenses relating to the performance of the work, bonuses, or premiums linked to



productivity or seniority or good attendance. This broader notion of remuneration is, however, applicable only to sex and not to other discrimination factors.

Therefore, national legislation meets the definition of pay in Article 157(2) TFEU, although in an indirect way, as explained above.

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

Article 31(1) combined with Article 25 of the LC, transposes Article 4 Paragraph 1 of Recast Directive 2006/54, prohibiting direct and indirect discrimination on grounds of sex, with regard to all aspects and conditions of remuneration.

#### 4.2.4 Related case law

To the author's knowledge, there is no leading national case law nor opinions of equality bodies relating to pay discrimination on the ground of sex. As already indicated, in Portugal, there is almost no case law in the area of gender equality, with the exception of maternity issues and issues related to gender equality in collective agreements.

#### 4.2.5 Permissibility of pay differences

Under the Portuguese legal system, differences in pay are only allowed when based on objective criteria, common to men and women, which are productivity, seniority, and the lack of periods of absence. However, as regards the criteria of the lack of periods of absence, the law explicitly indicates that the exercise of maternity and paternity rights ('parenthood rights') cannot justify different remuneration (Article 31(3) and (4) of the LC and Article 2(1)(d) of Law No. 60/2018, of 21 August 2018).

Nevertheless, despite the formal compliance with EU law, indirect discriminatory practices cannot be completely ruled out when considering the criteria relating to the lack of periods of absence of the worker, because other situations of time off are included, including time off for reasons relating to care for other relatives, which is more common among women than among men. Also, indirect discrimination can arise here, even in situations relating to a worker's periods of absence to take care of children, apart from maternity, paternity and parental leave, because the notion of 'parenthood rights' is not clear in the law and therefore tends to be interpreted in a strict sense, e.g. only in relation to specific rights attached to maternity, paternity and parental leave.

#### 4.2.6 Requirement for comparators

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

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

However, since there is no case law in this area, it is not possible to assess the practical difficulties of the invocation of a hypothetical comparator.

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

The legal definition of equal work establishes that there is equal work when the work is of a 'similar nature, quantity and quality' (Article 59(1)(a) of the PC and Article 23 (1)(c) of the LC).

The legal definition of work of equal value considers that the work is to be considered equivalent 'taking into consideration the qualification or the experience of the worker, the level of responsibility involved, the physical and mental effort required and the working conditions in practice'<sup>18</sup> (Article 23 No. 1 (d) of the LC).

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

#### 4.2.8 Other relevant rules or policies

There are no other relevant rules or policies that provide such parameters, in the Portuguese legislation.

#### 4.2.9 Wage transparency

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

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

However, in this area, the major legal development in recent years was the approval of Law No. 60/2018, of 21 August 2018. The main goal of this piece of legislation is to establish a set of measures directly intended to contribute to a better implementation of the principle of equal pay, thus complementing the provisions of the LC in this area. These measures are the following:

- Every year, the Ministry of Employment and Social Affairs will publish detailed statistical data on the salary gap between men and women, at general and sectorial levels; and statistical data by company, profession and qualification level, based upon the annual balance sheet provided by the companies (Article 3);
- The employers must implement a transparent wage policy in the companies (Article 4);
- Following the publication of the statistical data indicated above, if the Gender Equality Agency in the Field of Employment (CITE) detects wage inequalities inside a company, it notifies the employer to present an 'evaluation plan of the wage differences in the company' that is intended either to justify those differences and to eliminate those with no objective justification, and that will be put in place for a period of 12 months (Article 5);
- The workers and union representatives also have the right to ask the CITE for advice on alleged gender pay discriminatory practices inside the company; if the CITE concludes that a wage discrimination on the ground of sex is in place, the employer is compelled to eradicate it and he may be subjected to a fine (Article 6);

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<sup>18</sup> This is a rough and unofficial translation made by the author.

- The dismissal or the application of disciplinary measures against the worker up to one year after he/she has asked the CITE for the advice indicated above is presumed unlawful (Article 7).

The measures now approved are examples of possible good practices in this field, since they go far beyond the level of protection granted by EU law. However, in the author's opinion, some of these measures look rather complex and therefore may be difficult to implement in practice (mainly as regards the assessments tasks of the CITE). At another level, this Law repeats some of the definitions and some of the rules that are already written in the LC, apparently with the aim of reinforcing the protection already granted by the LC in this field. However, since the content of both definitions and rules is not always equivalent, some technical problems may arise in the application of this legislation.

#### 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

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

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

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

- Article 492(2)(c) of the LC indicates the measures intended to promote gender equality (including equal pay) as one of the mandatory topics of collective agreements. However, as already indicated, this rule is only a recommendation, with no binding effect.
- Article 479 of the LC, regarding the content of collective agreements and discrimination, establishes the duty of the CITE – '*Comissão para a Igualdade no Trabalho e no Emprego*' ('Gender Equality Agency in the Field of Employment') to inspect all collective agreements just after their publication in order to check if they include discriminatory clauses. If this is the case, the Agency will directly confront the employer inviting him to change the clause and if the employer fails to do so, the Agency presents the case to the public attorney, who can take it to court in order to have these clauses declared null and void. This rule, introduced by the Labour Code of 2009 is in line with point 5 of the Recommendation.
- Finally, Article 26 of the LC establishes that whenever a collective agreement or internal provision of company regulations restricts a certain type of remuneration to men or to women, these stipulations are automatically applicable to employees of both sexes, provided they perform equal work or work of the same value. This provision of national legislation on equal pay can be very effective to promote the practical implementation of equal pay and goes beyond the requirements of EU rules regarding the sanctions applicable to collective agreements that do not comply with the equal pay principle.

Apart from the LC, the measures established in Law No. 60/2018, of 21 August 2018, mentioned just above (especially the 'evaluation plan of the wage differences in the company' that the employer must put in place and which is intended to justify pay differences and to eliminate those with no objective justification, as indicated in Article 5 of this Law) go in this same direction.

#### 4.2.11 Other measures, tools or procedures

The measures already indicated on this issue are a good example of the several mechanisms that can be put forward to implement equal pay in practice.

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

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

In Portugal, the scope of the LC, which includes the provisions implementing the gender equality principle and the non-discrimination principle in the field of employment and industrial relations, is defined not on the basis of a notion of 'worker', but on the basis of the notion of employment contract.

In fact, national legislation does not have a concept of worker, as such, but it does include a concept of employment contract that is established both in the Civil Code (Article 1152) and in the LC (Article 11). Under these concepts, an employment contract is the contract concluded between an employer and a worker by which the worker performs paid mental or manual activity within the employer's organisation and in a subordinate way (e.g. under the employer's supervision and subjected to the employer's disciplinary power). In the public sector, there is a similar concept of employment contract with a public employer (Article 6(2) of '*Lei Geral do Trabalho em Funções Públicas*' ('General Law for Public Employment'), approved by Law No. 35/2014, of 20 June 2014).

The concept of worker for the purposes of employment legislation, both in the private and in the public sector, comes from these notions of employment contract and the main aspect of this concept is the element of 'subordination'.

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

'Quasi-subordinate' workers are a particular category of workers traditionally recognised in Portuguese legislation under the expression '*trabalhadores equiparados*' ('equivalent workers') or '*trabalhadores com dependência económica*' ('workers in economic dependence'). This category is specifically dealt with in Law No. 101/2009, of 8 September 2009, and is recognised when, in the absence of an employment contract (for lack of subordination), the worker is economically dependent on the creditor of the work in a substantial way (mainly because he works only for him) – see Article 1 of Law No. 101/2009. If this is the case, the law extends some labour protection rules to this category of workers, despite their formal qualification as independent workers.<sup>19</sup> In the LC, this extension is contemplated in Article 10, and includes the LC provisions in the field of gender equality. Therefore, in the private sector these workers are covered.

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

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

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

<sup>19</sup> This is even though, from an economic point of view, these workers seem to constitute a separate category between workers and independent persons.

The scope of Articles 24 and 30 of the LC is in line with the scope of Article 14(1) of Recast Directive 2006/54, except for the reference to self-employment and occupation, since self-employment is outside the scope of the LC.

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

The exception to non-discrimination and gender equality principles in access to employment based on occupational activities is possible under the Portuguese legislation, provided the conditions of Article 25(2) of the LC are met, e.g. provided the different treatment is based on objective and essential reasons which must be linked to that specific occupation, due to its nature or to the context in which the work is to be performed, and under the condition that the objective is legitimate and the different treatment is proportional.

These conditions are established by the Labour Code in relation to all discrimination grounds, so it includes gender.

The author is not aware of specific assessments led by the Portuguese State in relation to these occupational activities.

#### 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

The Labour Code protects women in relation to pregnancy, maternity, paternity, adoption and other situations related to the reconciliation of professional and family life.

This principle is developed in specific areas, like the non-renewal of fixed-term employment contracts and the dismissal of women during pregnancy and/or while on maternity leave.

The refusal to renew a fixed-term contract with such workers must be communicated to the CITE ('Public Agency for Equality in Employment') (Article 144(3) of the LC).

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

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

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

#### 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)

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

#### 4.3.6 Particular difficulties

There are no particular difficulties in this area, in the Portuguese legal system.

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

The Portuguese legislation allows for positive action measures in the course of employment relations, under the general provision of Article 27 of the LC.

In relation to discrimination on the grounds of maternity and parenthood, Article 30(3) of the LC states that, when professional training regards economic activities dominated by workers of one sex, workers of the under-represented sex have priority in the access to professional training; the same priority is generally granted to workers with low academic formation or no specific skills, as well as to workers responsible for single-parent families, and to those who have been on leave for reasons related to maternity, paternity or adoption. This provision may clearly favour women, since they are more likely to be in the situations described by the rule.

Also, outside the LC but with a direct impact in employment relations, it is worth mentioning the measures outlined in Article 7 of Law No. 62/2017, of 1 August 2017, which imposes upon the companies the duty to have elaborate annual equality plans, intended to achieve equal opportunities and equal treatment of women and men and to promote the reconciliation of professional and family life within the company, and with the specific intention of promoting gender-balanced access to subordinate leadership positions in the company. Given the fact that women are less represented in those positions, this provision is a positive action in the sense of the notion of positive action included in Article 27 of the LC. This is a very important provision because until now, these plans were not mandatory.

### 4.4 Evaluation of implementation

In the authors' opinion, the Portuguese experience shows that the granting of the rights related to equal pay and to equal treatment in employment relations by the law is not enough to eliminate the gender pay gap and the different treatment of men and women in the course of an employment contract.

This is so because the source of the problem is also linked to the traditional stigma attached to the social roles of men and women in public and private life and to the unbalanced share of the family and care responsibilities between workers of the two sexes – inequality in the reconciliation of professional and family life leads to shorter working time (women who have to take care of their children tend to avoid overtime work or night work, which bring more pay); undervalued work; shorter careers; increased difficulties in promotion and less training for women. All these factors involve or lead to lower pay and to fewer professional opportunities.

This is the reason why pay gap and equal treatment issues must be tackled both at the legal level and at the practical level and good practices can make a difference here.

#### **4.5 Remaining issues**

Not applicable.

## **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>20</sup>**

### **5.1 General (legal) context**

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

The periodical studies and surveys on equal pay, conducted by the CITE – ‘Comissão para a Igualdade no Trabalho e no Emprego’ (‘Gender Equality Agency in the Field of Employment’), already mentioned, also deal with maternity, paternity and issues related to the reconciliation of professional and family life. In this respect, the more recent general survey published by the CITE and relating to 2017 indicates a growing use of paternity leave and parental leave by the fathers in more recent years and the extensive use of childcare facilities for children prior to school age by Portuguese families.<sup>21</sup> On the contrary, part-time work is not used in Portugal in the context of work-family balance.<sup>22</sup>

Despite the encouraging data relating to the use of family-related leave by the fathers, it is a known fact that women are still the main ones responsible for caring roles, and that working fathers do not take full advantage of the several measures established by the Labour Code and intended to guarantee the exercise of ‘parenthood’ rights and to promote the reconciliation of professional and family life on a regular basis (for instance, time-off from work to attend to family needs). They tend to limit the taking of the family-related leave (like paternity leave, maternity leave in the period that can be divided between both parents, and parental leave) only during the periods in which the leave is paid.

#### **5.1.2 Other issues**

Not applicable.

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

In Portugal, work-life balance issues are dealt with in the Portuguese Constitution (PC), of 1976 and in the Labour Code of 2009, and also by certain acts on more specific issues.

Under the Portuguese Constitution, the right to an adequate reconciliation between work and family life is granted as a fundamental right of all workers (Article 59(1)(b)) and the State must implement policies and legal measures aiming towards that goal (Article 67(h) of the PC).

Prior to the approval of the first Labour Code (2003), these issues were dealt with by the Maternity and Paternity Act of 1984, but the Labour Code repealed that Act and integrated the provisions relating to maternity, paternity, and reconciliation issues. Today, these issues are dealt with by the Labour Code of 2009, which is now in force (Articles 33 to 65). Complementing the Labour Code in this area, two pieces of legislation are also worth mentioning:

- Decree-Law No. 91/2009, of 9 April 2009, on social protection attached to pregnancy risks and also to maternity, paternity and parental leave;

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<sup>20</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>21</sup> CITE Report 2017, pages 63 to 66.

<sup>22</sup> CITE Report 2017, page 68.



- Law No. 102/2009, of 10 September 2009, on safety and health at the workplace, that has transposed Directive 92/85 as regards the special protection of the health and safety of working women, while pregnant, on maternity leave and while breastfeeding.

The LC and the complementary legislation to the LC have transposed all relevant Directives regarding the maternity and parental leave directives. These provisions are applicable to employees of the private sector, but also to employees of the public sector (Law No. 35/2014, of 20 June 2014, called 'Public Servants General Law' – '*Lei Geral do Trabalho em Funções Públicas*', Article 4(1)(c) and (d)).

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

To the author's knowledge, there are no pending legislative proposals in the area of maternity, paternity and work-life balance in Portugal.

## 5.2 Pregnancy and maternity protection

### 5.2.1 Definition in national law

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

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

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

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

### 5.2.2 Obligation to inform employer

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

### 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

To the author's knowledge, there is no case law on the definition of a pregnant worker, a worker who has recently given birth and a worker who is breastfeeding.

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

Under the Portuguese legislation, pregnant women are protected as regards working conditions relating to the activity performed, working-time arrangements, including night work, and pregnancy-related illnesses, including antenatal examinations.

In relation to working conditions, all types of work that may be dangerous either for the woman or for the baby are forbidden or restricted, and the woman is entitled to change to non-dangerous work, or, if such a change is not possible, to go on leave, paid by social security (Article 62 of the LC). The list of activities forbidden or restricted during pregnancy is part of the legislation concerning health and safety at the workplace: Law No. 102/2009 of 10 September 2009, Articles 51 *et seq.* The legislation regarding social security benefits relating to all leave regarding pregnancy, maternity and paternity is Decree-Law No. 91/2009 of 9 April 2009.

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

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

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

To the author's knowledge, there is no case law in this area.

#### 5.2.6 Prohibition of night work

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

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

To the author's knowledge, there is no case law in this area.

#### 5.2.8 Prohibition of dismissal

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

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

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

### 5.2.9 Redundancy and payment during maternity leave

If an employee is made redundant during her maternity leave, the payment for maternity leave as such will cease, since this payment is granted by the public social security system to workers with an employment contract. But this payment will be replaced by unemployment allowance, also granted by the public social security system.

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

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

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

### 5.2.11 Case law on the protection against dismissal

Case law relating to the dismissal of pregnant women, or women or men using maternity, paternity or parental leave are known, but not very frequent, at least at the level of the Courts of Appeal, since in Portugal, only those Courts publish their judgments.

For instance, in 2018, no case law in this area was published and in 2017, there was a judgment of the Court of Appeal of Lisbon, in a case relating to the dismissal of a worker during parental leave (*Acórdão do Tribunal da Relação de Lisboa de 13/09/2017 – Proc. No. 26175/15.6T8LSB.L1-4*), which we will describe below in this Report, in the context of parental leave.

## 5.3 Maternity leave

### 5.3.1 Length

Maternity leave (which is called 'initial parental leave' by the LC)<sup>23</sup> is granted to women and to men and is in fact divided into several types of leave:

- 'initial parental leave just for the mother' with a minimum duration of 6 weeks after giving birth (Article 41 of the LC);
- 'initial parental leave' for the remaining time until 120 days or 150 days, according to the choice of the parents, which can be divided between both parents (Article 40 of the LC);
- and 'initial parental leave of one of the parents in replacement of the other parent' (e.g. leave for the father to replace the mother who died during the leave) (Article 42 of the LC), which lasts for the remaining part of maternity leave.

It is worth mentioning two specific provisions which have been established by the law in order to promote the taking of leave by the father and the sharing of leave between both parents: if after the initial period of maternity leave (e.g. 'initial parental leave') the other party of the couple takes the leave for 30 days or for 2 periods of 15 days, the total duration of maternity leave (120 or 150 days) is extended by 30 more days (Article 40(3))

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<sup>23</sup> This specific type of leave corresponds to 'maternity leave', as regulated by EU law. The Portuguese term for this type of leave ('initial parental leave') intends to draw attention to the fact that both parents can enjoy it, alternatively, but the phrase can be misinterpreted.

of the LC); also, if the parents choose to take the longer leave of 150 days, the last 30 days can be taken simultaneously by both parents (Article 40(2) of the LC, introduced by Law No. 120/2015, of 1 September 2015).

### 5.3.2 Obligatory maternity leave

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

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

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

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

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

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

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

### 5.3.5 Level of pay or allowance

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

- Maternity leave (meaning 'initial parental leave', as it is called in Portugal), when taken in the 120-days option, as well as the leave due to pregnancy risks, and also adoption leave, are paid on a basis of 100 % of the average salary of the worker (Decree-Law No. 91/2009 of 9 April 2009, Articles 29, 30(a), 31 and 34);
- Maternity leave when taken in the 150-days option is paid on a basis of 80 % of the average salary of the worker (Decree-Law No. 91/2009 of 9 April 2009, Articles 30(b) and 34);
- Other pregnancy-related leave, such as pregnancy-related sickness leave, leave in the case of abortion, and leave related to night work and to dangerous work, when there is no alternative job available, are paid on the basis of 65 % of the salary, in line with the payment of sick leave (Decree-Law No. 91/2009 of 9 April 2009, Articles 18, 19 and 35).

There is no ceiling to the amount paid.

### 5.3.6 Additional statutory maternity benefits

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

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

Under the Portuguese system the right to maternity leave and to other forms of parental leave is not subjected to special conditions for eligibility, including seniority in the company. To the contrary, a minimum period of six months of contributions to the public social security system is required to have access to the public allowances attached to those types of leave (Article 25 of Decree-Law No. 91/2009, of 9 April 2009).

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

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

#### 5.3.9 Legal right to share maternity leave

As indicated above, only the compulsory period of six weeks after giving birth (which in the Labour Code is called the 'initial parental leave just for the mother' (Article 41 of the LC)) cannot be shared between the mother and the father. The remaining period of maternity leave (called 'initial parental leave'), which in total may go up to 120 or to 150 days, depending upon the choice of the parents, can be divided between them (Article 40 of the LC).

This choice is independent from the father taking paternity leave, which is autonomous leave which the father enjoys during the 'initial parental leave just for the mother'.

In practice, women tend to make use of most of the duration, if not the entire duration, of maternity leave.

Maternity leave is taken on a full-time basis, as imposed by the LC (Article 40), and the taking of the leave is not negotiable with the employer, and does not depend upon the size of the company.

#### 5.3.10 Case law

To the author's knowledge, there is no case law concerning the use of maternity leave.

### **5.4 Adoption leave**

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

In Portugal, adoption leave is an autonomous leave, but it follows the pattern of maternity leave (in Portuguese, 'initial parental leave').

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

The parents can divide the full period of the leave between them (Article 44 of the LC), and if they choose to take the longer leave of 150 days, they can also take advantage of the right to take the last 30 days simultaneously (Article 40(2) of the LC, introduced by Law No. 120/2015, of 1 September 2015), applied by way of Article 44(1) of the LC.

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

Considered as a maternity- and paternity-related right, adoption leave is protected in the same way as maternity and parental leave.

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

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

#### 5.4.3 Case law

The author is not aware of case law regarding adoption leave.

### 5.5 Parental leave

#### 5.5.1 Implementation of Directive 2010/18

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

In national legislation, parental leave has a broad sense (that includes maternity leave) and a strict sense. In this strict sense (which corresponds to the EU concept of parental leave, e.g. the leave taken after maternity leave to take care of a child), there are several types of leave for care purposes:

- the strict parental leave, which in Portuguese is known as 'additional parental leave' (*'licença parental complementar'*), taken after maternity leave (Article 51 LC);
- several 'special leave for the care of children' (called *'licenças para assistência a filho'*) to take care of small children, disabled children or children with a long-term illness, which can be taken after strict parental leave (Articles 52 and 53 LC);
- 'grandparent's leave' (e.g. the right to a leave of absence from work to assist a daughter younger than 16 who has given birth, for a maximum of 30 days – Article 50 of the LC).

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

Portuguese legislation regarding parental leave is applicable to both the public and the private sector, according to the same terms. As regards private workers, this issue is dealt

with in the LC (Articles 51, 52 and 53). The same provisions are directly applicable to public servants, based on a reference to Article 4 of the '*Lei Geral do Trabalho em Funções Públicas*' ('Public Servants General Law'), approved by Law No. 35/2014, of 20 June 2014, which regulates employment contracts of civil servants.

#### 5.5.3 Scope of the transposing legislation

The scope of the national legislation in the field of parental leave is wide, since the LC applies not only to open-ended employment contracts, but also to employment relationships relating to part-time workers, fixed-term contract workers, teleworkers, or persons with an employment relationship with a temporary agency.

#### 5.5.4 Length of parental leave

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

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

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

#### 5.5.5 Age limits

The age limits of the child for the purposes of taking the leave is six years old (Article 51(1) of the LC).

However, this age limit does not apply in the case of disabled children or children with a long-term illness (Article 53(1) of the LC).

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

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

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

As indicated above, the law does not allow for the transfer of the right from one parent to the other (Article 51(2) of the LC).

#### 5.5.8 Form of parental leave

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

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

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

Under the Portuguese system, the right to parental leave is not subjected to special conditions for eligibility, including seniority in the company. To the contrary, a minimum period of six months of contributions to the public social security system is required to have access to the public allowances attached to those types of leave (Article 25 of Decree-Law No. 91/2009, of 9 April 2009).

#### 5.5.10 Notice period

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

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

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

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

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

Both additional parental leave and special leave for the care of children are a right of the worker which prevails over the needs of the employer, so there are no special arrangements for small firms in the Portuguese legislation.

#### 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)

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



and the age limit of the child is increased to 12, and, on medical indication, can exceed that age).

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

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

However, this measure was not taken as a consequence of Directive 2010/18 because Portugal found it unnecessary to formally transpose this Directive, as national legislation in place was already consistent with the Directive.

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

Parental leave is a maternity-related and paternity-related right, so it is protected in the same way as maternity leave, under the Portuguese legislation.

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

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

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

Workers benefitting from parental leave have the right to return to the same job or, if this is not possible, to an equivalent or similar job consistent with their employment contract or relationship at the end of the leave (Article 65(5) of the LC).

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

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

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

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

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

During the period of parental leave, there is continuity of the entitlements to social security cover under the different schemes, in particular healthcare. This is a specific consequence of the suspension of the employment contract, as, under the Labour Code (Article 295),

during the suspension period all rights and duties of the parties that are not directly linked with the performing of the activity (for instance, seniority rights, or social security rights) are kept by the parties.

#### 5.5.20 Remuneration

Under the Portuguese system, parental leave is not remunerated by the employer.

However, some collective agreements establish that the employer must cover the difference between the amount of the social security allowance attached to parental leave and the amount of the salary that the worker would be entitled to, if he/she was not on leave.

#### 5.5.21 Social security allowance

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

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

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

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

#### 5.5.23 Case law

There are not many judicial actions regarding parental leave.

For instance, in 2018, there was no case law published in this area and in 2017, there was a judgment of the Court of Appeal of Lisbon, in a case relating to the dismissal of a worker during parental leave (*Acórdão do Tribunal da Relação de Lisboa de 13/09/2017 – Proc. No. 26175/15.6T8LSB.L1-4*). In this case, the Court had no doubt in considering the dismissal null and void, because when on parental leave, the worker cannot be dismissed without the previous and positive advice of the CITE (Agency for Gender Equality in the Field of Employment) and the employer did not ask for the CITE's advice.

### 5.6 Paternity leave

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

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

This leave is divided into two periods, the first one with a compulsory nature and the second one with a non-compulsory nature. The length of this leave used to be 10 days

when the mother gives birth, followed by 10 more days during maternity leave. However, the LC has been changed in this respect, by Law No. 120/2015, of 1 September 2015, which established the following duration: 15 initial and compulsory days, five of each to be taken when the mother gives birth, and the other 10 days in the child's first month; plus 10 more non-compulsory days, to be enjoyed while the mother is on maternity leave. In short, the change introduced in the LC has increased the duration of the compulsory part of paternity leave by five days.

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

Since it became paid by the social security system, paternity leave is increasingly being taken by the fathers, including in the non-compulsory period.

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

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

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

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

#### 5.6.3 Case law

The author is not aware of case law regarding paternity leave.

### 5.7 Time off/care leave

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

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

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

#### 5.7.2 Case law

The author is not aware of case law regarding care leave.

## 5.8 Leave in relation to surrogacy

Traditionally, surrogacy was not permitted in Portugal, so if the situation arose, all the rights attached to pregnancy and maternity, including the leave, would be recognised for the woman who gives birth, since for all purposes, she would be considered the mother of the child. The LC provisions in this field are also based on the traditional recognition of the woman who gives birth as the mother of the child.

However, a new piece of legislation was approved in 2016: Law No. 25/2016, of 22 August 2016, changing Law No. 32/2006, of 26 July 2006, to regulate medically assisted pregnancy. This legislation allows for surrogacy on very strict conditions, which are now indicated in Article 8 of Law No. 32/2006.

If these conditions are met, the woman carrying the child renounces all rights and duties attached to maternity (Article 8 No. 1) and the child will be considered for all purposes as the son/daughter of the beneficiaries of the surrogacy procedure (Article 8 No. 7).

The absence of other references to parental rights in this piece of legislation made it difficult to assess the consequences of surrogacy not only in relation to parental leave but also in relation to the protection of the surrogate 'mother' during pregnancy and immediately after giving birth.

These issues were later dealt with by a complementary act to this law (*Decreto Regulamentar* No. 6/2017, of 31 July 2017), in which Article 6 establishes the following: the woman carrying the child is granted the right to a leave after giving birth with the same duration of abortion leave (i.e., between 14 and 30 days leave, upon medical determination, as indicated in Article 37(1) of the LC); she also has the rights to short leaves of absence justified by pregnancy; the legal parents of the child are entitled to all maternity and paternity rights attached.

In the view of the author, this legislation still needs to be complemented by the LC, as regards the provisions relating to the protection of female workers who are pregnant, since a literal interpretation of Article 6 of *Decreto Regulamentar* No. 6/2017, of 31 July 2017, does not grant the necessary protection to the surrogate 'mother' during pregnancy and a lower protection of these women would be unacceptable. It would also constitute a violation of gender equality law, taking into consideration that provisions related to pregnancy and maternity are part of gender equality regulations.

In this sense, maternity rights related to pregnancy (including pregnancy leave, health and safety protection measures during pregnancy, and protection against dismissal), established by the LC, must be granted to the woman who gives birth, alongside the leave relating to abortion leave after giving birth, granted by Article 6 of *Decreto Regulamentar* No. 6/2017, of 31 July 2017. In this sense, the surrogate mother's renunciation of all rights and duties attached to maternity (as indicated in Article 8 No. 1 of Law No. 32/2006, of 26 July 2006, as amended by Law No. 25/2016, of 22 August 2016) is of no consequence as regards the maternity rights indicated immediately above.

It is also to be noted that, after coming into force, Law No. 25/2016, of 22 August 2016, was brought before the Constitutional Court by some members of Parliament. The Constitutional Court, in its judgment No. 225/2018 (*Acórdão do Tribunal Constitucional* No. 225/2018, of 7 May 2018),<sup>24</sup> considered that some of the provisions of Law No. 32/2006, of 26 July 2006, as amended by Law No. 25/2016, of 22 August 2016, were against the Portuguese Constitution, because they offended the principle of human dignity in relation to the child and also in relation to the 'surrogate' mother.

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<sup>24</sup> Published in the official journal on 7/05/2018 ([www.dre.pt](http://www.dre.pt)).

Article 8 of this Act is among the provisions judged unconstitutional, namely as regards the prohibition imposed upon the surrogate mother to repeal her declaration renouncing all rights and duties attached to maternity after the signing of the surrogate pregnancy contract. The Court considered that the 'surrogate' mother can change her mind and decide to keep the child until giving birth, since another solution would be contrary to human dignity.

Naturally, if this happens, all maternity rights (including the right to maternity and parental leave) have to be granted to the 'surrogate' mother.

## **5.9 Flexible working time arrangements**

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

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

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

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

### **5.9.2 Right to adjust working time patterns**

The Portuguese Labour Code also offers the following possibilities with respect to the adjustment of working patterns, for a better accommodation of work with family responsibilities:

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

As regards the requests for part-time or flexible working-time arrangements for care purposes, they can be refused by the employer on the grounds of compelling operational reasons or of the impossibility of replacing the employee, but this justification has to be considered valid by the public agency '*Comissão para a Igualdade no Trabalho e no Emprego*' – CITE ('Agency for Gender Equality in the Field of Employment') and if the CITE does not agree, the employer must challenge the decision of the CITE before the Court (Article 57 LC).

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

In addition to these schemes, some limitations to the application of flexible working-time arrangements on the grounds of entrepreneurial reasons (such as adaptable working time and banking of hours established in collective agreement or by company regulation), which

may have a negative impact on reconciliation of family and working life, are now imposed by the LC (in the changes introduced by Law No. 120/2015, of 1 September 2015): since then, these flexible working-time arrangements determined by collective agreements or by company regulations cannot be imposed on workers with children under three without the specific and written consent of the working parent (Articles 206(4)(b) and 208-B(3)(b) of the LC).

#### 5.9.3 Right to work from home or remotely

The LC has been changed by Law No. 120/2015, of 1 September 2015, in order to introduce the legal right to telework for reconciliation purposes.

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

Provided the technical conditions are met, the employer cannot refuse the worker's request to become a teleworker (Article 166(4) of the LC). This situation can be reversed later if the parties agree (Article 166(4) of the LC).

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

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

In Portugal there are no other schemes related to flexible working time arrangements and aiming to promote better reconciliation of work and family life. To the contrary, since in Portuguese legislation flexible working-time arrangements are mostly adopted for entrepreneurial reasons (this is the case for adaptable working-time arrangements and banking hours), which may have a negative impact on reconciliation of family and working life, the law tends to impose more limitations on these schemes in their application to workers with young children, as explained above (Articles 206(4)(b) and 208-B(3)(b) of the LC).

In view of the negative repercussions of flexible working-time arrangements adopted for entrepreneurial reasons, some changes were introduced in the LC by Law No. 120/2015 of 1 September 2015, intended to impose some limitations on these flexible working-time arrangements on the ground of entrepreneurial reasons (such as adaptable working time and 'banking of hours', which is a system by which the employer and the employee, having agreed on a certain total number of working hours for a certain period of time, keep a register of the number of hours worked every day and may be either in credit or in debt to each other, until the agreed time limits are reached). From now on, flexible working-time arrangements determined by collective agreements, or by the internal regulation of the company, can no longer be imposed on workers with children under three without the specific and written consent of the working parent (Articles 206 No. 4(b) and 208-B No. 3(b) of the LC).

In the view of the author, these provisions may play an important role in the promotion of reconciliation between family and professional life.

#### 5.9.5 Case law

The author is not aware of case law regarding flexible working time arrangements in relation to work-family balance and care.

### **5.10 Evaluation of implementation**

In the author's view, the Portuguese legislation is a good example of law in books being different from law in action.

As indicated above, the Portuguese legislation has adopted all the mechanisms established in EU law in relation to the protection of maternity, paternity and care and intended to promote a better reconciliation between professional and family life. In fact, in this respect, the rights granted and the mechanisms provided by domestic legislation even go beyond EU law.

However, in practice, the protection of maternity (especially during pregnancy and immediately after giving birth) is still needed, since pregnant women and young mothers face more difficulties in being hired and are more easily dismissed.

Also, a balanced reconciliation of work and family life between working parents is in practice very difficult to achieve. Since care responsibilities are still considered predominantly as female tasks, and since most women in Portugal work full-time, the burden on women in this respect is still much higher than the burden on men, with inevitable consequences in women's careers, in pay, etc.

In the author's view, since this situation results mostly from the social stigma attached to care and family responsibilities, the legislation should mainly focus on the promotion of the role of the fathers within the family and on paternity rights, so that, in the long term, the share of family responsibilities may become more balanced.

### **5.11 Remaining issues**

The author has no remaining issues to report on this topic.

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

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

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

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

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

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

To some extent, the fact that professional social security systems have no practical meaning in the country explains the answers to some of the questions asked about this topic.

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

The author is not aware of specific surveys concerning gender equality in relation to occupational social security schemes.

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

The author has nothing to report in this respect.

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

To the author's knowledge there is no societal or political debate on gender equality in relation to occupational social security schemes, and there are no pending legislative proposals in this area.

### **6.2 Direct and indirect discrimination**

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

### **6.3 Personal scope**

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



#### **6.4 Material scope**

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

#### **6.5 Exclusions**

Portugal has applied the exclusions allowed by the Directive, in relation to the material scope of the legislation. These exclusions are defined in Article 5 of Decree-Law No. 307/97, of 11 November 1997, completely in line with Article 6(1) of Directive 2006/54, the exclusions being exactly the same.

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

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

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

#### **6.7 Actuarial factors**

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

The author has no specific information as to whether sex is used as an actuarial factor.

#### **6.8 Difficulties**

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

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

#### **6.9 Evaluation of implementation**

The precedent analysis allows for the conclusion that EU law in the field of gender equality in occupational social security schemes has been transposed into domestic legislation. In fact, the transposition of EU law in this respect was made in the strictest, 'copy paste' manner.

However, this is of no consequence, since, as indicated above, in Portugal, occupational social security schemes are rare, due to the universal scope of the general public social security system. In addition, over the years almost all specific social security schemes

(some of which cover many benefits; others having a more limited scope) have been integrated into the public social security scheme, so the practical meaning of such schemes today is of no significance.

#### **6.10 Remaining issues**

The author has nothing to add on this topic.

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

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

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

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

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

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

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

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

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

The author is not aware of specific surveys concerning gender equality in relation to statutory social security schemes.

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

The author has nothing to report in this respect.

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

The main acts in the field of statutory social security are the following:

- Portuguese Constitution (Article 63(1)), establishing the right to social security as a universal and fundamental right of all citizens, which must be granted by the Portuguese State. Therefore, the social security system is a public statutory system.
- 'Lei de Bases da Segurança Social' ('Social Security General Law') (Law No. 4/2007 of 16 January 2007), covering the situations contemplated by Directive 79/7 at

national level. However, there is no specific legislation explicitly transposing this Directive.

- 'Código dos Regimes Contributivos de Segurança Social' ('Contribution System of the Social Security Code') (CRCSS). The major social security system created by the Social Security General Law is developed by this Code, that was approved by Law No. 110/2009, of 16 September 2009. This Code deals with the several benefits granted in the contribution system to employees, self-employed persons and other specific categories of workers, with the exception of public servants (who are covered by a specific regulation in the area of social security). This system ('contribution system') integrates social protection related to sickness, invalidity and old-age pensions, family allowances (in situations related to maternity, paternity and adoption), involuntary unemployment, accidents at work and occupational diseases, in the sense of Article 3 of Directive 79/7.
- Specific legislation related to each benefit complements this Code (in this sense, for instance, Decree-Law No. 187/2007, of 10 Mai 2007, on old-age and invalidity pensions).

As indicated above, the Portuguese legal system in this area is rather complex.

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

To the author's knowledge there is no societal or political debate on gender equality in relation to statutory social security schemes, and there are no pending legislative proposals in this area.

More generally, issues related to statutory pensions are regularly debated, especially in relation to retirement age, and also taking into consideration the financial sustainability of the public system of pensions, but this discussion has no gender dimension.

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

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

Another principle of this system of relevance to gender equality is the 'principle of positive differentiation' (Article 10 of the Social Security General Law), which allows for flexibility of the benefits, taking into account a certain number of factors, including family and social factors, such as a very low level of income of the family, or the number of dependents of the family, or the fact that it is a one-parent family, or the fact that a member of the family is handicapped. However, these positive differentiation factors are developed in more specific legislation.

### 7.3 Personal scope

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

### 7.4 Material scope

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

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

## **7.5 Exclusions**

In Portugal, the general retirement age is the same for men and women, but it is fixed every year according to the so-called 'sustainability factor' established for that same year (presently, the retirement age is fixed at 66 years and 5 months). In some situations, the retirement age is lower, due to a number of criteria, such as career length or the profession or activities (Article 20 of Decree-Law No. 187/2007, of 10 Mai 2007).

However, this is not a mandatory age, as it depends upon the worker's intention to apply for retirement when he/she reaches the legal age and provided he/she meets the other requirements to have access to a pension (a minimum number of working years with paid contributions, for example). Only for public servants is there an age limit for continuing to work, which is fixed at 70 (Article 291 of the General Law for Civil Servants – Law No. 35/2014, of 20 June 2014), but not even this age limit is absolutely binding.

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

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

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

## **7.6 Actuarial factors**

The author has no specific information on the topic of actuarial factors linked to social security benefits.

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

## **7.7 Difficulties**

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

On the other hand, the Portuguese social security system has been subject to an overall reform for the past decade, mostly for reasons related to the economic sustainability of

the system itself.<sup>25</sup> In this sense, new principles on the subject have been developed by the law, such as reinforcing the economic strength of the system and promoting active ageing.

In the pursuit of these goals, several legal measures regarding old-age pensions have been approved by Decree-Law No. 187/2007, of 10 May 2007, such as new rules to calculate the old-age pension, a maximum limit for this pension, a pension bonus for those who choose not to apply for their pension when they reach pension age and a reduction in the pension for those who apply for it before reaching that age because they comply with other alternative requirements (for instance, working for a certain number of years). More recently, a new set of measures was adopted in this area by Decree-Law No. 119/2018, of 27 December 2018, which have repealed some of the more constraining measures imposed by the previous legislation, under the financial crisis.

In a global overview, all these measures seem to be gender neutral, but some of them can in fact have discriminatory results against women. The best example of these discriminatory effects is the present rule regarding the formula to calculate the amount for old-age and invalidity pensions: unlike the previous rule, this rule takes into account not only the best ten years of the last fifteen years of contributions to the social security system, but all years of contributions, to calculate the value of the pension.<sup>26</sup>

This formula may have a disproportionate effect on women's and on men's pensions, according to the salary gender gap, since this gap may be more relevant at different stages of the career. We have no information as to whether the gender factor was even taken into consideration when this measure was approved, but we cannot ignore this negative effect.

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

## **7.8 Evaluation of implementation**

In the area of statutory social security benefits, there is no reason to say that the implementation of EU law in Portugal has not been done, but the lack of data in this field makes it impossible to evaluate the practical result of the implementation of gender equality principles in this area.

At another level, it is important to point out that the national social security system is largely built on the traditional model of employment and therefore is largely supported by the contributions of both the employees and the employers, the latter being the major contributors to the system.

This system is therefore not well equipped to face the challenges attached to other forms of work that do not fall under the traditional employment contract model, as is the case of

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<sup>25</sup> One must take into consideration that the system has a universal scope – in the sense that every citizen has the right to social security protection – as well as a public nature, depending almost exclusively upon the National Budget for Social Security, which is part of the National Annual Budget. In this situation, the problem of the economic sustainability of the system is of major significance.

<sup>26</sup> This new formula to calculate the value of old-age pensions was introduced by Decree-Law No. 35/2005, from 19 February 2005, which changed Decree-Law No. 329/93, from 25 September 1993. The same rule is now established in Article 29 of Decree-Law No. 187/2007, from 10 May 2007.

independent work and other forms of work, such as remote work, work in digital platforms, co-work or smart work.

The questions related to the implementation of EU gender equality law as regards social security benefits may have to be addressed differently in these new models of work but this analysis is yet to be done.

## **7.9 Remaining issues**

The author has nothing to add on this topic.

## **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 author is not aware of specific surveys concerning gender equality in relation to self-employment.

#### **8.1.2 Other issues**

The author has no specific information on this topic.

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

The more important acts with relevance to gender equality in self-employment are the following:

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

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

To the author's knowledge there is no societal or political debate in relation to gender equality in self-employment, and there are no pending legislative proposals in this area.

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

Directive 2010/41 has not been formally transposed into Portuguese legislation, because national legislation was considered to already comply with the Directive. As indicated just above, four acts are to be taken into consideration for the several purposes of the Directive, in the field of employment and in the field of social security:

- Law No. 3/2011, of 15 February 2011, which establishes the general framework for the protection of the self-employed as regards the prohibition of discrimination in the access to and in the development of independent work in the private sector, in the public sector, and in the cooperative sector.
- Law No. 110/2009, of 16 September 2009, which approved the '*Código dos Regimes Contributivos do Sistema Previdencial de Segurança Social*' – CRCSS ('Social Security



Contribution System Code'), which includes some provisions regarding social security for independent workers, including assisting spouses, and separate provisions applicable to the members of company boards.

- The Labour Code (LC), which extensively regulates equality and non-discrimination in employment, which is important because these provisions are also applicable to the category of 'quasi-subordinate' workers (Article 10) and, under the new General Law for Civil Servants, also to workers of the public sector, including independent workers (Article 4(1)(c) and (d) of the 'Civil Servants General Law' – Law No. 35/2014, of 20 June 2014).
- Law No. 91/2009, of 9 April 2009, which establishes social security provisions attached to maternity and paternity rights. These provisions are applicable to subordinate workers in the private sector and in the public sector and to independent workers (Article 4(1)).

### **8.3 Personal scope**

#### **8.3.1 Scope**

The scope of Portuguese legislation in this field is determined by the notion of self-employment. However, the law defines self-employment for the purposes of non-discrimination provisions in the access to and in the development of self-employment in a slightly different way from self-employment for the purposes of social security rights.

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

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

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

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

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

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

### 8.3.2 Definitions

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

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

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

Under this definition, and as indicated above, this Code indicates several categories of independent workers.

### 8.3.3 Categorisation and coverage

For the purposes of non-discrimination in the access to and in the development of independent work (Law No. 3/2011, of 15 February 2011), the notion of self-employment accommodates very different situations, such as traditionally independent professions (doctor, attorney at law, or architect); small entrepreneurs; independent workers in agriculture, in commerce or in services; members of the boards of companies; workers in cooperatives; etc.

For the purposes of social security, the Social Security Contribution System Code (CRCSS) includes in the definition of independent worker, or treats as independent workers, the following professional categories:

- persons pursuing a gainful activity for their own account, business partners, authors and artists (Articles 133 and 134 of this Code);
- small entrepreneurs (Articles 133 and 134 of this Code);
- persons developing independent work in agriculture, including running a farm or operating a business in this area (Article 134(1)(a) and (b) of this Code)
- specific categories of independent workers under specific social security schemes, like workers in the cooperative sector (Article 135 of this Code), members of company boards (Article 61 of this Code), and 'quasi-subordinate' workers (Article 71 of this Code);
- assisting spouses or life partners of independent workers, who are defined as those who perform a regular and permanent (but not necessarily full-time) professional activity with their partners (Article 133(1)(c) of this Code).

### 8.3.4 Recognition of life partners

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

## **8.4 Material scope**

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

As indicated above, Directive 2010/41 has not been formally transposed into Portuguese legislation, because national legislation was considered to already comply with the Directive.

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

### **8.4.2 Material scope**

The protection against discriminatory practices in self-employment includes direct and indirect discrimination and discriminatory harassment (including sexual harassment) (Article 5(2), (3), (5) and (6) Law No. 3/2011, of 15 February 2011) and covers the access to self-employment (including advertisements, selection criteria and the affiliation of the worker to professional associations), and the development of independent work (including pay, access to vocational training and the conditions for the termination of the contract) – Article 3(2) and (3), and Article (4), specifically as regards equal pay. An instruction to discriminate is also qualified as discriminatory practice (Article 5(3)).

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

Firstly, national legislation considers all grounds of discrimination together, so sex discrimination is not treated separately.

Secondly, the principle of non-discrimination in relation to self-employment makes no explicit reference to the launching or creation of a business or company by independent workers (as expressed in Article 4(1) of Directive 2010/41), since the perspective of national law is more focused on the rights of the independent worker in relation to the counterparts of his/her work and the duties of the counterpart in relation to the independent contractor. From this perspective, under national law, equality issues relating to the creation of a business would more likely be dealt with by Law No. 14/2008, of 12 March (which transposed Directive 2004/113), for instance, to deal with different conditions granted to a person in the access to financial credit to start a business or create a company. Apart from this issue, and to say the least, national legislation is not clear as to the extension of the protection to the creation of a company or the establishment of a new business.

## **8.5 Positive action**

Positive action is not dealt with by Law No. 3/2011, of 15 February 2011, but is allowed by the Portuguese Constitution, especially in favour of women (since under Article 9(h) of the Constitution, the active promotion of gender equality is a fundamental goal of the State), and by the Labour Code (Article 27).

In practice, several positive action measures have been approved in the last years in the area of self-employment, especially in the area of the participation of women in decision-making, by legally imposing a women's quota on the boards of companies in the public sector and in private companies subjected to public regulation (Law No. 67/2013, of 28

August 2013, Article 17(8)),<sup>27</sup> and finally by imposing a minimum representation of the under-represented sex on executive boards and surveillance boards of public companies and of private listed companies (Law No. 62/2017, of 1 August 2017), as already indicated. In the view of the author, this kind of positive action is necessary and quite effective.

## 8.6 Social protection

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

It is also important to say that the provisions of the CRCSS in this field were amended by Decree-Law No. 2/2018, of 9 January 2018. However, in 2018, the old rules are still applicable, since this piece of legislation entered into force only on 1 January 2019. In this context, the analysis below is still reported according to the 'old' rules, as they are in force during the period covered by this report, and we will only add some references to the new provisions in footnotes when appropriate.

Most categories of self-employed persons are covered by the social security scheme of independent workers (Articles 132 *et seq.* of the CRCSS). Some categories can choose their social security system – this is the case for workers in the cooperative sector, since the by-laws of the cooperative can choose to place their workers under the social security provisions applicable to subordinate workers or under the social security provisions applicable to the self-employed (Article 135 of the CRCSS). Other categories of independent workers are subjected to the general social security scheme applicable to subordinate workers, with some specificities, as in the case of the members of company boards (Article 61 of the CRCSS), and in the case of 'quasi-subordinate' workers (Article 71 of the CRCSS). Finally, independent workers who perform at least 80 %<sup>28</sup> of their activity for a sole beneficiary fall under a specific provision (Article 140 of the CRCSS).

The major differences in the social security protection granted under these various schemes concern the amount and the responsibility for the payment of contributions and the social benefits attached to each scheme. In the general social security scheme applicable to subordinate workers, both the employer and the employee pay the contributions to the public social security system at different rates that are much higher for the employer than for the employee (Article 53 of the CRCSS). As regards independent workers, only the worker pays the contribution, at a rate that he/she can choose and which is determined on the basis of his median income and variable according to the category of the independent worker (Article 168)<sup>29</sup> – for instance, small entrepreneurs contribute at a higher rate than independent workers in agriculture.<sup>30</sup> As regards 'quasi-subordinate' workers, there is a contribution by both contractors but at a lower rate than the rate of the contribution in the general system for subordinate workers and their employers. Finally, the beneficiary of 80 % or more of the activity of an independent worker is also charged a small contribution to the social security system, despite the qualification of the worker as an independent worker (Article 168 of the CRCSS).<sup>31</sup>

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<sup>27</sup> As regards this particular point it is important to take into consideration that due to the wide notion of self-employed persons under national legislation, board members are to be qualified as a specific category of independent workers, since they are not engaged under an employment contract.

<sup>28</sup> In 2019, this percentage will change to 50 % under the amendment to Article 140(1) of the CRCSS, introduced by Decree-Law No. 2/2018, of 9 January 2018.

<sup>29</sup> In 2019, these rules will change under the amendment to Article 168 of the CRCSS, introduced by Decree-Law No. 2/2018, of 9 January 2018, that, among other changes, does not allow the independent worker to choose the low-level contribution model.

<sup>30</sup> In 2019, the percentage of these contributions will change to a fixed-value of 21.4 % (general rule) and 25 % for small entrepreneurs, under the amendment to Article 168(1) of the CRCSS, introduced by Decree-Law No. 2/2018, of 9 January 2018.

<sup>31</sup> In 2019, this percentage will change to 7 % or 10 % under the amendment to Article 168(7) of the CRCSS, introduced by Decree-Law No. 2/2018, of 9 January 2018.

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

In general, these schemes are mandatory.

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

## **8.7 Maternity benefits**

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

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

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

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

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

## **8.8 Occupational social security**

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

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

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

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

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

### 8.9 Prohibition of discrimination

Article 14(1)(a) of Recast Directive 2006/54 is implemented in national law as regards self-employment, by Article 3(1), (2) and (3) of Law No. 3/2011, of 15 February 2011.

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

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

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

### 8.10 Evaluation of implementation

In the author's view, EU law in this field was adequately implemented at national level, with the exception of the right to maternity leave, which, as indicated above, is in practice not enjoyed (or is enjoyed for much shorter periods) by independent workers.

### 8.11 Remaining issues

The author has nothing to add in relation to this topic.

## **9 Goods and services (Directive 2004/113)<sup>32</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**

To the author's knowledge, no surveys and/or reports have been published over the last five years to provide insight into the difficulties men and women may face in terms of equal access to and supply of goods and services.

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

Aside from the common information, made by algorithms, which indicates that the evaluation of work and the access to a job in digital platforms is not gender-neutral, the author has no means to identify specific problems of discrimination in the online environment or in the digital market.

#### **9.1.3 Political and societal debate**

The author is not aware of any political and/or societal debate on this topic, in Portugal.

### **9.2 Prohibition of direct and indirect discrimination**

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

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

### **9.3 Material scope**

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

### **9.4 Exceptions**

The exact same exceptions to the material scope of Directive 2004/113 have been established in Article 2(2)(b) and (c) of Law No. 14/2008, of 12 March 2008.

### **9.5 Justification of differences in treatment**

Article 4(5) of the Directive has not been transposed as such into national legislation.

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

<sup>32</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>.

*Test-Achats* judgment, Article 6(2), (3) and (4) were eliminated, so there are no differences in treatment at national level to be reported.

## **9.6 Actuarial factors**

Article 6(1) of Law No. 14/2008, of 12 March 2008, includes the exact same provision of Article 5(1) of Directive 2004/113, ensuring that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.

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

As regards the exception of Article 5(2) of Directive 2004/113, as indicated above, where insurance and financial contracts are concerned, and more specifically with regards to actuarial factors (Article 6 of Law No. 14/2008), Law No. 14/2008 allowed differences in individual obligations and prices regarding these contracts, on the condition that they were based on objective and proportional criteria, which had to be confirmed by actuarial data certified by the Portuguese Insurance Institute and should be reviewed every five years (Article 6(2), (3), and (4)).

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

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

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

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

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

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

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

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



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

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

#### **9.10 Evaluation of implementation**

In the author's view, EU law in this field was adequately implemented at national level.

#### **9.11 Remaining issues**

The author has nothing to add in relation to this topic.

## **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**

Violence against women and domestic violence is a matter of great concern to the Portuguese authorities, given the number of situations reported every year. The author is not aware of specific surveys in this area but it is certainly a subject that is being closely watched in recent years in our country.

On a regular basis, the *Comissão para a Cidadania e Igualdade de Género* – CIG (Agency for Citizenship and Gender Equality) publishes surveys and studies on these topics. In the paper '*Prevenção e Combate à Violência contra as mulheres e violência doméstica – 2018*' ('Prevention of and Action on Violence Against Women and Domestic Violence – 2018'),<sup>33</sup> published by the CIG, it is possible to find the latest numbers on the crimes in these areas in the year of 2018, but also relevant data on the protective actions and protective networks that are in place in this area in Portugal.

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

In this field, the following acts are worth mentioning:

- Parliament Resolution No. 4/2013, of 14 December 2012, and President Decree No. 13/2013, both published in the Official Journal (*Diário da República*) of 21 January 2013, approving and ratifying the Istanbul Convention;
- Criminal Code, as regards most crimes against women indicated in the IC, although in some cases under a different name;
- Civil Code, as regards non-consensual marriage and attacks on personal rights, such as the right to physical or moral integrity and the right to privacy;
- Labour Code, as regards discriminatory and sexual harassment;
- Specifically on the topic of domestic violence, Law No. 112/2009, of 16 September 2009, which establishes the legal framework regarding domestic violence, already amended by Law No. 129/2015, of 3 September 2015; Law No. 104/2009, of 14 September (right to damage compensation for the victims of domestic violence), and Law No. 107/2009, of 3 August 2009, Decree-Law No. 107/99, of 19 December 2009, and Act No. 1/2006, of 25 January 2006 (shelter homes for female victims of domestic violence), and the National Plans for the Prevention and Combat of Domestic Violence.
- The National Plans for Gender Equality, that also deal with the issue of violence against women.

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

The author is not aware of specific provisions related to online violence and online harassment. However, the legislation indicated above does not exclude the online environment of such practices, in their one specific context.

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<sup>33</sup> This study, on domestic violence, is available at [https://www.cig.gov.pt/wp-content/uploads/2018/11/AF\\_CIG\\_ViolDomestica\\_A4.pdf](https://www.cig.gov.pt/wp-content/uploads/2018/11/AF_CIG_ViolDomestica_A4.pdf).

#### 10.1.4 Political and societal debate

Violence against women and domestic violence is a matter of great concern to the Portuguese authorities, given the number of situations reported every year, so societal and political debate on these issues is quite frequent, and these issues draw the attention of the media quite regularly. In short, there is a great awareness of this subject at several levels.

### 10.2 Ratification of the Istanbul Convention

Portugal has approved and ratified the Istanbul Convention (IC), by Parliament Resolution No. 4/2013, of 14 December 2012, and President Decree No. 13/2013, both published in the Official Journal (*Diário da República*) of 21 January 2013. Portugal was in fact the first country of the EU to ratify the IC, and the ratification was made without any reservations.

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

In the author's view, the national legal framework complies with the obligations under the Convention.

Since the accession, some amendments to the Criminal Code have been introduced, following several proposals that have been presented to Parliament regarding some of the issues covered by the IC. Law No. 83/2015, of 5 August 2015 has changed the Criminal Code by introducing, as autonomous crimes, the crime of genital mutilation<sup>34</sup> (*Mutilação genital feminina* – Article 144-A of the Criminal Code), the crime of stalking (*Perseguição* – Article 154-A) and the crime of forced marriage (*Casamento forçado* – Article 154-B).

Finally, Law No. 112/2009, of 16 September 2009, on domestic violence, was amended by Law No. 129/2015 of 3 September 2015, in the sense of making the administrative response to domestic violence more efficient and also specifically directed at preventing homicide in this context.

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<sup>34</sup> Previously this offence fell under the scope of the crime of 'Serious offence to physical integrity' ('*Ofensa à integridade física grave*') as in Article 144(1)(a) of the Criminal Code.

## **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 author has no information regarding this topic.

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

The author has no information regarding this topic.

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

The author has no information regarding this topic.

### **11.2 Victimisation**

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

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

### **11.3 Access to courts**

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

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

In the field of employment, individual complaints can be brought directly before the courts (Labour Court for private employees, and Administrative Court for public employees) by the victim's lawyer.

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

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

Despite this general picture, judicial proceedings regarding gender discriminatory practices in Portugal are quite rare.<sup>35</sup> In contrast, as regards employment, the number of situations where the CITE acts in this area (since this Commission must give advice on several matters related to gender equality, such as the dismissal of pregnant women, the refusal to give access to part-time work or the non-renewal of a fixed-term job for childcare reasons) is well documented<sup>36</sup> and can amount to dozens of written advisory reports per year, in addition to support and counselling activities for discriminated workers.

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

In relation to self-employment and to the access to and supply of goods and services, the access to courts is also available with no restrictions, both to the alleged victim and to collective bodies. In this last sense, the law establishes the rights and competences of other private and public organisations to assist victims of discrimination, including the right to intervene in judicial proceedings in the field of self-employment (Law No. 3/2011, of 15 February 2011, Articles 1 and 8) and as regards gender equality in the access to and supply of goods and services (Article 11 of Law No. 14/2008, of 12 March 2008).

#### 11.3.2 Availability of legal aid

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

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

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

### 11.4 Horizontal effect of the applicable law

#### 11.4.1 Horizontal effect of relevant gender equality law

Gender equality law in Portugal has a horizontal effect in the sense that the provisions can be invoked in private relations and directly against the other party, because the legal provisions in this field are written in acts that are directly applicable to private parties, such as the Labour Code, the Civil Code, or in more specific legislation in the area of gender equality, including ‘domestic’ legislation per se and legislation ratifying international treaties, or transposing EU directives, that become ipso jure part of the national legislative system.

Even some provisions in the area of gender equality, which are indicated and qualified as fundamental rights by the Constitution, have horizontal effect, in the sense that they are immediately binding provisions and can therefore also be invoked between private parties (Article 18(2) of the PC). The non-discrimination principle (including on the ground of sex),

<sup>35</sup> A complete overview of case law in this area can be traced at M. P. SÁ FERNANDES / R. A. MARTINS DA ROCHA / M. CERQUEIRA (2006), *22 Anos de Jurisprudência portuguesa sobre Igualdade Laboral em razão do Sexo (1979-2001)*, Lisboa, CITE, 2006 (this book is also available in [www.cite.gov.pt](http://www.cite.gov.pt)).

<sup>36</sup> [www.cite.gov.pt](http://www.cite.gov.pt). (Pareceres)

the equality principle in the access to employment, or the equal pay principle, are good examples of provisions that can be directly invoked between private parties.

In fact, only the so-called 'programmatic' provisions (i.e., provisions directed at the State) and the non-binding principles written in international treaties, in EU law, or at national level, programmatic provisions written in the Portuguese Constitution or legislation, have no horizontal effect under the Portuguese system.

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

The CFREU is often quoted and called-upon at national level, including by the Courts. However, the question of the horizontal direct effect of the provisions of the Charter as regards gender equality at national level does not arise because the national legal provisions in this field already cover the topics dealt with by the Charter.

### 11.5 Burden of proof

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

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

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

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

The national provisions on the burden of proof comply with EU law, with the possible exception of actions related to discriminatory harassment, where the shift of the burden of proof is not explicitly established by the Labour Code.

### 11.6 Remedies and sanctions

#### 11.6.1 Types of remedies and sanctions

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

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

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

In the field of employment, a breach of equality provisions can also give ground to the application of administrative fines by the *Autoridade para as Condições de Trabalho* – ACT

('Labour Inspection Services'). If a breach of equality law in employment relations results in dismissal, the dismissal is unlawful and therefore null and void, giving right to reinstatement or to damage compensation, as the worker chooses (Article 63, Article 381(b) and (d) and Article 391 LC).

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

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

Finally, in relation to harassment practices in employment relations, Law No. 73/2017, of 16 August 2017, has reinforced the protection of harassment victims by granting them accrued rights to damage compensation, by imposing upon the employer the duty to approve a Code of Conduct in relation to harassment practices in the company as well as the duty to start a disciplinary procedure against harassment perpetrators, and by extending the protection against dismissal to witnesses of harassment practices who denounce such practices (Article 29(4), (5) and (6) and Article 127(1)(k) and (l)).

#### 11.6.2 Effectiveness, proportionality and dissuasiveness

In the author's view, the remedies and sanctions established in national legislation are effective, proportional and dissuasive.

### 11.7 Equality body

In Portugal two official bodies deal with gender discrimination: the *Comissão para a Igualdade no Trabalho e no Emprego* – CITE ('Gender Equality Agency in the Field of Employment'); and the *Comissão para a Cidadania e Igualdade de Género* – CIG ('Agency for Gender Equality and Citizenship').

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

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

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

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

appointed by the Government, but also members appointed by the major unions and members appointed by the major employer's organisations (e.g. representatives of the main social partners).

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

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

To achieve this purpose, the CITE has the following competences: promotional activities, e.g. awareness raising, and dissemination of information in these areas; analysis and monitoring, e.g. conducting or commissioning research and surveys, publishing reports and making legal recommendations to the Ministers in charge of employment and of civil servants in order to improve legislation in the areas indicated above; giving an opinion in several matters regarding gender equality, like dismissal of pregnant workers or workers on maternity, paternity or parental leave, part-time work for family reasons, and fixed-term contracts (in these cases employers are obliged to ask the opinion of the CITE before taking the measure, and a negative opinion is binding and can only be challenged before the courts); working with the employers and with the Labour Inspection Services in actions regarding discrimination at company level (such as visits, denouncing discriminatory practices, etc.), namely after receiving a complaint of a victim of discrimination; giving assistance to victims of discrimination, by providing advice; analysis of collective agreements after their publication to check whether they include discriminatory clauses (if this is the case, the Agency can directly challenge the employer to correct the discriminatory clause and if the employer does not comply with this request, present the case to the public lawyer, who can take it to court in order to have these clauses declared null and void).

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

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

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

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

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



working life; to fight domestic violence, gender violence and human trafficking and to give support to the victims of such practices.

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

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

### **11.8 Social partners**

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

Due to this rule, all legal provisions concerning labour law are, in fact, discussed with the social partners on a regular basis, and this includes provisions on gender equality. In Portugal, within the context of the *Conselho Económico e Social* ('Social and Economic Council'), the social partners and the Government meet regularly in a permanent committee (*Comissão Permanente da Concertação Social* (CPCS) – 'Social Consultation Permanent Committee') and in practice, the legislation related to employment and to industrial relations is discussed and actively 'negotiated' in this Committee by the social partners and the Government.

Gender equality law in the area of employment also has to be discussed at this level so the social partners can play a very active role here. However, in practice, gender equality is not traditionally considered an important subject by the social partners.

### **11.9 Other relevant bodies**

There are no other relevant bodies to be mentioned in the area of gender equality.

### **11.10 Evaluation of implementation**

In the author's view, EU law related to equality bodies has been well implemented in Portugal.

### **11.11 Remaining issues**

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

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

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

## 12 Overall assessment

In the author's view, Portuguese legislation formally complies with EU law, although exceptions are apparent concerning some specific points, such as the burden of proof rule in harassment situations and the extent of social protection regarding some professional categories, especially as regards self-employed persons, and maternity protection, again in the field of self-employment.

In some areas, the level of protection granted by national legislation goes even beyond EU law, as in the case of parental leave and other family-related leave, in the case of positive action, or as regards the very active role of the CITE in collective agreement evaluation, or in direct work with the employers as regards pay transparency and equal pay plans.

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

Firstly, although the law establishes many protective measures, the State does not always finance them where needed, and therefore some of these measures do not work in practice (this is true for some of the maternity and paternity measures). Secondly, there is no practical implementation of the legal measures by collective agreements, with or without the assistance of the State. Thirdly, there is no relevant case law describing gender equality (aside from those indicated in section 11.11 in relation to collective agreement provisions with a discriminatory content), since in Portugal hardly any cases have been decided in this area. Finally, the regular surveys conducted by the CITE in relation to pay show that the pay gap between men and women is still significant (still 17.5 % in 2017),<sup>37</sup> thus allowing the conclusion that even regarding such a traditional issue as equal pay, there is still a lot to be done.

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

Specifically regarding the period covered by the updating of this Report (from 1 January 2018 to 31 December 2018) it is worth mentioning the importance of one of the legal developments which has occurred at national level in the field of equality: Law No. 60/2018, of 21 August 2018, on equal pay. This piece of legislation may have an important impact in this area in the near future, as for the first time, it puts in place a system intended to disclose possible pay differences within companies and imposes on the employers the duty to implement internal plans to eradicate such differences, imposing tight timetables for the application of the measures.

In any case, the Portuguese legal system is already very comprehensive and generally in line with EU Law, as indicated above. This being the case, actions intended to raise social awareness on equality issues at all levels and aiming to promote the practical implementation of the legal provisions already in place, are more important.

At this level, the following topics seem to be attracting the attention of the relevant stakeholders (politicians, social partners, public agencies and NGOs in this area, and the media) in more recent years, by way of public debates and campaigns, legislative proposals and a variety of implementation programmes: the topic of domestic violence and more broadly, violence against women; the topic of reconciliation of family and working life; the topic of the gender pay gap, which periodically emerges; and the topic of gender equality in decision-making, including a discussion on the possibility of enlarging the quota legislation approved in 2017 to private but non-listed companies.

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<sup>37</sup> Report CITE, page 33.

Still at this more practical level, it is also worth mentioning the importance of the formal and informal work performed by both Equality Agencies, in their own fields, and the role of the Labour Inspection Services in the active implementation of gender equality, especially in the field of employment.

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